

# Labor & Employment Law Update

**Pepper Hamilton LLP**  
Attorneys at Law

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## Reserve Troops Reemployment Rights

**U**nited States troops are returning from Iraq, Afghanistan and other areas of conflict even as other reservists are being called up. As the deployment of military personnel likely will continue for some time, we thought a brief review of employer obligations under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA or the Act) would be useful. For a more detailed look at USERRA's requirements, see our October 2001 *Labor & Employment Law Update* (available at [www.pepperlaw.com/pepper/publications\\_update.cfm?rid=226.0](http://www.pepperlaw.com/pepper/publications_update.cfm?rid=226.0)).

USERRA is intended to minimize the disadvantages to employees who are called for military service. The Act also encourages non-career military service by making it easier to return to civilian life after military service. The Act applies to all public and private employers, regardless of size or location, and is the primary federal law protecting the rights of the women and men who serve in the armed forces. USERRA provides the "floor" of benefits for employees – many states have laws that expand the scope of protection for veterans. If a state law provides

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greater benefits than USERRA, then it will govern.

Employers should confirm that their employment policies, including employee benefits policies, comply with all federal and state laws relating to the rights of employees who perform service for the armed forces.

### **Reemployment Obligations Under USERRA**

An employer generally has a duty under USERRA to reemploy an employee who takes a leave of absence for military service. An employee who is called to military service qualifies for reemployment upon discharge from service if the employee (1) properly notified the employer of the need for a service-related absence; (2) takes a cumulative absence of no more than five years; and (3) properly reapplies or reports to work on a timely basis. An employee who is dishonorably discharged is disqualified from USERRA's reemployment rights. Also, an employee may be disqualified if the employer's circumstances have changed so that reinstatement is not possible.

Employers must abide by the Act's "escalator principle." The "escalator principle" man-

dates that returning employees be provided all the additional seniority, rights and benefits that they would have earned if they had been employed continuously during military service. In other words, a returning veteran must be reemployed in the job he or she would have attained had he or she remained at work, with the same seniority, status and pay.

USERRA also limits the employer's ability to terminate an employee returning from military service. An employee may be lawfully terminated only "for cause" during the first year following reemployment if the military leave was for more than six months. If the leave was less than six months but more than 30 days, then the employer may terminate the employee only "for cause" during the first six months of reemployment.

### **Benefits**

The employer also must protect the employment benefits of its employees while they are absent for military service.

An employee called to military service has the right to elect to continue the employer's health plan coverage (including dependents) during the leave. If the employee elects not to continue the health benefits while on leave, he or she has the right to re-enroll in the health plan upon reemployment. Generally, no waiting period or preexisting condition exclusion period may be imposed upon the employee if none would have been applicable without the military leave.

### **Also In This Issue**

- 2 NLRB: Non-Union Workers Have No Right to Witness at Investigatory Interview
- 3 Is Your Company in Compliance with the New Overtime Regulations?

*Reserve Troops continued on Page 4*

# NLRB: Non-Union Workers Have No Right to Witness at Investigatory Interview

**I**n what seems to be a continuing saga, the National Labor Relations Board recently held in *IBM Corporation*, 341 NLRB No. 148 (2004), that employees in a non-union workforce do not have the right to have a co-worker present at an investigatory interview. This marks the fourth time the board has changed its position on this issue since 1975, when the U.S. Supreme Court granted such a right to a unionized workforce in *NLRB v. J. Weingarten*, 420 U.S. 251 (1975).

In *Weingarten*, the Supreme Court held that employees in a unionized workforce have the right, if requested by the employee, to union representation in an investigatory interview which the employee reasonably believes might result in disciplinary action. The Supreme Court explained that this right, commonly referred to as a “*Weingarten* right,” is grounded in Section 7 of the National Labor Relations Act, which gives employees “a right to engage in concerted activities for the purpose of mutual aid or protection.”

After *Weingarten*, the board was left to determine whether such rights should be extended to a non-union workforce. The first time it was confronted with the issue in *Materials Research Corp.*, 262 NLRB 1010 (1982), the board held that an employee in a non-union workforce had the right to request the presence of a co-worker at an investigatory interview which he or she reasonably believed might result in disciplinary action.

The *Materials Research* decision was short lived. Just three years later, the board changed its position in *Sears Roebuck and Co.*, 274 NLRB 230 (1985). The board explained that the extension of a *Weingarten* right would “wreak havoc” on the rights of a non-union employer to deal with its employees on an individual basis. The board affirmed the *Sears* decision three years later in

*E.I. Dupont & Company*, 289 NLRB 627 (1988) with one caveat – in *Dupont*, the board held that the finding that a *Weingarten* right does not extend to a non-union workforce is a permissible construction of the act, but not a mandatory one.

The *Dupont* decision remained undisturbed until 2000, when the board changed its position in *Epilepsy Foundation of Northeast Ohio*, 331 NLRB 92 (2000). In *Epilepsy Foundation*, the board reverted back to its original position in *Materials Research*, holding that a *Weingarten* right extends to a non-union workforce. The board based this decision on the Supreme Court’s rationale in *Weingarten* that employees have a right under Section 7 of the National Labor Relations Act to engage in concerted activities for mutual aid or protection. According to the board’s decision in *Epilepsy Foundation*, this rationale “is equally applicable in circumstances where employees are not represented by a union, for in these circumstances the right to have a co-worker present at an investigatory interview also greatly enhances the employees’ opportunities to act in concert to address their concern ‘that the employer does not initiate or continue a practice of imposing punishment unjustly.’”

Only four years after the *Epilepsy Foundation* decision, the board has again reversed its position. In making its decision, the board relied on important policy issues, explaining that “[t]he years since the issuance of *Weingarten* has seen a rise in the need for investigatory interviews, both in response to new statutes governing the workplace and as a response to new security concerns raised by terrorist attacks on our country.” The board noted that employers in today’s workplace are often required to interview employees on a broad range of issues, including workplace violence, discrimination, sexual harassment, corporate abuse and “real and threatened” terrorist attacks. The board concluded that an employer “must be allowed to conduct its required investigations in a thorough,

sensitive and confidential manner,” which is best accomplished by allowing an employer to interview an employee without the presence of a co-worker.

It should come as no surprise that the board’s “flip-flop” position on whether a *Weingarten* right extends to a non-union workforce has changed with the board’s political composition. The current Republican-dominated board, which decided the *IBM Corp.* case, reflects the sentiments of the Bush Administration. On the other hand, the *Epilepsy Foundation* case was decided by a board that reflected the position of the Clinton Administration.

If Democratic presidential nominee John Kerry wins the November election, it will be interesting to see whether the board will again change its position on this issue. In the meantime, it is important to remember that the *IBM* decision does not affect a unionized employee’s *Weingarten* right. Unionized employees still have the right to request the presence of a union representative at an investigatory interview which the employee reasonably believes might result in disciplinary action. A refusal to honor such a request may void otherwise appropriate disciplinary action and subject an employer to an unfair labor practice violation, with attendant “make whole” and other remedies.

Author:

James P. Thomas  
412.454.5802  
thomasjp@pepperlaw.com

## Is Your Company in Compliance with the New Overtime Regulations?

The U.S. Department of Labor's new regulations for "white collar" overtime exemptions became effective on August 23, 2004. Under the new regulations, your company may now be required to pay overtime to "white collar" employees who were previously exempt. On the other hand, some employees may actually lose their eligibility for overtime pay. If you have not already done so, it is important that you promptly review your company's payroll practices for compliance with the new regulations. Any mistake, whether it is not paying overtime to an employee who is entitled to it or vice-versa, can be costly, especially if not promptly discovered and corrected. The following is an overview of some of the significant changes in the new regulations that may affect your employees.

- **Higher minimum salary requirement.** An employee must now earn a salary of at least \$455 per week to qualify for the executive, administrative or professional overtime exemption. Under the old regulations, an employee was only required to earn a salary of \$250 per week.
- **New Highly Compensated Employee Exemption.** The new regulations create an entirely new exemption for "highly compensated" employees earning a minimum of \$100,000 annually. To qualify for this exemption, the employee's primary duties must consist of office or non-manual work and the employee must customarily and regularly perform at least one of the exempt duties of an executive, administrative or professional employee. In addition, a minimum of \$455 per week of the employee's compensation must be paid on a salary or fee basis. The

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balance of the \$100,000 may be in the form of commissions, non-discretionary bonuses and other non-discretionary cash compensation. If an employee's compensation falls short of \$100,000, the employer may make up the difference with a lump sum payment within one month of the end of the year in order to preserve the exemption.

- **Outside Sales Exemption Expanded.** To qualify for the outside sales exemption under the new regulations, it is only necessary that the employee's primary duty be sales or solicitation. Previously, an employee was disqualified under this exemption if more than 20 percent of the employee's time was spent in work unrelated to outside sales.
- **Permissible Salary Deductions for Policy Violations Expanded.** Under the new regulations, an employer may suspend an exempt employee without pay for violations of **written** workplace conduct rules, such as workplace violence or sexual harassment. Under the old regulations, an exempt employee could not be suspended without pay for less than one week, except for "infractions of safety rules of major significance."

- **New Safe Harbor Provision.** Under the new regulations, an employer with a clearly communicated policy, **including a complaint procedure** addressing how employees are to be paid, will not lose the overtime exemption if the affected employee is promptly reimbursed for any improper deductions and the employer makes a good faith effort to comply with the regulations going forward.

These are just a few of the more significant changes in the new "white collar" overtime regulations. Even these few examples, however, highlight the importance of reviewing your company's payroll practices to ensure compliance with the new regulations, as well as the importance of having clearly written and communicated workplace policies with a complaint procedure. Such policies may prevent an employer from incurring substantial losses under the new overtime regulations, as well as in other areas such as sexual harassment and discrimination.

*Author:*

*James P. Thomas  
412.454.5802  
thomasjp@pepperlaw.com*

USERRA also requires that a veteran be considered as not having incurred any "break" in service for the purpose of pension benefits. If the employee returns to work, military service is considered service with the employer for benefit accrual and vesting purposes. The employer must fund any resulting obligation.

Employers must be aware of the coordination of rights under USERRA and the Family and Medical Leave Act (FMLA). In determining whether a veteran meets the FMLA eligibility requirement, the months and hours that the employee would have worked but for military service must be added to the months and hours actually worked for the employer. If the total hours exceed 1,250 during a 12-month period, then upon return to work the employee would be eligible for FMLA leave for a serious health condition.

#### Employer's Liability

Employers cannot discriminate against employees because of their military service obligations. For example, an employee who is denied reemployment following military service can bring an action against his employer for discrimination based solely on the employer's failure to reemploy the employee. An employee who is denied a promotion or is terminated because of duties as a member of the National Guard can file an action against his employer for a violation of USERRA.

An employer violates USERRA when the employee's military status is a motivating factor in the employer's action against the employee, unless the employer proves that it would have taken the same action regardless of the employee's military status. For an employee to prevail, he or she need only show that the employer was *motivated in part* by the employee's military status. The employee does not need to show that military service was the *sole* reason for the employer's discriminatory action. Employers must have legitimate, non-discriminatory reasons for taking employment actions against employees protected under USERRA.

As employees continue to be called for military service and as they return, an employer must be aware of its obligations under USERRA and any state laws. A review of these laws will help an employer advise its employees of their rights and will ensure that the employer avoids liability for failure to comply with its obligations.

*Author:*

*Maureen Q. Dwyer*  
215.981.4149  
*dwyerm@pepperlaw.com*

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## Pepper Hamilton LLP

Attorneys at Law

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### Labor and Employment Practice Group of Pepper Hamilton LLP

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Brian P. Downey  
K. Stewart Evans, Jr.  
Jonathan Kane  
William F. Kershner  
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Frank P. Spada, Jr.  
Stephen J. Sundheim  
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#### Associates

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Angelo A. Stio III  
James P. Thomas  
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