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Wisconsin Fair Employment Act Amended to Provide Additional Protections Against Discrimination Based on Military Service

On March 24, 2008, Governor Jim Doyle signed into law 2007 Wisconsin Act 159. The Act, effective April 8, 2008, amended the Wisconsin Fair Employment Act (WFEA) to broaden the WFEA's definition of "military service" and to prevent adverse employment action based on a less than honorable discharge from the military, so long as that discharge is not substantially related to the circumstances of an employee's particular job or licensed activity.

Definition of Military Service: As amended by 2007 Wisconsin Act 159, the WFEA now defines "military service" as "service in the U.S. armed forces, the state defense force, the national guard of any state, or any other reserve component of the U.S. armed forces." Wis. Stat. § 111.32(12g). This expands upon the previous version of the WFEA, as the prior version did not specifically include members of the United States armed forces or members of the national guard of states other than Wisconsin as protected groups.

Less Than Honorable Discharge: The WFEA, as amended, now specifically provides that it is not unlawful "employment discrimination because of military service . . . to refuse to hire, employ, or license an individual or to bar or terminate an individual from employment or licensure because the individual has been discharged from military service under a bad conduct, dishonorable or other than honorable discharge, or under an entry-level separation," so long as "the circumstances of the discharge or separation substantially relate to the circumstances of the particular job or licensed activity." Wis. Stat. § 111.355(2). This makes the standard for adverse employment action based upon a less than honorable discharge similar to that for adverse employment actions based upon a criminal arrest or conviction under the WFEA.

The attorneys in Reinhart's Labor and Employment Department are experienced in advising employers on the rights and obligations that exist under the WFEA and would be pleased to assist you if you have questions concerning the amendments to the WFEA or concerning the WFEA generally.

POSTED:

May 15, 2008

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EEOC Clarifies Employment Protections Available to Veterans with Service-Connected Disabilities

Since October 2001 more than 30,000 veterans serving in Iraq, Afghanistan and surrounding areas have been wounded in action. Many of these individuals are able to work and seek active employment upon their return from duty. Employers may be aware of their accommodation duties under the Americans with Disabilities Act (ADA); however, employers have additional duties with respect to veterans under the Uniformed Services Employment and Reemployment Rights Act (USERRA). The EEOC has issued new guidance clarifying the protections available to veterans with service-connected disabilities under both the ADA and USERRA.

The ADA prohibits employers with 15 or more employees from discriminating against individuals on the basis of disability. The ADA requires employers to make an accommodation to the known disability of a qualified applicant or employee if doing so would not impose an undue hardship on the operation of the employer's business. USERRA applies to all employers and prohibits employers from discriminating against individuals on the basis of their military status or military obligations. USERRA also provides individuals who leave their civilian jobs to serve in the uniformed services with specific reemployment rights.

Although the ADA can apply to wounded veterans if they meet the legal definition of disabled, USERRA provides veterans with even broader protection than does the ADA. In particular, USERRA requires an employer to make reasonable efforts to assist a veteran who is returning to employment in becoming qualified for a job. The employer must assist the veteran in becoming qualified to perform the functions of the position, regardless of whether the veteran has a service-related disability. Moreover, USERRA requires employers to provide those veterans who have service-related disabilities with reasonable accommodations, even if the "disability" does not constitute a disability under the ADA.

Employers should familiarize themselves with their obligations to veterans under both the ADA and USERRA. For further guidance on your obligations to accommodate a disabled veteran, please contact any member of Reinhart's Labor and Employment Department.

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Seventh Circuit Rules That FMLA Leave Is Available for Incapacity Caused by Treatment for an Addiction, but Not for Incapacity Caused by the Addiction Itself

The United States Court of Appeals for the Seventh Circuit recently held that an employee's absence while awaiting admission to a substance abuse treatment program was not covered under the Family and Medical Leave Act (FMLA). *Darst v. Interstate Brands Corp.*, 512 F.3d 903 (7th Cir. 2008).

On August 15, 2000, Interstate Brands Corporation (IBC) terminated an employee for excessive absenteeism. Prior to his termination, the employee requested a leave of absence from July 29 through August 14, so he could seek and receive treatment for his alcoholism. IBC granted that request. Late in the evening on Friday, July 28, the employee consumed a large quantity of alcohol. He did the same on July 29 and July 30. He did not actually begin his treatment program until August 4.

Between July 29 (the date the employee's leave started) and August 4 (the date the employee actually commenced treatment), the employee missed three regularly scheduled shifts—absences that IBC concluded were not covered under the FMLA. Because those three absences caused the employee to accumulate enough points to trigger termination of his employment under IBC's attendance policy, IBC discharged the employee.

The Seventh Circuit noted that regulations under the FMLA provide that an absence for substance abuse treatment qualifies for FMLA leave, but that an "absence because of the employee's use of the substance, rather than for treatment, does not qualify for FMLA leave." 29 C.F.R. § 825.114(d). Further, while "treatment" under the FMLA could include examinations to determine if a serious health condition exists or to evaluate such a condition, it does not include contacting a substance abuse treatment program to seek admittance.

In *Darst*, the employee failed to establish that he received any treatment over the three work days prior to his being admitted into a substance abuse treatment program. That failure was fatal to the employee's claim—the Seventh Circuit concluded that the employee's absence over those three days was not protected under the FMLA and, accordingly, that IBC was free to terminate him.

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If you have any questions about whether an employee's absence is covered under the FMLA, or about the FMLA generally, please contact any attorney in Reinhart's Labor and Employment Department.

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