

# Restaurant Newsletter

[Presented by the Law Offices of Ashley A. Baron]

## Legal News for the Restaurant Ind.

### RETURNING MILITARY PERSONNEL

The Uniform Services Employment and Reemployment Rights Act of 1994 (“USERRA”) is a federal law designed to protect returning military personnel from discrimination and retaliation, guarantee reemployment rights and preserve military personnel’s employment rights and benefits when they return from duty. What does that have to do with employers in the restaurant industry? It means that if you have a job applicant or employee and they notify you that they are in the military, considering joining the military or may have to report for active duty with a branch of the military they have rights protected by Federal law and if you violate those rights you will be held liable for damages.

There are three critical areas that an employer needs to be aware of under USERRA. First, employees who fall under the law may not be denied initial employment, reemployment, retention in employment, promotion, or any other benefit for employment by an employer on the basis of employee’s joining, going on active duty for or

being a member of the military service. Further, employers are prohibited from retaliating against any employee who has exercised USERRA rights or taken steps to enforce protections provided by USERRA or assisted anyone in doing so. The standard for finding a violation of USERRA is lower than other federal discrimination statutes (substantial factor) and the employee only needs to show that the military service was a motivating factor (i.e. relied on, took into account, considered or conditioned its decision on that consideration). Also, the burden of proof shifts to the employer after the employee has established that the military service was a motivating factor in the employment decision.

Second, the employee is guaranteed reemployment after returning from military services provided they follow the requirements of USERRA. The employee must give advanced notice to the employer. The employee must have five years or less total service while employed by the employer. The employee returns to or reapplies for work promptly after completing the military service. The employee was not dishonorably discharged from the service. It should be noted this provision applies to all employers whether you own a sandwich shop or a chain of restaurants. It also should be noted that an employer cannot refuse reemployment on the ground the employee has been replaced or there are no vacant positions. Prompt

reemployment means the employer must reemploy the returning veteran even if it has to terminate the replacement employee.

Third, employment benefits must be preserved. USERRA’s generally provides that returning military members should not be disadvantaged for their service. The employee salary must be that which he/she would have attained if they were employed during the absence. An employee is entitled to reinstatement of health care coverage without any waiting periods.

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Pension benefits must continue to accrue while the military service of the employee takes place and the employee must have the same benefits as if they had remained employed continuously. Any benefits based upon seniority must be given to the returning employee as if he/she had not left employment. Benefits not based on seniority must be given to the employee at the most favorable basis as other employees. Violation of USERRA may result in a Federal Court lawsuit without the necessity of any exhaustion of administrative remedies. The damages available for the successful employee in the litigation are back-pay, reinstatement to the position, attorneys' fees, and liquidated damages equal to the lost wages for "willful" violations.

## NO EXPECTATION OF PRIVACY ON COMPANY COMPUTERS

The Court in *United States v. Ziegler*, 456 F. 3d 1138 (9<sup>th</sup> Cir. 2006) held that an employee had no expectation of privacy while using a company computer. In that case, the owner of Frontline Processing contacted the FBI with a tip that an employee of theirs, Brian Ziegler, was using a company computer to view child pornography on a company computer. Frontline entered Ziegler's locked office and made a copy of his hard drive and then turned it over to the FBI. The FBI found many child pornographic images on Ziegler's copied hard drive.

The FBI took the evidence to a federal grand jury who indicted

Ziegler for receipt and possession of child pornography. Ziegler pled not guilty to the charges and attempted to exclude the evidence obtained from the computer claiming the FBI violated his right of privacy under the 4<sup>th</sup> Amendment in directing the search of his computer by Frontline (his employer).

The trial court denied his request to suppress the evidence and Ziegler appealed the issue to the Ninth Circuit Court of Appeals (traditionally very liberal). The Ninth Circuit agreed with the trial court's ruling and denied the appeal. The Ninth Circuit stated that Ziegler had no reasonable expectation of privacy in the internet files that he had accessed from the computer owned by Frontline. The Ninth Circuit Court cited California law and held that: "social norms suggest that employees are not entitled to privacy in the use of workplace computers, which belong to their employers and pose, significant dangers in terms of diminished productivity and even employer liability."

The Ninth Circuit Court stated that employer monitoring of use of company computers is an assumed practice and that a disseminated computer use policy is entirely sufficient to defeat any expectation of privacy that an employee might harbor.

Restaurant employers should heed the statements of the Ninth Circuit Court of Appeals and make sure they have a well drafted computer use policy that prohibits use of the computer for anything but company business and clearly informs the employees that they have no right to an expectation of privacy on their employers computer. Employers should regularly monitor the use of workplace computers to ensure that no illegal activity is being performed on those computers because the employer could have liability if an employee is using a work computer for an illegal or fraudulent purpose.

The Ninth Circuit case makes it

clear that if you have a proper computer use policy in place advising employees that you will be monitoring their use of the workplace computer you can do so and make sure that the employees are in fact using your computers for only the purposes that they are intended. Because so much time is spent on computers in most settings whether it be offices, front of the house or back of the house the misuse of the computer is much too tempting for most employees. The employer must be vigilant in order to not only make sure tremendous amounts of time are not being wasted by employees but also to prevent liability for illegal actions by employees. It is always advisable to consult an attorney when drafting policies such as a computer use policy so that they are properly drafted.

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