

# VETS Manual Series, Volume IX

## Uniformed Services Employment & Reemployment Rights Act Investigations Operations Manual

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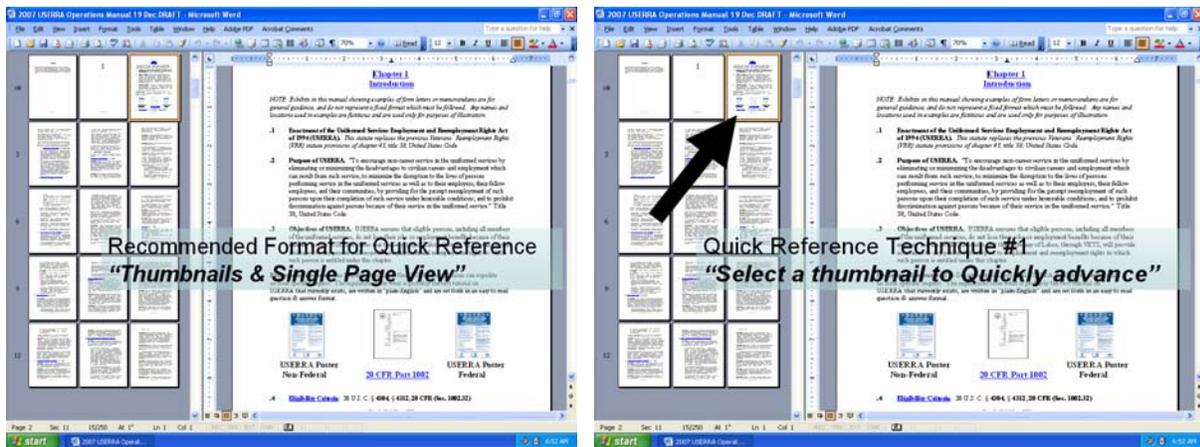
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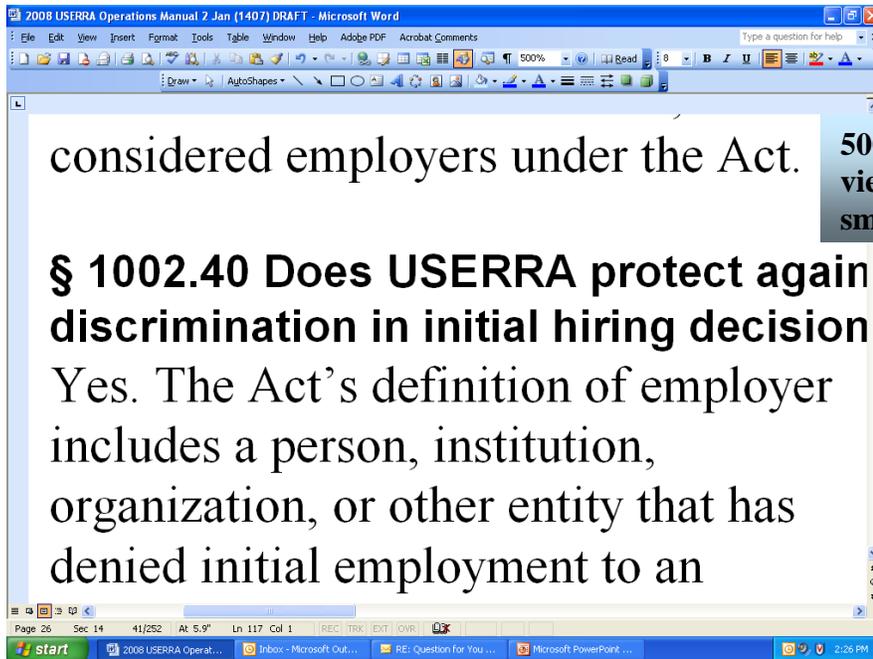
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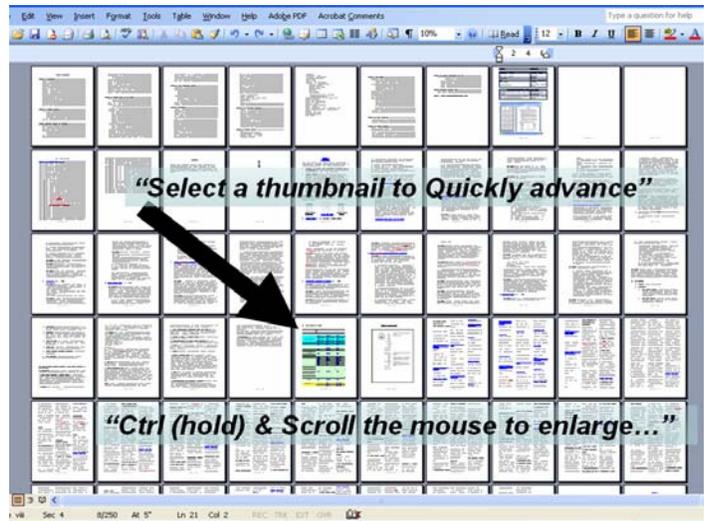
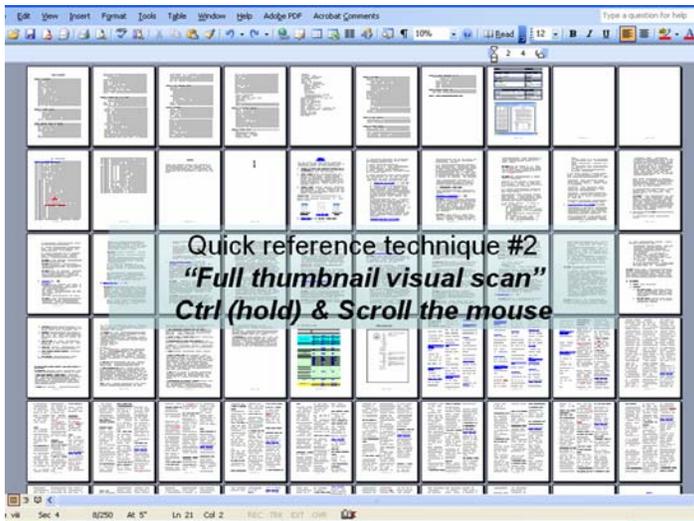
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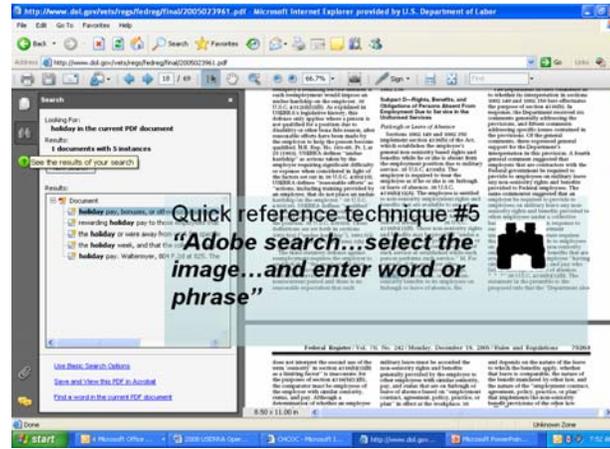
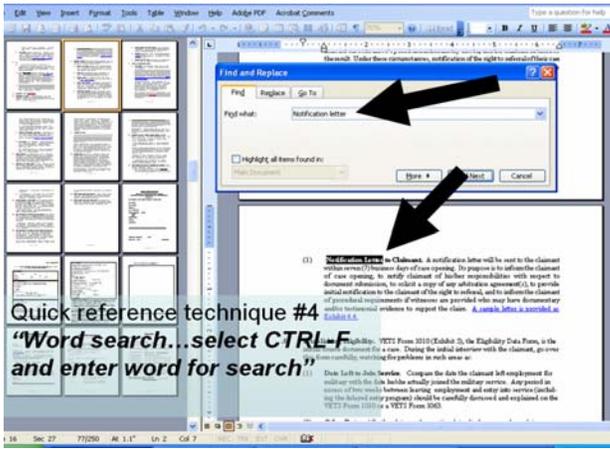


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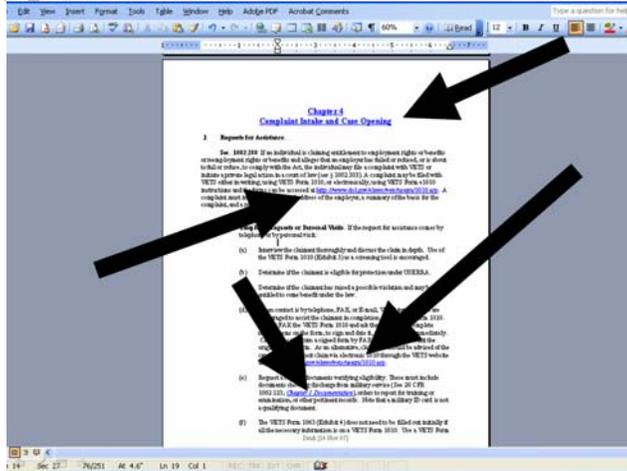
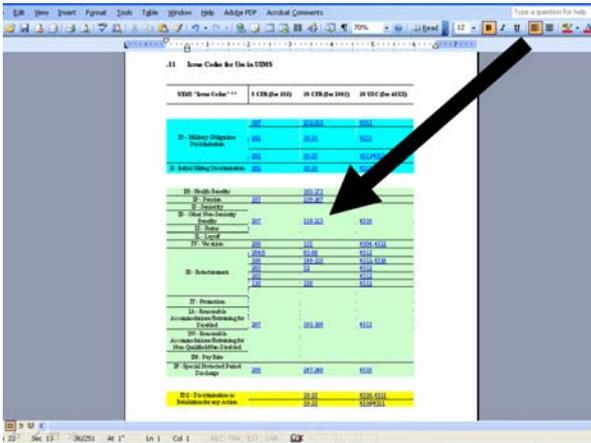
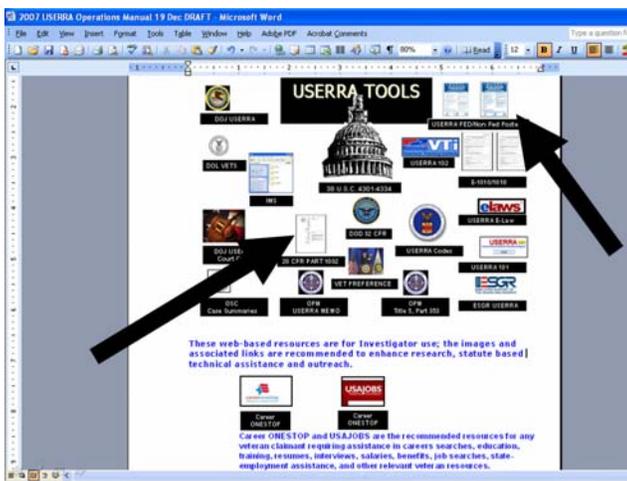
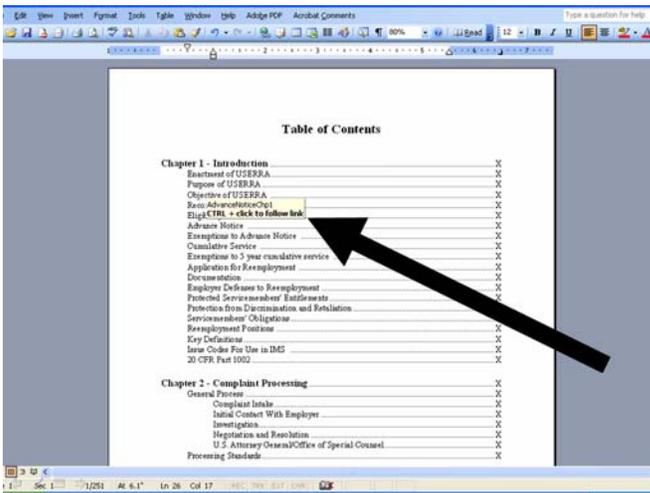
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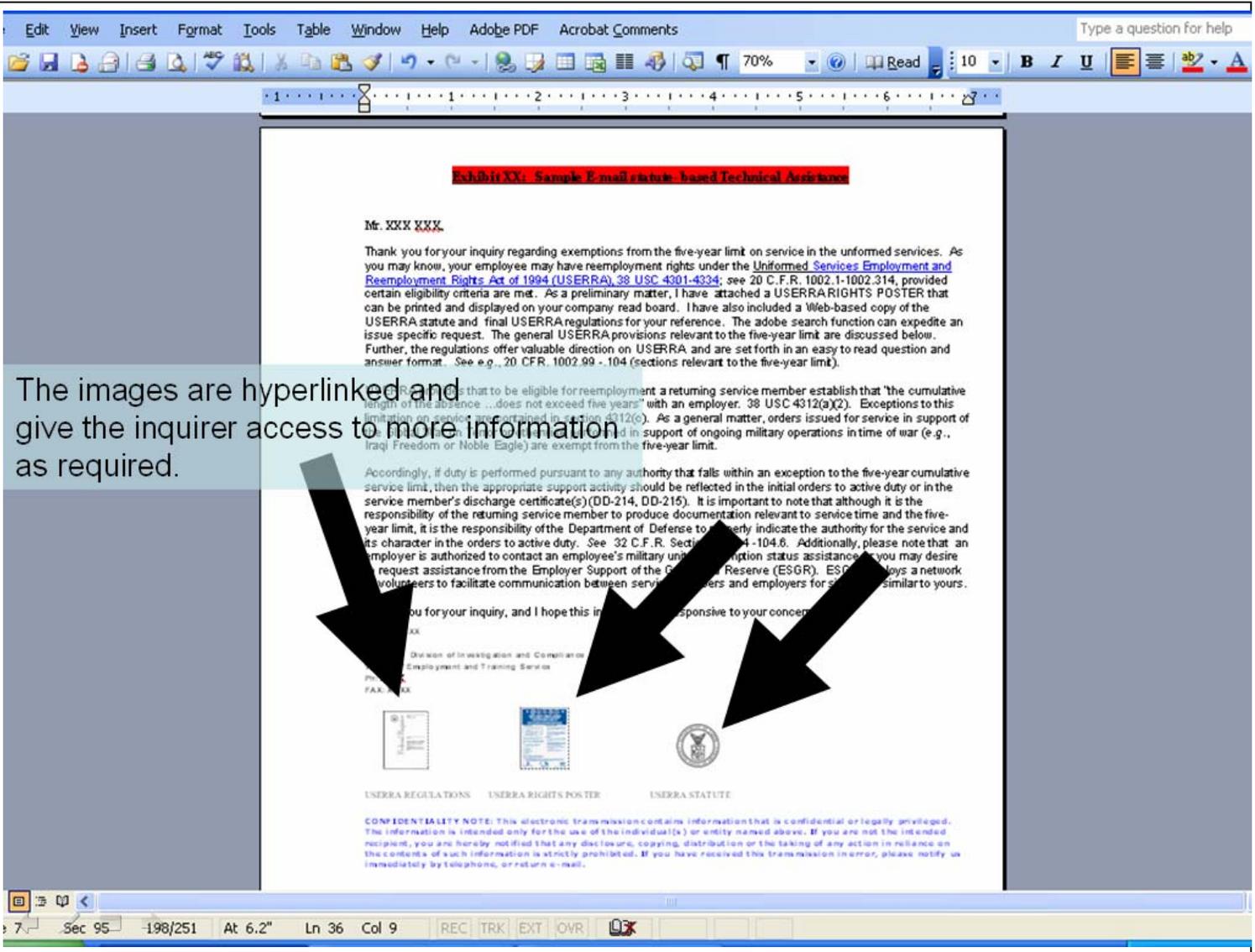
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Active Links (Table of Contents, Icons, Blue Highlights, Website addresses)



"Copy and paste images in electronic correspondences to provide links"



**Exhibit XX: Sample E-mail statute-based Technical Assistance**

Mr. XXX XXX,

Thank you for your inquiry regarding exemptions from the five-year limit on service in the uniformed services. As you may know, your employee may have reemployment rights under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), 38 USC 4301-4334; see 20 C.F.R. 1002.1-1002.314, provided certain eligibility criteria are met. As a preliminary matter, I have attached a USERRA RIGHTS POSTER that can be printed and displayed on your company read board. I have also included a Web-based copy of the USERRA statute and final USERRA regulations for your reference. The Adobe search function can expedite an issue specific request. The general USERRA provisions relevant to the five-year limit are discussed below. Further, the regulations offer valuable direction on USERRA and are set forth in an easy to read question and answer format. See e.g., 20 CFR 1002.99 - 104 (sections relevant to the five-year limit).

USERRA Regulations that to be eligible for reemployment a returning service member establish that "the cumulative length of the absence ... does not exceed five years" with an employer. 38 USC 4312(a)(2). Exceptions to this limitation on service are contained in section 4312(c). As a general matter, orders issued for service in support of Iraq, Afghanistan, or other operations in support of ongoing military operations in time of war (e.g., Iraq Freedom or Noble Eagle) are exempt from the five-year limit.

Accordingly, if duty is performed pursuant to any authority that falls within an exception to the five-year cumulative service limit, then the appropriate support activity should be reflected in the initial orders to active duty or in the service member's discharge certificate(s) (DD-214, DD-215). It is important to note that although it is the responsibility of the returning service member to produce documentation relevant to service time and the five-year limit, it is the responsibility of the Department of Defense to clearly indicate the authority for the service and its character in the orders to active duty. See 32 C.F.R. Section 101.4-104.6. Additionally, please note that an employer is authorized to contact an employee's military unit for information on extension status assistance. If you may desire request assistance from the Employer Support of the Guard and Reserve (ESGR). ESGR employs a network of volunteers to facilitate communication between service members and employers for situations similar to yours.

I hope this information is responsive to your concern.

Division of Investigation and Compliance  
Employment and Training Service



USERRA REGULATIONS    USERRA RIGHTS POSTER    USERRA STATUTE

**CONFIDENTIALITY NOTE:** This electronic transmission contains information that is confidential or legally privileged. The information is intended only for the use of the individual(s) or entity named above. If you are not the intended recipient, you are hereby notified that any disclosure, copying, distribution or the taking of any action in reliance on the contents of such information is strictly prohibited. If you have received this transmission in error, please notify us immediately by telephone, or return e-mail.

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## **PREFACE**

The purpose of this Manual is to introduce the users to important fundamentals of the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), and operations procedures necessary for effective handling of claims under the Act. The manual has been written for those individuals actually engaged in USERRA investigations as well as those that provide important technical and administrative support. The USERRA Operations Manual is for internal VETS use only and is not to be distributed to the public or to other agencies for any reason.

**1**

## Chapter 1 Introduction

*NOTE: Exhibits in this manual showing examples of form letters or memorandums are for general guidance ,and should be modified, as appropriate , based on the facts of the case; however, the notice of referral rights must be included in closing letters, as specified in Exhibits 34, 35, 36, 37. Any names and locations used in examples are fictitious and are used only for purposes of illustration.*

- .1 Enactment of the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA).** *This statute replaces the previous Veterans' Reemployment Rights (VRR) statute provisions of chapter 43, title 38, United States Code.*
- .2 Purpose of USERRA.** "To encourage noncareer service in the uniformed services by eliminating or minimizing the disadvantages to civilian careers and employment which can result from such service; to minimize the disruption to the lives of persons performing service in the uniformed services as well as to their employers, their fellow employees, and their communities, by providing for the prompt reemployment of such persons upon their completion of such service under honorable conditions, and to prohibit discrimination against persons because of their service in the uniformed service." Title 38, United States Code.
- .3 Objectives of USERRA.** USERRA ensures that eligible persons, including all members of the uniformed services, do not lose their jobs or employment benefits because of their military service. USERRA states that the Secretary of Labor, through VETS, will provide assistance to any person with respect to employment and reemployment rights to which such person is entitled under this chapter.

**Recommend resource:** The Department of Labor final USERRA regulations can expedite an issue specific request. The regulations offer what is probably the best tutorial on USERRA that currently exists, are written in "Plain Language" and are set forth in an easy to read question & answer format.



**USERRA Poster  
Non-Federal**



**20 CFR Part 1002**



**USERRA Poster  
Federal**

- .4 Eligibility Criteria:** 38 U.S. C. § 4304, § 4312; 20 CFR (Sec. 1002.32)

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

- (1) The employer had advance notice of the employee's service;
- (2) The employee has five years or less of cumulative service in the uniformed services in his or her employment relationship with a particular employer;
- (3) The employee timely returns to work or applies for reemployment; and,
- (4) The employee has not been separated from service with a disqualifying discharge or under other than honorable conditions. [\[QAR\]](#)

(b) These general eligibility requirements have important qualifications and exceptions, which are described in detail in Sec. 1002.73 through 1002.138. If the employee meets these eligibility criteria, then he or she is eligible for reemployment unless the employer establishes one of the defenses described in Sec. 1002.139. The employment position to which the employee is entitled is described in sections 1002.191 through 1002.199.

(1) [Advance Notice: 20 CFR \(Sec. 1002.85\): 38 U.S. C. § 4312,](#)

(a) The employee, or an appropriate officer of the uniformed service in which his or her service is to be performed, must notify the employer that the employee intends to leave the employment position to perform service in the uniformed services, with certain exceptions described below. In cases in which an employee is employed by more than one employer, the employee, or an appropriate officer of the uniformed service in which his or her service is to be performed, must notify each employer that the employee intends to leave the employment position to perform service in the uniformed services, with certain exceptions described below.

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

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

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

[Exemptions to Advance Notice: 20 CFR \(Sec. 1002.86\): 38 U.S. C. § 4312](#)

The employee is required to give advance notice of pending service unless giving

such notice is prevented by military necessity, or is otherwise impossible or unreasonable under all the circumstances.

(a) Only a designated authority can make a determination of "military necessity," and such a determination is not subject to judicial review. Guidelines for defining "military necessity" appear in regulations issued by the Department of Defense at 32 CFR 104.3. In general, these regulations cover situations where a mission, operation, exercise or requirement is classified, or could be compromised or otherwise adversely affected by public knowledge. In certain cases, the Secretary of Homeland Security, in consultation with the Secretary of Defense, can make a determination that giving of notice by intermittent disaster-response appointees of the National Disaster Medical System is precluded by "military necessity." See 42 U.S.C. 300hh-11(e)(3)(B).

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

(2) **Cumulative service: 20 CFR (Sec 1002.99) 38 U.S. C. § 4312**

In general, the employee may perform service in the uniformed services for a cumulative period of up to five (5) years and retain reemployment rights with the employer.

**Exemptions to 5 year cumulative service: 38 U.S. C. § 4312**

**Sec. 1002.100** The five-year period includes only the time the employee spends actually performing service in the uniformed services. A period of absence from employment before or after performing service in the uniformed services does not count against the five-year limit. For example, after the employee completes a period of service in the uniformed services, he or she is provided a certain amount of time, depending upon the length of service, to report back to work or submit an application for reemployment. The period between completing the uniformed service and reporting back to work or seeking reemployment does not count against the five-year limit.

**Sec. 1002.101** An employee is entitled to a leave of absence for uniformed service for up to five years with each employer for whom he or she works. When the employee takes a position with a new employer, the five-year period begins again regardless of how much service he or she performed while working in any previous employment relationship. If an employee is employed by more than one employer, a separate five-year period runs as to each employer independently, even if those employers share or co-determine the employee's terms and

conditions of employment.

**Sec. 1002.102** USERRA provides reemployment rights to which an employee may become entitled beginning on or after December 12, 1994, but any uniformed service performed before December 12, 1994, that was counted against the service limitations of the previous law (the Veterans Reemployment Rights Act), also counts against USERRA's five-year limit.

**Sec. 1002.103** USERRA creates the following exceptions to the five-year limit on service in the uniformed services:

(1) Service that is required beyond five years to complete an initial period of obligated service. Some military specialties require an individual to serve more than five years because of the amount of time or expense involved in training. If the employee works in one of those specialties, he or she has reemployment rights when the initial period of obligated service is completed;

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

(3)(i) Service performed to fulfill periodic National Guard and Reserve training requirements as prescribed by 10 U.S.C. 10147 and 32 U.S.C. 502(a) and 503; and, (ii) Service performed to fulfill additional training requirements determined and certified by a proper military authority as necessary for the employee's professional development, or to complete skill training or retraining;

(4) Service performed in a uniformed service if he or she was ordered to or retained on active duty under:

- (i) 10 U.S.C. 688 (involuntary active duty by a military retiree);
- (ii) 10 U.S.C. 12301(a) (involuntary active duty in wartime);
- (iii) 10 U.S.C. 12301(g) (retention on active duty while in captive status);
- (iv) 10 U.S.C. 12302 (involuntary active duty during a national emergency for up to 24 months);
- (v) 10 U.S.C. 12304 (involuntary active duty for an operational mission for up to 270 days);
- (vi) 10 U.S.C. 12305 (involuntary retention on active duty of a critical person during time of crisis or other specific conditions);
- (vii) 14 U.S.C. 331 (involuntary active duty by retired Coast Guard officer);
- (viii) 14 U.S.C. 332 (voluntary active duty by retired Coast Guard officer);
- (ix) 14 U.S.C. 359 (involuntary active duty by retired Coast Guard enlisted member);

- (x) 14 U.S.C. 360 (voluntary active duty by retired Coast Guard enlisted member);
- (xi) 14 U.S.C. 367 (involuntary retention of Coast Guard enlisted member on active duty); and
- (xii) 14 U.S.C. 712 (involuntary active duty by Coast Guard Reserve member for natural or man-made disasters).

(5) Service performed in a uniformed service if the employee was ordered to or retained on active duty (other than for training) under any provision of law because of a war or national emergency declared by the President or the Congress,

as determined by the Secretary concerned;

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

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

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

(9) Service performed to mitigate economic harm where the employee's employer is in violation of its employment or reemployment obligations to him or her.

(3) **[Application for reemployment: 20 CFR \(Sec. 1002.115\) 38 U.S. C. § 4312](#)**

Upon completing service in the uniformed services, the employee must notify the pre-service employer of his or her intent to return to the employment position by either reporting to work or submitting a timely application for reemployment. Whether the employee is required to report to work or submit a timely application for reemployment depends upon the length of service, as follows:

(a) Period of service less than 31 days or for a period of any length for the purpose of a fitness examination. If the period of service in the uniformed services was less than 31 days, or the employee was absent from a position of employment for a period of any length for the purpose of an examination to determine his or her fitness to perform service, the employee must report back to the employer not later than the beginning of the first full regularly-scheduled work period on the first full calendar day following the completion of the period of service, and the

of service, and the expiration of eight hours after a period allowing for safe transportation from the place of that service to the employee's residence. For example, if the employee completes a period of service and travel home, arriving at ten o'clock in the evening, he or she cannot be required to report to the employer until the beginning of the next full regularly-scheduled work period that begins at least eight hours after arriving home, i.e., no earlier than six o'clock the next morning. If it is impossible or unreasonable for the employee to report within such time period through no fault of his or her own, he or she must report to the employer as soon as possible after the expiration of the eight-hour period.

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

(c) Period of service more than 180 days. If the employee's period of service in the uniformed services was for more than 180 days, he or she must submit an application for reemployment (written or verbal) not later than 90 days after completing service.

**Sec. 1002.116** If the employee is hospitalized for, or convalescing from, an illness or injury incurred in, or aggravated during, the performance of service, he or she must report to or submit an application for reemployment to the employer at the end of the period necessary for recovering from the illness or injury. This period may not exceed two years from the date of the completion of service, except that it must be extended by the minimum time necessary to accommodate circumstances beyond the employee's control that make reporting within the period impossible or unreasonable. This period for recuperation and recovery extends the time period for reporting to or submitting an application for reemployment to the employer, and is not applicable following reemployment.

(4) **Character of Service: 20 CFR Sec. 1002.135: 38 U.S. C. § 4304**  
[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.

**Sec. 1002.136** The branch of service in which the employee performs the tour of duty determines the characterization of service.

**Sec. 1002.137** 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.

**Sec. 1002.138** A retroactive upgrade allows the employee to obtain reinstatement with the former employer, provided the employee otherwise meets the Act's eligibility criteria. Back pay and other benefits such as pension plan credits attributable to the time period between discharge and the retroactive upgrade are not required to be restored by the employer in this situation.

(5) **Documentation: 20 CFR (Sec 1002.121); 38 U.S. C. § 4312**

If the employee submits an application for reemployment after a period of service of more than 30 days, he or she must, upon the request of the employer, provide documentation to establish that:

- (a) The reemployment application is timely;
- (b) The employee has not exceeded the five-year limit on the duration of service (subject to the exceptions listed at Sec. 1002.103); and,
- (c) The employee's separation or dismissal from service was not disqualifying.

**Sec. 1002.122** The employer is not permitted to delay or deny reemployment by demanding documentation that does not exist or is not readily available. The employee is not liable for administrative delays in the issuance of military documentation. If the employee is reemployed after an absence from employment for more than 90 days, the employer may require that he or she submit the documentation establishing entitlement to reemployment before treating the employee as not having had a break in service for pension purposes. If the documentation is received after reemployment and it shows that the employee is not entitled to reemployment, the employer may terminate employment and any rights or benefits that the employee may have been granted.

**Sec. 1002.123** (a) Documents that satisfy the requirements of USERRA include the following:

- (1) DD (Department of Defense) 214 Certificate of Release or Discharge from

Active Duty;

- (2) Copy of duty orders prepared by the facility where the orders were fulfilled carrying an endorsement indicating completion of the described service;
- (3) Letter from the commanding officer of a Personnel Support Activity or someone of comparable authority;
- (4) Certificate of completion from military training school;
- (5) Discharge certificate showing character of service; and,
- (6) Copy of extracts from payroll documents showing periods of service;
- (7) Letter from National Disaster Medical System (NDMS) Team Leader or Administrative Officer verifying dates and times of NDMS training or Federal activation.

Note: 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, however, a military ID card is not a qualifying document.

The employer may contact either the public affairs officer at the Department of Defense or Employer Support of the Guard and Reserve to verify that the service was actually performed.

[QAR](#)

**.5 [Employer Statutory Defenses](#): 38 U.S. C. § 4312**

**Sec. 1002.139 (a)** Even if the employee is otherwise eligible for reemployment benefits, the employer is not required to reemploy him or her if the employer establishes that its circumstances have so changed as to make reemployment impossible or unreasonable. For example, an employer may be excused from reemploying the employee where there has been an intervening reduction in force that would have included that employee. The employer may not, however, refuse to reemploy the employee on the basis that another employee was hired to fill the reemployment position during the employee's absence, even if reemployment might require the termination of that replacement employee;

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

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

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

**.6**     [Protected Servicemembers' Entitlements.](#) 38 U.S. C. § 4312, § 4313

**Sec. 1002.191** As a general rule, the employee is entitled to reemployment in the job position that he or she would have attained with reasonable certainty if not for the absence due to uniformed service. This position is known as the escalator position. The principle behind the escalator position is that, if not for the period of uniformed service, the employee could have been promoted (or, alternatively, demoted, transferred, or laid off) due to intervening events. The escalator principle requires that the employee be reemployed in a position that reflects with reasonable certainty the pay, benefits, seniority, and other job perquisites, that he or she would have attained if not for the period of service. Depending upon the specific circumstances, the employer may have the option, or be required, to reemploy the employee in a position other than the escalator position.

**Sec. 1002.192** In all cases, the starting point for determining the proper reemployment position is the escalator position, which is the job position that the employee would have attained if his or her continuous employment had not been interrupted due to uniformed service. Once this position is determined, the employer may have to consider several factors before determining the appropriate reemployment position in any particular case. Such factors may include the employee's length of service, qualifications, and disability, if any. The reemployment position may be either the escalator position; the pre-service position; a position comparable to the escalator or pre-service position; or, the nearest approximation to one of these positions.

**Sec. 1002.193 (a)** The reemployment position includes the seniority, status, and rate of pay that an employee would ordinarily have attained in that position given his or her job history, including prospects for future earnings and advancement. The employer must determine the seniority rights, status, and rate of pay as though the employee had been continuously employed during the period of service. The seniority rights, status, and pay of an employment position include those established (or changed) by a collective bargaining agreement, employer policy, or employment practice. The sources of seniority rights, status, and pay include agreements, policies, and practices in effect at the beginning of the employee's service, and any changes that may have occurred during the period of service. In particular, the employee's status in the reemployment position could include opportunities for advancement, general working conditions, job location, shift assignment, rank, responsibility, and geographical location.

(b) If an opportunity for promotion, or eligibility for promotion, that the employee missed during service is based on a skills test or examination, then the employer should give him or her a reasonable amount of time to adjust to the employment position and then give a skills test or examination. No fixed amount of time for permitting adjustment

to reemployment will be deemed reasonable in all cases. However, in determining a reasonable amount of time to permit an employee to adjust to reemployment before scheduling a makeup test or examination, an employer may take into account a variety of factors, including but not limited to the length of time the returning employee was absent from work, the level of difficulty of the test itself, the typical time necessary to prepare or study for the test, the duties and responsibilities of the reemployment position and the promotional position, and the nature and responsibilities of the service member while serving in the uniformed service. If the employee is successful on the makeup exam and, based on the results of that exam, there is a reasonable certainty that he or she would have been promoted, or made eligible for promotion, during the time that the employee served in the uniformed service, then the promotion or eligibility for promotion must be made effective as of the date it would have occurred had employment not been interrupted by uniformed service.

**Sec. 1002.194** The Act does not prohibit lawful adverse job consequences that result from the employee's restoration on the seniority ladder. Depending on the circumstances, the escalator principle may cause an employee to be reemployed in a higher or lower position, laid off, or even terminated. For example, if an employee's seniority or job classification would have resulted in the employee being laid off during the period of service, and the layoff continued after the date of reemployment, reemployment would reinstate the employee to layoff status. Similarly, the status of the reemployment position requires the employer to assess what would have happened to such factors as the employee's opportunities for advancement, working conditions, job location, shift assignment, rank, responsibility, and geographical location, if he or she had remained continuously employed. The reemployment position may involve transfer to another shift or location, more or less strenuous working conditions, or changed opportunities for advancement, depending upon the application of the escalator principle.

**Sec. 1002.195** Once the employee's escalator position is determined, other factors may allow, or require, the employer to reemploy the employee in a position other than the escalator position. These factors, which are explained in Sec. Sec. 1002.196 through 1002.199, are:

- (a) The length of the employee's most recent period of uniformed service;
- (b) The employee's qualifications; and,
- (c) Whether the employee has a disability incurred or aggravated during uniformed service.

They are also entitled to continuation of health benefits for up to twenty-four months at the servicemembers' option and expense, while serving in the military service.

**Sec. 1002.149** During a period of service in the uniformed services, the employee is deemed to be on furlough or leave of absence from the civilian employer. In this status, the employee is entitled to the non-seniority rights and benefits generally provided by the employer to other employees with similar seniority, status, and pay that are on furlough or leave of absence. Entitlement to these non-seniority rights and benefits is not

dependent on how the employer characterizes the employee's status during a period of service. For example, if the employer characterizes the employee as "terminated" during the period of uniformed service, this characterization cannot be used to avoid USERRA's requirement that the employee be deemed on furlough or leave of absence, and therefore entitled to the non-seniority rights and benefits generally provided to employees on furlough or leave of absence.

Members of the National Guard and military Reserve units are entitled to time off from their jobs to attend training. This time cannot be involuntarily charged as vacation time. However, if the individual asks to use vacation time, the employer must allow it. If the Guard or Reserve member requests time off to attend military training, the employer must grant it. In addition, USERRA protects Guard and Reserve members against being discharged, discriminated against in hiring, or denied certain employment benefits because of their military activities.

**.7 Protection from Discrimination and Retaliation: 38 U.S. C. § 4311**

**Sec. 1002.18** An employer must not deny initial employment, reemployment, retention in employment, promotion, or any benefit of employment to an individual on the basis of his or her membership, application for membership, performance of service, application for service, or obligation for service in the uniformed services.

**Sec. 1002.19** An employer must not retaliate against an individual by taking any adverse employment action against him or her because the individual has taken an action to enforce a protection afforded any person under USERRA; testified or otherwise made a statement in or in connection with a proceeding under USERRA; assisted or participated in a USERRA investigation; or, exercised a right provided for by USERRA.

**Sec. 1002.20** Employers are prohibited from taking actions against an individual for any of the activities protected by the Act, whether or not he or she has performed service in the uniformed services. [\[QAR\]](#)

**Sec. 1002.21** The prohibitions against discrimination and retaliation apply to all covered employers (including hiring halls and potential employers, see sections 1002.36 and .38) and employment positions, including those that are for a brief, nonrecurrent period, and for which there is no reasonable expectation that the employment position will continue indefinitely or for a significant period. However, USERRA's reemployment rights and benefits do not apply to such brief, nonrecurrent positions of employment.

**.8 Protected Servicemembers' Obligations (Application for Reemployment): 38 U.S. C. § 4312**

**Sec. 1002.115** Upon completing service in the uniformed services, the employee must notify the pre-service employer of his or her intent to return to the employment position by either reporting to work or submitting a timely application for reemployment. Whether the employee is required to report to work or submit a timely application for

reemployment depends upon the length of service, as follows:

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

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

(c) Period of service more than 180 days. If the employee's period of service in the uniformed services was for more than 180 days, he or she must submit an application for reemployment (written or verbal) not later than 90 days after completing service.

**Sec. 1002.116** If the employee is hospitalized for, or convalescing from, an illness or injury incurred in, or aggravated during, the performance of service, he or she must report to or submit an application for reemployment to the employer at the end of the period necessary for recovering from the illness or injury. This period may not exceed two years from the date of the completion of service, except that it must be extended by the minimum time necessary to accommodate circumstances beyond the employee's control that make reporting within the period impossible or unreasonable. This period for recuperation and recovery extends the time period for reporting to or submitting an application for reemployment to the employer, and is not applicable following reemployment.

**Sec. 1002.117 (a)** If the employee fails to timely report for or apply for reemployment, he or she does not automatically forfeit entitlement to USERRA's reemployment and

other rights and benefits. Rather, the employee becomes subject to the conduct rules, established policy, and general practices of the employer pertaining to an absence from scheduled work.

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

**Sec. 1002.118** An application for reemployment need not follow any particular format. The employee may apply orally or in writing. The application should indicate that the employee is a former employee returning from service in the uniformed services and that he or she seeks reemployment with the pre-service employer. The employee is permitted but not required to identify a particular reemployment position in which he or she is interested.

**Sec. 1002.119** The application must be submitted to the pre-service employer or to an agent or representative of the employer who has apparent responsibility for receiving employment applications. Depending upon the circumstances, such a person could be a personnel or human resources officer, or a first-line supervisor. If there has been a change in ownership of the employer, the application should be submitted to the employer's successor-in-interest.

**Sec. 1002.120** The employee has reemployment rights with the pre-service employer provided that he or she makes a timely reemployment application to that employer. The employee may seek or obtain employment with an employer other than the pre-service employer during the period of time within which a reemployment application must be made, without giving up reemployment rights with the pre-service employer. However, such alternative employment during the application period should not be of a type that would constitute cause for the employer to discipline or terminate the employee following reemployment. For instance, if the employer forbids employees from working concurrently for a direct competitor during employment, violation of such a policy may constitute cause for discipline or even termination.

**Sec. 1002.121** If the period of service exceeded 30 days and if requested by the employer to do so. If the employee submits an application for reemployment after a period of service of more than 30 days, he or she must, upon the request of the employer, provide documentation to establish that:

- (a) The reemployment application is timely;
- (b) The employee has not exceeded the five-year limit on the duration of service (subject to the exceptions listed at Sec.

1002.103); and,  
(c) The employee's separation or dismissal from service was not disqualifying.

USERRA also provides for an extension of the above time limits up to a total of two years from completion of military service, if an individual is hospitalized or convalescing from an injury or illness caused by or aggravated during military service. The two-year period would be further extended by the minimum time required to accommodate the circumstances beyond the individual's control which makes reporting within the time limits impossible or unreasonable.

**Sec. 1002.122** The employer is not permitted to delay or deny reemployment by demanding documentation that does not exist or is not readily available. The employee is not liable for administrative delays in the issuance of military documentation. If the employee is reemployed after an absence from employment for more than 90 days, the employer may require that he or she submit the documentation establishing entitlement to reemployment before treating the employee as not having had a break in service for pension purposes. If the documentation is received after reemployment and it shows that the employee is not entitled to reemployment, the employer may terminate employment and any rights or benefits that the employee may have been granted.

**.9 Reemployment Positions. : 38 U.S. C. § 4313**

**Sec. 1002.196** Following a period of service in the uniformed services of less than 91 days, the employee must be reemployed according to the following priority:

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

**Sec. 1002.197** Following a period of service of more than 90 days, the employee must

be reemployed according to the following priority:

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

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

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

**Sec. 1002.198** The employee must be qualified for the reemployment position. The employer must make reasonable efforts to help the employee become qualified to perform the duties of this position. The employer is not required to reemploy the employee on his or her return from service if he or she cannot, after reasonable efforts by the employer, qualify for the appropriate reemployment position.

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

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

- (i) The employer's judgment as to which functions are essential;
- (ii) Written job descriptions developed before the hiring process begins;
- (iii) The amount of time on the job spent performing the function;
- (iv) The consequences of not requiring the individual to perform the function;
- (v) The terms of a collective bargaining agreement;
- (vi) The work experience of past incumbents in the job; and/or
- (vii) The current work experience of incumbents in similar jobs.

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

**Sec. 1002.199** If two or more employees are entitled to reemployment in the same position and more than one employee has reported or applied for employment in that position, the employee who first left the position for uniformed service has the first priority on reemployment in that position. The remaining employee (or employees) is entitled to be reemployed in a position similar to that in which the employee would have been reemployed according to the rules that normally determine a reemployment position, as set out in Sec. Sec. 1002.196 and 1002.197.

**.10 Key Definitions. 38 U.S. C. § 4303**

- (1) **Claimant** - The person who submits the claim.
- (2) **Conferences:**
  - (a) **Case Resolution Conference** - Meetings arranged and conducted by the investigator, usually attended by the parties and possibly their representatives. (If a collective bargaining agreement is involved, a union representative may also attend.) The purpose is to make an attempt at a mutually agreeable resolution.
  - (b) **Case Closing Conference** - A final resolution conference held after the investigation has been completed and merit has been determined, and a merit determination letter has been sent.
- (3) **Investigation** - The process of determining answers to the questions who, what, when, where, how and why. It is the systematic examination of records, obtaining statements, and collection of evidence, to determine the merits of a claim.
- (4) **Negotiation** - Communication between parties to a dispute. Negotiation is the basic building block of all forms of resolution. The parties seek to reach agreement on a dispute by listening to each other's arguments. Negotiation is useful in narrowing the scope of a dispute, clarifying the parties' positions and/or reaching agreement.
- (5) **Prima Facie Claim** - A claim in which there is sufficient evidence on its face to find for the claimant, if the elements of the claim are not rebutted by sufficient competent evidence.
- (6) **USERRA Case** - The investigation or other activity resulting from a request for assistance from a person in asserting rights provided under USERRA.
- (7) **USERRA Information Management System (UIMS)** - The computerized data base used to enter case information and track case progress, including quality assurance reviews.

- (8) **VETS Investigator** - Any VETS staff member authorized to investigate USERRA complaints and provide technical assistance on USERRA.

**The following definitions are from the Department of Labor's USERRA regulations at 20 CFR Sec. 1002.5:**

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

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

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

(d)(1) **Employer**, except as provided in paragraphs (d)(2) and (3) of this section, means any person, institution, organization, or other entity that pays salary or wages for work performed, or that has control over employment opportunities, including--

(i) A person, institution, organization, or other entity to whom the employer has delegated the performance of employment-related responsibilities, except in the case that such entity has been delegated functions that are purely ministerial in nature, such as maintenance of personnel files or the preparation of forms for submission to a government agency;

(ii) The Federal Government;

(iii) A State;

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

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

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

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

(e) **Health plan** means an insurance policy, insurance contract, medical or hospital service

agreement, membership or subscription contract, or other arrangement under which health services for individuals are provided or the expenses of such services are paid.

(f) **National Disaster Medical System (NDMS)** is an agency within the Federal Emergency Management Agency, Department of Homeland Security, established by the Public Health Security and Bioterrorism Preparedness and Response Act of 2002, Public Law 107-188. The NDMS provides medical-related assistance to respond to the needs of victims of public health emergencies. Participants in the NDMS are volunteers who serve as intermittent Federal employees when activated. For purposes of USERRA coverage only, these persons are treated as members of the uniformed services when they are activated to provide assistance in response to a public health emergency or to be present for a short period of time when there is a risk of a public health emergency, or when they are participating in authorized training. See 42 U.S.C. 300hh-11(e).

**NOTE:** Section 301 of the Pandemic and All-Hazards Preparedness Act, Public Law 109-417, transferred the NDMS from the Federal Emergency Management Agency, Department of Homeland Security to the Department of Health and Human Services, effective January 1, 2007. USERRA coverage for NDMS participants was not affected by the legislation.

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

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

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

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

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

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

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

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

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

- (1) The nature and cost of the action needed under USERRA and these regulations;
- (2) The overall financial resources of the facility or facilities involved in the provision of the action; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such action upon the operation of the facility;
- (3) The overall financial resources of the employer; the overall size of the business of an employer with respect to the number of its employees; the number, type, and location of its facilities; and,
- (4) The type of operation or operations of the employer, including the composition, structure, and functions of the work force of such employer; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the employer.

(o) **Uniformed services** means the Armed Forces; the Army National Guard and the Air National Guard when engaged in active duty for training, inactive duty training, or full-time National Guard duty; the commissioned corps of the Public Health Service; and any other category of persons designated by the President in time of war or national emergency. For purposes of USERRA coverage only, service as an intermittent disaster response appointee of the NDMS when federally activated or attending authorized training in support of their Federal mission is deemed "service in the uniformed services," although such appointee is not a member of the "uniformed services" as defined by USERRA.

**.11 Issue Codes for Use in UIMS**

**[QAR](#)**

UIMS "Issue Codes" **	5 CFR (Sec 353)	20 CFR (Sec 1002)	38 USC (Sec 43XX)
	<a href="#">107</a>	<a href="#">212-213</a>	<a href="#">4311</a>
ID - Military Obligations Discrimination	<a href="#">202</a>	<a href="#">18-23</a>	<a href="#">4311</a>
	<a href="#">202</a>	<a href="#">18-23</a>	<a href="#">4311/4312</a>
II - Initial Hiring Discrimination	<a href="#">202</a>	<a href="#">18-23</a>	<a href="#">4311</a>
IH - Health Benefits		<a href="#">163-171</a>	<a href="#">4317</a>
IP - Pension	<a href="#">107</a>	<a href="#">259-267</a>	<a href="#">4318</a>
IS - Seniority			
IB - Other Non-Seniority Benefits	<a href="#">207</a>	<a href="#">210-213</a>	<a href="#">4316</a>
IZ - Status			
IL - Layoff			
IV - Vacation	<a href="#">208</a>	<a href="#">153</a>	<a href="#">4304, 4312</a>
	<a href="#">204/5</a>	<a href="#">85-88</a>	<a href="#">4312</a>
	<a href="#">106</a>	<a href="#">149-153</a>	<a href="#">4312, 4316</a>
IR - Reinstatement	<a href="#">203</a>	<a href="#">32</a>	<a href="#">4312</a>
	<a href="#">207</a>	<a href="#">191-199</a>	<a href="#">4312</a>
	<a href="#">110</a>	<a href="#">139</a>	<a href="#">4312</a>
IT - Promotion			
IA - Reasonable Accommodations/Retraining for Disabled	<a href="#">207</a>	<a href="#">191-199</a>	<a href="#">4313</a>
IW - Reasonable Accommodations/Retraining for Non-Qualified/Non-Disabled			
IM - Pay Rate			
IF - Special Protected Period Discharge	<a href="#">209</a>	<a href="#">247-248</a>	<a href="#">4316</a>
ID2 - Discrimination as Retaliation for any Action	<a href="#">202</a>	<a href="#">19-23</a>	<a href="#">4316, 4311</a>
		<a href="#">19-23</a>	<a href="#">4316/4311</a>

This is a USERRA issue code “quick reference” guide. Select a reference, use Ctrl (hold) and left click your mouse...return to the table by selecting **(ISSUE CODE)**.

**Exhibit 1: 20 CFR Part 1002**

USERRA Regulations applicable to States, Local Governments, and Private Employers



**Federal Register**

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**Monday,  
December 19, 2005**

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**Part II**

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**Department of Labor**

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Veterans' Employment and Training  
Service

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20 CFR Part 1002  
Uniformed Services Employment and  
Reemployment Rights Act of 1994; Final  
Rules

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

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

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

2004).

#### **Subpart A—Introduction to the Regulations under the Uniformed Services Employment and Reemployment Rights Act of 1994 General Provisions**

##### **§ 1002.1 What is the purpose of this part?**

This part implements the Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA" or "the Act"). 38 U.S.C. 4301-4334. USERRA is a law that establishes certain rights and benefits for employees, and duties for employers. USERRA affects employment, reemployment, and retention in employment, when employees serve or have served in the uniformed services. There are five subparts to these regulations. Subpart A gives an introduction to the USERRA regulations. Subpart B describes USERRA's anti-discrimination and antiretaliation provisions. Subpart C explains the steps that must be taken by a uniformed service member who wants to return to his or her previous civilian employment. Subpart D describes the rights, benefits, and obligations of persons absent from employment due to service in the uniformed services, including rights and obligations related to health plan coverage. Subpart E describes the rights, benefits, and obligations of the returning veteran or service member. Subpart F explains the role of the Department of Labor in enforcing and giving assistance under USERRA. These regulations implement USERRA as it applies to States, local governments, and private employers. Separate regulations published by the Federal Office of Personnel Management implement USERRA for Federal executive agency employers and employees.

##### **§ 1002.2 Is USERRA a new law?**

USERRA is the latest in a series of laws protecting veterans' employment and reemployment rights going back to the Selective Training and Service Act of 1940. USERRA's immediate predecessor was commonly referred to as the Veterans' Reemployment Rights Act (VRRRA), which was enacted as section 404 of the Vietnam Era Veterans' Readjustment Assistance Act of 1974. In enacting USERRA, Congress emphasized USERRA's continuity with the VRRRA and its intention to clarify and strengthen that law. Congress also emphasized that Federal laws protecting veterans' employment and

reemployment rights for the past fifty years had been successful and that the large body of case law that had developed under those statutes remained in full force and effect, to the extent it is consistent with USERRA. USERRA authorized the Department of Labor to publish regulations implementing the Act for State, local government, and private employers. USERRA also authorized the Office of Personnel Management to issue regulations implementing the Act for Federal executive agencies (other than some Federal intelligence agencies). USERRA established a separate program for employees of some Federal intelligence agencies.

##### **§ 1002.3 When did USERRA become effective?**

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

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

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

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

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

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of April 22, 2002 (67 FR 31827).

##### **§ 1002.5 What definitions apply to USERRA?**

(a) *Attorney General* means the Attorney General of the United States or any person designated by the Attorney

General to carry out a responsibility of the Attorney General under USERRA.

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

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

(d)(1) *Employer*, except as provided in paragraphs (d)(2) and (3) of this section, means any person, institution, organization, or other entity that pays salary or wages for work performed, or that has control over employment opportunities, including—

(i) A person, institution, organization, or other entity to whom the employer has delegated the performance of employment-related responsibilities, except in the case that such entity has been delegated functions that are purely ministerial in nature, such as maintenance of personnel files or the preparation of forms for submission to a government agency;

(ii) The Federal Government;

(iii) A State;

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

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

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

(3) An employee pension benefit plan as described in section 3(2) of the

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

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

(f) *National Disaster Medical System (NDMS)* is an agency within the Federal Emergency Management Agency, Department of Homeland Security, established by the Public Health Security and Bioterrorism Preparedness and Response Act of 2002, Public Law 107-188. The NDMS provides medical related assistance to respond to the needs of victims of public health emergencies. Participants in the NDMS are volunteers who serve as intermittent Federal employees when activated. For purposes of USERRA coverage only, these persons are treated as members of the uniformed services when they are activated to provide assistance in response to a public health emergency or to be present for a short period of time when there is a risk of a public health emergency, or when they are participating in authorized training. See 42 U.S.C. 300hh-11(e).

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

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

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

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

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

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

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

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

(1) The nature and cost of the action needed under USERRA and these regulations;

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

(3) The overall financial resources of

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the employer; the overall size of the business of an employer with respect to the number of its employees; the number, type, and location of its facilities; and,

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

the facility or facilities in question to the employer.

(o) *Uniformed services* means the Armed Forces; the Army National Guard and the Air National Guard when engaged in active duty for training, inactive duty training, or full-time National Guard duty; the commissioned corps of the Public Health Service; and any other category of persons designated by the President in time of war or national emergency. For purposes of USERRA coverage only, service as an intermittent disaster response appointee of the NDMS when federally activated or attending authorized training in support of their Federal mission is deemed “service in the uniformed services,” although such appointee is not a member of the “uniformed services” as defined by USERRA.

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

USERRA’s definition of “service in the uniformed services” covers all categories of military training and service, including duty performed on a voluntary or involuntary basis, in time of peace or war. Although most often understood as applying to National Guard and reserve military personnel, USERRA also applies to persons serving in the active components of the Armed Forces. Certain types of service specified in 42 U.S.C. 300hh-11 by members of the National Disaster Medical System are covered by USERRA.

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

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

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

requires that seniority credit be given for periods of absence from work due to service in the uniformed services.

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

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

**Subpart B—Anti-Discrimination and Anti-Retaliation  
Protection From Employer  
Discrimination and Retaliation**

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

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

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

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

**§ 1002.20 Does USERRA protect an individual who does not actually perform service in the uniformed services?**

Yes. Employers are prohibited from taking actions against an individual for any of the activities protected by the Act, whether or not he or she has performed service in the uniformed services.

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

The prohibitions against discrimination and retaliation apply to all covered employers (including hiring halls and potential employers, see sections 1002.36 and .38) and employment positions, including those that are for a brief, nonrecurrent period, and for which there is no reasonable expectation that the employment position will continue indefinitely or for a significant period. However, USERRA’s reemployment rights and benefits do not apply to such brief, nonrecurrent positions of employment.

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

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

**§ 1002.23 What must the individual show to carry the burden of proving that the**

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**employer discriminated or retaliated against him or her?**

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

- (1) Membership or application for membership in a uniformed service;
- (2) Performance of service, application for service, or obligation for service in a uniformed service;
- (3) Action taken to enforce a protection afforded any person under USERRA;

- (4) Testimony or statement made in or in connection with a USERRA proceeding;
- (5) Assistance or participation in a USERRA investigation; or,
- (6) Exercise of a right provided for by USERRA.
- (b) If the individual proves that the employer's action was based on one of the prohibited motives listed in paragraph (a) of this section, the employer has the burden to prove the affirmative defense that the action would have been taken anyway absent the USERRA-protected status or activity.

**Subpart C—Eligibility For Reemployment**  
**General Eligibility Requirements for Reemployment**

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

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

- (1) The employer had advance notice of the employee's service;
- (2) The employee has five years or less of cumulative service in the uniformed services in his or her employment relationship with a particular employer;
- (3) The employee timely returns to work or applies for reemployment; and,
- (4) The employee has not been separated from service with a disqualifying discharge or under other than honorable conditions.

(b) These general eligibility requirements have important qualifications and exceptions, which are described in detail in §§ 1002.73 through 1002.138. If the employee meets these eligibility criteria, then he or she is eligible for reemployment unless the employer establishes one of the defenses described in § 1002.139. The employment position to which the employee is entitled is described in §§ 1002.191 through 1002.199.

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

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

**Coverage of Employers and Positions**

**§ 1002.34 Which employers are covered by USERRA?**

- (a) USERRA applies to all public and private employers in the United States, regardless of size. For example, an employer with only one employee is covered for purposes of the Act.
- (b) USERRA applies to foreign employers doing business in the United States. A foreign employer that has a physical location or branch in the United States (including U.S. territories and possessions) must comply with USERRA for any of its employees who are employed in the United States.
- (c) An American company operating either directly or through an entity under its control in a foreign country must also comply with USERRA for all its foreign operations, unless compliance would violate the law of the foreign country in which the workplace is located.

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

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

- (a) Whether there has been a substantial continuity of business operations from the former to the current employer;
- (b) Whether the current employer uses the same or similar facilities, machinery, equipment, and methods of production;
- (c) Whether there has been a substantial continuity of employees;
- (d) Whether there is a similarity of jobs and working conditions;
- (e) Whether there is a similarity of supervisors or managers; and,
- (f) Whether there is a similarity of products or services.

**§ 1002.36 Can an employer be liable as a successor in interest if it was unaware that an employee may claim reemployment rights when the employer acquired the business?**

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

succession.

**§ 1002.37 Can one employee be employed in one job by more than one employer?**

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

**§ 1002.38 Can a hiring hall be an employer?**

Yes. In certain occupations (for example, longshoreman, stagehand, construction worker), the employee may frequently work for many different

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employers. A hiring hall operated by a union or an employer association typically assigns the employee to the jobs. In these industries, it may not be unusual for the employee to work his or her entire career in a series of short-term job assignments. The definition of "employer" includes a person, institution, organization, or other entity to which the employer has delegated the performance of employment-related responsibilities. A hiring hall therefore is considered the employee's employer if the hiring and job assignment functions have been delegated by an employer to the hiring hall. As the employer, a hiring hall has reemployment responsibilities to its employees. USERRA's antidiscrimination and anti-retaliation

provisions also apply to the hiring hall.

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

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

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

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

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

USERRA rights are not diminished because an employee holds a temporary, part-time, probationary, or seasonal employment position. However, an employer is not required to reemploy an employee if the employment he or she left to serve in the uniformed services

was for a brief, nonrecurrent period and there is no reasonable expectation that the employment would have continued indefinitely or for a significant period. The employer bears the burden of proving this affirmative defense.

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

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

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

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

**§ 1002.43 Does an individual have rights under USERRA even if he or she is an executive, managerial, or professional employee?**

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

**§ 1002.44 Does USERRA cover an independent contractor?**

(a) No. USERRA does not provide protections for an independent contractor.  
(b) In deciding whether an individual is an independent contractor, the following factors need to be considered:

- (1) The extent of the employer's right to control the manner in which the individual's work is to be performed;
  - (2) The opportunity for profit or loss that depends upon the individual's managerial skill;
  - (3) Any investment in equipment or materials required for the individual's tasks, or his or her employment of helpers;
  - (4) Whether the service the individual performs requires a special skill;
  - (5) The degree of permanence of the individual's working relationship; and,
  - (6) Whether the service the individual performs is an integral part of the employer's business.
- (c) No single one of these factors is controlling, but all are relevant to determining whether an individual is an employee or an independent contractor.

**Coverage of Service in the Uniformed Services**

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

Yes. USERRA's definition of "service in the uniformed services" includes a period for which an employee is absent from a position of employment for the purpose of an examination to determine his or her fitness to perform duty in the uniformed services. Military fitness examinations can address more than physical or medical fitness, and include evaluations for mental, educational, and other types of fitness. Any examination to determine an employee's fitness for

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service is covered, whether it is an initial or recurring examination. For example, a periodic medical examination required of a Reserve component member to determine fitness for continued service is covered.

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

(a) USERRA's definition of "service in the uniformed services" includes a period for which an employee is absent from employment for the purpose of performing authorized funeral honors duty under 10 U.S.C. 12503 (members of Reserve ordered to perform funeral honors duty) or 32 U.S.C. 115 (Member of Air or Army National Guard ordered to perform funeral honors duty).  
(b) Funeral honors duty performed by persons who are not members of the uniformed services, such as members of veterans' service organizations, is not

“service in the uniformed services.”

**§ 1002.56 What types of service in the National Disaster Medical System are considered “service in the uniformed services?”**

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

**§ 1002.57 Is all service as a member of the National Guard considered “service in the uniformed services?”**

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

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

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

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

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

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

Yes. In time of war or national

emergency the President has authority to designate any category of persons as a “uniformed service” for purposes of USERRA. If the President exercises this authority, service as a member of that category of persons would be “service in the uniformed services” under USERRA.

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

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

**§ 1002.61 Does USERRA cover a member of the Reserve Officers Training Corps?**

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

(b) Typically, an individual in a College ROTC program enters into an agreement with a particular military service that obligates such individual to either complete the ROTC program and accept a commission or, in case he or she does not successfully complete the ROTC program, to serve as an enlisted member. Although an individual does not qualify for reemployment protection, except as specified in (a) above, he or she is protected under USERRA’s anti-discrimination provisions because, as a result of the agreement, he or she has applied to become a member of the uniformed services and has incurred an obligation to perform future service.

**§ 1002.62 Does USERRA cover a member**

**of the Commissioned Corps of the National Oceanic and Atmospheric Administration, the Civil Air Patrol, or the Coast Guard Auxiliary?**

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

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

**§ 1002.73 Does service in the uniformed services have to be an employee’s sole reason for leaving an employment position in order to have USERRA reemployment rights?**

No. If absence from a position of employment is necessitated by service in the uniformed services, and the employee otherwise meets the Act’s eligibility requirements, he or she has reemployment rights under USERRA,

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even if the employee uses the absence for other purposes as well. An employee is not required to leave the employment position for the sole purpose of performing service in the uniformed services. For example, if the employee is required to report to an out of State location for military training and he or she spends off-duty time during that assignment moonlighting as a security guard or visiting relatives who live in that State, the employee will not lose reemployment rights simply because he or she used some of the time away from the job to do something other than attend the military training. Also, if an employee receives advance notification of a mobilization order, and leaves his or her employment position in order to prepare for duty, but the mobilization is cancelled, the employee will not lose any reemployment rights.

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

No. At a minimum, an employee must

have enough time after leaving the employment position to travel safely to the uniformed service site and arrive fit to perform the service. Depending on the specific circumstances, including the duration of service, the amount of notice received, and the location of the service, additional time to rest, or to arrange affairs and report to duty, may be necessitated by reason of service in the uniformed services. The following examples help to explain the issue of the period of time between leaving civilian employment and beginning of service in the uniformed services:

- (a) If the employee performs a full overnight shift for the civilian employer and travels directly from the work site to perform a full day of uniformed service, the employee would not be considered fit to perform the uniformed service. An absence from that work shift is necessitated so that the employee can report for uniformed service fit for duty.
- (b) If the employee is ordered to perform an extended period of service in the uniformed services, he or she may require a reasonable period of time off from the civilian job to put his or her personal affairs in order, before beginning the service. Taking such time off is also necessitated by the uniformed service.
- (c) If the employee leaves a position of employment in order to enlist or otherwise perform service in the uniformed services and, through no fault of his or her own, the beginning date of the service is delayed, this delay does not terminate any reemployment rights.

#### **Requirement of Notice**

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

- (a) Yes. The employee, or an appropriate officer of the uniformed service in which his or her service is to be performed, must notify the employer that the employee intends to leave the employment position to perform service in the uniformed services, with certain exceptions described below. In cases in which an employee is employed by more than one employer, the employee, or an appropriate office of the uniformed service in which his or her service is to be performed, must notify each employer that the employee intends to leave the employment position to perform service in the uniformed services, with certain exceptions described below.
- (b) The Department of Defense

USERRA regulations at 32 CFR 104.3 provide that an “appropriate officer” can give notice on the employee’s behalf. An “appropriate officer” is a commissioned, warrant, or noncommissioned officer authorized to give such notice by the military service concerned.

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

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

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

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

- (a) Only a designated authority can make a determination of “military necessity,” and such a determination is not subject to judicial review. Guidelines for defining “military necessity” appear in regulations issued by the Department of Defense at 32 CFR 104.3. In general, these regulations cover situations where a mission, operation, exercise or requirement is classified, or could be compromised or otherwise adversely affected by public knowledge. In certain cases, the Secretary of Homeland Security, in consultation with the Secretary of Defense, can make a determination that giving of notice by intermittent disaster response appointees of the National Disaster Medical System is precluded by “military necessity.” See 42 U.S.C. 300hh–11(e)(3)(B).
- (b) It may be impossible or unreasonable to give advance notice under certain circumstances. Such circumstances may include the unavailability of the employee’s employer or the employer’s

representative, or a requirement that the employee report for uniformed service in an extremely short period of time.

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

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

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

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

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

#### **Period of Service**

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

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

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

No. The five-year period includes only the time the employee spends actually performing service in the uniformed services. A period of absence from employment before or after performing service in the uniformed

services does not count against the five year limit. For example, after the employee completes a period of service in the uniformed services, he or she is provided a certain amount of time, depending upon the length of service, to report back to work or submit an application for reemployment. The period between completing the uniformed service and reporting back to work or seeking reemployment does not count against the five-year limit.

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

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

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

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

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

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

(1) Service that is required beyond five years to complete an initial period of obligated service. Some military specialties require an individual to serve more than five years because of the amount of time or expense involved in training. If the employee works in one of those specialties, he or she has reemployment rights when the initial period of obligated service is completed;

(2) If the employee was unable to

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

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

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

(4) Service performed in a uniformed service if he or she was ordered to or retained on active duty under:

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

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

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

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

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

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

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

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

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

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

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

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

(5) Service performed in a uniformed service if the employee was ordered to or retained on active duty (other than for training) under any provision of law because of a war or national emergency declared by the President or the Congress, as determined by the Secretary concerned;

(6) Service performed in a uniformed service if the employee was ordered to active duty (other than for training) in support of an operational mission for which personnel have been ordered to

active duty under 10 U.S.C. 12304, as determined by a proper military authority;

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

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

(b) Service performed to mitigate economic harm where the employee's employer is in violation of its employment or reemployment obligations to him or her.

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

No. The employee is not required to accommodate his or her employer's interests or concerns regarding the

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

**Application for Reemployment**

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

Yes. Upon completing service in the uniformed services, the employee must notify the pre-service employer of his or her intent to return to the employment position by either reporting to work or submitting a timely application for reemployment. Whether the employee is

required to report to work or submit a timely application for reemployment depends upon the length of service, as follows:

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

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

(c) *Period of service more than 180 days.* If the employee's period of service in the uniformed services was for more than 180 days, he or she must submit an application for reemployment (written or verbal) not later than 90 days after completing service.

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

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

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

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

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

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

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

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

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

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

No. The employee has reemployment rights with the pre-service employer

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provided that he or she makes a timely reemployment application to that employer. The employee may seek or obtain employment with an employer other than the pre-service employer during the period of time within which a reemployment application must be made, without giving up reemployment rights with the pre-service employer. However, such alternative employment during the application period should not be of a type that would constitute cause for the employer to discipline or terminate the employee following reemployment. For instance, if the employer forbids employees from working concurrently for a direct competitor during employment, violation of such a policy may constitute cause for discipline or even termination.

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

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

(a) The reemployment application is timely;

(b) The employee has not exceeded the five-year limit on the duration of service (subject to the exceptions listed

at § 1002.103); and,

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

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

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

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

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

**Character of Service**

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

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

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

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

**§ 1002.136 Who determines the characterization of service?**

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

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

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

**§ 1002.138 If the employee receives a retroactive upgrade in the characterization of service, will that entitle him or her to**

**claim back wages and benefits lost as of the date of separation from service?**

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

**Employer Statutory Defenses**

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

(a) Even if the employee is otherwise

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

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

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

(d) The employer defenses included in this section are affirmative ones, and the employer carries the burden to prove by a preponderance of the

evidence that any one or more of these defenses is applicable.

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

### **Furlough and Leave of Absence**

#### **§ 1002.149 What is the employee's status with his or her civilian employer while performing service in the uniformed services?**

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

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

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

(b) If the non-seniority benefits to which employees on furlough or leave of absence are entitled vary according to the type of leave, the employee must be given the most favorable treatment accorded to any comparable form of leave when he or she performs service

in the uniformed services. In order to determine whether any two types of leave are comparable, the duration of the leave may be the most significant factor to compare. For instance, a twoday funeral leave will not be "comparable" to an extended leave for service in the uniformed service. In addition to comparing the duration of the absences, other factors such as the purpose of the leave and the ability of the employee to choose when to take the leave should also be considered.

(c) As a general matter, accrual of vacation leave is considered to be a non-seniority

benefit that must be provided by an employer to an employee on a military leave of absence only if the employer provides that benefit to similarly situated employees on comparable leaves of absence.

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

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

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

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

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

(a) If employment is interrupted by a period of service, the employee must be permitted upon request to use any accrued vacation, annual, or similar leave with pay during the period of service, in order to continue his or her civilian pay. However, the employee is not entitled to use sick leave that accrued with the civilian employer during a period of service in the uniformed services, unless the employer allows employees to use sick leave for any reason, or allows other similarly situated employees on comparable furlough or leave of absence to use accrued paid sick leave. Sick leave is

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usually not comparable to annual or vacation leave; it is generally intended to provide income when the employee or a family member is ill and the employee is unable to work.

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

### **Health Plan Coverage**

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

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

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

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

#### **§ 1002.164 What health plan coverage must the employer provide for the employee under USERRA?**

If the employee has coverage under a health plan in connection with his or

her employment, the plan must permit the employee to elect to continue the coverage for a certain period of time as described below:

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

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

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

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

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

#### **§ 1002.165 How does the employee elect continuing health plan coverage?**

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

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

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

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

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

#### **§ 1002.167 What actions may a plan administrator take if the employee does not elect or pay for continuing coverage in a timely manner?**

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

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

(b) *Notice of service but no election of continuing coverage:* Plan administrators may develop reasonable requirements addressing how continuing coverage may be elected. Where health plans are also covered under the Consolidated Omnibus Budget Reconciliation Act of 1985, 26 U.S.C. 4980B (COBRA), it may be reasonable for a health plan

administrator to adopt COBRA-compliant rules regarding election of continuing coverage, as long as those rules do not conflict with any provision of USERRA or this rule. If an employer provides employment-based health coverage to an employee who leaves employment for uniformed service for a period of service in excess of 30 days after having given advance notice of

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service but without making an election regarding continuing coverage, the plan administrator may cancel the employee's health plan coverage upon the employee's departure from employment for uniformed service, but must reinstate coverage without the imposition of administrative reinstatement costs under the following conditions:

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

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

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

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

(a) If health plan coverage for the employee or a dependent was terminated by reason of service in the uniformed services, that coverage must be reinstated upon reemployment. An exclusion or waiting period may not be

imposed in connection with the reinstatement of coverage upon reemployment, if an exclusion or waiting period would not have been imposed had coverage not been terminated by reason of such service. (b) USERRA permits a health plan to impose an exclusion or waiting period as to illnesses or injuries determined by the Secretary of Veterans Affairs to have been incurred in, or aggravated during, performance of service in the uniformed services. The determination that the employee's illness or injury was incurred in, or aggravated during, the performance of service may only be made by the Secretary of Veterans Affairs or his or her representative. Other coverage, for injuries or illnesses that are not service-related (or for the employee's dependents, if he or she has dependent coverage), must be reinstated subject to paragraph (a) of this section.

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

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

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

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

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

(a) Some employees receive health plan benefits provided pursuant to a multiemployer plan that utilizes a health benefits account system in which an employee accumulates prospective health benefit eligibility, also commonly referred to as "dollar bank," "credit bank," and "hour bank" plans. In such

cases, where an employee with a positive health benefits account balance elects to continue the coverage, the employee may further elect either option below:

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

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

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

**Subpart E—Reemployment Rights and Benefits**

**Prompt Reemployment**

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

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

**§ 1002.181 How is "prompt reemployment" defined?**

"Prompt reemployment" means as soon as practicable under the circumstances of each case. Absent unusual circumstances, reemployment must occur within two weeks of the employee's application for reemployment. For example, prompt reinstatement after a weekend National Guard duty generally means the next regularly scheduled working day. On the other hand, prompt reinstatement

following several years of active duty may require more time, because the employer may have to reassign or give notice to another employee who occupied the returning employee's position.

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**Reemployment Position**

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

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

**§ 1002.192 How is the specific reemployment position determined?**

In all cases, the starting point for determining the proper reemployment position is the escalator position, which is the job position that the employee would have attained if his or her continuous employment had not been interrupted due to uniformed service. Once this position is determined, the employer may have to consider several factors before determining the appropriate reemployment position in any particular case. Such factors may include the employee's length of service, qualifications, and disability, if any. The reemployment position may be either the escalator position; the preservice position; a position comparable to the escalator or pre-service position; or, the nearest approximation to one of these positions.

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

(a) Yes. The reemployment position includes the seniority, status, and rate of pay that an employee would ordinarily have attained in that position given his

or her job history, including prospects for future earnings and advancement. The employer must determine the seniority rights, status, and rate of pay as though the employee had been continuously employed during the period of service. The seniority rights, status, and pay of an employment position include those established (or changed) by a collective bargaining agreement, employer policy, or employment practice. The sources of seniority rights, status, and pay include agreements, policies, and practices in effect at the beginning of the employee's service, and any changes that may have occurred during the period of service. In particular, the employee's status in the reemployment position could include opportunities for advancement, general working conditions, job location, shift assignment, rank, responsibility, and geographical location.

(b) If an opportunity for promotion, or eligibility for promotion, that the employee missed during service is based on a skills test or examination, then the employer should give him or her a reasonable amount of time to adjust to the employment position and then give a skills test or examination. No fixed amount of time for permitting adjustment to reemployment will be deemed reasonable in all cases.

However, in determining a reasonable amount of time to permit an employee to adjust to reemployment before scheduling a makeup test or examination, an employer may take into account a variety of factors, including but not limited to the length of time the returning employee was absent from work, the level of difficulty of the test itself, the typical time necessary to prepare or study for the test, the duties and responsibilities of the reemployment position and the promotional position, and the nature and responsibilities of the service member while serving in the uniformed service. If the employee is successful on the makeup exam and, based on the results of that exam, there is a reasonable certainty that he or she would have been promoted, or made eligible for promotion, during the time that the employee served in the uniformed service, then the promotion or eligibility for promotion must be made effective as of the date it would have occurred had employment not been interrupted by uniformed service

**§ 1002.194 Can the application of the escalator principle result in adverse**

**consequences when the employee is reemployed?**

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

**§ 1002.195 What other factors can determine the reemployment position?**

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

- (a) The length of the employee's most recent period of uniformed service;
- (b) The employee's qualifications; and,
- (c) Whether the employee has a disability incurred or aggravated during uniformed service.

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

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

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

(b) If the employee is not qualified to

perform the duties of the escalator

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

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

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

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

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

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

position. The employee must be qualified to perform the duties of this position. The employer must make reasonable efforts to help the employee become qualified to perform the duties of this position.

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

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

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

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

- (i) The employer's judgment as to which functions are essential;
- (ii) Written job descriptions developed before the hiring process begins;
- (iii) The amount of time on the job spent performing the function;
- (iv) The consequences of not requiring the individual to perform the function;
- (v) The terms of a collective bargaining agreement;
- (vi) The work experience of past incumbents in the job; and/or
- (vii) The current work experience of incumbents in similar jobs.

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

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

If two or more employees are entitled to reemployment in the same position and more than one employee has reported or applied for employment in that position, the employee who first left the position for uniformed service has the first priority on reemployment in that position. The remaining employee (or employees) is entitled to

be reemployed in a position similar to that in which the employee would have been reemployed according to the rules that normally determine a reemployment position, as set out in §§ 1002.196 and 1002.197.

**Seniority Rights and Benefits**

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

The employee is entitled to the seniority and seniority-based rights and benefits that he or she had on the date the uniformed service began, plus any seniority and seniority-based rights and benefits that the employee would have attained if he or she had remained continuously employed. In determining entitlement to seniority and seniority based rights and benefits, the period of absence from employment due to or necessitated by uniformed service is not considered a break in employment. The rights and benefits protected by USERRA upon reemployment include those provided by the employer and those required by statute. For example, under USERRA, a reemployed service member would be eligible for leave under the Family and Medical Leave Act of 1993, 29 U.S.C. 2601-2654 (FMLA), if the number of months and the number of hours of work for which the service member was employed by the civilian employer, together with the number of months and the number of hours of work for which the service member would have been employed by the civilian employer during the period of uniformed service, meet FMLA's eligibility requirements. In the event that a service member is denied FMLA leave for failing to satisfy the FMLA's hours of work requirement due to absence from employment necessitated by uniformed service, the service member may have a cause of action under USERRA but not under the FMLA.

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

No. USERRA does not require the employer to adopt a formal seniority system. USERRA defines seniority as longevity in employment together with any employment benefits that accrue with, or are determined by, longevity in employment. In the absence of a formal seniority system, such as one

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established through collective bargaining, USERRA looks to the

custom and practice in the place of employment to determine the employee's entitlement to any employment benefits that accrue with, or are determined by, longevity in employment.

**§ 1002.212 How does a person know whether a particular right or benefit is a seniority-based right or benefit?**

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

- (a) Whether the right or benefit is a reward for length of service rather than a form of short-term compensation for work performed;
- (b) Whether it is reasonably certain that the employee would have received the right or benefit if he or she had remained continuously employed during the period of service; and,
- (c) Whether it is the employer's actual custom or practice to provide or withhold the right or benefit as a reward for length of service. Provisions of an employment contract or policies in the employee handbook are not controlling if the employer's actual custom or practice is different from what is written in the contract or handbook.

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

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

**Disabled Employees**

**§ 1002.225 Is the employee entitled to any specific reemployment benefits if he or she**

**has a disability that was incurred in, or aggravated during, the period of service?**

Yes. A disabled service member is entitled, to the same extent as any other individual, to the escalator position he or she would have attained but for uniformed service. If the employee has a disability incurred in, or aggravated during, the period of service in the uniformed services, the employer must make reasonable efforts to accommodate that disability and to help the employee become qualified to perform the duties of his or her reemployment position. If the employee is not qualified for reemployment in the escalator position because of a disability after reasonable efforts by the employer to accommodate the disability and to help the employee to become qualified, the employee must be reemployed in a position according to the following priority. The employer must make reasonable efforts to accommodate the employee's disability and to help him or her to become qualified to perform the duties of one of these positions:

- (a) A position that is equivalent in seniority, status, and pay to the escalator position; or,
- (b) A position that is the nearest approximation to the equivalent position, consistent with the circumstances of the employee's case, in terms of seniority, status, and pay. A position that is the nearest approximation to the equivalent position may be a higher or lower position, depending on the circumstances.

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

- (a) USERRA requires that the employee be qualified for the reemployment position regardless of any disability. The employer must make reasonable efforts to help the employee to become qualified to perform the duties of this position. The employer is not required to reemploy the employee on his or her return from service if he or she cannot, after reasonable efforts by the employer, qualify for the appropriate reemployment position.
- (b) "Qualified" has the same meaning here as in § 1002.198.

**Rate of Pay**

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

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

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

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applies in the event a pay reduction occurred in the reemployment position during the period of service. Any pay adjustment must be made effective as of the date it would have occurred had the

employee's employment not been interrupted by uniformed service. (b) If the employee is reemployed in the pre-service position or another position, the employer must compensate him or her at the rate of pay associated with the position in which he or she is reemployed. As with the escalator position, the rate of pay must be determined by taking into account any pay increases, differentials, step increases, merit increases, or periodic increases that the employee would have attained with reasonable certainty had he or she remained continuously employed during the period of service.

**Protection Against Discharge**

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

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

- (a) For 180 days after the employee's date of reemployment if his or her most recent period of uniformed service was more than 30 days but less than 181 days; or,
- (b) For one year after the date of reemployment if the employee's most recent period of uniformed service was more than 180 days.

**§ 1002.248 What constitutes cause for discharge under USERRA?**

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

- (a) In a discharge action based on conduct, the employer bears the burden of proving that it is reasonable to discharge the employee for the conduct in question, and that he or she had notice, which was express or can be fairly implied, that the conduct would constitute cause for discharge.
- (b) If, based on the application of other legitimate nondiscriminatory reasons, the employee's job position is eliminated, or the employee is placed on layoff status, either of these situations would constitute cause for purposes of USERRA. The employer bears the burden of proving that the employee's job would have been eliminated or that he or she would have been laid off.

**Pension Plan Benefits**

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

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

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

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

**§ 1002.260 What pension benefit plans are covered under USERRA?**

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

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

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

With the exception of multiemployer plans, which have separate rules discussed below, the employer is liable to the pension benefit plan to fund any

obligation of the plan to provide benefits that are attributable to the employee's period of service. In the case of a defined contribution plan, once the employee is reemployed, the employer must allocate the amount of its make-up contribution for the employee, if any; his or her make-up employee contributions, if any; and his or her elective deferrals, if any; in the same manner and to the same extent that it allocates the amounts for other employees during the period of service. In the case of a defined benefit plan, the employee's accrued benefit will be increased for the period of service once he or she is reemployed and, if applicable, has repaid any amounts previously paid to him or her from the plan and made any employee contributions that may be required to be made under the plan.

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

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

(b) If the employee is enrolled in a contributory plan he or she is allowed (but not required) to make up his or her missed contributions or elective deferrals. These makeup contributions or elective deferrals must be made during a time period starting with the date of reemployment and continuing for up to three times the length of the

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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 employer.

(c) If the employee's plan is contributory and he or she does not make up his or her contributions or

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

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

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

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

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

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

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

Yes, provided the plan is a defined benefit plan. If the employee received a distribution of all or part of the accrued benefit from a defined benefit plan in connection with his or her service in the uniformed services before he or she became reemployed, he or she must be allowed to repay the withdrawn amounts when he or she is reemployed. The amount the employee must repay includes any interest that would have accrued had the monies not been

withdrawn. The employee must be allowed to repay these amounts during a time period starting with the date of reemployment and continuing for up to three times the length of the employee's immediate past period of uniformed service, with the repayment period not to exceed five years (or such longer time as may be agreed to between the employer and the employee), provided the employee is employed with the post-service employer during this period.

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

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

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

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

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

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

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

(a) The last employer that employed the employee before the period of

service is responsible for making the employer contribution to the multiemployer plan, if the plan sponsor does not provide otherwise. If the last employer is no longer functional, the plan must nevertheless provide coverage to the employee.

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

(c) The employee is entitled to the same employer contribution whether he or she is reemployed by the pre-service employer or by a different employer contributing to the same multiemployer 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 employee's pension benefits,**

**if benefits are based on compensation?**

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

(a) Where the employee's rate of compensation must be calculated to determine pension entitlement, the calculation must be made using the rate of pay that the employee would have

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received but for the period of uniformed service.

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

(2) Where the rate of pay the employee would have received is not reasonably certain and he or she was employed for less than 12 months prior

to the period of uniformed service, the average rate of compensation must be derived from this shorter period of employment that preceded service.

**Subpart F—Compliance Assistance, Enforcement and Remedies**

**Compliance Assistance**

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

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

**Investigation and Referral**

**§ 1002.288 How does an individual file a USERRA complaint?**

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

**§ 1002.289 How will VETS investigate a USERRA complaint?**

(a) In carrying out any investigation,

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

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

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

No. If VETS determines as a result of an investigation that the complaint is meritorious, VETS attempts to resolve the complaint by making reasonable efforts to ensure that any persons or entities named in the complaint comply with the Act.

If VETS' efforts do not resolve the complaint, VETS notifies the person who submitted the complaint of:

(a) The results of the investigation; and,

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

**§ 1002.291 What actions may an individual take if the complaint is not resolved by VETS?**

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

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

(a) If the Attorney General is reasonably satisfied that an individual's complaint is meritorious, meaning that

he or she is entitled to the rights or benefits sought, the Attorney General may appear on his or her behalf and act as the individual's attorney, and initiate a legal action to obtain appropriate relief.

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

**Enforcement of Rights and Benefits**

**Against a State or Private Employer  
§ 1002.303 Is an individual required to file his or her complaint with VETS?**

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

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

Yes. If VETS notifies an individual that it is unable to resolve the complaint, the individual may pursue the claim on his or her own. The individual may choose to be represented by private counsel whether or not the Attorney General decides to represent him or her as to the complaint.

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

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

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

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

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

**§ 1002.306 Is a National Guard civilian technician considered a State or Federal employee for purposes of USERRA?**

A National Guard civilian technician is considered a State employee for USERRA purposes, although he or she is considered a Federal employee for most other purposes.

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

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

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

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

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

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

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

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

No fees or court costs may be charged or taxed against an individual if he or she is claiming rights under the Act. If the individual obtains private counsel for any action or proceeding to enforce a provision of the Act, and prevails, the

court may award reasonable attorney fees, expert witness fees, and other litigation expenses.

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

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

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

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

- (a) The court may require the employer to comply with the provisions of the Act;
- (b) The court may require the employer to compensate the individual for any loss of wages or benefits suffered by reason of the employer's failure to comply with the Act;
- (c) The court may require the employer to pay the individual an amount equal to the amount of lost wages and benefits as liquidated damages, if the court determines that the employer's failure to comply with the Act was willful. A violation shall be considered to be willful if the employer either knew or showed reckless disregard for whether its conduct was prohibited by the Act.
- (d) Any wages, benefits, or liquidated damages awarded under paragraphs (b) and (c) of this section are in addition to, and must not diminish, any of the other rights and benefits provided by USERRA (such as, for example, the right to be employed or reemployed by the employer).

**§ 1002.313 Are there special damages provisions that apply to actions initiated in**

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**the name of the United States?**

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

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

Yes. A court may use its full equity powers, including the issuance of temporary or permanent injunctions, temporary restraining orders, and contempt orders, to vindicate the rights or benefits guaranteed under the Act. Signed at Washington, DC, this 8th day of December, 2005.

**Charles S. Ciccolella,**

*Assistant Secretary for Veterans' Employment and Training.*

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[PART 1002; \(ISSUE CODE\) \[QAR\]](#)

# 38 USC

## 4301-4334

**Uniformed Service Employment Reemployment Rights Act of 1994  
(USERRA)**

**UNIFORMED SERVICES EMPLOYMENT  
AND  
REEMPLOYMENT RIGHTS ACT OF 1994**

USERRA is a federal statute that protects servicemembers' and veterans' civilian employment rights. Among other things, under certain conditions, USERRA requires employers to put individuals back to work in their civilian jobs after military service. USERRA also protects servicemembers from discrimination in the workplace based on their military service or affiliation.

**SUBCHAPTER I--GENERAL**

**§ 4301. Purposes; sense of Congress**

(a) The purposes of this chapter are--

(1) to encourage noncareer service in the uniformed services by eliminating or minimizing the disadvantages to civilian careers and employment which can result from such service;

(2) to minimize the disruption to the lives of persons performing service in the uniformed services as well as to their employers, their fellow employees, and their communities, by providing for the prompt reemployment of such persons upon their completion of such service; and

(3) to prohibit discrimination against persons because of their service in the uniformed services.

(b) It is the sense of Congress that the Federal Government should be a model employer in carrying out the provisions of this chapter.

**§ 4302. Relation to other law and plans or agreements**

(a) Nothing in this chapter shall supersede, nullify or diminish any Federal or State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that establishes a right or benefit that is more beneficial to, or is in addition to, a right or benefit provided for such person in this chapter.

(b) This chapter supersedes any State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by this chapter, including the establishment of additional prerequisites to the exercise of any such right or the receipt of any such benefit.

**§ 4303. Definitions**

For the purposes of this chapter--

(1) The term 'Attorney General' means the Attorney General of the United States or any person designated by the Attorney General to carry out a responsibility of the Attorney General under this chapter.

(2) The term '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 by reason of an employment contract or agreement or an employer policy, plan, or practice and includes rights and benefits under a pension plan, a health plan, an employee stock ownership plan, insurance coverage and awards, bonuses, severance pay, supplemental unemployment benefits, vacations, and the opportunity to select work hours or location of employment.

(3) The term 'employee' means any person employed by an employer. Such term includes any person who is a citizen, national or permanent resident alien of the United States employed in a workplace in a foreign country by an employer that is an entity incorporated or otherwise organized in the United States or that is controlled by an entity organized in the United States, within the meaning of Section 4319(c) of this title.

(4)(A) Except as provided in subparagraphs (B) and (C), the term 'employer' means any person, institution, organization, or other entity that pays salary or wages for work performed or that has control over employment opportunities, including--

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

(ii) the Federal Government;

(iii) a State;

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

(v) a person, institution, organization, or other entity that has denied initial employment in violation of section 4311.

(B) In the case of a National Guard technician employed under section 709 of title 32, the term 'employer' means the adjutant general of the State in which the technician is employed.

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(C) Except as an actual employer of employees, an employee pension benefit plan described in section 3(2) of the Employee Retirement Income Security Act of 1974 (29 U.S.C.

1002(2)) shall be deemed to be an employer only with respect to the obligation to provide benefits described in section 4318.

(5) The term 'Federal executive agency' includes the United States Postal Service, the Postal Rate Commission, any nonappropriated fund instrumentality of the United States, any Executive agency (as that term is defined in section 105 of title 5) other than an agency referred to in section 2302(a)(2)(C)(ii) of title 5, and any military department (as that term is defined in section 102 of title 5) with respect to the civilian employees of that department.

(6) The term 'Federal Government' includes any Federal executive agency, the legislative branch of the United States, and the judicial branch of the United States.

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

(8) The term 'notice' means (with respect to subchapter II) any written or verbal notification of an obligation or intention to perform service in the uniformed services provided to an employer by the employee who will perform such service or by the uniformed service in which such service is to be performed.

(9) The term 'qualified', with respect to an employment position, means having the ability to perform the essential tasks of the position.

(10) The term 'reasonable efforts', in the case of actions required of an employer under this chapter, means actions, including training provided by an employer, that do not place an undue hardship on the employer.

(11) Notwithstanding section 101, the term 'Secretary' means the Secretary of Labor or any person designated by such Secretary to carry out an activity under this chapter.

(12) The term 'seniority' means longevity in employment together with any benefits of employment which accrue with, or are determined by, longevity in employment.

(13) The term 'service in the uniformed services' means the performance of duty on a voluntary or involuntary basis in a uniformed service under competent authority and includes: active duty, active duty for training, initial active duty for training, inactive duty training, full-time National Guard, a period for which a person is absent from a position of employment for the purpose of an examination to determine the fitness of the employment for the purpose of performing funeral honors duty as authorized by section 12503 of title 10 or section 115 of title 32.

(14) The term 'State' means each of the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, and other territories of the United States (including the agencies and political subdivisions thereof).

(15) The term 'undue hardship', in the case of actions taken by an employer, means actions requiring significant difficulty or expense, when considered in light of--

(A) the nature and cost of the action needed under this chapter;

(B) 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;

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

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

(16) The term '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.

#### **§ 4304. Character of service**

A person's entitlement to the benefits of this chapter by reason of the service of such person in one of the uniformed services terminates upon the occurrence of any of the following events:

(1) A separation of such person from such uniformed service with a dishonorable or bad conduct discharge.

(2) A separation of such person from such uniformed service under other than honorable conditions, as characterized pursuant to regulations prescribed by the Secretary concerned.

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(3) A dismissal of such person permitted under section 1161(a) of title 10.

(4) A dropping of such person from the rolls pursuant to section 1161(b) of title 10.

### **SUBCHAPTER II--EMPLOYMENT AND REEMPLOYMENT RIGHTS AND LIMITATIONS; PROHIBITIONS**

#### **§ 4311. Discrimination against persons who serve in the uniformed services and acts of reprisal prohibited**

(a) 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.

(b) An employer may not discriminate in employment against or take any adverse employment action against any person because such person (1) has taken an action to enforce a protection afforded any person under this chapter, (2) has testified or otherwise made a statement in or in connection with any proceeding under this chapter, (3) has assisted or otherwise participated in an investigation under this chapter, or (4) has exercised a right provided for in this chapter. The prohibition in this subsection shall apply with respect to a person regardless of whether that person has performed service in the uniformed services.

(c) An employer shall be considered to have engaged in actions prohibited-

(1) under subsection (a), if the person's membership, application for membership, service, application for service, or obligation for service in the uniformed services is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such membership, application for membership, service, application for service, or obligation for service; or

(2) under subsection (b), if the person's (A) action to enforce a protection afforded any person under this chapter, (B) testimony or making of a statement in or in connection with any proceeding under this chapter, (C) assistance or other participation in an investigation under this chapter, or (D) exercise of a right provided for in this chapter, is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such person's enforcement action, testimony, statement, assistance, participation, or exercise of a right.

(d) The prohibitions in subsections (a) and (b) shall apply to any position of employment, including a position that is described in section 4312(d)(1)(C) of this title.

**§ 4312. Reemployment rights of persons who serve in the uniformed services**

(a) Subject to subsections (b), (c), and (d) and to section 4304, any person whose absence from a position of employment is necessitated by reason of service in the uniformed services shall be entitled to the reemployment rights and benefits and other employment benefits of this chapter if--

(1) the person (or an appropriate officer of the uniformed service in which such service is performed) has given advance written or verbal notice of such service to such person's employer;

(2) the cumulative length of the absence and of all previous absences from a position of employment with that employer by reason of service in the uniformed services does not exceed five years; and

(3) except as provided in subsection (f), the person reports to, or submits an application for reemployment to, such employer in accordance with the provisions of subsection (e).

(b) No notice is required under subsection (a)(1) if the giving of such notice is precluded by military necessity or, under all of the relevant circumstances, the giving of such notice is otherwise impossible or unreasonable. A determination of military necessity for the purposes of this subsection shall be made pursuant to regulations prescribed by the Secretary of Defense and shall not be subject to judicial review.

(c) Subsection (a) shall apply to a person who is absent from a position of employment by reason of service in the uniformed services if such person's cumulative period of service in the uniformed services, with respect to the employer relationship for which a person seeks reemployment, does not exceed five years, except that any such period of service shall not include any service--

(1) that is required, beyond five years, to complete an initial period of obligated service;

(2) during which such person was unable to obtain orders releasing such person from a period of service in the uniformed services before the expiration of such five-year period and such inability was through no fault of such person;

(3) performed as required pursuant to section 10147 of title 10, under section 502(a) or 503 of title 32, or to fulfill additional training requirements determined and certified in writing by the Secretary concerned, to be necessary for professional development, or for completion of skill training or retraining; or

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(4) performed by a member of a uniformed service who is--

(A) ordered to or retained on active duty under section 688, 12301(a), 12301(g), 12302, 12304, or 12305 of title 10 or under section 331, 332, 359, 360, 367, or 712 of title 14;

(B) 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;

(C) ordered to active duty (other than for training) in support, as determined by the Secretary concerned, of an operational mission for which personnel have been ordered to active duty under section 12304 of title 10;

(D) ordered to active duty in support, as determined by the Secretary concerned, of a critical mission or requirement of the uniformed services; or

(E) called into Federal service as a member of the National Guard under chapter 15 of title 10 or under section 12406 of title 10.

(d)(1) An employer is not required to reemploy a person under this chapter if--

(A) the employer's circumstances have so changed as to make such reemployment impossible or unreasonable;

(B) in the case of a person entitled to reemployment under subsection (a)(3), (a)(4), or (b)(2)(B) of section 4313, such employment would impose an undue hardship on the employer;

or

(C) the employment from which the person leaves to serve in the uniformed services is for a brief, nonrecurrent period and there is no reasonable expectation that such employment will continue indefinitely or for a significant period.

(2) In any proceeding involving an issue of whether--

(A) any reemployment referred to in paragraph (1) is impossible or unreasonable because of a change in an employer's circumstances,

(B) any accommodation, training, or effort referred to in subsection (a)(3), (a)(4), or (b)(2)(B) of section 4313 would impose an undue hardship on the employer, or

(C) the employment referred to in paragraph (1)(C) is for a brief, nonrecurrent period and there is no reasonable expectation that such employment will continue indefinitely or for a significant period, the employer shall have the burden of proving the impossibility or unreasonableness, undue hardship, or the brief or nonrecurrent nature of the employment without a reasonable expectation of continuing indefinitely or for a significant period.

(e)(1) Subject to paragraph (2), a person referred to in subsection (a) shall, upon the completion of a period of service in the uniformed services, notify the employer referred to in such subsection of the person's intent to return to a position of employment with such employer as follows:

(A) In the case of a person whose period of service in the uniformed services was less than 31 days, by reporting to the employer--

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

(ii) as soon as possible after the expiration of the eight-hour period referred to in clause (I), if reporting within the period referred to in such clause is impossible or unreasonable through no fault of the person.

(B) In the case of a person who is absent from a position of employment for a period of any length for the purposes of an examination to determine the person's fitness to perform service in the uniformed services, by reporting in the manner and time referred to in subparagraph (A).

(C) In the case of a person whose period of service in the uniformed services was for more than 30 days but less than 181 days, by submitting an application for reemployment with the employer not later than 14 days after the completion of the period of service or if submitting such application within such period is impossible or unreasonable through no fault of the person, the next first full calendar day when submission of such application becomes possible.

(D) In the case of a person whose period of service in the uniformed services was for more than 180 days, by submitting an application for reemployment with the employer not later than 90 days after the completion of the period of service.

(2)(A) A person who is hospitalized for, or convalescing from, an illness or injury incurred in, or aggravated during, the performance of service in the uniformed services shall, at the end of the period that is necessary for the person to recover from such illness or injury, report to the person's employer (in the case of a person described in subparagraph (A) or (B) of paragraph (1)) or submit an application for reemployment with such employer (in the case of a person described in subparagraph (C) or (D) of such paragraph). Except as provided in subparagraph (B), such period of recovery may not exceed two years.

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(B) Such two-year period shall be extended by the minimum time required to accommodate the circumstances beyond such person's control which make reporting within the period specified in subparagraph (A) impossible or unreasonable.

(3) A person who fails to report or apply for employment or reemployment within the appropriate period specified in this subsection shall not automatically forfeit such person's entitlement to the rights and benefits referred to in subsection (a) but shall be subject to the conduct rules, established policy, and general practices of the employer pertaining to explanations and discipline with respect to absence from scheduled work.

(f)(1) A person who submits an application for reemployment in accordance with subparagraph (C) or (D) of subsection (e)(1) or subsection (e)(2) shall provide to the person's employer (upon the request of such employer) documentation to establish that--

(A) the person's application is timely;

(B) the person has not exceeded the service limitations set forth in subsection (a)(2) (except as permitted under subsection (c)); and

(C) the person's entitlement to the benefits under this chapter has not been terminated pursuant to section 4304.

(2) Documentation of any matter referred to in paragraph (1) that satisfies regulations prescribed by the Secretary shall satisfy the documentation requirements in such paragraph.

(3)(A) Except as provided in subparagraph (B), the failure of a person to provide documentation that satisfies regulations prescribed pursuant to paragraph (2) shall not be a basis for denying reemployment in accordance with the provisions of this chapter if the failure occurs because such documentation does not exist or is not readily available at the time of the request of the employer. If, after such reemployment, documentation becomes available that establishes that such person does not meet one or more of the requirements referred to in subparagraphs (A), (B), and (C) of paragraph (1), the employer of such person may terminate the employment of the person and the provision of any rights or benefits afforded the person under this chapter.

(B) An employer who reemploys a person absent from a position of employment for more than 90 days may require that the person provide the employer with the documentation referred to in subparagraph (A) before beginning to treat the person as not having incurred a break in service for pension purposes under section 4318(a)(2)(A).

(4) An employer may not delay or attempt to defeat a reemployment obligation by demanding documentation that does not then exist or is not then readily available.

(g) The right of a person to reemployment under this section shall not entitle such person to retention, preference, or displacement rights over any person with a superior claim under the provisions of title 5, United States Code, relating to veterans and other preference eligibles.

(h) In any determination of a person's entitlement to protection under this chapter, the timing, frequency, and duration of the person's training or service, or the nature of such training or service (including voluntary service) in the uniformed services, shall not be a basis for denying protection of this chapter if the service does not exceed the limitations set forth in subsection (c) and the notice requirements established in subsection (a)(1) and the notification requirements established in subsection (e) are met.

### **§ 4313. Reemployment positions**

(a) Subject to subsection (b) (in the case of any employee) and sections 4314 and 4315 (in the case of an employee of the Federal Government), a person entitled to reemployment under section 4312, upon completion of a period of service in the uniformed services, shall be promptly reemployed in a position of employment in accordance with the following order of priority:

(1) Except as provided in paragraphs (3) and (4), in the case of a person whose period of service in the uniformed services was for less than 91 days--

(A) in the position of employment in which the person would have been employed if the continuous employment of such person with the employer had not been interrupted by such service, the duties of which the person is qualified to perform; or

(B) in the position of employment in which the person was employed on the date of the commencement of the service in the uniformed services, only if the person is not qualified to perform the duties of the position referred to in subparagraph (A) after reasonable efforts by the employer to qualify the person.

(2) Except as provided in paragraphs (3) and (4), in the case of a person whose period of service in the uniformed services was for more than 90 days--

(A) in the position of employment in which the person would have been employed if the continuous employment of such person with the employer had not been interrupted by such service, or a position of like seniority, status and pay, the duties of which the person is qualified to perform; or

(B) in the position of employment in which the person was employed on the date of the commencement of the service in the uniformed services, or a position of like seniority, status and pay, the duties of which the person is qualified to perform, only if

the person is not qualified to perform the duties of a position referred to in subparagraph (A) after reasonable efforts by the employer to qualify the person.

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(3) In the case of a person who has a disability incurred in, or aggravated during, such service, and who (after reasonable efforts by the employer to accommodate the disability) is not qualified due to such disability to be employed in the position of employment in which the person would have been employed if the continuous employment of such person with the employer had not been interrupted by such service--

(A) in any other position which is equivalent in seniority, status, and pay, the duties of which the person is qualified to perform or would become qualified to perform with reasonable efforts by the employer; or

(B) if not employed under subparagraph (A), in a position which is the nearest approximation to a position referred to in subparagraph (A) in terms of seniority, status, and pay consistent with circumstances of such person's case.

(4) In the case of a person who (A) is not qualified to be employed in (I) the position of employment in which the person would have been employed if the continuous employment of such person with the employer had not been interrupted by such service, or (ii) in the position of employment in which such person was employed on the date of the commencement of the service in the uniform services for any reason (other than disability incurred in, or aggravated during, service in the uniformed services), and (B) cannot become qualified with reasonable efforts by the employer, in any other position which is the nearest approximation to a position referred to first in clause (A)(I) and then in clause (A)(ii) which such person is qualified to perform, with full seniority.

(b)(1) If two or more persons are entitled to reemployment under section 4312 in the same position of employment and more than one of them has reported for such reemployment, the person who left the position first shall have the prior right to reemployment in that position.

(2) Any person entitled to reemployment under section 4312 who is not reemployed in a position of employment by reason of paragraph (1) shall be entitled to be reemployed as follows:

(A) Except as provided in subparagraph (B), in any other position of employment referred to in subsection (a)(1) or (a)(2), as the case may be (in the order of priority set out in the applicable subsection), that provides a similar status and pay to a position of employment referred to in paragraph (1) of this subsection, consistent with the circumstances of such person's case, with full seniority.

(B) In the case of a person who has a disability incurred in, or aggravated during, a period of service in the uniformed services that requires reasonable efforts by the employer for the person to be able to perform the duties of the position of employment, in any other position referred to in subsection (a)(3) (in the order of priority set out in that subsection) that provides a similar status and pay to a position referred to in paragraph (1) of this subsection, consistent with circumstances of such person's case, with full seniority.

**§ 4314. Reemployment by the Federal Government**

(a) Except as provided in subsections (b), (c), and (d), if a person is entitled to reemployment by the Federal Government under section 4312, such person shall be reemployed in a position of employment as described in section 4313.

(b)(1) If the Director of the Office of Personnel Management makes a determination described in paragraph (2) with respect to a person who was employed by a Federal executive agency at the time the person entered the service from which the person seeks reemployment under this section, the Director shall--

(A) identify a position of like seniority, status, and pay at another Federal executive agency that satisfies the requirements of section 4313 and for which the person is qualified; and

(B) ensure that the person is offered such position.

(2) The Director shall carry out the duties referred to in subparagraphs (A) and (B) of paragraph (1) if the Director determines that--

(A) the Federal executive agency that employed the person referred to in such paragraph no longer exists and the functions of such agency have not been transferred to another Federal executive agency; or

(B) it is impossible or unreasonable for the agency to reemploy the person. (c) If the employer of a person described in subsection (a) was, at the time such person entered the service from which such person seeks reemployment under this section, a part of the judicial branch or the legislative branch of the Federal Government, and such employer determines that it is impossible or unreasonable for such employer to reemploy such person, such person shall, upon application to the Director of the Office of Personnel Management, be ensured an offer of employment in an alternative position in a Federal executive agency on the basis described in subsection (b).

(d) If the adjutant general of a State determines that it is impossible or unreasonable to reemploy a person who was a National Guard technician employed under section 709 of title 32, such person shall, upon application to the Director of the Office of Personnel Management, be ensured an offer of employment in an alternative position in a Federal executive agency on the basis described in subsection (b).

#### **§ 4315. Reemployment by certain Federal agencies**

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(a) The head of each agency referred to in section 2302(a)(2)(C)(ii) of title 5 shall prescribe procedures for ensuring that the rights under this chapter apply to the employees of such agency.

(b) In prescribing procedures under subsection (a), the head of an agency referred to in that subsection shall ensure, to the maximum extent practicable, that the procedures of the agency for reemploying persons who serve in the uniformed services provide for the reemployment of such persons in the agency in a manner similar to the manner of reemployment described in section 4313.

(c)(1) The procedures prescribed under subsection (a) shall designate an official at the agency who shall determine whether or not the reemployment of a person referred to in subsection (b) by the agency is impossible or unreasonable.

(2) Upon making a determination that the reemployment by the agency of a person referred to in subsection (b) is impossible or unreasonable, the official referred to in paragraph (1) shall notify the person and the Director of the Office of Personnel Management of such determination.

(3) A determination pursuant to this subsection shall not be subject to judicial review.

(4) The head of each agency referred to in subsection (a) shall submit to the Select Committee on Intelligence and the Committee on Veterans' Affairs of the Senate and the Permanent Select Committee on Intelligence and the Committee on Veterans' Affairs of the House of Representatives on an annual basis a report on the number of persons whose reemployment with the agency was determined under this subsection to be impossible or unreasonable during the year preceding the report, including the reason for each such determination.

(d)(1) Except as provided in this section, nothing in this section, section 4313, or section 4325 shall be construed to exempt any agency referred to in subsection (a) from compliance with any other substantive provision of this chapter.

(2) This section may not be construed--

(A) as prohibiting an employee of an agency referred to in subsection (a) from seeking information from the Secretary regarding assistance in seeking reemployment from the agency under this chapter, alternative employment in the Federal Government under this chapter, or information relating to the rights and obligations of employee and Federal agencies under this chapter; or

(B) as prohibiting such an agency from voluntarily cooperating with or seeking assistance in or of clarification from the Secretary or the Director of the Office of Personnel Management of any matter arising under this chapter.

(e) The Director of the Office of Personnel Management shall ensure the offer of employment to a person in a position in a Federal executive agency on the basis described in subsection (b) if--

(1) the person was an employee of an agency referred to in section 2302(a)(2)(C)(ii) of title 5 at the time the person entered the service from which the person seeks reemployment under this section;

(2) the appropriate officer of the agency determines under subsection (c) that reemployment of the person by the agency is impossible or unreasonable; and

(3) the person submits an application to the Director for an offer of employment under this subsection.

**§ 4316. Rights, benefits, and obligations of persons absent from employment for service in a uniformed service**

(a) A person who is reemployed under this chapter is entitled to the seniority and other rights and benefits determined by seniority that the person had on the date of the commencement of service in the uniformed services plus the additional seniority and rights and benefits that such person would have attained if the person had remained continuously employed.

(b)(1) Subject to paragraphs (2) through (6), a person who is absent from a position of employment by reason of service in the uniformed services shall be--

(A) deemed to be on furlough or leave of absence while performing such service; and

(B) entitled to such other rights and benefits not determined by seniority as are generally provided by the employer of the person to employees having similar seniority, status, and pay who are on furlough or leave of absence under a contract, agreement, policy, practice, or plan in effect at the commencement of such service or established while such person performs such service.

(2)(A) Subject to subparagraph (B), a person who--

(I) is absent from a position of employment by reason of service in the uniformed services, and

(ii) knowingly provides written notice of intent not to return to a position of employment after service in the uniformed service, is not entitled to rights and benefits under paragraph (1)(B).

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(B) For the purposes of subparagraph (A), the employer shall have the burden of proving that a person knowingly provided clear written notice of intent not to return to a position of employment after service in the uniformed service and, in doing so, was aware of the specific rights and benefits to be lost under subparagraph (A).

(3) A person deemed to be on furlough or leave of absence under this subsection while serving in the uniformed services shall not be entitled under this subsection to any benefits to which the person would not otherwise be entitled if the person had remained continuously employed.

(4) Such person may be required to pay the employee cost, if any, of any funded benefit continued pursuant to paragraph (1) to the extent other employees on furlough or leave of absence are so required.

(5) The entitlement of a person to coverage under a health plan is provided for under section 4317.

(6) The entitlement of a person to a right or benefit under an employee pension benefit plan is provided for under section 4318.

(c) A person who is reemployed by an employer under this chapter shall not be discharged from such employment, except for cause--

(1) within one year after the date of such reemployment, if the person's period of service before the reemployment was more than 180 days; or

(2) within 180 days after the date of such reemployment, if the person's period of service before the reemployment was more than 30 days but less than 181 days.

(d) Any person whose employment with an employer is interrupted by a period of service in the uniformed services shall be permitted, upon request of that person, to use during such period of service any vacation, annual, or similar leave with pay accrued by the person before the commencement of such service. No employer may require any such person to use vacation, annual, or similar leave during such period of service.

(e)(1) An employer shall grant an employee who is a member of a reserve component an authorized leave of absence from a position of employment to allow that employee to perform funeral honors duty as authorized by section 12503 of title 10 or section 115 of title 32.

(e)(2) For the purposes of section 4312(e)(1) of this title, an employee who takes an authorized leave of absence under paragraph (1) is deemed to have notified the employer of the employee's intent to return to such position of employment.

**§ 4317. Health plans**

(a)(1) In any case in which a person (or the person's dependents) has coverage under a health plan in connection with the person's position of employment, including a group health plan (as defined in section 607(1) of the Employee Retirement Income Security Act of 1974), and such person is absent from such position of employment by reason of service in the uniformed services, or such person becomes eligible for medical and dental care under chapter 55 of title 10 by reason of subsection (d) of section 1074 of that title, the plan shall provide that the person may elect to continue such coverage as provided in this subsection. The maximum period of coverage of a person and the person's dependents under such an election shall be the lesser of--

(A) the 24-month period beginning on the date on which the person's absence begins; or

(B) the day after the date on which the person fails to apply for or return to a position of employment, as determined under section 4312(e).

(2) A person who elects to continue health-plan coverage under this paragraph may be required to pay not more than 102 percent of the full premium under the plan (determined in the same manner as the applicable premium under section 4980B(f)(4) of the Internal Revenue Code of 1986) associated with such coverage for the employer's other employees, except that in the case of a person who performs service in the uniformed services for less than 31 days, such person may not be required to pay more than the employee share, if any, for such coverage.

(3) In the case of a health plan that is a multiemployer plan, as defined in section 3(37) of the Employee Retirement Income Security Act of 1974, any liability under the plan for employer contributions and benefits arising under this paragraph shall be allocated--

(A) by the plan in such manner as the plan sponsor shall provide; or

(B) if the sponsor does not provide--

(i) to the last employer employing the person before the period served by the person in the uniformed services, or

(ii) if such last employer is no longer functional, to the plan.

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(b)(1) Except as provided in paragraph (2), in the case of a person whose coverage under a health plan was terminated by reason of service in the uniformed services, or by reason of the person's having become eligible for medical and dental care under chapter 55 of title 10 by reason of subsection (d) of section 1074 of that title, an exclusion or waiting period may not be imposed in connection with the reinstatement of such coverage upon reemployment under this chapter if an exclusion or waiting period would not have been imposed under a health plan had coverage of such person by such plan not been terminated as a result of such service or eligibility. This paragraph applies to the person who is reemployed and to any individual who is covered by such plan by reason of the reinstatement of the coverage of such person.

(2) Paragraph (1) shall not apply to the coverage of any illness or injury determined by the Secretary of Veterans Affairs to have been incurred in, or aggravated during, performance of service in the uniformed services.

(3) In the case of a person whose coverage under a health plan is terminated by reason of the person having become eligible for medical and dental care under chapter 55 of title 10 by reason of subsection (d) of section 1074 of that title but who subsequently does not commence a period of active duty under the order to active duty that established such eligibility because the order is canceled before such active duty commences, the provisions of paragraph (1) relating to any exclusion or waiting period in connection with the reinstatement of coverage under a health plan shall apply to

such person's continued employment, upon the termination of such eligibility for medical and dental care under chapter 55 of title 10 that is incident to the cancellation of such order, in the same manner as if the person had become reemployed upon such termination of eligibility.

**Sec. 4318. Employee pension benefit plans**

(a)(1)(A) Except as provided in subparagraph (B), in the case of a right provided pursuant to an employee pension benefit plan (including those described in sections 3(2) and 3(33) of the Employee Retirement Income Security Act of 1974) or a right provided under any Federal or State law governing pension benefits for governmental employees, the right to pension benefits of a person reemployed under this chapter shall be determined under this section.

(B) In the case of benefits under the Thrift Savings Plan, the rights of a person reemployed under this chapter shall be those rights provided in section 8432b of title 5. The first sentence of this subparagraph shall not be construed to affect any other right or benefit under this chapter.

(2)(A) A person reemployed under this chapter shall be treated as not having incurred a break in service with the employer or employers maintaining the plan by reason of such person's period or periods of service in the uniformed services.

(B) Each period served by a person in the uniformed services shall, upon reemployment under this chapter, be deemed to constitute service with the employer or employers maintaining the plan for the purpose of determining the nonforfeatability of the person's accrued benefits and for the purpose of determining the accrual of benefits under the plan.

(b)(1) An employer reemploying a person under this chapter shall, with respect to a period of service described in subsection (a)(2)(B), be liable to an employee pension benefit plan for funding any obligation of the plan to provide the benefits described in subsection (a)(2) and shall allocate the amount of any employer contribution for the person in the same manner and to the same extent the allocation occurs for other employees during the period of service. For purposes of determining the amount of such liability and any obligation of the plan, earnings and forfeitures shall not be included. For purposes of determining the amount of such liability and for purposes of section 515 of the Employee Retirement Income Security Act of 1974 or any similar Federal or State law governing pension benefits for governmental employees, service in the uniformed services that is deemed under subsection (a) to be service with the employer shall be deemed to be service with the employer under the terms of the plan or any applicable collective bargaining agreement. In the case of a multiemployer plan, as defined in section 3(37) of the Employee Retirement Income Security Act of 1974, any liability of the plan described in this paragraph shall be allocated--

(A) by the plan in such manner as the sponsor maintaining the plan shall provide; or

(B) if the sponsor does not provide--

(I) to the last employer employing the person before the period served by the person in the uniformed services, or

(ii) if such last employer is no longer functional, to the plan.

(2) A person reemployed under this chapter shall be entitled to accrued benefits pursuant to subsection (a) that are contingent on the making of, or derived from, employee contributions or elective deferrals (as defined in section 402(g)(3) of the Internal Revenue Code of 1986) only to the extent the person makes payment to the plan with respect to such contributions or deferrals. No such payment may exceed the amount the person would have been permitted or required to contribute had the person remained continuously employed by the employer throughout the period of service described in subsection (a)(2)(B). Any payment to the plan described in this paragraph shall be made during the period beginning with the date of reemployment and whose duration is three times the period of the person's services in the uniformed services, such payment period not to exceed five years.

(3) For purposes of computing an employer's liability under paragraph (1) or the employee's contributions under paragraph (2), the employee's compensation during the period of service described in subsection (a)(2)(B) shall be computed—

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(A) at the rate the employee would have received but for the period of service described in subsection (a)(2)(B), or

(B) in the case that the determination of such rate is not reasonably certain, on the basis of the employee's average rate of compensation during the 12-month period immediately preceding such period (or, if shorter, the period of employment immediately preceding such period).

(c) Any employer who reemploys a person under this chapter and who is an employer contributing to a multiemployer plan, as defined in section 3(37) of the Employee Retirement Income Security Act of 1974, under which benefits are or may be payable to such person by reason of the obligations set forth in this chapter, shall, within 30 days after the date of such reemployment, provide information, in writing, of such reemployment to the administrator of such plan.

**Sec. 4319. Employment and reemployment rights in foreign countries.**

(a) LIABILITY OF CONTROLLING UNITED STATES EMPLOYER OF FOREIGN ENTITY- If an employer controls an entity that is incorporated or otherwise organized in a foreign country, any denial of employment, reemployment, or benefit by such entity shall be presumed to be by such employer.

(b) INAPPLICABILITY TO FOREIGN EMPLOYER- This subchapter does not apply to foreign operations of an employer that is a foreign person not controlled by or United States employer.

(c) DETERMINATION OF CONTROLLING EMPLOYER- For the purpose of this section, the determination of whether an employer controls an entity shall be based upon the interrelations of operations, common management, centralized control of labor relations, and common ownership or financial control of the employer and the entity.

(d) EXEMPTION- Notwithstanding any other provision of this subchapter, an employer, or an entity controlled by an employer, shall be exempt from compliance with any of section 4311 through 4318 of this title with respect to an employee in a workplace in a foreign country, if compliance with that section would cause such employer, or such entity controlled by an employer, to violate the law of the foreign country in which the workplace is located.

**SUBCHAPTER III--PROCEDURES FOR ASSISTANCE, ENFORCEMENT, AND INVESTIGATION**

**§ 4321. Assistance in obtaining reemployment or other employment rights or benefits**

The Secretary (through the Veterans' Employment and Training Service) shall provide assistance to any person with respect to the employment and reemployment rights and benefits to which such person is entitled under this chapter. In providing such assistance, the Secretary may request the assistance of existing Federal and State agencies engaged in similar or related activities and utilize the assistance of volunteers.

**§ 4322. Enforcement of employment or reemployment rights**

(a) A person who claims that--

(1) such person is entitled under this chapter to employment or reemployment rights or benefits with respect to employment by an employer; and

(2)(A) such employer has failed or refused, or is about to fail or refuse, to comply with the provisions of this chapter; or

(B) in the case that the employer is a Federal executive agency, such employer or the Office of Personnel Management has failed or refused, or is about to fail or refuse, to comply with the provisions of this chapter, may file a complaint with the Secretary in accordance with subsection (b), and the Secretary shall investigate such complaint.

(b) Such complaint shall be in writing, be in such form as the Secretary may prescribe, include the name and address of the employer against whom the complaint is filed, and contain a summary of the allegations that form the basis for the complaint.

(c) The Secretary shall, upon request, provide technical assistance to a potential claimant with respect to a complaint under this subsection, and when appropriate, to such claimant's employer.

(d) The Secretary shall investigate each complaint submitted pursuant to subsection (a). If the Secretary determines as a result of the investigation that the action alleged in such complaint occurred, the Secretary shall attempt to resolve the complaint by making reasonable efforts to ensure that the person or entity named in the complaint complies with the provisions of this chapter.

(e) If the efforts of the Secretary with respect to any complaint filed under subsection (a) do not resolve the complaint, the Secretary shall notify the person who submitted the complaint of--

(1) the results of the Secretary's investigation; and

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(2) the complainant's entitlement to proceed under the enforcement of rights provisions provided under section 4323 (in the case of a person submitting a complaint against a State or private employer) or section 4324 (in the case of a person submitting a complaint against a Federal executive agency or the Office of Personnel Management).

(f) This subchapter does not apply to any action relating to benefits to be provided under the Thrift Savings Plan under title 5.

**§ 4323. Enforcement of rights with respect to a State or private employer**

(a) ACTION FOR RELIEF-(1) A person who receives from the Secretary a notification pursuant to section 4322(e) of this title of an unsuccessful effort to resolve a complaint relating to a State (as an employer) or a private employer may request that the Secretary refer the complaint to the Attorney General. If the Attorney General is responsibly satisfied that the person on whose behalf the complaint is referred is entitled to the rights or benefits sought, the Attorney General may appear on behalf of, and act as attorney for, the person on whose behalf the complaint is submitted and commence an action for relief under this chapter for such person. In the case of such an action against a State (as an employer), the action shall be brought in the name of the United States as the plaintiff in the action.

(2) A person may commence an action for relief with respect to a complaint against a State (as an employer) or a private employer if the person--

(A) has chosen not to apply to the Secretary for assistance under section 4322(a) of this title;

(B) has chosen not to request that the Secretary refer the complaint to the Attorney General under paragraph (1); or

(C) has been refused representation by the Attorney General with respect to the complaint under such paragraph .

(b) JURISDICTION-(1) In the case of an action against a State (as an employer) or a private employer commenced by the United States, the district courts of the United States shall have jurisdiction over the action.

(2) In the case of action against a State (as an employer) by a person, the action may be brought in a State court of competent jurisdiction in accordance with the laws of the State.

(3) In the case of an action against a private employer by a person, the district courts of the United States shall have jurisdiction of the action.

(c) VENUE-(1) In the case of an action by the United States against a State (as an employer), the action may proceed in the United States district court for any district in which the State exercises any authority or carries out any function.

(2) In the case of an action against a private employer, the action may proceed in the United States district court for any district in which the private employer of the person maintains a place of business.

(d) REMEDIES-(1) In any action under this section, the court may award relief as follows:

(A) The court may require the employer to comply with the provisions of this chapter.

(B) The court may require the employer to compensate the person for any loss of wages or benefits suffered by reason of such employer's failure to comply with the provisions of this chapter.

(C) The court may require the employer to pay the person an amount equal to the amount referred to in subparagraph (B) as liquidated damages, if the court determines that the employer's failure to comply with the provisions of this chapter was willful.

(2)(A) Any compensation awarded under subparagraph (B) or (C) of paragraph (1) shall be in addition to, and shall not diminish, any of the other rights and benefits provided for under this chapter.

(B) In the case of an action commenced in the name of the United States for which the relief includes compensation awarded under subparagraph (B) or (C) of paragraph (1), such compensation shall be held in a special deposit account and shall be paid, on order of the Attorney General, directly to the person. If the compensation is not paid to the person because of inability to do so within a period of 3 years, the compensation shall be converted into the Treasury of the United States as miscellaneous receipts.

(3) A State shall be subject to the same remedies, including prejudgment interest, as may be imposed upon any private employer under this section.

(e) EQUITY POWERS- The court may use its full equity powers, including temporary or permanent injunctions, temporary restraining orders, and contempt orders, to vindicate fully the rights of benefits of persons under this chapter.

(f) STANDING- An action under this chapter may be initiated only by a person claiming rights or benefits under this chapter under subsection (a) or by the United States under subsection (a)(1).

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(g) RESPONDENT- In any action under this chapter, only an employer or a potential employer, as the case may be, shall be a necessary party respondent.

(h) FEES, COURT COSTS- (1) No fees or court costs may be charged or taxed against any person claiming rights under this chapter.

(2) In any action or proceeding to enforce a provision of this chapter by a person under subsection (a)(2) who obtained private counsel for such action or proceeding, the court may award any such person who prevails in such action or proceeding reasonable attorney fees, expert witness fees, and other litigation expenses.

(i) INAPPLICABILITY OF STATE STATUTE OF LIMITATIONS- No State statute of limitations shall apply to any proceeding under this chapter.

(j) DEFINITION- In this section, the term 'private employer' includes a political subdivision of a State.'

#### **§ 4324. Enforcement of rights with respect to Federal executive agencies**

(a)(1) A person who receives from the Secretary a notification pursuant to section 4322(e) may request that the Secretary refer the complaint for litigation before the Merit Systems Protection Board. The Secretary shall refer the complaint to the Office of Special Counsel established by section 1211 of title 5.

(2)(A) If the Special Counsel is reasonably satisfied that the person on whose behalf a complaint is referred under paragraph (1) is entitled to the rights or benefits sought, the Special Counsel (upon the request of the person submitting the complaint) may appear on behalf of, and act as attorney for, the person and initiate an action regarding such complaint before the Merit Systems Protection Board.

(B) If the Special Counsel declines to initiate an action and represent a person before the Merit Systems Protection Board under subparagraph (A), the Special Counsel shall notify such person of that decision.

(b) A person may submit a complaint against a Federal executive agency or the Office of Personnel Management under this subchapter directly to the Merit Systems Protection Board if that person--

(1) has chosen not to apply to the Secretary for assistance under section 4322(a);

(2) has received a notification from the Secretary under section 4322(e);

(3) has chosen not to be represented before the Board by the Special Counsel pursuant to subsection (a)(2)(A); or

(4) has received a notification of a decision from the Special Counsel under subsection (a)(2)(B).

(c)(1) The Merit Systems Protection Board shall adjudicate any complaint brought before the Board pursuant to subsection (a)(2)(A) or (b), without regard as to whether the complaint accrued before, on, or after October 13, 1994. A person who seeks a hearing or adjudication by submitting such a complaint under this paragraph may be represented at such hearing or adjudication in accordance with the rules of the Board.

(2) If the Board determines that a Federal executive agency or the Office of Personnel Management has not complied with the provisions of this chapter relating to the employment or reemployment of a person by the agency, the Board shall enter an order requiring the agency or Office to comply with such provisions and to compensate such person for any loss of wages or benefits suffered by such person by reason of such lack of compliance.

(3) Any compensation received by a person pursuant to an order under paragraph (2) shall be in addition to any other right or benefit provided for by this chapter and shall not diminish any such right or benefit.

(4) If the Board determines as a result of a hearing or adjudication conducted pursuant to a complaint submitted by a person directly to the Board pursuant to subsection (b) that such person is entitled to an order referred to in paragraph (2), the Board may, in its discretion, award such person reasonable attorney fees, expert witness fees, and other litigation expenses.

(d)(1) A person adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board under subsection (c) may petition the United States Court of Appeals for the Federal Circuit to review the final order or decision. Such petition and review shall be in accordance with the procedures set forth in section 7703 of title 5.

(2) Such person may be represented in the Federal Circuit proceeding by the Special Counsel unless the person was not represented by the Special Counsel before the Merit Systems Protection Board regarding such order or decision.

#### **§ 4325. Enforcement of rights with respect to certain Federal agencies**

(a) This section applies to any person who alleges that—

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(1) the reemployment of such person by an agency referred to in subsection (a) of section 4315 was not in accordance with procedures for the reemployment of such person under subsection (b) of such section; or

(2) the failure of such agency to reemploy the person under such section was otherwise wrongful.

(b) Any person referred to in subsection (a) may submit a claim relating to an allegation referred to in that subsection to the inspector general of the agency which is the subject of the allegation. The inspector general shall investigate and resolve the allegation pursuant to procedures prescribed by the head of the agency.

(c) In prescribing procedures for the investigation and resolution of allegations under subsection (b), the head of an agency shall ensure, to the maximum extent practicable, that the procedures are similar to the procedures for investigating and resolving complaints utilized by the Secretary under section 4322(d).

(d) This section may not be construed--

(1) as prohibiting an employee of an agency referred to in subsection (a) from seeking information from the Secretary regarding assistance in seeking reemployment from the agency under this chapter, or information relating to the rights and obligations of employees and Federal agencies under this chapter; or

(2) as prohibiting such an agency from voluntarily cooperating with or seeking assistance in or of clarification from the Secretary or the Director of the Office of Personnel Management of any matter arising under this chapter.

#### **§ 4326. Conduct of investigation; subpoenas**

(a) In carrying out any investigation under this chapter, the Secretary's duly authorized representatives shall, at all reasonable times, have reasonable access to and the right to interview persons with information relevant to the investigation and shall have reasonable access to, for purposes of examination, and the right to copy and receive, any documents of any person or employer that the Secretary considers relevant to the investigation.

(b) In carrying out any investigation under this chapter, the Secretary may require by subpoena the attendance and testimony of witnesses and the production of documents relating to any matter under investigation. In case of disobedience of the subpoena or contumacy and on request of the Secretary, the Attorney General may apply to any district court of the United States in whose jurisdiction such disobedience or contumacy occurs for an order enforcing the subpoena.

(c) Upon application, the district courts of the United States shall have jurisdiction to issue writs commanding any person or employer to comply with the subpoena of the Secretary or to comply with any order of the Secretary made pursuant to a lawful investigation under this chapter and the district courts shall have jurisdiction to punish failure to obey a subpoena or other lawful order of the Secretary as a contempt of court.

(d) Subsections (b) and (c) shall not apply to the legislative branch or the judicial branch of the United States.

#### **SUBCHAPTER IV--MISCELLANEOUS PROVISIONS**

##### **§ 4331. Regulations**

(a) The Secretary (in consultation with the Secretary of Defense) may prescribe regulations implementing the provisions of this chapter with regard to the application of this chapter to States, local governments, and private employers.

(b)(1) The Director of the Office of Personnel Management (in consultation with the Secretary and the Secretary of Defense) may prescribe regulations implementing the provisions of this chapter with regard to the application of this chapter to Federal executive agencies (other than the agencies referred to in paragraph (2)) as employers. Such regulations shall be consistent with the regulations pertaining to the States as employers and private employers, except that employees of the Federal Government may be given greater or additional rights.

(2) The following entities may prescribe regulations to carry out the activities of such entities under this chapter:

(A) The Merit Systems Protection Board.

(B) The Office of Special Counsel.

(C) The agencies referred to in section 2303(a)(2)(C)(ii) of title 5.

##### **§ 4332. Reports**

The Secretary shall, after consultation with the Attorney General and the Special Counsel referred to in section 4324(a)(1) and no later than February 1, 2005, and annually thereafter, transmit to the Congress, a report containing the following matters for the fiscal year ending before such February 1:

(1) The number of cases reviewed by the Department of Labor under this chapter during the fiscal year for which the report is made.

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(2) The number of cases referred to the Attorney General or the Special Counsel pursuant to section 4323 or 4324, respectively, during such fiscal year.

(3) The number of complaints filed by the Attorney General pursuant to section 4323 during such fiscal year.

(4) The nature and status of each case reported on pursuant to paragraph (1), (2), or (3).

(5) An indication of whether there are any apparent patterns of violation of the provisions of this chapter, together with an explanation thereof.

(6) Recommendations for administrative or legislative action that the Secretary, the Attorney General, or the Special Counsel considers necessary for the effective implementation of this chapter, including any action that could be taken to encourage mediation, before claims are filed under this chapter, between employers and persons seeking employment or reemployment.

##### **§ 4333. Outreach**

The Secretary, the Secretary of Defense, and the Secretary of Veterans Affairs shall take such actions as such Secretaries determine are appropriate to inform persons entitled to rights and benefits under this chapter and employers of the rights, benefits, and obligations of such persons and such employers under this chapter.

##### **§ 4334. Notice of rights and duties**

(a) Requirement to provide notice.--Each employer shall provide to persons entitled to rights and benefits under this chapter a notice of the rights, benefits, and obligations of such persons and such employers under this chapter. The requirement for the provision of notice under this section may be met by the posting of the notice where employers customarily place notices for employees.

(b) Content of notice.--The Secretary shall provide to employers the text of the notice to be provided under this section.

# **5 CFR**

# **(Section 353)**

**USERRA Regulations Applicable to Federal Executive Branch Employers**

**(ISSUE CODE)**

**Authority:** 38 U.S.C. 4301 et. seq., and 5 U.S.C. 8151.

**Source:** 60 FR 45652, Sept. 1, 1995, unless otherwise noted.

**Subpart A—General Provisions**

**§ 353.101 Scope.**

The rights and obligations of employees and agencies in connection with leaves of absence or restoration to duty following uniformed service under 38 U.S.C. 4301 et. seq., and restoration under 5 U.S.C. 8151 for employees who sustain compensable injuries, are subject to the provisions of this part. Subpart A covers those provisions that are common to both of the above groups of employees. Subpart B deals with provisions that apply just to uniformed service and subpart C covers provisions that pertain just to injured employees.

**§ 353.102 Definitions.**

In this part:

*Agency* means.

(1) With respect to restoration following a compensable injury, any department, independent establishment, agency, or corporation in the executive branch, including the U.S. Postal Service and the Postal Rate Commission, and any agency in the legislative or judicial branch; and

(2) With respect to uniformed service, an executive agency as defined in 5 U.S.C. 105 (other than an intelligence agency referred to in 5 U.S.C. 2302(a)(2)(C)(ii), including the U.S. Postal Service and Postal Rate Commission, a nonappropriated fund instrumentality of the United States, or a military department as defined in 5 U.S.C. 102. In the case of a National Guard technician employed under 32 U.S.C. 709, the employing agency is the adjutant general of the State in which the technician is employed.

*Fully recovered* means compensation payments have been terminated on the basis that the employee is able to perform all the duties of the position he or she left or an equivalent one.

*Injury* means a compensable injury sustained under the provisions of 5 U.S.C. chapter 81, subchapter 1, and includes, in addition to accidental injury, a disease proximately caused by the employment.

*Leave of absence* means military leave, annual leave, without pay (LWOP), furlough, continuation of pay, or any combination of these.

*Military leave* means paid leave provided to Reservists and members of the National Guard under 5 U.S.C. 6323.

*Notice* means any written or verbal notification of an obligation or intention to perform service in the uniformed services provided to an agency by the employee performing the service or by the uniformed service in which the service is to be performed.

*Partially recovered* means an injured employee, though not ready to resume the full range of his or her regular duties, has recovered sufficiently to return to part-time or light duty or to another position with less demanding physical requirements. Ordinarily, it is expected that a partially recovered employee will fully recover eventually.

*Physically disqualified* means that:

(1)(i) For medical reasons the employee is unable to perform the duties of the position formerly held or an equivalent one, or

(ii) There is a medical reason to restrict the individual from some or all essential duties because of possible incapacitation (for example, a seizure) or because of risk of health impairment (such as further exposure to a toxic substance for an individual who has already shown the effects of such exposure).

(2) The condition is considered permanent with little likelihood for improvement or recovery.

*Reasonable efforts* in the case of actions required by an agency for a person returning from uniformed service means actions, including training, that do not place an undue hardship on the agency.

*Service in the uniformed services* means the performance of duty on a voluntary or involuntary basis in a uniformed service under competent authority and includes active duty, active duty for training, initial active duty for training, inactive duty training, full-time National Guard duty, and a period for which a person is absent from employment for the purpose of examination to determine fitness to perform such duty.

*Status* means the particular attributes of a specific position. This includes the rank or responsibility of the position, its duties, working conditions, pay, tenure, and seniority.

*Undue hardship* means actions taken by an agency requiring significant difficulty or expense, when considered in light of—

(1) The nature and cost of actions needed under this part;

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

(3) The overall size of the agency with respect to the number of employees, the number, type, and location of its facilities and type of operations, including composition, structure, and functions of the work force.

*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 emergency.

## **(ISSUE CODE)**

### **§ 353.103 Persons covered.**

(a) The provisions of this part pertaining to the uniformed services cover each agency employee who enters into such service regardless of whether the employee is located in the United States or overseas. However, an employee serving under a time-limited appointment completes any unexpired portion of his or her appointment upon return from uniformed service.

(b) The provisions of this part concerning employee injury cover a civil officer or employee in any branch of the Government of the United States, including an officer or employee of an instrumentally wholly owned by the United States, who was separated or furloughed from an appointment without time limitation, or from a temporary appointment pending establishment of a register (TAPER) as a result of a compensable injury; but do not include—

(1) A commissioned officer of the Regular Corps of the Public Health Service;

(2) A commissioned officer of the Reserve Corps of the Public Health Service on active duty; or

(3) A commissioned officer of the National Oceanic and Atmospheric Administration.

[60 FR 45652, Sept. 1, 1995, as amended at 64 FR 31487, June 11, 1999]

### **§ 353.104 Notification of rights and obligations.**

When an agency separates, grants a leave of absence, restores or fails to restore an employee because of uniformed service or compensable injury, it shall notify the employee of his or her rights, obligations, and benefits relating to Government employment, including any appeal and grievance rights. However, regardless of notification, an employee is still required to exercise due diligence in ascertaining his or her rights, and to seek reemployment within the time limits provided by chapter 43 of title 38, United States Code, for restoration after uniformed service, or as soon as he or she is able after a compensable injury.

### **§ 353.105 Maintenance of records.**

Each agency shall identify the position vacated by an employee who is injured or leaves to enter uniformed service. It shall also maintain the necessary records to ensure that all such employees are preserved the rights and benefits granted by law and this part.

### **§ 353.106 Personnel actions during employee's absence.**

(a) An employee absent because of service in the uniformed services is to be carried on leave without pay unless the employee elects to use other leave or freely and knowingly provides written notice of intent not to return to a position of employment with the agency, in which case the employee can be separated. (Note: A separation under this provision affects only the employee's seniority while gone; it does not affect his or her restoration rights.)

(b) An employee absent because of compensable injury may be carried on leave without pay or separated unless the employee elects to use sick or annual leave.

(c) Agency promotion plans must provide a mechanism by which employees who are absent because of compensable injury or uniformed service can be considered for promotion. In addition, agencies have an obligation to consider employees absent on military duty for any incident or advantage of employment that they may have been entitled to had they not been absent. This is determined by:

(1) Considering whether the "incident or advantage" is one generally granted to all employees in that workplace and whether it was denied solely because of absence for military service;

(2) Considering whether the person absent on military duty was treated the same as if the person had remained at work; and

(3) Considering whether it was reasonably certain that the benefit would have accrued to the employee but for the absence for military service.

[60 FR 45652, Sept. 1, 1995, as amended at 64 FR 31487, June 11, 1999]

### **§ 353.107 Service credit upon reemployment.**

Upon reemployment, an employee absent because of uniformed service or compensable injury is generally entitled to be treated as though he or she had never left. This means that a person who is reemployed following uniformed service or full recovery from compensable injury receives credit for the entire period of the absence for purposes of rights and benefits based upon seniority and length of service, including within-grade increases, career tenure, completion of probation, leave rate accrual, and severance pay.

### **§ 353.108 Effect of performance and conduct on restoration rights.**

The laws covered by this part do not permit an agency to circumvent the protections afforded by other laws to employees who face the involuntary loss of their positions. Thus, an employee may not be denied restoration rights because of poor performance or conduct that occurred prior to the employee's departure for compensable injury or uniformed service. However, separation for cause that is substantially unrelated to the injury or to the performance of uniformed service negates restoration rights. Additionally, if during the period of injury or uniformed service the employee's conduct is such that it would disqualify him or her for employment under OPM or agency regulations, restoration rights may be denied.

### **§ 353.109 Transfer of function to another agency.**

If the function of an employee absent because of uniformed service or compensable injury is transferred to another agency, and if the employee would have been transferred with the function under part 351 of this chapter had he or she not been absent, the employee is entitled to be placed in a position in the gaining agency that is equivalent to the one he or she left. It shall also assume the obligation to restore the employee in accordance with law and this part.

### **§ 353.110 OPM placement assistance.**

(a) *Employee returning from uniformed service.* (1) OPM will offer placement in the executive branch to the following categories of employees upon notification by the agency and application by the employee: (Such notification should be sent to the Associate Director for Employment, OPM, 1900 E Street, NW., Washington, DC 20415.)

#### **(ISSUE CODE)**

(i) Executive branch employees (other than an employee of an intelligence agency) when *OPM determines* that:

(A) their agencies no longer exist and the functions have not been transferred, or;

(B) it is otherwise impossible or unreasonable for their former agencies to place them;

(ii) Legislative and judicial branch employees when *their employers* determine that it is impossible or unreasonable to reemploy them;

(iii) National Guard technicians when the Adjutant General of a State determines that it is impossible or unreasonable to reemploy a technician otherwise eligible for restoration under 38 U.S.C. 4304 and 4312 (pertaining to character and length of service), and the technician is a noncareer military member who was separated involuntarily from the Guard for reasons beyond his or her control; and

(iv) Employees of the intelligence agencies (defined in 5 U.S.C. 2302(a)(2)(C)(ii)) when *their agencies* determine that it is impossible or unreasonable to reemploy them.

(2) OPM will determine if a vacant position equivalent (in terms of pay, grade, and status) to the one the individual left exists, for which the individual is qualified, in the commuting area in which he or she was employed immediately before entering the uniformed services. If such a vacancy exists, OPM will order the agency to place the individual. If no such position is available, the individual may elect to be placed in a lesser position in the commuting area, or OPM will attempt to place the individual in an equivalent position in another geographic location determined by OPM. If the individual declines an offer of equivalent employment, he or she has no further restoration rights.

(b) *Employee returning from compensable injury.* OPM will provide placement assistance to an employee with restoration rights in the executive, legislative, or judicial branches who cannot be placed in his or her former agency and who either has competitive status or is eligible to acquire it under 5 U.S.C. 3304(C). If the employee's agency is abolished and its functions are not transferred, or it is not possible for the employee to be restored in his or her former agency, the employee is eligible for placement assistance under the Interagency Career Transition Assistance Plan (ICTAP) under part 330, subpart G, of this chapter. This paragraph does not apply to an employee serving under a temporary appointment pending establishment of a register (TAPER).

[60 FR 45652, Sept. 1, 1995, as amended at 64 FR 31487, June 11, 1999; 66 FR 29897, June 4, 2001]

## **Subpart B—Uniformed Service**

### **§ 353.201 Introduction.**

The Uniformed Services Employment and Reemployment Rights Act of 1994 revised and strengthened the existing Veterans' Reemployment Rights law, made the Department of Labor responsible for investigating employee complaints, required OPM to place certain returning employees in other agencies, established a separate restoration rights program for employees of the intelligence agencies, and altered the appeals rights process. The new law applies to persons exercising restoration rights on or after December 12, 1994.

### **§ 353.202 Discrimination and acts of reprisal prohibited.**

A person who seeks or holds a position in the Executive branch may not be denied hiring, retention in employment, or any other incident or advantage of employment because of any application, membership, or service in the uniformed services. Furthermore, an agency may not

take any reprisal against an employee for taking any action to enforce a protection, assist or participate in an investigation, or exercise any right provided for under chapter 43 of title 38, United States Code.

### **§ 353.203 Length of service.**

(a) *Counting service after the effective date of USERRA (12/12/94).* To be entitled to restoration rights under this part, cumulative service in the uniformed services while employed by the Federal Government may not exceed 5 years. However, the 5-year period does not include any service—

- (1) That is required beyond 5 years to complete an initial period of obligated service;
- (2) During which the individual was unable to obtain orders releasing him or her from service in the uniformed services before expiration of the 5-year period, and such inability was through no fault of the individual;
- (3) Performed as required pursuant to 10 U.S.C. 10147, under 32 U.S.C. 502(a) or 503, or to fulfill additional training requirements determined and certified in writing by the Secretary of the military department concerned to be necessary for professional development or for completion of skill training or retraining;
- (4) Performed by a member of a uniformed service who is:
  - (i) Ordered to or retained on active duty under sections 12301(a), 12301(g), 12302, 12304, 12305, or 688 of title 10, United States Code, or under 14 U.S.C. 331, 332, 359, 360, 367, or 712;
  - (ii) Ordered to or retained on active duty (other than for training) under any provision of law during a war or during a national emergency declared by the President or the Congress, as determined by the Secretary concerned.
  - (iii) Ordered to active duty (other than for training) in support, as determined by the Secretary of the military department concerned, of an operational mission for which personnel have been ordered to active duty under 10 U.S.C. 12304;
  - (iv) Ordered to active duty in support, as determined by the Secretary of the military department concerned, of a critical mission or requirement of the uniformed services, or
  - (v) Called into Federal service as a member of the National Guard under chapter 15 or under section 12406 of title 10, United States Code.

(b) *Counting service prior to the effective date of USERRA.* In determining the 5-year total that may not be exceeded for purposes of exercising restoration rights, service performed prior to December 12, 1994, is considered only to the extent that it would have counted under the previous law (the Veterans' Reemployment Rights statute). For example, the service of a National Guard technician who entered on an Active Guard Reserve (AGR) tour under section 502(f) of title 32, United States Code, was not counted toward the 4-year time limit under the previous statute because it was specifically considered active duty for training. However, title 32, section 502(f) AGR service is not exempt from the cumulative time limits allowed under USERRA and service after the effective date counts under USERRA rules. Thus, if a technician was on a 32 U.S.C. 502(f) AGR tour on October 13, 1994, (the date USERRA was signed into law), but exercised restoration rights after December 11, 1994, (the date USERRA became fully effective), AGR service prior to December 12 would not count in computing the 5-year total, but all service beginning with that date would count.

(c) *Nature of Reserve service and resolving conflicts.* An employee who is a member of the Reserve or National Guard has a dual obligation—to the military and to his or her employer. Given the nature of the employee's service obligation, some conflict with job demands is often unavoidable and a good-faith effort on the part of both the employee and the agency is needed to minimize conflict and resolve differences. Some accommodation may be necessary by both parties. Most Reserve component members are required, as a minimum, to participate in drills for 2 days each month and in 2 weeks of active duty for training per year. But some members are required to participate in longer or more frequent training tours. USERRA makes it clear that the timing, frequency, duration, and nature of the duty performed is not an issue so long as the employee gave proper notice, and did not exceed the time limits specified. However, to the extent that the employee has influence upon the timing, frequency, or duration of such training or duty, he or she is expected to use that influence to minimize the burden upon the agency. The employee is expected to provide the agency with as much advance notice as possible whenever military duty or training will interfere with civilian work. When a conflict arises between the Reserve duty and the legitimate needs of the employer, the agency may contact appropriate military authorities to express concern. Where the request would require the employee to be absent from work for an extended period, during times of acute need, or when, in light of previous leaves, the requested leave is cumulatively burdensome, the agency may contact the military commander of the employee's military unit to determine if the military duty could be rescheduled or performed by another member. If the military authorities determine that the military duty cannot be rescheduled or cancelled, the agency is required to permit the employee to perform his or her military duty.

(d) *Mobilization authority.* By law, members of the Selected Reserve (a component of the Ready Reserve), can be called up under a presidential order for purposes other than training for as long as 270 days. If the President declares a national emergency, the remainder of the Ready Reserve—the Individual Ready Reserve and the Inactive National Guard—may be called up. The Ready Reserve as a whole is subject to as much as 24 consecutive months of active duty in a national emergency declared by the President.

[60 FR 45652, Sept. 1, 1995, as amended at 64 FR 31487, June 11, 1999]

### **§ 353.204 Notice to employer.**

To be entitled to restoration rights under this part, an employee (or an appropriate officer of the uniformed service in which service is to be performed) must give the employer advance written or verbal notice of the service except that no notice is required if it is precluded by military necessity or, under all relevant circumstances, the giving of notice is otherwise impossible or unreasonable.

### **§ 353.205 Return to duty and application for reemployment.**

Periods allowed for return to duty are based on the length of time the person was performing service in the uniformed services, as follows:

(a) An employee whose uniformed service was for *less than 31 days*, or who was absent for the purpose of an examination to determine fitness for the uniformed services, is required to report back to work not later than the beginning of the first regularly scheduled work day on the first full calendar day following completion of the period of service and the expiration of 8 hours after a period allowing for the safe transportation of the employee from the place of service to the employee's residence, or as soon as possible after the expiration of the 8-hour period if reporting within the above period is impossible or unreasonable through no fault of the employee.

(b) If the service was for *more than 30 but less than 181 days*, the employee must submit an application for reemployment with the agency not later than 14 days after completing the period of service. (If submitting the application is impossible or unreasonable through no fault of the individual, it must be submitted the next full calendar day when it becomes possible to do so.)

(c) If the period of service was for *more than 180 days*, the employee must submit an application for reemployment not later than 90 days after completing the period of service.

(d) An employee who is hospitalized or convalescing from an injury or illness incurred in, or aggravated during uniformed service is required to report for duty at the end of the period that is necessary for the person to recover, based on the length of service as discussed in paragraphs (a), (b), and (c) of this section, except that the period of recovery may not exceed 2 years (extended by the minimum time required to accommodate circumstances beyond the employee's control which make reporting within the period specified impossible or unreasonable).

(e) A person who does not report within the time limits specified does not automatically forfeit restoration rights, but, rather, is subject to whatever policy and disciplinary action the agency would normally apply for a similar absence without authorization.

### **§ 353.206 Documentation upon return.**

Upon request, a returning employee who was absent for more than 30 days, or was hospitalized or convalescing from an injury or illness incurred in or aggravated during the performance of service in the uniformed services, must provide the agency with documentation that establishes the timeliness of the application for reemployment, and length and character of service. If documentation is unavailable, the agency must restore the employee until documentation becomes available.

### **§ 353.207 Position to which restored.**

(a) *Timing.* An employee returning from the uniformed services following an absence of more than 30 days is entitled to be restored as soon as possible after making application, but in no event later than 30 days after receipt of the application by the agency.

(b) *Nondisabled.* If the employee's uniformed service was for less than 91 days, he or she must be employed in the position for which qualified that he or she would have attained if continuously employed. If not qualified for this position after reasonable efforts by the agency to qualify the employee, he or she is entitled to be placed in the position he or she left. For service of 91 days or more, the agency has the option of placing the employee in a position of like seniority, status, and pay. (Note: Upon reemployment, a term employee completes the unexpired portion of his or her original appointment.) If unqualified (for any reason other than disability incurred in or aggravated during service in the uniformed services) after reasonable efforts by the agency to qualify the employee for such position or the position the employee left, he or she must be restored to any other position of lesser status and pay for which qualified, with full seniority.

(c) *Disabled.* An employee with a disability incurred in or aggravated during uniformed service and who, after reasonable efforts by the agency to accommodate the disability, is entitled to be placed in another position for which qualified that will provide the employee with the same seniority, status, and pay, or the nearest approximation consistent with the circumstances in each case. The agency is not required to reemploy a disabled employee if, after making due efforts to accommodate the disability, such reemployment would impose an undue hardship on the agency.

(d) *Two or more persons entitled to restoration in the same position.* If two or more persons are entitled to restoration in the same position, the one who left the position first has the prior right to restoration in that position. The other employee(s) is entitled to be placed in a position as described in paragraphs (b) and (c) of this section.

### **(ISSUE CODE)**

(e) *Relationship to an entitlement based on veterans' preference.* An employee's right to restoration under this part does not entitle the person to retention, preference, or displacement rights over any person with a superior claim based on veterans' preference.

### **§ 353.208 Use of paid leave during uniformed service.**

An employee performing service with the uniformed services must be permitted, upon request, to use any accrued annual leave under 5 U.S.C. 6304, military leave under 5 U.S.C. 6323, or earned compensatory time off for travel under 5 U.S.C. 5550b during such service.

[72 FR 12035, Mar. 15, 2007]

### **§ 353.209 Retention protections.**

(a) *During uniformed service.* An employee may not be demoted or separated (other than military separation) while performing duty with the uniformed services except for cause. (Reduction in force is not considered "for cause" under this subpart.) He or she is not a "competing employee" under §351.404 of this chapter. If the employee's position is abolished during such absence, the agency must reassign the employee to another position of like status, and pay.

(b) *Upon reemployment.* Except in the case of an employee under time-limited appointment who finishes out the unexpired portion of his or her appointment upon reemployment, an employee reemployed under this subpart may not be discharged, except for cause—

(1) If the period of uniformed service was more than 180 days, within 1 year; and

(2) If the period of uniformed service was more than 30 days, but less than 181 days, within 6 months.

### **§ 353.210 Department of Labor assistance to applicants and employees.**

USERRA requires the Department of Labor's Veterans' Employment and Training Service [VETS] to provide employment and reemployment assistance to any Federal employee or applicant who requests it. VETS staff will attempt to resolve employment disputes brought to investigate. If dispute resolution proves unsuccessful, VETS will, at the request of the employee, refer the matter to the Office of the Special Counsel for representation before the Merit Systems Protection Board (MSPB).

[64 FR 31487, June 11, 1999]

### **§ 353.211 Appeal rights.**

An individual who believes an agency has not complied with the provisions of law and this part relating to the employment or reemployment of the person by the agency may—

(a) File a complaint with the Department of Labor, as noted in §353.210, or

(b) Appeal directly to MSPB if the individual chooses not to file a complaint with the Department of Labor, or is informed by either Labor or the Office of the Special Counsel that they will not pursue to the case. However, National Guard technicians do not have the right to appeal to MSPB a denial of reemployment rights by the Adjutant General. Technicians may file complaints with the appropriate district court in accordance with 38 U.S.C. 4323 (USERRA).

[60 FR 45652, Sept. 1, 1995, as amended at 64 FR 31487, June 11, 1999]

## **Subpart C—Compensable Injury**

### **§ 353.301 Restoration rights.**

(a) *Fully recovered within 1 year.* An employee who fully recovers from a compensable injury within 1 year from the date eligibility for compensation began (or from the time compensable disability recurs if the recurrence begins after the employee resumes regular full-time employment with the United States), is entitled to be restored immediately and unconditionally to his or her former position or an equivalent one. Although these restoration rights are agencywide, the employee's basic entitlement is to the former position or equivalent in the local commuting area the employee left. If a suitable vacancy does not exist, the employee is entitled to displace an employee occupying a continuing position under temporary appointment or tenure group III. If there is no such position in the local commuting area, the agency must offer the employee a position (as described above) in another location. This paragraph also applies when an injured employee accepts a lower-grade position in lieu of separation and subsequently fully recovers. A fully recovered employee is expected to return to work immediately upon the cessation of compensation.

(b) *Fully recovered after 1 year.* An employee who separated because of a compensable injury and whose full recovery takes longer than 1 year from the date eligibility for compensation began (or from the time compensable disability recurs if the recurrence begins after the injured employee resumes regular full-time employment with the United States), is entitled to priority consideration, agencywide, for restoration to the position he or she left or an equivalent one provided he or she applies for reappointment within 30 days of the cessation of compensation. Priority consideration is accorded by entering the individual on the agency's reemployment priority list for the competitive service or reemployment list for the excepted service. If the individual cannot be placed in the former commuting area, he or she is entitled to priority consideration for an equivalent position elsewhere in the agency. (See parts 302 and 330 of this chapter for more information on how this may be accomplished for the excepted and competitive services, respectively.) This subpart also applies when an injured employee accepts a lower-graded position in lieu of separation and subsequently fully recovers.

(c) *Physically disqualified.* An individual who is physically disqualified for the former position or equivalent because of a compensable injury, is entitled to be placed in another position for which qualified that will provide the employee with the same status, and pay, or the nearest approximation thereof, consistent with the circumstances in each case. This right is agencywide and applies for a period of 1 year from the date eligibility for compensation begins. After 1 year, the individual is entitled to the rights accorded individuals who fully or partially recover, as applicable.

(d) *Partially recovered.* Agencies must make every effort to restore in the local commuting area, according to the circumstances in each case, an individual who has partially recovered from a compensable injury and who is able to return to limited duty. At a minimum, this would mean treating these employees substantially the same as other handicapped individuals under the Rehabilitation Act of 1973, as amended. (See 29 U.S.C. 791(b) and 794.) If the individual fully recovers, he or she is entitled to be considered for the position held at the time of injury, or an equivalent one. A partially recovered employee is expected to seek reemployment as soon as he or she is able.

**(ISSUE CODE)**

**§ 353.302 Retention protections.**

An injured employee enjoys no special protection in a reduction in force. Separation by reduction in force or for cause while on compensation means the individual has no restoration rights.

**§ 353.303 Restoration rights of TAPER employees.**

An employee serving in the competitive service under a temporary appointment pending establishment of a register (TAPER) under §316.201 of this chapter (other than an employee serving in a position classified above GS-15), is entitled to be restored to the position he or she left or an equivalent one in the same commuting area.

**§ 353.304 Appeals to the Merit Systems Protection Board.**

(a) Except as provided in paragraphs (b) and (c) of this section, an injured employee or former employee of an agency in the executive branch (including the U.S. Postal Service and the Postal Rate Commission) may appeal to the MSPB an agency's failure to restore, improper restoration, or failure to return an employee following a leave of absence. All appeals must be submitted in accordance with MSPB's regulations.

(b) An individual who fully recovers from a compensable injury more than 1 year after compensation begins may appeal to MSPB as provided for in parts 302 and 330 of this chapter for excepted and competitive service employees, respectively.

(c) An individual who is partially recovered from a compensable injury may appeal to MSPB for a determination of whether the agency is acting arbitrarily and capriciously in denying restoration. Upon reemployment, a partially recovered employee may also appeal the agency's failure to credit time spent on compensation for purposes of rights and benefits based upon length of service.

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## Chapter 2

### Complaint Processing

**.1 General Process.** The steps of complaint processing usually follow a progressive sequence. However, this is not always the case. For example, negotiation and/or resolution, shown below as the fourth stage, may begin with the initial contact with the employer and may occur at any stage of the process.

- (1) **Complaint Intake.** This initial investigative stage includes steps to:
  - (a) Identify the alleged violation and the remedies available.
  - (b) Identify the applicable section(s) of the statute and regulations.
  - (c) Determine whether the claimant is eligible for USERRA assistance.
  - (d) Open a case file, or obtain additional information from the claimant if necessary.

Note: If the claimant is unequivocally not eligible for USERRA assistance, or if s/he has failed to assert an allegation of a USERRA violation, open and close the case file and notify the claimant of the result.

- (2) **Initial Contact with Complainant.** After receiving a written signed or electronic VETS Form 1010, the VETS investigator must contact the complainant to go over the complaint and make any needed corrections to the complaint form. The investigator should also discuss the provisions of USERRA that apply, remedies available, and give a brief overview of the investigative process.
- (3) **Initial Contact with Employer.** The objectives of this initial contact are to inform the employer of the claim; to explain USERRA and VETS' role in the resolution process; to obtain the employer's explanation; and to seek a resolution of the claim if possible. *If possible, this initial employer contact should be made by telephone or by pre-arranged on-site visit. Any substantive discussions in this initial employer contact should be documented on the VETS Form 1063.* Should the employer dispute the claim, further investigation is required and the investigator must develop a written investigative plan. [\[QAR\]](#)
- (4) **Investigation.** This is the process performed by the Investigator to obtain evidence determining whether a case has merit. This evidence is obtained through interviews, documentation obtained from both parties; witness statements; etc., that would be admissible in court. The investigation concludes when a finding is made by the investigator and all parties are informed of that finding.

- (5) **Negotiation and Resolution.** The purpose of this stage is to seek settlement. If possible, a resolution conference is held with the claimant and employer. This is a meeting with the employer and claimant to discuss investigative findings to date, and to seek resolution of the case. (See Chapter 7)
- (6) **U.S. Attorney General/Office of Special Counsel Referral.** Claimants can have unresolved cases referred to the U. S. Attorney General at the Department of Justice/Office of Special Counsel, which may accept them for litigation if reasonably satisfied that the claim has merit.

**.2 Processing Standards. [\[QAR\]](#)**

- (1) Make first contact with complainant within 3 working days after receipt of the signed written or electronic complaint form.
- (2) Make first contact with the employer within 7 business days after opening a case. If the claimant is unemployed or about to become unemployed, contact the employer within 3 business days.
- (3) Within 3 working days of receipt of a response from the employer, contact the claimant to let him or her know of the employer's position.
- (4) If appropriate, respond to all incoming documents in the case within 5 working days of date of receipt.
- (5) Attempt to complete the investigation within 90 calendar days after opening the case.
- (6) The DVET or the Regional Office must review progress on the case if the Investigation is still ongoing 45 working days after opening. If the investigation is still in progress 60 calendar days after opening, the written investigative plan must be reviewed and possibly revised. In addition, the regional Senior Investigator will review the case after 90 calendar days, or earlier on request of the investigator or RAVET.
- (7) If, after completion of the investigation, a claimant requests referral to the U.S. Attorney General/Office of Special Counsel, the referral should be completed within **15 working days** after receiving the written referral request. If the claimant requests referral prior to completion of the investigation, s/he will be advised that such action cannot be undertaken until the close of all investigative activity, but that s/he may withdraw the claim and proceed via private counsel.

(8) Continued attempts can be made to resolve the case throughout the referral process, however, they should not delay the referral. [\[QAR\]](#)

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# 3

## Chapter 3

### General Guidelines and Definitions

- .1 Secretary of Labor’s Responsibility under USERRA.** The Secretary of Labor, through the Veterans' Employment and Training Service shall provide assistance to eligible persons (including inductees, enlistees, rejectees, reservists, and members of the National Guard) in exercising their statutory rights.
- .2 Legal Authority.** The legal authority for the Secretary of Labor and VETS’ responsibilities and activities is found in USERRA, chapter 43, title 38, United States Code, and related predecessor statutes.
- .3 VETS Responsibility.** Under the law, VETS is responsible for:

  - (1) Ensuring reemployment in the proper position with proper seniority, status, pay, and all other seniority benefits for “any eligible person” who leaves a position, for the purpose of performing active military duty, active duty for training, inactive duty for training, or reporting for examination to determine fitness for military service.
  - (2) Ensuring the security of rights that protect individuals from discriminatory practices motivated by their service, or from reprisals based on an individual’s action to enforce a right, or cooperating with VETS during an investigation.
  - (3) Assisting employers, unions and other interested parties in resolving matters involving employment and reemployment rights issues while minimizing necessity for litigation.
  - (4) Promoting voluntary compliance by fully acquainting all interested individuals and organizations through outreach and public information efforts with the provisions of USERRA.
- .4 Definition of a USERRA Case.** A USERRA case arises from a request for assistance from an inductee or enlistee, a Reserve or National Guard member, an examinee or rejectee, a former servicemember, or non-service employee/witness who has assisted in enforcing an entitlement. The request for assistance usually results from a dispute with an employer, or the employer's agent, over the claimant's alleged employment or reemployment rights under USERRA. All cases must be opened, processed, and closed in accordance with the instructions contained in this Manual or subsequent memoranda from the Assistant Secretary for Veterans' Employment and Training (ASVET).

## **.5 Parties To A Case.**

- (1) **Claimant.** A claimant is the person who submits the claim.
- (2) **Employer.** Any person, institution, organization, or other entity that pays salary or wages for work performed, provides benefits, or that has control over employment opportunities, including;
  - (a) A private employer;
  - (b) A person, institution, organization, or other entity to whom the employer has delegated the performance of employment-related responsibilities, such as a pension plan or a hiring hall;
  - (c) The Federal Government;
  - (d) A State or local subdivision thereof;
  - (e) Any successor in interest to a person, institution, organization, or other entity; and
  - (f) The Adjutant General of the State in which a National Guard technician is employed.

**.6 Need For Informal Resolutions.** If the investigator's initial review of the complaint indicates that it may be meritorious, the investigator should contact the employer and attempt to resolve the complaint. If discussions with the employer are unsuccessful, and it is necessary to continue the investigation, it is important to remember that VETS has no legal authority to direct an employer to take action. Such authority rests with the Merit Systems Protection Board (for Federal executive agencies) or the court having jurisdiction over a given case. If it appears that a claimant is entitled to benefits under USERRA, and if the employer refuses to accord the claimant those benefits, the only alternative is to refer the case for legal representation if the claimant so chooses. Therefore, VETS efforts should be directed toward resolving cases satisfactorily and amicably.

**.7 Claimant's Waiver of Entitlement.** The claimant may agree to accept less than full entitlement in resolution of his or her claim. For example, the claimant may waive back pay in order to receive reinstatement or may agree to waive reinstatement in exchange for a monetary settlement.

**Note:** It is important to remember that it is the claimant who must make such decisions, and only after being fully apprised of the consequences of such a waiver. If a claimant decides to waive any entitlement, the VETS Investigator should execute a waiver form.

- .8 Negotiations with Employers.** As stated in Chapter 2, the primary function of the Investigator is to obtain evidence in order to determine if a violation did or did not occur, and to concurrently seek settlement between the parties should the opportunity arise. In negotiating with the employer on a possible settlement, the investigator should make every effort to obtain a remedy that reflects full compliance under the USERRA statute. Concessions to full compliance may be made only with the waiver executed by the claimant.

Before entering into negotiations, discuss candidly with the claimant the strengths and weaknesses of the case and determine if there are issues upon which the claimant is willing to make concessions. The investigator is expected to negotiate with the employer or employer's counsel and must relay settlement offers from the employer to the claimant. However, the investigator should explain to the employer that the decision about settlement remains with the claimant. If a settlement offer is rejected by the claimant, that offer and its rejection must be documented and should detail the reasons for the rejection. The same is true for settlement offers from the claimant that are rejected by the employer.

**.9 Record Keeping for Cases.**

[\[QAR\]](#)

- (1) **File Maintenance.** VETS investigators must keep careful written records of all contacts and attempted contacts with all parties, during all stages of complaint handling. Required questionnaires and other official forms must be completely filled out. All letters and other documents gathered during an investigation must be filed and safeguarded. The claimant's original documents, such as the #4 copy of the Form DD-214 and certificates, should be copied and filed in the case file and the originals returned to claimant. This is to establish a complete, accurate and up-to-date file on the matter, which might later be used in Federal Court. The following legal considerations apply regarding file preparation and maintenance:

- (a) Date stamp all incoming correspondence as well as all other documents related to the case. The date stamp should preferably appear on the lower right hand corner or; if necessary, elsewhere on the front side of the document, ensuring that no writing is covered. If stamping on the front is not possible, stamp on the reverse. If neither is possible date stamp where the least amount of writing will be covered.

In addition, outgoing documents and documentation of contacts and attempted contacts with the employer, claimant, or other interested parties should always be dated.

- (b) Do not write on or highlight incoming documents. (If you need to highlight for working purposes, make a copy and use as a work sheet, e.g. employer position letterF) Analysis of lengthy or technical documents

should be recorded on a VETS Form 1063 and placed in the file on top of the analyzed document.

- (c) In writing VETS Form 1063's, do not editorialize. Stick to the facts. If not typed, writing must be legible since these documents may be relied upon for court proceedings. Separate Form 1063's should be used to document each contact and attempted contact.
  - (d) Do not white-out anything on the VETS Form 1063. Cross out and initial instead.
  - (e) Do not discard any documents or information forwarded by outside parties including the claimant and employer, from the case file.
  - (f) Obtain signed, first-person statements from all witnesses, where possible.
  - (g) If the employer refuses to put its position in writing following a telephone discussion, send a confirming letter to the employer detailing the discussion, and provide the employer with an opportunity to respond.
- (2) **File Format.** Case file documents should be filed on the right side of the case file, in chronological order, with the newest on top. All documents should be tabbed. However, the VETS Form 1010, with all attachments received, should be the first document filed on the right side, even if it was not the first document received in the case. If military documentation is not received until a later date, it should also be filed with the VETS Form 1010. [\[QAR\]](#)

The following documents should be kept on the left side of the folder:

- (a) Investigative plan;
- (b) Quality Assurance review forms;
- (c) Memos to the file, investigative notes or other informal materials not meant to be released as part of the official case file;
- (d) Any VETS internal memos which are related to investigative matters but are not to be released as part of the official case file including Memorandum of Referral; and
- (e) All communication between VETS and the Office of the Solicitor.

**.10 Investigations.** Because USERRA cases might eventually go to Federal Court, VETS investigators must become familiar with rules of evidence and techniques of investigation described in Chapter 6 of this Manual.

**.11 Use of Letters.** Generally, letters should be used in the following situations:

- (1) An opening letter to the employer is sent upon opening a case, if the basic elements of the case are present. At a minimum this letter should contain the items listed in Chapter 5.
- (2) A follow-up letter when the expected response to a VETS-initiated letter has not been received.
- (3) A letter to an employer stating what VETS understands the employer's position to be when the employer has failed or refused to give his/her position in writing but has stated a position orally.
- (4) Advisory opinion letters and transmittal of settlement proposals, counter-proposals and withdrawal requests as needed.
- (5) A closing letter must be sent to the claimant. A closing letter must also be sent to the employer unless the employer was never notified about the case. [\[QAR\]](#)

**Note:** An open case review must be conducted with the supervisor prior to sending the closing letter to the claimant.

- (6) Letters of notification to the employer must be sent when the claimant requests referral to the U. S. Attorney/Office of Special Counsel.

**.12 Certified Mail, Return Receipt Requested.** The following correspondence will be sent "Certified Mail, Return Receipt Requested":

- (1) All second letters attempting to contact claimants;
- (2) All letters containing settlement checks;
- (3) All letters to employers confirming oral representations;
- (4) All "Final Notice" Letters to the employer or counsel of record;
- (5) Any letter which the investigator believes warrants special treatment;
- (6) Closing letters notifying claimant that the complaint cannot be resolved.

- .13 Freedom of Information and Privacy Act Requests.** Whenever a written request is received under either the Freedom of Information Act, or the Privacy Act, refer it to the Regional Office for consultation with the Regional Solicitor's Office. The Regional Administrator is the only person authorized to be a Disclosure Officer in responding to these requests. When you receive a request from a claimant whose case is currently under investigation you must NOT disclose ANY documents to him/her under either the Privacy Act or the FOIA.

If the case has been closed, generally most information in a USERRA file can be released under the Freedom of Information Act. However, under the Privacy Act, most information in an USERRA file must be released to claimants or their authorized representatives upon receipt of a written request. Information which cannot be released includes medical statements, any confidential statement (witness statements, etc.), internal correspondence and opinions, and information which may jeopardize the integrity of the case or the safety of any individual connected with the case.

Solicitor of Labor memoranda will not be released outside of DOL. These documents are usually exempt from disclosure based on attorney-client privilege and exemptions 4 and 5 of the FOIA. Any FOIA requests relating to such documents in either an open or closed file should be referred to the Regional Solicitor's office, through the Regional Administrator.

- .14 Federal Privacy Act Releases.** When requesting medical, military, employment or other records needed for complaint processing that are maintained by a Federal Agency, investigators should have the claimant sign a Federal Privacy Act release form. (Exhibit 2)
- .15 Unemployment Compensation Claim Release Form.** These forms should be obtained from the appropriate State office where necessary.
- .16 Private Physician/Hospital Release Form.** A release form (Exhibit 3) should be used to obtain records from physicians/hospitals if the claimant agrees and signs this release form.
- .17 Acceptance of Electronic Tapes from Claimant or Employers.** The use of audio or video tapes as evidence differs based on Federal, State and local laws. Should a VETS investigator be approached by either party to an investigation with audio or video tapes, the Regional Solicitor's Office, through the Regional Administrator, should be contacted for further advice. Contact the National Office for transcription services acquisitions.
- .18 Taping by Investigators.** Investigators should not tape or video record conferences, and shall discourage any of the participants from recording the conference, even if the other participants are aware of the recording and do not object. Recording tends to restrict a free flow of information and to paralyze certain parties. If a party to a conference insists

on recording a conference, the VETS investigator should arrange to receive a copy of the unedited recording as well as any transcripts made thereof.

**.19 Funding for Claimant's Travel.** VETS will not pay travel or other expenses for the claimant.

**.20 Communications Concerning Cases.**

- (1) VETS investigators will not discuss investigations with individuals or organizations which are not a party to the case. This restriction does not apply to the Office of the Solicitor, Office of Special Counsel, Department of Justice and VETS staff as required.
- (2) When discussing an investigation with the parties to the case, the investigator must avoid making statements which could cause the parties to identify witnesses who are otherwise protected from disclosure.
- (3) Responses to inquiries from Members of Congress should provide, in general terms, the status of the investigation. Specific details of an ongoing investigation should not be provided. While responses to Congressional inquiries may be prepared by the investigator, all responses must be signed by the Regional Administrator. The National Office shall be notified immediately of all congressional inquiries and shall receive copies of all responses promptly.
- (4) Any expression as to the merits of the case must be restricted to a case conference, and only after an actual merit determination has been made. Until a final determination is made, any such expression at other conferences, such as for settlement without a detailed investigation, should be qualified with the terms "initial" or "preliminary." At the earlier stages of an investigation, neither party should be given the impression that the door is closed to further discussions or evidence.
- (5) If contacted by the media, do not discuss any case, even those filed in court. Explain that it is VETS' policy not to disclose any information about the existence of any case. If necessary, refer the media to the Regional Office. Keep in mind that VETS does not have any authority to prevent either the claimant or the employer from media contact.
- (6) Investigators will not release documents provided by either party in the investigation to the other party. The investigator may, however, paraphrase information from documents obtained relating to the other party's concerns, allegations, and positions specifically involving disputed case issues.

- .21 Fax Documents.** Any document or communications (e.g. letters) sent by fax by investigators, should be followed up with an original. For example, if the investigator sends a letter to an employer by fax, the original letter should be annotated: (1) copy via fax; and (2) original via mail. The original letter should then be sent to the employer. The investigator should ensure the fax receipt is attached to the copy of the letter in the case file. If the employer sends a letter or document(s) via fax, the investigator should ensure that the employer also provides copies of the original documents. Both the fax and the original should be retained in the case file.
- .22 Email.** When E-mails are incorporated into the investigation process they are to be treated as the equivalent of letters sent on official letterhead, and must therefore be written in a professional and courteous tone. All official E-mail correspondence will include a confidentiality note which states (in general):

**“This electronic transmission contains information that is confidential or legally privileged. The information is intended only for the use of the individual(s) or entity named above. If you are not the intended recipient, you are hereby notified that any disclosure, copying, distribution or the taking of any action in reliance on the contents of such information is strictly prohibited. If you have received this transmission in error, please notify us immediately by telephone, or return e-mail.”**

**.23 DOL Guidance on the Protection of Personal Identifiable Information**

Personal Identifiable Information (PII) is defined as:

Any representation of information that permits the identity of an individual to whom the information applies to be reasonably inferred by either direct or indirect means. Further, PII is defined as information: (i) that directly identifies an individual (e.g., name, address, social security number or other identifying number or code, telephone number, email address, etc.) or (ii) by which an agency intends to identify specific individuals in conjunction with other data elements, i.e., indirect identification. (These data elements may include a combination of gender, race, birth date, geographic indicator, and other descriptors). Additionally, information permitting the physical or online contacting of a specific individual is the same as personally identifiable information. This information can be maintained in either paper, electronic or other media.

Department of Labor (DOL) federal employees and contractors are reminded that safeguarding sensitive information is a critical responsibility that must be taken seriously at all times. DOL internal policy specifies the following security policies for the protection of PII and other sensitive data:

It is the responsibility of the individual user to protect data to which they have access. Users must adhere to the rules of behavior defined in applicable Systems Security Plans, DOL and agency guidance.

DOL federal employees and contractors having access to personal information shall respect the confidentiality of such information, and refrain from any conduct that would indicate a careless or negligent attitude toward such information. DOL employees and contractors also shall avoid office gossip and should not permit any unauthorized viewing of records contained in a DOL system of records. Only individuals who have a "need to know" in their official capacity shall have access to such systems of records.

The loss of PII can result in substantial harm to individuals, including identity theft or other fraudulent use of the information. Because DOL employees and contractors may have access to personal identifiable information concerning individuals and other sensitive data, we have a special responsibility to protect that information from loss and misuse.

With these responsibilities federal employees and contractors should ensure to:

Safeguard DOL information at all times.

Obtain DOL management's written approval prior to taking any DOL sensitive information away from the office. The DOL manager's approval must identify the business necessity for removing such information from the DOL facility.

When approval is granted to take sensitive information away from the office, the employee must adhere to the security policies described above.

If any employee or contractor experiences or becomes aware of a theft or loss of PII, they are required to immediately inform their DOL contract manager or the VETS Information Security Officer (ISO). The name of the current VETS (ISO) can be found at <http://www.labornet.dol.gov/html/itc/ITSecurityOfficers.htm>. In the event their DOL contract manager is not available, they are to immediately report the theft or loss to the DOL Computer Security Incident Response Capability (CSIRC) team at [dolcsirc@dol.gov](mailto:dolcsirc@dol.gov).

Exhibit 2: Federal Privacy Act Release Form

**FEDERAL PRIVACY ACT RELEASE FORM**

To Whom It May Concern:

I hereby authorize release to the Veterans' Employment and Training Service, U.S. Department of Labor, information concerning (Check item/s that apply):

- Employment Records (Specify)
- Military records (Specific Description)
- Medical Records (Specific Description)
- Other (Specify)

I am aware of the Privacy Act of 1974, 5 U.S.C. §552a, and hereby authorize the release from my file of the information specified above.

A photocopy of the authorization shall bestow the same rights to the bearer, as the original.

\_\_\_\_\_  
Signature

\_\_\_\_\_  
SSN

\_\_\_\_\_  
Address

\_\_\_\_\_  
Date

\_\_\_\_\_  
USERRA Case Number

Exhibit 3: Medical Information Release Form

**MEDICAL INFORMATION RELEASE FORM**

**To Whom It May Concern:**

I, \_\_\_\_\_, authorize any physician, hospital, clinic, or other  
(Name – First, MI, Last)

health-related person or facility, to release any medical or other health-related information (including mental health) to the United States Department of Labor, Veterans' Employment and Training Service, which are deemed necessary for the Purpose of pursuing my claim under the Uniformed Services Employment and Reemployment Rights Act (USERRA) of 1994, and 38 U.S.C. §4301 et seq. This Release applies only to that claim, the designation of which appears below.

\_\_\_\_\_  
**Signature of Claimant**

\_\_\_\_\_  
**Social Security Number**

\_\_\_\_\_  
**Address**

\_\_\_\_\_  
**Date**

\_\_\_\_\_  
**USERRA Case Number**

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## Chapter 4

### Complaint Intake and Case Opening

#### **.1 Requests for Assistance.**

If an individual is claiming entitlement to employment rights or benefits or reemployment rights or benefits and alleges that an employer has failed or refused, or is about to fail or refuse, to comply with the Act, the individual may file a complaint with VETS or initiate a private legal action in a court of law (*see* § 1002.303). A complaint may be filed with VETS either in writing, using VETS Form 1010, or electronically, using VETS Form e1010 instructions and the forms can be accessed at <http://www.dol.gov/elaws/vets/userra/1010.asp>. A complaint must include the name and address of the employer, a summary of the basis for the complaint, and a request for relief. **Sec. 1002.288**

- (1) **Telephone Requests or Personal Visits.** If the request for assistance comes by telephone, fax or by personal visit:
  - (a) Interview the claimant thoroughly and discuss the complaint in depth. Use of the VETS Form 1010 (Exhibit 5) as a screening tool is encouraged.
  - (b) Determine if the claimant is eligible for protection under USERRA.
  - (c) Determine if the claimant has raised a possible violation and may be entitled to some benefit under the law. If so, determine the location of the complaint. If in another region or state, see instructions in .9 of this Chapter.
  - (d) When contact is by telephone, FAX, or E-mail, VETS investigators are encouraged to assist the claimant in completion of the VETS Form 1010. Mail or FAX the VETS Form 1010 and ask the claimant to complete needed items on the form, to sign and date it, and to return it immediately. Claimants can return a signed form by FAX, but must also submit the original signed form. As an alternative, claimants should be advised of the capability to file their complaint via electronically using VETS form e1010 through at <http://www.dol.gov/elaws/vets/userra/1010.asp>.
  - (e) Request a copy of documents verifying eligibility. These must include documents showing discharge from military service (See 20 CFR 1002.123), orders to report for training or examination, or other pertinent records. Note that a military ID card is not a qualifying document.

- (f) The VETS Form 1063 (Exhibit 4) does not need to be filled out initially if all the necessary information is on a VETS Form 1010. Use a VETS Form 1063 for all subsequent contacts. If the initial contact is by phone, use the VETS Form 1063 to record the claimant's statements and desired remedies.
- (2) **Mail Requests.** If the request for assistance comes by mail in a form other than a VETS Form 1010, mail the VETS 1010 form and explain that the enclosed VETS Form 1010 is to be completed, dated, signed, and returned immediately along with other documents establishing eligibility or detailing the complaint and the remedies sought. (Exhibit 6) Also advise them of the capability to file their complaint electronically using VETS for an E1010 at <http://www.dol.gov/elaws/vets/userra/1010.asp>

## .2 When to open a case.

- (1) A case should be opened immediately upon receipt of an electronic 1010, or a signed VETS Form 1010 from a person who alleges some violation of protected employment rights by a specific employer. If immediate opening is impossible or unreasonable, the case must be opened within three (3) business days if the claimant is unemployed, or about to become unemployed, and seven (7) business days if the claimant is employed.
- (2) A case **cannot be opened** if the claimant does not submit a signed 1010 Form. Filing an online 1010 (E-1010) is considered "signed"; [See 20 CFR 1002.288](#). A written letter/fax/or email (not on a 1010) requesting an investigation is insufficient as defined by the regulations and does not authorize the Investigator to contact the employer. The information provided on the 1010 (notification of punishment for unlawful statements, notification of USERRA claimant's rights, and privacy act statement) validates the claimant's awareness of his rights. The Investigation process, however, may proceed if the documentation that establishes eligibility is not readily available through no fault of the claimant. Efforts to obtain documentation must be continuous, and must be received and included in the case file before closing.

Note: VETS' obligation to investigate a complaint filed via a signed or electronic 1010 should be viewed in the same way as an employer's obligation to immediately reinstatement without regard to the absence of documentation that may not exist or be readily available through no fault of the claimant. See 38 U.S.C. 4312(f)(3)(A), 20 C.F.R. 1002.122. [\[QAR\]](#)

The initial lack of documentation of eligibility must not delay the investigator from contacting the employer or opening an investigation where one is warranted. A signed 1010 requires the claimant to certify (under penalty of perjury for

submitting false information) that he or she is eligible for protection by USERRA.

When eligibility documentation does not exist or is not readily available, the investigator should attempt to obtain some sort of preliminary verification of eligibility by contacting the claimant's military unit, or obtaining some indicia of the character and dates of service through ESGR or the Department of Veterans Affairs (VA.) ESGR is in a unique position to obtain records or validate the military status when the claimant is a member of the National Guard or Reserve. The VA keeps electronic copies of the DD-214 for those veterans who have received educational or medical assistance. Another possible resource for verifying military status is the State's Department of Veterans Affairs.

If an investigation is underway, the investigator obtains documentation that shows the claimant is ineligible, the investigation is to be closed.

- (3) If the information provided unequivocally establishes no eligibility or no violation, then the case should be opened and immediately closed, and the claimant notified in writing of the result. Similarly, under these circumstances, written notification of the right to referral of their case to the U.S. Attorney General or the Office of Special Counsel, or to seek private counsel, as appropriate, is required. See sample closing letters at Exhibits 34,35,36, and 37.

### **.3 How to Open a Case on *UIMS* PENDING**

**.4 Documentation of Contacts.** All VETS contacts and attempted contacts with the claimant, the employer, the military unit, and all other persons must be completely documented and included in the case file. Make notes of telephone contacts and attempts of contact on VETS Form 1063. (Exhibit 4)

- (1) **Notification Letter to Claimant.** A notification letter will be sent to the claimant within seven (7) working days of case opening. Its purpose is to inform the claimant of case opening, to notify claimant of his/her responsibilities with respect to document submission, to solicit a copy of any arbitration agreement(s), to provide initial notification to the claimant of the right to referral, and to inform the claimant of procedural requirements if witnesses are provided who may have documentary and/or testimonial evidence to support the complaint. [A sample letter is provided as Exhibit 11.](#)

### **[QAR]**

**.5 Establishing Eligibility.** VETS Form 1010 (Exhibit 5), the Eligibility Data Form, is the initial source document for a case. During the initial interview with the claimant, go over this form carefully, watching for problems in such areas as:

- (1) **Date Left to Join Service.** Compare the date the claimant left employment for military with the date he/she actually joined the military service. Any period in excess of two weeks between leaving employment and entry into service (including the delayed entry program) should be carefully discussed and explained on the VETS Form 1010 or a VETS Form 1063.
- (2) **Other Dates.** All other dates such as notice date, discharge or release date, terminal leave dates and application for reinstatement or reporting for work should be compared to the Form DD-214 (Exhibit 8) or military orders.
- (3) **Length Of Service.** Under USERRA, the cumulative period of unformed service with any single employer cannot exceed 5 years. If the time served is over 5 years, [refer to Exhibit 7 for exceptions](#).
- (4) **Military Service Information.** If the claimant applied for reemployment before December 12, 1994, the information concerning the type of military service performed (e.g., active duty, active duty for training) remains especially relevant, as does the issue of service of more than four, but less than five years, if the time between four and five years is at the request of and for the convenience of the government. [Vietnam Era Veterans' Readjustment Assistance Act of 1974, commonly referred to as the Veterans' Reemployment Rights Act (VRRRA)].
- (5) **Reemployment Information.** In this section, obtain the name and title of the person contacted by the claimant for reinstatement or reemployment and the date and method of contact. If the claimant called long distance, the telephone bill may tend to support the claimant's position. If the claimant cannot remember the person's name, ask for a full description of the person. If the claimant was denied reinstatement, ask what reasons were given. If any witnesses were present, note their names.
- (6) **Detailed Explanation and Remedies Sought.** The claimant should provide detailed statements on the back of the VETS Form 1010 about the circumstances of the complaint and the remedies he/she is seeking. The claimant's telephone statements should be fully recorded on the VETS Form 1063.
- (7) **Signature.** Always ensure that the original VETS Form 1010 contains an original signature of the claimant and a date. A VETS Form 1010 received through the [VETS E1010](#) System is considered to have an original signature when the complaint is accepted by the System.
- (8) **Incomplete VETS Form 1010.** If an incoming VETS Form 1010 is incomplete, call, write, email or FAX the claimant to obtain the missing information.

## **.6 Request for Pertinent Military Records.**

- (1) **Form DD-214.** At time of separation from active duty or initial active duty for training, the Department of Defense issues a separation form, titled Form DD-214.

Obtain Member Copy 4, Certificate of Release or Discharge, DD-214 if available. This form certifies the dates of military service as well as the character of service. If the original document is sent to VETS, make a copy for the file and return the original to the claimant. Since the completion of service under conditions other than those listed as disqualifying is an eligibility requirement for active duty and initial active duty for training, these claimants must be able to prove such service when asked to do so. [See 20 CFR 1002.135 for types of discharge that are considered disqualifying for reemployment eligibility under USERRA.](#)

Claimants returning from service of 31 or more days are required by law to provide copies of pertinent military documents to their employers, upon request of the employer. (See 20 CFR 1002.121-122). The claimant must provide VETS with proof of legally acceptable service even if this does not become an issue in the processing of a complaint. Without this documentation, VETS cannot be assured that the claimant has USERRA entitlements. Furthermore, a recommendation for action by the Attorney General or OSC cannot be made unless the referral contains a Form DD-214 or proof of service under qualifying conditions.

If the DD-214 reflects that the claimant does not meet the character of service eligibility criteria, advise the claimant in writing via closing letter that he/she has no statutory USERRA entitlements. The claimant will not be entitled to USERRA protection unless the discharge is retroactively upgraded by the relevant military authorities.

NOTE: Even though an individual does not meet the character of service criterion, he or she should be informed that to protect the right to any entitlements, in the event the discharge is subsequently retroactively upgraded, application must be made to the pre-service employer within the time limit specified by law, both after the initial discharge, and after the upgrade.

The VETS Investigator should inform the claimant that a veteran service organization may be available to provide assistance for an upgrade if appropriate. However, the Investigator is not to become actively involved in the claimant's efforts to upgrade the discharge.

- (2) **Helping the Claimant Obtain a Form DD-214.** If not otherwise provided, the VETS Investigator will assist the claimant in obtaining copies of the Form DD-214 by referring the claimant to a veterans' service organization, Military Personnel Records Center or the Department of Veterans' Affairs Regional Office

for assistance in obtaining a Form DD-214. The form used to request military records is a “Standard Form 180”. ([See Exhibit 9, Standard Form 180 \[link\].](#))

- (3) **Form DD-215.** This form shows corrections to the Form DD-214. Sometimes, the Form DD-214 contains administrative or clerical errors which may be relevant to the claimant's reemployment rights. If the claimant needs assistance in obtaining a Form DD-215 refer him/her to the nearest County Veterans' Service Officer.

Since eligibility must be established prior to processing a case, a Form DD-215 establishing eligibility must be obtained prior to a case being processed if the original DD Form 214 showed ineligibility.

- .7 Multiple Claimants.** When a number of claimants are involved in complaints against the same employer, a case will be opened and processed for each complainant who specifically requests assistance. No class actions will be entertained during investigative-resolution case processing. Similar cases involving complaints against the same employer will be considered companion cases. Companion cases may be assimilated for purposes of referral memoranda, if the VETS Regional Administrator believes assimilation would expedite case processing without decreasing the quality of referral.
- .8 Jurisdiction for Case Opening Purposes.** The case will be opened by the VETS office serving the complainant's work site, not the VETS office nearest the claimant's home nor the first office the claimant contacts. If it appears that a case should be opened by another VETS office, immediately inform the complainant, contact that office, and then forward the VETS Form 1010 and VETS Form 1063 and any other materials provided to that office.

In cases where the employer is located in more than one state, the deciding factor on where the case should be opened and investigated is based on where the employer's management decision was made that prompted the filing of a USERRA complaint by the claimant. This may or may not be the location of the claimant's worksite, personnel and payroll files, or corporate headquarters. Upon receiving a Form 1010, if the VETS office believes the case should be transferred to another state VETS office based on the above, the DVET should first coordinate this with the gaining state's DVET before transferring the Form 1010 or, if already opened, the case file. Conflicts on where to open a case between DVETs should be brought to the attention of the Regional Administrator (s) for resolution.

## **.9 Transfer of Case Files**

When it is necessary to transfer USERRA case files, the DVETs or the Senior Investigator responsible for the case will maintain a duplicate copy of each case file mailed. When the paper file(s) is shipped to the region or reassigned to another state, an e-mail will be sent to

the office that is to receive the case file identifying the case file number, claimant's name, method of shipment, and date shipped. When received, the shipper will be notified by e-mail that the file has been received. Upon receipt of this e-mail receipt confirmation, shipper may destroy the duplicate file.

The shipper and office receiving the case file have joint responsibility to monitor the shipping and receipt of the file and will begin tracking inquiries if the files are not received at region within 10 working days. *Upon receiving a Form 1010, if the receiving VETS office believes the case should be transferred to another state VETS office based on the above, the DVET should coordinate the transfer of the Form 1010, or the case if already opened, through the region's Senior Investigator.* Files hand carried to region are exempt from the above procedures. Until the appropriate VETS office acknowledges receipt of the case file, the file will remain open with the shipper.

**Note:** Anytime a case file or duplicate case is to be shipped, the intended recipient should be e-mailed the name of the file and the tracking number# for the shipment. Confirmation of receipt will always be obtained.

- .10 Re-opened Cases.** A closed case may be re-opened if “new and material” evidence (information) is presented on the original issues or if it appears that the case was erroneously closed. New evidence is that which has not been previously considered or associated with the complaints file. Material evidence is that which bears either directly or indirectly on the allegations made in the case, and which either standing alone or in conjunction with evidence already of record could serve to prove or disprove the allegations asserted in the case. If those elements are not present, there is no basis to reopen a previously closed case. For example, if a case was closed by a settlement agreement, the case may be re-opened if the claimant asserts, or it otherwise appears, that the employer has not implemented the terms of the settlement. A re-opened case will (automatically) be given the original case number with the letter “R” added.

If documents in one case file, open or closed, are also relevant to another open file, the VETS Investigator will make a copy of relevant documents and place them in the new file, along with a note giving the source.

- .11 Federal Executive Agency Employees (Including Postal Service Employees).** USERRA requires that VETS provide assistance to Federal and Postal Service employees, and sets forth the enforcement mechanism for their complaints. *For reemployment by certain Federal agencies, the head of the agency, not VETS, shall prescribe procedures for ensuring that the rights under USERRA are afforded to employees of that agency. See 5 U.S.C. §2302(a)(2)(C)(ii) for a listing of the agencies concerned.*

Complaints from employees of intelligence community agencies must be handled by the Inspector General of the respective agency; however, in referring intelligence community employees back to the relevant Inspector General offices, technical assistance can be provided.

- .12 Concurrent Complaint under a Collective Bargaining Agreement or State Law.** An inductee or enlistee, Reservist or National Guard member, examinee, rejectee or NDMS member may have greater rights under a collective bargaining agreement (CBA) or under State law than under USERRA. However, neither the CBA nor State law may diminish any of the claimant's rights under USERRA nor impose any additional eligibility conditions beyond those required by USERRA.

A claimant is not required to exhaust administrative or arbitration remedies outlined in any State law or collective bargaining agreement before requesting assistance under USERRA.

Occasionally, a complaint may be made where a person has initiated a proceeding under State law or a CBA before contacting VETS for assistance. A case will not be opened until the outcome of the State Court action is determined. Once a State Court action is decided and the claimant desires to proceed under USERRA, the Regional Office should be contacted for guidance.

When a complaint is made where a person has initiated a proceeding under a collective bargaining agreement, a case shall be opened and shall be processed in the normal manner notwithstanding the pendency of the grievance/arbitration proceeding.

If an employer declines to cooperate with an investigation based on the asserted application of an arbitration agreement, the Regional Office should be immediately contacted for assistance in the preparation of a subpoena.

- .13 When Claimant's Rights under State Reemployment Laws are Greater.** If it comes to the VETS investigator's attention that the claimant has greater rights under a State law, the following guidelines should be observed:
- (a) If the claimant is eligible for rights under the State law, but is not eligible for rights under USERRA and since VETS does not have the authority to enforce State law, the case should be closed. However, the claimant should be referred to the appropriate agency or officer of the State who has enforcement authority under the State law.
  - (b) If the claimant is eligible under both the Federal and the State laws, and it appears that the claimant has greater rights, in whole or in part, under the State law, because of the possible complexity of such situations, seek guidance from your Regional Office on how to proceed with the case.
- .14 Claimant Represented by Private Counsel.** Under USERRA, the plaintiff (claimant) is the individual inductee or enlistee, Reservist or National Guard member, examinee, or rejectee or NDMS member--not the Secretary of Labor or the United States. Although the United States Attorney represents the plaintiff in the typical court case, the claimant is free to file suit through private counsel retained at his or her own expense. The claimant

claimant is not required to exhaust any remedies through the Department of Labor before seeking representation and filing suit through private counsel.

If the VETS Investigator is contacted by a private counsel who requests technical assistance with respect to USERRA, the VETS Investigator should refer the private counsel to the appropriate Senior Investigator.

- .15 Dual Representation with Respect to Rights under USERRA.** Although a claimant is entitled to be represented either by VETS or by a third party under USERRA, he or she may not be simultaneously represented by both parties in developing or litigating the case with the following exception: a claimant may be represented by an attorney in dealing strictly with VETS as long as that representation does not interfere with the investigation or the litigation.

If the claimant insists on being represented by a third party in a USERRA complaint, other than strictly with VETS, he or she is to be informed that VETS will no longer handle the case and the case will be closed. Prohibited third party representation could include private counsel, military lawyers/judge advocates, ESGR, or any organization performing a function of representation.

- .16 Dual Representation with Respect to Rights under USERRA and Another Law.** Occasionally, a case may arise wherein the claimant has arguable rights under USERRA and different rights under another Federal or State law. For example, a discharged employee may assert that he or she was fired because of race and also because of a military obligation in the Reserves. The employee may have private counsel representation with respect to the racial discrimination complaint, and that attorney may have chosen, for whatever reason, not to represent the claimant under USERRA.

In such a situation, the VETS investigator should contact the private attorney to work out an agreement that the USERRA complaint be the sole responsibility of VETS. The agreement or a statement of the understanding should be reduced to writing and a copy included in the file.

- .17 USERRA Complaints Against Church Employers.** If you receive a USERRA complaint against a church employer, process the case as if no church element were involved. However, if the employer raises the issue of separation of church and State, seek guidance, through channels, from the VETS National Office.
- .18 USERRA Complaints Against Native American Tribes.** If you receive a USERRA complaint against a Native American Tribe, process the case as if no Native American Tribe element were involved. However, once the employer raises the issue of sovereign immunity, seek guidance, through channels, from the VETS National Office.

Exhibit 4: Sample VETS Form 1063

**REPORT OF CONTACT/ATTEMPTED CONTACT  
UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT  
RIGHTS ACT**

U.S. Department of Labor, Veterans' Employment & Training Service  
////////////////////////////////////

**CASE NAME:**

**FILE NUMBER:**

**REPORT OF:**

**DATE CONDUCTED:**

**PHONE NUMBER(S):**      **Home:**  
   **Work:**  
   **Cell:**  
   **Fax:**

**E-MAIL Address:**

**NAME(S):**

**ADDRESS(ES):**

////////////////////////////////////  
////////////////////////////////////

**PREPARER'S SIGNATURE**

**DATE:**

**PAGE 1 OF 1 PAGES**

**EXHIBIT NO:**

**ELIGIBILITY DATA FORM: For claims under the Uniformed Services Employment and Reemployment Rights Act (USERRA) and/or claims under the Veterans' Preference (VP) provisions of the Veterans Employment Opportunities Act of 1998**  
**U.S. Department of Labor, Veterans' Employment and Training Service**

**PLEASE TYPE OR PRINT**

**Section I: Claimant Information**

1. Name: \_\_\_\_\_  
Last Name First Name M.I.
2. Address: \_\_\_\_\_  
Street City State ZIP
3. Social Security No: \_\_\_\_\_ 4. Home Phone: \_\_\_\_\_ 5. Work Phone: \_\_\_\_\_
6. Email Address \_\_\_\_\_

**Section II: Uniformed Service Information**

7. Serve(d) In:  Army  Navy  Marine Corps  Air Force  Coast Guard  National Guard  Reserve  
 Public Health Service  Other (Explain in "Comments")  None (Retaliation Claim – Explain in "Comments")
8. If Reserve/National Guard:
- (a) Name of Unit: \_\_\_\_\_
- (b) Unit Address: \_\_\_\_\_
- (c) Unit Phone: \_\_\_\_\_
9. Dates of Service (If applicable): (a) From: \_\_\_\_\_ To: \_\_\_\_\_  
**OR** (b) Date of Examination/Rejection for Service: \_\_\_\_\_
10. Type of Discharge or Separation:  Honorable Conditions  Entry Level  Uncharacterized  Medical  
 Other than Honorable Conditions  Other (Explain in "Comments")  Not Applicable

**Section III: Employer Information**

11. Employer or Prospective Employer's Name: \_\_\_\_\_
12. Address: \_\_\_\_\_  
Street City County State ZIP
13. Principal Employer Contact (PEC):  
(a) PEC Name/Title: \_\_\_\_\_ (b) PEC Phone: \_\_\_\_\_
14. Employment Dates (If applicable): From: \_\_\_\_\_ To: \_\_\_\_\_
15. Since beginning work with this employer, has your cumulative uniformed service exceeded 5 years?  Yes  No  
If **YES**, explain in Comments box at end of this claim form.
16. Name of Union(s) That Represent You: \_\_\_\_\_

**Section IV: Claim Information**

17. Was the Employer Support of the Guard and Reserve (ESGR) involved in handling your claim initially?  Yes  No

**If Claim Concerns Veterans' Preference in Federal Employment**

18. Preference Issue (Check One):  Hiring  Reduction-in-Force (RIF)

**If Claim Concerns Employment Discrimination under USERRA**

19. Employment Discrimination Issue(s):  Hiring  Reemployment  Promotion  Termination  Benefits of Employment

**If Claim Concerns Hiring, Promotion, RIF or Termination**

20. Title of Position Held or Applied For: \_\_\_\_\_

21. Pay Rate: \_\_\_\_\_

22. Date of Application Employment/Promotion: \_\_\_\_\_

20a. Vacancy Announcement No.: \_\_\_\_\_

20b. Date Vacancy Opened: \_\_\_\_\_ 20c. Date Vacancy Closed: \_\_\_\_\_

**If Claim Concerns Reemployment Following Service**

23. Was Prior Notice of Service Provided to Employer?  Yes  No (If "No," Explain in Comments)

24. (a) Who Provided Notice of Service to Employer?  Self  Other (name): \_\_\_\_\_

(b) Was the Notice of Service:  Written  Oral  Both

(c) Date Notice of Service was given to Employer: \_\_\_\_\_

25. Name/Title of Person to Whom Notice of Service was Provided: \_\_\_\_\_

26. Date Applied for Reemployment: \_\_\_\_\_ **OR** Date Returned to Work: \_\_\_\_\_

27. Reemployment Application Made To: Name: \_\_\_\_\_ Title: \_\_\_\_\_

28. Reemployed or Reinstated?  Yes (date): \_\_\_\_\_  No

(a) If **YES**, what position? \_\_\_\_\_ at what pay rate? \_\_\_\_\_

(b) If **NO**, Date denied: \_\_\_\_\_ Reason given: \_\_\_\_\_

(c) Who denied (name): \_\_\_\_\_

**PUNISHMENT FOR UNLAWFUL STATEMENTS**

The information provided in this complaint will be utilized by the U.S. Department of Labor, Veterans' Employment and Training Service (VETS) to initiate an investigation of alleged violations of the Uniformed Service Employment and Reemployment Rights Act (USERRA) and/or the Veterans' Preference (VP) provisions of the Veterans Employment Opportunities Act of 1998 (VEOA). Potential claimants should keep in mind that it is unlawful to "knowingly and willfully" make any "materially false, fictitious, or fraudulent statements or representation" to a federal agency. Violations can be punished under Section 2 of the False Statements Accountability Act of 1996 by a fine and/or imprisonment of not more than 5 years. 18 U.S.C. § 1001.

I certify that the above information is true and correct to the best of my knowledge and belief. I authorize the U.S. Department of Labor to contact my employer or any other person for information concerning this claim. I further authorize my employer or any other person to release such information to the U.S. Department of Labor. Pursuant to 5 U.S.C., Section 552a(b) of the Privacy Act, I authorize the U.S. Department of Labor and the U.S. Department of Defense to release information and records necessary for the investigation and prosecution of my claim.

**SIGNATURE:** \_\_\_\_\_ **DATE:** \_\_\_\_\_

Persons are not required to respond to the collection of information unless it displays a currently valid OMB control number. Public reporting burden for this collection of information is estimated to average 15 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the U.S. Department of Labor, Veterans' Employment and Training Service, Room-S1316, 200 Constitution Avenue, N.W., Washington, DC 20210.

**NOTIFICATION OF USERRA CLAIMANT'S RIGHTS**

For claims arising under USERRA, a person has a right to commence an action for relief directly against the employer in the appropriate federal district court (in the case of a complaint against a State or private employer), pursuant to 38 U.S.C. § 4323(a)(2), or the Merit Systems Protection Board (in the case of a complaint against a Federal executive agency or the Office of Personnel Management), pursuant to 38 U.S.C. § 4324(b).

**PRIVACY ACT STATEMENT**

The primary use of this information is by staff of the Veterans' Employment and Training Service in investigating cases under USERRA or laws/regulations relating to veterans' preference in Federal employment. Disclosure of this information may be made to: a Federal, state or local agency for appropriate reasons; in connection with litigation; and to an individual or contractor performing a Federal function. Furnishing the information on this form, including your Social Security Number, is voluntary. However, failure to provide this information may jeopardize the Department of Labor's ability to provide assistance on your claim.

**Continue in Comments box &/or use additional sheet(s) to explain items if needed – Sign and date form (above)**



**Exhibit 6: Sample Cover Letter for VETS Form 1010**

**U.S. Department of Labor  
Office of the Assistant Secretary for Veterans'  
Employment and Training  
Street Address  
City, State Zip Code**

Date

XXXXXXXX

Claimant's Street Address

City, State and Zip Code

Dear XXXXXXXX:

In response to your request for assistance with your rights and benefits under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), you are requested to complete the enclosed USERRA Eligibility Data Form 1010 (VETS Form 1010) or you may file the VETS Form 1010 electronically by going to our website at <https://vets1010.dol.gov/>.

Complete all items to the best of your knowledge. In the comment section on the back of the form, if you run out of room, state exactly what your complaint is and what corrective action you are seeking (e.g., reinstatement to your job, seniority, pay, lost wages, etc.). Also, please provide a copy of the following: [insert appropriate documents.] If filing electronically, please provide the relevant documents separately to your investigator identified in the paragraph below.

\_\_\_\_\_ Copy #4 of your Form DD-214.

The orders which sent you to, and returned you from, military duty.

The drill schedule which required your attendance at training.

All the forms you received while taking your military entrance exams.

[Privacy Act Form, Medical Release Form, if applicable]

Please sign, date, and return the requested VETS Form 1010 and all accompanying documents immediately. This will enable us to act upon your complaint at the earliest possible date. Questions and correspondence about your complaint should be addressed to your VETS Investigator, insert investigator's name. Failure to promptly forward these accompanying documents may cause your case to be administratively closed, unless the failure occurs because such documentation is not readily available through no fault of your own. Please advise me within 10 days of receipt of this letter if and why you are unable to provide the requested documents.

Sincerely,

Investigator's Name

Investigator's Title

Enclosure:

VETS Form 1010

**Exhibit 7: Exceptions to 5-Year Service Limit**

**EXCEPTIONS TO 5-YEAR LIMIT IN 38 U.S.C. § 4312 (c) USERRA**

**Notes:**

1. Effective with enactment of the Reserve Officer Personnel Management Act on October 6, 1994, several of the section numbers of title 10 that are referenced as exceptions to the five-year limit have been changed. In such cases, the new section number is noted in brackets after the section number stated in USERRA [1230l(a)].
2. The term “Reservist” means member of the National Guard or Reserve. Sections that apply only to National Guard or only to Coast Guard Reserve are identified as such.
3. State call-ups of National guard members are not protected under USERRA.
4. The symbol “§” means “section.”

**38 U.S.C.§4312 “... does not exceed five years, except that any such period of service shall not include...”**

**Obligated Service -- 4312(c)(1)**

Applies to initial obligations incurred beyond five years.

**Unable to Obtain Release -- 4312(c)(2)**

Self explanatory. Needs to be documented on a case-by-case basis.

**Training Requirement -- 4312(c)(3)**

- |                       |  |
|-----------------------|--|
| 10 U.S.C.§10147.....  | RESERVIST regularly scheduled inactive duty training (drills) and annual training.                   |
| 10 U.S.C.§10148.....  | RESERVIST ordered to active duty up to forty-five days because of unsatisfactory participation.      |
| 32 U.S.C.§502(a)..... | NATIONAL GUARD regularly scheduled inactive duty training and annual training.                       |
| 32 U.S.C.§503.....    | NATIONAL GUARD active duty for encampments, maneuvers, other exercises for field or coastal defense. |

**Exhibit 7: (cont.)**

**Specific Active Duty Provisions – 4312(c)(4)(A)**

10 U.S.C.§12301(a).....	involuntary active duty in wartime.
10 U.S.C.§12301(g).....	retention on active duty while in captive status.
10 U.S.C.§ 12302.....	involuntary active duty for national emergency up to 24 months.
10 U.S.C.§12304.....	involuntary active duty for operational mission up to 270 days.
10 U.S.C.§12305.....	involuntary retention of critical persons on active duty during a period of crisis or other specific condition.
10 U.S.C.§688.....	involuntary active duty by retirees.
14 U.S.C.§331.....	COAST GUARD involuntary active duty by retired officer.
14 U.S.C.§332.....	COAST GUARD voluntary active duty by retired officer.
14 U.S.C.§359.....	COAST GUARD involuntary active duty by retired enlisted member.
14 U.S.C.§360.....	COAST GUARD voluntary active duty by retired enlisted member.
14 U.S.C.§367.....	COAST GUARD involuntary retention of enlisted member.
14 U.S.C.§712.....	COAST GUARD involuntary active duty of Reserve members to augment regular Coast Guard in time of natural/man-made disaster.

**War or Declared National Emergency -- 4312(c)(4)(B)**

Provides that active duty (other than for training) because of a war or national emergency is exempt from the five-year limit whether voluntary or involuntary.

**Exhibit 7: (cont.)**

**Critical Operational Mission – 4312(c)(4)(C)**

Provides that active duty (other than for training) in support of an operational mission for which Reservists have been activated under 10 U.S.C. § 12304 is exempt from the five-year limit, whether voluntary or involuntary. Note: In such a situation, involuntary call-ups would be under §12304. Volunteers may be ordered to active duty under a different authority.

**Critical Missions or Requirements -- 4312(c)(4)(D)**

Provides that active duty in support of certain critical missions and requirements is exempt from the 5-year limit, whether voluntary or involuntary. This would apply in situations such as Grenada or Panama in the 1980s, when provisions for involuntary activation of Reserves were not exercised.

**Specific National Guard Provisions -- 4312(c)(4)(E)**

10 U.S.C. chapter 15..... NATIONAL GUARD call into Federal service to suppress insurrection, domestic violence, etc.

10 U.S.C. §12406..... NATIONAL GUARD call into Federal service in case of invasion, rebellion, or inability to execute Federal law with active forces

**20 C.F.R. “Exemptions to 5 year cumulative service”:**

**Sec. 1002.100;** The five-year period includes only the time the employee spends actually performing service in the uniformed services. A period of absence from employment before or after performing service in the uniformed services does not count against the five-year limit. For example, after the employee completes a period of service in the uniformed services, he or she is provided a certain amount of time, depending upon the length of service, to report back to work or submit an application for reemployment. The period between completing the uniformed service and reporting back to work or seeking reemployment does not count against the five-year limit.

**Sec. 1002.101;** An employee is entitled to a leave of absence for uniformed service for up to five years with each employer for whom he or she works. When the employee takes a position with a new employer, the five-year period begins again regardless of how much service he or she performed while working in any previous employment relationship. If an employee is employed by more than one employer, a separate five-year period runs as to each employer independently, even if those employers share or co-determine the employee's terms and conditions of employment.

**Exhibit 7: (cont.)**

**Sec. 1002.102;** USERRA provides reemployment rights to which an employee may become entitled beginning on or after December 12, 1994, but any uniformed service performed before December 12, 1994, that was counted against the service limitations of the previous law (the Veterans Reemployment Rights Act), also counts against USERRA's five-year limit.

**Sec. 1002.103;** USERRA creates the following exceptions to the five-year limit on service in the uniformed services:

(1) Service that is required beyond five years to complete an initial period of obligated service. Some military specialties require an individual to serve more than five years because of the amount of time or expense involved in training. If the employee works in one of those specialties, he or she has reemployment rights when the initial period of obligated service is completed;

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

(3)(i) Service performed to fulfill periodic National Guard and Reserve training requirements as prescribed by 10 U.S.C. 10147 and 32 U.S.C. 502(a) and 503; and, (ii) Service performed to fulfill additional training requirements determined and certified by a proper military authority as necessary for the employee's professional development, or to complete skill training or retraining;

(4) Service performed in a uniformed service if he or she was ordered to or retained on active duty under:

- (i) 10 U.S.C. 688 (involuntary active duty by a military retiree);
- (ii) 10 U.S.C. 12301(a) (involuntary active duty in wartime);
- (iii) 10 U.S.C. 12301(g) (retention on active duty while in captive status);
- (iv) 10 U.S.C. 12302 (involuntary active duty during a national emergency for up to 24 months);
- (v) 10 U.S.C. 12304 (involuntary active duty for an operational mission for up to 270 days);
- (vi) 10 U.S.C. 12305 (involuntary retention on active duty of a critical person during time of crisis or other specific conditions);
- (vii) 14 U.S.C. 331 (involuntary active duty by retired Coast Guard officer);
- (viii) 14 U.S.C. 332 (voluntary active duty by retired Coast Guard officer);
- (ix) 14 U.S.C. 359 (involuntary active duty by retired Coast Guard enlisted member);
- (x) 14 U.S.C. 360 (voluntary active duty by retired Coast Guard enlisted member);
- (xi) 14 U.S.C. 367 (involuntary retention of Coast Guard enlisted member on active duty); and
- (xii) 14 U.S.C. 712 (involuntary active duty by Coast Guard Reserve member for natural or man-made disasters).

(5) Service performed in a uniformed service if the employee was ordered to or retained on active duty (other than for training) under any provision of law

because of a war or national emergency declared by the President or the Congress, as determined by the Secretary concerned;

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

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

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

(9) Service performed to mitigate economic harm where the employee's employer is in violation of its employment or reemployment obligations to him or her.

The National Committee for Employer Support of the Guard and Reserve will keep the VETS national office informed of developments in this area as they occur (e.g., the manner in which the necessity of additional Reserve training is to be documented).

**Exhibit 9: Standard Form 180 (Hyperlinked)**

Standard Form 180 (Rev. 4-07) (Page 1) Prescribed by NARA (36 CFR 1220.104(b))	Authorized for local reproduction Previous edition obsolete	OMB No. 3295-0025 Expires 5/3/2008		
<b>REQUEST PERTAINING TO MILITARY RECORDS</b>		To ensure the best possible service, please thoroughly review the accompanying instructions before filling out this form. Please print clearly or type. If you need more space, use plain paper.		
<b>SECTION I - INFORMATION NEEDED TO LOCATE RECORDS (Furnish as much as possible.)</b>				
1. NAME USED DURING SERVICE (last, first, and middle)	2. SOCIAL SECURITY NO.	3. DATE OF BIRTH	4. PLACE OF BIRTH	
5. SERVICE, PAST AND PRESENT (For an effective records search, it is important that all service be shown below.)				
BRANCH OF SERVICE	DATES OF SERVICE		CHECK ONE	SERVICE NUMBER
	DATE ENTERED	DATE RELEASED	OFFICER	ENLISTED
(If unknown, write "unknown")				
a. ACTIVE SERVICE				
b. RESERVE SERVICE				
c. NATIONAL GUARD				
6. IS THIS PERSON DECEASED? IF "YES" enter the date of death.		7. IS (WAS) THIS PERSON RETIRED FROM MILITARY SERVICE?		
<input type="checkbox"/> NO <input type="checkbox"/> YES _____		<input type="checkbox"/> NO <input type="checkbox"/> YES		
<b>SECTION II - INFORMATION AND/OR DOCUMENTS REQUESTED</b>				
1. <b>REPORT OF SEPARATION</b> (DD Form 214 or equivalent). This contains information normally needed to verify military service. A copy may be sent to the veteran, the deceased veteran's next of kin, or other persons or organizations if authorized in Section III, below. NOTE: If more than one period of service was performed, even in the same branch, there may be more than one Report of Separation. Be sure to show EACH year that a Report of Separation was issued, for which you need a copy.				
<input type="checkbox"/> An UNDELETED Report of Separation is requested for the year(s) _____				
This normally will be a copy of the full separation document including such sensitive items as the character of separation, authority for separation, reason for separation, reenlistment eligibility code, separation (SPD/SPN) code, and dates of time lost. An undeleted version is ordinarily required to determine eligibility for benefits.				
<input type="checkbox"/> A DELETED Report of Separation is requested for the year(s) _____				
The following information will be deleted from the copy sent: authority for separation, reason for separation, reenlistment eligibility code, separation (SPD/SPN) code, and for separations after June 30, 1979, character of separation and dates of time lost.				
2. <b>OTHER INFORMATION AND/OR DOCUMENTS REQUESTED</b> _____				
_____				
3. <b>PURPOSE</b> (Optional - An explanation of the purpose of the request is strictly voluntary. Such information may help the agency answering this request to provide the best possible response and will in no way be used to make a decision to deny the request.) _____				
_____				
<b>SECTION III - RETURN ADDRESS AND SIGNATURE</b>				
1. <b>REQUESTER IS:</b>				
<input type="checkbox"/> Military service member or veteran identified in Section I, above		<input type="checkbox"/> Legal guardian (must submit copy of court appointment)		
<input type="checkbox"/> Next of kin of deceased veteran _____ (relation)		<input type="checkbox"/> Other (specify) _____		
2. <b>SEND INFORMATION/DOCUMENTS TO:</b> (Please print or type. See item 3 on accompanying instructions.)		3. <b>AUTHORIZATION SIGNATURE REQUIRED</b> (See item 2 on accompanying instructions.) I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the information in this Section III is true and correct.		
Name _____		Signature (Please do not print.) _____		
Street _____ Apt. _____		Date of this request _____ ( ) Daytime phone _____		
City _____ State _____ Zip Code _____		Email address _____		
<b>RESET</b>				
** This form is available at <a href="http://www.archives.gov/recordsborderstates/sfr-180.pdf">http://www.archives.gov/recordsborderstates/sfr-180.pdf</a> on the National Archives and Records Administration (NARA) web site. **				

## Exhibit 9: Standard Form 180 (Hyperlinked)

Standard Form 180 (Rev. 4-07) (Page 2)  
Prescribed by NARA (16 CFR 1220.168(b))

Authorized for local reproduction  
Previous edition obsolete

OMB No. 5095-0025 Expires 5/31/2008

### LOCATION OF MILITARY RECORDS

The various categories of military service records are described in the chart below. For each category there is a code number which indicates the address at the bottom of the page to which this request should be sent. Please refer to the Instruction and Information Sheet accompanying this form as needed.

BRANCH	CURRENT STATUS OF SERVICE MEMBER	ADDRESS CODE	
		Personnel Record	Health Record
AIR FORCE	Discharged, deceased, or retired before 5/1/1994	14	14
	Discharged, deceased, or retired 5/1/1994 - 9/30/2004	14	11
	Discharged, deceased, or retired on or after 10/1/2004	1	11
	Active (including National Guard on active duty in the Air Force), TDRL, or general officers retired with pay	1	
	Reserve, retired reserve in nonpay status, current National Guard officers not on active duty in the Air Force, or National Guard released from active duty in the Air Force	2	
	Current National Guard enlisted not on active duty in the Air Force	13	
COAST GUARD	Discharge, deceased, or retired before 1/1/1898	6	
	Discharged, deceased, or retired 1/1/1898 - 3/31/1998	14	14
	Discharged, deceased, or retired on or after 4/1/1998	14	11
	Active, reserve, or TDRL	3	
MARINE CORPS	Discharged, deceased, or retired before 1/1/1905	6	
	Discharged, deceased, or retired 1/1/1905 - 4/30/1994	14	14
	Discharged, deceased, or retired 5/1/1994 - 12/31/1998	14	11
	Discharged, deceased, or retired on or after 1/1/1999	4	11
	Individual Ready Reserve or Fleet Marine Corps Reserve	5	
	Active, Selected Marine Corps Reserve, TDRL	4	
ARMY	Discharged, deceased, or retired before 11/1/1912 (enlisted) or before 7/1/1917 (officer)	6	
	Discharged, deceased, or retired 11/1/1912 - 10/15/1992 (enlisted) or 7/1/1917 - 10/15/1992 (officer)	14	14
	Discharged, deceased, or retired 10/16/1992 - 9/30/2002	14	11
	Discharged, deceased, or retired on or after 10/1/2002	7	11
	Reserve, or active duty records of current National Guard members who performed service in the U.S. Army before 7/1/1972	7	
	Active enlisted (including National Guard on active duty in the U.S. Army) or TDRL enlisted	9	
	Active officers (including National Guard on active duty in the U.S. Army) or TDRL officers	8	
Current National Guard enlisted not on active duty in Army (including records of Army active duty performed after 6/30/1972)	13		
	Current National Guard officers not on active duty in Army (including records of Army active duty performed after 6/30/1972)	12	
NAVY	Discharged, deceased, or retired before 1/1/1886 (enlisted) or before 1/1/1903 (officer)	6	
	Discharged, deceased, or retired 1/1/1886 - 1/30/1994 (enlisted) or 1/1/1903 - 1/30/1994 (officer)	14	14
	Discharged, deceased, or retired 1/31/1994 - 12/31/1994	14	11
	Discharged, deceased, or retired on or after 1/1/1995	10	11
	Active, reserve, or TDRL	10	
FHS	Public Health Service - Commissioned Corps officers only	15	

#### ADDRESS LIST OF CUSTODIANS (BY CODE NUMBERS SHOWN ABOVE) - Where to write/send this form

1	Air Force Personnel Center HQ AFPC/DPSRP 580 C Street West, Suite 19 Randolph AFB, TX 78150-4721	6	National Archives & Records Administration Old Military and Civil Records (NWCTB-Military) Textual Services Division 700 Pennsylvania Ave., N.W. Washington, DC 20408-0901	11	Department of Veterans Affairs Records Management Center P.O. Box 5020 St. Louis, MO 63115-5020
2	Air Reserve Personnel Center /DSMR HQ ARPC/DPSSA/B 6750 E. Irvington Place, Suite 4600 Denver, CO 80229-4600	7	U.S. Army Human Resources Command ATTN: AHRC-PAV-V 1 Reserve Way St. Louis, MO 63132-5200	12	Army National Guard Readiness Center NGB-ARF 111 S. George Mason Dr. Arlington, VA 22204-1382
3	Commander, CGPC-ada-3 USCG Personnel Command 4200 Wilson Blvd., Suite 1100 Arlington, VA 22203-1804	8	U.S. Army Human Resources Command ATTN: AHRC-MSR 200 Stovall Street Alexandria, VA 22332-0444	13	The Adjutant General (of the appropriate state, DC, or Puerto Rico)
4	Headquarters U.S. Marine Corps Personnel Management Support Branch (MMSB-10) 2098 Elliot Road Quantico, VA 22134-5030	9	Commander USAEREC ATTN: PCRE-F 8859 E. 56th St. Indianapolis, IN 46249-8301	14	National Personnel Records Center (Military Personnel Records) 9700 Page Ave. St. Louis, MO 63132-5100
5	Marine Corps Reserve Support Command (Code MMI) 15303 Andrews Road Kansas City, MO 64147-1207	10	Navy Personnel Command (PERS-312) 5720 Integrity Drive Millington, TN 38956-3130	15	Division of Commissioned Corps Officer Support ATTN: Records Officer 1101 Watson Parkway, Plaza Level, Suite 100 Rockville, MD 20852

**Exhibit (11): Sample Letter to Complainant Acknowledging Receipt of Complaint**

**U.S. Department of Labor  
Veterans' Employment and Training Service  
Street Address  
City, State, Zip Code**

Date

Claimant Name  
Street Address  
City, State, Zip Code

RE: Claimant Name  
Case Number

Dear Claimant's Name:

We have received your Uniformed Services Employment and Reemployment Rights Act (USERRA) complaint against your employer, EEEEEEEE, and opened a case on October 1, 20XX.

Please submit all documentation relevant to your complaint to me at the letterhead address as soon as possible. **Do not send originals, send unaltered complete copies only.** (NOTE TO INVESTIGATOR: If eligibility documentation was not provided with the original submission or if there are specific documents necessary for the investigation, include a request for the documentation here).

If you signed an arbitration agreement (or if an arbitration agreement is part of a relevant collective bargaining agreement at your worksite), you should submit a complete copy of the agreement to me as soon as possible. If you have witnesses you wish to offer, please provide the contact information listed in item 1. above as soon as possible. You may submit the information via telephone to me at ???-???-????, by facsimile at ???-???-????, or by email to [LastName.FirstName@dol.gov](mailto:LastName.FirstName@dol.gov). Voice mail is provided if we are unavailable. Please leave a detailed message and someone will contact you as soon as possible.

The following is important if you have witness that can provide documentary and/or testimonial evidence to support your complaint:

1. The following information must be provided for each witness:
  - a. Full name, address (including zip code), and telephone number (including area code);
  - b. If the witness is a co-worker, provide his/her job title;
  - c. Summarize the information you believe the witness is able to provide; and
  - d. Provide the date, time, and place that is most convenient to meet with or contact the witness. The place should be away from the work site, if possible.
2. If asked to, you must assist in locating your witnesses;
3. Do not "coach" witnesses by telling them what to say;

4. Witness interviews may be face-to-face, by telephone, or by mail;
5. You will not be allowed to participate when a witness is being interviewed;
6. A witness may refuse to cooperate without providing justification;
7. Witness anonymity is provided to the extent possible by the Veterans' Employment and Training Service. However, if your complaint is referred to the U.S. Attorney General/Office of Special Counsel (select relevant agency) for possible litigation, witness identities may be revealed to interested parties; and
8. Protection against retaliation to those who assist with the investigation is provided by the reemployment rights statute.

VETS will investigate your complaint and if it determines that the alleged action occurred, it will attempt to resolve the complaint by making reasonable efforts to ensure that the employer complies with USERRA. If VETS is not able to resolve your complaint, VETS will notify you in writing of the results of its investigation and advise you of the right to seek referral of your complaint to the U.S. Attorney General/Office of Special Counsel (select relevant agency) for consideration of litigation.

Sincerely,

Investigator's Name

Investigator's Title

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## Chapter 5

### Initial Contact With Employer

**.1 Initial Contact with Employer.** The initial contact with the claimant's employer should be made not later than three working days after the case is opened if the claimant is currently unemployed or threatened with unemployment because of a discharge due to military obligations; or was not reinstated after returning from military training or service and is currently unemployed. In all other cases, the initial contact must be made within 7 business days after the case is opened. **Under no circumstances should an Investigator contact the employer prior to the case being opened.**

The initial contact should normally be made by telephone, because this is generally the most expeditious method of obtaining information about the situation. Also, the employer may be unfamiliar with USERRA and may be willing to comply with the law once the VETS Investigator explains the employer's legal obligations.

When it is known that the claimant was previously working with an Ombudsman from the Employer Support of the Guard and Reserve (ESGR), the VETS investigator should, before contacting the employer, first confer with the ESGR Ombudsman to determine the background of the complaint and to obtain available documents. ESGR policies may limit the degree of participation in sharing of case information.

**.2 Goals of Initial Contact.** The objectives of the initial contact are to let the employer know about the complaint; to verify the correct person or persons to respond for the employer, to explain, if needed, the requirements of USERRA and VETS role in the resolution process; to set forth the remedies the claimant is seeking; to obtain the employer's explanation of the situation; to seek a resolution of the complaint through voluntary compliance or settlement if appropriate.

**.3 Opening Letter.** An opening letter must always be sent to the employer, even when the initial contact is made by telephone, unless after case opening the case is immediately closed due to non-eligibility of the claimant. If the case is resolved during the initial telephone contact, send the employer a letter confirming what the employer and the claimant have agreed to do. In such a situation, the opening letter may also serve as the closing letter.

(1) **Tone.** Opening letters are to be phrased in specific information seeking terms and are not to contain words or statements calculated to trigger adverse, angry, or hostile reactions. The letter should identify the statute under which the complaint arises, but court case citations will not be included in an opening letter unless by previous request of the employer's attorney. The letter should not contain language which would cause the employer to infer that the VETS investigator has already arrived at a conclusion as to the merits of the complaint.

- (2) **Contents.** Whether it is the initial contact with the employer or a confirmation of an opening telephone discussion, the opening letter should be tailored to the situation. It will contain, at a minimum:
- (a) The legal citation to USERRA;
  - (b) The name of the claimant and whether he or she is an inductee or enlistee returning from active duty, Reservist, National Guard member, examinee, or rejectee, covered NDMS member, is a former servicemember, or is a person who assisted in a USERRA complaint;
  - (c) The fact that the individual is seeking assistance under USERRA -- the specifics of the complaint and remedies sought;
  - (d) The claimant's apparent eligibility for rights based on the information contained in the claimant's Eligibility Data Form;
  - (e) Specific sections of USERRA that are applicable and the fact that back wages may be accruing, if applicable;
  - (f) A request for a copy of the appropriate collective bargaining agreement, arbitration agreement, employee handbook and/or employer policies relevant to the issues; and
  - (g) A request that the employer provide a position statement including relevant documentation by a specific date and that the response be sent to the attention of the VETS investigator to whom the case is assigned;

Exhibit 12 shows a sample opening letter in a case where the claimant seeks reemployment based on seniority, Exhibit 13 shows a sample case where the claimant seeks reemployment based on military service discrimination, and Exhibit 14 shows a sample opening letter that is also a closing letter.

- (3) **Distribution.** The original is sent to the employer. Copies are distributed as follows:
- (a) Copy is sent to the claimant. Claimant is provided copies of all correspondence initiated and sent by VETS on his or her behalf.
  - (b) Copy is placed in the investigative case file.
  - (c) Copies are sent to other parties, as deemed appropriate by the VETS investigator (e.g., a referring agency or union).

(d) Federal Chief Human Capital Officers will receive courtesy copies of all opening letters against their respective Agency.

## **EXECUTIVE BRANCH CHIEF HUMAN CAPITAL OFFICERS**

### **Office of Personnel Management**

Chief Human Capital Officer  
1900 E Street, N.W., Suite 5H09  
Washington, DC 20415  
Phone: 202-606-1000/Fax: 202-606-4489

### **Department of Agriculture**

Chief Human Capital Officer  
1400 Independence Avenue, S.W., Room 209A  
Washington, DC 20250  
Phone: 202-720-3291/Fax: 202-720-2191

### **Department of Commerce**

Chief Human Capital Officer  
14<sup>th</sup> Street and Constitution Avenue, N.W.  
Washington, DC 20230 Phone: 202-482-4951/Fax:  
202-482-3592

### **Department of Defense**

Chief Human Capital Officer  
The Pentagon, Room 3E764  
Washington, DC 20301  
Phone: 703-695-5254/Fax: 703-693-0171

### **Office of Management and Budget**

Chief Human Capital Officer  
1600 Pennsylvania Avenue, N.W., EEOB, Room 260  
Washington, DC 20502  
Phone: 202-456-7070/Fax: 202-456-5938

### **Department of Energy**

Chief Human Capital Officer  
1000 Independence Avenue, SW  
Room 4E-084, Forrestal Bldg.  
Washington, DC 20585  
202.586.5610

### **Department of Health and Human Services**

Chief Human Capital Officer  
200 Independence Avenue, S.W., Room 300E  
Washington, DC 20201  
Phone: 202-690-6191/Fax: 202-690-6758

### **Department of Housing and Urban Development**

Chief Human Capital Officer  
451 7<sup>th</sup> Street, S.W.

Washington, DC 20410  
Phone: 202-708-0940/Fax: 202-619-8129

### **Department of Education**

Chief Human Capital Officer  
400 Maryland Avenue, S.W.  
Washington, DC 20202  
Phone: 202-260-7337/ Fax: 202-260-3761

### **Department of Homeland Security**

Chief Human Capital Officer  
1201 New York Avenue, N.W.  
Washington, DC 20528  
Phone: 202-357-8151/Fax: 202-357-8295

### **Department of the Interior**

Chief Human Capital Officer  
1849 C Street, N.W.  
Washington, DC 20240  
Phone: 202-208-6291/Fax: 202-513-0734

### **Department of Justice**

Chief Human Capital Officer  
950 Pennsylvania Avenue, N.W.  
Washington, DC 20530  
Phone: 202-514-5501/Fax: 202-305-4746

### **Department of Labor**

Chief Human Capital Officer  
200 Constitution Avenue, N.W.  
Washington, DC 20210  
Phone: 202-693-4040/Fax: 202-693-4055

### **Department of State**

Chief Human Capital Officer  
HST Room 6218  
2201 C Street, N.W.  
Washington, DC 20520  
Phone: 202-647-9898/Fax: 202-647-5080

### **Department of Transportation**

Chief Human Capital Officer  
1200 New Jersey Avenue, SE  
8<sup>th</sup> Floor, West Building  
Washington, DC 20590  
Phone: 202-366-2332/Fax: 202-366-2191

**Department of the Treasury**  
Chief Human Capital Officer  
1500 Pennsylvania Avenue, N.W.  
Room 1136MT  
Washington, DC 20220  
Phone: 202-622-6052/Fax: 202-622-0300

**Department of Veterans Affairs**  
Chief Human Capital Officer  
810 Vermont Avenue, N.W.  
Washington, DC 20420  
Phone: 202-273-4901/Fax: 202-273-4914

**Environmental Protection Agency**  
Chief Human Capital Officer  
1200 Pennsylvania Avenue, N.W.  
Washington, DC 20460  
Phone: 202-564-4600/Fax: 202-564-0233

**National Aeronautics and Space Administration**  
Chief Human Capital Officer  
300 E Street, S.W.  
Washington, DC 20546  
Phone: 202-358-0520/Fax: 202-358-3039

**Nuclear Regulatory Commission**  
Chief Human Capital Officer  
Mail Stop: GW 5A06  
Washington, DC 20555  
Phone: 301-492-2076/Fax: 301-492-2241

**Office of Personnel Management**  
Chief Human Capital Officer  
1900 E Street, N.W.

Washington, DC 20415  
Phone: 202-606-3207/Fax: 202-606-4520

**Social Security Administration**  
Chief Human Capital Officer  
6401 Security Boulevard  
Baltimore, MD 21235  
Phone: 410-965-1900/Fax: 410-965-8996

**General Services Administration**  
Chief Human Capital Officer  
1800 F Street, N.W.  
Washington, DC 20405  
Phone: 202-501-0398/Fax: 202-219-0982

**Intelligence Community Chief Human Capital Officer**  
Chief Human Capital Officer  
Office of the Director of National Intelligence  
Washington, DC 20511  
Phone: 202-201-1822/Fax: 202-201-1379  
Phone: 703-482-1290/Fax: 703-482-0684

**National Science Foundation**  
Chief Human Capital Officer  
4201 Wilson Blvd.  
Arlington, VA 22230  
Phone: 703-292-8100/Fax:

**Federal Trade Commission**  
Chief Human Capital Officer  
600 Pennsylvania Avenue  
Washington, DC 20580  
Phone: 202-326-2748

**.4 Employer's Response.** The employer's response to the initial contact is vitally important because it suggests the direction the case may take and, to some extent, the amount of time and effort that will be involved. The employer's initial response should not be automatically interpreted as a firm position, but as an immediate reaction which may change as the case develops and the employer better understands USERRA. **The VETS investigator should not send the employer's response directly to the claimant.** The VETS investigator must summarize information contained in the employer's response before conveying it to the claimant. Summaries must also be used when there is a need to inform the claimant of subsequent important employer responses.

(1) **Positive.** If the employer's response recognizes the validity of the claimant's allegations, or at least does not contest them, resolution may be imminent. If

resolution is attained, verify that the claimant has received his/her entitlements under the law, and close the case. (See Chapter 9, Case Closing.)

- (2) **Noncommittal or Negative.** If the employer's response is noncommittal or negative, continue investigation and seek resolution.  
(See Chapter 6, Investigation; **Sec. 1002.139 Employer Defenses; Sec. 1002.22-23 Discrimination/Retaliation proof** )
  - (3) **Missing Information or Information Not Fully Clarified.** If the employer's initial response fails to contain all necessary information, or if the information is unclear, seek clarification from the employer, either by telephone or in writing.
  - (4) **No Response.** If the employer does not respond to telephone messages or does not respond to an opening letter within 10 working days after the response date cited in the letter, send a Certified Mail-Return Receipt letter with a new response date and notification that **"this is an attempt to avoid the need for a subpoena"** and continue contacting the employer on a regular basis by telephone. If the employer does not respond within 10 working days after the new response date, consult with the next higher office (Regional Office or DVET Office) to determine possible future actions.
- .5 Advisory Opinion Letter.** As soon as possible, but no later than 10 working days after the employer brings up an issue of law anytime during case processing--such as during initial contact, by phone, in a letter, during a conference, etc., consult with the Regional Office for guidance. Answer the employer's questions in writing.
- .6 Contact with Claimant.** Within three working days after receiving the employer's response, the VETS investigator should contact the claimant to describe the employer's point of view. The claimant must be informed of and given the opportunity to rebut any relevant allegation that may affect the outcome of his/her case. This contact should be recorded using the VETS form 1063.

**[Exhibit 12: Sample Employer Opening Letter – Reinstatement](#)**

**U.S. Department of Labor**

**Veterans' Employment and Training Service**  
**Street Address**  
**City, State, Zip Code**

Date

EEEEEEE

Street

Suite

City, State Zip

Re: XXXXXXXX

Case No.

Dear EEEEEEE:

Thank you for taking the time to speak with me on (date), regarding the above-referenced matter. As I explained in our telephone conversation, this agency is responsible for seeking compliance with the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), codified at Title 38 U.S. Code Sections 4301 - 4334 and 20 C.F.R. Part 1002. (XXXXXXX) has requested assistance in determining and exercising his reemployment rights under USERRA into an appropriate position at (the Employer).

In general, to qualify for reemployment protections under USERRA, a service member must leave a non-temporary employment position to perform military service, provide notice to the employer of the military service, serve for fewer than five years, have a qualifying discharge from the military, and make a timely request for reemployment. See 38 U.S.C. § 4312(a) and 20 CFR 1002.32. (XXXXXXX) began employment with Employer on (date). He was a (Position) when he left on (date) to perform service in the uniformed services and provided notice of his/her military service. He served honorably in the (unit/branch) from (date) to (date). Based on the information provided to date, (XXXXXXX) is eligible for employment protection under USERRA.

(XXXXXXX) states he was employed with Employer from October 1991 to present. (XXXXXXX) contends that, while he was deployed for service in the uniformed services, a contract was passed which resulted in several positions being opened. Many senior employees retired, and many jobs became open, including the job of Position. According to (XXXX), the Position however was awarded to someone other than (XXXXXXX), however. (XXXXXXX) sought the Position because, while it may not be a more senior position than his current position, the status inherent to the position is viewed as being greater than the status of his current position.

(XXXXXXX) maintains that it is the practice of the Employer to award such jobs based

1/30/08

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on seniority. (XXXXXXX) contends that he was the senior most person who would have bid for that job and, as such, he should have been placed in that job upon his return from service in the uniformed services. (XXXXXXX) stated that the Employer told him that because he was not physically there to bid on the job, it had no obligation to offer him the job.

If it is your practice to award jobs based on seniority, and if (XXXXXXX) bid on the job in the sign shop (or it is reasonably certain that he would have bid on this job) and he was the most senior bidding on that job, then USERRA requires that he be placed in the sign shop position, effective upon his date of reemployment. Should the evidence support the claimant's allegations he/she may be eligible for lost or disadvantaged wages and benefits from the date of the denial of reemployment, until a proper offer of reemployment is made.

Please provide us with your position statement and any documentation that will support your position that you did not violate (XXXXXXX's) rights under USERRA when you failed to promote him into the (position) in the sign shop when he returned from military duty.

Your response is requested by (date 10 business days from submission of letter).

Please contact me at (phone number) if you have questions regarding this complaint.

Sincerely,

Investigator

cc: XXX

**Exhibit 13: Sample Employer Opening Letter – Discrimination**

**U.S. Department of Labor  
Veterans' Employment and Training Service  
Street Address  
City, State, Zip Code**

Date

(EEEEEEEE)

Street

Suite

City, State Zip

Re: (XXXXXXXX)

Case No.

Dear (EEEEEEEE):

Thank you for taking the time to speak with me on (date) regarding the above referenced matter. As I explained in our telephone conversation, this agency is responsible for seeking compliance with the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), codified at Title 38 U.S. Code Sections 4301 - 4334 and 20 C.F.R. Part 1002. (XXXXXXXX) has requested our assistance in determining and exercising his employment rights under USERRA and restoring him to his former position at the ((Employer)).

A person alleging discrimination under USERRA must establish that he or she is protected as result of past, present or future affiliation with the uniformed services, that an adverse employment action by the (Employer) or prospective (Employer) occurred, and that there was a causal relationship between the claimant's protected status and the adverse employment action. The claimant does not need to show that his or her status was the sole factor in the employment action; the person need only show that his or her status was a motivating factor in the employment action. 20 C.F.R. § 1002.23.

(XXXXXXXX) states he was employed by (Employer) from September 14, 1998, until December 20, 2006, when he was terminated. (XXXXXXXX) contends that his service in the U.S. Air Force Reserve was a motivating factor in his termination. Specifically, (XXXXXXXX) complains that, on several occasions, he was threatened with termination because of his military requirements. (XXXXXXXX) states that one such threat occurred in January 2005, after he informed his supervisor, (Supervisor's name), of upcoming military duty. (XXXXXXXX) complains that the authenticity of his orders was challenged by Supervisor, who subsequently contacted (XXXXXXXX's) military commander to confirm his service requirements. Additionally, upon his return from that duty in late February 2006, (XXXXXXXX) contends that he was harassed and threatened for using military leave. Also, (XXXXXXXX) further contends that in August

2005, after giving notice of upcoming military service, Supervisor remarked to the effect that were it not for (XXXXXXX)'s military service, he would not be working. XXXXXXXX understood this to be a disparaging remark that was meant to convey disdain for his military service. XXXXXXXX reported for duty on September 5 and returned on October 2, at which time he informed his supervisor of additional military service. Thereafter, (Employer) proceeded with a pre-disciplinary meeting. (XXXXXXX) was terminated in December 20, 2006.

(XXXXXXX) complains that he was terminated because (state the specific reasons provided by the Claimant). During our conversation, you indicated that you had information which supports the termination and that his military service was in no way a motivating factor in this decision. Please provide us with your position statement and documentation that will support your position regarding(XXXXXXX)'s termination.

This request includes all documents, including email, handwritten notes, memoranda, or any other means of recording information from anyone exercising any authority of(XXXXXXX), that relate in any way to(XXXXXXX)'s performance, disciplinary actions, or his military service. We need to know specifically the circumstance of(XXXXXXX)'s termination and what was considered in the termination action.

Should the evidence support the(XXXXXXX)'s allegations,(XXXXXXX) may be eligible for lost wages and benefits derived from the employment action.

Your response is requested by (date 10 business days from submission of letter).

Please contact me at (phone number) if you have questions regarding this complaint.

Sincerely,

Investigator

cc: (XXXXXXX)

**Exhibit 14: Sample Opening and Closing Letter**

**U.S. Department of Labor  
Veterans' Employment and Training Service  
Street Address  
City, State, Zip Code**

Date

(XXXXXXXX)  
Street Address  
City, State, Zip Code

Re: (XXXXXXXX)  
Case Number

Dear (XXXXXXXX) :

Thank you for taking such prompt action to provide a proper reemployment position to reservist (XXXXXXXX) . (XXXXXXXX) has verified that he started work on Monday, August 1<sup>st</sup>. His position is "20 Cold Form Press Brake Operator" on the 2<sup>nd</sup> shift. His starting rate is \$12.53 per hour. His seniority date is May 15, 20XX.

In view of this action, we are closing (XXXXXXXX)'s case file.

Sincerely,

Investigator's Name  
Investigator's Title

cc: (XXXXXXXXXX)

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## Chapter 6 Investigation

- .1 Objective of Investigation.** The basic/mandated reason for investigating a complaint under USERRA is to determine the facts necessary to evaluate the merits of the complaint, to proceed with these facts to resolve the issues, and to conclude the case in a satisfactory manner. The investigation should also provide sufficient accurate information to permit an effective presentation at a civil trial if litigation is necessary. This requires a careful assembling and evaluation of provable facts and accurate and complete reports of contacts, including interviews. [See Chapter 2, paragraph 1.](#)
- .2 Investigative Ethics:** An intangible, but exceptionally important part of being a VETS Investigator, is maintaining an objective and completely impartial attitude toward case handling. Any appearance of favoritism or emotional involvement with a case may not only cause embarrassment to the Agency, but will destroy employer and claimant confidence, hindering the Investigator's ability to gather necessary facts from all relevant sources. This would reduce VETS' effectiveness in negotiations and other dealings with the public. Some basic guidelines for investigator conduct:
- (1) Maintain absolute integrity and honesty with all parties in a case. Answer questions completely, while keeping the identity of information sources confidential. If asked by anyone for the name of the person who provided certain information, politely refuse, explaining that VETS does not release information during an investigation to avoid placing any person in jeopardy.
  - (2) Conduct the investigation fairly and without bias. Avoid snap judgments, and do not give "updates" to either party concerning the current evaluation of the complaint. Doing so can be damaging if the final determination is at odds with the "update." Wait until all the evidence is gathered before announcing any conclusion, and even then, leave the door open for new evidence.
  - (3) Do not accept anything from either employers or claimants. For example, if investigating a restaurant, refuse coffee and go elsewhere for lunch. The key here is to avoid any appearance of accepting favors or appearance of conflict of interest.
  - (4) Investigations may become highly charged with emotions. The VETS investigator must keep his or her head though others may be losing theirs. Avoid becoming part of the problem.
  - (5) If a relative works for, or is otherwise closely associated with either party, attempt to have another person handle the case to avoid any possible complaint of conflict

of interests. If this is not possible, inform the Regional Office and discuss the matter up front with both sides to defuse any potential the problem before it starts.

- (6) Do not casually discuss or otherwise mention details of any open or closed case to anyone except those charged with USERRA responsibilities. Maintain confidentiality for both the employer and the claimant.
- (7) If an investigator has any questions or doubts concerning a situation in which he or she is involved, or is about to be involved, that person should consult with his or her supervisor before continuing. [\[QAR\]](#)

**.3 Need for Impartial Investigation.** USERRA does not empower VETS to make findings or rulings that are binding on the employer or the claimant. Rather, the role of the VETS investigator is to assist the claimant by objective fact finding. In order to resolve cases, the VETS investigator must make a thorough and objective investigation.

**.4 Investigative Steps.** To conduct a quality investigation, the VETS investigator must follow a systematic procedure. Preparation and laying of a good foundation are the key to any investigation.

- (1) Identify the Issues: Upon receipt, the complaint must be thoroughly analyzed, and the VETS investigator must have a full understanding of the relevant issues, and the remedies sought. *The identification of the correct issue(s) is critical as it is only this alleged issue(s) that should be identified in the opening letter to the employer.*

**Note:** Investigators must determine whether the claimant has signed an arbitration agreement. Case law in certain federal circuits has held that a USERRA claimant may be bound by the terms of an arbitration agreement to resolve a USERRA dispute through arbitration. If an arbitration agreement exists, obtain a copy and discuss the issue with the Regional Office immediately.

- (2) Determine the Applicable Sections of the Statute and Regulations: Once the issues and remedies are identified, it is necessary to determine those sections of the Act, regulations and case law that may apply to such issues. If the investigator is unsure as to the applicable sections, contact the next higher office (DVET or Region) for guidance.

- (3) Prepare Investigative Plan: The need for a formal investigation will usually be determined by the first or second employer contact. Before starting a formal investigation, develop a written investigative plan. The investigative plan should identify the issues in the case, taking case law and VETS' policies into account. It should also identify any evidence needed to make a factual determination; the

means by which that evidence is to be obtained (e.g. interview, records review); and all steps necessary to arrive at a determination on the merits of the complaint.

**.5 Obtaining Records and Information.** Information can be obtained not only from the employer, claimant, and witnesses, but also from Federal and State agencies, unions, military organizations, and others. Information and supporting documentation should be requested from all sources as early as possible during the investigation. If no information is provided promptly and voluntarily, contact the Regional Solicitor to discuss use of a subpoena to obtain the information. See .14 below.

**.6 Interviews.** In-person interviews are the most effective means of gathering information from a claimant, employer, or witness. During the investigation, conduct in-person interviews of all available persons who may have knowledge of relevant facts, if practicable. Witnesses should be interviewed separately. A signed statement (Witness Statement, Exhibit 18) should be sought from each person who supplied relevant information at the end of the interview. Individuals should understand that signing the statement is voluntary. The claimant should not have access to the records of other employees and should not be present when a witness is being interviewed. [\[QAR\]](#)

(1) **Objectives Of Interviewing.** The objective of an interview is to develop credible information relevant to the investigation. It is also used to verify information taken from records, and that obtained from other people. Additionally, it may be used to develop leads to new case information. Particular objectives will vary with the facts or circumstances of each case.

Be prepared for interviews. Thoroughly analyze all available background information, evidence, and any other material. Determine what needs to be resolved through each interview. Develop a list of questions for each person to be interviewed. When a response to a particular question dictates such, follow-up questions should be utilized to clarify the previous response, or to obtain additional relevant information that would lead to new case information.

(2) **Documenting Interviews.** The contents of each interview will be documented on a Witness Statement (Exhibit 18). Signed statements should be requested from witnesses who provide relevant evidence. After writing the statement, have the witness read it, and note any objections to the wording. Correct the statement by drawing a single line through the part to be changed, and have the witness print the change (if needed) above it. Have the witness initial each change. When finished, complete the attestation at the bottom of the form. The witness will be asked to initial at the end of the last line of the last paragraph on each page and sign on the last page after the declaration statement. After the witness signs and dates the form, the VETS investigator signs just below the witness' signature, as a witness to the signing. If a witness refuses to sign the form, the investigator

should write “Refused to sign” where the witness would have signed, write the date, and then sign it. A separate VETS Form 1063 should be prepared detailing why the witness refused to sign the statement.

**Note:** In carrying out an investigation, section 4326 of USERRA provides that VETS shall, at all reasonable times, have access to and the right to interview persons with information relevant to the investigation. If such persons refuse to make themselves available for an interview, USERRA authorizes VETS to seek their testimony by subpoena. See section .14 below.

- .7 Use of Telephone and E-mail.** Telephone and E-mail provide immediate access to basic information, to clarify points, to verify information, to obtain witnesses' names and addresses, to relay offers and counter-offers of settlement, to explain administrative processing of cases, and to schedule appointments. **However, telephone and E-mail contacts should not be used as the exclusive or even the primary method of investigation.**

All significant information obtained over the telephone and E-mail or otherwise obtained verbally (such as the position of the employer) should be confirmed in writing, which may include E-mail correspondence/confirmation when warranted. If there is reason to believe that the addressee might deny receipt of VETS correspondence, attempt to misconstrue information provided by the VETS investigator, or change his/her position later, the correspondence will be sent by Certified Mail (return receipt). The importance of what the employer tells the VETS investigator cannot be over-emphasized because statements made against self interest by supervisors or managers can be binding in court, if properly noted and confirmed in writing.

- .8 Updating Investigative Plan.** After 60 calendar days, the investigative plan will be revised to include a timetable for completion of investigation. Following the initial revision, the plan will be updated every 30 calendar days after that as long as the case remains open. In revising the investigative plan, follow these guidelines: [\[QAR\]](#)

- (1) Identify the remaining unresolved issues.
- (2) Define possible remedies for each remaining issue to resolve the complaint.
- (3) **Consult with the Senior Investigator prior to determining what further investigation needs to be done to either resolve or refer the complaint.**

**Note:** If possible, investigations should be completed no later than 90 calendar days after a case is opened. **After 90 days, serious consideration should be given to whether the additional information sought can realistically be obtained within a**

reasonable period of time. This consideration should be carefully balanced with the primary goal of a quality investigation.

- .9 On-Site Investigations.** An on-site investigation should be conducted when the investigator doubts the veracity of information provided by the employer or otherwise believes an on-site investigation would be beneficial. An on-site investigation will be necessary when relevant documents and records that cannot otherwise be obtained or where witnesses need to be personally interviewed. The importance of an on-site investigation to resolve disparate application of benefits of employment (comparative issues) cannot be over-emphasized. On-site visits should be scheduled in advance, and the employer should be sent a letter confirming the visit. (Exhibit 17 shows a sample letter scheduling an on-site visit). [\[QAR\]](#)
- .10 Contacts with Employer's Attorney.** When the employer indicates that the matter has been placed in the hands of counsel or when the employer's reply comes from an attorney, all future VETS contacts with the employer concerning the case will be made exclusively through the attorney unless permission is obtained from the attorney to speak directly to the employer. **Regional SIs should be notified when an employer is represented by counsel.** Contacts and/or correspondence regarding new cases, unrelated to the case under investigation, will be initially addressed to the employer.
- .11 Auxiliary Investigations.** As the case progresses, it may become necessary to interview witnesses or examine records in a distant city. If there is a VETS investigator in or near that city, that VETS investigator should be asked to assist, so that travel costs can be minimized. The VETS investigator requesting assistance should send a memorandum detailing the required information needed as well as a copy of the file, or pertinent parts thereof. Auxiliary investigations crossing different regions will be requested through the appropriate Regional Administrators.
- .12 Examination Of Records.** All basic records necessary to substantiate material facts will be examined and exact copies or a transcription of those records should be obtained. Depending on the issues in the case, the review and analysis of pertinent records may include, but is not limited to, the following records:
- Claimant's personnel file
  - Company personnel manual, handbook and written policies
  - Personnel files of other employees
  - Seniority lists
  - Collective Bargaining Agreement (CBA)
  - Organization charts
  - Job posting sheets
  - Job bids
  - Job selection notices

- Employment applications
- Weekly work schedules
- Written warnings or reprimands
- Written interview notes
- Grievances
- Arbitration agreements
- Dates of advancement of other employees in the claimant's peer group
- Payroll policies and payroll records
- Initial Unemployment Insurance complaint filed by claimant and employer's response
- Unemployment Insurance hearing decisions
- Pension plans and brochures.

Do not mark or write on the original records in any way. All such records will be placed in the investigative file and a [VETS Form 1063](#) will be prepared summarizing the results of the on-site visit to include a summary of the source of each document obtained.

**.13 Authority to Obtain Records.** The VETS investigator can usually obtain whatever records are needed simply by requesting them. However, USERRA provides that the Secretary's duly authorized representatives (VETS investigators) shall, at all reasonable times, have reasonable access to, for purposes of examination, the right to copy and receive any documents of any person or employer that the Secretary considers relevant to the investigation. If necessary, VETS investigators may require production of those documents through a subpoena. See .14 below.

**.14 Subpoena Power.** [\[QAR\]](#)

- (1) **Statutory Provision.** USERRA provides that, in carrying out any investigation, the Secretary may require by subpoena the attendance and testimony of witnesses and the production of documents relating to any matter under investigation.

**Note:** Although a subpoena should only be requested after other means of obtaining the information have been unsuccessful, a subpoena can be an effective means of obtaining necessary information. **The investigator must consult with the Senior Investigator when requested information is not provided in a timely manner.**

- (2) **Delegation of Authority to Issue Subpoenas.** On June 13, 2002, the ASVET delegated his authority to Regional Administrators to sign and issue subpoenas pursuant to Section 4326(b) of USERRA, to compel the production of documents and the testimony of witnesses for the purpose of any investigation provided for in the Act.

- (2) **Enforcement.** Section 4326(c) of USERRA authorizes Federal court action to enforce subpoenas if they are not complied with.
- (3) **Types of Subpoenas.**
- (a) **Subpoena Duces Tecum.** A *subpoena duces tecum* is a command to a person or organization to appear at a specific time and place, and to produce the designated records. (see Exhibit 20)
- (b) **Subpoena Ad Testificandum.** A *subpoena ad testificandum* is an order directing a named individual or corporation to appear at a particular time and designated place to give oral testimony. (see Exhibit 21)
- (4) **Subpoena Request (VETS Form).** Regional Administrators have authority to issue *duces tecum* and *ad testificandum* subpoenas upon receipt of a properly completed Subpoena Request (see Exhibit 19). Each subpoena issued must be justified by a separate request. Instructions for properly completing a Subpoena request follow:
- (a) **Case Name and File Number.** Enter the case name and the file number designated by the office with primary investigative jurisdiction.
- (b) **Subpoena Subject.** Enter the full name and address of the individual or organization on whom the subpoena is to be served. If necessary, contact the appropriate state office, e.g., the Secretary of State, to determine if the subject organization is incorporated. The principal corporate officer or appropriate agent to receive service of subpoenas may also be identified by calling the appropriate state office, usually the Secretary of State
- Mark the appropriate boxes in the upper right part of the form to indicate the nature of the subject, the subject's relationship to the VETS investigation, and whether compliance with the subpoena is anticipated.
- (c) **Delivery Data.** Indicate in the box to whom and where the completed subpoena is to be served.
- (d) **Proposed Date of Service.** Enter the proposed date of service to ensure prompt processing of the request.
- (e) **Identification of Records.** Provide a specific, detailed description of the records or documents sought. A reasonable request which is sufficiently specific will diminish the likelihood of a successful challenge to the

subpoena on the grounds that the record request is indefinite, over broad, unduly burdensome, or not relevant.

- (f) **Justification for Issuance.** Specify whether a formal VETS request for records has been made and denied, or whether denial is anticipated.

Include a statement describing the purpose of the investigation along with a brief explanation as to how the subpoenaed records are necessary to further the investigation. In addition, cite the USERRA sections pertinent to the investigation.

- (5) **Subpoena Approval.** Upon receipt of a Subpoena Request, the Regional Administrator must review the Request to determine whether alternative means are available to obtain the required information without issuing a subpoena and to ensure that all necessary information is contained in the Request. After Regional Administrator's approval, the Subpoena Request should be forwarded to the Regional Solicitor and a copy retained at the Regional Office. Following Regional Solicitor review and approval, the Subpoena Request should be returned to the Regional Administrator for preparation of the subpoena and transmittal to the VETS investigator.
- (6) **Subpoena Log.** Regional Administrators are accountable for every subpoena issued and will maintain a Subpoena Log indicating the sequential number of the subpoena, the type of subpoena, the case number, the issue date, and any appropriate remarks. A completed Subpoena Request must be on file for each subpoena issued. Prepared but unused subpoenas should be destroyed and marked "unused and destroyed" in the Subpoena Log.
- (7) **Right to Financial Privacy Act-Covered Records.** If a subpoena is deemed necessary to secure records from a financial institution, consult with the Regional Administrator.
- (8) **Completion of Subpoena.** All items on the subpoena must be properly completed. The VETS investigator before whom production is requested should be named followed by the words "an officer." The subpoenaed party should be given a reasonable time, usually ten to fourteen working days, to assemble the records for production or to appear to give oral testimony. In certain situations, more or less time should be allowed based on the particular case facts.
- (9) **Signing of Subpoenas.** Only Regional Administrators and certain designated officials in the National Office are authorized to sign VETS *duces tecum* and *ad testificandum* subpoenas. Persons serving as "acting" Regional Administrators must receive authorization to sign a given subpoena from the Assistant Secretary

for Veterans' Employment Training. Both the original subpoena and the duplicate copy must contain original signatures.

(10) **Service of Subpoenas.**

(a) **Who May Serve.** Any authorized employee of VETS can serve subpoenas.

(b) **Party Served.**

1) **Individual.** If the presence of a particular witness is essential, the subpoenas must be served on that person [Rule 45(b)(1) of the Federal Rules of Civil Procedure]. However, where service on such a witness is impossible or impractical, some courts have ruled that it is permissible to make service by leaving the subpoena with a person of suitable age and discretion at the last and usual place of abode, coupled with mailing a copy of the subpoena via Certified Mail-Return Receipt. If this form of service appears necessary, the investigator must first consult with the Regional Solicitor's Office to assure that such service meets the local jurisdiction's subpoena service requirements. The courts have generally held that individuals age 16 and over are of a suitable age to receive service. Identifying information about the person being served should be obtained and recorded.

2) **Corporation.** Service on a corporation is made by serving a corporate officer, a managing or general agent, or, if not available, the person in charge of the corporate offices. A subpoena may also be served on any agent authorized by law to receive service (i.e., Secretary of State). Such service should be at the corporation's usual place of business or wherever the corporation is doing business. If seeking testimony or documents from a corporation, the subpoena should be addressed to the corporation since it is the corporation from which testimony and records are "demanded," rather than any individual corporate officer. Identifying information about the person being served should be obtained and recorded.

When service is made on a corporation for production of documents, individual served should be the person who has the authority to release the document as opposed to the person who possesses the document.

- 3) **Federal Agency.** If applicable, service on a Federal Agency should be made by serving the agency officer designated to accept service. For information on who may be authorized to receive service, contact the agency's General Counsel. Otherwise, when a subpoena is used to request the presence of a particular person in an agency as a witness (*i.e., Subpoena Ad Testificandum*), service should be made by serving the person named in the subpoena. When service is made on an agency for production of documents (*i.e., Subpoena Duces Tecum*), the individual served should be the person who has control of the records sought (e.g., authority to release the document). The subpoena should be addressed to the agency since it is the agency from which the records are "demanded," rather than an individual agency official. Generally, control of agency records will lie with division heads, area directors, and the like. In all cases, service should be at the agency's usual place of operation or wherever the agency is currently operating. Identifying information about the person being served, such as name and title, should be obtained and recorded.

**(11) Subpoena Enforcement.**

- (a) **Failure to Respond.** In the case of disobedience or resistance to a subpoena, the Regional Administrators will work with the Regional Solicitor in seeking enforcement of the subpoena as follows:

The Regional Administrator will confer with the Regional Solicitor in preparing an affidavit regarding the specifics involving a refusal to produce requested records or to give oral testimony. Regional Administrators will provide the Regional Solicitor with all necessary assistance during subpoena enforcement proceedings.

- (b) **Enforcement Action.** In the event a subpoena is not honored, the Regional Administrator working with the Regional Solicitor, will request the U.S. Attorney General to secure an order from the United States District Court having jurisdiction in the matter, upon petition for such by the Secretary of Labor, requiring appearance, answers, or production of records. A continued refusal to obey after the issuance of a court order may be punished as contempt of court.

**.15 Evidence.**

- (1) **Relevant evidence.** Because we must investigate and document cases as though they might go to Federal Court, the files must contain relevant evidence. Such evidence includes any statement, document, or object tending to prove or disprove a fact in question. In addition, the person providing the evidence must be qualified, and the evidence must be adequate. For example, a person who has never observed the claimant's work may be considered incompetent to testify on the quality of the claimant's performance.
- (2) **Best evidence** is the original document itself. In general, the law requires production of the original document if possible. A duplicate is admissible if the originals were lost or destroyed, not obtainable, in the possession of the opposing party or not closely related to a controlling issue. An issue can be made regarding the admissibility of duplicates if there is a genuine question raised as to the authenticity of the original or in circumstances where it would be unfair to admit the duplicate instead of the original. Consequently, wherever possible, VETS investigators should review original documents, rather than copies.

#### .17 **Computation of Monetary Damages**

- (1.) If a returning veteran is unlawfully denied reemployment, he or she is entitled to back pay from the date of the application for reemployment until -- s/he is properly reinstated, or s/he rejects a proper reinstatement offer that is fully in accord with his or her rights.
- (2.) If the claimant is unlawfully denied initial hiring, or unlawfully fired, the back pay is computed from the date of that unlawful action until--s/he is properly placed or reinstated in employment, or s/he rejects an employer offer that is fully in accord with his or her rights.

#### **Claimant Responsibilities**

The claimant is required to mitigate damages. This means that the service member or returning veteran is required to seek and, if feasible, to accept suitable alternative employment when the pre-service employer unlawfully fires, refuses to hire, or refuses to reinstate the claimant. Although s/he has a responsibility to mitigate damages, the claimant is not required to accept or retain a position that is inferior in terms of seniority, status, or rate of pay to the position to which the claimant is entitled with the employer. If the claimant does accept such a position, this does not amount to a waiver of the right to the better position.

Failure to mitigate damages is an affirmative defense for which the employer has the burden of proof. For example, if the employer claims that the back pay award should be reduced to reflect earnings which the claimant should have earned but did not, the employer must demonstrate that other suitable employment was in fact available to the claimant, and that the claimant knew that

the position existed. The service member or veteran is not required to apply for or accept a position that is not comparable to or in the same line of work as the position unlawfully denied.

In determining what part of the back pay award has been mitigated, only the claimant's earnings from employment or profit-making activity should be considered. Payments that the claimant received from a collateral source, including unemployment compensation received from the State, should not be considered in computing the back pay award.

### **Mitigation Wages are Periodic Rather than Absolute**

Mitigation of damages is normally computed on a pay-period-by-pay-period basis. If during a particular pay period the claimant earns more from the alternate employer than he or she would have earned from the defendant employer, the claimant is not entitled to back pay for that pay period. However, the excess from that pay period is not carried forward to later pay periods or carried back to earlier ones.

If the claimant takes an alternate position to mitigate damages, the claimant may choose to work overtime in the alternate position. In the pay-period-by-pay-period comparison, only comparable hours should be considered. The benefit of the claimant's extra effort (working overtime) should inure to the benefit of the claimant, not the employer that has been determined to have violated the law.

In some cases, the claimant may mitigate the back pay award by arranging to perform more service in the uniformed service. Care should be taken to determine whether the claimant would have received that pay in addition to or instead of the pay that he or she would have received from the defendant employer. For example, pay that the claimant receives for performing inactive duty training on weekends should not be deducted from the back pay award if the claimant would not ordinarily have worked for the civilian employer on weekends.

If the claimant performs additional uniformed service to mitigate part or all of the back pay award, that period of uniformed service should not be included in computing the claimant's five-year cumulative limit with that particular employer. In such a situation, the employer's violation has necessitated the additional uniformed service, and the employer has benefited from that additional service because the amount the claimant earned for performing such service will reduce the back pay award that the employer will be required to pay. Accordingly, the employer is not permitted to assert that the additional service has caused the claimant to exceed the five-year limit, under the equitable doctrine of estoppel (a legal rule that prevents somebody from stating a position inconsistent with one previously stated, especially when the earlier representation has been relied upon by others). That doctrine provides that a party is not permitted to benefit from its own wrongdoing.

### **1 Effect of Escalator on Back Pay**

It is important to compute the back pay award on a pay-period-by-pay period basis because the amount that the claimant would have earned from the defendant employer is not necessarily a static number, especially if back pay must be computed for an extended period of time. If the claimant had been properly reinstated following uniformed service, or if he or she had not been unlawfully fired or denied initial hiring, he or she would have received cost of living increases or pay raises based on seniority. Such increases, if reasonably certain, should be considered in computing the back pay award.

## **2 Elements of Back Pay**

In computing the back pay award, it may be necessary to consider more than basic pay. If it is reasonably certain that the claimant would have received special pay or overtime pay, those forms of pay should be included in the back pay award. The claimant's own work history and the pay received by other employees of the defendant employer should be reviewed in determining the pay that the claimant probably would have received but for the employer violation.

The back pay award should also include the economic value of all benefits (including vacation days and health insurance benefits) that the claimant would have received but for the employer violation. The claimant may purchase an individual health insurance policy to cover the possible need for medical care during the interim period. In that case, the back pay award should include the difference between what the claimant paid for the individual policy and what he or she would have been required to pay (if anything) as an active employee.

In some cases, the claimant may be unable to obtain an individual health insurance policy. In that case, the back pay award should include any out-of-pocket medical expenses that the claimant incurred that would have been covered by the employer's health insurance plan if the employer had complied with the law.

## **3 Interest**

Pre-judgment interest should be sought and normally should be awarded as part of the relief, especially if there has been a substantial delay. For two reasons, a back pay award without interest does not make the complainant whole for losses created by the employer's violation. First, inflation will have lessened the value of the money the claimant receives. Second, the claimant has lost the opportunity to invest and earn interest on that money. The second consideration is known as the "time value of money."

As a rule of thumb, the interest rate on 13-week Treasury bills could be used in computing interest on back pay. That rate is readily available in newspapers and financial publications, and it is often used as the base rate for savings accounts, variable rate mortgages, etc.

**.17 Determination Letter to Employer.** *If a determination of merit is found by the investigator, notify the employer in writing even if the initial notification has already been made by phone. This letter will set forth an evaluation of the merit of the claim based upon the established facts. The evaluation will be phrased in terms such as “based upon the facts, as determined in our investigation, and the application of the statute to the facts, it is our opinion that the claim is meritorious and that the claimant is entitled to...” It is not necessary to go into a lengthy discussion of the facts in this letter. Include in the letter what action or actions are necessary to comply with the law or resolve the claim and inform the employer that if the resolution is not acceptable to the claimant, he or she may exercise their referral rights or right to seek private counsel.*

*If a determination of no violation is found by the investigator, but the claimant has requested referral, see Chapter 8 for guidance. For no merit determination letter to the claimant, see Chapter 9 (Case Closing). For other types of closing letters to the employer, see Exhibits 34 (Claim Withdrawn) and 38 (No response from claimant). For closing letters where the complainant has received a favorable outcome, see Exhibit 39 (Claim Granted) and Exhibit 42 (Claim Settled).*

**.17 No Merit Determination.** When it is determined that a claim has no merit, the claimant must be notified in writing of the determination. The letter will set forth an evaluation of the claim based upon the facts determined, and will be sent by Certified Mail (return receipt). The evaluation will be phrased in terms such as "based upon the facts as determined during the investigation and the application of the statute to the facts, it is our conclusion that the claim is not meritorious." It is not necessary to go into a lengthy discussion of the facts in this letter. The letter must also inform the claimant of his/her options (Refer to Chapters 8 & 9).

**Exhibit 15: Sample Blank Case Investigative Plan**

**CASE INVESTIGATIVE PLAN  
UNIFORMED SERVICES EMPLOYMENT & REEMPLOYMENT RIGHTS ACT  
U. S. Department of Labor, Veterans' Employment and Training Service**

Check One: Initial CIP \_\_\_\_ Follow-Up CIP \_\_\_\_

**SECTION I: General Information**

1. File Number \_\_\_\_\_ 2. Claimant \_\_\_\_\_  
3. Type of Military Service \_\_\_\_\_ 4. Length of Service \_\_\_\_\_  
5. Claimant's Allegation \_\_\_\_\_  
\_\_\_\_\_  
6. Remedies Due (if meritorious) \_\_\_\_\_  
\_\_\_\_\_  
7. Applicable Statutory Section(s) and regulation (s)  
\_\_\_\_\_

**SECTION II: Employer Information**

8. Employer \_\_\_\_\_  
9. Nature of Prior Contact with Employer (if applicable) \_\_\_\_\_  
10. Contact for Employer \_\_\_\_\_ 11. Employer's Counsel \_\_\_\_\_  
12. Employer's Position \_\_\_\_\_  
\_\_\_\_\_  
13. Basis for Employer's Position \_\_\_\_\_  
\_\_\_\_\_

**SECTION III: Disputed Legal Issue(s) and Action Plan(s)**

- 14a. Issue \_\_\_\_\_  
14b. Action Plan (Include date) \_\_\_\_\_  
\_\_\_\_\_  
15a. Issue \_\_\_\_\_  
15b. Action Plan (Include date) \_\_\_\_\_  
\_\_\_\_\_  
16a. Issue \_\_\_\_\_

16b. Action Plan (Include date) \_\_\_\_\_

\_\_\_\_\_

**SECTION IV: Disputed Fact(s) and Action Plan(s) [Include all evidence, e.g., witnesses, documents, etc.]**

17a. Issue \_\_\_\_\_

17b. Action Plan (Include date) \_\_\_\_\_

\_\_\_\_\_

17c. Purpose \_\_\_\_\_

\_\_\_\_\_

18a. Issue \_\_\_\_\_

18b. Action Plan (Include date) \_\_\_\_\_

\_\_\_\_\_

18c. Purpose \_\_\_\_\_

\_\_\_\_\_

19a. Issue \_\_\_\_\_

19b. Action Plan (Include date) \_\_\_\_\_

\_\_\_\_\_

19c. Purpose \_\_\_\_\_

\_\_\_\_\_

**SECTION V: General Comments** \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_  
PREPARER'S SIGNATURE

\_\_\_\_\_  
DATE

**Exhibit 16: Sample Completed Case Investigative Plan**

**CASE INVESTIGATIVE PLAN  
UNIFORMED SERVICES EMPLOYMENT & REEMPLOYMENT RIGHTS ACT  
U. S. Department of Labor, Veterans' Employment and Training Service  
[QAR]**

Check One: Initial CIP X Follow-Up CIP \_\_\_\_\_

**SECTION I: General Information**

1. File Number AL-20XX-00012-10-G 2. Claimant (XXXXXXXXXX)  
3. Type of Military Service Army National Guard 4. Length of Service 4 Years  
5. Claimant's Allegation Not hired because of Guard obligations  
\_\_\_\_\_  
6. Remedies Due (if meritorious) employment and back pay with full compensation and benefits from date of  
employment denial  
7. Applicable Statutory Section(s) and regulation (s) 38 U.S.C. 4311 (a) and 20 CFR  
1002.18

**SECTION II: Employer Information**

8. Employer (XXXXXXXXXX)  
9. Nature of Prior Contact with Employer (if applicable) \_\_\_\_\_  
10. Contact for Employer (XXXXXXXXXX) 11. Employer's Counsel \_\_\_\_\_  
12. Employer's Position (XXXXXXXXXX) was not denied employment based on Guard obligations  
\_\_\_\_\_  
13. Basis for Employer's Position Persons hired were more qualified that (XXXXXXXXXX). Company does not hire  
anyone who can't work weekends.

**SECTION III: Disputed Legal Issue(s) and Action Plan(s)**

- 14a. Issue Can (XXXXXXXXXX) refuse to hire if (XXXXXXXXXX) does not hire anyone who cannot work weekends?  
14b. Action Plan (Include date) By 5-31-20XX: Review applicable case law, if any. Review Congressional  
Reports. Seek guidance from the DVET/SI.  
15a. Issue \_\_\_\_\_  
15b. Action Plan (Include date) \_\_\_\_\_  
\_\_\_\_\_  
16a. Issue \_\_\_\_\_  
1/30/08

16b. Action Plan (Include date) \_\_\_\_\_

**SECTION IV: Disputed Fact(s) and Action Plan(s) [Include all evidence, e.g., witnesses, documents, etc.]**

17a. Issue Were other applicants more qualified than (XXXXXXXX) ? \_\_\_\_\_

17b. Action Plan (Include date) By 5/31/20XX review (EEEEEEEE) 's job announcement and job description, (XXXXXXXX) 's application, applications and personnel files of those hired. \_\_\_\_\_

17c. Purpose Establish qualifications for the position; determine (XXXXXXXX) 's qualifications; compare qualifications to qualifications of those hired. \_\_\_\_\_

18a. Issue Any comments from EEEEEEEE reflecting (XXXXXXXX) not hired due to obligations. \_\_\_\_\_

18b. Action Plan (Include date) Interview EEEEEEEE. Interview witnesses, if any, to conversation between (XXXXXXXX) and EEEEEEEE. \_\_\_\_\_

18c. Purpose To determine if EEEEEEEE made statement denying (XXXXXXXX) due to Guard obligations. To corroborate (XXXXXXXX) 's statement that EEEEEEEE told (XXXXXXXX) that he was "having trouble hiring" (XXXXXXXX) because of (XXXXXXXX) 's Guard obligations. \_\_\_\_\_

19a. Issue Is EEEEEEEE using military obligations to make employment decisions? \_\_\_\_\_

19b. Action Plan (Include date) Review application files of other unsuccessful applicants. Interview other employees. \_\_\_\_\_

19c. Purpose Determine if protected absences (military, etc.) are used by (EEEEEEEE) in making employment decisions. \_\_\_\_\_

**SECTION V: General Comments** Need to verify remedies sought as (XXXXXXXX) does not desire to work for EEEEEEEE. \_\_\_\_\_

PREPARER'S SIGNATURE

DATE

**Exhibit 17: Sample Letter Scheduling On-Site Visit**

**U.S. Department of Labor  
Veterans' Employment and Training Service  
Street Address  
City, State, Zip Code**

Date

(EEEEEEEE)  
Street Address  
City, State, Zip Code

Re: (XXXXXXX)  
Case Number

Dear EEEEEEEE:

This confirms our conversation yesterday concerning (XXXXXXX)'s claim under the Uniformed Services Employment and Reemployment Rights Act (USERRA) in which we agreed that I will visit your establishment at (time and date) to conduct an on-site investigation. I request that you make the following documents (and witnesses if appropriate) available for review during our conference:

- 1) (XXXXXXX)'s personnel file, including all performance evaluations;
- 2) (EEEEEEEE)'s military leave policy;
- 3) The personnel files of any assembly operators who were hired after (XXXXXXX) entered employment with (EEEEEEEE); and
- 4) Witness (XXXXXXX), (XXXXXXX), and (XXXXXXX).

Thank you for your cooperation.

Sincerely,

Investigator's Name  
Investigator's Title

cc: (XXXXXXX)

**Exhibit 18: Blank Witness Statement**

**Witness Statement**

I, \_\_\_\_\_,

(Name)

(Address & Telephone #)

make the following voluntary statement to \_\_\_\_\_,

(Investigator)

who has identified himself/herself to me as an investigator for the Veterans' Employment and Training Service, U.S. Department of Labor, and who has advised me that he/she is conducting an investigation pursuant to 38 U.S.C. Section 4301 *et. seq.*, and/or predecessor Federal veterans' reemployment rights statute(s). I understand that my statement and identity will be kept confidential to the maximum extent possible under existing law.

(Body of the Statement)

(The first paragraph should contain background information regarding the witness that will establish the witness' relationship to the claimant or case. This might include the place of the witness' employment, type of position held, possible association with the claimant, and possible union affiliation)

(The subsequent paragraphs should begin to address the issue(s) in dispute and should be organized either chronologically or topically and must be, to the extent possible, in the words of the witness. Also, the paragraphs should reflect the source of all information and must be clearly identified. It should be clear from the signed statement whether or not the witness has first-hand knowledge of the information the claimant is alleging. If the information comes from a source other than what the witness saw and/or heard, the source must be identified.)

(All additions and deletions in the body of the signed statement must be made and initialed by the interviewee.)

(All pages must be numbered. The interviewee must place his/her initials next to the last word in the last line of the last paragraph on each page.)

(Do not leave any space between paragraphs.)

(Attestation)

I have read (or have had read to me) the foregoing statement of \_\_\_\_\_ page(s). Each page has been numbered and I have initialed each correction. I declare (or certify, verify or state) under penalty of perjury under the laws of the United States of America that this statement is true and correct to the best of my knowledge.

/s/ \_\_\_\_\_ Date:

Witnessed: \_\_\_\_\_ Date:

Page \_\_\_\_ of \_\_\_\_\_

Exhibit

**Exhibit 19: Sample Subpoena Request**

**U.S. Department of Labor  
Veterans' Employment and Training Services  
Subpoena Request**

<b>Case Name</b>	<b>File No.</b>	<input type="checkbox"/> Natural Person <input type="checkbox"/> Corporation <input type="checkbox"/> Labor Organization <input type="checkbox"/> Unincorporated Business Association <input type="checkbox"/> Potential Defendant <input type="checkbox"/> Not Involved In Investigation <input type="checkbox"/> Subpoena requested by subject <input type="checkbox"/> No resistance anticipated <input type="checkbox"/> Enforcement <u>may</u> be required <input type="checkbox"/> Enforcement <u>will</u> be required <input type="checkbox"/> Other (Explain under Justification) <input type="checkbox"/> RFPA – covered request
<b>Subpoena Subject (Name and Address)</b>		
<b>Deliver Subpoena to: (Name and Address)</b>		

**Proposed Date of Service:** \_\_\_\_\_  
**Identification of Records**

**Justification for Issuance**

Action	Initial	Date	Hour
<b>Requested</b>			
<b>DD Authorization (as appropriate)</b>			
<b>Approved RAVET</b>			
<b>Approved RSol</b>			
<b>Signed</b>			
<b>Return</b>			
<b>To Litigation</b>			

**Exhibit 20: Sample Subpoena Duces Tecum**

**UNITED STATES OF AMERICA  
DEPARTMENT OF LABOR  
VETERANS' EMPLOYMENT AND TRAINING  
SUBPEONA DUCES TECUM**

TO \_\_\_\_\_  
\_\_\_\_\_

*At the instance of the Regional Administrator for the Veterans' Employment and Training Service, U.S. Department of Labor, you are hereby required to appear before*

\_\_\_\_\_  
*an Officer of the Veterans' Employment and Training Service, U.S. Department of Labor, at*

\_\_\_\_\_  
*in the City of \_\_\_\_\_ on the \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_,  
at \_\_\_\_\_ o'clock of that day, in the matter of of*

\_\_\_\_\_  
*And you are hereby required to bring with you and produce at said time and place the following books, papers, and documents:*

Described in items \_ through \_ in the ATTACHMENT hereto

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**FAIL NOT AT YOUR PERIL**

IN TESTIMONY WHEREOF, *the seal of the U.S. DEPARTMENT OF LABOR is affixed hereto, and the undersigned, the REGIONAL ADMINISTRATOR OF THE VETERANS' EMPLOYMENT AND TRAINING SERVICE, of said U.S. DEPARTMENT OF LABOR, has hereunto set his hand at PHILADELPHIA, PENNSYLVANIA, this \_\_\_\_\_ day of \_\_\_\_\_, 2006.*

\_\_\_\_\_

VETS \_\_\_\_\_

Exhibit 21: Sample Subpoena Ad Testificandum

**United States of America**

**DEPARTMENT OF LABOR**

**VETERANS' EMPLOYMENT AND TRAINING SERVICE**

**SUBPOENA AD TESTIFICANDUM**

TO \_\_\_\_\_  
\_\_\_\_\_

*At the instance of the Regional Administrator for the Veterans' Employment and Training Service U.S. DEPARTMENT OF LABOR, you are hereby required to appear before*

\_\_\_\_\_,  
*an Officer of the Veterans' Employment And Training Service, U.S. Department of Labor, at*

\_\_\_\_\_,  
*in the City of \_\_\_\_\_ on the \_\_\_\_\_ day of \_\_\_\_\_,*

*20 \_\_\_\_\_ at \_\_\_\_\_ o'clock of the day \_\_\_\_\_ In the Matter of*

\_\_\_\_\_.

**FAIL NOT AT YOUR PERIL**

IN TESTIMONY WHEREOF, *the seal of the U.S. DEPARTMENT OF LABOR is affixed hereto, and the undersigned,* \_\_\_\_\_

\_\_\_\_\_  
*of said U.S. DEPARTMENT OF LABOR, has hereunto set his hand at \_\_\_\_\_ this \_\_\_\_\_ day of \_\_\_\_\_ 20 \_\_\_\_\_*

VETS \_\_\_\_\_

**Exhibit 22: Sample Opening Statement for Case Resolution Conferences**

This conference is held by the Department of Labor pursuant to the Uniformed Services Employment and Reemployment Rights Act of 1994, 38 U.S.C., Chapter 43.

The purpose of this conference is to assist the Veterans' Employment and Training Service of the Department of Labor in attempting to reach a final resolution of this claim. It is not a formal hearing, and the statements made here are not under oath. Notes will be taken and made part of the case file.

The agenda is as follows: first, I will present the claim as made by the claimant, and ask for verification of the allegations. I will then present the employer's position and, again, ask for verification that this is the company's position. Each party will be allowed to add any additional evidence without interruption during its presentation.

All questions and statements should be addressed to me. There will be no direct cross conversation or cross examination. If anyone wishes to respond to what another has said, please wait until that person is through. If you have any questions, please channel them through me.

The employer is represented by \_\_\_\_\_, his Attorney, at this conference. I would ask, however, that unless it is not possible, employer and employer witnesses speak for themselves. Again, let me repeat, cross examination will not be permitted, except through me.

The Department strongly urges the parties to consider settling this claim. Suggested proposals to resolve the dispute will be open for discussion. Either party may request a recess, or I may request one as appropriate.

I ask all parties to maintain proper courtesy throughout the conference so that we may expedite the resolution of this matter.

If amicable resolution is not reached, I must inform you (the employer) that the claimant has the right to request that his/her case be referred to the U.S. Attorney-General/Office of Special Counsel for consideration of legal representation.

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## Chapter 7

### Case Resolution Conferences

**.1 Definition of Case Resolution Conferences.** Case Resolution Conferences are meetings conducted by the investigator and the parties to the case, and their representatives. The purpose of the case resolution conference is to attempt to reach a mutually agreeable resolution of a meritorious case. USERRA promotes the resolution of complaints without resort to litigation.

**Proviso:** Conferences may be conducted at any stage during case processing when the investigator believes it may help the parties to reach an agreement.

- (1) A resolution conference should be attempted when an investigation has been completed and merit has been determined, and letters and telephone calls are unable to resolve the case.
- (2) If a resolution conference is requested by the employer prior to the completion of the investigation, such conference should be held. However, it should be clearly explained to both parties that the investigation is not yet completed, and any findings that are discussed would be preliminary at best.

**.2 Confirmation Letter.** After the Case Resolution Conference has been arranged, the investigator will send a letter to both parties confirming the date, time, and location of the conference. As appropriate, the purpose of the conference may also be stated.

**.3 Advice to the Claimant Before the Conference.** Before opening the conference, meet privately with the claimant to discuss the strengths and weaknesses of the case and explore areas where compromise may be possible. If the claimant chooses to attend, advise the claimant not to bring up matters that are not directly related to the case, because this conference is not a proper forum for unrelated issues.

In addition, advise the claimant that he/she should not feel compelled or pressured to accept or sign any settlement offered during the conference. If the remedies offered are less than the full remedies required by law, advise the claimant that he or she has the right to refuse the offer. However, the claimant should be told that the refusal does not guarantee that further government action will better benefit the claimant and that it is possible that referral for litigation may result in a similar or lesser resolution, including rejection of the case by Attorney General or the Office of Special Counsel or an unfavorable court ruling. The claimant should also be told that if he/she elects to accept such an offer, he/she may be waiving additional rights under the law, that will be fully explained.

- .4 **General Conference Hints.** At the conference, maintain a relaxed, friendly, business-like tone. Never lose your temper. Be especially cautious with persons who may be trying to make you angry.
- .5 **Opening The Conference.** Open the conference by identifying yourself and listing the participants by name and relationship to the case. Review and use the conference opening statement found in Exhibit 22, as it sets the tone for the conference and clarifies the purpose, goals and conduct of the conference. Then explain that the conference has been convened to review the facts and seek an equitable resolution of the claim.
- .6 **Control of the Conference.** Maintain control of the conference by having all discussions funneled through the investigator. Do not permit the parties to argue about extraneous matters. If the discussion gets side-tracked, redirect it by reminding the parties of the purposes of the conference. If a union representative has been included, ensure that the conference does not turn into a labor relations meeting about issues unrelated to the case at hand.

Avoid using inflammatory words such as “unlawful,” “illegal,” “discriminatory,” and “violation” during a case resolution conference.

If emotions flare, recess the conference for a cooling-off-period. If meaningful discussion seems impossible, adjourn the meeting, but only if it is clear that no benefit is being obtained by continuing and the situation is being damaged rather than helped.

- .7 **Conference Notes.** Take comprehensive notes during the conference. These notes will form the basis for a summary report of the conference which becomes part of the case file.
- .8 **Conference Resulting in Resolution.** When the conference results in an agreed resolution by both parties, either in whole or in part, take the following steps:
  - (1) Review the details of the resolution with all present so there is no misunderstanding as to who agrees to do what and when and reduce this to writing with copies to both parties. (Exhibit 23)
  - (2) When lost wages are part of the resolution, ensure that all figures used are accurate and agreed upon, including an end date for the calculations.
  - (3) When the resolution involves payment to the claimant of any monies (such as payment for lost wages), and it is not possible to immediately obtain full payment of all the amounts agreed upon, make necessary arrangements to have a check for the balance, made payable to the claimant, forwarded to your office by an agreed date for transmittal to the claimant.

- (4) See associated guidelines in Chapter 9 for procedures dealing with monetary settlements and appropriate case closing procedures.
- .9 Refusal by Employer to Grant or Settle Claim.** If the claim cannot be resolved, explain that the claimant has a right to request referral to the Attorney General/Office of Special Counsel. If the investigation is not yet complete (see paragraph .1 above), explain that it will again proceed. In addition, inform the employer that a lost wage claim may be accruing (in appropriate cases) and that liquidated damages may be awarded in a court action.
- .10 Request for Additional Time.** If the employer or the claimant requests additional time to consider their respective positions (this time should not exceed 10 working days) or if the employer requests additional legal authority to support the claimant's position, the Investigator should confer with the Regional Office (RO). If appropriate, the RO will confer with the Regional Solicitor's Office. After receipt of a response from the RO, the Investigator will send the employer a letter addressing the legal issues.
- .11 Conference Closing.** Once all the parties have had an opportunity to fully discuss their respective positions, and if the claim is not resolved, the investigator should inform the parties that the conference is at an end.
- .12 Conference Report.** As soon as possible after returning to the office, prepare a summary of the conference based on the notes. The report should be on a [VETS Form 1063](#) and should include the case number, name of parties, addresses of parties, date, time and place of conference, and a list of participants by name, title, address, and telephone number. The report should contain the items below, as appropriate:
- (1) All contested issues and sub-issues identified;
  - (2) Positions of the parties and their supporting reasons for each contested issue;
  - (3) Offers of settlement, proposals, and counter-proposals as to each issue;
  - (4) Issues that remain outstanding;
  - (5) If issues were resolved, a detailed outline of the agreement. (Exhibit 23)
  - (6) All documents obtained should be listed on a [VETS Form 1063](#), to include the source of each document.

The conference report and all other related documents secured during the conference will become exhibits in the case file. No shortcuts should be taken in developing the report.

**.13 Actions Following Advisory Opinion.** If more than 10 working days pass after the action taken in paragraph #10, and no compliance or indication of possible compliance or settlement is obtained, contact the proper party, and explain that the other party has not responded or agreed to settle. In addition, explain what options are available. These options are:

- (1) If appropriate, complete the investigation (see paragraph .1 above). Additional resolution conferences can be attempted in the future.
- (2) Upon completion of the investigation,
  - (a) the claimant can request referral to the Attorney General or the Office of Special Counsel; or
  - (b) the claimant can close the file, but pursue the claim via private counsel at his or her own expense if the claimant so chooses; or
  - (c) the case can be closed if no further action is taken by the claimant.

Give the claimant an honest appraisal of the merits of the case and advise that VETS will refer the claim to the Attorney General/Office of Special Counsel, upon request. If the claimant elects referral, follow the procedures in Chapter 8.

**Exhibit 23: Sample Agreement Outline**

In the case of (XXXXXXX) , the EEEEEEEE, EEEEEEEE's name agrees to take the following actions:

1. Reinstate (XXXXXXX) to a Machine Operator position at the wage rate of \$5.85 per hour effective February 27, 20XX;
2. Reinstate (XXXXXXX) 's health insurance coverage effective (specify date);
3. Credit (XXXXXXX) for all time spent in the military service and for the period from October 21, 20XX to February 27, 20XX, for pension, vacation and seniority purposes; and
4. Compensate (XXXXXXX) \$1,500.00 for wages lost from October 21, 20XX to February 27, 20XX.
5. Settlement outlined above is relative only to rights and benefits arising from (XXXXXXX) 's reemployment rights claim under the Uniformed Services Employment and Reemployment Rights Act of 1994 and its predecessor statutes.

\_\_\_\_\_  
Signature of EEEEEEEE

\_\_\_\_\_  
Signature of XXXXXXXXX

\_\_\_\_\_  
Signature of Investigator

\_\_\_\_\_  
Date

\_\_\_\_\_  
Case Number

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## Chapter 8 Litigation Referrals

- .1 Purpose.** This chapter describes how to prepare, develop and transmit a referral to the U.S. Attorney General (AG) or the Office of Special Counsel (OSC) through the VETS Regional Office and Regional Solicitor.

**Sec. 1002.290** If VETS determines as a result of an investigation that the complaint is meritorious, VETS attempts to resolve the complaint by making reasonable efforts to ensure that any persons or entities named in the complaint comply with the Act. If VETS' efforts do not resolve the complaint, VETS notifies the person who submitted the complaint of:

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

- .2 Representation by U.S. Attorney General.** A claimant with a claim against a private or State or local government employer may receive legal representation by the Attorney General for the district in which the employer maintains a place of business or exercises authority, if the Attorney General is reasonably satisfied that the claimant is entitled to the benefits under USERRA.
- .3 Representation by Office of Special Counsel.** A claimant with a claim against a Federal Executive Branch employer may receive legal representation by the OSC before the Merit Systems Protection Board, if the OSC is reasonably satisfied that the claimant is entitled to the benefits under USERRA.
- .4 Advising the Claimant of Right of Referral.** At the time the case is closed, the claimant must be advised of his or her right to have the case referred to either the U.S. Department of Justice or to the U.S. Office of Special Counsel, as appropriate, in the closing letter. **Claimants must be advised of that right at the time the case is closed regardless of whether or not the claim is found to have merit.** The investigator may advise the claimant of the referral process at the outset of the investigation, but the notice must still be provided in writing at the close of the investigation. [\[QAR\]](#)

When it appears that VETS will be unable to reach a mutually acceptable settlement, the VETS investigator should explain privately to the claimant the findings of the

investigation, the strengths and weaknesses of the case, and VETS' position on the merits of the case. In addition, explain that:

- (1) The right to referral is a right to consideration of representation only and not an automatic right to representation by the AG or OSC.
- (2) If the AG or OSC accepts the case for litigation, legal services will be furnished by the government, except that the claimant's travel or other associated expenses will still be borne by the claimant.
- (3) If the AG or OSC declines to accept the case for litigation, the claimant may hire private counsel at his or her own expense.
- (4) At any point, claimant may refuse further pursuance of his or her claim via the government and retain private counsel. (Claimant should be advised that if private counsel is retained, the government will close its file.)
- (5) If referred, the VETS investigator and the Regional Solicitor will make a recommendation to AG or OSC based on the investigative findings and merits of the case. The AG or the OSC makes an independent determination regarding whether to file suit.
- (6) A request for referral obligates the claimant to continue to fully cooperate with the government providing any change of address or telephone number.

- .5 Written Request for Referral.** Before the case is prepared for transmittal to the AG or OSC for consideration of litigation, the claimant must submit to VETS a written request for referral. A referral request form appears in Exhibit 24. A copy of this request must be placed in the case file. Once VETS receives a written request for referral, it can be withdrawn only by the claimant. Such withdrawal must be in writing. [\[QAR\]](#)

If a claimant requests referral prior to completion of the investigation of the claim, the investigator shall advise the claimant that no such referral can be made prior to completion of the investigation.

- .6 Referral Advisory letter to Employer** No later than 5 working days after receiving a claimant's appropriate request for referral, forward a Referral Advisory letter to the employer or the counsel of record advising the employer that referral has been requested. [\(See Exhibit 25\)](#)

- .7 15 Day Action on Referral.** Within 15 working days after receipt of the request for referral, prepare the case for referral and transmit it to the Regional Office. The "clock"

does not stop running on this preparation even in the event of receiving indications that a resolution is possible.

Note: The Regional Office review will be completed within 5 working days, upon receipt of the referral at the Regional Office. The Regional Office will reassign the case to the Senior Investigator or another investigator if needed to expedite referral.

**.8 File Preparation for AG or OSC Referral.** Before a case is referred, the case file must contain the following:

- (1) All information, documents, correspondence from and to the parties, including the employer's written position letter, the VETS investigator's "employers notification of referral" letter, and any other relevant material that has been received and/or developed, including all reports of contact, signed statements, memoranda to the file, and the report of the resolution conference if applicable. All materials must be legible. All reports of contact must be signed and dated by the VETS investigator. The documents must be placed in the file in chronological order by date received or date of contact, with the oldest on the bottom (except that the VETS Form 1010 and military discharge records shall be at the bottom of the file), and each exhibit should be numbered.
- (2) All referral files will contain a copy of the appropriate Form DD-214 or release certificate; a copy of relevant orders, if issued; or other confirmatory documents.

**.9 Memorandum of Referral (MOR).** All case files referred to the AG or OSC for consideration of enforcement proceedings will be accompanied by a report of investigation called a Memorandum of Referral. The MOR is not merely a recital of exhibits but will provide a thorough description of the case and must be able to stand alone. The MOR must support each pertinent factual statement by reference to a specific numbered exhibit in the case file. The exhibits should include either (but not both) the original or copies of the VETS Form 1063, or a typed copy of the original if the original is not legible (all original documents must be retained in the original case file). The MOR should also include the name of the individual who investigated the case and prepared the MOR if different from the individual signing the MOR. This is useful in cases when the Regional Solicitor or the AG/OSC needs to discuss the case.

In cases recommending litigation, or in cases involving questions of fact or complex or novel issues, MORs must be prepared in "long" form. [\(See](#)

[Exhibit 26](#)). In very limited situations of a non-recommendation for litigation, and only after consultation with the region's Senior Investigator, the "short" form may be used ([See Exhibit 27](#)). Regardless of whether the long or short form is used, there must be a table of contents or index identifying all exhibits in the case file. The Regional Office will consult with the Regional Solicitor's Office if questions arise over format.

Retain one copy of the MOR and one copy of the case file containing all the exhibits in your office. *Forward the original MOR and Case File plus the specified number of copies by your region to the Regional Office for review and action. If a diskette is not available, send an electronic file of the MOR and List of Exhibits to the region's Senior Investigator as an e-mail attachment.*

The MOR will identify the type of military training or service involved, the subsection(s) of the statute and regulations applicable to the issues, and the eligibility criteria. If the referral is positive, the MOR will identify why the case has merit. The MOR will identify those issues admitted by the employer and those contested. With respect to contested issues, the evaluation section will explain why the VETS investigator believes that the evidence shows the case has merit. Where it does not recommend litigation, the MOR will identify why the case is without merit. All MORs must make reference to each exhibit supporting each specific finding.

***(1) Expedited Referrals.** Advise the National Office and your Regional Solicitor of Labor (RSOL) when you begin a review of the MOR for a non-Federal USERRA case if the case has merit and the claimant is unemployed, the claimant has been denied a significant benefit of employment, or where the employer has reemployed the claimant to a position that is of significantly lower seniority, status, or pay. The purpose of the contact is to allow the RSOL and the U.S. Attorney General to prepare for their review of the case and to give the case a priority status. When forwarding the case to the RSOL, include in the transmittal memo the following statement, "**This case may be appropriate for expedited referral under the DOL-DOJ MOU.**" The referral of non-meritorious cases with issues that do not have an immediate financial impact on the claimant are forwarded without these special considerations.*

- .10 Format of the MOR.** An example of the format can be found at [Exhibit 26](#). The MOR must include at a minimum the information in the following outline:

- (1) Introduction
  - (a) Identification of parties, and representatives, if applicable, and their addresses and phone numbers
  - (b) Case number
  - (c) Alleged violation(s) and applicable section(s) of statute
  - (d) Action recommended
  - (e) Date
  
- (2) Synopsis
  - (a) Date claimant requested VETS assistance
  - (b) Basis for case opening and identification of applicable statute (VRR or USERRA)
  - (c) Identification of claimant's military affiliation (e.g., an inductee or enlistee returning from active duty, a member of the Reserve or National Guard)
  - (d) Date claimant requested referral
  
- (3) The body of the Memorandum
  - (a) Parties to the dispute
  - (b) Statement of the dispute (Issue(s))
  - (c) Claimant's position as to each issue
  - (c) Employer's position as to each issue
  - (d) Settlement attempts and specific offers
  - (e) Investigative findings as to each issue including all witnesses who support one position or another
  - (f) Evaluation of each issue
  - (g) Relief request for each issue
  - (h) Recommendation regarding each issue [\[QAR\]](#)

## **.11 Development of Each Section of the MOR**

(1) **Information on the Parties to the Dispute.** This section will always include information on the claimant and the immediate employer. It should also include any other entities which are exercising managerial discretion or are impacting upon the employment relationship, such as labor organizations, pension plan administrators, etc.

- (a) **Claimant.** The information on the claimant will include all necessary details to illustrate statutory eligibility. In cases where persons are claiming reemployment rights after military service, necessary details include the following:

- (i) Date of original hire
- (ii) All positions held from date of hire to date of departure for military service, and dates held
- (iii) Rate of pay at the time of departure
- (iv) Date of departure from civilian employer, and date of notification to the employer and by what means
- (v) Date of entering military service and branch of Armed Forces entered
- (vi) Date separated from military service
- (vii) Character of military service
- (viii) Date of return to work or application for reemployment
- (ix) Person to whom application for reemployment or return to work was made
- (x) How application for reemployment was made
- (xi) Date rehired or denied restoration and by whom
- (xii) Reason given for denial

**Note:** If the claimant has entered into an arbitration agreement or is covered by an arbitration provision in a collective bargaining agreement, the MOR must make reference to the agreement and the file should contain a copy of the agreement.

Variations will be necessary for cases involving alleged discrimination, NDMS service, retaliation or other types of cases.

- (b) **Employer.** The information on the employer will include a description of the:
  - (i) Employer's proper legal name
  - (ii) Nature of business
  - (iii) Size of business (by number of employees or number of facilities)
  - (iv) Location of work site at which claimant claims rights

If the claim involves nontraditional entities (e.g., a pension or hiring hall) performing employer functions, the information on the employer will identify such entities and describe their roles:

- (v) Name of plan
- (vi) Method of formation of the plan; e.g., defined benefit, defined contribution, profit sharing, retirement, health and welfare, etc.
- (vii) Formula for the computation of benefits
- (viii) Date of implementation of the plan and general terms

- (ix) Any plan provisions which are obviously relevant to the disposition of the case, such as how military absence is treated

The file should contain a copy of the Summary Plan Description and Trust Agreement for pension claims.

If the case involves a union, the information will also identify the union and describe any pertinent collective bargaining agreement provisions, such as how military absence is treated. The file should contain a copy of the pertinent collective bargaining agreement.

- (2) **Statement of the Dispute.** State each issue and allegation separately, including the appropriate sections of the statute and regulations involved for each allegation. This should be followed by a detailed statement of the positions of each of the parties as to each issue. If the employer has refused to furnish a statement, the VETS investigator should so state and then leave it to the AG or OSC to obtain a position statement from the employer.
- (3) **Settlement Attempts and Offers.** Outline any settlement attempts and specify the exact terms of all offers and the reasons for the rejection. This is to advise the Solicitor, AG or OSC making settlement attempts of prior efforts.
- (4) **Investigative Findings.** Include all specific findings as they pertain to each specific issue. The investigative findings section must specify how the facts support or don't support each eligibility criteria for reemployment rights. For example, the investigative findings in a merit case should show that:
  - (a) Prior to military service claimant was an employee of the employer.
  - (b) The claimant provided the notification (if required) and left for the purpose of performing military service.
  - (c) The claimant met the character of service requirements.
  - (d) The claimant made a timely application for reemployment.
  - (e) The claimant did not exceed the service limitation(s).
  - (f) Where appropriate, the claimant provided the documentation requested by the employer.
  - (g) The claimant is qualified to perform either the escalator or some other position with the employer.

- (h) The employer failed or refused to grant other entitlements protected by USERRA.
- (i) It can be said with “reasonable certainty” that the claimant would have received the entitlements claimed if he/she had remained continuously employed instead of entering military service.
- (j) Why any affirmative defense raised by the employer as set forth in USERRA is not applicable.

The findings to be detailed will, of course, depend on the issues in the case.

- (5) **Evaluation.** The investigating office will evaluate the claim by applying the statute and applicable regulations to the facts. The VETS investigator will accomplish this by evaluating the claimant's entitlement and the employer's obligation in light of requirements of the applicable sections of the statute. Given the requirements of the statute and the facts revealed by the investigative findings, the office will trace and reconstruct what the claimant's employment history would have been had he or she not been absent. The reconstruction will be guided by the “reasonable certainty” concept.

The VETS investigator shall not make a positive recommendation unless the investigation supports the allegations with reasonable certainty, except in cases dealing with a credibility issue. If credibility findings (determinations made based upon feelings, opinions, nuances and/or slight evidence which are worthy or may inspire belief) are necessary, they shall be influenced by the following:

- (a) Concept of liberal interpretation for the benefit of the claimant;
  - (b) Reasonable certainty; and
  - (c) Common sense.
- (6) **Relief Requested.** The MOR will state exactly what remedy the claimant is entitled to receive. This may include:
    - (a) All possible affirmative actions pertaining to the claim such as reinstatement, seniority adjustment, promotion, pay increases, vacation adjustment, pension adjustment, etc.
    - (b) The total amount of lost wages or other monetary relief requested such as medical claims, vacation pay, etc. and the basis for the calculations. [See Chapter 6](#). If the case involves a pension benefit, determine the effect the

additional years of credit would have on the pension benefit, date of vesting, the retroactive loss to date if applicable, and an explanation of how the loss was computed.

- (c) The period for which the lost wages are accruing.
  - (d) The future date, if any, when the violation will cease, if applicable.
  - (e) Any mitigation of losses (including unemployment compensation, for settlement purposes only) and all job seeking efforts by the claimant to find other employment. [See Chapter 6.](#)
  - (f) Liquidated damages if the investigation has shown the violation to be willful.
- (7) **Recommendation.** The VETS investigator will make a recommendation for further handling of the claim. In certain situations where there are disputed facts, or information could not be corroborated, a recommendation does not need to be made. In such instances indicate the reason(s) for no recommendation.
- (8) **List of Exhibits.** The VETS investigator will include a list of exhibits identifying each one by type and date of document. Each exhibit will be numbered.
- (9) **Regional Offices' Approval to Use "Short Form".** When the claim is unequivocally invalid, the VETS investigator may use the "short form" MOR ([Exhibit 27](#)), but must discuss the case with the Region's Senior Investigator prior to submitting the AG/OSC referral. Exhibits must still be listed and identified in the case file.
- (10) **Case Transferred to Regional Office.** When the MOR has been completed, it is transferred to the Regional Office, along with the case file, for appropriate action. [See .9 in this Chapter for content.](#)

## **.12 Responsibilities of the Regional Office (RO) Under this Chapter.**

- (1) The RO shall review the entire case file and the MOR to ensure that the investigation is accurate and sufficient, that the information in the exhibits fully support the statements made in the MOR, and that the evaluation of the claim is in accordance with the facts established by the investigation and proper application of the statute.
- (2) The RO shall be responsible for the quality and timeliness of referrals to the Regional Solicitor and shall serve as the chief liaison with the Regional Solicitor.

The RO must submit referrals to the Regional Solicitor within **5 working days** after receipt from the VETS investigator or may reassign the case to the Senior Investigator or another investigator if needed to expedite closing. If the original file is returned to the VETS investigator due to an incomplete or defective investigation, time needed for the investigator's corrections will not be counted against the RO's 5 working day time period.

- (3) The RO shall track the status and nature of the litigation efforts.
- (4) The RO is ultimately responsible for all USERRA activities including referrals, and for transmitting the applicable documents to the Regional Solicitor.
- (5) At the point that the referral is sent to the Solicitor's Office the RO will enter either RR [recommended] or NR [not recommended] into the IMS.

**.13 Insufficient Investigation.** If the investigation is incomplete or defective, the RO may reassign the case or return the file to the original VETS investigator with a detailed memorandum requesting additional investigation on specific points and revision of the MOR as necessary or appropriate. The Supplemental Investigation and revised MOR must be completed within 30 calendar days from the date the case is reassigned or returned to the VETS investigator.

**.14 Regional Office's Transmittal to SOL.** When the RO is satisfied as to the scope and quality of the investigation, the RO shall prepare an analytical transmittal memorandum to the Regional Solicitor. (See sample transmittal memorandum in Exhibit 28). This shall be prepared for all MOR's.

The RO transmittal memorandum will make a specific recommendation for or against litigation and explain the reason for the recommendation. The transmittal memorandum shall contain appropriate reasoning to support the recommendation and will include any information which may assist the Regional Solicitor in the future processing of the case.

The transmittal memorandum shall supplement the MOR or further describe the application of the law to the facts. The transmittal will reflect:

- (1) That the case file was thoroughly reviewed; and
- (2) That the RO takes a specific position with regard to future processing of the case.

NOTE: It is important to bring weaknesses to the attention of the Regional Solicitor so an adequate defense may be prepared.

**.15 Regional Office's Letter to Employer.** After the file has been reviewed, approved for action and the transmittal composed, the RO will advise the employer or counsel of record (with a copy to the claimant, and blind copies to the initiating investigator), that the claim has been transmitted to RSOL for referral to OSC or the U.S. Attorney General. [Exhibit 29](#) shows a sample of this letter. The letter will serve as official notice to the employer that the claim has been forwarded, and that all future communications should be directed to the designated Regional Solicitor.

**.16 Distribution of the MOR.** The referral documents should be--

- (1) Distributed to the Regional Solicitor:
  - (a) The original MOR, with the original case file containing all the exhibits; and
  - (b) The original RO transmittal memorandum.
- (2) Retained at the Regional Office, duplicate (or originals, when appropriate) of:
  - (a) The MOR;
  - (b) A duplicate case file containing all the exhibits;
  - (c) The RO's transmittal memorandum; and
  - (d) Documents received after transmittal of MOR, including documents received from various referring office (SOL, AG, OSC).

**.17 Securing of Documents.** As part of the ongoing liaison with the SOL, the RO will request copies of significant correspondence or documents relevant to the USERRA case. These may include:

- (1) The SOL's analysis referring the case to the AG or OSC;
- (2) AG's transmittal to the U.S. Attorney;
- (3) Department of Justice's letter of declination, if appropriate;
- (5) Copy of the complaint filed, if any;
- (6) Copy of briefs; and
- (7) Copy of the court decision or settlement documents.

- .18 Keeping VETS/NO Informed of Unusual or Precedent-Setting Cases.** The RO will keep the VETS/NO informed of actions taken on unusual or precedent-setting cases in the litigation pipeline.

If the RO staff becomes aware of cases being litigated by private counsel, he/she should keep the VETS/NO and the Regional Solicitor informed of those actions. VETS National Office and The National Office of the Solicitor will consult on such cases.

- .19 Contact with Attorney General/ Office of Special Counsel.** The VETS investigator will advise the RO and Regional Solicitor immediately of any contact by a U.S. Attorney or the AG or OSC on a USERRA matter, and will write a report of contact for the case file.

- .20 Attendance at Trial.** The RO shall determine from the Regional Solicitor when cases are set for trial and may send a representative to observe. RO's are encouraged to utilize such trials for training purposes.

No VETS staff may testify at a trial in which DOL is not a party unless released by the Regional Solicitor. If a subpoena is served on an employee, he/she must immediately notify the RO, who shall immediately notify the Regional Solicitor and the National Office. The subpoena should be forwarded by the most expeditious means available to the RO.

- .21 Declination by Department of Justice or OSC.** When advised by the DOJ or OSC of a declination to represent a claimant, if in the judgment of the RO, representation has been inappropriately declined, the RO shall discuss the matter with the Regional Solicitor and the National Office. The ASVET may intervene, if warranted. Any questions received, verbally or in writing, regarding a declination by DOJ or OSC, shall be referred to DOJ or OSC for a response.

If in the judgment of the RO, the AG, OSC, or U.S. Attorney has inappropriately declined to provide representation with respect to a meritorious claim, the RO shall discuss the matter with the Regional Solicitor and the National Office. The Assistant Secretary for Veterans' Employment and Training (ASVET) may intervene, if warranted.

- .22 Responsibilities Of VETS National Office.** Upon receipt of the text of court decision(s), the VETS National Office shall interpret the decision in consultation with the National Office of the Solicitor of Labor. If the decision is deemed appropriate for distribution, VETS' National Office must ensure that the decision is distributed to the field within 60 days of receipt and ensure that it is maintained in the numbered series of court decisions. The VETS National Office shall determine whether release is to be

made to media reporting services and shall provide for press releases as appropriate. They shall also ensure that policy decisions are made when court decisions require them, and shall monitor all decisions to determine whether or not an appeal is going to be made.

- .23 Press Releases.** VETS may, through the DOL Office of Public Affairs (OPA), issue nationally distributed press releases on pertinent and newsworthy court decisions and USERRA activities. The releases shall be composed by OPA based upon information furnished by the VETS/NO Staff. VETS/NO shall immediately distribute a copy of the approved release to the Regional Administrators who may coordinate with the DOL Regional OPA, and Regional Solicitor's Office.

**Exhibit 24: Sample Attorney General/Office of Special Counsel**  
**Referral Request Form**

REQUEST FOR REFERRAL TO THE  
ATTORNEY GENERAL/OFFICE OF SPECIAL COUNSEL

Case Number: \_\_\_\_\_

Name of Employer: \_\_\_\_\_

I, \_\_\_\_\_ SSN: \_\_\_\_\_, do hereby request the Veterans' Employment and Training Service, U.S. Department of Labor, to refer my Uniformed Services Employment and Reemployment Rights Act (USERRA) claim to the Attorney General (AG) or Office of Special Counsel (OSC) [specify] for consideration of representation, and I request the AG/OSC [specify] intercede on my behalf by representing me in the United States courts or before the Merit Systems Protection Board (MSPB) to protect my USERRA Rights under the provisions of Chapter 43, Title 38, U.S.C. and/or related predecessor statute. I understand that my request for referral and representation pledges me to cooperate with the Solicitor of Labor, and the Attorney General/Office of Special Counsel [specify], in prosecution of my claim and to give prompt notice of any change in my mailing address and/or telephone number.

\_\_\_\_\_  
Signature of Claimant

\_\_\_\_\_  
Address

\_\_\_\_\_  
Telephone No.

\_\_\_\_\_  
Date

NOTE: Request for Referral should be modified to specify the agency to which the referral is to be transmitted, (e.g., Attorney General, Office of Special Counsel). The Office of Special Counsel is the agency responsible for initiating any action before the Merit Systems Protection Board.

**Exhibit 25: Referral Advisory letter to Employer**

**[QAR]**

**U.S. Department of Labor  
Veterans' Employment and Training Service**

**Street Address**

**City, State, Zip Code**

Date

(EEEEEEEE)

Street Address

City, State, Zip Code

Re: (EEEEEEEE)

Case Number

Dear (EEEEEEEE):

This is to advise you that (XXXXXXX)'s case against (EEEEEEEE) is being referred to the Attorney General/Office of Special Counsel [specify] for consideration of legal action. As you are aware, (XXXXXXX) seeks reinstatement in the position of Quality Control Specialist and consequent lost wages since the date of denial of his reemployment, August 28, 20XX.

We regret that this matter could not be resolved to the satisfaction of the parties.

Sincerely,

Investigator's Name

Investigator's Title

cc: (XXXXXXX)

**Exhibit 26: Sample “Long Form” Memorandum of Referral  
(Litigation Recommended)**

**U.S. Department of Labor  
Veterans’ Employment and Training Service  
Street Address  
City, State, Zip Code**

DATE: Date

MEMORANDUM FOR: U.S. Attorney General/Office of Special Counsel (specify)

THROUGH: Regional Administrator’s Name, Regional Administrator

FROM: Investigator’s Name, Investigator’s Title

SUBJECT: Memorandum of Referral

<u>Claimant</u> (XXXXXXXX) Street Address City, State, Zip Code (Phone Number)	<u>Alleged Violation</u> Failure to reemploy pursuant to Section 4313
--	--

v.

<u>Employer</u> EEEEEEEE Street Address City, State, Zip Code (Phone Number)	<u>Action Recommended</u> Litigation Recommended
--	---

Case Number  
DC-20XX-XXXXXX-XX-X

This report and file cover an investigation of a claim filed by (XXXXXXXX), a member of the U.S. Army Reserves, against (EEEEEEEE). This case was opened on (date) by the Local VETS Office, Veterans' Employment and Training Service, acting for the Secretary of Labor and the Veterans' Employment and Training Service per Section 4322, Chapter 43, Title 38, U.S. Code.

Settlement efforts were not fully successful and (XXXXXXXX) requested referral to the U.S. Department of Justice on January 19, 20XX (Exh. 36).

### Claimant

(XXXXXXXX) began employment with (EEEEEEEE) in City, State on May 17, 20XX (Exh. 1, p.1). He joined the U.S. Army Reserves on September 24, 20XX (Exh. 24, p.1) and received orders dated October 7, 20XX to attend active duty training for a period of 126 days beginning November 13, 20XX (Exh. 24, p.12). On October 17, 20XX he presented his orders to the Supervisor of Human Resources (Exh. 9, p.2). (XXXXXXXX)'s last day of work, as a full-time janitor [last position held], at \$5.15 [wage rate] was November 24, 20XX (Exh. 1, p.4) at which time he left to report for military training on November 13, 20XX (Exh. 1, p.2). On or about December 1, 20XX, (XXXXXXXX) was sent a letter from his employer stating that his name was being removed from the rolls due to "a lack of proper documentation" (Exh. 1, p.4). He completed military training April 1, 20XX and reported back to work that same day or the next day (Exh. 34, p.2). On April 2, 20XX, (XXXXXXXX), upon reporting for work, was presented a December 1, 20XX termination letter by (Name), Supervisor of Human Resources along with his payroll check (Exh. 1, p.12,26, p.9) and was denied reemployment."

### Employer

(EEEEEEEE) manufactures and repairs large power transformers. It is located at Street Address, City, State and employs approximately 195 people. The corporate office is located in City, State (Exh. 39, p.1). [The employees are/are not represented by the Union Name.]

### The Dispute and Each Party's Position

The issue in this case is whether (XXXXXXXX) made a "proper" leave request pursuant to Section 4312 of the statute. It is undisputed that the (XXXXXXXX) possessed orders and presented those orders

orders to his (EEEEEEEE) well in advance of his military leave (Exh. 9, P.2).

However, (EEEEEEEE) maintains that (XXXXXXXX) 's discharge was justified because he failed to provide complete supporting documentation of his military orders prior to going on military leave (Exh. 9, p.6).

A related issue was discrimination in violation of section 4311 since (XXXXXXXX) 's discharge was a result of disparate treatment as prohibited pursuant to Section 4301(b)(3), the penalty imposed on (XXXXXXXX) (discharge) was not consistent with (EEEEEEEE) 's discharge policy (Exh. 24, p.9 and 25).

### Settlement Attempts

(XXXXXXXX) was fully reinstated to his former position effective December 7, 20XX. However, EEEEEEEE did not agree to award back pay despite verbal and written attempts. (EEEEEEEE) 's POC Name stated (EEEEEEEE) 's refusal during telephone conversations on December 15, 20XX, January 28, 20XX and February 3, 20XX. Finally, EEEEEEEE 's POC Name did not respond to a February 3, 20XX certified letter requesting back pay for (XXXXXXXX) (Exhs. 32, 38 and 41).

### Investigative Findings

1.(XXXXXXXX) began employment with (EEEEEEEE) on May 17, 20XX (Exh. 1, p.1). (XXXXXXXX) joined the U.S. Army Reserves on September 24, 20XX (Exh. 24, p.1) and received orders dated October 7, 20XX to attend active duty training for a period of 126 days beginning November 13, 20XX (Exh. 24, p.12). Since (XXXXXXXX) had already served two years of active duty between 20XX and 20XX, he was not required to complete initial active duty training (Exh. 28, p.2).

2. (XXXXXXXX) verbally informed his immediate supervisor, Supervisor 's Name, on September 26, 20XX of his upcoming training. Supervisor 's Name suggested that (XXXXXXXX) talk to Name, Supervisor of Human Resources (Exh. 26, p.3).

3. (XXXXXXXX) informed Name, Supervisor of Human Resources of his upcoming obligation on October 1, 20XX. (XXXXXXXX) maintains that Name, Supervisor of Human Resources requested that he sign a leave of absence and (XXXXXXXX) says he did so on October 1, 20XX (Exh. 26, p.3). Name, Supervisor of Human Resources acknowledges (XXXXXXXX) 's verbal request, but maintains

that she never requested (XXXXXXXX) to sign a leave of absence nor did (XXXXXXXX) do so (Exh. 26, p.5).

4. On October 17, 20XX (XXXXXXXX) presented his written orders to Name, Supervisor of Human Resources. Name, Supervisor of Human Resources reviewed the orders and asked about the meaning of the section in the orders which read: "Additional Instructions: see reverse" (Exh. 9, p.2;26, p.3). (XXXXXXXX) called his recruiter, Recruiter's Name, since he could not answer Name, Supervisor of Human Resources' question about the meaning of the "Additional Instructions" reference in the orders (Exh. 26, p.3).

5. Recruiter's Name recalls talking to both Name, Supervisor of Human Resources and (XXXXXXXX)'s immediate supervisor, Supervisor's Name, on one or two occasions, but does not remember specific dates. However, she clearly remembers that both Name, Supervisor of Human Resources and Supervisor's Name could not understand (XXXXXXXX)'s military obligation or the purpose of the orders, despite her efforts to explain such, along with the efforts of another individual in her office, Name, and the Staff Administrator in (XXXXXXXX)'s Reserve unit, Staff Administrator's Name (Exh. 40). Both Staff member and Name of Staff Administrator attempted to explain to Name, Supervisor of Human Resources that the orders possessed by (XXXXXXXX) were complete and the "Additional Instructions" reference was not relevant in (XXXXXXXX)'s case, but Name, Supervisor of Human Resources did not understand (Exh. 26, p.6, 40). Name, Staff Administrator also provided Name, Supervisor of Human Resources with the 800 number in the Washington, DC area if she had further questions and Name, Supervisor of Human Resources later admitted that she did not call that number (Exh. 26, p.6).

6. Both parties agree that (XXXXXXXX)'s last day of work was November 12, 20XX and that he informed Name, Supervisor of Human Resources that he was leaving the next day (Exh. 9, p.2;26, p.4). (XXXXXXXX) maintains that when he asked Name, Supervisor of Human Resources if there was anything else he could do, Name, Supervisor of Human Resources shook his hand and said: "No, (XXXXXXXX). Good luck!" (Exh. 26, p.4). Name, Supervisor of Human Resources maintains that she replied to (XXXXXXXX)'s question with, "(XXXXXXXX), I still do not have that Additional Instructions, see reverse, incorporated by reference." (Exh. 26, p.5).

7. Name, Supervisor of Human Resources maintains that following (XXXXXXXX)'s leaving for military training she talked to three military representatives regarding (XXXXXXXX). She asserts that she never received a satisfactory explanation about the "Additional Instructions" on (XXXXXXXX)'s

orders (Exh. 9, p.2-5). Both Sergeant's Name and Name, civilian Staff Administrative Specialist assigned to (XXXXXXX)'s Reserve unit, assert that they tried to answer Name, Supervisor of Human Resources' question but she did not understand (Exh. 26, p.6, 40). Name Staff Administrative Specialist states that he is sure he told Name, Supervisor of Human Resources that the "Instructions" were irrelevant (Exh. 30). The third representative with whom Name, Supervisor of Human Resources talked, Sergeant's Name, has since transferred and is stationed abroad (Exh. 40, p.2).

8. On December 1, 20XX Name, Supervisor of Human Resources sent a certified letter to (XXXXXXX) stating: "Your last day of work was November 12, 20XX. Final review indicates a lack of proper documentation. You are hereby notified that your name has been removed from our rolls effective your last day worked, which was November 12, 20XX." (Exh. 1, p.4). Name, Supervisor of Human Resources admitted during a November 24, 20XX closing conference that the letter served as (XXXXXXX)'s termination notice (Exh. 26, p.9). The letter was never served as (XXXXXXX)'s termination notice (Exh. 26, p.9). The letter was never claimed (Exh. 1, p.5).

9. (XXXXXXX) successfully completed his military training on April 1, 20XX (Exh. 24, p.15). He reported back to work either the same afternoon or the following afternoon. (XXXXXXX) thinks it was April 1 and (EEEEEEEE) says it was April 2; in any event, the reporting time is not an issue as far as the (EEEEEEEE) is concerned. Upon reporting for work. (XXXXXXX) was presented the December 1, 20XX termination letter by Name, Supervisor of Human Resources along with his payroll check (Exh. 1, p.12,26, p.9).

10. (XXXXXXX) proceeded to apply for unemployment benefits and was denied on the basis of Division of Employment Security's determination: "Reason" the (XXXXXXX) was discharged because he was absent from work without requesting or being granted a military leave of absence. When the (XXXXXXX) could not be reached to substantiate the need for a leave, he was discharged." (Exh. 9, p.15). Since (XXXXXXX) did not file a timely appeal, the determination stood and (XXXXXXX) did not receive any benefits (Exh. 26, p.8).

11. During a November 24, 20XX closing conference Name, Supervisor of Human Resources and Name, EEEEEEEE's POC stated that (XXXXXXX) was "released" rather than "discharged." (Exh. 26, p.9). They reiterated their previous position that (XXXXXXX) was terminated for failure to provide sufficient documentation regarding his military leave request (Exh. 26, p.10). They provided a copy of (EEEEEEEE)'s written disciplinary policy (Exh. 25) but admitted that their "release" policy was not in writing (Exh. 26, p.9). The disciplinary policy did not include "lack of proper

documentation” in the lengthy list of actions considered as misconduct (Exh. 25).

12. At the conclusion of the November 24, 20XX conference, Name (EEEEEEEE)’s POC elaborated on (EEEEEEEE)’s position: He concurred that a notice requirement is all that is needed for an employee to be granted military leave. However, the notice requirement carries with it a document requirement which is verified and sufficiently complete. . (XXXXXXX) ’s orders were not sufficient documentation and it was his responsibility to obtain that documentation or have the military obtain such. The fact that the proper documentation was not provided XXXXXXXX is “tough s--- on him.” Despite the fact that it was not . (XXXXXXX) ’s fault, “it is somebody’s responsibility to give details of military leave to the (EEEEEEEE).” (Exh. 26, p.10). Name, EEEEEEEE’s POC said that the (EEEEEEEE) would not agree to state their position in writing (Exh. 38).

13. (EEEEEEEE) agreed to fully reinstate . (XXXXXXX) effective December 7, 20XX without back pay (Exhs. 31 and 32). Name, (EEEEEEEE)’s POC said that they were willing to reinstate him because he was a victim of circumstances, but back pay was not justified for the reasons stated on November 24, 20XX (Exh. 38, p.1-2).

### Evaluation

The substantive facts in this case are undisputed. Those facts conclusively reveal that . (XXXXXXX) was denied his statutory entitlement under USERRA.

The . (XXXXXXX) X was a member of a Reserve component of the Armed Forces. He possessed orders for military leave and requested such leave. In fact, he initially notified EEEEEEEE verbally about his upcoming leave and then presented the Supervisor of Human Resources with a copy of the orders after receiving them. Moreover, he attempted to comply with (EEEEEEEE)’s request for clarification of his orders by arranging for military representatives to talk with the Supervisor of Human Resources. Further, he notified that same individual on his last day of work that he was leaving for training the next day. Finally, the . (XXXXXXX) reported back to work on a timely basis following successful completion of his training pursuant to Section 4312, only to learn that he had been discharged shortly after leaving for training for providing “...incomplete supporting documentation of his Military Orders...” Therefore, from all indications, . (XXXXXXX) did everything possible to comply with his responsibilities under Section 4312.

(EEEEEEEE)’s position that . (XXXXXXX) ’s discharge was justified is totally without merit for several reasons: (1) Section 4312 only requires that an employee provide advance written or verbal

notice. The (EEEEEEEE) has no choice but to grant the leave. (2) An employer is not entitled by USERRA to any documentation prior to an employee's military service. (EEEEEEEE)'s termination of . (XXXXXXXX) for allegedly insufficient documentation prior to service is inconsistent with section 4312 of the Act. (3) Finally, . (XXXXXXXX) 's discharge appears to be discrimination in violation of section 4311, since the discharge was motivated by XX's military service.

### Remedies

. (XXXXXXXX) was entitled to return to work on April 2, 20XX. However, he was not reinstated with EEEEEEEE until December 7, 20XX. Although . (XXXXXXXX) was actively seeking employment and applied with such companies as Company Name, Company Name and Company Name, he was not successful in finding substantially equivalent employment. Since he did not have interim earnings during that period, he is due back pay for a total of 34 weeks . (XXXXXXXX) was denied unemployment benefits). His pay rate was \$6.92 per hour when he left for military training on November 12, 20XX and he was reemployed at the rate of \$8.14 per hour. (EEEEEEEE) could not provide the date when the rate increased from \$6.92 to \$8.14 per hour (Exh. 39, p.1-2). Therefore, . (XXXXXXXX) 's back pay is estimated at \$11,070, i.e., \$8.14 per hour @ 40 hours per week x 34 weeks.

### Recommendation

Litigation is strongly recommended based on the sizeable amount of back pay due, plus the clear cut evidence that . (XXXXXXXX) 's reemployment was improperly delayed for a lengthy period of time.

## **EXHIBITS**

1. Eligibility Data Form with attachments
2. Report of Contact, SFC Name of Military Member, September 15, 20XX
3. Report of Contact, . (XXXXXXXX) , September 15, 20XX

4. Report of Contact, SGT Name of Military Member, September 15, 20XX
5. Report of Contact, Name, Supervisor of Human Resources, September 15, 20XX
6. Letter, September 22, 20XX, Investigator's Name to . (XXXXXXX)
7. Report of Contact, Name, Supervisor of Human Resources, October 5, 20XX
8. Letter, October 6, 20XX, Name, Supervisor of Human Resources to Investigator's Name
9. Letter with attachments, October 9, 20XX, Name, Supervisor of Human Resources to Investigator's Name
10. Report of Contact, Name, Staff Administrative Specialist, October 15, 20XX
11. Report of Contact, Name, Supervisor of Human Resources, October 25, 20XX
12. Letter, October 19, 20XX, Investigator's Name to Name, Supervisor of Human Resources
13. Report of Contact, Name, Supervisor of Human Resources, October 26, 20XX
14. Report of Contact, Name, (EEEEEEEE)'s' Attorney, October 27, 20XX
15. Report of Contact, Unit Staff Administrative Assistant, October 27, 20XX
16. Letter w/attachments, October 27, 20XX, Names, Unit Staff Administrative Specialist to Investigator's Name
17. Report of Contact, Name, Supervisor of Human Resources, November 2, 20XX
18. Letter, October 20, 20XX, from Name, Witness
19. Report of Contact, Name, Supervisor of Human Resources, November 10, 20XX
20. Report of Contact, Name, . (XXXXXXX) 's Attorney, November 12, 20XX

21. Letter November 16, 20XX, Investigator's Name to Name, (EEEEEEEE) 's Attorney
22. Report of Contact, Name, (EEEEEEEE) 's Attorney, November 30, 20XX
23. Copies of Court Cases
24. Documents provided by . (XXXXXXXX)
25. Document provided by (EEEEEEEE)
26. Report of Contact, November 24, 20XX, Closing conference notes
27. Letter, November 25, 20XX, Name, Unit Staff Administrative Specialist to Investigator's Name
28. Report of Contact, Name, (EEEEEEEE) 's Attorney, November 30, 20XX
29. Report of Contact, . (XXXXXXXX) , December 1, 20XX
30. Document provided by Name, Unit Staff Administrative Specialist, December 3, 20XX
31. Report of Contact, . (XXXXXXXX) , December 4, 20XX
32. Report of Contact, Name, (EEEEEEEE) 's Attorney, December 15, 20XX
33. Report of Contact, . (XXXXXXXX) , December 16, 20XX
34. Report of Contact, . (XXXXXXXX) , January 7, 20XX
35. Letter, January 8, 20XX, Investigator's Name to . (XXXXXXXX)
36. Claimants Request for Referral , January 11, 20XX
37. Notification of Referral letter to sent to (EEEEEEEE), January 11, 20XX
38. Report of Contact, Name, (EEEEEEEE) 's Attorney, January 20, 20XX

39. Report of Contact, Name, (EEEEEEEE)ʼs Attorney, January 28, 20XX
40. Report of Contact, Name, Supervisor of Human Resources, February 3, 20XX
41. Report of Contact, Witness Name, February 3, 20XX
42. Letter, February 3, 20XX, Investigatorʼs Name to Name, (EEEEEEEE)ʼs Attorney

**Exhibit 27: Sample “Short Form” Memorandum of Referral  
(Litigation Not Recommended)**

**U.S. Department of Labor  
Veterans’ Employment and Training Service  
Street Address  
City, State, Zip Code**

DATE: Date

MEMORANDUM FOR: U.S. Attorney General/Office of Special Counsel (specify)

THROUGH: Regional Administrator’s Name, Regional Administrator

FROM: Investigator’s Name, Investigator’s Title

SUBJECT: Memorandum of Referral

<u>Claimant</u>	<u>Alleged Violation</u>
. (XXXXXXX)	Failure to Reemploy (Section 4312)
Street Address	
City, State, Zip Code	
(Phone Number)	

v.

<u>Employer</u>	<u>Action Recommended</u>
EEEEEEEE	Litigation Not Recommended
Street Address	
City, State, Zip Code	
(Phone Number)	

Case Number  
DC-20XX-XXXXXX-XX-X

This report and file covers an investigation of the claim of National Guardsman . (XXXXXXX) filed against his employer, Company, City and State, received by the Local Office of the Veterans' Employment and Training Service, acting for the Secretary of Labor and the Veterans' Employment and Training Service per Section 4322, Chapter 43, Title 38, U.S. Code. The undisputed facts established that . (XXXXXXX) was discharged from active duty with the U.S. Marine Corps on January 19, 20XX, and that he received a bad conduct discharge. This would make . (XXXXXXX) ineligible for reemployment under section 4304 of the Uniformed Services Employment and Reemployment Rights Act of 1994.

**Exhibit 28: Sample RA Transmittal Letter to DOJ**  
**(Litigation Recommended)**

**U.S. Department of Labor**  
**Veterans' Employment and Training Service**  
**Street Address**  
**City, State, Zip Code**

DATE: Date

MEMORANDUM FOR: U.S. Attorney General/Office of Special Counsel (specify)

THROUGH: Regional Solicitor of Labor's Name, Regional Solicitor of Labor

FROM: Regional Administrator's Name, Regional Administrator

SUBJECT: XXXXXXXX v. EEEEEEEE  
DC-20XX-XXXXX-XX-X

Forwarded herewith is (Investigator's Title and Name's) Memorandum of Referral to the Department of Justice with a duplicate copy of the case file. We have reviewed both the report and file and concur in the recommendation.

. (XXXXXXX) was employed by EEEEEEEE as a patrolman. Before completing the required six months probationary period, . (XXXXXXX) was ordered to a period of active duty with the U.S. Marine Corps Reserves. Upon satisfactory completion of active duty, . (XXXXXXX) applied for reinstatement and was reinstated. Rather than being placed at the exact point he left in the probationary period, his probation was extended. Military service was not included for seniority purposes and the pay rate granted was that of a new hire and was not elevated properly even after the extended period of probationary employment was successfully completed. . (XXXXXXX) subsequently resigned and through this case is seeking lost wages.

The employer at one point in the investigation stated that pay raises were based on evaluations; however, their final position stated that no merit system exists. They failed to provide any specific criteria for the granting of raises other than that the Board of Aldermen makes the decision. Nor did

they supply the evaluation on anyone except . (XXXXXXX) when requested. From the pay raises given other patrolmen, it is evident that raises were based on the passage of time only. . (XXXXXXX) , therefore, should have been granted the rate he would have attained if not for military service at least upon completion of the balance of his probationary period.

Based upon our investigative findings, we recommend pursuit of this matter through litigation.

**Exhibit 29: Sample RA Referral Notice to Employer**

**U.S. Department of Labor  
Veterans' Employment and Training Service  
Street Address  
City, State, Zip Code**

Date

EEEEEEEE

Director of Human Resources

Street Address

City, State, Zip Code

Re: . (XXXXXXXX)

DC-20XX-XXXXXX-XX-X

Dear EEEEEEEE:

In accordance with Section 4323 of Title 38, U.S.C., Chapter 43, Reservist . (XXXXXXXX) 's claim for a retroactive seniority date on the engineer seniority roster to May 1, 20XX, as well as subsequent financial benefits resulting from that seniority date, has been forwarded to the Regional Solicitor for referral to the U.S. Attorney General/Office of Special Counsel (select).

Future correspondence on this matter should be addressed to:

Regional Solicitor's Name, Regional Solicitor

U.S. Department of Labor

Street Address

City, State, Zip Code

I regret that we were unable to reach a satisfactory resolution to this matter.

Sincerely,

Regional Administrator's Name

Regional Administrator

cc: . (XXXXXXXX)

Regional Solicitor's Name, Regional Solicitor

Investigator's Title and Name

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9

## Chapter 9 Case Closing

- .1 **Purpose.** This section describes closing procedures to be used in different circumstances.
  
- .2 **Administrative Closure (AD).** A case should be closed administratively under any of the following circumstances:
  - (1) **Lack of Interest.** Administrative closure is appropriate when the claimant clearly displays lack of interest, is inappropriately interfering and/or intentionally disrupting the investigation, or unable to assist in pursuing the claim. Examples are failure to reply to VETS' letters, failure to give VETS a change of address, failure to supply information which could be easily obtained, failure to attend scheduled meetings or conferences, and failure to make a written request for referral after being given the opportunity to do so.

*Document the reason(s) the case has been closed on a [VETS Form 1063](#). Send the claimant a letter advising that if he/she fails to respond the closure of the case will become necessary because [state reason(s) as described in the VETS Form 1063]. Allow the claimant ten business days to respond. The letter must be sent via Certified Mail – Return Receipt. If at the end of this period the claimant fails to respond, the receipt is not returned to VETS, or is undeliverable, close the case administratively and send the claimant a closing letter, Certified Mail-Return Receipt. [Exhibit 30](#). [\[QAR\]](#)*
  
  - (2) **Continued Unauthorized Contact by Third Party with Employer.** Although a claimant is entitled to be represented either by VETS or by a third party under the USERRA, he or she may not be simultaneously represented by both parties, if the representation interferes with the investigation. (See Chapter 4, paragraph .16).

If the claimant insists on being represented by a third party in a USERRA claim, he or she will be informed that VETS will no longer handle the case and the case will be administratively closed, by letter sent Certified Mail-Return Receipt. [\(Exhibit 31\)](#)
  
- .3 **Claim Granted (CG).** When the employer grants all or substantially all of the claimant's entitlements, close the case as a "Claim Granted."
  - (1) **Release Form.** A release form should be completed and signed by the Claimant and the employer if appropriate. [\(Exhibit 41\)](#)

- (2) **VETS Receipt Of Check.** When the resolution involves payment to the claimant of any monies (such as payment for lost wages), and it is not possible to immediately obtain full payment of all the amounts agreed upon, make necessary arrangements to have a check for the balance, made payable to the claimant, forwarded to your office, for transmittal to the claimant. With agreement of the parties to the dispute (i.e. claimant and employer/attorney) the check may be sent/presented directly to the claimant. However, verification of such payment (e.g. copy of the check) should be obtained by the investigator.
- (3) **Send Claimant Check by Certified Mail.** Send the claimant the employer's check via Certified Mail – Return Receipt and, after verifying the satisfaction of all the other elements of the agreement, notify the claimant that the case is being closed, enclosing a copy of the signed release. ([Exhibit 41](#))
- (4) **Send Employer Closing Letter.** After all issues have been resolved, send the employer a letter advising that the check has been sent to the claimant by certified mail. Advise the employer that the case is being closed. Enclose a copy of the signed release. (Exhibit 42)

**Note:** If there is no written acknowledgment (e.g., settlement agreement) that complainant is fully satisfied with the resolution of the case, the closing letter should set out the relief obtained by VETS and a statement that if the complainant is not fully satisfied with the resolution, he may request that VETS refer his case to DOJ or OSC or he may seek private counsel.

- .4 **Claim Settled (CS).** When the claimant and the employer agree to settle the claim for less than the claimant's full entitlements under USERRA, close the case as a "Claim Settled."

**Note:** If there is no written acknowledgment (e.g., settlement agreement) that complainant is fully satisfied with the resolution of the case, the closing letter should set out the relief obtained by VETS and a statement that if the complainant is not fully satisfied with the resolution, he may request that VETS refer his case to DOJ or OSC or he may seek private counsel.

- .5 **Withdrawn Claim (CW).** A case should be closed as claim withdrawn when the claimant informs VETS in writing of his/her desire to withdraw the claim. Send the claimant a brief letter Certified Mail-Return Receipt confirming the request and advise that the case is being closed ([Exhibit 32](#)). Send a separate closing letter to the employer. ([Exhibit 33](#)) If the claimant tries to withdraw the claim after VETS determines that the claimant is not eligible or the claim is not meritorious, the case should be closed as a "Not Eligible" or "No Merit," whichever is appropriate. (Exhibit 34 and 37)

- .6 **Not Eligible (NE).** If a case has already been opened, and VETS finds that the claimant does not meet the eligibility requirements in the statute, the case should be discussed with the claimant and with his/her concurrence, closed on the basis of no eligibility. The claimant must be informed of this closure in writing, by **Certified Mail-Return Receipt** (Exhibit 36 or 37) The claimant **must also** be advised, in writing, of the right of referral to the AG/OSC, or to seek private counsel.
- .7 **No Merit (NM).** It may be found that the claimant is not entitled to any relief for reasons other than failure to meet eligibility requirements. Explain the findings in writing to the claimant, by **Certified Mail-Return Receipt** ([Exhibit 35](#)), and explain the right to referral. When there is no response by claimant to the referral letter, notify the employer that the case was closed. ([Exhibit 39](#)).
- .8 **Cases Referred.** Unsettled cases are closed only when they are referred to the Regional Solicitor's Office for appropriate referral action.
- .9 **Maintenance of Closed Case Files.** Each Region must have a written plan for maintaining closed case files until they are eligible for retirement to the Federal Records Center. The plan should specify where the closed cases are to be kept and how they are to be filed. The plan should also indicate who is responsible for retiring them and Regional retirement procedures. This plan must comply with the VETS Record Retention Plan. SEE DM 21-01; SEE DM 05-06 "Case File Retention and Disposal Procedures".
- .10 **Closing date.** Investigators will ensure that the closing date of USERRA cases entered in the UIMS matches the date on the case closing letter that was sent to the claimant. A copy of the dated closing letter will be included in the case file.

[\[QAR\]](#)

Note: **The investigator must confer with his supervisor prior to sending a closing letter.**

**Exhibit 30: Sample Closing Letter to Non-Federal Claimant – Lack of Interest**

**U.S. Department of Labor  
Veterans' Employment and Training Service  
Street Address  
City, State, Zip Code**

Date

. (XXXXXXXX)

Street Address

City, State, Zip Code

Re: . (XXXXXXXX)

DC-20XX-XXXXX-XX-X

Dear . (XXXXXXXX) :

This is to advise you that the Veterans' Employment and Training Service (VETS) is treating your failure to respond to our February 1, 20XX certified letter as a request to withdraw your application for assistance pursuant to 38 U.S.C. § 4322(a) (your Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) claim). Accordingly, VETS is closing your case as of this date. Should you decide that you would like VETS to investigate your allegations, and to receive any right you may have to have your claim referred to the Attorney General, you will need to file a new claim.

You have the right to seek private counsel at your own expense or to file a lawsuit against the Named Employer (Employer or Abbreviated Employer) in a court of competent jurisdiction. If you are considering seeking private counsel or filing a lawsuit, you should be aware that some courts have held that a lawsuit must be filed within a certain period of time after the alleged USERRA violation. You should seek counsel of your own choosing and at your own expense to determine whether such a time limitation would apply to your case.

Sincerely,

Investigator's Name

Investigator's Title

Encl: Certified Letter dated February 1, 20XX

**Exhibit 30(A): Sample Closing Letter to Federal Claimant – Lack of Interest**

**U.S. Department of Labor  
Veterans' Employment and Training Service  
Street Address  
City, State, Zip Code**

Date

. (XXXXXXXX)

Street Address

City, State, Zip Code

Re: . (XXXXXXXX)

DC-20XX-XXXXX-XX-X

Dear . (XXXXXXXX) :

This is to advise you that the Veterans' Employment and Training Service (VETS) is treating your failure to respond to our February 1, 20XX certified letter as a request to withdraw your application for assistance pursuant to 38 U.S.C. § 4322(a) (your Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) claim). Accordingly, VETS is closing your case as of this date. Should you decide that you would like VETS to investigate your allegations, and to receive any right you may have to have your claim referred to the Office of Special Counsel, you will need to file a new claim.

You have the right to seek private counsel at your own expense, or to file an appeal against the Named Federal Agency or Administration (Agency or Abbreviated Agency Name) (or the Office of Personnel Management) directly to the Merit Systems Protection Board (MSPB). The MSPB encourages appellants to file a USERRA appeal as soon as possible after the date of the alleged violation. *See* 5 C.F.R. 1208.12.

Sincerely,

Investigator's Name

Investigator's Title

Encl: Certified Letter dated February 1, 20XX

**Exhibit 31: Sample Closing Letter to Non-Federal Claimant –Third Party Representation**

**U.S. Department of Labor**  
**Veterans' Employment and Training Service**  
**Street Address**  
**City, State, Zip Code**

Date

. (XXXXXXXX)

Claimant's Street Address

City, State, Zip Code

Re: . (XXXXXXXX)

DC-20XX-XXXXX-XX-X

Dear . (XXXXXXXX) :

This is to advise you that the Veterans' Employment and Training Service (VETS) is treating the continued involvement of an outside party in resolving your Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) claim as a request to withdraw your application for assistance pursuant to 38 U.S.C. § 4322(a). Accordingly, VETS is closing your case as of this date. Should you decide that you would like VETS to investigate your allegations, and to receive any right you may have to have your claim referred to the Attorney General, you will need to file a new claim.

You have the right to seek private counsel at your own expense, or to file a lawsuit against the Named Employer (Employer or Abbreviated Employer) in a court of competent jurisdiction. If you are considering seeking private counsel or filing a lawsuit, you should be aware that some courts have held that a lawsuit must be filed within a certain period of time after the alleged USERRA violation. You should seek counsel of your own choosing and at your own expense to determine whether such a time limitation would apply to your case.

Sincerely,

Investigator's Name

Investigator's Title

**Exhibit 31 (A): Sample Closing Letter to Federal Claimant –Third Party Representation**

**U.S. Department of Labor**  
**Veterans' Employment and Training Service**  
**Street Address**  
**City, State, Zip Code**

Date

. (XXXXXXXX)

Claimant's Street Address

City, State, Zip Code

Re: . (XXXXXXXX)

DC-20XX-XXXXX-XX-X

Dear . (XXXXXXXX) :

This is to advise you that the Veterans' Employment and Training Service (VETS) is treating the continued involvement of an outside party in resolving your Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) claim as a request to withdraw your application for assistance pursuant to 38 U.S.C. § 4322(a). Accordingly, VETS is closing your case as of this date. Should you decide that you would like VETS to investigate your allegations, and to receive any right you may have to have your claim referred to the Office of Special Counsel, you will need to file a new claim.

You have the right to seek private counsel at your own expense, or to file an appeal against the Named Federal Agency or Administration (Agency or Abbreviated Agency Name) (or the Office of Personnel Management) directly to the Merit Systems Protection Board (MSPB). The MSPB encourages appellants to file a USERRA appeal as soon as possible after the date of the alleged violation. *See* 5 CFR 1208.12.

Sincerely,

Investigator's Name

Investigator's Title

**Exhibit 32: Sample Closing Letter to Non-Federal Claimant – Claim Withdrawn**

**U.S. Department of Labor  
Veterans' Employment and Training Service  
Street Address  
City, State, Zip Code**

Date

. (XXXXXXX)

Claimant's Street Address

City, State, Zip Code

Re: . (XXXXXXX)

DC-20XX-XXXXX-XX-X

Dear (XXXXXXX) :

In accordance with your August 23, 20XX written request to withdraw your application for assistance pursuant to 38 U.S.C. § 4322(a) (your Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) claim), the Veterans' Employment and Training Service (VETS) is closing your case this date. Should you change your mind and decide that you would like VETS to investigate your allegations, and to receive any right you may have to have your claim referred to the Attorney General, you will need to file a new claim.

You have the right to seek private counsel at your own expense, or to file a lawsuit against the Named Employer (Employer or Abbreviated Employer) in a court of competent jurisdiction. If you are considering seeking private counsel or filing a lawsuit, you should be aware that some courts have held that a lawsuit must be filed within a certain period of time after the alleged USERRA violation. You should seek counsel of your own choosing and at your own expense to determine whether such a time limitation would apply to your case.

Sincerely,

Investigator's Name

Investigator's Title

**Exhibit 32 (A): Sample Closing Letter to Federal Claimant – Claim Withdrawn**

**U.S. Department of Labor  
Veterans' Employment and Training Service  
Street Address  
City, State, Zip Code**

Date

. (XXXXXXX)

Claimant's Street Address

City, State, Zip Code

Re: . (XXXXXXX)

DC-20XX-XXXXX-XX-X

Dear (XXXXXXX) :

In accordance with your August 23, 20XX written request to withdraw your application for assistance pursuant to 38 U.S.C. § 4322(a) (your Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) claim), the Veterans' Employment and Training Service (VETS) is closing your case this date. Should you change your mind and decide that you would like VETS to investigate your allegations, and to receive any right you may have to have your claim referred to the Office of Special Counsel, you will need to file a new claim.

You have the right to seek private counsel at your own expense, or to file an appeal against the Named Federal Agency or Administration (Agency or Abbreviated Agency Name) (or the Office of Personnel Management) directly to the Merit Systems Protection Board (MSPB). The MSPB encourages appellants to file a USERRA appeal as soon as possible after the date of the alleged violation. *See* 5 CFR 1208.12.

Sincerely,

Investigator's Name

Investigator's Title

**Exhibit 33: Sample Closing Letter to Employer – Claim Withdrawn**

**U.S. Department of Labor  
Veterans' Employment and Training Service  
Street Address  
City, State, Zip Code**

Date

EEEEEEEE

District Manager

Employer's Street Address

City, State, Zip Code

Re: . (XXXXXXX)

DC-20XX-XXXXXX-XX-X

Dear EEEEEEEE:

This is to inform you that . (XXXXXXX) has advised us that he does not wish to pursue his USERRA claim any further. Therefore, we are closing our file on the above referenced case.

Sincerely,

Investigator's Name

Investigator's Title

cc: . (XXXXXXX)

**Exhibit 34:**  
**SAMPLE CLOSING LETTER FOR A FEDERAL COMPLAINT---No Merit**

**Office of the Assistant Secretary for  
Veterans' Employment and Training  
1100 Main Street, Suite 850  
Kansas City, Missouri, 64105**

**\*Send via Certified Mail-Return Receipt**

Date

. (XXXXXXX)

Claimant's Street Address

City, State Zip Code

Re: . (XXXXXXX)

Case Number

Dear . (XXXXXXX)

This agency, under the mandate of 38 U.S.C. § 4322 to render aid to persons seeking assistance under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), 38 U.S.C. §§ 4301-4334, has investigated your claim against the Named Federal Agency or Administration (Agency or Abbreviated Agency Name). Based on the information obtained during the investigation, we do not find that the evidence supports a violation of USERRA.

Your position is: [1] on July 1, 20XX you properly notified your employer of your military service and requested a leave of absence from your position as an Employment Position, to perform annual training; [2] you reported for work on your next regularly scheduled work shift following release from military duty; and [3] you were denied return to work by the Abbreviated Agency Name. Your employer's position is: [1] it was properly notified of your military service; [2] during your military service, through routine computer monitoring, it was determined that while you were working, over the past 8 months, you spent an average of five hours each day browsing inappropriate internet websites; [3] you properly reported back to work; [4] you were notified on July 10, 20XX of the agency's proposal to remove you from your position for cause and provided you all due process rights; and [5] you failed to respond, either verbally or in writing to the charges against you. Your employer terminated you for cause based on its finding that you violated its policy of appropriate use of (Abbreviated Agency Name) information technology on August 10, 20XX.

We reviewed those findings with you at a meeting held on December 11, 20XX, and you stated that the facts were correct. Accordingly, this investigator, after speaking with your supervisors, and having reviewed numerous documents and employer policies concludes that you were terminated for nondiscriminatory reasons. The evidence fails to disclose that your military service was a factor in your termination.

*If you disagree with the finding specified above, you have a right to request referral of your claim to the Office of Special Counsel (OSC) for further review. If you elect to have your claim referred, please notify this office of your decision not later than (provide claimant a specific date for response). If OSC is reasonably satisfied that you are entitled to the relief sought, the Special Counsel may appear on your behalf and initiate an action regarding your complaint before the Merit Systems Protection Board (MSPB).*

You have the right to seek private counsel at your own expense, or to file an appeal against the Named Federal Agency or Administration (Agency or Abbreviated Agency Name) (or the Office of Personnel Management) directly to the MSPB. The MSPB encourages appellants to file a USERRA appeal as soon as possible after the date of the alleged violation. *See* 5 CFR 1208.12.

Please contact us if you would like any additional information on this matter.

Sincerely,

Investigator's Name  
and Title

**Exhibit 35: SAMPLE CLOSING LETTER FOR A NON-FEDERAL COMPLAINT---No Merit**

**Office of the Assistant Secretary for  
Veterans' Employment and Training  
1100 Main Street, Suite 850  
Kansas City, Missouri, 64105**

**\*Send via Certified Mail-Return Receipt**

Date

. (XXXXXXX)

Claimant's Street Address

City, State Zip Code

Re: . (XXXXXXX)

Case Number

Dear . (XXXXXXX)

This agency, under the mandate of 38 U.S.C. § 4322 to render aid to persons seeking assistance under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), 38 U.S.C. §§ 4301-4334 and 20 C.F.R. Part 1002, has investigated your claim against the Named Employer (Employer or Abbreviated Employer). Based on the information obtained during the investigation, we do not find that the evidence supports a violation of USERRA.

Your position is: [1] on July 1, 20XX you properly notified your employer of your military service and requested a leave of absence from your position as an Employment Position, to perform annual training; [2] you reported for work on your next regularly scheduled work shift following release from military duty; and [3] you were denied return to work by the Employer. Your employer's position is: [1] it was properly notified of your military service; [2] during your military service, through routine computer monitoring, it was determined that while you were working, over the past 8 months, you spent an average of five hours each day browsing inappropriate internet websites; [3] you properly reported back to work; [4] you were notified on July 10, 20XX of the employer's proposal to remove you from your position for cause and provided you all due process rights; and [5] you failed to respond, either verbally or in writing to the charges against you. Your employer terminated you for cause based on its finding that you violated its policy of appropriate use of the Employer's information technology resources on August 10, 20XX.

We reviewed those findings with you at a meeting held on December 11, 20XX, and you stated that the facts as set forth above were correct. As such, this investigator, after speaking with your supervisors, and having reviewed numerous documents and employer policies concludes that you were terminated for nondiscriminatory reasons, and that your military service was not a motivating factor in your termination.

If you disagree with the finding specified above, you have the right to request a referral of your claim to the U.S. Attorney General. If you elect to have your claim referred, please notify this office of your decision no later than (provide claimant a specific date for response). If the office of U.S. Attorney General is reasonably satisfied that you are entitled to the relief sought, the Attorney General may appear on your behalf and initiate an action regarding your complaint before a district court of the United States.

You have the right to seek private counsel at your own expense, or to file a lawsuit against the Named Employer (Employer or Abbreviated Employer) in a court of competent jurisdiction.

If you are considering seeking private counsel or filing a lawsuit, you should be aware that some courts have held that a lawsuit must be filed within a certain period of time after the alleged USERRA violation. You should seek counsel of your own choosing and at your own expense to determine whether such a time limitation would apply to your case.

Please contact us if you would like any additional information on this matter.

Sincerely,

Investigator's Name  
and Title

**Exhibit 36: Sample Closing Letter to Federal Claimant – Not Eligible**

**Office of the Assistant Secretary for  
Veterans' Employment and Training  
1100 Main Street, Suite 850  
Kansas City, Missouri, 64105**

**\*Send via Certified Mail-Return Receipt**

Date

. (XXXXXXX)

Claimant's Street Address

City, State Zip Code

Re: . (XXXXXXX)

Case Number

Dear . (XXXXXXX)

This agency, under the mandate of 38 § U.S.C. 4322 to render aid to persons seeking assistance under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), 38 U.S.C. §§ 4301-4334, has compiled and reviewed facts related to your claim against the Named Employer (Employer or Abbreviated Employer). Based on the information we have compiled, we have not found you eligible for (TYPE OF RELIEF SOUGHT) under USERRA.

In making the above determination, the investigator reviewed (include what types of documentation was reviewed reflecting a finding of not eligible). If you have any evidence to refute this finding, please contact this office so that we can discuss the evidence.

If you disagree with the finding specified above, you have a right to request referral of your claim to the Office of Special Counsel (OSC) If you elect to have your claim referred, please notify this office of your decision no later than (provide claimant a specific date for response). If OSC is reasonably satisfied that you are entitled to the relief sought, the Special Counsel may appear on your behalf and initiate an action regarding your complaint before the Merit Systems Protection Board (MSPB). You also have the right to seek private counsel at your own expense, or to file a complaint against the Federal executive agency (or the Office of Personnel Management) directly to the MSPB.

If you are considering seeking private counsel or filing a lawsuit, you should be aware that some courts have held that a lawsuit must be filed within a certain period of time after the alleged USERRA violation. You should seek counsel of your own choosing and at your own expense to determine whether such a time limitation would apply to your case.

Sincerely,

Investigator's Name and Title

**Exhibit 37: Sample Closing Letter to Non-Federal Claimant – Not Eligible**

**Office of the Assistant Secretary for  
Veterans' Employment and Training  
1100 Main Street, Suite 850  
Kansas City, Missouri, 64105**

**\*Send via Certified Mail-Return Receipt**

Date

. (XXXXXXX)

Claimant's Street Address

City, State Zip Code

Re: . (XXXXXXX)

Case Number

Dear . (XXXXXXX)

The Veterans' Employment and Training Service, under the mandate of 38 U.S.C. § 4322, to render aid to persons seeking assistance under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), 38 U.S.C. §§ 4301-4334, and 20 C.F.R. Part 1002, has compiled and reviewed facts related to your claim against the Named Employer (Employer or Abbreviated Employer). Based on the information we have compiled, we have not found you to be eligible for [type of relief sought] under USERRA

The investigator reviewed (include what types of documentation was reviewed reflecting a finding of not eligible). If you have any evidence to refute this finding, please contact this office so that we can discuss that evidence.

If you disagree with the finding specified above, you have the right to request a referral of your claim to the U.S. Attorney General. If you elect to have your claim referred, please notify this office of your decision not later than (provide claimant a specific date for response). If the office of U.S. Attorney General is reasonably satisfied that you are entitled to the relief sought, the Attorney General may appear on your behalf and initiate an action regarding your complaint before a district court of the United States. You also have the right to seek private counsel at your own expense, or to file a lawsuit against the employer in a court of competent jurisdiction.

If you are considering seeking private counsel or filing a lawsuit, you should be aware that some courts have held that a lawsuit must be filed within a certain period of time after the alleged USERRA violation. You should seek counsel of your own choosing and at your own expense to determine whether such a time limitation would apply to your case.

Sincerely,

Investigator's Name and Title



**Exhibit 39: Sample Closing Letter to Employer – No Response from Claimant**

**U.S. Department of Labor  
Veterans' Employment and Training Service  
Street Address  
City, State, Zip Code**

Date

EEEEEEEE  
District Manager  
Employer's Street Address  
City, State, Zip Code

Re: . (XXXXXXX)  
Case Number

Dear EEEEEEEE:

Our investigation of the above-referenced case has been concluded, and we are closing our file in this matter.

We wish to thank you for your assistance and cooperation.

Sincerely,

Investigator's Name  
Investigator's Title

cc: . (XXXXXXX)

**Exhibit 40: Sample Closing Letter to Employer – Claim Granted**

**U.S. Department of Labor  
Veterans' Employment and Training Service  
Street Address  
City, State, Zip Code**

Date

EEEEEEEE  
Compensation Manager  
Employer's Street Address  
City, State, Zip Code

Re: . (XXXXXXX)  
Case Number

Dear EEEEEEEE:

This confirms our November 19, 20XX telephone conversation regarding. (XXXXXXX) case under the Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. 4301-4334.

On date EEEEEEEE stated that. (XXXXXXX) will be advanced to Step #10 of the pay scale, presently \$6.50 per hour, retroactive to May 12, 20XX, and that she will receive \$1,650.00 in back pay. Additionally, she will receive military service credit for all benefits accruing from seniority, including pension and payable to . (XXXXXXX) , forwarded to this office. We will forward the check to . (XXXXXXX) .

Based on satisfactory resolution, this case is being closed. We greatly appreciate your cooperation in resolving this matter.

Sincerely,

Investigator's Name  
Investigator's Title

cc: . (XXXXXXX)

**Exhibit 41: Sample Settlement Agreement and Release Form**

**UNITED STATES DEPARTMENT OF LABOR  
VETERANS' EMPLOYMENT AND TRAINING SERVICE**

XXXXXXXXX	)	CASE NUMBER
	)	
Complainant	)	DC-20XX-XXXXXX-XX-X
	)	
v.	)	
	)	
EEEEEEEEE	)	
	)	
Respondent	)	

**SETTLEMENT AGREEMENT AND RELEASE**

This SETTLEMENT AGREEMENT and RELEASE is made and entered into between XXXXXXXXX and EEEEEEEEE, who agree and stipulate as follows:

WHEREAS, . (XXXXXXX) has filed a claim with the United States Department of Labor, Veterans' Employment and Training Service, alleging that he was terminated from his employment with EEEEEEEEE on or about January 29, 20XX, in violation of Section 4311 of the Uniformed Services Employment and Reemployment Rights Act, 38, U.S.C. § 4301, et. seq; and

WHEREAS, . (XXXXXXX) has waived his right to reemployment with EEEEEEEEE and

WHEREAS, . (XXXXXXX) has a claim for lost wages for the period January 29, 20XX to March 27, 20XX; and

WHEREAS both parties now wish to settle this case without the necessity of litigation;

NOW, THEREFORE, inconsideration of the mutual covenants hereinafter Contained, the sufficiency of which is hereby acknowledged, the parties hereto agree as

Follows:

A. EEEEEEEE agrees to pay . (XXXXXXX) \$4,500.00, less legal deductions, in full and complete satisfaction of his claim as expressed above.

B. . (XXXXXXX) agrees to have closed VETS Case No. DC-200XX-XXXXX-XX-X as identified above and agrees not to institute or pursue any civil action Under any statute for lost wages, damages or otherwise against EEEEEEEE, its agents, employees or successors as a result of his termination from EEEEEEEE employment on or about January 29, 20XX.

C. Failure to comply with the terms of this agreement authorizes the claimant to request the Veterans' Employment and Training Service re-open the case for further investigation or to seek private counsel in resolving the dispute.

EEEEEEEE

By: \_\_\_\_\_

\_\_\_\_\_  
XXXXXXXXX Signature

Dated: \_\_\_\_\_

Dated: \_\_\_\_\_

By: \_\_\_\_\_

EEEEEEEE Signature  
Employer's Name  
Employer's Street Address  
City, State, Zip Code  
Phone Number

**Exhibit 42: Sample Closing Letter to Claimant – Claim Settled**

**U.S. Department of Labor  
Veterans' Employment and Training Service  
Street Address  
City, State, Zip Code**

**CERTIFIED MAIL-RETURN RECEIPT**

Date

. (XXXXXXX)

Claimant's Street Address

City, State, Zip Code

Re: . (XXXXXXX)

Case Number

Dear. (XXXXXXX) :

Enclosed is a check in the amount of \$10,999.07 from EEEEEEEE in payment for total withdrawal of your Thrift Plan.

This payment, along with the previous back pay award of \$3,000.00 finalizes resolution of your USERRA claim against EEEEEEEE. Therefore, your case is closed this date.

A copy of your signed release is also enclosed.

Sincerely,

Investigator's Name

Investigator's Title

Enclosures

**Exhibit 43: Sample Closing Letter to Employer – Claim Settled**

**U.S. Department of Labor  
Veterans' Employment and Training Service  
Street Address  
City, State, Zip Code**

Date

EEEEEEEE

General Counsel

Employer's Street Address

City, State, Zip Code

Re: . (XXXXXXX)  
Case Number

Dear EEEEEEEE:

Enclosed is the release signed by . (XXXXXXX) in settlement of the claim in this case. The check you provided has been sent by certified mail to the . (XXXXXXX) , and the signature on the release indicates satisfaction.

Thank you for your cooperation and attention. Our file on this case is now closed.

Sincerely,

Investigator's Name

Investigator's Title

cc: . (XXXXXXX)

Enclosure

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# 10

## Chapter 10 Protest Procedures

- .1 **Purpose.** This chapter describes procedures to be followed when a claimant expresses disagreement with the handling of his or her claim by a VETS staff member, and the disagreement is disrupting the investigation.
- .2 **When to Implement Protest Procedures.** Action should be taken by the VETS Investigator within 3 working days whenever a claimant expresses disagreement regarding the handling of his/her claim, and this disagreement is disrupting the investigation.
- .3 **Procedures to be followed when a Protest is Filed.** If a claimant expresses a disagreement, oral or written, regarding the handling of his/her claim and he/she is not able to resolve the issues with the Investigator, the claim will be referred to the Regional Office for review with respect to the specific protest. If it is established that further investigation is needed, the case file should be returned to: (1) the original Investigator; or (2) transferred to another investigator, if deemed appropriate by the Regional Administrator, with specific written instructions. The Regional Office should notify the claimant by letter that his/her claim has been returned to the original investigator or has been transferred to another investigator (identify) for completion of the investigation and that the Investigator will be contacting the claimant as to the completion.

If the Regional Office review determines no basis for the claimant's protest, the Regional Office should notify the claimant by letter of such decision and advise the claimant of his/her options. (Chapter 8, paragraph .4).

If the protest is filed with the National Office, the protest should be referred to the appropriate Regional Office for response. The exception would be if the Regional Office had investigated the claim.

- .4 **Time Frames for Review.** When an open case file is to be reviewed by the DVET, Regional Office and/or National Office staff, based on a protest, the following criteria are applicable:
  - (1) A copy of the case file should be forwarded to the appropriate DVET, Regional Office or appropriate staff member in the National Office. The original case file should be maintained by the investigator so that action, if appropriate, can continue as the clock is still running with respect to case processing time. Copies of any action taken on the case should immediately be forwarded to the appropriate review office for inclusion in their review.

- (2) The reviewing office will have 30 calendar days following receipt of the complete case file in which to review, analyze and prepare corrective action recommendations, if appropriate. If the case file must be referred to the Solicitor's Office for review, that time will be excluded from the above 30 day requirement and will be taken into consideration with respect to final case processing time.

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## Chapter 11 Technical Assistance

**Purpose of Technical Assistance.** Technical assistance seeks to broaden public awareness and understanding of USERRA in an effort to increase compliance with the law.

VETS provides technical assistance to a potential claimant upon request, and his or her employer if appropriate [38 U.S.C. 4322(c)]. Technical assistance is not limited to filing a complaint; it also includes responding to requests for information on specific issues that are not yet part of a formal USERRA investigation.

The Secretary, through the Veterans' Employment and Training Service (VETS), provides assistance to any person or entity with respect to employment and reemployment rights and benefits under USERRA. This assistance includes a wide range of compliance assistance outreach activities, such as responding to inquiries; conducting USERRA briefings and Webcasts; issuing news releases; and, maintaining the elaws USERRA Advisor (located at <http://www.dol.gov/elaws/userra.htm>), the e-VETS Resource Advisor and other web-based materials (located at <http://www.dol.gov/vets>), which are designed to increase awareness of the Act among affected persons, the media, and the general public. In providing such assistance, VETS may request the assistance of other Federal and State agencies, and utilize the assistance of volunteers. See 20 C.F.R. 1002.277.

- (1) **Technical Assistance to Individuals or Employers.** Responses to inquiries not related to a specific USERRA case are considered technical assistance. The two general categories are:
  - (a) Responses to a request for information concerning the application of USERRA to specific problems. Since situations have the potential for evolving into USERRA cases, they need to be documented in the same way that information in a USERRA case is documented. All such requests should be documented on a VETS Form 1063. Other documentation, such as typed or handwritten memoranda to the file, or copies of letters of confirmation, may also be used.
  - (b) General requests for information about USERRA. Requests for information concerning USERRA can be answered orally or by emailing or mailing a leaflet or other printed materials (see Exhibit XX). Answers should be prompt, courteous, and correct. View this as an opportunity to establish good rapport. When applicable, take the opportunity to provide an electronic version of the 20 C.F.R. Part 1002, USERRA poster, USERRA 101, and other resources for future reference. Additionally, it would be helpful to provide an orientation of information research

techniques available in the Adobe search function. General requests for technical assistance should also be documented.

- (2) **Answer Inquires.** Guidelines for answering inquiries follow:
- (a) If you are in doubt about an answer to any inquiry, consult your immediate supervisor. **Do not answer when you are not sure of the correct response.**
  - (b) Make it clear that a response to a mail, email, or telephone inquiry is not an official or legal position. If a legal opinion is requested, contact the Regional Office.  
  
**Note:** If responding via mail or email, the material should include the following disclaimer: "This response is for information purposes only and does not constitute an official interpretation of the U.S. Department of Labor. "
  - (c) Do not issue written opinions if USERRA promotional literature answers the inquirer's questions.
  - (d) It is beneficial for VETS investigators to cooperate with other agencies. If an inquiry does not relate to USERRA it should be promptly referred to the appropriate agency.
- (3) **Employer Support of the Guard and Reserve (ESGR).** Whenever possible, the VETS investigator should work closely with the national and state committees for Employer Support of the Guard and Reserve.

The ESGR is an agency within the Office of the Assistant Secretary of Defense for Reserve Affairs, and was established to promote cooperation and understanding between Reserve component members and their civilian employers and to assist in the resolution of conflicts arising from an employee's military commitment. ESGR seeks to educate employers and the general public about the value and importance of Guard and Reserve participation. The Department works closely with ESGR in its administration of USERRA, and the ESGR provides valuable service to this Department in this regard.

ESGR was established as a nationwide network of state and territorial committees headed by volunteer business and civic leaders and including representatives of the local Guard and Reserve forces. More than 3,000 volunteer business executives, senior government representatives, educators and military personnel now serve on these committees, conducting a variety of public awareness initiatives to demonstrate the benefits--to the

company and the entire country--of employing Guard and Reserve members. They also explain Guard/Reserve members' rights and obligations under USERRA and promote public recognition of employers who do support the Guard and Reserve.

Unlike VETS, which has formal statutory authority and responsibility to investigate claims involving between Guard/Reserve duty and employment responsibilities, the national and State ESGR committees provide information and informal assistance through the use of local volunteers or a toll-free assistance line to resolve employment conflicts.

ESGR Ombudsmen work closely with VETS to provide technical assistance to employers and servicemembers. An agreement has been reached with ESGR in which they forward problem cases involving lost wages or potential lost wages to VETS field staff within 7 days of initial contact, and all other problem cases within 14 days of initial contact.

#### (4) **Technical Assistance to Groups and Organizations**

- (a) **Initiating Contacts.** To help increase public awareness of and compliance with USERRA, VETS investigators should initiate contacts with groups likely to be interested in or involved in USERRA matters. Such organizations include local Reserve and National Guard units, veterans organizations, ESGR, Judge Advocate General (JAG) offices, personnel associations, recruiter associations, and other groups.

To make initial contact, find out who heads such groups, then telephone or send out letters of introduction and promotional materials. Explain USERRA, invite the groups to ask questions and refer possible problems to VETS, and offer to make group presentations.

- (b) **Purpose of Presentations.** Presentations are an efficient way to introduce USERRA to groups. The purpose of a presentation is to explain what USERRA is, what rights and obligations servicemembers and employers have, how to file complaints, and how complaints are processed.
- (c) **Techniques for Making Effective Presentations.** Following are techniques that may be used in making presentations:
  - (i) Ask the sponsoring organization for a written invitation or confirmation that will describe exactly where and when the presentation will be held. Such documentation will support travel and absence from the office.
  - (ii) Determine the size of the audience so that you know how many handouts to bring.

- (iii) Schedule adequate time for a presentation and a question-and-answer session. Ask your contact person about any specific questions the group may have.
- (iv) During the presentation, use questions to spark interest.
- (d) **Documenting Technical Assistance.** Individual (verbal, written) and group technical assistance (Presentations) should be documented on the VETS O:Drive. [\(See Exhibit 49\)](#)

**Exhibit 44: Sample E-mail statute- based Technical Assistance (Non-Fed)**

Mr. XXX XXX,

Thank you for your inquiry regarding exemptions from the five-year limit on service in the uniformed services. As you may know, your employee may have reemployment rights under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), 38 USC 4301-4334; see 20 C.F.R. 1002.1-1002.314, provided certain eligibility criteria are met. As a preliminary matter, I have attached a USERRA RIGHTS POSTER that can be printed and displayed on your company read board. I have also included a Web-based copy of the USERRA statute and final USERRA regulations for your reference. The adobe search function can expedite an issue specific request. The general USERRA provisions relevant to the five-year limit are discussed below. Further, the regulations offer valuable direction on USERRA and are set forth in an easy to read question and answer format. See e.g., 20 CFR. 1002.99 -.104 (sections relevant to the five-year limit).

USERRA provides that to be eligible for reemployment a returning service member establish that “the cumulative length of the absence ...does not exceed five years” with an employer. 38 USC 4312(a)(2). Exceptions to this limitation on service are contained in section 4312(c). As a general matter, orders issued for service in support of the Global War on Terror or otherwise performed in support of ongoing military operations in time of war (e.g., Iraqi Freedom or Noble Eagle) are exempt from the five-year limit.

Accordingly, if duty is performed pursuant to any authority that falls within an exception to the five-year cumulative service limit, then the appropriate support activity should be reflected in the initial orders to active duty or in the service member's discharge certificate(s) (DD-214, DD-215). It is important to note that although it is the responsibility of the returning service member to produce documentation relevant to service time and the five-year limit, it is the responsibility of the Department of Defense to properly indicate the authority for the service and its character in the orders to active duty. See 32 C.F.R. Sections 104.4 -104.6. Additionally, please note that an employer is authorized to contact an employee’s military unit for exemption status assistance or you may desire to request assistance from the Employer Support of the Guard and Reserve (ESGR). ESGR employs a network of volunteers to facilitate communication between service members and employers for situations similar to yours.

Thank you for your inquiry, and I hope this information is responsive to your concerns.

XXXX XXXX

**USERRA,  
Veterans' Employment and Training Service**  
Ph: XXXX  
FAX: XXXX

<http://www.dol.gov/vets/regs/fedreg/final/2005023961.pdf>



[http://www.dol.gov/vets/programs/userra/USERRA\\_Private.pdf](http://www.dol.gov/vets/programs/userra/USERRA_Private.pdf)

USERRA REGULATIONS

USERRA RIGHTS POSTER

USERRA STATUTE

**CONFIDENTIALITY NOTE: This electronic transmission contains information that is confidential or legally privileged. The information is intended only for the use of the individual(s) or entity named above. If you are not the intended recipient, you are hereby notified that any disclosure, copying, distribution or the taking of any action in reliance on**

the contents of such information is strictly prohibited. If you have received this transmission in error, please notify us immediately by telephone, or return e-mail.

Exhibit 45 (USERRA Tools)

These web-based resources are for Investigator use; the images and associated links are recommended to enhance research, statute based technical assistance and outreach.



Career ONESTOP



Career ONESTOP

Career ONESTOP and USAJOBS are the recommended resources for any veteran claimant requiring assistance in careers searches, education, training, resumes, interviews, salaries, benefits, job searches, state-employment assistance, and other relevant veteran resources.

Exhibit 46 (USERRA Poster, Non-Federal)

**FOR ONE BY PRIVATE SECTOR AND STATE GOVERNMENT EMPLOYERS**

## YOUR RIGHTS UNDER USERRA

### THE UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT

USERRA protects the job rights of individuals who voluntarily or involuntarily leave employment positions to undertake military service or certain types of service in the Uniformed Services Employment and Reemployment Rights Act. USERRA also prohibits employers from discriminating against past and present members of the uniformed services, and applicants to the uniformed services.

<p><b>REEMPLOYMENT RIGHTS</b></p> <p>You have the right to be reemployed in your civilian job if you leave that job to perform service in the uniformed service and:</p> <ul style="list-style-type: none"> <li>★ you ensure that your employer receives advance written or verbal notice of your service;</li> <li>★ you have five years or less of cumulative service in the uniformed services while with that particular employer;</li> <li>★ you return to work or apply for reemployment in a timely manner after conclusion of service; and</li> <li>★ you have not been separated from service with a disqualifying discharge or under other than honorable conditions.</li> </ul> <p>If you are eligible to be reemployed, you must be restored to the job and benefits you would have attained if you had not been absent due to military service or, in some cases, a comparable job.</p> <p><b>RIGHT TO BE FREE FROM DISCRIMINATION AND RETALIATION</b></p> <p>If you:</p> <ul style="list-style-type: none"> <li>★ are a past or present member of the uniformed service;</li> <li>★ have applied for membership in the uniformed service; or</li> <li>★ are obligated to serve in the uniformed service;</li> </ul> <p>then an employer may not deny you:</p> <ul style="list-style-type: none"> <li>★ initial employment;</li> <li>★ reemployment;</li> <li>★ retention in employment;</li> <li>★ promotion; or</li> <li>★ any benefit of employment</li> </ul> <p>because of this status.</p> <p>In addition, an employer may not retaliate against anyone assisting in the enforcement of USERRA rights, including testifying or making a statement in connection with a proceeding under USERRA, even if that person has no service connection.</p>	<p><b>HEALTH INSURANCE PROTECTION</b></p> <ul style="list-style-type: none"> <li>★ If you leave your job to perform military service, you have the right to elect to continue your existing employer-based health plan coverage for you and your dependents for up to 24 months while in the military.</li> <li>★ Even if you don't elect to continue coverage during your military service, you have the right to be reinstated in your employer's health plan when you are reemployed, generally without any waiting periods or exclusions (e.g., pre-existing condition exclusions) except for service-connected illnesses or injuries.</li> </ul> <p><b>ENFORCEMENT</b></p> <ul style="list-style-type: none"> <li>★ The U.S. Department of Labor, Veterans Employment and Training Service (VETS) is authorized to investigate and resolve complaints of USERRA violations.</li> <li>★ For assistance in filing a complaint, or for any other information on USERRA, contact VETS at 1-866-4-USA-000, or visit its website at <a href="http://www.dol.gov/vets">http://www.dol.gov/vets</a>. An interactive online USERRA Advisor can be viewed at <a href="http://www.dol.gov/obaweb/userr.htm">http://www.dol.gov/obaweb/userr.htm</a>.</li> <li>★ If you file a complaint with VETS and VETS is unable to resolve it, you may request that your case be referred to the Department of Justice for representation.</li> <li>★ You may also bypass the VETS process and bring a civil action against an employer for violations of USERRA.</li> </ul>
---	---

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

U.S. Department of Justice

U.S. Department of Labor  
1-866-487-2365

ESGR  
1-800-336-4300  
Publication Date—January 2006

The following language is recommended to supplement all technical assistance requests regarding USERRA Posters...

The USERRA rights notice posters are available on our website at: [www.dol.gov/vets](http://www.dol.gov/vets) for downloading and printing free of charge. Please note that the notice comes in two forms; one for private-sector employers and the other for Federal-sector employers. Please use the version that is appropriate to your office.

## Exhibit 47 (USERRA Poster, Federal)

FD-606 OF FEDERAL EXECUTIVE AGENCIES

**YOUR RIGHTS UNDER USERRA**  
**THE UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT**

USERRA protects the job rights of individuals who voluntarily or involuntarily leave employment positions to undertake military service or certain types of service in the National Disaster Medical System. USERRA also prohibits employers from discriminating against past and present members of the uniformed services, and applies to the uniformed services.

**REEMPLOYMENT RIGHTS**

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

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

If you are eligible to be reemployed, you must be restored to the job and benefits you would have obtained if you had not been absent due to military service or, in some cases, a comparable job.

**RIGHT TO BE FREE FROM DISCRIMINATION AND RETALIATION**

If you:

- ★ are a past or present member of the uniformed services;
- ★ have applied for membership in the uniformed services; or
- ★ are obligated to serve in the uniformed services;

then an employer may not deny you:

- ★ initial employment;
- ★ reemployment;
- ★ retention in employment;
- ★ promotion; or
- ★ any benefit of employment

because of the status.

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

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

**HEALTH INSURANCE PROTECTION**

- ★ If you leave your job to perform military service, you have the right to elect to continue your existing employer-based health plan coverage for you and your dependents for up to 24 months while in the military.
- ★ Even if you don't elect to continue coverage during your military service, you have the right to be reinstated in your employer's health plan when you are reemployed, generally without any waiting periods or exclusions (e.g., pre-existing condition exclusions) except for service-connected illnesses or injuries.

**ENFORCEMENT**

- ★ The U.S. Department of Labor, Veterans' Employment and Training Service (VETS) is authorized to investigate and resolve complaints of USERRA violations.
- ★ For assistance in filing a complaint, or for any other information on USERRA, contact VETS at 1-866-4-USA-DOL or visit its website at <http://www.dol.gov/vets>. An interactive online USERRA Adviser can be viewed at <http://www.dol.gov/vets/usaerradviser.htm>. In some cases involving USERRA claims against Federal executive agencies, a complaint filed with VETS before September 30, 2007 may be transferred to the Office of Special Counsel for Investigation and Resolution pursuant to a demonstration project established under Section 204 of the Veterans Benefits Improvement Act of 2004, Pub. Law No. 108-454 (Dec. 10, 2004).
- ★ If VETS is unable to resolve a complaint that has not been transferred for investigation under the demonstration project, you may request that your case be referred to the Office of Special Counsel for representation.
- ★ You may also bypass the VETS process and bring a civil action against an employer for violations of USERRA.

Office of Special Counsel  
202-254-3020

U.S. Department of Labor  
1-866-487-2365

ESRG  
1-800-338-4390  
Publication Date—January 2006

The following language is recommended to supplement all technical assistance requests regarding USERRA Posters...

The USERRA rights notice posters are available on our website at: [www.dol.gov/vets](http://www.dol.gov/vets) for downloading and printing free of charge. Please note that the notice comes in two forms; one for private-sector employers and the other for Federal-sector employers. Please use the version that is appropriate to your office.

## Exhibit 48 (Thrift Savings FACT SHEET)



**THRIFT SAVINGS PLAN  
FACT SHEET**

**TSP Benefits That Apply to Members  
of the Military Who Return to  
Federal Civilian Service**

This fact sheet applies to you if you meet all of the following conditions:

- You were separated from Federal civilian service to perform military service or were placed in nonpay status to perform military service;
- Your release from military service, discharge from hospitalization, or other similar event occurred on or after August 2, 1990; and
- You were subsequently reemployed in, or restored to, a position covered by FERS or CSRS pursuant to 38 U.S.C. Chapter 43.<sup>1</sup>

The Uniformed Services Employment and Re-employment Rights Act of 1994 (USERRA) contains several provisions regarding the Thrift Savings Plan (TSP):

- You may make up TSP contributions missed as a result of your military service.
- If you were not vested when you separated from civilian service, and Agency Automatic (1%) Contributions and attributable earnings were removed from your TSP account, you are entitled to have these funds restored to your account.
- If you separated from civilian service and your TSP account was paid to you as an automatic cashout, you may return the funds, and, if applicable, reestablish a TSP loan.

This fact sheet explains each of these benefits. For an explanation of how they relate to your specific situation and more information, see your personnel office.

**Making Up TSP Contributions**

You may make up contributions to your civilian TSP account for the period of time you missed as a result of your military service. The amount of these contributions will be determined by your TSP contribution election that was in effect immediately before your entry into military service. However, you may also make a retroactive contribution election to terminate the contributions or retroactive contribution election (s) for any open season that occurred during this period. If you had made an election to terminate contributions within two months before your entry into military service, you may make a contribution election for the first open season that occurred after the termination election was effective, even if the termination was made outside an open season.

If you contributed to the TSP during your period of military service, the amount of employee contributions that you may make up must be reduced by the amount of the employee contributions you made to your uniformed services account.

<sup>1</sup> FERS refers to the Federal Employees' Retirement System, the Foreign Service Pension System, and other equivalent Federal retirement systems. CSRS refers to the Civil Service Retirement System, including CSRS Offset, the Foreign Service Retirement and Disability System, and other equivalent Federal retirement systems.

*Federal Retirement Thrift Investment Board* OC 16-4/07/2003

The following language is recommended to supplement all Thrift Savings Plan requests for assistance...

"...We will not be able to address the issue with your Thrift Savings Plan (TSP) contributions. USERRA does not give VETS authority to investigate complaints concerning TSP. Section 4322(f) of the statute provides: "This subchapter does not apply to any action relating to benefits to be provided under the Thrift Savings Plan under title 5."

TSP-related complaints should be addressed, in writing, to the Federal Retirement Thrift Investment Board, Office of External Affairs, 1250 H Street, NW, Washington, DC 20005, (202) 942-1450 or (202) 942-1460.

Please see attached "Thrift Savings Plan Fact Sheet" for additional information.

**Exhibit 49: O: Drive Technical Assistance Log (Opening Screen)**

	A	B	C	D
1				
2				
3				
4				
5				
6	<p>Type your name in the next box: Last name first, then first initial, like this: Doe, J ... Bush, G ... Spurrier, S &gt;&gt;&gt;</p>			
7				
8	<p>If National Office employee, type NO here &gt;&gt;&gt;&gt;&gt;&gt;&gt; If field employee, type Region's number here: 1, 5, 10, etc. &gt;&gt;&gt;</p>			
9				
10	<p>If field employee at a Regional headquarters site, type in your city here: Boston, Dallas, etc. &gt;&gt;&gt;&gt; If field employee at a State office site, type in your State's abbreviation here: AL, AZ, NH, etc. &gt;&gt;&gt;</p>			
11				
12	<p>When the three boxes above are completed, click on "Instructions" tab at bottom of screen</p>			
13				
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## Chapter 12 Staff Roles

- .1 Staff Roles.** In general, VETS staff perform the following functions in USERRA program activities:
- (1) **Management Services Assistants and Veterans' Program Assistants.** These individuals provide administrative support to the Regional Administrator and Directors for Veterans' Employment and Training (DVET), respectively. They can/may be the first point of contact when a potential claimant calls for information. Their role is to provide basic information regarding rights and eligibility requirements, and to assist individuals in filing complaints.
  - (2) **Veterans' Program Specialists.** Veterans' Program Specialists investigate USERRA complaints, provide technical assistance, and perform related activities such as assisting with other VETS programs within a State.
  - (3) **Directors and Assistant Directors for Veterans' Employment and Training.** Directors for Veterans' Employment and Training (DVETs) have responsibility for managing the VETS program within a State. DVET responsibilities include oversight, reporting and providing technical assistance on USERRA. Where there are no Assistant Directors for Veterans' Employment and Training (ADVETS) assigned, DVETS will also investigate USERRA complaints. ADVETS investigate complaints and provide technical assistance.
  - (4) **Regional Office Staff.** Regional Administrators (RAs) have overall responsibility for managing and monitoring the VETS program. Staff assigned to the Regional Offices assist the RAs in fulfilling this responsibility. Among their duties, Regional Office Staff must analyze and approve all referrals, coordinate efforts with, and request opinions from the Office of the Solicitor, and provide guidance to DVET, ADVETS, ESGR, etc. Certain Regional Office staff may also be assigned USERRA cases.
  - (5) **Senior Investigators (SIs).** These individuals maintain regional office guidance and policy materials for reference by regional and state staff to include agency/department policies, Memoranda of Understandings, regulations and Federal register notices impacting on VETS' operation of USERRA, Federal veterans' preference (VP) and the Federal Contractor Programs (FCP.). SIs monitor the USERRA/VP Information Management System for timely case openings and closures in accordance with the USERRA and VP Operation Manuals, Quality Assurance and Closed Case Reviews, records of regional USERRA referrals and VP cases to assure timely, accurate and complete

processing. Additionally, SIs monitor USERRA and VP case information to ensure UIMS and VPIMS data entries are in accordance with National and Regional directives and that cases are processed in accordance with VETS Operations Manual procedures.

(6) **National Office Staff.** National Office Staff provides overall guidance and establishes policies and procedures for USERRA.

**.2 Regional Protocol.** Field staff members should use the expertise within their State and Region whenever case processing questions arise. If Regional Office staff cannot answer the field staff members' questions, the Regional Office staff will contact the National Office and/or Solicitor of Labor for guidance. All requests for Solicitors' opinions will be forwarded to the Regional Office.

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## Chapter 13

### Quality Assurance Review

- .1 **Definition.** The USERRA Quality Assurance Review (QAR) Form is an evaluation tool designed to assess the quality of case investigations. The QAR Form also provides VETS' supervisory personnel with information for use in improving individual and agency effectiveness, efficiency, timeliness, and service as well as identifying any training, systemic issues, or problems, and recommended corrective action(s).
- .2 **Scope.** The QAR is intended to measure whether case processing and case management activities follow the policies and procedures described in this Manual. The review process encourages self-assessment and improvement. The review process provides timely information necessary for effective management of cases and identification of staff training needs.
- .3 **Impact Elements .** Elements of the QAR are individually identified according to their impact on the investigation and its outcome. They are as follows:

**Critical.** Critical elements are the items whose absence will likely obstruct the USERRA investigation to the point where successful resolution of the claim is unlikely or impossible without intervention and corrective action(s),

**Mandatory.** A mandatory element is one that identifies established procedural requirements. Failure to achieve one or more of these elements results in poor case management and documentation of the investigation and could pose difficulties in continued investigations, subsequent reopening or referral.

- .4 **Types of Reviews.** Open and Closed cases are reviewed using the USERRA Open/Closed Case Quality Assurance Review Form found at Exhibit 45.
  - A. **Open Case Reviews.** The quality of each case is measured against the two (2) impact elements defined in item 3 above. An open case review will be conducted by the investigator's first-line USERRA supervisor (defined as the DVET for ADVETS and the RAVET, or his/her designee, for the DVETs) at the following points:
    - (1). **Upon receipt of the employer's written position statement**
    - (2). **Prior to notifying the claimant of the findings of the Investigation.**

- B. When the review is completed, the review form should be placed on the left side of the paper case file. When reaching the next **open case review event(s)**, this same process would be repeated and will continue until the case is closed. There is no need to complete a new Case Review Form for each event; rather, the reviewer may update the initial form, insuring the date the event is reviewed and included in the space provided and the form is returned to the left side of the case file.
- C. **Closed Case Reviews.** All closed cases will be reviewed by the case investigator's first-line USERRA supervisor. Following case closure, the reviewer will complete the QAR Form by first completing the date closed and closing code in the heading of the form if this has not already been done by the investigator, and by then completing blocks H through M. The purpose of closed case review is to assess case quality through case closure, to identify corrective action(s), to determine if the case has been effectively handled and **properly entered into the UIMS**, and to identify systemic, training, resources, material or other factors that require attention or improvement.

**.5 Review Standards. [QAR]**

**A. Case Re-Opening**

1. Determine whether the parent case investigator followed established policies, procedures and guidelines when closing the parent case (See QAR item A.1.a.).
2. The claimant must provide or identify new and material evidence to justify re-opening the case. For purposes of this element, new and material evidence is that which has not been previously considered or associated with the claims file, and which, either standing alone or in conjunction with other evidence already of record would tend to prove or disprove the issue under consideration (See QAR item A.1.b.).

**B. Case Opening**

1. If the claim is received through the UIMS (E-1010 format), the claimant must be contacted within 3 working days of receipt of the E-1010 for the purpose of clarifying issues and allegations and to request documentation to prove eligibility for USERRA coverage (See QAR item B.1.).
2. If a *signed* VETS 1010 form is received through alternate communication (facsimile, E-mail attachment, postal service) and the person alleges their employer is or is about to be in violation of USERRA which has resulted in or may result in unemployment, the case must be —
  - a. Opened within 3 working days of receipt of the VETS 1010 form, including USERRA IMS entry (See QAR item B.2.a.);
  - b. The employer must be contacted within 7 working days of case opening (See QAR item B.2.b.); and,
  - c. Efforts must be made to make this initial employer contact by telephone or pre-arranged personal on-site visit. These efforts must be documented in the case file (See QAR item B.2.c.).

3. If a claim is received in some other form than an E-1010 form (facsimile, e-mail, postal service, phone call,) then the Investigator must notify the claimant that a *signed 1010* form is required. A case **cannot be opened** if the claimant does not submit a signed 1010 Form. Filing an online 1010 (E-1010) is considered “signed”; [See 20 CFR 1002.288](#). A written letter/fax/or email (not on a 1010) requesting an Investigation is insufficient as defined by the regulations and does not authorize the Investigator to contact the employer. The information provided on the 1010 (notification of punishment for unlawful statements, notification of USERRA claimant’s rights, and privacy act statement) validates the claimant’s awareness of his rights. The Investigation process, however, can be initiated without documentation that establishes eligibility.

After the claimant has been notified of the requirement to submit a signed 1010 form, and the Investigator receives a signed 1010 form, the case must be —

- a. Opened within 3 business days of receipt of the signed 1010 form, including USERRA IMS entry (See QAR item B.3.a.);
  - b. The employer must be contacted within 7 working days of case opening (See QAR item B.3.b.); and,
  - c. Efforts must be made to make this initial employer contact by telephone or pre-arranged personal on-site visit. These efforts must be documented in the case file (See QAR item B.3.c.).
4. Was the required opening letter sent to the claimant within 5 working days of case opening and was it in accordance with the guidance in Chapter 5 of the Operations Manual.
  5. Was the information and documentation received from the claimant sufficient to begin the investigation —
    - a. Did the 1010 or written claim clearly state the issue(s)?
    - b. If not, was the issue(s) determined in follow-up contacts?
    - c. Was sufficient documentation available to proceed?
    - d. If not, were follow-up contacts performed to secure essential documentation?

### **C. Alleged Violation, Remedies, USERRA Eligibility, and Citations**

1. If the claimant failed to state remedies s/he was seeking, did the investigator obtain this information in follow-up contacts (See QAR item C.1.a.)?
2. If appropriate, did the investigator determine and explain to the claimant the remedies available based on USERRA (See QAR item C.2.a.)?
3. Was sufficient documentation obtained to determine eligibility for USERRA coverage (See QAR item 3); if so, in what form (See QAR item C.3.a.), and was the correct eligibility determination made by the investigator (See QAR item C.3.b.)?
4. Was the correct UIMS issue code(s) selected and did the investigator apply the correct provisions of Title 38 U.S. Code and either 20 CFR, in the case of a State or private employer, or 5 CFR, in the case of a Federal Executive branch employer (See QAR item C.4.)?

**D. Case Investigative Plan**

1. Was the CIP prepared and was it a meaningful document, i.e., does it correctly identify the issue and statutory and regulatory cites as well as factors holding up resolution and outline case investigative needs for additional evidence?
2. Was the CIP updated as the investigation progressed?
3. Were appropriate entries made in the UIMS?

**E. Documentation/File Maintenance; including UIMS data entry**

1. Was the Form 1010, E-1010 or written complaint the first document on the bottom right side of the folder?
2. Telephone or in-person contacts with interested parties (including proceedings at conferences) should be on VETS Form 1063 or the appropriate memorandum and recorded in the UIMS.
3. Documents should be in chronological order by date received, with the newest on top, except that the VETS Form 1010 should be placed on the bottom of the file with its attachments next on top of the Form 1010, no matter when it is received.
4. Were all incoming documents properly date stamped?

**F. Investigation**

1. If the complaint alleges section 4311 discrimination, did the investigator identify the three required factors —
  - a. Did an adverse employment action take place against the claimant?
  - b. Was the claimant a member of a protected class (past, present or future military obligation or service)?
  - c. Was there a causal connection between the adverse employment action and the membership in the protected class?
2. Did the service member —
  - a. leave a position of civilian employment by reason of service in the uniformed services and
  - b. give his/her employer advance notice of the service and
  - c. have five years or less of cumulative service in the uniformed services with respect to a position of employment with a particular employer and
  - d. return to work or apply for reemployment in a timely manner after conclusion of service and
  - e. not separate from service with a disqualifying discharge or under other than honorable conditions?
3. Did the investigator identify, investigate and document all issues relevant to the investigation?
4. Were all witnesses contacted or were attempted contacts documented and did the investigator obtains and document relevant, material evidence?
5. Was an on-site visit conducted?
  - a. If not, would an on-site visit have been beneficial to the investigation?

- b. Was all available, relevant, material evidence obtained during the visit?
- 6. Were questions and legal issues raised by the employer and, if so, did the investigator provide accurate, timely responses?
- 7. Was it necessary and, if so, did the investigator seek assistance from available resources (SIs, RSOL, Westlaw, Internet, etc.)?
- 8. Would a subpoena have assisted with the investigation and, if so, did the investigator submit a subpoena request in accordance with the guidance provided in Chapter 6 of this Manual?
- 9. Was a USERRA violation identified and were reasonable attempts to resolve the complaint executed and documented?
- 10. Was the investigation properly and timely documented in the UIMS?

#### **G. Pre-Case Closure**

- 1. Is the closing letter —
  - a. in the relevant format provided in accordance with [Chapter 9](#) of this manual?
  - b. was notification of DOJ/OSC referral rights required?
  - c. if so, were the DOJ/OSC referral rights provided, including the stipulations?
  - d. Was the closing letter reviewed with a supervisor prior to being sent to the claimant?

#### **H. Case Closure**

- 1. Was the case closed only after the investigation was complete and all of the required documentation was completed and on file?
- 2. Did the investigator record case closing in the UIMS accurately and timely?

#### **I. Enforcement and Referral.**

- 1. Upon completion of the investigation, did the investigator —
  - a. Provide the appropriate rights regarding enforcement and referral?
  - b. Was the notification in the proper format?
- 2. If the claimant elected referral —
  - a. Was the 10-day letter sent to the employer in a timely manner?
  - b. Was the MOR prepared in accordance with directions found in [Chapter 8](#) of this Manual?
  - c. Was the referral packet submitted to the RO within **15 working days** of receipt of the signed referral request?
- 3. Did the claimant, subsequent to requesting referral, withdraw the referral request?
  - a. If so, did the investigator obtain documentation specified in [Chapter 8, Sec 5.](#) of this Manual to support the withdrawal request?
- 4. Was timely, accurate data entered into the UIMS?

#### **J. Corrective Action**

It is the first-line supervisor's responsibility to ensure that problem areas are identified and addressed early in the case processing. Identified problems must be addressed in writing

to the VETS investigator handling the case. A corrective action plan agreeable upon by the first-line supervisor and investigator must be implemented. The space provided is to list, in narrative form, the deficiencies identified during the review, the impact level of the deficiency, and the corrective action plan for each.

**K. Effective case handling occurs when —**

1. VETS' established policies, procedures, and guidelines are followed;
2. Issues and statutory and regulatory sections are properly identified;
3. Results-oriented actions are planned and completed in a timely and appropriate manner;
4. A logical, defensible position is taken regarding the viability of the claim;
5. The claimant has been briefed on the outcome of the investigation and his/her concerns have been adequately addressed; and
6. Open case reviews have been conducted as prescribed.

**L. Training, Resources and Material and/or Equipment Needs**

1. What training is necessary and available that might improve the investigator's performance?
2. What resources, material and/or equipment is needed to provide the investigator adequate means to conduct investigations, to maintain a case file, to provide direct input into the USERRA IMS, to access information and resources, to perform research in support of the case, and to perform analysis of the case?

**.6 The Quality Assurance Review Process**

The process is intended to ensure regular and periodic review and oversight of case activity by appropriate levels of staff and management. Personnel involved in the review process include supervisors at the state, region, and National Office and support staff including the USERRA Regional Lead Center and Senior Investigators. The DVET and RAVET have the primary roles.

The RAVET is ultimately responsible as the reviewing official. The RAVET can designate other reviewer(s) but must ensure reviews are performed within the parameters described and that constructive and corrective feed back is provided to Investigators.

Management and support staff reviewers will utilize the USERRA Open/Closed Quality Assurance Review Form ([Exhibit 50](#)) to facilitate and record required reviews. The National Office, with the support of the USERRA RLC, provides the quality assurance role through the IMS and the Quality Assurance Review and periodically monitors the regional quality assurance review process to verify each region is exercising appropriate and timely managerial oversight. The National Office also provides feedback to the region commending effective performance and making suggestions or providing assistance when appropriate.

## **.7 Levels of Review**

### **A. State**

1. The DVET shall perform QAR assessments by completing a QAR Form on each case as described in items 3-5 above. In the case where the DVET is the investigator, the QAR assessments will be conducted by the Regional Administrator or designated representative.

### **B. Region**

1. The Regional Administrator may require more frequent or additional state-level QARs, as appropriate, based on training needs or observed deficiencies.
2. A designated management reviewer will physically review no less than 100% of closed cases and 100% of open cases. The review will include examination of data from the USERRA IMS. Written findings will be prepared per region policy and feedback will be provided to each DVET and investigator for their respective cases.

### **C. USERRA Regional Lead Center**

The URLC will select a nationwide random sample of 10%, or twenty cases, whichever is more, of cases closed each quarter for review. The URLC will request a copy of the cases from the appropriate Regional Offices. The URLC, with the support of the SIs, will review the cases and related data in the USERRA IMS. The URLC will summarize the results of the review in a report to the National Office. The random sample will exclude cases still being processed by the Solicitor, the Attorney General, or the Office of Special Counsel.

### **D. National Office**

The National Office will review the URLC Quality Assurance Review report and direct the URLC to prepare reports and memorandum as appropriate.

### **E. Time Periods Allowed for Review Completion**

1. Open case reviews. The reviewer will have 7 working days following receipt of notification by the investigator that an event in the investigation has been attained to complete the review.
2. Closed Case Review. The reviewer official will have 30 working days following receipt of the case file to complete the review.
3. Regions may impose additional timeframes as needed in consideration of the final storage location of closed files. For example, if regional policy is that all closed cases must be shipped and stored at region, the region may impose a timeframe for receipt of closed files.

**Exhibit 50: USERRA Quality Assurance Review Form**

5 USERRA Open/Closed Case Quality Assurance Review Form

Claimant Name: \_\_\_\_\_ Case No.: \_\_\_\_\_

Date Opened: \_\_\_\_\_ Date Closed: \_\_\_\_\_

VETS Inv.: \_\_\_\_\_ Reviewer: \_\_\_\_\_

Opening Issue(s): \_\_\_\_\_ Closing Code: \_\_\_\_\_

Reference: Chapter 13, USERRA Operations Manual

IMPACT (IMP): **Critical (C) Mandatory (M)**

Note: Comments or a just cause explanation must be entered for any "No" entry. If an item is not applicable, check "N/A". Use additional sheet(s) if more space is needed.

IMPACT – I: **DATE REVIEWED D/R**; YES – Y; NO – N; PENDING – PDG; NOT APPLICABLE – N/A

CRITERIA	I	D/R	Y	N	PDG	N/A	COMMENTS
<b>A. CASE RE-OPENING</b>							
1. Is this a re-opened case? a. <u>Were appropriate policies and procedures utilized when the parent case was closed?</u>	M						
b. <u>Was sufficient new evidence provided to justify re-opening the case?</u>	M						
<b>B. CASE OPENING</b>							
1. <u>Following receipt of the E-1010, was the claimant contacted within 3 business days of receipt of the E-1010?</u>	M						
2. <u>Is the claimant unemployed?</u> (NOTE: If "No" skip to question 3.)	M						
a. <u>If "Yes" was the case opened within 3 working days of receipt of the E1010?</u>	M						
b. <u>Was employer contacted within 3 working days of case opening?</u>	M						
c. <u>If "Yes" was the initial contact by telephone or in person?</u>	M						
3. <u>Is the claimant employed?</u>	M						
a. <u>If "Yes," was the case opened within 7 working days of receipt of the E1010?</u>	M						
b. <u>Was employer contacted within 7 business days of case opening?</u>	M						
c. <u>If "Yes," was the initial contact by telephone or in person?</u>	M						

4. <a href="#">Was the required opening letter sent to claimant within 7 business days of case opening?</a>	M					
5. <a href="#">Did the claimant provide sufficient information and documentation to proceed with the investigation?</a>	M					
<b>C. ALLEGED VIOLATION, REMEDIES, USERRA ELIGIBILITY, and CITES</b>						
1. <a href="#">Did the claimant specify the remedies s/he was requesting?</a> a. <a href="#">If not, did the investigator obtain this information at any time during the investigation?</a>	M					
2. <a href="#">Did the investigator determine the remedies available under USERRA?</a> a. <a href="#">Did the investigator notify the claimant of the available remedies?</a>	C C					
3. <a href="#">Was documentation obtained to verify eligibility for coverage under USERRA?</a> a. <a href="#">What form of documentation (Copy 4 of the DD-214; orders; copy of ID card; letter from unit; etc.)?</a> b. <a href="#">Was the correct eligibility determination made?</a>	C M C					
4. <a href="#">Did the investigator determine the correct issue code(s) and cite the appropriate section(s) of 38USC and 20CFR or 5CFR, as appropriate?</a>	C					
<b>D. CASE INVESTIGATIVE PLAN</b>						
1. <a href="#">Was a CIP prepared?</a>	M					
2. <a href="#">Was the CIP updated as needed?</a>	M					
3. <a href="#">Was UIMS updated as required?</a>	M					

E. DOCUMENTATION/FILE MAINTENANCE						
1. Was the Form 1010 the first document on the bottom right side of folder?	M					
2. <u>Were all telephone and in-person contacts with individuals relevant to the investigation documented on VETS Form 1063?</u>	C					
3. <u>Was the case file in reverse chronological order?</u>	M					
4. <u>Were all incoming documents properly date stamped?</u>	M					
F. INVESTIGATION						
1. If the allegation is 4311 discrimination, did the investigator identify all three elements of discrimination — a. <u>was there an adverse employment action?</u> and b. was the claimant a member of a protected class, and c. was there a causal connection between the military service and the adverse employment action?	C					
2. If the claim involves reemployment, did the claimant — a. <u>leave employment to perform service in the uniformed services?</u> and b. <u>provide advance notice?</u> and c. <u>serve less than 5 years?</u> and d. <u>make timely and appropriate application for reemployment?</u> and e. <u>serve honorably?</u>	C					
3. If the Investigation was completed, were all issues relevant to the complaint thoroughly investigated?	C					

4. Were witnesses identified by the claimant and/or investigator contacted and was relevant material evidence obtained?	C					
5. Was an on-site investigation conducted? a. If not, would one have been beneficial? b. Was all available relevant information and documentation obtained during the on-site visit?	C C					
6. Did the investigator provide accurate and timely responses to the employer's questions and to legal issues raised by the employer?	M					
7. When necessary, did the investigator seek assistance from available sources (SI, RSOL, etc.) during the course of the investigation?	M					
8. When necessary, did the investigator request a subpoena?	C					
9. Did the investigator correctly identify a USERRA violation(s) and, if so, attempt to resolve the complaint?	C					
10. Was the investigation properly and timely documented in the UIMS?	M					
G. PRE-CASE CLOSURE						
1. Is the closing letter — a. in the proper format? and b. Were appropriate referral rights provided in writing?	C C					
H. CASE CLOSURE						

<p>1. <u>Was the case closed when appropriate?</u>  a. <u>Did the case closure date accurately reflect the actual date the investigation was complete and the required documentation was on file?</u></p>	C				
<p>2. <u>Were all required Red Flag Reports and Open case Quality Assurance Reviews submitted and/or conducted in accordance with established policies and procedures and in a timely manner?</u></p>	M				
<p>I. ENFORCEMENT AND REFERRAL</p>					
<p>1. UPON COMPLETION OF THE INVESTIGATION, did  the investigator —  a. <u>provide the appropriate rights regarding enforcement and referral?</u>  b. <u>Was the notification in the proper format?</u></p>	C  M				
<p>2. If the claimant elected referral —  a. <u>Was a Employer notification of referral sent to the employer?</u>  b. <u>Was the MOR prepared in accordance with directions found in Chapter 8 of this Manual?</u>  c. <u>Was the MOR and duplicate case file submitted to the RO within 15 working days of receipt of the signed referral request?</u></p>	C  M  M				
<p>3. <u>Were procedures as outlined in Chapter 8 of the USERRA Operations Manual followed to document a withdrawal of a USAG/OSC referral request?</u></p>	C				

4. <a href="#">Was timely, accurate data entry made in the UIMS/</a>	M					
5. <a href="#">Was a second level review of the case and closing letter completed prior to notifying the claimant of the case findings?</a>	C					

I. CORRECTIVE ACTION: In narrative form, state the deficiency identified during the review, its level of significance, and the individual or systemic corrective action recommended to the investigator or management. Systemic corrective actions relate to the agencies’ resources and their effect on the quality of the Investigation ie policy statements, training, management functions, equipment, personnel, funding, mentoring, reference materials, etc.

- 1.
- 2.
- 3.

Was the corrective action recommended implemented? YES \_\_\_ NO \_\_\_ N/A \_\_\_.  
Describe the corrective action:

J. Effective case handling occurs when –

1. VETS’ established policies, procedures, and guidelines are followed;
2. Issues and statutory and regulatory sections are properly identified;
3. Results-oriented actions are planned and completed in a timely and appropriate manner;
4. A logical, defensible position is taken regarding the viability of the claim;
5. The claimant has been briefed on the outcome of the investigation ; and his/her concerns have been adequately addressed; and
6. Open case reviews have been conducted as prescribed.

Based on these criteria, was this case handled effectively?

YES \_\_\_ NO \_\_\_ INCONCLUSIVE \_\_\_\_ If “No” or “Inconclusive,” provide a complete explanation for this determination.

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## Chapter 14

### USERRA Computer Applications

1. **Definition.** VETS operates multiple computer applications for use by VETS staff and the public in support of the USERRA program.
2. **Purpose.** The various USERRA computer applications enable both VETS and the public to process and document USERRA activities and reports efficiently and effectively.
3. **Types of Computer Applications.**
  - (1) **USERRA Information Management System (UIMS).** The UIMS provides VETS with the ability to input essential data related to USERRA cases and to generate reports that will assist VETS staff in the analysis of USERRA operations and outcomes. The UIMS accepts data at the investigator level and performs rollups of information through the State and Regional office levels to the USERRA Regional Lead Center (RLC) and National office levels. For detailed UIMS user instructions, See **UIMS QUICK REFERENCE GUIDE, October 27, 2006.**
  - (2) **Electronic 1010 (E-1010).** VETS' E-1010 site provides the public a secure means of submitting an "official" electronic VETS/USERRA/VP Form 1010 claim to VETS over the Internet. The E-1010 system also sends email notification to VETS' managers and other designated staff about E-1010 claims within their jurisdiction, and allows them to review E-1010 data, open a USERRA or VP case in the appropriate Information Management System (IMS), and assign the case to a VETS Investigator for further action. For detailed E-1010 user instructions (including Director's Memorandum No. 17-05), see Exhibit 46.
  - (3) **USERRA Technical Assistance Logs (TA Logs).** The TA Logs (in Microsoft Excel format) are a reporting mechanism for compiling all "non-case related" USERRA technical assistance (TA) contacts -- that is, TA contacts made outside the scope of case investigations. For detailed TA Log user instructions (including Director's Memorandum No. 01-02), see Exhibit 47.

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