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Part II

Department of Labor

**Veterans' Employment and Training
Service**

**20 CFR Part 1002
Regulations Under the Uniformed Services
Employment and Reemployment Rights
Act of 1994, as Amended; Proposed Rule**

DEPARTMENT OF LABOR**Veterans' Employment and Training Service****20 CFR Part 1002**

[Docket No. VETS-U-04]

RIN 1293-AA09

Regulations Under the Uniformed Services Employment and Reemployment Rights Act of 1994, as Amended**AGENCY:** Veterans' Employment and Training Service, Department of Labor.**ACTION:** Proposed rules.

SUMMARY: The Veterans' Employment and Training Service ("VETS" or "the Agency") is issuing proposed rules that would implement the Uniformed Services Employment and Reemployment Rights Act of 1994, as amended (USERRA). Congress enacted USERRA to protect the rights of persons who voluntarily or involuntarily leave employment positions to undertake military service. USERRA authorizes the Secretary of Labor (in consultation with the Secretary of Defense) to prescribe rules implementing the law as it applies to States, local governments, and private employers. VETS is proposing these rules under that authority in order to provide guidance to employers and employees concerning their rights and obligations under USERRA. The Agency invites written comments on these proposed rules, and any specific issues related to this proposal, from members of the public.

DATES: Comments regarding this proposal, including comments on the information-collection determination described in Section V of the preamble ("Paperwork Reduction Act"), must be received by the Agency on or before November 19, 2004. Please see the sections below entitled **ADDRESSES** and **SUPPLEMENTARY INFORMATION** for additional information on submitting comments.

ADDRESSES: You may submit comments, identified as "Docket No. VETS-U-04," by any of the following methods:

Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.

Electronic mail (email): vets-public@dol.gov. Include "Docket No. VETS-U-04" on the subject line of the message. You can attach materials that are in Microsoft Office formats such as Word, Excel, and Power Point. Attachments may also be made using Adobe Acrobat, Word Perfect, or ASCII/text documents. You cannot attach

materials using executables (.exe, .com, .bat) or any encrypted zip files.

Facsimile (fax): VETS at 202-693-4754.

Mail, Express Delivery, Hand Delivery, and Messenger Service: Submit an original and three copies of written comments and attachments to the Office of Operations and Programs, Docket No. VETS-U-04, Room S-1316, U.S. Department of Labor, 200 Constitution Ave., NW., Washington, DC 20210; telephone (202) 693-4711. If possible, provide your written comments on a computer disc. Contact Mr. Bob Sacoman at (202) 693-4721 with any formatting questions. Normal hours of operation for the VETS Office of Operations and Programs and the Department of Labor are 8:15 a.m. to 4:45 p.m., Eastern Time, Monday through Friday (except Federal holidays).

Note that security-related problems may result in significant delays in receiving comments and other written materials by regular mail. Contact Mr. Charles Dawson, VETS Office of Operations and Programs, at (202) 693-4711 for information regarding security procedures concerning delivery of materials by express delivery, hand delivery, and messenger service.

Docket Access: All comments and submissions will be available for inspection and copying in the VETS Office of Operations and Programs at the address above during normal hours of operation. Contact Mr. Charles Dawson, VETS Office of Operations and Programs, at (202) 693-4711 for information about access to the docket submissions. Because comments sent to the docket are available for public inspection, the Agency cautions commenters against including in their comments personal information such as social security numbers and birth dates.

FOR FURTHER INFORMATION CONTACT: For information, contact Charles Dawson, Office of Operations and Programs, Veterans' Employment and Training Service (VETS), U.S. Department of Labor, Room S1316, 200 Constitution Ave., NW., Washington, DC 20210. Telephone: 202-693-4711 (this is not a toll-free number). Electronic mail: dawson.charles@dol.gov.

For press inquiries, contact Michael Biddle, Office of Public Affairs, U.S. Department of Labor, Room S-1032, 200 Constitution Avenue, NW., Washington, DC 20210. Telephone: 202-693-5051 (this is not a toll-free number). Electronic mail: biddle.michael@dol.gov.

SUPPLEMENTARY INFORMATION:**I. Introduction**

The Department of Labor proposes to issue regulations to implement the Uniformed Services Employment and Reemployment Rights Act of 1994, as amended (USERRA), 38 U.S.C. 4301-4333. Congress enacted USERRA to protect the rights of persons who voluntarily or involuntarily leave employment positions to undertake military service. Section 4331 of USERRA authorizes the Secretary of Labor (in consultation with the Secretary of Defense) to prescribe regulations implementing the law as it applies to States, local governments, and private employers. 38 U.S.C. 4331(a). The Department has consulted with the Department of Defense, and proposes these regulations under that authority in order to provide guidance to employers and employees concerning the rights and obligations of both under USERRA. The Department invites written comments on these proposed regulations from interested parties. The Department also invites public comment on specific issues.

USERRA was enacted in part to clarify prior laws relating to the reemployment rights of service members, rights that were first contained in the Selective Training and Service Act of 1940, 54 Stat. 885, 50 U.S.C. 301, *et seq.* USERRA's immediate predecessor was the Vietnam Era Veterans' Readjustment Assistance Act of 1974, 38 U.S.C. 2021-2027 (later recodified at 38 U.S.C. 4301-4307 and commonly referred to as the Veterans' Reemployment Rights Act), which was amended and recodified as USERRA.

In construing USERRA and these prior laws, courts have followed the Supreme Court's admonition that:

This legislation is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need * * * And no practice of employers or agreements between employers and unions can cut down the service adjustment benefits which Congress has secured the veteran under the Act.

See Fishgold v. Sullivan Drydock and Repair Corp., 328 U.S. 275, 285 (1946), cited in *Alabama Power Co. v. Davis*, 431 U.S. 581, 584-85 (1977); *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 n.9 (1991). The Department intends that this interpretive maxim apply with full force and effect in construing USERRA and these proposed regulations.

This preamble also selectively refers to many other cases decided under USERRA and its predecessor statutes, to explain and illustrate the rights and benefits established under the Act. The failure to cite or refer to a particular

court decision in this preamble is not intended to indicate the Department's approval or disapproval of the reasoning or holding of that case.

II. Plain Language

The Department wrote this proposed rule in the more personal style advocated by the Presidential Memorandum on Plain Language.

"Plain language" encourages the use of:

- Personal pronouns (we and you);
- Sentences in the active voice; and,
- A greater use of headings, lists, and questions.

In this proposed rule, "you," "I," and "my," refers to employees because they are the primary beneficiaries of USERRA rights and benefits. The Department recognizes and appreciates the value of comments, ideas, and suggestions from members of the uniformed services, employers, industry associations, labor organizations and other parties who have an interest in uniformed service members' and veterans' employment and reemployment benefits. The Department would appreciate comments and suggestions from all parties on this proposed rule and on language that would improve the clarity of this regulation.

III. Electronic Access and Filing

You may submit comments and data by sending electronic mail (E-mail) to: vets-public@dol.gov. Include "Docket No. VETS-U-04" on the subject line of the message. You can attach materials that are in Microsoft Office formats such as Word, Excel, and PowerPoint. Attachments may also be made using Adobe Acrobat, Word Perfect, or ASCII/text documents. You cannot attach materials using executables (.exe, .com, .bat) or any encrypted zip files.

IV. Summary of Proposed Regulations

Subpart A—Introduction to the Regulations Under the Uniformed Services Employment and Reemployment Rights Act of 1994

General Provisions

Proposed sections 1002.1 through 1002.7 describe the regulation's purpose, scope, and background, as well as the sense of the Congress in enacting USERRA. Proposed Section 1002.1 sets out the purpose of these regulations. See 38 U.S.C. 4301. Proposed Sections 1002.2 through 1002.4 provide additional background on USERRA, its effective date, and its purposes. Proposed section 1002.5 defines the important terms used in the regulation. See 38 U.S.C. 4303. Proposed sections 1002.6 and 1002.7 describe the general

coverage of the rule, its applicability and its relationship to other laws, contracts, agreements, and workplace policies and practices. See 38 U.S.C. 4302. The Federal Office of Personnel Management has issued a separate body of regulations that govern the USERRA rights of Federal employees. See 5 CFR part 353.

Subpart B—Anti-Discrimination and Anti-Retaliation

Protection From Employer Discrimination and Retaliation

USERRA prohibits an employer from engaging in acts of discrimination against past and present members of the uniformed services, as well as applicants to the uniformed services. 38 U.S.C. 4311(a). The anti-discrimination prohibition applies to both employers and potential employers. No employer may deny a person initial employment, reemployment, retention in employment, promotion, or any benefit of employment based on the person's membership, application for membership, performance of service, application to perform service, or obligation for service in the uniformed services. USERRA also protects any person who participates in an action to protect past, present or future members of the uniformed services in the exercise of their rights under the Act. The Act prohibits any employer from discriminating or taking reprisals against any person who acts to enforce rights under the Act; testifies in or assists a statutory investigation; or, exercises any right under the statute pertaining to any person. 38 U.S.C. 4311(b). A person is protected against discrimination and reprisal regardless whether he or she has served in the military.

Proposed sections 1002.18, 1002.19 and 1002.20 implement the protections of section 4311(a) and (b). Proposed section 1002.21 makes clear that the prohibition on discrimination applies to any employment position, regardless of its duration, including a position of employment that is for a brief, non-recurrent period, and for which there is no reasonable expectation that the employment position will continue indefinitely or for a significant period. Proposed section 1002.22 explains who has the burden of proving that certain action violates the statute. The Department requests comment on the application of the anti-discrimination provisions of the Act to potential employers.

In order to establish a case of employer discrimination, the person's membership, application for

membership, performance of service, application for service, or obligation for service in the uniformed services must be a "motivating factor" in the employer's actions or conduct. 38 U.S.C. 4311(c)(1). Section 4311(c) sets out an evidentiary scheme like that followed by the National Labor Relations Board in interpreting the National Labor Relations Act, as explained by the United States Supreme Court in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 401 (1983). See *Gummo v. Village of Depew, NY*, 75 F.3d 98, 106 (2d Cir. 1996) (citing S.Rep. No. 158, 103d Cong., 2d Sess. 45 (1993), and H.R. Rep. No. 65, 103d Cong., 2d Sess. 18, 24 (1993)). The initial burden of proving discrimination or retaliation rests with the person alleging discrimination (the claimant). The burden then shifts to the employer to prove that it would have taken the action anyway, without regard to the employee's protected status or activity. If the employer successfully establishes such an affirmative defense, the claimant can prevail only by showing that the employer would not have taken the action, but for the claimant's protected activity.

A person alleging discrimination under USERRA must first establish that his or her protected status as a past, present or future service member was a motivating factor in the adverse employment action. See *Robinson v. Morris Moore Chevrolet-Buick, Inc.*, 974 F. Supp. 571 (E.D. Tex. 1997). The claimant alleging discrimination must prove the elements of a violation—*i.e.*, membership in a protected class (such as past, present or future affiliation with the uniformed services); an adverse employment action by the employer or prospective employer; and a causal relationship between the claimant's protected status and the adverse employment action (the "motivating factor"). To meet this burden, a claimant need not show that his or her protected status was the sole cause of the employment action; the person's status need be only one of the factors that "a truthful employer would list if asked for the reasons for its decision." *Kelley v. Maine Eye Care Associates, P.A.*, 37 F. Supp.2d 47, 54 (D. Me. 1999); see *Robinson*, 974 F. Supp. at 575 (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250 (1989) (addressing Title VII gender discrimination claim and related defense)). "Military status is a motivating factor if the defendant relied on, took into account, considered, or conditioned its decision on that consideration." *Fink v. City of New York*, 129 F.Supp.2d 511, 520 (E.D.N.Y. 2001), citing *Robinson*, 974 F.Supp. at

576. The employee is not required to provide direct proof of employer animus at this stage of the proceeding; intent to discriminate or retaliate may be established through circumstantial evidence. See *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003); *United States Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 714 (1983). If the employer fails to counter this evidence, the claimant's proof establishes that the adverse employment action was more likely than not motivated by unlawful reasons.

After the employee establishes the elements of a violation, the employer may avoid liability by proving that the claimant's military status was not a motivating factor in the adverse employment action. See *Gummo*, 75 F.3d at 106. The employer must demonstrate that it would have taken the same adverse action for legitimate reasons regardless of the claimant's protected status. If the employer satisfies this burden of proof, then the employee can prevail only by demonstrating that the employer would not have taken the action but for the prohibited motive. This burden may be satisfied either directly by proving that a discriminatory reason more likely motivated the employer, or indirectly by persuading the adjudicator that the employer's explanation is not credible. *Aikens*, 460 U.S. at 716.

Section 4311(c)(2) provides the same evidentiary framework for adjudicating allegations of reprisal against any person (including individuals unaffiliated with the military) for engaging in activities to enforce a protected right; providing testimony or statements in a USERRA proceeding; assisting or participating in a USERRA investigation; or exercising a right provided by the statute. 38 U.S.C. 4311(c)(2). Proposed section 1002.19 addresses the elements of a case of retaliation.

Subpart C—Eligibility for Reemployment

General Eligibility Requirements for Reemployment

USERRA requires that the service member meet five general criteria in order to establish eligibility for reemployment:

- (1) That the service member be absent from a position of civilian employment by reason of service in the uniformed services;
- (2) That the service member's employer be given advance notice of the service;
- (3) That the service member have five years or less of cumulative service in the

uniformed services with respect to a position of employment with a particular employer;

(4) That the service member return to work or apply for reemployment in a timely manner after conclusion of service; and,

(5) That the service member not have been separated from service with a disqualifying discharge or under other than honorable conditions.

Proposed section 1002.32 sets out these general eligibility requirements.

Proposed sections 1002.34–.74 explain the “absent from a position of civilian service” requirement, sections 1002.85–.88 explain the “advance notice” requirement, sections 1002.99–.104 explain the “five years or less of cumulative service” requirement, sections 1002.115–.123 explain the “return to work or apply for reemployment” requirement, and sections 1002.134–.138 explain the “no disqualifying discharge” requirement.

A person who meets these eligibility criteria, which are contained in 38 U.S.C. 4312(a)–(c) and 4304, is entitled to be reemployed in the position described in 38 U.S.C. 4313, unless the employer can establish one of the three affirmative defenses contained in 38 U.S.C. 4312(d).

There has been some disagreement in the courts over the appropriate burden of proof in cases brought under 38 U.S.C. 4312, the provision in USERRA establishing the reemployment rights of persons who serve in the uniformed services. One court has interpreted that provision to be “a subsection of § 4311 [the anti-discrimination and anti-retaliation provision].” *Curby v. Archon*, 216 F.3d 549, 556 (6th Cir. 2000). Other courts have interpreted section 4312 to establish a statutory protection distinct from section 4311, creating an entitlement to re-employment for qualifying service members rather than a protection against discrimination. *Wrigglesworth v. Brumbaugh*, 121 F. Supp.2d 1126, 1134 (W.D. Mich. 2000) (stating that requirements of section 4311 do not apply to section 4312). *Brumbaugh* relies in part on legislative history and the Department's interpretation of USERRA. *Id.* at 1137. Another district court supports the *Brumbaugh* decision and characterizes the contrary view in *Curby* as *dicta*. *Jordan v. Air Products and Chem.*, 225 F. Supp.2d 1206, 1209 (C.D. Ca. 2002).

The Department agrees with the district court decisions in *Brumbaugh* and *Jordan* that sections 4311 and 4312 of USERRA are separate and distinct. Proposed section 1002.33 provides that a person seeking relief under section

4312 need not meet the additional burden of proof requirements for discrimination cases brought under section 4311. The Department disagrees with the decision in *Curby v. Archon* discussed above, insofar as it interprets USERRA to the contrary. The Department invites comments regarding the proper interpretation of the statute regarding the burden of proof for relief under section 4312.

Coverage of Employers and Positions

Proposed sections 1002.34 through 1002.44 list the employers and employment positions that are covered by USERRA. Proposed section 1002.33 provides that the Act's coverage extends to virtually all employers in the United States; the statute contains no threshold or minimum size to limit its reach. The remaining proposed provisions address various aspects of the employment relationship subject to the Act. Proposed section 1002.35 defines the term “successor in interest.” Proposed section 1002.37 addresses the situation in which more than one employer may be responsible for one employee. Proposed sections 1002.38 and 1002.42 discuss hiring halls, layoffs and recalls. Proposed section 1002.39 covers States and other political subdivisions of the United States as employers.

Proposed section 1002.40 makes clear that USERRA makes it unlawful for any employer to deny employment to a prospective employee on the basis of his or her membership, application for membership, performance of service, application to perform service, or obligation for service in the uniformed services, or on the basis of his or her exercise of any right guaranteed under the Act. Temporary, part-time, probationary, and seasonal employment positions are also covered by USERRA. Proposed section 1002.41 addresses the limited exception for positions that are for a brief, non-recurrent period and for which the employee has no reasonable expectation of continued employment indefinitely or for a significant period. Proposed section 1002.42 explains that USERRA covers employees on strike, layoff, or leave of absence. Proposed section 1002.43 makes clear that persons occupying professional, executive and managerial positions also are entitled to USERRA rights and benefits. Proposed section 1002.44 addresses the distinction between an independent contractor and an employee under USERRA.

Coverage of Service in the Uniformed Service

Proposed sections 1002.54 through 1002.62 explain the term “service in the

uniformed services," list the various types of uniformed services, and clarify that both voluntary and involuntary duty are covered under USERRA. Proposed section 1002.54 provides that "service in the uniformed services" includes a period for which a person is absent from a position of employment for the purpose of an examination to determine his or her fitness to perform duty in the uniformed services. Proposed sections 1002.55 and 1002.56 provide that service under certain authorities for funeral honors duty or as a disaster-response appointee also constitute service in the uniformed services. Proposed section 1002.57 clarifies when service in the National Guard is covered by USERRA, and proposed section 1002.58 addresses service in the commissioned corps of the Public Health Service, a division of the Department of Health and Human Services. Proposed section 1002.59 recognizes coverage for persons designated by the President in time of war or national emergency. Proposed sections 1002.60, 1002.61, and 1002.62 address the coverage of a cadet or midshipman attending a service academy, and members of the Reserve Officers Training Corps, Commissioned Corps of the National Oceanic and Atmospheric Administration, Civil Air Patrol, and Coast Guard Auxiliary.

Absence From a Position of Employment Necessitated by Reason of Service in the Uniformed Services

Proposed section 1002.73 addresses the issue of the employee's reason for leaving employment as it bears on his or her reemployment rights. Section 4312(a) of the Act states that "any person whose absence from a position of employment is necessitated by reason of service in the uniformed services" is entitled to the reemployment rights and benefits of USERRA, assuming the Act's eligibility requirements are met. Military service need not be the only reason the employee leaves, provided such service is at least one of the reasons. *See* H.R. Rep. No. 103-65, Part I, at 25 (1993).

USERRA does not impose a limit on the amount of time that may elapse between the date the employee leaves his or her position and the date he or she actually enters the service. Proposed section 1002.74 recognizes that no such limit is warranted. A person entering military service generally needs a period of time to organize his or her personal affairs, travel safely to the site where the service is to be performed, and arrive fit to perform service. The amount of time needed for these preparations will vary from case to case. Moreover, the actual

commencement of the period of service may be delayed for reasons beyond the employee's control. If an unusual delay occurs between the time the person leaves civilian employment and the commencement of the uniformed service, the circumstances causing the delay may be relevant to establish that the person's absence from civilian employment was "necessitated by reason of service in the uniformed services." *See Lapine v. Town of Wellesley*, 304 F.3d 90 (1st Cir. 2002).

Requirement of Advance Notice

Proposed section 1002.85 explains one of the basic obligations imposed on the service member by USERRA as a prerequisite to reemployment rights: the requirement to notify the employer in advance about impending military service. 38 U.S.C. 4312(a)(1). Section 4312(a)(1) of USERRA contains three general components of adequate notice: (i) The sender of the notice; (ii) the type of notice; and (iii) the timing of notice. First, the employee must notify his or her employer that the employee will be absent from the employment position due to service in the uniformed services. An "appropriate officer" from the employee's service branch, rather than the employee, may also provide the notice to the employer. Second, the notice may be either verbal or in writing. *See* 38 U.S.C. 4303(8) (defining "notice" to include both written and verbal notification). Although written notice by the employee provides evidence that can help establish the fact that notice was given, the sufficiency of verbal notice recognizes the "informality and current practice of many employment relationships[.]" S. Rep. No. 103-158, at 47 (1993). The act of notification is therefore more important than its particular form. Third, the notice should be given in advance of the employee's departure. USERRA does not establish any bright-line rule for the timeliness of advance notice, i.e., a minimum amount of time before departure by which the employee must inform the employer of his or her forthcoming service. Instead, timeliness of notice must be determined by the facts in any particular case, although the employee should make every effort to give notice of impending military service as far in advance as is reasonable under the circumstances. *See* H.R. Rep. No. 103-65, Pt. 1, at 26 (1993).

Proposed section 1002.86 implements the statutory exceptions to the requirement of advance notice of entry into the uniformed services. The statute recognizes that in rare cases it may be very difficult or impossible for an employee to give advance notice to his

or her employer. To accommodate these cases, the advance notice requirement may be excused by reason of "military necessity" or circumstances that make notice to the employer "otherwise impossible or unreasonable." 38 U.S.C. 4312(b). Section 4312(b) also provides that the uniformed services make the determination whether military necessity excuses an individual from notifying his or her employer about forthcoming military service. Any such determination is to be made according to regulations issued by the Secretary of Defense. *See* 32 CFR part 104. Finally, section 4312(b) states that the "military necessity" determination is not subject to judicial review. The same finality and exemption from review, however, do not apply if the employee fails to provide notice to his or her employer because the particular circumstances allegedly make notification "impossible or unreasonable." Whether the circumstances of the case support the employee's failure to provide advance notice of service are questions to be decided by the appropriate fact-finder. *See* S. Rep. No. 103-158, at 47 (1993).

Proposed section 1002.87 makes explicit that the employee is not required to obtain the employer's permission before departing for uniformed service in order to protect his or her reemployment rights. Imposing a prior consent requirement would improperly grant the employer veto authority over the employee's ability to perform service in the uniformed services by forcing the employee to choose between service and potential loss of his or her employment position, if consent were withheld.

Proposed section 1002.88 implements the long-standing legal principle that an employee departing for service is not required to decide at that time whether he or she intends to return to the pre-service employer upon completion of the tour of duty. Rather, the employee may defer the decision until after he or she concludes the period of service, and the employer may not press the employee for any assurances about his or her plans. *See* H.R. Rep. No. 103-65, Part I, at 26 (1993) ("One of the basic purposes of the reemployment statute is to maintain the service member's civilian job as an 'unburned' bridge.") and S. Rep. No. 103-158, at 47 (1993), both of which cite *Fishgold v. Sullivan Drydock and Repair Corp.*, 328 U.S. 275, 284 (1946).

Period of Service

USERRA provides that an individual may serve up to five years in the uniformed services, in a single period of service or in cumulative periods totaling

five years, and retain the right to reemployment by his or her pre-service employer. 38 U.S.C. 4312(c). Proposed sections 1002.99 through 1002.104 implement this statutory provision. Section 1002.99 implements the basic five-year period established by the statute. Proposed section 1002.100 provides that the five-year period includes only actual uniformed service time. Periods of time preceding or following actual service are not included even if those periods may involve absences from the employment position for reasons that are service-related, for example, travel time to and from the duty station, time to prepare personal affairs before entering the service, delays in activation, etc. Proposed section 1002.101 clarifies that the five-year period pertains only to the cumulative period of uniformed service by the employee with respect to one particular employer, and does not include periods of service during which the individual was employed by a different employer. Therefore, the employee is entitled to be absent from a particular position of employment because of service in the uniformed services for up to five years and still retain reemployment rights with respect to that employer; this period starts anew with each new employer. The regulation derives from section 4312(c)'s language tying the five-year period "to the employer relationship for which a person seeks reemployment[.]" 38 U.S.C. 4312(c). Note, however, that under these proposed regulations a hiring hall out of which an individual may work for several different employers is considered to be a single employer. See proposed section 1002.38.

Proposed section 1002.102 addresses periods of service undertaken prior to the enactment of USERRA, when the Veterans' Reemployment Rights Act (VRRRA) was in effect. If an individual's service time counted towards the VRRRA's four or five-year periods for reemployment rights, then that service also counts towards USERRA's five-year period. The regulation implements section (a)(3) of the rules governing the transition from the VRRRA to USERRA, which appear in a note following 38 U.S.C. 4301. The Department invites comments as to whether this interpretation best effectuates the purpose of the Act. See proposed section 1002.102.

Section 4312(c) enumerates eight specific exceptions to the five-year limit on uniformed service that allow an individual to serve longer than five years while working for a single employer and retain reemployment

rights under USERRA. 38 U.S.C. 4312(c)(1)-(4)(A)-(E). The exceptions involve unusual service requirements, circumstances beyond the individual's control, or service (voluntary or involuntary) under orders issued pursuant to specific statutory authority or the authority of the President, Congress or a Service Secretary. Proposed section 1002.103 implements this provision by describing each exception set out in the statute.

The regulation also recognizes a ninth exception based on equitable considerations. A service member is expected to mitigate economic damages suffered as a consequence of an employer's violation of the Act. See *Graham v. Hall-McMillen Co., Inc.*, 925 F. Supp. 437, 446 (N.D. Miss. 1996). If an individual remains in (or returns to) the service in order to mitigate economic losses caused by an employer's unlawful refusal to reemploy that person, the additional service is not counted against the five-year limit. The Secretary seeks comments on whether an exception to the five-year limit based on the service member's mitigation of economic loss furthers the purposes of the statute.

Proposed section 1002.104 implements section 4312(h), which prohibits the denial of reemployment rights based on the "timing, frequency, and duration" of the individual's training or service, as well as the nature of that service or training. 38 U.S.C. 4312(h). A service member's reemployment rights must be recognized as long as the individual has complied with the eligibility requirements specified in the Act. *Id.* The legislative history of section 4312(h) makes clear the Congress' intent to codify the holding of the United States Supreme Court in *King v. St. Vincent's Hospital*, 502 U.S. 215 (1991). See H.R. Rep. No. 103-65, Part I, at 30 (1993); S. Rep. No. 103-158, at 52 (1993). In *King*, the court held that no service limit based on a standard of reasonableness could be implied from the predecessor version of USERRA. Section 4312(h). Proposed section 1002.104 therefore prohibits applying a "reasonableness" standard in determining whether the timing, frequency, or duration of the employee's service should prejudice his or her reemployment rights. Consistent with views expressed in the House report, however, proposed section 1002.104 counsels an employer to contact the appropriate military authority to discuss its concerns over the timing, frequency, and duration of an employee's military service.

Application for Reemployment

In order to protect reemployment rights under USERRA, the returning service member must make a timely return to, or application for reinstatement in, his or her employment position after completing the tour of duty. 38 U.S.C. 4312(a)(3). Sections 4312(e) and (f) establish the required steps of the reinstatement process. 38 U.S.C. 4312(e), (f). Section 4312(e) establishes varying time periods for requesting reinstatement based on the length of the individual's military service. This provision also addresses the time periods for reporting to the employer or applying for reemployment by a person who is hospitalized for, or convalescing from, an injury or illness incurred in, or aggravated during, the performance of service. Section 4312(f) describes the documentary evidence that the service member must submit to the employer in order to establish that the service member meets the statutory requirements for reinstatement. The proposed regulations implement these documentation requirements at 1002.121 to .123.

Proposed section 1002.115 explains the three statutory time periods for making a request for reinstatement, depending on the length of the period of military service, except in the case of an employee's absence for an examination to determine fitness to perform service. The proposed regulation also specifies the actions that must be taken by the employee. Section 4312(e)(1)(A)(i) of USERRA provides that the employee reporting back to the employer following a period of service of less than 31 days must report:

(i) Not later than the beginning of the first full regularly scheduled work period on the first full calendar day following the completion of the period of service and the expiration of eight hours after a period allowing for the safe transportation of the person from the place of that service to the person's residence * * *

38 U.S.C. 4312(e)(1)(A)(i). The Department interprets this provision as requiring the employee to report at the beginning of the first full shift on the first full day following the completion of service, provided the employee has a period of eight hours to rest following safe transportation to the person's residence. See H.R. Rep. No. 103-65 at 29 (1993). The Department also understands the term "next" in the clause "next first full calendar day" in section 4312(e)(1)(C) to be superfluous. The Department invites comments as to whether these interpretations best effectuate the purpose of this provision. See proposed section 1002.115.

If it is impossible or unreasonable for the employee to report within the above time period, he or she must report to the employer as soon as possible after the expiration of the eight-hour period.

If the individual served between 31 and 180 days, he or she must make an oral or written request for reemployment no more than 14 days after completing service. If it is impossible or unreasonable for the employee to apply within 14 days through no fault of the employee, he or she must submit the application not later than the next full calendar day after it becomes possible to do so. Finally, if the individual served more than 180 days, he or she must make an oral or written request for reemployment no more than 90 days after completing service.

Proposed section 1002.116 addresses the situation where a service member is unable to meet the foregoing timeframes due to the individual's hospitalization for or convalescence from a service-related illness or injury. Such a person must comply with the notification procedures determined by the length of service, after the time period required for the person's recovery. The recovery period may not exceed two years unless circumstances beyond the individual's control make notification within the required two-year period impossible or unreasonable.

Proposed section 1002.117 covers the situation where the employee fails to report or to submit a timely application for reemployment. Such failure does not automatically divest the individual of his or her statutory reemployment rights. See 38 U.S.C. 4312(e)(3). The employer may subject the employee to the workplace rules, policies and practices that ordinarily apply to an employee's unexcused absence from work.

Proposed sections 1002.118 through 1002.123 establish procedures for notifying the employer that the service member intends to return to work. These sections also address the requirement that the returning service member provide documentation to the employer in certain instances. The documentation provides evidence that the service member meets three of the basic requirements for reemployment: timely application for reinstatement, permissible duration of service, and appropriate type of service discharge. USERRA expressly provides that the Secretary may prescribe, by regulation, the documentation necessary to demonstrate that a service member applying for employment or reemployment meets these requirements. Proposed section

1002.120 makes clear that the service member does not forfeit reemployment rights with one employer by working for another employer after completing his or her military service, as long as the service member complies with USERRA's reinstatement procedures.

Character of Service

USERRA makes entitlement to reemployment benefits dependent on the characterization of an individual's separation from the uniformed service, or "character of service." 38 U.S.C. 4304. The general requirement is that the individual's service separation be under other than dishonorable conditions. Proposed section 1002.135 lists four grounds for terminating the individual's reemployment rights based on character of service: (i) Dishonorable or bad conduct discharge; (ii) "other than honorable" discharge as characterized by the regulations of the appropriate service Secretary; (iii) dismissal of a commissioned officer by general court-martial or Presidential order during a war (10 U.S.C. 1161(a)); and, (iv) removal of a commissioned officer from the rolls because of unauthorized absence from duty or imprisonment by a civil authority (10 U.S.C. 1161(b)). 38 U.S.C. 4304(1)-(4). The uniformed services determine the individual's character of service, which is referenced on Defense Department Form 214. For USERRA purposes, Reservists who do not receive character of service certificates are considered honorably separated; many short-term tours of duty do not result in an official separation or the issuance of a Form 214.

Proposed sections 1002.137 and 1002.138 address the consequences of a subsequent upgrading of an individual's disqualifying discharge. Upgrades may be either retroactive or prospective in effect. An upgrade with retroactive effect may reinstate the individual's reemployment rights provided he or she otherwise meets the Act's eligibility criteria, including having made timely application for reinstatement. However, a retroactive upgrade does not restore entitlement to the back pay and benefits attributable to the time period between the individual's discharge and the upgrade.

Employer Statutory Defenses

USERRA provides three statutory defenses with which an employer may defend against a claim for USERRA benefits. The employer bears the burden of proving any of these defenses. 38 U.S.C. 4312(d)(2)(A)-(C).

An employer is not required to reemploy a returning service member if

the employer's circumstances have so changed as to make such reemployment impossible or unreasonable. 38 U.S.C. 4312(d)(1)(A). In view of USERRA's remedial purposes, this exception must be narrowly construed. The employer bears the burden of proving that changed circumstances make it impossible or unreasonable to reemploy the returning veteran. 38 U.S.C. 4312(d)(2)(A); proposed section 1002.139. The change must be in the pre-service employer's circumstances, as distinguished from the circumstances of its employees. For example, the defense of changed circumstances is available where reemployment would require the creation of a "useless job or mandate reinstatement where there has been a reduction in the workforce that reasonably would have included the veteran." H.R. Rep. No. 103-65, at 25 (1993), citing *Watkins Motor Lines v. De Galliford*, 167 F.2d 274, 275 (5th Cir. 1948); *Davis v. Halifax County School System*, 508 F. Supp. 966, 969 (E.D. N.C. 1981). However, an employer cannot establish that it is unreasonable or impossible to reinstate the returning service member solely by showing that no opening exists at the time of the reemployment application or that another person was hired to fill the position vacated by the veteran, even if reemploying the service member would require terminating the employment of the replacement employee. See *Davis* at 968; see also *Cole v. Swint*, 961 F.2d 58, 60 (5th Cir. 1992); *Fitz v. Bd. of Education of Port Huron Area Schools*, 662 F. Supp. 1011, 1015 (E.D. Mich. 1985), *aff'd*, 802 F.2d 457 (6th Cir. 1986); *Anthony v. Basic American Foods, Inc.*, 600 F. Supp. 352, 357 (N.D. Cal. 1984); *Goggin v. Lincoln St. Louis*, 702 F.2d 698, 709 (8th Cir. 1983). *Id.*

An employer is also not required to reemploy a returning service member if such reemployment would impose an undue hardship on the employer. 38 U.S.C. 4312(d)(1)(B). As explained in USERRA's legislative history, this defense only applies where a person is not qualified for a position due to disability or other bona fide reason, after reasonable efforts have been made by the employer to help the person become qualified. H.R. Rep. No. 103-65, at 25 (1993). USERRA defines "undue hardship" as actions taken by the employer requiring significant difficulty or expense when considered in light of the factors set out in 38 U.S.C. 4303(15). USERRA defines "reasonable efforts" as "actions, including training provided by an employer, that do not place an undue hardship on the employer." 38 U.S.C. 4303(10). USERRA defines "qualified"

in this context to mean having the ability to perform the essential tasks of the position. 38 U.S.C. 4303(9). These definitions are set forth in proposed sections 1002.5(m) (“undue hardship”), 1002.5(h) (“reasonable efforts”), and 1002.5(g) (“qualified”).

The third statutory defense against reemployment requires the employer to establish that “the employment from which the person leaves to serve in the uniformed services is for a brief, nonrecurrent period and there is no reasonable expectation that such employment will continue indefinitely or for a significant period.” 38 U.S.C. 4312(d)(1)(C), (2)(C). USERRA does not define “significant period.” Under both USERRA and its predecessor, the VRRRA, a person holding a seasonal job may have reemployment rights if there was a reasonable expectation that the job would be available at the next season. *See, e.g., Stevens v. Tennessee Valley Authority*, 687 F.2d 158, 161–62 (6th Cir. 1982), and cases cited therein; S. Rep. No. 103–158, at 46–47.

Subpart D—Rights, Benefits, and Obligations of Persons Absent From Employment Due to Service in the Uniformed Services

Furlough or Leave of Absence

Proposed section 1002.149 implements section 4316(b) of the Act, which establishes the employee’s general non-seniority based rights and benefits while he or she is absent from the employment position due to military service. 38 U.S.C. 4316(b). The employer is required to treat the employee as if he or she is on furlough or leave of absence. 38 U.S.C. 4316(b)(1)(A). The employee is entitled to non-seniority employment rights and benefits that are available to any other employee “having similar seniority, status, and pay who [is] on furlough or leave of absence. * * *” 38 U.S.C. 4316(b)(1)(B). These non-seniority rights and benefits may be provided “under a contract, agreement, policy, practice, or plan in effect at the commencement of such service or established while such person performs such service.” *Id.* For example, if the employer offers continued life insurance coverage, holiday pay, bonuses, or other non-seniority benefits to its employees on furlough or leave of absence, the employer must also offer the service member similar benefits during the time he or she is absent from work due to military service. If the employer has more than one kind of non-military leave and varies the level and type of benefits provided according to the type of leave used, the comparison should be

made with the employer’s most generous form of comparable leave. *See Waltermeyer v. Aluminum Company of America*, 804 F.2d 821 (3d Cir. 1986); H.R. Rep. No. 103–65, Part I, at 33–34 (1993); *Schmauch v. Honda of America Manufacturing, Inc.*, 295 F. Supp. 2d 823 at 836–839 (S.D. Ohio 2003) (employer improperly treated jury duty more favorably than military leave). The returning employee is entitled not only to the non-seniority rights and benefits of workplace agreements, policies, and practices in effect at the time he or she began the period of military service, but also to those that came into effect during the period of service. The Department invites comments as to whether this interpretation best effectuates the purpose of section 4316(b). Reference should be made to 38 U.S.C. 4316(a) and proposed sections 1002.210 through 1002.214 for the provisions addressing seniority-based rights and benefits.

The Department also interprets section 4316(b) of the Act to mean that an employee who is absent from a position of employment by reason of service is not entitled to greater benefits than would be generally provided to a similarly situated employee on non-military furlough or leave of absence. *See* Sen. Rep. No. 103–158 (1993) at 58. The Department also does not interpret the second use of the term “seniority” in section 4316(b)(1)(B) as a limiting factor in determining what non-seniority rights must be provided to the service member during the absence from the employment position. The Department invites comments as to whether this interpretation best effectuates the purpose of this provision. *See* proposed section 1002.149.

Proposed section 1002.152 addresses the circumstances under which an employee waives entitlement to non-seniority based rights and benefits. Section 4316(b)(2) of the Act provides that an employee who “knowingly” states in writing that he or she will not return to the employment position after a tour of duty will lose certain rights and benefits that are not determined by seniority. 38 U.S.C. 4316(b)(2). The Department intends for principles of Federal common law pertaining to a waiver of interest to apply in determining whether such notice is effective in any given case. *See Melton v. Melton*, 324 F.3d 941, 945 (7th Cir. 2003); *Smith v. Amedisys, Inc.*, 298 F.3d 434, 443 (5th Cir. 2002). By contrast, a notice given under 38 U.S.C. 4316(b)(2) does not waive the employee’s reemployment rights or seniority-based rights and benefits upon reemployment. The Department invites comments as to

whether this interpretation best effectuates the purpose of this provision.

Proposed section 1002.153 clarifies that an employer may not require the employee to use his or her accrued leave to cover any part of the period during which the employee is absent due to military service. 38 U.S.C. 4316(d). The employee must be permitted upon request to use any accrued vacation, annual or similar leave with pay during the period of service. The employer may require the employee to request permission to use such accrued leave. However, sick leave is not comparable to vacation, annual or similar types of leave; entitlement to sick leave is conditioned on the employee (or a family member) suffering an illness or receiving medical care. An employee is therefore not entitled to use accrued sick leave solely to continue his or her civilian pay during a period of service.

Health Plan Coverage

Section 4317 of the Act provides that service members who leave work to perform military service have the right to elect to continue their existing employer-based health plan coverage for a period of time while in the military. Section 4317 also requires that the employee and eligible dependents must, upon reemployment of the service member, be reinstated in the employer’s health plan without a waiting period or exclusion that would not have been imposed had coverage not been suspended or terminated due to service in the uniformed services. The employee need not elect to continue health plan coverage during a period of uniformed service in order to be entitled to reinstatement in the plan upon reemployment. Section 4317 of USERRA is the exclusive source in USERRA of service members’ rights with respect to the health plan coverage they receive in connection with their employment. Section 4317 therefore controls the entitlement of a person to coverage under a health plan, and supersedes more general provisions of the Act dealing with rights and benefits of service members who are absent from employment. *See* 38 U.S.C. 4316(b)(5).

Under USERRA, the term “employer” is defined broadly to cover entities, such as insurance companies or third party plan administrators, to which employer responsibilities such as administering employee benefit plans or deciding benefit claims have been delegated. “Health plan” is defined to include an insurance policy or contract, medical or hospital service agreement, membership or subscription contract, or other arrangement under which health

services for individuals are provided, or the expenses of such services are paid. Proposed Section 1002.5(d); 38 U.S.C. 4303(7). However, because USERRA's continuation coverage provisions only apply to health coverage that is provided in connection with a position of employment, coverage obtained by an individual through a professional association, club or other organization would not be governed by USERRA, nor would health coverage obtained under another family member's policy or separately obtained by an individual.

USERRA's health plan provisions are similar but not identical to the continuation of health coverage provisions added to Federal law by the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA). As with COBRA, the Act permits the continuation of employment-based coverage. Unlike COBRA, USERRA's continuation coverage is available without regard to either the size of the employer's workforce or to whether the employer is a government entity.

Proposed section 1002.164 addresses the length of time the service member is entitled to continuing health plan coverage. Section 4317(a)(1) provides that the maximum period of continued coverage is either 18 months or the period of military service (beginning on the date the absence begins and ending on the day after the service member fails to apply for reemployment), whichever occurs first.

Under section 4317(a)(2), implemented by proposed section 1002.166, a service member who elects to continue employer-provided health plan coverage may be required to pay no more than 102 percent of the full premium (the employee's share plus the employer's share) for such coverage, except that service members who perform service for fewer than 31 days may not be required to pay more than the employee share, if any, for such coverage. The amount of the full premium is determined in the same manner as for COBRA under section 4980B(f)(4) of the Internal Revenue Code of 1986. 26 U.S.C. 4980B(f)(4). The legislative history of USERRA indicates that the purpose of these provisions, and in particular the requirement that service members pay only the employee share for coverage during service lasting fewer than 31 days, is to ensure that there is no gap in health insurance coverage for the service member's family during a short period of service. Dependents of Reserve Component members are entitled to participate in the military health care system, called TRICARE, only if the period of service

exceeds 30 days. See H.R. Rep. No. 103-65, Pt. 1, at 34 (1993).

USERRA does not require that any particular type of health plan coverage be provided. The statute requires only that the employer, and hence the plan, permit the service member to continue the coverage that he or she already has obtained through the employment relationship, including family and dependent coverage. USERRA does not provide specific guidance regarding how or within what time period the continuing coverage is to be elected. Proposed section 1002.165 provides that plan administrators and fiduciaries may develop reasonable requirements and operating procedures for the election of continuing coverage, consistent with the Act and the terms of the plan. Such procedures must take into consideration the requirement in USERRA section 4312(b) that where military necessity prevents the service member from giving the employer notice that he or she is leaving for military duty, or where giving such notice would be impossible or unreasonable, plan requirements may not be imposed to deny the service member continuation coverage.

The Department invites comments as to whether this approach—allowing health plan administrators latitude to develop reasonable requirements for employees to elect continuation coverage—best effectuates the purpose of the statute. Alternatively, the Department requests comments on the question whether these USERRA regulations should establish a date certain by which time continuing health plan coverage must be elected. Moreover, should a service member be permitted to delay electing continuation health plan coverage under some circumstances? Finally, in a case where health plan coverage was terminated or suspended by reason of military service, if the employee is permitted to delay reinstatement to the health plan for a period of time after the date of reemployment, the Department invites comments as to whether such delayed reinstatement coverage should be subject to an exclusion or waiting period. See 38 U.S.C. 4317(b)(1).

As with every other right and benefit guaranteed by USERRA, the employer is free to provide continuation health plan coverage that exceeds that which is required by the Act. For example, some employers do not require the service member to pay more than the ordinary employee premium for continuation health coverage during an extended period of service in the uniformed services.

Proposed sections 1002.167–1002.168 explain the rights of a reemployed service member whose health plan coverage has been terminated as a result of his or her failure to elect continuation coverage, or length of service. At the time of reemployment, no exclusion or waiting period may be imposed where one would not have been imposed if the coverage of the service member had not terminated as a result of service in the uniformed services. This provision also applies to the coverage of any other person who is covered under the service member's policy, such as a dependent. Injuries or illnesses determined by the Secretary of Veterans' Affairs to have been incurred or aggravated during service are excluded from the ban on exclusions and waiting periods; however, the service member and any dependents must be reinstated as to all other medical conditions covered by the plan.

USERRA provides for the continuation of health coverage available to the service member in connection with his or her employment, so, generally, if the employer cancels health coverage for its employees while the service member is performing service, or if the employer goes out of business, the service member's coverage terminates also. Under USERRA, the treatment of multiemployer health plans provides an exception to this result. Special rules for multiemployer plans are the focus of proposed section 1002.169. This provision requires continued health plan coverage in a multiemployer plan even when the service member's employer no longer exists, or no longer participates in the plan. Any liability under the multiemployer plan for employer contributions and benefits under USERRA is to be allocated as the sponsor maintaining the plan provides. If the sponsor does not provide for an allocation of responsibility under these circumstances, the liability is allocated to the last employer employing the person before the period of uniformed service. Where that employer is no longer functional, the liability is allocated to the plan.

Subpart E—Reemployment Rights and Benefits

Prompt Reemployment

One of the stated purposes of USERRA is “to minimize the disruption to the lives of persons performing service in the uniformed services * * * by providing for [their] prompt reemployment.” 38 U.S.C. 4301(2). Section 4313 requires that a returning service member who meets the

eligibility requirements of section 4312 be “promptly reemployed” in the appropriate position. 38 U.S.C. 4313(a). The circumstances of each individual case will determine the meaning of “prompt.” See H.R. Rep. No. 103–65, Part I, at 32 (1993); S. Rep. No. 103–158, at 54 (1993). Proposed section 1002.181 provides guidance for the “prompt” reinstatement of returning service members. The regulation states, as a general rule, that the employer shall reinstate the employee as soon as practicable under the circumstances. Reinstatement must occur within two weeks after he or she applies for reemployment “absent unusual circumstances.” The reasonableness of any delay depends on a variety of factors, including, for example, the length of the service member’s absence or intervening changes in the circumstances of the employer’s business. An employer does not have the right to delay or deny reemployment because the employer filled the service member’s pre-service position and no comparable position is vacant, or because a hiring freeze is in effect. The Department invites comments as to whether allowing the employer two weeks to reemploy the service member returning from a period of service of more than thirty days best effectuates the purpose of this provision of USERRA. [Note: If the period of service is less than 31 days then the statute requires that the returning employee simply report back to work; these regulations anticipate that such a person will be immediately reemployed.]

Reemployment Position

In construing an early precursor statute to USERRA, the Selective Training and Service Act of 1940, 50 U.S.C. Appendix, 308(b, c), the Supreme Court recognized a basic principle embedded in early protections provided for veterans, which was to become a bedrock concept of all future similar legislation. Thus, in *Fishgold v. Sullivan Drydock and Repair Corp.*, 328 U.S. 275, 284–85 (1946), the Supreme Court stated that the returning service member “does not step back on the seniority escalator at the point he stepped off. He steps back on at the precise point he would have occupied had he kept his position continuously during the war.” *Id.* *Fishgold* principally involved the issue of a veteran’s seniority; however, the principle applies with equal force to all aspects of the service member’s return to the work force. The returning service member therefore should be restored to “a position which, on the moving escalator of terms and conditions affecting that particular [pre-

service] employment, would be comparable to the position which he would have held if he had remained continuously in his civilian employment.” *Oakley v. Louisville & Nashville R.R.*, 338 U.S. 278, 283 (1949). The position to which the returning service member should be restored has become known as the “escalator position.” The requirement that the service member be reemployed in the escalator position is implemented in section 4313 of USERRA. 38 U.S.C. 4313.

Proposed sections 1002.191 and 1002.192 implement general principles related to a returning veteran’s right to reemployment in this escalator position. Proposed sections 1002.193 and 1002.195 clarify that seniority, status, pay, length of service, and service-related disability may affect the service member’s reemployment position. Proposed sections 1002.196 and 1002.197 explain the employer’s obligations to reemploy the service member based on the duration of the person’s absence from the work place. Proposed section 1002.198 describes the criteria to be followed by the employer in making reasonable efforts to enable the service member to qualify for the reemployment position. Finally, proposed section 1002.199 provides guidance for employers in determining the priority of two or more service members who are eligible for the same employment position.

In some workplaces, where opportunities for promotion are conditioned upon the employee passing a skills test or examination, determining the escalator position will require administering a makeup promotional exam. If a reemployed service member was eligible to take such a promotional exam and missed it while performing military service, the employer should provide the employee with an opportunity to take the missed exam after a reasonable period of time to acclimate to the employment position. See, e.g., *Fink v. City of New York*, 129 F.Supp.2d 511 (2001). In some cases, success on a promotional exam entitles an employee to an immediate promotion, and in some cases it entitles an employee only to a particular placement on an eligibility list. If the reemployed employee is successful on the makeup exam, and there is a reasonable certainty that, given the results of that exam, the reemployed employee would have been promoted during the time he or she was in military service, then the reemployed employee’s promotion must be made effective as of the date it would have occurred had the employment not been

interrupted by military service. Similarly, if the reemployed employee is successful on the makeup exam, and there is a reasonable certainty that, given the results of that exam, the reemployed employee would have been placed in a particular position on an eligibility list during the time he or she was in military service, then the reemployed employee’s placement on the list must be made effective as of the date it would have occurred had the employment not been interrupted by military service. This requirement is similar to the requirement in Section 1002.236, that obliges an employer to give a reemployed employee, after a reasonable amount of time to adjust to the reemployment position, a missed skills test or examination that is the basis of a merit pay increase. Proposed section 1002.193 implements these requirements. The Department invites comments as to whether this interpretation best effectuates the purpose of this provision, or whether the issue of promotional exams requires more detailed treatment in these regulations.

The Department understands the statutory term “qualify” in 38 U.S.C. 4313 to include the employer’s affirmative obligation to make reasonable efforts to assist the returning employee in acquiring the ability to perform the essential tasks of the reemployment position. This understanding is reflected in the language used in the regulations. The Department requests comments on whether this interpretation is proper.

The statute makes the duration of a returning employee’s period of service a critical factor in determining the reemployment position to which the employee is entitled upon return from service. After service of 90 days or less, the person is entitled to reinstatement in the position of employment in which he or she would have been employed if not for the interruption in employment due to uniformed service (the escalator position). 38 U.S.C. 4313(a)(1)(A). The employer must make reasonable efforts to assist the individual in becoming qualified for the reemployment position. In the event the returning employee cannot become qualified for the escalator position despite reasonable efforts by the employer, the returning employee is entitled to the employment position in which he or she was employed on the date that the period of service commenced. 38 U.S.C. 4313(a)(1)(B). These requirements are implemented in proposed section 1002.196.

The service member returning from a period of service longer than 90 days is

similarly entitled to reemployment in the escalator position, but, at the employer's option, may also be reinstated in any position for which the employee is qualified with the same seniority, status, and pay as the escalator position. 38 U.S.C. 4313(a)(2)(A). This statutory option is intended to provide the employer with a degree of flexibility in meeting its reemployment obligations. As with an employee returning from a shorter period of service, the employer must first make reasonable efforts to qualify the individual for the escalator position or for the position of like seniority, status, and pay. In the event the returning employee cannot become qualified for one of these positions despite reasonable employer efforts, the person is entitled to the employment position in which he or she was employed on the date that the period of service commenced, or a position of like seniority, status, and pay. 38 U.S.C. 4313(a)(2)(B). These requirements are implemented in proposed section 1002.197.

In some instances, the service member may not be able to qualify for either the escalator position or the pre-service position (or a position similar in seniority, status, and pay to either of these positions) despite reasonable employer efforts. In such an event, the employee is entitled to be reemployed in any other position that is the nearest approximation to the escalator position. If there is no such position for which the returning service member is qualified, he or she is entitled to reemployment in any other position that is the nearest approximation to the preservice position. In either event, the returning service member must be reemployed with full seniority. 38 U.S.C. 4313(a)(4). This requirement is implemented by proposed sections 1002.196(c) and .197(c).

Depending on the circumstances, section 4313 either permits or requires the employer to reemploy a returning service member in a position with equivalent (or the nearest approximation to "equivalent") seniority, status and pay to the escalator or pre-service position. 38 U.S.C. 4313(a)(2)(A), (B), (3)(A), (B). Although "seniority" and "pay" are generally well-understood terms, USERRA does not define "status" as it is used in section 4313 of the Act. Case law interpreting VRRRA, a precursor to USERRA, recognized status as encompassing a broader array of rights than either seniority or pay. Job status varies from position to position, but generally refers to the incidents or attributes attached to, and inherent in,

a particular job. The term often includes the rank or responsibility of the position, its duties, location, working conditions, and the pay and seniority rights attached to the position. See H.R. Rep. No. 103-65, Part I, at p. 31 (1993). Examples of status may be the exclusive right to a sales territory; the opportunity to advance in a position; eligibility for possible election to a position with the employee representative organization; greater availability of work where piece rates apply; the opportunity to work additional hours and to advance in a job; the opportunity to withdraw from a union; the opportunity to obtain a license; or, the opportunity to work a particular shift. The facts and circumstances surrounding the position determine whether a specific attribute is part of the position's status for USERRA purposes. Proposed sections 1002.193 and .194 implement these provisions of the Act.

Notwithstanding the escalator principle, USERRA does not require an employer to reinstate a returning service member in an employment position if he or she is not qualified to perform the civilian job. See proposed section 1002.198. USERRA defines "qualified" as "having the ability to perform the essential tasks of the position." 38 U.S.C. 4303(9). An individual's performance qualifications are a function of his or her ability to perform the "essential tasks" of the employment position. This regulation provides guidelines for determining whether a given task is essential for proper performance of the position. In general, whether a task is essential for a position will depend on its relationship to the actual performance requirements of the position rather than, for example, the criteria enumerated in a job description. An employer may not decline to rehire a returning service member simply because he or she is unable to do some auxiliary, but nonessential, parts of the job. The Department invites comments as to whether this interpretation best effectuates the purpose of this provision.

Proposed section 1002.198 describes the employer's obligation to assist a returning service member for civilian reemployment in becoming qualified for a civilian position. USERRA requires the employer to make reasonable efforts to enable the returning service member to qualify for a position that he or she would be entitled to if qualified. Section 4303(10) defines "reasonable efforts" as "actions, including training provided by an employer, that do not place an undue hardship on the employer." 38 U.S.C. 4303(10). Section 4303(15) defines "undue hardship" as "actions [taken by

an employer] requiring significant difficulty or expense, when considered in light of * * * the overall financial resources of the employer" and several other stated factors. 38 U.S.C. 4303(15). Depending upon an employer's size and resources, a given level of effort might be an undue hardship for one employer and yet reasonable for another. The employer has the burden of proving that the training, retraining, or other efforts to enable the returning employee to qualify would impose an undue hardship. The proposed regulation describes the criteria that apply in determining whether the steps for aiding the service member in becoming qualified impose an undue hardship on the employer.

Proposed section 1002.199 implements section 4313(b), which governs the priority of reemploying two (or more) service members who are entitled to reemployment in the same position. 38 U.S.C. 4313(b). The individual who first vacated the employment position for military service has the highest priority for reemployment. 38 U.S.C. 4313(b)(1). If this priority means another returning service member is denied reemployment in that position, the USERRA rules that give reemployment options to the employer would govern the reemployment of the second person. Thus, the second service member is entitled to "any other position" offering status and pay similar to the denied position according to the statutory rules generally applicable to returning service members. 38 U.S.C. 4313(b)(2)(A). A disabled service member in this situation would be entitled to any other position offering status and pay similar to the denied position according to the rules governing disabled service members. 38 U.S.C. 4313(b)(2)(B).

Seniority Rights and Benefits

Section 4316(a) provides that a reemployed service member is entitled to "the seniority and other rights and benefits determined by seniority" that the service member had attained as of the date he or she entered the service, together with the additional seniority he or she would have attained if continuously employed during the period of service. 38 U.S.C. 4316(a). As with the principles governing the determination of the reemployment position, this provision reflects the escalator principle. As applied to seniority rights under section 4316(a), the escalator principle entitles the returning service member to the "same seniority and other rights and benefits determined by seniority that [the service member] would have attained if [his or

her] employment had not been interrupted by service in the uniformed services." S. Rep. No. 103-158, at 57 (1993); see also H.R. Rep. No. 103-65, Part I, at 33 (1993). Proposed section 1002.210 states the basic escalator principle as it applies to seniority and seniority-based rights and benefits. It bears emphasis here that the escalator principle is outcome-neutral in terms of the effect of restoring the service member's seniority. For example, the application of the principle does not offer protection against adverse job consequences that result from placing the service member in his or her proper position on the seniority escalator. Finally, this section explains that the rights and benefits protected by USERRA upon reemployment include those provided by employers and those required by statute, such as the right to leave under the Family and Medical Leave Act of 1993, 29 U.S.C. 2601-2654 (FMLA). Accordingly, a reemployed service member would be eligible for FMLA leave if the number of months and the number of hours of work for which the service member was employed by the civilian employer, together with the number of months and number of hours of work for which the service member would have been employed by the civilian employer during the period of military service, meet FMLA's eligibility requirements. See Memorandum of July 22, 2002, *Protection of Uniformed Service Member's Rights to Family and Medical Leave* at <http://www.dol.gov/vets/media/fmlarights.pdf>.

Proposed section 1002.211 makes clear that section 4316(a) is not a statutory mandate to impose seniority systems on employers. Rather, USERRA requires only that those employers who provide benefits based on seniority restore the returning service member to his or her proper place on the seniority ladder.

Proposed section 1002.212 adopts the basic definition of seniority-based rights and benefits developed in Supreme Court decisions. This definition imposes two requirements: first, the benefit must be provided as a reward for length of service rather than a form of short-term compensation for services rendered; second, the service member's receipt of the benefit, but for his or her absence due to service, must have been reasonably certain. See *Coffy v. Republic Steel Corp.*, 447 U.S. 191 (1980); *Alabama Power Co. v. Davis*, 431 U.S. 581 (1977); see also S. Rep. No. 103-158, at 57 (1993), citing with approval *Goggin v. Lincoln, St. Louis*, 702 F.2d 698, 701 (8th Cir. 1983) (summarizing Supreme Court

formulation of two-part definition of "perquisites of seniority"). Proposed section 1002.212(c) adds a third consideration which derives from another Supreme Court decision, *McKinney v. Missouri-Kansas-Texas R.R. Co.*, 357 U.S. 265 (1958). In that case, the Court allowed consideration of the employer's "actual practice" in making advancement an automatic benefit based on seniority under the collective bargaining agreement. Accordingly, proposed section 1002.212(c) adds the requirement that "actual custom or practice" in conferring or withholding a benefit also determines whether the benefit is a perquisite of seniority.

Proposed section 1002.213 further defines one aspect of seniority-based rights and benefits: the requirement that receipt of the benefit be "reasonably certain." The proposed regulation describes a "reasonably certain" likelihood as a "high probability" that the returning service member would have obtained the seniority-based benefit if continuously employed. A "high probability" is less than an "absolute certainty," which the Supreme Court has rejected in analyzing the degree of probability a reemployed service member must satisfy in order to establish that his or her advancement would have been "reasonably certain" but for the period of service. See *Tilton v. Missouri Pacific Railroad Co.*, 376 U.S. 169, 180 (1964). The employer may not deny a reemployed service member seniority-based rights or benefits based on a scenario of unlikely events that allegedly would have occurred during the period of service.

Proposed section 1002.214 emphasizes that the returning employee is also entitled to claim perquisites of seniority that first became available to co-workers or that were modified while he or she was in the service. That the employer did not offer the particular benefit until after the individual began the service is not a justification for denying the benefit to the returning service member. Similarly, if a benefit is modified or eliminated, the change would affect the returning service member. This requirement flows from the fact that the returning service member must be restored to the seniority rights and benefits that he or she would have attained with reasonable certainty if he or she had remained continuously employed during the period of service.

Disabled Employees

USERRA imposes additional requirements in circumstances involving the reemployment of a

disabled service member. A disabled service member is entitled, to the same extent as any other individual, to the escalator position he or she would have attained but for military service. If the disability is not an impediment to the service member's qualifications for the escalator position, then the disabling condition is irrelevant for USERRA purposes. If the disability limits the service member's ability to perform the job, however, the statute imposes a duty on the employer to make reasonable efforts to accommodate the disability. 38 U.S.C. 4313(a)(3). In some instances, an employer is unable to accommodate a service member's disability despite reasonable efforts. If, despite the employer's reasonable efforts to accommodate the disability, the returning disabled service member cannot become qualified for his or her escalator position, that person is entitled to be reemployed "in any other position which is equivalent in seniority, status, and pay, the duties of which the person is qualified to perform or would become qualified to perform with reasonable efforts by the employer." 38 U.S.C. 4313(a)(3)(A). If no such position exists, the service member is entitled to reemployment "in a position which is the nearest approximation * * * in terms of seniority, status, and pay consistent with circumstances of such person's case." 38 U.S.C. 4313(a)(3)(B). See, e.g., *Hembree v. Georgia Power Co.*, 637 F.2d 423 (5th Cir. 1981); *Blake v. City of Columbus*, 605 F. Supp. 567 (S.D. Ohio 1984).

Proposed section 1002.225 sets forth the priority of reemployment positions for which the disabled service member should be considered. The regulation also implements the statutory requirement for reasonable accommodation of the returning service member's disability. Such accommodations may include placing the reemployed person in an alternate position, on "light duty" status; modifying technology or equipment used in the job position; revising work practices; or, shifting job functions. The appropriate level of accommodation depends on the nature of the service member's disability, the requirements for properly performing the job, and any other circumstances surrounding the particular situation. See 38 U.S.C. 4303(9), (10), and (15); 4313(a)(3); H.R. Rep. No. 103-65, at 31 (1993); S. Rep. No. 103-158, at 53 (1993).

The employer must make reasonable accommodations for any disability incurred in, or aggravated during, a period of service. The accommodation requirement is not limited to disabilities

incurred during training or combat, so long as they are incurred during the period of service. Any disability that is incurred or aggravated outside of a period of service (including a disability incurred between the end of the period of service and the date of reemployment) is not covered as a service-related disability for USERRA purposes. The disability must have been incurred or aggravated when the service member applies for reemployment, even if it has not yet been detected. If the disability is discovered after the service member resumes work and it interferes with his or her job performance, then the reinstatement process should be restarted under USERRA's disability provisions.

A returning service member may have rights under USERRA based on a service-related disability that is not permanent. A service member who incurs a temporary disability may be entitled to interim reemployment in an alternate position provided he or she is qualified for the position and the disability will not affect his or her ability to perform the job. If no such alternate position exists, the disabled service member would be entitled to reinstatement under a "sick leave" or "light duty" status until he or she completely recovers.

In identifying an alternate position for a disabled service member, the focus should be on the returning service member's ability to perform the essential duties of the job. The position must be one that the person can safely perform without unreasonable risk to the person or fellow employees. The disabled service member is required to provide information on his or her education and experience, the extent of the disability, and his or her present capabilities. The employer then has the duty to disclose all positions that the service member may be qualified to perform. Because the employer has greater knowledge of the various positions and their requirements in the organization, the employer, and not the service member, is exclusively responsible for accommodating the disability by identifying suitable positions within the service member's abilities and capabilities. Proposed sections 1002.225 and .226 implement USERRA's requirements regarding disabled employees.

Rate of Pay

The escalator principle also determines the returning service member's rate of pay after an absence from the workplace due to military service. As with respect to benefits and the reemployment position, the

application of this fundamental principle with respect to pay is intended to restore the returning service member to the employment position that he or she would have occupied but for the interruption in employment occasioned by military service. See generally *Fishgold v. Sullivan Drydock and Repair Corp.* Proposed section 1002.236 implements the escalator principle for purposes of determining the reemployed service member's rate of pay. The regulation also addresses the various elements of compensation that often compose the returning service member's "rate of pay." Depending on the particular position, the rate of pay may include more than the basic salary. The regulation lists various types of compensation that may factor into determining the employee's overall compensation package under the escalator principle. The list is not exclusive; any compensation, in whatever form, that the employee would have received with reasonable certainty if he or she had remained continuously employed should be considered an element of compensation. The returning employee's rate of pay may therefore include pay increases, differentials, step increases, merit increases, periodic increases, or performance bonuses.

In some workplaces, merit pay increases are conditioned upon the employee passing a skills or performance evaluation. The employer should allow a reasonable period of time for the employee to become acclimated in the escalator position before such an evaluation is administered. In order that the employee not be penalized financially for his or her military service, the employee must be reemployed at the higher rate of pay, assuming that it is reasonably certain that the employee would otherwise have attained the merit pay increase during the period of military service. This requirement is similar to the requirement in Section 1002.193, which obliges an employer to give a reemployed employee, after a reasonable amount of time to adjust to the reemployment position, a missed skills test or examination that is the basis of an opportunity for promotion. The Department invites comments as to whether this interpretation best effectuates the purpose of this provision, or whether the issue of merit pay requires more detailed treatment in these regulations.

What is critical is not how the employer characterizes the compensation, but whether it would have been attained with reasonable certainty if not for the service in the uniformed services. In determining rate

of pay, as in other situations, application of the escalator principle may leave the returning service member with less than he or she had before performing service. Thus, if nondiscriminatory adverse changes in the employment position's pay structure would with reasonable certainty have lowered the compensation rate during the period of service if he or she had remained continuously employed, the escalator principle may operate to diminish the returning service member's pay.

Protection Against Discharge

Section 4316(c) of USERRA provides service members special protection from discharge from civilian employment after returning from uniformed service. If the individual served over 180 days before reemployment, then he or she may not be discharged from the employment position within one year after reemployment except for cause. 38 U.S.C. 4316(c)(1). If the individual served between 31 and 180 days in the military, he or she may not be discharged from the employment position within 180 days after reemployment except for cause. 38 U.S.C. 4316(c)(2). A reinstated service member whose duration of service lasted 30 days or less has no similar protection from discharge; however, the individual is protected by USERRA's anti-discrimination provisions, 38 U.S.C. 4311, as explained in proposed sections 1002.18–.23. Proposed section 1002.247 elaborates the general rules for protection against discharge based on the duration of service prior to reemployment.

Prohibiting a reemployed service member's discharge, except for cause, ensures that the service member has a reasonable amount of time to get accustomed to the employment position after a significant absence. A period of readjustment may be especially warranted if the service member has assumed a new employment position after the military service. The discharge protection also guards against an employer's bad faith or *pro forma* reinstatement followed by an unjustified termination of the reemployed service member. Moreover, the time period for special protection does not start until the service member has been fully reemployed and any benefits to which the employee is entitled have been restored. Even assuming the service member receives the benefit of the full protection period prior to dismissal, an employer nevertheless violates the Act if the reason for discharging the service member is impermissible under USERRA.

Section 4316(c) does not provide complete protection from discharge to a reemployed service member for the duration of the protected period. An employer may dismiss a reemployed service member even during the protected period for just cause. Depending on the circumstances of the specific case, just cause may include unacceptable or unprofessional public behavior, incompetent or inefficient performance of duties, or criminal acts. An employer may also discharge the service member for cause if the application of the escalator principle results in a legitimate layoff or in the elimination of the job position itself, provided the person would have faced the same consequences had he or she remained continuously employed. Proposed section 1002.248 provides general guidelines for establishing just cause to discharge a reemployed service member during the protection period, and places the burden of proof on the employer to demonstrate that it is reasonable to discharge the person. *See* H.R. Rep. No. 103–65, Pt. 1, at 35 (1993); S. Rep. No. 103–158, at 63 (1993).

Pension Plan Benefits

USERRA establishes specific rights for reemployed service members in their employee pension benefit plans; the Act's specific provisions for pension benefit plans supersede general provisions elsewhere in the statute. 38 U.S.C. 4316(b)(6). The Act defines an employee pension benefit plan in the same way that the term is defined under the Employee Retirement Income Security Act of 1974 (ERISA). *See* 29 U.S.C. Chapter 18; 38 U.S.C. 4318(a). The term "employee pension benefit plan" includes any plan, fund or program established or maintained by an employer or by an employee organization, or by both, that provides retirement income or results in the deferral of income for a period of time extending to or beyond the termination of the employment covered by the plan. Profit sharing and stock bonus plans that meet this test are included. USERRA provides that once the service member is reemployed according to the statute, he or she is treated as not having a break in service with the employer or employers maintaining the plan even though the service member was away from work performing military service.

Proposed sections 1002.259 to .267 describe the types of employee pension benefit plans that come within the Act and the pension benefits that must be provided to reemployed service members. Although USERRA relies on the ERISA definition of an employee pension benefit plan, some plans

excluded from ERISA coverage may be subject to USERRA. For example, USERRA (but not ERISA) extends coverage to plans sponsored by religious organizations and plans established under State or Federal law for governmental employees. Benefits paid pursuant to federally legislated programs such as Social Security or the Railroad Retirement Act, however, are not covered by USERRA. USERRA coverage also does not include benefits under the Thrift Savings Plan (TSP); the rights of reemployed service members to benefits under the TSP are governed by another Federal statute. *See* 5 U.S.C. 8432b. 38 U.S.C. 4318(a)(1)(B).

As proposed sections 1002.259 to .267 illustrate, each period of ununiformed service is treated as an uninterrupted period of employment with the employer(s) maintaining the pension plan in determining eligibility for participation in the plan, the non-forfeiture of accrued benefits, and the accrual of service credits, contributions and elective deferrals (as defined in section 402(g)(3) of the Internal Revenue Code of 1986 (IRC)) under the plan. 38 U.S.C. 4318(a)(2)(B). As a result, for purposes of calculating these pension benefits, or for making contributions or deferrals to the plan, the reemployed service member is treated as though he or she had remained continuously employed for pension purposes.

Proposed sections 1002.261 and 1002.262 clarify who must make the contribution and/or deferral attributable to a particular period of military service and the timeframes within which payments are to be made to the plan. The employer who reemploys the service member is responsible for funding any employer contribution to the plan to provide the benefits described in the Act and the regulation. 38 U.S.C. 4318(b)(1). Some plans do not require or permit employer contributions. In that case, the plan is funded by employee contributions or elective deferrals. Other plans provide that the employer will match a certain portion of the employee contribution or deferral. If employer contributions are contingent on employee contributions or elective deferrals, such as where the employer matches all or a portion of the employee deferral or contribution, the reemployed service member is entitled to the employer contribution only to the extent that he or she makes the employee contributions or elective deferrals to the plan. 38 U.S.C. 4318(b)(2). A reemployed service member has the right to make his or her contributions or elective deferrals, but is not required to do so. Elective deferrals can be made up only to the extent that

the employee has compensation from the employer that can be deferred. Proposed section 1002.262 provides that, if an individual cannot make up missed contributions as an elective deferral because he or she does not have enough compensation from the employer to defer (for example, if the individual is no longer employed by the employer), the plan must provide an equivalent opportunity for the individual to receive the maximum employer matching contributions that were available under the plan during the period of uniform service through a match of after-tax contributions.

USERRA is silent with respect to the amount of time allowed the employer to pay to the plan the contributions attributable to a reemployed service member's period of military service. It is the view of the Department that employer contributions to a pension plan that are not contingent on employee contributions or elective deferrals must be made no later than thirty days after the date of the person's reemployment. Interested parties are requested to comment on this proposed requirement, implemented in proposed section 1002.262. Specifically, the Department requests public comment on whether the proposed thirty-day period is too long or too short.

Where pension benefits are derived from employee contributions or elective deferrals, or from a combination of employee contributions or elective deferrals and matching employer contributions, the reemployed service member may make his or her contributions or deferrals during a time period starting with the date of reemployment and continuing for up to three times the length of the employee's immediate past period of military service, with the repayment period not to exceed five years. 38 U.S.C. 4318(b)(2); proposed section 1002.262. No payment by the service member may exceed the amount that would have been required or permitted during the period of time had the service member remained continuously employed. 38 U.S.C. 4318(b)(2). Any permitted or required amount of employee contributions or elective deferrals would be adjusted for any employee contributions or elective deferrals made to the plan during the employee's period of service. Any employer contributions that are contingent on employee contributions or elective deferrals must be made according to the plan's requirements for employer matching contributions. The Department also invites comments as to whether this interpretation best

effectuates the purpose of this provision.

USERRA does not specify whether the returning service member is entitled to partial credit in return for making up part (but not all) of the missed employee contributions or elective deferrals, but it does not require that the employee make up the full amount. Given that returning service members often face financial hardships on their return to civilian employment, and in view of the remedial purposes of USERRA, the Department interprets the Act to permit the employee to partially make up missed employee contributions (including required employee contributions to a defined benefit plan) or elective deferrals. In such a situation, the employer is required to make any contributions that are contingent on employee make-up contributions or elective deferrals only to the extent that the employee makes such partial contributions or elective deferrals. See proposed section 1002.262. For example, in a plan where the employee may or must contribute from zero to five percent of his or her compensation, and receive a commensurate employer match, the reemployed service member must be permitted to partially make up a missed contribution and receive the employer match. Where contributions from all employees are handled in a similar, consistent fashion under the plan, either the plan documents or the normal, established practices of the plan control the disposition of partial contributions or elective deferrals.

Under proposed section 1002.264, if the service member has withdrawn his or her account balance from the employee pension benefit plan prior to entering military service, he or she must be allowed to repay the withdrawn amounts upon reemployment. The amount to be repaid also includes any interest that would have been earned had the monies not been withdrawn. Repayment entitles the individual to appropriate credit in the plan. The reemployed service member may make his or her contributions or deferrals during a time period starting with the date of reemployment and continuing for up to three times the length of the employee's immediate past period of military service, with the repayment period not to exceed five years; during the time period provided by 26 U.S.C. 411(a)(7)(C) (if applicable); or within such longer time period as may be agreed to between the employer and service member. Proposed section 1002.264 applies to defined benefit plans and defined contribution plans. The Department invites comments on

whether or how this section should apply to defined contribution plans.

Section 4318(b)(3) describes the method for calculating the reemployed service member's compensation for the period of military service to determine the amount the employer and service member must contribute under the plan. 38 U.S.C. 4318(b)(3). Proposed section 1002.267 provides that the compensation rate the reemployed service member would have earned had he or she remained continuously employed provides the usual benchmark. If that rate cannot be determined with reasonable certainty (for example, where the rate varies based on commissions or tips), the compensation rate may be based on the service member's average compensation rate during the 12-month period before the service period. For an employee who worked fewer than 12 months before entering the service, the entire employment period just prior to the service period may be used.

The employer must allocate its contribution on behalf of the employee in the same manner as contributions made for other employees during the period of the service member's service were allocated. However, under proposed section 1002.265, the employer is not required to allocate accrued earnings and forfeitures to the reemployed service member. 38 U.S.C. 4318(b)(1).

Special rules apply to multiemployer plans. 38 U.S.C. 4318(b)(1). Proposed section 1002.266 focuses on the operation of multiemployer plans. ERISA defines the term "multiemployer plan" as a plan to which more than one employer is required to contribute; which is maintained pursuant to one or more collective bargaining agreements between one or more employee organizations and more than one employer; and, which satisfies regulations prescribed by the Secretary of Labor. 29 U.S.C. 1002(37). An individual's period of uniformed service that qualifies as employment for purposes of section 4318(a)(2) is also employment under the terms of the pension benefit plan; any applicable collective bargaining agreement under 29 U.S.C. 1145; or, any similar Federal or State law requiring employers who contribute to multiemployer plans to make contributions as specified in plan documents.

With a multiemployer plan, a service member does not have to be reemployed by the same employer for whom he or she worked prior to the period of service in order to be reinstated in the pension plan. As long as the employer is a contributing employer to the plan, the

service member is entitled to be treated as though he or she experienced no break in service under the plan. Proposed section 1002.266 describes the allocation of the employer's obligation to fund employer contributions for reemployed service members participating in multiemployer plans. Initially, the benefits liability is to be allocated as specified by the sponsor maintaining the plan. 38 U.S.C. 4318(b)(1)(A). Both of the bargaining parties, usually the union(s) and the employers, and the plan trustees of a multiemployer plan are sponsors of the plan. The initial allocation by the plan sponsor(s) is likely to vary from plan to plan. For purposes of USERRA, if the plan documents make no provision to allocate the obligation to contribute, then the individual's last employer before the service period is liable for the employer contributions. In the event that entity no longer exists or functions, the plan must nevertheless provide coverage to the service member. 38 U.S.C. 4318(b)(1)(B).

By authorizing the plan sponsors to designate how the contribution is to be paid, Congress intended to give employers, employee organizations and plan trustees (all of whom are plan sponsors) flexibility in structuring the payment obligation to suit the plan's particular circumstances. "The Committee intends that multiemployer pension plan trustees or bargaining parties should be able to adopt uniform standard rules under which another employer, such as the last employer for which the individual worked before going into the uniformed service or the employer for which the returning service member had the most service during a given period following release from the uniformed service, may be considered the 'reemploying' employer for purposes of the pension provisions of Chapter 43. The Committee also intends for multi-employer pension plan trustees to have the right to determine that it would be more appropriate not to make any individual employer liable for such costs and thus to be able to adopt rules under which returning service members' reconstructed benefits would be funded out of plan contributions and other assets without imposing a specific additional funding obligation on any one employer." S. Rep. No. 103-158, at 65 (1993). With respect to both multiemployer and single employer plans, however, the Committee indicated: "It is the intent of the Committee that, with respect to allocations to individual account plans under section 3(34) of ERISA,

allocations to the accounts of returning service members not be accomplished by reducing the account balances of other plan participants.” *Id.*

If an employer participating in a multiemployer plan reemploys an individual who is entitled to pension benefits attributable to military service, then the employer must notify the plan administrator of the reemployment within 30 days. 38 U.S.C. 4318(c). USERRA requires this notice because multiemployer plan administrators may not be aware that a contributing employer has reemployed a person who may have a pension claim arising from his or her military service. In contrast, administrators of single employer pension plans are more likely to have access to such information. This notification requirement is implemented by proposed section 1002.266.

Although a service member who is not reemployed under the Act would not be entitled to pension benefits for his or her period of service, any vested accrued benefit in the plan to which the service member was entitled prior to entering military service would remain intact whether or not he or she was reemployed. Joint Explanatory Statement on H.R. 995, 103–353, at 2507 (1994); H.R. Rep. No. 103–65, Part I, at 36–37 (1993). The terms of the plan document control the manner and timing of distributions of vested accrued benefits from the plan if the service member is not reemployed by a participant employer.

USERRA provides specific guidance on certain aspects of the reemployed service member’s pension plan rights. At the same time, employers, fiduciaries and plan administrators must also comply with other laws that regulate plan administration but are beyond the scope of these proposed regulations. Federal and State laws governing the establishment and operation of pension plans, such as ERISA or the Internal Revenue Code of 1986, as amended, and the regulations of the Pension Benefit Guaranty Corporation, continue to apply in the context of providing benefits under USERRA. Thus, for example, while section 4318(b)(1)(A) provides that liability for funding multiemployer pension plan benefits for a reemployed service member shall be allocated as the plan sponsor specifies, laws other than USERRA govern the technical aspects of the allocation.

Subpart F—Compliance Assistance, Enforcement and Remedies

Compliance Assistance

USERRA authorizes the Secretary of Labor to provide assistance to any

person regarding the employment and reemployment rights and benefits provided under the statute. 38 U.S.C. 4321. The Secretary acts through the Veterans’ Employment and Training Service (VETS). USERRA promotes the resolution of complaints without resort to litigation. In order to facilitate this process, section 4321 allows VETS to request assistance from other Federal and State agencies and volunteers engaged in similar or related activities. Proposed section 1002.277 describes VETS’ authority to provide assistance to both employees and employers. VETS’ assistance is not contingent upon the filing of a USERRA complaint.

Investigation and Referral

Proposed section 1002.288 implements section 4322, which authorizes VETS to enforce an individual’s USERRA rights. Any person claiming rights or benefits under USERRA may file a complaint with VETS if his or her employer fails or refuses to comply with the provisions of USERRA, or indicates that it will not comply in the future. 38 U.S.C. 4322(a). This avenue, however, is optional. Nothing in section 4322 requires an individual to file a complaint with VETS, to request assistance from VETS, or to await notification from VETS of the right to bring an enforcement action. *Palmatier v. Michigan Dept. of State Police*, 981 F. Supp. 529 (W.D. Mich. 1997). Invoking VETS’ enforcement authority is an alternative provided by the statute once an employee decides to file a USERRA complaint. *See Gagnon v. Sprint Corp.*, 284 F.3d 839, 854 (8th Cir. 2002). Alternatively, the individual may file a complaint directly in the appropriate United States District Court or State court in cases involving a private sector or State employer, respectively (or the Merit Systems Protection Board in cases involving a Federal executive agency). *See* 38 U.S.C. 4323(b) (direct action against State or private employer); 38 U.S.C. 4324(b) (direct action against Federal executive agency). *See* proposed sections 1002.288 and 1002.303. The Office of Personnel Management has issued a separate body of regulations that implement USERRA for employees of Federal executive agencies. *See* 5 CFR Part 353.

Proposed section 1002.288 also implements the statutory criteria for the form of a complaint. 38 U.S.C. 4322(b). Any complaint submitted to VETS must be in writing, using VETS Form 1010, which may be found at <http://www.dol.gov/library/forms/forms/vets/vets-1010.pdf>. The proposed regulation also contains the procedures for processing a complaint. VETS provides

technical assistance to a potential claimant upon request, and his or her employer if appropriate. 38 U.S.C. 4322(c). Technical assistance is not limited to filing a complaint; it also includes responding to requests for information on specific issues that are not yet part of a formal USERRA complaint. Once an individual files a complaint, VETS must conduct an investigation. If the agency determines that a violation of USERRA has occurred, VETS undertakes “reasonable efforts” to effectuate compliance by the employer (or other entity) with its USERRA obligations. Proposed section 1002.289–.290; 38 U.S.C. 4322(d). VETS notifies the claimant of the outcome of the investigation and the claimant’s right to request that VETS refer the case to the Attorney General. *See* 38 U.S.C. 4322(e), 4323.

Section 1002.289 sets forth VETS’ authority to use subpoenas in connection with USERRA investigations. VETS may (i) require by subpoena the attendance and testimony of witnesses and the production of documents relating to any matter under investigation; and (ii) enforce the subpoena by requesting the Attorney General to apply to a district court for an appropriate order. 38 U.S.C. 4326(a)–(b). VETS’ subpoena authority does not apply to the judicial or legislative branch of the Federal Government. 38 U.S.C. 4326(d).

Enforcement of Rights and Benefits Against a State or Private Employer

Section 4323 establishes the procedures for enforcing USERRA rights against a State or private employer. “State” includes the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, and other territories of the United States. 38 U.S.C. 4303(14). The political subdivisions of a State (counties, municipalities and school districts), however, are private employers for enforcement purposes. 38 U.S.C. 4323(j). Although USERRA does not define “private employer,” the term includes all employers other than the Federal Government or a State. Proposed sections 1002.303 to .314 implement section 4323 of the Act.

An aggrieved individual may initiate a USERRA action either by filing an action in court or by filing a complaint with VETS. If a complaint is filed with VETS and voluntary compliance cannot be achieved, the claimant may request VETS to refer the complaint to the Attorney General. 38 U.S.C. 4323(a)(1). If the Attorney General considers the complaint meritorious, the Attorney

General may represent the claimant and file a complaint in the appropriate U.S. district court. In cases where representation is provided by the Attorney General, the complainant is the plaintiff if the case is brought against a private employer, including a political subdivision of a State; however, if the complaint involves a State employer, it is brought in the name of the United States. A claimant may also proceed directly to the courts in the following circumstances: (i) The claimant foregoes informal resolution by VETS; (ii) the claimant declines referral of the complaint to the Attorney General after an unsuccessful informal resolution; or, (iii) the Attorney General refuses to represent the claimant after referral. 38 U.S.C. 4323(a)(2). Proposed sections 1002.303 and .304 implement these provisions.

Section 4323 establishes requirements for several aspects of the judicial process involving USERRA complaints, which are explained in proposed sections 1002.305 through 1002.311. The United States district courts have jurisdiction over actions against a State or private employer brought by the United States, and actions against a private employer by a person. For actions brought by a person against a State, the action may be brought in a State court of competent jurisdiction. 38 U.S.C. 4323(b); proposed section 1002.305. Venue for an action between the United States and a State lies in any Federal district in which the State exercises authority or carries out functions. Venue for an action against a private employer lies in any Federal district in which the employer maintains a place of business. 38 U.S.C. 4323(c); proposed section 1002.307. Only persons claiming rights or benefits under USERRA (or the United States acting on their behalf) have standing to initiate a USERRA action. 38 U.S.C. 4323(f). Proposed section 1002.308 therefore prohibits employers or other entities (such as pension plans or unions) from initiating actions. See H.R. Rep. No. 103-65, at 39 (1993). As for the respondents necessary to maintain an action, the statute requires only the employer or prospective employer to be named as necessary parties. 38 U.S.C. 4323(g); see H.R. Rep. No. 103-65, at 39 (1993). Proposed section 1002.309 implements this restriction.

No fees or court costs may be imposed on the claimant. In addition, a prevailing claimant may recover his or her attorney's fee, expert witness fee, and other litigation expenses. 38 U.S.C. 4323(h); proposed section 1002.310.

No State statute of limitations applies to a USERRA proceeding. 38 U.S.C.

4323(i). Proposed section 1002.311 provides that an unreasonable delay by the claimant in asserting his or her rights that causes prejudice to the employer may result in dismissal of the claim under the doctrine of *laches*. See H.R. Rep. No. 103-65, at 39 (1994). The legislative history relies in part on a Sixth Circuit decision, which held that any limitation upon a former employee's right to sue is derived from the equitable doctrine of *laches* rather than an analogous State statute of limitations. See *Stevens v. Tennessee Valley Authority*, 712 F.2d 1047, 1049 (6th Cir. 1983) (decided under the predecessor Veterans' Reemployment Rights Act).

The Department has long taken the position that no Federal statute of limitations applied to actions under USERRA. USERRA's provision that State statutes of limitations are inapplicable, together with USERRA's legislative history, show that the Congress intended that the only time-related defense that may be asserted in defending against a USERRA claim is the equitable doctrine of *laches*. 38 U.S.C. 4323(i); see S. Rep. No. 103-158, at 70 (1993); H.R. Rep. No. 103-65, at 39. Recently, a Federal district court ruled that USERRA claims are subject to a four-year statute of limitations enacted prior to the enactment of USERRA that imposes a general limitations period for all Federal causes of action where no statute of limitations is "otherwise provided by law," 28 U.S.C. 1658. *Rogers v. City of San Antonio*, No. Civ. A. SA-99-CA-1110, 2003 WL 1566502 (W.D. Tex. Mar. 4, 2003). The *Rogers* decision is on appeal to the Fifth Circuit Court of Appeals. *City of San Antonio v. Rogers*, No. 03-50588 (5th Cir.) Another recent district court decision, *Akhday v. City of Chattanooga*, No. 1:01-CV-106, 2002 WL 32060140 (E.D. Tenn. May 22, 2002), held that 28 U.S.C. 1658 does not apply to USERRA claims. The recent decision of the United States Supreme Court in *Jones v. R. R. Donnelley & Sons Co.*, No. 02-1205, 2004 WL 936488 (U.S. May 3, 2004) is not dispositive because USERRA "otherwise provides by law" that no statute of limitations applies, and because, with respect to some USERRA claims, the cause of action previously existed under the VERA and consequently predates the effective date of 28 U.S.C. 1658. The Department continues to believe that no statute of limitations applies to USERRA claims but invites comments on the validity of this view in light of the conflicting court decisions.

With respect to remedies, the court has broad authority to protect the rights

and benefits of persons covered by USERRA. The court may order the employer to comply with USERRA's provisions; compensate the claimant for lost wages and/or benefits; and pay additional, liquidated, damages equivalent to the lost wages/benefits if it determines that the employer's violation is willful. 38 U.S.C. 4323(d)(1). The legislative history establishes that "a violation shall be considered to be willful if the employer or potential employer 'either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the [provisions of this chapter].'" H.R. Rep. No. 103-65, at 38 (1994), quoting *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 617 (1993) (holding that a violation of the ADEA is willful if the employee either knew or showed reckless disregard for whether the statute prohibited its conduct). Proposed section 1002.312 lists the possible remedies allowed under section 4323(d). Proposed section 1002.313 states that compensation consisting of lost wages, benefits or liquidated damages derived from any action brought on behalf of the United States shall be paid directly to the aggrieved individual. Finally, the court may use its equity powers to enforce the rights guaranteed by USERRA. 38 U.S.C. 4323(e); proposed section 1002.314.

Effective Date and Compliance Deadlines

These regulations impose no new legal requirements but explain existing ones, in some cases for the first time. The Department proposes that these regulations be effective 30 days after publication of the final rule, and requests comment on whether this allows adequate time for covered parties to come into full compliance. We expect that most employers are currently in full compliance. However, to the extent that these regulations clarify USERRA's requirements and require adjustments in employer policies and practices, the Department wants to allow a reasonable amount of time for the transition to take place.

V. Procedural Determinations

A. Paperwork Reduction Act

This rule involves information collection, recordkeeping, or reporting requirements, as described in the chart below. As required by the Paperwork Reduction Act of 1995 (44 U.S.C. 3501, *et seq.*), these requirements have been submitted to the Office of Management and Budget. Send comments regarding this burden or any other aspect of this collection of information, including

suggestions for reducing this burden, to: Office of Information and Regulatory Affairs (Attention: Katherine Astrich, Desk Officer for VETS), 725 17th St., NW., Washington, DC 20503. In addition to regular mail, OIRA will accept comments via electronic mail to

KAstrich@omb.eop.gov, or by Fax at (202) 395-6974. Please include "Docket No. VETS-U-04" on the subject line of the email, fax or letter. Note that security-related problems may result in significant delays in receiving comments by regular mail. In addition,

the Agency encourages commenters to submit their comments on the paperwork determination to VETS using the methods described above under **ADDRESSES**.

COMPARISON OF PROPOSED AND STATUTORY LANGUAGE CONTAINING PAPERWORK REQUIREMENTS

Proposed provision and language	Statutory provision and language
1002.85(a) * * * You or an appropriate officer of the uniformed service in which your service is to be performed, must notify your employer that you intend to leave your employment position to perform service in the uniformed services. * * *	4312(a)(1) [Reemployment rights and benefits available if] the person (or an appropriate officer of the uniformed service in which such service is performed) has given advance written or verbal notice of such service to such person's employer[.]
1002.85(c) Your notice to your employer may be either verbal or written.	
1002.115 * * * When you complete your service in the uniformed services, you must notify your pre-service employer of your intent to return to your employment position by either reporting to work or submitting a timely application for employment.	4312(a)(3) [Reemployment rights and benefits available if] the person reports to, or submits an application for reemployment to, such employer in accordance with the provisions of subsection (e).
1002.118 * * * You may apply either orally or in writing.	
1002.193 * * * Your employer must determine your seniority rights, status, and rate of pay as though you had been continuously employed during the period of service.	4313(a)(2)(A) [A person entitled to reemployment shall be promptly re-employed] in the position of employment in which the person would have been employed if the continuous employment of such person with the employer had not been interrupted by such service, or a position of like seniority, status and pay [with certain exceptions].
1002.266(b) An employer that contributes to a multiemployer plan and that reemploys you must provide written notice of your reemployment to the plan administrator. * * *	4318(c) Any employer who reemploys a person under this chapter and who is an employer contributing to a multiemployer plan * * * under which benefits are or may be payable to such person by reason of the obligations set forth in this chapter, shall * * * provide information, in writing, of such reemployment to the administrator of the plan.
1002.228 * * * A complaint filed with VETS must be in writing, using VETS Form 1010, and must include the name and address of your employer, a summary of the basis for your complaint, and a request for relief.	4322(b) Such complaint shall be in writing, be in such form as [VETS] may prescribe, include the name and address of the employer against whom the complaint is filed, and contain a summary of the allegations that form the basis of for the complaint.
Note: VETS Form 1010 is currently approved by OMB, # 1293-0002, expiration date March 2007.	

B. Preliminary Economic Analysis and Regulatory Flexibility Certification

This rule is being treated as a "significant regulatory action" within the meaning of Executive Order 12866, because of its importance to the public and the Department's priorities. Therefore, the Office of Management and Budget has reviewed the rule. However, because this rule is not "economically significant" as defined in section 3(f)(1) of EO 12866, it does not require a full economic impact analysis under section 6(a)(3)(C) of the Order. The proposed rule is not a "major rule" under the Unfunded Mandates Reform Act or Section 801 of the Small Business Regulatory Enforcement Fairness Act (SBREFA). The proposal would impose no additional costs on any private or public sector entity, and does not meet any of the criteria for a economically significant or major rule specified by the Executive Order or relevant statutes.

The Senate Committee report accompanying the passage of USERRA noted that the "[Congressional Budget Office] estimates that the enactment of [section 9 of USERRA, transitioning

from the predecessor veterans' reemployment rights law to USERRA] would entail no significant cost." (See Senate Report No. 103-158, p. 82 (1993).) The same report states further on page 84, under the heading "Regulatory Impact Statement," that:

[T]he Committee [on Veterans' Affairs] has made an evaluation of the regulatory impact which would be incurred in carrying out the Committee bill. The Committee finds that the enactment of the bill would not entail any significant new regulation of individuals or business. * * *

USERRA is the latest in a series of laws protecting veterans' employment and reemployment rights going back to the Selective Training and Service Act of 1940. USERRA's immediate predecessor was the VERRA. USERRA continued the fundamental protections of the VERRA and the case law interpreting the VERRA while clarifying that law, and VETS considers that by recodifying and clarifying longstanding statutory and case law under the VERRA, USERRA did not impose new economic burdens on employers. This proposed rule implements USERRA, and while it

imposes no new costs, it may provide some economic benefits. Delays may occur when employers respond to employee claims and inquiries concerning USERRA due to confusion or ambiguity as to the correct interpretation of USERRA. Moreover, some employee claims are contested in part because of a lack of employer knowledge about the statute. The proposed rule should reduce these costs by: providing employers with accurate information necessary to respond efficiently and effectively to employee claims; potentially reducing the number of contested claims and the resulting need for administrative resolution or legal action; expediting the settlement of outstanding claims because employers and employees will have an enhanced knowledge of their rights and responsibilities under USERRA; and reducing the number of inquiries made by employers and employees to administrative agencies such as VETS and the Office of Personnel Management.

VETS also expects the proposed rule to benefit both pension- and health-plan

sponsors and participants by helping to dispel plan administrators' uncertainty about compliance with USERRA provisions, and by reducing delays and the risk of inadvertent noncompliance. The rule may assist participants and beneficiaries to better understand their USERRA rights as well, thereby averting disputes and lost opportunities to elect continuing health-plan coverage, or to obtain reinstated pension-plan coverage.

Based on the above analysis, the Agency concludes that the proposed rule would not impose any additional costs on employers; consequently, the proposal requires no preliminary economic analysis. Furthermore, because the proposal imposes no costs on employers, VETS certifies that it would not have a significant impact on a substantial number of small businesses; accordingly, the Agency need not prepare an initial regulatory flexibility analysis.

C. Unfunded Mandates

The Congressional Budget Office (CBO) determined that State and local governments would incur no cost resulting from passage of USERRA (*see* Senate Report No. 103-158, p. 84 (1993)). In this regard, State and local governments would be obligated to comply with USERRA to the same extent as private employers; therefore, when USERRA (and the proposed rule) impose no cost on private employers, they also impose no cost on State and local government employers. The House Committee Report for USERRA (House Report No. 103-65, pp. 49-51) contained similar CBO language.¹

The Agency reviewed the proposed rule according to the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1501 *et seq.*) and Executive Order 12875. Based on the CBO determinations described in the previous paragraph, the Agency made a preliminary determination that the proposed rule does not include any Federal mandate that would result in increased expenditures by State, local, or tribal governments in the aggregate of more than \$100 million, or increased expenditures by the private sector of more than \$100 million. Therefore, the Agency concludes that the proposed rule: (1) Would not affect State, local, or tribal entities significantly or uniquely; (2) does not contain an unfunded mandate requiring consultation with these entities; and (3) would not impose substantial direct compliance costs on

Indian tribal governments. Accordingly, the proposed rule does not mandate that State, local, or tribal governments adopt new, unfunded regulatory obligations.

D. Federalism

The proposed rule does not have federalism implications as specified under Executive Order 13132 (64 FR 43255; August 10, 1999) because it has no substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Section 4302 of USERRA provides that its provisions supersede any and all laws of the States as they relate to any rights and benefits provided under USERRA if such State laws reduce, limit, or eliminate in any manner any right or benefit provided by USERRA. Accordingly, the requirements implemented by the proposed rule do not alter these fundamental statutory provisions with respect to military service members' and veterans' employment and reemployment rights and benefits. Therefore, the proposed rule has no implications for the States, or for the relationship or distribution of power between the national government and the States.

VI. Statutory and Rulemaking Background

The Uniformed Services Employment and Reemployment Rights Act (USERRA), Pub. L. 103-353, 108 Stat. 3150 (codified at 38 U.S.C. 4301-4333), became law on October 13, 1994, replacing the Veterans' Reemployment Rights Act (VRRA). Congress enacted USERRA, in part, to clarify the ambiguities of the VRRA and strengthen the rights of service members and veterans. USERRA's guiding principle is that a person who leaves civilian employment to perform service in the uniformed services is entitled to return to that job with the seniority, status, and rate of pay that would have accrued during the absence, provided the person meets USERRA's eligibility criteria. USERRA applies to voluntary or involuntary military service in peacetime as well as wartime. Its provisions apply to virtually all employers, regardless of size. USERRA also codifies 54 years of accumulated case law and clarifies previously existing rights and obligations. For most purposes, USERRA applies to reemployments initiated on or after December 12, 1994. Congress enacted amendments to the Act in 1996, 1998, and 2000.

VII. Statutory Authority

This regulation is proposed pursuant to the authority in section 4331(a) of USERRA (Pub. L. 103-353, 108 Stat. 3150, 38 U.S.C. 4331(a)), and Secretary's Order 3-2004, September 10, 2004.

List of Subjects in 20 CFR Part 1001

Labor, Pensions, Veterans.

Proposed Regulation

For the reasons set out in the preamble, the Department proposes to add a new part 1002 to Chapter IX of Title 20 of the Code of Federal Regulations as follows:

PART 1002—REGULATIONS UNDER THE UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT OF 1994

Subpart A—Introduction to the Regulations Under the Uniformed Services Employment and Reemployment Rights Act of 1994

General Provisions

Sec.

- 1002.1 What is the purpose of the regulations in this part?
- 1002.2 Is USERRA a new law?
- 1002.3 When did USERRA become effective?
- 1002.4 What is the role of the Secretary of Labor under USERRA?
- 1002.5 What definitions will help me understand USERRA?
- 1002.6 What types of service in the uniformed services are covered by USERRA?
- 1002.7 How does USERRA relate to other laws, public and private contracts, and employer practices?

Subpart B—Anti-Discrimination and Anti-Retaliation

Protection From Employer Discrimination and Retaliation

- 1002.18 What activity is protected from employer discrimination by USERRA?
- 1002.19 Is any other activity protected under USERRA?
- 1002.20 Does USERRA protect me if I do not actually perform service in the uniformed service?
- 1002.21 Do the Act's prohibitions against discrimination and retaliation apply to all employment positions?
- 1002.22 Who has the burden of proving discrimination or retaliation in violation of USERRA?
- 1002.23 What do I have to show to carry my burden of proving that my employer discriminated or retaliated against me?

Subpart C—Eligibility for Reemployment

General Eligibility Requirements for Reemployment

- 1002.32 What criteria must I meet to be eligible under USERRA for reemployment after my service in the uniformed services?

¹ However, the CBO determined that, because of changes to Thrift Savings Plan provisions, the cost for the Federal government to comply with USERRA would be about \$1 million in FY 1994 and 1995, and zero cost thereafter.

1002.33 To be eligible for reemployment, do I have to show that my employer discriminated against me?

Coverage of Employers and Positions

- 1002.34 Which employers are covered by USERRA?
- 1002.35 Is a successor in interest an employer covered by USERRA?
- 1002.36 Can an employer be liable as a successor in interest if it was unaware of my potential reemployment claim when it acquired the business?
- 1002.37 Is it possible for me to be employed in one job by more than one employer?
- 1002.38 Can a hiring hall be my employer?
- 1002.39 Are States (and their political subdivisions), the District of Columbia, the Commonwealth of Puerto Rico, and United States territories, considered employers?
- 1002.40 Does USERRA protect against discrimination in initial hiring decisions?
- 1002.41 Can I have rights under USERRA even though I hold a temporary, part-time, probationary, or seasonal employment position?
- 1002.42 What rights do I have under USERRA if I am on layoff, on strike, or on a leave of absence?
- 1002.43 Can I have rights under USERRA even if I am an executive, managerial, or professional employee?
- 1002.44 Does USERRA cover me if I am an independent contractor?

Coverage of Service in the Uniformed Services

- 1002.54 Are all military fitness examinations considered "service in the uniformed services?"
- 1002.55 Is all funeral honors duty considered "service in the uniformed services?"
- 1002.56 I am participating in a training program to provide emergency assistance in the event of a terrorist attack. Is that considered "service in the uniformed services?"
- 1002.57 Is all of my service as a member of the National Guard considered "service in the uniformed services?"
- 1002.58 Is my service in the commissioned corps of the Public Health Service considered "service in the uniformed services?"
- 1002.59 Are there any circumstances in which special categories of persons are considered to perform "service in the uniformed services?"
- 1002.60 If I am a cadet or midshipman attending a service academy am I covered by USERRA?
- 1002.61 If I am a member of the Reserve Officers Training Corps am I covered by USERRA?
- 1002.62 If I am a member of the Commissioned Corps of the National Oceanic and Atmospheric Administration, the Civil Air Patrol, or the Coast Guard Auxiliary am I covered by USERRA?

Absence From a Position of Employment Necessitated by Reason of Service in the Uniformed Services

- 1002.73 Does service in the uniformed services have to be my sole reason for leaving my employment position in order to have USERRA reemployment rights?
- 1002.74 Am I required to begin service in the uniformed services immediately after leaving my employment position in order to have USERRA reemployment rights?

Requirement of Notice

- 1002.85 Am I required to give advance notice to my employer of my service in the uniformed services?
- 1002.86 When am I excused from giving advance notice of my service in the uniformed services?
- 1002.87 Am I required to get permission from my employer before I leave to perform service in the uniformed services?
- 1002.88 Am I required to tell my civilian employer that I intend to seek reemployment after completing my military service before I leave to perform service in the uniformed services?

Period of Service

- 1002.99 Is there a limit on the total amount of service in the uniformed services that I may perform and still retain reemployment rights with my employer?
- 1002.100 Does the five-year service limit include all absences from my employment position that are related to my service in the uniformed services?
- 1002.101 Does the five-year service limit include periods of service that I performed when I worked for a previous employer?
- 1002.102 Does the five-year limit include periods of service that I performed before USERRA was enacted?
- 1002.103 Are there any types of service in the uniformed services that I can perform that do not count against USERRA's five-year service limit?
- 1002.104 Am I required to accommodate my employer's needs as to the timing, frequency or duration of my service?

Application for Reemployment

- 1002.115 Am I required to report to or submit a timely application for reemployment to my pre-service employer when I complete my period of service in the uniformed services?
- 1002.116 Is my time period for reporting back to my employer extended if I am hospitalized for, or convalescing from, an illness or injury incurred in, or aggravated during, the performance of service?
- 1002.117 Are there any consequences if I fail to report for or submit a timely application for reemployment?
- 1002.118 Is my application for reemployment required to be in any particular form?
- 1002.119 To whom must I submit my application for reemployment?
- 1002.120 If I seek or obtain employment with an employer other than my pre-

service employer before the end of the period within which my reemployment application must be filed, will that jeopardize my reemployment rights with my pre-service employer?

- 1002.121 Am I required to submit documentation to my employer in connection with my application for reemployment?
- 1002.122 Is my employer required to reemploy me if documentation establishing my eligibility does not exist or is not readily available?
- 1002.123 What documents satisfy the requirement that I establish my eligibility for reemployment after a period of service of more than thirty days?

Character of Service

- 1002.134 What type of discharge or separation from military service is required for me to be entitled to reemployment under USERRA?
- 1002.135 What type of discharge or separation from military service will make me ineligible for reemployment under USERRA?
- 1002.136 Who determines the characterization of my service?
- 1002.137 If I receive a disqualifying discharge or release from uniformed service and it is later upgraded, will my right to reemployment be restored?
- 1002.138 If I receive a retroactive upgrade in my characterization of service will that entitle me to claim back wages and benefits lost as of my date of separation from service?

Employer Statutory Defenses

- 1002.139 Are there any circumstances in which my pre-service employer is excused from its obligation to reemploy me following a period of military service? What statutory defenses are available to the employer in an action or proceeding for reemployment benefits?

Subpart D—Rights, Benefits, and Obligations of Persons Absent From Employment Due to Service in the Uniformed Services

Furlough and Leave of Absence

- 1002.149 What is my status with my civilian employer when I am performing service in the uniformed services?
- 1002.150 What non-seniority rights and benefits am I entitled to during my period of service?
- 1002.151 If my employer provides full or partial pay to me while I am on military leave is it required to also provide me with the non-seniority rights and benefits ordinarily granted to similarly situated employees on furlough or leave of absence?
- 1002.152 If my employment is interrupted by a period of service in the uniformed services, are there any circumstances under which I am not entitled to the non-seniority rights and benefits ordinarily granted to similarly situated employees on furlough or leave of absence?
- 1002.153 If my employment is interrupted by a period of service in the uniformed

services can I use my accrued vacation, annual or similar leave with pay during the service? Can my employer require me to use my accrued leave during the period of service?

Health Plan Coverage

- 1002.163 What types of health plans are covered by USERRA?
- 1002.164 What health plan coverage must my employer provide to me under USERRA?
- 1002.165 How do I elect continuing health plan coverage?
- 1002.166 How much do I have to pay in order to continue my health plan coverage?
- 1002.167 If my coverage was terminated at the beginning of or during my service, does my coverage have to be reinstated upon my reemployment?
- 1002.168 Can I elect to delay reinstatement of my health plan coverage until a date after the date I am reemployed?
- 1002.169 Which employer is responsible for providing me with continuing health plan coverage if I am enrolled under a multiemployer plan?

Subpart E—Reemployment Rights and Benefits

Prompt Reemployment

- 1002.180 When am I entitled to be reemployed by my civilian employer?
- 1002.181 How is “prompt reemployment” defined?

Reemployment Position

- 1002.191 What position am I entitled to upon my reemployment?
- 1002.192 How is my specific reemployment position determined?
- 1002.193 Does my reemployment position include elements such as my seniority, status, and rate of pay?
- 1002.194 Can the application of the escalator principle result in adverse consequences when I am reemployed?
- 1002.195 What other factors can determine my reemployment position?
- 1002.196 What is my reemployment position if my period of service was less than 91 days?
- 1002.197 What is my reemployment position if my period of service in the uniformed services was more than 90 days?
- 1002.198 What efforts must my employer make to help me become qualified for the reemployment position?
- 1002.199 What priority must my employer follow if two or more returning employees are entitled to reemployment in the same position?

Seniority Rights and Benefits

- 1002.210 What seniority rights do I have when I am reemployed following a period of uniformed service?
- 1002.211 Does USERRA require my employer to use a seniority system?
- 1002.212 How do I know whether a particular right or benefit is a seniority-based right or benefit?
- 1002.213 How can I demonstrate a reasonable certainty that I would have

received the seniority right or benefit if I had remained continuously employed during my period of service?

- 1002.214 What happens if my employer establishes, or eliminates seniority and seniority-based rights and benefits after I begin my period of service?

Disabled Employees

- 1002.225 Am I entitled to any specific reemployment benefits if I have a disability that was incurred in, or aggravated during, my period of service?
- 1002.226 If I have a disability incurred in, or aggravated during, my period of service what efforts must my employer make to qualify me for my reemployment position?

Rate of Pay

- 1002.236 How is my rate of pay determined when I return from a period of service?

Protection Against Discharge

- 1002.247 Does USERRA provide me with protection against discharge?
- 1002.248 What constitutes cause for discharge under USERRA?

Pension Plan Benefits

- 1002.259 How does USERRA protect my pension benefits?
- 1002.260 What pension benefit plans are covered under USERRA?
- 1002.261 Who is responsible for funding any plan obligation to provide me with pension benefits?
- 1002.262 When is my employer required to make the plan contribution that is attributable to my period of military service?
- 1002.263 Am I required to pay interest when I make up my missed contributions or elective deferrals?
- 1002.264 Am I allowed to repay my account balance if I withdrew all or part of my account from the pension benefits plan before becoming reemployed?
- 1002.265 If I am reemployed with my pre-service employer is my pension benefit the same as if I had remained continuously employed?
- 1002.266 What are the obligations of a multiemployer pension benefit plan under USERRA?
- 1002.267 How is my compensation during my period of service calculated in order to determine my pension benefits, if my benefits are based on my compensation rate?

Subpart F—Compliance Assistance, Enforcement and Remedies

Compliance Assistance

- 1002.277 What assistance does the Department of Labor provide to employees and employers concerning employment, reemployment, or other rights and benefits under USERRA?

Investigation and Referral

- 1002.288 How do I file my USERRA complaint?
- 1002.289 How will VETS investigate my USERRA complaint?
- 1002.290 Does VETS have the authority to order compliance with USERRA?

- 1002.291 What actions may I take if my complaint is not resolved by VETS?
- 1002.292 What can the Attorney General do about my complaint?

Enforcement of Rights and Benefits Against a State or Private Employer

- 1002.303 Am I required to file my complaint with VETS?
- 1002.304 If I file a complaint with VETS and VETS' efforts do not resolve my complaint can I pursue the claim on my own?
- 1002.305 What court has jurisdiction in an action against a State or private employer?
- 1002.306 As a National Guard civilian technician am I considered a State or Federal employee for purposes of USERRA?
- 1002.307 What is the proper venue in an action against a State or private employer?
- 1002.308 Who has legal standing to bring an action under USERRA?
- 1002.309 Who is a necessary party in an action under USERRA?
- 1002.310 How are fees and court costs charged or taxed in an action under USERRA?
- 1002.311 Is there a statute of limitations in an action under USERRA?
- 1002.312 What remedies may be awarded for a violation of USERRA?
- 1002.313 Are there special damages provisions that apply to actions initiated in the name of the United States?
- 1002.314 May a court use its equity powers in an action or proceeding under the Act?

Authority: Pub. L. 103–353, 108 Stat. 3150, 38 U.S.C. 4331(a); Secretary's Order 3–2004, September 10, 2004.

Subpart A—Introduction to the Regulations Under the Uniformed Services Employment and Reemployment Rights Act of 1994

General Provisions

§ 1002.1 What is the purpose of the regulations in this part?

The regulations in this part implement the Uniformed Services Employment and Reemployment Rights Act of 1994 (“USERRA” or “the Act”), 38 U.S.C. 4301–4333. USERRA is a law that establishes certain rights and benefits for employees, and duties for employers. USERRA affects employment, reemployment, and retention in employment, when employees serve or have served in the uniformed services. There are five subparts to this part. Subpart A gives an introduction to the USERRA regulations. Subpart B describes USERRA's anti-discrimination and anti-retaliation provisions. Subpart C explains the steps that must be taken by a uniformed service member who wants

to return to his or her previous civilian employment. Subpart D describes the rights, benefits, and obligations of persons absent from employment due to service in the uniformed services, including rights and obligations related to health plan coverage. Subpart E describes the rights, benefits, and obligations of the returning veteran or service member. Subpart F explains the role of the Department of Labor in enforcing and giving assistance under USERRA. The regulations in this part implement USERRA as it applies to States, local governments, and private employers. Separate regulations published by the Federal Office of Personnel Management implement USERRA for Federal executive agency employers and employees.

§ 1002.2 Is USERRA a new law?

USERRA is the latest in a series of laws protecting veterans' employment and reemployment rights going back to the Selective Training and Service Act of 1940. USERRA's immediate predecessor was commonly referred to as the Veterans' Reemployment Rights Act (VRRRA), which was enacted as section 404 of the Vietnam Era Veterans' Readjustment Assistance Act of 1974. In enacting USERRA, Congress emphasized USERRA's continuity with the VRRRA and its intention to clarify and strengthen that law. Congress also emphasized that Federal laws protecting veterans' employment and reemployment rights for the past fifty years had been successful and that the large body of case law that had developed under those statutes remained in full force and effect, to the extent it is consistent with USERRA. USERRA authorized the Department of Labor to publish regulations implementing the Act for State, local government, and private employers. USERRA also authorized the Office of Personnel Management to issue regulations implementing the Act for Federal executive agencies (other than some Federal intelligence agencies). USERRA established a separate program for employees of some Federal intelligence agencies.

§ 1002.3 When did USERRA become effective?

USERRA became law on October 13, 1994. USERRA's reemployment provisions apply to members of the uniformed services seeking civilian reemployment on or after December 12, 1994. USERRA's anti-discrimination and anti-retaliation provisions became effective on October 13, 1994.

§ 1002.4 What is the role of the Secretary of Labor under USERRA?

(a) USERRA charges the Secretary of Labor (through the Veterans' Employment and Training Service) with providing assistance to any person with respect to the employment and reemployment rights and benefits to which such person is entitled under the Act. More information about the Secretary's role in providing this assistance is contained in subpart F of this part.

(b) USERRA also authorizes the Secretary of Labor to issue regulations implementing the Act with respect to States, local governments, and private employers. The regulations in this part are issued under this authority.

(c) The Secretary of Labor delegated authority to the Assistant Secretary for Veterans' Employment and Training for administering the veterans' reemployment rights program by Secretary's Order 1-83 (February 3, 1983) and for carrying out the functions and authority vested in the Secretary pursuant to USERRA by memorandum of April 22, 2002 (67 FR 31827).

§ 1002.5 What definitions will help me understand USERRA?

(a) *Attorney General* means the Attorney General of the United States or any person designated by the Attorney General to carry out a responsibility of the Attorney General under USERRA.

(b) *Benefit, benefit of employment, or rights and benefits* means any advantage, profit, privilege, gain, status, account, or interest (other than wages or salary for work performed) that accrues to the employee because of an employment contract, employment agreement, or employer policy, plan, or practice. The term includes rights and benefits under a pension plan, health plan, or employee stock ownership plan, insurance coverage and awards, bonuses, severance pay, supplemental unemployment benefits, vacations, and the opportunity to select work hours or the location of employment.

(c) *Employee* means any person employed by an employer. The term also includes any person who is a citizen, national or permanent resident alien of the United States who is employed in a workplace in a foreign country by an employer that is an entity incorporated or organized in the United States, or that is controlled by an entity organized in the United States. "Employee" includes the former employees of an employer.

(d)(1) *Employer*, except as provided below in paragraphs (d)(2) and (3) of this section, means any person, institution, organization, or other entity

that pays salary or wages for work performed, or that has control over employment opportunities, including—

(i) A person, institution, organization, or other entity to whom the employer has delegated the performance of employment-related responsibilities;

(ii) The Federal Government;

(iii) A State;

(iv) Any successor in interest to a person, institution, organization, or other entity referred to in this definition; and,

(v) A person, institution, organization, or other entity that has denied initial employment in violation of 38 U.S.C. 4311, USERRA's anti-discrimination and anti-retaliation provisions.

(2) In the case of a National Guard technician employed under 32 U.S.C. 709, the term "employer" means the adjutant general of the State in which the technician is employed.

(3) An employee pension benefit plan as described in section 3(2) of the Employee Retirement Income Security Act of 1974 (ERISA)(29 U.S.C. 1002(2)) is considered an employer for an individual that it does not actually employ only with respect to the obligation to provide pension benefits.

(e) *Health plan* means an insurance policy, insurance contract, medical or hospital service agreement, membership or subscription contract, or other arrangement under which health services for individuals are provided or the expenses of such services are paid.

(f) *Notice*, when the employee is required to give advance notice of service, means any written or verbal notification of an obligation or intention to perform service in the uniformed services provided to an employer by the employee who will perform such service, or by the uniformed service in which the service is to be performed.

(g) *Qualified*, with respect to an employment position, means having the ability to perform the essential tasks of the position.

(h) *Reasonable efforts*, in the case of actions required of an employer, means actions, including training provided by an employer that do not place an undue hardship on the employer.

(i) *Secretary* means the Secretary of Labor or any person designated by the Secretary of Labor to carry out an activity under USERRA and the regulations in this part, unless a different office is expressly indicated in the regulation.

(j) *Seniority* means longevity in employment together with any benefits of employment that accrue with, or are determined by, longevity in employment.

(k) *Service in the uniformed services* means the performance of duty on a voluntary or involuntary basis in a uniformed service under competent authority. Service in the uniformed services includes active duty, active and inactive duty for training, National Guard duty under Federal statute, and a period for which a person is absent from a position of employment for an examination to determine the fitness of the person to perform such duty. The term also includes a period for which a person is absent from employment to perform funeral honors duty as authorized by law (10 U.S.C. 12503 or 32 U.S.C. 115). The Public Health Security and Bioterrorism Preparedness and Response Act of 2002, Pub. L. 107-188, provides that service as an intermittent disaster-response appointee upon activation of the National Disaster Medical System or as a participant in an authorized training program is deemed "service in the uniformed services." 42 U.S.C. 300hh-11(e)(3).

(l) *State* means each of the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, and other territories of the United States (including the agencies and political subdivisions thereof); however, for purposes of enforcement of rights under 38 U.S.C. 4323, a political subdivision of a State is a private employer.

(m) *Undue hardship*, in the case of actions taken by an employer, means an action requiring significant difficulty or expense, when considered in light of —

(1) The nature and cost of the action needed under USERRA and the regulations in this part;

(2) The overall financial resources of the facility or facilities involved in the provision of the action; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such action upon the operation of the facility;

(3) The overall financial resources of the employer; the overall size of the business of an employer with respect to the number of its employees; the number, type, and location of its facilities; and,

(4) The type of operation or operations of the employer, including the composition, structure, and functions of the work force of such employer; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the employer.

(n) *Uniformed services* means the Armed Forces; the Army National Guard and the Air National Guard when engaged in active duty for training, inactive duty training, or full-time

National Guard duty; the commissioned corps of the Public Health Service; and any other category of persons designated by the President in time of war or national emergency.

§ 1002.6 What types of service in the uniformed services are covered by USERRA?

USERRA's definition of "service in the uniformed services" covers all categories of military training and service, including duty performed on a voluntary or involuntary basis, in time of peace or war. Although most often understood as applying to National Guard and reserve military personnel, USERRA also applies to persons serving in the active components of the Armed Forces. However, USERRA's reemployment provisions vary according to the length of service in the uniformed services.

§ 1002.7 How does USERRA relate to other laws, public and private contracts, and employer practices?

(a) USERRA establishes a floor, not a ceiling, for the employment and reemployment rights and benefits of those it protects. In other words, an employer may provide greater rights and benefits than USERRA requires, but no employer can refuse to provide any right or benefit guaranteed by USERRA.

(b) USERRA supersedes any State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by USERRA, including the establishment of additional prerequisites to the exercise of any USERRA right or the receipt of any USERRA benefit. For example, an employment contract that determines seniority based only on actual days of work in the place of employment would be superseded by USERRA, which requires that seniority credit be given for periods of absence from work due to service in the uniformed services.

(c) USERRA does not supersede, nullify or diminish any Federal or State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that establishes an employment right or benefit that is more beneficial than, or is in addition to, a right or benefit provided under the Act. For example, although USERRA does not require an employer to pay an employee for time away from work performing service, an employer policy, plan, or practice that provides such a benefit is permissible under USERRA.

(d) If an employer provides a benefit that exceeds USERRA's requirements in

one area, it cannot reduce or limit other rights or benefits provided by USERRA. For example, even though USERRA does not require it, an employer may provide a fixed number of days of paid military leave per year to employees who are members of the National Guard or Reserve. The fact that it provides such a benefit, however, does not permit an employer to refuse to provide an unpaid leave of absence to an employee to perform service in the uniformed services in excess of the number of days of paid military leave.

Subpart B—Anti-Discrimination and Anti-Retaliation

Protection From Employer Discrimination and Retaliation

§ 1002.18 What activity is protected from employer discrimination by USERRA?

An employer must not deny initial employment, reemployment, retention in employment, promotion, or any benefit of employment to you on the basis of your membership, application for membership, performance of service, application for service, or obligation for service in the uniformed services.

§ 1002.19 Is any other activity protected under USERRA?

An employer must not retaliate against you by taking any adverse employment action against you because you have taken an action to enforce a protection afforded any person under USERRA; testified or otherwise made a statement in or in connection with a proceeding under USERRA; assisted or participated in a USERRA investigation; or, exercised a right provided for by USERRA.

§ 1002.20 Does USERRA protect me if I do not actually perform service in the uniformed service?

Yes. Employers are prohibited from taking actions against you for any of the activities protected by the Act, whether or not you have performed service in the uniformed services.

§ 1002.21 Do the Act's prohibitions against discrimination and retaliation apply to all employment positions?

The prohibitions against discrimination and retaliation apply to all covered employers (including hiring halls and potential employers, see §§ 1002.36 and 1002.38) and employment positions, including those that are for a brief, non-recurrent period, and for which there is no reasonable expectation that the employment position will continue indefinitely or for a significant period. However, USERRA's reemployment rights and

benefits do not apply to such brief, nonrecurrent positions of employment.

§ 1002.22 Who has the burden of proving discrimination or retaliation in violation of USERRA?

You have the burden of proving that activity protected by USERRA was one of the reasons that your employer took action against you, in order to establish that the action was discrimination or retaliation in violation of USERRA. If you succeed in proving this point, your employer can prevail by proving that he or she would have taken the action anyway, unless you can prove that but for your service the employer would not have taken the action.

§ 1002.23 What do I have to show to carry my burden of proving that my employer discriminated or retaliated against me?

(a) In order to prove that your employer discriminated or retaliated against you, first you must show that the employer's action against you was motivated by either:

- (1) Membership or application for membership in a uniformed service;
- (2) Performance of service, application for service, or obligation for service in a uniformed service;
- (3) Action taken to enforce a protection afforded any person under USERRA;
- (4) Testimony or statement made in or in connection with a USERRA proceeding;
- (5) Assistance or participation in a USERRA investigation; or,
- (6) Exercise of a right provided for by USERRA.

(b) If you prove that the employer's action against you was based on one of the prohibited motives listed in paragraph (a) of this section, your employer may prevail by showing that the action would have been taken anyway. In that event, you can prevail only if you can show that the employer would not have taken the action against you but for your protected activity.

Subpart C—Eligibility for Reemployment

General Eligibility Requirements for Reemployment

§ 1002.32 What criteria must I meet to be eligible under USERRA for reemployment after my service in the uniformed services?

(a) In general, if you have been absent from a position of civilian employment by reason of service in the uniformed services, you will be eligible for reemployment under USERRA if you meet the following criteria:

- (1) Your employer had advance notice of your service;

(2) You have five years or less of cumulative service with respect to your position of employment;

(3) You timely return to work or apply for reemployment; and,

(4) You have not been separated from service with a disqualifying discharge or under other than honorable conditions.

(b) These general eligibility requirements have important qualifications and exceptions, which are described in detail in §§ 1002.73 through 1002.138. If you meet these eligibility criteria, then you are eligible for reemployment, unless your employer can establish that one of the defenses described in § 1002.139 apply. The reemployment position that you are entitled to if you meet USERRA's eligibility criteria is described in §§ 1002.191 through 1002.199.

§ 1002.33 To be eligible for reemployment, do I have to show that my employer discriminated against me?

No. To be eligible for reemployment it is not necessary for you to establish that your employer discriminated against you because of your military service.

Coverage of Employers and Positions

§ 1002.34 Which employers are covered by USERRA?

(a) USERRA applies to all public and private employers in the United States, regardless of size. For example, an employer with only one employee is covered for purposes of the Act.

(b) USERRA applies to foreign employers doing business in the United States. A foreign employer that has a physical location or branch in the United States (including U.S. territories and possessions) must comply with USERRA for any of its employees who are employed in the United States.

(c) An American company operating either directly or through an entity under its control in a foreign country must also comply with USERRA for all its foreign operations, unless compliance would violate the law of the foreign country in which the workplace is located.

§ 1002.35 Is a successor in interest an employer covered by USERRA?

USERRA's definition of "employer" includes a successor in interest. In general, an employer is a successor in interest where there is a substantial continuity in operations, facilities, and workforce from the former employer. The determination whether an employer is a successor in interest must be made on a case-by-case basis using a multi-factor test that considers the following:

- (a) Whether there has been a substantial continuity of business

operations from the former to the current employer;

(b) Whether the current employer uses the same or similar facilities, machinery, equipment, and methods of production;

(c) Whether there has been a substantial continuity of employees;

(d) Whether there is a similarity of jobs and working conditions;

(e) Whether there is a similarity of supervisors or managers; and,

(f) Whether there is a similarity of products or services.

§ 1002.36 Can an employer be liable as a successor in interest if it was unaware of my potential reemployment claim when it acquired the business?

Yes. In order to be a successor in interest, it is not necessary for an employer to have notice of a potential reemployment claim at the time of merger, acquisition, or other form of succession.

§ 1002.37 Is it possible for me to be employed in one job by more than one employer?

Yes. Under USERRA, an employer includes not only the person or entity that pays your salary or wages, but also includes a person or entity that has control over your employment opportunities, including a person or entity to whom an employer has delegated the performance of employment-related responsibilities. For example, if you are a security guard hired by a security company and you are assigned to a work site, you may report both to the security company and to the site owner. In such an instance, both employers share responsibility for compliance with USERRA. If the security company declines to assign you to a job because of a uniformed service obligation (for example, your National Guard duties), then the security company could be in violation of the reemployment requirements and the anti-discrimination provisions of USERRA. Similarly, if the employer at the work site causes your removal from the job position because of your uniformed service obligations, then the work site employer could be in violation of the reemployment requirements and the anti-discrimination provisions of USERRA.

§ 1002.38 Can a hiring hall be my employer?

Yes. If you are a longshoreman, stagehand, construction worker, or you work in certain other industries, you may frequently work for many different employers. A hiring hall operated by a union or an employer association typically assigns you to your jobs. In

these industries, it may not be unusual for you to work your entire career in a series of short-term job assignments. The definition of "employer" includes a person, institution, organization, or other entity to which the employer has delegated the performance of employment-related responsibilities. A hiring hall therefore is considered your employer if the hiring and job assignment functions have been delegated by an employer to the hiring hall. As your employer, a hiring hall has reemployment responsibilities to you. USERRA's anti-discrimination and anti-retaliation provisions also apply to the hiring hall.

§ 1002.39 Are States (and their political subdivisions), the District of Columbia, the Commonwealth of Puerto Rico, and United States territories, considered employers?

Yes. States and their political subdivisions, such as counties, parishes, cities, towns, villages, and school districts, are considered employers under USERRA. The District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, and territories of the United States, are also considered employers under the Act.

§ 1002.40 Does USERRA protect against discrimination in initial hiring decisions?

Yes. The Act's definition of employer includes a person, institution, organization, or other entity that has denied you initial employment in violation of USERRA's anti-discrimination provisions. An employer need not actually employ you to be your "employer" under the Act, if it has denied you initial employment on the basis of your membership, application for membership, performance of service, application for service, or obligation for service in the uniformed services. Similarly, the employer would be liable if it denied you initial employment on the basis of your action taken to enforce a protection afforded to any person under USERRA, your testimony or statement in connection with any USERRA proceeding, your assistance or other participation in a USERRA investigation, or your exercise of any other right provided by the Act. For example, if you have been denied initial employment because of your obligations as a member of the National Guard or Reserves, the company or entity denying you employment is an employer for purposes of USERRA. Similarly, if an entity withdraws an offer of employment to you because you are called upon to fulfill an obligation in the uniformed services, the entity withdrawing your offer of employment is an employer for purposes of USERRA.

§ 1002.41 Can I have rights under USERRA even though I hold a temporary, part-time, probationary, or seasonal employment position?

Your rights under USERRA are not diminished because you hold a temporary, part-time, probationary, or seasonal employment position. However, an employer is not required to reemploy you if the employment you left to serve in the uniformed services was for a brief, non-recurrent period and there is no reasonable expectation that your employment would have continued indefinitely or for a significant period. The employer bears the burden of proving this affirmative defense.

§ 1002.42 What rights do I have under USERRA if I am on layoff, on strike, or on a leave of absence?

(a) If you are laid off with recall rights, on strike, or on a leave of absence, you are an employee for purposes of USERRA. If you are on layoff and begin service in the uniformed services, or you are laid off while performing service, you may be entitled to reemployment on return if the employer would have recalled you to employment during the period of service. Similar principles apply if you are on strike or on a leave of absence from work when you begin a period of service in the uniformed services.

(b) If you are sent a recall notice during your period of service in the uniformed services and you cannot resume the position of employment because of the service, you still remain an employee for purposes of the Act. Therefore, if you are otherwise eligible, you are entitled to reemployment following the conclusion of your period of service even if you did not respond to the recall notice.

(c) If you are laid off before or during your service in the uniformed services, and your employer would not have recalled you during your period of service, you are not entitled to reemployment following your period of service simply because you are a covered employee. Your reemployment rights under USERRA cannot put you in a better position than if you had remained in your civilian employment position.

§ 1002.43 Can I have rights under USERRA even if I am an executive, managerial, or professional employee?

Yes. USERRA applies to all employees. There is no exclusion for executive, managerial, or professional employees.

§ 1002.44 Does USERRA cover me if I am an independent contractor?

(a) No. USERRA does not provide protections for you if you are an independent contractor.

(b) In deciding whether you are an independent contractor, the following factors need to be considered:

(1) The extent of the employer's right to control the manner in which your work is to be performed;

(2) Your opportunity for profit or loss that depends upon your managerial skill;

(3) Your investment in equipment or materials required for your tasks, or your employment of helpers;

(4) Whether the service you render requires a special skill;

(5) The degree of permanence of your working relationship; and,

(6) Whether the service you render is an integral part of the employer's business.

(c) No single one of these factors is controlling, but all are relevant to the determination whether you are an employee or an independent contractor.

Coverage of Service in the Uniformed Services

§ 1002.54 Are all military fitness examinations considered "service in the uniformed services?"

Yes. USERRA's definition of "service in the uniformed services" includes a period for which you are absent from a position of employment for the purpose of an examination to determine your fitness to perform duty in the uniformed services. Military fitness examinations can address more than physical or medical fitness, and include evaluations for mental, educational, and other types of fitness. Any examination to determine your fitness for service is covered, whether it is an initial or recurring examination. For example, a periodic medical examination required of a Reserve component member to determine fitness for continued service is covered.

§ 1002.55 Is all funeral honors duty considered "service in the uniformed services?"

(a) USERRA's definition of "service in the uniformed services" includes a period for which you are absent from employment for the purpose of performing authorized funeral honors duty under 10 U.S.C. 12503 (members of Reserve ordered to perform funeral honors duty) or 32 U.S.C. 115 (Member of Air or Army National Guard ordered to perform funeral honors duty).

(b) Funeral honors duty performed by persons who are not members of the uniformed services, such as members of

veterans' service organizations, is not "service in the uniformed services."

§ 1002.56 I am participating in a training program to provide emergency assistance in the event of a terrorist attack. Is that considered "service in the uniformed services?"

Under a provision of the Public Health Security and Bioterrorism Preparedness and Response Act of 2002, 42 U.S.C. 300hh 11(e)(3), "service in the uniformed services" includes service you perform as an intermittent disaster-response appointee upon activation of the National Disaster Medical System or when you participate in an authorized training program, even if you are not a member of the uniformed services.

§ 1002.57 Is all of my service as a member of the National Guard considered "service in the uniformed services?"

The National Guard has a dual status. It is a Reserve component of the Army, or, in the case of the Air National Guard, of the Air Force. Simultaneously, it is a State military force subject to call-up by the State Governor for duty not subject to Federal control, such as emergency duty in cases of floods or riots. National Guard members may perform service under either Federal or State authority, but only your Federal National Guard service is covered by USERRA.

(a) Your National Guard service under Federal authority is protected by USERRA. Service under Federal authority includes active duty you perform under Title 10 of the United States Code. Service under Federal authority also includes duty under Title 32 of the United States Code, such as active duty for training, inactive duty training, or full-time National Guard duty.

(b) Your National Guard service under authority of State law is not protected by USERRA. However, many States have laws protecting the civilian job rights of National Guard members who serve under State orders. Enforcement of those State laws is not covered by USERRA or the regulations in this part.

§ 1002.58 Is my service in the commissioned corps of the Public Health Service considered "service in the uniformed services?"

Yes. Your service in the commissioned corps of the Public Health Service (PHS) is "service in the uniformed services" under USERRA.

§ 1002.59 Are there any circumstances in which special categories of persons are considered to perform "service in the uniformed services?"

Yes. In time of war or national emergency the President has authority to designate any category of persons as

a "uniformed service" for purposes of USERRA. If the President exercises this authority, your service as a member of that category of persons would be "service in the uniformed services" under USERRA.

§ 1002.60 If I am a cadet or midshipman attending a service academy am I covered by USERRA?

Yes. Your service as a cadet or midshipman at a service academy is considered uniformed service for purposes of USERRA. There are four service academies: The United States Military Academy (West Point, New York), the United States Naval Academy (Annapolis, Maryland), the United States Air Force Academy (Colorado Springs, Colorado), and the United States Coast Guard Academy (New London, Connecticut).

§ 1002.61 If I am a member of the Reserve Officers Training Corps am I covered by USERRA?

No. Your membership in the Reserve Officers Training Corps (ROTC) or the Junior ROTC is not "service in the uniformed services." However, many Reserve and National Guard units use a college ROTC program as a means of qualifying enlisted personnel for commissioned officer status. In these cases, if you participate in ROTC training sessions as a member of a Reserve or National Guard unit performing active or inactive duty training, that training is considered "service in the uniformed services."

§ 1002.62 If I am a member of the Commissioned Corps of the National Oceanic and Atmospheric Administration, the Civil Air Patrol, or the Coast Guard Auxiliary am I covered by USERRA?

No. Although the Commissioned Corps of the National Oceanic and Atmospheric Administration (NOAA) is a "uniformed service" for some purposes, it is not included in USERRA's definition of this term. Service in the Civil Air Patrol and the Coast Guard Auxiliary similarly is not considered "service in the uniformed services" for purposes of USERRA. Consequently, service performed in the Commissioned Corps of the National Oceanic and Atmospheric Administration (NOAA), the Civil Air Patrol, and the Coast Guard Auxiliary is not protected by USERRA.

Absence From a Position of Employment Necessitated by Reason of Service in the Uniformed Services

§ 1002.73 Does service in the uniformed services have to be my sole reason for leaving my employment position in order to have USERRA reemployment rights?

No. If your absence from a position of employment is necessitated by your service in the uniformed services, and you otherwise meet the Act's eligibility requirements, you have reemployment rights under USERRA, even if you use your absence for other purposes as well. You are not required to leave the employment position for the sole purpose of performing service in the uniformed services. For example, if you are required to report to an out of State location for military training and spend your off-duty time during that assignment moonlighting as a security guard or visiting relatives who live in that State, you will not lose your reemployment rights simply because you used some of the time you were required to be absent from your job to do something other than attend the military training. Also, if you receive advance notification of a mobilization order, and leave your employment position in order to prepare for duty, but the mobilization is cancelled, you will not lose your reemployment rights.

§ 1002.74 Am I required to begin service in the uniformed services immediately after leaving my employment position in order to have USERRA reemployment rights?

No. At a minimum, you must have enough time after leaving your employment position to travel safely to the site where your service in the uniformed services is to be performed, and arrive fit to perform the service. Depending on the specific circumstances, additional time to rest, or to arrange your affairs and report to duty may be necessitated by reason of service in the uniformed services. The following examples help to explain the issue of the period of time between leaving civilian employment and the beginning of service in the uniformed services:

(a) If you perform a full overnight shift for your civilian employer and travel directly from the work site to perform a full day of military service, you would not be considered fit to perform the military service. An absence from that work shift is necessitated so that you can report for military service fit for duty.

(b) If you are ordered to perform an extended period of service in the uniformed services, you will require a reasonable period of time off from your civilian job to put your personal affairs

in order, before beginning the service. Taking such time off is also necessitated by the military service.

(c) If you leave a position of employment in order to enlist or otherwise perform service in the uniformed services and, through no fault of your own, the beginning date of the service is delayed, this delay does not terminate your reemployment rights.

Requirement of Notice

§ 1002.85 Am I required to give advance notice to my employer of my service in the uniformed services?

(a) Yes. You, or an appropriate officer of the uniformed service in which your service is to be performed, must notify your employer that you intend to leave your employment position to perform service in the uniformed services, with certain exceptions described below.

(b) The Department of Defense USERRA regulations at 32 CFR 104.3 provide that an "appropriate officer" can give notice on your behalf. An "appropriate officer" is a commissioned, warrant, or non-commissioned officer authorized to give such notice by the military service concerned.

(c) Your notice to your employer may be either verbal or written. The notice may be informal and does not need to follow any particular format. Although USERRA does not specify how far in advance your notice must be given, you should provide the notice as far in advance as is reasonable under the circumstances.

§ 1002.86 When am I excused from giving advance notice of my service in the uniformed services?

You are required to give advance notice of pending service unless giving such notice is prevented by military necessity, or is otherwise impossible or unreasonable under all the circumstances.

(a) Only a designated military authority can make a determination of "military necessity," and such a determination is not subject to judicial review. Guidelines for defining "military necessity" appear in regulations issued by the Department of Defense at 32 CFR 104.3. In general, these regulations cover situations where a mission, operation, exercise or requirement is classified, or could be compromised or otherwise adversely affected by public knowledge.

(b) It may be impossible or unreasonable for you to give advance notice under certain circumstances. Such circumstances may include the unavailability of your employer or the employer's representative, or a

requirement that you report for military service in an extremely short period of time.

§ 1002.87 Am I required to get permission from my employer before I leave to perform service in the uniformed services?

No. You are not required to ask for or get your employer's permission to leave to perform service in the uniformed services. You are only required to give your employer notice of pending service.

§ 1002.88 Am I required to tell my civilian employer that I intend to seek reemployment after completing my military service before I leave to perform service in the uniformed services?

No. When you leave your employment position to begin a period of service you are not required to tell your civilian employer that you intend to seek reemployment after completing your military service. Even if you tell your employer that you do not intend to seek reemployment after completing the military service, you do not forfeit your right to reemployment. You are not required to decide in advance of leaving your civilian employment position whether you will seek reemployment after completing military service.

Period of Service

§ 1002.99 Is there a limit on the total amount of service in the uniformed services that I may perform and still retain reemployment rights with my employer?

Yes. In general, you may perform service in the uniformed services for a cumulative period of up to five (5) years and retain reemployment rights with your employer. The exceptions to this rule are described below.

§ 1002.100 Does the five-year service limit include all absences from my employment position that are related to my service in the uniformed services?

No. The five-year period includes only the time you spend actually performing service in the uniformed services. A period of absence from employment before or after your performance of service in the uniformed services does not count against the five-year limit. For example, after you complete a period of service in the uniformed services, you are provided a certain amount of time, depending upon your length of service, to report back to work or submit an application for reemployment. The period between the completion of the period of service and the time you have to report back to work or seek reemployment does not count against the five-year limit.

§ 1002.101 Does the five-year service limit include periods of service that I performed when I worked for a previous employer?

No. You are entitled to a leave of absence for uniformed service for up to five years with each employer for whom you work. When you take a position with a new employer, the five-year period begins again regardless of how much service you performed while you worked in any previous employment relationship.

§ 1002.102 Does the five-year service limit include periods of service that I performed before USERRA was enacted?

Yes. USERRA provides reemployment rights to which you may become entitled beginning on or after December 12, 1994, but any uniformed service that you performed before December 12, 1994, that was counted against the service limitations of the previous law (the Veterans Reemployment Rights Act), also counts against USERRA's five-year limit.

§ 1002.103 Are there any types of service in the uniformed services that I can perform that do not count against USERRA's five-year service limit?

(a) USERRA creates the following exceptions to the five-year limit on service in the uniformed services:

(1) Service that is required beyond five years to complete your initial period of obligated service. Some military specialties require you to serve more than five years because of the amount of time or expense involved in training. If you work in one of those specialties you have reemployment rights when your initial period of obligated service is completed;

(2) If you were unable to obtain orders releasing you from service in the uniformed services before the expiration of the five-year period, and the inability was not your fault;

(3)(i) Service that you performed to fulfill periodic National Guard and Reserve training requirements as prescribed by 10 U.S.C. 10147 and 32 U.S.C. 502(a) and 503; and,

(ii) Service that you performed to fulfill additional training requirements determined and certified by a proper military authority as necessary for your professional development, or to complete your skill training or retraining;

(4) Service that you performed in a uniformed service if you were ordered to or retained on active duty under:

(i) 10 U.S.C. 688 (involuntary active duty by a military retiree);

(ii) 10 U.S.C. 12301(a) (involuntary active duty in wartime);

(iii) 10 U.S.C. 12301(g) (retention on active duty while in captive status);

(iv) 10 U.S.C. 12302 (involuntary active duty during a national emergency for up to 24 months);

(v) 10 U.S.C. 12304 (involuntary active duty for an operational mission for up to 270 days);

(vi) 10 U.S.C. 12305 (involuntary retention on active duty of a critical person during time of crisis or other specific conditions);

(vii) 14 U.S.C. 331 (involuntary active duty by retired Coast Guard officer);

(viii) 14 U.S.C. 332 (voluntary active duty by retired Coast Guard officer);

(ix) 14 U.S.C. 359 (involuntary active duty by retired Coast Guard enlisted member);

(x) 14 U.S.C. 360 (voluntary active duty by retired Coast Guard enlisted member);

(xi) 14 U.S.C. 367 (involuntary retention of Coast Guard enlisted member on active duty); and

(xii) 14 U.S.C. 712 (involuntary active duty by Coast Guard Reserve member for natural or man-made disasters).

(5) Service that you performed in a uniformed service if you were ordered to or retained on active duty (other than for training) under any provision of law because of a war or national emergency declared by the President or the Congress, as determined by a proper military authority;

(6) Service that you performed in a uniformed service if you were ordered to active duty (other than for training) in support of an operational mission for which personnel have been ordered to active duty under 10 U.S.C. 12304, as determined by a proper military authority;

(7) Service that you performed in a uniformed service if you were ordered to active duty in support of a critical mission or requirement of the uniformed services as determined by a proper military authority; and,

(8) Service that you performed as a member of the National Guard if you were called to respond to an invasion, danger of invasion, rebellion, danger of rebellion, insurrection, or the inability of the President with regular forces to execute the laws of the United States.

(b) Service that you performed to mitigate economic harm where your employer is in violation of its employment or reemployment obligations to you.

§ 1002.104 Am I required to accommodate my employer's needs as to the timing, frequency or duration of my service?

No. You are not required to accommodate your employer's interests or concerns regarding the timing, frequency, or duration of your uniformed service. Your employer

cannot refuse to reemploy you because it believes that the timing, frequency or duration of your service is unreasonable. However, your employer is permitted to bring its concerns over the timing, frequency, or duration of your service to the attention of the appropriate military authority. Regulations issued by the Department of Defense at 32 CFR 104.4 direct military authorities to provide assistance to your employer in addressing these types of employment issues. The military authorities are required to consider requests from employers of National Guard and Reserve members to adjust your scheduled absence from civilian employment to perform service.

Application for Reemployment

§ 1002.115 Am I required to report to or submit a timely application for reemployment to my pre-service employer when I complete my period of service in the uniformed services?

Yes. When you complete your service in the uniformed services, you must notify your pre-service employer of your intent to return to your employment position by either reporting to work or submitting a timely application for reemployment. Whether you are required to report to work or submit a timely application for reemployment depends upon the length of your service, as follows:

(a) *Period of service less than 31 days or for a period of any length for the purpose of a fitness examination.* If your period of service in the uniformed services was less than 31 days, or you were absent from a position of employment for a period of any length for the purpose of an examination to determine your fitness to perform service, you must report back to your employer not later than the beginning of the first full regularly-scheduled work period on the first full calendar day following the completion of the period of service, and the expiration of eight hours after a period allowing for your safe transportation from the place of that service to your residence. For example, if you complete a period of service and travel home, arriving at ten o'clock in the evening, you cannot be required to report to your employer until the beginning of the next full regularly-scheduled work period that begins at least eight hours after you safely arrive home, *i.e.*, no earlier than six o'clock the next morning. If it is impossible or unreasonable for you to report within the above time period through no fault of your own, you must report to your employer as soon as possible after the expiration of the eight-hour period.

(b) *Period of service more than 30 days but less than 181 days.* If your period of service in the uniformed services was for more than 30 days but less than 181 days you must submit an application for reemployment (written or verbal) with your employer not later than 14 days after the completion of your service. If it is impossible or unreasonable for you to apply within 14 days through no fault of your own, you must submit the application not later than the next full calendar day after it becomes possible to do so.

(c) *Period of service more than 180 days.* If your period of service in the uniformed services was for more than 180 days you must submit an application for reemployment (written or verbal) with your employer not later than 90 days after the completion of your service.

§ 1002.116 Is my time period for reporting back to my employer extended if I am hospitalized for, or convalescing from, an illness or injury incurred in, or aggravated during, the performance of service?

Yes. If you are hospitalized for, or convalescing from, an illness or injury incurred in, or aggravated during, your performance of service, you must report to or submit an application for reemployment to your employer at the end of the period necessary for you to recover from the illness or injury. This period may not exceed two years from the date of the completion of your service, except that it must be extended by the minimum time necessary to accommodate circumstances beyond your control that make reporting within the period impossible or unreasonable.

§ 1002.117 Are there any consequences if I fail to report for or submit a timely application for reemployment?

(a) If you fail to timely report for or apply for reemployment you do not automatically forfeit your entitlement to USERRA's reemployment and other rights and benefits. Rather, you become subject to the conduct rules, established policy, and general practices of your employer pertaining to your absence from scheduled work.

(b) If reporting or submitting an employment application to your employer is impossible or unreasonable through no fault of your own, you may report to your employer as soon as possible (in the case of a period of service less than 31 days) or submit an application for reemployment to your employer by the next full calendar day after it becomes possible to do so (in the case of a period of service from 31 to 180 days), and you will be considered to have timely reported or applied for reemployment.

§ 1002.118 Is my application for reemployment required to be in any particular form?

Your application for reemployment need not follow any particular format. You may apply orally or in writing. Your application should indicate that you are a former employee returning from service in the uniformed services and that you seek reemployment with your pre-service employer. You are permitted but not required to identify a particular reemployment position in which you are interested.

§ 1002.119 To whom must I submit my application for reemployment?

Your application must be submitted to your pre-service employer or to an agent or representative of your employer who has apparent responsibility for receiving employment applications. Depending upon the circumstances, such a person could be a personnel or human resources officer, or a first-line supervisor. If there has been a change in ownership of your employer, your application should be submitted to the employer's successor-in-interest.

§ 1002.120 If I seek or obtain employment with an employer other than my pre-service employer before the end of the period within which my reemployment application must be filed, will that jeopardize my reemployment rights with my pre-service employer?

No, you have reemployment rights with your pre-service employer provided that you make a timely reemployment application to that employer. You may seek or obtain employment with an employer other than your pre-service employer during the period of time within which your reemployment application must be made, without giving up your reemployment rights with your pre-service employer.

§ 1002.121 Am I required to submit documentation to my employer in connection with my application for reemployment?

Yes, if the period of service exceeded 30 days. If you submit an application for reemployment after a period of service of more than 30 days you must, upon the request of your employer, provide documentation to establish that:

- (a) Your reemployment application is timely;
- (b) You have not exceeded the five-year limit on the duration of service (subject to the exceptions listed at § 1002.103); and,
- (c) Your separation or dismissal from service was not disqualifying.

§ 1002.122 Is my employer required to reemploy me if documentation establishing my eligibility does not exist or is not readily available?

Yes. Your employer is not permitted to delay or deny your reemployment by demanding documentation that does not exist or is not readily available. You are not liable for administrative delays in the issuance of military documentation. If you are reemployed after an absence from employment for more than 90 days your employer may require that you submit the documentation establishing your entitlement to reemployment before treating you as not having had a break in service for pension purposes. If your documentation is received after reemployment and it shows that you are not entitled to reemployment, your employer may terminate your employment and any rights or benefits that you may have been granted.

§ 1002.123 What documents satisfy the requirement that I establish my eligibility for reemployment after a period of service of more than thirty days?

- (a) Documents that satisfy the requirements of USERRA include the following:
 - (1) DD (Department of Defense) 214 Certificate of Release or Discharge from Active Duty;
 - (2) Copy of duty orders prepared by the facility where the orders were fulfilled carrying an endorsement indicating completion of the described service;
 - (3) Letter from the commanding officer of a Personnel Support Activity or someone of comparable authority;
 - (4) Certificate of completion from military training school;
 - (5) Discharge certificate showing character of service; and,
 - (6) Copy of extracts from payroll documents showing periods of service.
- (b) The types of documents that are necessary to establish your eligibility or reemployment will vary from case to case. Not all of these documents are available or necessary in every instance to establish your reemployment eligibility.

Character of Service**§ 1002.134 What type of discharge or separation from service is required for me to be entitled to reemployment under USERRA?**

USERRA does not require any particular form of discharge or separation from service. However, even if you are otherwise eligible for reemployment you will be disqualified if your characterization of service falls within one of four categories. USERRA requires that you not have received one of these types of discharge.

§ 1002.135 What types of discharge or separation from military service will make me ineligible for reemployment under USERRA?

Your reemployment rights are terminated if you are:

- (a) Separated from uniformed service with a dishonorable or bad conduct discharge;
- (b) Separated from uniformed service under other than honorable conditions, as characterized by regulations of the uniformed service;
- (c) A commissioned officer dismissed as permitted under 10 U.S.C. 1161(a) by sentence of a general court-martial; in commutation of a sentence of a general court-martial; or, in time of war, by order of the President; or,
- (d) A commissioned officer dropped from the rolls under 10 U.S.C. 1161(b) due to absence without authority for at least three months; separation by reason of a sentence to confinement adjudged by a court-martial; or, a sentence to confinement in a Federal or State penitentiary or correctional institution.

§ 1002.136 Who determines the characterization of my service?

The branch of service in which you perform your tour of duty determines your characterization of service.

§ 1002.137 If I receive a disqualifying discharge or release from uniformed service and it is later upgraded, will my right to reemployment be restored?

Yes. A military review board has the authority to prospectively or retroactively upgrade your disqualifying discharge or release. A retroactive upgrade would restore your reemployment rights providing you otherwise meet the Act's eligibility criteria.

§ 1002.138 If I receive a retroactive upgrade in my characterization of service will that entitle me to claim back wages and benefits lost as of my date of separation from service?

No. A retroactive upgrade allows you to obtain reinstatement with your former employer, provided you otherwise meet the Act's eligibility criteria. Back pay and other benefits such as pension plan credits attributable to the time period between your discharge and the retroactive upgrade are not required to be restored by your employer in this situation.

Employer Statutory Defenses

§ 1002.139 Are there any circumstances in which my pre-service employer is excused from its obligation to reemploy me following a period of military service? What statutory defenses are available to the employer in an action or proceeding for reemployment benefits?

(a) Even if you are otherwise eligible for reemployment benefits, your employer is not required to reemploy you if it establishes that its circumstances have so changed as to make your reemployment impossible or unreasonable. For example, an employer may be excused from reemploying you where there has been an intervening reduction in force that would have included you. Your employer may not, however, refuse to reemploy you on the basis that an employee was hired to fill your position during your absence, even if your reemployment might require the termination of that replacement employee;

(b) Even if you are otherwise eligible for reemployment benefits, your employer is not required to reemploy you if it establishes that assisting you in becoming qualified for reemployment would impose an undue hardship, as defined in § 1002.5(l) and discussed in § 1002.198, on the employer; or,

(c) Even if you are otherwise eligible for reemployment benefits, your employer is not required to reemploy you if it establishes that the employment you left in order to perform service in the uniformed services was for a brief, non-recurrent period and there was no reasonable expectation that the employment would continue indefinitely or for a significant period.

Subpart D—Rights, Benefits, and Obligations of Persons Absent From Employment Due to Service in the Uniformed Services

Furlough and Leave of Absence

§ 1002.149 What is my status with my civilian employer when I am performing service in the uniformed services?

During your period of service in the uniformed services, you are deemed to be on furlough or leave of absence from your civilian employer. In this status you are entitled to the non-seniority rights and benefits generally provided by the employer to other employees with similar seniority, status, and pay that are on furlough or leave of absence. Your entitlement to these non-seniority rights and benefits is not dependent on how your employer characterizes your status during a period of service. For example, if your employer characterizes you as “terminated” during your period

of military service, this characterization cannot be used to avoid USERRA’s requirement that you be deemed on furlough or leave of absence, and therefore entitled to the non-seniority rights and benefits generally provided to employees on furlough or leave of absence.

§ 1002.150 What non-seniority rights and benefits am I entitled to during my period of service?

(a) The non-seniority rights and benefits to which you are entitled during your service are those that your employer provides to similarly situated employees by an employment contract, agreement, policy, practice, or plan in effect at your workplace. These rights and benefits include those in effect at the beginning of your employment and those established after your employment began. They also include those rights and benefits that become effective during your period of service and that are provided to similarly situated employees on furlough or leave of absence.

(b) If the non-seniority benefits to which employees on furlough or leave of absence are entitled vary according to the type of leave, you must be given the most favorable treatment accorded to any comparable form of leave when you perform service in the uniformed services.

§ 1002.151 If my employer provides full or partial pay to me while I am on military leave is it required to also provide me with the non-seniority rights and benefits ordinarily granted to similarly situated employees on furlough or leave of absence?

Yes. If your employer provides additional benefits such as full or partial pay when you perform service it is not excused from providing other rights and benefits to which you are entitled under the Act.

§ 1002.152 If my employment is interrupted by a period of service in the uniformed services, are there any circumstances under which I am not entitled to the non-seniority rights and benefits ordinarily granted to similarly situated employees on furlough or leave of absence?

If your employment is interrupted by a period of service in the uniformed services and you knowingly provide written notice of intent not to return to your position of employment after service in the uniformed services you are not entitled to those non-seniority rights and benefits. Your written notice does not waive your entitlement to any other rights to which you are entitled under the Act, including your right to reemployment after your service.

§ 1002.153 If my employment is interrupted by a period of service in the uniformed services am I permitted upon request to use my accrued vacation, annual or similar leave with pay during the service? Can my employer require me to use my accrued leave during my period of service?

(a) If your employment is interrupted by a period of service you must be permitted upon request to use any accrued vacation, annual, or similar leave with pay during the period of service, in order to continue your civilian pay. However, you are not entitled to use sick leave that you accrued with your civilian employer during a period of service in the uniformed services. Sick leave is not comparable to annual or vacation leave; it is generally intended to provide income when you or a family member is ill and you are unable to work.

(b) Your employer may not require you to use accrued vacation, annual, or similar leave during a period of service in the uniformed services.

Health Plan Coverage

§ 1002.163 What types of health plans are covered by USERRA?

(a) USERRA defines a health plan to include an insurance policy or contract, medical or hospital service agreement, membership or subscription contract, or arrangement under which your health services are provided or the expenses of those services are paid.

(b) USERRA covers group health plans as defined in the Employee Retirement Income Security Act of 1974 (ERISA) at 29 U.S.C. 1191b(a). USERRA applies to group health plans that are subject to ERISA, and plans that are not subject to ERISA, such as those sponsored by State or local governments or religious organizations for their employees.

(c) USERRA covers multiemployer plans maintained pursuant to one or more collective bargaining agreements between employers and employee organizations. USERRA applies to multiemployer plans as they are defined in ERISA at 29 U.S.C. 1002(37). USERRA contains provisions that apply specifically to multiemployer plans in certain situations.

§ 1002.164 What health plan coverage must my employer provide to me under USERRA?

If you have coverage under a health plan in connection with your employment, the plan must permit you to elect to continue the coverage for a certain period of time as described below:

(a) When you are performing service in the uniformed services you are

entitled to continuing coverage for you (and your dependents if your plan offers dependent coverage) under a health plan provided in connection with your employment. The plan must allow you to elect to continue your coverage for a period of time that is the lesser of:

(1) The 18-month period beginning on the date on which your absence for the purpose of performing service begins; or,

(2) The period beginning on the date on which your absence for the purpose of performing service begins, and ending on the date on which you fail to return from your service or apply for a position of employment as provided under §§ 1002.115 through 1002.123.

(b) USERRA does not require your employer to establish a health plan if there is no health plan coverage in connection with your employment, or, where there is a plan, to provide any particular type of coverage.

(c) USERRA does not require your employer to permit you to initiate new health plan coverage at the beginning of a period of service if you did not previously have such coverage.

§ 1002.165 How do I elect continuing health plan coverage?

USERRA does not specify requirements for electing continuing coverage. Health plan administrators may develop reasonable requirements addressing how continuing coverage may be elected, consistent with the terms of the plan and the Act's exceptions to the requirement that you give advance notice of your service in the uniformed services. For example, you cannot be precluded from electing continuing health plan coverage under circumstances where it is impossible or unreasonable for you to make a timely election of coverage.

§ 1002.166 How much do I have to pay in order to continue my health plan coverage?

(a) If you perform service in the military for fewer than 31 days, you cannot be required to pay more than the regular employee share, if any, for health plan coverage.

(b) If you perform service for 31 or more days you may be required to pay no more than 102% of the full premium under the plan, which represents your employer's share plus your share, plus 2% for administrative costs.

(c) USERRA does not specify requirements for methods of paying for continuing coverage. Health plan administrators may develop reasonable procedures for payment, consistent with the terms of the plan.

§ 1002.167 If my coverage was terminated at the beginning of or during my service, does my coverage have to be reinstated upon my reemployment?

(a) If health plan coverage for you or a dependent was terminated by reason of your service in the uniformed services, that coverage must be reinstated upon reemployment. An exclusion or waiting period may not be imposed in connection with the reinstatement of your coverage upon reemployment, if an exclusion or waiting period would not have been imposed had your coverage not been terminated by reason of such service.

(b) Reinstatement procedures that apply to multiemployer plans are discussed in § 1002.169.

(c) USERRA permits a health plan to impose an exclusion or waiting period as to illnesses or injuries determined by the Secretary of Veterans Affairs to have been incurred in, or aggravated during, performance of service in the uniformed services. The determination that your illness or injury was incurred in, or aggravated during, the performance of service may only be made by the Secretary of Veterans Affairs or his or her representative. Other coverage, for injuries or illnesses that are not service-related (or for your dependents, if you have dependent coverage), must be reinstated.

§ 1002.168 Can I elect to delay reinstatement of my health plan coverage until a date after the date I am reemployed?

USERRA requires your employer to reinstate your health plan coverage upon request at reemployment. USERRA permits but does not require your employer to allow you to delay reinstatement of health plan coverage until a date that is later than the date of your reemployment.

§ 1002.169 Which employer is responsible for providing me with continuing health plan coverage if I am enrolled under a multiemployer plan?

Responsibility under a multiemployer plan for employer contributions and benefits in connection with continuing coverage that you elect must be allocated either as the plan sponsor provides, or, if the sponsor does not provide, to your last employer before your service. If your last employer is no longer functional, liability for continuing coverage is allocated to the health plan.

Subpart E—Reemployment Rights and Benefits

Prompt Reemployment

§ 1002.180 When am I entitled to be reemployed by my civilian employer?

Your employer must promptly reemploy you when you return from a period of service if you meet the Act's eligibility criteria as described in subpart C of this part.

§ 1002.181 How is "prompt reemployment" defined?

"Prompt reemployment" means as soon as practicable under the circumstances of your case. Absent unusual circumstances, your reemployment must occur within two weeks of your application for reemployment. For example, prompt reinstatement after your weekend National Guard duty generally means the next regularly scheduled working day. On the other hand, prompt reinstatement following several years of active duty may require more time, because your employer may have to reassign or give notice to another employee who occupied your position.

Reemployment Position

§ 1002.191 What position am I entitled to upon my reemployment?

As a general rule, you are entitled to reemployment in the job position that you would have attained with reasonable certainty if not for your absence due to military service. This position is known as the escalator position. The principle behind the escalator position is that if not for your period of military service, you could have been promoted (or, alternatively, demoted, transferred, or laid off) due to intervening events. The escalator principle requires that you be reemployed in a position that reflects with reasonable certainty the pay, benefits, seniority, and other job perquisites, that you would have attained if not for the period of service. Depending upon the specific circumstances, your employer may have the option, or be required, to reemploy you in a position other than the escalator position.

§ 1002.192 How is my specific reemployment position determined?

In all cases, the starting point for determining your proper reemployment position is the escalator position, which is the job position that you would have attained if your continuous employment had not been interrupted due to military service. Once this position is determined, your employer may have to consider several factors before

determining your appropriate reemployment position in any particular case. Such factors may include your length of service, qualifications, and disability, if any. Your reemployment position may be either the escalator position; the pre-service position; a position comparable to the escalator or pre-service position; or, the nearest approximation to one of these positions.

§ 1002.193 Does my reemployment position include elements such as my seniority, status, and rate of pay?

Yes. Your reemployment position includes the seniority, status, and rate of pay that you would ordinarily have attained in that position given your job history, including your prospects for future earnings and advancement. Your employer must determine your seniority rights, status, and rate of pay as though you had been continuously employed during the period of service. The seniority rights, status, and pay of an employment position include those established (or changed) by a collective bargaining agreement, employer policy, or employment practice. The sources of seniority rights, status, and pay include agreements, policies, and practices in effect at the beginning of your service, and any changes that may have occurred during your period of service. In particular, your status in the reemployment position could include opportunities for advancement, general working conditions, job location, shift assignment, rank, responsibility, and geographical location. If an opportunity for promotion, or eligibility for promotion, that you missed during service is based on a skills test or examination, then your employer should give you a reasonable amount of time to adjust to your employment position and then give you the skills test or examination. If you are successful on the makeup exam and, based on the results of that exam, there is a reasonable certainty that you would have been promoted, or made eligible for promotion, during the time that you served in the military, then your promotion or eligibility for promotion must be made effective as of the date it would have occurred had your employment not been interrupted by military service.

§ 1002.194 Can the application of the escalator principle result in adverse consequences when I am reemployed?

Yes. The Act does not prohibit lawful adverse job consequences that result from your restoration on the seniority ladder. Depending on your circumstances, your seniority rank may cause you to be reemployed in a higher

or lower position, laid off, or even terminated. For example, if your seniority would have resulted in your being laid off during the period of service, and the layoff continued after the date of your reemployment, your reemployment would reinstate you to layoff status. Similarly, the status of your reemployment position requires the employer to assess what would have happened to such factors as your opportunities for advancement, working conditions, job location, shift assignment, rank, responsibility, and geographical location, if you had remained continuously employed. Your reemployment position may involve transfer to another shift or location, more or less strenuous working conditions, or changed opportunities for advancement, depending upon the application of the escalator principle.

§ 1002.195 What other factors can determine my reemployment position?

Once your escalator position is determined, other factors may allow, or require, your employer to reemploy you in a position other than the escalator position. These factors, which are explained in §§ 1002.196 through 1002.199 below, are:

- (a) The length of your most recent period of military service;
- (b) Your qualifications; and,
- (c) Whether you have a disability incurred or aggravated during your military service.

§ 1002.196 What is my reemployment position if my period of service was less than 91 days?

Following a period of service in the uniformed services of less than 91 days, you must be reemployed according to the following priority:

- (a) You must be reemployed in the escalator position. You must be qualified to perform the duties of this position. Your employer must make reasonable efforts to help you become qualified to perform the duties of this position.
- (b) If you are not qualified to perform the duties of the escalator position after reasonable efforts by your employer, you must be reemployed in the position in which you were employed on the date that your period of service began. You must be qualified to perform the duties of this position. Your employer must make reasonable efforts to help you become qualified to perform the duties of this position.
- (c) If you are not qualified to perform the duties of the escalator position or the pre-service position, after reasonable efforts by your employer, you must be reemployed in any other position that is

the nearest approximation first to the escalator position and then to the pre-service position. You must be qualified to perform the duties of this position. The employer must make reasonable efforts to help you become qualified to perform the duties of this position.

§ 1002.197 What is my reemployment position if my period of service in the uniformed services was more than 90 days?

Following a period of service of more than 90 days, you must be reemployed according to the following priority:

- (a) You must be reemployed in the escalator position or a position of like seniority, status, and pay. You must be qualified to perform the duties of this position. Your employer must make reasonable efforts to help you become qualified to perform the duties of this position.
- (b) If you are not qualified to perform the duties of the escalator position or a like position after reasonable efforts by your employer, you must be reemployed in the position in which you were employed on the date that your period of service began or in a position of like seniority, status, and pay. You must be qualified to perform the duties of this position. Your employer must make reasonable efforts to help you become qualified to perform the duties of this position.
- (c) If you are not qualified to perform the duties of the escalator position, the pre-service position, or a like position, after reasonable efforts by your employer, you must be reemployed in any other position that is the nearest approximation first to the escalator position and then to the pre-service position. You must be qualified to perform the duties of this position. Your employer must make reasonable efforts to help you become qualified to perform the duties of this position.

(c) If you are not qualified to perform the duties of the escalator position, the pre-service position, or a like position, after reasonable efforts by your employer, you must be reemployed in any other position that is the nearest approximation first to the escalator position and then to the pre-service position. You must be qualified to perform the duties of this position. Your employer must make reasonable efforts to help you become qualified to perform the duties of this position.

§ 1002.198 What efforts must my employer make to help me become qualified for the reemployment position?

You must be qualified for your reemployment position. Your employer must make reasonable efforts to help you become qualified to perform the duties of this position. Your employer is not required to reemploy you on your return from service if you cannot, after reasonable efforts by your employer, qualify for the appropriate reemployment position.

- (a) (1) "Qualified" means that you have the ability to perform the essential tasks of the position. Your inability to perform one or more non-essential tasks of a position does not make you unqualified.
- (2) Whether a task is essential depends on several factors, including:

(j) Whether you regularly perform the task in the job position. It is not necessary or sufficient that the task is labeled "essential," or is part of your job description. If you do not regularly perform the task in your position, it is generally not essential;

(ii) Whether your position exists solely to perform the task;

(iii) Whether a significant portion of your workday or workweek is spent performing the task;

(iv) Whether the result of your failing to correctly perform the task would create a dangerous workplace situation or cause a catastrophe;

(v) Whether the task is highly specialized, and you were hired specifically to perform the task; and,

(vi) Whether your failure to perform the task would place your employer in violation of a law or regulation.

(b) Only after your employer makes reasonable efforts, as defined in § 1002.5(g) and § 1002.5(l), may it determine that you are not qualified for the reemployment position. These reasonable efforts must be made at no cost to you.

§ 1002.199 What priority must my employer follow if two or more returning employees are entitled to reemployment in the same position?

If two or more persons are entitled to reemployment in the same position and more than one person has reported or applied for employment in that position, the employee who first left the position for military service has the first priority on reemployment in that position. The remaining employee (or employees) is entitled to be reemployed in a position similar to that in which the person would have been reemployed according to the rules that normally determine a person's reemployment position, as set out in §§ 1002.196 and 1002.197.

Seniority Rights and Benefits

§ 1002.210 What seniority rights do I have when I am reemployed following a period of uniformed service?

You are entitled to the seniority and seniority-based rights and benefits that you had on the date your service began, plus any seniority and seniority-based rights and benefits that you would have attained if you had remained continuously employed during your period of service. In determining your entitlement to seniority and seniority-based rights and benefits, your period of uniformed service is not considered a break in employment. The rights and benefits protected by USERRA upon reemployment include those provided by the employer and those required by

statute. For example, a reemployed service member would be eligible for leave under the Family and Medical Leave Act of 1993, 29 U.S.C. 2601–2654 (FMLA), if the number of months and the number of hours of work for which the service member was employed by the civilian employer, together with the number of months and the number of hours of work for which the service member would have been employed by the civilian employer during the period of military service, meet FMLA's eligibility requirements.

§ 1002.211 Does USERRA require my employer to use a seniority system?

No. USERRA does not require your employer to adopt a formal seniority system. USERRA defines seniority as longevity in employment together with any employment benefits that accrue with, or are determined by, longevity in employment. In the absence of a formal seniority system, such as one established through collective bargaining, USERRA looks to the custom and practice in your place of employment to determine your entitlement to any employment benefits that accrue with, or are determined by, longevity in employment.

§ 1002.212 How do I know whether a particular right or benefit is a seniority-based right or benefit?

A seniority-based right or benefit is one that accrues with, or is determined by, longevity in employment. Generally, whether a right or benefit is seniority-based depends on three factors:

(a) Whether the right or benefit is a reward for your length of service rather than a form of short-term compensation for work performed;

(b) Whether it is reasonably certain that you would have received the right or benefit if you had remained continuously employed during your period of service; and,

(c) Whether it is your employer's actual custom or practice to provide or withhold the right or benefit as a reward for your length of service. Provisions of an employment contract or policies in your employee handbook are not controlling if your employer's actual custom or practice is different from what is written in the contract or handbook.

§ 1002.213 How can I demonstrate a reasonable certainty that I would have received the seniority right or benefit if I had remained continuously employed during my period of service?

A reasonable certainty is a high probability that you would have received the seniority or seniority-based right or benefit if you had been

continuously employed. You do not have to establish that you would have received the benefit as an absolute certainty. You can demonstrate a reasonable certainty that you would have received the seniority right or benefit by showing that other employees with seniority similar to that which you would have had if you had remained continuously employed received the right or benefit. Your employer cannot withhold the right or benefit based on an assumption that a series of unlikely events could have prevented you from gaining the right or benefit.

§ 1002.214 What happens if my employer establishes or eliminates seniority and seniority-based rights and benefits after I begin my period of service?

(a) When you are reemployed, you are entitled to seniority and seniority-based rights and benefits that are established or become available after you entered service, even if those rights and benefits were not previously available. Those seniority-based rights and benefits must be made available upon your reemployment if you otherwise qualify for the right or benefit.

(b) If your employer eliminates seniority or a seniority-based right or benefit after you begin your period of service, you are entitled to be treated as if you had been continuously employed. For example, if an employer that previously made an assignment available based on seniority determines while you are absent to make the assignment available only to employees who had previously held certain other assignments or completed certain training, you may be entitled to the assignment if you can show with reasonable certainty that you would have acquired the necessary experience or training had you been continuously employed. In this situation, the employer is obligated to make reasonable efforts to help you become qualified for the position.

Disabled Employees

§ 1002.225 Am I entitled to any specific reemployment benefits if I have a disability that was incurred in, or aggravated during, my period of service?

Yes. If you have a disability incurred in, or aggravated during, your period of service in the uniformed services, your employer must make reasonable efforts to accommodate your disability and to help you become qualified to perform the duties of your reemployment position. If you are not qualified for reemployment in the escalator position because of your disability after reasonable efforts by the employer to accommodate your disability and to

help you to become qualified, you must be reemployed in a position according to the following priority. Your employer must make reasonable efforts to accommodate your disability and to help you to become qualified to perform the duties of one of these positions:

(a) A position that is equivalent in seniority, status, and pay to the escalator position; or,

(b) A position that is the nearest approximation to the equivalent position, consistent with the circumstances of your case, in terms of seniority, status, and pay.

§ 1002.226 If I have a disability that was incurred in, or aggravated during, my period of service, what efforts must my employer make to help me become qualified for my reemployment position?

(a) USERRA requires that you be qualified for your reemployment position regardless of your disability. Your employer must make reasonable efforts to help you to become qualified to perform the duties of this position. Your employer is not required to reemploy you on your return from service if you cannot, after reasonable efforts by your employer, qualify for the appropriate reemployment position.

(b) "Qualified" has the same meaning here as in § 1002.198.

Rate of Pay

§ 1002.236 How is my rate of pay determined when I return from a period of service?

Your rate of pay is determined by applying the same escalator principles that are used to determine your reemployment position, as follows:

(a) If you are reemployed in the escalator position, your employer must compensate you at the rate of pay associated with the escalator position. Your rate of pay must be determined by taking into account any pay increases, differentials, step increases, merit increases, or periodic increases that you would have attained with reasonable certainty had you remained continuously employed during your period of service. For example, if you missed a merit pay increase while you were performing service, but you qualified for previous merit pay increases, then your rate of pay should include the merit pay increase that you missed. If the merit pay increase that you missed during service is based on a skills test or examination, then your employer should give you a reasonable amount of time to adjust to your reemployment position and then give you the skills test or examination. The escalator principle also applies in the event a pay reduction occurred in the

reemployment position during your period of service. Any pay adjustment must be made effective as of the date it would have occurred had your employment not been interrupted by military service.

(b) If you are reemployed in the pre-service position or another position, your employer must compensate you at the rate of pay associated with the position in which you are reemployed. As with the escalator position, your rate of pay must be determined by taking into account any pay increases, differentials, step increases, merit increases, or periodic increases that you would have attained with reasonable certainty had you remained continuously employed during your period of service.

Protection Against Discharge

§ 1002.247 Does USERRA provide me with protection against discharge?

Yes. If your most recent period of service in the uniformed services was more than 30 days you must not be discharged except for cause—

(a) For 180 days after your date of reemployment if your most recent period of uniformed service was more than 30 days but less than 181 days; or,

(b) For one year after the date of reemployment if your most recent period of uniformed service was more than 180 days.

§ 1002.248 What constitutes cause for discharge under USERRA?

You may be discharged for cause based either on your conduct or, in some circumstances, on the application of the escalator principle.

(a) In a discharge action based on your conduct, your employer bears the burden of proving that it is reasonable to discharge you for the conduct in question, and that you had notice that such conduct would constitute cause for discharge.

(b) If the application of the escalator principle after your reemployment results in your job position being eliminated, or in your being placed on layoff status, either of these situations would constitute cause for purposes of USERRA. Your employer bears the burden of proving that your job would have been eliminated or that you would have been laid off.

Pension Plan Benefits

§ 1002.259 How does USERRA protect my pension benefits?

On reemployment you are treated as not having a break in service with your employer or employers maintaining a pension plan, for purposes of participation, vesting and accrual of

benefits, by reason of your period of service in the uniformed services.

(a) Depending on the length of your period of service, you are entitled to take from one to ninety days following your service before reporting back to work or applying for employment (See § 1002.115). This period of time must be treated as continuous service with your employer for purposes of determining participation, vesting and accrual of pension benefits under the plan.

(b) If you are hospitalized for, or convalescing from, an illness or injury incurred in, or aggravated during, your service you are entitled to report to or submit an application for reemployment at the end of the time period necessary for you to recover from the illness or injury. This period, which may not exceed two years from the date you completed your service, except in circumstances beyond your control, must be treated as continuous service with your employer for purposes of determining the participation, vesting and accrual of pension benefits under the plan.

§ 1002.260 What pension benefit plans are covered under USERRA?

(a) The Employee Retirement Income Security Act of 1974 (ERISA) defines an employee pension benefit plan as a plan that provides retirement income to employees, or defers employee income to a period extending to or beyond the termination of employment. Any such plan maintained by your employer or employers is covered under USERRA. USERRA also covers certain pension plans not covered by ERISA, such as those sponsored by a State, government entity, or church for its employees.

(b) USERRA does not cover pension benefits under the Federal Thrift Savings Plan; those benefits are covered under 5 U.S.C. 8432b.

§ 1002.261 Who is responsible for funding any plan obligation to provide me with pension benefits?

With the exception of multiemployer plans, which have separate rules discussed below, your employer is liable to the pension benefit plan to fund any obligation of the plan to provide benefits that are attributable to your period of service. In the case of a defined contribution plan, once you are reemployed, your employer must allocate the amount of its make-up contribution for you, if any, your make-up employee contributions, if any, your elective deferrals, if any, and the repayment of distributions from the plan, if any, in the same manner and to the same extent that it allocates the amounts for other employees during the

period of service. In the case of a defined benefit plan, your accrued benefit will be increased for your period of service once you are reemployed and, if applicable, have repaid any amounts previously paid to you from the plan and made any employee contributions that may be required to be made under the plan.

§ 1002.262 When is my employer required to make the plan contribution that is attributable to my period of military service?

(a) The employer is not required to make its contribution until you are reemployed. For employer contributions to a plan in which you are not required or permitted to contribute, your employer must make the contribution attributable to your period of service no later than thirty days after the date of your reemployment. If it is impossible or unreasonable for your employer to make the contribution within thirty days after the date you were reemployed, your employer must make the contribution as soon as practicable.

(b) If you are enrolled in a contributory plan you are allowed (but not required) to make up your missed contributions or elective deferrals. These makeup contributions or elective deferrals must be made during a time period starting with your date of reemployment and continuing for up to three times the length of your immediate past period of military service, with the repayment period not to exceed five years. If you cannot make up missed contributions as an elective deferral because you are no longer employed by the employer sponsoring the plan, the plan must give you an equivalent opportunity to receive the maximum employer matching contributions that were available under the plan during your period of uniform service through a match of after-tax contributions.

(c) If your plan is contributory and you do not make up your contributions or elective deferrals, you will not receive the employer match or the accrued benefit attributable to your contribution because your employer is required to make contributions that are contingent on or attributable to your contributions or elective deferrals only to the extent that you make up your payments to the plan. Any employer contributions that are contingent on or attributable to your make-up contributions or elective deferrals must be made according to the plan's requirements for employer matching contributions.

(d) You are not required to make up the full amount of employee

contributions or elective deferrals that you missed making during your period of service. If you do not make up all of your missed contributions or elective deferrals, your pension may be less than if you had done so.

(e) Any vested accrued benefit in the pension plan that you were entitled to prior to your period of military service remains intact whether or not you choose to be reemployed under the Act after leaving the military.

(f) An adjustment will be made to the amount of employee contributions or elective deferrals you will be able to make to the pension plan for any employee contributions or elective deferrals you actually made to the plan during your period of service.

§ 1002.263 Am I required to pay interest when I make up my missed contributions or elective deferrals?

No. You are not required to make up a missed contribution in an amount that exceeds the amount you would have been permitted or required to contribute had you remained continuously employed during your period of service.

§ 1002.264 Am I allowed to repay my account balance if I withdrew all or part of my account from the pension benefits plan before becoming reemployed?

Yes. If you withdrew all or part your account balance from the pension benefits plan before you became reemployed, you must be allowed to repay the withdrawn amounts when you are reemployed. In the case of a defined benefit plan (but not a defined contribution plan) the amount you must repay includes any interest that would have accrued had the monies not been withdrawn. The repayment of these amounts must be made:

(a) During a time period starting with the date of reemployment and continuing for up to three times the length of the employee's immediate past period of military service, with the repayment period not to exceed five years; or

(b) During the time period provided by 26 U.S.C. 411(a)(7)(C) (if applicable); or

(c) Within such longer time period as may be agreed to between the employer and service member.

§ 1002.265 If I am reemployed with my pre-service employer is my pension benefit the same as if I had remained continuously employed?

The amount of your pension benefit depends on the type of pension plan.

(a) In a non-contributory defined benefit plan, where the amount of your pension benefit is determined according to a specific formula, your benefit will

be the same as though you had remained continuously employed during your period of service.

(b) In a contributory defined benefit plan, you will need to make up your contributions in order to have the same benefit as if you had remained continuously employed during your period of service.

(c) In a defined contribution plan, the benefit may not be the same as if you had remained continuously employed, even though you and your employer make up any contributions or elective deferrals attributable to your period of service, because you are not entitled to forfeitures and earnings or required to experience losses that accrued during your period or periods of service.

§ 1002.266 What are the obligations of a multiemployer pension benefit plan under USERRA?

A multiemployer pension benefit plan is one to which more than one employer is required to contribute, and which is maintained pursuant to one or more collective bargaining agreements between one or more employee organizations and more than one employer. The Act uses ERISA's definition of a multiemployer plan. In addition to the provisions of USERRA that apply to all pension benefit plans, there are provisions that apply specifically to multiemployer plans, as follows:

(a) The last employer that employed you before your period of service is responsible for making the employer contribution to the multiemployer plan, if the plan sponsor does not provide otherwise. If the last employer is no longer functional, the plan must nevertheless provide coverage to the service member.

(b) An employer that contributes to a multiemployer plan and that reemploys you must provide written notice of your reemployment to the plan administrator within 30 days after your date of reemployment.

(c) You are entitled to the same employer contribution whether you are reemployed by your pre-service employer or by a different employer contributing to the same multiemployer plan.

§ 1002.267 How is my compensation during my period of service calculated in order to determine my pension benefits, if my benefits are based on my compensation?

In many pension benefit plans, your compensation determines the amount of your contribution or the retirement benefit to which you are entitled.

(a) Where your rate of compensation must be calculated to determine your

pension entitlement, the calculation must be made using the rate of pay that you would have received but for your period of military service.

(b)(1) Where the rate of pay you would have received is not reasonably certain, such as where your compensation is based on commissions that you earned, your average rate of compensation during the 12-month period prior to your period of military service must be used.

(2) Where the rate of pay you would have received is not reasonably certain and you were employed for less than 12 months prior to the period of military service, your average rate of compensation must be derived from this shorter period of employment that preceded your service.

Subpart F—Compliance Assistance, Enforcement and Remedies

Compliance Assistance

§ 1002.277 What assistance does the Department of Labor provide to employees and employers concerning employment, reemployment, or other rights and benefits under USERRA?

The Secretary, through the Veterans' Employment and Training Service (VETS), provides assistance to any person or entity with respect to employment and reemployment rights and benefits under USERRA. This assistance includes a wide range of compliance assistance outreach activities, such as responding to inquiries; conducting USERRA briefings and Webcasts; issuing news releases; and, maintaining the elaws USERRA Advisor (located at <http://www.dol.gov/elaws/userra.htm>), the e-VETS Resource Advisor and other Web-based materials (located at <http://www.dol.gov/vets/#userra>), which are designed to increase awareness of the Act among affected persons, the media, and the general public. In providing such assistance, VETS may request the assistance of other Federal and State agencies, and utilize the assistance of volunteers.

Investigation and Referral

§ 1002.288 How do I file my USERRA complaint?

If you are claiming entitlement to employment rights or benefits or reemployment rights or benefits and you allege that your employer has failed or refused, or is about to fail or refuse, to comply with the Act, you may file a complaint with VETS or initiate a private legal action in a court of law (see § 1002.303). A complaint filed with VETS must be in writing, using VETS Form 1010 (instructions and the form can be accessed at <http://www.dol.gov/>

[elaws/vets/userra/1010.asp](http://www.dol.gov/elaws/vets/userra/1010.asp)), and must include the name and address of your employer, a summary of the basis for your complaint, and a request for relief.

§ 1002.289 How will VETS investigate my USERRA complaint?

(a) In carrying out any investigation, VETS has, at all reasonable times, reasonable access to and the right to interview persons with information relevant to the investigation. VETS also has reasonable access to, for purposes of examination, the right to copy and receive any documents of any person or employer that VETS considers relevant to the investigation.

(b) VETS may require by subpoena the attendance and testimony of witnesses and the production of documents relating to any matter under investigation. In case of disobedience of or resistance to the subpoena, the Attorney General may, at VETS' request, apply to any district court of the United States in whose jurisdiction such disobedience or resistance occurs for an order enforcing the subpoena. The district courts of the United States have jurisdiction to order compliance with the subpoena, and to punish failure to obey a subpoena as a contempt of court. This paragraph does not authorize VETS to seek issuance of a subpoena to the legislative or judicial branches of the United States.

§ 1002.290 Does VETS have the authority to order compliance with USERRA?

No. If VETS determines as a result of an investigation that the complaint is meritorious, VETS attempts to resolve the complaint by making reasonable efforts to ensure that any persons or entities named in the complaint comply with the Act. If VETS' efforts do not resolve the complaint, VETS notifies the person who submitted the complaint of:

(a) The results of the investigation; and,

(b) The person's right to proceed under the enforcement of rights provisions in 38 U.S.C. 4323 (against a State or private employer), or 38 U.S.C. 4324 (against a Federal executive agency or the Office of Personnel Management (OPM)).

§ 1002.291 What actions may I take if my complaint is not resolved by VETS?

If you receive a notification from VETS of an unsuccessful effort to resolve your complaint relating to a State or private employer, you may request that VETS refer the complaint to the Attorney General.

§ 1002.292 What can the Attorney General do about my complaint?

(a) If the Attorney General is reasonably satisfied that your complaint is meritorious, meaning that you are entitled to the rights or benefits sought, the Attorney General may appear on your behalf and act as your attorney, and initiate a legal action to obtain relief for you.

(b) If the Attorney General determines that your complaint does not have merit, the Attorney General may decline to represent you.

Enforcement of Rights and Benefits Against a State or Private Employer

§ 1002.303 Am I required to file my complaint with VETS?

No. You may initiate a private action for relief against a State or private employer if you decide not to apply to VETS for assistance.

§ 1002.304 If I file a complaint with VETS and VETS' efforts do not resolve my complaint can I pursue the claim on my own?

Yes. If VETS notifies you that it is unable to resolve your complaint, you may pursue the claim on your own. You may choose to be represented by private counsel whether or not the Attorney General decides to represent you as to your complaint.

§ 1002.305 What court has jurisdiction in an action against a State or private employer?

(a) If an action is brought against a State or private employer by the Attorney General, the district courts of the United States have jurisdiction over the action. If the action is brought against a State by the Attorney General, it must be brought in the name of the United States as the plaintiff in the action.

(b) If an action is brought against a State by a person, the action may be brought in a State court of competent jurisdiction according to the laws of the State.

(c) If an action is brought against a private employer or a political subdivision of a State by a person, the district courts of the United States have jurisdiction over the action.

(d) An action brought against a State Adjutant General, as an employer of a civilian National Guard technician, is considered an action against a State for purposes of determining which court has jurisdiction.

§ 1002.306 As a National Guard civilian technician am I considered a State or Federal employee for purposes of USERRA?

If you are a National Guard civilian technician you are considered a State employee for USERRA purposes, although you are considered a Federal employee for most other purposes.

§ 1002.307 What is the proper venue in an action against a State or private employer?

(a) If an action is brought by the Attorney General against a State, the action may proceed in the United States district court for any district in which the State exercises any authority or carries out any function.

(b) If an action is brought against a private employer, or a political subdivision of a State, the action may proceed in the United States district court for any district in which the employer maintains a place of business.

§ 1002.308 Who has legal standing to bring an action under USERRA?

An action may be brought only by the United States or by the person, or representative of a person, claiming rights or benefits under the Act. An employer, prospective employer or other similar entity may not bring an action under the Act.

§ 1002.309 Who is a necessary party in an action under USERRA?

In an action under USERRA only an employer or a potential employer, as the case may be, is a necessary party respondent. In some circumstances, such as where terms in a collective bargaining agreement need to be interpreted, the court may allow an interested party to intervene in the action.

§ 1002.310 How are fees and court costs charged or taxed in an action under USERRA?

No fees or court costs may be charged or taxed against you if you are claiming rights under the Act. If you obtain private counsel for any action or proceeding to enforce a provision of the Act, and you prevail, the court may award reasonable attorney fees, expert witness fees, and other litigation expenses.

§ 1002.311 Is there a statute of limitations in an action under USERRA?

No. USERRA does not have a statute of limitations, and it expressly precludes the application of any State statute of limitations. If you unreasonably delay asserting your rights, and that unreasonable delay causes prejudice to your employer, the courts have recognized the availability of the equitable doctrine of laches to bar a claim under USERRA.

§ 1002.312 What remedies may be awarded for a violation of USERRA?

In any action or proceeding the court may award relief as follows:

(a) The court may require your employer to comply with the provisions of the Act;

(b) The court may require your employer to compensate you for any loss of wages or benefits suffered by reason of your employer's failure to comply with the Act;

(c) The court may require your employer to pay you an amount equal to the amount of lost wages and benefits as liquidated damages, if the court determines that your employer's failure to comply with the Act was willful. A violation shall be considered to be willful if the employer or potential employer either knew or showed

reckless disregard for whether its conduct was prohibited by the Act.

(d) Any wages, benefits, or liquidated damages awarded under paragraphs (b) and (c) of this section are in addition to, and must not diminish, any of the other rights and benefits provided by USERRA (such as, for example, the right to be employed or reemployed by the employer).

§ 1002.313 Are there special damages provisions that apply to actions initiated in the name of the United States?

Yes. In an action brought in the name of the United States, for which the relief includes compensation for lost wages, benefits, or liquidated damages, the compensation must be held in a special deposit account and must be paid, on order of the Attorney General, directly to the person. If the compensation is not paid to you because of the Federal Government's inability to do so within a period of three years, the compensation must be converted into the Treasury of the United States as miscellaneous receipts.

§ 1002.314 May a court use its equity powers in an action or proceeding under the Act?

Yes. A court may use its full equity powers, including the issuance of temporary or permanent injunctions, temporary restraining orders, and contempt orders, to vindicate the rights or benefits guaranteed to you under the Act.

Signed at Washington, DC, this 10th day of September, 2004.

Frederico Juarbe Jr.,

Assistant Secretary for Veterans' Employment and Training.

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