

FOR YOUR INFORMATION

News for School Clients

MILITARY MATTERS

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This FYI will briefly review three legal issues related to military matters: (1) rights of access by military recruiters to students and student information; (2) the ability of local units of government (including school districts) to provide pay to employees called to active duty; and (3) the interaction between the Wisconsin Retirement System (WRS) contribution requirements and the Uniformed Services Employment and Reemployment Rights Act (USERRA).

First, schools receiving funds under the Elementary and Secondary Education Act (ESEA) are required to disclose the names, addresses and telephone listings of students to military recruiters, unless the student or his or her parent notified the school that they did not want this information to be disclosed without prior written parental consent. Further, schools are required to inform students and parents of the option to withhold such information. The U.S. Department of Education has issued a sample Family Educational Rights and Privacy Act (FERPA) Notice for disclosure of Directory Information that incorporates these requirements and is available at <http://www.ed.gov/offices/OM/fpco/pdf/ht100902a.pdf>.

Wisconsin schools should not adopt the U.S. Department of Education FERPA

notice without modification, however, because it does not contain all of the information that must be conveyed to parents under state law. In particular, parents in Wisconsin must be informed that they have 14 days after notification to inform a school that they do not want all or part of a student's directory data to be released. Wis. Stats. § 118.125 (2) (j) (2002) Therefore, the Department's sample FERPA notice will not meet state law requirements.

Moreover, the Department's sample FERPA notice need not be adopted, and some school districts may not wish to do so. The Department's sample notice appears to require a parent to deny access to all persons requesting directory data in order to prevent a military recruiter from having access to student information. While as a practical matter this approach makes sense (because it would be problematic to deny military recruiters in their official capacity access to information that they could receive as members of the public), this approach to complying with the law may not suit all school districts. And while the Department's approach may make some sense, there is no legal requirement to combine consent to release directory data under FERPA with consent to release information to military recruiters.

Finally, schools receiving ESEA funds are required to provide military recruiters the same access to secondary school students as is provided generally to post secondary educational institutions or prospective employers. For many school districts this requirement will not conflict with present policies or practices. However, school districts that have by policy or practice excluded military recruiters from job fairs, on-campus interviews, or similar student contact opportunities, will no longer be able to do so.

Second, municipal employers (including school districts) may now provide employees or officers called to active service with the difference between their military salary and the person's municipal salary. Under prior law, municipal employers were not permitted to do so. However, there is no *requirement* for municipal employers to do so. Additionally, municipal employers may have a duty to bargain the extension of such a benefit to represented employees and should, therefore, consult with an attorney prior to adopting any policy or extending such a benefit to an individual.

Third, the interaction between USERRA and the WRS creates a potential problem for municipal employers. USERRA provides certain protections and benefits to employees called to active military service.

Among these benefits is the right of a *qualified* person who is reemployed under USERRA to have the period of military service treated as a period of employment with the employer. A problem may arise because a person may not be *qualified* to receive the protections and benefits of USERRA, yet the WRS requires an employer to remain current on retirement fund contributions by reporting the "deemed earnings" and making the required employer contributions on behalf of employees called to military service. See *WRS Administration Manual*, Chapter 22 (State of Wisconsin, Department of Employee Trust Funds, 1999). Put simply, if an employee is on military leave now, the employer must make retirement fund contributions now, even though the employee may not be a qualified person who is reemployed under USERRA for a variety of reasons (including discharge under less than honorable conditions, service in state-funded national guard duty, failure to report back in a timely manner, and voluntary or involuntary election to remain in military service for a period exceeding five years). If a person is not qualified to receive the protections of USERRA, the employer may wish to recover the contributions made to the WRS. Presently, the Department of Employee Trust Funds is revising the *WRS Administration Manual* to address this issue. In the meantime, employers who experience problems with this issue should contact the Department of Employee Trust Funds for further guidance.

If you have any questions regarding this topic, please call Mark A. Herman of the Lathrop & Clark LLP School, Municipal, Labor and Employment Law Team at 608-286-7157. Attorney Herman provides legal counsel in the areas of school, labor and employment law, among other areas.

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