Hoffmeister, Matt Kazan, Michael London, Bridget Mallon, Vincent Mascia, Toni Miles, Aris Prosetiyo, Leslee Soudrette, Dan Stein, and Kelly Whitener.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

Mr. REID. Mr. President, I ask unanimous consent that legislative fellows in the office of Senator KENNEDY, Lauren Gilchrist, Craig Martinez, Stephanie Hammonds, Taryn Morrissey, Joe Hutter, and Elisabeth Jacobs be granted floor privileges during the consideration of H.R. 1.

The PRESIDING OFFICER. Without objection, it is so ordered.

USERRA REGULATIONS

Mr. KAUFMAN. Mr. President, I ask unanimous consent that a communication to Senator BYRD from the Office of Compliance related to the USERRA regulations be printed in the RECORD.

The PRESIDING OFFICER. Without objection, it is so ordered.

OFFICE OF COMPLIANCE,
Washington, DC, January 26, 2009.

Re USERRA regulations.

Hon. ROBERT C. BYRD,
President pro tempore, U.S. Senate, Hart Office Building, Washington, DC.

DEAR SENATOR BYRD: Section 304(b)(3) of the Congressional Accountability Act of 1995 (CAA), 2 U.S.C. 1384(b)(3), requires that, with regard to substantive regulations under the CAA, after the Board has published a general notice of proposed rulemaking as required by subsection (b)(1), and received comments as required by subsection (b)(2), ''the Board shall adopt regulations and shall transmit notice of such action together with a copy of such regulations to the Speaker of the House of Representatives and the President pro tempore of the Senate for publication in the Congressional Record on the first day on which both Houses are in session following such transmittal.''

The Board of Directors of the Office of Compliance has adopted the proposed regulations in the Notice of Adoption of Substantive Regulations and Transmittal for Congressional Approval which accompany this transmittal letter. The Board requests that the accompanying Notice, ''S'' and ''C'' versions of the Adopted Regulations, and the Numbering Index be published in the Senate version of the Congressional Record on the first day on which both Houses are in session following receipt of this transmittal. The Board also requests that Congress approve the proposed Regulations, as further specified in the accompanying Notice.

Any inquiries regarding the accompanying Notice should be addressed to Tamara E. Chrisler, Executive Director of the Office of Compliance, 110 2nd Street, S.E., Room LA–200, Washington, D.C. 20540; 202–724–9250, TDD 202–426–1912.

Sincerely,

SUSAN S. ROBFOGEL,
Chair of the Board of Directors.

Text of USERRA Regulations

"S " Version

When approved by the Senate for the Senate, these regulations will have the prefix "S."

Subpart A: Introduction to the Regulations

§ 1002.1 What is the purpose of this part?

This part implements certain provisions of the Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA" or "the Act"), as applied by the Congressional Accountability Act ("CAA"). 2 U.S.C. 1316. 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 Office of Compliance in administering USERRA as applied by the CAA.

§ 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, with the exception of certain Federal intelligence agencies. For those Federal intelligence agencies, USERRA established a separate program for employees. Section 206 of the CAA requires the Board of Directors of the Office of Compliance to issue regulations to implement the statutory provisions relating to employment and reemployment rights of members of the uniformed services. The regulations are required to be the same as substantive regulations promulgated by the Secretary of Labor, except where a modification of such regulations would be more effective for the implementation of the rights and protections of the Act. The Department of Labor issued its regulations, effective January 18, 2006. The regulations set forth herein are the substantive regulations that the Board of Directors of the Office of Compliance has promulgated for the legislative branch, for the implementation of the USERRA provisions of the CAA. All references to USERRA in these regulations, means USERRA, as applied by the CAA.

§ 1002.3 When did USERRA become effective?
USERRA, as applied by the CAA, became effective for employing offices of the legislative branch on January 23, 1996. These regulations will become effective upon approval by Congress.

§ 1002.4 What is the role of the Executive Director of the Office of Compliance under the USERRA provisions of the CAA?
(a) As applied by the CAA, the Executive Director of the Office of Compliance is responsible for providing education and information to any covered employing office or employee with respect to their rights, benefits, and obligations under the USERRA provisions of the CAA.
(b) The Office of Compliance, under the direction of the Executive Director, is responsible for the processing of claims filed pursuant to these regulations. More information about the Office of Compliance's role is contained in Subpart F.

§ 1002.5 What definitions apply to these USERRA regulations?
(a) **Act or USERRA** means the Uniformed Services Employment and Reemployment Rights Act of 1994, as applied by the CAA.
(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 employing office policy, plan, or practice. The term includes rights and benefits under a pension plan, health plan, insurance coverage and awards, bonuses, severance pay, supplemental unemployment benefits, vacations, and, where applicable, the opportunity to select work hours or the location of employment.
(c) **Board** means Board of Directors of the Office of Compliance.
(d) **CAA** means the Congressional Accountability Act of 1995, as amended (Pub. L. 104-1, 109 Stat. 3, 2 U.S.C. §§ 1301-1438).
(e) **Covered employee** means any employee, including an applicant for employment and a former employee, of (1) the House of Representatives; (2) the Senate; (3) the Office of Congressional Accessibility Services; (4) the Capitol Police; (5) the Congressional Budget Office; (6) the Office of the Architect of the Capitol; (7) the Office of the Attending Physician; (8) the Government Accountability Office; (9) the Library of Congress; and (10) the Office of Compliance.
(f) **Eligible employee** means a covered employee performing service in the uniformed services, as defined in 1002.5 (t) of this subpart, whose service has not been terminated upon occurrence of any of the events enumerated in section 1002.135 of these regulations. For the purpose of defining who is covered under the discrimination section of these regulations, "performing service" means an eligible employee who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in the uniformed services.
(g) **Employee of the Office of the Architect of the Capitol** includes any employee of the Office of the Architect of the Capitol, the Botanic Gardens, or the Senate Restaurants.
(h) **Employee of the Capitol Police** includes any member or officer of the Capitol Police.
(i) **Employee of the House of Representatives** includes an individual occupying a position for which the pay is disbursed by the Clerk of the House of Representatives, or another official designated by the House of Representatives, or any employment position in an entity that is paid with funds derived from the clerk-hire allowance of the House of Representatives but not

any such individual employed by any entity listed in subparagraphs (3) through (10) of paragraph (e) above.

(j) **Employee of the Senate** includes an individual occupying a position for which the pay is disbursed by the Secretary of the Senate, but not any such individual employed by any entity listed in subparagraphs (3) through (10) of paragraph (e) above.

(k) **Employing office** means (1) the personal office of a Senator; (2) a committee of the Senate or a joint committee of the House of Representatives and the Senate; (3) any other office headed by a person with the final authority to appoint, or be directed by a Member of Congress to appoint, hire, discharge, and set the terms, conditions, or privileges of the employment of an employee of the Senate.

(l) **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.

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

(n) **Office** means the Office of Compliance.

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

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

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

(r) **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(d)(3).

(s) **Undue hardship**, in the case of actions taken by an employing office, 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 employing office; the overall size of the business of an employing office 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 employing office, including the composition, structure, and functions of the work force of such employing office; the geographic

separateness, administrative, or fiscal relationship of the State, District, or satellite office in question to the employing office.

(t) **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 National Disaster Medical System (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?

The 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, as applied by the Congressional Accountability Act, relate to other laws, public and private contracts, and employing office 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 employing office may provide greater rights and benefits than USERRA requires, but no employing office can refuse to provide any right or benefit guaranteed by USERRA, as applied by the CAA.

(b) USERRA supersedes any 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 office policy 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 law, 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 employing office to pay an eligible employee for time away from work performing service, an employing office policy, plan, or practice that provides such a benefit is permissible under USERRA.

(d) If an employing office 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 employing office 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 employing office 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 employing office 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 employing office must not retaliate against an eligible employee by taking any adverse employment action against him or her because the eligible employee 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's prohibitions against discrimination and retaliation apply to all employment positions?
Under USERRA, as applied by the CAA, the prohibitions against discrimination and retaliation apply to eligible employees in all positions within covered employing offices, 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, non-recurrent positions of employment

§ 1002.21 Does USERRA protect a covered employee who has not actually performed service in the uniformed services?
USERRA's provisions, as applied by Section 206 of the CAA, prohibit discrimination and retaliation only against eligible employees. Section 207(a) of the CAA, however, prohibits retaliation against all covered employees because the employee has opposed any practice made unlawful under the CAA, including a violation of USERRA's provisions, as applied by the CAA; or testified; assisted; or participated in any manner in a hearing or proceeding under the CAA.

Subpart C – Eligibility for Reemployment

GENERAL ELIGIBILITY FOR REEMPLOYMENT

§ 1002.32 What criteria must an employee meet to be eligible under USERRA for reemployment after service in the uniformed services?
(a) In general, if an eligible employee has been absent from a position of employment in an employing office by reason of service in the uniformed services, he or she will be eligible for reemployment in that same employing office, if that employing office continues to exist at such time, by meeting the following criteria:
(1) The employing office had advance notice of the eligible employee's service; (2) The eligible employee has five years or less of cumulative service in the uniformed services in his or her employment relationship with a particular employing office; (3) The eligible employee timely returns to work or applies for reemployment; and, (4) The eligible 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 employing office establishes one of the defenses described in § 1002.139. The employment position to which the eligible employee is entitled is described in §§ 1002.191 through 1002.199.

§ 1002.33 Does the eligible employee have to prove that the employing office discriminated against him or her in order to be eligible for reemployment?
No. The eligible employee is not required to prove that the employing office 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 employing offices are covered by these regulations?
(a) USERRA applies to all covered employing offices of the legislative branch as defined in 2 U.S.C. § 1301(9) and 2 U.S.C.§ 1316(a)(2)(C).

§ 1002.40 Does USERRA protect against discrimination in initial hiring decisions?
Yes. The definition of employer in the USERRA provision as applied by the CAA includes an employing office that has denied initial employment to an individual in violation of USERRA's anti-discrimination provisions. An employing office need not actually employ an individual to be liable 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 employing office 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 employing office denying employment is liable under USERRA. Similarly, if an employing office withdraws an offer of employment because the individual is called upon to fulfill an

obligation in the uniformed services, the employing office withdrawing the employment offer is also liable under USERRA.

§ 1002.41 Does an eligible 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 eligible employee holds a temporary, part-time, probationary, or seasonal employment position. However, an employing office is not required to reemploy an eligible 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 employing office bears the burden of proving this affirmative defense.

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

(a) If an eligible employee is laid off with recall rights, or on a leave of absence, he or she is protected under USERRA. If the eligible 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 employing office would have recalled the employee to employment during the period of service. Similar principles apply if the eligible employee is on a leave of absence from work when he or she begins a period of service in the uniformed services.

(b) If the eligible 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 eligible 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 eligible employee is laid off before or during service in the uniformed services, and the employing office 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 an eligible employee. Reemployment rights under USERRA cannot put the eligible 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 eligible employees. There is no exclusion for executive, managerial, or professional employees.

§ 1002.44 Does USERRA cover an independent contractor?

No. USERRA, as applied by the CAA, does not provide protections for 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 eligible 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 eligible 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 eligible employee is absent from employment for the purpose of performing authorized funer 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 service 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(d)(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 eligible employee 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?"

No. Only Federal National Guard Service is 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-u 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, su 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 eligible 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 eligible employee uses the absence for other purposes as well. An eligible employee is not required to leave the employment position for the sole purpose of performing service in the uniformed services, although such uniformed service must be the main reason for departure from employment. For example, if the eligible 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 eligible 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 eligible 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 eligible 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 eligible 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 service in the uniformed services:

(a) If the eligible 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 eligible employee would not be considered fit to perform the uniformed service. An absence from that work shift is necessitated so that the eligible employee can report for uniformed service fit for duty.

(b) If the eligible 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 eligible 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.

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

(a) Yes. The eligible employee, or an appropriate officer of the uniformed service in which his or her service is to be performed, must notify the employing office 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 eligible employee is employed by more than one employing office, the employee, or an appropriate officer of the uniformed service in which

his or her service is to be performed, must notify each employing office 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 eligible 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 eligible employee's notice to the employing office may be either oral 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 employing office, an eligible 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 eligible employee excused from giving advance notice of service in the uniformed services?
The eligible 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.C300hh–11(d)(3)(B).
(b) It may be impossible or unreasonable to give advance notice under certain circumstances. Such circumstances may include the unavailability of the eligible employee's employing office or the employing office's representative, or a requirement that the eligible employee report for uniformed service in an extremely short period of time.

§ 1002.87 Is the eligible employee required to get permission from his or her employing office before leaving to perform service in the uniformed services?
No. The eligible employee is not required to ask for or get the employing office's permission to leave to perform service in the uniformed services. The eligible employee is only required to give the employing office notice of pending service.

§ 1002.88 Is the eligible employee required to tell the employing office 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 eligible employee leaves the employment position to begin a period of service, he or she is not required to tell the employing office that he or she intends to seek reemployment after completing uniformed service. Even if the eligible employee tells the employing office 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 eligible employee is not required to decide in advance of leaving the position with the employing office, 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 eligible employee may perform and still retain reemployment rights with the employing office?

Yes. In general, the eligible employee may perform service in the uniformed services for a cumulative period of up to five (5) years and retain reemployment rights with the employing office. 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 eligible 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 eligible 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 eligible employee performed when he or she worked for a previous employing office?

No. An eligible employee is entitled to a leave of absence for uniformed service for up to five years with each employing office for whom he or she works or has worked. When the eligible employee takes a position with a new employing office, the five-year period begins again regardless of how much service he or she performed while working in any previous employment relationship. If an eligible employee is employed by more than one employing office, a separate five-year period runs as to each employing office independently, even if those employing offices share or co-determine the employee's terms and conditions of employment. For example, an eligible employee of the legislative branch may work part-time for two employing offices. In this case, a separate five-year period would run as to the eligible employee's employment with each respective employing office.

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

It depends. Under the CAA, USERRA provides reemployment rights to which an eligible employee may become entitled beginning on or after January 23, 1996, but any uniformed service performed before January 23, 1996, 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 eligible 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 eligible 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 eligible 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 eligible 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 eligible 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 eligible 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 eligible 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 eligible 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 in a uniformed service to mitigate economic harm where the eligible employee's employing office is in violation of its employment or reemployment obligations to him or her.

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

No. The eligible employee is not required to accommodate his or her employing office's interests or concerns regarding the timing, frequency, or duration of uniformed service. The employing office cannot refuse to reemploy the eligible employee because it believes that the timing, frequency or duration of the service is unreasonable. However, the employing office is permitted to bring its concerns over the timing, frequency, or duration of the eligible 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 EMPLOYMENT

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

Yes. Upon completing service in the uniformed services, the eligible employee must notify the pre-service employing office 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 eligible 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 eligible 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 eligible employee must report back to the employing office 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 eligible employee's residence. For example, if the eligible 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 employing office 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 eligible employee to report within such time period through no fault of his or her own, he or she must report to the employing office 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 eligible 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 oral) with the employing office not later than 14 days after completing service. If it is impossible or unreasonable for the eligible

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 eligible 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 oral) not later than 90 days after completing service.

§1002.116 Is the time period for reporting back to an employing office extended if the eligible employee is hospitalized for, or convalescing from, an illness or injury incurred in, or aggravated during, the performance of service?
Yes. If the eligible 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 employing office 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 eligible 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 employing office, and is not applicable following reemployment.

§ 1002.117 Are there any consequences if the eligible employee fails to report for or submit a timely application for reemployment?
(a) If the eligible 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. However, the eligible employee does become subject to any conduct rules, established policy, and general practices of the employing office pertaining to an absence from scheduled work.
(b) If reporting or submitting an employment application to the employing office is impossible or unreasonable through no fault of the eligible employee, he or she may report to the employing office as soon as possible (in the case of a period of service less than 31 days) or submit an application for reemployment to the employing office 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 eligible 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 eligible 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 employing office. The eligible 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 eligible employee submit the application for reemployment?
The application must be submitted to the pre-service employing office or to an agent or representative of the employing office 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.

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

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

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

Yes, if the period of service exceeded 30 days and if requested by the employing office to do so. If the eligible 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 employing office, provide documentation to establish that:

(a) The reemployment application is timely;

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

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

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

Yes. The employing office is not permitted to delay or deny reemployment by demanding documentation that does not exist or is not readily available. The eligible employee is not liable for administrative delays in the issuance of military documentation. If the eligible employee is re-employed after an absence from employment for more than 90 days, the employing office 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 eligible employee is not entitled to reemployment, the employing office 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 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 eligible 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 employing office, 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 employing office in this situation.

EMPLOYER STATUTORY DEFENSES

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

(a) Even if the employee is otherwise eligible for reemployment benefits, the employing office is not required to reemploy him or her if the employing office establishes that its circumstances have so changed as to make reemployment impossible or unreasonable. For example, an employing office may be excused from re-employing the eligible employee where there has been an intervening reduction in force that would have included that employee. The employing office may not, however, refuse to reemploy the eligible 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 employing office is not required to reemploy him or her if it establishes that assisting the eligible employee in becoming qualified for reemployment would impose an undue hardship, as defined in § 1002.5(s) and discussed in § 1002.198, on the employing office; or,

(c) Even if the employee is otherwise eligible for reemployment benefits, the employing office is not required to reemploy him or her if it establishes that the employment position vacated by the eligible 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 employing office defenses included in this section are affirmative ones, and the employing office 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 eligible employee's status with the employing office while performing service in the uniformed services?

During a period of service in the uniformed services, the eligible employee is deemed to be on leave of absence from the employing office. In this status, the eligible employee is entitled to the non-seniority rights and benefits generally provided by the employing office to other employees with similar seniority, status, and pay that are on leave of absence. Entitlement to these non-seniority rights and benefits is not dependent on how the employing office characterizes the eligible employee's status during a period of service. For example, if the employing office 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 leave of absence, and therefore, entitled to the non-seniority rights and benefits generally provided to employees on leave of absence.

§ 1002.150 Which non-seniority rights and benefits is the eligible employee entitled to during a period of service?

(a) The non-seniority rights and benefits to which an eligible employee is entitled during a period of service are those that the employing office provides to similarly situated employees by an 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 eligible employee's employment and those established after employment began. They also include those rights and benefits that become effective during the eligible employee's period of service and that are provided to similarly situated employees on leave of absence.

(b) If the non-seniority benefits to which employees on leave of absence are entitled vary according to the type of leave, the eligible 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 employing office to an eligible employee on a military leave of absence only if the employing office provides that benefit to similarly situated employees on comparable leaves of absence.

(d) Nothing in this section gives the eligible employee rights or benefits to which the employee otherwise would not be entitled if the employee had remained continuously employed with the employing office.

§ 1002.151 If the employing office provides full or partial pay to the eligible employee while he or she is on military leave, is the employing office 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 employing office provides additional benefits such as full or partial pay when the eligible employee performs service, the employing office 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 eligible 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 eligible 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 eligible 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 eligible employee permitted upon request to use accrued vacation, annual or similar leave with pay during the service? Can the employing office require the eligible employee to use accrued leave during a period of service?

(a) If employment is interrupted by a period of service, the eligible 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 eligible employee is not entitled to use sick leave that accrued with the employing office during a period of service in the uniformed services, unless the employing office 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 employing office may not require the eligible 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 the Federal Government.

(c) USERRA covers multi-employer plans maintained pursuant to one or more collective bargaining agreements between employers and employee organizations. USERRA applies to

multi-employer plans as they are defined in ERISA at 29 U.S.C. 1002(37). USERRA contains provisions that apply specifically to multi-employer plans in certain situations.

§ 1002.164 What health plan coverage must the employing office provide for the eligible employee under USERRA?

If the eligible 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 eligible 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 eligible 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 eligible employee's absence for the purpose of performing service begins; or,

(2) The period beginning on the date on which the eligible 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 employing office 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 employing office to permit the eligible 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 eligible 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 eligible 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 eligible employee pay in order to continue health plan coverage?

(a) If the eligible 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 eligible 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 employing office'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 eligible 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 eligible 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 employing office provides employment-based health coverage to an eligible 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 eligible 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 eligible 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 employing office provides employment-based health coverage to an eligible 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 eligible 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 eligible 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 eligible 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 eligible 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 eligible employee elect to delay reinstatement of health plan coverage until a date after the date he or she is reemployed?

USERRA requires the employing office to reinstate or direct the reinstatement of health plan coverage upon request at reemployment. USERRA permits but does not require the employing office 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 multi-employer health plan, how is liability allocated for employer contributions and benefits arising under USERRA's health plan provisions?

Liability under a multi-employer 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 eligible 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 multi-employer plan that provides health plan coverage through a health benefits account system?

(a) Some employees receive health plan benefits provided pursuant to a multi-employer 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 eligible 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 eligible 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 eligible 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 eligible 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 eligible 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 eligible employee entitled to be reemployed by the employing office?
The employing office 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 eligible 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 employing office 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 eligible employee entitled to upon reemployment?
As a general rule, the eligible 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 eligible employee could have been promoted (or, alternatively, demoted, transferred, or laid off) due to intervening events. The escalator principle requires that the eligible 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 employing office may have the option, or be required, to reemploy the eligible 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 eligible employee would have attained if his or her continuous employment had not been interrupted due to uniformed service. Once this position is determined, the employing office may have to consider several factors before determining the appropriate reemployment position in any particular case. Such factors may include the eligible employee's length of service, qualifications, and disability, if any. The actual 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 eligible employee would ordinarily have attained in that position given his or her job history, including

prospects for future earnings and advancement. The employing office must determine the seniority rights, status, and rate of pay as though the eligible 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 eligible employee's service, and any changes that may have occurred during the period of service. In particular, the eligible 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 eligible employee missed during service is based on a skills test or examination, then the employing office 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 eligible employee to adjust to reemployment before scheduling a makeup test or examination, an employing office 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 eligible 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 eligible employee is reemployed?

Yes. The Act does not prohibit lawful adverse job consequences that result from the eligible employee's restoration on the seniority ladder. Depending on the circumstances, the escalator principle may cause an eligible employee to be reemployed in a higher or lower position, laid off, or even terminated. For example, if an eligible 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 employing office to assess what would have happened to such factors as the eligible 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 eligible employee's escalator position is determined, other factors may allow, or require, the employing office 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 eligible employee's most recent period of uniformed service;
(b) The eligible employee's qualifications; and,
(c) Whether the eligible employee has a disability incurred or aggravated during uniformed service.

§ 1002.196 What is the eligible 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 eligible employee must be reemployed according to the following priority:
(a) The eligible employee must be reemployed in the escalator position. He or she must be qualified to perform the duties of this position. The employing office must make reasonable efforts to help the eligible employee become qualified to perform the duties of this position.
(b) If the eligible employee is not qualified to perform the duties of the escalator position after reasonable efforts by the employing office, 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 eligible employee must be qualified to perform the duties of this position. The employing office must make reasonable efforts to help the eligible employee become qualified to perform the duties of this position.
(c) If the eligible employee is not qualified to perform the duties of the escalator position or the pre-service position, after reasonable efforts by the employing office, 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 eligible employee must be qualified to perform the duties of this position. The employing office must make reasonable efforts to help the eligible employee become qualified to perform the duties of this position.

§ 1002.197 What is the reemployment position if the eligible 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 eligible employee must be reemployed according to the following priority:
(a) The eligible 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 employing office must make reasonable efforts to help the eligible employee become qualified to perform the duties of this position.
(b) If the eligible employee is not qualified to perform the duties of the escalator position or a like position after reasonable efforts by the employing office, 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 eligible employee must be qualified to perform the duties of this position. The employing office must make reasonable efforts to help the eligible employee become qualified to perform the duties of this position.
(c) If the eligible 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 employing office, 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 eligible employee must be qualified to perform the duties of this position. The employing office must make reasonable efforts to help the eligible employee become qualified to perform the duties of this position.

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

The eligible employee must be qualified for the reemployment position. The employing office must make reasonable efforts to help the eligible employee become qualified to perform the duties of this position. The employing office is not required to reemploy the eligible employee on his or her return from service if he or she cannot, after reasonable efforts by the employing office, 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 employing office'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 employing office makes reasonable efforts, as defined in § 1002.5(p), may it determine that the otherwise eligible 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 employing office follow if two or more returning employees are entitled to reemployment in the same position?

If two or more eligible 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 re-employed 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 eligible employee have when reemployed following a period of uniformed service?

The eligible 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. The eligible employee is not entitled to any benefits to which he or she would not have been entitled had the employee been continuously employed with the employing office. 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 employing office 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 employing office, together with the number of months and the number of hours of work for which the service member would have been employed by the employing office 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 employing office to use a seniority system?

No. USERRA does not require the employing office 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 eligible 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 eligible 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 employing office'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 employing office's actual custom or practice is different from what is written in the contract or handbook.

§ 1002.213 How can the eligible 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 eligible employee would have received the seniority or seniority-based right or benefit if he or she had been continuously employed. The eligible employee does not have to establish that he or she would have received the benefit as an absolute certainty. The eligible 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 employing office cannot withhold the right or benefit based on an assumption that a series of unlikely events could have prevented the eligible employee from gaining the right or benefit.

DISABLED EMPLOYEES

§ 1002.225 Is the eligible 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 eligible employee has a disability incurred in, or aggravated during, the period of service in the uniformed services, the employing office 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 eligible employee is not qualified for reemployment in the escalator position because of a disability after reasonable efforts by the employing office 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 employing office must make reasonable efforts to accommodate the eligible 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 eligible 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 eligible employee has a disability that was incurred in, or aggravated during, the period of service, what efforts must the employing office make to help him or her become qualified for the reemployment position?

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

The eligible 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 eligible employee is reemployed in the escalator position, the employing office 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 eligible 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 employing office may examine the returning eligible 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 eligible 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 eligible employee missed during service is based on a skills test or examination, then the employing office 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 eligible employee to adjust to reemployment before scheduling a makeup test or examination, an employing office 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 eligible employee's employment not been interrupted by uniformed service.
(b) If the eligible employee is reemployed in the pre-service position or another position, the employing office 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 eligible 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 eligible employee with protection against discharge?
Yes. If the eligible 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 eligible 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 eligible employee's most recent period of uniformed service was more than 180 days.

§ 1002.248 What constitutes cause for discharge under USERRA?
The eligible 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 employing office bears the burden of proving that it is reasonable to discharge the eligible 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 eligible employee's job position is eliminated, or the eligible employee is placed on layoff status, either of these situations would constitute cause for purposes of USERRA. The employing office bears the burden of proving that the eligible 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 eligible employee's pension benefits?

On reemployment, the eligible employee is treated as not having a break in service with the employing office for purposes of participation, vesting and accrual of benefits in a pension plan, 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 eligible 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 employing office for purposes of determining participation, vesting and accrual of pension benefits under the plan.

(b) If the eligible 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 eligible employee completed service, except in circumstances beyond his or her control, must be treated as continuous service with the employing office 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. USERRA also covers certain pension plans not covered by ERISA, such as those sponsored by the Federal Government.

(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 eligible employee with pension benefits?

With the exception of multi-employer plans, which have separate rules discussed below, the employing office is required to ensure the funding of any obligation of the plan to provide benefits that are attributable to the eligible employee's period of service. In the case of a defined contribution plan, once the eligible employee is reemployed, the employing office must ensure that the amount of the make-up contribution for the employee, if any; the employee's make-up contributions, if any; and the employee's elective deferrals, if any; in the same manner and to the same extent that the amounts are allocated for other employees during the period of service. In the case of a defined benefit plan, the eligible 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 must the plan contribution that is attributable to the employee's period of uniformed service be made?

(a) Employer contributions are not required until the eligible employee is reemployed. For employer contributions to a plan in which the eligible employee is not required or permitted to

contribute, the contribution attributable to the employee's period of service must be made 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 contribution to be made within this time period, the contribution must be made as soon as practicable.

(b) If the eligible 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 eligible employee's immediate past period of uniformed service, with the repayment period not to exceed five years. Makeup contributions or elective deferrals may only be made during this period and while the employee is employed with the post-service employing office.

(c) If the eligible 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. This is true because employer contributions 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 eligible employee's make-up contributions or elective deferrals must be made according to the plan's requirements for employer matching contributions.

(d) The eligible 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 eligible 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 eligible 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 that the eligible 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 eligible employee pay interest when he or she makes up missed contributions or elective deferrals?

No. The eligible 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 eligible 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 eligible 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 eligible employee must repay includes any interest that would have accrued had the monies not been withdrawn. The eligible 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 employing office and the employee), provided the employee is employed with the post-service employing office during this period.

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

The amount of the eligible 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 eligible 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 eligible 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 multi-employer pension benefit plan under USERRA?

A multi-employer 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 multi-employer plan. In addition to the provisions of USERRA that apply to all pension benefit plans, there are provisions that apply specifically to multi-employer plans, as follows:
(a) The last employer that employed the eligible employee before the period of service is responsible for making the employer contribution to the multi-employer 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 eligible employee.
(b) An employer that contributes to a multi-employer plan and that reemploys the eligible 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 multi-employer plan pursuant to this subsection does not begin until the employer has knowledge that the eligible employee was re-employed pursuant to USERRA.
(c) The eligible employee is entitled to the same employer contribution whether he or she is reemployed by the pre-service employer or by a different employer contributing to the same multi-employer plan, provided that the pre-service 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 eligible employee's pension benefits, if benefits are based on compensation?

In many pension benefit plans, the eligible 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 eligible 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 eligible employee would have received is not reasonably certain, 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 eligible 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 Office of Compliance provide to employees and employers concerning employment, reemployment, or other rights and benefits under USERRA?

The Office of Compliance provides assistance to any person or entity who is covered by the CAA with respect to employment and reemployment rights and benefits under USERRA as applied by the CAA. This assistance includes responding to inquiries, and providing a program of education and information on matters relating to USERRA.

INVESTIGATION AND REFERRAL

§ 1002.288 How does an eligible employee initiate a claim alleging a violation of USERRA under the CAA?

(a) If an eligible employee is claiming entitlement to employment rights or benefits or reemployment rights or benefits and alleges that an employing office has failed or refused, or is about to fail or refuse, to comply with the Act, the eligible employee may file a complaint with the Office of Compliance, after a required period of counseling and mediation.

(b) To commence a proceeding, an eligible employee alleging a violation of the rights and protections of USERRA must request counseling by the Office of Compliance no later than 180 days after the date of the alleged violation. If an eligible employee misses this deadline, the claim may be time barred under the CAA.

(c) The following procedures are available under subchapter IV of the CAA for eligible employees who believe their rights under USERRA as made applicable by the CAA have been violated:

(1) counseling;

(2) mediation; and

(3) election of either -

(A) a formal complaint filed with the Office of Compliance (which must meet the requirements as set forth in the Office of Compliance Procedural Rules, Section 5.01(c)), and a hearing before a hearing officer, subject to review by the Board of Directors of the Office of Compliance, and judicial review in the United States Court of Appeals for the Federal Circuit; or

(B) a civil action in a district court of the United States.

(d) Regulations of the Office of Compliance describing and governing these procedures can be found at 141 Cong. Rec. H15645-H15655 (daily ed. December 30, 1995) and 141 Cong. Rec. S19239-19249 (daily ed. December 22, 1995), 143 Cong. Rec. H8316-H8317 (daily ed. October 2, 1997)(as amended, applying USERRA to the Government Accountability Office and the Library of Congress).

ENFORCEMENT OF RIGHTS AND BENEFITS AGAINST AN EMPLOYING OFFICE

§ 1002.303 Is an eligible employee required to bring his or her USERRA claim to the Office of Compliance?

Yes. All eligible employees who file claims under Section 206 of the CAA, are required to go through counseling and mediation before electing to file a civil action or a complaint with the Office of Compliance

§ 1002.308 Who has legal standing to bring a USERRA claim under the CAA?
An action under Section 206 of the CAA may be brought by an eligible employee, as defined by Section 1002.5 (f) of Subpart A of these regulations. An action under 207(a) of the CAA may be brought by a covered employee, as defined by section 1002.5 (e) of Subpart A of these regulations. An employing office, prospective employing office 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 the covered employing office or a potential covered employing office, as the case may be, is a necessary party respondent. Under the Office of Compliance Procedural Rules, a hearing officer has authority to require the filing of briefs, memoranda of law, and the presentation of oral argument. A hearing officer also may order the production of evidence and the appearance of witnesses.

§ 1002.310 How are fees and court costs awarded in an action under USERRA?
If an eligible employee is a prevailing party with respect to any claim under USERRA, the hearing officer, Board, or 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. However, Section 402 of the CAA requires a covered employee to bring a request for counseling alleging a violation of the CAA no later than 180 days after the date of the alleged violation. A claim by an eligible employee alleging a USERRA violation as applied by the CAA would follow this requirement .

§ 1002.312 What remedies may be awarded for a violation of USERRA?
In any action or proceeding the following relief may be awarded:
(a) The court and/or hearing officer may require the employing office to comply with the provisions of the Act;
(b) The court and/or hearing officer may require the employing office to compensate the eligible employee for any loss of wages or benefits suffered by reason of the employing office's failure to comply with the Act;
(c) The court and/or hearing officer may require the employing office to pay the eligible employee an amount equal to the amount of lost wages and benefits as liquidated damages, if the court and/or hearing officer determines that the employing office's failure to comply with the Act was willful. A violation shall be considered to be willful if the employing office 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 employing office).

DOL SECTIONS

Subpart A

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

Subpart B

Sec. 1002.18 What status or activity is protected from employer discrimination by USERRA?
Sec. 1002.19 What activity is protected from employer retaliation by USERRA?
Sec. 1002.20 Does USERRA protect an individual who does not actually perform service in the uniformed services?
Sec. 1002.21 Do the Act's prohibitions against discrimination and retaliation apply to all employment positions?
Sec. 1002.22 Who has the burden of proving discrimination or retaliation in violation of USERRA?
Sec. 1002.23 What must the individual show to carry the burden of proving that the employer discriminated or retaliated against him or her?

OOC SECTIONS

Subpart A

Sec. 1002.1 What is the purpose of this part?
Sec. 1002.2 Is USERRA new law?
Sec. 1002.3 When did USERRA become effective?
Sec. 1002.4 What is the role of the Executive Director of the Office of Compliance under the USERRA provisions of the CAA?
Sec. 1002.5 What definitions apply to these USERRA regulations?
Sec. 1002.6 What types of service in the uniformed services are covered by USERRA?
Sec. 1002.7 How does USERRA as applied by the CAA relate to other laws, public and private contracts, and employer practices?

Subpart B

Sec. 1002.18 What status or activity is protected from employer discrimination by USERRA?
Sec. 1002.19 What activity is protected from employer retaliation by USERRA?
Sec. 1002.20 Does USERRA's prohibitions against discrimination and retaliation apply to all employment positions?
Sec. 1002.21 Does USERRA protect a covered employee who has not actually performed service in the uniformed services?

Sections 1002.22-23 are deleted from OOC regulations.

DOL SECTIONS	OOC SECTIONS
Subpart C **Sections 1002.32-34 and 1002.40-139** are the same in DOL and OOC regulations.	Subpart C **Sections 1002.32-34 and 1002.40-139** are the same in DOL and OOC regulations. **Sections 1002.35-39** are deleted from OOC regulations.
Subpart D **Sections 1002.149-171** are the same in DOL and OOC regulations.	Subpart D **Sections 1002.149-171** are the same in DOL and OOC regulations.
Subpart E **Sections 1002.180-267** are the same in DOL and OOC regulations.	Subpart E **Sections 1002.180-267** are the same in DOL and OOC regulations.
Subpart F **Section 1002.277** What assistance does the Department of Labor provide to employees and employers concerning employment, reemployment, or other rights and benefits under USERRA?	Subpart F **Section 1002.277** What assistance does the Office of Compliance provide to employees and employers concerning employment, reemployment, or other rights and benefits under USERRA?
Section 1002.288 How does an individual file a USERRA complaint?	**Section 1002.288** How does an eligible employee initiate a claim alleging a violation of USERRA under the CAA?
Section 1002.289 How will VETS investigate a USERRA complaint?	**Sections 1002.289-292** are deleted from OOC regulations.
Section 1002.290 Does VETS have the authority to order compliance with USERRA?	
Section 1002.291 What actions may an individual take if the complaint is not resolved by VETS?	
Section 1002.292 What can the Attorney General do about the complaint?	
Section 1002.303 Is an individual required to file his or her complaint with VETS?	**Section 1002.303** Is an eligible employee required to bring his or her USERRA claim to the Office of Compliance?
Section 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?	**Sections 1002.304-307** are deleted from OOC regulations.
Section 1002.305 What court has jurisdiction in an action against a State or private employer?	
Section 1002.306 Is a National Guard civilian technician considered a State or Federal employee for purposes of USERRA?	
Section 1002.307 What is the proper venue in an action against a State or Private employer?	

OFFICE OF COMPLIANCE: NOTICE OF ADOPTION OF SUBSTANTIVE REGULATIONS, AND SUBMISSION FOR CONGRESSIONAL APPROVAL

Adoption of the Office of Compliance Regulations Implementing Certain Substantive Employment Rights and Protections for Veterans, as Required by 2 U.S.C. 1316, the Congressional Accountability Act of 1995, as Amended

Procedural Summary:

Issuance of the Board's Initial Notice of Proposed Rulemaking:

On April 21, 2008 and May 8, 2008, the Office of Compliance published a Notice of Proposed Rulemaking ("NPR") in the Congressional Record (154 Cong. Rec. S3188 (daily ed. April 21, 2008) H3338 (daily ed. May 8, 2008))

Why did the Board propose these new Regulations?

Section 206 of the Congressional Accountability Act ("CAA"), 2 U.S.C. §1316, applies certain provisions of the Uniformed Services Employment and Reemployment Rights Act ("USERRA"), Title 38, Chapter 43 of the United States Code. Section 1316 of the CAA provides protections to eligible employees in the uniformed services from discrimination, denial of reemployment rights, and denial of employee benefits. Subsection 1316(c) requires the Board not only to issue regulations to implement these protections, but to issue regulations which are "the same as the most relevant substantive regulations promulgated by the Secretary of Labor . . ." This section provides that the Board may only modify the Department of Labor regulations if it can establish good cause as to why a modification would be more effective for the application of the protections to the legislative branch. In addition, Section 1384 provides procedures for the rulemaking process in general.

What procedure followed the Board's April 16 Notice of Proposed Rulemaking?

The May 8, 2008 Notice of Proposed Rulemaking included a thirty day comment period, which began on May 9, 2008. A number of comments to the proposed substantive regulations were received by the Office of Compliance from interested parties. The Board of Directors has reviewed the comments from interested parties, made a number of changes to the proposed substantive regulations in response to comments, and on December 3, 2008 adopted the amended regulations.

What is the effect of the Board's "adoption" of these proposed substantive regulations?
Adoption of these substantive regulations by the Board of Directors does not complete the promulgation process. Pursuant to section 304 of the CAA, 2 U.S.C. 1384, the procedure for promulgating such substantive regulations requires that:

(1) the Board of Directors issue proposed substantive regulations and publish a general notice of proposed rulemaking in the *Congressional Record*;
(2) there be a comment period of at least 30 days after the date of publication of the general notice of proposed rulemaking; and
(3) after consideration of comments by the Board of Directors, that the Board adopt regulations and transmit notice of such action together with the regulations and a recommendation regarding the method for Congressional approval of the regulations to the Speaker of the House and President pro tempore of the Senate for publication in the *Congressional Record.*

This **Notice of Adoption of Substantive Regulations and Submission for Congressional Approval** completes the third step described above.

What are the next steps in the process of promulgation of these regulations?
Pursuant to section 304(b)(4) of the CAA, 2 U.S.C. 1384(b)(4), the Board of Directors is required to "include a recommendation in the general notice of proposed rulemaking and in the regulations as to whether the regulations should be approved by resolution of the Senate, by resolution of the House of Representatives, by concurrent resolution, or by joint resolution." The Board of Directors recommends that the House of Representatives adopt the "H" version of the regulations by resolution; that the Senate adopt the "S" version of the regulations by resolution; and that the House and Senate adopt the "C" version of the regulations applied to the other employing offices by a concurrent resolution.

Which employment and reemployment protections are applied to eligible employees in 2 U.S.C. 1316?
USERRA was enacted in December 1994, and the Department of Labor final regulations for the executive branch became effective in 2006. USERRA's provisions ensure that entry and re-entry into the civilian workforce are not hindered by participation in military service. USERRA provides certain reemployment rights; protection from discrimination based on military service, denial of an employment benefit as a result of military service; and protection from retaliation for enforcing USERRA protections.

The selected statutory provisions which Congress incorporated into the CAA and determined "shall apply" to eligible employees in the legislative branch include nine sections: sections 4303(13), 4304, 4311(a)(b), 4312, 4313, 4316, 4317, 4318, and paragraphs (1), (2)(A), and (3) of 4323(c)[1] of title 38.

The first section, section 4303(13), provides a definition for "service in the uniformed services."

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[1] As written in Section 206 of the CAA, reference is made to application of paragraphs (1), (2)(A), and (3) of section 4323(c) (Venue). However, in USERRA, section 4323(c) is not comprised of paragraphs (1), (2)(A), and (3) - - section 4323(d) (Remedies) is comprised of those paragraphs. Because of this apparent typographical error, where the CAA references paragraphs (1), (2)(A), and (3) of section 4323(c), the Board refers to section 4323(d).

This is the only definition in USERRA that Congress made applicable to the legislative branch. Section 4303(13) references Section 4304, which describes the "character of service" and illustrates situations which would terminate eligible employees' rights to USERRA benefits.

Congress applied section 4311 to the legislative branch in order to provide discrimination and retaliation protections, respectively to eligible and covered employees. Interestingly, although Congress adopted these protections, it did not adopt the legal standard by which to establish a violation of this section of the regulations.

Sections 4312 and 4313 outline the reemployment rights that are provided to eligible employees. These rights are automatic under the statute, and if an employee meets the eligibility requirements, he or she is entitled to the rights provided therein.

Sections 4316, 4317, and 4318 provide language on the benefits given to eligible employees.

Are there veterans' employment regulations already in force under the CAA?
No. The Board has issued to the Speaker of the House and the President Pro Tempore of the Senate its Notice of Adoption of Substantive Regulations and Transmittal for Congressional Approval for Veterans Employment Opportunities Act (VEOA). The Board is awaiting Congressional approval of those regulations.

Why are there substantive differences in the proposed regulations for the House of Representatives, the Senate, and the other employing offices?
As the Board of Directors has identified "good cause" to modify the executive branch regulations to implement more effectively the rights and protections for veterans, there are some differences in other parts of the proposed regulations applicable to the Senate, the House of Representatives, and the other employing offices. Therefore, the Board is submitting three separate sets of regulations: an "H" version, an "S" version, and a "C" version, each denoting those provisions in the regulations that are applicable to the House, Senate, and other employing offices, respectively.

Are these proposed regulations also recommended by the Office of Compliance's Executive Director, the Deputy Executive Director for the Senate, and the Deputy Executive Director for the House of Representatives?
Yes, as required by section 304(b)(1) of the CAA, 2 U.S.C. 1384(b)(1), these regulations have also been recommended by the Executive Director and Deputy Executive Directors of the Office of Compliance.

Are these proposed CAA regulations available to persons with disabilities in an alternate format?
This Notice of Adoption of Substantive Regulations, and Submission for Congressional Approval is available on the Office of Compliance web site, www.compliance.gov, which is compliant with section 508 of the Rehabilitation Act of 1973 as amended, 29 U.S.C. 794d. This Notice can also be made available in large print or Braille. Requests for this Notice in an alternative format should be made to: Annie Leftwood, Executive Assistant, Office of Compliance, 110 2nd Street, S.E., Room LA-200, Washington, D.C. 20540; 202-724-9250; TDD:

202-426-1912; FAX: 202-426-1913.

Supplementary Information: The Congressional Accountability Act of 1995 (CAA), PL 104-1, was enacted into law on January 23, 1995. The CAA applies the rights and protections of 12 federal labor and employment statutes to covered employees and employing offices within the Legislative Branch of Government. Section 301 of the CAA (2 U.S.C. 1381) establishes the Office of Compliance as an independent office within the Legislative Branch.

The Board's Responses to Comments

SUMMARY OF MAJOR COMMENTS

General Comments

The Board noted in the Notice of Proposed Regulations (NPR) that it had not identified any "good cause" for issuing three separate sets of regulations and that if the regulations were approved as proposed, there would be one text applicable to all employing offices and covered employees. During the notice and comment period, the Board received comments from the Committee on House Administration ("CHA"), Senate Employment Counsel ("Counsel"), and the United States Capitol Police ("Capitol Police"). All of the commenters noted, in different places throughout the regulations, the need for modifications that would apply specifically to the House, Senate or other employing offices. Although the Board has not found "good cause" to vary the Department of Labor (DOL) regulations in all instances where requested, there are a number of places where such variances are warranted. In light of that and the comment by the CHA that the Congressional Accountability Act (CAA) requires the publication of separate regulations for the Senate, House and other covered employees and employing offices, the Board has made that change and put forward three separate sets of regulations, an "H" version, an "S" version, and a "C" version, each denoting the provisions that are included in the regulations that are applicable to the House, Senate, and other employing offices, respectively.

Eligible Employees

In its comments, CHA maintains that the definition of "eligible employee" in the regulations is overly broad. Pointing to Section 206(a)(2)(A) of the CAA, which defines an "eligible employee" as "a covered employee performing service in the uniformed service, within the meaning of section 4303(13) of title 38, whose service has not been terminated upon occurrence of any of the events enumerated in section 4304 of title 38," the CHA notes that the definition references only the present tense of the verb "performing" and makes no mention of the past tense. CHA also notes the Section 206 does not define eligible employee to include an individual who was previously a member of the uniformed services or one who applies or has applied to perform service in the uniformed services. CHA acknowledges that this "stands in marked contrast to the general USERRA statute's protection of individuals who currently serve as well as to those who have previously served, to those who have an obligation to serve, and to those who have applied to serve in the uniformed services (regardless of whether they actually served)." CHA further recognizes "that USERRA's intent is to provide broad protections for those who serve and have served in the uniformed services..." CHA comments that the regulations are inappropriately broad, notwithstanding language in Section 206(a)(2)(A) that strongly suggests inclusion of an individual who has been honorably discharged and is therefore not currently serving, but who has served in the past.

The Board acknowledges the tension in the language in Section 206(a)(2)(A), but does not agree with the conclusions reached by the CHA, that, absent a statutory amendment revising the

definition in Section 206(a)(2)(A), the proposed regulations should be revised to reflect that, "as applied by the CAA, USERRA only protects employees who are currently 'performing service in the uniformed services.'"

The Board's authority to promulgate substantive regulations is found in Section 206 of the CAA, 2 U.S.C. §1316, which applies certain provisions of the Uniformed Services Employment and Reemployment Rights Act ("USERRA"), Title 38, Chapter 43 of the United States Code. Section 1316 of the CAA provides protections to eligible employees in the uniformed services from discrimination, denial of reemployment rights, and denial of employee benefits.

Subsection 1316(c) of the CAA requires the Board not only to issue regulations to implement these protections, but to issue regulations which are "the same as the most relevant substantive regulations promulgated by the Secretary of Labor . . ." This section provides that the Board may modify the Department of Labor regulations only if it can establish good cause as to why a modification would be more effective for application of the protections to the legislative branch. The Board chooses to apply a broad definition of "eligible employee".

The Board does not read the "performing service" language in Section 206(a)(2)(A) as limiting the discrimination protection of USERRA to only those employees who are currently serving in the uniformed services. Rather, we interpret the phrase "performing service" in this context to refer to covered employees who have some form of military status (i.e., those who have performed service or who have applied or have an obligation to perform military service, as well as those who are currently members of or who are serving in the uniformed services) as distinguished from covered employees who do not have this military status.

This application of the phrase "performing service" is supported by several indicia of Congressional intent. First, Section 206(a)(2)(A) prohibits discrimination against eligible employees "within the meaning of" subsection (a) of section 4311 of Title 38, which states: "A person who is a member of, applies to be a member of, performs, 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 benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation." Most, if not all, of these protections would be lost if the phrase "performing service" were applied to exclude covered employees who are not currently performing service at the moment of the alleged violation. It would vitiate the reemployment rights under USERRA because employees would lose their statutory rights at the moment of discharge, whether honorable or not. Similarly, had Congress intended to so limit the coverage of USERRA, it could have said that "any" discharge was a disqualifying condition, not those that are other than honorable.

Congressional intent is also reflected in the USERRA statute itself, passed in 1994, which states, "It is the sense of Congress that the Federal Government should be a model employer in carrying out the provisions of this chapter." 38 USC 4301(b). A narrow application of the phrase "performing service" would be directly contrary to this statement of the sense of Congress.

Finally, we note that after the CAA was enacted, Congress enacted the Veteran Employment Opportunities Act and thereby granted certain preferences in hiring and retention during layoffs to *all* covered employees who are "veterans" as defined in 5 U.S.C. § 2108, or any superseding legislation. We conclude that Congress intended a broad application of the phrase "performing service" so that covered employees who will or have performed service are also protected against discrimination and the improper denial of reemployment or benefits.

In light of the above, the Board has found "good cause" to modify the Department of Labor's definition of "eligible employee". Further, in order to avoid any confusion as to the application of the regulations to "eligible" employees, the Board has made the appropriate editorial changes throughout the adopted regulations.

Other Definitions

Section 1002.5 contains the definitions used in the regulations. Several commenters have recommended that some of the definitions in this section be edited to be consistent with the CAA. Where appropriate, the Board has made those changes.[2]

Section 1002.5(i) defines an employee of the House of Representatives. The Committee on House Administration noted that because there may be some joint employees of the House and Senate, the definition of an employee of the House of Representatives should also include individuals employed by the Senate. We agree and have made the necessary revisions.

Section 1002.5(k) defines employing office. CHA commented that the definition in 1002.5(k)(4) was broader than the definition of "employing office" in Section 101(9) of the CAA. We note that during the rulemaking procedures for the Veterans Equal Opportunities Act (VEOA), the Board determined that in view of the selection process for certain Senate employees, the words "or directed" would be added to the definition of "covered employee" to include any employee who is hired at the direction of a Senator, but whose appointment form is signed by an officer of either House of Congress. Although we included such language in the proposed rules on USERRA, it appears that this language would be overreaching for the House and other employing offices. As the House has different methods of making appointments and selections, this language is unnecessary and may create confusion given the practices of the House. Accordingly, the Board has deleted this provision from the House and other employing offices version, but will include it in the Senate version.

Section 1002.5(l) defines health plan. The Capitol Police has recommended that the language in the definition of health care plans be limited to the FEHB program. As discussed more fully below, the Board is mandated to follow, as closely as possible, the regulations applied to the executive branch. In view of the fact that the DOL regulations apply to federal employees in the executive branch who are also only covered under the Federal Employees Health Benefits (FEHB) program, the Board finds that there is no good cause to limit the definition.

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[2] On October 20, 2008, Congress passed the Capitol Visitor Center Act (PL 110-437) amending Sections 101(3)(C) and 101(9)(D) of CAA to substitute "the Office of Congressional Accessibility Services" for both "the Capitol Guide Service" and "the Capitol Guide Board". The Board has modified its regulations to reflect this change in §1002.5(e)(3) in all versions and in §1002.5(k)(1) in the "C" version.

Section 1002.5(q) defines seniority. The Capitol Police has also recommended that this definition of seniority be deleted because of potential conflict with definitions of seniority in various collective bargaining agreements. The Board has determined that there is no good cause for such a change. The definition in the adopted regulations are not limiting and are consistent with §4316 of USERRA. Further, as DOL indicated in its notice to the final USERRA regulations, section 4316(a) of USERRA is not a statutory mandate to impose seniority systems on employers. Rather, USERRA requires only that those employers who provide benefits based on seniority restore the returning service member to his or her proper place on the seniority ladder. Because each employing office defines and determines how seniority is to be applied, the definition of seniority in the adopted regulations should not conflict with collective bargaining agreements.

Section 1002.5(s) defines undue hardship. The CHA has noted that in setting out the standards for considering when an action might require significant difficulty or expense, the proposed regulations did not include the language from §1002.5(n)(2) of the DOL's regulations. In the DOL's regulations, §1002.5(n)(2) provides that an action may be considered to be an undue hardship if it requires significant difficulty or expense when considered in light of: 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. Section 1002.5(s)(2) of the proposed regulations similarly referred to the overall financial resources of the *employing office*. However, in view of the fact that employing offices also may have multiple facilities, the Board agrees with the CHA comments and finds that there is no "good cause" to delete what was §1002.5(n)(2) of the DOL regulations. Therefore, what was §1002.5(n)(2) of the DOL regulations has been included in the adopted regulations as §1002.5(s)(2) and subsequent sections have been renumbered accordingly.

The Relationship Between USERRA and Other Laws, Contracts and Practices

Section 1002.7 states that USERRA supersedes any state and local law, contract, or policy that reduces or limits any rights or benefits provided by USERRA, but does not supersede those provisions that are more beneficial. Senate Employment Counsel has commented that reference to the fact that USERRA supersedes any state and local laws is superfluous and does not apply to legislative offices. Further, Counsel has recommended that the section referring to the fact that USERRA does not supersede more beneficial state or local laws be omitted. The Board acknowledges that state and local laws do not apply to federal employees or the employing offices covered under the CAA. Therefore, in order to avoid any confusion, the Board has made the appropriate changes.

Anti-Discrimination and Anti-Retaliation Provisions

As a general comment, the Capitol Police has raised questions about the Board's reference in the notice to *Britton v. Office of the Architect of the Capitol*. The Capitol Police maintains that *Britton* is not applicable to §4311(a) or (b) and that the USERRA regulations should not be changed to include substantive regulations under section 207 of the CAA. The Board notes that

the reference to the *Britton* case and retaliation under Section 207 of the CAA is merely explanatory and not a part of the substantive regulations. In the NPR, there is a typographical error and the correct statement is that the Board does not propose a particular standard for claims of discrimination or retaliation brought by eligible employees under section 206. Any discussion referring to Section 207 retaliation was for explicative purposes only. Accordingly, it should be noted that in these regulations, the Board is not discussing claims of retaliation under Section 207 and that references to Section 207 have been omitted from the adopted regulations.

Section 1002.20, as set out in the proposed regulations, discussed the extent of the coverage of USERRA's prohibitions against discrimination and retaliation. Several commenters noted that §1002.20 and §1002.21 were confusing and did not clearly differentiate discrimination and retaliation protections as applied by §206 and §207 of the CAA. The Board agrees and has modified section 1002.20 and replaced section 1002.21 with a new section to reflect that USERRA protects eligible employees in all positions with covered employing offices. Thus, because Section 206 of the CAA only covers "eligible employees" as defined in §1002.5(f), "covered employees" would only be protected by the anti-retaliation provisions under Section 207 of the CAA.

Additionally, in its comments, the Capitol Police asks why the numbering of §1002.20 and §1002.21 was reversed and why §1002.22 covering the burden of proving discrimination or retaliation was excluded. The Board notes that it had good cause to delete §1002.22 as Congress specifically did not adopt the "but for" test (38 U.S.C 4311 (c) (1) and (2)) and therefore it was confusing and unnecessary to include this provision. In view of the revisions to sections 1002.20 and 1002.21 noted above, the Board has kept the order as it was in the proposed regulations to be more consistent with these edits.

Eligibility for Reemployment

As a general comment, the CHA notes that with respect to employees in the House, the statement in the NPR that "it is not permitted for an employee to work for a Member office and a Committee at the same time" is incorrect. Although this statement is not part of the substantive regulations, where there are variations in the employment requirements of different employing offices, the Board has made the necessary changes to each of the versions of the adopted regulations.

Section 1002.32 sets out the criteria that an employee must meet to be eligible under USERRA for reemployment after service in the uniformed services. The CHA has recommended that this section be changed to be consistent with the definition of eligible employee in section 206(a)(2)(A) of the CAA, and for clarity as applied to individual employing offices which may cease to exist while an eligible employee is performing service. The Board agrees and has changed the House and Senate versions to reflect that generally, if an eligible employee is absent from a position in an employing office by reason of service in the uniformed services, he or she will be eligible for employment in the same employing office if that employing office continues to exist at such time.

Section 1002.34 of the proposed regulations established that USERRA applies to all covered employing offices of the legislative branch as defined in Subpart A, section 1002.5(e). Both the Capitol Police and Senate Employment Counsel commented that the definition of "employing office" should be changed to track the CAA, rather than the definition in the proposed regulations. Thus, Counsel notes that any regulation the Office of Compliance issues for an "employing office" should track 2 U.S.C. §1301(9), and include the General Accounting Office and Library of Congress, as required under 2 U.S.C. §1316(a)(2)(C). The Board agrees and has changed the definition to more closely follow the CAA.

Section 1002.40 states that in protecting against discrimination in initial hiring decisions, an employing office need not actually employ an individual to be his or her employer. The CHA commented that it is not correct to say that "[a]n employing office need not actually employ an individual to be his or her 'employer'." The CHA notes that while the result is the same-- an applicant who is otherwise an eligible employee cannot be discriminated against in initial employment based on his or her performing service in the uniformed service, to say that the employing office is his or her employer is incorrect. The Board agrees and has made the change to reflect that while an employing office may not technically be the "employer" of an applicant, the result is the same -- the employing office is *liable* under the Act if it engages in discrimination against an applicant based on his or her performing service in the uniformed service.

Section 1002.120 allows an employee to seek or obtain employment with an employer other than the pre-service employing office during the period of time within which a reemployment application must be made, without giving up reemployment rights with the pre-service employing office. The proposed regulations stated that such alternative employment during the application period should not be of a type that would constitute a cause for the employing office to discipline or terminate the employee following reemployment. The CHA has noted that because employees of the House are "at-will", reference to termination and/or discipline for "cause" in this section is inapplicable and could be confusing. While the Board recognizes that employees of the House are "at-will", the same issues raised by the CHA can apply to many executive branch and private sector employees, as well. In view of the fact that the DOL regulations contain the same provision, notwithstanding the different employment arrangements in the private sector and executive branch agencies, the Board finds no good cause to make the change.

Health and Pension Plan Coverage

USERRA ensures that eligible employees are provided with health and pension plan coverage on a continuing basis in certain circumstances and reinstatement of coverage upon reemployment. All of the commenters have raised concerns over the inclusion of provisions concerning health and pension plan benefits and ask that these provisions be withdrawn or limited specifically to the specific health and pension plans covering federal employees. For example, the CHA notes that House employing offices do not provide health or retirement benefits to their employees and do not pay or administer contributions and/or premiums for such plans. Similarly, Senate Employment Counsel explains that while employees of Senate employing offices are entitled to health plan coverage and pension benefits under the FEHB and Civil Service Retirement System

(CSRS) or the Federal Employment Retirement System (FERS), their respective employing offices do not provide the "employer contribution" for such coverage and do not determine when such coverage starts or is reinstated or any terms or conditions of the coverage. Moreover, while the Senate appropriates monies for any agency contribution to such plans, these contributions do not come from the monies appropriated to individual employing offices.

The Board recognizes that the role of the Senate and House employing offices, in administering health and pension plans is somewhat attenuated. With the caveat in mind that it is the U.S. Office of Personnel Management that controls not only federal employee health plans, but pension plans as well, the Board nonetheless does not find good cause to exclude these provisions from the adopted regulations. In support of this, the Board notes that the DOL regulations cover federal employees in the executive branch who are also covered under the FEHB, CSRS and FERS. Moreover, USERRA itself states in Section 4318 that a right provided under any Federal or State law governing pension benefits for governmental employees (except for benefits under the Thrift Savings Plan) is covered. The Board is not aware of every employment relationship in the legislative branch and there is always the possibility that there may be situations where employees are not covered under the FEHB or CSRS/FERS, or may be covered under craft union or multi-employer plans. The Board further notes that to the extent that an employing office does not control nor is responsible for assuring that eligible employees are properly covered under health and pension plans, these provisions would not apply. Although employing offices may not have direct control over health and pension plans, they are responsible for ensuring that eligible employees are covered by facilitating or requesting that the necessary contribution or funding is made. Rather than deleting sections of the regulations, the Board has revised the regulations to reflect the responsibility of the employing offices and where appropriate, has made changes to reflect that while employing agencies may not have control over the plans, they do have some responsibility in assuring that eligible employees are covered as required under USERRA.

Protection Against Discharge

Section 1002.247 protects an employee against discharge. Rather than state that a discharge except for cause is prohibited if an employee's most recent period of service was for more than 30 days, the proposed regulations stated that, because legislative employees are at will, a discharge without cause could create a rebuttable presumption of a violation. In its comments, the CHA notes that in modifying this section, the explanation regarding the discharge of a returning employee was unclear. The Board agrees that there is no "good cause" for making the revisions originally contained in the proposed regulations and has changed this section to be consistent with DOL regulations.

Enforcement of Rights and Benefits Against an Employing Office

Section 102.303 requires that employees who file claims under USERRA are required to go through counseling and mediation before electing to file a civil action or a complaint with the Office of Compliance. The proposed regulations contained language that provided for "covered" rather than "eligible" employees to bring claims under USERRA to the Office of Compliance. The CHA commented that to be consistent with Section 206(a)(2)(A) of the CAA, this provision

should be modified to make clear that only "eligible employees" may bring claims under Section 206. The Board agrees and because only eligible employees are covered under Section 206 discrimination and retaliation provisions, this section has been modified.

Section 1002.312 provides for the various remedies that may be awarded for violations of USERRA, including liquidated damages. The CHA comments that because of a technical error in the CAA, there is no statutory authority to provide for liquidated damages remedies under USERRA. In its notice of rulemaking, the Board noted the same error. Thus, as written in Section 206 of the CAA, reference is made to the application of paragraphs (1), (2)(A), and (3) of section 4323(c). However, in USERRA, section 4323(c), which refers to venue, is not comprised of paragraphs (1), (2)(A), and (3). Rather, section 4323(d), which does address remedies, is comprised of those paragraphs. Because of this apparent typographical error, the Board noted that where the CAA references paragraphs (1), (2)(A), and (3) of section 4323(c), it would read it as referring to section 4323(d). The Board disagrees with CHA's position that because of this technical error, the liquidated damages remedy section of USERRA is not incorporated into the CAA. There is no question from the context and the express language of §206(b) which specifically provides that the remedy for a violation of §206(a) of the CAA shall be the same as remedies awarded under USERRA, that there has been a waiver of sovereign immunity sufficient to provide for all the remedies covered in paragraphs (1), (2)(A), and (3) of section 4323(d). Contrary to the CHA's observations, it does not require a court to look beyond the express language of the statute to understand Congress's intent that the liquidated damages provision of USERRA be applied under the CAA.

Under sections 1002.310 and 1002.314 of the proposed regulations, respectively, fees and court costs may not be charged against individuals claiming rights under the CAA and courts and/or hearing officers may use their equity powers in actions or proceedings under the Act. The CHA commented that because § 1002.314 and the first sentence of § 1002.310 are based on sections of USERRA that are not incorporated by the CAA (§4323(e) and §4323(h) respectively), these provisions should be deleted from the adopted regulations. The Board has reviewed these comments and while we would find that, notwithstanding any "technical" error, the CAA does incorporate the remedies set out in §1002.314 (a)-(c), we agree that the CAA does not include the remedies articulated in §4323(e) and §4323(h) of USERRA. As the first sentence in §1002.310 of the proposed regulations does appear to mirror §4323(h) of USERRA and §1002.314 of the proposed regulations similarly mirrors §4323(e), in order to avoid any confusion, the Board has found good cause to delete these provisions. The Board has retained the part of §1002.310 pertaining to the awarding of fees and costs. As discussed in the NPR, the Board found that the DOL regulations permitting an award of fees and court costs for an individual who has obtained counsel and prevailed in his or her claim against the employer was consistent with Section 225(a) of the CAA, permitting a prevailing covered employee to be awarded reasonable fees and costs. To be more fully consistent with the CAA, the Board has kept its modification of the language removing the requirement that the individual retain private counsel as a condition of such an award.

Text of USERRA Regulations

"C" Version
When approved by Congress for the other employing offices covered by the CAA, these regulations will have the prefix "C."

Subpart A: Introduction to the Regulations

§ 1002.1 What is the purpose of this part?
This part implements certain provisions of the Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA" or "the Act"), as applied by the Congressional Accountability Act ("CAA"). 2 U.S.C. 1316. 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 Office of Compliance in administering USERRA as applied by the CAA.

§ 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, with the exception of certain Federal intelligence agencies. For those Federal intelligence agencies, USERRA established a separate program for employees. Section 206 of the CAA requires the Board of Directors of the Office of Compliance to issue regulations to implement the statutory provisions relating to employment and reemployment rights of members of the uniformed services. The regulations are required to be the same as substantive regulations promulgated by the Secretary of Labor, except where a modification of such regulations would be more effective for the implementation of the rights and protections of the Act. The Department of Labor issued its regulations, effective January 18, 2006. The regulations set forth herein are the substantive regulations that the Board of Directors of the Office of Compliance has promulgated for the legislative branch, for the implementation of the USERRA provisions of the CAA. All references to USERRA in these regulations, means USERRA, as applied by the CAA.

§ 1002.3 When did USERRA become effective?

USERRA, as applied by the CAA, became effective for employing offices of the legislative branch on January 23, 1996. These regulations will become effective upon approval by Congress.

§ 1002.4 What is the role of the Executive Director of the Office of Compliance under the USERRA provisions of the CAA?

(a) As applied by the CAA, the Executive Director of the Office of Compliance is responsible for providing education and information to any covered employing office or employee with respect to their rights, benefits, and obligations under the USERRA provisions of the CAA.

(b) The Office of Compliance, under the direction of the Executive Director, is responsible for the processing of claims filed pursuant to these regulations. More information about the Office of Compliance's role is contained in Subpart F.

§ 1002.5 What definitions apply to these USERRA regulations?

(a) **Act or USERRA** means the Uniformed Services Employment and Reemployment Rights Act of 1994, as applied by the CAA.

(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 employing office policy, plan, or practice. The term includes rights and benefits under a pension plan, health plan, insurance coverage and awards, bonuses, severance pay, supplemental unemployment benefits, vacations, and, where applicable, the opportunity to select work hours or the location of employment.

(c) **Board** means Board of Directors of the Office of Compliance.

(d) **CAA** means the Congressional Accountability Act of 1995, as amended (Pub. L. 104-1, 109 Stat. 3, 2 U.S.C. §§ 1301-1438).

(e) **Covered employee** means any employee, including an applicant for employment and a former employee, of (1) the House of Representatives; (2) the Senate; (3) the Office of Congressional Accessibility Services; (4) the Capitol Police; (5) the Congressional Budget Office; (6) the Office of the Architect of the Capitol; (7) the Office of the Attending Physician; (8) the Government Accountability Office; (9) the Library of Congress; and (10) the Office of Compliance.

(f) **Eligible employee** means a covered employee performing service in the uniformed services, as defined in 1002.5 (t) of this subpart, whose service has not been terminated upon occurrence of any of the events enumerated in section 1002.135 of these regulations. For the purpose of defining who is covered under the discrimination section of these regulations, "performing service" means an eligible employee who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in the uniformed services.

(g) **Employee of the Office of the Architect of the Capitol** includes any employee of the Office of the Architect of the Capitol, the Botanic Gardens, or the Senate Restaurants.

(h) **Employee of the Capitol Police** includes any member or officer of the Capitol Police.

(i) **Employee of the House of Representatives** includes an individual occupying a position for which the pay is disbursed by the Clerk of the House of Representatives, or another official designated by the House of Representatives, or any employment position in an entity that is paid with funds derived from the clerk-hire allowance of the House of Representatives but not

any such individual employed by any entity listed in subparagraphs (3) through (10) of paragraph (e) above.

(j) **Employee of the Senate** includes an individual occupying a position for which the pay is disbursed by the Secretary of the Senate, but not any such individual employed by any entity listed in subparagraphs (3) through (10) of paragraph (e) above.

(k) **Employing office** means (1) the Office of Congressional Accessibility Services; (2) the Capitol Police Board; (3) the Congressional Budget Office; (4) the Office of the Architect of the Capitol; (5) the Office of the Attending Physician; (6) the Government Accountability Office; (7) the Library of Congress; or (8) the Office of Compliance.

(l) **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.

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

(n) **Office** means the Office of Compliance.

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

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

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

(r) **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(d)(3).

(s) **Undue hardship**, in the case of actions taken by an employing office, 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 employing office; the overall size of the business of an employing office 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 employing office, including the composition, structure, and functions of the work force of such employing office; the geographic separateness, administrative, or fiscal relationship of the State, District, or satellite office in question to the employing office.

(t) **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 National Disaster Medical System (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?

The 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, as applied by the Congressional Accountability Act, relate to other laws, public and private contracts, and employing office 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 employing office may provide greater rights and benefits than USERRA requires, but no employing office can refuse to provide any right or benefit guaranteed by USERRA, as applied by the CAA.

(b) USERRA supersedes any 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 office policy 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 law, 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 employing office to pay an eligible employee for time away from work performing service, an employing office policy, plan, or practice that provides such a benefit is permissible under USERRA.

(d) If an employing office 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 employing office 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 employing office 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 employing office 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 employing office must not retaliate against an eligible employee by taking any adverse employment action against him or her because the eligible employee 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's prohibitions against discrimination and retaliation apply to all employment positions?
Under USERRA, as applied by the CAA, the prohibitions against discrimination and retaliation apply to eligible employees in all positions within covered employing offices, 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, non-recurrent positions of employment

§ 1002.21 Does USERRA protect a covered employee who has not actually performed service in the uniformed services?
USERRA's provisions, as applied by Section 206 of the CAA, prohibit discrimination and retaliation only against eligible employees. Section 207(a) of the CAA, however, prohibits retaliation against all covered employees because the employee has opposed any practice made unlawful under the CAA, including a violation of USERRA's provisions, as applied by the CAA; or testified; assisted; or participated in any manner in a hearing or proceeding under the CAA.

Subpart C – Eligibility for Reemployment

GENERAL ELIGIBILITY FOR REEMPLOYMENT

§ 1002.32 What criteria must an employee meet to be eligible under USERRA for reemployment after service in the uniformed services?
(a) In general, if an eligible employee has been absent from a position of employment in an employing office by reason of service in the uniformed services, he or she will be eligible for reemployment in that same employing office by meeting the following criteria:
(1) The employing office had advance notice of the eligible employee's service; (2) The eligible employee has five years or less of cumulative service in the uniformed services in his or her employment relationship with a particular employing office; (3) The eligible employee timely returns to work or applies for reemployment; and, (4) The eligible 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 employing office establishes one of the defenses described in § 1002.139. The employment position to which the eligible employee is entitled is described in §§ 1002.191 through 1002.199.

§ 1002.33 Does the eligible employee have to prove that the employing office discriminated against him or her in order to be eligible for reemployment?
No. The eligible employee is not required to prove that the employing office 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 employing offices are covered by these regulations?
(a) USERRA applies to all covered employing offices of the legislative branch as defined in 2 U.S.C. § 1301(9) and 2 U.S.C.§ 1316(a)(2)(C).

§ 1002.40 Does USERRA protect against discrimination in initial hiring decisions?
Yes. The definition of employer in the USERRA provision as applied by the CAA includes an employing office that has denied initial employment to an individual in violation of USERRA's anti-discrimination provisions. An employing office need not actually employ an individual to be liable 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 employing office 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 employing office denying employment is liable under USERRA. Similarly, if an employing office withdraws an offer of employment because the individual is called upon to fulfill an

obligation in the uniformed services, the employing office withdrawing the employment offer is also liable under USERRA.

§ 1002.41 Does an eligible 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 eligible employee holds a temporary, part-time, probationary, or seasonal employment position. However, an employing office is not required to reemploy an eligible 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 employing office bears the burden of proving this affirmative defense.

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

(a) If an eligible employee is laid off with recall rights, or on a leave of absence, he or she is protected under USERRA. If the eligible 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 employing office would have recalled the employee to employment during the period of service. Similar principles apply if the eligible employee is on a leave of absence from work when he or she begins a period of service in the uniformed services.

(b) If the eligible 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 eligible 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 eligible employee is laid off before or during service in the uniformed services, and the employing office 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 an eligible employee. Reemployment rights under USERRA cannot put the eligible 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 eligible employees. There is no exclusion for executive, managerial, or professional employees.

§ 1002.44 Does USERRA cover an independent contractor?

No. USERRA, as applied by the CAA, does not provide protections for 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 eligible 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 eligible 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 eligible 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(d)(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 eligible employee 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?"

No. Only Federal National Guard Service is 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 eligible 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 eligible employee uses the absence for other purposes as well. An eligible employee is not required to leave the employment position for the sole purpose of performing service in the uniformed services, although such uniformed service must be the main reason for departure from employment. For example, if the eligible 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 eligible 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 eligible 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 eligible 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 eligible 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 service in the uniformed services:
(a) If the eligible 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 eligible employee would not be considered fit to perform the uniformed service. An absence from that work shift is necessitated so that the eligible employee can report for uniformed service fit for duty.
(b) If the eligible 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 eligible 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.

§ 1002.85 Must the eligible employee give advance notice to the employing office of his or her service in the uniformed services?
(a) Yes. The eligible employee, or an appropriate officer of the uniformed service in which his or her service is to be performed, must notify the employing office 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 eligible employee is employed by more than one employing office, the employee, or an appropriate officer of the uniformed service in which

his or her service is to be performed, must notify each employing office 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 eligible 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 eligible employee's notice to the employing office may be either oral 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 employing office, an eligible 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 eligible employee excused from giving advance notice of service in the uniformed services?

The eligible 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.C300hh–11(d)(3)(B).

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

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

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

§ 1002.88 Is the eligible employee required to tell the employing office 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 eligible employee leaves the employment position to begin a period of service, he or she is not required to tell the employing office that he or she intends to seek reemployment after completing uniformed service. Even if the eligible employee tells the employing office 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 eligible employee is not required to decide in advance of leaving the position with the employing office, 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 eligible employee may perform and still retain reemployment rights with the employing office?

Yes. In general, the eligible employee may perform service in the uniformed services for a cumulative period of up to five (5) years and retain reemployment rights with the employing office. 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 eligible 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 eligible 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 eligible employee performed when he or she worked for a previous employing office?

No. An eligible employee is entitled to a leave of absence for uniformed service for up to five years with each employing office for whom he or she works or has worked. When the eligible employee takes a position with a new employing office, the five-year period begins again regardless of how much service he or she performed while working in any previous employment relationship. If an eligible employee is employed by more than one employing office, a separate five-year period runs as to each employing office independently, even if those employing offices share or co-determine the employee's terms and conditions of employment. For example, an eligible employee of the legislative branch may work part-time for two employing offices. In this case, a separate five-year period would run as to the eligible employee's employment with each respective employing office.

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

It depends. Under the CAA, USERRA provides reemployment rights to which an eligible employee may become entitled beginning on or after January 23, 1996, but any uniformed service performed before January 23, 1996, 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 eligible 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 eligible 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 eligible 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 eligible 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 eligible 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 eligible 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 eligible 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 eligible 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 in a uniformed service to mitigate economic harm where the eligible employee's employing office is in violation of its employment or reemployment obligations to him or her.

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

No. The eligible employee is not required to accommodate his or her employing office's interests or concerns regarding the timing, frequency, or duration of uniformed service. The employing office cannot refuse to reemploy the eligible employee because it believes that the timing, frequency or duration of the service is unreasonable. However, the employing office is permitted to bring its concerns over the timing, frequency, or duration of the eligible 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 EMPLOYMENT

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

Yes. Upon completing service in the uniformed services, the eligible employee must notify the pre-service employing office 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 eligible 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 eligible 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 eligible employee must report back to the employing office 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 eligible employee's residence. For example, if the eligible 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 employing office 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 eligible employee to report within such time period through no fault of his or her own, he or she must report to the employing office 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 eligible 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 oral) with the employing office not later than 14 days after completing service. If it is impossible or unreasonable for the eligible

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 eligible 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 oral) not later than 90 days after completing service.

§1002.116 Is the time period for reporting back to an employing office extended if the eligible employee is hospitalized for, or convalescing from, an illness or injury incurred in, or aggravated during, the performance of service?
Yes. If the eligible 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 employing office 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 eligible 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 employing office, and is not applicable following reemployment.

§ 1002.117 Are there any consequences if the eligible employee fails to report for or submit a timely application for reemployment?
(a) If the eligible 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. However, the eligible employee does become subject to any conduct rules, established policy, and general practices of the employing office pertaining to an absence from scheduled work.
(b) If reporting or submitting an employment application to the employing office is impossible or unreasonable through no fault of the eligible employee, he or she may report to the employing office as soon as possible (in the case of a period of service less than 31 days) or submit an application for reemployment to the employing office 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 eligible 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 eligible 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 employing office. The eligible 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 eligible employee submit the application for reemployment?
The application must be submitted to the pre-service employing office or to an agent or representative of the employing office 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.

§ 1002.120 If the eligible employee seeks or obtains employment with an employer other than the pre-service employing office before the end of the period within which a reemployment

application must be filed, will that jeopardize reemployment rights with the pre-service employing office?

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

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

Yes, if the period of service exceeded 30 days and if requested by the employing office to do so. If the eligible 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 employing office, provide documentation to establish that:

(a) The reemployment application is timely;

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

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

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

Yes. The employing office is not permitted to delay or deny reemployment by demanding documentation that does not exist or is not readily available. The eligible employee is not liable for administrative delays in the issuance of military documentation. If the eligible employee is re-employed after an absence from employment for more than 90 days, the employing office 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 eligible employee is not entitled to reemployment, the employing office 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 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 eligible 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 employing office, 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 employing office in this situation.

EMPLOYER STATUTORY DEFENSES

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

(a) Even if the employee is otherwise eligible for reemployment benefits, the employing office is not required to reemploy him or her if the employing office establishes that its circumstances have so changed as to make reemployment impossible or unreasonable. For example, an employing office may be excused from re-employing the eligible employee where there has been an intervening reduction in force that would have included that employee. The employing office may not, however, refuse to reemploy the eligible 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 employing office is not required to reemploy him or her if it establishes that assisting the eligible employee in becoming qualified for reemployment would impose an undue hardship, as defined in § 1002.5(s) and discussed in § 1002.198, on the employing office; or,

(c) Even if the employee is otherwise eligible for reemployment benefits, the employing office is not required to reemploy him or her if it establishes that the employment position vacated by the eligible 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 employing office defenses included in this section are affirmative ones, and the employing office 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 eligible employee's status with the employing office while performing service in the uniformed services?

During a period of service in the uniformed services, the eligible employee is deemed to be on leave of absence from the employing office. In this status, the eligible employee is entitled to the non-seniority rights and benefits generally provided by the employing office to other employees with similar seniority, status, and pay that are on leave of absence. Entitlement to these non-seniority rights and benefits is not dependent on how the employing office characterizes the eligible employee's status during a period of service. For example, if the employing office 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 leave of absence, and therefore, entitled to the non-seniority rights and benefits generally provided to employees on leave of absence.

§ 1002.150 Which non-seniority rights and benefits is the eligible employee entitled to during a period of service?

(a) The non-seniority rights and benefits to which an eligible employee is entitled during a period of service are those that the employing office provides to similarly situated employees by an 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 eligible employee's employment and those established after employment began. They also include those rights and benefits that become effective during the eligible employee's period of service and that are provided to similarly situated employees on leave of absence.

(b) If the non-seniority benefits to which employees on leave of absence are entitled vary according to the type of leave, the eligible 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 employing office to an eligible employee on a military leave of absence only if the employing office provides that benefit to similarly situated employees on comparable leaves of absence.

(d) Nothing in this section gives the eligible employee rights or benefits to which the employee otherwise would not be entitled if the employee had remained continuously employed with the employing office.

§ 1002.151 If the employing office provides full or partial pay to the eligible employee while he or she is on military leave, is the employing office 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 employing office provides additional benefits such as full or partial pay when the eligible employee performs service, the employing office 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 eligible 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 eligible 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 eligible 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 eligible employee permitted upon request to use accrued vacation, annual or similar leave with pay during the service? Can the employing office require the eligible employee to use accrued leave during a period of service?

(a) If employment is interrupted by a period of service, the eligible 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 eligible employee is not entitled to use sick leave that accrued with the employing office during a period of service in the uniformed services, unless the employing office 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 employing office may not require the eligible 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 the Federal Government.

(c) USERRA covers multi-employer plans maintained pursuant to one or more collective bargaining agreements between employers and employee organizations. USERRA applies to

multi-employer plans as they are defined in ERISA at 29 U.S.C. 1002(37). USERRA contains provisions that apply specifically to multi-employer plans in certain situations.

§ 1002.164 What health plan coverage must the employing office provide for the eligible employee under USERRA?

If the eligible 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 eligible 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 eligible 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 eligible employee's absence for the purpose of performing service begins; or,

(2) The period beginning on the date on which the eligible 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 employing office 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 employing office to permit the eligible 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 eligible 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 eligible 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 eligible employee pay in order to continue health plan coverage?

(a) If the eligible 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 eligible 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 employing office'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 eligible 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 eligible 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 employing office provides employment-based health coverage to an eligible 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 eligible 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 eligible 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 employing office provides employment-based health coverage to an eligible 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 eligible 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 eligible 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 eligible 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 eligible 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 eligible employee elect to delay reinstatement of health plan coverage until a date after the date he or she is reemployed?

USERRA requires the employing office to reinstate or direct the reinstatement of health plan coverage upon request at reemployment. USERRA permits but does not require the employing office 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 multi-employer health plan, how is liability allocated for employer contributions and benefits arising under USERRA's health plan provisions?

Liability under a multi-employer 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 eligible 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 multi-employer plan that provides health plan coverage through a health benefits account system?

(a) Some employees receive health plan benefits provided pursuant to a multi-employer 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 eligible 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 eligible 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 eligible 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 eligible 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 eligible 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 eligible employee entitled to be reemployed by the employing office?
The employing office 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 eligible 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 employing office 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 eligible employee entitled to upon reemployment?
As a general rule, the eligible 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 eligible employee could have been promoted (or, alternatively, demoted, transferred, or laid off) due to intervening events. The escalator principle requires that the eligible 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 employing office may have the option, or be required, to reemploy the eligible 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 eligible employee would have attained if his or her continuous employment had not been interrupted due to uniformed service. Once this position is determined, the employing office may have to consider several factors before determining the appropriate reemployment position in any particular case. Such factors may include the eligible employee's length of service, qualifications, and disability, if any. The actual 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 eligible employee would ordinarily have attained in that position given his or her job history, including

prospects for future earnings and advancement. The employing office must determine the seniority rights, status, and rate of pay as though the eligible 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 eligible employee's service, and any changes that may have occurred during the period of service. In particular, the eligible 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 eligible employee missed during service is based on a skills test or examination, then the employing office 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 eligible employee to adjust to reemployment before scheduling a makeup test or examination, an employing office 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 eligible 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 eligible employee is reemployed?

Yes. The Act does not prohibit lawful adverse job consequences that result from the eligible employee's restoration on the seniority ladder. Depending on the circumstances, the escalator principle may cause an eligible employee to be reemployed in a higher or lower position, laid off, or even terminated. For example, if an eligible 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 employing office to assess what would have happened to such factors as the eligible 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 eligible employee's escalator position is determined, other factors may allow, or require, the employing office 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 eligible employee's most recent period of uniformed service;
(b) The eligible employee's qualifications; and,
(c) Whether the eligible employee has a disability incurred or aggravated during uniformed service.

§ 1002.196 What is the eligible 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 eligible employee must be reemployed according to the following priority:
(a) The eligible employee must be reemployed in the escalator position. He or she must be qualified to perform the duties of this position. The employing office must make reasonable efforts to help the eligible employee become qualified to perform the duties of this position.
(b) If the eligible employee is not qualified to perform the duties of the escalator position after reasonable efforts by the employing office, 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 eligible employee must be qualified to perform the duties of this position. The employing office must make reasonable efforts to help the eligible employee become qualified to perform the duties of this position.
(c) If the eligible employee is not qualified to perform the duties of the escalator position or the pre-service position, after reasonable efforts by the employing office, 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 eligible employee must be qualified to perform the duties of this position. The employing office must make reasonable efforts to help the eligible employee become qualified to perform the duties of this position.

§ 1002.197 What is the reemployment position if the eligible 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 eligible employee must be reemployed according to the following priority:
(a) The eligible 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 employing office must make reasonable efforts to help the eligible employee become qualified to perform the duties of this position.
(b) If the eligible employee is not qualified to perform the duties of the escalator position or a like position after reasonable efforts by the employing office, 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 eligible employee must be qualified to perform the duties of this position. The employing office must make reasonable efforts to help the eligible employee become qualified to perform the duties of this position.
(c) If the eligible 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 employing office, 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 eligible employee must be qualified to perform the duties of this position. The employing office must make reasonable efforts to help the eligible employee become qualified to perform the duties of this position.

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

The eligible employee must be qualified for the reemployment position. The employing office must make reasonable efforts to help the eligible employee become qualified to perform the duties of this position. The employing office is not required to reemploy the eligible employee on his or her return from service if he or she cannot, after reasonable efforts by the employing office, 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 employing office'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 employing office makes reasonable efforts, as defined in § 1002.5(p), may it determine that the otherwise eligible 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 employing office follow if two or more returning employees are entitled to reemployment in the same position?

If two or more eligible 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 re-employed 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 eligible employee have when reemployed following a period of uniformed service?

The eligible 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. The eligible employee is not entitled to any benefits to which he or she would not have been entitled had the employee been continuously employed with the employing office. 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 employing office 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 employing office, together with the number of months and the number of hours of work for which the service member would have been employed by the employing office 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 employing office to use a seniority system?

No. USERRA does not require the employing office 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 eligible 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 eligible 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 employing office'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 employing office's actual custom or practice is different from what is written in the contract or handbook.

§ 1002.213 How can the eligible 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 eligible employee would have received the seniority or seniority-based right or benefit if he or she had been continuously employed. The eligible employee does not have to establish that he or she would have received the benefit as an absolute certainty. The eligible 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 employing office cannot withhold the right or benefit based on an assumption that a series of unlikely events could have prevented the eligible employee from gaining the right or benefit.

DISABLED EMPLOYEES

§ 1002.225 Is the eligible 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 eligible employee has a disability incurred in, or aggravated during, the period of service in the uniformed services, the employing office 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 eligible employee is not qualified for reemployment in the escalator position because of a disability after reasonable efforts by the employing office 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 employing office must make reasonable efforts to accommodate the eligible 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 eligible 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 eligible employee has a disability that was incurred in, or aggravated during, the period of service, what efforts must the employing office make to help him or her become qualified for the reemployment position?

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

The eligible 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 eligible employee is reemployed in the escalator position, the employing office 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 eligible 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 employing office may examine the returning eligible 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 eligible 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 eligible employee missed during service is based on a skills test or examination, then the employing office 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 eligible employee to adjust to reemployment before scheduling a makeup test or examination, an employing office 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 eligible employee's employment not been interrupted by uniformed service.

(b) If the eligible employee is reemployed in the pre-service position or another position, the employing office 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 eligible 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 eligible employee with protection against discharge?

Yes. If the eligible 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 eligible 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 eligible employee's most recent period of uniformed service was more than 180 days.

§ 1002.248 What constitutes cause for discharge under USERRA?

The eligible 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 employing office bears the burden of proving that it is reasonable to discharge the eligible 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 eligible employee's job position is eliminated, or the eligible employee is placed on layoff status, either of these situations would constitute cause for purposes of USERRA. The employing office bears the burden of proving that the eligible 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 eligible employee's pension benefits?

On reemployment, the eligible employee is treated as not having a break in service with the employing office for purposes of participation, vesting and accrual of benefits in a pension plan, 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 eligible 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 employing office for purposes of determining participation, vesting and accrual of pension benefits under the plan.

(b) If the eligible 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 eligible employee completed service, except in circumstances beyond his or her control, must be treated as continuous service with the employing office 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. USERRA also covers certain pension plans not covered by ERISA, such as those sponsored by the Federal Government.

(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 eligible employee with pension benefits?

With the exception of multi-employer plans, which have separate rules discussed below, the employing office is required to ensure the funding of any obligation of the plan to provide benefits that are attributable to the eligible employee's period of service. In the case of a defined contribution plan, once the eligible employee is reemployed, the employing office must ensure that the amount of the make-up contribution for the employee, if any; the employee's make-up contributions, if any; and the employee's elective deferrals, if any; in the same manner and to the same extent that the amounts are allocated for other employees during the period of service. In the case of a defined benefit plan, the eligible 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 must the plan contribution that is attributable to the employee's period of uniformed service be made?

(a) Employer contributions are not required until the eligible employee is reemployed. For employer contributions to a plan in which the eligible employee is not required or permitted to

contribute, the contribution attributable to the employee's period of service must be made 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 contribution to be made within this time period, the contribution must be made as soon as practicable.

(b) If the eligible 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 eligible employee's immediate past period of uniformed service, with the repayment period not to exceed five years. Makeup contributions or elective deferrals may only be made during this period and while the employee is employed with the post-service employing office.

(c) If the eligible 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. This is true because employer contributions 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 eligible employee's make-up contributions or elective deferrals must be made according to the plan's requirements for employer matching contributions.

(d) The eligible 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 eligible 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 eligible 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 that the eligible 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 eligible employee pay interest when he or she makes up missed contributions or elective deferrals?

No. The eligible 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 eligible 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 eligible 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 eligible employee must repay includes any interest that would have accrued had the monies not been withdrawn. The eligible 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 employing office and the employee), provided the employee is employed with the post-service employing office during this period.

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

The amount of the eligible 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 eligible 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 eligible 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 multi-employer pension benefit plan under USERRA?

A multi-employer 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 multi-employer plan. In addition to the provisions of USERRA that apply to all pension benefit plans, there are provisions that apply specifically to multi-employer plans, as follows:
(a) The last employer that employed the eligible employee before the period of service is responsible for making the employer contribution to the multi-employer 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 eligible employee.
(b) An employer that contributes to a multi-employer plan and that reemploys the eligible 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 multi-employer plan pursuant to this subsection does not begin until the employer has knowledge that the eligible employee was re-employed pursuant to USERRA.
(c) The eligible employee is entitled to the same employer contribution whether he or she is reemployed by the pre-service employer or by a different employer contributing to the same multi-employer plan, provided that the pre-service 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 eligible employee's pension benefits, if benefits are based on compensation?

In many pension benefit plans, the eligible 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 eligible 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 eligible employee would have received is not reasonably certain, 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 eligible 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 Office of Compliance provide to employees and employers concerning employment, reemployment, or other rights and benefits under USERRA?

The Office of Compliance provides assistance to any person or entity who is covered by the CAA with respect to employment and reemployment rights and benefits under USERRA as applied by the CAA. This assistance includes responding to inquiries, and providing a program of education and information on matters relating to USERRA.

INVESTIGATION AND REFERRAL

§ 1002.288 How does an eligible employee initiate a claim alleging a violation of USERRA under the CAA?

(a) If an eligible employee is claiming entitlement to employment rights or benefits or reemployment rights or benefits and alleges that an employing office has failed or refused, or is about to fail or refuse, to comply with the Act, the eligible employee may file a complaint with the Office of Compliance, after a required period of counseling and mediation.

(b) To commence a proceeding, an eligible employee alleging a violation of the rights and protections of USERRA must request counseling by the Office of Compliance no later than 180 days after the date of the alleged violation. If an eligible employee misses this deadline, the claim may be time barred under the CAA.

(c) The following procedures are available under subchapter IV of the CAA for eligible employees who believe their rights under USERRA as made applicable by the CAA have been violated:

(1) counseling;

(2) mediation; and

(3) election of either -

(A) a formal complaint filed with the Office of Compliance (which must meet the requirements as set forth in the Office of Compliance Procedural Rules, Section 5.01(c)), and a hearing before a hearing officer, subject to review by the Board of Directors of the Office of Compliance, and judicial review in the United States Court of Appeals for the Federal Circuit; or

(B) a civil action in a district court of the United States.

(d) Regulations of the Office of Compliance describing and governing these procedures can be found at 141 Cong. Rec. H15645-H15655 (daily ed. December 30, 1995) and 141 Cong. Rec. S19239-19249 (daily ed. December 22, 1995), 143 Cong. Rec. H8316-H8317(daily ed. October 2, 1997)(as amended, applying USERRA to the Government Accountability Office and the Library of Congress).

ENFORCEMENT OF RIGHTS AND BENEFITS AGAINST AN EMPLOYING OFFICE

§ 1002.303 Is an eligible employee required to bring his or her USERRA claim to the Office of Compliance?

Yes. All eligible employees who file claims under Section 206 of the CAA, are required to go through counseling and mediation before electing to file a civil action or a complaint with the Office of Compliance

§ 1002.308 Who has legal standing to bring a USERRA claim under the CAA?
An action under Section 206 of the CAA may be brought by an eligible employee, as defined by Section 1002.5 (f) of Subpart A of these regulations. An action under 207(a) of the CAA may be brought by a covered employee, as defined by section 1002.5 (e) of Subpart A of these regulations. An employing office, prospective employing office 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 the covered employing office or a potential covered employing office, as the case may be, is a necessary party respondent. Under the Office of Compliance Procedural Rules, a hearing officer has authority to require the filing of briefs, memoranda of law, and the presentation of oral argument. A hearing officer also may order the production of evidence and the appearance of witnesses.

§ 1002.310 How are fees and court costs awarded in an action under USERRA?
If an eligible employee is a prevailing party with respect to any claim under USERRA, the hearing officer, Board, or 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. However, Section 402 of the CAA requires a covered employee to bring a request for counseling alleging a violation of the CAA no later than 180 days after the date of the alleged violation. A claim by an eligible employee alleging a USERRA violation as applied by the CAA would follow this requirement .

§ 1002.312 What remedies may be awarded for a violation of USERRA?
In any action or proceeding the following relief may be awarded:
(a) The court and/or hearing officer may require the employing office to comply with the provisions of the Act;
(b) The court and/or hearing officer may require the employing office to compensate the eligible employee for any loss of wages or benefits suffered by reason of the employing office's failure to comply with the Act;
(c) The court and/or hearing officer may require the employing office to pay the eligible employee an amount equal to the amount of lost wages and benefits as liquidated damages, if the court and/or hearing officer determines that the employing office's failure to comply with the Act was willful. A violation shall be considered to be willful if the employing office 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 employing office).

APPOINTMENT

The PRESIDING OFFICER. The Chair, on behalf of the Republican leader, pursuant to Public Law 105–83, announces the appointment of the following individual to serve as a member of the National Council of the Arts: The Honorable ROBERT BENNETT of Utah.

ORDERS FOR TUESDAY, FEBRUARY 3, 2009

Mr. KAUFMAN. Mr. President, I ask unanimous consent that when the Senate completes its business today, it stand in adjournment until 10 a.m. Tuesday, February 3; that following the prayer and the pledge the Journal of proceedings be approved to date, the morning hour be deemed expired, the time for the two leaders be reserved for their use later in the day, and the Senate then resume consideration of H.R. 1, the Economic Recovery and Reinvestment Act; further, that the Senate stand in recess from 12:30 p.m. to 2:15 p.m. to allow for the weekly caucus luncheons.

The PRESIDING OFFICER. Without objection, it is so ordered.

PROGRAM

Mr. KAUFMAN. Mr. President, Senators should be prepared for a long day tomorrow, with votes on numerous amendments throughout the day.

ADJOURNMENT UNTIL 10 A.M. TOMORROW

Mr. KAUFMAN. If there is no further business to come before the Senate, I ask unanimous consent that it stand adjourned under the previous order.

There being no objection, the Senate, at 8:07 p.m., adjourned until Tuesday, February 3, 2009, at 10 a.m.

CONFIRMATION

Executive nomination confirmed by the Senate Monday, February 2, 2009:

DEPARTMENT OF JUSTICE

ERIC H. HOLDER, JR., OF THE DISTRICT OF COLUMBIA, TO BE ATTORNEY GENERAL.