The Uniformed Services Employment and Reemployment Rights Act (USERRA) Guide

Legal Assistance Branch, Administrative and Civil Law Department
The Judge Advocate General's School, U.S. Army
Charlottesville, Virginia

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DEPARTMENT OF THE ARMY
THE JUDGE ADVOCATE GENERAL'S SCHOOL
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3 August 1998

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SUBJECT: Request for Inclusion/Deletion of Publications

1. Please add the enclosed publications to the Defense Technical Information Center (DTIC) Database:

The Uniformed Services Employment and Reemployment Rights Act (USAERRA) Guide, Volume I, JA 270, June 1998, 219 pages

The Uniformed Services Employment and Reemployment Rights Act (USAERRA) Guide, Volume II, JA 270, June 1998, 223 pages

The Law of Federal Employment, JA 210, July 1998, 226 pages

2. Please delete the following publication from the DTIC database:

The Law of Federal Employment, JA 210-97, 290 pages

3. Enclosed are the SF 298, Report Documentation Page and DTIC Form 50, DTIC Accession Notice, for the publication. Please direct any questions to the undersigned at (804) 972-6396 or e-mail stroncj@hqda.army.mil.

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DOD, GS7
Editorial Assistant

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This publication is one of a series prepared and distributed by the Legal Assistance Branch of the Administrative and Civil Law Department of The Judge Advocate General's School, U.S. Army (TJAGSA). Legal assistance attorneys should find this series useful I the delivery of legal assistance. The series contains summaries of the law, guidance, and sample documents for handling common problems.

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PREFACE

This publication is one of a series prepared and distributed by the Legal Assistance Branch of the Administrative and Civil Law Department of The Judge Advocate General's School, U.S. Army (TJAGSA). Legal assistance attorneys should find this series useful in the delivery of legal assistance. The information contained herein is as current as possible as of the date of publication. Attorneys should recall, however, the law is subject to legislative amendment and judicial interpretations that occur much more rapidly than this publication can be updated and distributed. For this reason, use this publication only as a guide and not final authority on any specific law or regulation. Where appropriate, legal assistance attorneys should consult more regularly updated references before rendering legal advice.

The series contains summaries of the law, guidance, and sample documents for handling common problems. The sample documents are guides only. Legal assistance attorneys should ensure that the samples are adapted to local circumstances and are consistent with current format provisions in Army Reg. 25-50 prior to reproduction and use.

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There are, however, several ways to obtain many of these publications. First, the Defense Technical Information Center (DTIC) makes some of these publications available to government users. Practitioners may request the necessary information and forms to become registered as a user from: Defense Technical Information Center, 8725 John J. Kingman Road, Suite 0944, Fort Belvoir, Virginia 22060-6218, telephone (703) 767-9087 or DSN 427-9087.

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Number	Title
JA 260	Soldiers' & Sailors' Civil Relief Act
JA 261	Legal Assistance Real Property Guide
JA 262	Legal Assistance Wills Guide
JA 263	Legal Assistance Family Law Guide
JA 265	Legal Assistance Consumer Law Guide
JA 267	Uniformed Services Worldwide Legal Assistance Office Directory
JA 269	Legal Assistance Federal Income Tax Information Series
JA 270	The Uniformed Services Employment and Reemployment Rights Act Guide
JA 271	Legal Assistance Office Administration Guide
JA 272	Legal Assistance Deployment Guide
JA 274	Uniformed Services Former Spouses' Protection Act - Outline and References
JA 275	Model Tax Assistance Program
JA 276	Preventive Law Series

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This publication does not promulgate Department of the Army policy and does not necessarily reflect the views of The Judge Advocate General or any government agency.

TABLE OF CONTENTS - VOLUME I --JA 270

TABLE OF CONTENTS - VOLUME II -- JA 270

CHAPTER ONE

INTRODUCTION

INTRODUCTION

This publication, JA 270, replaces the previous version of JA 270, *Materials on the Veterans Reemployment Rights Law* (March 1991), which was published prior to the enactment of the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA). This USERRA Guide is designed for use by military lawyers who are requested to advise service members or commands on the USERRA. A chapter has been created to discuss federal employee USERRA issues and remedies.

This guide includes useful handouts and briefing materials on USERRA (for non-lawyer audiences). We have attempted to gather the applicable law and regulations published on USERRA at the time this guide was published. This guide will be updated periodically to reflect new regulations and statutory changes.

A companion USERRA case digest will be electronically published periodically and placed in the RCNG Files Library of the LAAWS BBS and JAGCNET. Readers are reminded that much of the pre-USERRA caselaw remains viable as to many aspects of reemployment rights.

Internet entry to the LAAWS BBS/JAGCNET may be obtained via the Army JAGC website at http://www.jagcnet.army.mil **. Additional USERRA handouts and information may be obtained by accessing the National Committee for Employer Support of the Guard & Reserve (NCESGR) website at** http://www.ncesgr.osd.mil **, the**

Department of Labor-Veterans Employment and Training Service website at http://www.dol.gov/dol/vets **; the Office of Special Counsel website at** http://www.access.gpo.gov/osc **; and the Merit Systems Protection Board website (including MSPB cases) at** http://www.msbp.com **.**

The authors fully expect this handbook to grow with this new law, as more cases and regulations are published. Any suggestions or comments as to the content or layout of this publication are welcome. Please contact the Administrative and Civil Law Department, The Judge Advocate General's School, ATTN: JAGS-ADA, 600 Massie Road, Charlottesville, VA 22903-1781, telephone DSN: 934-711 + x357; COM: (804) 972-6357; TOLL-FREE: (800) 552-3978 + x357; FAX: (804) 972-6377; E-MAIL: conraPE@hqda.army.mil **or** paul.conrad@jagc.army.mil**.**

Special thanks are given to CPT Shane E. Bartee, FLEP intern, for his efforts in researching, editing and assembling this handbook.

CHAPTER TWO

USERRA OVERVIEW

A. UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT
A Brief Summary

On October 13, 1994, President Clinton signed into law the Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. 4301-4333, Public Law 103-353, 108 Stat. 3149. USERRA is a complete rewrite of and replacement for the Veterans' Reemployment Rights (VRR) law. This law became fully effective on December 12, 1994.

The basic idea of USERRA, like the VRR law, is that if you leave your civilian job for service in the uniformed services, you are entitled to return to the job, with accrued seniority, provided that you meet the law's eligibility criteria. Like the VRR law, USERRA applies to voluntary as well as involuntary service [Section 4303(13)], in peacetime as well as wartime, and the law applies to virtually all civilian employers, including the Federal Government, State and local governments, and private employers, regardless of size. [Section 4303(4)]

Unlike most Federal labor laws, the VRR law never had a threshold for applicability, based upon the size of an enterprise or the number of employees, and the Fifth Circuit declined to find an implied threshold. See Cole v. Swint, 961 F.2d 58, 60 (5th Cir. 1992). If Congress had intended here to be an applicability threshold in USERRA, it would have said so expressly, and the lack of an express threshold means that the law applies even to very small employers. Cf. King v. St. Vincent's Hospital, 112 S. Ct. 570 (1991) (rejecting any implied limitation on frequency or duration of military leaves of absence under the VRR law).

Under USERRA, the District of Columbia government is treated as though D.C. were a state, and the same is true of Puerto Rico, Guam, the Virgin Islands, and the other territories and possessions of the United States. [Section 4303(14)] Also, National Guard civilian technicians are treated as state employees, and the state adjutant general is considered to be their employer. [Section 4303(4)(B)]

USERRA represents a floor and not a ceiling on the rights of persons who serve or have served in the uniformed services. USERRA does not supersede, nullify, or diminish any federal or state law (including a local law or ordinance), contract, agreement, policy, plan, practice, or other matter that establishes a right or benefit that is more beneficial to persons protected by USERRA or is in addition to rights and benefits accorded to those persons by USERRA. [Section 4302(a)] USERRA does supersede any State law (including a local law or ordinance), contract, agreement, policy, practice, or other matter that reduces, limits, or eliminates USERRA rights and benefits or that imposes additional prerequisites upon the exercise of such rights or the receipt of such benefits. [Section4302(b)]

Under USERRA, service in the "uniformed services" gives rise to rights. These services include the Army, Navy, Marine Corps, Air Force, Coast Guard, and Public Health Service commissioned corps, as well as the reserve components of each of these services. [Section 4303(16)] Federal training or service in the Army National Guard and Air National Guard gives

rise to rights under USERRA, but state service, pursuant to a call from the governor of the state, is not protected by the federal law, although it may be protected by state law. [Section 4303(13)]

Under the VRR law, different rules applied to different **categories** of military training or service. For example, one set of rules applied to active duty and another to active duty for training. Under USERRA, all categories are treated as "service in the uniformed services," and the rules depend upon the **duration of service**, not the category.

In order to have reemployment rights following a period of service in the uniformed services, you must meet five eligibility criteria. They are discussed separately below, in some detail.

a. You must have held a civilian job. (Discrimination in hiring is prohibited and is discussed later in this article.)

b. You must have given notice to the employer that you were leaving the job for service in the uniformed services.

c. The period of service must not have exceeded five years.

d. You must have been released from service under "honorable conditions."

e. You must have reported back to the civilian job in a timely manner or have submitted a timely application for reemployment.

LEAVING A CIVILIAN JOB

Under USERRA, unlike the VRR law, your civilian job need not be "other than temporary." Even if the employer considered your preservice job to have been "temporary," you can have reemployment rights unless "the employment [was] for a brief, nonrecurrent period and there [was] no reasonable expectation that such employment [would] last indefinitely or for a significant period." [Section 4312(d)(1)(C)] This is an affirmative defense for which the employer bears the burden of proof. [Id.]

Under USERRA, you must give prior notice to your employer regardless of the category of the service to be performed. [Section 4312(a)(1)] Under the VRR law, prior notice was not required in the case of active duty or initial active duty training. See 38 U.S.C. 4301(a), 4304(a), 4304(b), 4304(c)(old law). If you entered active duty or initial active duty training prior to December 12, 1994, you will be excused from the notice requirement with respect to that one period of service, but not any subsequent periods. [Section 8(a)(4) of USERRA, not codified, "Transition Rules and Effective Dates"]

You are only required to notify the employer of the fact of leaving and impending service. You are not required to predict that you will return to the job to apply for reemployment. Like the VRR law, USERRA preserves your option to seek reemployment until a specified period after completion of the service, as discussed later.

Prior notice to the employer is not required if such notice is precluded by military necessity or if such notice is "impossible or unreasonable." [Section 4312(b)] These will be rare exceptions to the notice requirement.

A classified recall would be an example of a situation wherein notice would be precluded by military necessity. If you are ordered to withhold notification of the fact of your recall to active duty, you must obey such an order, and the decision by military authorities that military necessity precluded notice will not be subject to judicial review. [Section 4312(b)] This will be a rare circumstance, but it is possible that military authorities could conclude that such secrecy would be required because the activation of a unit with a unique mission or capabilities could tip off a potential adversary to the plans of our military.

If you are recalled to active duty in the middle of the night and it is impossible for you to give notice, you will be excused from the notice requirement. [Section 4312(b)] Of course, it would be a good idea for you to notify the employer as soon as possible.

Under USERRA, the departing servicemember can give the notice, or an appropriate officer of the service can give the notice for the servicemember. [Section 4312(a)(1)] The notice can be written or oral [Id.], but it is **strongly recommended** that you give written notice and retain a copy. USERRA does not specify how much notice you must give, but it is **strongly recommended** that you give as much advance notice as possible.

The legislative history of this section, indicating the intent of Congress, shows that you will not be penalized if you had little notice from military authorities, but if you **intentionally withhold** notice to your employer, this will be viewed unfavorably, especially if the lateness of the notice causes serious problems for your employer. [H.R. Rep. 103-65, 103d Cong., 1st Sess., page 26 (April 28, 1993). See also Burkart v. Post-Browning. Inc., 859 F.2d 1245 (6th Cir. 1988) (upholding firing of National Guard member who withheld notice until the last moment).]

LIMIT ON DURATION OF SERVICE

The period of service in the uniformed services can last up to five years. [Section 4312(a)(2)] This limit is cumulative, so long as you are employed by or seeking reemployment with the same employer. When you start a new job with a new employer, you receive a fresh five-year entitlement. [Section 4312(a)(2)]

The passage of USERRA does not give currently employed persons fresh five-year entitlements. If you performed service under the VRR law and are still employed by the same civilian employer, that period of service counts toward USERRA's five-year limit unless it is exempted by one of the VRR law's exceptions to that law's four-year limit. [Section 8(a)(3) of USERRA, not codified, "Transition Rules and Effective Dates"]

It is important to note that some categories of military training or service do not count toward the five-year limit. Most periodic and special Reserve and National Guard training does not count [Section 4312(c)(3)], and most service in time of war or emergency does not count. [Section 4312(c)(4)] If you are retained on active duty past your expiration of active obligated service date, through no fault of your own, such an involuntary extension period does not count toward the five-year limit. [Section 4312(c)(2)] For example, if you are stationed on a vessel at sea on the service expiration date, you may be involuntarily extended until the ship returns to port.

Under USERRA, you can have reemployment rights if you leave active duty at the end of your initial period of obligated service, even if that period exceeds five years. [Section 4312(c)(1)] For example, if you enlisted in the Navy's nuclear power program, you probably had to agree to serve on active duty for six years. If you seek reemployment following such a period of service and meet the other eligibility criteria, you will have reemployment rights.

There are several exceptions to the five-year limit, and some are not as clear as they might be. If you are in any danger of exceeding the five-year limit with your current employer, it is **strongly recommended** that you seek advice as to how much of the limit you have already expended and whether a proposed tour of training or service will count toward the limit.

CHARACTER OF SERVICE

Under USERRA, as under the VRR law, you will not have reemployment rights if you receive a punitive discharge or dismissal as a result of a court martial conviction, if you receive an "other than honorable" administrative discharge, or if you are "dropped from the rolls" of a uniformed service because of a long period of unauthorized absence or because of a civilian criminal conviction. [Section 4304]

TIMELY RETURN TO WORK

Under USERRA, the deadline for you to report back to work or apply for reemployment depends upon the **duration** of the period of service or training, not the category. Following a period of up to 30 consecutive days of training or service, you must report back to work "not later than the beginning of the first full regularly scheduled work period on the first full calendar day following the completion of the period of service and the expiration of eight hours after a period allowing for safe transportation from the place of service [in the uniformed services] to the person's residence." [Section 4312(e)(1)(A)(i)] For example, if you complete weekend drills at 4:00 Sunday afternoon, and if it takes you five hours to drive home, you need not report to work for a shift that starts at 2:00 a.m. on Monday, because you have not had an opportunity for eight hours of rest.

This deadline is similar but not identical to the VRR law's deadline for returning to work following active duty for training or inactive duty training (drills). See 38 U.S.C. 4304(d)(old).

The reference to "safe" transportation was added to ensure that you not be required to drive all night to be timely in reporting back to your civilian job, and the eight-hour period was added to ensure that you have the opportunity to have adequate rest before returning to work.

If you find it "impossible or unreasonable" through no fault of your own to report back to work the next day, as otherwise required, you must report back to work as soon as possible. [Section 4312(e)(1)(A)(ii)] For example, an automobile accident on the way home from the drill weekend could extend the deadline by a day or two, even if you are not injured.

Following a period of 31-180 continuous days of service or training, you must submit an application for reemployment within 14 days. [Section 4312(e)(1)(C)] If you find it impossible or unreasonable to meet this deadline, through no fault of your own, you must submit the application as soon as possible thereafter. [Section 4312(e)(1)(C)] Following a period of 181 or more days of continuous service or training, you must submit an application for reemployment within 90 days. [Section 4312(e)(1)(D)] Any of these deadlines can be extended by up to two years if you are hospitalized or convalescing from a service-connected injury or illness. [Section 4312(e)(2)(A)]

If you miss one of these deadlines, without adequate cause, you do not automatically lose reemployment rights, but you will be subject to the employer's normal policies concerning explanations and discipline for unexcused absences. [Section 4312(e)(3)]

The "application for reemployment" need not be in writing. You are only required to inform the employer that you formerly worked there and are returning from service in the uniformed services.

Following a period of training or service of 31 days or more, the employer has the right to request that you submit documentation establishing that your application for reemployment is timely, that you have not exceeded the five-year limit, and that you are not disqualified from reemployment by virtue of having received a punitive or "other than honorable" discharge. You must submit such documentation as is readily available. [Section 4312(f)(1)]

The Department of Labor will adopt regulations establishing the kinds of documentation that will be considered satisfactory. [Section 4312(f)(2)] Examples of such documentation could include a DD-214, a letter from your commanding officer, an endorsed copy of your military orders, or a certificate of completion of a military training school.

If the requested documentation does not yet exist or is not readily available, the employer is required to reemploy you while awaiting such documentation. If the documentation, when it becomes available, establishes that you are not entitled to reemployment, the employer is then free to discharge you and to terminate any benefits that have been accorded. [Section 4312(f)(3)] The employer is permitted to delay reinstating you into the pension plan until the documentation has been provided. [Section 4312(f)(3)(B)]

ENTITLEMENTS

If you meet the eligibility criteria discussed above, you have seven basic entitlements:

a. Prompt reinstatement.
b. Accrued seniority, as if you had been continuously employed.
c. Status.
d. Health insurance coverage.
e. Other non-seniority benefits, as if you had been on a furlough or leave of absence.
f. Training or retraining and other accommodations.
g. Special protection against discharge, except for cause.

PROMPT REINSTATEMENT

Following a period of up to 30 days of training or service, you must report back to work almost immediately, and you should be put back on the payroll immediately upon reporting back to work. Following a longer tour, you must submit an application for reemployment, and the employer is required to act on the application promptly [Section 4313(a)], even if there does not happen to be a vacancy at the time the application for reemployment is submitted. Sometimes, it is necessary for the employer to displace another employee in order to make room for the returning servicemember. See Cole v. Swint, 961 F.2d 58, 60 (5th Cir. 1992); Goggin v. Lincoln St. Louis, 702 F.2d 698, 703-04 (8th Cir. 1983); Fitz v. Board of Education of the Port Huron Area Schools, 662 F.Supp. 1011 (E.D. Mich. 1985); Anthony v. Basic American Foods, 600 F.Supp. 352, 357 (N.D. Cal. 1984); Green v. Oktibbeha County Hospital, 526 F. Supp. 49, 55 (N.D. Miss. 1981). The law does not define "prompt," but generally this should be a matter of days, not weeks or months.

ACCRUED SENIORITY

In a 1946 case, the Supreme Court held: "The returning veteran does not step back on the seniority escalator at the point he stepped off. He steps back on at the precise point he would have occupied had he kept his position continuously during [his military service]." Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275, 284-85 (1946). USERRA codifies this "escalator principle." [Section 4316(a)]

If you meet the eligibility criteria set forth above, you are entitled to be treated as if you had been continuously employed for purposes of the employer's system of seniority, if any. In other words, your uniformed service time must be treated as "service in the plant" for purposes of the employer's system of seniority, even an informal system based solely on practice.

If the employer does not have a system of seniority, then you are entitled to your preservice job or another job of like status and rate of pay. [Section 4313(a)(2)(A)] The employer's option of reemploying you in a "like" job only applies if the period of service was for

91 days or more. Following a shorter tour (up to 90 days), you are entitled to the precise job that you would have attained if continuously employed. [Section 4313(a)(1)(A)]

USERRA expressly applies the same "escalator principle" to all kinds of pension plans, including defined contribution plans as well as defined benefit plans. Generally speaking, you must be treated as if you had been continuously employed in determining when you qualify for your civilian pension (vesting) and also in determining the amount of the monthly pension check upon retirement (benefit computation). [Section 4318]

If you and other employees contribute to the pension plan while working, you must make retroactive contributions to the plan upon returning from service in the uniformed services, if you wish to be treated as if you had been continuously employed for pension purposes. USERRA gives you an extended period to make up back contributions, without interest. That period extends for three times your period of service in the uniformed services, but not to exceed five years. [Section 4318(b)(2)]

Employer and employee contributions to pension plans are often computed based upon a percentage of earnings. This computation will be based upon what you would have earned in the civilian job if you had remained continuously employed, not what you earned from the uniformed service. [Section 4318(b)(3)(A)]

In some cases, what you would have earned cannot readily be ascertained. For example, if you work on commission no one can determine precisely how many items you would have sold and how many commissions you would have earned. In such a situation, the computation of employee and employer contributions to the pension plan will be based upon what you earned from the civilian employer during the 12 months immediately preceding your entry into the uniformed services. If you were employed for less than 12 months, the computation will be based upon your entire time with that employer. [Section 4318(b)(3)(B)]

Longshoremen, construction workers, stagehands, and some other kinds of workers frequently work for a whole series of employers, as assigned by a "hiring hall" operated by the union or an employer association. If you return to a job situation of this kind, you are entitled to reemployment and to be treated as continuously employed for pension purposes, even if you return to a different "employer" (in the traditional sense) than your last employer prior to service in the uniformed services. See Imel v. Laborers' Pension Trust Fund of Northern California, 904 F.2d 1327 (9th Cir.), cert. denied, 111 S. Ct. 343 (1990); Akers v. Arnett, 597 F.Supp. 557 (S.D. Tex. 1983), aff'd, 748 F.2d 283 (5th Cir. 1984). Case law to this effect under the VRR law has been adopted by Congress when it enacted USERRA. [Section 4303(4)(A)(i)(definition of "employer" includes "a person, institution, organization, or other entity to whom the employer has delegated the performance of employment-related responsibilities")]

STATUS

Whether or not the employer has a system of seniority, you are entitled to the status that you would have attained if continuously employed. For example, if you were the Nurse Manager of a medical facility, reinstating you as "Assistant Nurse Manager" is not satisfactory, even if the pay is the same, because that is not equivalent status. See Ryan v. Rush-Presbyterian-St. Luke's Medical Center, 15 F.3d 697, 699 (7th Cir. 1994).

Location is also an aspect of status. [See Armstrong v. Cleaner Services, Inc., 79 L.R.R.M. 2921 (M.D. Tenn. 1972); Britton v. Department of Agriculture, 23 M.S.P.R. 170 (1984).] For example, if you worked in your employer's store in Fairfax, Virginia, and if that position still exists (although it may have been filled), reinstating you in a vacant position in Fairbanks, Alaska is not satisfactory, if you object, because the status of the Alaska job is not equivalent to the status of the Virginia job. Other aspects of status include the opportunity to work during the day, instead of at night, and the opportunity to work in a department or at such times when there are better opportunities to earn commissions or to be promoted.

HEALTH INSURANCE COVERAGE

Upon return to the civilian job, you are entitled to immediate reinstatement of your civilian health insurance coverage, if the employer offers such insurance. There must be no waiting period and no exclusion of pre-existing conditions, other than those conditions which the Department of Veterans Affairs has determined to be service-connected. [Section 4317(b)] If the civilian employer's health insurance plan covers each employee's family members, your entire family is entitled to reinstatement of this health insurance coverage.

A new provision in USERRA gives a person departing a civilian job for service in the uniformed services the right to elect continued employer-related health insurance coverage, for the person and his or her family, **during** the service in the uniformed services. [Section 4317(a)] For periods of up to 30 days of training or service, including most annual training tours for Reservists and National Guard members, the employer can only require you to pay the employee share (if any) of the premium. [Section 4317(a)(1)(B)]

If you are serving a longer tour of service in the uniformed services, you have the right to continue your civilian health insurance coverage, but the employer is permitted to charge you up to 102% of the entire premium, including the part normally paid by the employer. [Section 4317(a)(1)(B)I

If you elect this coverage, it will continue until your period of service in the uniformed services has been completed and the deadline to apply for reemployment has passed (as explained above), or until 18 months after your absence from your civilian job began, **whichever comes first.** [Section 4317(a)(1)(A)] It is important to note that your right to reinstatement of

civilian health insurance coverage upon return to your civilian job is not dependent upon your having exercised the right to continued coverage during your period of service.

You would almost certainly be well-advised to elect this coverage for **short** (up to 30 days) tours of service or training in the uniformed services, including typical annual training tours performed by Reservists and National Guard members. Electing such coverage can protect your family from any possible gap in health insurance coverage. You should be aware that your right to have your family use the military health care system, including CHAMPUS, only applies if you are on active duty or active duty for training for **31 days or more.** See 10 U.S.C. 1076(a)(2)(A). Electing continued coverage through your civilian job for longer tours (31 days or more) makes sense only if there is some reason why your dependents cannot or don't want to use the CHAMPUS system.

OTHER NON-SENIORITY BENEFITS

If your employer offers continued life insurance coverage, holiday pay, Christmas bonuses, and other non-seniority benefits to other employees on furlough or on non-military leaves of absence, the employer must offer you similar benefits while you are absent from work for service in the uniformed services, **during** your service. [Section 4316(b)(1)(A)] If the employer has more than one kind of non-military leave of absence, the comparison should be made with the employer's most generous form of leave. See Waltermyer v. Aluminum Company of America, 804 F.2d 821 (3d Cir. 1986). The comparison must be for comparable periods of time. You cannot compare a four-day jury leave with a four-year military leave.

If you state in writing that you intend not to return to the civilian job, this will amount to a waiver of your right to these non-seniority benefits under this clause, but only if the waiver is made knowingly, voluntarily, and in writing. [Section 4316(b)(2)(A)(ii)] Even if the waiver meets all of these tests, it only waives your right to these non-seniority benefits during service in the uniformed services. It does not waive your right to reemployment upon completion of service, nor the right to be treated as continuously employed for seniority purposes upon return to the civilian job. [Section 8(g) of USERRA, not codified, "Transition Rules and Effective Dates"] Even if you intended not to apply for reemployment at the time you entered service in the uniformed services, the law gives you the right to change your mind.

When you notify your employer that you will be leaving your job for a long tour of service in the uniformed services, it is possible that the employer will ask you to sign a statement like that discussed above. **Signing such a document is probably not in your best interest.** You should seek legal advice before signing documents your employer asks you to sign.

TRAINING OR RETRAINING AND OTHER ACCOMMODATIONS

If you have been gone from your civilian job for months or years, you may find many changes upon your return. The employer may be using new equipment and methods with which

you are unfamiliar. Even if equipment and methods have not changed, your civilian job skills may have been dulled by a long period of absence. You must be qualified for the civilian job in order to have reemployment rights, but USERRA requires the employer to make "reasonable efforts" to qualify you. [Section 4313(a)(1)(B)] This may very well include training or retraining.

USERRA defines "reasonable efforts" as "actions, including training provided by an employer, that do not place an undue hardship on the employer." [Section 4303(10)] USERRA defines "undue hardship" as "actions requiring significant difficulty or expense, when considered in light of ... the overall financial resources of the employer [and several other factors]." [Section 4303(15)] This is similar to the definitions of "reasonable accommodations" and "undue hardship" in the Americans With Disabilities Act (ADA). Cf. 42 U.S.C. 12111(9) and 12111(10). **Unlike the ADA, USERRA does not exempt very small employers.** The ADA exempts employers with fewer than 15 employees. See 42 U.S.C. 12111(5).

USERRA also requires an employer to make reasonable efforts to accommodate the disability of a returning disabled servicemember otherwise entitled to reemployment. [Section 4313(a)(3)] For example, an employer might be required to lower an assembly line by two feet to enable a returning veteran in a wheelchair to perform his or her job.

There is some overlap between USERRA and the ADA, which requires employers to make such accommodations for disabled persons generally, including but not limited to disabled veterans. USERRA applies to some small employers that are exempted from the ADA, but USERRA only applies to returning servicemembers who are otherwise entitled to reemployment.

There are some disabilities which cannot be accommodated by reasonable employer efforts. For example, a blinded veteran cannot be a commercial airline pilot. If upon your return from service in the uniformed services you are suffering from a disability that cannot be accommodated, thus disqualifying you from returning to your preservice job, the employer is required to reemploy you in some other position which is the "nearest approximation" of the position to which you are otherwise entitled, in terms of seniority, status, and pay, consistent with the circumstances of your case. [Section 4313(a)(3)(B)] See also Hembree v. Georgia Power Co., 637 F.2d 423 (5th Cir. 1981); Blake v. City of Columbus, 605 F.Supp. 567 (S.D. Ohio 1984); Ryan v. City of Philadelphia, 559 F.Supp. 783 (E.D. Pa. 1983), aff'd, 732 F.2d 147 (3d Cir. 1984); Armstrong v. Baker, 394 F.Supp. 1380 (N.D.W.V. 1975).

A disability **need not be permanent** in order to confer rights under this provision. For example, if you break your leg during your annual Reserve or National Guard training, your employer may have the obligation to make reasonable efforts to accommodate your broken leg, or to place you in an alternative position, until your leg has healed.

SPECIAL PROTECTION AGAINST DISCHARGE

If your period of continuous service in the uniformed services was 181 days or more, the period of special protection is one year. [Section 4316(c)(1)] If your period of continuous service was 31-180 days, the period of special protection is 180 days. [Section 4316(c)(2)] If you are fired during the period of special protection, the employer has a heavy burden of proof, to prove that you were discharged for cause. See Carter v. United States, 407 F.2d 1238 (D.C. Cir. 1968). This is intended to protect you from a bad faith or pro forma reinstatement.

There is no period of special protection after a period of up to 30 days of continuous service in the uniformed services, but you will have rights under the anti-discrimination provision discussed below.

PROHIBITION OF DISCRIMINATION OR REPRISAL

USERRA provides that an employer or a prospective employer cannot deny you initial employment, reemployment, retention in employment, promotion, or any benefit of employment because you are a member of, apply to be a member of, or have been a member of a uniformed service or because you perform, have performed, apply to perform, or have an obligation to perform service in the uniformed services. [Section 4311(a)] USERRA also provides that it is unlawful for an employer to discriminate against you or to take any adverse employment action against you because you take an action to enforce rights under USERRA, for yourself or anyone else, because you have testified in or assisted a USERRA investigation, or because you have exercised any right under USERRA. [Section 4311(c)] This provision was included because there have been cases wherein employers have fired witnesses who have provided information to the Department of Labor or who testified in VRR cases.

If one of the above protected activities (service in the uniformed services, etc.) was a motivating factor **(not necessarily the only factor)** in an adverse action taken against you by an employer or a prospective employer, such action is unlawful unless the employer can **prove** (not just say) that the action would have been taken even in the absence of the protected activity. [Section 4311(b)] This provision overrules Sawyer v. Swift & Co., 836 F.2d 1257 (10th Cir. 1988), a VRR case which held that to prove a violation of Section 4301(b)(3) of the VRR law it was necessary to establish that an employee's firing was motivated **solely** by his or her military obligations.

ASSISTANCE AND ENFORCEMENT

The Veterans' Employment and Training Service (VETS), United States Department of Labor, will assist persons claiming rights under USERRA, including persons claiming rights with respect to the federal government as a civilian employer. [Section 4321] USERRA has

granted VETS subpoena authority so that it can obtain access to witnesses and documents to complete its investigations in a timely and comprehensive manner. [Section 4326]

If you request assistance, VETS will contact your employer to explain the law and will conduct an investigation. [Section 4322(a)] If the investigation establishes that a violation probably occurred, and if efforts to obtain voluntary compliance are not successful, VETS will refer the case to the Office of Special Counsel (OSC), if the employer is a federal executive agency, or the Attorney General (AG), if the employer is a state or local government or a private employer. [Section 4324(a)(1)(federal) and Section 4323(a)(1)(non-federal)] If the OSC or AG is reasonably satisfied that you are entitled to the benefits you seek, the OSC or AG may agree to provide you free legal representation. [Section 4324(a)(2)(A)(federal) and Section 4323(a)(1)(non-federal)]

If the OSC or AG decline your request for representation, or if you do not request their help, you can file suit directly, through private counsel that you retain. [Section 4324(b)(federal) and Section 4323(a)(2)(non-federal)] If you prevail, the federal court or the Merit Systems Protection Board (MSPB, for federal-sector cases) can order the employer to pay your attorney's fees and litigation expenses. [Section 4324(c)(4)(federal) and Section 4323(c)(2)(B))(non federal)] This new USERRA provision makes the option of proceeding through private counsel much more realistic.

Regardless of who represents you, the court or the MSPB can order the employer to comply with the law and to compensate you for lost pay, including interest. [Section 4324(c)(2)(federal) and Section 4323(c)(1)(A)(ii)(non-federal)] USERRA expressly provides that states, as employers, are subject to the same remedies, including interest, as may be imposed upon private employers. [Section 4323(c)(7)] If the court finds that the employer's violation was willful, the court can double the back pay award. [Section 4323(c)(1)(A)(iii)] (This provision for double damages does not apply to cases where the federal government is the employer.)

If you have questions, you can reach the National Committee for Employer Support of the Guard and Reserve (NCESGR) at 1-800-336-4590. NCESGR explains the law to reservists and their employers, but NCESGR is not an enforcement agency. Through an ombudsman program, public service announcements, and other means, NCESGR explains to employers the importance of the reserve components to our country, and the need for "employer support" of members of these components. NCESGR also operates an awards program for cooperative employers, especially those who go beyond what the law requires in accommodating their employees who serve in the National Guard or Reserve.

B. USERRA Note*

Employers Cannot Require Reservists
to Use Vacation Time and Pay
for Military Duty

Recently, the United States District Court for the Northern District of Mississippi held that an employer cannot require a reservist employee to use vacation time or pay to perform military duty, and that one cannot be fired for protesting to an employer about improper employer directives that require the Reservist to use his vacation time and pay for his military absence from the workplace.[1]

Tennessee Air National Guard member Mr. Mike Graham worked as a machinist for the Hall McMillen Company (HMC) of Oxford, Mississippi, and was granted absence for military duty for the period of 20-24 January 1992. On Friday, 31 January 1992, Mr. Graham received his pay stub for the previous week, which indicated that he was paid vacation pay for the time he missed work due to military training. On the check stub, under the column marked "Earnings," appeared the words "Vacation Hours." The stub indicated that forty vacation hours were debited from Mr. Graham's vacation pay hours, leaving forty-eight vacation hours remaining for the year. Mr. Graham protested to his supervisor that he had not requested vacation pay for his military time and that the company was trying to force him to use his vacation pay and time for his military duties in violation of the Veteran's Reemployment Rights Act (VRRA).[2] Mr. Graham refused to accept the check. When HMC's owner, David McMillen, overheard Mr. Graham's protests with his supervisor, he called Mr. Graham into his office and requested Mr. Graham to resign within two weeks. Mr. Graham refused to resign and told Mr. McMillen that he would have to fire him.[3]

*Reprinted from Major Paul Conrad, *Employers Cannot Require Reservists to Use Vacation Time and Pay for Military Duty*, ARMY LAW., Dec. 1996, at 22.

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1 Graham v. Hall-McMillen Company, Inc., 925 F. Supp. 437 (N.D. Miss. 1996).

2 Veterans' Reemployment Rights Act (VRRA), 38 U.S.C. §§ 2021-27 (1994). The VRRA was renumbered as Chapter 43, § 4301-07 by Pub. L. No. 102-568, Title V, § 506(a), 106 Stat. 4340 (Oct. 29, 1992). The VRRA was subsequently replaced by the Uniformed Services Employment and Reemployment Act (USERRA), Pub. L. No. 103-353, 108 Stat. 3150 (Oct. 13, 1994) (*codified at* 38 U.S.C. §§ 4301-33 (1994)). The VRRA citations in the case were to the original 1982 section numbers to avoid confusion with the USERRA statute section numbers.

3 Graham, 925 F. Supp. at 439

The situation further deteriorated on 5 February 1992 when Mr. Graham recorded a conversation with his supervisor, Larry Kain, regarding the vacation pay dispute. When Mr. Kain informed Mr. McMillen of Mr. Graham's conduct regarding the recorded conversation, Mr. McMillen called Mr. Graham into his office and immediately terminated his employment.[4]

At trial, HMC claimed that it had a flexible time policy that allowed employees to receive holiday or vacation pay at a different time than the days of vacation actually used; and thus, it did not wrongly ask Mr. Graham to use his vacation pay or time for his military duty. Mr. Graham denied that he had requested vacation pay or time for his military leave. The court looked at the plain wording of the check stub, which indicated that vacation pay was deducted for the period of military duty in January. Furthermore, HMC's attendance records indicated that the company marked Mr. Graham's January military training time as vacation time, rather than as military leave time.[5]

Finally, the court reviewed a transcript of the 5 February 1992 recorded conversation between Mr. Graham and his supervisor, Mr. Kain, wherein Mr. Kain confirmed that he did not give Mr. Graham an option about using his vacation pay or time for military duty:

> Kain: We have never denied you time off to serve with the Guard. The only thing we have asked you to do is take vacation for this week.
>
> Mr. Graham: I was told that it was not an option. I will take vacation time. Is that not the situation? I don't have a choice.
>
> Kain: No, I'm not giving you a choice.[6]

The court found that HMC's actions violated section 2024(d) of the VRRA, which states in part:

> Upon such employee's release from a period of such active duty for training or inactive duty training . . . , such employee shall be permitted to return to such employee's position with such . . . pay, and vacation as such employee would have had if such employee had not been absent for such purposes.[7]

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4 Id. at 439-40.

5 Id. at 440.

6 *Id.*

7 38 U.S.C. § 2021(b)(3) (1982). Similar provisions were incorporated into the new USERRA at 38 U.S.C. §§ 4312, 4316 (1994). The USERRA provisions do not spell out that vacation time or pay is protected, but have broad language that "all rights and benefits" of employment are protected. The definition of "rights and benefits" at 38

The court determined that had Mr. Graham not gone on military duty he would not have had the vacation hours deducted from his pay and time records.[8]

The court determined that HMC also violated the Reserve anti-discrimination provision of the VRRA[9] by firing Mr. Graham for asserting his rights under the VRRA and by denying him use of his vacation time and pay. While HMC presented evidence of Mr. Graham's substandard work performance, the court was not convinced that he was discharged for cause unrelated to his military duties.[10] The court found that the evidence was very clear that Mr. Graham's military status was a motivating factor in HMC's decision to discharge him.[11]

U.S.C. § 4303(2) includes "vacation." The legislative history of the USERRA indicates that Congress intended to continue prohibiting employers from requiring reservist employees to use their vacation time or pay for military duty. *See* H.R. Rep. No. 103-65, at 35 (1993) (citing with approval *Hilliard v. New Jersey Army Nat'l Guard*, 527 F. Supp. 405, 412 (D.N.J. 1981) holding that employers may not require employees to use their vacation pay or time for military absences)).

[8] *Graham*, 925 F. Supp. at 442. Under USERRA, Reservists may elect to use vacation time/pay to conduct their military duties. *See* 38 U.S.C. § 4316(d) (1996).

[9] Veterans' Reemployment Rights Act of 1974, 38 U.S.C. § 2021(b)(3) (1982); subsequently renumbered as 38 U.S.C. § 4311 (1994), Uniformed Services Employment and Reemployment Act of 1994. Wrongful discharge of Reserve member cases are subject to the three-prong "burden shifting" analysis set forth in McDonald Douglas v. Green, 411 U.S. 792 (1973). The Reservist plaintiff must demonstrate a prima facie case of discrimination under the VRRA or USERRA; if successful, the burden shifts to the employer to show a legitimate and nondiscriminatory rationale for the adverse employee action; and finally, the Reservist is entitled to rebut the employer's rationale as a pretext or unworthy of belief. *See* Novak v. Mackintosh & Dakota Indus., Inc., 919 F. Supp. 870, 878-79 (D.S.D. 1996); Tukesbrey v. Midwest Transit, Inc., 822 F. Supp. 1192, 1194-95 (W.D. Pa. 1993).

[10] *Graham*, 925 F. Supp. at 442. The USERRA standard of proof for Reserve wrongful discharge discrimination cases is currently found at 38 U.S.C. § 4311(b), which provides for "a motivating factor" test, overruling dicta in Monroe v. Standard Oil Co., 452 U.S. 549, 559 (1981); Clayton v. Blachowske Truck Lines, Inc., 640 F. Supp. 172, 174 (D. Minn. 1986), *aff'd*, 815 F.2d 1203 (8th Cir. 1987); and Sawyer v. Swift & Co., 836 F.2d 1257, 1261 (10th Cir. 1988), which indicated that the proper test for Reserve employer discrimination was a "sole motivating factor" test under the VRRA. Congress explicitly found that the courts misinterpreted the intent of Congress in creating the "sole motivating factor" test for 38 U.S.C. § 2021(b)(3) [VRRA] and thereby rejected it in the successor anti-discrimination provision of the USERRA. See H.R. Rep. No. 103-65, at 24 (1993). The court in Graham held that the more liberal test adopted in the USERRA was retroactive and applied despite the fact that the incident which led to the lawsuit occurred prior to the adoption of USERRA by the Congress. The court based its decision on the legislative history of the USERRA, which indicated that the USERRA "motivating factor" test applied to all cases pending at the time of USERRA's enactment. *See* H. R. Rep. No. 103-65, at 21 (1993), Gummo v. Village of Depew, New York, 75 F.3d 98, 104-07 (2d Cir. 1996); *Novak v. Mackintosh & Dakota Indus., Inc.*, 919 F. Supp. at 878.

[11] *Graham*, 925 F. Supp. at 443.

While this case was basically decided under pre-Uniformed Services Employment and Reemployment Act (USERRA) law, the VRRA civilian job status protection and Reserve anti-discrimination statute sections relied on by the court were incorporated in the new USERRA. This is the only reported case where a Reservist was wrongly discharged in retaliation for asserting his right not to have to use vacation time or pay for military absences from his civilian employer.

C. USERRA Note*

Interpreting USERRA "Mixed Motive" Discrimination Cases

As one of the first cases reported under the Uniformed Services Employment and Reemployment Rights Act (USERRA),[12] *Robinson v. Morris Moore Chevrolet-Buick, Inc.*[13] is instructive as to how this new law works. In *Robinson*, the Court of Appeals for the Fifth Circuit illustrates the major differences between the USERRA and its predecessor, the Veterans Reemployment Rights Act (VRRA).[14]

Clinton Robinson was a used car salesman for the defendant. In February 1996, Robinson notified his supervisor that he had to attend a mandatory military physical examination with his Army Reserve unit on 23 February 1996 and would be absent from work that day. The car dealership was planning an important sales event that day, and the supervisor asked Robinson if his attendance at the physical examination was mandatory. Robinson said that he was not sure, and the supervisor contacted the Reserve unit and confirmed that Robinson's attendance was required and that he had no discretion to choose a different time to take his physical examination. Even though the supervisor released Robinson to attend his military physical examination on 23 February, the defendant fired Robinson on 29 February 1996. Claiming that he had been fired for fulfilling his Army Reserve obligations, Robinson filed suit under the USERRA.[15]

*Reprinted from Lieutenant Colonel Paul Conrad, *Interpreting USERRA "Mixed Motive" Discrimination Cases*, ARMY LAW., Dec. 1997, at 30.

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[12] Uniformed Services Employment and Reemployment Rights Act, Pub. L. No. 103-353, 108 Stat. 3150 (1994), *codified at* 38 U.S.C. §§ 4301-33 (1994).

[13] Robinson v. Morris Moore Chevrolet-Buick, Inc., 974 F. Supp. 571 (E.D. Tex. 1997).

[14] Pub. L. No. 93-508, § 404(a), 88 Stat. 1596 (1974), *previously codified at* 38 U.S.C. §§ 2021-27 (1988).

[15] Robinson filed suit under Section 4311 of the USERRA, alleging discrimination because of military duty. Section 4311 states:

(a) A person who is a member.. of ... a uniformed service shall not bew denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership...

(b) An employer may not discrimiate in employment against or take any adverses employment action against any person because such person ... has exercised a right provided for in this chapter...

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

(1) under subsection (a) [of the USERRA], if the person's ... service ....in the uniformed services is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of [such service]...38 U.S.C.A. § 4311 (West 1997).

In its motion for summary judgment, the defendant claimed that it had sufficient justification to fire Robinson for nondiscriminatory reasons, including tardiness, poor sales performance, and unexcused work absences.[16] The employer submitted sworn affidavits from a supervisor who alleged poor work performance and repeated tardiness and unexcused absences. Robinson's previous employer indicated that Robinson had quit his job because of unexcused absences and unhappiness with selling cars. Robinson responded that his supervisor, Mr. Croker, was extremely angry with his work absence to attend his military physical examination. Robinson pointed out that he was selling well and had never been disciplined or counseled prior to requesting time off to attend his military physical examination. He added that his work performance had not been criticized by the car dealership until after his absence for his physical examination.[17]

Noting that neither the Fifth Circuit nor the United States Supreme Court had heard a USERRA "mixed motive"[18] discrimination claim, the court looked to USERRA discrimination cases in other circuits. The court adopted the Second Circuit's "motivating factor" test and "but-for" employment discrimination analysis.[19] Under the motivating factor test, the plaintiff must show, by a preponderance of the evidence, that his military position or obligation was a motivating factor in the employer's decision to fire him. If an employee's military position was a motivating factor for the adverse action, the employer's action is improper.[20] The Fifth Circuit explained that the employer must do more than show that it was motivated in part by a legitimate reason to discharge or to discipline; it must that show its legitimate reasons would, standing alone, be sufficient to justify its adverse employment decision.[21]

The court reviewed the evidence presented on the summary judgment motion and found that Robinson laid out a sufficient chronology of facts, including the extremely close proximity of his Army Reserve obligation to the date of his firing and the dealership's complaints about his

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[16] Robinson, 974 F. Supp. at 573.

[17] Id.

[18] Id. at 575. "Mixed motive" refers to employment discrimination cases where the employer alleges a valid reason to discharge or discipline an employee, and the employee raises an impermissible basis for the employer to discharge or to discipline the employee.

[19] *Id.* at 575-76, n.1. *See* Gummo v. Village of Depew, 75 F.3d 98, 106 (2d Cir. 1996), *cert. denied*, 116 S. Ct. 1678 (1996). The Gummo court confirmed that USERRA plaintiffs no longer have to prove that military status discrimination was the sole cause for their discharge, as was required under prior caselaw. Some good examples of the pre-USERRA "sole cause" requirement can be found in: Monroe v. Standard Oil Co., 452 U.S. 549 (1981); Sawyer v. Swift & Co., 836 F.2d 1257 (10th Cir. 1988); and Clayton v. Blachowske Truck Lines, Inc., 640 F. Supp. 172, 174 (D. Minn. 1986), *aff'd*, 815 F.2d 1203 (8th Cir. 1987). The *Clayton* court held that to avoid summary judgment, the plaintiff must provide "evidence which raises an inference that his reserve status was the sole motivation behind his termination." *Clayton*, 640 F. Supp. at 174.

[20] *Robinson*, 974 F. Supp. at 576.

[21] *Id.*

poor attendance (which may have also been related to Reserve duty absences). Viewing the evidence in the light most favorable to Robinson (the non-moving party), the court found that the defendant had made no complaints about Robinson's work performance prior to his absence to attend his physical examination.

In its motion for summary judgment, the defendant relied on a Seventh Circuit case which predated the USERRA. That case, *Pignato v. American Trans Air, Inc.*,[22] held that the mere existence of mixed motives is not enough to establish employer liability.[23] The Fifth Circuit, however, found *Pignato* unpersuasive for several reasons: (1) it was not a summary judgment decision;[24] (2) it relied on pre-USERRA cases, which held that plaintiffs must prove military status discrimination was the sole reason for adverse employer action;[25] and (3) the facts in Pignato were not similar to those in *Robinson*.[26] Unlike the plaintiff in *Pignato*, Robinson did not attempt to create job conflicts, lie to his supervisors to get off work, or deliberately violate company policies.[27]

Robinson's employer failed to provide convincing evidence that Robinson's work performance would have justified firing him, without considering his absence for his military physical on 23 February 1996. The court further found that the employer failed to prove a nondiscriminatory motivation for the firing, which left a material issue of fact unresolved.[28] Thus, summary judgment was not appropriate.

In *Robinson*, the Fifth Circuit illustrates two of the biggest changes the USERRA made in military discrimination cases. First, plaintiffs now have a reduced burden of proof under the motivating factor test. Second, the USERRA makes it tougher for employers to obtain summary judgment in mixed motive cases.

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[22] Pignato v. American Trans Air, Inc., 14 F.3d 342 (7th Cir. 1994) (holding that in order to establish employer liability in mixed motive cases, the impermissible motive must be the controlling reason for the adverse action).

[23] *Robinson*, 974 F. Supp. at 577.

[24] *Id.* at 577-78.

[25] *Id.; See supra* note 65 and accompanying text.

[26] *Robinson*, 974 F. Supp. at 577-78.

[27] *Id.*

[28] *Id.* at 578.

D. USERRA Note*

Jury Trials for USERRA Cases

A federal district court recently held that, under the Uniformed Services Employment and Reemployment Rights Act[29] (USERRA), plaintiffs may request jury trials in those cases where there is a claim for liquidated damages.[30] In *Spratt v. Guardian Automotive Products, Inc.*,[31] the U.S. District Court for the Northern District of Indiana ruled that a plaintiff is entitled to a jury trial under the liquidated damages provision of the USERRA.[32] The court determined that the USERRA provides for double damages where willful employer noncompliance is shown. As a result, the USERRA converts such cases to suits at common law for Seventh Amendment[33] right to jury trial purposes.[34]

*Reprinted from Lieutenant Colonel Paul Conrad, *Jury Trials for USERRA Cases*, ARMY LAW., June 1998, at 15.

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[29] Uniformed Services Employment and Reemployment Rights Act of 1994, Pub. L. No. 103-353, 108 Stat. 3149 (1994) (codified at 38 U.S.C. §§ 4301-4333 (West Supp. 1997)).

[30] Spratt v. Guardian Automotive Prods., Inc., No. 1:97-CV-323, 1998 WL 125939 (N.D. Ind. Mar. 17, 1998).

[31] *Id.*

[32] The USERRA liquidated damages provision states:

> (1)(A) The district courts of the United States shall have jurisdiction, upon the filing of a complaint, motion, petition or other appropriate pleading by or on behalf of the person claiming a right or benefit under this chapter
>
> (i) to require the employer to comply with the provisions of this chapter; and
>
> (ii) to require the employer to compensate the person for any loss of wages or benefits suffered by reason of such employer's failure to comply with the provisions of this chapter; and
>
> (iii) to require the employer to pay the person an amount equal to the amount referred to in clause (ii) as liquidated damages, if the court determines that the employer's failure to comply with the provisions of this chapter was willful.
>
> (B) Any compensation under clauses (ii) and (iii) of subparagraph (A) shall be in addition to, and shall not diminish, any of the other rights and benefits provided for under this chapter.

38 U.S.C. § 4323(c) (West Supp. 1997). The provision does not apply to federal employees.

[33] "In suits at common law, where the value of the controversy shall exceed twenty dollars, the right to a trial by jury shall be preserved . . . ." U.S. CONST. AMEND. VII.

[34] *See Spratt*, 1998 WL 125939, at *5.

Spratt marks a change in this area of the law. The previous reemployment rights statute, the Veterans' Reemployment Rights Act (VRRA), had no liquidated damages provision for willful misconduct by the employer.[35] Most courts interpreted the VRRA to have only provided for equitable remedies. Thus, under the VRRA, plaintiffs were not entitled to jury trials.[36]

In *Spratt*, the court reached its conclusion by reviewing the two possible sources for a constitutional right to trial by jury in federal cases: (1) where the statute expressly provides for trial by jury and (2) where the claim involves those rights and remedies typically enforced by a court of law, not a court of equity.[37] The court conceded that Congress did not expressly provide a right to jury trial in the USERRA statute,[38] but found that Seventh Circuit precedent provided that "actions seeking liquidated damages provided by statute are 'suits at common law' for constitutional purposes."[39] The court rejected the defendant's argument that the USERRA liquidated damages clause provided only for "court" determination of actual damages suffered.[40] The court observed that the word "court" could mean trial by either judge or jury.[41]

The employer argued that Congress, in the USERRA's legislative history, urged courts to incorporate into the USERRA the case law arising from the VRRA.[42] The court replied that the legislative history should be read to encourage incorporation of those concepts and prior cases from the VRRA that are still consistent with the USERRA. Since the VRRA never had a

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[35] *Compare* 38 U.S.C. § 2022 (West Supp. 1991) (containing the VRRA damages provision), *with* 38 U.S.C. § 4323(c) (West Suppl 1997). The VRRA provision provided only for monetary recovery of actual wages lost, but not punitive (liquidated) damages.

[36] *See Spratt*, 1998 WL 125939, at *1.

[37] *Id.* at *2-*3.

[38] *Id.*

[39] Calderon v. Witvoet, 999 F.2d 1010, 1014-17 (7th Cir. 1991). The court recognized a split of authority regarding whether actions seeking liquidated damages create a "suit at common law" for Seventh Amendment purposes outside of the Seventh Circuit. *See* Lorillard v. Pons, 434 U.S. 575, 577 n.2 (1978). The court compared the "willful misconduct" damages provisions of the law involved in the *Calderon* case to the present USERRA case and found the statutes similar. *Spratt*, 1998 WL 125939, at *3.

[40] *Spratt*, 1998 WL 125939, at *5.

[41] *Id. See* Kobs v. Arrow Serv. Bureau, Inc., 134 F.3d 893, 896 (7th Cir. 1998).

[42] *Spratt*, 1998 WL 125939, at *3. *See* H.R. Rep. No. 103-65, at 19 (1994), *reprinted in* 1994 U.S.C.C.A.N. 2452.

liquidated damages provision, those VRRA cases that indicate that there is no right to a jury trial would not be controlling in interpreting the USERRA liquidated damages provision.[43]

The employer then argued that the monetary remedies provided under the USERRA were in fact restitution, which would make them equitable in nature, especially when they are combined with the injunctive nature of the other USERRA remedies.[44] The court responded that the USERRA liquidated damages provision, unlike the VRRA back-pay provision, was not solely restitution for wages lost, but included a punitive aspect by doubling damages for willful employer violations of the statute.[45] Punitive damages are traditionally a legal remedy that must be imposed by a jury.[46]

Finally, the employer argued that the USERRA liquidated damages provision was intertwined with, or solely incidental to, equitable remedies under the Act. The court pointed out that the USERRA, unlike its predecessor, has a distinct and separate remedy for willful employer violations; that remedy is not incidental to any equitable relief.[47] As a separate punitive remedy for willful employer violations, the liquidated damages provision is not part of any equitable scheme to make a wronged employee whole. Rather, it is a separate potential punishment for employers who willfully violate the USERRA.

The potential prospect of a jury trial in a USERRA case can result in extra bargaining power for reservists and veterans in dealing with recalcitrant civilian employers on job reemployment and military status discrimination questions. The high employer costs of defending a case before a jury include lengthy delays in case resolution, jury unpredictability as to damage awards, significant attorney fees and court costs, and productive time lost due to depositions and trial proceedings. These additional burdens on employers may encourage greater employer cooperation in seeking pre-trial settlement of USERRA cases where employer willful misconduct is an issue.

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[43] *Spratt*, 1998 WL 125939, at *3.

[44] *Id. See* Crocker v. Piedmont Aviation, Inc., 49 F.3d 735 (D.C. Cir. 1995).

[45] *Spratt*, 1998 WL 125939, at *4.

[46] *Id. See* Tull v. United States, 481 U.S. 412, 422 (1987).

[47] *Spratt*, 1998 WL 125939, at *5.

E. USERRA Note*

How Do You Get Your Job Back?

In a case of first impression, *McGuire v. United Parcel Service, Inc.,*[48] a court spelled out what a Reservist needs to do to be reinstated to his preservice job. A returning service member has the burden of establishing whether he has satisfied the requirements of the Uniformed Services Employment and Reemployment Rights Act (USERRA)[49] for reinstatement.[50]

The prerequisites for being reinstated under USERRA are: (1) Service member must give the employer advance written or oral notice of the service-related absence[51] ; (2) the cumulative length of absence must be less than five years[52] ; (3) the service member must receive an honorable discharge for the active military duty[53]; and (4) if the period of active military service is less than 180 days, the service member must apply for reemployment within fourteen days after completion of service.[54]

McGuire had been an air sales representative for United Parcel Service's (UPS's) Chicago office for over two years when he orally notified his supervisors in November 1995 that he might be activated for an extended period of active military duty. He had been a member of the Army Reserve during his entire period of employment with the company.[55] He provided UPS with a written notice of military duty on December 22, 1995, and faxed a copy of his military orders to UPS on January 2, 1996. During his absence UPS did not replace McGuire, but had other employees cover his duties. On April 27, 1996, McGuire sent his supervisor, Mr. John Segovia, a letter requesting information on reemployment upon his discharge from active duty. Apparently, Segovia did not receive the letter, but when McGuire called to follow up on June 8, another supervisor assured him that Segovia had the letter and would contact him.

*Scheduled for publication, Lieutenant Colonel Paul Conrad, *How Do You Get Your Job Back?* ARMY LAW., Aug. 1998, at __.

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[48] Mc Guire v. United Parcel Service, Inc., 1997 WL 543059 (N.D. Ill. 1997) (unpublished).

[49] Uniformed Services Employment and Reemployment Rights Act, 38 U.S.C. §§ 4301-33, as amended [hereinafter referred to as USERRA].

[50] 38 U.S.C. § 4312 (1994).

[51] 38 U.S.C. § 4312(a)(1) (1994). The service member must have been employed prior to activation.

[52] 38 U.S.C § 4312(a)(2) (1994).

[53] 38 U.S.C. § 43O4 (1994).

[54] 38 U.S.C. § 4312 (e)(1) (C) (1994).

[55] McGuire apparently had less than five years of Reserve active duty time while employed with UPS.

McGuire was honorably discharged from active duty on June 30, 1996. On July 11, 1996, McGuire wrote Segovia another letter requesting "the procedures to get my job back".[56] McGuire also asked, "If you cannot answer this please pass it on to someone who can."[57] Mr. Segovia asked Mr. Ed LeBel of the UPS Human Resources Department for guidance. LeBel told Segovia that all McGuire had to do to be rehired was to submit an employee update form.

On July 16, 1996, Segovia sent the following letter to McGuire:

> Dave--
> The law specifies that there are no requirements for reemployment. Please touch base w/ Ed LeBel (HR) upon your return. Look to see you--
> John Segovia
> Resp. Ex. K.[58]

McGuire received Segovia's letter the next day, but he never contacted the UPS Human Relations Department, as directed. Mistakenly, McGuire believed that Segovia's letter was a letter of termination. McGuire attempted to contact Segovia by phone over the next few days, but never requested his job back or indicated that he believed he had been fired.

On July 18, Segovia received a letter from an attorney assisting McGuire. The lawyer informed Segovia that McGuire believed that UPS was refusing to rehire him. Segovia called the lawyer and told him that McGuire was not fired, and that all McGuire had to do was to report to the UPS Human Resources Office and he would be reinstated. The lawyer passed on Segovia's message to McGuire. Incredibly, McGuire never did contact the UPS Human Relations Office or visit the UPS facility to inquire about reinstatement.

On January 13, 1997, McGuire filed a court petition for reinstatement by UPS, alleging violations of the USERRA. United Parcel Service moved for summary judgment on the grounds that McGuire failed to properly apply for reinstatement under USERRA.[59]

The court framed the dispositive issue as whether McGuire had submitted an application for reemployment as required by the USERRA reinstatement statute [38 U.S.C. § 4312(e)(1)(C)]. The court determined that what constituted a proper application for reinstatement under

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[56] McGuire v. United Parcel Service, Inc., 1997 WL 543059, at*2.

[57] *Id.*

[58] *Id.*

[59] *Id.*, at *3.

USERRA was a question of first impression.[60] Since there were no cases interpreting this provision of USERRA,[61] the court looked back to reinstatement application requirements under the Veterans' Reemployment Rights Act (VRRA).[62] The court noted that Congress directed that where the statute sections of the VRRA and USERRA are similar, that case law interpreting the predecessor statute should be "given full force and effect in interpreting these provisions".[63] The court determined that while application for reemployment involves "more than a mere inquiry, a written application is not required in every situation".[64] The court determined that a case-by-case examination of the facts, "based upon the intent and reasonable expectations [of the parties], in light of all the circumstances," was the appropriate standard of review.[65]

The court reviewed several cases under the VRRA where service members were found to have not properly requested reinstatement upon return from active duty[66], and conceded that McGuire had made more than a "mere inquiry" about reemployment.[67] McGuire sent several letters back to his supervisor and followed up with several telephone calls. Still, the court found that McGuire failed to have submitted an application.[68] The court looked at the exchange of letters between Segovia and McGuire. The court determined that McGuire failed to use due

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[60] *Id.*

[61] *Id.*, at *3 n. 5.

[62] Veterans' Reemployment Rights Act (VRRA), Pub. L. No. 93-508, 88 Stat. 1594 (1974), (previously codified at 38 U.S.C. §§ 2021-2027). The reemployment application requirement section of the VRRA was last codified at 38 U.S.C. § 2021. Neither statute specified any specific application procedure or application requirement for reinstatement. *See also* Thomas v. City & Borough of Juneau, 638 F. Supp. 303 (D. Alaska. 1986) (Where employer was aware that veteran was reapplying for reemployment, the employer had a legal obligation to rehire him).

[63] McGuire v. United Parcel Service, Inc., 1997 WL 543059, *3 n.5. *See also* H.Rep. No. 103-65, 103d Cong., 2d Sess. 21 (1993), reprinted in 1994 U.S.C.C.A.N. 2449, 2451-52.

[64] *Id.*, at *3. *See* Baron v. United States Steel Corp., 649 F. Supp. 537, 540 (N.D. Ind. 1986).

[65] *Id. See* Shadle v. Superwood Corp., 858 F.2d 437, 438 (8th Cir. 1988).

[66] *Id. See* Shadle v. Superwood Corp., 858 F.2d 437, 440 (Service member's mere visit to employer guard shack to request employment application and two calls to supervisor held insufficient request for reinstatement); Baron v. United State Steel Corp., 649 F. Supp. 537, 540 (Service member's advisement to employer that he would seek reemployment if he didn't get into college held insufficient request for reinstatement); and Lacek v. Peoples Laundry Co., 94 F. Supp. 399, 401 (M.D. Pa. 1950) (Service member's casual visit to workplace and general discussion about working conditions held insufficient request for reinstatement). *See also* U.S. Department of Labor, Veterans' Reemployment Rights Handbook, Chapter 7 (1986).

[67] *Id.*

[68] *Id.*

diligence since he was put on notice that Segovia did not have authority to hire him back, and that he needed to contact the UPS Human Relations Office, but failed to do so.[69]

Finally, the court pointed out that McGuire's misunderstanding regarding his reemployment status did not equal employer refusal to rehire. United Parcel Service never denied or discouraged McGuire's right to be rehired. When McGuire's attorney notified UPS of his client's concern that he was being denied reemployment, Segovia contacted the lawyer and reassured him that all his client needed to do to be rehired was to report to the Human Relations Office. As the court observed, "At a certain point the responsibility to see that one's reemployment rights are observed falls on the employee."[70] The court concluded that summary judgment was appropriate, as McGuire failed to follow-up on UPS's response to his letter directing him where and to whom to reapply for his civilian job.

While this case has limited precedential value, it is instructive as to what the courts expect of returning veterans and reservists invoking their reemployment rights. Service members should contact their employer in writing, by certified mail, demanding their reinstatement to their civilian employment within the statutory report back period. The letter should be sent to their company director of human relations or someone else within the company with clear authority to rehire the service member, with a copy to their immediate supervisor. If necessary, service members should follow up their letters with personal visits to their employer's human relations office upon discharge requesting USERRA reinstatement to their pre-service employment. While there is no specific reemployment application form, the letter should leave no doubt to the employer that the service member wants reinstatement to their civilian job, in accordance with USERRA.[71]

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[69] *Id.* *See* Hayse v. Tennessee Dep't of Conservation, 750 F. Supp. 298, 304 (E.D. Tenn. 1989) (Employer "has a right to expect that notice be received by someone who is in a decision-making position, i.e., someone who is able to hire the returning veteran."). *See also* H.R. Rep. 103-65, 103d Cong., 2d Sess. 21,at 29 (1993), *reprinted in* 1994 U.S.C.C.A.N 2449, 2462. (Application must be made verbally or in writing, to the employer or an employer's representative "who has either the authority to act on the application or who is in a position to forward the request to someone who has the authority.") Arguably Mr. Segovia, as McGuire's supervisor, was in a position to forward his reemployment request, which should have met the requirements of the statute.

[70] *Id.* "Common sense dictates that an employer cannot be expected to give every inquiry, regardless of how slight, full consideration and attention." Baron v. United States Steel Corp., 649 F. Supp. 537, 541.

[71] Model letters to employers are available on the Army Judge Advocate BBS, Reserve and National Guard File Section for downloading, and via the Army JAGCNET internet site at http://www.jagcnet.army.mil. Additional sources for information on reemployment rights are the Department of Defense National Committee for Employer Support of the Guard and Reserve (NCESGR) website at http://www.ncesgr.osd.mil, and the Department of Labor (VETS) website at http://www.dol.gov/dol/vets. Army Judge Advocate officers and civilian legal assistance attorneys are precluded from contacting employers directly on USERRA matters by U.S. DEP'T OF ARMY, REG. 27-3, THE ARMY LEGAL ASSISTANCE PROGRAM, para. 3-6e(2) (10 Sep 1995).

If there is any misunderstanding about reemployment, the service member should immediately contact the National Committee for Employer Support of the Guard and Reserve National Ombudsman, or the Department of Labor Veterans and Employment Training Service, to quickly resolve the misunderstanding.[72] If the service member waits beyond the statutory period to seek reemployment, the employer does not have an obligation to rehire them.[73]

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[72] The NCESGR National Ombudsman may be contacted by calling (800) 336-4590 for assistance mediating reemployment rights with employers. Department of Labor assistance may be obtained by calling (202) 219-9110.

[73] 38 U.S.C. § 4312(e)(3) (1994). Such employees do not automatically forfeit all their rights under USERRA, but they are subject to any employer policies or practices regarding workers who are absent from the workplace without permission.

CHAPTER THREE

USERRA & Federal Employment

A. USERRA Note*

Merit Systems Protection Board Addresses the Uniformed Services Employment and Reemployment Rights Act

In the past year, the Merit Systems Protection Board (MSPB) has dealt with the first four cases[1] in which federal employees seek reemployment rights as the result of prior military service pursuant to the Uniformed Services Employment and Reemployment Rights Act (USERRA).[2] Two of the four cases involved probationary status federal employees.[3]

The USERRA provides specific rights to federal workers who have been activated to military duty. These rights include reinstatement to their civilian jobs, accrued seniority, continuation of civilian employment status, employer provided health insurance and nonseniority benefits, training, and special protection against discharge except for cause.[4] The USERRA also protects federal workers and potential federal workers against discrimination because of their active or reserve military membership.[5]

The federal government cannot deny federal employment, reemployment, retention in employment, promotion, or any benefit of employment to a federal employee because he is a member of, applies to be a member of, or has been a member of a uniformed service or because the federal employee performs, has performed, applies to perform, or has an obligation to perform service in the uniformed services.[6] The

*Reprinted from Lieutenant Colonel Paul Conrad, *Merit Systems Protection Board Addresses the Uniformed Services Employment and Reemployment Rights Act*, ARMY LAW., Sep. 1997, at 47.

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[1] Duncan v. U.S. Postal Service, 73 M.S.P.R. 86 (1997); Jasper v. U.S. Postal Service, 73 M.S.P.R. 367 (1997); Wright v. Department of Veterans Affairs, 73 M.S.P.R. 453 (1997); Petersen v. Department of Interior, 71 M.S.P.R. 227 (1996).

[2] Uniformed Services Employment and Reemployment Rights Act (USERRA), Pub. L. No. 103-353, 108 Stat. 3150 (1994) (codified at 38 U.S.C. §§ 4301-33). *See also* Restoration to Duty From Uniformed Service, 60 Fed. Reg. 45,650 (1995) (to be codified at 5 C.F.R. pts. 353, 870, 890).

[3] *Jasper*, 73 M.S.P.R. 367; *Wright*, 73 M.S.P.R. 453. Probationary and temporary federal employees are covered under the USERRA. 38 U.S.C.A. §§ 4303(4)(A)(ii), 4311(a), 4324(b) (West 1996). *See also* 5 C.F.R. § 353.103 (1997).

[4] 38 U.S.C.A. §§ 4312-18. *See also* 5 C.F.R. §§ 353.107-08, 353.207, 353.209, 890.303-05, and 890.501-02.

[5] 38 U.S.C.A. § 4311. *See also* 5 C.F.R. § 353.202.

[6] 38 U.S.C.A. §§ 4301-18. "Service in the uniformed services means the performance of duty on a voluntary or involuntary basis in a uniformed service under competent authority and includes active duty, active duty for training, inactive duty training [Reserve Component weekend drill], full-time National Guard duty, and a period for which a person is absent from a position of employment for the purpose of an examination to determine the fitness of the person to perform any such duty." *Id.* § 4303(13). *See also* 5 C.F.R. § 353.102.

USERRA also makes it unlawful for a federal agency to seek any reprisal against a federal employee for taking action to enforce his rights under the USERRA. The protection against reprisal also extends to anyone who assists the aggrieved employee in asserting his USERRA rights by testifying or assisting in an investigation involving the agency.[7]

The USERRA sets up a standard which is favorable to federal employees for proving discrimination based upon military status. If a protected activity, such as service in the reserve components, was a motivating factor (not necessarily the only factor) in an adverse personnel action taken by the agency (or in the withholding of a favorable personnel action) against the employee, such action is unlawful, unless the employer can prove that the adverse action (or withholding) would have been taken even in the absence of the protected activity.[8] Proof can be direct evidence of discriminatory intent or acts or circumstantial evidence similar to that used in Title VII discrimination cases.[9]

The USERRA provides that the Veterans' Employment and Training Service (VETS) of the U.S. Department of Labor will assist federal employees in investigating federal agencies accused of USERRA violations. The VETS has subpoena and contempt powers to gain access to agency witnesses and documents to complete its investigations.[10] If a federal employee requests help from the VETS regarding a potential USERRA violation the VETS will attempt to contact the agency to explain the law. If the VETS investigator's explanation of the law does not cause the agency to comply with the law, the VETS may initiate an investigation of the agency.[11] If the investigation establishes a probable violation and the agency refuses to comply, the VETS will refer the case to the Office of Special Counsel (OSC).[12] If the OSC finds that the case has merit, it will represent the federal employee before the MSPB at no charge to the employee.[13]

Federal employees can also submit their complaints directly to the MSPB, pro se, even if they have not sought assistance from the VETS in investigating their complaints,

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[7] 38 U.S.C.A. § 4311. *See also* 5 C.F.R. § 353.202.

[8] 38 U.S.C.A. § 4311(b). *See also* Gummo v. Village of Depew, 75 F.3d 98, 104-07 (2d Cir. 1996); Graham v. Hall-McMillen Co., Inc., 925 F. Supp. 437 (N.D. Miss. 1996); Novak v. Mackinstosh, 919 F. Supp. 870 (D.S.D. 1996); Hansen v. Town of Irondequoit, 896 F. Supp. 110, 114 n.3 (W.D.N.Y. 1995); Wright v. Department of Veterans Affairs, 73 M.S.P.R. 453 (1997); Duncan v. U.S. Postal Service, 73 M.S.P.R. 86 (1997); Jasper v. U.S. Postal Service, 73 M.S.P.R. 367 (1997); Petersen v. Department of Interior, 71 M.S.P.R. 227(1996); H.R. REP. NO. 103-65, at 21 (1993), *reprinted in* 1994 U.S.C.C.A.N. 2449, 2457.

[9] *Wright*, 73 M.S.P.R. at 455; *Jasper*, 73 M.S.P.R. at 371.

[10] 38 U.S.C.A. §§ 4321-22, 4326. *See also* 5 C.F.R. § 353.210.

[11] 38 U.S.C.A. § 4322(e).

[12] *Id.* § 4324 (a)(1).

[13] *Id.* § 4324 (a)(2). *See also* 5 C.F.R. § 353.210.

have been turned down by the OSC for representation for "lack of merit," or have not requested representation by the OSC.[14] There is no requirement that the employee exhaust all of his remedies; thus, investigation by the VETS and representation by the OSC are not prerequisites to filing a complaint with the MSPB.[15] Currently, there are also no time limits for filing a USERRA complaint with the MSPB. Administrative rules have not been published yet, and the USERRA provides no MSPB filing time limits.[16] Congress has explicitly stated that the USERRA protections and rights are to be "broadly construed and strictly enforced."[17]

The USERRA establishes a new area of jurisdiction for the MSPB. The Board has the authority to hear military reemployment and discrimination cases involving federal employees who normally would not have a jurisdictional right to present a case before the Board (for example, temporary and probationary employees).[18] In light of the expansion of the MSPB's jurisdiction, the USERRA requires the Secretary of Defense to inform federal employees and agency managers of the rights, benefits, and obligations created by the USERRA.[19] Furthermore, Congress has designated the federal government as a "model employer" under the USERRA.[20]

If the MSPB determines that a federal agency violated the USERRA, the MSPB "shall enter an order requiring the agency or employee to comply [with the USERRA] and to compensate such person for any loss of wages or benefits suffered by such person by reason of such lack of compliance."[21] If the employee chose to employ private

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[14] 38 U.S.C.A. § 4324 (b)-(c)(1). *See also* 5 C.F.R. § 353.211.

[15] Petersen v. Department of Interior, 71 M.S.P.R. 227, 233 (1996).

[16] *See, e.g.,* Duncan v. U.S. Postal Service, 73 M.S.P.R. 86 (1997) (eight months between last request for reemployment to agency and MSPB filing); Jasper v. U.S. Postal Service, 73 M.S.P.R. 367 (1997) (two and one-half months between separation and MSPB filing); Wright v. Department of Veterans Affairs, 73 M.S.P.R. 453 (1997) (less than three months between separation and MSPB filing); *Petersen*, 71 M.S.P.R. at 227 (one month between last request to agency for reemployment and MSPB filing). As of this date, the MSPB has not promulgated regulations regarding USERRA appeals submitted to the Board under its appellate jurisdiction, except as to attorney fees. The Board has the authority to initiate such regulations under its enabling legislation (5 U.S.C. § 1204(h)) and under the USERRA (38 U.S.C.A. § 4331(b)(2)(A)). Agency counsel may be able to argue the equitable defense of laches in extremely untimely cases. *See* Jordan v. Kenton County Board of Education, No. 95-6569, 1996 U.S. App. LEXIS 25304, at *4 (6th Cir. Sept. 6, 1996) (holding that laches barred reemployment rights claim in case of ten-year delay); Farries v. Stanadyne/Chicago Division, 832 F.2d 374, 380-82 (7th Cir. 1987) (holding that laches barred reemployment rights claim in case of nine-year delay).

[17] *Petersen*, 71 M.S.P.R. at 236. H.R. REP. NO. 103-65, pt. 1, at 21 (1993), *reprinted in* 1994 U.S.C.C.A.N. 2454, 2456.

[18] *See supra* text accompanying note 45.

[19] 38 U.S.C.A. § 4333 (West 1996). *See also* 5 C.F.R. § 353.104 (1997) (Federal agencies must notify employees of their rights and obligations under the USERRA.).

[20] 38 U.S.C.A. § 4301(b).

[21] *Id.* § 4324(c).

counsel to represent him in the matter before the MSPB and wins, the attorney may also petition the MSPB for reasonable attorney fees, expert witness fees, and "other litigation expenses."[22] If the agency prevails, the federal employee, or the OSC (if the OSC represented the worker before the Board), may appeal the decision to the United States Federal Circuit Court of Appeals.[23] The USERRA does not allow the employer agency to appeal an adverse MSPB decision regarding USERRA rights.[24]

The case of *Petersen v. Department of the Interior* best illustrates the USERRA's impact on federal employees. The plaintiff asserted that he was unfairly discriminated against by the Department of the Interior because of his disabled Vietnam veteran status.[25] He alleged that he was removed from his prestigious park ranger law enforcement position to an office desk job because of the antimilitary attitude of his superiors; that he was subjected to a "hostile work environment" by his coworkers and supervisors; and that he was regularly called names such as "psycho," "babykiller," and "platehead," despite his complaints to his superiors to stop such comments.[26] The MSPB found that Mr. Petersen had provided sufficient factual allegations to raise the issue that he was denied a "benefit of employment" when the agency removed his law enforcement status and that the broad antimilitary discrimination language of the USERRA provided sufficient basis to allow allegations of a hostile work environment.[27]

In the other three recent cases,[28] the MSPB held that it had expanded jurisdiction under the USERRA to hear prior military service discrimination cases, including those involving probationary federal employees. All three of the cases were remanded to hearing officers to further develop the factual basis of the plaintiffs' claims. The OSC did not represent the plaintiffs in any of the four reported cases.[29]

The USERRA adds another means for federal employees to challenge adverse agency personnel decisions. Federal labor counsel and legal assistance attorneys who advise reserve members should take note of this new and potentially powerful statute which protects the rights of federal employee citizen- soldiers to employment,

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[22] Attorney Fee Rules-MSPB, 62 Fed. Reg. 17,045 (1997) (to be codified at 5 C.F.R. §§ 1201.202(a)(7), 2301.203).

[23] 38 U.S.C.A. § 4324(d).

[24] *Id.*

[25] Petersen v. Department of Interior, 71 M.S.P.R. 227 (1996).

[26] *Id.* at 235.

[27] *Id.* at 236.

[28] Wright v. Department of Veterans Affairs, 73 M.S.P.R. 453 (1997); Jasper v. U.S. Postal Service, 73 M.S.P.R. 367 (1997); Duncan v. U.S. Postal Service, 73 M.S.P.R. 86 (1997).

[29] The OSC, although granted regulatory authority to draft regulations regarding USERRA representation of federal employees, has not promulgated any regulations at this time and has not represented any federal employee in a reported case before the MSPB or the Federal Circuit. *See* 38 U.S.C.A. § 4331(b)(2)(B).

reinstatement, promotion, and employee benefits. The number of MSPB cases in this area is very likely to grow rapidly as reserve soldiers, sailors, and airmen are called more often to mobilize and to leave their federal employment[30] for temporary periods of active duty and as federal employee reservists become more aware of their USERRA rights. Labor counselors should also look for new USERRA regulations which will be promulgated by the Office of Personnel Management, the MSPB, and the OSC.

[30] As of 1997, one out of every eight Reserve Component members was a federal employee. Also, 11.6% of the DOD civilian workforce are reservists. John Pulley, *A Role in Reserve*, FED. TIMES, Mar. 31, 1997, at 1, 12, 15-24.

B. USERRA Note*

Merit Systems Protection Board Develops Regulations for USERRA Claims by Federal Employees

On 22 December 1997, the Merit Systems Protection Board (MSPB) promulgated interim procedural regulations[31] for claims by federal employees that their agencies or the Office of Personnel Management did not comply with the Uniformed Services Employment and Reemployment Rights Act (USERRA).[32] Under the interim regulations, all USERRA actions brought before the MSPB will be processed under the board's appellate jurisdiction procedures. Past board actions involving government employee restoration after military duty were handled under the board's appellate procedures, and the MSPB has determined that the USERRA does not require the board to change this practice.[33]

The interim regulations also establish time limits for filing USERRA complaints with the MSPB.[34] All federal employees are given a minimum of six months (180 days) from the date of an alleged USERRA violation to file a complaint directly to the MSPB.[35] "If a person seeks assistance from DOL [the Department of Labor] under 38 U.S.C. § 4321 but does not file a formal complaint under 38 U.S.C. § 4322(a), he or she may subsequently file an appeal with [the] MSPB at any time during the 180-day period."[36] If a federal employee files a formal complaint with his agency and the DOL investigates, is unable to resolve the issue, and so notifies the employee in writing, the employee may choose to file directly with the Board within the 180-day limit or within thirty days of receiving the DOL non- resolution notice, whichever is later.[37]

*Reprinted from Lieutenant Colonel Paul Conrad, *Merit Systems Protection Board Develops Regulations for USERRA Claims by Federal Employees*, ARMY LAW., Feb. 1998, at 33.

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[31] *See* Merit Systems Protection Board Practices and Procedures, 62 Fed. Reg. 66,813 (1997) (to be codified at 5 C.F.R. pt. 1201).

[32] Pub. L. No. 103-353, 108 Stat. 3150 (1994), *codified at* 38 U.S.C. §§ 4301-33 (1994).

[33] 62 Fed. Reg. at 66,813. The original jurisdiction procedures for the Office of Special Counsel when processing cases before the MSPB, found at 5 C.F.R. part 1201, subpart D, do not apply to USERRA cases. 5 C.F.R. § 1201.3 (1997).

[34] 62 Fed. Reg. at 66,814. These regulations address the lack of a statute of limitations in the USERRA and the problems raised because the MSPB did not set a time limit on considering USERRA discrimination and job restoration claims. *See* Petersen v. Department of Interior, 71 M.S.P.R. 227, 233 (1996); Jasper v. U.S. Postal Serv., 73 M.S.P.R. 367, 370 (1997).

[35] 62 Fed. Reg. at 66,814.

[36] *Id.* (to be codified at 5 C.F.R. §§ 1201.22(b)(2)(i), 1201.22(b)(2)(ii)).

[37] *Id.* (to be codified at 5 C.F.R. § 1201.22(b)(2) (iii)). A copy of the DOL notification must be filed with the appeal to get the thirty-day extension. *Id.*

The DOL can also refer complaints to the Office of Special Counsel (OSC). [38] If, after investigation, the DOL refers a complaint to the OSC and the OSC notifies the employee that the OSC "will not represent the person before [the] MSPB, [the employee] may subsequently file an appeal with [the] MSPB within 30 days after receipt of the notification from the special counsel or within 180 days of the alleged violation, whichever is later."[39] If the OSC agrees to represent the employee, the MSPB will not set a time limit for filing.[40] The board's rationale is that the special counsel should have time to secure voluntary agency compliance before filing with the MSPB.[41] The board assumes that the OSC should give the agency one last chance to resolve issues after refusing to do so with DOL investigators.

The MSPB interim regulations guarantee federal employees at least six months from the time of an alleged USERRA violation to file an appeal with the MSPB. If a person files a formal complaint with the DOL or seeks OSC representation, the time limit for filing may extend beyond six months. The new regulations encourage federal employees to use the free services of the DOL and the OSC to resolve USERRA complaints prior to filing a formal complaint with the MSPB. Lieutenant Colonel Conrad.

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[38] *See* 38 U.S.C.A. § 4322(a) (West 1997).

[39] 62 Fed. Reg. at 66,814 (to be codified at 5 C.F.R. § 1201.22(b)(2) (iv)). A copy of the OSC "no merit" notice must be filed with the appeal to get the thirty-day extension. *Id.*

[40] *Id.*

[41] *Id.*

C. OPM News Release (1995): Benefits For Federal Employee Reservists Outlined

NEWS RELEASE

FOR IMMEDIATE RELEASE
December 28, 1995

CONTACT: Sharon J. Wells
(202) 606-1800, fax: 606-2264

BENEFITS FOR FEDERAL EMPLOYEE RESERVISTS OUTLINED

Washington, D.C.--Office of Personnel Management Director Jim King yesterday issued a notice to heads of Executive departments and agencies providing a summary of the rights and benefits of those federal employees who, as military reservists, are being called to assist in the international efforts in former Yugoslavia. This mobilization is called "Operation Joint Endeavor."

"The Federal Government is by far the largest single employer of members of the Armed Forces Reserves, and we as Federal employees are proud of the dedication and commitment of these fellow workers in a time of international crisis," said Director King.

The package contained specifics on the rights and benefits of federal civilian employees who perform active military duty including information on:

- Employee Assistance Programs (EAP's);
- pay;
- military leave;
- annual and sick leave;
- lump-sum leave payments;
- health benefits;
- life insurance;
- retirement; and,
- return to civilian duty.

On the last point, an employee on military duty is guaranteed the right to return to the position he or she would have held but for the military duty.

"Our first obligation as an employer is to make sure that those friends and colleagues who perform active military duty are able to leave their employment temporarily with the knowledge that their affairs are in order and their rights protected," Jim King continued.

Agencies were urged to share the information with all affected employees as soon as possible.

Office of Personnel Management
Theodore Roosevelt Building
1900 E. Street, NW
Room 5F12
Washington, D.C. 20415-0001

UNITED STATES
OFFICE OF PERSONNEL MANAGEMENT
WASHINGTON, D.C. 20415

OFFICE OF THE DIRECTOR

MEMORANDUM FOR HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES
FROM: JAMES B. KING, DIRECTOR

SUBJECT: Operation Joint Endeavor

Pursuant to section 12304 of title 10, United States Code, and Executive Order l2982 of December 8, 1995, the Secretary of Defense has delegated to the Secretaries of the Military Departments the authority to order to active duty Selected Reserve units and individual members not assigned to units for a period of up to 270 days to assist in the international efforts in former Yugoslavia. This mobilization is called "Operation Joint Endeavor."

The Federal Government is by far the largest single employer of members o£ the Armed Forces Reserves, and we as Federal employees are proud of the dedication and commitment of these fellow workers in a time of international crisis. Our first obligation as an employer is to make sure that those friends and colleagues who perform active military duty are able to leave their employment temporarily with the knowledge that their affairs are in order and their rights protected. Federal law provides many important rights and benefits for Federal employees who perform active military duty. An overview of these rights and benefits, including changes made necessary by the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), is provided in attachment 1. I urge agencies to share this information with all affected employees as soon as possible.

USERRA generally requires an agency to place an employee entering the military on leave without pay unless the employee requests to be separated. Employees may also choose to be placed on military leave or paid leave, as appropriate. In any event, an employee entering on military duty is guaranteed the right to return to the position he or she would have held but for the military duty.

Finally attachment 2 reminds agencies of their authority and obligation to provide certain premium pay benefits to civilian employees who perform emergency work in support of Operation Joint Endeavor.

Attachments

Attachment 1

EMPLOYEE RIGHTS AND BENEFITS OF FEDERAL CIVILIAN EMPLOYEES WHO PERFORM ACTIVE MILITARY DUTY

Civilian Federal employees who are members of the Uniformed Services and who are called to active duty (or volunteer for active duty) are entitled to the following rights and benefits:

1. EMPLOYEE ASSISTANCE PROGRAMS(EAPs). Employee Assistance Programs can be very helpful to employees and their families in coping with the stress and disruption associated with a call to active military duty. EAP's provide short-term counseling and referral services to help with financial, emotional, and dependent care problems. These services are available to employees who have been called to active military duty (or who volunteer for such duty) and to employees who are family members of those who are performing active military duty. In addition, many EAP's offer services to family members of employees.

2. PAY. Employees performing active military duty will receive compensation from the Armed Forces in accordance with the terms and conditions of their military enlistment or commission. They will now receive any compensation from their civilian employing agency unless they elect to use military leave, annual leave, or sick leave as described in paragraphs 3 and 4 below. As usual, agencies should continue the payment of annual premium pay for administratively uncontrollable overtime (AUO) work, availability pay for criminal investigators, regularly scheduled standby duty, or Sunday premium pay (when Sunday is part of the employee's regularly scheduled non-overtime civilian tour of duty) on days of military leave, annual leave, or sick leave.

3. MILITARY LEAVE. Employees who perform active military duty may request the use of paid military leave, as specified in 5 U.S C. 6323(a). Under the law, an eligible full-time employee accrues 15 calendar days of military leave each fiscal year, and any unused military leave at the end of the fiscal year (up to 15 calendar days) is carried forward for use in addition to the 15 days credited at the beginning of the new fiscal year. Part-time career employees accrue military leave on a prorated basis. Full-time employees may have up to 30 calendar days of military leave for use during a fiscal year. However, an employee who has more than 15 calendar days of unused military leave must use the excess amount of leave before the end of the fiscal year in order to avoid forfeiture. Employees who elect to use military leave will receive full compensation from their civilian position for each workday charged to military leave, in addition to their military pay for the same period.

Employees who perform active military duty in support of Operation Joint Endeavor may not be granted an additional 22 days of military leave under 5 U.S.C. 6323 (b) because that type of military leave is for the purpose of providing military aid to assist domestic civilian authorities to enforce the law or protect life and property.

4. ANNUAL AND SICK LEAVE. Employees who perform active military duty may request the use of accrued and accumulated annual leave to their credit (under 5 U.S C. 6303 and 6304). and such requests must be granted by the agency. Requests for sick leave (under 5 U.S.C. 6307) may be granted if appropriate under the normal requirements for such leave. In addition, requests for advanced annual or sick leave may be granted at the agency's discretion. Employees who use annual leave or sick leave will receive full compensation from their civilian position for all hours charged to annual or sick leave in addition to their military pay for the same period. Generally, employees do not earn annual or sick leave while in an extended nonpay status (e.g., LWOP for 2 weeks (80 hours) or more for most full-time employees)

5. LUMP-SUM PAYMENTS. Employees who enter into active military duty may choose (1) to have their annual leave remain to their credit until they return to their civilian position, or (2) receive a lump-sum payment for all accrued and accumulated annual leave. There is no requirement to separate from the civilian position in order to receive a lump-sum leave payment under 5 U.S.C. 5552.

6. HEALTH BENEFITS. Individuals performing active military duty under orders specifying a period of more than 30 days are provided medical and dental services, and their dependents are covered by care within an active military medical facility or the Civilian Health and Medical Program of the Uniformed Services (CHAMPUS). If an employee covered by the Federal Employees Health Benefits Program (FEHBP) is separated or placed in an LWOP status to perform military service, his or her health benefits enrollment continues for up to 18 months, unless elects in writing to have the enrollment terminated. If the FEHBP enrollment continues, the employee is responsible for paying the usual enrollee share of the premium for the first 12 months of absence for military duty and 102 percent o£ the full premium (Government and enrollee shares) for the final 6 months of continued coverage. However, employees may incur a debt during the first 12 months of such absence, rather than paying concurrently.
Termination. If an employee elects in writing to have the FEHBP enrollment terminated or if the enrollment automatically terminates after 18 months of separation or LWOP related to military duty, the employee and the covered family members have a 31-day temporary extension of coverage to convert to a non-group policy. These employees are not eligible for temporary continuation of coverage (TCC) at the end of the 18-month period of continued FEHEP coverage.

7. LIFE INSURANCE. If an employee is separated or placed in an LWOP status for reasons related to military service, his or her Federal Employees' Group Life Insurance (both basic and all forms of optional coverage) continues for up to 12 months at no cost to the employee. If the life insurance coverage is terminated after 12 months of such absence, the employee has a 31-day temporary extension of coverage for conversion to a non-group policy.

8. RETIREMENT. An employee who is placed in an LWOP status while performing active military duty continues to be covered by the retirement law--i.e., the Civil Service Retirement System (CSRS) or the Federal Employees Retirement System (FERS) Death benefits will be paid as if he or she were still in the civilian position. If the employee becomes disabled for his or her civilian position during the LWOP and has the minimum amount of civilian service necessary for title to disability benefits (5 years for CSRS, 18 months for FERS), the employee will become entitled to disability benefits under the retirement law. Upon eventual retirement from civilian service, the period of military service is creditable under either CSRS or FERS, subject to the normal rules for crediting military service.

If an employee separates to enter active military duty, he or she generally will receive retirement credit for the period of separation when the employee exercises restoration rights to his or her civilian position. If the separated employee does not exercise the restoration right, but later re-enters Federal civilian service, the military service may be credited under the retirement system, subject to the normal rules governing credit for military service. However, if an employee covered by CSRS is separated to enter active military duty during a period of war or national emergency as declared by Congress or proclaimed by the President, the employee is deemed not to be separated from his or her civilian position for retirement purposes, unless the employee applies for and receives a refund of his or her retirement deductions.

Thrift Savings Plan. For purposes of the Thrift Savings Plan (TSP), no contributions can be made, either by the agency or the employee, for any time in an LWOP status or for a period of separation. However, if employees are subsequently reemployed in, or restored to, a position covered by FERS or CSRS pursuant to 38 U.S C. chapter 43, they may make up missed contributions. FERS employees are entitled to receive retroactive Agency Automatic (1 percent) Contributions and, if they make up their own contributions, retroactive Agency Matching Contributions.

Also, if FERS employees separate and their Agency Automatic (1 percent) Contributions and associated earnings are forfeited because they did not meet the TSP vesting requirement, the employees are entitled to have these funds restored to their accounts after they are reemployed. In addition, if employees separate and their accounts are disbursed as automatic cashouts, the employees may return to the TSP an amount equal to the full amount of the payment after they are reemployed.

For more information, see TSP Bulletins 95-13, Implementation of the Uniformed Services Employment and Reemployment Rights Act of l994, and 95-20, Interim Regulations and Fact Sheet on Thrift Savings Plan Benefits Resulting from the Uniformed Services Employment and Reemployment Rights Act of 1994.

9. RETURN TO CIVILIAN DUTY. An employee who enters active military duty (voluntarily or involuntarily) from any position, including a temporary position, has full job protection, provided he or she applies for reemployment within the following time limits:

(A) Employees who served less than 31 days must report back to work at the beginning of the next scheduled workday following their release from service and the expiration of 8 hours after a time for safe transportation back to the employee's residence.

(B) Employees who served more than 30 days, but less than 181 days, must apply for reemployment within 14 days of release by the military.

(C) Employees who served more than 180 days have 90 days to apply for reemployment.

Employees who served less than 91 days must be restored to the position for which qualified that they would have attained had their employment not been interrupted. Employees who served more than 90 days have essentially the same rights, except that the agency has the option of placing the employee in a position for which qualified of like seniority, status, and pay.

Upon return or restoration, an employee generally is entitled to be treated as though he or she had never left for purposes of rights and benefits based upon length of service. This means that the employee must be considered for career ladder promotions, and the time spent in the military will be credited for seniority, successive within-grade increases, probation, career tenure, annual leave accrual rate, and severance pay. An employee who was on a temporary appointment serves out the remaining time, if any, left on the appointment. (The military activation period does not extend the civilian appointment.)

An employee performing active military duty is protected from reduction in force (RIF) and may not be discharged from employment for a period of 1 year following separation (6 months in the case of a Reservist called to active duty under 10 U.S.C. l2304 for more than 30 days but less than 181 days or ordered to an initial period of active duty for training of not less than 12 consecutive weeks), except for poor performance or conduct or for suitability reasons.

NOTE: Employees in the intelligence agencies have substantially the same rights. but are covered under agency regulations rather than the Office of Personnel Management's regulations and have different appeal rights.

10. APPEAL RIGHTS. An employee or former employee of an agency in the executive branch (including the U.S. Postal Service) who is entitled to restoration in connection with military duty may appeal an agency's failure to properly carry out the law directly to the Merit Systems Protection Board (MSPB), or the employee may first submit a complaint to the Department of Labor, which will attempt to resolve it. If resolution is not possible, the Department may present the case to the Office of the Special Counsel, which may represent the employee in an appeal to the MSBP. Appeals to the Board must be submitted within 30 calendar days after the effective date of the action being appealed.

11. DOCUMENTING PERSONNEL ACTIONS.

Leave without Pay. LWOP must be documented on an SF 50, Notification of Personnel Action, with nature of action 473/LWOP-US and legal authorities Q3K/5 CFR 353 and ZJU/Operation Joint Endeavor. (Note: ZJU is a new legal authority that has been established to enable OPM and agencies to identify reservists who are involved in the international effort under Operation Joint Endeavor.) These same two authorities must also be used on the 292/RTD action when the reservist returns to civilian employment.

Health Benefits and Life Insurance. For those reservists with health benefits coverage while absent for reasons related to military duty, enter in block 45 of the SF 5 0 remark B66:

"Health benefits coverage will continue for 18 months unless you elect to cancel coverage You are liable for the employee share of the premiums for the first 365 days and for 102% of the full subscription charge after 365 days. Payment for coverage after 365 days must be

made on a current basis; payment for the first 365 days may be made while you are absent or when you return."

For those reservists with Federal Employees' Group Life Insurance (FEGLI) coverage, enter in block 45 of the SF 50 remark B39:

"FEGLI coverage continues for up to 12 months in a nonpay status."

Separations. If the reservist requests separation rather than LWOP, the separation must be documented with nature of action 353/Separation-US and legal authorities Q3K/5 CFR 353 and ZJU/Operation Joint Endeavor. Follow the instructions in Chapter 9 or 11 (as appropriate) of *The Guide to Processing Personnel Actions*, to document the reservist's restoration upon completion of his or her military service.

12. CONTACTS. For further information on employment rights and benefits of civilian Federal employees who perform active military duty, agencies should contact the following offices:

--For information on pay, military leave, and annual and sick leave, contact OPM's Compensation Administration Division, (202) 606-2858.

--For information on health benefits, life insurance, and retirement, contact the Insurance Officer or Retirement Counselor of your agency. Retirement Counselors may contact OPM's Agency Advisory Services Division, (202) 606-0788. Insurance Officers may contact the Office of Insurance Programs, Insurance Policy and Information Division, (202) 606-0191.

--For information on the Thrift Savings Plan, agency headquarters personnel offices may contact the Federal Retirement Thrift Investment Board, (202) 523-7507 Field installations should contact their headquarters TSP Coordinator for guidance.

--For information on return to civilian duty and appeal rights, contact OPM's Staffing Reinvention Office, (202) 606-0830.

--For information on documenting actions related to entering active military duty, contact OPM's Personnel Records and Systems Division. (202) 606-4415.

--For information on labor-management relations issues, contact OPM's Labor-Management Relations Division, (202) 606-2930.

Attachment 2

PREMIUM PAY FOR FEDERAL CIVILIAN EMPLOYEES WHO PERFORM EMERGENCY WORK IN SUPPORT OF OPERATION JOINT ENDEAVOR

The purpose of this attachment is to provide information about premium pay for civilian employees who perform emergency work in connection with "Operation Joint Endeavor."

Agencies are reminded of their authority under the law (5 U.S.C. 5547(b)) and OPM regulations (5 CFR 550.106) to make exceptions to the bi-weekly maximum earnings limitation. (Please note that overtime pay under the Fair Labor Standards Act of 1938, as amended, does not count toward this limitation) When the head of an agency or his or her designee determines that an emergency posing a direct threat to life or property exists, an employee who is performing work in connection With the emergency must be paid premium pay under the annual limitation of GS-15, step 10, rather than the GS-15, step 10, biweekly limitation. However, law enforcement officers (LEO's) are covered by the higher biweekly limitation in 5 U.S.C. 5547(c) and are not covered by the authority to apply the annual limitation during emergencies.

OPM encourages agencies to exercise their authority in the case of employees (other than LEO's) who perform emergency work in connection with Operation Joint Endeavor. Agency heads are required to make a determination as soon as practicable and to make entitlement to premium pay under the annual limitation effective as of the first day of the pay period in which the emergency began. Questions may be referred to OPM' s Compensation Administration Division on (202) 606-2858.

D. OPM Regulations - Restoration to Duty from Uniformed Service, 5 C.F.R. Parts 353, 870, and 890

[Federal Register: September 1, 1995 (Volume 60, Number 170)]
[Rules and Regulations]
[Page 45650-45658]
From the Federal Register Online via GPO Access [wais.access.gpo.gov]
[DOCID:fr01se95-2]

OFFICE OF PERSONNEL MANAGEMENT
5 CFR Parts 353, 870, and 890

RIN 3206-AG02

Restoration to Duty From Uniformed Service or Compensable Injury
AGENCY: Office of Personnel Management.
ACTION: Interim regulations with request for written comments.

SUMMARY: The Office of Personnel Management (OPM) is issuing interim regulations on the restoration rights of Federal employees who leave their employment to perform duty with the uniformed services. These regulations implement the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), Public Law 103-353, which was enacted into law on October 13, 1994. The new law revises and restructures the Veteran's Reemployment Rights law (codified in chapter 43 of title 38, United States Code), which governs the restoration rights of employees who perform military duty. USERRA clarifies, expands, and strengthens the rights and benefits of applicants and employees, alters the appeal procedures available to Federal employees, and, for the first time, provides Federal employees Department of Labor assistance in processing claims. USERRA also requires OPM to place certain returning employees when their former agencies determine that it is ``impossible or unreasonable'' to reemploy them.

Although the sections have been renumbered, and in some cases renamed, there is no substantive change in the regulations governing the restoration rights of employees who sustain compensable injuries. However, in Sec. 353.301(a), the word ``may'' has been changed to ``must'' to make clear that an agency must place an employee who fully recovers from a compensable injury within 1 year, even if it means placing the person in a different location. Also, Sec. 353.301(d) makes clear that partially recovered employees are entitled to restoration rights only in the local commuting area, not agencywide. (This provision was inadvertently omitted from the final regulations published in the Federal Register on January 13, 1995, that

incorporated into the regulations various staffing provisions previously found only in the Federal Personnel Manual.)

These interim regulations also implement provisions that expand on the coverage of the affected employees under the Federal Employees' Group Life Insurance (FEGLI) Program and the Federal Employees Health Benefits (FEHB) Program. Both the FEGLI and the FEHB regulations are amended to show that employees who separate to perform military service under the provisions of this Act are considered to be employees in nonpay status. The FEHB regulations are further amended to show that FEHB coverage may continue for up to 18 months after the employee enters military service.

DATES: Effective: September 1, 1995. Comments must be received on or before November 30, 1995.

ADDRESS: Send or deliver comments to: Leonard R. Klein, Associate Director for Employment, U.S. Office of Personnel Management, 1900 E Street, NW., Washington, DC 20415.

FOR FURTHER INFORMATION CONTACT: For part 353: Raleigh M. Neville, (202) 606-

[[Page 45651]]
0830. For parts 870 and 890: Margaret Sears (202) 606-0004.

SUPPLEMENTARY INFORMATION: The job rights of employees who leave their employment to perform military duty have been protected under the Veterans' Reemployment Rights Act (chapter 43 of title 38, United States Code) since 1940. However, this law had become a confusing patchwork of statutory amendments, which, over the years, had been interpreted by over one thousand different (and sometimes conflicting) court decisions. It became increasingly difficult for employers and employees to understand their respective rights and responsibilities.

Thus, on October 13, 1994, President Clinton signed into law the new Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), Pub. L. 103-353. The new law completely rewrites the existing provisions of title 38, United States Code, governing the rights of employees who perform military duty and makes many substantive changes that will affect employees, agencies, and OPM.

Among the important changes made by the new law are the following:

--Coverage is broader. USERRA covers persons who perform duty in the ``uniformed services.'' (Under the old law, coverage was limited to the ``armed forces.'') It also covers all employees except those serving in positions where there is ``no reasonable expectation that employment will continue indefinitely or for a reasonable period.'' (The old law specifically excluded temporary service.) The interim

regulations provide that all employees are covered. However, an employee on a time-limited appointment who enters uniformed service serves out any remaining unexpired portion of the appointment upon his or her return.

--Intelligence agencies are treated differently under the law. Although employees in these agencies (CIA, FBI, NSA, etc.) have substantially the same rights as other Federal employees under the law, they are not subject to OPM's regulations and do not have the same appeal rights as other employees.

--There is a 5-year cumulative total on uniformed service. For the first time, the law makes clear that it is intended to protect ``noncareer'' service and establishes a 5-year cumulative total on uniformed service. (Under the interpretations applied to the old law, a Federal employee could be absent on military duty for up to 4 years at a time and there was no cumulative limit.) However, there are important exceptions to the 5-year limit. These include initial enlistments lasting more than 5 years, periodic training duty, and involuntary active duty extensions and recalls. The new law expressly provides that an employee's job protections do not depend on the timing, frequency, or duration of uniformed service.

--Enhanced protections for disabled veterans. Agencies must make reasonable efforts to accommodate the disability. Servicemembers convalescing from injuries received during service now have up to 2 years to return to their jobs (as opposed to 1 year under the old law).

--New skills training required for some veterans. As under the old law, USERRA provides that returning servicemembers be reemployed in the job they would have attained had they not been absent for military service (the longstanding ``escalator'' principle). However, the new law also requires that reasonable efforts be made (such as training or retraining) that would enable returning servicemembers to refresh or upgrade their skills so that they might qualify for reemployment.

--The position to which the person has restoration rights is now determined by how long the employee has been gone. If the period of military duty is less than 91 days, the employee is entitled to the position he or she would have attained had the absence not occurred. If the military duty lasts more than 90 days, the person's entitlement is essentially the same except that he or she may be placed in an equivalent position. (Under the old law, restoration rights were based largely on the kind of military duty performed, for example, active duty, active duty for training, inactive duty, etc.)

--Similarly, the length of time an employee has to report back for duty following uniformed service is now determined by how long he or she has been gone. If the absence was for less than 31 days, the employee must return at the beginning of the next regularly scheduled work period on the first full day after release from service, taking account safe travel home plus an 8 hour rest period. For service of

more than 30 days but less than 181 days, the employee must submit an application for restoration within 14 days of release from service. For service of more than 180 days, an application for restoration must be submitted within 90 days of release from service. Failure to return within these time limits does not mean that restoration rights are forfeited; it only means the agency can take whatever disciplinary action it would normally take for unexcused absences. (Under the old law, the length of time an employee had to apply for restoration was determined by the type of military duty performed.)

--Notice requirement. For the first time, the law requires that servicemembers provide advance written or verbal notice to their agencies for all military service. (Under the old law, notice was required only for training duty.)

--Appeal rights have changed. Federal employees and applicants with complaints under the new law may now seek assistance from the Department of Labor's Veterans' Employment and Training Service (VETS). VETS will attempt to informally resolve any disputes with the agency over military duty. If informal resolution fails, Labor will refer the case to the Office of the Special Counsel which is authorized to represent the employee before the Merit Systems Protection Board. Alternatively, an employee may still elect to appeal directly to MSPB and by-pass Labor and the Special Counsel.

--Special placement provisions are mandated for certain returning employees when their former agencies are unable to reemploy them. The new law requires OPM to place in the executive branch the following categories of employees when their former agencies determine that it is ``impossible or unreasonable'' to reemploy them:

(1) Executive branch employees whose agencies no longer exist and the functions have not been transferred, or it is otherwise impossible or unreasonable to reemploy the person;

(2) Legislative and judicial branch employees;

(3) National Guard technicians; and

(4) Employees of the intelligence agencies.

The interim regulations specify how this will be carried out.

--Status while absent. While on duty with the uniformed services, an employee is considered to be on a leave of absence (leave without pay) unless the employee elects to use other leave.

--Nondiscrimination. USERRA broadens the nondiscrimination provisions of the old law and expressly forbids any discrimination in employment or proportion because of uniformed service.

--Enhanced health and pension plan coverage. Employees performing military duty of more than 30 days may elect to continue their health benefit coverage for up to 18 months. Also under USERRA, to receive retirement credit for military service, employees under the Federal Employees Retirement System (FERS) are required to pay only what they would have paid had they not gone on military duty.

[[Page 45652]]
USERRA also expands retirement coverage to include all full-time National Guard duty if that duty interrupts creditable civilian service. and is followed by reemployment that occurs after August 1, 1990. (Only National Guard service performed for the U.S. was covered under the old law.)

Under 38 U.S.C. 4316, employee benefits, other than health benefits, continue for employees covered by this Act in the same way as they do for other employees who are on leave without pay. Employees who leave their jobs to enter the uniformed services are considered to be employees on leave without pay so long as they meet the requirements for reemployment under this Act. Under the Federal Employees' Group Life Insurance (FEGLI) Program, employees may continue their life insurance coverage for up to 12 months in nonpay status at no cost to the employee. Therefore, the interim regulations amend 5 CFR 870.502 to show that an employee who separates from Federal service to enter the uniformed services is considered to be an employee in nonpay status for so long as the employee remains eligible for benefits under 38 U.S.C. 4316. As a result, life insurance coverage continues for up to one year for employees who do not separate, but go on military furloughs (nonpay status). For those who actually separate from their Federal jobs to enter the uniformed services, life insurance coverage continues for up to 12 months or until a date that is 90 days after the service with the uniformed services ends, whichever is earlier.

Under 38 U.S.C. 4317, employees who are covered by an employers' group health plan and who enter the uniformed services may elect to continue their coverage for up to 18 months after the date the absence to serve in the uniformed services begins. If the service continues for more than 30 days, the employee can be charged up to 102 percent of the premium. The Federal Employees Health Benefits (FEHB) law provides for continued coverage for up to 12 months for employees in leave without pay status. FEHB regulations provide that these employees may pay their respective shares of the premium; however, an employee may choose to incur a debt and postpone payment until he or she returns to pay and duty status. The employing agency must pay the Government contribution on a current basis. Therefore, for the first 12-months, employees entitled to benefits under 38 U.S.C. 4317 are charged only the employee share of the premium.

The interim regulations amend Secs. 890.303 and 890.304 to provide that the enrollment of an employee who enters on military furlough (nonpay status) may continue an additional 6 months after the coverage would otherwise stop due to the expiration of 365 days in nonpay status if the employee's eligibility for benefits under 38 U.S.C. 4317 continues. The enrollment of an employee who separates to enter the uniformed services may continue for up to 18 months if the employee's

eligibility for benefits under 38 U.S.C. 4317 continues. (Eligibility for benefits under 38 U.S.C. 4317 ends the earlier of 18 months after the date the employee's absence due to service in the uniformed services began or 90 days after the service ends.) Employees on military furlough or in nonpay status to serve in the uniformed services on the date of enactment of Pub. L. 103-353, October 13, 1994, are also entitled to continued coverage under 38 U.S.C. 4317 for the balance of the 18-month period after their absence to enter the uniformed services began. An enrollment that had already terminated due to the expiration of 365 days in nonpay status may be reinstated for the balance of the 18-month period.

The interim regulations also amend 5 CFR 890.502(g) to provide that employees whose enrollment continues beyond 12 months in nonpay status because of their eligibility for benefits under 38 U.S.C. 4317 must pay 102 percent of the premium (the employee share plus the Government share, plus 2 percent of the total). In addition, the interim regulations amend the provision for waiving the employee share of the health benefits premium for employees who enter the uniformed services in support of Operations Desert Shield and/or Desert Storm by limiting its application to those who enter before the effective date of these interim regulations.

--Enhanced thrift savings plan coverage. The new law allows employees to make up contributions to the thrift savings plan missed because of military duty. Under the old law, employees who went on military duty were ineligible to make contributions to the thrift savings plan. (The Federal Retirement Thrift Investment Board is issuing regulations on this aspect of the law.)

--Effective date. The new law applies to restorations effected on or after December 12, 1994.

Waiver of Notice of Proposed Rulemaking

Pursuant to 5 U.S.C. 553(b)(3)(B), I find that good cause exists for waiving the general notice of proposed rulemaking. Specifically, the law which these regulations implement was enacted in October 1994 and became fully effective as of December 12, 1994.

Regulatory Flexibility Act

I certify that this regulation will not have a significant impact on a substantial number of small entities because it pertains only to Federal employees and agencies.

List of Subjects

5 CFR Part 353

Administrative practice and procedure, Government employees.
5 CFR Part 870

Administrative practice and procedure, Government employees, Hostages, Iraq, Kuwait, Lebanon, Life insurance, Retirement.

5 CFR Part 890

Administrative practice and procedure, Government employees, Health facilities, Health insurance, Health professions, Hostages, Iraq, Kuwait, Lebanon, Reporting and recordkeeping requirements, Retirement.

Office of Personnel Management,
James B. King,
Director.

Accordingly, OPM is amending parts 353, 870, and 890 as follows:

1. Part 353 is revised to read as follows:

PART 353--RESTORATION TO DUTY FROM UNIFORMED SERVICE OR COMPENSABLE INJURY

Subpart A--General Provisions

Sec.

Subpart B--Uniformed Service

[[Page 45653]]

Subpart C--Compensable Injury

Authority: 38 U.S.C. 4301 et. seq., and 5 U.S.C. 8151.

Subpart A--General Provisions

Sec. 353.101 Scope.

The rights and obligations of employees and agencies in connection with leaves of absence or restoration to duty following uniformed service under 38 U.S.C. 4301 et. seq., and restoration under 5 U.S.C. 8151 for employees who sustain compensable injuries, are subject to the provisions of this part. Subpart A covers those provisions that are common to both of the above groups of employees. Subpart B deals with provisions that apply just to uniformed service and subpart C covers provisions that pertain just to injured employees.

Sec. 353.102 Definitions.

In this part:

Agency means.

(1) With respect to restoration following a compensable injury, any department, independent establishment, agency, or corporation in the executive branch, including the U.S. Postal Service and the Postal Rate Commission, and any agency in the legislative or judicial branch; and

(2) With respect to uniformed service, an executive agency as defined in 5 U.S.C. 105 (other than an intelligence agency referred to in 5 U.S.C. 2302(a)(2)(C)(ii), including the U.S. Postal Service and Postal Rate Commission, a nonappropriated fund instrumentality of the United States, or a military department as defined in 5 U.S.C. 102. In the case of a National Guard technician employed under 32 U.S.C. 709,

the employing agency is the adjutant general of the State in which the technician is employed.

Fully recovered means compensation payments have been terminated on the basis that the employee is able to perform all the duties of the position he or she left or an equivalent one.

Injury means a compensable injury sustained under the provisions of 5 U.S.C. chapter 81, subchapter 1, and includes, in addition to accidental injury, a disease proximately caused by the employment.

Leave of absence means military leave, annual leave, without pay (LWOP), furlough, continuation of pay, or any combination of these.

Military leave means paid leave provided to Reservists and members of the National Guard under 5 U.S.C. 6323.

Notice means any written or verbal notification of an obligation or intention to perform service in the uniformed services provided to an agency by the employee performing the service or by the uniformed service in which the service is to be performed.

Partially recovered means an injured employee, though not ready to resume the full range of his or her regular duties, has recovered sufficiently to return to part-time or light duty or to another position with less demanding physical requirements. Ordinarily, it is expected that a partially recovered employee will fully recover eventually.

Physically disqualified means that:

(1)(i) For medical reasons the employee is unable to perform the duties of the position formerly held or an equivalent one, or

(ii) There is a medical reason to restrict the individual from some or all essential duties because of possible incapacitation (for example, a seizure) or because of risk of health impairment (such as further exposure to a toxic substance for an individual who has already shown the effects of such exposure).

(2) The condition is considered permanent with little likelihood for improvement or recovery.

Reasonable efforts in the case of actions required by an agency for a person returning from uniformed service means actions, including training, that do not place an undue hardship on the agency.

Service in the uniformed services means the performance of duty on a voluntary or involuntary basis in a uniformed service under competent authority and includes active duty, active duty for training, initial active duty for training, inactive duty training, full-time National Guard duty, and a period for which a person is absent from employment for the purpose of examination to determine fitness to perform such duty.

Status means the particular attributes of a specific position. This includes the rank or responsibility of the position, its duties, working conditions, pay, tenure, and seniority.

Undue hardship means actions taken by an agency requiring

significant difficulty or expense, when considered in light of--

(1) The nature and cost of actions needed under this part;

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

(3) The overall size of the agency with respect to the number of employees, the number, type, and location of its facilities and type of operations, including composition, structure, and functions of the work force.

Uniformed services means the Armed Forces, the Army National Guard and the Air National Guard when engaged in active duty for training, inactive duty training, or full-time National Guard duty, the Commissioned Corps of the Public Health Service, and any other category of persons designated by the President in time of war or emergency.

Sec. 353.103 Persons covered.

(a) The provisions of this part pertaining to service in the uniformed services cover each agency employee who enters into such service. However, an employee serving under a time-limited appointment completes any unexpired portion of his or her appointment upon return from uniformed service.

(b) The provisions of this part concerning employee injury cover a civil officer or employee in any branch of the Government of the United States, including an officer or employee of an instrumentally wholly owned by the United States, who was separated or furloughed from an appointment without time limitation, or from a temporary appointment pending establishment of a register (TAPER) as a result of a compensable injury; but do not include--

(1) A commissioned officer of the Regular Corps of the Public Health Service;

(2) A commissioned officer of the Reserve Corps of the Public Health Service on active duty; or

(3) A commissioned officer of the National Oceanic and Atmospheric Administration.

Sec. 353.104 Notification of rights and obligations.

When an agency separates, grants a leave of absence, restores or fails to restore an employee because of uniformed service or compensable injury, it shall notify the employee of his or her rights, obligations, and benefits relating to Government employment, including any appeal and grievance rights. However, regardless of notification,

an employee is still required to exercise due diligence in

[[Page 45654]]
ascertaining his or her rights, and to seek reemployment within the time limits provided by chapter 43 of title 38, United States Code, for restoration after uniformed service, or as soon as he or she is able after a compensable injury.

Sec. 353.105 Maintenance of records.

Each agency shall identify the position vacated by an employee who is injured or leaves to enter uniformed service. It shall also maintain the necessary records to ensure that all such employees are preserved the rights and benefits granted by law and this part.

Sec. 353.106 Personnel actions during employee's absence.

(a) An employee absent because of service in the uniformed services is to be carried on leave without pay unless the employee elects to use other leave or freely and knowingly provides written notice of intent not to return to a position of employment with the agency, in which case the employee can be separated. (Note: A separation under this provision affects only the employee's seniority while gone; it does not affect his or her restoration rights.)

(b) An employee absent because of compensable injury may be carried on leave without pay or separated unless the employee elects to use sick or annual leave.

(c) Agency promotion plans must provide a mechanism by which employees who are absent because of compensable injury or uniformed service can be considered for promotion.

Sec. 353.107 Service credit upon reemployment.

Upon reemployment, an employee absent because of uniformed service or compensable injury is generally entitled to be treated as though he or she had never left. This means that a person who is reemployed following uniformed service or full recovery from compensable injury receives credit for the entire period of the absence for purposes of rights and benefits based upon seniority and length of service, including within-grade increases, career tenure, completion of probation, leave rate accrual, and severance pay.

Sec. 353.108 Effect of performance and conduct on restoration rights.

The laws covered by this part do not permit an agency to circumvent the protections afforded by other laws to employees who face the involuntary loss of their positions. Thus, an employee may not be denied restoration rights because of poor performance or conduct that occurred prior to the employee's departure for compensable injury or uniformed service. However, separation for cause that is substantially unrelated to the injury or to the performance of uniformed service negates restoration rights. Additionally, if during the period of injury or uniformed service the employee's conduct is such that it would disqualify him or her for employment under OPM or agency regulations, restoration rights may be denied.

Sec. 353.109 Transfer of function to another agency.

If the function of an employee absent because of uniformed service or compensable injury is transferred to another agency, and if the employee would have been transferred with the function under part 351 of this chapter had he or she not been absent, the employee is entitled to be placed in a position in the gaining agency that is equivalent to the one he or she left. It shall also assume the obligation to restore the employee in accordance with law and this part.

Sec. 353.110 OPM placement assistance.

(a) Employee returning from uniformed service. (1) OPM will offer placement in the executive branch to the following categories of employees upon notification by the agency and application by the employee: (Such notification should be sent to the Associate Director for Employment, OPM, 1900 E Street, NW., Washington, DC 20415.)

(i) Executive branch employees (other than an employee of an intelligence agency) when OPM determines that:

(A) their agencies no longer exist and the functions have not been transferred, or;

(B) it is otherwise impossible or unreasonable for their former agencies to place them;

(ii) Legislative and judicial branch employees when their employers determine that it is impossible or unreasonable to reemploy them;

(iii) National Guard technicians when the Adjutant General of a State determines that it is impossible or unreasonable to reemploy them; and

(iv) Employees of the intelligence agencies (defined in 5 U.S.C. 2302(a)(2)(C)(ii)) when their agencies determine that it is impossible

or unreasonable to reemploy them.

(2) OPM will determine if a vacant position equivalent (in terms of pay, grade, and status) to the one time the individual left exists, for which the individual is qualified, in the commuting area in which he or she was employed immediately before entering the uniformed services. If such a vacancy exists, OPM will order the agency to place the individual. If no such position is available, the individual may elect to be placed in a lesser position in the commuting area, or OPM will attempt to place the individual in an equivalent position in another geographic location determined by OPM. If the individual declines an offer of equivalent employment, he or she has no further restoration rights.

(b) Employee returning from compensable injury. OPM will provide placement assistance to an employee with restoration rights in the executive, legislative, or judicial branches who cannot be placed in his or her former agency and who either has competitive status or is eligible to acquire it under 5 U.S.C. 3304(C). If the employee's agency is abolished and its functions are not transferred, or it is not possible for the employee to be restored in his or her former agency, OPM will provide placement assistance by enrolling the employee in OPM's Interagency Placement Program (or its successor) under part 330 of this chapter. This paragraph does not apply to an employee serving under a temporary appointment pending establishment of a register (TAPER).

Subpart B--Uniformed Service

Sec. 353.201 Introduction.

The Uniformed Services Employment and Reemployment Rights Act of 1994 revised and strengthened the existing Veterans' Reemployment Rights law, made the Department of Labor responsible for investigating employee complaints, required OPM to place certain returning employees in other agencies, established a separate restoration rights program for employees of the intelligence agencies, and altered the appeals rights process. The new law applies to persons exercising restoration rights on or after December 12, 1994.

Sec. 353.202 Discrimination and acts of reprisal prohibited.

A person who seeks or holds a position in the Executive branch may not be denied hiring, retention in employment, or any other incident or advantage of employment because of any application, membership, or service in the uniformed services. Furthermore, an agency may not take

any reprisal against an employee for taking any action to enforce a protection, assist or participate in an investigation, or exercise any right provided for under chapter 43 of title 38, United States Code.

[[Page 45655]]

Sec. 353.203 Length of service.

(a) Counting service after the effective date of USERRA (12/12/94). To be entitled to restoration rights under this part, cumulative service in the uniformed services while employed by the Federal Government may not exceed 5 years. However, the 5-year period does not include any service--

(1) That is required beyond 5 years to complete an initial period of obligated service;

(2) During which the individual was unable to obtain orders releasing him or her from service in the uniformed services before expiration of the 5-year period, and such inability was through no fault of the individual;

(3) Performed as required pursuant to 10 U.S.C. 10147, under 32 U.S.C. 502(a) or 503, or to fulfill additional training requirements determined and certified in writing by the Secretary of the military department concerned to be necessary for professional development or for completion of skill training or retraining;

(4) Performed by a member of a uniformed service who is:

(i) Ordered to or retained on active duty under sections 12301(a), 12301(g), 12302, 12304, 12305, or 688 of title 10, United States Code, or under 14 U.S.C. 331, 332, 359, 360, 367, or 712;

(ii) Ordered to or retrained on active duty (other than for training) under any provision of law during a war or during a national emergency declared by the President or the Congress;

(iii) Ordered to active duty (other than for training) in support, as determined by the Secretary of the military department concerned, of an operational mission for which personnel have been ordered to active duty under 10 U.S.C. 12304;

(iv) Ordered to active duty in support, as determined by the Secretary of the military department concerned, of a critical mission or requirement of the uniformed services, or

(iv) Called into Federal service as a member of the National Guard under chapter 15 or under section 12406 of title 10, United States Code.

(b) Counting service prior to the effective date of USERRA. In determining the 5-year total that may not be exceeded for purposes of exercising restoration rights, service performed prior to December 12,

1994, is considered only to the extent that it would have counted under the previous law (the Veterans' Reemployment Rights statute). For example, the service of a National Guard technician who entered on an Active Guard Reserve (AGR) tour under section 502(f) of title 32, United States Code, was not counted toward the 4-year time limit under the previous statute because it was specifically considered active duty for training. However, title 32, section 502(f) AGR service is not exempt from the cumulative time limits allowed under USERRA and service after the effective date counts under USERRA rules. Thus, if a technician was on a 32 U.S.C. 502(f) AGR tour on October 13, 1994, (the date USERRA was signed into law), but exercised restoration rights after December 11, 1994, (the date USERRA became fully effective), AGR service prior to December 12 would not count in computing the 5-year total, but all service beginning with that date would count.

(c) Nature of Reserve service and resolving conflicts. An employee who is a member of the Reserve or National Guard has a dual obligation--to the military and to his or her employer. Given the nature of the employee's service obligation, some conflict with job demands is often unavoidable and a good-faith effort on the part of both the employee and the agency is needed to minimize conflict and resolve differences. Some accommodation may be necessary by both parties. Most Reserve component members are required, as a minimum, to participate in drills for 2 days each month and in 2 weeks of active duty for training per year. But some members are required to participate in longer or more frequent training tours. USERRA makes it clear that the timing, frequency, duration, and nature of the duty performed is not an issue so long as the employee gave proper notice, and did not exceed the time limits specified. However, to the extent that the employee has influence upon the timing, frequency, or duration of such training or duty, he or she is expected to use that influence to minimize the burden upon the agency. The employee is expected to provide the agency with as much advance notice as possible whenever military duty or training will interfere with civilian work. When a conflict arises between the Reserve duty and the legitimate needs of the employer, the agency may contact appropriate military authorities to express concern. Where the request would require the employee to be absent from work for an extended period, during times of acute need, or when, in light of previous leaves, the requested leave is cumulatively burdensome, the agency may contact the military commander of the employee's military unit to determine if the military duty could be rescheduled or performed by another member. If the military authorities determine that the military duty cannot be rescheduled or cancelled, the agency is required to permit the employee to perform his or her military duty.

(d) Mobilization authority. By law, members of the Selected Reserve (a component of the Ready Reserve), can be called up under a

presidential order for purposes other than training for as long as 270 days. If the President declares a national emergency, the remainder of the Ready Reserve--the Individual Ready Reserve and the Inactive National Guard--may be called up. The Ready Reserve as a whole is subject to as much as 24 consecutive months of active duty in a national emergency declared by the President.

Sec. 353.204 Notice to employer.

To be entitled to restoration rights under this part, an employee (or an appropriate officer of the uniformed service in which service is to be performed) must give the employer advance written or verbal notice of the service except that no notice is required if it is precluded by military necessity or, under all relevant circumstances, the giving of notice is otherwise impossible or unreasonable.

Sec. 353.205 Return to duty and application for reemployment.

Periods allowed for return to duty are based on the length of time the person was performing service in the uniformed services, as follows:

(a) An employee whose uniformed service was for less than 31 days, or who was absent for the purpose of an examination to determine fitness for the uniformed services, is required to report back to work not later than the beginning of the first regularly scheduled work day on the first full calendar day following completion of the period of service and the expiration of 8 hours after a period allowing for the safe transportation of the employee from the place of service to the employee's residence, or as soon as possible after the expiration of the 8-hour period if reporting within the above period is impossible or unreasonable through no fault of the employee.

(b) If the service was for more than 30 but less than 181 days, the employee must submit an application for reemployment with the agency not later than 14 days after completing the period of service. (If submitting the application is impossible or unreasonable through no fault of the individual, it must be submitted the next full calendar day when it becomes possible to do so.)

(c) If the period of service was for more than 180 days, the employee must submit an application for reemployment

[[Page 45656]]
not later than 90 days after completing the period of service.

(d) An employee who is hospitalized or convalescing from an injury or illness incurred in, or aggravated during uniformed service is

required to report for duty at the end of the period that is necessary for the person to recover, based on the length of service as discussed in paragraphs (a), (b), and (c) of this section, except that the period of recovery may not exceed 2 years (extended by the minimum time required to accommodate circumstances beyond the employee's control which make reporting within the period specified impossible or unreasonable).

(e) A person who does not report within the time limits specified does not automatically forfeit restoration rights, but, rather, is subject to whatever policy and disciplinary action the agency would normally apply for a similar absence without authorization.

Sec. 353.206 Documentation upon return.

Upon request, a returning employee who was absent for more than 30 days, or was hospitalized or convalescing from an injury or illness incurred in or aggravated during the performance of service in the uniformed services, must provide the agency with documentation that establishes the timeliness of the application for reemployment, and length and character of service. If documentation is unavailable, the agency must restore the employee until documentation becomes available.

Sec. 353.207 Position to which restored.

(a) Timing. An employee returning from the uniformed services following an absence of more than 30 days is entitled to be restored as soon as possible after making application, but in no event later than 30 days after receipt of the application by the agency.

(b) Nondisabled. If the employee's uniformed service was for less than 91 days, he or she must be employed in the position for which qualified that he or she would have attained if continuously employed. If not qualified for this position after reasonable efforts by the agency to qualify the employee, he or she is entitled to be placed in the position he or she left. For service of 91 days or more, the agency has the option of placing the employee in a position of like seniority, status, and pay. (Note: Upon reemployment, a term employee completes the unexpired portion of his or her original appointment.) If unqualified (for any reason other than disability incurred in or aggravated during service in the uniformed services) after reasonable efforts by the agency to qualify the employee for such position or the position the employee left, he or she must be restored to any other position of lesser status and pay for which qualified, with full seniority.

(c) Disabled. An employee with a disability incurred in or

aggravated during uniformed service and who, after reasonable efforts by the agency to accommodate the disability, is entitled to be placed in another position for which qualified that will provide the employee with the same seniority, status, and pay, or the nearest approximation consistent with the circumstances in each case. The agency is not required to reemploy a disabled employee if, after making due efforts to accommodate the disability, such reemployment would impose an undue hardship on the agency.

(d) Two or more persons entitled to restoration in the same position. If two or more persons are entitled to restoration in the same position, the one who left the position first has the prior right to restoration in that position. The other employee(s) is entitled to be placed in a position as described in paragraphs (b) and (c) of this section.

(e) Relationship to an entitlement based on veterans' preference. An employee's right to restoration under this part does not entitle the person to retention, preference, or displacement rights over any person with a superior claim based on veterans' preference.

Sec. 353.208 Use of paid leave during uniformed service.

An employee performing service with the uniformed services must be 6permitted, upon request, to use any accrued annual leave (or sick leave, if appropriate), or military leave during such service. (Note, however, that under 5 U.S.C. 6323, military leave cannot be used for inactive duty, e.g., drills.)

Sec. 353.209 Retention protections.

(a) During uniformed service. An employee may not be demoted or separated (other than military separation) while performing duty with the uniformed services except for cause. (Reduction in force is not considered ``for cause" under this subpart.) He or she is not a ``competing employee" under Sec. 351.404 of this chapter. If the employee's position is abolished during such absence, the agency must reassign the employee to another position of like status, and pay.

(b) Upon reemployment. Except in the case of an employee under time-limited appointment who finishes out the unexpired portion of his or her appointment upon reemployment, an employee reemployed under this subpart may not be discharged, except for cause--

(1) If the period of uniformed service was more than 180 days, within 1 year; and

(2) If the period of uniformed service was more than 30 days, but less than 181 days, within 6 months.

Sec. 353.210 Department of Labor assistance to applicants and employees.

USERRA requires the Department of Labor's Veterans' Employment and Training Service (VETS) to provide employment and reemployment assistance to any Federal employee or applicant who requests it. VETS staff will attempt to informally resolve employment disputes brought to them. If informal dispute resolution proves unsuccessful, VETS may ask the Office of the Special Counsel to represent the individual in an appeal before the Merit Systems Protection Board (MSPB).

Sec. 353.211 Appeal rights.

An individual who believes an agency has not complied with the provisions of law and this part relating to the employment or reemployment of the person by the agency may--

(a) File a complaint with the Department of Labor, as noted in Sec. 353.210, or

(b) Appeal directly to MSPB if the individual chooses not to file a complaint with the Department of Labor, or is informed by either Labor or the Office of the Special Counsel that they will not pursue to the case.

Subpart C--Compensable Injury

Sec. 353.301 Restoration rights.

(a) Fully recovered within 1 year. An employee who fully recovers from a compensable injury within 1 year from the date eligibility for compensation began (or from the time compensable disability recurs if the recurrence begins after the employee resumes regular full-time employment with the United States), is entitled to be restored immediately and unconditionally to his or her former position or an equivalent one. Although these restoration rights are agencywide, the employee's basic entitlement is to the former position or equivalent in the local commuting area the employee left. If a suitable vacancy does not exist, the employee is entitled to displace an employee occupying a continuing position under temporary appointment or tenure group III. If there is no such position in the local commuting area, the agency must offer the employee a position (as described above) in another location. This paragraph also applies when an injured employee accepts a lower-grade position

[[Page 45657]]
in lieu of separation and subsequently fully recovers. A fully recovered employee is expected to return to work immediately upon the cessation of compensation.

(b) Fully recovered after 1 year. An employee who separated because of a compensable injury and whose full recovery takes longer than 1 year from the date eligibility for compensation began (or from the time compensable disability recurs if the recurrence begins after the injured employee resumes regular full-time employment with the United States), is entitled to priority consideration, agencywide, for restoration to the position he or she left or an equivalent one provided he or she applies for reappointment within 30 days of the cessation of compensation. Priority consideration is accorded by entering the individual on the agency's reemployment priority list for the competitive service or reemployment list for the excepted service. If the individual cannot be placed in the former commuting area, he or she is entitled to priority consideration for an equivalent position elsewhere in the agency. (See parts 302 and 330 of this chapter for more information on how this may be accomplished for the excepted and competitive services, respectively.) This subpart also applies when an injured employee accepts a lower-graded position in lieu of separation and subsequently fully recovers.

(c) Physically disqualified. An individual who is physically disqualified for the former position or equivalent because of a compensable injury, is entitled to be placed in another position for which qualified that will provide the employee with the same status, and pay, or the nearest approximation thereof, consistent with the circumstances in each case. This right is agencywide and applies for a period of 1 year from the date eligibility for compensation begins. After 1 year, the individual is entitled to the rights accorded individuals who fully or partially recover, as applicable.

(d) Partially recovered. Agencies must make every effort to restore in the local commuting area, according to the circumstances in each case, an individual who has partially recovered from a compensable injury and who is able to return to limited duty. At a minimum, this would mean treating these employees substantially the same as other handicapped individuals under the Rehabilitation Act of 1973, as amended. (See 29 U.S.C. 791(b) and 794.) If the individual fully recovers, he or she is entitled to be considered for the position held at the time of injury, or an equivalent one. A partially recovered employee is expected to seek reemployment as soon as he or she is able.

Sec. 353.302 Retention protections.

An injured employee enjoys no special protection in a reduction in force. Separation by reduction in force or for cause while on compensation means the individual has no restoration rights.

Sec. 353.303 Restoration rights of TAPER employees.

An employee serving in the competitive service under a temporary appointment pending establishment of a register (TAPER) under Sec. 316.201 of this chapter (other than an employee serving in a position classified above GS-15), is entitled to be restored to the position he or she left or an equivalent one in the same commuting area.

Sec. 353.304 Appeals to the Merit Systems Protection Board.

(a) Except as provided in paragraphs (b) and (c) of this section, an injured employee or former employee of an agency in the executive branch (including the U.S. Postal Service and the Postal Rate Commission) may appeal to the MSPB an agency's failure to restore, improper restoration, or failure to return an employee following a leave of absence. All appeals must be submitted in accordance with MSPB's regulations.

(b) An individual who fully recovers from a compensable injury more than 1 year after compensation begins may appeal to MSPB as provided for in parts 302 and 330 of this chapter for excepted and competitive service employees, respectively.

(c) An individual who is partially recovered from a compensable injury may appeal to MSPB for a determination of whether the agency is acting arbitrarily and capriciously in denying restoration. Upon reemployment, a partially recovered employee may also appeal the agency's failure to credit time spent on compensation for purposes of rights and benefits based upon length of service.

PART 870--BASIC LIFE INSURANCE

2. The authority citation for part 870 continues to read as follows:

Authority: 5 U.S.C. 8716; section 870.202(c) also issued under 5 U.S.C. 7701(b)(2); subpart J is also issued under section 599C of Pub. L. 101-513, 104 Stat. 2064, as amended.

3. In Sec. 870.501, paragraph (d) is amended by adding a sentence at the end to read as follows:

Sec. 870.501 Termination and conversion of insurance coverage.

* * * * *

(d) * * * For the purpose of this paragraph, an individual who is entitled to benefits under part 353 of this chapter is considered to be an employee in nonpay status.

* * * * *

PART 890--FEDERAL EMPLOYEES HEALTH BENEFITS PROGRAM

4. The authority citation for part 890 continues to read as follows:

Authority: 5 U.S.C. 8913; section 890.803 also issued under 50 U.S.C. 403p, 22 U.S.C. 4069c and 4069c-1; subpart L also issued under sec. 599C of Pub. L. 101-513, 104 Stat. 2064, as amended.

5. Section 890.303 is amended by adding a new paragraph (i) to read as follows:

Sec. 890.303 Contination of enrollment.

* * * * *

(i) Service in the uniformed services. The enrollment of an individual who separates to enter the uniformed services under conditions that entitle him or her to benefits under part 353 of this chapter may continue for the 18-month period beginning on the date that the absence to serve in the uniformed services begins, provided that the individual continues to be entitled to benefits under part 353 of this chapter. The enrollment of an employee who enters on military furlough or is placed in nonpay status to serve in the uniformed services may continue for the 18-month period beginning on the date that the absence to serve in the uniformed services begins, provided that the employee continues to be entitled to benefits under part 353 of this chapter. An employee in nonpay status is entitled to continued coverage under paragraph (e) of this section if the employee's entitlement to benefits under part 353 of this chapter ends before the expiration of 365 days in nonpay status. The enrollment of an employee who is on military furlough or in nonpay status in order to serve in the uniformed services on October 13, 1994, may continue for the 18-month period beginning on the date that the absence to serve in the

uniformed services began, provided that the employee continues to be entitled to continued coverage under part 353 of this chapter. If the enrollment of such an employee had terminated due to the expiration of 365 days in nonpay status, it may be reinstated for the remainder of the 18-month period beginning on the date that the absence to serve in the uniformed services began, provided that the

[[Page 45658]]
employee continues to be entitled to continued coverage under part 353 of this chapter.

6. In Sec. 890.304 paragraph (a)(1) is amended by revising paragraph (a)(1)(vi) and adding two new paragraphs (a)(1)(vii) and (viii) to read as follows:

Sec. 890.304 Termination of enrollment.

(a) * * *

(1) * * *

(vi) The day he or she is separated, furloughed, or placed on leave of absence to serve in the uniformed services under conditions entitling him or her to benefits under part 353 of this chapter for the purpose of performing duty not limited to 30 days or less, provided the employee elects, in writing to have the enrollment so terminated.

(vii) For an employee who separates to serve in the uniformed services under conditions entitling him or her to benefits under part 353 of this chapter for the purpose of performing duty not limited to 30 days or less, the date that is 18 months after the date that the absence to serve in the uniformed services began or the date entitlement to benefits under part 353 of this chapter ends, whichever is earlier, unless the enrollment is terminated under paragraph (a)(1)(vi) of this section.

(viii) For an employee who is furloughed or placed on leave of absence under conditions entitling him or her to benefits under part 353 of this chapter, the date that is 18 months after the date that the absence to serve in the uniformed services began or the date entitlement to benefits under part 353 of this chapter ends, whichever is earlier, but not earlier than the date the enrollment would otherwise terminate under paragraph (a)(1)(v) of this section.

* * * * *

7. In Sec. 890.305 paragraph (a) is revised to read as follows:

Sec. 890.305 Reinstatement of enrollment after military service.

(a) The enrollment of an employee or annuitant whose enrollment was terminated under Sec. 890.304(a)(1)(vi), (vii) or (viii) or Sec. 890.304(b)(4)(iii) is automatically reinstated on the day the

employee is restored to a civilian position under the provisions of part 353 of this chapter or on the day the annuitant is separated from the uniformed services, as the case may be.

* * * * *

8. In Sec. 890.501 paragraph (e) is revised and two new paragraphs (f) and (g) are added to read as follows:

Sec. 890.501 Government contributions.

* * * * *

(e) Except as provided in paragraphs (f) and (g) of this section, the employing office must make a contribution for an employee for each pay period during which the enrollment continues.

(f) Temporary employees enrolled under 5 U.S.C. 8906a must pay the full subscription charge including the Government contribution. Employees with provisional appointments under Sec. 316.403 are not considered to be enrolled under 5 U.S.C. 8906a for the purpose of this paragraph.

(g) The Government contribution for an employee who enters the uniformed services and whose enrollment continues under Sec. 890.303(i) ceases after 365 days in nonpay status.

9. In Sec. 890.502 paragraph (g) is revised to read as follows:

Sec. 890.502 Employee withholdings and contributions.

* * * * *

(g) Uniformed services. (1) except as provided in paragraph (g)(2) of this section, an employee whose coverage continues under section 890.303(i) is responsible for payment of the employee share of the cost of enrollment for every pay period for which the enrollment continues for the first 365 days of continued coverage as set forth under paragraph (b) of this section. For coverage that continues after 365 days in nonpay status, the employee must pay, on a current basis, the full subscription charge, including both the employee and Government shares, plus an additional 2 percent of the full subscription charge.

(2) Payment of the employee's share of the cost of enrollment is waived for the first 365 days of continued coverage in the case of an employee whose coverage continues under Sec. 890.303(e) following furlough or placement on leave of absence under the provisions of part 353 of this chapter or under Sec. 890.303(i) if the employee was

ordered to active duty before September 1, 1995 under section 672, 673b, 674, 675, or 688 of title 10, United States Code, in support of Operation Desert Storm.

* * * * *

[FR Doc. 95-21571 Filed 8-31-95; 8:45 am]

BILLING CODE 6325-01-M

E. OPM Regulation - Placement in a Different Agency Upon Restoration to Duty, 5 C.F.R. Part 213

[Federal Register: October 30, 1995 (Volume 60, Number 209)]
[Rules and Regulations]
[Page 55173-55174]
From the Federal Register Online via GPO Access [wais.access.gpo.gov]
[DOCID:fr30oc95-1]

[[Page 55173]]

OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 213

RIN 3206-AH15

Appointment of Nonstatus Employees Entitled to Placement in a Different Agency Upon Restoration to Duty From Uniformed Service

AGENCY: Office of Personnel Management.

ACTION: Interim regulations with request for comments.

SUMMARY: The Office of Personnel Management (OPM) is issuing interim regulations to permit Schedule A appointments of certain excepted service employees who are entitled to placement in a different agency if their original employing agency cannot reemploy them following uniformed service. These regulations implement the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), Public Law 103-353, which mandates such placement. Interim regulations setting out the categories of employees who are eligible for this assistance and

OPM's responsibility for placing them were published for comment on September 1, 1995 (60 FR 45650).

DATES: Effective: October 30, 1995.
Comments must be received on or before December 29, 1995.

ADDRESSES: Send or deliver comments to Leonard R. Klein, Associate Director for Employment, U.S. Office of Personnel Management, 1900 E Street, NW., Washington, DC 20415.

FOR FURTHER INFORMATION CONTACT:
Raleigh M. Neville, (202) 606-0830.

SUPPLEMENTARY INFORMATION: USERRA clarifies, expands, and strengthens the restoration rights of employees who perform active duty in a uniformed service. Among the changes are a requirement that OPM place in the executive branch certain categories of employees when their former agencies determine that it is ``impossible or unreasonable'' to reemploy them. The employees entitled to special placement assistance are:

(1) Executive branch employees (including those serving under excepted or time-limited appointments) whose agencies no longer exist and the functions have not been transferred, or it is otherwise impossible or unreasonable to reemploy them;

(2) Legislative and judicial branch employees;

(3) National Guard Technicians; and

(4) Employees of the intelligence agencies.

Placement in executive branch positions frequently requires that an individual have competitive civil service status or be hired through competitive examination. Executive branch employees who left career or career-conditional appointments or who had established reinstatement eligibility based on prior service are eligible for noncompetitive placement in competitive service positions. Executive branch employees who left temporary or term appointments are generally eligible for noncompetitive reappointment to complete any unexpired portion of those appointments. The remaining employees entitled to placement, however, have no status that would permit their noncompetitive appointment in the competitive service.

Under USERRA, the employees are entitled to placement in positions that are equivalent in terms of pay, grade, and status to the positions they left. Since the employees covered by this interim regulation left positions filled under excepted appointment, it is appropriate that they be placed in the executive branch under an excepted appointment. Such appointment would permit the restored employees to continue serving indefinitely (or up to any time limit of their original appointment) and to be promoted or reassigned to other positions in

their new agency, but would not give them competitive status they could not have earned in their original positions.

Excepted appointing authority already exists under Sec. 213.3102(j) for National Guard Technicians who are applying for or receiving a civil service annuity based on a disability that disqualifies them from membership in the National Guard or from holding the military grade required as a condition of their Technician employment. These interim regulations expand that authority to cover nonstatus employees entitled to placement under USERRA, with one exception.

The Schedule A authority does not cover employees who held Schedule C appointments or appointments under statutory authorities that specified the employees served at the discretion, will, or pleasure of the agency. We find that such at-will employees are not entitled to placement in other agencies if their original employing agency declines to reemploy them. Since their original appointments could be terminated at any time, their positions afforded ``no reasonable expectation that employment will continue indefinitely or for a reasonable period,'' as required by USERRA.

Waiver of Notice of Proposed Rulemaking

Pursuant to 5 U.S.C. 553(b)(3)(B), I find that good cause exists for waiving the general notice of proposed rulemaking, because the statutory provisions for reemployment in other agencies became effective on December 12, 1994. The Schedule A appointing authority set out in these interim regulations is needed for practical implementation of that law.

Regulatory Flexibility Act

I certify that this regulation will not have a significant impact on a substantial number of small entities because it pertains only to Federal employees and agencies.

List of Subjects in 5 CFR Part 213

Government employees, Reporting and recordkeeping requirements.

Office of Personnel Management.
James B. King,
Director.

Accordingly, OPM is amending part 213, as follows:

PART 213--EXCEPTED SERVICE

1. The authority citation for part 213 is revised to read as follows:

Authority: 5 U.S.C. 3301 and 3302, E.O. 10577, 3 CFR 1954-1958 Comp., p. 218; Sec. 213.101 also issued under 5 U.S.C. 2103; Sec. 213.3102 also issued under 5 U.S.C. 3301, 3302, 3307, 8337(h), and 8456; E.O. 12364,

[[Page 55174]]
47 FR 22931, 3 CFR 1982 Comp., p. 185; and Pub. L. 103-353.

2. In Sec. 213.3102, paragraph (j) is revised to read as follows:

Sec. 213.3102 Entire executive civil service.

* * * * *

(j) Positions filled by current or former Federal employees eligible for placement under special statutory provisions. Appointments under this authority are subject to the following conditions.

(1) Eligible employees. (i) Persons previously employed as National Guard Technicians under 32 U.S.C. 709(a) who are entitled to placement under Sec. 353.110 of this chapter, or who are applying for or receiving an annuity under the provisions of 5 U.S.C. 8337(h) or 8456 by reason of a disability that disqualifies them from membership in the National Guard or from holding the military grade required as a condition of their National Guard employment.

(ii) Executive branch employees (other than employees of intelligence agencies) who are entitled to placement under Sec. 353.110 but who are not eligible for reinstatement or noncompetitive appointment under the provisions of part 315 of this chapter.

(iii) Legislative and judicial branch employees and employees of the intelligence agencies defined in 5 U.S.C. 2302(a)(2)(C)(ii) who are entitled to placement under Sec. 353.110.

(2) Employees excluded. Employees who were last employed in Schedule C or under a statutory authority that specified the employee served at the discretion, will, or pleasure of the agency are not eligible for appointment under this authority.

(3) Position to which appointed. Employees who are entitled to placement under Sec. 353.110 will be appointed to a position that OPM determines is equivalent in pay and grade to the one the individual left, unless the individual elects to be placed in a position of lower grade or pay. National Guard Technicians whose eligibility is based upon a disability may be appointed at the same grade, or equivalent, as their National Guard Technician position or at any lower grade for which they are available.

(4) Conditions of appointment. (i) Individuals whose placement eligibility is based on an appointment without time limit will receive appointments without time limit under this authority. These appointees may be reassigned, promoted, or demoted to any position within the same agency for which they qualify.

(ii) Individuals who are eligible for placement under Sec. 353.110 based on a time-limited appointment will be given appointments for a time period equal to the unexpired portion of their previous appointment.

* * * * *

[FR Doc. 95-26851 Filed 10-27-95; 8:45 am]
BILLING CODE 6325-01-M

F. MSPP Regulations - Attorney Fees in USERRA Cases, 5 C.F.R. Part 1201

[Federal Register: April 9, 1997 (Volume 62, Number 68)]
[Rules and Regulations]
[Page 17041-17047]
From the Federal Register Online via GPO Access [wais.access.gpo.gov]
[DOCID:fr09ap97_dat-1]

Rules and Regulations

Federal Register

[[Page 17041]]

MERIT SYSTEMS PROTECTION BOARD
5 CFR Part 1201
Practices and Procedures
AGENCY: Merit Systems Protection Board.
ACTION: Interim rule with request for comments.

SUMMARY: The Merit Systems Protection Board (MSPB or the Board) is amending its rules of practice and procedure to: Implement the compensatory damages provision of the Civil Rights Act of 1991, Public Law 102-166, with respect to MSPB cases where certain kinds of discrimination are found; implement the attorney fee provision of the Uniformed Services Employment and Reemployment Rights Act of 1994, Public Law 103-353; implement the attorney fee, consequential damages, and choice of procedures provisions of Public Law 103-424 (MSPB and Office of Special Counsel reauthorization of 1994); and amend its existing rules governing requests for attorney fees to change the time limit for filing and incorporate an evidentiary requirement from the Board's case law. The purpose of these amendments is to provide guidance to the parties to MSPB cases, and their representatives, on how to proceed with respect to requests for attorney fees,

consequential damages, and compensatory damages, and to inform them of the statutory requirement regarding choice of procedures in cases involving both an appealable action and a prohibited personnel practice other than discrimination. The Board is also making a technical change to its rules governing mixed cases to reflect the fact that the Equal Employment Opportunity Commission's regulations governing Federal employee discrimination complaints are now found at 29 CFR part 1614. The Board is implementing other provisions of Public Law 103-424 through an amendment to its rules at 5 CFR part 1209, which is being published simultaneously with this amendment.

DATES: Effective date April 9, 1997. Submit written comments on or before June 9, 1997.

ADDRESSES: Send comments to Robert E. Taylor, Clerk of the Board, Merit Systems Protection Board, 1120 Vermont Avenue, NW, Washington, DC 20419. Comments may be sent via e-mail to mspb@mspb.gov.

FOR FURTHER INFORMATION CONTACT: Robert E. Taylor, Clerk of the Board, (202) 653-7200.

SUPPLEMENTARY INFORMATION: This amendment consists principally of the addition of a new subpart H to the Board's rules of practice and procedure at 5 CFR part 1201. This new subpart sets forth the Board's statutory authorities to make awards of attorney fees (plus, where applicable, costs, expert witness fees, and litigation expenses), consequential damages, and compensatory damages. It combines the Board's existing procedural rules governing requests for attorney fees (with modifications) with new procedural rules governing requests for consequential damages and compensatory damages. Conforming amendments are made in appropriate sections of part 1201.

Awards of Attorney Fees

The Civil Service Reform Act of 1978 (CSRA), Public Law 95-454, authorized the newly established Merit Systems Protection Board to award attorney fees to an employee or applicant who prevails before the Board. The CSRA provided two authorities for attorney fee awards. The first, 5 U.S.C. 7701(g)(1), authorizes an award where warranted in the interest of justice, including any case in which the agency engaged in a prohibited personnel practice or the agency's action was clearly without merit. The second, 5 U.S.C. 7701(g)(2), applies only to cases where the employee or applicant prevails on a finding of discrimination; it authorizes an award under the standards of section 706(k) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(k)). The Civil Rights Act standard also permits an award for out-of-pocket costs

such as those for copying, postage, and facsimile (see Chin v. Department of the Treasury, 55 M.S.P.R. 84, 86 (1992)).

Although the CSRA authorities for attorney fee awards were made a part of chapter 77 of title 5 of the U.S. Code, which governs appeals to MSPB, subsequent case law determined that section 7701(g) provides authority for an award of attorney fees in other kinds of MSPB cases as well. In Frazier v. MSPB, 672 F.2d 150, 168-170 (D.C. Cir. 1982), the U.S. Court of Appeals for the District of Columbia Circuit ruled that section 7701(g) permitted the Board to award attorney fees where the Special Counsel obtained corrective action from the Board for an employee and the employee also was represented by private counsel.

Thus, the Board now has seven--sometimes overlapping-- statutory authorities to make awards of attorney fees. (An eighth authority was enacted in October 1996 as part of the Presidential and Executive Office Accountability Act, Public Law 104-331, but that authority does not take effect with respect to cases to be adjudicated by MSPB until the President issues implementing regulations or on October 1, 1998, whichever is earlier. See section 2(a), adding new 3 U.S.C. 435.)

The Board's existing rules governing requests for attorney fees, found at 5 CFR 1201.37(a), implement only the two original authorities provided by the CSRA and the additional authority provided by the WPA in 1989. There is a need, therefore, to amend the Board's rules governing requests for attorney fees to incorporate the new statutory authorities and, in view of the overlap among certain of the authorities for attorney fee awards, to provide guidance to parties and their representatives as to how the Board will apply its various authorities for attorney fee awards to the cases it adjudicates.

In the course of its review of the rules governing requests for attorney fees, the Board also has determined that two changes should be made in its existing rules. The current time limit for filing a request for attorney fees--30 days after an initial decision becomes final or 35 days after a final Board decision--is deleted and replaced by a requirement that such a request be filed as soon as possible after there is a final Board decision but no later than 60 days after the date on which a decision becomes final. This change is intended to reduce the need for litigation over late-filed attorney fee requests. The evidentiary requirements for attorney fee requests are amended, in accordance with the Board's established case law, to incorporate the requirement for evidence of an established attorney-client relationship. Allen v. U.S. Postal Service, 2 M.S.P.R. 420, 427 n.9 (1980). See Stewart v. Office of Personnel Management, 70 M.S.P.R. 544 (1996).

Awards of Consequential Damages

Public Law 103-424 also gave the Board new authority--in two kinds of cases only--to order payment of medical costs, travel expenses, and any other reasonable and foreseeable consequential damages incurred by an employee, former employee, or applicant. This authority applies only where the Board orders corrective action in a Special Counsel case brought under 5 U.S.C. 1214 (see 5 U.S.C. 1214(g)(2)) or in an IRA or other whistleblower appeal to which 5 U.S.C. 1221 applies (see 5 U.S.C. 1221(g)(1)(A)(ii)).

Because the Board has no existing rules governing awards of consequential damages, there is a need to amend its rules of practice and procedure to set forth the statutory authorities for it to make such awards and to prescribe procedural rules for making requests for such awards. In these new rules, the Board uses the term ``consequential damages" to encompass what the statutory provisions at 5 U.S.C. 1214(g)(2) and 5 U.S.C. 1221(g)(1)(A)(ii) describe as ``medical costs incurred, travel expenses, and any other reasonable and foreseeable consequential damages." The legislative history of Public Law 103-424 provides no further guidance as to the kinds of costs and expenses intended to be covered by these provisions. The Board, therefore, will interpret these provisions through its adjudication of individual cases.

The Board has had little opportunity to date to address these new provisions for awards of consequential damages in actual cases. Its principal ruling thus far is that the consequential damages provisions of Public Law 103-424 may not be applied retroactively and, therefore, do not apply where the contested personnel action took place before the law's effective date, October 29, 1994. See Roman v. Department of the Army, 72 M.S.P.R. 409 (1996). In Roman, the Board also ruled that while the appellant's claimed mileage costs could not be awarded as consequential damages, because of the Board's ruling against retroactive application, they could be awarded as ``costs" under the WPA provision for attorney fees and costs (formerly 5 U.S.C. 1221(g)(1), now 5 U.S.C. 1221(g)(2)). The Board declined in Roman to decide what the term ``travel expenses" means in the new consequential damages provisions.

Despite the paucity of case law dealing with consequential damages, the Board has determined that its procedural rules for adjudication of requests for consequential damages should be consistent with those governing requests for compensatory damages. These rules are discussed below under ``Awards of Compensatory Damages."

Awards of Compensatory Damages

Section 102 of the Civil Rights Act of 1991, Public Law 102-166, authorizes an award of compensatory damages where there is a finding of intentional discrimination or a failure to provide reasonable accommodation, where such discrimination is prohibited by the Civil Rights Act of 1964, the Rehabilitation Act of 1973, or the Americans with Disabilities Act of 1990 (42 U.S.C. 1981a). In late 1992, the Equal Employment Opportunity Commission ruled that compensatory damages under the Civil Rights Act of 1991 are available to Federal employees in administrative proceedings (Jackson v. U.S. Postal Service, EEOC Appeal No. 01923399, Nov. 12, 1992).

The Board issued its first decision on a request for compensatory damages in July of 1994. Hocker v. Department of Transportation, 63 M.S.P.R. 497, 503-508 (1994), aff'd. 64 F.3d 676 (Fed. Cir. 1995) (table), cert. denied, 116 U.S. 918, 116 S.Ct. 918 (1996). Citing the EEOC ruling in Jackson, the Board ruled in Hocker that compensatory damages are available in MSPB proceedings where there is a finding of discrimination to which section 102 of the Civil Rights Act of 1991 applies. The Board further ruled that it would not apply the compensatory damages provision of the Civil Rights Act of 1991 retroactively to cases pending on the effective date of the Act, November 21, 1991. In addition, the Board stated that a request for compensatory damages may not be made for the first time in a petition for enforcement of a Board order (unless the non-compliance with the order constituted a separate, intentional act of discrimination) but must be made in the proceeding on the merits before the judge.

[[Page 17043]]

In Yates v. U.S. Postal Service, 70 M.S.P.R. 170, 179-180 (1996), the Board distinguished the Hocker requirement that a request for compensatory damages must be made in the proceeding on the merits before the judge as dictum, ruling that an appellant who prevails on a finding of discrimination to which section 102 of the Civil Rights Act of 1991 applies has a right to seek compensatory damages. Finding that the appellant was not notified of his right to seek compensatory damages or the time for doing so, the Board gave the appellant 30 days from the date of the decision to file a request for compensatory damages with the judge. (Accord Spencer v. Department of the Navy, MSPB Docket No. DC-0752-96-0116-I-1, Jan. 3, 1997, and Callagan v. Department of Agriculture, MSPB Docket No. DE-0752-95-0588-I-2, Feb. 26, 1997).

Other key cases in which the Board has ruled on compensatory damages issues include Schultz v. U.S. Postal Service, 70 M.S.P.R. 633, 639-640 (1996) (remand to judge for adjudication of compensatory

damages claim necessary where appellant made claim early on in the appeal), and Currier v. U.S. Postal Service, 72 M.S.P.R. 191, 195-198 (1996) (where appellant has made a nonfrivolous claim of discrimination to which section 102 of the Civil Rights Act of 1991 applies but has not specifically made a claim for compensatory damages, judge should afford opportunity to make such a claim before dismissing appeal as moot; judge may bifurcate proceeding by deferring a decision on a claim for compensatory damages for a separate proceeding after there is a final decision in the merits proceeding).

Because the Board has no existing rules governing awards of compensatory damages, there is a need to amend its rules of practice and procedure to set forth the statutory authority for it to make such awards and to prescribe procedural rules for making requests for such awards. Based on its rulings in cases involving compensatory damages to date, the Board in these rules calls for a request for compensatory damages to be made as early as possible in a Board proceeding before an administrative judge or administrative law judge. Such a request is to be made no later than the time the first pleading is filed with the three-member Board. In permitting a request for compensatory damages to be made as late as the time of the first filing with the three-member Board, the Board is following the lead of the EEOC (the lead agency in interpreting compensatory damages provisions). Hocker, supra. See Thorne v. Department of Education, EEOC No. 01922524, slip op. at 3 (Dec. 23, 1993); Square v. Department of Veterans Affairs, EEOC No. 0193053, slip op. at 5 (Aug. 25, 1994); and Simpkins v. U.S. Postal Service, EEOC No. 01942339, slip op. at 2-3 (Sep. 28, 1995).

The rules permit the judge or the Board, as applicable, to waive the time limit for good cause shown. The rules also permit the judge or the Board, as applicable, to decide a request for compensatory damages in the merits proceeding or to defer it for an addendum proceeding.

Amendment to Choice of Procedures

Section 9(b) of Public Law 103-424 amended 5 U.S.C. 7121, ``Grievance procedures,'' by adding a new subsection (g) which imposes a new choice of procedures requirement. Where an employee is subject to a personnel action that is appealable to MSPB, and the employee may grieve the action under a negotiated grievance procedure (NGP), and the employee alleges that the action was the result of a prohibited personnel practice--other than discrimination--that may form the basis of a complaint to the Special Counsel, the employee may elect not more than one of the following remedies: an appeal to MSPB, a grievance under the NGP, or a corrective action complaint under subchapters II (Special Counsel actions) and III (IRA appeals) of chapter 12 of title 5. The choice among these three procedures is deemed to have been made when the employee timely files an appeal with MSPB, a written grievance

under the NGP, or a complaint with the Special Counsel.

The Board's existing rules at 5 CFR 1201.3(c) reflect the choice of procedures requirements of 5 U.S.C. 7121 prior to its amendment by Public Law 103-424. Those rules require a choice between an MSPB appeal and a grievance under the NGP where there is an allegation of discrimination (see 5 U.S.C. 7121(d)) or where the personnel action is a performance-based action under chapter 43 of title 5 or an adverse action under chapter 75 of title 5 (see 5 U.S.C. 7121(e)). There is a need, therefore, for the Board to amend its rules at 5 CFR 1201.3(c) to incorporate the new choice of procedures requirement in 5 U.S.C. 7121(g).

Under 5 U.S.C. 7121 as amended by Public Law 103-424, an employee who chooses to seek corrective action from the Special Counsel could not also appeal to MSPB--unless the prohibited personnel practice complained of is an action based on whistleblowing, in which case the employee could file an IRA appeal with MSPB after exhausting the procedures of the Office of Special Counsel. (See Briley v. National Archives and Records Administration, 71 M.S.P.R. 211, 224-226 (1996).)

Section-by-Section Guide to Changes

The following paragraphs constitute a section-by-section guide to the changes made in 5 CFR part 1201 by this amendment.

(1-3) The authority citation for part 1201 is amended to include the authority for the Board to issue implementing regulations under USERRA, 38 U.S.C. 4331.

(4) Section 1201.3(b), concerning appeals governed by part 1209, is amended to include a statement that the attorney fee and consequential damages provisions of subpart H apply to such appeals.

(5) Section 1201.3(c)(1) is amended to incorporate the choice of procedures requirements of 5 U.S.C. 7121(g), as discussed above under ``Amendment to Choice of Procedures."

(6) Section 1201.3(c)(2) is amended to incorporate the provisions of 5 U.S.C. 7121(g) regarding when a choice of procedures is deemed to have been made, as discussed above under ``Amendment to Choice of Procedures."

(7) Section 1201.37 is amended to change the title from ``Fees" to ``Witness fees;" to remove paragraph (a)--which is moved to the new subpart H (with modifications)--in its entirety; and to redesignate the remaining paragraphs.

(8) Section 1201.55(b), concerning objections to motions, is amended to remove the reference to a motion for attorney fees; new section 1201.203(d) in subpart H will now apply to such objections.

(9) Section 1201.111(b)(6), concerning the statement in a judge's initial decision of any further processes available, is amended to

state that such further processes include, as appropriate, a motion for attorney fees under new section 1201.203 of subpart H, and, where a claim for consequential damages or compensatory damages has been deferred for an addendum proceeding, the right to such a

[[Page 17044]]

proceeding, with the time to be established by the judge.

(10) Section 1201.112(a)(3), concerning a judge's retaining jurisdiction to rule on a request for attorney fees after isssuing an initial decision, is amended to also authorize the judge to retain jurisdiction to rule on a request for consequential damages or compensatory damages under subpart H.

(11) Section 1201.121, concerning actions brought by the Special Counsel, is amended by revising the section title to read ``Scope of jurisdiction; application of subparts B, F, and H."

(12) Section 1201.121 is further amended by revising the heading of paragraph (b) to read ``Application of subparts B, F, and H;" by revising paragraph (b) to state that all provisions of subpart B of part 1201--not just the hearing procedures--apply to Special Counsel cases, except as otherwise expressly provided by this subpart; and by including in the revised paragraph (b) cross-references to subpart F for enforcement proceedings and to subpart H for requests for attorney fees, consequential damages, and compensatory damages.

(13) Section 1201.131, concerning procedures for actions against administrative law judges, is amended by revising it to state that all provisions of subpart B of part 1201--not just the hearing procedures--apply to actions against administrative law judges, except as otherwise expressly provided by this subpart, and by including cross-references to subpart F for enforcement proceedings and to subpart H for requests for attorney fees and compensatory damages.

(14) Section 1201.163, concerning mixed case procedures, is amended at paragraphs (a) and (c) by removing ``29 CFR part 1613" each place it appears and by replacing it with ``29 CFR part 1614."

(15) A new subpart H is added after subpart G of part 1201. The following is a section-by-section guide to the provisions of subpart H:

Section 1201.201 states that the purpose of subpart H is to prescribe procedures for awards of attorney fees (plus costs, expert witness fees, and litigation expenses, where applicable), consequential damages, and compensatory damages in MSPB cases. It provides a general overview of the Board's statutory authorities to make such awards.

Section 1201.202(a) provides a ``roadmap" to each statutory authority for the Board to award attorney fees (plus costs, expert witness fees, and litigation expenses, where applicable) and describes the kind of case or cases with which each authority is associated. Section 1201.202(b) sets forth the Board's statutory authorities for

awards of consequential damages and describes the kind of case with which each authority is associated. Section 1201.202(c) sets forth the Board's statutory authority to award compensatory damages and incorporates the definition of such damages from 42 U.S.C. 1981a.

Section 1201.203 prescribes procedures for requests for attorney fees. The procedures are essentially the same as in the Board's existing rules at 5 CFR 1201.37(a)(3), with some modifications. The time limit for filing a motion for attorney fees has been changed to ``as soon as possible after a final decision of the Board but no later than 60 days after the date on which a decision becomes final.'' A requirement for submission of evidence of ``an established attorney-client relationship'' has been incorporated, reflecting the Board's established case law. Certain changes in wording have been made to clarify that the provisions apply to MSPB cases generally--not just to appeals, the requirements for an addendum proceeding are set forth more fully, and a definition of a ``proceeding on the merits'' has been added.

Section 1201.204 prescribes procedures for requests for consequential damages and compensatory damages. Paragraph (a)(1) calls for such requests to be made as early as possible in the merits proceeding before an administrative judge or administrative law judge. Such a request may be made no later than the time the first pleading is filed with the three-member Board. Paragraph (a)(2) permits the judge or the Board, as applicable, to waive the time limit for filing a request for consequential damages or compensatory damages for good cause shown. Paragraph (b) sets forth the service requirements.

Paragraph (c) of section 1201.204 authorizes the judge or the Board, as applicable, to decide a request for consequential damages or compensatory damages either in the merits proceeding or in an addendum proceeding after there is a final decision on the merits. Paragraph (d) requires the judge, where a decision on a request for consequential damages or compensatory damages has been deferred for an addendum proceeding, to schedule that proceeding after there is a final Board decision. Paragraph (e) permits the Board, at its discretion, to order that an addendum proceeding to decide a request for consequential damages or compensatory damages be held prior to the issuance of a final decision on the merits.

Paragraph (f) of section 1201.204 provides for the application of appropriate provisions of subpart B in an addendum proceeding to decide a request for consequential damages or compensatory damages, and paragraph (g) provides for a petition for review of the judge's initial decision by the Board and for Board review of a recommended decision of an administrative law judge. Paragraph (h) provides for EEOC review of a final Board decision on a request for compensatory damages (but not consequential damages) in accordance with subpart E of part 1201.

Section 1201.205 provides that a final Board decision issued under

subpart H--on a request for attorney fees, consequential damages, or compensatory damages--is subject to judicial review in accordance with 5 U.S.C. 7703.

Citations

All citations to MSPB decisions are to West Publishing Company's Merit Systems Protection Board Reporter (M.S.P.R.). The citation to a D.C. Circuit decision is to West Publishing Company's Federal Reporter, second series (F.2d). These publications are available in many law libraries and some public libraries. They are also available in the MSPB Library, 1120 Vermont Avenue, NW, 8th Floor, Washington, DC, which is open to the public between 1:00 and 5:00 PM, Monday through Friday (excluding Federal holidays).

The Board is publishing this rule as an interim rule pursuant to 5 U.S.C. 1204(h).

List of Subjects in 5 CFR Part 1201

Administrative practice and procedure, Civil rights, Government employees.

Accordingly, the Board amends 5 CFR part 1201 as follows:

PART 1201--[AMENDED]

1-3. The authority citation for part 1201 is revised to read as follows:

Authority: 5 U.S.C. 1204 and 7701, and 38 U.S.C. 4331, unless otherwise noted.

4. Section 1201.3 is amended in paragraph (b) by adding a sentence to the end of the paragraph to read as follows:

Sec. 1201.3 Appellate jurisdiction.

* * * * *

(b) * * * The provisions of subpart H of this part regarding awards of attorney fees and consequential damages under 5

[[Page 17045]]

U.S.C. 1221(g) apply to appeals governed by part 1209 of this chapter.
* * * * *

5. Section 1201.3 is amended by revising paragraph (c)(1)(ii) and adding paragraph (c)(1)(iii) to read as follows:

* * * * *

(c) * * *

(1) * * *

(ii) An appealable action involving a prohibited personnel practice other than discrimination under 5 U.S.C. 2302(b)(1) may be raised under not more than one of the following procedures:

(A) The Board's appellate procedures;

(B) The negotiated grievance procedures; or

(C) The procedures for seeking corrective action from the Special Counsel under subchapters II and III of chapter 12 of title 5 of the United States Code.

(iii) Except for actions involving discrimination under 5 U.S.C. 2302(b)(1) or any other prohibited personnel practice, any appealable action that is excluded from the application of the negotiated grievance procedures may be raised only under the Board's appellate procedures.

* * * * *

6. Section 1201.3 is further amended at paragraph (c) by adding a sentence to the end of paragraph (c)(2) to read as follows:

* * * * *

(c) * * *

(2) * * * When an employee has the choice of pursuing an appealable action involving a prohibited personnel practice other than discrimination under 5 U.S.C. 2302(b)(1) in accordance with paragraph (c)(1)(ii) of this section, the Board considers the choice among those procedures to have been made when the employee timely files an appeal with the Board, timely files a written grievance under the negotiated grievance procedure, or seeks corrective action from the Special Counsel by making an allegation under 5 U.S.C. 1214(a)(1), whichever event occurs first.

* * * * *

Sec. 1201.37 [Amended]

7. Section 1201.37 is amended by revising the heading to read ``Witness fees''; by removing paragraph (a) in its entirety; by removing the heading of paragraph (b), and by redesignating paragraphs (b)(1), (b)(2), and (b)(3) as paragraphs (a), (b), and (c), respectively.

Sec. 1201.55 [Amended]

8. Section 1201.55 is amended at paragraph (b) by removing the phrase, ``and unless the motion is one for payment of attorney fees

under Sec. 1201.37(a) of this part," in the first sentence.

Sec. 1201.111 [Amended]

9. Section 1201.111 is amended by removing the phrase, ``and a petition for judicial review." in paragraph (b)(6) and by adding in its place the phrase ``a petition for judicial review, a motion for attorney fees under section 1201.203 of this part, and where a claim for consequential damages or compensatory damages has been raised, the right to an addendum proceeding to determine consequential damages or compensatory damages, with the time to be established by the judge.".

Sec. 1201.112 [Amended]

10. Section 1201.112 is amended by removing the semi-colon at the end of paragraph (a)(3) and by adding in its place the phrase ``, consequential damages, or compensatory damages under subpart H of this part;".

11. Section 1201.121 is amended by revising the heading to read as follows:

Sec. 1201.121 Scope of jurisdiction; application of subparts B, F, and H.

12. Section 1201.121 is further amended by revising paragraph (b) to read as follows:

* * * * *

(b) Application of subparts B, F, and H. Except as otherwise expressly provided by this subpart, the regulations in subpart B of this part apply to complaints or requests filed by the Special Counsel under this subpart. Subpart F of this part applies to enforcement proceedings in connection with Special Counsel complaints or requests decided under this subpart. Subpart H of this part applies to requests for attorney fees, consequential damages, or compensatory damages in connection with Special Counsel complaints decided under this subpart.

13. Section 1201.131 is revised to read as follows:

Sec. 1201.131 Procedures.

When an agency proposes an action against an administrative law judge, the regulations in subpart B of this part apply, unless these provisions expressly provide otherwise. Initial and subsequent pleadings, however, must be filed and served in accordance with Sec. 1201.122 of this subpart. Subpart F of this part applies to enforcement proceedings in connection with actions against administrative law judges decided under this subpart. Subpart H of this

part applies to requests for attorney fees or compensatory damages in connection with actions against administrative law judges decided under this subpart.

Sec. 1201.163 [Amended]

14. Section 1201.163 is amended at paragraphs (a) and (c) by removing ``29 CFR part 1613" each place it appears and by adding in its place ``29 CFR part 1614".

15. Part 1201 is amended by adding new subpart H to read as follows:

Subpart H--Attorney Fees (Plus Costs, Expert Witness Fees, and Litigation Expenses, Where Applicable), Consequential Damages, and Compensatory Damages

Sec.

Subpart H--Attorney Fees (Plus Costs, Expert Witness Fees, and Litigation Expenses, Where Applicable), Consequential Damages, and Compensatory Damages

Sec. 1201.201 Statement of purpose.

(a) This subpart governs Board proceedings for awards of attorney fees (plus costs, expert witness fees, and litigation expenses, where applicable), consequential damages, and compensatory damages.

(b) There are seven statutory provisions covering attorney fee awards. Because most MSPB cases are appeals under 5 U.S.C. 7701, most requests for attorney fees will be governed by Sec. 1201.202(a)(1). There are, however, other attorney fee provisions that apply only to specific kinds of cases. For example, Sec. 1201.202(a)(4) applies only to certain whistleblower appeals. Sections 1201.202 (a)(5) and (a)(6) apply only to corrective and disciplinary action cases brought by the Special Counsel. Section 1201.202(a)(7) applies only to appeals brought under the Uniformed Services Employment and Reemployment Rights Act.

(c) An award of consequential damages is authorized in only two situations: Where the Board orders corrective action in a whistleblower appeal under 5 U.S.C. 1221, and where the Board orders corrective action in a Special Counsel complaint under 5 U.S.C. 1214. Consequential damages include such items as medical costs and travel expenses, and other costs as determined by the Board through case law.

(d) The Civil Rights Act of 1991 (42 U.S.C. 1981a) authorizes an award of compensatory damages to a prevailing party who is found to have been intentionally discriminated against based on race, color, religion, sex,

[[Page 17046]]

national origin, or disability. Compensatory damages include pecuniary losses, future pecuniary losses, and nonpecuniary losses, such as emotional pain, suffering, inconvenience, mental anguish, and loss of enjoyment of life.

Sec. 1201.202 Authority for awards.

(a) Awards of attorney fees (plus costs, expert witness fees, and litigation expenses, where applicable). The Board may order payment of:

(1) Attorney fees, as authorized by 5 U.S.C. 7701(g)(1), where the appellant or respondent is the prevailing party in an appeal under 5 U.S.C. 7701 or an agency action against an administrative law judge under 5 U.S.C. 7521, and an award is warranted in the interest of justice;

(2) Attorney fees, as authorized by 5 U.S.C. 7701(g)(2), where the appellant or respondent is the prevailing party in an appeal under 5 U.S.C. 7701, a request to review an arbitration decision under 5 U.S.C. 7121(d), or an agency action against an administrative law judge under 5 U.S.C. 7521, and the decision is based on a finding of discrimination prohibited under 5 U.S.C. 2302(b)(1);

(3) Attorney fees and costs, as authorized by 5 U.S.C. 1221(g)(2), where the appellant is the prevailing party in an appeal under 5 U.S.C. 7701 and the Board's decision is based on a finding of a prohibited personnel practice;

(4) Attorney fees and costs, as authorized by 5 U.S.C. 1221(g)(1)(B), where the Board orders corrective action in a whistleblower appeal to which 5 U.S.C. 1221 applies;

(5) Attorney fees, as authorized by 5 U.S.C. 1214(g)(2), where the Board orders corrective action in a Special Counsel complaint under 5 U.S.C. 1214;

(6) Attorney fees, as authorized by 5 U.S.C. 1204(m), where the respondent is the prevailing party in a Special Counsel complaint for disciplinary action under 5 U.S.C. 1215; and

(7) Attorney fees, expert witness fees, and litigation expenses, as authorized by the Uniformed Services Employment and Reemployment Rights Act, 38 U.S.C. 4324(c)(4).

(b) Awards of consequential damages. The Board may order payment of consequential damages, including medical costs incurred, travel expenses, and any other reasonable and foreseeable consequential

damages:

(1) As authorized by 5 U.S.C. 1221(g)(1)(A)(ii), where the Board orders corrective action in a whistleblower appeal to which 5 U.S.C. 1221 applies; and

(2) As authorized by 5 U.S.C. 1214(g)(2), where the Board orders corrective action in a Special Counsel complaint under 5 U.S.C. 1214.

(c) Awards of compensatory damages. The Board may order payment of compensatory damages, as authorized by section 102 of the Civil Rights Act of 1991 (42 U.S.C. 1981a), based on a finding of unlawful intentional discrimination but not on an employment practice that is unlawful because of its disparate impact under the Civil Rights Act of 1964, the Rehabilitation Act of 1973, or the Americans with Disabilities Act of 1990. Compensatory damages include pecuniary losses, future pecuniary losses, and nonpecuniary losses such as emotional pain, suffering, inconvenience, mental anguish, and loss of enjoyment of life.

Sec. 1201.203 Proceedings for attorney fees.

(a) Form and content of request. A request for attorney fees must be made by motion, must state why the appellant or respondent believes he or she is entitled to an award under the applicable statutory standard, and must be supported by evidence substantiating the amount of the request. Evidence supporting a motion for attorney fees must include at a minimum:

(1) Accurate and current time records;

(2) A copy of the terms of the fee agreement (if any);

(3) A statement of the attorney's customary billing rate for similar work if the attorney has a billing practice or, in the absence of that practice, other evidence of the prevailing community rate that will establish a market value for the attorney's services; and

(4) An established attorney-client relationship.

(b) Addendum proceeding. (1) A request for attorney fees will be decided in an addendum proceeding before a judge after issuance of a final decision in the proceeding on the merits, including a decision accepting the parties' settlement of the case.

(2) For purposes of this subpart, a ``proceeding on the merits'' is a proceeding to decide an appeal of an agency action under 5 U.S.C. section 1221 or 7701, an appeal under 38 U.S.C. 4324, a request to review an arbitration decision under 5 U.S.C. 7121(d), a Special Counsel complaint under 5 U.S.C. section 1214 or 1215, or an agency action against an administrative law judge under 5 U.S.C. 7521.

(3) The final decision in the proceeding on the merits may be an initial decision of a judge that has become final under section 1201.113 of this part or a final decision of the Board.

(c) Place of filing. Where the decision in the proceeding on the

merits was issued by a judge in a MSPB regional or field office, a motion for attorney fees must be filed with the regional or field office that issued the decision. Where the decision in the proceeding on the merits was issued by the Board, a motion for attorney fees must be filed with the Clerk of the Board.

(d) Time of filing; service. A motion for attorney fees must be filed as soon as possible after a final decision of the Board but no later than 60 days after the date on which a decision becomes final. A copy of the motion must be served on the other parties or their representatives at the time of filing. A party may file a pleading responding to the motion within the time limit established by the judge.

(e) Hearing; applicability of subpart B. The judge may hold a hearing on a motion for attorney fees and may apply appropriate provisions of subpart B of this part to the addendum proceeding.

(f) Review by the Board. The judge will issue an initial decision in the addendum proceeding, which shall be subject to the provisions for a petition for review by the Board under subpart C of this part.

Sec. 1201.204 Proceedings for consequential damages and compensatory damages.

(a) Time for making request. (1) In all instances where a request for consequential damages or compensatory damages is made, it should be made as early as possible in a Board proceeding before an administrative judge or administrative law judge but no later than the first pleading filed with the three-member Board.

(2) The judge or the Board, as applicable, may waive the time limit for making a request for consequential damages or compensatory damages for good cause shown.

(b) Service. A copy of a request for consequential damages or compensatory damages must be served on the other parties or their representatives when the request is made. A party may file a pleading responding to the request within the time limit established by the judge or the Board, as applicable.

(c) Discretion to decide in merits proceeding or addendum proceeding. When a request for consequential damages or compensatory damages is made, the judge or the Board, as applicable, may:

(1) Consider the request during the proceeding on the merits and rule on the request in the decision on the merits if the judge or the Board, as applicable, determines that such action is in the interest of the parties and will promote efficiency and economy in adjudication; or

[[Page 17047]]

(2) Defer a decision on the request for an addendum proceeding.

Except as provided in paragraph (e) of this section, the addendum proceeding will be held after issuance of a final decision in the proceeding on the merits. As used in this section, a ``final decision in the proceeding on the merits'' has the same meaning as in Sec. 1201.203(b) of this part.

(d) Initiation of addendum proceeding. If a decision on a request for consequential damages or compensatory damages has been deferred for an addendum proceeding, the judge will schedule the proceeding after issuance of an initial decision that becomes final or a final Board decision.

(e) Discretion of Board to order addendum proceeding. Notwithstanding paragraphs (a) through (d) of this section, the Board, at its discretion, may order that an addendum proceeding to decide a request for consequential damages or compensatory damages be held prior to the issuance of a final decision on the merits. If the Board exercises this discretion, the Board order will provide for initiation of the addendum proceeding.

(f) Hearing; applicability of subpart B. The judge may hold a hearing on a request for consequential damages or compensatory damages and may apply appropriate provisions of subpart B of this part to the addendum proceeding.

(g) Review by the Board. (1) An initial decision issued by a judge under this section, whether in accordance with paragraph (c)(1) of this section or in an addendum proceeding, shall be subject to the provisions for a petition for review by the Board under subpart C of this part.

(2) A recommended decision issued by an administrative law judge in accordance with paragraph (c)(1) of this section shall be subject to the provisions of subpart D of this part.

(h) EEOC review of decision on compensatory damages. A final decision of the Board on a request for compensatory damages pursuant to the Civil Rights Act of 1991 shall be subject to review by the Equal Employment Opportunity Commission as provided under subpart E of this part.

Sec. 1201.205 Judicial review.

A final Board decision under this subpart is subject to judicial review as provided under 5 U.S.C. 7703.

Dated: April 1, 1997.
Robert E. Taylor,
Clerk of the Board.
[FR Doc. 97-8643 Filed 4-8-97; 8:45 am]
BILLING CODE 7400-01-U

G. MSPB Regulations - USERRA Complaint Filing Deadlines, 5 C.F.R. Part 1201

[Federal Register: December 22, 1997 (Volume 62, Number 245)]

[Rules and Regulations]
[Page 66813-66815]
From the Federal Register Online via GPO Access [wais.access.gpo.gov]
[DOCID:fr22de97-1]

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Rules and Regulations

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[[Page 66813]]

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MERIT SYSTEMS PROTECTION BOARD

5 CFR Part 1201

Practices and Procedures

AGENCY: Merit Systems Protection Board.

ACTION: Interim rule; request for comments.

SUMMARY: The Merit Systems Protection Board (MSPB or the Board) is amending its rules of practice and procedure to implement provisions of the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA). The purpose of these amendments is to provide guidance to the parties to MSPB cases, and their representatives, on how to proceed in cases raising claims that an agency employer or the Office of Personnel Management (OPM) has not complied with a USERRA provision governing the employment and reemployment rights to which a person is entitled after service in the uniformed services.

DATES: Effective date December 22, 1997. Submit written comments on or before February 20, 1998.

ADDRESSES: Send comments to Robert E. Taylor, Clerk of the Board, Merit Systems Protection Board, 1120 Vermont Avenue, NW, Washington, DC 20419. Comments may be sent via e-mail to mspb@mspb.gov.

FOR FURTHER INFORMATION CONTACT: Robert E. Taylor, Clerk of the Board, (202) 653-7200.

SUPPLEMENTARY INFORMATION: The Uniformed Services Employment and Reemployment Rights Act of 1994, Pub. L. 103-353 (108 Stat. 3149), consists principally of a revision of chapter 43 of title 38 of the United States Code, ``Employment and Reemployment Rights of Members of the Uniformed Services."

Under USERRA, Federal employees have expanded employment and reemployment rights and benefits after service in the uniformed services, including a new statutory right to appeal USERRA violations to MSPB. Previously, a Federal employee had the right to appeal only an alleged failure to restore to duty, or improper restoration to duty, after military service, a right provided under OPM regulations (5 CFR part 353).

USERRA provides new mechanisms for Federal employees to enforce their employment or reemployment rights. In addition to the right to appeal to MSPB, a Federal employee has the right to seek assistance from the Secretary of Labor, to file a complaint with the Secretary of Labor, and to request representation before MSPB by the Special Counsel if the Secretary of Labor is unable to resolve the complaint. 38 U.S.C. 4321, 4322, and 4324.

USERRA authorizes OPM and the agencies involved in enforcement of USERRA rights for Federal employees--the Department of Labor (DOL), Office of Special Counsel (OSC), and the Board--to promulgate regulations to carry out their functions under the Act. 38 U.S.C.

4331(b)(2)(A).

OPM has issued interim regulations, in the form of amendments to 5 CFR parts 353, 870, and 890, to implement USERRA (60 FR 45650, September 1, 1995). As amended, part 353 includes separate MSPB appeal right provisions for USERRA appeals at 5 CFR 353.211 and for appeals involving restoration to duty after recovery from a compensable injury at 5 CFR 353.304.

The Board is amending its regulation at 5 CFR 1201.3(a), describing appealable actions, to conform to this change by OPM. Section 1201.3(a)(12) is amended to describe only restoration after recovery from a compensable injury and to conform the language to that in OPM's regulation at 5 CFR 353.304. USERRA actions are described in a new section 1201.3(a)(22), which includes citations to both the applicable enforcement provision of USERRA (38 U.S.C. 4324) and the OPM regulation at 5 CFR 353.211.

In describing appealable USERRA actions in new section 1201.3(a)(22), the Board has relied on the following provisions of the Act. The enforcement mechanisms for Federal employees under 38 U.S.C. 4324 apply to an agency employer's or OPM's failure or refusal to comply with the provisions of chapter 43 of title 38. 38 U.S.C. 4322(a)(2)(B). The Act prohibits discrimination against an employee on the basis of service in the uniformed services and prohibits acts of reprisal for exercising a right or seeking to enforce a protection under chapter 43 of title 38. 38 U.S.C. 4311. One kind of action related to the rights and benefits afforded by USERRA is specifically excluded from the enforcement mechanism--an ``action relating to benefits to be provided under the Thrift Savings Plan under title 5." 38 U.S.C. 4322(f).

USERRA does not prescribe specific procedures that the Board must apply to appeals brought under chapter 43 of title 38. The Board has determined that all USERRA cases should be processed under its appellate jurisdiction procedures and that its original jurisdiction procedures, contained in subpart D of part 1201, should not be applied to those USERRA appeals filed by the Special Counsel. Appeals involving restoration after military service that were authorized by OPM regulation have traditonally fallen under the Board's appellate jurisdiction. Congress was presumably aware of that practice, and nothing in USERRA or its legislative history suggests an intent that this practice be changed.

Subpart B of part 1201 is amended at section 1201.2(a) to exclude USERRA appeals from the Special Counsel actions included under the Board's ``original jurisdiction," at section 1201.3(a) to add USERRA actions to the list of appealable actions as new paragraph (a)(22), and at section 1201.31 to add a specific provision in new paragraph (e) for representation of a person in a USERRA appeal by the Special Counsel. Subpart D of part 1201 is amended at sections 1201.121 and 1201.131 to

exclude USERRA appeals specifically from the original jurisdiction procedures applying to corrective actions brought by the Special Counsel.

USERRA does not establish a time limit for appealing to the Board, nor does it specifically prohibit the establishment of a time limit. Petersen v. Department of the Interior, 71 M.S.P.R. 227 (1996); Duncan v. U.S. Postal Service, 73 M.S.P.R. 86 (1997); Jasper v. U.S. Postal Service, 73 M.S.P.R. 367 (1997); Wright v.

[[Page 66814]]

Department of Veterans Affairs, 73 M.S.P.R. 453 (1997). The Board is authorized by 5 U.S.C. 1204(h) to promulgate regulations to carry out its functions and has used this authority since its inception to prescribe time limits for filing appeals with the Board. The Board is also authorized by 38 U.S.C. 4331(b)(2)(A) to promulgate regulations to carry out its functions under USERRA.

The Act provides a person three opportunities to file an appeal with MSPB: (1) after the alleged violation, if the person does not file a complaint with DOL; (2) after DOL notifies the person that it cannot resolve the matter with the agency, if the person chooses not to have the matter referred to the Special Counsel; and (3) after being advised that the Special Counsel chooses not to represent the person in an appeal to MSPB. 38 U.S.C. 4324(b). If a matter is referred to the Special Counsel, the Special Counsel may file an appeal with MSPB. 38 U.S.C. 4324(a)(2).

Any filing time limit established by the Board by regulation must allow sufficient time for a person to explore his or her options, including possibly pursuing the matter with DOL and OSC, while not allowing the matter to become stale. The Board has ruled that if a person files a formal complaint with DOL, the DOL procedure must be exhausted before an appeal may be filed with MSPB. Petersen, 71 M.S.P.R. at 233; Jasper, 73 M.S.P.R. at 370.

The Board is amending its regulation at 5 CFR 1201.22(b), prescribing time limits for filing, to provide that a USERRA appeal may be filed directly with MSPB within 180 days of the alleged violation. If a person seeks assistance from DOL under 38 U.S.C. 4321 but does not file a formal complaint under 38 U.S.C. 4322(a), he or she may subsequently file an appeal with MSPB at any time during the 180-day period. If a person files a formal complaint with DOL under 38 U.S.C. 4322(a) and receives notification from DOL that it has been unable to resolve the matter, he or she may subsequently file an appeal with MSPB within 30 days after receipt of the notification from DOL or within 180 days of the alleged violation, whichever is later. If DOL refers a person's complaint to OSC under 38 U.S.C. 4322(a) and the person receives notification from the Special Counsel that OSC will not

represent the person before MSPB, he or she may subsequently file an appeal with MSPB within 30 days after receipt of the notification from the Special Counsel or within 180 days of the alleged violation, whichever is later.

This guarantees that a person will have at least six months from the time of an alleged violation of USERRA to file an appeal with MSPB. If a person files a formal complaint with DOL or seeks OSC representation, the time limit for filing with MSPB may be greater than six months.

Where the Special Counsel chooses to represent a person in a USERRA appeal before MSPB, the Board has not set a time limit for filing. The intent is to allow the Special Counsel time to secure voluntary compliance before filing an appeal with MSPB. Because DOL will have already tried, and failed, to secure compliance by the agency, the Board expects that the Special Counsel will file an appeal with MSPB expeditiously where a matter cannot be resolved with the agency.

In addition to the amendments with respect to USERRA discussed above, the Board is making several technical amendments to its regulation at 5 CFR 1201.3(a).

The Board is publishing this rule as an interim rule pursuant to 5 U.S.C. 1204(h) and 38 U.S.C. 4331.

List of Subjects in 5 CFR Part 1201

Administrative practice and procedure, Civil rights, Government employees.

Accordingly, the Board amends 5 CFR part 1201 as follows:

PART 1201--[AMENDED]

1. The authority citation for part 1201 continues to read as follows:

Authority: 5 U.S.C. 1204 and 7701, and 38 U.S.C. 4331, unless otherwise noted.

2. Section 1201.2 is amended by revising paragraph (a) to read as follows:

Sec. 1201.2 Original jurisdiction.

* * * * *

(a) Actions brought by the Special Counsel under 5 U.S.C. 1214, 1215, and 1216;

* * * * *

3. Section 1201.3 is amended by revising paragraph (a)(12), by removing ``and" at the end of paragraph (a)(19), by removing the period at the end of paragraph (a)(20) and adding a semi-colon in its place, by revising the citation in the parenthetical at the end of paragraph (a)(21) to read ``(22 U.S.C. 4011)", by deleting the period at the end of paragraph (a)(21) and substituting ``; and", and by adding a new paragraph (a)(22) to read as follows:

Sec. 1201.3 Appellate jurisdiction

(a)* * *

(12) Failure to restore, improper restoration of, or failure to return following a leave of absence an employee or former employee of an agency in the executive branch (including the U.S. Postal Service and the Postal Rate Commission) following partial or full recovery from a compensable injury (5 CFR 353.304);

* * * * *

(22) Non-compliance by a Federal executive agency employer or the Office of Personnel Management with the provisions of chapter 43 of Title 38 of the United States Code relating to the employment or reemployment rights or benefits to which a person is entitled after service in the uniformed services (38 U.S.C. 4324, 5 CFR 353.211), excluding any action related to benefits to be provided under the Thrift Savings Plan under title 5 of the United States Code (38 U.S.C. 4322(f)).

* * * * *

4. Section 1201.22 is amended by redesignating the text of paragraph (b) as paragraph (b)(1), by revising the first sentence of paragraph (b)(1) and by adding a new paragraph (b)(2) to read as follows:

Sec. 1201.22 Filing an appeal and responses to appeals.

* * * * *

(b) * * * (1) Except as provided in paragraph (b)(2) of this section, an appeal must be filed no later than 30 days after the effective date, if any, of the action being appealed, or 30 days after the date of receipt of the agency's decision, whichever is later. * * *

(2) (i) Where a person alleges non-compliance with the provisions of chapter 43 of title 38 of the United States Code relating to the employment or reemployment rights or benefits to which a person is entitled after service in the uniformed services (see paragraph (a)(22) of Sec. 1201.3 of this part), he or she may file an appeal directly

with the Board within 180 days after the alleged act or incidence of non-compliance.

(ii) Where a person seeks assistance from the Secretary of Labor under 38 U.S.C. 4321 but does not file a complaint under 38 U.S.C. 4322(a), he or she may file an appeal directly with the Board within 180 days after the alleged act or incidence of non-compliance.

(iii) Where a person files a complaint with the Secretary of Labor under 38 U.S.C. 4322(a) and receives notification under 38 U.S.C. 4322(e) that the Secretary has been unable to resolve the matter, he or she may subsequently file an appeal with the Board within 30 days after the date of receipt of the Secretary's notification or within 180 days after the alleged act or incidence of non-compliance, whichever is later. A

[[Page 66815]]

copy of the Secretary's notification must be submitted with the appeal.

(iv) Where the Secretary of Labor refers a person's complaint to the Special Counsel under 38 U.S.C. 4322(a) and the person receives notification that the Special Counsel declines to represent the person in an appeal to the Board, he or she may subsequently file an appeal with the Board within 30 days after the date of receipt of the Special Counsel's notification or within 180 days after the alleged act or incidence of non-compliance, whichever is later. A copy of the Special Counsel's notification must be submitted with the appeal.

(v) Where the Secretary of Labor refers a person's complaint to the Special Counsel under 38 U.S.C. 4322(a) and the Special Counsel agrees to represent the person in an appeal to the Board, the Special Counsel may file an appeal with the Board at any time thereafter.

* * * * *

5. Section 1201.31 is amended by adding a new paragraph (d) to read as follows:

Sec. 1201.31 Representatives.

* * * * *

(e) The Special Counsel may represent a person in an appeal alleging non-compliance with the provisions of chapter 43 of title 38 of the United States Code relating to the employment or reemployment rights or benefits to which a person is entitled after service in the uniformed services (see paragraph (a)(22) of Sec. 1201.3 of this part and 38 U.S.C. 4324). In such an appeal, a copy of any written request by the person to the Secretary of Labor that the matter be referred to the Special Counsel for litigation before the Board will be accepted as the written designation of representative required by paragraph (a) of

this section.

6. Section 1201.121 is amended by adding a new paragraph (c) to read as follows:

Sec. 1201.121 Scope of jurisdiction; application of subparts B, F, and H.

* * * * *

(c) The provisions of this subpart do not apply to appeals alleging non-compliance with the provisions of chapter 43 of title 38 of the United States Code relating to the employment or reemployment rights or benefits to which a person is entitled after service in the uniformed services, in which the Special Counsel appears as the designated representative of the appellant. Such appeals are governed by subpart B of this part.

Sec. 1201.131 [Amended]

7. Section 1201.131 is amended at paragraph (a) by adding after ``Special Counsel'' the phrase, ``under this subpart''.

Dated: December 17, 1997.
Robert E. Taylor,
Clerk of the Board.
[FR Doc. 97-33353 Filed 12-19-97; 8:45 am]
BILLING CODE 7400-01-U

H. Office of the Special Counsel Considerations Regarding MSPB Representation

OFFICE OF THE SPECIAL COUNSEL & USERRA

1. What is the Office of Special Counsel?

The Office of Special Counsel is an independent federal executive agency that investigates and prosecutes cases involving:

a. Prohibited Personnel Practices (PPPs) under 5 U.S.C. Section 2302(b).

b. Federal employee violations of the Hatch Act, which regulates the partisan political activities of federal employees.

c. Agency violations of law, rule, or regulations; fraud, waste, and abuse of authority; gross mismanagement or a substantial and specific danger to public health and safety, disclosed by federal employee whistleblowers.

d. Agency denials of veteran and reservist employment or reemployment rights, discrimination based upon military status, and denial of any promotion, or other benefit of employment because of military status.

2. What obligations does USERRA give the Office of Special Counsel, with respect to federal employees who allege agency discrimination, failure to hire or reemploy because of their military or veteran status?

a. **38 U.S.C. Section 4324(a)(1):**

A person who receives from the Secretary [of Labor] a notification pursuant to section 4322(e) may request that the Secretary refer the complaint for litigation before the Merit Systems Protection Board. The Secretary shall also refer the complaint to the Office of Special Counsel established by section 1211 of title 5.

b. **38 U.S.C. Section 4324(a)(2)(A):**

If the Special Counsel is reasonably satisfied that the person on whose behalf a complaint is referred under paragraph (1) is entitled to the rights or benefits sought, the Special Counsel (upon request of the person submitting the complaint) may appear on behalf of, and act as attorney for, the person and initiate an action regarding such complaint before the Merit Systems Protection Board.

c. **38 U.S.C. Section 4324(a)(2)(B):**

If the Special Counsel declines to initiate an action and represent a person before the Merit Systems Protection Board under subparagraph (A), the Special Counsel shall notify such person of that decision.

3. What action does the Office of Special Counsel take upon referral?

a. Obtains the DOL-VETS investigative file and report/memorandum from the Office of the Solicitor, Department of Labor.

b. Reviews the entire investigative file in detail.

(1) Direct Evidence of Military Status Discrimination

(2) Circumstantial Evidence of Military Status Discrimination

A. Statements of Animus

B. Agency's Explanation

C. Disparate Treatment

D. Time Chronology

E. Conduct of the Veteran/Reserve Component Employee

c. Reviews the legal analysis from Secretary of Labor, Office of the Solicitor

d. Determines if further investigation is needed

e. Conducts their own legal analysis of the facts and law

4. What is the legal standard for a finding of military status discrimination?

a. The employee's affiliation (or former affiliation) with the active component Armed Forces or the Reserve Components of the Armed Forces (including the National Guard) played **a "substantial or motivating" part** in the agency's adverse action against the employee.

b. A "substantial or motivating factor" must be more than "some weight", but less than the "sole reason" for agency adverse action against an employee. Each case is examined on its unique facts. The employee must show by a preponderance of evidence (>50%) that military status was a "motivating" or "substantial" basis for adverse agency action. Petersen v. Department of the Interior, 71 M.S.P.R. 227 (1996); *Accord,* Gummo v. Village of Depew, New York, 75 F.3d 98, 106 (2d Cir. 1996)

c. Once an employee raises a USERRA claim of military status discrimination, the agency must prove that **it would have taken the same action against the employee even if the employee had no military affiliation**. The employee can then rebut the agency's claims by use of direct or circumstantial evidence, showing the agency's defense is really a **pretext for discriminatory conduct**. 38 U.S.C. Section 4311(b).

5. What would be considered "direct evidence" of military status discrimination?

a. Uncontradicted evidence that something was done or not done to an agency employee because of his or her status as a veteran or military member.

(1) Statements found in performance evaluations, letters of reprimand, e.g., that "X is not a 'team player' because of his or her numerous absences for Reserve duty and meetings."

(2) Stated reasons given to a veteran or reservist for a particular assignment or demotion. ("You are gone on military duty so much that we can't consider you for X position, as we can't count on you being here when we need you.")

b. Direct evidence is gathered from documents, witness statements, independent sources (internal inspector general investigations/audits), and agency policy and conduct/past practices.

6. What constitutes "circumstantial evidence" of military status discrimination?

a. The MSPB, in Duncan v. U.S. Postal Service, 73 M.S.P.R. 86 (1997), has determined that federal employees may **prove indirectly the agency's discriminatory intent** by providing relevant circumstantial evidence which a fact finder can infer discriminatory agency intent. The Board has directed that circumstantial evidence cases use the "burden-shifting analysis" provided under Title VII of the Civil Rights Act of 1964. The employee must establish a ***prima facie*** case that:

(1) he or she was a member of a protected group, the Armed Forces, Armed Forces Reserve Component, or a former member of the military (veteran), and the employer was aware of this status,

(2) he or she was similarly situated to an individual who was not a member of the protected group (e.g., someone on sabbatical or pregnancy leave), and

(3) he or she was treated more harshly or disparate than the individual who was not a member of the Armed Forces, Armed Forces Reserve Component or veteran.

Coleman v. Department of Air Force, 66 M.S.P.R. 498, 508 (1995), *aff'd*, 79 F.3d 1165 (Fed. Cir. 1996).

b. Once the employee has met the initial burden of proof, the burden "shifts" to the **agency to articulate a legitimate, nondiscriminatory reason for its action**. The agency meets this burden when it introduces evidence, which, on its face, would lead a fact finder to conclude that the agency had a nondiscriminatory basis for its action, regardless whether the agency proves the reason.

c. One the agency has raised a legitimate nondiscriminatory defense for its action, the employee must show that the agency's stated reason was really a **pretext for prohibited discrimination**. The employee must show both that the agency's stated reason was not the real reason for its action and that military status discrimination was a motivating factor for the adverse action.

d. Several types of information help the reservist or veteran prove his case:

(1) Statements of animus. Statements of animus are statements by supervisors and agency officials indicating a strong dislike of someone because of military or veteran status. In the Peterson case, the employee was a Vietnam veteran who was subjected to continuous abusive name calling by his supervisors and co-workers, such as "Psycho" and "Babykiller". Other common agency manager statements would be to disparage Reservists as "unreliable" or "disloyal", "non-team players", and "double dippers".

(2) Disparate Treatment. A good example is where a Reservist on active duty is denied an annual bonus, but a woman employee on pregnancy leave is given the annual bonus.

(3) Time Sequencing/Chronology. Where an agency immediately disciplines or fires an employee after he has asserted his USERRA rights or returned from military duty, despite agency protests of non-discriminatory purpose, a strong inference of discriminatory conduct may be found. *Accord*, Robinson v. Morris Moore Chevrolet, 974 F. Supp. 571 (E.D. Tex. 1997).

7. Does a Reserve or National Guard employee have an obligation to minimize the burden upon the agency by rescheduling military duty or training that conflicts with his agency job demands?

a. Practically speaking, the answer is generally yes. Whenever possible, Reserve and National Guard members should work with their commands to avoid unnecessary conflicts between their military duty and civilian work schedules. This is particularly true in shift work type jobs, such as firemen, policemen, prison guards, postal workers, and hospital workers. Employees should provide their agencies with as much

advance notice as possible to avoid scheduling conflicts. Still, military employees do not always have a say as to when they must participate in military training or activations.

b. Agency management must understand that they cannot refuse to allow their military member employees to attend military duty or training for agency convenience. The military mission is paramount. *See* H. Rep. No. 103-65, 103^{d} Cong., 1st Sess., at 30 (1993):

> [T]here is no obligation on the part of the service member to rearrange or postpone already scheduled military service nor is there any obligation to accede to an employer's desire that such service be planned for the employer's convenience.

c. There are no reported MSPB cases where the Board has endorsed adverse action against an employee for failing to minimize the frequency, timing or duration of their military training or duty. The statute, 38 U.S.C. § 4312(h), makes clear that civilian employers, including the federal government, do not decide when, where, or how often employee Reservists do their military duty or training. As Congress observed in creating this section of the Act:

> This section makes clear the Committee's intent that no "reasonableness" test be applied to determine reemployment rights and that this section prohibits consideration of timing, frequency, or duration of service so long as it does not exceed the cumulative limits under section 4312(C) and the servicemember has complied with the requirements under sections 4312(a) and (e).

H. Rep. No. 103-65, 103^{d} Cong., 1st Sess., at 30 (1993). *See also* OPM Regulation, 5 C.F.R. Section 353.203(c), which urges federal employees to make a good faith effort to resolve work conflicts with their military duty. The 5 C.F.R. Section 353.203(c) provision should not be used as a test to determine whether the service member's military duty was "reasonable" or "fair to the agency", or whether the OSC should represent a federal employee with a USERRA issue.

8. How do you contact the Office of Special Counsel?

The OSC has a website at http://www.access.gpo.gov/osc . You can also contact the OSC senior counsel for USERRA cases, at telephone (202) 653-6005. Merit Systems Protection Board regulations and cases may be found at the MSPB website, http://www.access.gpo.gov/mspb .

CHAPTER FOUR

USERRA EMPLOYEE PENSION/THRIFT SAVINGS PLAN ISSUES

A. USERRA and Federal Thrift Savings Plans

Summary of Uniformed Services Employment And Reemployment Rights Act (USERRA) As It Pertains To Thrift Savings Plans (TSPs)

This reference guide and example are provided as clarification of **TSP Bulletin 95-13**. It is not intended to replace the bulletin. Please refer to TSP Bulletin 95-13 for more detailed information.

The Uniformed Services Employment and Reemployment Rights Act (USERRA), enacted on October 13, 1994, includes provisions to allow all eligible employees the opportunity to make up any Thrift Savings Plan (TSP) contributions that were not made to their TSP accounts because they separated (or were in a leave-without-pay status) to perform military service. TSP Bulletin 95-13 defines eligible employees as persons who separated (or entered in a leave-without-pay status) to perform military service and who were restored or reemployeed under Chapter 43 of Title 38, U.S.C. on or after August 2, 1990. Personnel offices may solicit self identification of employees in addition to automated methods to identify potentially eligible employees. When the employee has been identified, the personnel representative may make an appointment with him or her to explain the impact of USERRA. This is an opportunity to advise the employee of the amount of retroactive agency automatic 1% contributions. To assist the employee in making an informed decision, the personnelist may compute an estimate of retroactive employee contributions based on the employee's election.

Employees have until April 21, 1996 or one year from the date of reemployment, whichever is later, to submit a written request to the personnel office to make up the missed employee contributions, or their rights are forfeited. Agency Automatic 1% contributions should be forwarded to TSP by June 20, 1995. Belated submissions will continue to accrue lost earnings at the cost of the employing agency.

1. Employee Contributions: Eligible employees may choose to make retroactive contributions to their TSP accounts. Such contributions are made via payroll deductions from the employee's biweekly pay. The rate(s) of basic pay for the retroactive period must be furnished to employee's civilian payroll office. For the portion of the retroactive period when the employee did not receive a civilian salary, the rate of basic pay used to calculate TSP contributions, including the Agency Automatic 1%, is the basic pay to which the employee would have been entitled had he or she remained continuously employed. TSP Bulletin 95-13, Paragraph II.F., defines the retroactive period. Employees

may change the amount of their contributions one time for each TSP Open Season during which they were eligible to participate, except that they were separated from civilian employment (or on LWOP) to perform military duty. An election to make a retroactive open season election is treated similarly to the error correction process. The fund allocations for all contributions must be identical to those indicated on the most current TSP-1.

2. Government Matching Contributions: Matching is available only to FERS employees if they choose to make retroactive contributions. If employees are currently contributing to TSP, government matching contributions will be invested in accordance with current allocations. Lost earnings will be paid on the retroactive government matching contributions (see paragraph 4 below).

3. Agency Automatic 1%: The personnel office is responsible for determining the retroactive period and for submitting corresponding basic pay rates to payroll. The personnel representative should find this information in the OPF. Payroll will submit the appropriate amount to the National Finance Center (NFC) to be invested in accordance with the current TSP-1.

4. Lost Earnings: A lost earnings record will be submitted by the employee's civilian payroll office for each pay period covered by the retroactive period. The TSP will calculate lost earnings on all retroactive agency contributions using the G-Fund rate of return unless the employee submitted one or more interfund transfer requests during the period of separation. In this case, lost earnings will be calculated using the G-Fund rate of return until the first interfund transfer request was processed. Contributions subject to lost earnings will be moved to the investment funds indicated on interfund transfer requests and lost earnings will then be calculated based on those investment funds. The contribution is traced through any additional interfund transfers that were processed during the lost earnings calculation period.

5. Forfeitures: If a FERS employee separated to perform military service before he or she was vested and thus forfeited agency automatic contributions, he or she is entitled to have these funds restored. It is incumbent on the employee to notify the personnel office of the forfeiture. TSP-5-R has been issued by TSP to be used to request restoration. Please refer to TSP Bulletin 95-18 for procedures to request restoration of forfeited funds.

6. Withdrawals: If the employee received an automatic cash out or was required to withdraw his or her TSP funds prior to March 1995, he or she may elect to reinvest the full amount of the withdrawal back into TSP. In certain cases, if a taxable distribution was declared on a TSP loan and the employee returns the amount of the withdrawal to the TSP, the taxable distribution that was declared on the loan may be reversed. In such a case, regular loan payments are resumed.

EXAMPLE #1:

In July 1991 TSP Open Season Mike submits a TSP-1 to contribute 3% of basic pay, allocating 100% to C-Fund. On October 1, 1991 Mike enters LWOP status to perform military duty. Mike returns to his civilian job March 12, 1992. At this time he resumes contributions at the 3% rate with 100% in the C-Fund. He has made no change since. On June 1, 1995 he is contacted by his employing agency and notified of his right to make retroactive contributions under USERRA.

--Mike has the opportunity to make retroactive contributions which will be based on the TSP-1 on file, at the 3% rate, 100% in the C-Fund. Mike will be entitled to the Agency Automatic 1% and Agency matching. Lost earnings will be calculated at the G-Fund rate of return only on the Agency Automatic 1% and on the Agency Matching Contributions. Retroactive contributions will be invested according to his current contribution allocation which is still 100% C-Fund.

--A TSP Open Season occurred during Mike's LWOP. Thus, he may submit a TSP-1 to change the amount of the contribution. However, the contributions will be invested according to the allocations indicated on his current TSP-1. If, for example Mike wants to make retroactive contributions at 5% of Basic Pay (instead of 3%), this change would be effective the first full pay period in January and would end with the pay period prior to the first full pay period in July 1992. Effective with the July 1992 open season, Mike's contributions would return to 3%. (Reason: Mike had an opportunity to make an open season election in July 1992 yet remained at the 3% contribution level.)

--The personnel office should provide the payroll office with the period during which agency automatic 1% contributions are due. In this case that period of time begins on October 1, 1991 and terminates at the end of the pay period prior to the pay period in which Mike returned to duty. The personnel office should also provide the payroll office with the period during which agency matching contributions must be calculated. In the above example, the periods are from October 1, 1991 through December 1991, at 3% and January 1992 through June 1992, at 5%. Applicable salary rates should be provided for each period individually.

EXAMPLE #2

Pat is a CSRS employee contributing 2% of basic pay to TSP with 100% invested in the G-Fund. Pat is placed on LWOP in February 1994 to perform military service. He returns to duty in June 1994. In June 1995 Pat's employing office notifies him of his rights under USERRA.

--Pat may reinstate the TSP-1 election that was in effect in February 1994. As no open season occurred during Pat's leave, he does not have the option to change the contribution amount. He is locked into the 2% contribution rate. Pat is not entitled to the Agency Automatic 1% or the Agency Matching because he is covered under CSRS.

EXAMPLE #3

Debbie was first employed on October 1, 1992. November 1, 1992 she enters LWOP to perform military service. She remains on LWOP until she returns to her

civilian position on June 2, 1993. During the July 1993 open season she enrolls in TSP for the first time.

--Debbie may not make retroactive contributions under the USERRA provisions. This is because she was not eligible to participate in TSP until the July 1993 Open Season.

EXAMPLE #4

Colette is a FERS employee who, prior to her separation on February 15, 1992 to perform military service, participated in TSP (5% of Basic Pay with 50% in the G-Fund and 50% in the F-Fund). Colette is reemployed on July 1, 1995 under Chapter 43 of Title 38, U.S.C.

--Immediately upon reemployment, Colette's agency will give her the opportunity to submit a Form TSP-1 to make current contributions. The fund allocation she requests will be the prospective investment allocation as well as the investment allocation for retroactive contributions. Within 60 days of becoming reemployed Colette's agency should advise her of her opportunity to make retroactive contributions. If she chooses to make retroactive payments, she is locked into the 5% contribution amount until her open season opportunity in July 1992. She can change the amount of her contribution for each open season during which she was separated in order to perform military service.

--The agency determines the retroactive period and the basic pay amounts on which the agency automatic 1% will be computed and submits this information to the civilian payroll office.

Federal Retirement Thrift Investment Board

THRIFT SAVINGS PLAN

FACT SHEET

TSP Benefits That Apply to Members of the Military Who Return to Federal Civilian Service

This Fact Sheet applies only to employees who meet all of the following conditions:

– they separated or were placed in nonpay status to perform military service;

– their release from military service, discharge from hospitalization, or other similar event occurred on or after August 2, 1990; and

– they are subsequently reemployed in, or restored to, a position covered by FERS or CSRS pursuant to 38 U.S.C. Chapter 43.[1]

The Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) contains several provisions regarding the Thrift Savings Plan (TSP):

- You may make up TSP contributions missed as a result of your military service.
- If you were not vested when you separated from civilian service, and Agency Automatic (1%) Contributions and associated earnings were removed from your TSP account, you are entitled to have these funds restored to your account.
- If you separated from civilian service and your TSP account was paid out for one the reasons explained below, you may return the funds, and, if applicable, reestablish a TSP loan.

This Fact Sheet explains each of these benefits. **For an explanation of how they relate to your specific situation and more information, see your personnel office.**

Making Up TSP Contributions

You may make up TSP contributions for the period of time you missed as a result of your military service. The amount of these contributions will be determined by using the TSP Election Form (TSP-1) that was in effect immediately before your entry into military service, unless you submit a new Form TSP-1 to terminate the contributions or to make an election(s) for any open season that

[1] FERS refers to the Federal Employees' Retirement System, the Foreign Service Pension System, and other equivalent Government retirement plans. CSRS refers to the Civil Service Retirement System, including CSRS Offset, the Foreign Service Retirement and Disability System, and other equivalent Government retirement plans. OC 95-5 (4/98)

(Continued on page 2)

occurred during this period. If you had made an election to terminate your contributions within two months before your entry into military service, you may submit Form TSP-1 to make an election for the first open season that occurred after the termination election was effective, even if the termination was made outside an open season.

Investment allocations. If you make contribution elections for your period of military service, the investment allocation you make on the Forms TSP-1 must be the same as the investment allocation on your current Form TSP-1. Both your makeup and current contributions must be invested in the funds you requested on your current Form TSP-1. (Absent a current Form TSP-1, your makeup contributions will be invested in the Government Securities Investment (G) Fund.)

Deducting Makeup Employee Contributions.

All makeup Employee Contributions must be deducted from future pay. Makeup Employee Contributions deducted from your pay in a current calendar year are subject to the Internal Revenue Service (IRS) annual limit in effect for the year to makeup contributions are attributable. They do not count against the limit on your cur-rent year contributions.

If you choose to make up Employee Contributions, your agency will help you set up a payment schedule.

Stopping Makeup Employee Contributions.

You can always stop your makeup contributions, just as you can always stop your current contributions. However, your decision to stop your makeup contributions is irrevocable.

Receiving retroactive agency contributions. If you are covered by FERS, you will receive retroactive Agency Matching Contributions as you make up your Employee Contributions. These Agency Matching Contributions are made in equal installments over the period during which you are making up your contributions. If you do not make up Employee Contributions, you will not receive makeup Agency Matching Contributions.

You will receive retroactive Agency Automatic (1%) Contributions for the entire period missed as a result of military service **whether or not** you make up Employee Contributions. Your agency will deposit these contributions as a single deposit.

Receiving lost earnings. You are entitled to lost earnings on the retroactive agency contributions made to your account.[2] You are **not** entitled to lost earnings on your makeup Employee Contributions.

The TSP will calculate the lost earnings on each retroactive agency contribution using the G Fund rates of return unless one or more interfund transfer requests had been made during the retroactive period. If this is the case, lost earnings will be calculated using the G Fund rates of return until your first interfund transfer was processed. The contribution will be moved to the investment fund(s) you had requested and lost earnings will then be calculated based upon that fund or those funds. The contribution is traced through all other subsequent interfund transfers processed during the period, and lost earnings are calculated based upon the investment fund(s) to which it was moved.

Time limits. To make up missed TSP contributions, you must submit a written request to your agency within one year of the date of your reemployment in, or restoration to, civilian service.

Restoring Forfeited Agency Automatic (1%) Contributions

[2] Your receipt of lost earnings is subject to the *de minimis* rules in 5 C.F.R. Part 1606. See your personnel or payroll office for more information.

If the Agency Automatic (1%) Contributions and associated earnings in your TSP account were removed because you did not meet the TSP vesting requirement when you separated to perform military service, you are entitled to have these funds restored to your TSP account.[3]

Restoration process. You must notify your agency that the Agency Automatic (1%) Contributions and associated earnings were removed from your account. You can tell if a forfeiture was processed by checking your TSP Participant Statements. Your agency must take the actions required by the TSP to request that the funds be restored to your account. The TSP record keeper will then restore these funds to your account.

Returning Money Withdrawn from the TSP

If you separated from civilian service to perform military service and your TSP account was paid out because:

- it was $3,500 or less, **or**

- you were required to withdraw your TSP account balance prior to March 1995 because you were not eligible for retirement benefits,

you may return to the TSP an amount equal to the full amount of the payment. (You may not return only part of this amount.) You will not receive retroactive earnings on this amount.

Process. To return your TSP disbursement, you must notify the TSP record keeper within one year from the date of your reemployment in, or restoration to, civilian service. You must provide the record keeper with a copy of your SF-50, Notification of Personnel Action, or a letter from your agency indicating your reemployment pursuant to 38 U.S.C. Chapter 43.

The TSP record keeper will then notify you of the amount you must return. You must provide this amount to the record keeper as a single payment within 90 days of the date of the notice stating the amount.

Taxable distribution reversed. If you return your TSP withdrawal and you had a TSP loan that had been closed as a taxable distribution as a result of your separation to perform military service, you may be eligible to have the taxable distribution reversed. The TSP record keeper will notify you of this opportunity when it notifies you of the amount of the withdrawal you must return.

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[3] The vesting requirement for most FERS employees is three years of Federal service. FERS employees in congressional, Schedule C, noncareer Senior Executive Service, and certain Executive Level positions become vested in the Agency Automatic (1%) Contributions and associated earnings in their ac-counts after only two years of Federal service. Generally, this is civilian service; however, the type of military service you have just performed also counts for TSP vesting purposes. See your personnel office for more information about service that counts for TSP vesting.

B. Implementation of USERRA Provisions Regarding Thrift Savings Plans

THRIFT SAVINGS PLAN

BULLETIN 95-13

Subject: Implementation of Public Law 103-353, the Uniformed Services Employment and Remployment Rights Act of 1994 (USERRA)

DATE: April 21, 1995

The purpose of this bulletin is to provide agency representatives with detailed instructions and procedures for implementing Section 4 of Public Law 103-353, the Uniformed Services Employment and Reemployment Rights Act (USERRA), which was enacted on October 13, 1994.

Background

A. **General.**

Section 4 of Public Law 103-353 amends Title 5 of the United States Code to add Section 8432b, Contributions of persons who perform military service. The new Section 8432b of Title 5 pertains to the Thrift Savings Plan (TSP) and the TSP benefits that apply to any Federal employee whose release from military service, discharge from hospitalization, or other similar event that makes him or her eligible for restoration or reemployment under Chapter 43 of Title 38, U.S.C., occurs on or after August 2, 1990.

B. **Contributions.**

USERRA includes provisions to allow all eligible employees the opportunity to make up any TSP contributions that were not made to their TSP accounts because they separated (or were in a leave-without-pay status) to perform military service. Employing agencies must deposit the appropriate amount of Agency Matching Contributions to the accounts of those employees covered by the Federal Employees' Retirement System (FERS)* who elect to make up missed contributions. In addition, employing agencies must deposit to the accounts of eligible FERS employees an amount equal to 1 percent of their basic pay for the retroactive period. Subject to the lost earnings *de minimis* rules, employing agencies must also pay lost earnings on the retroactive agency contributions that are reported for investment.

Inquiries:

Questions concerning this bulletin should be directed to the Federal Retirement Thrift Investment Board at 202-942-1460.

* FERS refers to the Federal Employees' Retirement System, the Foreign Service Pension System and other equivalent retirement plans.

(Continued on next page)

C. **Forfeitures.**
FERS employees who separated to perform military service before they were vested and whose Agency Automatic (1%) Contributions and associated earnings were forfeited are entitled to have these funds restored. The employing agency must submit a written request to the TSP recordkeeper to restore these funds.

D. **Withdrawals.**
The legislation also allows certain employees who separated because of military service to elect to have the separation treated as if it had never occurred. Employees who so elect must return the full amount of the withdrawals. In addition, in certain cases, if a taxable distribution was declared on a TSP loan and the employee returns the amount of the withdrawal to the TSP, the taxable distribution that was declared on the loan may be reversed. In this case, the employee can resume regular loan payments.

E. **Regulations.**
The Executive Director of the Federal Retirement Thrift Investment Board (Board) has issued regulations to implement the provisions of Section 4 of Public Law 103-353. These regulations were published in the *Federal Register* on April 21, 1995, and will be distributed to agency representatives with a separate TSP bulletin.

II. Definitions

A. **Basic pay.**
For the portion of the retroactive period when an employee did not receive a civilian salary, the rate of basic pay that will be used to calculate TSP contributions is the basic pay that would have been payable to the employee if the employee had remained continuously employed in the position that he or she last held before separating to perform military service. For the portion of the retroactive period that occurs after the employee is reemployed, the employee's actual basic pay will be used to calculate TSP contributions.

B. **Current contributions.**
The Open Season election that an employee makes with the most recent effective date is considered the current election. The current Form TSP-1, Election Form, is used to calculate the amount of current contributions that are made prospectively each pay period after reemployment. In addition, this form is used to determine the amounts to be reported for investment in each of the investment funds for both current and retroactive contributions based on the allocation election on that election form.

C. **Employee.**
As used in this bulletin, employee means any Federal employee whose release from military service, discharge from hospitalization, or other similar event that makes him or her eligible for restoration or reemployment under Chapter 43 of Title 38, U.S.C., occurs on or after August 2, 1990.

D. **Leave-without-pay.**
As used in this bulletin, leave-without-pay means a temporary nonpay status and absence from duty (including military furlough) to perform military service.

E. **Reemployed or reemployment.**
Reemployed or reemployment means reemployed in (or restored to) a position pursuant to Chapter 43 of Title 38, U.S.C., which is subject to Chapter 84 of Title 5, U.S.C. or which entitles the employee to contribute to the TSP pursuant to 5 U.S.C. 8351.

F. **Retroactive period.**

The retroactive period is the period for which an employee is entitled to make up missed TSP Employee Contributions and receive retroactive Agency Automatic (1%) and Agency Matching Contributions, as applicable.

1. **Retroactive period begins.**

The retroactive period begins on the date following the date of separation (or on the date the employee enters leave- without-pay status). An exception to the beginning date of the retroactive period is when an employee was not eligible to make contributions when military service began. In this case, the retroactive period does not begin until the first day of the first pay period in the election period during which the employee would have become eligible to make contributions had he or she remained in civilian service.

2. **Retroactive period ends.**

The retroactive period ends on the date prior to the first day of the first election period during which a contribution election could have been made effective after reemployment or the last day of the pay period prior to the pay period during which routine current contributions are begun after the employee is reemployed, whichever is earlier. If an employee who was making contributions when he or she separated elects to not make routine current contributions, the ending date of the retroactive period is the last day of the pay period during which the employee elects to terminate contributions.

G. **Separation or separated.**

As used in this bulletin, separation or separated means the period an employee was separated from Government employment (or entered a leave-without-pay status) to perform military service.

III. Processing TSP Contribution Elections

A. **General.**

Immediately upon reemployment, an employee's agency must give an eligible employee the opportunity to submit a Form TSP-1 to make current contributions. Within 60 days of becoming reemployed, the employee's agency must advise the employee of his or her opportunity to make any TSP Open Season contribution election that could have been made if the employee had not separated to perform military service. However, an employee will have one year from April 21, 1995, or the date of reemployment, whichever is later, to submit a written request to the agency to make up the missed Employee Contributions.

B. **Resuming current contributions.**

The effective date of the current Form TSP-1 will be the first day of the first full pay period in the most recent TSP election period. If the employee is reemployed during a TSP Open Season but before the election period, he or she can also submit a Form TSP-1 that will become effective the first day of the first full pay period in the following election period. For example, if an employee is reemployed on January 2, 1995, the effective date of the current Form TSP-1 will be January 15, 1995 (the first day of the first full pay period in the most recent election period). If an employee is reemployed on March 22, 1995, the effective date of the current Form TSP-1 will be January 15, 1995. If an employee is reemployed on May 20, 1995, the effective date of the current Form TSP-1 will be January 15, 1995. In addition, this employee can submit another Form TSP-1 that will become effective on July 3, 1995 (the first day of the first full pay period in the following election period).

C. **Retroactive contributions.**

If an employee had a valid Form TSP-1 on file when he or she separated, that election will be reinstated upon the employee's reemployment. For example, if an employee was separated from April 7, 1995, through March 13, 1996, the TSP election that was in effect on April 7, 1995, would be deemed to be a valid election at the time of the reemployment. The employee can decide to continue the contributions

that were being made when he or she separated and not submit a new Form TSP-1 for any TSP Open Season that occurred during the retroactive period; or the employee can elect to change his or her TSP contribution election for any Open Season that occurred during the retroactive period. The allocation elections made on all Forms TSP-1 for the retroactive period must be the same as the current Form TSP-1.

D. **Terminating contributions.**

If an employee does not wish to make any retroactive TSP contributions, or does not wish to make retroactive TSP contributions from the date of separation through the end of the Open Season that occurred immediately after the separation, the employee must submit Form TSP-1 to terminate the contributions. This termination will be effective at the end of the pay period in which the employee separated. Alternatively, a Form TSP-1 to terminate contributions can be submitted and made effective at any time chosen by the employee during the retroactive period. The current rules regarding terminating contributions apply (i.e., if an election to terminate contributions is made effective during an Open Season, the employee is eligible to make a new contribution election during the following Open Season; if an election to terminate contributions is made effective outside of an Open Season, the employee is eligible to make a new contribution election during the second Open Season after the termination is effective). In the above example, if the employee elects to terminate contributions effective April 8, 1995 (the end of the pay period following the date of separation), he or she would be eligible to make a new contribution election for the November 1995–January 1996 Open Season. The employee would not be eligible to make a new contribution election for the May 1995– July 1995 Open Season.

E. **Contribution elections not permitted.**

An employee is not allowed to make a retroactive contribution election for any Open Season for which he or she was not otherwise eligible to make an election. For example, if an employee is first employed on February 1, 1995, he or she is eligible to make the first TSP contribution election during the November 15, 1995 – January 31, 1996 Open Season. The employee is not eligible to make a contribution election for the May 15, 1995 – July 31, 1995 Open Season. If that employee separates on June 6, 1995, and is reemployed on December 15, 1995, he or she is eligible to make a contribution election for the January 1996 election period. However, because the employee was not eligible to participate in the TSP in July 1995, he or she is not eligible to make a retroactive contribution election for the July 1995 election period. In addition, if the employee does not make a contribution election during the November 15, 1995 – January 31, 1996 Open Season, he or she cannot later make a retroactive contribution election for that Open Season (unless the employee was not allowed to make a contribution election because of an employing agency error).

F. **Calculating and reporting retroactive Agency Automatic (1%) Contributions.**

For all eligible FERS employees, agencies must calculate the amount of Agency Automatic (1%) Contributions for the retroactive period. This amount must be reported to the TSP recordkeeper for investment by the employee's agency in a lump sum by June 20, 1995, or within 60 days from the date of reemployment, whichever is later.

G. **Payment schedule for make-up Employee Contributions.**

If an employee elects to make up the missed Employee Contributions, the employee's agency must help the employee set up a payment schedule to make up the missed contributions from future salary payments. The employing agency may impose limits on the maximum amount of time during which an employee can make up the missed contributions. This maximum can be no less than two times and no more than four times the number of pay periods that were covered by the period of missed contributions. An employee may decide to terminate the make-up contributions; however, such a decision is irrevocable.

H. **Equal installments of Agency Matching Contributions.**

If a FERS employee elects to make up missed Employee Contributions from future salary payments, the employee's agency must deposit retroactive Agency Matching Contributions in equal installments to the employee's TSP account over the period of the payment schedule.

I. **Investment allocations.**

All current and retroactive contributions will be reported to the TSP recordkeeper for investment by an employee's agency based on the allocation election on the employee's current Form TSP-1. If there is no current Form TSP-1, the contributions will be reported for investment by the employee's agency in the G Fund. Generally, an employee will not have a current Form TSP-1 election if he or she terminated current contributions. Although this situation is probably very rare, in certain cases an employee may not wish to make current contributions, but does wish to contribute some or all of the make-up contributions.

J. **Termination of contributions before separation.**

An employee who terminated TSP contributions within two months before entering military service will be eligible to make a retroactive contribution election effective for the first Open Season that occurs after the effective date that the contributions were terminated. This election can be made even if the termination was made outside of a TSP Open Season. This special provision is allowed for those employees who may have terminated their contributions in anticipation of impending military activation.

K. **Limitation on make-up Employee Contributions.**

Certain highly compensated FERS employees (generally those employees whose annual basic pay is 10 times greater than the IRS annual limit on elective deferrals) may not be able to make retroactive contributions. If these employees currently contribute 10 percent of their basic pay to their TSP accounts, any additional contributions would cause their accounts to exceed the IRS annual limit. (See TSP Bulletin 95-4, 1995 Limit on Employee Contributions to the Thrift Savings Plan, dated January 12, 1995, for information about the IRS annual limit on Employee Contributions.)

IV. Lost Earnings

A. **Creating Lost Earnings Records (51-Records).**

All agency contributions that are subject to lost earnings must be reported by the employee's agency payroll office on each Lost Earnings Record (51-Record) as G Fund contributions, regardless of any allocation elections that the employee made.

B. **Calculating lost earnings.**

The TSP will calculate lost earnings on all retroactive agency contributions using the G Fund rate of return unless the employee submitted one or more interfund transfer requests during the period of separation. In this case, lost earnings will be calculated using the G Fund rate of return until the first interfund transfer request was processed. The contribution that is subject to lost earnings will be moved to the investment funds the employee requested on the interfund transfer request and lost earnings will then be calculated based on those investment funds. The contribution is traced through any additional interfund transfers that were processed during the lost earnings calculation period. It is moved among the investment funds according to each interfund transfer request and lost earnings are calculated based on the investment funds to which the contribution is moved. The amount of lost earnings calculated will be posted to the investment funds to which the contribution is moved. If there were no interfund transfers processed during the lost
earnings calculation period, the amount of lost earnings calculated will be posted to the employee's G Fund account.

C. ***De minimis***.

Employing agencies cannot pay lost earnings for any agency contribution that is less than $1.00 for a pay period or any agency contribution that is received by the TSP recordkeeper within 30 days of the applicable pay date.

D. **Make-up Employee Contributions.**

Employing agencies may not pay lost earnings for make-up Employee Contributions.

E. **Agency Automatic (1%) Contributions.**

Employing agencies are required to pay lost earnings for Agency Automatic (1%) Contributions that are made for the retroactive period.

1. A Lost Earnings Record (51-Record) must be submitted for each pay period covered by the retroactive period.

2. The Beginning Date on each Lost Earnings Record (51-Record) will be the pay date that each Agency Automatic (1%) Contribution would have been reported for investment.

3. The Ending Date on each Lost Earnings Record (51-Record) will be the pay date that the lump sum retroactive Agency Automatic (1%) Contributions are reported for investment by the employee's agency. (Note: If the agency's payroll submission that contains the retroactive Agency Automatic (1%) Contributions is submitted late and processed by the TSP recordkeeper after the applicable pay date, the ending date reported on each Lost Earnings Record (51-Record) must be the date the contribution was processed by the TSP recordkeeper, rather than the agency's pay date.)

F. **Agency Matching Contributions.**

If a FERS employee elects to make up the missed Employee Contributions, employing agencies must pay lost earnings for the Agency Matching Contributions associated with those Employee Contributions.

1. At least one Lost Earnings Record (51-Record) must be submitted for each pay period covered by the retroactive period.

2. The Beginning Date on each Lost Earnings Record (51-Record) will be the pay date that each Agency Matching Contribution would have been reported for investment.

3. The Ending Date on each Lost Earnings Record (51-Record) will be the pay date that each retroactive Agency Matching Contribution is reported for investment by the employee's agency based on the payment schedule. (Note: If the agency's payroll submission that contains the retroactive Agency Matching Contributions is submitted late and processed by the TSP recordkeeper after the applicable pay date, the ending date reported on the Lost Earnings Record (51-Record) must be the date the contribution was processed by the TSP recordkeeper, rather than the agency's pay date.)

G. **Lost Earnings References.**

For detailed procedures on processing lost earnings records see TSP Bulletin 90-39, Implementation of Public Law 101-335, Correction of Employing Agency Errors Relating to the Thrift Savings Plan, dated December 17, 1990; TSP Bulletin 90-40, Processing Lost Earnings Records, dated December 17, 1990; TSP Bulletin 92-29, Reports Produced by the TSP Lost Earnings System to Support Agency Financial Management Procedures, dated December 10, 1992; and 5 C.F.R. 1606, Lost Earnings Attributable to Employing Agency Errors.

V. Restoring Forfeited Agency Automatic (1%) Contributions

If an employee's Agency Automatic (1%) Contributions were forfeited because the employee was not vested when he or she separated to perform military service, the employee must notify the employing agency that a forfeiture occurred. The employing agency must submit a written request to the TSP recordkeeper to restore these funds. In addition, if a current Employee Data Record (01-Record) has not been sent to the TSP recordkeeper showing that the employee is reemployed, the employing agency must correct the separation data that were provided to the TSP recordkeeper when the employee separated to enter military service. For FERS employees, USERRA requires that the period of military service performed by these employees be credited as civilian service for TSP vesting purposes. If the TSP-SCD does not include this service, the agency must submit an Employee Data Record (01-Record) containing the correct TSP-SCD. (Note: The TSP-SCD cannot be prior to January 1, 1984.)

VI. Returning Amounts Previously Withdrawn

A. **General.**
Employees who are subject to the TSP automatic cashout provisions (i.e., those employees whose account balances at the time of payment were $3,500 or less) and employees who separated without eligibility for retirement benefits and prior to March 1995 withdrew amounts greater than $3,500, may elect to have the separation for military service treated as if it had never occurred. If these employees elect to have the separation treated as if it had never occurred, they must return the full amount of the withdrawal. Eligible employees must notify the TSP Service Office (TSPSO) by April 21, 1996, or one year from the date of reemployment, whichever is later, of their intent to have the separation treated as if it had never occurred. The TSPSO will notify the employee of the amount that must be returned and the time frame for returning the funds. The employee must provide the funds in a single payment to the TSPSO within 90 days after the TSPSO sends the notice to the employee advising him or her of the amount and procedure for returning the funds. The employee must provide the TSPSO with a copy of SF 50, Notification of Personnel Action (or facsimile form), or a letter from the employing agency that clearly indicates the employee was reemployed pursuant to USERRA; otherwise, the withdrawn funds cannot be returned.

B. **Earnings.**
Employees will not receive any earnings on the funds that are returned.

C. **Loans.**
Eligible employees who choose to set aside a separation **and** who return the amounts that were previously withdrawn may also be eligible to have a loan reestablished (i.e., reverse a taxable distribution that was declared at the time of separation). At the time the TSPSO notifies an employee of the amount required to replace the withdrawn funds, it will also notify an employee whether he or she is eligible to have a taxable distribution reversed. A taxable distribution can only be reversed if the full amount of the withdrawn TSP funds is returned.

VII. Agency Responsibilities

A. **General.**
Each agency must establish implementing procedures for the TSP provisions of USERRA. These procedures should include requirements for agency personnel to identify and notify returning service members of their TSP benefits within 60 days of becoming reemployed. In addition, the agency procedures should include a one-year period for an employee to make a decision regarding the make-up Employee Contributions for the retroactive period. An employee must submit a written request to his or her agency to make up the Employee Contributions for the retroactive period by April 21, 1996, or within one year of the date he or she is reemployed, whichever is later, or forfeit the right to make up these contributions.

B. **Responsible agency.**

The agency that reemploys an employee is responsible for paying the retroactive agency contributions and lost earnings from the same source that is used to pay routine TSP contributions. If an employee changed agencies during the period between the date of reemployment and October 13, 1994, the employing agency as of October 13, 1994, is considered the reemploying agency and is responsible for paying the retroactive agency contributions and lost earnings for the employee. However, only the current employing agency can establish a payment schedule for the employee to make up the retroactive Employee Contributions and have these amounts deducted from future salary payments. Therefore, the current employing agency must coordinate with the former employing agency to determine the corrections that need to be made to the employee's TSP account and the procedures to follow for collecting the amounts owed by the former employing agency. Since the current employing agency must submit the make-up Employee Contributions to the TSP recordkeeper, it should also report all of the retroactive agency contributions and Lost Earnings Records (51-Records) using the information it obtained from the former employing agency.

C. **Actions which must be taken by June 20, 1995.**

For each employee who was reemployed on or after August 2, 1990, and before April 21, 1995 (the date the TSP regulations were published), agencies must determine his or her eligibility for TSP benefits pursuant to the provisions of USERRA. No later than -10- June 20, 1995, agencies must identify and notify each eligible employee of the right to make retroactive TSP contribution elections attributable to any TSP Open Season during the retroactive period. For FERS employees, agencies must calculate the amount of retroactive Agency Automatic (1%) Contributions and report these contributions in a lump sum to the TSP recordkeeper for investment. In addition, agencies must prepare and submit Lost Earnings Records (51-Records) for each pay period an employee is entitled to receive lost earnings for these retroactive Agency Automatic (1%) Contributions.

D. **Actions which must be taken within 60 days after an employee is reemployed.**

For each employee who is reemployed on or after April 21, 1995, agencies must determine his or her eligibility for TSP benefits pursuant to the provisions of USERRA. Within 60 days of the employee's reemployment, agencies must notify and explain to each eligible employee the right to elect to make retroactive TSP contribution elections attributable to any TSP Open Season during the retroactive period. In addition, for returning FERS employees, agencies must calculate the amount of retroactive Agency Automatic (1%) Contributions and report these contributions in a lump sum to the TSP recordkeeper for investment. Agencies must prepare and submit Lost Earnings Records (51-Records) for each pay period an employee is entitled to receive lost earnings for these retroactive Agency Automatic (1%) Contributions.

E. **Contributions and lost earnings.**

Agencies must determine the retroactive period for making TSP contributions. In addition, agencies must:

1. Help the employee develop a payment schedule for the make-up Employee Contributions. For FERS employees, calculate the amount of Agency Matching Contributions that will be reported for investment to the TSP recordkeeper for each pay period covered by the payment schedule.

2. Advise employees that lost earnings will not be paid on make-up Employee Contributions.

3. Advise employees that the total amount of make-up Employee Contributions when added to an employee's current year Employee Contributions in any calendar year may not exceed the IRS annual limit on Employee Contributions for the year in which the contributions are being made. (See the Board's error correction regulations at 5 C.F.R. 1605.2(b)(2)(ii) for procedures to follow to suspend the make-up contributions if the employee's current contributions, when added to the make-up contributions, will exceed the annual limit.)

4. Advise employees that all retroactive contributions will be reported for investment by an employee's agency according to the allocation election on the employee's current Form TSP-1.

5. Advise employees that the TSP will calculate lost earnings on all retroactive agency contributions using the G Fund rate of return unless the employee submitted one or more interfund transfer requests during the period of separation. In this case, lost earnings will be calculated using the G Fund rate of return until the first interfund transfer request was processed. The contribution that is subject to lost earnings will be moved to the investment funds the employee requested on the interfund transfer request and lost earnings will then be calculated based on those investment funds. The contribution is traced through any additional interfund transfers that were processed during the lost earnings calculation period. It is moved among the investment funds according to each interfund transfer request and lost earnings are calculated based on the investment funds to which the contribution is moved. The amount of lost earnings calculated will be posted to the investment funds to which the contribution is moved. If there were no interfund transfers processed during the lost earnings calculation period, the amount of lost earnings calculated will be posted to the employee's G Fund account.

F. **Review and correct TSP-Service Computation Date.**
Agencies must review the TSP-SCD for all returning FERS employees to ensure that the period of military service is included. If a correction is required, agencies must submit an Employee Data Record (01-Record) to the TSP recordkeeper with the correct TSP-SCD.

G. **Restoration of forfeited Agency Automatic (1%) Contributions.**
Agencies must notify FERS employees of their entitlement to have their Agency Automatic (1%) Contributions and associated earnings restored if these funds were forfeited at the time of separation. Agencies should inform these employees to contact the agency so that these forfeitures can be restored. When notified by an employee that the Agency Automatic (1%) Contributions were forfeited after separation, the employing agency must submit a written request to the TSP recordkeeper to restore these funds. If a current Employee Data Record (01- Record) has not been sent to the TSP recordkeeper showing that the employee is reemployed, the employing agency must correct the separation data that were provided to the TSP recordkeeper when the employee separated to enter military service.

H. **Notice of option to return a withdrawal and restore a TSP loan.**
Agencies must notify eligible employees of their option to return funds representing the full amount of a TSP withdrawal. This notice must also include information concerning the employee's option to restore a TSP loan, if applicable.

ROGER W. MEHLE
Executive Director

C. Federal Thrift Investment Board Regulations [re USERRA], 5 C.F.R. Part 1620

[Federal Register: April 14, 1997 (Volume 62, Number 71)]
[Rules and Regulations]
[Page 18233-18234]
From the Federal Register Online via GPO Access [wais.access.gpo.gov]
[DOCID:fr14ap97-21]
[[Page 18233]]

Part IV
Federal Retirement Thrift Investment Board

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5 CFR Part 1620
Thrift Savings Plan; Continuation of Eligibility; Final Rule
[[Page 18234]]
FEDERAL RETIREMENT THRIFT INVESTMENT BOARD
5 CFR Part 1620
Thrift Savings Plan; Continuation of Eligibility
AGENCY: Federal Retirement Thrift Investment Board.
ACTION: Final rule.

SUMMARY: The Executive Director of the Federal Retirement Thrift Investment Board (Board) is publishing final regulations concerning the eligibility of certain individuals to have make-up contributions credited to their Thrift Savings Plan (TSP) accounts and, in certain cases, restore withdrawn funds and reestablish loan accounts. Section four of the Uniformed Services Employment and Reemployment Rights Act amends Title 5 of the United States Code to add a new section 8432b that addresses TSP benefits that apply to any Federal employee whose release from military service, discharge from hospitalization related to that service, or other similar event making the individual eligible to seek restoration from leave-without-pay status or reemployment under 38 U.S.C. Chapter 43, occurring on or after August 2, 1990. This final rule governs retroactive participation in the TSP by these employees.

EFFECTIVE DATE: The final rule is effective April 14, 1997.

FOR FURTHER INFORMATION CONTACT: John J. O'Meara, Federal Retirement Thrift Investment Board, 1250 H Street, NW, Washington, DC 20005. Telephone: (202) 942-1660.

SUPPLEMENTARY INFORMATION: Interim regulations governing retroactive TSP contributions by certain reemployed veterans were published in the Federal Register on April 21, 1995 (60 FR 19990). The Board received no comments on those interim regulations. Section four of the Uniformed

Services Employment and Reemployment Rights Act of 1994 (USERRA), Pub. L. 103-353, 108 Stat. 3149, amended the Federal Employees' Retirement System Act of 1986, Pub. L. 99-335, 100 Stat. 514, codified, as amended, largely at 5 U.S.C. 8401-8479 (1994), to permit veterans returning to a Federal civilian job from qualified military service to make retroactively any employee contributions to the TSP which might have been made if the veteran had remained continuously employed.

Taxes on these retroactive contributions were deferred only within certain overall limits. On August 20, 1996, Congress passed the Small Business Job Protection Act of 1996 (the Small Business Act), Pub. L. 104-188, 110 Stat. 1755. The Small Business Act added section 414(u) to the Internal Revenue Code to provide that contributions made by a reemployed veteran pursuant to USERRA are not subject to the limits on elective deferrals that are otherwise applicable to TSP contributions. Section 1620.102(b)(3) of the Board's interim regulations stated that employees may not make any retroactive contributions that would cause them to exceed the Internal Revenue Code's elective deferral limit. The final rule removes paragraph (b)(3) of Sec. 1620.102 to conform with the Internal Revenue Code as amended by the Small Business Act. The final rule adopts the interim rule as final in all other respects.

These regulations are being given retroactive effect to August 2, 1990, in order to provide eligible employees an opportunity to seek and obtain TSP benefits from the effective date of USERRA.

Regulatory Flexibility Act

I certify that these regulations will not have a significant economic impact on a substantial number of small entities because the regulations will affect only employees of the United States Government.

Paperwork Reduction Act

I certify that these regulations do not require additional reporting under the criteria of the Paperwork Reduction Act of 1980.

Unfunded Mandates Reform Act of 1995

Pursuant to the Unfunded Mandates Reform Act of 1995, Pub. L. 104-4, section 201, 109 Stat. 48, 64, the effect of this regulation on State, local, and tribal governments and on the private sector has been assessed. This regulation will not compel the expenditure in any one year of $100 million or more by any State, local, or tribal governments in the aggregate or by the private sector. Therefore, a statement under section 202, 109 Stat. 48, 64-65, is not required.

Submission to Congress and the General Accounting Office

Under 5 U.S.C. 801(a)(1)(A), the Board submitted a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to the publication of this rule in today's Federal Register. This rule is not a major rule as defined at 5 U.S.C. 804(2).

List of Subjects in 5 CFR Part 1620

Employee benefit plans, Government employees, Pensions, Retirement.

Federal Retirement Thrift Investment Board.
Roger W. Mehle,
Executive Director.

Accordingly, the interim rule amending 5 CFR part 1620 which was published at 60 FR 1990 on April 21, 1995, is adopted as a final rule with the following change:

PART 1620--CONTINUATION OF ELIGIBILITY

1. The authority citation for Part 1620 is revised to read as follows:

Authority: 5 U.S.C. 8474 and 8432b; Pub. L. 99-591, 100 Stat. 3341; Pub. L. 100-238, 101 Stat. 1744; Pub. L. 100-659, 102 Stat. 3910; Pub. L. 104-188, 110 Stat. 1755.

Sec. 1620.102 [Amended]

2. Section 1620.102 is amended by removing paragraph (b)(3).
[FR Doc. 97-9532 Filed 4-11-97; 8:45 am]
BILLING CODE 6760-01-P

D. Internal Revenue Service Guidance on USERRA*

On October 7, 1996, the IRS issued Revenue Procedure 96-49 providing guidance and model plan amendments on the Uniformed Services Employment and Reemployment Rights Act of 1993 (USERRA). The law clarifies the employment and reemployment rights of individuals who are returning to employment after service in the uniformed services. USERRA entitles employees returning from service to full employer contributions to a defined benefit or defined contribution pension plan for the period of time they were on active duty. These contributions to their retirement plans potentially violate various Internal Revenue Code (IRC) sections and put the qualification of a plan at risk. The Small Business Job Protection Act of 1996 (Pub. L. No. 104-188) added a new provision, section 414(u), to the IRC to ensure that an employer who is required to make contributions to a pension plan as a result of USERRA will not violate these IRC sections.

These technical changes will:

•Allow contributions by an employer, on behalf of an employee, to a defined contribution retirement plan to exceed the annual maximum deferral limits under IRC Sections 402(g), 403(b), 404(a), 408, 415, or 457 if required by USERRA. Contributions to a plan as a result of USERRA also would not affect the nondiscrimination testing of that plan.

•Provide that, if an employer maintains a matching plan that requires an employee contribution, the employer does not have to contribute to the pension plan until the employee does. Repayment of the contributions to the pension plan does not have to be made in the period of time the employee begins reemployment, and extends to the lesser of five years or three times the period of time that the individual was called up for military service.

•Allow an employer to suspend loan repayments from employees to pension plans during the period of time an individual is performing service in the uniformed services without violating the five-year repayment requirements of IRC Section 72(p)(2)(B)(1).

Revenue Procedure 96-49 provides that employers must amend their plans to reflect compliance with USERRA by the first day of the plan year beginning on or after July 1, 1998. Government plans are required to amend their plans by January 1, 2000. Plan sponsors are required, however, to begin making contributions to pension plans on or after October 13, 1996, for employees who are returning to work after service in the uniformed services. Revenue Procedure 96-49 also contains two sample model plan amendments that employers may use word-for-word to amend their plans to comply with USERRA.

*This summary (which is not meant to impart legal advice) is an excerpt from College and University Personnel Association News, Vol. 23, #21, November 11, 1996, by Mr. Michael P. Aitken. This article is reprinted with the permission of the College and University Personnel Association. It may be reproduced as part of these materials for educational purposes only. This copyrighted material may not be otherwise reproduced without the prior permission of the College and University Personnel Association in compliance with 17 U.S.C. Section 107. The United States Army disclaims any endorsement of the article or the College and University Personnel Association.

D. Internal RevenueProcedure 96-49, October 7, 1996
USERRA Implementation for Employee Pension Plans

Rev. Proc. 96-49*

1996-2 C.B. 369, 1996-43 I.R.B. 74, 1996 WL 568811 (I.R.S.)

Internal Revenue Service (I.R.S.)

Revenue Procedure

RETIREMENT PLANS; SECTION 414(U); MODEL AMENDMENTS

Released: October 7, 1996

Published: October 21, 1996

26 CFR 601.201: Rulings and determination letters.

SECTION 1. PURPOSE

This revenue procedure provides a model amendment that will give plan sponsors a streamlined way to amend their plans to comply with the requirements of the Uniformed Services Employment and Reemployment Rights Act of 1994, Pub.L. No. 103-353 ("USERRA"), and s 414(u) of the Internal Revenue Code. The revenue procedure also provides that plan amendments to reflect the provisions of USERRA and s 414(u) generally will not be required to be made before 1998. Section 414(u) was added by s 1704(n) of the Small Business Job Protection Act of 1996, Pub.L. No. 104-188 ("SBJPA"). The model amendment is available for use by sponsors of master or prototype ("M & P"), regional prototype, volume submitter specimen, individually designed, and simplified employee pension ("SEP") plans that have received favorable opinion, notification, advisory, ruling, or determination letters that take into account the requirements of the Tax Reform Act of 1986, Pub.L. No. 99-514 ("TRA '86").

SECTION 2. BACKGROUND AND GENERAL INFORMATION

.01 USERRA, codified at 38 U.S.C. ss 4301-4333, revised

*IRS Bulletins may be accessed by website, http://www.irs.ustreas.gov .

and restated the federal law protecting veterans' reemployment rights. Under USERRA, which is interpreted and enforced by the Veterans' Employment and Training Service of the U.S. Department of Labor, an employee who is absent from a position with an employer because of military service generally is entitled to reemployment with that employer, subject to certain limits and exceptions. USERRA also requires certain other rights and benefits to be provided or made available, including, in certain circumstances, coverage under the employer's health plan. In addition, on reemployment, an employee is entitled to receive certain pension, profit-sharing and similar benefits (under defined benefit or defined contribution plans) that would have been received but for the employee's absence during military service. USERRA sets worth various rules relating to the employee's reemployment and other rights and benefits, including--

. the types of military service covered,

. advance notice of military service to be given to an employer,

. documentation of reemployment eligibility,

. exceptions for dishonorable discharge and employer hardship,

. the position in which an individual must be reemployed, and

. enforcement procedures.

.02 Section 414(u) generally provides that a contribution that is made by an employer or employee to an individual account plan or by an employee to a contributory defined benefit plan, and that is required under USERRA, is taken into account for purposes of the limitations of s 402(g), 402(h), 403(b), 404(a), 404(h), 408, 415 or 457 in the year to which the contribution relates, not the year in which the contribution is made. In addition, s 414(u) provides that a plan is not treated as failing to meet the requirements of s 401(a)(4), 401(a)(26), 401(k)(3), 401(k)(11), 401(k)(12), 401(m), 403(b)(12), 408(k)(3), 408(k)(6), 408(p), 410(b), or 416 because of the contribution (or the right to make the contribution).

.03 Section 414(u) generally provides that an employer maintaining a plan shall be treated as meeting the requirements of USERRA only if an employee reemployed under USERRA is treated as not having incurred a break in service because of the period of military service, the employee's military service is treated as service with the employer for vesting and benefit accrual purposes, the employee is permitted to make additional elective deferrals and employee contributions in an amount not exceeding the maximum amount the employee would have been permitted or required to contribute during the period of military service if the employee had actually been employed by the employer during that period ("make-up contributions"), and the employee is entitled to any accrued benefits that are contingent on employee

contributions or elective deferrals to the extent the employee pays the contributions or elective deferrals to the plan. Make-up contributions must be permitted during the period that begins on the date of reemployment and continues for five years or, if less, three times the period of military service. With respect to make-up contributions, the employer must make matching contributions that would have been required if the make-up contributions had actually been made during the period of military service.

.04 Section 414(u) provides that an employee is treated as receiving compensation from the employer during the period of military service equal to the compensation the employee otherwise would have received from the employer during that period, or, if the compensation the employee otherwise would have received is not reasonably certain, the employee's average compensation from the employer during the period immediately preceding the period of military service. For purposes of s 414(u), USERRA is not treated as requiring the crediting of earnings to an employee with respect to any contribution before the contribution is actually made or requiring any allocation of forfeitures to the employee for the period of military service. Section 414(u) also provides that, if a plan provides for the suspension of an employee's obligation to repay a loan for any part of any period of military service, the suspension is not taken into account for purposes of s 72(p), 401(a) or 4975(d)(1).

.05 USERRA provides generally that it is effective with respect to reemployments initiated 60 days or more after the October 13, 1994, enactment date of USERRA, that is, reemployments initiated on or after December 12, 1994. USERRA provides that an employee pension benefit plan has two years from the date of enactment, that is, until October 13, 1996, to come into compliance. Section 1704(n)(3) of SBJPA provides that s 414(u) is effective as of December 12, 1994. The relief provided by s 414(u) extends to plans that are not operated in compliance with the requirements of USERRA specified in s 414(u) until after October 12, 1996, as well as to plans that were operated in compliance with those requirements before October 13, 1996.

.06 Provisions of SBJPA that are unrelated to USERRA changed various qualification requirements for plans. Section 1465 of SBJPA provides that, if a plan amendment is required by certain changes under SBJPA ("SBJPA change"), the amendment is not required to be made before the first day of the first plan year beginning on or after January 1, 1998 (January 1, 2000, for a governmental plan as defined in s 414(d) of the Code), if the plan is operated in accordance with the SBJPA change during the period from the effective date of the SBJPA change to the time the plan amendment is required and if the plan amendment reflecting the SBJPA change applies retroactively to that period.

.07 Plan amendments to reflect the provisions of USERRA and s 414(u) will not be required to be made before the date plan

amendments will be required to be made under s 1465 of SBJPA.

SECTION 3. MODEL AMENDMENT

.01 All plans--Sponsors described in subsection .02 may amend their plans by adopting, word-for-word, the model language in the appendix to this revenue procedure in accordance with the instructions in this revenue procedure. If a sponsor to whom the model language is available pursuant to subsection .02 adopts the model language, neither application to the Service nor a user fee is required. The Service will not issue new opinion, notification, advisory, ruling, or determination letters for plans that are amended solely to add the model language described in this section.

.02 The model language is available only to sponsors of M & P, regional prototype, volume submitter specimen, and individually designed (including volume submitter and SEP) plans that, as of the date of the adoption of the model amendment, have reliance on a favorable opinion, notification, advisory, ruling, or determination letter that takes into account the requirements of TRA '86 under Rev.Proc. 87-50, 1987-2 C.B. 647, as modified; Rev. Proc. 89-9, 1989-1 C.B. 780, as modified; Rev. Proc. 89-13, 1989-1 C.B. 801, as modified; Rev. Proc. 90-20, 1990-1 C.B. 495; Rev. Proc. 91-41, 1991-2 C.B. 697; Rev. Proc. 91-66, 1991-2 C.B. 870; Rev. Proc. 93-39, 1993-2 C.B. 513; or Rev. Proc. 96-6, 1996-1 I.R.B. 151.

.03 M & P, Regional Prototype and Volume Submitter Plans--M & P, regional prototype and volume submitter plan sponsors that use the model language must file Form 8837, Notice of Adoption of Revenue Procedure Model Amendments.

SECTION 4. RELIANCE

An employer entitled to rely on an opinion, notification, ruling, or determination letter will not lose reliance on the letter merely because of this amendment. Plan amendments made in accordance with section 2.07 and section 3 of this revenue procedure will not cause the plan to lose its otherwise applicable extended reliance period under Rev. Procs. 89-9 and 89-13, as modified by Rev. Proc. 93-9, 1993-1 C.B. 474, or section 13 of Rev. Proc. 93-39.

DRAFTING INFORMATION

The principal author of this revenue procedure is Richard Wright of the Employee Plans Division. For further information regarding this revenue procedure, contact the Employee Plans Division's telephone assistance service between 1:30 and 4:00 p.m., Eastern Time, Monday through Thursday at (202) 622-6074/6075 or Mr. Wright at (202) 622-6214. (These telephone numbers are not toll-free numbers.)

For further information regarding USERRA, contact the local office of the Veterans' Employment and Training Service ("VETS") of the U.S. Department of Labor or contact the VETS National Office at 1-202-219-8611.

APPENDIX

MODEL AMENDMENTS

AMENDMENT 1

(Note to Sponsor: The following model amendment may be used to amend plans to provide for the requirements of USERRA and s 414(u) of the Code.)

"Notwithstanding any provision of this plan to the contrary, contributions, benefits and service credit with respect to qualified military service will be provided in accordance with s 414(u) of the Internal Revenue Code."

AMENDMENT 2

(Note to Sponsor: The following model amendment may be used to amend plans that provide for loans to participants, if the sponsor chooses to suspend loan repayments during participants' periods of military service.)

"Loan repayments will be suspended under this plan as permitted under s 414(u)(4) of the Internal Revenue Code."

Rev. Proc. 96-49, 1996-2 C.B. 369, 1996-43 I.R.B. 74, 1996 WL 568811 (I.R.S.)

Rev. Proc. 97-41 *[Some non-USERRA sections deleted.]*

1997-33 I.R.B. 51, 1997 WL 427213 (I.R.S.)

Internal Revenue Service (I.R.S.)Revenue Procedure

PLAN AMENDMENTS; DISCRETIONARY EXTENSION OF THE REMEDIAL AMENDMENT PERIOD

Released: July 31, 1997

Published: August 18, 1997

26 CFR 601.601: Rules and regulations.

Section 401.--Qualified Pension, Profit-sharing, and Stock Bonus Plans., 26 CFR 1.401(b)-1: Certain retroactive changes in plan.

Section 403.--Taxation of Employee Annuities

A procedure describes when tax-sheltered annuity plans within the meaning of s 403(b) must be amended for the Small Business Job Protection Act of 1996, Pub.L. 104-188.

Plan amendments; discretionary extension of the remedial amendment period. This procedure provides an extended remedial amendment period for certain qualified plans described in sections 401(a) and 403(a) of the Code and describes the time for making amendments to certain tax-sheltered annuities described in section 403(b).

SECTION 1. PURPOSE

.01 This revenue procedure provides guidance to sponsors of pension, profit- sharing and stock bonus plans qualified under s 401(a) or 403(a) of the Internal Revenue Code (qualified plans) and tax-sheltered annuity plans described in s 403(b) (s 403(b) plans) with respect to the date by which they must adopt amendments to comply with changes in the law made by the Small Business Job Protection Act of 1996, Pub.L. 104-188 (SBJPA), the Uruguay Round Agreements Act, Pub.L. 103-465 (GATT), and the Uniformed Services Employment and Reemployment Rights Act of 1994, Pub.L. 103-353 (USERRA). This revenue procedure provides that:

1 In general, there is a single deadline for adopting SBJPA, GATT and USERRA amendments to qualified plans.

2 The deadline for adopting SBJPA, GATT and USERRA amendments is the same as the date by which certain plans that have extended reliance on Tax Reform Act of 1986 (TRA '86) determination letters must be amended.

3 Plan sponsors are allowed, for qualification purposes, to anticipate in plan operation certain plan amendments that they intend to adopt as a result of changes in the qualification requirements.

.02 Specifically, under this revenue procedure:

1 Qualified plans have a remedial amendment period under s 401(b) with respect to certain amendments for SBJPA, GATT or USERRA through the last day of the first plan year beginning on or after January 1, 1999. Thus, these amendments will not have to be adopted before the last day of a plan's 1999 plan year.

2 The deadline for adopting plan amendments to reflect certain limitations under s 415(b), as amended by GATT and SBJPA, is also the last day of the first plan year beginning on or after January 1, 1999. In addition, relief is provided so that a plan amendment described in s 1449(d)(2) of SBJPA repealing an earlier plan amendment that implemented certain amendments made by GATT to s 415(b) need not be adopted before the last day of the first plan year beginning on or after January 1, 1999.

3 Plan sponsors are advised of the Service's intention to publish procedures for obtaining determination letters that include consideration of the changes to the qualification requirements made by SBJPA and GATT as soon as possible after necessary guidance is issued.

4 Amendments for SBJPA to s 403(b) plans, or to annuity contracts purchased under s 403(b) plans, are not required to be adopted before the first day of the first plan year beginning on or after January 1, 1998.

PART I. BACKGROUND

SECTION 2. SBJPA

.01 SBJPA changed several of the requirements of the Code that apply to pension, profit-sharing and stock bonus plans qualified under s 401(a) or 403(a). While a number of these changes are effective in plan years beginning after December 31, 1996, others are not effective until later years.

.02 Section 1465 of SBJPA generally provides an extended period for amending plans and annuity contracts as required by SBJPA. Under s 1465, if any provision of subtitle D (Pension Simplification) of SBJPA requires an amendment to any plan or annuity contract, the amendment is not required to be made before the first day of the first plan year beginning on or after January 1, 1998, provided (1) the amendment is made effective retroactively to the date on which the provision of SBJPA became effective with respect to the plan or contract and (2) the plan or contract is operated in accordance with the requirements of the provision as of its effective date. For a governmental plan (as defined in s 414(d) of the Code), the year "2000" is substituted for the year "1998" in s 1465. Section 1465 applies to plans and contracts in existence on or after the date of enactment of SBJPA, August 20, 1996.

.03 In Rev. Proc. 96-49, 1996-43 I.R.B. 74, the Service stated that plan amendments to reflect the provisions of USERRA and s

414(u), which was added by s 1704(n) in subtitle G (Technical Corrections) of SBJPA, are not required to be made before the date plan amendments are required to be made under s 1465 of SBJPA.

SECTION 3. GATT

.01 GATT, which was enacted December 8, 1994, also changed several of the Code's qualification requirements. These included the rules relating to the determination of certain benefits under ss 411(a)(11)(B), 415(b)(2)(E) and 417(e)(3).

.02 The changes to ss 411(a)(11)(B) and 417(e)(3), relating to the determination of the present value of certain plan distributions, were generally effective for plan years beginning after December 31, 1994. However, s 767(a)(2) of GATT provided a transition rule with respect to the determination under ss 411(a)(11)(B) and 417(e)(3) of the present value of distributions from plans that were adopted and in effect as of December 7, 1994 ("pre-GATT plans"). In general, under this transition rule, the present value of a distribution from a pre-GATT plan that is made before the earlier of (i) the first plan year beginning after December 31, 1999, or (ii) the later of the adoption or effective date of a plan amendment applying the GATT changes to ss 411(a)(11)(B) and 417(e)(3) to the plan is to be determined under the plan's pre-GATT terms. Thus, for pre-GATT plans, amendments applying the GATT changes to ss 411(a)-(11)(B) and 417(e)(3) to the plan cannot be adopted retroactively. As a result, these plans are not permitted to operate in accordance with these changes prior to the adoption of plan amendments.

.03 Under section 767(d) of GATT, the changes to s 415(b)(2)(E), relating to required adjustments to certain benefits for limitation purposes, were effective for limitation years beginning after December 31, 1994. In addition, s 767(d) of GATT required plans to be operated in accordance with the GATT changes to s 415(b)(2)(E) as of the first limitation year beginning after December 31, 1994, even though, under s 767(d)(3)(B) of GATT, plan amendments applying these changes to the plan would not be required until such date as the Secretary provides.

.04 Section 1449 of SBJPA amended s 767(d)(3)(A) of GATT, however, to permit plan sponsors to delay the implementation of the GATT changes to s 415(b)(2). Section 1449 provides that a pre-GATT plan is not required to apply the GATT changes to s 415(b)(2)(E) with respect to benefits accrued before the earlier of (i) the later of the date a plan amendment applying the changes is adopted or effective or (ii) the first day of the first limitation year beginning after December 31, 1999. Further, s 1449(d) of SBJPA provides that an amendment applying specified GATT changes that was adopted or effective before August 20, 1996, will be disregarded in applying s 767(d)(3)(A) of GATT, as modified by s 1449(a) of SBJPA, if that amendment is repealed by another plan amendment that is adopted no later than August 20, 1997.

SECTION 4. THE REMEDIAL AMENDMENT PERIOD UNDER SECTION 401(B)

.01 Section 401(b) provides a remedial amendment period during which a plan may be amended retroactively, under certain circumstances, to comply with the Code's qualification requirements. Temporary and proposed amendments to the regulations under s 401(b) were published in the Federal Register on August 1, 1997. Section 1.401(b)-1(f) of the regulations grants the Commissioner the discretion to extend the remedial amendment period. Absent such an extension, however, the remedial amendment period is generally determined as described below.

.02 Section 1.401(b)-1 provides that a plan that fails to satisfy the requirements of s 401(a) solely as a result of a disqualifying provision defined under s 1.401(b)-1(b) need not be amended to comply with those requirements until the last day of the remedial amendment period with respect to the disqualifying provision, provided the amendment is made retroactively effective to the beginning of the remedial amendment period. Under s 1.401(b)- 1T(b)(3), a disqualifying provision includes a plan provision designated, at the Commissioner's discretion, as a disqualifying provision that either (i) results in the failure of the plan to satisfy the qualification requirements of the Code by reason of a change in those requirements; or (ii) is integral to a qualification requirement of the Code that has been changed. For this purpose, s 1.401(b)-1T(c)(1) provides that a disqualifying provision includes the absence from a plan of a provision required by or, if applicable, integral to the applicable change in the qualification requirements of the Code, if the plan was in effect on the date the change in those requirements became effective with respect to the plan.

.03 For a disqualifying provision described in s 1.401(b)-1T(b)(3), the remedial amendment period generally begins with the date on which the change becomes effective with respect to the plan or, in the case of a provision that is integral to a qualification requirement that has been changed, the first day on which the plan was operated in accordance with the provision as amended. The remedial amendment period for a disqualifying provision described in s 1.401(b)-1T(b)(3) generally ends with the later of (1) the due date (including extensions) for filing the income tax return for the employer's taxable year that includes the date on which the remedial amendment period begins or (2) the last day of the plan year that includes the date on which the remedial amendment period begins. A plan maintained by more than one employer need not be amended until the last day of the tenth month following the last day of the plan year in which the remedial amendment period begins.

.04 Section 1.401(b)-1 also provides that in the case of a new plan which contains (or fails to contain) a provision that causes the plan to fail to satisfy the requirements of s 401(a) as of the date the plan is put into effect, the plan need not be amended to comply with those requirements until the later of the due date including extensions for filing the employer's tax return for the taxable year in which the plan is put into effect or the last day of the plan year in which the plan is put into

effect. A new plan maintained by more than one employer need not be amended until the last day of the tenth month following the last day of the plan year in which falls the date the plan is put into effect.

.05 Section 1.401(b)-1 also provides that in the case of an amendment to an existing plan which causes the plan to fail to satisfy the requirements of s 401(a) as of the date the amendment is adopted or effective (whichever is earlier), the plan need not be amended to correct the amendment until the later of the due date for filing the employer's tax return (including extensions) for the taxable year in which the amendment is adopted or effective (whichever is later) or the last day of the plan year in which the amendment is adopted or effective (whichever is later). In the case of an amendment to an existing plan maintained by more than one employer, the plan need not be amended until the last day of the tenth month following the last day of the plan year in which the amendment is adopted or effective (whichever is later).

SECTION 5. EXTENDED RELIANCE

.01 Under Rev. Proc. 89-9, 1989-1 C.B. 780, Rev. Proc. 89-13, 1989-1 C.B. 801 (both as modified by Rev. Proc. 93-9, 1993-1 C.B. 474), Rev. Proc. 93-39, 1993-2 C.B. 513, Announcement 94-85, 1994-26 I.R.B. 23, and Rev. Proc. 95-12, 1995-1 C.B. 508, plans that were submitted to the Service within certain deadlines for determination, opinion, or notification letters under the Tax Reform Act of 1986, Pub.L. 99-514 (TRA '86), and received favorable letters are entitled to extended reliance. During the extended reliance period, a plan is generally not required to operationally comply with or be amended for regulations or administrative guidance of general applicability issued after the date of the plan's letter which interpret the qualification requirements in effect when the letter was issued. The extended reliance period continues until the earlier of the last day of the last plan year commencing prior to January 1, 1999, or the date established for plan amendment by any legislation that is effective after the date of the plan's letter.

PART II. TIME FOR AMENDING QUALIFIED PLANS FOR SBJPA, GATT, AND USERRA

SECTION 6. DESIGNATION OF CERTAIN PLAN PROVISIONS RELATING TO SBJPA, GATT AND USERRA CHANGES AS DISQUALIFYING PROVISIONS

.01 Pursuant to the Commissioner's authority under s 1.401(b)-1T(b)(3), a plan provision is hereby designated as a disqualifying provision under s 1.401(b)-1(b) if the plan provision causes a plan to fail to satisfy the qualification requirements of the Code because of changes made to those requirements by SBJPA or GATT that are effective before the first day of the first plan year beginning on or after January 1, 1999.

.02 A plan provision is also hereby designated as a disqualifying provision if the plan provision is integral to a

qualification requirement changed by SBJPA, but only to the extent the change in the qualification requirement is effective before the first day of the first plan year beginning on or after January 1, 1999, and the plan provision as amended is effective prior to the end of the remedial amendment period as described in section 6.04, below. For purposes of this paragraph, the changes in the qualification requirements made by SBJPA include s 414(u) and USERRA. In accordance with s 1.401(b)- 1T(d)(1)(v), an amendment of a disqualifying provision described in this paragraph may be made retroactively effective only to the first day on which the plan was operated in accordance with the provision. For example, Announcement 97-24, 1997-11 I.R.B. 24, and Announcement 97-70, 1997-29 I.R.B. 14, provide that an employer may offer certain employees an option to defer commencement of benefits under its qualified plan provided the employer amends the plan retroactively to conform the plan to its pre-amendment operation regarding the option to defer. These announcements also state that future guidance will provide the date by which such a retroactive amendment must be adopted. The retroactive amendment described in Announcements 97-24 and 97-70 is an amendment to a plan provision that is integral to a qualification requirement changed by SBJPA and must therefore be adopted by the end of the remedial amendment period as described below. Generally, plan provisions reflecting the family aggregation rules as in effect prior to 1997 would also be integrally related to SBJPA qualification changes. See section 6.09.

.03 A plan provision that causes a plan to fail to satisfy s 401(a) because of a change made by SBJPA or GATT to the qualification requirements that is effective on or after the first day of the first plan year beginning on or after January 1, 1999, is not a disqualifying provision under section 6.01. A plan provision that is integral to a qualification requirement changed by SBJPA is not a disqualifying provision under section 6.02 if the change in the qualification requirement is effective on or after the first day of the first plan year beginning on or after January 1, 1999, or if the plan provision as amended is not effective prior to the end of the remedial amendment period as described in section 6.04, below. Thus, for example, s 401(b) and the regulations thereunder would not apply to permit the adoption of the s 401(k) and s 401(m) safe harbors described in s 1433(a) and (b) of SBJPA on a retroactive basis, because the provisions of s 1433(a) and (b) are effective for plan years beginning after December 31, 1998. A plan provision that is integral to the limitation under s 415(e), which was repealed by s 1452(a) of SBJPA effective for limitation years beginning after December 31, 1999, also is not a disqualifying provision under section 6.02.

.04 Pursuant to the Commissioner's authority under s 1.401(b)-1(f), with respect to plans other than governmental plans, the remedial amendment period for disqualifying provisions described in sections 6.01 and 6.02 is hereby extended to the last day of the first plan year beginning on or after January 1, 1999. Thus, for example, a single employer calendar year nongovernmental plan that does not satisfy the requirements of s

401(a) because of a disqualifying provision described in section 6.01 or 6.02 may be retroactively amended to meet those requirements by December 31, 1999. For governmental plans, the remedial amendment period for disqualifying provisions described in sections 6.01 and 6.02 is extended to the later of (i) the first day of the first plan year beginning on or after January 1, 2000, or (ii) the last day of the first plan year beginning on or after the "1999 legislative date" (that is, the 90th day after the opening of the first legislative session beginning on or after January 1, 1999, of the governing body with authority to amend the plan, if that body does not meet continuously).

.05 In addition, the remedial amendment period with respect to all disqualifying provisions of new plans adopted or effective after December 7, 1994, and all disqualifying provisions of existing plans arising from a plan amendment adopted after December 7, 1994, that causes the plan to fail to satisfy the requirements of s 401(a) as of the date the amendment is adopted or effective (whichever is earlier), will not expire earlier than the last day of the first plan year beginning on or after January 1, 1999. For a governmental plan, this period will not expire before the later of (i) the first day of the first plan year beginning on or after January 1, 2000, or (ii) the last day of the first plan year beginning on or after the 1999 legislative date.

.06 Although plan amendments are not required before the end of the remedial amendment period, plan sponsors must operate their plans in compliance with the provisions of SBJPA or GATT prior to the time plan amendments are required to the extent earlier operational compliance is required by law or regulation or by revenue ruling, notice or other guidance published in the Internal Revenue Bulletin. In these cases, any retroactive amendments will have to reflect the choices the plan sponsor has already made in the operation of the plan. The following are examples where earlier operational compliance is required.

1 Section 1465 of SBJPA generally requires plans to be operated in compliance with any provision of SBJPA that is effective before the first day of the first plan year beginning on or after January 1, 1998 (or January 1, 2000, in the case of a governmental plan), as of such provision's effective date.

2 Section 401(m)(6)(A) requires correction of excess aggregate contributions to s 401(m) plans to be accomplished within 12 months of the end of the plan year in which the contributions were made. Thus, to this extent, for example, a sponsor of a s 401(m) plan will have to operate the plan in a manner that satisfies s 401(a) as amended by SBJPA and any retroactive amendments must reflect the choices that the plan sponsor has already made in the operation of the plan (for example, the definition of highly compensated employee).

3 Section 1.401(b)-1T(d)(1)(v) permits a remedial amendment of a disqualifying provision that is integral to a qualification requirement changed by SBJPA (including s 414(u) and USERRA) to be made retroactively effective only to the first day on which the plan was operated in accordance with the provision as amended.

.07 Earlier plan amendment may be required by law or regulation or by revenue ruling, notice or other guidance published in the Internal Revenue Bulletin. In these cases plan sponsors may not rely on the remedial amendment period as a basis for making an amendment retroactively effective. The following are examples where the remedial amendment period may not be relied on as a basis for making an amendment retroactively effective.

1 Except as provided in Rev. Proc. 97-9, 1997-2 I.R.B. 55, a plan sponsor may not retroactively amend a s 401(k) plan to adopt the alternative ("SIMPLE") method of satisfying the s 401(k) and s 401(m) nondiscrimination tests added by s 1422 of SBJPA.

2 As provided in s 417(e)(3)(B), the present value of a distribution from a pre-GATT plan that is made prior to the first plan year beginning after December 31, 1999, and before a plan amendment applying the GATT changes to s 417(e)(3) to the plan has been adopted and made effective generally must be determined under the plan's pre-GATT terms.

.08 Any amendment that would result in an elimination or reduction of s 411(d)(6) protected benefits may not be made retroactively effective unless specifically permitted by law or regulation or by revenue ruling, notice, or other guidance published in the Internal Revenue Bulletin.

.09 Section 1431(b)(1) of SBJPA eliminated the family aggregation requirements of s 414(q)(6), effective for years beginning after December 31, 1996. Section 1431(b)(2) of SBJPA also eliminated the family aggregation requirement that formerly applied under s 401(a)(17)(A), effective for years beginning after December 31, 1996. A plan's family aggregation provisions generally would be disqualifying provisions under s 401(b) because they would be integrally related to a qualification requirement of the Code that has been changed by SBJPA, effective before 1999. In certain limited circumstances, the continued application of the family aggregation rules in the operation of a plan could result in the loss of qualified status. The plan's family aggregation provisions also would then be disqualifying provisions because they would cause disqualification as a result of SBJPA changes to the qualification requirements effective before 1999. Regardless of whether a plan's family aggregation provisions are disqualifying provisions because they are integrally related to SBJPA qualification changes or because they would cause plan disqualification, a plan amendment eliminating the provisions will not violate the requirements of s 411(d)(6) provided the amendment is effective no earlier than the first day on which the plan was operated in accordance with the amendment, and in no event earlier than the first day of the first plan year beginning after December 31, 1996.

SECTION 7. TIME FOR ADOPTING CERTAIN AMENDMENTS RELATING TO SECTION 415

For purposes of s 767(d)(3)(B) of GATT, the date provided by the Secretary for adopting plan amendments reflecting the changes to s 415(b)(2)(E) is the last day of the plan's remedial amendment period under section 6.04. Moreover, as discussed in

section 3.04, s 1449(d) of SBJPA provides that an amendment applying specified GATT changes that was adopted or effective before August 20, 1996, will be disregarded in applying s 767(d)(3)(A) of GATT, as modified by s 1449(a) of SBJPA, if that amendment is repealed by another plan amendment that is adopted no later than August 20, 1997. Pursuant to this revenue procedure, a plan amendment applying the amendments made by s 767 of GATT which was adopted or made effective on or before August 20, 1996, also shall not be taken into account in applying s 767(d)(3)(A) of GATT as amended by s 1449(a) of SBJPA, if the amendment is repealed by another plan amendment that is adopted on or before the last day of the plan's remedial amendment period under section 6.04. This relief will not fail to be available merely because a plan is not operated in accordance with the repealing amendment prior to the date specified in future guidance. The Service intends to issue additional guidance concerning the GATT and SBJPA changes to the limitations under s 415(b) in the near future.

SECTION 8. MINIMUM FUNDING REQUIREMENTS

Section 412 provides minimum funding standards applicable to pension plans that are or were qualified plans under s 401. Section 1.412(c)(3)-1 provides rules concerning the reasonable funding methods for defined benefit pension plans. Section 1.412(c)(3)-1(d)(1)(i) provides that, except as provided by the Commissioner, a reasonable funding method does not anticipate changes in plan benefits that become effective, whether or not retroactively, in a future plan year or that become effective during a plan year but after the first day thereof. Section 412(c)(12), which was added by GATT, provides that the funding method of a collectively bargained plan described in s 413(a) (other than a multiemployer plan) must anticipate benefit increases scheduled to take effect during the term of the collective bargaining agreement applicable to the plan. Therefore, except to the extent required by s 412(c)(12) or as otherwise provided by the Commissioner, in determining the minimum funding standards for a defined benefit plan under s 412, amendments that become effective, whether or not retroactively, in a future plan year may not be anticipated, even though the amendments are made before the end of any applicable remedial amendment period. Contributions to a defined benefit plan will be deductible subject to the limitations of s 404, with the s 412 minimum funding standards determined without anticipating such future amendments.

SECTION 9. TERMINATING PLANS

A plan (including a master or prototype, regional prototype, or volume submitter plan) that is terminated after the effective date of changes in the qualification requirements made by SBJPA or GATT but before the date that plan amendments would otherwise be required must be amended in connection with the plan termination to comply with the changes as of their effective date with respect to the plan. For this purpose, any amendment that is

adopted after the date of plan termination in order to receive a favorable determination letter will be considered as adopted in connection with the plan termination. In addition, annuity contracts distributed from such terminated plans also must meet all the applicable requirements of SBJPA and GATT. In the case of changes in the qualification requirements to which s 1465 of SBJPA applies, the operational compliance requirement of s 1465 must also be satisfied. (See Notice 87-57, 1987-2 C.B. 368, and Announcement 88-8, 1988-4 I.R.B. 32, which enunciated the same principles with respect to plans that terminated before the amendment date described in s 1140 of TRA 86.)

SECTION 10. PLANS WITH EXTENDED RELIANCE

As described above, the sponsor of a plan that is entitled to extended reliance on a favorable TRA 86 letter may rely on that letter until the earlier of the last day of the last plan year commencing prior to January 1, 1999, or the date established for plan amendment by any legislation that is effective after the date of the plan's letter. A plan with extended reliance must be amended by the last day of the first plan year beginning on or after January 1, 1999, to the extent necessary to comply with regulations or administrative guidance of general applicability that has been issued since the date of the plan's favorable TRA 86 letter. These amendments must be made effective no later than the first day of the first plan year beginning on or after January 1, 1999, and no earlier than the first day of the plan year in which the amendments are adopted. (But see Rev. Rul. 94-76, 1994-2 C.B. 46, and Rev. Rul. 96-48, 1996-40 I.R.B. 7.) Also see section 11, below, regarding preapproved plans.

SECTION 11. DETERMINATION AND OPINION LETTER PROGRAMS

.01 Effective with the date of enactment of SBJPA or GATT, as applicable, and until further notice is given, determination, opinion, notification, and advisory letters, other than determination letters issued for terminating plans, will not include consideration by the Service of any amendments to the qualification requirements made by SBJPA or GATT, with the following two exceptions. First, determination letters will include consideration of the changes made to s 401(a)(26) by s 1432 of SBJPA, which limited the applicability of s 401(a)(26) to defined benefit plans and made certain other changes. See Announcement 97-2, 1997-2, I.R.B. 62. Second, determinations of leased employee status under s 414(n) will reflect the "primary direction or control" test under s 414(n)(2)(C), as amended by s 1454 of SBJPA, that replaces the former "historically performed" test.

.02 Until further notice is given, plans (including master or prototype, regional prototype, and volume submitter plans), other than terminating plans, that include provisions that reflect the SBJPA or GATT amendments to the qualification requirements will not be subject to adverse letters by reason of the inclusion of the provisions. This will not preclude the issuance of adverse

letters for other reasons, such as an impermissible elimination or reduction of s 411(d)(6) protected benefits resulting from the adoption of amendments for SBJPA or GATT. However, favorable letters issued for plans, other than terminating plans, may not be relied upon with respect to whether the plans satisfy the qualification requirements as amended by SBJPA or GATT.

.03 The Service will begin reviewing both preapproved plans and individually designed plans for compliance with the qualification requirements as amended by SBJPA or GATT as soon as possible after the issuance of additional guidance pertaining to the requirements of SBJPA. Prior to that time, the Service intends to publish procedures relating to the issuance of determination, opinion, notification and advisory letters for plans that take into account the requirements of SBJPA or GATT. The procedures are also expected to include rules pertaining to the required time for sponsors to amend preapproved plans and SBJPA or GATT and actions that may be required of adopters of these plans.

PART III. TIME FOR AMENDING SECTION 403(B) PLANS

SECTION 12. SECTION 403(B) PLANS

.01 SBJPA also made certain changes that may require the amendment of tax- sheltered annuity plans described in s 403(b) or annuity contracts purchased under these plans. The provisions of s 1465 of SBJPA apply with respect to any plan or annuity contract that is required to be amended by any provision of subtitle D of SBJPA. Section 1465 thus applies not only to qualified plans but also to s 403(b) plans and annuity contracts purchased under these plans. Therefore, if a provision of subtitle D of SBJPA requires an amendment to a s 403(b) plan or an annuity contract purchased under the plan, the amendment will not be required to be made before the time described in s 1465 of SBJPA, provided the retroactive amendment and operational compliance requirements of s 1465 are satisfied. For this purpose, the time described in s 1465 with respect to a s 403(b) plan that is a governmental plan will be treated as not expiring before the last day of the first plan year beginning on or after the 1999 legislative date, that is, the 90th day after the opening of the first legislative session beginning on or after January 1, 1999, of the governing body with authority to amend the plan, if that body does not meet continuously.

.02 For example, s 1450(c)(1) of SBJPA amended s 403(b)(1)(E) to provide that each contract purchased under a s 403(b) plan salary reduction agreement must provide that elective deferrals made under the contract may not exceed the annual limit on elective deferrals under s 402(g)(1). Prior to this amendment, the s 403(b) plan, not each contract, was required to provide this limitation. Section 1450(c)(2) provides that this amendment applies to years beginning after December 31, 1995, except a contract will not be required to meet any change in any requirement by reason of the amendment before the 90th day after enactment of SBJPA (that is, November 18, 1996). Because s 1465 applies to any annuity contract purchased under a s 403(b) plan,

such a contract is not required to be amended to comply with s 1450(c)(1) before the first day of the first plan year beginning on or after January 1, 1998 (or, in the case of a contract purchased under a s 403(b) plan that is a governmental plan, the later of (i) the first day of the first plan year beginning on or after January 1, 2000, or (ii) the last day of the first plan year beginning on or after the 1999 legislative date), provided the retroactive amendment and operational compliance requirements of s 1465 are satisfied with respect to the contract.

SECTION 13. EFFECTIVE DATE

This revenue procedure is effective August 18, 1997.

DRAFTING INFORMATION

The principal author of this revenue procedure is James Flannery of the Employee Plans Division. For further information regarding this revenue procedure, please contact the Employee Plans Division's taxpayer assistance telephone service between the hours of 1:30 p.m. and 4 p.m. Eastern Time, Monday through Thursday, by calling (202) 622-6074/6075, or Mr. Flannery on (202) 622-6214. (These telephone numbers are not toll-free numbers.)

Rev. Proc. 97-41, 1997-33 I.R.B. 51, 1997 WL 427213 (I.R.S.)

. The years to which the contributions relate, and
. The amounts.

Note: Contributions to pension plans for the current year will continue to be reported on Form W-2.

Additional information

The 1998 Instructions for Form W-2 contain a discussion of the reporting requirements for contributions to pension plans. Announcement 98-45, 1998-23 I.R.B. 18, 1998 WL 252740 (I.R.S.)

CHAPTER FIVE

Army USERRA Soldier Training

DEPARTMENT OF THE ARMY
The Judge Advocate General's School
Charlottesville, Virginia 22903-1781

JAGS-ADA (351) 26 May 1998

MEMORANDUM FOR JUDGE ADVOCATES

SUBJECT: Uniformed Service Employment and Reemployment Rights Act Training

1. I have prepared the enclosed **training materials** to assist you in preparing soldiers in your area for deployment.

2. The Uniformed Service Employment and Reemployment Rights Act (USERRA) provides job protection for members of the armed forces, both active duty and reserve component. On 13 December 1993, it superseded the Veterans' Reemployment Rights Act (VRRA). **USERRA contains a number of significant differences from VRRA**. Most important to deploying soldiers, **it requires departing employees to give notice to their employer** of their upcoming military service before leaving their job.

3. Enclosed are a soldier handout and attorney teaching notes. Please use the teaching notes to prepare your own classes, briefings, and hand-outs, customized for the units you support. In our experience, the teaching notes contain more detail than most clients want or need. All materials have been uploaded to the Legal Assistance and Reserve Component files libraries on the LAAWS bulletin board system and JAGCNET/Lotus Notes.

4. Primary responsibility for enforcement of USERRA is assigned by statute to the Department of Labor Veterans Employment and Training Service (VETS). VETS declines to provide assistance to returning veterans who are represented by counsel. For that reason, **AR 27-3, para 3-6e, places significant limits on assistance you may provide to individual clients**. These limits are explained in the teaching notes at para VI, pp. 7-8. You may provide briefings and information to deploying units, and give general information handouts to soldiers. If you have specific questions about a specific client after consulting the teaching notes and AR 27-3, call VETS (202-219-9110) before you undertake representation.

5. Feel free to call me at (804) 972-6357/fax 6377, or DSN 934-7115/(800) 552-3978, ext. 357.

2 Encls

PAUL E. CONRAD
LTC, JA
Professor, Administrative and Civil Law
Department

THE UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT (USERRA)

B. *Soldier's Information Paper*

The Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) is a federal law which gives members and former members of the U.S. armed forces (active and reserves) the right to go back to a civilian job they held before military service.

Who gets USERRA protection? You probably qualify for USERRA protection if you meet all five of these tests:

1. **Job.** Did you have a civilian job before you went on active duty? *All* jobs are covered, unless your employer can prove the job was truly a temporary position. USERRA applies to all private employers, state governments, and all branches of the federal government.

2. **Notice. YOU (OR A RESPONSIBLE OFFICER FROM YOUR MILITARY UNIT) MUST GIVE ADVANCE NOTICE TO YOUR EMPLOYER BEFORE LEAVING FOR ACTIVE DUTY.** Notice can be oral or in writing, but you can best protect your rights by sending a letter by certified mail, or having your employer sign your copy of your letter, acknowledging receipt. Your legal assistance attorney has a sample letter.

3. **Duration.** You can be gone from your civilian job for up to five years (total). Any absences from your employer protected under the previous law (VRRA) count towards your total. Most periodic and special Reserve and National Guard training does not count towards your five year total.

4. **Character of service.** If you are discharged, you must receive an honorable or general discharge. This test does not apply if you remain in the reserve component, but your employer can still require some proof from your unit that your period of service was honorable. A letter from your commander will suffice.

5. **Prompt return to work.** If you were gone up to 30 days, you must report back to the first shift which begins after safe travel time from your duty site plus eight hours to rest. If you gone 31 to 180 days, you must apply in writing for work within 14 days after completing military service. If you were gone 181 days or more, you must apply in writing for work within 90 days. Tell your employer you worked there before, and you left for military service.

You are entitled to protections both while you are gone and when you return to work.

1. **Health insurance during service**. If you ask for it, your employer must continue to carry you and your family on the company health plan for up to 30 days of service, at the normal cost to you. ***TRICARE does not cover family members***

for tours of 30 days or less. You can get up to 18 months of coverage, but your employer can pass on the full cost (*including the company's share*) on to you.

2. **Prompt reinstatement**. You get your job back immediately if you were gone 30 days or less. After longer service, you must get your job back within a few days.

3. **Status and Seniority.** For purposes of status, seniority, and most pension rights (including pay rate) you are treated as if you never left for military service. If your peers got promotions or raises while you were gone, you do too.

4. **Training and other accommodations**. Your employer must train you on new equipment or techniques, refresh your skills, and accommodate any service-connected disability.

5. **Special protection against discharge other than for cause**. If you are fired within a protected period, your employer must prove the firing wasn't because of military service. Your protected period varies with how long you were gone.

6. **Immediate reinstatement of health benefits.** You and your family may chose to go back on the company health plan immediately when you return to your civilian job. There can be no waiting period and no exclusion of pre-existing conditions, other than for VA-determined service-connected conditions.

7. **Antidiscrimination provision**. USERRA prohibits discrimination based on military service or military service obligation.

8. **Other benefits**. USERRA guarantees you certain rights. It does not eliminate any *other* benefits you may have from state law, contract, or collective bargaining agreement.

Enforcement. [Websites: http://www.ncesgr.osd.mil and http://www.dol.gov/dol/vets .]

1. The U.S. Department of Defense National Committee for Employer Support of the Guard and Reserve (NCESGR), (800)336-4590 or (703)696-1400. Email: ncesgr@osd.pentagon.mil . NCESGR provides ombudsmen who mediate reemployment issues between military members and their civilian employers.

2. The U.S. Department of Labor Veterans Employment and Training Service (VETS), 1-202-219-9110. The Department of Labor is responsible for resolving and/or investigating reemployment issues.

3. Contact your legal assistance attorney. Remember your military legal assistance attorney may not act as your personal attorney in reemployment disputes.

4. USERRA gives your the right to sue your employer in federal court. See 38 U.S.C. §§ 4301-33. If your lawsuit is successful, you may be able to recover court costs and attorney fees from your employer.

THE UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT (USERRA)

C. *Attorney's Teaching Notes*

I. **Introduction.** The Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA),[1] was signed into law on 13 October 1994. USERRA is a comprehensive revision of the federal law of veterans' employment rights. It applies to virtually all employers, and protects the rights of those who served with the regular components, reserve components, and National Guard when in the federal service. USERRA clarifies and replaces the Veterans' Reemployment Rights Act (VRRA), formerly codified at 38 U.S.C. §§ 2021-26. During its 52-year history, VRRA was amended several times. Judicial decisions interpreting VRRA made its interpretation even more confusing. USERRA broadens some provisions of VRRA and adds enforcement mechanisms.

II. **References and Resources.**

A. The National Committee for Employer Support of the Guard and Reserve (NCESGR), 1-800-336-4590. A DoD agency, NCESGR has a public information and ombudsman role. It is not an enforcement agency. NCESGR training materials are available on the LAAWS bulletin board system in the Legal Assistance and Reserve Conferences. NCESGR gives awards to recognize employers who are especially helpful to members of the Guard and Reserve.

B. Veterans' Employment and Training Service (VETS), U.S. Department of Labor, (202)219-9110. Refers callers to regional and state agencies for local information and mediation. VETS has primary statutory responsibility for mediation and enforcement of USERRA.

C. This outline was prepared by LTC Paul E. Conrad, Administrative and Civil Law Department, The Judge Advocate General's School, U.S. Army. This version was last revised on 26 May 1998. Please email me or call me if I can be of further assistance: conrape@hqda.army.mil,(804) 972-6357, DSN 934-7115 ext. 357, or 1-800-552-3978 ext. 357.

D. ***Caveat.*** Beware of training material prepared for the VRRA, e.g., TJAGSA Guide (Legal Assistance Branch): Materials on the Veterans Reemployment Rights Law, Mar. 1991; Dept. of Army, Pam. 135-2-R, Briefing on Reemployment Rights of members of the Army National Guard and U.S. Army Reserve (May 1982); Ingold and Dunlap, When Johnny (Joanny) Comes Marching Home: Job Security for the Returning Service Member Under the

[1] P.L. 103-353, 108 Stat. 3149, mostly codified at 38 U.S.C. §§ 4301-33. Citations in this outline by section number alone (e.g., "§ 4301") are references to USERRA as codified at 38 U.S.C. §§ 4301-33.

Veterans' Reemployment Rights Act, 132 Mil. L. Rev. 175 (1991). Although some of the provisions of USERRA and VRRA are similar, until training materials prepared under VRRA are updated to reflect changes in the law, such material must be used with extreme caution.

III. **Which employers are covered by USERRA?** USERRA applies to all private employers, the states, and all branches of the federal government. §§ 4303(4)(A)(ii) & (iii).[2] There is no exception based on the small size of an employer. § 4303(4)(A)(i). USERRA also applies to union hiring halls and similar entities to whom employers have delegated employment-related responsibilities. Id. If an employer can prove that reemployment is impossible, is unreasonable, or would impose an undue hardship on the employer, the employer need not reemploy the soldier, § 4312(d)(1), but the employer has the burden of proof, § 4312(d)(2).

IV. **Who is eligible for USERRA protections?** To obtain USERRA's protections, a soldier[3] must pass each element of a five-part test.

A. **Job.** Did the soldier have a civilian job before the period of active duty in question? *All* jobs are covered, except jobs "for a brief, nonrecurrent period and [in which] there is no reasonable expectation that such employment will continue indefinitely for a significant period." § 4312(d)(1)(C).

B. **Notice.**

1. Did the soldier give notice before leaving? Notice is one of the important changes from VRRA to USERRA: a soldier must give advance notice to the employer before leaving for active duty. § 4312(a)(1). Notice can be oral or in writing; written notice is easier to prove. Appendix 1 to this outline is a sample form for notice. The soldier's commander or another appropriate officer may also give notice for the soldier. VRRA used the term "request" instead of "notice"; "notice" is more accurate because the employer can't refuse permission for an absence. USERRA addresses rare circumstances when notice isn't required, such as for a classified mission, or when notice is impossible. § 4312(b). If the soldier entered active duty before 12 December 1994 (USERRA's effective date), VRRA's notice

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[2] Protections for employees of certain federal intelligence organizations are somewhat limited under USERRA. § 4315; 5 U.S.C. § 2302(a)(2)(C)(ii). Enforcement and remedies (discussed *infra* in para VI [at pp. 7-9] are similarly limited. § 4325.

[3] For clarity and simplicity, "soldier" in this information paper refers to the protected person. USERRA uses the term "person"; other publications refer to her or him as the "veteran" or "reservist." USERRA protects those who serve in the Army, Navy, Air Force, Marine Corps, Coast Guard, the commissioned corps of the Public Health Service, the Army and Air National Guard when engaged in active duty for training, inactive duty training, or full-time National Guard duty, and other persons designated by the President in time of war or national emergency. § 4303(16).

rules apply. USERRA itself doesn't address how much notice is required, but its legislative history makes clear that a soldier should give as much notice as possible. See also *Burkart v. Post-Browning, Inc.*, 859 F.2d 1245 (6th Cir. 1988) (VRRA case upholding firing of National Guard member who withheld notice of active duty for training until the last moment).

2. Some employers give employees paid military leave. For example, federal employees have a right to fifteen day of paid military leave each fiscal year. 5 U.S.C. § 6323. Such rights are independent of USERRA. Some employers prefer for employees to use vacation days or paid leave to perform military training. Employees have the right to use "vacation, annual, or similar leave with pay" before beginning military service. 43 U.S.C. § 4316(d). The decision whether to take such leave is the employee's. The employer cannot require the employee to do so.

3. **Waiver of rights**. An employer may ask a departing soldier to sign a statement saying the soldier does not intend to return to the civilian job, or a more limited waiver of the soldier's rights to non-seniority benefits. Despite any such waiver, *a soldier never gives up his or her rights to reemployment*, nor the right to be treated as continuously employed for seniority purposes upon return to the job. USERRA § 8(g) (not codified). A statement of non-return, however, does waive non-seniority benefits. § 4316(b)(2)(A)(ii). To be effective, a waiver must be made with full knowledge of the rights the soldier is giving up, and the employer bears the burden of proof on this issue. § 4316(b)(2)(B). Signing such a waiver will almost never be in a soldier's best interest.

C. **Duration.** Was the soldier gone for less than five years? The USERRA clarifies VRRA practice: all soldiers now are now entitled to five years of protected absence. § 4312(c). Absences with any one employer are cumulative, and include any absences protected under VRRA. The soldier can exclude certain absences from the five-year limit: most periodic and special Reserve and National Guard training, § 4312(c)(3), most service connected with war or national emergency, § 4312(c)(4), and certain other absences.

D. **Character of service.** Did the soldier receive an honorable or general discharge? Soldiers with less favorable discharges, or who were dropped from the rolls of the Army because of AWOL or desertion, aren't protected by USERRA. § 4304. Although § 4304 doesn't address an entry-level discharge, uncharacterized discharge, or a release from military control for a void enlistment, such service also should be protected, given the language of the section. If the period of absence was 31 days or longer, the employer is entitled to ask the soldier for proof of character of service. § 4312(f)(1)(C).

E. **Timely request or reapplication for work.** How soon after completion of service the soldier must return to work depends on how long the soldier was gone:

1. Absences of up to 30 consecutive days. The soldier is entitled to safe travel time for place of duty to her or his residence, plus eight hours of rest. The soldier must "report" to work at the beginning of the first normal shift on the full calendar day following this period. § 4312(e)(1)(A)(i).

2. Absences of 31 to 180 days. The soldier must "apply" for work not later than 14 days after completing service. § 4312(e)(1)(C). Although USERRA doesn't require that applications be in writing, returning soldiers avoid proof problems by making a written application. Soldiers should make clear that they are not applicants for new employment: they had previous positions and left work to perform military service.

3. Absences of 181 days or longer. The soldier must apply for work not later than 90 days after completing service. § 4312(e)(1)(D). Soldiers returning from absences of 181 days or longer should make a written application, and make clear that they left a previous position for military service.

4. Extensions are possible if the soldier was hospitalized for or convalescing from a service connected injury or illness, or was otherwise unable to meet the time requirements above for reasons beyond the soldier's control. §§ 4312(e)(1)(A) (ii) & 4312(e)(2).

5. Soldiers who don't meet the time requirements don't automatically lose the protections of USERRA. Their cases are determined under the employer's ordinary absence and disciplinary policies. § 4312(e)(3)(C).

V. **What protections must an employer give under USERRA?** Soldiers are entitled to protections both while they are gone and when they return.

A. **Protections during service.**

1. **Health insurance** for the soldier and family members. Upon request, soldiers can maintain health coverage, subject to the normal employee's contribution, for up to 30 days of service. § 4317(a)(1)(B). ***CHAMPUS does not cover family members for tours of 30 days or less***, so it makes sense for most soldiers with family members to maintain private family member coverage for tours of up to 30 days. Soldiers can maintain health coverage for up to 18 months, at their request, but employers can charge up to 102% of the full premium under the plan, including any employer contribution. § 4317(a)(1)(A)(i).

2. **Other benefits**. USERRA requires an employer to treat an employee who serves in the armed forces like any other employee of similar seniority and status who is on furlough or leave of absence. § 4316(b)(1). For example, if the employer offers other employees on furlough or leave of absence holiday bonuses, low cost life insurance or loans, profit sharing plans, etc., a serving soldier-employee is also entitled to them. If the employer has more than one kind of furlough or leave of absence, the soldier is entitled to the most generous treatment for comparable periods of time. *See Waltermyer v. Aluminum Company of America*, 804 F.2d 821 (3d Cir. 1986).

B. **Protections upon a soldier's return**.

1. **Prompt reinstatement**. Soldiers gone 30 days or less "report" back to work at the start of the first regular shift starting at least eight hours after safe travel time from their release from duty. § 4312(e)(1)(A)(i). By implication, such soldiers are entitled to immediate reemployment. All other covered soldiers must be reemployed "promptly." § 4313(a). USERRA does not define "prompt" but the clear intent of the law is reemployment within days, not weeks or months.

2. **Seniority**. Soldiers gone for 90 days or less are entitled to the exact job they left. § 4313(a)(1). If service was 91 days or more, the employer has the option of giving the returning soldier a position of like seniority, status, and pay. § 4313(a)(2). For all absences, USERRA incorporates the "escalator principle," (§ 4316(a)) first recognized in *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 284-85 (1946). Returning employees are entitled to the same seniority they would have had if they never left the employer for military service. If their pre-service peers were promoted or received raises in their absence, the returning soldier is entitled to the same raise or promotion. Conversely, if their pre-service peers took pay cuts, or their jobs were eliminated, the returning soldier gets the same adverse treatment.

3. **Status**. Returning soldiers are entitled to the same status they would have attained if continuously employed. This includes job title, *Ryan v. Rush-Presbyterian-St. Luke's Medical Center*, 15 F.3d 697, 699 (7th Cir. 1994), location, *Armstrong v. Cleaner Services.*, 79 L.R.R.M. 2921 (M.D. Tenn. 1972); *Britton v. Department of Agriculture*, 23 M.S.P.R. 170 (1984), the opportunity to work during the day versus at night, and the opportunity to work in a department where there are better opportunities to earn commissions.

4. **Training and other accommodations**. An employer must make "reasonable efforts" to train a soldier on new equipment or techniques, or

to refresh skills not used during service. § 4313(a)(2)(B). An employer must make "reasonable efforts" to accommodate a service-connected disability, or to offer the soldier alternate employment. § 4313(a)(3). There is some overlap between USERRA and the Americans With Disabilities Act (ADA), 42 U.S.C. § 12111. The ADA exempts employers with less than fifteen employees. USERRA contains no such exception.

5. **Special protection against discharge other than for cause**. If a returning soldier is fired within a protected period, the employer has the burden of showing the discharge was for cause, and was not taken in retaliation for USERRA reemployment rights. The protected period is one year for soldiers gone for 181 days or more, § 4316(c)(1), and 180 days for soldiers gone for 31 to 180 days, § 4316(c)(2). Soldiers gone for 30 days or less are protected by the general anti-discrimination clause of USERRA, § 4311; they have no protected period.

6. **Immediate reinstatement of health benefits.** The employer or employer's health insurer can impose no waiting period and no exclusion of pre-existing conditions, other than for VA-determined service-connected conditions. § 4317(b). A returning soldier is entitled to reinstatement of health coverage whether or not she elected to pay for health coverage through the employer during her absence.

7. **Pension benefits**. For purposes of pension benefits, employers must count any period of service protected under USERRA as if it were service with the employer. § 4318(a)(2)(B). This applies both to benefit eligibility (vesting) and to calculation of benefit computations. If the pension plan does not require employee contributions, the soldier gets credit as if she or he never left work. If the plan uses employee contributions or deferrals, the returning soldier gets up to three times the period of absence (up to a maximum of five years) to make up her or his contributions. § 4318(b)(2).

8. **Antidiscrimination provision**. USERRA prohibits discrimination based on military service or military service obligation. § 4311(a). If military service was a motivating factor in an employer's adverse action, the employer must prove that the adverse action would have been taken in the absence of the employee's military service or status. See *Novak v. Mackintosh*, 919 F.Supp. 870 (D.S.D. 1996) and *Gummo v. Village of DePew*, 75 F.3d. 98 (2d Cir. 1996). USERRA also prohibits retaliatory action against witnesses and those who take action to enforce USERRA protections.

9. **Other benefits**. As discussed in para V.A.2 above (p. 5), USERRA requires an employer to treat an employee who serves in the armed forces

like any other employee of similar seniority and status who is on furlough or leave of absence. § 4316(b)(1). Any other benefits available to other employees returning from a similar period of absence are due to returning soldiers.

C. **Other protections**. USERRA acts as a safety net: It supersedes any state law, local law, or ordinance contract, agreement, policy, plan, practice, or other matter that *reduces, limits, or eliminates* any rights under USERRA or that established additional prerequisites to the exercise of such rights. § 4302(b). On the other hand, returning soldiers are still entitled to any other benefits that they enjoy from any other source, such as state law or constitution, collective bargaining agreement, private contract, etc. § 4302(a).

VI. **Enforcement**.

A. **Limits on Army legal assistance in USERRA cases**. AR 27-3, para 3-6e.

1. ***DOL and Department of Justice (DoJ) will not pursue any relief in a USERRA case if a soldier is represented by an attorney***. This includes a legal assistance judge advocate.

2. **Legal assistance on USERRA matters is limited to** conducting mobilization and demobilization briefings, providing sample letter formats, advising soldiers of the notice requirements of USERRA; advising returning soldiers of their rights under USERRA and applicable State law, referring soldiers to VETS or NCESGR; providing DoL Form 1010 to open a file with VETS and assisting in the preparation of the form; and periodically contacting soldiers who have sought help to determine if their employment problems have been resolved.

3. Any request for an exception to the foregoing limitations must be approved in advance by the Chief, Legal Assistance Division, The Judge Advocate General, 2200 Army Pentagon, Washington, DC 20310-2200 [(703) 588-6708].

B. **Informal mediation**. If a soldier believes his USERRA rights have been violated, the soldier can file a complaint with the Veterans' Employment and Training Service (VETS), U.S. Department of Labor, (202) 219-9110 [§ 4322(a)&(b)]. VETS will attempt to resolve the complaint with the employer [§ 4322(d)]. VETS has subpoena power to compel production of documents and attendance of witnesses [§ 4326(b)]. If VETS cannot resolve the problem, VETS will inform the complainant of the unsuccessful outcome and further enforcement rights [§ 4322(e)].

C. **Proceedings by the United States on behalf of the soldier**. If VETS is unable to resolve the complaint, the soldier may request the U.S. Attorney General (in the

case of a civilian employer) (§ 4323) or the Merit Systems Protection Board (MSPB) Office of Special Counsel (OSC) (if the employer is the federal government) (§ 4324) to bring an enforcement action on the soldier's behalf. Such actions are discretionary on the part of the Attorney General or the OSC. USERRA contains jurisdictional and remedial authority for actions by the Attorney General in U.S. district courts. § 4322(c).

D. **Proceedings by the soldier**. If the Attorney General or the OSC declines to take action, or if a soldier wishes to proceed on her own behalf, the soldier may bring suit in federal district court (civilian employer) (§ 4323(a)(2)) or before the MSPB (federal employer) (§ 4324(b)). There is no requirement in USERRA for exhaustion of administrative remedies. The MSPB has promulgated interim time limit regulations for filing USERRA claims. See 62 Fed. Reg 66,813 (22 Dec. 97) (to be codified at 5 C.F.R. pt. 1201). Basically, federal employees have 180 days from the time of the alleged discriminatory incident to file a complaint.

E. **Remedies**. District courts have broad remedial powers against a private employer: injunctive relief, money damages, attorney costs, expert witness fees, and other litigation expenses. § 4322(c). If the court finds the employer's failure to comply with USERRA was willful, the court may award liquidated damages (in an amount equal to the actual damages) in addition to actual damages. § 4322(c)(1)(A)(iii). For the purpose of remedies, states are treated as private employers. § 4322(c)(7). When the federal government is the employer, the MSPB may award lost wages and benefits, attorney costs, expert witness fees, and other litigation expenses, but not liquidated damages for willful misconduct, and may order federal agencies to comply with USERRA. § 4324(c). Recently, a federal court has held that non-federal employees may be entitled to a jury trial in USERRA cases, at least in liquidated damage (willful discrimination) cases. See *Spratt v. Guardian Automotive Products, Inc.*, __F.Supp. __, 1998 U.S. Dist. LEXIS 3503 (N.D. Ind. March 17, 1998).

D. USERRA Employer Notice Sample Letters

(See AR 25-50 for further guidance and technical details)

Unit Commander Letter to Employer - Annual Training & Drill Schedule Notice

[UNIT LETTERHEAD]*

*Send by Certified Mail-Return receipt requested

[Date]

Commanding Officer

[Employer Name and Address: ATTN: Director of Personnel]

Dear [Employer]:

As the commander of a [unit] soldier, I would like to personally thank you for you efforts in support of the Army Guard and Reserve program. As you know, in recent history Army Guard and Reserve units and soldiers have been activated several times, for war and peace operations. The reserve forces now account for about 48% of our total military forces. Week-end drill and annual training are absolutely essential to maintain those military skills that Reservists need to be able to accomplish our missions, be they for war, peacekeeping operations such as Operation Joint Endeavor in Bosnia, or disaster relief in our local area.

On December 12, 1994, the Uniformed Services Employment and Reemployment Rights Act (USERRA) became law. The USERRA affects all Guard members, Reservists and their employers. This statute, found at Title 38, U.S. Code Sections 4301-33, was designed to minimize employment problems that can result from Reserve military service. The new law replaces the old Veterans' Reemployment Rights Act (VRRA) and eliminates confusing distinctions as to Reservist reemployment rights based upon the type of military duty performed by the Reserve member.

To qualify for reemployment rights under USERRA, Reserve soldiers must meet five basic conditions:

- Hold a civilian job (including most "temporary" jobs)
- Give reasonable prior notice of military duty to the employer.
- Not exceed five years of cumulative active duty military service with the employer.
- Be released from active military duty under honorable conditions.
- Report back to the civilian job in a timely manner upon making timely request for reemployment.

Voluntary military service, peacetime or wartime, is fully covered under the USERRA. Generally, employers are entitled to receive prior notice, either verbal or written, from their Reserve employees or their employee's military commander of pending military duty, and must in return, grant their employee's requests for absence, without exception. ***You cannot condition permission to leave for military duty upon Reservist presentation of written military orders.*** I have advised my soldiers to give their employers as much forewarning as possible. In rare cases when call-up is short notice, such as an emergency mission, prior employer notice will not be required as it may be "unreasonable or impossible". Reserve soldiers may not be required by employers to use vacation pay or time saved to conduct their military duty assignments.

After periods of training or service for less than 30 days, soldiers must report back to work at the beginning of the first regularly scheduled work period on the first calendar day after completion of service. However, USERRA allows travel time for safe transportation home and eight hours of rest before returning to work. This means when a Reserve employee has weekend drill from Friday night to release by 6:00 P.M. on Sunday night, that the employee is expected to show up for work the next morning. The Reserve soldier has to apply for reinstatement within 14 days of active duty release, when he or she has been on active duty from 31-181 days. When a Reserve soldier is on active duty for more than 181 days, they have up to 90 days from their release to request reinstatement. Please be advised that you, as their employer, are expected to promptly reinstate the Reserve employee, provide them with the same seniority and status on the job they would have received if they had never left, training or retraining if necessary, and special protection against discharge except for cause for various periods of time.

Your continued support and cooperation are greatly appreciated, and are vital to the continued adequate defense of this nation by our military forces. I have enclosed a copy of our 199[_] training dates for you. I have included the tentative dates that your employee is expected to go on up to 16 consecutive days of Annual Training. It is my hope that by providing this notice of scheduled military training for your employee that scheduling problems can be avoided. If there are any major changes in this schedule, either your employee, my senior non-commissioned officer, or myself will notify you.

I can understand that Reserve military duty commitments may cause a hardship for your business. In these cases, I am prepared to work with you or your representative to resolve such problems whenever possible. Please feel free to contact me or my Unit Administrator, at [telephone number]. Please notify us as soon as possible of any potential scheduling conflicts. If you have any other questions about the Army Reserve or National Guard, or USERRA, please feel free to contact me or the National Committee for Employer Support for the Guard and Reserve (NCESGR), toll-free at (800) 336-4590.

Sincerely,

[Officer Signature Block for Civilian Letter]

Enclosure

Sample Employee's Active Duty Absence Notification Letter to Employer

[Employee's Home Address]

[Date]

[Employer's Business Address]*

*Send by Certified Mail, Return receipt requested

Dear Sir/Madam:

I will perform service with the [United States Army] [United States Army Reserve] [_____ National Guard] [etc.] beginning on [_____ __, 199_] and ending on [_____ __, 199_]. My absence from work for this period of military service is protected by the Uniformed Services Employment and Reemployment Rights Act, Title 38, United States Code Sections 4301-33.

My last day at work with you before I begin my military service will be [_____ __, 199_]. I expect to return to work with you on or about [_____ __, 199_]. ***Note: Make sure your return date complies with Title 38, United States Code Section 4312.*** [During my absence, I can be reached at [give mailing address and telephone number, if known.]] [During my absence, _____, telephone number (___) ___-_____, will know how to reach me.] [I [do] [do not] desire to take ___ days of paid [vacation, annual leave, etc.] as the first ___days of my absence.] Please be advised that I may not be required to use vacation pay or time for military absence from my workplace, per Title 38, United States Code Section 4316(d).

[During my absence, I [do] [do not] desire to maintain [my] health insurance [for [me and] my family] through your insurer.] ***[Remember, your employer can charge you your regular premium for health insurance for absences of 30 days or less [Title 38, U.S. Code Section 4317(a)(1)(B)], and up to 102% of the full premium, including employer's contribution, for up to the first 18 months of your absence, per Title 38, U.S. Code Section 4317(a)(1)(A)(i), if you elect to continue private health insurance coverage after 30 days, instead of enrolling in Tricare.]***

[During my absence, I [do] [do not] desire to continue to make [employee contributions] [payments to replace deferred compensation] to keep my pension plan current.] Pursuant to Title 38, U.S. Code Section 4318 (a)(2)(B), you are required to continue to make regular employer contributions, and to continue my membership in your pension plan during my absence.

If you have any questions about the provisions of the Uniformed Services Employment and Reemployment Rights Act, the National Committee for Employer

Support of the Guard and Reserve, toll-free telephone number 1-800-336-4590, will be happy to answer them.

Sincerely,

[Signature]

Original Received for Employer by:

_____

[Printed Name and Signature]

Sample Employee's Active Duty Return Notification Letter to Employer

[Employee's Home Address]

[Date]

[Employer's Business Address]*

*Send by Certified Mail, Return receipt requested

RE: Application for Reinstatement - Uniformed Services Employment and Reemployment Act, Title 38, U.S. Code Section 4312

Dear Sir/Madam:

On _____ __, 199_, I entered active duty with the U.S Army. On _____ __, 199_, I was honorably released from active duty with the service.

Please accept this letter as a formal request to be reinstated in my former job. With your permission, I plan to report to work on _____ __, 199__. Please call me at the number listed below if this date is not convenient. Pursuant to the Uniformed Services Employment and Reemployment Act, Title 38, U.S. Code Sections 4301-33, I am entitled to be reinstated as soon as possible in my former position.

If you have any questions about the provisions of the Uniformed Services Employment and Reemployment Rights Act, the National Committee for Employer Support of the Guard and Reserve, toll-free telephone number 1-800-336-4590, will be happy to answer them.

Sincerely,

[Signature]

Original Received for Employer by:

_____

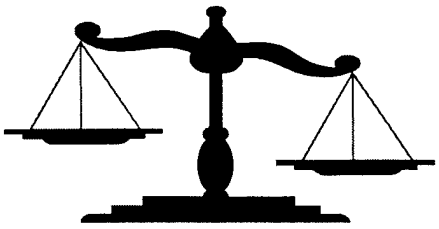
[Printed Name and Signature]

CHAPTER SIX

USERRA TEACHING OUTLINE

MAY 1998

UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT (USERRA)



UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT

I. REFERENCES.

A. Uniformed Services Employment and Reemployment Rights Act (USERRA), P.L. 103-353, 108 Stat. 3149, mostly codified at 38 U.S.C. §§ 4301-4333.

B. Department of Defense Instruction 1205.12, Civilian Employment and Reemployment Rights of Applicants for, and Service Members and Former Service Members of the Armed Forces [63 Fed. Reg. 3465, to be codified at 32 C.F.R. Part 104] (23 Jan 98).

C. Army Regulation 27-3, The Army Legal Assistance Program, para 3-6e (10 Sep 95) [Appendix A].

D. Restoration to Duty from Uniformed Service, 5 C.F.R. Part 353 (1996).

E. Note, *Employers Cannot Require Reservists to Use Vacation Time and Pay for Military Duty*, The Army Lawyer, December 1996, at 22.

F. Note, *Merit System Protection Board Addresses the Uniformed Services Employment and Reemployment Act*, The Army Lawyer, September 1997, at 47.

G. Note, *Interpreting USERRA "Mixed Motive" Discrimination Cases*, The Army Lawyer, December 1997, at 30.

H. Note, *Merit Systems Protection Board Develops Regulations for USERRA Claims by Federal Employees*, The Army Lawyer, February 1998, at 33.

II. OVERVIEW.

A. What are the prerequisites (i.e., requirements) for a returning service member to gain the protections of USERRA?

B. What are the protections granted by USERRA?

C. How are the USERRA protections enforced if an employer doesn't comply with the law?

III. PREREQUISITES FOR APPLICATION OF STATUTE. [38 U.S.C. § 4312].

A. Employee must have held a civilian job.

1. USERRA applies to virtually all employers: the federal government, state governments, all private employers. No exemption for small size, etc.

2. Even a temporary job may get USERRA protections, if there was a "reasonable expectation that employment will continue indefinitely or for a significant period." Burden is on employer to prove that the job was not permanent.

3. Certain Federal employees may be excluded from active duty and maintained in the Standby Reserve, if they are designated "key employees" under DoD Directive 1200.7, Screening the Ready Reserve, (6 Apr 84), and AR 135-133, Ready Reserve Screening, (10 Jul 89). ***See Dew v. United States***, 1998 WL 159060 (S.D.N.Y. 1 Apr. 98) (FBI agents argued FBI policy [violates USERRA] that no Special Agents may serve in the Ready Reserve because of a "blanket" key employee designation. Suit dismissed for failure to exhaust administrative remedies).

B. Employee must have given prior notice of military service to civilian employer.

1. Statute requires notice: it doesn't require that notice be written; written notice, however, will minimize proof problems. See Appendix B, USERRA Employer Notice Letters.

2. Notice may be given by the soldier or by a responsible officer from the soldier's unit.

3. Exceptions: "military necessity" precludes notice (e.g., fact of deployment is classified) or where giving notice would be otherwise "unreasonable." Clear from legislative history, and case law construing predecessor legislation, that this exception will be construed narrowly. Soldier should give notice as soon as possible.

C. **Employee's period of military service cannot exceed five years [Appendix B].**

1. Five year limit on military service is cumulative.

2. The five-year clock restarts when employee changes civilian employers.

3. Some types of service (e.g., periodic/special Reserve/NG training, service in war or national emergency, service beyond five years in first term of service) do not count toward the five year calculation.

4. Five year period does not start fresh on 12 December 1994 (effective date of USERRA) - it reaches back to include all periods of military service during employment with given employer, unless such service was exempted from old VRR law's four year service calculations.

D. **Employee's service must have been under "honorable conditions" - that is, no punitive discharge, no OTH discharge, and no DFR.** For service of 31 (or more) days, employer can demand proof of honorable conditions. Proof can consist of a DD Form 214, letter from commander, endorsed copy of military orders, or a certificate of school completion.

E. **Employee must report back or apply for reemployment in a timely manner.**

1. If service up to 30 days, must report at next shift following safe travel time plus 8 hours (for rest).

2. If service 31 days to 180 days, must report or reapply within 14 days.

3. If service 181 days (or more), must report or reapply within 90 days.

4. Extensions are available if employee can show that it was impossible or unreasonable, through no fault of the employee, to report or reapply.

5. Reapplication need only indicate that you formerly worked there, are returning from military service, and request reemployment pursuant to USERRA. The request need not be in writing. Written request for reemployment, however, will avoid proof problems. **See *Mc Guire v. United Parcel Service, Inc.***, 1997 WL 543059 (N.D. Ill. 1997) (unpub.).

6. A soldier who fails to comply with USERRA's timeliness requirements doesn't lose all USERRA protections. The employer, however, is entitled to treat (and discipline) that employee's late reporting just like any other unauthorized absence.

IV. **PROTECTIONS AFFORDED BY THE STATUTE. [38 U.S.C. §§ 4311-18.]** If the employee meets the five reemployment prerequisites discussed above, the employee is entitled to **seven** basic entitlements: **prompt reinstatement; status; accrued seniority; health insurance coverage; training, retraining, or other accommodations; and special protection from discharge (except for cause)**. Note that these requirements apply to all employers: both public (federal, state, & local) and private. Unlike many other federal laws, there is no "small company" exception.

A. **Prompt Reinstatement.** If the employee was gone 30 (or fewer) days, the employee must be reinstated immediately; if gone 31 (or more) days, the reinstatement should take place within a matter of days.

B. **Status.** The employee may object to the proffered reemployment position if it does not have the same status as previous employment. Examples:

1. "Assistant Manager" is not the same as "Manager," even if both carry the same renumeration.

2. One location or position may be less desirable than another (geographically, by earnings potential, or by opportunity for promotion).

3. A change in shift work (from day to night, for example) can be challenged.

C. **Seniority.** If the employer has any system of seniority, the employee returns to the "escalator" as if he or she had never left the employer's service.

1. If the service was for 90 days (or less), the employee is entitled to the same job (plus seniority). If the service was for 91 days (or more), the employee is entitled to same "or like" job (status and pay), at employer's option, plus seniority [See Appendix C].

2. Seniority applies to pension plans as well. The seniority principle protects the employee for purposes of both vesting and amount of pension. Additional information is provided in IRS Revenue Procedure 96-49, which requires private pension plans to comply with USERRA pension requirements NLT 1 July 1998, and government pension plans NLT 1 January 2000.

   a. If employer has a plan that does not involve employee contribution, employer must give employee pension credit as if employee never left.

   b. If pension depends on a variable that is hard to estimate because of the employee's absence (e.g., amount of accrual pension depends on % of commissions earned by employee), employer may use what employee did in the 12 months before service to determine pension benefits. Employer may not, in any case, use military earnings as basis to figure civilian pension accrual.

   c. If the employer has a plan that involves employee contributions, employee must make up the contributions after returning to work. The employee has a period of three times the period of absence for military service, not to exceed five years, to make up the contributions. No interest may be charged by employer. Federal employees are entitled to a period of four times the period of absence to make up contributions, per 5 C.F.R Part1620, as amended by interim rule published 60 F.R. 19990 (21 Apr. 95), and final rule published 62 F.R. 18234 (14 Apr. 97). [See Appendix F--Federal Employee Reemployment Benefits.]

D. Health Insurance.

1. Immediately upon return to the civilian job, the employee (and his/her family) must be reinstated in the employer's health plan. The employer may not impose any waiting period or preexisting condition exclusions, except for service-connected injuries as determined by the Department of Veterans Affairs.

2. USERRA offers something new: continued employer health coverage, at the option of the employee, during the military service. [Federal employees should refer to 5 C.F.R. Part 890 (1996).]

    a. Employers must, if requested, continue employee and family on health insurance up to first 30 days of service. Note: CHAMPUS does not cover dependents on tours of less than 31 days. Cost to employee cannot exceed normal employee contribution to health coverage.

    b. Employees may request coverage beyond 31 days. Employer must provide this coverage up to 180 days or end of service (plus reapplication period), whichever occurs first. However, employers may charge employees a premium not to exceed 102% of total cost (employee + employer) of the entire premium.

E. **Training, Retraining, and Other Accommodations.** An employee who returns to the job after a long period of absence may find his/her skills rusty or face some new organization or technology. An employer must take "reasonable efforts" to requalify the employee for his/her job.

1. "Reasonable efforts" are those that do not cause "undue hardship" for the employer. A claim of "undue hardship" requires an analysis of the difficulty and expense in light of the overall financial resources of employer (and several other factors). The USERRA language is similar to that employed in the Americans with Disabilities Act.

2. If the employer cannot accommodate the employee, employer must find a position which is the "nearest approximation" in terms of seniority, status, and pay.

F. **Special Protection Against Discharge.** Depending on the length of service, there are certain periods of post-service employment where, if the employee is discharged, the employer will have a heavy burden of proof to show discharge for cause. This provision is a hedge against bad faith or pro forma reinstatement.

1. For service 181 days (or more), the subsequent protection lasts a year.

2. For service of 31 days to 180 days, the subsequent protection lasts for 180 days.

3. There is no special protection for service 30 (or less) days. However, the statute's general prohibition against discrimination or reprisal applies.

   a. Employers cannot discriminate in hiring, employment, reemployment, retention in employment, promotion, or any other benefit of employment because of military service. Not only are current Active and Reserve Component military members covered by this provision, but so are former members--veterans. **See** ***Petersen v. Dep't of Interior***, 71 M.S.P.R. 227 (1996). [NEW] Employers cannot require someone to use vacation time/pay for military duty [§ 4316(d)]. **See** Veterans' Benefit Improvement Act of 1996, Pub. L. No. 104-275, § 311, 110 Stat. 3322 (9 Oct. 96), and ***Graham v. Hall-McMillen Company, Inc.***, 925 F. Supp. 437 (N.D. Miss. 1996) (Reservist may not be fired for complaining about employer requiring him to use vacation pay/days for military duty.)

   b. Employers may not take adverse action against anyone (not just the military employee) because that person takes action to enforce rights under USERRA or testifies or assists in a USERRA action or investigation.

c. USERRA makes it easier to prevail in allegations of unlawful discrimination - if plaintiff can show that such discrimination was a motivating factor (not necessarily the sole motivating factor), the burden of proof is then on the employer to show that the action would have been taken even without the protected activity. **See** ***Robinson v. Morris Moore Chevrolet,*** 974 F. Supp. 571 (E.D. Tex. 1997); ***Gummo v. Village of Depew,*** 75 F.3d 98 (2d Cir. 1996); ***Novak v. Mackintosh,*** 919 F. Supp. 870 (D.S.D. 1996); ***Graham v. Hall-McMillen Company***, 925 F. Supp. 437, 443 (N.D. Miss. 1996); ***Petersen v. Dep't of Interior***, 71 M.S.P.R. 227, 1996 MSPB LEXIS 735 (1996); and ***Hanson v. Town of Irondequoit***, 896 F. Supp. 110 (W.D. N.Y. 1995). Such cases are proven by direct evidence of discrimination or by indirect circumstantial evidence of discrimination. ***Duncan v. U.S. Postal Service***, 73 M.S.P.R. 86, 93-94 (1997).

d. An employee's intervening act of misconduct can overcome an inference of military status discrimination inferred by the close proximity between military duty and an adverse employer personnel action. ***Chance v. Dallas County Hospital District***, 1998 WL 177963 (N.D. Tex. 6 Apr. 98) (unpub.).

e. Military veteran/Reserve employees may raise "hostile work environment" discrimination claim based upon the individual's military status. **See** ***Petersen v. Dep't of Interior,*** 71 M.S.P.R 227, 1996 MSPB LEXIS 735 (1996).

G. **Other Non-Seniority Benefits.** If the employer offers other benefits, not based on seniority, to employees who are on furlough or nonmilitary leave, the employer must make them available to the employee on military service during the service.

1. Examples: ESOP, 401K or 403(b) plans, low cost life insurance, Christmas bonus, holiday pay, etc.

2. If the employer has more than one leave/furlough policy, the military employee gets the benefit of the most generous. However, if policies vary by length of absence, the military employee may only take advantage of policies geared to similar periods of absence (e.g., 6 months, 1 year, etc.) of absence.

3. The employee may waive the right to these benefits if the employee states, in writing, that he/she does not intend to return to the job. Note, however, that such a written waiver cannot deprive the employee of his other reemployment rights should he "change his mind" and seek reemployment.

V. ASSISTANCE AND ENFORCEMENT. [GENERALLY, 38 U.S.C. §§ 4322-24].

A. **The National Committee for Employer Support of Guard and Reserve (1-800-336-4590).** DoD agency. Provides information on USERRA to employees and employers, and seeks to resolve disputes on an informal basis. National and state ombudsman program first step to resolve employer-employee USERRA disputes. Website: http://www.ncesgr.osd.mil

B. **The Veterans' Employment and Training Service (VETS) (1-202-219-9110).** Department of Labor agency. Primary responsibility to formally investigate claims of USERRA violations. Website: http://www.dol.gov/dol/vets/

1. If the VETS investigation establishes a violation probably occurred, VETS will refer the case to the Office of Special Counsel (OSC - employer a federal executive agency) or Department of Justice (DOJ) for other employers.

2. The OSC or AG may provide counsel for representation free of charge. If they do not, the individual may hire private counsel. Action against the employer may then be taken in Federal Court or the MSPB (for federal employers). MSPB regulation providing for USERRA case attorney fee awards is at 62 F.R. 17046 (9 Apr. 97) (to be codified at 5 C.F.R. § 1202.202(a)(7)). There is no exhaustion of remedies requirement before appealing to the MSPB. ***Roche v. MSPB***, 1998 WL 47210 (Fed. Cir. 1998)(unpub.).

3. The MSPB has recognized that it has appellate jurisdiction over probationary, and non-probationary federal employees for USERRA claims. There were no time limits for individuals to file USERRA discrimination claims before the MSPB, until the MSPB promulgated regulations on 22 December 1997. ***See*** 62 FR 66813 (22 Dec. 97) (to be codified at 5 C.F.R. Part 1201). **See also** ***Petersen v. Dept of Interior***, 71 M.S.P.R. 227, 1996 MSPB LEXIS 735 (1996); ***Duncan v. U.S. Postal Service***, 73 M.S.P.R. 86, 1997 MSPB LEXIS 157 (1997); ***Botello v. Dep't of Justice***, 76 M.S.P.R.117, (M.S.P.B. 1997); ***Jasper v. U.S. Postal Service***, 73 M.S.P.R. 367, 1997 MSPB LEXIS 262 (1997) [probationary employee]; ***Wright v. Dep't of Veteran's Affairs***, 73 M.S.P.R. 453, 1997 MSPB LEXIS 351 (1997) [probationary employee]; and ***Roberson v. U.S. Postal Service***, __M.S.P.R. __, 1998 WL 105204 (MSPB 5 Mar. 98)[probationary employee]. Generally, the employee must file the complaint with the MSPB within 180 days from the date of the alleged USERRA violation. If the employee seeks OSC representation, the employee receives additional time to file (additional 30 days from notice of non-representation by OSC, or no time limit if OSC agrees to represent the employee). Congress is looking at rolling back any attempt to limit USERRA claim filing by the MSPB. **See** H.R. 3213, 105th Congress (introduced 2/12/98).

4. VETS has informally retained its policy, dating from the preceding statutory scheme, of not assisting veterans who are represented by counsel. Legal assistance attorneys should beware of holding themselves out to employers or to VETS as the veteran's "counsel." **See also** AR 27-3, The Army Legal Assistance Program, para 3-6e(2), concerning limits on Army legal assistance in USERRA cases (Appendix A).

5. The USERRA adds several new "teeth" to the enforcement of reemployment rights.

   a. Gives the DOL (VETS) subpoena power to aid in the conduct of its investigations.

   b. Employees who prevail on their claims may be entitled to reinstatement, lost pay (plus prejudgement interest), attorney's fees, and litigation costs. **See** 62 F.R. 17046 (9 Apr. 97), to be codified at 5 C.F.R. § 1201.202(a)(7), and ***Graham v. Hall-McMillen Company***, 925 F. Supp. 437, 446-447 (N..D. Miss. 1996).

c. Employees who can demonstrate that reinstatement is not a viable remedy may seek "front pay" damage remedies. **See *Graham v. Hall-McMillen Company***, 925 F. Supp. 437, 443-446 (N.D. Miss. 1996).

d. If the court finds that the violation was willful, the court may double the back pay award. (Does not apply to MSPB cases involving the federal government as employer.) Where there is evidence of willful employer noncompliance that could result in a double damage award, a jury trial may be authorized. ***Spratt v. Guardian Automotive Products, Inc.,*** __F.Supp.__, 1998 U.S. Dist. LEXIS 3503 (N.D. Ind. March 17, 1998).

6. Eleventh Amendment Immunity Defense. State and local governments are arguing that Congress may not abrogate by legislation state government immunity from individual lawsuits in violation of the Eleventh Amendment, U.S. Constitution. **See *Seminole Tribe of Florida v. Florida,*** 517 U.S. 44, 116 S. Ct. 1114, 134 L. Ed. 2d 252 (1996). This defense has been successfully upheld in two published cases so far. ***Palmatier v. Michigan Dep't of State Police***, 981 F. Supp. 529, 1997 U.S. Dist. LEXIS 13444, 1997 WL 663080 (W.D. Mich. 15 Aug. 97) (pending appeal) and ***Velasquez v. Frapwell,*** __F.Supp. __, 1998 WL 57473 (S.D. Ind 1998)(pending appeal). **BUT See *Diaz-Gandia v. Dapena-Thompson,*** 90 F.3d 609, 614 n. 9 (1st Cir. 1996) (Court ruled Eleventh Amendment immunity defense raised by Seminole Tribe does not apply to USERRA/VRRA cases, since USERRA/VRRA are War Power Clause legislation, not Commerce Clause legislation.) Remedial legislation to resolve the Eleventh Amendment issue by substituting the United States as plaintiff in state employee cases is currently before Congress [H.R. 3213, 105th Congress, *supra.*].

VI. CONCLUSION.

- **Post -Secondary Education Student Mobilization Assistance - Appendix D.**

APPENDIX A

Army Regulation 27-3 Extract

THE ARMY LEGAL ASSISTANCE PROGRAM

10 September 1995

3-6. Types of Cases

e. Economic

. . . . (2) Legal assistance will also be provided to those seeking reemployment under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) (38 U.S.C. §§ 4301-4333), and comparable State statutes subject to the following restrictions:

(a) Under USERRA, service members who leave civilian jobs to go on active duty have the right to return to those jobs when they are released from active duty. The primary responsibility for enforcing the protection afforded by USERRA rests with the United States Department of Labor (DOL) through its Veterans' Employment and Training Service (VETS). **DOL and Department of Justice (DOJ) will not pursue any relief in a reemployment case where a service member is represented by an attorney**. Therefore, in cases where a service member desires to pursue relief pursuant to USERRA, attorneys providing legal assistance will not take any action which could be viewed as legal representation of the service member (for example, contacting an employer on a USERRA case constitutes legal representation).

(b) **Legal assistance on VRRL [i.e., USERRA] matters is limited to the following**: (1) Conducting mobilization briefings and advising service members of the notice requirements of USERRA; (2) Conducting demobilization briefings and otherwise advising returning service members of their rights under the USERRA and applicable State law, if any; (3) providing sample letter formats for use by returning service members in asserting their USERRA rights with their employers; (4) Referring service members to VETS or the National Committee for Employer Support of the Guard and Reserve (NCESGR); (5) Providing service members DOL Form 1010 (Eligibility Data Form: Veterans' Reemployment Rights Program) to open a file with VETS and assisting in the preparation of the form; (6) Periodically contacting service members who have sought help on employment problems to determine if their employment problems have been resolved.

(c) Legal assistance on USERRA matters should be coordinated with officials within appropriate State agencies or DOL. Any request for an exception to the foregoing limitations must be approved in advance by the Chief, Legal Assistance Division, The Judge Advocate General, 2200 Army Pentagon, Washington, DC 20310-2200 [(703) 697-3170].

(emphasis added)

APPENDIX B

EXCEPTIONS TO 5 YEAR MILITARY SERVICE LIMIT IN TITLE 38, U.S. CODE SECTION 4312(c) [USERRA]

NOTES:

1. Effective with enactment of the Reserve Officer Personnel Management Act (ROPMA) on October 6, 1994, several section numbers from Title 10 U.S. Code that are referenced as exceptions to the five year limit have been changed. The new Title 10 section numbers are noted in italics and underlined.

2. The term "Reservist" means member of the National Guard or Reserve. Sections that apply only to the National Guard or the Coast Guard are identified as such.

3. State call-ups of National Guard members are not protected under USERRA.

4. The symbol "§" means "section."

Title 38, U.S. Code § 4312(c) "...does not exceed five years, except that any such period of service shall not include..."

Obligated Service -- 4312(c)(1)

Applies to obligations incurred beyond 5 years, usually by individuals with special skills, such as aviators.

Unable to Obtain Release -- 4312(c)(2)

Self explanatory. Needs to be documented on a case-by-case basis.

Training Requirements -- 4312(c)(3)

10 U.S.C. §270(a) *(10147)*----------regularly scheduled inactive duty training (drills) and annual training.

10 U.S. C. §270(B) & (c) *(10148)*----------ordered to active duty up to 45 days because of unsatisfactory participation.

EXCEPTIONS TO 5 YEAR MILITARY SERVICE LIMIT IN TITLE 38, U.S. CODE SECTION 4312(c) [USERRA], continued...

32 U.S.C§502(a)----------NATIONAL GUARD regularly scheduled inactive duty training and annual training.

32 U.S.C.§503----------NATIONAL GUARD active duty for encampments, maneuvers, or other exercises for field or coastal defense.

Specific Active Duty Provisions -- 4312(c)(4)(A)

10 U.S.C.§672(a) *(12301(a))*----------involuntary active duty in wartime.

10 U.S.C.§672(g) *(12301(g))*----------retention on active duty while in a captive status.

10 U.S.C.§673 *(12302)*----------involuntary active duty for national emergency up to 24 months.

10 U.S.C.§673b *(12304)*----------involuntary active duty for operational mission up to 270 days.

10 U.S.C.§673c *(12305)*----------involuntary retention of critical persons on active duty during a period of crisis or other specific condition.

10 U.S.C.§688----------involuntary active duty by retirees.

14 U.S.C.§331----------COAST GUARD involuntary active duty by retired officer.

14 U.S.C.§332----------COAST GUARD voluntary active duty by retired officer.

14 U.S.C.§359----------COAST GUARD involuntary active duty by retired enlisted member.

14 U.S.C.§360----------COAST GUARD voluntary active duty by retired enlisted member.

14 U.S.C.§367----------COAST GUARD involuntary retention of enlisted member.

EXCEPTIONS TO 5 YEAR MILITARY SERVICE LIMIT IN TITLE 38, U.S. CODE SECTION 4312(c) [USERRA], continued...

14 U.S.C.§712----------COAST GUARD involuntary active duty of Reserve members to augment regular Coast Guard in time of natural/man-made disaster.

War or Declared National Emergency -- 4312(c)(4)(B)

Provides that active duty (other than for training) in time of war or national emergency is exempt form the 5 year limit, ***whether voluntary or involuntary activation***.

Certain Operational Missions --4312(c)(4)(C)

Provides that active duty (other than training) ***in support of an operational mission*** for which Reservists have been activated under Title 10, U.S. Code Section 673b *(12304)* is exempt from the 5 year limit, whether voluntary or involuntary activation. NOTE: In such a situation, involuntary call-ups would be under §673b *(12304)*. Volunteers may be ordered to active duty under a different authority.

Critical Missions or Requirements -- 4312(c)(4)(D)

Provides that active duty in support of certain critical missions and requirements is exempt from the 5 year limit, ***whether call-up is voluntary or involuntary***. This would apply in situations such as Grenada or Panama in the 1980s, when provisions for involuntary activation of the Reserves were not exercised.

Specific National Guard Provisions -- 4312(c)(4)(E)

10 U.S.C. Chapter 15----------NATIONAL GUARD call into Federal service to suppress insurrection, domestic violence, etc.

10 U.S.C.§§3500/8500 *(12406)*------ARMY/AIR NATIONAL GUARD call into Federal service in case of invasion, rebellion, or inability to execute Federal law with active forces

APPENDIX C

REEMPLOYMENT POSITIONS UNDER USERRA

IF PERIOD OF SERVICE WAS FOR LESS THAN 91 DAYS

1. Escalator Position

   if not qualified for this position after reasonable effort then

2. Position Held at Beginning of Service

   if can't become qualified for position 1 or 2 with reasonable effort then

3. Any position of Lesser Status and Pay Qualified to Perform (with full seniority)

IF PERIOD OF SERVICE IS MORE THAN 90 DAYS

1. Escalator Position or

2. Position of Like Seniority, Status and Pay

   if not qualified for either position 1 or 2 after reasonable effort then

3. Position Held at Beginning of Service or a Position of Like Seniority, Status, and Pay

   if not qualified for any of the above after reasonable effort then

4. Any position of Lesser Status and Pay Qualified to Perform (with full seniority)

PERSONS WITH SERVICE RELATED DISABILITY

1. Escalator Position (with reasonable accommodation)

   if not qualified for this position after effort to accommodate disability then

2. Any Other Position Equivalent in Seniority, Status, and Pay Qualified to Perform with Reasonable Effort

   if no such position exists or if not employed as above then

3. Nearest Approximation to Equivalent Position (consistent with person's circumstances with full seniority)

APPENDIX D

ASSISTANCE FOR MOBILIZED RESERVE COMPONENT COLLEGE AND VOC-TECH STUDENTS

10 June 1996

MEMORANDUM FOR Reserve Component Judge Advocate Officers

SUBJECT: Assistance for Mobilized Reserve Component College and Voc-Tech Students

1. Like regularly employed Reserve Component members who are activated for mobilization, operational missions, and other military duty and training, significant disruption of the plans of Reserve students occurs upon notice of military duty and upon return to school after military service ends. Among the problems encountered are loss of tuition and fees paid, loss of college credit, and often loss of the right to re-enroll at their schools upon the completion of military service, especially in the highly competitive admission professional schools for medicine, law, and graduate business education. Unlike their employed Reserve brothers and sisters, the student Reservist is not protected by a broad federal reemployment statute, such as the Uniformed Services Employment and Reemployment Act (USERRA). The Assistant Secretary of Defense, Reserve Affairs Office estimates approximately 30% of National Guard and Reserve members are students enrolled in post high school educational institutions.

2. In light of Operation Joint Endeavor, which is predicted to result in at least 10,000 reservists being mobilized, Secretary of Defense William J. Perry has recently sent a letter to each state governor to ask them to work with their state educational institutions to insure Reserve students receive refunds for tuition and fees already paid, partial credit for semesters not completed because of military duty, and the right to reenrollment upon completion of military service. At this time, the effort is a voluntary one, being promoted by DOD officials, the National Committee for Employer Support of the Guard and Reserve (NCESGR) and their state counterparts, Reserve organizations such as NAGAUS, and ROA, and local Reserve organizations. No legislation like USERRA for college students is contemplated at this time.

3. Assistant Secretary of Defense for Reserve Affairs, Deborah R. Lee, and her staff have enlisted the support of the Servicemembers Opportunity Colleges (SOC), to work individually with student reservists and their educational institutions to mediate some solution to problems resulting from their Reserve duty, in a fashion similar to that of the NCESGR Ombudsman program. The SOC may be contacted by calling or writing to the Servicemembers Opportunity Colleges, One Dupont Circle, N.W., Suite 680, Washington, DC 20036. The SOC's toll-free number is 1-800-368-5622.

ASSISTANCE FOR MOBILIZED RESERVE COMPONENT COLLEGE AND VOC-TECH STUDENTS, continued...

4. Student Reservists should also be reminded that Federal student loans [Federal Stafford Loans (AKA GSL loans), Federal Supplemental Loans for Students (SLS), federal PLUS loans, and Federal consolidation loans] are not subject to the SSCRA 6% interest cap, according to the U.S. Department of Education, which relies on Section 1078(d), Title 20, U.S. Code, which says that federal student loans are not subject to any interest rate limits. Students should keep in mind that all other aspects of the SSCRA still apply, including the stay provisions under Title 50, U.S. Code Appendix Section 521, reopening of default judgments under Title 50, U.S. Code Appendix Section 520, and anticipatory relief by court order under Title 50, U.S. Code Appendix Section 590. Non-federal student loans would come under the 6% interest cap provision of Title 50, U.S. Code Appendix Section 526, provided military service materially affected the student's ability to pay their student loan. Students should also be aware that federal student loan payments may be deferred for up to six months, or payments can be temporarily adjusted downward upon showing of good cause, upon written or telephone request to the lender IAW 34 C.F.R. Section 682.211(1990). Students should also inquire with their lender about any possible economic hardship deferments of federal student loans for a specific deployment [e.g., Public Law 102-26, signed 9 April, 1991 for Desert Storm] for military reservists. There is no longer an automatic military deferment of federal student loans for military service.