



NEW USERRA CASE CLARIFIES OBLIGATIONS WHEN REINSTATING COMMISSION EMPLOYEES

By: Greg Grobe
Liebmann, Conway, Olejniczak & Jerry, S.C.
E-Mail: grobe@lcojlaw.com

This past Veterans' Day, the United States honored over 21.8 million current citizens who have served in the armed forces. Many of these individuals will soon be returning to their former worksites. Many will continue to be recalled to duty periodically, or will continue to serve in an active reserve or National Guard capacity throughout their employment careers.

With these numbers of veterans filling the employee ranks, administering reinstatement procedures under the federal Uniformed Services Employment and Reemployment Rights Act ("USERRA") will become a more frequent duty of Human Resources professionals. The USERRA law contains a complex formula for reinstatement and a lengthy set of rules relating to the benefits and obligations owed to veterans when they return to the workplace. Failure to comply with these obligations can result in significant legal liabilities and create a negative public image. A recent federal appeals court decision emphasized the challenges associated with returning veteran employees to the workforce and some of the considerations that should go into the reinstatement proceedings, particularly in relation to commission employees.

On September 13, 2011, the 2nd Circuit Court of Appeals issued a decision, Serricchio v. Wachovia Securities, LLC, which addressed, for the first time, a number of issues concerning the reinstatement of employees under USERRA who were paid on a commission-only basis prior to their departure. The facts of the case are interesting.

Michael Serricchio was employed as a financial advisor and worked solely on a commission basis. He had a large number of client accounts, some of which were shared with another advisor. In the years prior to his departure for military service, he earned in excess of \$75,000 in annual commissions.

Serricchio was recalled to active duty in the Air Force reserve following the September 11, 2001 terrorist attacks. He served for just over two years and was honorably discharged in October of 2003.

During the interim two years, several changes occurred at Wachovia. First, the company was forced to reassign Serricchio's accounts so they were properly managed in his absence. Those employees who took on the accounts began to rely on them for their income. Second, the company made some internal changes in relation to some of the accounts, as part of a restructuring designed to transition "commission" accounts to "fee accounts." A number of Serricchio's former accounts were part of this transition. Third, during his two year absence, several Wachovia employees left the company and took some of Serricchio's former accounts with them, including some key accounts.

When Serricchio applied for reinstatement, Wachovia informed him that it was impossible to reassign him to his former accounts, because most of them did not exist anymore. Rather, it offered to pay him a \$2,000 monthly "draw" (which he had not received before), a set of new

USERRA & COMMISSION EMPLOYEES

accounts that he had not previously managed, and the opportunity to build his book of business to the level it was at before through “cold calling” efforts.

Serricchio was upset with the reinstatement offer, as his projected annual income would be far less than the level he enjoyed prior to his call to active duty. He declined reinstatement and instead filed a lawsuit, claiming that USERRA requires that employees be reinstated to a position of “like seniority, status and pay,” and that Wachovia’s reinstatement offer failed to meet that standard. Wachovia claimed that business circumstances had changed since Serricchio’s departure and that it had taken fair actions by providing him with the opportunity to earn similar commissions to those he earned when he left, paying him the same commission rate on customer accounts, and providing him with a monthly draw which he did not receive before he left.

The court held that Wachovia’s efforts failed to satisfy the requirements of USERRA. It held that, despite the internal changes during the intervening two years, Wachovia could and should have done more to provide Serricchio with a position of “like seniority, status and pay.” As a penalty for Wachovia’s USERRA violation, the court awarded Serricchio \$389,453 in back pay, then doubled that award due to its finding that Wachovia’s violation was “willful” (for a total back pay award of \$778,906). It then took the unusual step of ordering Serricchio to be reinstated and ordered him to be paid a salary of \$12,300 for the first three months, while he regained his broker licenses, and then a monthly “draw” of an additional \$12,300 per month for the following nine months, to be offset against commissions.

The court’s decision in Serricchio was groundbreaking in several respects. First, it is admittedly difficult to assign and reassign customer accounts during a lengthy two-year absence of a sales representative or other commission employee. During those two years, accounts may change, businesses may change, sales and product mixes may change, and many other factors could affect commissions.

Moreover, the sales representatives that “pick up” the accounts during the employee’s military service begin to rely on the income from those accounts, making reassignment difficult. Employers are very often challenged in attempting to craft a “like position” to reinstate a commission employee to.

The Serricchio decision makes it clear that employers must do more to accommodate veterans who relied on commissions as their primary earnings prior to their military service. The Serricchio case in effect mandates that the employer pay the employee earnings similar to what the employee earned before the military service, even if the employee is not generating commissions to justify that income. The Serricchio decision does not require that such revenues be paid indefinitely, but at a minimum the supplemental salary or draw must provide a reasonable and effective opportunity for the commission sales person to reestablish accounts sufficient to generate the income he was receiving before his departure.

There will continue to be exceptions to this rule. Certainly as a business begins to fail during a veteran’s military service, and customer accounts are down across the board, it may be unreasonable to require a company to pay the same level of commissions when such commissions are not being earned by current sales representatives. Each of the cases will be fact-intensive. However, Human Resource professionals must be aware of the Serricchio decision when reinstating veterans who worked on a commission basis.

Summary

The USERRA law is a relatively complex law which, until recent years, was not an everyday consideration of Human Resource professionals. With the large numbers of veterans returning to the workplace, the USERRA law will present new challenges in years to come. The Serricchio decision illustrates how complicated a reinstatement decision can become, particularly after a lengthy absence for military service.

Further information on USERRA can be obtained from the Department of Labor website (www.dol.gov) or from the authors.