

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

RIN 1293-AA14

Notice of Rights and Duties Under the Uniformed Services Employment and Reemployment Rights Act**AGENCY:** Veterans' Employment and Training Service, Department of Labor.**ACTION:** Interim final rule; request for comments.

SUMMARY: The Veterans' Employment and Training Service (VETS) of the Department of Labor (Department of DOL) is issuing this interim final rule to implement a requirement of the Veterans Benefits Improvement Act of 2004 (VBIA), Pub. Law 108-454 (Dec. 10, 2004). The VBIA amended the Uniformed Services Employment and Reemployment Rights Act (USERRA) by adding a requirement that employers provide a notice of the rights, benefits, and obligations of employees and employers under USERRA. The text of this notice is included in this interim final rule. This interim final rule does not affect the Department's pending proposal to implement the USERRA, which was published in the **Federal Register** of September 20, 2004.

DATES: *Effective Date:* This interim final rule is effective March 10, 2005.

Comment Date: Interested persons are invited to submit written comments on this interim final rule. To ensure consideration, comments must be received on or before May 9, 2005.

ADDRESSES: You may submit comments, identified by "Docket No. VETS-U-05," by any of the following methods:

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

Electronic mail: Comments may be submitted by e-mail to: vetspublic@dol.gov. Include "Docket No. VETS-U-05" 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-05, 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. Gary Smith at (202) 693-4724 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. Because DOL continues to experience delays in receiving postal mail in the Washington, DC area, commenters are encouraged to submit any comments by mail early. Contact Mr. Kenan Torrans, VETS Office of Operations and Programs, at (202) 693-4731 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. Kenan Torrans, VETS Office of Operations and Programs, at (202) 693-4731 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. Persons who need assistance to review the comments will be provided with appropriate aids such as readers or print magnifiers. Copies of this interim final rule may be obtained in alternative formats (e.g., large print, Braille, audiotape, or disk) upon request.

FOR FURTHER INFORMATION CONTACT: For information, contact Mr. Kenan Torrans, 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) 693-4731 (this is not a toll-free number). Electronic mail: torrans-william@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.

Individuals with hearing or speech impairments may access the telephone numbers above via TTY by calling the toll-free Federal Information Relay Service at 1-800-877-8339.

SUPPLEMENTARY INFORMATION:**I. Background**

The Veterans Benefits Improvement Act of 2004 (VBIA), Pub. Law No. 108-454 (Dec. 10, 2004), amended several provisions of the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), 38 U.S.C. 4301-4333. In part, the VBIA imposed a new requirement, to be codified at 38 U.S.C. 4334, that "Each employer shall provide to persons entitled to rights and benefits under [USERRA] a notice of the rights, benefits, and obligations of such persons and such employers under [USERRA]." Employers may provide the notice by posting it where employee notices are customarily placed. However, employers are free to provide the notice to employees in other ways that will minimize costs while ensuring that the full text of the notice is provided (e.g., by handing or mailing out the notice, or distributing the notice via electronic mail).

The VBIA requires the Secretary of Labor to make available to employers the text of the required notice not later than March 10, 2005, ninety days after the enactment of the VBIA. The publication of this interim final rule containing the text of the notice is pursuant to this Congressional mandate. Effective March 10, the VBIA requires employers to provide the notice "to persons entitled to rights and benefits" under USERRA.

The VBIA also created a demonstration project under which about half of the claims against Federal executive agencies arising under USERRA will be transferred by the Department of Labor to the Office of Special Counsel. Section 204(a) of the VBIA directs the "Secretary of Labor and the Office of Special Counsel [to] carry out a demonstration project under which certain claims against Federal executive agencies under [USERRA] are referred to * * * the Office of Special Counsel for assistance, including investigation and resolution of the claim as well as enforcement of rights with respect to the claim." Under this demonstration project, the Secretary of Labor transfers to OSC those cases involving Federal executive agency employees with odd-numbered social security numbers. The demonstration project began on February 8, 2005, and will end on September 30, 2007.

USERRA provides employment and reemployment rights for members of the uniformed services, including veterans and members of the Reserve and National Guard. Under USERRA, service members who leave their civilian jobs for military service can perform their duties with the knowledge that they will be able to return to their jobs with the same pay, benefits, and status they would have attained had they not been away on duty. USERRA also prohibits employers from discriminating against these individuals in employment because of their military service.

Over 460,000 members of the National Guard and Reserve have been mobilized since the President's declaration of a national emergency following the attacks of September 11, 2001. As service members conclude their tours of duty and return to civilian employment, it is important that employees be fully informed of their USERRA rights, benefits, and obligations. It is also important for service members to know how the Department can assist them in enforcing these rights. Providing employees with a notice of the USERRA rights, benefits, and obligations of employees and employers advances these objectives.

The publication of this interim final rule does not affect the Department's pending proposal to issue regulations implementing the USERRA, which was published in the **Federal Register** of September 20, 2004, and which is expected to result in a final rule in 2005.

II. Administrative Information

Executive Order 12866—Regulatory Planning and Review

The interim final rule has been drafted and reviewed in accordance with Executive Order 12866, section 1(b), Principles of Regulation. The Department has determined that this proposed rule is not an "economically significant" regulatory action under section 3(f)(1) of Executive Order 12866. Based on a preliminary analysis of the data, the rule is not likely to: (1) Have an annual effect on the economy of \$100 million; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; or (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof. As a result, the Department has concluded that a full economic impact and cost/benefit analysis is not required for the interim final rule under Section 6(a)(3) of the Order. However, because of its importance to the public the interim final rule is a significant

regulatory action and was reviewed by the Office of Management and Budget.

Regulatory Flexibility Act

Under the Regulatory Flexibility Act, Public Law 96-354 (94 Stat. 1164; 5 U.S.C. 601 *et seq.*), Federal agencies are required to analyze the anticipated impact of proposed rules on small entities. VETS has notified the Chief Counsel for Advocacy, Small Business Administration, and made the certification pursuant to the Regulatory Flexibility Act at 5 U.S.C. 605(b), that this interim final rule will not have a significant economic impact on a substantial number of small entities.

The basis for that certification is that this interim final rule will not have a significant economic impact on any employers because it only makes available to them information required to be posted or disseminated by statute. This information concerns employee rights, benefits, and obligations already available under Federal law. Accordingly, VETS concludes that the final rule will not have a significant economic impact on a substantial number of small business entities. Therefore, under the Regulatory Flexibility Act, 5 U.S.C. 605(b), a regulatory flexibility analysis is not required.

The Small Business Administration (SBA) estimates in "A Guide for Government Agencies—How to Comply with the Regulatory Flexibility Act" (May 2003), that 23 percent of business tax returns are filed by firms with employees. <http://www.sba.gov/advo/laws/rfaguide.pdf>. Internal Revenue Service statistics for Fiscal Year 2003 indicate that 29,916,033 business tax returns were filed. <http://www.irs.gov/pub/irs-soi/03db03nr.xls>. Using the 23 percent SBA estimate, there were approximately 6,880,690 private employers with employees in FY 2003. For purposes of comparison, the U.S. Census Bureau cites a figure of at least 7,743,444 business establishments with employees for the year 2002, the most recent year for which such statistics are available. See <http://www.census.gov/econ/census02/advance/TABLE1.HTM>. Consequently, VETS estimates that in FY2005 fewer than 8,000,000 private employers with employees are potentially covered by this interim final rule. Assuming a cost of \$.15 for reproducing a copy of the notice and .1 hour of clerical time at \$19.05 per hour (based on National Compensation Survey: Occupational Wages in the United States, July 2002, Bureau of Labor Statistics, U.S. Department of Labor, June 2003) to post or otherwise disseminate the notice, the per-

employer cost for providing employees the notice contained in this interim rule is approximately \$2.00 and the total cost for all private employers to comply is less than \$16,000,000. Consequently, VETS concludes that the cost of compliance will not have a significant economic impact on a substantial number of small entities.

The Department welcomes comments on this Regulatory Flexibility Act certification.

Unfunded Mandates Reform Act of 1995

This interim final rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year, and it will not significantly or uniquely affect small governments. USERRA applies to all public employers. The Census Bureau lists a total of 265,641 State and local governments in its 2002 Compendium of Public Employment; <http://www.census.gov/prod/2004pubs/gc023x2.pdf>. Consequently, VETS estimates that fewer than 300,000 State and local employers are covered by this interim final rule. Assuming a cost of \$.15 for reproducing a copy of the notice and .1 hour of clerical time at \$19.05 per hour (based on National Compensation Survey: Occupational Wages in the United States, July 2002, Bureau of Labor Statistics, U.S. Department of Labor, June 2003) to post or otherwise disseminate the notice, the per-employer cost for providing employees the notice contained in this interim rule is less than \$2.00 and the total cost for all State and local employers to comply is less than \$600,000, and as discussed above the total cost for all private employers to comply is less than \$16,000,000. Therefore, no actions are necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Small Business Regulatory Enforcement Fairness Act of 1996

This interim final rule is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Act of 1996 (SBREFA). The standards for determining whether a rule is a major rule as defined by section 804 of SBREFA are similar to those used to determine whether a rule is an "economically significant regulatory action" within the meaning of Executive Order 12866. Because VETS certified that this interim final rule is not an economically significant rule under Executive Order 12866, VETS certifies that it also is not a major rule under SBREFA. It will not result in an annual effect on the economy of \$100 million

or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

Executive Order 13132—Federalism

This interim final rule will not have a 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. Therefore, in accordance with Executive Order 13132, VETS has determined that this interim final rule does not have sufficient federalism implications to warrant the preparation of a summary impact statement.

Paperwork Reduction Act

The public disclosure of information supplied by the Federal government to the recipient for the purpose of disclosure to the public is not included within the definition of "collection of information" under the Paperwork Reduction Act (PRA). See 5 CFR 1320.3(c)(2). Here, the notice made available by this interim final rule is supplied by the Department of Labor. Consequently, the Department believes the Paperwork Reduction Act is inapplicable to this interim final rule. The Department invites the public to comment on its Paperwork Reduction Act analysis.

Publication as an Interim Final Rule

The Department has determined that it is impracticable to publish this notice of USERRA rights, benefits, and obligations as a Notice of Proposed Rulemaking, with the delays inherent to the process of publishing a proposed rule, receiving and reviewing comments, and preparing and publishing a final rule. Moreover, USERRA is enforceable by private citizens, the Department of Justice, and the Office of Special Counsel, so any potential harm to employers caused by delay in publication cannot be ameliorated solely through the exercise of the Department's administrative discretion to defer enforcement proceedings. This interim final rule will allow timely transmittal to affected parties of the text of the notice required by the VBIA amendment, within the short timeframe mandated by Congress. Therefore, the Department finds pursuant to 5 U.S.C. 553(b)(3)(B) that good cause exists for publishing this notice as an interim final rule.

The Department invites the public to comment on this interim final rule. The Department will consider the comments received and, through the issuance of a final rule, make adjustments to the text of the notice as is required or advisable. Consequently, the content of the notice contained in this interim final rule will gain the full benefit of public notice and comment.

List of Subjects in 20 CFR Part 1002

Administrative practice and procedure, Employment, Enforcement, Labor, Veterans, Working conditions.

■ For the reasons stated in the preamble, the Veterans' Employment and Training Service, Department of Labor, adds a new part 1002 to chapter IX of title 20 of the Code of Federal Regulations to read as follows:

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

Sec.

1002.1 through 1002.314 [Reserved] Appendix to Part 1002—Your Rights Under USERRA

Authority: Veterans Benefits Improvement Act of 2004 (VBIA), Pub. L. 108-454 (Dec. 10, 2004).

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

Appendix to Part 1002—Your Rights Under USERRA

A. The Uniformed Services Employment and Reemployment Rights Act

USERRA protects the job rights of individuals who voluntarily or involuntarily leave employment positions to undertake military service. USERRA also prohibits employers from discriminating against past and present members of the uniformed services, and applicants to the uniformed services.

B. Reemployment Rights

You have the right to be reemployed in your civilian job if you leave that job to perform service in the uniformed service and:

- You ensure that your employer receives advance written or verbal notice of your service;
- You have five years or less of cumulative service in the uniformed services while with that particular employer;
- You return to work or apply for reemployment in a timely manner after conclusion of service; and
- You have not been separated from service with a disqualifying discharge or under other than honorable conditions.

If you are eligible to be reemployed, you must be restored to the job and benefits you

would have attained if you had not been absent due to military service or, in some cases, a comparable job.

C. Right to be Free From Discrimination and Retaliation

If you:

- Are a past or present member of the uniformed service;
- Have applied for membership in the uniformed service; or
- Are obligated to serve in the uniformed service;

then an employer may not deny you

- Initial employment;
- Reemployment;
- Retention in employment;
- Promotion; or
- Any benefit of employment.

because of this status.

In addition, an employer may not retaliate against anyone assisting in the enforcement of USERRA rights, including testifying or making a statement in connection with a proceeding under USERRA, even if that person has no service connection.

D. Health Insurance Protection

- If you leave your job to perform military service, you have the right to elect to continue your existing employer-based health plan coverage for you and your dependents for up to 24 months while in the military.

• Even if you don't elect to continue coverage during your military service, you have the right to be reinstated in your employer's health plan when you are reemployed, generally without any waiting periods or exclusions (e.g., pre-existing condition exclusions) except for service-connected illnesses or injuries.

E. Enforcement

- The U.S. Department of Labor, Veterans Employment and Training Service (VETS) is authorized to investigate and resolve complaints of USERRA violations.

For assistance in filing a complaint, or for any other information on USERRA, contact VETS at 1-866-4-USA-DOL or visit its website at <http://www.dol.gov/vets>. An online guide to USERRA can be viewed at <http://www.dol.gov/elaws/userra.htm>.

• If you file a complaint with VETS and VETS is unable to resolve it, you may request that your case be referred to the Department of Justice or the Office of Special Counsel, depending on the employer, for representation.

- You may also bypass the VETS process and bring a civil action against an employer for violations of USERRA.

The rights listed here may vary depending on the circumstances. This poster was prepared by VETS, and may be viewed on the internet at this address: <http://www.dol.gov/vets/programs/userra/poster.pdf>. Federal law requires employers to notify employees of their rights under USERRA, and employers may meet this requirement by displaying this poster where they customarily place notices for employees.

U.S. Department of Labor, Veterans Employment and Training Service, Washington, DC 20210, 1-866-487-2365.

Publication Date—March 2005.

Signed at Washington, DC, this 8th day of
March, 2005.

Frederico Juarbe Jr.,
*Assistant Secretary for Veterans' Employment
and Training.*

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