

Called to Duty? ADVICE FOR YOUR CLIENTS

By Brian Clauss

The Army National Guard and Reserve have been vital contributors to national security both at home and abroad. Reliance upon these citizen-soldiers has only increased since September 11, 2001, as has the need for their civilian employers to understand their obligations under federal law. Not knowing the law about the rights of service members could cause your clients, whether the employer or the employee, unnecessary headaches.

What Could Happen: A Typical Scenario

Ruth, a reservist and manager of a retail store, was ordered to active duty in April 2004 and deployed to Afghanistan. Ruth received short notice of her orders and thus was only able to give her employer short notice. She provided written notice to the employer that she was being called to active military duty for a term of more than one year. During her absence, the company hired a

replacement manager. Ruth returned from Afghanistan in August 2006 and appeared in person and tendered written notice that she wanted her job back. Ken, the manager hired to replace her, stated that he would look into the matter and contact her in a few days.

How do you advise either Ruth or the company?

The USERRA Law

Obviously, preventing employment litigation based upon military discrimination is the wisest route for both the employer and the employee. Accordingly, your clients should be familiar with the Uniformed Services Employment and Reemployment Rights Act (USERRA), enacted in 1994 to provide a comprehensive framework for the rights and obligations of the employer and the employed military member.

Some of the key provisions of USERRA:

- Prohibition of discrimination in employment and reemployment against National Guard and Reserve members

because of their military service.

- Up to five cumulative year leaves of absence from civilian employment for the period of voluntary or involuntary military service;
 - Continuation of seniority during period of service, including pension credit;
 - Prompt reinstatement to civilian employment upon return from military duty without loss of seniority, status or pay rate;
 - No termination for first year of return other than for just cause; and
 - Resolution of employment issues through enforcement by the U.S. Department of Labor.
- USERRA provides that when the men and women of the Guard and Reserve are called to active duty, their jobs must be held for them. When they return from deployment, they must be promptly returned to their civilian employment—to the position they held prior to their departure.

Resources through ESGR

The Employer Support of the Guard and Reserve (ESGR) program was established to assist the employer and employees in understanding the USERRA law and to quickly resolve disputes

related to military service between employers and employees. ESGR has a local committee in every state and territory and is a resource for both the employer and employees. The mission of ESGR is twofold: education and alternative dispute resolution.

Education: ESGR provides at no cost speakers and presentations to interested groups (including employers, labor unions, bar associations, civic or trade organizations, and other interested groups). These presentations are designed to give a comprehensive overview of USERRA and address the

common problem areas. There are also a number of useful training materials on the USERRA statute available for no cost either through the local ESGR Committee or through a download on the Web site at www.esgr.mil.

ADR: ESGR has an Ombudsman Program that is designed to quickly resolve employment-related complaints by service members and to keep employers from litigating against the U.S. Department of Labor. These neutral ombudsmen investigate employment-related complaints by service members and recommend appropriate resolutions to the parties based on the requirements of the USERRA law. The ombudsmen are trained mediators and can also assist in resolving disputes through informal mediation.

With the increase of military personnel returning from active duty, employment-related issues are on the rise. The USERRA statutes and regulations recognize the sacrifice of the men and women of the Guard and Reserve and ensure that service members need not worry when they return. **YL**

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Reflections of a New Litigator TEN LESSONS FROM MY FIRST YEAR

By Sonia J. Buck

After surviving three intense years of law school and the bar exam, you may still feel somewhat unprepared when thrown into the real-world practice of law. Here are some lessons I learned from my first year of practice that weren't in the law books.

1. Recognize You Didn't Learn Enough in Law School

I've learned a lot since a year ago, but I still have much more to learn, and not only about the law. There's so much law and it's always changing; that's why we have computerized research. The learning I'm talking about can come only from

experience. Keep doing and keep learning!

2. Observe, Observe, Observe

Watch for opportunities to observe experienced trial lawyers in action. You'll see different styles, what seems effective, what's unattractive. If you work in a firm with several lawyers, see if your schedule permits you to go and watch hearings and trials; or sit in on depositions, mediations, judicial conferences, even client interviews. Most law firm part-

ners will agree that learning by observing is a good use of your nonbillable time. If you're on your own, check with the clerk's office for upcoming trials to watch and, of course, network!

3. Overpreparing Is a Good Investment of Time

Like most new lawyers, you'll be getting your feet wet in district court, handling matters like disclosure hearings to enforce money judgments, eviction proceedings, preliminary family law matters, arraignments and other

criminal matters, protection from abuse/harassment hearings, and motion hearings. When you're inexperienced, you may overprepare, and you should. For client billing, consider not charging some of your prep time and chalking it up to learning experience.

4. Be Prepared to Be Prepared for Nothing

You're up late the night before your hearing thinking of ways to make your client look like

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Merrily We Roll Along

COMPUTING FMLA LEAVE TIME USING THE “ROLLING” METHOD

By W. Gary Yeldell

Do you represent businesses with 50 or more employees? Are you general counsel for a company that has—or will someday have—50 or more employees? Do you like to wow your friends with an encyclopedic knowledge of all things relating to employment law? If so, this article is necessary reading.

You likely already know that (a) employees covered by the Family Medical Leave Act (FMLA) are eligible to take up to 12 weeks of FMLA leave in a year, and (b) there are four ways to determine what makes up a year under the FMLA (calendar year, fixed period, forward-measured period, and “rolling” method). But, do you know how to calculate the year if an employer has chosen the rolling method—arguably the most commonly used of the four methods? While most answer yes to this question, many don’t really know.

Take, for example, the following situation: Tom is out on 12 weeks of FMLA leave that began January 1. As a result, Tom does not come back to work until April. In December—only nine months later—Tom asks for 12 more weeks of FMLA leave starting January 1. The initial reaction of many would be to deny Tom’s request, and cite the fact that he’s used all of his time this year. The remainder of this article explains why this would be wrong.

The Regs

Title 29, section 825.200(b) of the Code of Federal Regulations defines the “rolling” method as a “12-month period measured backward from the date an employee uses any FMLA leave.” This definition lacked clarity. So the drafters kindly included a hypothetical example of the rolling method in use in the regulations. Still, even with the example, many are still not clear exactly how the rolling method works.

The Roll

The best way to understand the process is to picture a conveyor belt that rotates so slowly it takes the whole year for a block placed on the front of the belt to reach the end. As the conveyor rolls over at the end, the block falls off into a bucket under the end of the conveyor. Got the picture? Good.

OK, here’s how it works. The belt represents the passage of time and each block represents one day off. An employee is given only enough blocks to amount to 12 weeks’ time off. When the employee takes time off (whether it is a day, a month, or more) the corresponding number of blocks are taken out of the bucket and stacked *in a vertical column* on the front of the belt. The employee can keep taking his FMLA leave time until all of his blocks are out of the bucket and stacked on top of the conveyor belt. Once all blocks are on the conveyor, the employee cannot take any more FMLA time until one or more blocks fall off of the conveyor into the bucket.

The Result

When an employee takes FMLA leave, they become eligible for more leave on the anniversary of the day their first leave began. In the example with Tom, all 12 weeks of blocks were stacked in one column on the belt. They stayed there until the anniversary of his first

day of leave, January 1. On that January 1, all of the blocks fell off of the belt and into the bucket. At that time, Tom was eligible for 12 more weeks off.

Some have complained that, intuitively, it seems like Tom is getting more than 12 weeks off in a year. However, keep in mind that *the date the leave is approved is not the date the leave is actually taken*. Picture the conveyor belt again. While an entire stack of blocks is put onto the belt the day the leave is commenced, each of the days—except for the first one—was actually taken sometime thereafter.

The key to the rolling method is to focus on total amount of leave in any one 12-month period. While it may seem confusing at first, the conveyor belt method is helpful to visualize the process. After some time, the rolling method will become second nature; until then, the illustration can help avoid calculation mistakes that often lead to improper denial of FMLA leave. **YL**

W. Gary Yeldell is an attorney practicing with the law firm of Harper Gerlach, PL, in Jacksonville, Florida. He can be reached at wgy@harpergerlach.com.

READY RESOURCES

■ *The Family and Medical Leave Act*. 2006. PC #1620097B1290. Section of Labor and Employment Law members receive a discounted price. To order online, visit www.ababooks.org.



Financial Tips for the Recent Law School Graduate

By Hattie Russell DuBois

Having personally financed a hefty chunk of my law school education, I am keenly aware of the financial burden bearing down on the shoulders of law school graduates from the moment they turn their tassels. Here are five tips to help alleviate the burden:

1. Use an accountant to prepare your taxes. Probably the worst-kept secret is that most lawyers would have been doctors or engineers if they had been good at math. So if numbers just aren’t your thing, it is well worth the money to have a trained professional examine your financial situation before April 15. This is especially important during your first year out of law school because working with an accountant will ensure that you tap all of the education-related tax breaks to which you are entitled.
2. Buy a house before a car. Now before you run out and finance that BMW you’d planned on purchasing as a graduation gift to yourself, buy a house. Not only will your mortgage interest be deductible, but the amount of mortgage interest you pay will likely allow you to claim an assortment of other deductions, yielding a far greater overall tax benefit than simply settling for the standard deduction. Also, bear in mind that your credit will look considerably better to mortgage lenders without a car payment clouding up your debt-to-income ratio.
3. Focus on passing the bar. It may sound obvious, but if you don’t have a job offer when you graduate from law school, don’t let it be your primary concern. Instead, immerse yourself in studying for the bar. The sooner you pass the bar, the easier it will be to find legal work.
4. Wear cheap suits. When you do get a gig, wear a suit. For some reason, even a cheap suit looks more professional than a pair of \$120 khakis from Banana Republic. If you are between 24 and 30, you want your clients, who will likely be twice your age, to know that you are the lawyer. Wearing a suit will give you the professional edge you need.
5. Live slightly below your means. If you make a few sacrifices, your income will go further and you can pay down more of your debt. Besides paying down credit card debt that you likely accumulated in law school, try to make more than the minimum payment on high-interest-rate private student loans, which are often more difficult to consolidate at low interest rates. I know it sounds trite but as they say, “a bowl of ramen noodles today means lobster tomorrow.” **YL**

Hattie Russell DuBois is an assistant general counsel for a federal agency in Colorado.



Reflections

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St. Peter on direct and dreaming up a cross that will make your opponent squirm. Two cups of coffee and you're raring to go! But in court, the judge decides the matter without a hearing, or your client suddenly wants to settle and go home. You'll get to do the trial lawyer bit another day but your prep time wasn't wasted time—it's better to be prepared for something than unprepared for something.

5. The Devil Is Not Opposing Counsel

Neither is her client. They just disagree with you and your client, and, for some reason, seem to oppose you at every turn. Disputes with opposing counsel are the nature of the beast, but your opponent isn't the Devil. Keep it cordial and don't take personally pleadings, letters, oppositions, and objections, no matter how personal they may seem.

6. You Can't Always Control Your Client

Sometimes your client calls the shots—making decisions about whether he takes the stand, or even whether he will show up for your scheduled appointment. Clients can make bad decisions and do stupid things you can't prevent. This loss of control can be tough for an eager new trial lawyer. Just be the voice of logic and reason and hope for your client's best behavior.

7. Don't Assume Your Client's Story Is the Gospel

Explain to your client how crucial it is that he tells you the truth, but you don't have to believe every word he says. Do your own fact-finding to verify your client's story. Talk to witnesses *early* in the case; use discovery to screen what your client tells you. You're on your client's side 100%, but you don't have to trust him 100%.

8. Awaiting Court Decisions

If you were one of those law school students who spent most

of Christmas break anxiously awaiting grades, you won't have time to feel that same sense of anxiety as you wait for court decisions. After a hearing or after submitting a brief, motion, or opposition, focus on your many other pressing matters. Let the judge worry about the results.

9. Embrace Feedback

Law firm partners, other associates, opposing counsel, judges, mediators, clients, witnesses, court reporters, clerks, and staff are excellent evaluators of your performance as you attempt to get the hang of things. Their comments may be harsh sometimes, but seek and use their comments. And remember, all feedback is good feedback, even if it's bad.

10. Don't "Should" All Over Yourself

You will make mistakes, particularly during your first year of practice. Later, you will think about your mistakes and agonize about what you should

have said or what you should not have done. Should have should have should have! Learn from your mistakes, but don't "should" all over yourself.

Finishing law school and passing the bar exam means that you are qualified, capable, and ready to represent clients. As you begin to apply your knowledge to your practice, you will soon be able to enjoy the challenges and rewards of the legal profession. You've earned it. **YL**

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READY RESOURCES

■ *The Trial Lawyer: What It Takes to Win* (Paperback). 2006. PC #531-0357. Section of Litigation.

■ *The Commercial Litigator's Job: A Survival Guide*. 2005. PC #515-0412. General Practice, Solo and Small Firm Division.

Section and Division members receive a discounted price. To order online, visit www.ababooks.org.

Called to Duty

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Brian Clauss, a licensed attorney, is an arbitrator and mediator of labor and employment disputes from Park Ridge, Illinois.

FOR MORE INFO

The ABA has several resources and substantive areas of information for military lawyers and those who represent them. Standing Committee on Legal Assistance for Military Personnel (LAMP): www.abanet.org/legalservices/lamp/home.html; Government and Public Sector Lawyers Division, Military Lawyers Conference: www.abanet.org/govpub/military.html; General Practice, Solo and Small Firm Division, Military Law Committee: www.abanet.org/genpractice/military.

READY RESOURCES

■ *Military Law, GPSolo* magazine (January/February 2005). PC # 51501002201. Order online at www.ababooks.org.

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Business Law Young Lawyer Forum

With more demands on us than time, we could all use an easy, one-stop opportunity for practical training. The Business Law Section's Young Lawyer Forum offers just that. The Young Lawyer Forum is a center of gravity for business lawyers under the age of 40 or in practice for less than 10 years. Every Business Law Section lawyer member who meets the age/practice criteria is automatically a member of the Forum. The Forum provides numerous opportunities for education, training, networking, socializing, leadership, and business development. The Forum also provides a soft landing for younger and newer lawyers in the Section's committees and assists them in finding a home in active Section work.

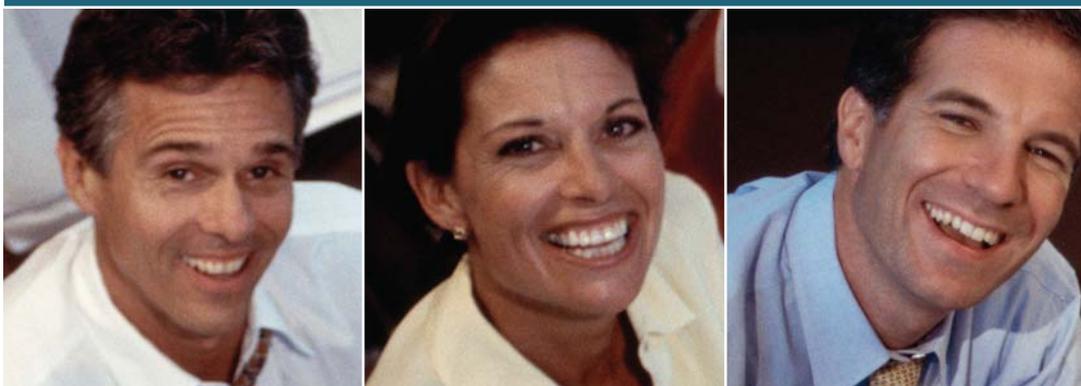
The Forum sponsors the annual Institute for the New Business Lawyer. The Institute is scheduled for March 15, 2007, in Washington, D.C., during the Section's Annual Meeting. It features an activity-filled day of nuts and bolts programming on such topics as the ABC's of Unincorporated Entities, Contract Drafting, Negotiating and Drafting Technology Licensing Agreements, Taking and Defending Depositions in Complex Cases, Corporate Governance & Ethics, and Hot Topics in Mergers & Acquisitions. A networking lunch, a welcome reception, a leadership opportunity meeting, and a high-energy evening event are also planned activities.

Visit www.ababusinesslaw.org and click on "Opportunities for Young Lawyers" to learn more about the resources and programs available to you through the ABA Section of Business Law. **YL**



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www.abayld.org

Be a Better Business Lawyer

By Steve Mayer

As a new lawyer you likely were relieved, proud, and ready to test the limits of the Constitution like no other lawyer before you.

Until your first day on the job.

When your supervising partner directs you to incorporate a new company for an important technology client anxious to

begin pre-holiday production and distribution of its new software product, your task includes preparing and filing the articles of incorporation, and drafting bylaws, key personnel employment contracts, and licensing and distribution agreements. Then reality quickly hits.

In law school, future business lawyers are educated in contracts by studying cases of their breach, not by actually preparing one. You learn business law by studying cases on such topics as shareholder derivative actions, breach of officer duties, blue sky law violations, and partnership disputes, without ever learning how to form these businesses or the critical contracts to keep them operating before they are forced into bankruptcy or costly litigation.

It is not long before you realize that your legal educa-

tion did not end when you graduated law school. It just began. Continued education and practical training are critical to your development and success.

The extent of practical training depends on many factors, including the quantity and quality of training offered by your firm, the patience of partners and supervising associates, your available time to attend seminars and the high cost of developing yourself piecemeal (a luncheon this week, a mixer the next, and another seminar soon thereafter). Sometimes your best resource is your network of friends at other firms whom you can call with a question without alerting your firm that you needed help.

Below are tips to help you remain current on recent developments in your practice area (from a recent program of the Section of Business Law's Young Lawyer Forum):

- Don't underestimate the value of continuing legal education

- Pay attention during CLE programs and focus on identifying potential business solutions and "best practices" your clients can implement
- Provide a checklist summary of your CLE knowledge to share with clients and post on your firm's Web site
- Remember, seminars and

conferences provide opportunities to learn a cutting edge approach *and* to generate new business **YL**

Steve Mayer co-chairs the Business Law Section's Young Lawyer Forum. He practices at Mayer & Glassman Law Corp. in Los Angeles and can be reached at smayer@mglawcorp.com for more information.



Resources for the Young Business Lawyer

- **Web site:** www.ababusinesslaw.org; click on "Opportunities for Young Lawyers"
- **Periodicals:** *Business Law Today*, bimonthly magazine; *The Business Lawyer*, quarterly law journal; *eSource*, monthly e-newsletter
- **Program Materials:** www.ababusinesslaw.org; click on "Program Library"
- **Meeting CD ROMS:** www.ababooks.org
- **Books and Other Recent Publications:** www.ababooks.org
 - *The M & A Process: A Practical Guide for the Business Lawyer*
 - *Model Asset Purchase Agreement with Commentary*
 - *Model Stock Purchase Agreement with Commentary*
 - *Model Joint Venture Agreement with Commentary*
 - *The ABC's of UCC Series*
 - *A Practical Guide to Software Licensing for Licensees and Licensors*
 - *A Manual of Style for Contract Drafting*