WILLCOX & SAVAGE

EMPLOYMENT LAW OUTLOOK

CONGRESS PASSES AMERICAN JOBS CREATION ACT OF 2004

William M. Furr

On October 11, 2004, the U.S. Congress passed the American Jobs Creation Act. Among other things, this law allows plaintiffs in employment discrimination cases to deduct attorneys' fees and costs from the plaintiffs' gross income. The Act allows plaintiffs to deduct the actual amounts that they pay in attorneys' fees and costs in determining adjusted gross income.

The Act applies to both judgments and settlements in discrimination cases and defines "discrimination" to include violations of Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, the Americans with Disabilities Act, the Employment Retirement Income Security Act, the Family and Medical Leave Act, and other laws prohibiting discrimination.

Employees settling employment discrimination actions frequently ask employers to "gross up" the payment to account for taxes. The American Jobs Creation Act should reduce employees' demands to "gross up" any settlement offers because they can now deduct such fees from their gross income. ■

We hope you find our quarterly newsletter informative and useful. If there is a topic you would like covered, or would like to receive this newsletter via e-mail, please contact Michelle Shearon at 757-628-5631 or e-mail mshearon@wilsav.com. This publication is provided for general purpose information. It is not and should not be used as a substitute for legal advice. Copyright 2005 Willcox & Savage

USERRA GETS A CHECK-UP: BARK STILL LOUD, BITE STILL SHARP

Andrew R. Fox

Do you know USERRA? The sound of this mellifluous acronym may ring a faint bell in your memory from seminars and HR bulletins past. In any case, it's an acronym whose familiarity should be right up there with Fim-mi-la and Er-iss-sa in the repertoire of every human relations guru.

Why you ask? USERRA applies to an employee who is a member of the Reserves or National Guard and who is involuntarily called to duty for a temporary period, generally a year or less. Currently, approximately 175,000 Reservists and National Guard members, or fifteen percent of the nation's Reserve and Guard force, are mobilized to active duty here in Hampton Roads, and around the world. Of those remaining, about two-thirds serve in an active status, meaning that they fulfill their annual requirement of a weekend a month, two weeks a year, and are considered volunteers for mobilization should the need arise. The remaining third are not active participants in the Reserves or Guard but remain in ready status to be called to duty by the President or Congress, under the appropriate statute.

The Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) provides employees who are affiliated with the armed services protection from discrimination in employment on the basis of their service. USERRA also creates rights in service members to be reemployed upon their return from service and to receive pay, seniority, and benefits commensurate with what they would have received if their service had not required them to be absent from work. Recently, the Department of Labor released draft regulations that define and illustrate the substantive and procedural provisions of USERRA. These draft provisions were developed in response to ten years of court decisions and employee and

CONTINUED ON PAGE 2

CONTINUED FROM FRONT COVER
employer feedback concerning the application and enforcement of USERRA. Once enacted in 2005, these rules will complement USERRA to form a comprehensive and quite feisty piece of law.

USERRA contains three elements: an antidiscrimination section, a reemployment section, and a procedure and enforcement section. The most robust of those elements is the reemployment section, which includes provisions related not only to putting service members back to work when they return, but also, in painstaking detail, to providing them the proper seniority and benefits both while they are gone and upon their return. The enforcement section gives broad and powerful rights to employees to bring USERRA claims against their employers. These claims can be in the form of an administrative action or a federal lawsuit in which the employee can be awarded reinstatement and significant monetary damages and fees.

USERRA's Antidiscrimination Provisions

Employers may not discriminate against a current or prospective employee on the basis of that employee's military affiliation. Like other federal antidiscrimination laws, USERRA's prohibition on discrimination in employment is broadly stated and applies to every aspect of the employment relationship including hiring, retention, discharge, promotion, and "any benefit of employment." An employer may not fire an employee because of that employee's intention to join the military or because an employee's military obligations adversely affect the employer's operations. Employers must therefore accommodate active reservists' annual training commitments and cannot take adverse employment actions based on those requirements.

In addition to covering all service members, the antidiscrimination provisions of USERRA encompass two additional groups. The first is employees who decide to join the armed forces, including both potential hires who inform a prospective employer of their intent to join, and employees who decide to serve after they are already on the job. The second group is employees who have no connection to the armed services at all but who assist a fellow employee in enforcing that employee's rights under USERRA – whether formally, such as testifying against the employer on the service member's behalf, or informally, such as cooperating in an investigation.

While most employers are aware that they may not discriminate against employees on the basis of race, gender, age, religion, or disability, many are likely unaware that USERRA's antidiscriminatory provisions apply as broadly as they do. An employer who assumes that he may treat an employee's service affiliation the same as any other non-work commitment could be liable for some stiff penalties.

USERRA's Reemployment Provisions and the Escalator Principle

Once an employee returns from service, the employer must determine in what capacity and under what terms to bring the employee back to work. At the heart of this section is what the proposed rules call the 'escalator position.' When an employee leaves work to perform military service, he steps out of his shoes. When he returns, he steps back into his shoes, however far up the escalator they have traveled in his absence. The operative legal language from USERRA and the proposed rules is that the returning employee is entitled to whatever pay and benefits he would have been reasonably certain to obtain had he not left. This is obviously easier to say than to actually determine, and may be highly fact-specific based on the nature of the employer's operations. USERRA also includes detailed provisions for determining what benefits an employee must continue to receive while on duty away from work and upon return to work. To be entitled to reemployment rights under USERRA, an employee must provide reasonable notice (time not specified) that he is leaving to perform military duty; this duty cannot exceed five years of cumulative service with respect to a single employer; and the employee must return to work or apply for reemployment within a specified period following the end of his service. An employee must also be honorably discharged from the military to qualify for reemployment rights. To remain eligible, the employee must adhere to specific timelines for returning to work, depending on his length of service.

The Employer and USERRA

Most disputes arising under USERRA could have been easily and amenably resolved had the employer been aware of its obligations and the employee aware of his rights. The best advice an employer can get is to be knowledgeable – about USERRA and its clear-cut requirements, and about the employees who are affected. It is imperative that employers proactively communicate with all employees relative to their rights under USERRA. An employee who knows his rights and is comfortable with the employer's stance on USERRA issues will be more apt to proactively notify the employer of protected military activities and commitments.

Information and resources:

Veterans' Employment and Training Service (VETS)
(www.dol.gov/vets/#userra)

USERRA Advisor (www.dol.gov/elaws/userra.htm)

Employer Support of the Guard and Reserve
(www.esgr.com) ■

NEW LAW RESTRICTS DEFERRED COMPENSATION ARRANGEMENTS BEGINNING JANUARY 1, 2005

James R. Warner, Jr.

The American Jobs Creation Act of 2004 adds significant new requirements for deferred compensation arrangements between employers and their employees, directors and independent contractors. These restrictions were generally effective January 1, 2005. The provisions target "constructive receipt" of compensation – that is, the tax doctrine that taxes an individual immediately if the individual has the right to choose between receiving current compensation and postponing receipt of the compensation. Unless a deferred compensation arrangement satisfies the new requirements, a participant will be subject to current taxation of the compensation intended to be deferred, plus interest from the date on which the compensation was first deferred, and plus a 20% penalty tax.

The new law applies to a broad range of deferred compensation plans and arrangements, including nonqualified 401(k) mirror plans, other supplemental executive retirement plans, bonus deferral provisions, most stock appreciation rights, discounted stock options (where exercise price is less than fair market value at grant), and other compensation arrangements with choice as to the timing of payments (which may include severance/reduction in force arrangements, option cancellation payments, commissions agreements, signing bonus agreements and LLC/partnership profit interests).

The restrictions do not apply to tax-qualified retirement plans (such as 401(k), 403(b), and 457(b) plans and qualified profit-sharing and pension plans), or to incentive stock options or nonqualified stock options that have no discount or deferral provisions. In addition, the provisions do not apply to bona fide vacation leave, sick leave, compensatory time, disability pay and death benefit plans. Also exempt from the requirements are bonuses or other annual compensation amounts paid within 2-1/2 months after the close of the taxable year in which the services giving rise to payment are performed.

The new requirements include:

- Deferred compensation may not be paid earlier than (1) "separation from service" (plus 6 months in the case of a "key employee" of a corporation with publicly traded stock); (2) total disability; (3) death; (4) a specified time or the beginning of a fixed payment schedule established before deferral; (5) a change of control of the employer; or (6) the occurrence of an "unforeseeable emergency."

- The time for payment of deferred compensation may not be accelerated even if the employer terminates the plan (with limited exceptions such as divorce orders, cash-out of small amounts or termination upon change in control of the employer).

- A deferred compensation election must be made before the year in which services are performed to earn the compensation (except that for the first year in which a participant becomes eligible to defer compensation, the election may be made within 30 days after the participant's initial eligibility date; and in the case of "performance-based compensation" for services performed over a period of at least 12 months, the election may be made no later than 6 months before the end of the performance period).

- Any change in a deferred compensation election to delay payment or change the form of payment must be made at least 12 months before the change becomes effective.

- No change in a schedule of payments may be made less than 12 months before the date of the first scheduled payment.

- Any extension of a previously elected payment date must be to a date at least 5 years later.

- Form W-2 (or Form 1099, if applicable) reporting of amounts deferred each year is required whether or not the amounts are taxable for the year.

The legislation provides some grandfather treatment for compensation previously deferred. Grandfather treatment is available only if the deferred compensation was earned and vested before 2005, and the deferred compensation arrangement is not materially changed after October 3, 2004. A material change occurs if rights or benefits are added or enhanced.

On December 20, 2004, the IRS issued its first guidance on the legislation, focusing on definitions and transition rules and promising additional detailed guidance in 2005 as to numerous unanswered questions. The guidance permits plans and arrangements to be amended by December 31, 2005 in order to comply with the legislation. In the meantime, the IRS requires compliance with its guidance, plus good faith compliance with the legislation as to issues not addressed in the guidance. The IRS guidance establishes a number of transition rules for 2005, which can provide flexibility for deferred compensation either to be paid during 2005 (subject to income tax but not to penalties), or to continue being deferred subject to the new rules.

We suggest that employers, with legal counsel's advice, identify their compensation arrangements that may be subject to the Act and as early as practicable in 2005, determine the best approach to comply with the Act as to those arrangements. ■

NEW LEGISLATION IMPACTS BUSINESS IMMIGRATION

Susan R. Blackman

American employers who hire foreign talent were hoping Congress would provide some relief from this year's immigration problems; instead, the latest action by Congress will make employment visas more costly.

Employers who wish to hire foreign professionals during Fiscal Year 2005 have already encountered a harsh reality: there are no more H-1B visas available. In fact, the annual allotment of H-1B visas was completely exhausted on the very first day of the federal government's fiscal year, October 1, 2004. The employers who were adversely affected by this development were hoping that Congress would grant some relief by increasing the annual cap on new H-1B visas. Instead, the latest efforts by Congress will require such employers to pay an additional $2,000 in order to obtain an H-1B visa for a qualified employee.

An H-1B visa is issued to a qualified professional who has a four-year degree in a specialized field and is coming to the United States to work in a specialty occupation. The filing fee for an H-1B petition was previously $185. A bill passed by the House and Senate on November 20, 2004, and signed by President Bush on December 8, has added a $1,500 surcharge to such petitions in order to fund technology training programs. In addition, the legislation will impose a $500 fee intended to curb fraud and abuse in visa cases. The new $500 Fraud Prevention and Detection Fee will apply not only to H-1B visas for foreign professionals, but also to L-1 visas, which are visas issued to managers and specialized employees who work with international businesses. The $500 fraud prevention fee will be required for all cases filed after March 8, 2005, but the $1,500 surcharge on H-1B petitions is effective immediately.

The impact of these new fees is that most employers seeking H-1B visas will have to pay an additional $2,000 per case. H-1B employers will also be required to confirm that they are paying the foreign professionals 100% of the current prevailing wage in their geographical market. At present, H-1B employers are required to pay at least 95% of the prevailing wage for similar positions.

Another new provision removes a shortcut that had temporarily been available for users of Blanket L-1 visas. Large international companies can use Blanket L-1 visas to expedite the process of transferring managerial and professional employees to subsidiaries in the United States. A 2002 amendment had shortened from twelve months to six months the required period of prior experience with the international organization. The latest bill deletes that shortcut and restores the twelve-month requirement, so that transferees cannot apply for L-1 visas until they have worked for an affiliated employer for a full year or more.

The only good news contained in this legislation for employers of foreign talent applies to foreign employees who hold American graduate degrees. Up to 20,000 H-1B employees per year may be exempt from the H-1B cap (the maximum number of H-1B visas issued per year) if the employee obtained a Master's or higher degree from an American university. However, this limited relief from the H-1B cap does not outweigh the costly impact that the other changes will have on business immigration in the United States. ■

WILLCOX & SAVAGE

LABOR AND EMPLOYMENT LAW

Wm. E. Rachels, Jr. wrachels@wilsav.com 757/628-5568

William M. Furr wfurr@wilsav.com 757/628-5651

Samuel J. Webster swebster@wilsav.com 757/628-5518

Susan R. Blackman sblackman@wilsav.com 757/628-5646

Timothy M. McConville tmcconville@wilsav.com 757/628-5581

Andrew R. Fox afox@wilsav.com 757/628-5688

LEGAL ASSISTANTS

Gillian W. Field gfield@wilsav.com 757/628-5645

Leslie M. Rockwell lrockwell@wilsav.com 757/628-5621

•

EMPLOYEE BENEFITS

James R. Warner, Jr. jwarner@wilsav.com 757/628-5570

David A. Snouffer dsnouffer@wilsav.com 757/628-5678

•

WORKERS' COMPENSATION

Stephen R. Jackson sjackson@wilsav.com 757/628-5642

NEW DOL REGULATIONS CLARIFY COBRA DISCLOSURE REQUIREMENTS

David A. Snouffer

As employer group health benefit plans begin new plan years, many in January or July, they become subject to new rules the U.S. Department of Labor has issued for informing employees of their rights to continuation health coverage under the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA). With new regulations, the Department has published model forms of notices of COBRA rights to be given to employees and covered family members. The Department of Labor previously published a model notice of COBRA rights in 1986, but it is now outdated and should not be used.

The most recent major development on the COBRA regulatory front had been the completion in 2001 of comprehensive Treasury Regulations detailing what employees' actual rights are under COBRA. Many employers revised their COBRA notices to reflect a fuller understanding of COBRA rights in light of the regulations.

The new Labor Department rules, on the other hand, deal with procedural issues, such as when, how and to whom notices must be issued and what they must say. The new regulations focus primarily on notices required when someone becomes covered under an employer plan and those required when someone experiences a "qualifying event" that entitles the person to elect continuation health coverage under COBRA.

To whom, and when, notice must be given. A general notice of COBRA rights usually must be provided to an employee and his or her spouse within 90 days after they become covered under an employer group health plan. A single notice addressed to both of them may be sent to their common residence, unless the spouse first enrolls in the plan later, after the notice was sent, but distributing the notice to employees at the workplace does not satisfy the requirement of notifying spouses. There is no requirement to send a notice to dependent children who share a residence with an employee or spouse to whom the notice is given.

The initial notice may be incorporated in the group health plan's summary plan description, which in any event must provide various information about COBRA rights.

When there occurs a "qualifying event" that entitles persons covered by an employer group health plan to elect continuation coverage, such as the employee's termination of employment or death, the divorce of the employee and his or her spouse, or a dependent child's ceasing to qualify for dependent coverage under the plan, a notice of the right to elect continuation coverage generally must be sent to each person (termed in the COBRA law a "qualified beneficiary") who has that right. If the "qualifying event" is the employee's termination, reduction of hours or death, the employer has 30 days after the event (or, if later, 30 days after the date coverage is lost) to notify the plan administrator, which in turn must give the notice of COBRA rights within 14 days to persons entitled to elect coverage. (If the employer and the plan administrator are the same, it has the full 44 days to give the notice.) How soon the notice is provided affects how long eligible persons have to elect continuation coverage because they must be given at least 60 days from the date of the notice.

A single notice of a current right to elect COBRA coverage may be addressed to the employee and spouse at their common residence, and such a notice will also satisfy the requirement of notifying any dependent child who resides with them, at least if the parents are also covered under the plan, but a separate notice presumably is required for any person entitled to elect COBRA coverage who lives elsewhere.

Notices required from plan participants. An employer may not have reason to know of such events as the employee's divorce or a dependent child's ceasing to be a dependent. The rules therefore place on employees and family members entitled to continuation coverage the responsibility to notify the plan administrator of such events. An employer may impose a 60-day deadline for such notification, but only once the employee and, if applicable, the employee's spouse have received notice of it through the general COBRA rights notice or the plan's summary plan description. An employer may also require that specific procedures be followed, such as putting the notifications in writing and directing them to particular persons, but only if those procedures are set forth in the plan's summary plan description. (In the absence of specific employer procedures, an employee or other person entitled to COBRA coverage under a single-employer plan may give notification of a "qualifying event" orally or in writing to the person or unit that customarily handles employee benefits matters.)

Contents of notices. The regulations list numerous bits of information that must be included in the general COBRA rights notice and the election notice sent to persons who have an immediate right to elect continuation coverage. The Department has prepared model notices whose use can assure that the employer has provided all the information the regulations require.

The Department has endeavored with some success to make its model notices both understandable and precise. To help employees focus on what is most important to them, the Department actually proposes that the notices omit various details of COBRA rights that are contained in the Treasury Regulations and that, in the absence of Labor Department guidance, a cautious employer might have thought should be included. As just

CONTINUED ON BACK COVER

CONTINUED FROM PAGE 5
one example, the model notices do not point out that persons receiving COBRA coverage may add newborn children to their coverage pursuant to their rights under the Health Insurance Portability and Accountability Act (HIPAA).

On the other hand, the Labor Department determined that certain information that employers may not have been including because not directly related to COBRA was important for employees to have. Specifically, the Department concluded that employees needed to be advised how their failure to elect COBRA coverage could give them a coverage "gap" that could allow them, when they enroll in another plan, to be made subject to a preexisting conditions clause that, under HIPAA, could not have been imposed on them if they had not had a coverage gap. The notices also must advise of the importance of keeping the plan administrator advised of the current addresses of all plan participants and beneficiaries.

Additional required notices. In addition to more familiar COBRA notices, the Department of Labor has mandated specific notices to be given in certain circumstances in which the employer has determined that someone is not eligible for COBRA coverage, or to be given if COBRA coverage is cut short earlier than the maximum 18-month or 36-month coverage period, such as for non-payment of premiums. ■

From conference room to courtroom.

Our lawyers remain committed to the needs of Hampton Roads' businesses and professionals.

WILLCOX & SAVAGE

One Commercial Place, Suite 1800
Norfolk, Virginia 23510

Return Service Requested