

Office of the Secretary of Defense

§ 104.3

of the Active Forces (other than Military Advisory Assistance Group or attached personnel) within their boundaries.

(b) Prior to authorizing such training, the Secretaries of the Military Departments will instruct the attaches representing their respective Departments to inform the U.S. Ambassador and the appropriate officials of the foreign government of the intent to conduct such training. If the foreign government objects, the Secretaries of the Military Departments will furnish all the facts and their recommendations to the Secretary of Defense.

(c) This policy does not prohibit the conduct of inactive duty training, such as correspondence courses, in those sovereign foreign countries in which the United States does not maintain Active Forces and where an agreement exists between the United States and the sovereign foreign nation concerned for the conduct of such training.

(d) This policy does not prohibit for a limited duration the augmentation of Defense Attache Offices by attache reservists (mobilization augmentees or mobilization designees) during periods of local emergencies or for short-term (less than 30 days) training periods, provided the provisions of paragraph (b) of this section are respected. Attache reservists who are available, possess the expertise required, and reside temporarily in foreign countries, shall be utilized to the maximum extent to augment Defense Attache Offices before the continental United States-based attache reservists are utilized.

PART 104—CIVILIAN EMPLOYMENT AND REEMPLOYMENT RIGHTS OF APPLICANTS FOR, AND SERVICE MEMBERS AND FORMER SERVICE MEMBERS OF THE UNIFORMED SERVICES

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APPENDIX A TO PART 104—CIVILIAN EMPLOYMENT AND REEMPLOYMENT RIGHTS, BENEFITS AND OBLIGATIONS FOR APPLICANTS

FOR, AND SERVICE MEMBERS AND FORMER SERVICE MEMBERS OF THE UNIFORMED SERVICES
APPENDIX B TO PART 104—SAMPLE EMPLOYER NOTIFICATION OF UNIFORMED SERVICE

AUTHORITY: 10 U.S.C. 1161.

SOURCE: 62 FR 3466, Jan. 23, 1998, unless otherwise noted.

§ 104.1 Purpose.

This part:

(a) Updates implementation policy, assigns responsibilities, and prescribes procedures for informing Service members who are covered by the provisions of 38 U.S.C chapter 43 and individuals who apply for uniformed service, of their civilian employment and reemployment rights, benefits and obligations.

(b) Implements 38 U.S.C. chapter 43, which updated, codified, and strengthened the civilian employment and reemployment rights and benefits of Service members and individuals who apply for uniformed service, and specifies the obligations of Service members and applicants for uniformed service.

§ 104.2 Applicability.

This part applies to the Office of the Secretary of Defense; the Military Departments, including the Coast Guard when it is not operating as a Military Service in the Department of the Navy by agreement with the Department of Transportation; the Chairman of the Joint Chiefs of Staff; and the Defense Agencies (referred to collectively in this part as “the DoD Components”). The term “Military Departments,” as used in this part, refers to the Departments of the Army, Navy, and Air Force. The term “Secretary concerned” refers to the Secretaries of the Military Departments and the Secretary of Transportation with respect to the Coast Guard when it is not operating as a Service in the Department of the Navy. The term “Military Services” refers to the Army, the Navy, the Air Force, the Marine Corps, and the Coast Guard.

§ 104.3 Definitions.

Critical mission. An operational mission that requires the skills or resources available in a Reserve component or components.

Critical requirement. A requirement in which the incumbent possesses unique knowledge, extensive experience, and specialty skill training to successfully fulfill the duties or responsibilities in support of the mission, operation or exercise. Also, a requirement in which the incumbent must gain the necessary experience to qualify for key senior leadership positions within his or her Reserve component.

Escalator position. This is established by the principle that the returning Service member is entitled to the position of civilian employment that he or she would have attained had he or she remained continuously employed by that civilian employer. This may be a position of greater or lesser responsibilities, to include a layoff status, when compared to the employees of the same seniority and status employed by the company.

Impossible or unreasonable. For the purpose of determining when providing advance notice of uniformed service to an employer is impossible or unreasonable, the unavailability of an employer or employer representative to whom notification can be given, an order by competent military authority to report for uniformed service within forty-eight hours of notification, or other circumstances that the Office of the Assistant Secretary of Defense for Reserve Affairs may determine are impossible or unreasonable are sufficient justification for not providing advance notice of pending uniformed service to an employer.

Military necessity. For the purpose of determining when providing advance notice of uniformed service is not required, a mission, operation, exercise or requirement that is classified, or a pending or ongoing mission, operation, exercise or requirement that may be compromised or otherwise adversely affected by public knowledge is sufficient justification for not providing advance notice to an employer.

Non-career service. The period of active uniformed service required to complete the initial uniformed service obligation; a period of active duty or full-time National Guard duty that is for a specified purpose and duration with no expressed or implied commitment for continued active duty; or participation

in a Reserve component as a member of the Ready Reserve performing annual training, active duty for training or inactive duty training. Continuous or repeated active uniformed service or full-time National Guard duty that results in eligibility for a regular retirement from the Armed Forces is not considered non-career service.

Officer. For determining those Service officials authorized to provide advance notice to a civilian employer of pending uniformed service by a Service member or an individual who has applied for uniformed service, an officer shall include all commissioned officers, warrant officers, and non-commissioned officers authorized by the Secretary concerned to act in this capacity.

Uniformed service. Performance of duty on a voluntary or involuntary basis in the Army, the Navy, the Air Force, the Marine Corps or the Coast Guard, including their Reserve components, when the Service member is engaged in active duty, active duty for special work, active duty for training, initial active duty for training, inactive duty training, annual training or full-time National Guard duty, and, for purposes of this part, a period for which a person is absent from a position of employment for the purpose of an examination to determine the fitness of the person to perform such duty.

§104.4 Policy.

It is DoD policy to support non-career service by taking appropriate actions to inform and assist uniformed Service members and former Service members who are covered by the provisions of 38 U.S.C. chapter 43, and individuals who apply for uniformed service of their rights, benefits, and obligations under 38 U.S.C. Chapter 43. Such actions include:

- (a) Advising non-career Service members and individuals who apply for uniformed service of their employment and reemployment rights and benefits provided in 38 U.S.C. chapter 43, as implemented by this part, and the obligations they must meet to exercise those rights.
- (b) Providing assistance to Service members, former Service members and

individuals who apply for uniformed service in exercising employment and reemployment rights and benefits.

(c) Providing assistance to civilian employers of non-career Service members in addressing issues involving uniformed service as it relates to civilian employment or reemployment.

(d) Considering requests from civilian employers of members of the National Guard and Reserve to adjust a Service member's scheduled absence from civilian employment because of uniformed service or make other accommodations to such requests, when it is reasonable to do so.

(e) Documenting periods of uniformed service that are exempt from a Service member's cumulative 5-year absence from civilian employment to perform uniformed service as provided in 38 U.S.C. chapter 43 and implemented by this part.

(f) Providing, at the Service member's request, necessary documentation concerning a period or periods of service, or providing a written statement that such documentation is not available, that will assist the Service member in establishing civilian reemployment rights, benefits and obligations.

§ 104.5 Responsibilities.

(a) The Assistant Secretary of Defense for Reserve Affairs, under the Under Secretary of Defense for Personnel and Readiness, shall:

(1) In conjunction with the Departments of Labor (DoL) and Veterans Affairs, the Office of Personnel Management (OPM), and other appropriate Departments and activities of the executive branch, determine actions necessary to establish procedures and provide information concerning civilian employment and reemployment rights, benefits and obligations.

(2) Establish procedures and provide guidance to the Secretaries concerned about civilian employment and reemployment rights, benefits and obligations of Service members who are covered by the provisions of 38 U.S.C. chapter 43 and individuals who apply for uniformed service as provided in 38 U.S.C. chapter 43. This responsibility shall be carried out in coordination with DoL, OPM, and the Federal Retirement Thrift Investment Board.

(3) Monitor compliance with 38 U.S.C. chapter 43 and this part.

(4) Publish in the FEDERAL REGISTER, DoD policies and procedures established to implement 38 U.S.C. chapter 43.

(b) The Secretaries of the Military Departments and the Commandant of the Coast Guard shall establish procedures to:

(1) Ensure compliance with this part.

(2) Inform Service members who are covered by the provisions of 38 U.S.C. chapter 43 and individuals who apply for uniformed service of the provisions of 38 U.S.C. chapter 43 as implemented by this part.

(3) Provide available documentation, upon request from a Service member or former Service member, that can be used to establish reemployment rights of the individual.

(4) Specify, as required, and document those periods of active duty that are exempt from the 5-year cumulative service limitation that a Service member may be absent from a position of civilian employment while retaining reemployment rights.

(5) Provide assistance to Service members and former Service members who are covered by the provisions of 38 U.S.C. chapter 43, and individuals who apply for uniformed service in exercising employment and reemployment rights.

(6) Provide assistance, as appropriate, to civilian employers of Service members who are covered by the provisions of 38 U.S.C. chapter 43 and individuals who apply for uniformed service.

(7) Cooperate with the DoL in discharging its responsibilities to assist persons with employment and reemployment rights and benefits.

(8) Cooperate with OPM in carrying out its placement responsibilities under 38 U.S.C. chapter 43.

§ 104.6 Procedures.

The Secretaries of the Military Departments and the Commandant of the Coast Guard shall:

(a) Inform individuals who apply for uniformed service and members of a Reserve component who perform or participate on a voluntary or involuntary basis in active duty, active duty

for special work, initial active duty for training, active duty for training, inactive duty training, annual training and full-time National Guard duty, of their employment and reemployment rights, benefits, and obligations as provided under 38 U.S.C. chapter 43 and described in Appendix A of this part. Other appropriate materials may be used to supplement the information contained in Appendix A of this part.

(1) Persons who apply for uniformed service shall be advised that DoD strongly encourages applicants to provide advance notice in writing to their civilian employers of pending uniformed service or any absence for the purpose of an examination to determine the person's fitness to perform uniformed service. Providing written advance notice is preferable to verbal advance notice since it is easier to establish that this basic prerequisite to retaining reemployment rights was fulfilled. Regardless of the means of providing advance notice, whether verbal or written, it should be provided as early as practicable.

(2) Annually and whenever called to duty for a contingency operation, advise Service members who are participating in a Reserve component of:

(i) The requirement to provide advance written or verbal notice to their civilian employers for each period of military training, active and inactive duty, or full-time National Guard duty.

(A) Reserve component members shall be advised that DoD strongly encourages that they provide advance notice to their civilian employers in writing for each period of pending uniformed service. Providing written advance notice is preferable to verbal advance notice since it easily establishes that this prerequisite to retaining reemployment rights was fulfilled.

(B) Regardless of the means of providing advance notice, whether written or verbal, it should be provided as early as practicable. DoD 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.

(C) The advance notice requirement can be met by providing the employer with a copy of the unit annual training schedule or preparing a standardized

letter. The sample employer notification letter in Appendix B of this part may be used for this purpose.

(ii) The 5-year cumulative limit on absences from their civilian employment due to uniformed service and exemptions to that limit.

(iii) The requirements for reporting or submitting application to return to their position of civilian employment.

(iv) Their general reemployment rights and benefits.

(v) The option for continuing employer provided health care, if the employer provides such a benefit.

(vi) The opportunity to use accrued leave in order to perform uniformed service.

(vii) Who they may contact to obtain assistance with employment and reemployment questions and problems.

(b) Inform Service members who are covered by the provisions of 38 U.S.C. Chapter 43, upon completion of an extended period of active duty and before separation from active duty of their employment and reemployment rights, benefits, and obligations as provided under 38 U.S.C. Chapter 43. This shall, as a minimum, include notification and reporting requirements for returning to employment with their civilian employer. While Appendix A of this part provides the necessary information to satisfy this requirement, other appropriate materials may be used to supplement this information.

(c) Issue orders that span the entire period of service when ordering a member of the National Guard or Reserve to active duty for a mission or requirement. Order modifications shall be initiated, as required, to ensure continuous active duty should the period required to complete the mission or requirement change.

(d) Document the length of a Service member's initial period of military service obligation performed on active duty.

(e) Determine and certify in writing those additional training requirements not already exempt for the 5-year cumulative service limit which are necessary for the professional development, or skill training or retraining for members of the National Guard or Reserve. Once the Secretary concerned certifies those training requirements,

performance of uniformed service to complete a certified training requirement is exempt from the 5-year cumulative service limit.

(f) Determine those periods of active duty when a Service member is 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 Congress. If the purpose of the order to, or retention on, active duty is for the direct or indirect support of the war or national emergency, then the orders of the Service member should be so annotated, since that period of service is exempt from the 5-year cumulative service limit established in 38 U.S.C. Chapter 43.

(g) Determine those periods of active duty performed by a member of the National Guard or Reserve that are designated by the Secretary concerned as a critical mission or critical requirement, and for that reason are exempt from the 5-year cumulative service limit. The authority for determining what constitutes a critical mission or requirement shall not be delegated below the Assistant Secretary level or the Commandant of the Coast Guard. The designation of a critical requirement to gain the necessary experience to qualify for key senior leadership positions shall be used judiciously, and the necessary experience and projected key leadership positions fully documented. This authority shall not be used to grant exemptions to avoid the cumulative 5-year service limit established by 38 U.S.C. Chapter 43 or to extend individuals in repeated statutory tours. The Assistant Secretary of Defense for Reserve Affairs shall be notified in writing of all occasions in which a Service member is granted more than one exemption for a critical requirement when the additional exemption(s) extend the Service member beyond the 5-year cumulative service limit established in 38 U.S.C. Chapter 43.

(h) When appropriate, ensure that orders to active duty or orders retaining members on active duty specify the statutory or Secretarial authority for those orders when such authority meets one or more of the exemptions from the 5-year cumulative service limit provided in 38 U.S.C. Chapter 43.

If circumstances arise that prevent placing this authority on the orders, the authority shall be included in a separation document and retained in the Service member's personnel file.

(i) Ensure that appropriate documents verifying any period of service exempt from the 5-year cumulative service limit are placed in the Service member's personnel record or other appropriate record.

(j) Document those circumstances that prevent a Service member from providing advance notification of uniformed service to a civilian employer because of military necessity or when advance notification is otherwise impossible or unreasonable, as defined in § 104.3.

(k) Designate those officers, as defined in § 104.3, who are authorized by the Secretary concerned to provide advance notification of service to a civilian employer on behalf of a Service member or applicant for uniformed service.

(l) Provide documentation, upon request from a Service member or former Service member, that may be used to satisfy the Service member's entitlement to statutory reemployment rights and benefits. Appropriate documentation may include, as necessary:

(1) The inclusive dates of the initial period of military service obligation performed on active duty.

(2) Any period of service during which a Service member was required to serve because he or she was unable to obtain a release from active duty though no fault of the Service member.

(3) The cumulative length of all periods of active duty performed.

(4) The authority under which a Service member was ordered to active duty when such service was exempt from the 5-year cumulative service limit.

(5) The date the Service member was last released from active duty, active duty for special work, initial active duty for training, active duty for training, inactive duty training, annual training or full-time National Guard duty. This documentation establishes the timeliness of reporting to, or submitting application to return to, a position of civilian employment.

(6) Whether service requirements prevent providing a civilian employer

with advance notification of pending service.

(7) That the Service member's entitlement to reemployment benefits has not been terminated because of the character of service as provided in 38 U.S.C. 4304.

(8) When appropriate, a statement that sufficient documentation does not exist.

(m) Establish a central point of contact at a headquarters or regional command who can render assistance to active duty Service members and applicants for uniformed service about employment and reemployment rights, benefits and obligations.

(n) Establish points of contact in each Reserve component headquarters or Reserve regional command, and each National Guard State headquarters who can render assistance to:

(1) Members of the National Guard or Reserve about employment and reemployment rights, benefits and obligations.

(2) Employers of National Guard and Reserve members about duty or training requirements arising from a member's uniformed service or service obligation.

(o) A designated Reserve component representative shall consider, and accommodate when it does not conflict with military requirements, a request from a civilian employer of a National Guard and Reserve member to adjust a Service member's absence from civilian employment due to uniformed service when such service has an adverse impact on the employer. The representative may make arrangements other than adjusting the period of absence to accommodate such a request when it serves the best interest of the military and is reasonable to do so.

APPENDIX A TO PART 104—CIVILIAN EMPLOYMENT AND REEMPLOYMENT RIGHTS, BENEFITS AND OBLIGATIONS FOR APPLICANTS FOR, AND SERVICE MEMBERS AND FORMER SERVICE MEMBERS OF THE UNIFORMED SERVICES

A. SCOPE OF COVERAGE

1. The Uniformed Services Employment and Reemployment Rights Act (USERRA) which is codified in 38 U.S.C. Chapter 43 provides protection to anyone absent from a po-

sition of civilian employment because of uniformed service if:

a. Advance written or verbal notice was given to the civilian employer.

(1) Advance notice is not required if precluded by military necessity, or is otherwise unreasonable or impossible.

(2) DoD strongly encourages Service members and or applicants for service to provide advance notice to their civilian employer in writing for each period of pending uniformed service. Providing written advance notice is preferable to verbal advance notice since it easily establishes that this prerequisite to retaining reemployment rights was fulfilled. Regardless of the means of providing advance notice, whether written or verbal, it should be provided as early as practicable. Also, DoD strongly recommends that Reserve component members provide advance notice to their civilian employers at least 30 days in advance when it is feasible to do so. The advance notice requirement can be met by providing the employer with a copy of the unit annual training schedule or preparing a standardized letter. The sample employer notification letter in Appendix B of this part may be used for this purpose:

b. The cumulative length of absences does not exceed 5 years;

c. The individual reports to, or submits an application for reemployment, within the specified period based on duration of services as described in section D of this Appendix; and,

d. The person's character of service was not disqualifying as described in paragraphs A.2.d. and e. of this appendix.

2. A civilian employer is not required to reemploy a person if:

a. The civilian employment was for a brief, non-recurrent period and there was no reasonable expectation that the employment would continue indefinitely or for a significant period.

b. The employer's circumstances have so changed as to make reemployment impossible or unreasonable.

c. The reemployment imposes an undue hardship on the employer in the case of an individual who:

(1) Has incurred a service connected disability; or,

(2) Is not qualified for the escalator position or the position last held, and cannot become qualified for any other position of lesser status and pay after a reasonable effort by the employer to qualify the person for such positions.

d. The Service member or former Service member was separated from a uniformed service with a dishonorable or bad conduct discharge, or separated from a uniformed service under other than honorable conditions.

e. An officer dismissed from any Armed Force or dropped from the rolls of any

Armed Force as prescribed under 10 U.S.C. 1161.

f. The cumulative length of service exceeds five years and no portion of the cumulative five years of uniformed service falls within the exceptions described in section C. of this Appendix.

g. An employer asserting that he or she is not required to reemploy an individual because the employment was for a brief, non-recurrent period, or reemployment is impossible or unreasonable, or reemployment imposes an undue hardship on the employer, that employer has the burden of proving his or her assertion.

3. Entitlement to protection under 38 U.S.C. Chapter 43 does not depend on the timing, frequency, and duration of training or uniformed service.

B. PROHIBITION AGAINST DISCRIMINATION AND ACTS OF REPRISAL

1. A person who is a member of, applies to be a member of, has performed, applies to perform, or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any employment benefit by an employer on the basis of that membership, an application for membership, performance of service, or an obligation for service in the uniformed services.

2. A person, including a non-Service member, shall not be subject to employment discrimination or any adverse employment action because he or she has taken an action to enforce a protection afforded a Service member, has testified or made a statement in or in connection with any proceeding concerning employment and reemployment rights of a service member, has assisted or participated in an investigation, or has otherwise exercised any right provided by 38 U.S.C. Chapter 43.

3. An employer shall be considered to have engaged in an act of discrimination if an individual's membership, application for membership, service, application for service, or obligation for service in the uniformed services is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such membership, application for membership, performance of service, application for service or obligation.

C. EXCEPTIONS TO THE MAXIMUM PERIOD OF SERVICE FOR COVERAGE

In order to retain reemployment rights and benefits provided by 38 U.S.C. Chapter 43, the cumulative length of absences from the same employer cannot exceed 5 years. Not counted toward this limit is:

1. Service beyond 5 years if required to complete an initial service obligation;

2. Service during which an individual was unable to obtain release orders before the expiration of the 5-year cumulative service limit through no fault of his or her own;

3. Inactive duty training; annual training; ordered to active duty for unsatisfactory participation; active duty by National Guardsmen for encampments, maneuvers, field operations or coastal defense; or to fulfill additional training requirements, as determined by the Secretary concerned, for professional skill development, or to complete skill training or retraining;

4. Involuntary order or call to active duty, or retention on active duty;

5. Ordered to or retained on active duty during a war or national emergency declared by the President or Congress;

6. Ordered to active duty in support of an operational mission for which personnel have been involuntarily called to active duty;

7. Performing service in support of a critical mission or requirement, as determined by the Secretary concerned;

8. Performing service in the National Guard when ordered to active duty by the President to suppress an insurrection or rebellion, repel an invasion, or execute laws of the United States; and,

9. Voluntary recall to active duty of retired regular Coast Guard officers or retired enlisted Coast Guard members.

D. APPLICATIONS FOR REEMPLOYMENT

1. For service of 30 days or less, or for an absence for an examination to determine the individual's fitness to perform uniformed service, the Service member or applicant must report to work not later than the beginning of the first full regularly scheduled work period on the first full calendar day following the completion of service or the examination, after allowing for an eight hour rest period following safe transportation to his or her residence.

2. For service of 31 days or more but less than 181 days, the Service member must submit an application for reemployment not later than 14 days after completion of service, or by the next full calendar day when submitting an application within the 14 day limit was impossible or unreasonable through no fault of the Service member.

3. For service of 181 days or more, the Service member must submit an application for reemployment not later than 90 days after the completion of service.

4. If hospitalized or convalescing from an illness or injury incurred or aggravated during service, the Service member must, at the end of the period necessary for recovery, follow the same procedures, based on length of service, as described in sections D.1. through D.3. of this appendix. The period of hospitalization or convalescence may not normally exceed 2 years.

5. Anyone who fails to report or apply for reemployment within the specified period shall not automatically forfeit entitlement to reemployment rights and benefits, but is subject to the rules of conduct, established policies, general practices of the employer pertaining to explanations and discipline because of an absence from scheduled work.

E. DOCUMENTATION UPON RETURN

1. If service is for 31 days or more, a Service member must provide documentation, upon request from the employer, that establishes:

- a. He or she made application to return to work within the prescribed time period;
- b. He or she has not exceeded the 5-year cumulative service limit; and
- c. His or her reemployment rights were not terminated because of character of service as described in paragraphs A.2.d. and e. of this appendix.

2. Failure to provide documentation cannot serve as a basis for denying reemployment to the Service member, former Service member, or applicant if documentation does not exist or is not readily available at the time of the employer's request. However, if after reemployment, documentation becomes available that establishes that the Service member or former Service member does not meet one or more of the requirements contained in section E.1. of this appendix, the employer may immediately terminate the employment.

F. POSITION TO WHICH ENTITLED UPON REEMPLOYMENT

1. Reemployment position for service of 90 days or less:

- a. The position the person would have attained if continuously employed (the "escalator" position) and if qualified to perform the duties; or,
- b. The position in which the person was employed in when he or she departed for uniformed service, but only if the person is not qualified to perform the duties of the escalator position, despite the employer's reasonable efforts to qualify the person for the escalator position.

2. Reemployment position for service of 91 days or more:

- a. The escalator position, or a position of like seniority, status and pay, the duties of which the person is qualified to perform; or,
- b. The position in which the person was employed in when he or she departed for uniformed service or a position of like seniority, status and pay, the duties of which the person is qualified to perform, but only if the person is not qualified to perform the duties of the escalator position after the employer has made a reasonable effort to qualify the person for the escalator position.

3. If a person cannot become qualified, after reasonable efforts by the employer to qualify the person, for either the escalator position or the position formerly occupied by the employee as provided in sections F.1. and F.2. of this appendix, for any reason (other than disability), the person must be employed in any other position of lesser status and pay that the person is qualified to perform, with full seniority.

G. POSITION TO WHICH ENTITLED IF DISABLED

If a person who is disabled because of service cannot (after reasonable efforts by the employer to accommodate the disability) be employed in the escalator position, he or she must be reemployed:

1. In any other position that is equivalent to the escalator position in terms of seniority, status, and pay that the person is qualified or can become qualified to perform with reasonable efforts by the employer; or,

2. In a position, consistent with the person's disability, that is the nearest approximation to the position in terms of seniority, status, and pay to the escalator or equivalent position.

H. REEMPLOYMENT BY THE FEDERAL GOVERNMENT

1. A person who was employed by a Federal Executive Agency when he or she departed for uniformed service must be reemployed using the same order of priorities as prescribed in sections F. and G. of this appendix as appropriate. If the Director of OPM determines that the Federal Executive Agency that employed the person no longer exists and the functions have not been transferred to another Federal Executive Agency, or it is impossible or unreasonable for the agency to reemploy the person, the Director of OPM shall identify a position of like seniority, status, and pay at another Federal Executive Agency that satisfies the reemployment criteria established for private sector employers, sections F. and G. of this appendix, and for which the person is qualified and ensure that the person is offered such position.

2. If a person was employed by the Judicial Branch or the Legislative Branch of the Federal Government when he or she departed for uniformed service, and the employer determines that it is impossible or unreasonable to reemploy the person, the Director of OPM shall, upon application by the person, ensure that an offer of employment in a Federal Executive Agency is made.

3. If the Adjutant General of a State determines that it is impossible or unreasonable to reemploy a person who was employed as a National Guard technician, the Director of OPM shall, upon application by the person, ensure that an offer of employment in a Federal Executive Agency is made.

I. REEMPLOYMENT BY CERTAIN FEDERAL AGENCIES

1. The heads of the Federal Bureau of Investigation, the Central Intelligence Agency, the Defense Intelligence Agency, the National Imagery and Mapping Agency, the National Security Agency, and, as determined by the President, any Executive Agency or unit thereof, the principal function of which is to conduct foreign intelligence or counter-intelligence activities, shall prescribe procedures for reemployment rights for their agency that are similar to those prescribed for private and other Federal agencies.

2. If an appropriate officer of an agency referred to in subsection I.1. of this appendix determines that reemployment of a person who was an employee of that agency when he or she departed for uniformed service is impossible or unreasonable, the agency shall notify the person and the Director of OPM. The Director of OPM shall, upon application by that person, ensure that the person is offered employment in a position in a Federal Executive Agency.

J. GENERAL RIGHTS AND BENEFITS

1. A person who is reemployed under 38 U.S.C. Chapter 43 is entitled to the seniority, and other rights and benefits determined by seniority that the person had upon commencing uniformed service, and any additional seniority, and rights and benefits he or she would have attained if continuously employed.

2. A person who is absent by reason of uniformed service shall be deemed to be on furlough or leave of absence from his or her civilian employer and is entitled to such other rights and benefits not determined by seniority as generally provided by the employer to employees on furlough or leave of absence having similar seniority, status and pay who are also on furlough or leave of absence, as provided under a contract, policy, agreement, practice or plan in effect during the Service member's absence because of uniformed service.

3. The individual may be required to pay the employee cost, if any, of any funded benefit continued to the same extent other employees on furlough or leave of absence are required to pay.

K. LOSS OF RIGHTS AND BENEFITS

If, after being advised by his or her employer of the specific rights and benefits to be lost, a Service member, former Service member or applicant of uniformed service knowingly provided written notice of intent not to seek reemployment after completion of uniformed service, he or she is no longer entitled to any non-seniority based rights and benefits. This includes all non-seniority based rights and benefits provided under any contract, plan, agreement, or policy in effect

at the time of entry into uniformed service or established while performing such service, and are generally provided by the employer to employees having similar seniority, status and pay who are on furlough or leave of absence.

L. RETENTION RIGHTS

A person who is reemployed following uniformed service cannot be discharged from employment, except for cause:

1. Within 1 year after the date of reemployment if that person's service was 181 days or more; or,

2. Within 180 days after the date of reemployment if such service was 31 days or more but less than 181 days.

M. ACCRUED LEAVE

During any period of uniformed service, a person may, upon request, use any vacation, annual leave, or similar leave with pay accrued before the commencement of that period of service.

N. HEALTH PLANS

An employer who provides employee health plan coverage, including group health plans, must allow the Service member to elect to continue personal coverage, and coverage for his or her dependents under the following circumstances:

1. The maximum period of coverage of a person and the person's dependents under such an election shall be the lesser of:

a. The 18 month period beginning on the date on which the person's absence begins; or

b. The day after the date on which the person was required to apply for or return to a position or employment as specified in section D. of this appendix, and fails to do so.

2. A person who elects to continue health plan coverage may be required to pay up to 102 percent of the full premium under the plan, except a person on active duty for 30 days or less cannot be required to pay more than the employee's share, if any, for the coverage.

3. An exclusion or waiting period may not be imposed in connection with the reinstatement of coverage upon reemployment if one would not have been imposed had coverage not been terminated because of service. However, an exclusion or waiting period may be imposed for coverage of any illness or injury determined by the Secretary of Veterans Affairs to have been incurred in, or aggravated during, the performance of uniformed service.

O. EMPLOYEE PENSION BENEFIT PLANS

1. This section applies to individuals whose pension benefits are not provided by the Federal Employees' Retirement System (FERS) or the Civil Service Retirement System

(CSRS), or a right provided under any Federal or State law governing pension benefits for governmental employees.

2. A person reemployed after uniformed service shall be treated as if no break in service occurred with the employer(s) maintaining the employee's pension benefit plan. Each period of uniformed service, upon reemployment, shall be deemed to constitute service with the employer(s) for the purpose of determining the nonforfeitability of accrued benefits and accrual of benefits.

3. An employer reemploying a Service member or former Service member under 38 U.S.C. Chapter 43 is liable to the plan for funding any obligation attributable to the employer of the employee's pension benefit plan that would have been paid to the plan on behalf of that employee but for his or her absence during a period of uniformed service.

4. Upon reemployment, a person has three times the period of military service, but not to exceed five years after reemployment, within which to contribute the amount he or she would have contributed to the pension benefit plan if he or she had not been absent for uniformed service. He or she is entitled to accrued benefits of the pension plan that are contingent on the making of, or are derived from, employee contributions or elective deferrals only to the extent the person makes payment to the plan.

P. FEDERAL EMPLOYEES' RETIREMENT SYSTEM (FERS)

1. Federal employees enrolled in FERS who are reemployed with the Government are allowed to make up contributions to the Thrift Savings Fund over a period specified by the employee. However, the makeup period may not be shorter than two times nor longer than four times the period of absence for uniformed service.

2. Employees covered by the FERS are entitled to have contributions made to the Thrift Savings Fund on their behalf by the employing agency for their period of absence in an amount equal to one percent of the employee's basic pay. If an employee covered by FERS makes contributions, the employing agency must make matching contributions on the employee's behalf.

3. The employee shall be credited with a period of civilian service equal to the period of uniformed service, and the employee may elect, for certain purposes, to have his or her separation treated as if it had never occurred.

4. This benefit applies to any employee whose release from uniformed service, discharge from hospitalization, or other similar event make him or her eligible to seek reemployment under 38 U.S.C. Chapter 43 on or after August 2, 1990.

5. Additional information about Thrift Saving Plan (TSP) benefits is available in TSP Bulletins 95-13 and 95-20. A fact sheet is

included in TSP Bulletin 95-20 which describes benefits and procedures for eligible employees. Eligible employees should contact their personnel office for information and assistance.

Q. CIVIL SERVICE RETIREMENT SYSTEM (CSRS)

1. Employees covered by CSRS may make up contributions to the TSP, as in section P.1. of this appendix. However, no employer contributions are made to the TSP account of CSRS employees.

2. This benefit applies to any employee whose release from uniformed service, discharge from hospitalization, or other similar event makes him or her eligible to seek reemployment under 38 U.S.C. Chapter 43 on or after August 2, 1990.

3. Additional information about TSP benefits is available in TSP Bulletins 95-13 and 95-20. A fact sheet is included in TSP Bulletin 95-20 which describes benefits and procedures for eligible employees. Eligible employees should contact their personnel office for information and assistance.

R. INFORMATION AND ASSISTANCE

Information and informal assistance concerning civilian employment and reemployment is available through the National Committee for Employer Support of the Guard and Reserve (NCESGR). NCESGR representatives can be contacted by calling 1-800-336-4590.

S. ASSISTANCE IN ASSERTING CLAIMS

1. A person may file a complaint with the Secretary of Labor if an employer, including any Federal Executive Agency or OPM, has failed or refused, or is about to fail or refuse, to comply with employment or reemployment rights and benefits. The complaint must be in writing, and include the name and address of the employer, and a summary of the allegation(s).

2. The Secretary of Labor shall investigate each complaint and, if it is determined that the allegation(s) occurred, make reasonable efforts to ensure compliance. If these efforts are unsuccessful, the Secretary of Labor shall notify the complainant of the results and advise the complainant of his or her entitlement to pursue enforcement.

3. The Secretary of Labor shall, upon request, provide technical assistance to a claimant and, when appropriate, to the claimant's employer.

T. ENFORCEMENT

1. State or Private Employers.

a. A person may request that the Secretary of Labor refer a complaint to the Department of Justice. If the Department of Justice is reasonably satisfied that the person is entitled to the rights or benefits sought, the

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Department of Justice may appear on behalf of, and act as attorney for, the complainant, and commence an action for appropriate relief, or the individual may commence an action on his or her own behalf in the appropriate Federal district court.

b. The district court hearing the complaint can require the employer to:

- (1) Comply with the law;
- (2) Compensate the person for any loss of wages or benefits suffered; and
- (3) If the court determines that the employer willfully failed to comply with the law, pay the person an amount equal to the amount of lost wages or benefits as liquidated damages.

c. A person may file a private suit against an employer without the Secretary of Labor's assistance if he or she:

- (1) Has chosen not to seek the Secretary's assistance;
- (2) Has chosen not to request that the Secretary refer the complaint to the Department of Justice; or
- (3) Has refused the Department of Justice's representation of his or her complaint.

d. No fees or court costs shall be charged or taxed against any person filing a claim. The court may award the person who prevails reasonable attorney fees, expert witness fees, and other litigation expenses.

2. Federal Government as the Employer.

a. The same general enforcement procedures established for private employers are applied to Federal Executive Agencies as an employer; however, if unable to resolve the complaint, the Secretary of Labor shall refer the complaint to the Office of Special Counsel, which shall represent the individual in a hearing before the Merit Systems Protection Board if reasonably satisfied that the individual is entitled to the rights and benefits sought. The claimant also has the option of directly filing a complaint with the Merit Systems Protection Board on his or her own behalf.

b. A person who is adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board may petition the United States Court of Appeals for the Federal Circuit to review the final order or decision.

3. Federal Intelligence Agency as the Employer. An individual employed by a Federal Intelligence Agency listed in subparagraph I.1. of this appendix, may submit a claim to the inspector general of the agency.

APPENDIX B TO PART 104—SAMPLE EMPLOYER NOTIFICATION OF UNIFORMED SERVICE

This is to inform you that (insert applicant or Service member's name) must report for military training or duty on (insert date). My last period of work will be on (insert date), which will allow me sufficient time to

report for military duty. I will be absent from my position of civilian employment for approximately (enter expected duration of duty as specified on your orders, and include the applicable period you have to return or submit notification of your return to work) while performing military training or duty unless extended by competent military authority or delayed by circumstances beyond my control. I otherwise expect to return to work on (insert date).

Signature and date

Employer acknowledgment and date

PART 105—EMPLOYMENT AND VOLUNTEER WORK OF SPOUSES OF MILITARY PERSONNEL

Sec.

- 105.1 Purpose.
- 105.2 Applicability.
- 105.3 Definitions.
- 105.4 Policy.
- 105.5 Responsibilities.
- 105.6 Effective date and implementation.

AUTHORITY: 10 U.S.C. 113 note.

SOURCE: 53 FR 15205, Apr. 28, 1988, unless otherwise noted.

§ 105.1 Purpose.

This part implements Pub. L. 100-180 and reissues Secretary of Defense Memorandum for Secretaries of the Military Departments, "Employment of Spouses of Members of the Armed Forces," October 22, 1987 and Secretary of Defense Memorandum for Secretaries of the Military Departments, "Employment of Spouses of Members of the Armed Forces," December 30, 1987.

§ 105.2 Applicability.

This part applies to the Office of the Secretary of Defense (OSD), the Military Departments (including their National Guard and Reserve components), the Organization of the Joint Chiefs of Staff (OJCS), the Unified and Specified Commands, the Defense Agencies, and the DoD Field Activities (hereafter referred to as "DoD Components").

§ 105.3 Definitions.

DoD official. Any commander, supervisor, or other military or civilian official of a DoD Component.