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USERRA – Don't Forget About Service Members On Military Leave During Your Asset Sale

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USERRA is one of those laws that may affect very few members of your workforce, but if it does, you better know what your obligations are. A recent decision issued by the Eighth Circuit Court of Appeals serves as a good reminder to employers of some of those obligations. In *Dorris v. TXD Services*, LP (8th Cir. Feb. 27, 2014), the Eighth Circuit reversed a district court's order granting summary judgment to an employer who failed to include a service member's name on a list of active employees in the course of an asset sale. Here, the service member, who had been deployed to Iraq months before the asset sale, was not included on the list of active employees provided to the buyer because his employer documented him as having quit or been terminated. When he returned from his 12-month deployment, the service member discovered that he could not seek reinstatement to his former position (as USERRA provides) because his former "employer" no longer existed. And, since his name had not been included on the list of active employees provided to the company who purchased all the assets of his former employer, that business did not believe it had any obligation to hire him. I guess you could say the employee was in a bit of a pickle. So, off to the Courthouse he went. The service member filed suit claiming that his former employer violated USERRA's anti-discrimination provision, 38 USC § 4311(a), which prohibits discrimination against service members with respect to "benefits" of employment, which is broadly interpreted to include "any advantage…that accrues by reason of an employment contract or agreement or an employer policy, plan, or practice." 38 USC § 4303(2). First, the Court quickly dismissed any argument about the label the employer attached to this employee – that is, whether he was terminated or quit. This label had little meaning because USERRA specifically provides that an employee who is absent during a period of service in the uniformed service is "deemed to be on furlough or leave of absence from the civilian employer." 20 CFR § 1002.149. Thus, even if the employer TXD Services labeled the service member as having quit or been terminated, that label did not alter TXD Services' obligations to that service member. This position is consistent with the USERRA regulations, which provide: "Entitlement to these non-seniority rights and benefits is not dependent on how the employer characterizes the employee's status during a period of service. For example, if the employer characterizes the employee as 'terminated' during the period of uniformed service, this characterization cannot be used to avoid USERRA's requirement that the employee be deemed on furlough or leave of absence, and therefore entitled to the non-seniority rights and benefits generally provided to employees on furlough or leave of absence." 20 CFR § 1002.149. So, the next question was whether being placed on this list of active employees was a "non-seniority benefit", such that the service member on leave could not be excluded from that list if others on similar leaves were included. Indeed, a service member is only entitled to non-seniority benefits that "are generally provided by the employer…to employees having similar seniority, status, and pay who are on furlough or leave of absence under a contract, agreement, policy, practice, or

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plan in effect at the commencement of such service or established while such person performs such service." 38 U.S.C. § 4316(b)(1)(B). The Court concluded that "a reasonable jury could find that the opportunity for seamless transfer of employment to a successor employer was an 'advantage' or 'benefit' of TXD employment." Here, the district court had improperly put the burden of proof and persuasion on the service member to show that his employer treated plaintiff the same as all employees on comparable non-military leaves. The Court spelled out the correct allocation of these burdens, stating "if being on the list was a benefit of employment and [the service member's] military service was 'a motivating factor' in his not being on the list, the burden shifts to [the employer] to show that the same action would have been taken in the absence of military service, i.e., that anyone similarly on furlough or leave of absence would have been left off the list." What's the take away for employers? For one, be aware that no matter how you label a service member's cessation of active employment, USERRA's obligations are still the same. Second, while this case involved an asset sale, the holding could have applications to your business if you have service members who have been on active duty and seek to return. You'll need to analyze just what is a "non-seniority benefit" in your organization in order to determine your potential obligations to that service member upon his or her return.