



JONES, BLECHMAN,  
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# EMPLOYMENT LAW UPDATE NEWSLETTER

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## **JBW&K Employment Law Practice Group**

JBW&K formed the Employment Law Practice Group in response to the growing needs of employers to keep abreast of the many laws, both federal and state, impacting the employment relationship. Our goal is to help our clients proactively understand and balance the rights of management and employees in order to maintain a healthy and stable workforce.

Our Employment Law Practice Group is ready to provide our clients with advice and guidance involving the myriad issues arising out of and involving the employer/employee relationship. In proactively managing the employment relationship, we offer advice, guidance, compliance review and document preparation.

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## **What Every Employer Should Know About Employee Military Leave**

*By Jennifer L. Muse*

In light of world events, a growing number of employers across the country are faced with having their employees called to active duty military service for indefinite lengths of time. This includes both employees who serve as military reservists and employees brought back into active duty service through military "stop loss" policies. Obviously, employers in Hampton Roads are particularly impacted by such deployments given the large number of active and reserve military personnel who live in our community. Importantly, employers should realize that the Uniformed Services Employment and Reemployment Rights Act ("USERRA") places specific requirements on how employers must handle employee leaves of absence from work due to military service.

USERRA protects the reemployment rights of individuals who are absent from employment due to service in the uniformed services. USERRA applies to all public and private employers in the United States, regardless of size, and covers all categories of voluntary and involuntary military service and training. USERRA also prohibits an employer from discriminating or retaliating against an employee on the basis of his or her membership or obligation for service in the uniformed services.

USERRA generally requires that an employer offer reemployment to any employee returning from military service if the employee gave advance notice to his employer of such service, the cumulative length of the absence and all previous absences with that employer because of military service does not exceed five years, and the individual seeks reemployment within a

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specified period of time after conclusion of military service. The employee is not required to decide before leaving for military service whether the employee will seek reemployment upon return. In fact, even if an employee indicates before leaving, or during the employee's military service, that the employee does not intend to seek reemployment, the employee will still be entitled to reinstatement upon return if the employee desires reemployment at that point.

If a returning service member seeks reemployment, the reemployment must occur within two weeks of the employee's application for reemployment. When reinstating the employee, the employer must consider carefully the position in which the employee should be placed. Under USERRA, an individual generally is entitled to reemployment in the job position that he or she would have attained with reasonable certainty if not for the absence due to military service, a concept known as the "escalator principle." Although the employee must be qualified to perform the duties of the escalator position, USERRA imposes an obligation on the employer to engage in reasonable efforts to qualify the employee for the escalator position.

The escalator principle also determines the returning employee's seniority, status, and rate of pay. An individual who is reemployed under USERRA generally has the right to the same seniority, rights and benefits determined by seniority that the employee would have attained if he or she had not left due to military service. The absent employee is considered to be on furlough or leave of absence while serving and is entitled to any other rights and benefits not determined by seniority that the employer generally provides to employees who are on furlough or leave of absence. In addition, an employer must use the escalator principle to determine the returning employee's rate of pay, taking into account all pay or step increases, as well as merit or performance increases, which the employee would have attained with reasonable certainty.

In certain circumstances, an employer may not be required to reemploy a returning service member. USERRA does not require an employer to reinstate an employee if the employer's circumstances have so changed as to make reemployment impossible or unreasonable. In addition, an employer is not required to reemploy a returning service member if the position the employee held before leaving for

military service was for a brief, non-recurrent period and there was no reasonable expectation that the employment would continue for a significant period of time.

Employers of all sizes must be aware of the requirements placed on them by USERRA. Failure to follow this law can lead to costly penalties and legal exposure. Employers should, therefore, inform themselves of their responsibilities under USERRA and seek appropriate legal advice when necessary.

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## Senate Passes FMLA Expansion Measure

*By Jennifer L. Muse*

On August 2, 2007, the United States Senate approved an amendment that would expand the Family and Medical Leave Act to allow six months of unpaid leave for family members of wounded military personnel. The amendment is part of a child insurance reauthorization bill, which President Bush has threatened to veto, so it is unclear whether this amendment will become law.



## Federal Minimum Wage Increase

*By Jennifer L. Muse*

The federal minimum wage increased to \$5.85 per hour, effective July 24, 2007. The federal minimum wage will increase again to \$6.55 on July 24, 2008 and then to \$7.25 on July 24, 2009. Employers should ensure that their federal minimum wage posters are up-to-date. The Department of Labor requires all employers, regardless of size, to post a new federal minimum wage poster that reflects this change to the minimum wage.

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## CHANGES FOR THE EEO-1 REPORT 2007 & BEYOND

*By Lauren C. Baddar*

The Equal Employment Opportunity Commission (“EEOC”) requires employers with federal government contracts of \$50,000 or more and 50 or more employees, as well as all employers with 100 or more employees to file EEO-1 reports annually by September 30 with the EEOC. The EEOC has adopted revisions to the EEO-1 report effective for the September 2007 filings, consisting of changes to the “Officials and Managers” job category and the ethnic and racial categories.

The EEOC divided the “Officials and Managers” job category into two levels: Executive/Senior Level Officials and Managers and First/Mid-level Officials and Managers. The two levels are distinguished based on responsibility and influence within the organization. Executive/Senior Level Officials and Managers (“Executive”) includes employees who plan, direct, and formulate policies, set strategy, and provide overall direction for the organization. First/Mid-level Officials and Managers consists of employees who work as managers and receive direction and instruction from employees in the Executive category. In addition, the EEOC has moved business and financial occupations from the “Officials and Managers” category into the “Professionals” category.

The EEOC has also made changes to the race and ethnic categories, including the addition of a new category entitled “Two or more races”, the division of the category “Asian and Pacific Islander” into two separate categories, “Asian” and “Native Hawaiian or other Pacific Islander,” and the renaming of the category “Black” to “Black or African American” and the category “Hispanic” to “Hispanic or Latino.” The EEOC has also endorsed self-identification of race and ethnic categories, as opposed to visual identification by employers.

The chart below describes the race and ethnicity categories as revised:

Revised EEO-1 Race and Ethnicity Categories	Descriptions
Hispanic or Latino	A person of Cuban, Mexican, Puerto Rican, South or Central American, or other Spanish culture or origin regardless of race
American Indian or Alaska Native (Not Hispanic or Latino)	A person having origins in any of the original peoples of North and South America (including Central America), and who maintain tribal affiliation or community attachment.
Asian (Not Hispanic or Latino)	A person with origins in any of the original peoples of the Far East, Southeast Asia, or the Indian Subcontinent including, for example, Cambodia, China, India, Japan, Korea, Malaysia, Pakistan, the Philippine Islands, Thailand, and Vietnam.
Black or African-American (Not Hispanic or Latino)	A person having origins in any of the black racial groups of Africa
Native Hawaiian or Other Pacific Islander (not Hispanic or Latino)	A person having origins in any of the peoples of Hawaii, Guam, Samoa, or other Pacific Islands
White (Not Hispanic or Latino)	A person having origins in any of the original peoples of Europe, the Middle East, or North Africa
Two or More Races (Not Hispanic or Latino)	All persons who identify with more than one of the above five races

While employers are required to utilize the revised EEO-1 report for September 2007 filings, the EEOC does not require resurveying employees for that filing, but does require that employers resurvey employees prior to the September 2008 filing. Employers should report employees in the same groups as previously reported until they are resurveyed.

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## **OFCCP FINAL RULE DEFINING “INTERNET APPLICANT”**

*By Lauren C. Baddar*

Employers required to maintain Affirmative Action Programs (“AAPs”) should become familiar with the OFCCP’s recent rule defining “Internet Applicant” and its implications regarding record-keeping for AAPs. Importantly, the rule imposes no new obligation on contractors to solicit race, ethnicity, and gender data, but rather prescribes the records contractors must maintain regarding hiring accomplished through the Internet or related electronic data technologies.

Employers must solicit demographic information from job seekers who qualify as “Internet Applicants.” A job seeker will qualify as an Internet Applicant if the individual submits an expression of interest through Internet or related electronic data technologies, the employer considered the individual for employment in a particular position, the individual’s expression of interest indicates that he or she possesses the basic qualifications for the position, and the individual does not remove him or herself from consideration for the position prior to a job offer. An individual will only be considered an Internet applicant if all four criteria are met.

### **Expression of Interest**

An “expression of interest” includes all expressions of interest, regardless of the means or manner in which made, if the contractor considers expressions of interest through the Internet or related electronic data technologies in recruiting or selection processes *for that particular position*. Due to the rapidly evolving nature of electronic data technology, the OFCCP declined to define “Internet and related electronic technologies” precisely, but, in the preamble to the final rule, advises that it intends the term to include e-mail, resume databases, job banks, electronic scanning technology, and applicant screeners. The OFCCP has stated that an individual’s posting of a resume on a commercial resume database is generally sufficient to satisfy the “expression of interest” requirement.

When an employer considers an expression of interest via both the Internet and traditional

paper applications, the employer must solicit demographic information from job seekers based on the Internet Applicant definition. However, if an employer does not utilize the Internet or related electronic data technologies for a particular position, the traditional paper OFCCP record-keeping standards apply.

### **Considers the Individual for Employment in a Particular Position**

The OFCCP states that “considers the individual for employment in a particular position” means that the contractor assesses the substantive information provided in an expression of interest with respect to any qualifications involved in a particular position. OFCCP allows contractors to establish protocols under which the contractor refrains from considering expressions of interest that are not submitted in accordance with standard procedures the contractor establishes. For example, contractors may exclude unsolicited resumes or resumes that are not submitted with respect to a particular position. Such protocols should be consistently and uniformly applied. Furthermore, if a contractor must deal with large numbers of expressions of interest then it may use data management techniques, such as random sampling or absolute numerical limits, to reduce the number considered.

### **Basic Qualifications**

The OFCCP’s final rule defines “basic qualifications” as qualifications that the contractor advertises to potential applicants that they must possess in order to be considered for the position, or for which the contractor establishes criteria in advance by making or maintaining a record of such qualifications for the position prior to considering any expression of interest for that particular position, if the contractor does not advertise for the position but instead uses an alternate device to find individuals for consideration. In the second instance, the qualifications must be noncomparative features of a job seeker, objective, relevant to the performance of the particular position, and enable the contractor to accomplish business-related goals.

The regulations provide examples of the first two criteria. A requirement that an individual have one of the top five number of years’ experience among a pool of job seekers would be a comparative qualification. Whereas, a requirement that an individual have three years

experience in a particular position would be a noncomparative qualification. Regarding the second criteria, a requirement for a certain degree is objective. However, a requirement for a technical degree from a good school is subjective.

#### **Continued Interest**

A job seeker who removes himself or herself from consideration of a position is not counted as an Internet Applicant. The final rule permits a contractor to conclude that an individual has removed himself or herself from further consideration of a position based on the individual's express statement that he or she is no longer interested in the position, or alternatively, on the individual's passive demonstration of disinterest shown through repeated non-responsiveness to inquiries by the contractor regarding the position. Additionally, a contractor may conclude that an individual has removed himself or herself from further consideration of a position based on information the individual provided in an expression of interest, such as incompatible salary requirements, preferences as to type of work or position, or preferences as to location of work.

#### **Record-keeping**

The OFCCP's requirement in the final rule defining Internet Applicants that contractors maintain records regarding the hiring process does not impose new obligations on employers. However, employers should keep in mind that "expressions of interest made through the Internet or related technologies" covers a broader range of media than the traditional expressions of interests, such as on-line resumes, internal resume databases, and records identifying job seekers contacted regarding their interest in a particular position regardless of whether an individual qualifies as an Internet Applicant. Regarding the use of internal databases, the OFCCP stipulates that contractors must maintain records of each resume added to the database, the position for which each search of the database was made, the date of the search, and the substantive search criteria used. Contractors must keep similar records when utilizing external databases, including the position for which each search was made, the date each search was made, the substantive search criteria used, and resumes of any job seekers who meet the basic qualifications for the particular position who are considered by the contractor.

#### **(Continued from page 1 - Employment Law Practice Group)**

Additionally, we provide employers with specially designed training and workshops in an effort to avoid complaints and lawsuits. In the event that employment disputes do arise, we are well prepared to represent our clients before administrative bodies or courts at the local, state or federal level.

The Employment Law Practice Group is available to assist our clients in evaluating any employment situations that arise; and, we are ready to help formulate a strategy which best serves the client's objectives and needs.

#### **Members of the Employment Law Practice Group:**



Robyn Hylton Hansen, Chairperson  
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#### **Employment Law Practice Areas:**

- Affirmative Action
- Discrimination & Harassment
- Drug and Alcohol Testing
- Employment Practices, Policies and Handbooks
- Executive Compensation Packages
- Employment Contracts, Noncompetition Agreements and Duty of Loyalty
- Employee Retirement and Health Benefits
- Family and Medical Leave Act (FMLA)
- Immigration
- Labor and Union
- Safety
- Unemployment Compensation
- Tax Issues
- Wage and Hour Issues
- Whistleblower and Retaliation
- Worker's Compensation