TEXT OF PROPOSED UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT REGULATIONS

Subpart A—Introduction to the Regulations under the Uniformed Services Employment and Re-employment Rights Act of 1994 General Provisions

§ 1002.1 What is the purpose of this part?

This part implements certain provisions of the Uniformed Services Employment and Re-employment Rights Act of 1994 (''USERRA'' or ''the Act''), as applied by the Congressional Accountability Act ("CAA"). 2 U.S.C. 1316. USERRA is a law that establishes certain rights and benefits for employees, and duties for employers. USERRA affects employment, re-employment, and retention in employment, when employees serve or have served in the uniformed services. There are five subparts to these regulations. Subpart A gives an introduction to the USERRA regulations. Subpart B describes USERRA's anti-discrimination and anti-retaliation provisions. Subpart C explains the steps that must be taken by a uniformed service member who wants to return to his or her previous civilian employment. Subpart D describes the rights, benefits, and obligations of persons absent from employment due to service in the uniformed services, including rights and obligations related to health plan coverage. Subpart E describes the rights, benefits, and obligations of the returning veteran or service member. Subpart F explains the role of the Office of Compliance in administering USERRA as applied by the CAA.

§ 1002.2 Is USERRA a new law?

USERRA is the latest in a series of laws protecting veterans' employment and reemployment rights going back to the Selective Training and Service Act of 1940. USERRA's immediate predecessor was commonly referred to as the Veterans' Reemployment Rights Act ("VRRA"), which was enacted as section 404 of the Vietnam Era Veterans' Readjustment Assistance Act of 1974. In enacting USERRA, Congress emphasized USERRA's continuity with the VRRA and its intention to clarify and strengthen that law. Congress also emphasized that Federal laws protecting veterans' employment and reemployment rights for the past fifty years had been successful and that the large body of case law that had developed under those statutes remained in full force and effect, to the extent it is consistent with USERRA. USERRA authorized the Department of Labor to publish regulations implementing the Act for State, local government, and private employers. USERRA also authorized the Office of Personnel Management to issue regulations implementing the Act for Federal executive agencies, with the exception of certain Federal intelligence agencies. For those Federal intelligence agencies, USERRA established a separate program for employees. Section 206 of the CAA requires the Board of Directors of the Office of Compliance to issue regulations to implement the statutory provisions relating to employment and reemployment rights of members of the uniformed services. The regulations are required to be the same as substantive regulations promulgated by the Secretary of Labor, except where a modification of such regulations would be more effective for the implementation of the

rights and protections of the Act. The Department of Labor issued its regulations, effective January 18, 2006. The regulations set forth herein are the substantive regulations that the Board of Directors of the Office of Compliance has promulgated for the legislative branch, for the implementation of the USERRA provisions of the CAA. All references to USERAA in these regulations, means USERRA, as applied by the CAA.

§ 1002.3 When did USERRA become effective?

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

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

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

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

§ 1002.5 What definitions apply to these USERRA regulations?

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

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

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

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

(e) **Covered employee** means any employee, including an applicant for employment, of (1) the

House of Representatives; (2) the Senate; (3) the Capitol Guide Board or the Capitol Guide Service; (4) the Capitol Police Board or the Capitol Police; (5) the Congressional Budget Office; (6) the Office of the Architect of the Capitol; (7) the Office of the Attending Physician; (8) the Government Accountability Office; (9) the Library of Congress; and (10) the Office of Compliance.

(f) **Eligible employee** means a covered employee performing service in the uniformed services, as defined in 1002.5 (u) of this subpart, whose service has not been terminated upon occurrence of any of the events enumerated in section 1002.135 of these regulations.

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

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

(i) **Employee of the House of Representatives** includes an individual occupying a position for which the pay is disbursed by the Clerk of the House of Representatives, or another official designated by the House of Representatives, or any employment position in an entity that is paid with funds derived from the clerk-hire allowance of the House of Representatives but not any such individual employed by any entity listed in subparagraphs (2) through (10) of paragraph (e) above.

(j) **Employee of the Senate** includes an individual occupying a position for which the pay is disbursed by the Secretary of the Senate, but not any such individual employed by any entity listed in subparagraphs (1) and (3) through (10) of paragraph (e) above.

(k) **Employing office** means (1) the personal office of a Member of the House of Representatives or of a Senator; (2) a committee of the House of Representatives or the Senate or a joint committee; (3) any other office headed by a person with the final authority to appoint, hire, discharge, and set the terms, conditions, or privileges of the employment of an employee of the House of Representatives; (4) any other office headed by a person with the final authority to appoint, or be directed by a Member of Congress to appoint, hire, discharge, and set the terms, conditions, or privileges of the employment of an employee of the House of Representatives or the Senate; (5) the Capitol Guide Board; (6) the Capitol Police Board; (7) the Congressional Budget Office; (8) the Office of the Architect of the Capitol; (9) the Office of the Attending Physician; (10) the Government Accountability Office; (11) the Library of Congress; (12) or the Office of Compliance.

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

(m) **Notice**, when the employee is required to give advance notice of service, means any written

or oral notification of an obligation or intention to perform service in the uniformed services provided to an employing office by the employee who will perform such service, or by the uniformed service in which the service is to be performed.

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

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

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

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

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

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

(1) The nature and cost of the action needed under USERRA and these regulations;
(2) The overall financial resources of the employing office; the overall size of the business of an employing office with respect to the number of its employees; the number, type, and location of its facilities; and,
(3) The type of operation or operations of the employing office, including the composition, structure, and functions of the work force of such employing office; the geographic separateness, administrative, or fiscal relationship of the State, District, or satellite office in question to the employing office.

(t) **Uniformed services** means the Armed Forces; the Army National Guard and the Air National Guard when engaged in active duty for training, inactive duty training, or full-time National Guard duty; the commissioned corps of the Public Health Service; and any other category of persons

designated by the President in time of war or national emergency. For purposes of USERRA coverage only, service as an intermittent disaster response appointee of the National Disaster Medical System (NDMS) when federally activated or attending authorized training in support of their Federal mission is deemed ''service in the uniformed services,'' although such appointee is not a member of the ''uniformed services'' as defined by USERRA.

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

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

§ 1002.7 How does USERRA, as applied by the Congressional Accountability Act, relate to other laws, public and private contracts, and employing office practices?

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

(b) USERRA supersedes any 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 office policy that determines seniority based only on actual days of work in the place of employment would be superseded by USERRA, which requires that seniority credit be given for periods of absence from work due to service in the uniformed services.

(c) USERRA does not supersede, nullify or diminish any Federal 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 employing office to pay an employee for time away from work performing service, an employing office policy, plan, or practice that provides such a benefit is permissible under USERRA.

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

provide an unpaid leave of absence to an employee to perform service in the uniformed services in excess of the number of days of paid military leave.

Subpart B—Anti-Discrimination and Anti-Retaliation

Protection From Employer Discrimination and Retaliation

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

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

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

An employing office must not retaliate against an 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; exercised a right provided for by USERRA; or is performing service in the uniformed services within the meaning of 1002.5 of Subpart A of these regulations.

§ 1002.20 Do the Act's prohibitions against discrimination and retaliation apply to all employment positions?

Under USERRA, as applied by the CAA, the prohibitions against discrimination and retaliation apply to all positions within covered employing offices, including those that are for a brief, nonrecurrent period, and for which there is no reasonable expectation that the employment position will continue indefinitely or for a significant period. However, USERRA's re-employment rights and benefits do not apply to such brief, non-recurrent positions of employment.

§ 1002.21 Does USERRA protect a covered employee who does not actually perform service in the uniformed services?

USERRA's provisions, as applied by Section 206 of the CAA, prohibit discrimination and retaliation against eligible employees. Section 207(a) of the CAA prohibits retaliation against those non-eligible, covered employees under the CAA who have not performed service in the uniformed services.

Subpart C—Eligibility For Reemployment

General Eligibility Requirements for Reemployment

§ 1002.32 What criteria must the employee meet to be eligible under USERRA for re-employment 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 covered employee have to prove that the employing office discriminated against him or her in order to be eligible for reemployment?

No. The covered employee is not required to prove that the employing office discriminated against him or her because of the employee's uniformed service in order to be eligible for re-employment.

Coverage of Employers and Positions

§ 1002.34 Which employing offices are covered by these regulations?

(a) USERRA applies to all covered employing offices of the legislative branch as defined in Subpart A, section 1002.5, subsection (e) of these regulations.

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

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

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

(b) If the 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 employing office would not have recalled him or her during that period of service, the employee is not entitled to reemployment following the period of service simply because he or she is 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 covered employees. There is no exclusion for executive, managerial, or professional employees.

§ 1002.44 Does USERRA cover an independent contractor?

(a) No. USERRA, as applied by the CAA, does not provide protections for an independent contractor.

Coverage of Service in the Uniformed Services

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

Yes. USERRA's definition of ''service in the uniformed services'' includes a period for which an employee is absent from a position of employment for the purpose of an examination to determine his or her fitness to perform duty in the uniformed services. Military fitness examinations can address more than physical or medical fitness, and include evaluations for mental, educational, and other types of fitness. Any examination to determine an employee's fitness for service is covered, whether it is an initial or recurring examination. For example, a periodic medical examination required of a Reserve component member to determine fitness for continued service is covered.

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

(a) USERRA's definition of ''service in the uniformed services'' includes a period for which an employee is absent from employment for the purpose of performing authorized funeral honors duty under 10 U.S.C. 12503 (members of Reserve ordered to perform funeral honors duty) or 32 U.S.C. 115 (Member of Air or Army National Guard ordered to perform funeral honors duty).

(b) Funeral honors duty performed by persons who are not members of the uniformed services, such as members of veterans' service organizations, is not ''service in the uniformed services.''

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

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

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

No. Only Federal National Guard Service is considered "service in the uniformed services." The National Guard has a dual status. It is a Reserve component of the Army, or, in the case of the Air National Guard, of the Air Force. Simultaneously, it is a State military force subject to call-up by the State Governor for duty not subject to Federal control, such as emergency duty in cases of floods or riots. National Guard members may perform service under either Federal or State authority, but only Federal National Guard service is covered by USERRA.

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

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

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

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

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

Yes. In time of war or national emergency, the President has authority to designate any category of persons as a ''uniformed service'' for purposes of USERRA. If the President exercises this authority, service as a member of that category of persons would be ''service in the uniformed services'' under USERRA.

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

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

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

Yes, under certain conditions:

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

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

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

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

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

§ 1002.73 Does service in the uniformed services have to be an 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 re-employment rights under USERRA, even if the employee uses the absence for other purposes as well. An employee is not required to leave the employment position for the sole purpose of performing service in the uniformed services, although such uniformed service must be the main reason for departure from employment. 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 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 employing office 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 employing office that the employee intends to leave the employment position to perform service in the uniformed services, with certain exceptions described below. In cases in which an employee is employed by more than one employing office, the employee, or an appropriate officer of the uniformed service in which his or her service is to be performed, must notify each employing office that the employee intends to leave the employment position to perform service in the uniformed services, with certain exceptions described below.

(b) The Department of Defense USERRA regulations at 32 CFR 104.3 provide that an ''appropriate officer'' can give notice on the 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 employing office may be either oral or written. The notice may be informal and does not need to follow any particular format.

(d) Although USERRA does not specify how far in advance notice must be given to the employing office, an 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.C300hh–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 employing office or the employing office'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 the employing office's permission to leave to perform service in the uniformed services. The employee is only required to give the employing office notice of pending service.

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

No. When the employee leaves the employment position to begin a period of service, he or she is not required to tell the employing office that he or she intends to seek reemployment after completing uniformed service. Even if the employee tells the employing office before entering or completing uniformed service that he or she does not intend to seek reemployment after completing the uniformed service, the employee does not forfeit the right to reemployment after completing service. The 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 employing office. The exceptions to this rule are described below.

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

No. The five-year period includes only the time the 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 employing office?

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

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

It depends. Under the CAA, USERRA provides reemployment rights to which a covered employee may become entitled beginning on or after January 23, 1996, but any uniformed service performed before January 23, 1996, that was counted against the service limitations of the previous law (the Veterans Reemployment Rights Act), also counts against USERRA's five-year limit.

§ 1002.103 Are there any types of service in the uniformed services that an 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 in a uniformed service to mitigate economic harm where the employee's employing office 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 employing office's interests or concerns regarding the timing, frequency, or duration of uniformed service. The employing office cannot refuse to reemploy the employee because it believes that the timing, frequency or duration

of the service is unreasonable. However, the employing office is permitted to bring its concerns over the timing, frequency, or duration of the 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 re-employment 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 employing office of his or her intent to return to the employment position by either reporting to work or submitting a timely application for reemployment. Whether the 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 employing office not later than the beginning of the first full regularly-scheduled work period on the first full calendar day following the completion of the period of service, and the expiration of eight hours after a period allowing for safe transportation from the place of that service to the 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 employing office until the beginning of the next full regularly-scheduled work period that begins at least eight hours after arriving home, i.e., no earlier than six o'clock the next morning. If it is impossible or unreasonable for the employee to report within such time period through no fault of his or her own, he or she must report to the employing office as soon as possible after the expiration of the eight-hour period.

(b) Period of service more than 30 days but less than 181 days. If the employee's period of service in the uniformed services was for more than 30 days but less than 181 days, he or she must submit an application for reemployment (written or oral) with the employing office not later than 14 days after completing service. If it is impossible or unreasonable for the 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 oral) not later than 90 days after completing service.

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

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

§ 1002.117 Are there any consequences if the 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. However, the employee does become subject to any conduct rules, established policy, and general practices of the employing office pertaining to an absence from scheduled work.

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

representative of the employing office who has apparent responsibility for receiving employment applications. Depending upon the circumstances, such a person could be a personnel or human resources officer, or a first-line supervisor.

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

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

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

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

(a) The reemployment application is timely;

(b) The 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 employing office required to reemploy the employee if documentation establishing the employee's eligibility does not exist or is not readily available?

Yes. The employing office is not permitted to delay or deny reemployment by demanding documentation that does not exist or is not readily available. The employee is not liable for administrative delays in the issuance of military documentation. If the employee is re-employed after an absence from employment for more than 90 days, the employing office may require that he or she submit the documentation establishing entitlement to reemployment before treating the

employee as not having had a break in service for pension purposes. If the documentation is received after reemployment and it shows that the employee is not entitled to reemployment, the employing office may terminate employment and any rights or benefits that the employee may have been granted.

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

(a) Documents that satisfy the requirements of USERRA include the following:

(1) DD (Department of Defense) 214 Certificate of Release or Discharge from Active Duty;
(2) Copy of duty orders prepared by the facility where the orders were fulfilled carrying an endorsement indicating completion of the described service;
(3) Letter from the commanding officer of a Personnel Support Activity or someone of comparable authority;
(4) Certificate of completion from military training school;
(5) Discharge certificate showing character of service; and,
(6) Copy of extracts from payroll documents showing periods of service;
(7) Letter from NDMS Team Leader or Administrative Officer verifying dates and times of NDMS training or Federal activation.

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

Character of Service

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

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

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

Reemployment rights are terminated if the employee is:

(a) Separated from uniformed service with a dishonorable or bad conduct discharge;
(b) Separated from uniformed service under other than honorable conditions, as characterized by

regulations of the uniformed service;
(c) A commissioned officer dismissed as permitted under 10 U.S.C. 1161(a) by sentence of a general court-martial; in commutation of a sentence of a general court-martial; or, in time of war, by order of the President; or,
(d) A commissioned officer dropped from the rolls under 10 U.S.C. 1161(b) due to absence without authority for at least three months; separation by reason of a sentence to confinement adjudged by a court-martial; or, a sentence to confinement in a Federal or State penitentiary or correctional institution.

§ 1002.136 Who determines the characterization of service?

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

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

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

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

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

Employer Statutory Defenses

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

(a) Even if the employee is otherwise eligible for reemployment benefits, the employing office is not required to reemploy him or her if the employing office establishes that its circumstances have so changed as to make reemployment impossible or unreasonable. For example, an employing office may be excused from re-employing the employee where there has been an intervening reduction in force that would have included that employee. The employing office may not,

however, refuse to reemploy the employee on the basis that another employee was hired to fill the reemployment position during the employee's absence, even if reemployment might require the termination of that replacement employee;

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

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

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

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

Furlough and Leave of Absence

§ 1002.149 What is the employee's status with the employing office while performing service in the uniformed services?

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

§ 1002.150 Which non-seniority rights and benefits is the 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 employing office provides to similarly situated employees by an agreement, policy, practice, or plan in effect at the employee's workplace. These rights and benefits include those in effect at the beginning of the 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 leave of absence.

(b) If the non-seniority benefits to which employees on leave of absence are entitled vary according to the type of leave, the employee must be given the most favorable treatment accorded to any comparable form of leave when he or she performs service in the uniformed services. In order to determine whether any two types of leave are comparable, the duration of the leave may be the most significant factor to compare. For instance, a two-day funeral leave will not be ''comparable'' to an extended leave for service in the uniformed service. In addition to comparing the duration of the absences, other factors such as the purpose of the leave and the ability of the employee to choose when to take the leave should also be considered.

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

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

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

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

§ 1002.152 If employment is interrupted by a period of service in the uniformed services, are there any circumstances under which the 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 employing office during a period of service in the uniformed services, unless the employing office allows employees to use sick leave for any reason, or allows other similarly situated employees on comparable furlough or leave of absence to use accrued paid sick leave. Sick leave is usually not comparable to annual or vacation leave; it is generally intended to provide income when the employee or a family member is ill and the employee is unable to work.

(b) The employing office may not require the 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 multi-employer plans maintained pursuant to one or more collective bargaining agreements between employers and employee organizations. USERRA applies to multi-employer plans as they are defined in ERISA at 29 U.S.C. 1002(37). USERRA contains provisions that apply specifically to multi-employer plans in certain situations.

§ 1002.164 What health plan coverage must the employing office provide for the 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 employing office to establish a health plan if there is no health plan coverage in connection with the employment, or, where there is a plan, to provide any particular type of coverage.

(c) USERRA does not require the employing office to permit the 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 employing office's share plus the employee's share, plus 2% for administrative costs.

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

§ 1002.167 What actions may a plan administrator take if the 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 employing office 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 .S.C. 4980B (COBRA), it may be reasonable for a health plan administrator to adopt COBRA-compliant rules regarding election of continuing coverage, as long as those rules do not conflict with any provision of USERRA or this rule. If an employing office provides employment-based health coverage to an employee who leaves employment for uniformed service for a period of service in excess of 30 days after having given advance notice of service but without making an election regarding continuing coverage, the plan administrator may cancel the employee's health plan coverage upon the employee's departure from employment for uniformed service, but must reinstate coverage without the imposition of administrative reinstatement costs under the following conditions:

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

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

(c) Election of continuation coverage without timely payment:

Health plan administrators may adopt reasonable rules allowing cancellation of coverage if timely payment is not made. Where health plans are covered under COBRA, it may be reasonable for a health plan administrator to adopt COBRA-compliant rules regarding payment for continuing coverage, as long as those rules do not conflict with any provision of USERRA or this rule.

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

(a) If health plan coverage for the employee or a dependent was terminated by reason of service in the uniformed services, that coverage must be reinstated upon reemployment. An exclusion or waiting period may not be imposed in connection with the reinstatement of coverage upon reemployment, if an exclusion or waiting period would not have been imposed had coverage not been terminated by reason of such service.

(b) USERRA permits a health plan to impose an exclusion or waiting period as to illnesses or injuries determined by the Secretary of Veterans Affairs to have been incurred in, or aggravated

during, performance of service in the uniformed services. The determination that the employee's illness or injury was incurred in, or aggravated during, the performance of service may only be made by the Secretary of Veterans Affairs or his or her representative. Other coverage, for injuries or illnesses that are not service-related (or for the employee's dependents, if he or she has dependent coverage), must be reinstated subject to paragraph (a) of this section.

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

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

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

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

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

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

> (1) The 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 re-employment, 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 the employing office?

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

§ 1002.181 How is ''prompt reemployment'' defined?

''Prompt reemployment'' means as soon as practicable under the circumstances of each case. Absent unusual circumstances, reemployment must occur within two weeks of the employee's application for reemployment. For example, prompt reinstatement after a weekend National Guard duty generally means the next regularly scheduled working day. On the other hand, prompt reinstatement following several years of active duty may require more time, because the employing office may have to reassign or give notice to another employee who occupied the returning employee's position.

Reemployment Position

§ 1002.191 What position is the 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 employing office 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 employing office 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 actual reemployment position may be either the escalator position; the pre-service position; a position comparable to the escalator or pre-service

position; or, the nearest approximation to one of these positions.

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

(a) Yes. The reemployment position includes the seniority, status, and rate of pay that an employee would ordinarily have attained in that position given his or her job history, including prospects for future earnings and advancement. The employing office must determine the seniority rights, status, and rate of pay as though the 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 employing office should give him or her a reasonable amount of time to adjust to the employment position and then give a skills test or examination. No fixed amount of time for permitting adjustment to reemployment will be deemed reasonable in all cases. However, in determining a reasonable amount of time to permit an employee to adjust to reemployment before scheduling a makeup test or examination, an employing office may take into account a variety of factors, including but not limited to the length of time the returning employee was absent from work, the level of difficulty of the test itself, the typical time necessary to prepare or study for the test, the duties and responsibilities of the reemployment position and the promotional position, and the nature and responsibilities of the service member while serving in the uniformed service. If the 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 employing office 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 employing office to reemploy the employee in a position other than the escalator position. These factors, which are explained in §§ 1002.196 through 1002.199, are:

(a) The length of the 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 employing office 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 employing office, the employee must be reemployed in the position in which he or she was employed on the date that the period of service began. The employee must be qualified to perform the duties of this position. The employing office 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 employing office, he or she must be re-employed 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 employing office 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 employing office 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 employing office, the employee must be reemployed in the position in which he or she was employed on the date that the period of service began or in a position of like seniority, status, and pay. The employee must be qualified to perform the duties of this position. The employing office 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 employing office, he or she must be re-employed 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 employing office must make reasonable efforts to help the employee become qualified to perform the duties of this position.

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

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

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

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

(i) The employing office's judgment as to which functions are essential;
(ii) Written job descriptions developed before the hiring process begins;
(iii) The amount of time on the job spent performing the function;
(iv) The consequences of not requiring the individual to perform the function;

(v) The terms of a collective bargaining agreement;
(vi) The work experience of past incumbents in the job; and/or
(vii) The current work experience of incumbents in similar jobs.

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

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

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

Seniority Rights and Benefits

§ 1002.210 What seniority rights does an 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. The employee is not entitled to any benefits to which he or she would not have been entitled had the employee been continuously employed with the employing office. In determining entitlement to seniority and seniority-based rights and benefits, the period of absence from employment due to or necessitated by uniformed service is not considered a break in employment. The rights and benefits protected by USERRA upon reemployment include those provided by the employing office and those required by statute.

For example, under USERRA, a reemployed service member would be eligible for leave under the Family and Medical Leave Act of 1993, 29 U.S.C. 2601–2654 (FMLA), if the number of months and the number of hours of work for which the service member was employed by the employing office, together with the number of months and the number of hours of work for which the service member would have been employed by the employing office during the period of uniformed service, meet FMLA's eligibility requirements. In the event that a service member is denied FMLA leave for failing to satisfy the FMLA's hours of work requirement due to absence from employment necessitated by uniformed service, the service member may have a cause of action under USERRA but not under the FMLA.

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

No. USERRA does not require the employing office to adopt a formal seniority system. USERRA defines seniority as longevity in employment together with any employment benefits that accrue with, or are determined by, longevity in employment. In the absence of a formal seniority system, such as one established through collective bargaining, USERRA looks to the custom and practice in the place of employment to determine the employee's entitlement to any employment benefits that accrue with, or are determined by, longevity in employment.

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

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

(a) Whether the right or benefit is a reward for length of service rather than a form of short-term compensation for work performed;

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

(c) Whether it is the employing office's actual custom or practice to provide or withhold the right or benefit as a reward for length of service.

Provisions of an employment contract or policies in the employee handbook are not controlling if the employing office's actual custom or practice is different from what is written in the contract or handbook.

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

A reasonable certainty is a high probability that the employee would have received the seniority or seniority-based right or benefit if he or she had been continuously employed. The employee does not have to establish that he or she would have received the benefit as an absolute certainty. The employee can demonstrate a reasonable certainty that he or she would have received the seniority right or benefit by showing that other employees with seniority similar to that which the employee would have had if he or she had remained continuously employed received the right or benefit. The employing office 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 employing office must make reasonable efforts to accommodate that disability and to help the employee become qualified to perform the duties of his or her reemployment position. If the employee is not qualified for reemployment in the escalator position because of a disability after reasonable efforts by the employing office to accommodate the disability and to help the employee to become qualified, the employee must be reemployed in a position according to the following priority. The employing office must make reasonable efforts to accommodate the 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 employing office 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 employing office must make reasonable efforts to help the employee to become qualified to perform the duties of this position. The employing office is not required to reemploy the employee on his or her return from service if he or she cannot, after reasonable efforts by the employing office, qualify for the appropriate reemployment position.

(b) ''Qualified'' has the same meaning here as in § 1002.198.

Rate of Pay

§ 1002.236 How is the 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 employing office must compensate him or her at the rate of pay associated with the escalator position. The rate of pay must be determined by taking into account any pay increases, differentials, step increases, merit increases, or periodic increases that the employee would have attained with reasonable certainty had he or she remained continuously employed during the period of service. In addition, when considering whether merit or performance increases would have been attained with reasonable certainty, an employing office may examine the returning 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 employing office should give the employee a reasonable amount of time to adjust to the reemployment position and then give him or her the skills test or examination. No fixed amount of time for permitting adjustment to reemployment will be deemed reasonable in all cases. However, in determining a reasonable amount of time to permit an employee to adjust to reemployment before scheduling a makeup test or examination, an employing office may take into account a variety of factors, including but not limited to the length of time the returning employee was absent from work, the level of difficulty of the test itself, the typical time necessary to prepare or study for the test, the duties and responsibilities of the reemployment position and the promotional position, and the nature and responsibilities of the service member while serving in the uniformed service. The escalator principle also applies in the event a pay reduction occurred in the reemployment position during the period of service. Any pay adjustment must be made effective as of the date it would have occurred had the employee's employment not been interrupted by uniformed service.

(b) If the employee is reemployed in the pre-service position or another position, the employing office must compensate him or her at the rate of pay associated with the position in which he or she is reemployed. As with the escalator position, the rate of pay must be determined by taking into account any pay increases, differentials, step increases, merit increases, or periodic increases that the 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?
It depends. If the employee's most recent period of service in the uniformed services was more than 30 days, a discharge without cause may create a rebuttable presumption that there has been a violation of USERRA—

(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 employing office 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 employing office 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 employing office 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 employing office 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 employing office for purposes of determining the participation, vesting and accrual of pension benefits under the plan.

§ 1002.260 What pension benefit plans are covered under USERRA?

(a) The Employee Retirement Income Security Act of 1974 (ERISA) defines an employee pension benefit plan as a plan that provides retirement income to employees, or defers employee income to a period extending to or beyond the termination of employment. Any such plan maintained by the employing office 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 multi-employer plans, which have separate rules discussed below, the employing office 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 employing office must allocate the amount of its make-up contribution for the employee, if any; the employee's make-up contributions, if any; and the employee's elective deferrals, if any; in the same manner and to the same extent that 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 employing office required to make the plan contribution that is attributable to the employee's period of uniformed service?

(a) The employing office is not required to make its contribution until the employee is re-employed. For employer contributions to a plan in which the employee is not required or permitted to contribute, the employing office 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 employing office to make the contribution within this time period, the employer must make the contribution as soon as practicable.

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

service, with the repayment period not to exceed five years. Makeup contributions or elective deferrals may only be made during this period and while the employee is employed with the post-service employing office.

(c) If the employee's plan is contributory and he or she does not make up his or her contributions or elective deferrals, he or she will not receive the employer match or the accrued benefit attributable to his or her contribution. This is true because the employing office 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 employing office 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 that 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 employing office and the employee), provided the employee is employed with the post-service employing office during this period.

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

The amount of the 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 employing office make up any contributions or elective deferrals attributable to the period of service, because the employee is not entitled to forfeitures and earnings or required to experience losses that accrued during the period or periods of service.

§ 1002.266 What are the obligations of a multi-employer pension benefit plan under USERRA?

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

(a) The last employer that employed the employee before the period of service is responsible for making the employer contribution to the multi-employer plan, if the plan sponsor does not provide otherwise. If the last employer is no longer functional, the plan must nevertheless provide coverage to the employee.

(b) An employer that contributes to a multi-employer 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 multi-employer

plan pursuant to this subsection does not begin until the employer has knowledge that the employee was re-employed 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 multi-employer plan, provided that the pre-service employer and the post-service employer share a common means or practice of hiring the employee, such as common participation in a union hiring hall.

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

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

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

(b) (1) Where the rate of pay the employee would have received is not reasonably certain, 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 Office of Compliance provide to employees and employers concerning employment, reemployment, or other rights and benefits under USERRA?

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

Investigation and Referral

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

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

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

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

(1) counseling;
(2) mediation; and
(3) election of either -
(A) a formal complaint filed with the Office of Compliance (which must meet the requirements as set forth in the Office of Compliance Procedural Rules, Section 5.01(c)), and a hearing before a hearing officer, subject to review by the Board of Directors of the Office of Compliance, and judicial review in the United States Court of Appeals for the Federal Circuit; or
(B) a civil action in a district court of the United States.

(d) Regulations of the Office of Compliance describing and governing these procedures can be found at 141 Cong. Rec. H15645-H15655 (December 22, 1995) and 141 Cong. Rec. §19239,

143 Cong. Rec. H8316-H8317 (as amended, applying USERRA to the Government Accountability Office and the Library of Congress).

Enforcement of Rights and Benefits Against an Employing Office

§ 1002.303 Is a covered employee required to bring his or her claim to the Office of Compliance?

Yes. All covered employees who file claims under Part A of subchapter II of the CAA, which includes USERRA, are required to go through counseling and mediation before electing to file a civil action or a complaint with the Office of Compliance.

§ 1002.308 Who has legal standing to bring a USERRA claim under the CAA?

An action under Section 206 of the CAA may be brought by an eligible employee, as defined by Section 1002.5 (f) of Subpart A of these regulations. An action under 207(a) of the CAA may be brought by a covered employee, as defined by section 1002.5 (e) of Subpart A of these regulations. An employing office, prospective employing office or other similar entity may not bring an action under the Act.

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

In an action under USERRA, only the covered employing office or a potential covered employing office, as the case may be, is a necessary party respondent. Under the Office of Compliance Procedural Rules, a hearing officer has authority to require the filing of briefs, memoranda of law, and the presentation of oral argument. A hearing officer also may order the production of evidence and the appearance of witnesses.

§ 1002.310 How are fees and court costs 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 a covered employee is a prevailing party with respect to any claim under USERRA, the hearing officer, Board, or court may award reasonable attorney fees, expert witness fees, and other litigation expenses.

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

USERRA does not have a statute of limitations. However, Section 402 of the CAA requires an individual to bring a request for counseling alleging a violation of the CAA no later than 180 days after the date of the alleged violation. A claim alleging a USERRA violation as applied by the

CAA would follow this requirement

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

In any action or proceeding the following relief may be awarded:

(a) The court and/or hearing officer may require the employing office to comply with the provisions of the Act;

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

(c) The court and/or hearing officer may require the employing office to pay the individual an amount equal to the amount of lost wages and benefits as liquidated damages, if the court and/or hearing officer determines that the employing office's failure to comply with the Act was willful. A violation shall be considered to be willful if the employing office either knew or showed reckless disregard for whether its conduct was prohibited by the Act.

(d) Any wages, benefits, or liquidated damages awarded under paragraphs (b) and (c) of this section are in addition to, and must not diminish, any of the other rights and benefits provided by USERRA (such as, for example, the right to be employed or reemployed by the employing office).

§ 1002.314 May a court and/or hearing officer use its equity powers in an action or proceeding under the Act?

Yes. A court and/or hearing officer 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.

END OF TEXT OF PROPOSED USERRA REGULATIONS