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its agents to successfully complete investigations of suspected or alleged violators of the regulations governing the performance of actuarial services with respect to plans to which ERISA applies. Individuals who learn that they are suspected of violating said regulations are given the opportunity to destroy or alter evidence needed to prove the alleged violations. Such individuals may also be able to impair investigations by temporarily suspending or restructuring the activities which place them in violation of said regulations. Further, as noted in preceding subparagraph (2)(B) and incorporated by reference herein, the procedural requirements imposed on the Joint Board by ERISA make the protections afforded by subsections (c)(4)(G) and (f)(1) unnecessary. For these reasons, the Joint Board seeks exemptions from the requirements of subsections (c)(4)(G) and (f)(1).

(v) Subsection (e)(1) of the Privacy Act of 1974 requires that the Joint Board maintain in its records only information that is relevant and necessary to accomplish a purpose of the Office required to be accomplished by statute or by executive order of the President. The Joint Board believes that imposition of said requirement would seriously impair its ability, and the abilities of its agents and other investigative entities to effectively investigate suspected or alleged violations of regulations and of civil or criminal laws. The Joint Board does not initiate inquires into individuals' conduct unless it receives information evidencing violation by such individuals of the regulations governing performance of actuarial services with respect to plans to which ERISA applies. Sources of such information may be unfamiliar with the Joint Board's interpretations of said regulations and, therefore, may not always provide only relevant and necessary information. Therefore, it may often be impossible to determine whether or not information is relevant and necessary. For these reasons, the Joint Board seeks exemptions from the requirement of subsection (e)(1).

(vi) Subsection (e)(4)(I) of the Privacy Act of 1974 requires the publication of the categories of sources of records in each system of records. The Joint Board believes that imposition of said requirement would seriously impair its ability to obtain information from such sources for the following reasons. Revealing such categories of sources could disclose investigative techniques and procedures and could cause sources to decline to provide information because of fear of reprisal, or fear of breaches of promises of confidentiality. For these reasons, the Joint Board seeks exemptions from the requirement of subsection (e)(4)(I).

CHAPTER IX—OFFICE OF THE ASSISTANT SECRETARY FOR VETERANS' EMPLOYMENT AND TRAINING SERVICE, DEPARTMENT OF LABOR

Part		*Page*
1001	Services for veterans	1181
1002	Regulations under the Uniformed Services Employment and Reemployment Rights Act of 1994	1187
1010	Application of priority of service for covered persons	1224

PART 1001—SERVICES FOR VETERANS

Subpart A—Purpose and Definitions

Sec.
1001.100 Purpose and scope of subpart.
1001.101 Definitions of terms used in subpart.

Subpart B—Federal Responsibilities

1001.110 Role of the Assistant Secretary for Veterans' Employment and Training (ASVET).

Subpart C—Standards of Performance Governing State Agency Services to Veterans and Eligible Persons

1001.120 Standards of performance governing State agency services.
1001.121 Performance standard on facilities and support for Veterans' Employment and Training Service (VETS) staff.
1001.122 Reporting and budget requirements.
1001.123 Performance standards governing the assignment and role of Local Veterans' Employment Representatives (LVERs).
1001.124 Standards of performance governing State agency cooperation and coordination with other agencies and organizations.
1001.125 Standards of performance governing complaints of veterans and eligible persons.

Subpart D—State Employment Service Agency Compliance

1001.130 Determination of compliance.
1001.131 Secretary's annual report to Congress.

Subpart E—Standards of Performance Governing the Disabled Veterans Outreach Program (DVOP)

1001.140 Administration of DVOP.
1001.141 Functions of DVOP staff.
1001.142 Stationing of DVOP staff.

Subpart F—Formula for the Allocation of Grant Funds to State Agencies

1001.150 Method of calculating State basic grant awards.
1001.151 Other funding criteria.
1001.152 Hold-harmless criteria and minimum funding level.

AUTHORITY: 29 U.S.C. 49k; 38 U.S.C. chapters 41 and 42.

Subpart A—Purpose and Definitions

§ 1001.100 Purpose and scope of subpart.

(a) This subpart contains the Department of Labor's regulations for implementing 38 U.S.C. 2001–2012, chapters 41 and 42, which require the Secretary of Labor to provide eligible veterans and eligible persons the maximum of employment and training opportunities, with priority given to the needs of disabled veterans and veterans of the Vietnam era, through the public employment service system established pursuant to the Wagner-Peyser Act, as amended.

(b) This subpart describes the roles and responsibilities of the Assistant Secretary for Veterans' Employment and Training (ASVET) and the staff of the Veterans' Employment and Training Service (VETS).

(c) This subpart describes the performance standards for determining compliance of State agencies in carrying out the provisions of 38 U.S.C., chapters 41 and 42 with respect to:

(1) Providing services to eligible veterans and eligible persons to enhance their employment prospects,

(2) Priority referral of special disabled veterans and veterans of the Vietnam era to job openings listed by Federal contractors pursuant to 38 U.S.C. 2012(a), and

(3) Reporting of services provided to eligible veterans and eligible persons pursuant to 38 U.S.C. 2007(c) and 2012(c).

(d) Performance standards are contained in this part at §§ 1001.140–1001.142 on the conduct of the Disabled Veterans Outreach Program (DVOP) in accordance with 38 U.S.C. 2003A.

[49 FR 12919, Mar. 30, 1984. Redesignated and amended at 54 FR 39353, Sept. 26, 1989]

§ 1001.101 Definitions of terms used in subpart.

Assistant Secretary for Veterans' Employment and Training (ASVET) shall mean the official of the Department of Labor as described in § 1001.110 of this part.

Assistant State Director for Veterans' Employment and Training Service

(ASDVETS) shall mean a Federal employee who is designated as an assistant to a State Director for Veterans' Employment and Training Service (SDVETS).

Disabled Veteran shall mean a veteran who is entitled to compensation (or who but for the receipt of military retired pay would be entitled to compensation) under laws administered by the Veterans Administration and whos not classified as a Special Disabled Veteran.

Eligible person shall mean:

(1) The spouse of any person who died of a service-connected disability; or

(2) The spouse of any member of the armed forces serving on active duty who at the time of application for assistance under this subpart, is listed, pursuant to 37 U.S.C. 556 and the regulations issued thereunder, by the Secretary concerned, in one or more of the following categories and has been so listed for a total of more than 90 days: (i) Missing in action, (ii) captured in line of duty by a hostile force, or (iii) forcibly detained or interned in line of duty by a foreign government or power; or

(3) The spouse of any person who has a total disability permanent in nature resulting from a service-connected disability or the spouse of a veteran who died while a disability so evaluated was in existence.

Eligible veteran shall mean a person who (1) served on active duty for a period of more than 180 days and was discharged or released therefrom with other than a dishonorable discharge, or (2) was discharged or released from active duty because of a service-connected disability.

Local Veterans' Employment Representative (LVER) shall mean a member of the State agency staff designated and assigned by the State agency administrator to serve veterans and eligible persons pursuant to this subpart.

Regional Director for Veterans' Employment and Training Service (RDVETS) is the representative of the ASVET on the staff of the Veterans' Employment and Training Service (VETS) at the regional level; supervises all other VETS staff within the region to which assigned; and shall report to, be responsible to, and be under the administrative direction of the ASVET.

Service Delivery Point (SDP) shall mean a designated local employment service office which serves an area that may also contain extended service locations.

Special disabled veteran shall mean (1) a veteran who is entitled to compensation (or who but for the receipt of military retired pay would be entitled to compensation) under laws administered by the Veterans Administration for a disability rated at 30 percent or more, or (2) a person who was discharged or released from active duty because of a service-connected disability.

State agency means the State governmental unit designated pursuant to section 4 of the Wagner-Peyser Act, as amended, to cooperate with the United States Employment Service in the operation of the public employment service system.

State Director for Veterans' Employment and Training Service (SDVETS) is the representative of ASVET on the staff of the Veterans' Employment and Training Service (VETS) at the State level.

United States Employment Service (USES) shall mean the component of the Employment and Training Administration of the Department of Labor, established under the Wagner-Peyser Act, as amended, to maintain and coordinate a national system of public employment service agencies.

Veteran of the Vietnam era shall mean an eligible veteran who (1) served on active duty for a period of more than 180 days, any part of which occurred during the Vietnam era (August 5, 1964, through May 7, 1975) and was discharged or released therefrom with other than a dishonorable discharge; or (2) was discharged or released from active duty for a service-connected disability if any part of such active duty was performed during the Vietnam era.

Veterans' Employment and Training Service (VETS) shall mean the organizational component of the Department of Labor administered by the Assistant Secretary of Labor for Veterans' Employment and Training established to promulgate and administer policies

and regulations to provide eligible veterans and eligible persons the maximum of employment and training opportunities according to 38 U.S.C. 2002.

[49 FR 12919, Mar. 30, 1984. Redesignated and amended at 54 FR 39353, Sept. 26, 1989]

Subpart B—Federal Responsibilities

§ 1001.110 Role of the Assistant Secretary for Veterans' Employment and Training (ASVET).

(a) As the principal veterans' advisor to the Secretary of Labor, the ASVET shall formulate, promulgate, and administer policies, regulations, grant procedures, grant agreements and administrative guidelines and administer them through the Veterans' Employment and Training Service (VETS) so as to provide eligible veterans and eligible persons the maximum of employment and training opportunities, with priority given to the needs of disabled veterans and veterans of the Vietnam era, through existing programs, coordination, and merger of programs and implementation of new programs.

(b) ASVET shall oversee activities carried out by State agencies pursuant to 38 U.S.C., chapters 41 and 42.

(c) ASVET shall ensure that appropriate records and reports are maintained by State agencies within their management information systems to fulfill their obligations under this subpart.

[49 FR 12919, Mar. 30, 1984. Redesignated at 54 FR 39353, Sept. 26, 1989]

Subpart C—Standards of Performance Governing State Agency Services to Veterans and Eligible Persons

SOURCE: 49 FR 12919, Mar. 30, 1984, unless otherwise noted. Redesignated at 54 FR 39353, Sept. 26, 1989.

§ 1001.120 Standards of performance governing State agency services.

(a) To the extent required by 38 U.S.C. 2002 and other applicable law, each State agency shall assure that all of its SDPs, using LVERs and other staff, shall provide maximum employment and training opportunities to eligible veterans and eligible persons with priority given to disabled veterans and veterans of the Vietnam-era, by giving them preference over non-veterans in the provision of employment and training services available at the SDP involved. Services are those activities or efforts including but not limited to registration, counseling, referral to supportive services, job development, etc., which are directed to help applicants find jobs or training. When making referrals from the group of applicants meeting the specific eligibility criteria for a particular program, State agencies shall observe the priority order to referral in paragraph (b).

(b) In making referrals of qualified applicants to job openings and training opportunities, to provide maximum employment and training opportunities under 38 U.S.C., SDPs shall observe the following order of priority:

(1) Special disabled veterans;

(2) Veterans of the Vietnam era;

(3) Disabled veterans other than special disabled veterans;

(4) All other veterans and eligible persons; and

(5) Nonveterans.

§ 1001.121 Performance standard on facilities and support for Veterans' Employment and Training Service (VETS) staff.

Each State agency shall provide adequate and appropriate facilities and administrative support such as office space, furniture, telephone, equipment, and supplies to VETS staff.

§ 1001.122 Reporting and budget requirements.

(a) State agencies shall provide RDVETS, SDVETS, and ASDVETS with access to regular and special internal State agency reports which relate in whole or in part with services to veterans and/or eligible persons.

(b) Each State agency shall make reports and prepare budgets pursuant to instructions issued by the ASVET and in such format as the ASVET shall prescribe.

§ 1001.123 Performance standards governing the assignment and role of Local Veterans' Employment Representatives (LVERs).

(a) To carry out the requirements of 38 U.S.C. 2004, at least one member of each State agency staff, preferably an eligible veteran, shall be designated and assigned by each State agency administrator as a full-time or part-time LVER in each SDP in accordance with terms/requirements of a grant agreement approved by the ASVET. The ASVET intends to use the following criteria in establishing the terms and requirements of grant agreements:

(1) At least one full-time LVER shall be assigned in each SDP which has had 1,000 new or renewed applications from veterans and eligible persons during the most recent twelve-month report period unless a waiver based on demonstrated lack of need is granted by the ASVET, and

(2) At least one part-time LVER whose time shall be devoted to veterans' services in proportion to the full-time criteria shall be assigned to each SDP not meeting the criteria for full-time LVERs in paragraph (a)(1) of this section.

(b) Additional full-time or part-time LVERs may be assigned based on a determination of need by the State agency administrator and in accordance with terms/requirements of a grant agreement approved by the ASVET.

(c) Each LVER shall perform, at the SDP level, the duties prescribed at 38 U.S.C. 2003(c) required by 38 U.S.C. 2004.

[49 FR 12919, Mar. 30, 1984. Redesignated and amended at 54 FR 39353, Sept. 26, 1989]

§ 1001.124 Standards of performance governing State agency cooperation and coordination with other agencies and organizations.

(a) Each State agency shall establish cooperative working relationships through written agreements with the Veterans Administration (VA) offices serving the State to maximize the use of VA employment and training programs for veterans and eligible persons.

(b) All programs and activities governed by this subpart will be coordinated to the maximum extent feasible with other programs and activities under 38 U.S.C., the Wagner-Peyser Act, the Job Training Partnership Act, and other employment and training programs at the State and local level.

(c) Such relationships or agreements may be described in the Governor's Coordination and Special Services Plan prepared according to section 121(b) of the Job Training Partnership Act (Pub. L. 97–300).

§ 1001.125 Standards of performance governing complaints of veterans and eligible persons.

Each SDP shall display information on the various complaint systems to advise veterans and eligible persons about procedures for filing employment service, Federal contractor, equal opportunity, and other complaints.

Subpart D—State Employment Service Agency Compliance

§ 1001.130 Determination of compliance.

(a) The ASVET shall have authority for applying the requirements and remedial actions necessary to implement 20 CFR part 658, subpart H. In the event of such application, references in 20 CFR part 658, subpart H, to ''ETA'' shall read instead ''OASVET''; references to ''Regional Administrator'' shall read instead ''RDVETS''; and references to ''JS regulations'' shall include this part.

(b) The ASVET shall establish appropriate program and management measurement and appraisal mechanisms to ensure that the standards of performance set forth in §§ 1001.120–1001.125 of this part are met. Specific performance standards designed to measure State agency services provided to veterans and eligible persons required by § 1001.120(a) of this part will be developed administratively through negotiations between State agency administrators and SDVETS and numerical values of the standards will be published as public notices in the FEDERAL REGISTER. A full report of those State agencies in noncompliance with the standards of performance and their corrective action plans shall be incorporated into the Secretary's annual report to the Congress cited at § 1001.131 of this part.

(c) Every effort should be made by the State agency administrator and the SDVETS to resolve all issues informally before proceeding with the formal process.

(d) If it is determined by the ASVET that certain State agencies are not complying with the performance standards at §§ 1001.120–1001.125 of this part, such State agencies shall be required to provide documentary evidence to the ASVET that their failure is based on good cause. If good cause is not shown, the ASVET, pursuant to subpart H of 20 CFR part 658, shall formally designate the State agency as out of compliance, shall require it to submit a corrective action plan for the following program year, and may take other action against the State agency pursuant to subpart H of 20 CFR part 658.

[49 FR 12919, Mar. 30, 1984. Redesignated and amended at 54 FR 39353, Sept. 26, 1989]

§ 1001.131 Secretary's annual report to Congress.

The Secretary shall report, after the end of each program year, on the success of the Department and State agencies in carrying out the provisions of this part.

[49 FR 12919, Mar. 30, 1984. Redesignated at 54 FR 39353, Sept. 26, 1989, and amended at 54 FR 39354, Sept. 26, 1989]

Subpart E—Standards of Performance Governing the Disabled Veterans Outreach Program (DVOP)

SOURCE: 49 FR 12919, Mar. 30, 1984, unless otherwise noted. Redesignated at 54 FR 39353, Sept. 26, 1989.

§ 1001.140 Administration of DVOP.

(a) The ASVET shall negotiate and enter into grant agreements within each State to carry out the requirements of 38 U.S.C. 2003A for support of a Disabled Veterans Outreach Program (DVOP) to meet the employment needs of veterans, especially disabled veterans of the Vietnam era.

(b) The ASVET shall be responsible forthe supervision and monitoring of the DVOP program, including monitoring of the appointment of DVOP specialists.

(c) DVOP specialists shall be in addition to and shall not supplant local veterans' employment representatives assigned under § 1001.123 of this part.

[49 FR 12919, Mar. 30, 1984. Redesignated at 54 FR 39353, Sept. 26, 1989, and amended at 54 FR 39354, Sept. 26, 1989]

§ 1001.141 Functions of DVOP staff.

Each DVOP specialist shall carry out the duties and functions for providing services to eligible veterans according to provisions of 38 U.S.C. 2003A (b) and (c).

§ 1001.142 Stationing of DVOP staff.

DVOP specialists shall be stationed at various locations in accordance with 38 U.S.C. 2003A(b)(2).

Subpart F—Formula for the Allocation of Grant Funds to State Agencies

SOURCE: 70 FR 28406, May 17, 2005, unless otherwise noted.

§ 1001.150 Method of calculating State basic grant awards.

(a) In determining the amount of funds available to each State, the ratio of the number of veterans seeking employment in the State to the number of veterans seeking employment in all States will be used.

(b) The number of veterans seeking employment will be determined based on the number of veterans in the civilian labor force and the number of unemployed persons. The civilian labor force data will be obtained from the Current Population Survey (CPS) and the unemployment data will be obtained from the Local Area Unemployment Statistics (LAUS), both of which are compiled by the Department of Labor's Bureau of Labor Statistics.

(c) Each State's basic grant allocation will be determined by dividing the number of unemployed persons in each State by the number of unemployed persons across all States (LAUS for the individual States / LAUS for all States) and by dividing the number of veterans in the civilian labor force in each State

by the number of veterans in the civilian labor force across all States (CPS for the individual States / CPS for all States). The result of these two ratios will be averaged and converted to a percentage of veterans seeking employment in the State compared to the percentage of veterans seeking employment in all States. Three-year averages of the CPS and LAUS data will be used in calculating the funding formula to stabilize the effect of annual fluctuations in the data in order to avoid undue fluctuations in the annual basic grant amounts allocated to States.

(d) State Plans are prepared in response to estimated basic grant allocation amounts prepared by the Department of Labor, based upon a projection of the appropriation. Variations from Department of Labor projections will be treated as follows:

(1) If the actual appropriation varies from the projection, the Secretary will make every reasonable effort to avoid recalculating the estimated basic grant allocation amounts, in order to maintain the delivery of services to veterans and to minimize the administrative workload required to recalculate grant allocations and to revise State Plans. Therefore upon enactment and allotment of an appropriated amount, it is the Department's intent to proceed by awarding the estimated basic grant allocation amounts to State agencies, unless the difference between the projection and the appropriation creates a compelling reason to do otherwise.

(2) If the actual appropriation exceeds the projection, the Secretary will determine whether the appropriation and the projection is large enough to warrant recalculating the State basic grant amounts. In such case, state basic grant amounts will be recalculated in accordance with paragraphs (a) through (c) of this section. If it is determined that no compelling reason to recalculate exists, the increased amount available for basic grants will be retained as undistributed funds. These undistributed basic grant funds will be retained separately from the funds retained for TAP workload and other exigencies, as established by § 1001.151(a). The intent will be to award these undistributed basic grant funds to States as basic grant supplements, in response to circumstances arising during the applicable fiscal year.

(3) If the actual appropriation falls below the projection, the Secretary will determine whether the lower appropriation creates a compelling reason to recalculate the State basic grant amounts. If it is determined that not recalculating the State basic grant amounts would jeopardize the availability of sufficient funding for TAP workload and other exigencies, a compelling reason to recalculate would exist. In that case, the State basic grant amounts will be recalculated under paragraphs (a) through (c) of this section in response to the reduced appropriation, to the extent required to assure that sufficient funding is available for TAP workload and other exigencies.

§ 1001.151 Other funding criteria.

(a) Up to four percent of the total amount available for allocation will be available for distribution based on Transition Assistance Program (TAP) workload and other exigencies.

(b) Funding for TAP workshops will be allocated on a per workshop basis. Funding to the States will be provided pursuant to the approved State Plan.

(c) Funds for exigent circumstances, such as unusually high levels of unemployment, surges in the demand for transitioning services, including the need for TAP workshops, will be allocated based on need.

§ 1001.152 Hold-harmless criteria and minimum funding level.

(a) A hold-harmless rate of 90 percent of the prior year's funding level will be applied after the funding formula phase-in period is completed (beginning fiscal year 2006 and subsequent years).

(b) A hold-harmless rate of 80 percent of the prior year's funding level will be applied for fiscal year 2005.

(c) A minimum funding level is established to ensure that in any year, no State will receive less than 0.28 percent (.0028) of the previous year's total funding for all States.

(d) If the appropriation for a given fiscal year does not provide sufficient funds to comply with the hold-harmless provision, the Department will:

(1) Update, as appropriate, the States' estimates of TAP workload and reserve sufficient funds for that purpose from the total amount available for allocation to the States. Beyond TAP workload, no funds will be reserved for exigent circumstances because the shortfall in the appropriation will be the primary exigent circumstance to be addressed.

(2) Apply proportionally the remaining balance available for basic grant allocations to the States for that fiscal year. The proportion will be calculated by dividing the remaining balance available for allocation by the total estimated State basic grant allocations for that fiscal year. The proportion resulting from that calculation will be applied to each State's estimated basic grant allocation to calculate the amount to be awarded.

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 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 apply to 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 status or activity is protected from employer discrimination by USERRA?
1002.19 What activity is protected from employer retaliation by USERRA?
1002.20 Does USERRA protect an individual who does not actually perform service in the uniformed services?
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 must the individual show to carry the burden of proving that the employer discriminated or retaliated against him or her?

Subpart C—Eligibility for Reemployment

GENERAL ELIGIBILITY REQUIREMENTS FOR REEMPLOYMENT

1002.32 What criteria must the employee meet to be eligible under USERRA for reemployment after service in the uniformed services?
1002.33 Does the employee have to prove that the employer discriminated against him or her in order to be eligible for reemployment?

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 that an employee may claim reemployment rights when the employer acquired the business?
1002.37 Can one employee be employed in one job by more than one employer?
1002.38 Can a hiring hall be an 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 Does an employee have rights under USERRA even though he or she holds a temporary, part-time, probationary, or seasonal employment position?
1002.42 What rights does an employee have under USERRA if he or she is on layoff, on strike, or on a leave of absence?
1002.43 Does an individual have rights under USERRA even if he or she is an executive, managerial, or professional employee?
1002.44 Does USERRA cover 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 What types of service in the National Disaster Medical System are considered ''service in the uniformed services?''
1002.57 Is all service as a member of the National Guard considered ''service in the uniformed services?''
1002.58 Is 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 Does USERRA cover an individual attending a military service academy?
1002.61 Does USERRA cover a member of the Reserve Officers Training Corps?
1002.62 Does USERRA cover a member of the Commissioned Corps of the National Oceanic and Atmospheric Administration, the Civil Air Patrol, or the Coast Guard Auxiliary?

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 an employee's sole reason for leaving an employment position in order to have USERRA reemployment rights?
1002.74 Must the employee begin service in the uniformed services immediately after leaving his or her employment position in order to have USERRA reemployment rights?

REQUIREMENT OF NOTICE

1002.85 Must the employee give advance notice to the employer of his or her service in the uniformed services?
1002.86 When is the employee excused from giving advance notice of service in the uniformed services?
1002.87 Is the employee required to get permission from his or her employer before leaving to perform service in the uniformed services?
1002.88 Is the employee required to tell his or her civilian employer that he or she intends to seek reemployment after completing uniformed service before the employee leaves 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 an employee may perform and still retain reemployment rights with the employer?
1002.100 Does the five-year service limit include all absences from an employment position that are related to service in the uniformed services?
1002.101 Does the five-year service limit include periods of service that the employee performed when he or she worked for a previous employer?
1002.102 Does the five-year service limit include periods of service that the employee performed before USERRA was enacted?
1002.103 Are there any types of service in the uniformed services that an employee can perform that do not count against USERRA's five-year service limit?
1002.104 Is the employee required to accommodate his or her employer's needs as to the timing, frequency or duration of service?

APPLICATION FOR REEMPLOYMENT

1002.115 Is the employee required to report to or submit a timely application for reemployment to his or her pre-service employer upon completing the period of service in the uniformed services?
1002.116 Is the time period for reporting back to an employer extended if the employee is 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 the employee fails to report for or submit a timely application for reemployment?
1002.118 Is an application for reemployment required to be in any particular form?
1002.119 To whom must the employee submit the application for reemployment?
1002.120 If the employee seeks or obtains employment with an employer other than the pre-service employer before the end of the period within which a reemployment application must be filed, will that jeopardize reemployment rights with the pre-service employer?
1002.121 Is the employee required to submit documentation to the employer in connection with the application for reemployment?
1002.122 Is the employer required to reemploy the employee if documentation establishing the employee's eligibility does not exist or is not readily available?
1002.123 What documents satisfy the requirement that the employee establish 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 service is required for an employee to be entitled to reemployment under USERRA?
1002.135 What types of discharge or separation from uniformed service will make the employee ineligible for reemployment under USERRA?

1002.136 Who determines the characterization of service?
1002.137 If the employee receives a disqualifying discharge or release from uniformed service and it is later upgraded, will reemployment rights be restored?
1002.138 If the employee receives a retroactive upgrade in the characterization of service, will that entitle him or her to claim back wages and benefits lost as of the date of separation from service?

EMPLOYER STATUTORY DEFENSES

1002.139 Are there any circumstances in which the pre-service employer is excused from its obligation to reemploy the employee following a period of uniformed 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 the employee's status with his or her civilian employer while performing service in the uniformed services?
1002.150 Which non-seniority rights and benefits is the employee entitled to during a period of service?
1002.151 If the employer provides full or partial pay to the employee while he or she is on military leave, is the employer required to also provide the non-seniority rights and benefits ordinarily granted to similarly situated employees on furlough or leave of absence?
1002.152 If employment is interrupted by a period of service in the uniformed services, are there any circumstances under which the employee is not entitled to the non-seniority rights and benefits ordinarily granted to similarly situated employees on furlough or leave of absence?
1002.153 If employment is interrupted by a period of service in the uniformed services, is the employee permitted upon request to use accrued vacation, annual or similar leave with pay during the service? Can the employer require the employee to use accrued leave during a period of service?

HEALTH PLAN COVERAGE

1002.163 What types of health plans are covered by USERRA?
1002.164 What health plan coverage must the employer provide for the employee under USERRA?
1002.165 How does the employee elect continuing health plan coverage?
1002.166 How much must the employee pay in order to continue health plan coverage?
1002.167 What actions may a plan administrator take if the employee does not elect or pay for continuing coverage in a timely manner?
1002.168 If the employee's coverage was terminated at the beginning of or during service, does his or her coverage have to be reinstated upon reemployment?
1002.169 Can the employee elect to delay reinstatement of health plan coverage until a date after the date he or she is reemployed?
1002.170 In a multiemployer health plan, how is liability allocated for employer contributions and benefits arising under USERRA's health plan provisions?
1002.171 How does the continuation of health plan benefits apply to a multiemployer plan that provides health plan coverage through a health benefits account system?

Subpart E—Reemployment Rights and Benefits

PROMPT REEMPLOYMENT

1002.180 When is an employee entitled to be reemployed by his or her civilian employer?
1002.181 How is ''prompt reemployment'' defined?

REEMPLOYMENT POSITION

1002.191 What position is the employee entitled to upon reemployment?
1002.192 How is the specific reemployment position determined?
1002.193 Does the reemployment position include elements such as seniority, status, and rate of pay?
1002.194 Can the application of the escalator principle result in adverse consequences when the employee is reemployed?
1002.195 What other factors can determine the reemployment position?
1002.196 What is the employee's reemployment position if the period of service was less than 91 days?
1002.197 What is the reemployment position if the employee's period of service in the uniformed services was more than 90 days?
1002.198 What efforts must the employer make to help the employee become qualified for the reemployment position?
1002.199 What priority must the 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 does an employee have when reemployed following a period of uniformed service?
1002.211 Does USERRA require the employer to use a seniority system?
1002.212 How does a person know whether a particular right or benefit is a seniority-based right or benefit?
1002.213 How can the employee demonstrate a reasonable certainty that he or she would have received the seniority right or benefit if he or she had remained continuously employed during the period of service?

DISABLED EMPLOYEES

1002.225 Is the employee entitled to any specific reemployment benefits if he or she has a disability that was incurred in, or aggravated during, the period of service?
1002.226 If the employee has a disability that was incurred in, or aggravated during, the period of service, what efforts must the employer make to help him or her become qualified for the reemployment position?

RATE OF PAY

1002.236 How is the employee's rate of pay determined when he or she returns from a period of service?

PROTECTION AGAINST DISCHARGE

1002.247 Does USERRA provide the employee with protection against discharge?
1002.248 What constitutes cause for discharge under USERRA?

PENSION PLAN BENEFITS

1002.259 How does USERRA protect an employee's pension benefits?
1002.260 What pension benefit plans are covered under USERRA?
1002.261 Who is responsible for funding any plan obligation to provide the employee with pension benefits?
1002.262 When is the employer required to make the plan contribution that is attributable to the employee's period of uniformed service?
1002.263 Does the employee pay interest when he or she makes up missed contributions or elective deferrals?
1002.264 Is the employee allowed to repay a previous distribution from a pension benefits plan upon being reemployed?
1002.265 If the employee is reemployed with his or her pre-service employer, is the employee's pension benefit the same as if he or she had remained continuously employed?
1002.266 What are the obligations of a multiemployer pension benefit plan under USERRA?
1002.267 How is compensation during the period of service calculated in order to determine the employee's pension benefits, if benefits are based on compensation?

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 does an individual file a USERRA complaint?
1002.289 How will VETS investigate a USERRA complaint?
1002.290 Does VETS have the authority to order compliance with USERRA?
1002.291 What actions may an individual take if the complaint is not resolved by VETS?
1002.292 What can the Attorney General do about the complaint?

ENFORCEMENT OF RIGHTS AND BENEFITS AGAINST A STATE OR PRIVATE EMPLOYER

1002.303 Is an individual required to file his or her complaint with VETS?
1002.304 If an individual files a complaint with VETS and VETS' efforts do not resolve the complaint, can the individual pursue the claim on his or her own?
1002.305 What court has jurisdiction in an action against a State or private employer?
1002.306 Is a National Guard civilian technician 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?

APPENDIX TO PART 1002—NOTICE OF YOUR RIGHTS UNDER USERRA

AUTHORITY: Section 4331(a) of the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), 38 U.S.C. 4331(a) (Pub. L. 103–353, 108 Stat. 3150).

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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 this part?

This part implements the Uniformed Services Employment and Reemployment Rights Act of 1994 (''USERRA'' or ''the Act''). 38 U.S.C. 4301–4334. 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 these regulations. 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. These regulations 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 (VRRA), 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 VRRA 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.

(b) USERRA also authorizes the Secretary of Labor to issue regulations implementing the Act with respect to

States, local governments, and private employers. These regulations 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 apply to 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 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, except in the case that such entity has been delegated functions that are purely ministerial in nature, such as maintenance of personnel files or the preparation of forms for submission to a government agency;

(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) *National Disaster Medical System (NDMS)* is an agency within the Federal Emergency Management Agency, Department of Homeland Security, established by the Public Health Security and Bioterrorism Preparedness and Response Act of 2002, Public Law 107–188. The NDMS provides medical-related assistance to respond to the needs of victims of public health emergencies. Participants in the NDMS are volunteers who serve as intermittent Federal employees when activated. For purposes of USERRA coverage only, these persons are treated as members of the uniformed services when they are activated to provide assistance in response to a public health emergency or to be present for a short period of time when there is a risk of a public health emergency, or when they are

participating in authorized training. See 42 U.S.C. 300hh–11(e).

(g) *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.

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

(i) *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.

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

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

(l) *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 (NDMS) or as a participant in an authorized training program is deemed ''service in the uniformed services.'' 42 U.S.C. 300hh–11(e)(3).

(m) *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.

(n) *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 these regulations;

(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.

(o) *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. For purposes of USERRA coverage only, service as an intermittent disaster response appointee of the NDMS when federally activated or attending authorized training in support of their Federal mission is deemed ''service in the uniformed services,'' although such appointee is not a member of the ''uniformed services'' as defined by USERRA.

§ 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. Certain types of service specified in 42 U.S.C. 300hh-11 by members of the National Disaster Medical System are covered by USERRA.

§ 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 status or 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 an individual on the basis of his or her membership, application for membership, performance of service, application for service, or obligation for service in the uniformed services.

§ 1002.19 What activity is protected from employer retaliation by USERRA?

An employer must not retaliate against an individual by taking any adverse employment action against him or her because the individual has 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 an individual who does not actually perform service in the uniformed services?

Yes. Employers are prohibited from taking actions against an individual for any of the activities protected by the Act, whether or not he or she has 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 sections 1002.36 and .38) and employment positions, including those that are for a brief, nonrecurrent 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?

The individual has the burden of proving that a status or activity protected by USERRA was one of the reasons that the employer took action against him or her, in order to establish that the action was discrimination or retaliation in violation of USERRA. If the individual succeeds in proving that the status or activity protected by USERRA was one of the reasons the employer took action against him or her, the employer has the burden to prove the affirmative defense that it would have taken the action anyway.

§ 1002.23 What must the individual show to carry the burden of proving that the employer discriminated or retaliated against him or her?

(a) In order to prove that the employer discriminated or retaliated against the individual, he or she must first show that the employer's action was motivated by one or more of the following:

(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 the individual proves that the employer's action was based on one of the prohibited motives listed in paragraph (a) of this section, the employer has the burden to prove the affirmative defense that the action would have been taken anyway absent the USERRA-protected status or activity.

Subpart C—Eligibility For Reemployment

GENERAL ELIGIBILITY REQUIREMENTS FOR REEMPLOYMENT

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

(a) In general, if the employee has been absent from a position of civilian employment by reason of service in the uniformed services, he or she will be eligible for reemployment under USERRA by meeting the following criteria:

(1) The employer had advance notice of the employee's service;

(2) The employee has five years or less of cumulative service in the uniformed services in his or her employment relationship with a particular employer;

(3) The employee timely returns to work or applies for reemployment; and,

(4) The employee has 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 the employee meets these eligibility criteria, then he or she is eligible for

reemployment unless the employer establishes one of the defenses described in § 1002.139. The employment position to which the employee is entitled is described in §§ 1002.191 through 1002.199.

§ 1002.33 Does the employee have to prove that the employer discriminated against him or her in order to be eligible for reemployment?

No. The employee is not required to prove that the employer discriminated against him or her because of the employee's uniformed service in order to be eligible for reemployment.

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 that an employee may claim reemployment rights when the employer 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 Can one employee be employed in one job by more than one employer?

Yes. Under USERRA, an employer includes not only the person or entity that pays an employee's salary or wages, but also includes a person or entity that has control over his or her employment opportunities, including a person or entity to whom an employer has delegated the performance of employment-related responsibilities. For example, if the employee is a security guard hired by a security company and he or she is assigned to a work site, the employee 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 the employee to a job because of a uniformed service obligation (for example, 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 the employee's removal from the job position because of his or her 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 an employer?

Yes. In certain occupations (for example, longshoreman, stagehand, construction worker), the employee may frequently work for many different employers. A hiring hall operated by a union or an employer association typically assigns the employee to the jobs. In these industries, it may not be unusual for the employee to work his or her 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 the employee's employer if the hiring and job assignment functions have been delegated by an employer to the hiring hall. As the employer, a hiring hall has reemployment responsibilities to its employees. 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 initial employment to an individual in violation of USERRA's anti-discrimination provisions. An employer need not actually employ an individual to be his or her ''employer'' under the Act, if it has denied initial employment on the basis of the individual's 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 initial employment on the basis of the individual's action taken to enforce a protection afforded to any person under USERRA, his or her testimony or statement in connection with any USERRA proceeding, assistance or other participation in a USERRA investigation, or the exercise of any other right provided by the Act. For example, if the individual has been denied initial employment because of his or her obligations as a member of the National Guard or Reserves, the company or entity denying employment is an employer for purposes of USERRA. Similarly, if an entity withdraws an offer of employment because the individual is called upon to fulfill an obligation in the uniformed services, the entity withdrawing the employment offer is an employer for purposes of USERRA.

§ 1002.41 Does an employee have rights under USERRA even though he or she holds a temporary, part-time, probationary, or seasonal employment position?

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

§ 1002.42 What rights does an employee have under USERRA if he or she is on layoff, on strike, or on a leave of absence?

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

apply if the employee is on strike or on a leave of absence from work when he or she begins a period of service in the uniformed services.

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

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

§ 1002.43 Does an individual have rights under USERRA even if he or she is 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 an independent contractor?

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

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

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

(2) The opportunity for profit or loss that depends upon the individual's managerial skill;

(3) Any investment in equipment or materials required for the individual's tasks, or his or her employment of helpers;

(4) Whether the service the individual performs requires a special skill;

(5) The degree of permanence of the individual's working relationship; and,

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

(c) No single one of these factors is controlling, but all are relevant to determining whether an individual is 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 an employee 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. 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 an employee's 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 an employee is 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 What types of service in the National Disaster Medical System are 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 performed as an intermittent disaster-response appointee upon activation of the National Disaster Medical System or participation in an authorized training program, even if the individual is not a member of the uniformed services.

§ 1002.57 Is all 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 Federal National Guard service is covered by USERRA.

(a) National Guard service under Federal authority is protected by USERRA. Service under Federal authority includes active duty performed 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) 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 these regulations.

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

Yes. 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, service as a member of that category of persons would be ''service in the uniformed services'' under USERRA.

§ 1002.60 Does USERRA cover an individual attending a military service academy?

Yes. Attending a military 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 Does USERRA cover a member of the Reserve Officers Training Corps?

Yes, under certain conditions.

(a) Membership in the Reserve Officers Training Corps (ROTC) or the Junior ROTC is not ''service in the uniformed services.'' However, some Reserve and National Guard enlisted members use a college ROTC program as a means of qualifying for commissioned officer status. National Guard and Reserve members in an ROTC program may at times, while participating in that program, be receiving active duty and inactive duty training service credit with their unit. In these cases, participating in ROTC training sessions is considered ''service in the uniformed services,'' and qualifies a person for protection under USERRA's reemployment and anti-discrimination provisions.

(b) Typically, an individual in a College ROTC program enters into an agreement with a particular military service that obligates such individual to either complete the ROTC program and accept a commission or, in case he or she does not successfully complete the ROTC program, to serve as an enlisted member. Although an individual does not qualify for reemployment protection, except as specified in (a) above, he or she is protected under

USERRA's anti-discrimination provisions because, as a result of the agreement, he or she has applied to become a member of the uniformed services and has incurred an obligation to perform future service.

§ 1002.62 Does USERRA cover a member of the Commissioned Corps of the National Oceanic and Atmospheric Administration, the Civil Air Patrol, or the Coast Guard Auxiliary?

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 an employee's sole reason for leaving an employment position in order to have USERRA reemployment rights?

No. If absence from a position of employment is necessitated by service in the uniformed services, and the employee otherwise meets the Act's eligibility requirements, he or she has reemployment rights under USERRA, even if the employee uses the absence for other purposes as well. An employee is not required to leave the employment position for the sole purpose of performing service in the uniformed services. For example, if the employee is required to report to an out of State location for military training and he or she spends off-duty time during that assignment moonlighting as a security guard or visiting relatives who live in that State, the employee will not lose reemployment rights simply because he or she used some of the time away from the job to do something other than attend the military training. Also, if an employee receives advance notification of a mobilization order, and leaves his or her employment position in order to prepare for duty, but the mobilization is cancelled, the employee will not lose any reemployment rights.

§ 1002.74 Must the employee begin service in the uniformed services immediately after leaving his or her employment position in order to have USERRA reemployment rights?

No. At a minimum, an employee must have enough time after leaving the employment position to travel safely to the uniformed service site and arrive fit to perform the service. Depending on the specific circumstances, including the duration of service, the amount of notice received, and the location of the service, additional time to rest, or to arrange 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 beginning of service in the uniformed services:

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

(b) If the employee is ordered to perform an extended period of service in the uniformed services, he or she may require a reasonable period of time off from the civilian job to put his or her personal affairs in order, before beginning the service. Taking such time off is also necessitated by the uniformed service.

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

REQUIREMENT OF NOTICE

§ 1002.85 Must the employee give advance notice to the employer of his or her service in the uniformed services?

(a) Yes. The employee, or an appropriate officer of the uniformed service in which his or her service is to be performed, must notify the employer that the employee intends to leave the employment position to perform service in the uniformed services, with certain exceptions described below. In cases in which an employee is employed by more than one employer, the employee, or an appropriate office of the uniformed service in which his or her service is to be performed, must notify each employer that the employee intends to leave the 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 the employee's behalf. An ''appropriate officer'' is a commissioned, warrant, or non-commissioned officer authorized to give such notice by the military service concerned.

(c) The employee's notice to the employer may be either verbal or written. The notice may be informal and does not need to follow any particular format.

(d) Although USERRA does not specify how far in advance notice must be given to the employer, an employee should provide notice as far in advance as is reasonable under the circumstances. In regulations promulgated by the Department of Defense under USERRA, 32 CFR 104.6(a)(2)(i)(B), the Defense Department ''strongly recommends that advance notice to civilian employers be provided at least 30 days prior to departure for uniformed service when it is feasible to do so.''

§ 1002.86 When is the employee excused from giving advance notice of service in the uniformed services?

The employee is 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 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. In certain cases, the Secretary of Homeland Security, in consultation with the Secretary of Defense, can make a determination that giving of notice by intermittent disaster-response appointees of the National Disaster Medical System is precluded by ''military necessity.'' See 42 U.S.C. 300hh–11(e)(3)(B).

(b) It may be impossible or unreasonable to give advance notice under certain circumstances. Such circumstances may include the unavailability of the employee's employer or the employer's representative, or a requirement that the employee report for uniformed service in an extremely short period of time.

§ 1002.87 Is the employee required to get permission from his or her employer before leaving to perform service in the uniformed services?

No. The employee is not required to ask for or get his or her employer's permission to leave to perform service in the uniformed services. The employee is only required to give the employer notice of pending service.

§ 1002.88 Is the employee required to tell his or her civilian employer that he or she intends to seek reemployment after completing uniformed service before the employee leaves to perform service in the uniformed services?

No. When the employee leaves the employment position to begin a period of service, he or she is not required to tell the civilian employer that he or she intends to seek reemployment after completing uniformed service. Even if the employee tells the employer before entering or completing uniformed service that he or she does not intend to

seek reemployment after completing the uniformed service, the employee does not forfeit the right to reemployment after completing service. The employee is not required to decide in advance of leaving the civilian employment position whether he or she will seek reemployment after completing uniformed service.

PERIOD OF SERVICE

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

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

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

No. The five-year period includes only the time the employee spends actually performing service in the uniformed services. A period of absence from employment before or after performing service in the uniformed services does not count against the five-year limit. For example, after the employee completes a period of service in the uniformed services, he or she is provided a certain amount of time, depending upon the length of service, to report back to work or submit an application for reemployment. The period between completing the uniformed service and reporting back to work or seeking reemployment does not count against the five-year limit.

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

No. An employee is entitled to a leave of absence for uniformed service for up to five years with each employer for whom he or she works. When the employee takes a position with a new employer, the five-year period begins again regardless of how much service he or she performed while working in any previous employment relationship. If an employee is employed by more than one employer, a separate five-year period runs as to each employer independently, even if those employers share or co-determine the employee's terms and conditions of employment.

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

It depends. USERRA provides reemployment rights to which an employee may become entitled beginning on or after December 12, 1994, but any uniformed service 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 an employee 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 an initial period of obligated service. Some military specialties require an individual to serve more than five years because of the amount of time or expense involved in training. If the employee works in one of those specialties, he or she has reemployment rights when the initial period of obligated service is completed;

(2) If the employee was unable to obtain orders releasing him or her from service in the uniformed services before the expiration of the five-year period, and the inability was not the employee's fault;

(3)(i) Service 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 performed to fulfill additional training requirements determined and certified by a proper military authority as necessary for the employee's professional development, or

to complete skill training or retraining;

(4) Service performed in a uniformed service if he or she was 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 performed in a uniformed service if the employee was 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 the Secretary concerned;

(6) Service performed in a uniformed service if the employee was 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 performed in a uniformed service if the employee was ordered to active duty in support of a critical mission or requirement of the uniformed services as determined by the Secretary concerned; and,

(8) Service performed as a member of the National Guard if the employee was 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 performed to mitigate economic harm where the employee's employer is in violation of its employment or reemployment obligations to him or her.

§ 1002.104 Is the employee required to accommodate his or her employer's needs as to the timing, frequency or duration of service?

No. The employee is not required to accommodate his or her employer's interests or concerns regarding the timing, frequency, or duration of uniformed service. The employer cannot refuse to reemploy the employee because it believes that the timing, frequency or duration of the service is unreasonable. However, the employer is permitted to bring its concerns over the timing, frequency, or duration of the employee's 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 an 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 scheduled absences from civilian employment to perform service.

APPLICATION FOR REEMPLOYMENT

§ 1002.115 Is the employee required to report to or submit a timely application for reemployment to his or her pre-service employer upon completing the period of service in the uniformed services?

Yes. Upon completing service in the uniformed services, the employee must notify the pre-service employer of his or her intent to return to the employment position by either reporting to work or submitting a timely application for reemployment. Whether the employee is required to report to work or submit a timely application for reemployment depends upon the length of 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 the period of service in the uniformed services was less than 31 days, or the employee was absent from a position of employment for a period of any length for the purpose of an examination to determine his or her fitness to perform service, the employee must report back to the 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 safe transportation from the place of that service to the employee's residence. For example, if the employee completes a period of service and travel home, arriving at ten o'clock in the evening, he or she cannot be required to report to the employer until the beginning of the next full regularly-scheduled work period that begins at least eight hours after arriving home, *i.e.*, no earlier than six o'clock the next morning. If it is impossible or unreasonable for the employee to report within such time period through no fault of his or her own, he or she must report to the 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 the employee's period of service in the uniformed services was for more than 30 days but less than 181 days, he or she must submit an application for reemployment (written or verbal) with the employer not later than 14 days after completing service. If it is impossible or unreasonable for the employee to apply within 14 days through no fault of his or her own, he or she 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 the employee's period of service in the uniformed services was for more than 180 days, he or she must submit an application for reemployment (written or verbal) not later than 90 days after completing service.

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

Yes. If the employee is hospitalized for, or convalescing from, an illness or injury incurred in, or aggravated during, the performance of service, he or she must report to or submit an application for reemployment to the employer at the end of the period necessary for recovering from the illness or injury. This period may not exceed two years from the date of the completion of service, except that it must be extended by the minimum time necessary to accommodate circumstances beyond the employee's control that make reporting within the period impossible or unreasonable. This period for recuperation and recovery extends the time period for reporting to or submitting an application for reemployment to the employer, and is not applicable following reemployment.

§ 1002.117 Are there any consequences if the employee fails to report for or submit a timely application for reemployment?

(a) If the employee fails to timely report for or apply for reemployment, he or she does not automatically forfeit entitlement to USERRA's reemployment and other rights and benefits. Rather, the employee becomes subject to the conduct rules, established policy, and general practices of the employer pertaining to an absence from scheduled work.

(b) If reporting or submitting an employment application to the employer is impossible or unreasonable through no fault of the employee, he or she may report to the employer as soon as possible (in the case of a period of service less than 31 days) or submit an application for reemployment to the 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 the employee will be considered to have timely reported or applied for reemployment.

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

An application for reemployment need not follow any particular format. The employee may apply orally or in writing. The application should indicate that the employee is a former employee returning from service in the uniformed services and that he or she seeks reemployment with the pre-service employer. The employee is permitted but not required to identify a particular reemployment position in which he or she is interested.

§ 1002.119 To whom must the employee submit the application for reemployment?

The application must be submitted to the pre-service employer or to an agent or representative of the 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 the employer, the application should be submitted to the employer's successor-in-interest.

§ 1002.120 If the employee seeks or obtains employment with an employer other than the pre-service employer before the end of the period within which a reemployment application must be filed, will that jeopardize reemployment rights with the pre-service employer?

No. The employee has reemployment rights with the pre-service employer provided that he or she makes a timely reemployment application to that employer. The employee may seek or obtain employment with an employer other than the pre-service employer during the period of time within which a reemployment application must be made, without giving up reemployment rights with the pre-service employer. However, such alternative employment during the application period should not be of a type that would constitute cause for the employer to discipline or terminate the employee following reemployment. For instance, if the employer forbids employees from working concurrently for a direct competitor during employment, violation of such a policy may constitute cause for discipline or even termination.

§ 1002.121 Is the employee required to submit documentation to the employer in connection with the application for reemployment?

Yes, if the period of service exceeded 30 days and if requested by the employer to do so. If the employee submits an application for reemployment after a period of service of more than 30 days, he or she must, upon the request of the employer, provide documentation to establish that:

(a) The reemployment application is timely;

(b) The employee has not exceeded the five-year limit on the duration of service (subject to the exceptions listed at § 1002.103); and,

(c) The employee's separation or dismissal from service was not disqualifying.

§ 1002.122 Is the employer required to reemploy the employee if documentation establishing the employee's eligibility does not exist or is not readily available?

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

§ 1002.123 What documents satisfy the requirement that the employee establish 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;

(7) Letter from National Disaster Medical System (NDMS) Team Leader or Administrative Officer verifying dates and times of NDMS training or Federal activation.

(b) The types of documents that are necessary to establish eligibility for reemployment will vary from case to case. Not all of these documents are available or necessary in every instance to establish reemployment eligibility.

CHARACTER OF SERVICE

§ 1002.134 What type of discharge or separation from service is required for an employee to be entitled to reemployment under USERRA?

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

§ 1002.135 What types of discharge or separation from uniformed service will make the employee ineligible for reemployment under USERRA?

Reemployment rights are terminated if the employee is:

(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 service?

The branch of service in which the employee performs the tour of duty determines the characterization of service.

§ 1002.137 If the employee receives a disqualifying discharge or release from uniformed service and it is later upgraded, will reemployment rights be restored?

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

§ 1002.138 If the employee receives a retroactive upgrade in the characterization of service, will that entitle him or her to claim back wages and benefits lost as of the date of separation from service?

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

EMPLOYER STATUTORY DEFENSES

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

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

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

(c) Even if the employee is otherwise eligible for reemployment benefits, the employer is not required to reemploy him or her if it establishes that the employment position vacated by the employee in order to perform service in the uniformed services was for a brief, nonrecurrent period and there was no reasonable expectation that the employment would continue indefinitely or for a significant period.

(d) The employer defenses included in this section are affirmative ones, and the employer carries the burden to prove by a preponderance of the evidence that any one or more of these defenses is applicable.

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 the employee's status with his or her civilian employer while performing service in the uniformed services?

During a period of service in the uniformed services, the employee is deemed to be on furlough or leave of absence from the civilian employer. In this status, the employee is 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. Entitlement to these non-seniority rights and benefits is not dependent on how the employer characterizes the employee's status during a period of service. For example, if the employer characterizes the employee as ''terminated'' during the period of uniformed service, this characterization cannot be used to avoid USERRA's requirement that the employee 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 Which non-seniority rights and benefits is the employee entitled to during a period of service?

(a) The non-seniority rights and benefits to which an employee is entitled during a period of service are those that the employer provides to similarly situated employees by an employment contract, agreement, policy, practice, or plan in effect at the employee's workplace. These rights and benefits include those in effect at the beginning of the employee's employment and those established after employment began. They also include those rights and benefits that become effective during the employee's 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, the employee must be given the most favorable treatment accorded to any comparable form of leave when he or she performs service in the uniformed services. In order to determine whether any two types of leave are comparable, the duration of the leave may be the most significant factor to compare. For instance, a two-day funeral leave will not be ''comparable'' to an extended leave for service in the uniformed service. In addition to comparing the duration of the absences, other factors such as the purpose of the leave and the ability of the employee to choose when to take the leave should also be considered.

(c) As a general matter, accrual of vacation leave is considered to be a non-seniority benefit that must be provided by an employer to an employee on a military leave of absence only if the employer provides that benefit to similarly situated employees on comparable leaves of absence.

§ 1002.151 If the employer provides full or partial pay to the employee while he or she is on military leave, is the employer required to also provide the non-seniority rights and benefits ordinarily granted to similarly situated employees on furlough or leave of absence?

Yes. If the employer provides additional benefits such as full or partial pay when the employee performs service, the employer is not excused from providing other rights and benefits to which the employee is entitled under the Act.

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

If employment is interrupted by a period of service in the uniformed services and the employee knowingly provides written notice of intent not to return to the position of employment after service in the uniformed services, he or she is not entitled to those non-seniority rights and benefits. The employee's written notice does not waive entitlement to any other rights to which he or she is entitled under the Act, including the right to reemployment after service.

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

(a) If employment is interrupted by a period of service, the employee 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 his or her civilian pay. However, the employee is not entitled to use sick leave that accrued with the civilian employer during a period of service in the uniformed services, unless the employer allows employees to use sick leave for any reason, or allows other similarly situated employees on comparable furlough or leave of absence to use accrued paid sick leave. Sick leave is usually not comparable to annual or vacation leave; it is generally intended to provide income when the employee or a family member is ill and the employee is unable to work.

(b) The employer may not require the employee 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 the employee's 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 the employer provide for the employee under USERRA?

If the employee has coverage under a health plan in connection with his or her employment, the plan must permit the employee to elect to continue the coverage for a certain period of time as described below:

(a) When the employee is performing service in the uniformed services, he or she is entitled to continuing coverage for himself or herself (and dependents if the plan offers dependent coverage) under a health plan provided in connection with the employment. The plan must allow the employee to elect to continue coverage for a period of time that is the lesser of:

(1) The 24-month period beginning on the date on which the employee's absence for the purpose of performing service begins; or,

(2) The period beginning on the date on which the employee's absence for the purpose of performing service begins, and ending on the date on which he or she fails to return from service or apply for a position of employment as provided under sections 1002.115–123 of these regulations.

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

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

§ 1002.165 How does the employee 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 the employee give advance notice of service in the uniformed services. For example, the employee cannot be precluded from electing continuing health plan coverage under circumstances where it is impossible or unreasonable for him or her to make a timely election of coverage.

§ 1002.166 How much must the employee pay in order to continue health plan coverage?

(a) If the employee performs service in the uniformed service for fewer than 31 days, he or she cannot be required to pay more than the regular employee share, if any, for health plan coverage.

(b) If the employee performs service in the uniformed service for 31 or more days, he or she may be required to pay no more than 102% of the full premium under the plan, which represents the employer's share plus the employee's 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 What actions may a plan administrator take if the employee does not elect or pay for continuing coverage in a timely manner?

The actions a plan administrator may take regarding the provision or cancellation of an employee's continuing coverage depend on whether the employee is excused from the requirement to give advance notice, whether the plan has established reasonable rules for election of continuation coverage, and whether the plan has established reasonable rules for the payment for continuation coverage.

(a) *No notice of service and no election of continuation coverage:* If an employer

provides employment-based health coverage to an employee who leaves employment for uniformed service without giving advance notice of service, the plan administrator may cancel the employee's health plan coverage upon the employee's departure from employment for uniformed service. However, in cases in which an employee's failure to give advance notice of service was excused under the statute because it was impossible, unreasonable, or precluded by military necessity, the plan administrator must reinstate the employee's health coverage retroactively upon his or her election to continue coverage and payment of all unpaid amounts due, and the employee must incur no administrative reinstatement costs. In order to qualify for an exception to the requirement of timely election of continuing health care, an employee must first be excused from giving notice of service under the statute.

(b) *Notice of service but no election of continuing coverage:* Plan administrators may develop reasonable requirements addressing how continuing coverage may be elected. Where health plans are also covered under the Consolidated Omnibus Budget Reconciliation Act of 1985, 26 U.S.C. 4980B (COBRA), it may be reasonable for a health plan administrator to adopt COBRA-compliant rules regarding election of continuing coverage, as long as those rules do not conflict with any provision of USERRA or this rule. If an employer provides employment-based health coverage to an employee who leaves employment for uniformed service for a period of service in excess of 30 days after having given advance notice of service but without making an election regarding continuing coverage, the plan administrator may cancel the employee's health plan coverage upon the employee's departure from employment for uniformed service, but must reinstate coverage without the imposition of administrative reinstatement costs under the following conditions:

(1) Plan administrators who have developed reasonable rules regarding the period within which an employee may elect continuing coverage must permit retroactive reinstatement of uninterrupted coverage to the date of departure if the employee elects continuing coverage and pays all unpaid amounts due within the periods established by the plan;

(2) In cases in which plan administrators have not developed rules regarding the period within which an employee may elect continuing coverage, the plan must permit retroactive reinstatement of uninterrupted coverage to the date of departure upon the employee's election and payment of all unpaid amounts at any time during the period established in section 1002.164(a).

(c) *Election of continuation coverage without timely payment:* Health plan administrators may adopt reasonable rules allowing cancellation of coverage if timely payment is not made. Where health plans are covered under COBRA, it may be reasonable for a health plan administrator to adopt COBRA-compliant rules regarding payment for continuing coverage, as long as those rules do not conflict with any provision of USERRA or this rule.

§ 1002.168 If the employee's coverage was terminated at the beginning of or during service, does his or her coverage have to be reinstated upon reemployment?

(a) If health plan coverage for the employee or a dependent was terminated by reason of 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 coverage upon reemployment, if an exclusion or waiting period would not have been imposed had coverage not been terminated by reason of such service.

(b) 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 the employee's 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 the employee's dependents, if he or she has dependent coverage), must be reinstated subject to paragraph (a) of this section.

§ 1002.169 Can the employee elect to delay reinstatement of health plan coverage until a date after the date he or she is reemployed?

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

§ 1002.170 In a multiemployer health plan, how is liability allocated for employer contributions and benefits arising under USERRA's health plan provisions?

Liability under a multiemployer plan for employer contributions and benefits in connection with USERRA's health plan provisions must be allocated either as the plan sponsor provides, or, if the sponsor does not provide, to the employee's last employer before his or her service. If the last employer is no longer functional, liability for continuing coverage is allocated to the health plan.

§ 1002.171 How does the continuation of health plan benefits apply to a multiemployer plan that provides health plan coverage through a health benefits account system?

(a) Some employees receive health plan benefits provided pursuant to a multiemployer plan that utilizes a health benefits account system in which an employee accumulates prospective health benefit eligibility, also commonly referred to as ''dollar bank,'' ''credit bank,'' and ''hour bank'' plans. In such cases, where an employee with a positive health benefits account balance elects to continue the coverage, the employee may further elect either option below:

(1) The employee may expend his or her health account balance during an absence from employment due to service in the uniformed services in lieu of paying for the continuation of coverage as set out in § 1002.166. If an employee's health account balance becomes depleted during the applicable period provided for in § 1002.164(a), the employee must be permitted, at his or her option, to continue coverage pursuant to § 1002.166. Upon reemployment, the plan must provide for immediate reinstatement of the employee as required by § 1002.168, but may require the employee to pay the cost of the coverage until the employee earns the credits necessary to sustain continued coverage in the plan.

(2) The employee may pay for continuation coverage as set out in § 1002.166, in order to maintain intact his or her account balance as of the beginning date of the absence from employment due to service in the uniformed services. This option permits the employee to resume usage of the account balance upon reemployment.

(b) Employers or plan administrators providing such plans should counsel employees of their options set out in this subsection.

Subpart E—Reemployment Rights and Benefits

PROMPT REEMPLOYMENT

§ 1002.180 When is an employee entitled to be reemployed by his or her civilian employer?

The employer must promptly reemploy the employee when he or she returns from a period of service if the employee meets the Act's eligibility criteria as described in Subpart C of these regulations.

§ 1002.181 How is "prompt reemployment" defined?

''Prompt reemployment'' means as soon as practicable under the circumstances of each case. Absent unusual circumstances, reemployment must occur within two weeks of the employee's application for reemployment. For example, prompt reinstatement after a 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 the employer may have to reassign or give notice to another employee who occupied the returning employee's position.

REEMPLOYMENT POSITION

§ 1002.191 What position is the employee entitled to upon reemployment?

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

§ 1002.192 How is the specific reemployment position determined?

In all cases, the starting point for determining the proper reemployment position is the escalator position, which is the job position that the employee would have attained if his or her continuous employment had not been interrupted due to uniformed service. Once this position is determined, the employer may have to consider several factors before determining the appropriate reemployment position in any particular case. Such factors may include the employee's length of service, qualifications, and disability, if any. The 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 the reemployment position include elements such as seniority, status, and rate of pay?

(a) Yes. The reemployment position includes the seniority, status, and rate of pay that an employee would ordinarily have attained in that position given his or her job history, including prospects for future earnings and advancement. The employer must determine the seniority rights, status, and rate of pay as though the employee 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 the employee's service, and any changes that may have occurred during the period of service. In particular, the employee's status in the reemployment position could include opportunities for advancement, general working conditions, job location, shift assignment, rank, responsibility, and geographical location.

(b) If an opportunity for promotion, or eligibility for promotion, that the employee missed during service is based on a skills test or examination, then the employer should give him or her a reasonable amount of time to adjust to the employment position and then give a skills test or examination. No fixed amount of time for permitting adjustment to reemployment will be deemed reasonable in all cases. However, in determining a reasonable amount of time to permit an employee to adjust to reemployment before scheduling a makeup test or examination, an employer may take into account a variety of factors, including but not limited to the length of time the returning employee was absent from work, the level of difficulty of the test itself, the typical time necessary to prepare or study for the test, the duties and responsibilities of the reemployment position and the promotional position, and the nature and responsibilities of the service member while serving in the uniformed service. If the employee is successful on the makeup exam and, based on the results of that exam, there is a reasonable certainty that he or she would have been promoted, or made eligible for promotion, during the time that the employee served in the uniformed service, then

the promotion or eligibility for promotion must be made effective as of the date it would have occurred had employment not been interrupted by uniformed service.

§ 1002.194 Can the application of the escalator principle result in adverse consequences when the employee is reemployed?

Yes. The Act does not prohibit lawful adverse job consequences that result from the employee's restoration on the seniority ladder. Depending on the circumstances, the escalator principle may cause an employee to be reemployed in a higher or lower position, laid off, or even terminated. For example, if an employee's seniority or job classification would have resulted in the employee being laid off during the period of service, and the layoff continued after the date of reemployment, reemployment would reinstate the employee to layoff status. Similarly, the status of the reemployment position requires the employer to assess what would have happened to such factors as the employee's opportunities for advancement, working conditions, job location, shift assignment, rank, responsibility, and geographical location, if he or she had remained continuously employed. The 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 the reemployment position?

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

(a) The length of the employee's most recent period of uniformed service;

(b) The employee's qualifications; and,

(c) Whether the employee has a disability incurred or aggravated during uniformed service.

§ 1002.196 What is the employee's reemployment position if the period of service was less than 91 days?

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

(a) The employee must be reemployed in the escalator position. He or she must be qualified to perform the duties of this position. The employer must make reasonable efforts to help the employee become qualified to perform the duties of this position.

(b) If the employee is not qualified to perform the duties of the escalator position after reasonable efforts by the employer, the employee must be reemployed in the position in which he or she was employed on the date that the period of service began. The employee must be qualified to perform the duties of this position. The employer must make reasonable efforts to help the employee become qualified to perform the duties of this position.

(c) If the employee is not qualified to perform the duties of the escalator position or the pre-service position, after reasonable efforts by the employer, he or she must be reemployed in any other position that is the nearest approximation first to the escalator position and then to the pre-service position. The employee must be qualified to perform the duties of this position. The employer must make reasonable efforts to help the employee become qualified to perform the duties of this position.

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

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

(a) The employee must be reemployed in the escalator position or a position of like seniority, status, and pay. He or she must be qualified to perform the duties of this position. The employer must make reasonable efforts to help the employee become qualified to perform the duties of this position.

(b) If the employee is not qualified to perform the duties of the escalator position or a like position after reasonable efforts by the employer, the employee must be reemployed in the position in which he or she was employed on the date that the period of service began or in a position of like seniority, status, and pay. The employee must be qualified to perform the duties of this position. The employer must make reasonable efforts to help the employee become qualified to perform the duties of this position.

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

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

The employee must be qualified for the reemployment position. The employer must make reasonable efforts to help the employee become qualified to perform the duties of this position. The employer is not required to reemploy the employee on his or her return from service if he or she cannot, after reasonable efforts by the employer, qualify for the appropriate reemployment position.

(a)(1) ''Qualified'' means that the employee has the ability to perform the essential tasks of the position. The employee's inability to perform one or more non-essential tasks of a position does not make him or her unqualified.

(2) Whether a task is essential depends on several factors, and these factors include but are not limited to:

(i) The employer's judgment as to which functions are essential;

(ii) Written job descriptions developed before the hiring process begins;

(iii) The amount of time on the job spent performing the function;

(iv) The consequences of not requiring the individual to perform the function;

(v) The terms of a collective bargaining agreement;

(vi) The work experience of past incumbents in the job; and/or

(vii) The current work experience of incumbents in similar jobs.

(b) Only after the employer makes reasonable efforts, as defined in § 1002.5(i), may it determine that the employee is not qualified for the reemployment position. These reasonable efforts must be made at no cost to the employee.

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

If two or more employees are entitled to reemployment in the same position and more than one employee has reported or applied for employment in that position, the employee who first left the position for uniformed 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 employee would have been reemployed according to the rules that normally determine a reemployment position, as set out in §§ 1002.196 and 1002.197.

SENIORITY RIGHTS AND BENEFITS

§ 1002.210 What seniority rights does an employee have when reemployed following a period of uniformed service?

The employee is entitled to the seniority and seniority-based rights and benefits that he or she had on the date the uniformed service began, plus any seniority and seniority-based rights and benefits that the employee would have attained if he or she had remained continuously employed. In determining entitlement to seniority and seniority-based rights and benefits, the period of absence from employment due to or necessitated by 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,

under USERRA, 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 uniformed service, meet FMLA's eligibility requirements. In the event that a service member is denied FMLA leave for failing to satisfy the FMLA's hours of work requirement due to absence from employment necessitated by uniformed service, the service member may have a cause of action under USERRA but not under the FMLA.

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

No. USERRA does not require the 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 the place of employment to determine the employee's entitlement to any employment benefits that accrue with, or are determined by, longevity in employment.

§ 1002.212 How does a person 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 length of service rather than a form of short-term compensation for work performed;

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

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

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

A reasonable certainty is a high probability that the employee would have received the seniority or seniority-based right or benefit if he or she had been continuously employed. The employee does not have to establish that he or she would have received the benefit as an absolute certainty. The employee can demonstrate a reasonable certainty that he or she would have received the seniority right or benefit by showing that other employees with seniority similar to that which the employee would have had if he or she had remained continuously employed received the right or benefit. The employer cannot withhold the right or benefit based on an assumption that a series of unlikely events could have prevented the employee from gaining the right or benefit.

DISABLED EMPLOYEES

§ 1002.225 Is the employee entitled to any specific reemployment benefits if he or she has a disability that was incurred in, or aggravated during, the period of service?

Yes. 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 uniformed service. If the employee has a disability incurred in, or aggravated during, the period of service in the uniformed services, the employer must make reasonable efforts to accommodate that disability and to help the employee become qualified to perform the duties of his or her reemployment position. If the employee is not qualified

for reemployment in the escalator position because of a disability after reasonable efforts by the employer to accommodate the disability and to help the employee to become qualified, the employee must be reemployed in a position according to the following priority. The employer must make reasonable efforts to accommodate the employee's disability and to help him or her 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 the employee's case, in terms of seniority, status, and pay. A position that is the nearest approximation to the equivalent position may be a higher or lower position, depending on the circumstances.

§ 1002.226 If the employee has a disability that was incurred in, or aggravated during, the period of service, what efforts must the employer make to help him or her become qualified for the reemployment position?

(a) USERRA requires that the employee be qualified for the reemployment position regardless of any disability. The employer must make reasonable efforts to help the employee to become qualified to perform the duties of this position. The employer is not required to reemploy the employee on his or her return from service if he or she cannot, after reasonable efforts by the 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 the employee's rate of pay determined when he or she returns from a period of service?

The employee's rate of pay is determined by applying the same escalator principles that are used to determine the reemployment position, as follows:

(a) If the employee is reemployed in the escalator position, the employer must compensate him or her at the rate of pay associated with the escalator position. The rate of pay must be determined by taking into account any pay increases, differentials, step increases, merit increases, or periodic increases that the employee would have attained with reasonable certainty had he or she remained continuously employed during the period of service. In addition, when considering whether merit or performance increases would have been attained with reasonable certainty, an employer may examine the returning employee's own work history, his or her history of merit increases, and the work and pay history of employees in the same or similar position. For example, if the employee missed a merit pay increase while performing service, but qualified for previous merit pay increases, then the rate of pay should include the merit pay increase that was missed. If the merit pay increase that the employee missed during service is based on a skills test or examination, then the employer should give the employee a reasonable amount of time to adjust to the reemployment position and then give him or her the skills test or examination. No fixed amount of time for permitting adjustment to reemployment will be deemed reasonable in all cases. However, in determining a reasonable amount of time to permit an employee to adjust to reemployment before scheduling a makeup test or examination, an employer may take into account a variety of factors, including but not limited to the length of time the returning employee was absent from work, the level of difficulty of the test itself, the typical time necessary to prepare or study for the test, the duties and responsibilities of the reemployment position and the promotional position, and the nature and responsibilities of the service member while serving in the uniformed service. The escalator principle also applies in the event a pay reduction occurred in the reemployment position during the period of service. Any pay adjustment must be made effective as of the date it would have occurred had the employee's employment not been interrupted by uniformed service.

(b) If the employee is reemployed in the pre-service position or another position, the employer must compensate

him or her at the rate of pay associated with the position in which he or she is reemployed. As with the escalator position, the rate of pay must be determined by taking into account any pay increases, differentials, step increases, merit increases, or periodic increases that the employee would have attained with reasonable certainty had he or she remained continuously employed during the period of service.

PROTECTION AGAINST DISCHARGE

§ 1002.247 Does USERRA provide the employee with protection against discharge?

Yes. If the employee's most recent period of service in the uniformed services was more than 30 days, he or she must not be discharged except for cause—

(a) For 180 days after the employee's date of reemployment if his or her 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 the employee's most recent period of uniformed service was more than 180 days.

§ 1002.248 What constitutes cause for discharge under USERRA?

The employee may be discharged for cause based either on conduct or, in some circumstances, because of the application of other legitimate nondiscriminatory reasons.

(a) In a discharge action based on conduct, the employer bears the burden of proving that it is reasonable to discharge the employee for the conduct in question, and that he or she had notice, which was express or can be fairly implied, that the conduct would constitute cause for discharge.

(b) If, based on the application of other legitimate nondiscriminatory reasons, the employee's job position is eliminated, or the employee is placed on layoff status, either of these situations would constitute cause for purposes of USERRA. The employer bears the burden of proving that the employee's job would have been eliminated or that he or she would have been laid off.

PENSION PLAN BENEFITS

§ 1002.259 How does USERRA protect an employee's pension benefits?

On reemployment, the employee is treated as not having a break in service with the employer or employers maintaining a pension plan, for purposes of participation, vesting and accrual of benefits, by reason of the period of absence from employment due to or necessitated by service in the uniformed services.

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

(b) If the employee is hospitalized for, or convalescing from, an illness or injury incurred in, or aggravated during, service, he or she is entitled to report to or submit an application for reemployment at the end of the time period necessary for him or her to recover from the illness or injury. This period, which may not exceed two years from the date the employee completed service, except in circumstances beyond his or her control, must be treated as continuous service with the 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 the 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 the employee with pension benefits?

With the exception of multiemployer plans, which have separate rules discussed below, the employer is liable to the pension benefit plan to fund any obligation of the plan to provide benefits that are attributable to the employee's period of service. In the case of a defined contribution plan, once the employee is reemployed, the employer must allocate the amount of its make-up contribution for the employee, if any; his or her make-up employee contributions, if any; and his or her elective deferrals, 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, the employee's accrued benefit will be increased for the period of service once he or she is reemployed and, if applicable, has repaid any amounts previously paid to him or her from the plan and made any employee contributions that may be required to be made under the plan.

§ 1002.262 When is the employer required to make the plan contribution that is attributable to the employee's period of uniformed service?

(a) The employer is not required to make its contribution until the employee is reemployed. For employer contributions to a plan in which the employee is not required or permitted to contribute, the employer must make the contribution attributable to the employee's period of service no later than ninety days after the date of reemployment, or when plan contributions are normally due for the year in which the service in the uniformed services was performed, whichever is later. If it is impossible or unreasonable for the employer to make the contribution within this time period, the employer must make the contribution as soon as practicable.

(b) If the employee is enrolled in a contributory plan he or she is allowed (but not required) to make up his or her missed contributions or elective deferrals. These makeup contributions or elective deferrals must be made 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 uniformed service, with the repayment period not to exceed five years. Make-up contributions or elective deferrals may only be made during this period and while the employee is employed with the post-service employer.

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

(d) The employee is not required to make up the full amount of employee contributions or elective deferrals that he or she missed making during the period of service. If the employee does not make up all of the missed contributions or elective deferrals, his or her pension may be less than if he or she had done so.

(e) Any vested accrued benefit in the pension plan that the employee was entitled to prior to the period of uniformed service remains intact whether or not he or she chooses to be reemployed under the Act after leaving the uniformed service.

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

§ 1002.263 Does the employee pay interest when he or she makes up missed contributions or elective deferrals?

No. The employee is not required or permitted to make up a missed contribution in an amount that exceeds the amount he or she would have been permitted or required to contribute had he or she remained continuously employed during the period of service.

§ 1002.264 Is the employee allowed to repay a previous distribution from a pension benefits plan upon being reemployed?

Yes, provided the plan is a defined benefit plan. If the employee received a distribution of all or part of the accrued benefit from a defined benefit plan in connection with his or her service in the uniformed services before he or she became reemployed, he or she must be allowed to repay the withdrawn amounts when he or she is reemployed. The amount the employee must repay includes any interest that would have accrued had the monies not been withdrawn. The employee must be allowed to repay these amounts 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 uniformed service, with the repayment period not to exceed five years (or such longer time as may be agreed to between the employer and the employee), provided the employee is employed with the post-service employer during this period.

§ 1002.265 If the employee is reemployed with his or her pre-service employer, is the employee's pension benefit the same as if he or she had remained continuously employed?

The amount of the employee's pension benefit depends on the type of pension plan.

(a) In a non-contributory defined benefit plan, where the amount of the pension benefit is determined according to a specific formula, the employee's benefit will be the same as though he or she had remained continuously employed during the period of service.

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

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

(b) An employer that contributes to a multiemployer plan and that reemploys the employee pursuant to USERRA must provide written notice of reemployment to the plan administrator within 30 days after the date of reemployment. The returning service member should notify the reemploying employer that he or she has been reemployed pursuant to USERRA. The 30-day period within which the reemploying employer must provide written notice to the multiemployer plan pursuant to this subsection does not begin until the employer has knowledge that the employee was reemployed pursuant to USERRA.

(c) The employee is entitled to the same employer contribution whether

he or she is reemployed by the preservice employer or by a different employer contributing to the same multiemployer plan, provided that the preservice employer and the post-service employer share a common means or practice of hiring the employee, such as common participation in a union hiring hall.

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

In many pension benefit plans, the employee's compensation determines the amount of his or her contribution or the retirement benefit to which he or she is entitled.

(a) Where the employee's rate of compensation must be calculated to determine pension entitlement, the calculation must be made using the rate of pay that the employee would have received but for the period of uniformed service.

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

(2) Where the rate of pay the employee would have received is not reasonably certain and he or she was employed for less than 12 months prior to the period of uniformed service, the average rate of compensation must be derived from this shorter period of employment that preceded 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*), 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 does an individual file a USERRA complaint?

If an individual is claiming entitlement to employment rights or benefits or reemployment rights or benefits and alleges that an employer has failed or refused, or is about to fail or refuse, to comply with the Act, the individual may file a complaint with VETS or initiate a private legal action in a court of law (*see* § 1002.303). A complaint may be filed with VETS either in writing, using VETS Form 1010, or electronically, using VETS Form e1010 (instructions and the forms can be accessed at *http://www.dol.gov/elaws/vets/userra/1010.asp*). A complaint must include the name and address of the employer, a summary of the basis for the complaint, and a request for relief.

§ 1002.289 How will VETS investigate a 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 an individual take if the complaint is not resolved by VETS?

If an individual receives a notification from VETS of an unsuccessful effort to resolve his or her complaint relating to a State or private employer, the individual may request that VETS refer the complaint to the Attorney General.

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

(a) If the Attorney General is reasonably satisfied that an individual's complaint is meritorious, meaning that he or she is entitled to the rights or benefits sought, the Attorney General may appear on his or her behalf and act as the individual's attorney, and initiate a legal action to obtain appropriate relief.

(b) If the Attorney General determines that the individual's complaint does not have merit, the Attorney General may decline to represent him or her.

ENFORCEMENT OF RIGHTS AND BENEFITS AGAINST A STATE OR PRIVATE EMPLOYER

§ 1002.303 Is an individual required to file his or her complaint with VETS?

No. The individual may initiate a private action for relief against a State or private employer if he or she decides not to apply to VETS for assistance.

§ 1002.304 If an individual files a complaint with VETS and VETS' efforts do not resolve the complaint, can the individual pursue the claim on his or her own?

Yes. If VETS notifies an individual that it is unable to resolve the complaint, the individual may pursue the claim on his or her own. The individual may choose to be represented by private counsel whether or not the Attorney General decides to represent him or her as to the 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 Is a National Guard civilian technician considered a State or Federal employee for purposes of USERRA?

A National Guard civilian technician is considered a State employee for USERRA purposes, although he or she is 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 an individual if he or she is claiming rights under the Act. If the individual obtains private counsel for any action or proceeding to enforce a provision of the Act, and prevails, 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?

USERRA does not have a statute of limitations, and it expressly precludes the application of any State statute of limitations. At least one court, however, has held that the four-year general Federal statute of limitations, 28 U.S.C. 1658, applies to actions under USERRA. *Rogers* v. *City of San Antonio,* 2003 WL 1566502 (W.D. Texas), *reversed on other grounds,* 392 F.3d 758 (5th Cir. 2004). But see *Akhdary* v. *City of Chattanooga,* 2002 WL 32060140 (E.D. Tenn.). In addition, if an individual unreasonably delays asserting his or her rights, and that unreasonable delay causes prejudice to the employer, the courts have recognized the availability of the equitable doctrine of *laches* to bar a claim under USERRA. Accordingly, individuals asserting rights under USERRA should determine whether the issue of the applicability of the Federal statute of limitations has been resolved and, in any event, act promptly to preserve their rights 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 the employer to comply with the provisions of the Act;

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

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

APPENDIX TO PART 1002—NOTICE OF YOUR RIGHTS UNDER USERRA

Pursuant to 38 U.S.C. 4334(a), 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. The requirement for the provision of notice under this section may be met by posting the following notice where employers customarily place notices for employees. Posting one of the original notices published in 70 FR 75316 (Dec. 19, 2005) will also satisfy this requirement. The following text is provided by the Secretary of Labor to employers pursuant to 38 U.S.C. 4334(b).

TEXT FOR USE BY ALL EMPLOYERS

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 or certain types of service in the National Disaster Medical System. 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 do not 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 Web site at *http://www.dol.gov/vets*. An interactive online USERRA Advisor 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, as applicable, 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. The text of this notice was prepared by VETS, and may be viewed on the Internet at this address: *http://www.dol.gov/vets/programs/userra/poster.htm*. Federal law requires employers to notify employees of their rights under USERRA, and employers may meet this requirement by displaying the text of this notice where they customarily place notices for employees. U.S. Department of Labor, Veterans' Employment and Training Service, 1–866–487–2365.

[73 FR 63632, Oct. 27, 2008]

PART 1010—APPLICATION OF PRIORITY OF SERVICE FOR COVERED PERSONS

Subpart A—Purpose and Definitions

Sec.
1010.100 What is the purpose and scope of this part?
1010.110 What definitions apply to this part?

Subpart B—Understanding Priority of Service

1010.200 What is priority of service?
1010.210 In which Department job training programs do covered persons receive priority of service?
1010.220 How are recipients required to implement priority of service?
1010.230 In addition to the responsibilities of all recipients, do States and political subdivisions of States have any particular responsibilities in implementing priority of service?
1010.240 Will the Department be monitoring for compliance with priority of service?
1010.250 Can priority of service be waived?

Subpart C—Applying Priority of Service

1010.300 What processes are to be implemented to identify covered persons?
1010.310 How will priority of service be applied?
1010.320 Will recipients be required to collect information and report on priority of service?
1010.330 What are the responsibilities of recipients to collect and maintain data on covered and non-covered persons?

AUTHORITY: Pub. L. 109–461 (Dec. 22, 2006), section 605 [38 U.S.C. 4215 Note]; 38 U.S.C. 4215.

SOURCE: 73 FR 78142, Dec. 19, 2008, unless otherwise noted.

Subpart A—Purpose and Definitions

§ 1010.100 What is the purpose and scope of this part?

(a) Part 1010 contains the Department regulations implementing priority of service for covered persons. Priority of service for covered persons is authorized by section 2(a)(1) of JVA (38 U.S.C. 4215). These regulations fulfill section 605 of the Veterans Benefits, Health Care, and Information Technology Act of 2006, Pub. L. 109–461 (Dec. 22, 2006), which requires the Department to implement priority of service via regulation.

(b) As provided in § 1010.210, this part applies to all qualified job training programs.

§ 1010.110 What definitions apply to this part?

The following definitions apply to this part:

Covered person as defined in section 2(a) of the JVA (38 U.S.C. 4215(a)) means a veteran or eligible spouse.

Department or DOL means the United States Department of Labor, including its agencies and organizational units and their representatives.

Eligible spouse as defined in section 2(a) of the JVA (38 U.S.C. 4215(a)) means the spouse of any of the following:

(1) Any veteran who died of a service-connected disability;

(2) Any member of the Armed Forces serving on active duty who, at the time of application for the priority, is listed in one or more of the following categories and has been so listed for a total of more than 90 days:

(i) Missing in action;

(ii) Captured in line of duty by a hostile force; or

(iii) Forcibly detained or interned in line of duty by a foreign government or power;

(3) Any veteran who has a total disability resulting from a service-connected disability, as evaluated by the Department of Veterans Affairs;

(4) Any veteran who died while a disability, as indicated in paragraph (3) of this section, was in existence.

Grant means an award of Federal financial assistance by the Department of Labor to an eligible recipient.

Jobs for Veterans Act (JVA) means Public Law 107–288 (2002). Section 2(a) of the JVA, codified at 38 U.S.C. 4215(a), provides priority of service for covered persons.

Non-covered person means any individual who meets neither the definition of ''veteran,'' as defined in this section, nor the definition of ''eligible spouse'' as defined in this section.

Qualified job training program means any program or service for workforce preparation, development, or delivery that is directly funded, in whole or in part, by the Department of Labor.

Recipient means an entity to which federal financial assistance, in whole or in part, is awarded directly from the Department or through a sub-award for any qualified job training program.

Secretary means the Secretary of the Department of Labor.

Veteran means a person who served in the active military, naval, or air service, and who was discharged or released therefrom under conditions other than dishonorable, as specified in 38 U.S.C. 101(2). Active service includes full-time duty in the National Guard or a Reserve component, other than full-time duty for training purposes.

Subpart B—Understanding Priority of Service

§ 1010.200 What is priority of service?

(a) As defined in section 2(a) of the JVA (38 U.S.C. 4215(a)) ''priority of service'' means, with respect to any qualified job training program, that a covered person shall be given priority over a non-covered person for the receipt of employment, training, and placement services provided under that program, notwithstanding any other provision of the law.

(b) Priority in the context of providing priority of service to veterans and other covered persons in qualified job training programs covered by this regulation means the right to take precedence over non-covered persons in obtaining services. Depending on the type of service or resource being provided, taking precedence may mean:

(1) The covered person receives access to the service or resource earlier in time than the non-covered person; or

(2) If the service or resource is limited, the covered person receives access to the service or resource instead of or before the non-covered person.

§ 1010.210 In which Department job training programs do covered persons receive priority of service?

(a) Priority of service applies to every qualified job training program funded, in whole or in part, by the Department, including:

(1) Any such program or service that uses technology to assist individuals to access workforce development programs (such as job and training opportunities, labor market information, career assessment tools, and related support services); and

(2) Any such program or service under the public employment service system, One-Stop Career Centers, the Workforce Investment Act of 1998, a demonstration or other temporary program; any workforce development program targeted to specific groups; and those programs implemented by States or local service providers based on Federal block grants administered by the Department.

(b) The implementation of priority of service does not change the intended

function of a program or service. Covered persons must meet all statutory eligibility and program requirements for participation in order to receive priority for a program or service.

§ 1010.220 How are recipients required to implement priority of service?

(a) An agreement to implement priority of service, as described in these regulations and in any departmental guidance, is a condition for receipt of all Department job training program funds.

(b) All recipients are required to ensure that priority of service is applied by all sub-recipients of Department funds. All program activities, including those obtained through requests for proposals, solicitations for grant awards, sub-grants, contracts, sub-contracts, and (where feasible) memoranda of understanding or other service provision agreements, issued or executed by qualified job training program operators, must be administered in compliance with priority of service.

§ 1010.230 In addition to the responsibilities of all recipients, do States and political subdivisions of States have any particular responsibilities in implementing priority of service?

(a) Pursuant to their responsibility under the Workforce Investment Act of 1998, States are required to address priority of service in their comprehensive strategic plan for the State's workforce investment system. Specifically, States must develop policies for the delivery of priority of service by the State Workforce Agency or Agencies, Local Workforce Investment Boards, and One-Stop Career Centers for all qualified job training programs delivered through the State's workforce system. The policy or policies must require that processes are in place to ensure that covered persons are identified at the point of entry and given an opportunity to take full advantage of priority of service. These processes shall be undertaken to ensure that covered persons are aware of:

(1) Their entitlement to priority of service;

(2) The full array of employment, training, and placement services available under priority of service; and

(3) Any applicable eligibility requirements for those programs and/or services.

(b) The State's policy or policies must require Local Workforce Investment Boards to develop and include in their strategic local plan, policies implementing priority of service for the local One-Stop Career Centers and for service delivery by local workforce preparation and training providers. These policies must establish processes to ensure that covered persons are identified at the point of entry so that covered persons are able to take full advantage of priority of service. These processes shall ensure that covered persons are aware of:

(1) Their entitlement to priority of service;

(2) The full array of employment, training, and placement services available under priority of service; and

(3) Any applicable eligibility requirements for those programs and/or services.

§ 1010.240 Will the Department be monitoring for compliance with priority of service?

(a) The Department will monitor recipients of funds for qualified job training programs to ensure that covered persons are made aware of and afforded priority of service.

(b) Monitoring priority of service will be performed jointly between the Veterans' Employment and Training Service (VETS) and the DOL agency responsible for the program's administration and oversight.

(c) A recipient's failure to provide priority of service to covered persons will be handled in accordance with the program's established compliance review processes. In addition to the remedies available under the program's compliance review processes, a recipient may be required to submit a corrective action plan to correct such failure.

§ 1010.250 Can priority of service be waived?

No, priority of service cannot be waived.

Subpart C—Applying Priority of Service

§ 1010.300 What processes are to be implemented to identify covered persons?

(a) Recipients of funds for qualified job training programs must implement processes to identify covered persons who physically access service delivery points or who access virtual service delivery programs or Web sites in order to provide covered persons with timely and useful information on priority of service at the point of entry. Point of entry may include reception through a One-Stop Career Center established pursuant to the Workforce Investment Act of 1998, as part of an application process for a specific program, or through any other method by which covered persons express an interest in receiving services, either in-person or virtually.

(b)(1) The processes for identifying covered persons at the point of entry must be designed to:

(i) Permit the individual to make known his or her covered person status; and

(ii) Permit those qualified job training programs specified in § 1010.330(a)(2) to initiate data collection for covered entrants.

(2) The processes for identifying covered persons are not required to verify the status of an individual as a veteran or eligible spouse at the point of entry unless they immediately undergo eligibility determination and enrollment in a program.

(c) The processes for identifying covered persons must ensure that:

(1) Covered persons are identified at the point of entry to allow covered persons to take full advantage of priority of service; and

(2) Covered persons are to be made aware of:

(i) Their entitlement to priority of service;

(ii) The full array of employment, training, and placement services available under priority of service; and

(iii) Any applicable eligibility requirements for those programs and/or services.

§ 1010.310 How will priority of service be applied?

(a) Recipients of funds for qualified job training programs must implement processes in accordance with § 1010.300 to identify covered persons at the point of entry, whether in person or virtual, so the covered person can be notified of their eligibility for priority of service. Since qualified job training programs may offer various types of services including staff-assisted services as well as self-services or informational activities, recipients also must ensure that priority of service is implemented throughout the full array of services provided to covered persons by the qualified job training program.

(b) Three categories of qualified job training programs affect the application of priority of service: universal access, discretionary targeting and statutory targeting. To obtain priority, a covered person must meet the statutory eligibility requirement(s) applicable to the specific program from which services are sought. For those programs that also have discretionary or statutory priorities or preferences pursuant to a Federal statute or regulation, recipients must coordinate providing priority of service with applying those other priorities, as prescribed in paragraphs (b)(2) and (b)(3) of this section.

(1) *Universal access programs* operate or deliver services to the public as a whole; they do not target specific groups. These programs are required to provide priority of service to covered persons.

(2) *Discretionary targeting programs* focus on a particular group, or make efforts to provide a certain level of service to such a group, but do not specifically mandate that the favored group be served before other eligible individuals. Whether these provisions are found in a Federal statute or regulation, priority of service will apply. Covered persons must receive the highest priority for the program or service, and non-covered persons within the discretionary targeting will receive priority over non-covered persons outside the discretionary targeting.

(3) *Statutory targeting programs* are programs derived from a Federal statutory mandate that requires a priority

or preference for a particular group of individuals or requires spending a certain portion of program funds on a particular group of persons receiving services. These are mandatory priorities. Recipients must determine each individual's covered person status and apply priority of service as described below:

(i) Covered persons who meet the mandatory priorities or spending requirement or limitation must receive the highest priority for the program or service;

(ii) Non-covered persons within the program's mandatory priority or spending requirement or limitation, must receive priority for the program or service over covered persons outside the program-specific mandatory priority or spending requirement or limitation; and,

(iii) Covered persons outside the program-specific mandatory priority or spending requirement or limitation must receive priority for the program or service over non-covered persons outside the program-specific mandatory priority or spending requirement or limitation.

§ 1010.320 Will recipients be required to collect information and report on priority of service?

Yes. Every recipient of funds for qualified job training programs must collect such information, maintain such records, and submit reports containing such information and in such formats as the Secretary may require related to the provision of priority of service.

§ 1010.330 What are the responsibilities of recipients to collect and maintain data on covered and non-covered persons?

(a) *General requirements.* Recipients must collect information in accordance with instructions issued by the Department.

(1) Recipients must collect two broad categories of information:

(i) For the qualified job training programs specified in paragraph (a)(2) of this section, information must be collected on covered persons from the point of entry, as defined in § 1010.300(a), and as provided in paragraph (b) of this section; and,

(ii) For all qualified job training programs, including the programs specified in paragraph (a)(2) of this section, information must be collected on covered and non-covered persons who receive services, as prescribed by the respective qualified job training programs, as provided in paragraph (c) of this section.

(2) For purposes of paragraph (a)(1) of this section, qualified job training programs that served, at the national level, 1,000 or more veterans per year for the three most recent years of program operations (currently the Wagner-Peyser, WIA Adult, WIA Dislocated Worker, WIA National Emergency Grant, and Senior Community Service Employment Programs) must collect information and report on covered entrants. The Trade Adjustment Assistance Program must collect information and report on covered entrants on the effective date of the next information collection requirement applicable to that program, whether that is for a renewal of an existing approved information collection or for approval of a new information collection.

(3) For purposes of this section, covered persons at the point of entry are referred to as ''covered entrants.'' This group includes two further subgroups: veterans and eligible spouses as defined in § 1010.110.

(b) *Collection and maintenance of data on covered entrants.* In accordance with instructions issued by the Department, recipients of assistance for the programs specified in paragraph (a)(2) of this section must collect and report individual record data for all covered entrants from the point of entry.

(c) *Collection and maintenance of data on covered and non-covered persons who receive services.* In accordance with instructions issued for individual qualified job training programs, all recipients must collect and maintain data on covered and non-covered persons who receive services, including individual record data for those programs that require establishment and submission of individual records for persons receiving services.

(1) The information to be collected shall include, but is not limited to:

(i) The covered and non-covered person status of all persons receiving services;

(ii) The types of services provided to covered and non-covered persons;

(iii) The dates that services were received by covered and non-covered persons; and;

(iv) The employment outcomes experienced by covered and non-covered persons receiving services.

(2)(i) Except as provided in paragraph (c)(2)(ii) of this section, for persons receiving services, recipients must apply the definitions set forth in § 1010.110 to distinguish covered from non-covered persons receiving services and, within covered persons, to distinguish veterans from eligible spouses.

(ii) Until qualified job training programs adopt the definitions for covered and non-covered persons set forth at § 1010.110 through the publication of requirements pursuant to the Paperwork Reduction Act, recipients must collect data on the services provided to and the outcomes experienced by veterans (however defined) and non-veterans receiving services in accord with regulations, policies and currently approved information collections.

(d) All information must be stored and managed in a manner that ensures confidentiality.