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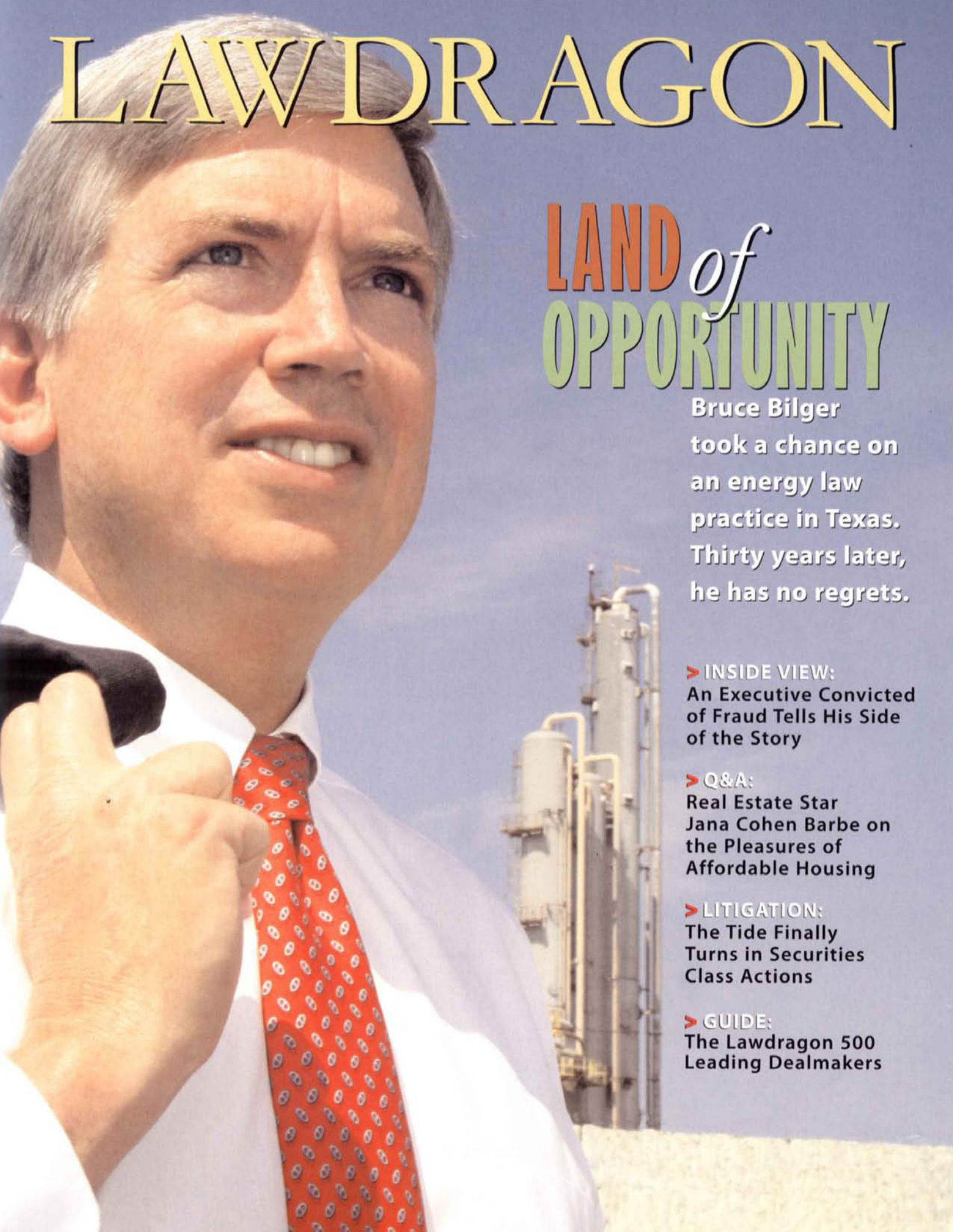

LAND of OPPORTUNITY

Bruce Bilger took a chance on an energy law practice in Texas. Thirty years later, he has no regrets.

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Opinion

War.time Duties

Federal law protects the reemployment rights of workers who take up to five years of military leave. As the war on terror and engagements in the Middle East continue, it's time for employers to review all the statutory requirements and exceptions.

BY DAVID JAFFE and TODD BOYER

MORE THAN FIVE YEARS after the terrorist attacks of Sept. 11, 2001, and the ensuing military engagements, many employers are facing the decision of what, if anything, they can or should do about employees who have been on military leave for more than five years. The Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. Section 4301, protects the employment of employees who take up to five years of cumulative military leave with the same employer. In addition, there are exceptions in the act that protect the employment rights of employees whose leave lasts longer than five years. Employers should reacquaint themselves with USERRA's statutory obligations and the interpretive federal regulations before ringing any bells that cannot be unrung, such as terminating an employee who has been on military leave for more than five years.

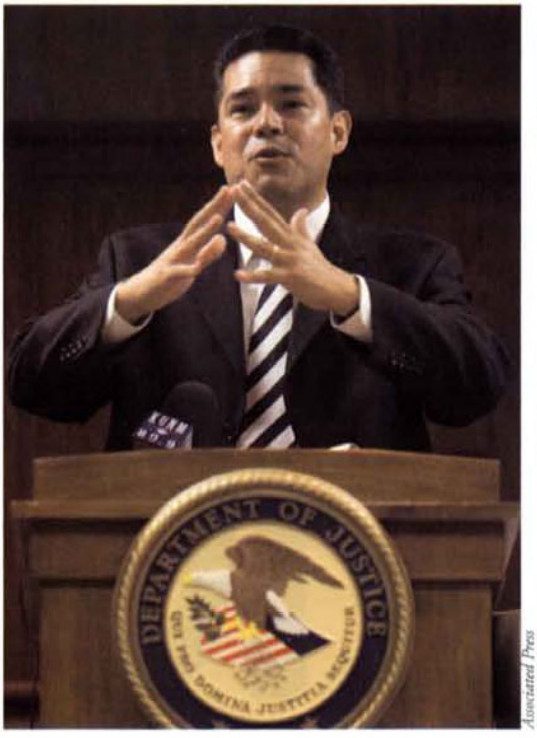
As the recent firings of U.S. attorneys demonstrate, no employer is exempt from complying with USERRA's requirements. In December 2006, the former U.S. Attorney for the District of New Mexico, David Iglesias, was terminated by the Department of Justice. Department officials claimed that all eight U.S. Attorneys who were fired served at the pleasure of the President and could be terminated for any reason or no reason at all. However, even U.S. attorneys who serve at the pleasure of the President are protected from termination if their military service was a "motivating factor" in the firing.

Iglesias is a judge advocate in the Navy Reserves who holds the rank of Captain, which is the equivalent of Colonel in the Army, Air Force and Marines. During his tenure as U.S. attorney, he had spent approximately 40 days per year on military duty. Documents released by

the Justice Department show that one reason officials cited in justifying Iglesias's termination was that Iglesias was "an absentee landlord" who spent too much time away from the office.

Iglesias recently filed a complaint alleging a violation of USERRA because of statements made by the Justice Department regarding his absence. If he can demonstrate that his military service played a motivating factor in his termination, he could obtain damages from the government and, although extremely unlikely, even seek reinstatement. The Iglesias example should serve as a warning to all employers that no one is immune from the far reach of USERRA's obligations.

USERRA requires employers to reemploy returning service members. The law permits employees who take military leave to apply for their former positions upon return from military duty. To be eligible for the act's benefits, an employee is required to give advance written or verbal notice of such service to his employer. In addition, the cumulative length of absence of all previous absences from a position of employment with that employer cannot exceed five years. Finally, the employee must also report or submit an application for reemployment to his employer within a certain prescribed period of time after returning from military duty.



Associated Press

Former U.S. Attorney David Iglesias spent 40 days a year on military leave as a judge advocate in the Navy Reserves. His bosses called him an "absentee landlord."

Employers should be aware of exceptions to the reporting requirement based on military necessity, and they should consult the statute and applicable regulations in the Code of Federal Regulations (20 C.F.R. §§ 1002.1). USERRA sets forth specific requirements for how service members must apply for reemployment, which vary according to how long the employees are absent from their jobs.

An employer may be excused from reemploying the employee under certain conditions, such as if the employer's circumstances have so changed as to make reemployment impossible or unreasonable. The employer has the burden of proving that one of these exceptions exists.

An employer is required, in most circumstances, to restore the service member to the position he would have occupied if he had not been called to military duty. Even if the employee is no longer qualified to perform those duties, the employer may be obliged to train that employee so that he can perform those duties. If this is not possible, the employer must restore that employee to "any other position which is the nearest approximation" to those positions with full seniority. A person who is reemployed is entitled to the seniority and other rights and benefits determined by the seniority that the person had on the date of the commencement of military service, plus the additional seniority and rights and benefits that he would have attained if he had remained continuously employed.

USERRA also prohibits discrimination based on the employee's military affiliation and reprisals for his participation in any action to enforce rights under the statute. An employer is liable if discriminatory animus played a motivating factor in a decision affecting the employee. The act does not require employers to pay employees their salary while they are on military leave. However, employers who pay similarly situated employees when they are on other types of leave, such as jury duty or family leave, may be required to pay salaries for employees who are on military leave. Under such conditions, a court might construe an employer's failure to pay an employee's salary while on military leave as discriminatory.

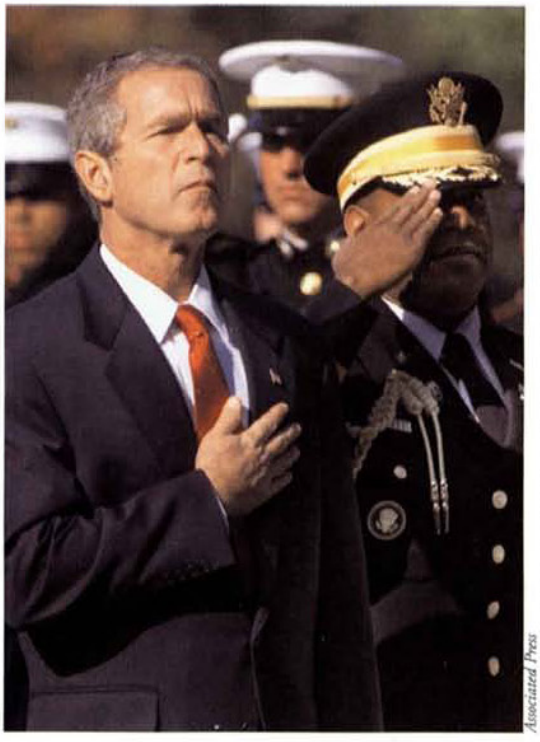
USERRA also has a safe harbor provision that protects returning employees from discharge if they meet certain conditions. A person who is reemployed by an employer under USERRA cannot be discharged, except for cause, within one year after returning to his job if his period of military service exceeded 180 days. If an employee takes military leave exceeding 30 days, but fewer than 181 days, the employee cannot be discharged, except for cause, within 180 days of returning to his job. Despite the safe harbor provision, the USERRA regulations specifically permit an employer to lay off an employee while on military leave as part of a reduction in force so long as that employee would have been laid off regardless of his military service.

Damages under USERRA include injunctive relief, reinstatement, backpay, restoration of benefits and liquidated damages in an amount equal to the amount of loss suffered by the employee if the court determines that the employer's failure to comply with the law was willful. In addition, an aggrieved employee is not liable for fees or court costs in an action brought to enforce USERRA rights, and, if he prevails, the court may award him reasonable attorney's fees, expert witness fees and other litigation expenses.

More than five years have passed since the U.S. military began its engagement in Afghanistan. The five-year milestone is important because USERRA provides that an employee's reemployment rights with the same

employer cover up to five years of cumulative service. Many employers are now reviewing their employees' personnel files and finding that some employees have exceeded this five-year limitation. Some employers have concluded, at their peril, that they can now terminate these employees because they no longer enjoy the statute's protection. USERRA's regulations, however, contain several significant exceptions that apply to employees who have been called to serve during the last five years.

Exceptions to the five-year rule can be broken down into three broad categories: service to fulfill an initial period of obligated service or an inability to obtain release from service exceeding five years; service for required drill and annual training certified by the military as necessary for professional development; and service performed during time of war or national emergency or for other critical missions, contingencies and military requirements. The third exception is the most important to employers today because a period of national emergency has existed since September 23, 2001, when President George W. Bush declared a national emergency (Executive Order No. 13224) in "response to the extraordinary threat posed to the national security..." by the Sept. 11 2001 attacks. This executive order arguably covers any employee who has been called to active service to participate in the war on terrorism.



Associated Press

President Bush's declaration of national emergencies could trigger additional reemployment rights for employees on extended military leave.

In addition, on May 22, 2003, President Bush declared a National Emergency (Executive Order No. 13303) to "deal with the unusual and extraordinary threats to the national security and foreign policy of the United States constituted by the action and policies of the Government of Iraq." Thus, any military members called to active duty to serve in Iraq are also likely exempt from the five-year rule.

Employers who have concerns or questions about an employee's notification that he must take military leave have options for verifying the employee's explanation. Although employees are not required to provide written prior notice to employers (verbal notice will suffice) to trigger USERRA's protection, employers may request documentation to prove military duty, such as military orders. If an employee is unable to provide documentation in a timely manner, as might reasonably be the case if the employee has deployed overseas, the employer may seek such proof from the employee's unit. It is therefore prudent for employers, upon discovering that the employee is a guardsman or reservist, to ask the employee to provide information identifying his unit of attachment and commanding officer.

All military services have established personnel locators that employers can call to help them verify whether the employee is actually performing military service. These personnel locators should be able to provide information on whether the member is on active duty orders and, in some cases, whether the member is deployed overseas. Employers should also be aware that the military frequently allows a member a period of personal leave when he returns from temporary duty in a deployed location. Thus, an employer may become aware that one of its employees has returned to the United States, but that person may still be considered to be "on duty" until her "leave" expires.

In addition, an employee may be permitted to take some reasonable period of leave from her civilian employer to prepare for military duty. For example, if an employee is a single mother and her orders require her to report on a Monday, an employer should permit her a reasonable period of time prior to her report date to arrange for her children's childcare while she is deployed. Such periods of military leave prior to being activated on military orders will vary according to each member's personal circumstances. It may be reasonable for a single mother to need one week to prepare to be activated while such a long period may not be reasonable for a single person without children. Employers should invite a dialogue and attempt to be reasonable.

The far-reaching implications of the USERRA protections are now particularly important given the length of the military conflict in Afghanistan and the broader war against terrorism. It is imperative that employers understand the rights and obligations created by, or derived from, USERRA, especially before making any termination decisions concerning employees who have been absent on military leave for five years. ■

David Jaffe is an associate in Littler Mendelson's Boston office and serves in the Air National Guard as the Deputy Staff Judge Advocate of the 102nd Fighter Wing at Otis Air National Guard Base in Massachusetts, where he holds the rank of Major. Todd Boyer is an associate in Littler Mendelson's San Jose office and serves in the Air Force Reserves as the Deputy Staff Judge Advocate for the 349th Air Mobility Wing at Travis Air Force Base in California, where he holds the rank of Major.