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

JA 270 Volume II

June 1998

DEPARTMENT OF THE ARMY
THE JUDGE ADVOCATE GENERAL'S SCHOOL
CHARLOTTESVILLE, VIRGINIA 22903-1781

REPLY TO
ATTENTION OF

JAGS-ADL-P

3 August 1998

MEMORANDUM FOR Defense Technical Information Center, ATTN: Ms. Anh Nguyen, 8725 Kingman Road, Suite 0944, Fort Belvoir, VA 22060-6218

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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Charles J. Strong
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.

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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.

USERRA GUIDE

VOLUME II

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The Uniformed Services Employment and Reemployment Rights Act (USERRA)

Title 38, United States Code

Disclaimer: *This reprint of the U.S. Code sections regarding USERRA is not regularly updated. You should check the most current versions of Public Laws for any new amendments. See* http://www.access.gpo.gov/su_docs/dbsearch.html .

(As enacted by Pub. Law 103-353, October 13, 1994, and amended by Pub. Law 104-275, Oct. 9, 1996)

CHAPTER 43--EMPLOYMENT AND REEMPLOYMENT RIGHTS OF MEMBERS OF THE UNIFORMED SERVICES

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SUBCHAPTER I--GENERAL

§ 4301. Purposes; sense of Congress

(a) The purposes of this chapter are--

(1) to encourage noncareer service in the uniformed services by eliminating or minimizing the disadvantages to civilian careers and employment which can result
from such
service;
(2) to minimize the disruption to the lives of persons performing service in the uniformed services as well as to their employers, their fellow employees, and their communities, by
providing for the prompt reemployment of such persons upon their completion of such service; and
(3) to prohibit discrimination against persons because of their service in the uniformed services.

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

§ 4302. Relation to other law and plans or agreements

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

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

§ 4303. Definitions

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

(2) The term 'benefit', 'benefit of employment', or 'rights and benefits' means any advantage, profit, privilege, gain, status, account, or interest (other than wages or salary for work performed) that accrues by reason of an employment contract or agreement or an employer policy, plan, or practice and includes rights and benefits under a pension plan, a health plan, an employee stock ownership plan, insurance coverage and awards, bonuses, severance pay, supplemental unemployment benefits, vacations, and the opportunity to select work hours or location of employment.
(3) The term 'employee' means any person employed by an employer.
(4)(A) Except as provided in subparagraphs (B) and (C), the term 'employer' means any person, institution, organization, or other entity that pays salary or wages for work performed or that has control over employment opportunities, including--

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

(ii) the Federal Government;

(iii) a State;

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

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

(B) In the case of a National Guard technician employed under section 709 of title 32, the term 'employer' means the adjutant general of the State in which the technician is employed.
(C) Except as an actual employer of employees, an employee pension benefit plan described in section 3(2) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002(2)) shall be deemed to be an employer only with respect to the obligation to provide benefits described in section 4318.
(5) The term 'Federal executive agency' includes the United States Postal Service, the Postal Rate Commission, any nonappropriated fund instrumentality of the United States, any Executive agency (as that term is defined in section 105 of title 5) other than an agency referred to in section 2302(a)(2)(C)(ii) of title 5, and any military department (as that term is defined in section 102 of title 5) with respect to the civilian employees of that department.
(6) The term 'Federal Government' includes any Federal executive agency, the legislative branch of the United States, and the judicial branch of the United States.
(7) The term 'health plan' means an insurance policy or contract, medical or hospital service agreement, membership or subscription contract, or other arrangement under which health services for individuals are provided or the expenses of such services are paid.
(8) The term 'notice' means (with respect to subchapter II) any written or verbal notification of an obligation or intention to perform service in the

uniformed services provided to an employer by the employee who will perform such service or by the uniformed service in which such service is to be performed.
(9) The term 'qualified', with respect to an employment position, means having the ability to perform the essential tasks of the position.
(10) The term 'reasonable efforts', in the case of actions required of an employer under this chapter, means actions, including training provided by an employer, that do not place an undue hardship on the employer.
(11) Notwithstanding section 101, the term 'Secretary' means the Secretary of Labor or any person designated by such Secretary to carry out an activity under this chapter.
(12) The term 'seniority' means longevity in employment together with any benefits of employment which accrue with, or are determined by, longevity in employment.
(13) The term 'service in the uniformed services' means the performance of duty on a voluntary or involuntary basis in a uniformed service under competent authority and includes active duty, active duty for training, initial active duty for training, inactive duty training, full-time National Guard 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.
(14) The term 'State' means each of the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, and other territories of the United States (including the agencies and political subdivisions thereof).
(15) The term 'undue hardship', in the case of actions taken by an employer, means actions requiring significant difficulty or expense, when considered in light of--

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

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

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

(D) the type of operation or operations of the employer, including the composition, structure, and functions of the work force of such employer; the geographic separateness,
administrative, or fiscal relationship of the facility or facilities in question to the employer.
(16) The term 'uniformed services' means the Armed Forces, the Army National Guard and the Air National Guard when engaged in active duty for training, inactive duty training, or full-time National Guard duty, the commissioned corps of the Public Health Service, and any other category of persons designated by the President in time of war or national emergency.

§ 4304. Character of service

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

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

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

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

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

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

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

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

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

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

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

obligation for service; or

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(B) ordered to or retained on active duty (other than for training) under any provision of law because of a war or during a national emergency declared by the President or the Congress. as determined by the Secretary concerned;

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

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

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

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

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

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

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

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

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

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

(C) the employment referred to in paragraph (1)(C) is for a brief, nonrecurrent period and there is no reasonable expectation that such employment will continue indefinitely or for a significant period, the employer shall have the burden of proving the impossibility or unreasonableness, undue hardship, or the brief or

nonrecurrent nature of the employment without a reasonable expectation of continuing indefinitely or for a significant period.

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

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

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

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

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

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

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

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

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

(3) A person who fails to report or apply for employment or reemployment within the appropriate period specified in this subsection shall not automatically forfeit such person's entitlement to the rights and benefits referred to in subsection (a) but shall be

subject to the conduct rules, established policy, and general practices of the employer pertaining to explanations and discipline with respect to absence from scheduled work.

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

(A) the person's application is timely;

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

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

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

(3)(A) Except as provided in subparagraph (B), the failure of a person to provide documentation that satisfies regulations prescribed pursuant to paragraph (2) shall not be a basis for denying reemployment in accordance with the provisions of this chapter if the failure occurs because such documentation does not exist or is not readily available at the time of the request of the employer. If, after such reemployment, documentation becomes available that establishes that such person does not meet one or more of the requirements referred to in subparagraphs (A), (B), and (C) of paragraph (1), the employer of such person may terminate the employment of the person and the provision of any rights or benefits afforded the person under this chapter.
(B) An employer who reemploys a person absent from a position of employment for more than 90 days may require that the person provide the employer with the documentation referred to in subparagraph (A) before beginning to treat the person as not having incurred a break in service for pension purposes under section 4318(a)(2)(A).
(4) An employer may not delay or attempt to defeat a reemployment obligation by demanding documentation that does not then exist or is not then readily available.

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

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

§ 4313. Reemployment positions

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

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

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

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

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

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

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

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

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

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

(4) In the case of a person who (A) is not qualified to be employed in (i) the position of employment in which the person would have been employed if the continuous employment of such person with the employer had not been interrupted by such service, or (ii) in the position of employment in which such person was employed on the date of

the commencement of the service in the uniform services for any reason (other than disability incurred in, or aggravated during, service in the uniformed services), and (B) cannot become qualified with reasonable efforts by the employer, in any other position which is the nearest approximation to a position referred to first in clause (A)(i) and then in clause (A)(ii) which such person is qualified to perform, with full seniority.

(b)(1) If two or more persons are entitled to reemployment under section 4312 in the same position of employment and more than one of them has reported for such reemployment, the person who left the position first shall have the prior right to reemployment in that position.
(2) Any person entitled to reemployment under section 4312 who is not reemployed in a position of employment by reason of paragraph (1) shall be entitled to be reemployed as follows:

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

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

§ 4314. Reemployment by the Federal Government

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

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

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

(B) ensure that the person is offered such position.
(2) The Director shall carry out the duties referred to in subparagraphs (A) and (B) of paragraph (1) if the Director determines that--

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

(B) it is impossible or unreasonable for the agency to reemploy the person. (c)

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

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

§ 4315. Reemployment by certain Federal agencies

(a) The head of each agency referred to in section 2302(a)(2)(C)(ii) of title 5 shall prescribe procedures for ensuring that the rights under this chapter apply to the employees of such agency.
(b) In prescribing procedures under subsection (a), the head of an agency referred to in that subsection shall ensure, to the maximum extent practicable, that the procedures of the agency for reemploying persons who serve in the uniformed services provide for the reemployment of such persons in the agency in a manner similar to the manner of reemployment described in section 4313.

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

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

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

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

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

chapter.

(2) This section may not be construed--

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

§ 4317. Health plans

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

(A) the 18-month period beginning on the date on which the person's absence begins; or

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

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

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

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

(B) if the sponsor does not provide--

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

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

(b)(1) Except as provided in paragraph (2), in the case of a person whose coverage under a health plan was terminated by reason of service in the uniformed services, an exclusion or waiting period may not be imposed in connection with the reinstatement of such coverage upon reemployment under this chapter if an exclusion or waiting period would not have been imposed under a health plan had coverage of such person by such plan not been terminated as a result of such service. This paragraph applies to the person who is reemployed and to any individual who is covered by such plan by reason of the reinstatement of the coverage of such person.

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

Sec. 4318. Employee pension benefit plans

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

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

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

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

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

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

(B) if the sponsor does not provide--

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

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

(2) A person reemployed under this chapter shall be entitled to accrued benefits pursuant to subsection (a) that are contingent on the making of, or derived from, employee contributions or elective deferrals (as defined in section 402(g)(3) of the Internal Revenue Code of 1986) only to the extent the person makes payment to the plan with respect to such contributions or deferrals. No such payment may exceed the amount the person would have been permitted or required to contribute had the person remained continuously employed by the employer throughout the period of service described in subsection (a)(2)(B). Any payment to the plan described in this paragraph shall be made during the period beginning with the date of reemployment and whose duration is three times the period of the person's services in the uniformed services, such payment period

not to exceed five years.

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

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

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

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

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

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

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

§ 4322. Enforcement of employment or reemployment rights

(a) A person who claims that--

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

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

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

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

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

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

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

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

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

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

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

(a)(1) A person who receives from the Secretary a notification pursuant to section 4322(e) relating to a State (as an employer) or a private employer may request that the Secretary refer the complaint to the Attorney General. If the Attorney General is reasonably satisfied that the person on whose behalf the complaint is referred is entitled to the rights or benefits sought, the Attorney General may appear on behalf of, and act as attorney for, the person on whose behalf the complaint is submitted and commence an action for appropriate relief for such person in an appropriate United States district court.

(2) A person may commence an action for relief with respect to a complaint if that person--

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

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

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

(b) In the case of an action against a State as an employer, the appropriate district court is the court for any district in which the State exercises any authority or carries out any function. In the case of a private employer the appropriate district court is the district court for any district in which the private employer of the person maintains a place of business.

(c)(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;

(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 in this chapter.

(2)(A) No fees or court costs shall be charged or taxed against any person claiming rights under this chapter.

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

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

(4) An action under this chapter may be initiated only by a person claiming rights or benefits under this chapter, not by an employer, prospective employer, or other entity with obligations under this chapter.

(5) In any such action, only an employer or a potential employer, as the case may be, shall be a necessary party respondent.

(6) No State statute of limitations shall apply to any proceeding under this chapter.

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

§ 4324. Enforcement of rights with respect to Federal executive agencies

(a)(1) A person who receives from the Secretary a notification pursuant to section 4322(e) may request that the Secretary refer the complaint for litigation before the Merit Systems Protection Board. The Secretary shall refer the complaint to the Office of Special Counsel established by section 1211 of title 5.

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

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

(b) A person may submit a complaint against a Federal executive agency or the Office of Personnel Management under this subchapter directly to the Merit Systems Protection Board if that person--

(1) has chosen not to apply to the Secretary for assistance under section 4322(a);

(2) has received a notification from the Secretary under section 4322(e);

(3) has chosen not to be represented before the Board by the Special Counsel pursuant to subsection (a)(2)(A); or

(4) has received a notification of a decision from the Special Counsel under subsection (a)(2)(B).

(c)(1) The Merit Systems Protection Board shall adjudicate any complaint brought before the Board pursuant to subsection (a)(2)(A) or (b). A person who seeks a hearing or adjudication by submitting such a complaint under this paragraph may be represented at such hearing or adjudication in accordance with the rules of the Board.

(2) If the Board determines that a Federal executive agency or the Office of Personnel Management has not complied with the provisions of this chapter relating to the employment or reemployment of a person by the agency, the Board shall enter an order requiring the agency or Office to comply with such provisions and to compensate such person for any loss of wages or benefits suffered by such person by reason of such lack of compliance.

(3) Any compensation received by a person pursuant to an order under paragraph (2) shall be in addition to any other right or benefit provided for by this chapter and shall not diminish any such right or benefit.

(4) If the Board determines as a result of a hearing or adjudication conducted pursuant to a complaint submitted by a person directly to the Board pursuant to subsection (b) that such person is entitled to an order referred to in paragraph (2), the Board may, in its discretion, award such person reasonable attorney fees, expert witness fees, and other litigation expenses.

(d)(1) A person adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board under subsection (c) may petition the United States Court of Appeals for the Federal Circuit to review the final order or decision. Such petition and review shall be in accordance with the procedures set forth in section 7703 of title 5.

(2) Such person may be represented in the Federal Circuit proceeding by the Special Counsel unless the person was not represented by the Special Counsel before the Merit Systems Protection Board regarding such order or decision.

§ 4325. Enforcement of rights with respect to certain Federal agencies

(a) This section applies to any person who alleges that--

(1) the reemployment of such person by an agency referred to in subsection (a) of section 4315 was not in accordance with procedures for the reemployment of such person under subsection (b) of such section; or

(2) the failure of such agency to reemploy the person under such section was otherwise wrongful.

(b) Any person referred to in subsection (a) may submit a claim relating to an allegation referred to in that subsection to the inspector general of the agency which is the subject of the allegation. The inspector general shall investigate and resolve the allegation pursuant to procedures prescribed by the head of the agency.

(c) In prescribing procedures for the investigation and resolution of allegations under subsection (b), the head of an agency shall ensure, to the maximum extent practicable, that the procedures are similar to the procedures for investigating and resolving complaints utilized by the Secretary under section 4322(d).

(d) This section may not be construed--

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

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

§ 4326. Conduct of investigation; subpoenas

(a) In carrying out any investigation under this chapter, the Secretary's duly authorized representatives shall, at all reasonable times, have reasonable access to and the right to interview persons with information relevant to the

investigation and shall have reasonable access to, for purposes of examination, and the right to copy and receive, any documents of any person or employer that the Secretary considers relevant to the investigation.

(b) In carrying out any investigation under this chapter, the Secretary may require by subpoena the attendance and testimony of witnesses and the production of documents relating to any matter under investigation. In case of disobedience of the subpoena or contumacy and on request of the Secretary, the Attorney General may apply to any district court of the United States in whose jurisdiction such disobedience or contumacy occurs for an order enforcing the subpoena.

(c) Upon application, the district courts of the United States shall have jurisdiction to issue writs commanding any person or employer to comply with the subpoena of the Secretary or to comply with any order of the Secretary made pursuant to a lawful investigation under this chapter and the district courts shall have jurisdiction to punish failure to obey a subpoena or other lawful order of the Secretary as a contempt of court.

(d) Subsections (b) and (c) shall not apply to the legislative branch or the judicial branch of the United States.

SUBCHAPTER IV--MISCELLANEOUS PROVISIONS

§ 4331. Regulations

(a) The Secretary (in consultation with the Secretary of Defense) may prescribe regulations implementing the provisions of this chapter with regard to the application of this chapter to States, local governments, and private employers.

(b)(1) The Director of the Office of Personnel Management (in consultation with the Secretary and the Secretary of Defense) may prescribe regulations implementing the provisions of this chapter with regard to the application of this chapter to Federal executive agencies (other than the agencies referred to in paragraph (2)) as employers. Such regulations shall be consistent with the regulations pertaining to the States as employers and private employers, except that employees of the Federal Government may be given greater or additional rights.

(2) The following entities may prescribe regulations to carry out the activities of such entities under this chapter:

(A) The Merit Systems Protection Board.

(B) The Office of Special Counsel.

(C) The agencies referred to in section 2303(a)(2)(C)(ii) of title 5.

§ 4332. Reports

The Secretary shall, after consultation with the Attorney General and the Special Counsel referred to in section 4324(a)(1) and no later than February 1, 1996, and annually thereafter through 2000, transmit to the Congress, a report containing the following matters for the fiscal year ending before such February 1:

(1) The number of cases reviewed by the Department of Labor under this chapter during the fiscal year for which the report is made.

(2) The number of cases referred to the Attorney General or the Special Counsel pursuant to section 4323 or 4324, respectively, during such fiscal year.

(3) The number of complaints filed by the Attorney General pursuant to section 4323 during such fiscal year.

(4) The nature and status of each case reported on pursuant to paragraph (1), (2), or (3).

(5) An indication of whether there are any apparent patterns of violation of the provisions of this chapter, together with an explanation thereof.

(6) Recommendations for administrative or legislative action that the Secretary, the Attorney General, or the Special Counsel considers necessary for the effective implementation of this chapter, including any action that could be taken to encourage mediation, before claims are filed under this chapter, between employers and persons seeking employment or reemployment.

§ 4333. Outreach

(a) The Secretary, the Secretary of Defense, and the Secretary of Veterans Affairs shall take such actions as such Secretaries determine are appropriate to inform persons entitled to rights and benefits under this chapter and employers of the rights, benefits, and obligations of such persons and such employers under this chapter.

(b) Conforming Amendments.--

(1) Amendments to title 38.-- The tables of chapters at the beginning of title 38, United States Code, and the beginning of part III of such title are each amended by striking out the item relating to chapter 43 and inserting in lieu thereof the following:

" 43. Employment and reemployment rights of members of the uniformed services .....4301."

(2) Amendment to title 5.-- (A) Section 1204(a)(1) of title 5, United States Code, is amended by striking out section 4323 and inserting in lieu thereof chapter 43.

(B) Subchapter II of chapter 35 of such title is repealed.

(C) The table of sections for chapter 35 of such title is amended by striking out the heading relating to subchapter II of such chapter and the item relating to section 3551 of such chapter.

(3) Amendment to title 10.-- Section 706(c)(1) of title 10, United States Code, is amended by striking out section 4321 and inserting in lieu thereof chapter 43.

(c) Amendments to Title 28.--Section 631 of title 28, United States Code, is amended--
(1) by striking out subsection (j);
(2) by redesignating subsections (k) and (l) as subsections (j) and (k), respectively; and
(3) in subsection (j), as redesignated by paragraph (2), by striking out under the terms of and all that follows through section, the first place it appears and inserting in lieu thereof under chapter 43 of title 38,.

NOTES:

Sec. 3. EXEMPTION FROM MINIMUM SERVICE REQUIREMENTS.

Section 5303A(b)(3) of title 38, United States Code, is amended--
(1) by striking out or at the end of subparagraph (E);
(2) by striking out the period at the end of subparagraph (F) and inserting in lieu thereof ; or; and
(3) by adding at the end thereof the following new subparagraph:
(G) to benefits under chapter 43 of this title.

Sec. 4. THRIFT SAVINGS PLAN.

(a) In General.--(1) Title 5, United States Code, is amended by inserting after section 8432a the following:
§ 8432b. Contributions of persons who perform military service
(a) This section applies to any employee who--
(1) separates or enters leave-without-pay status in order to perform military service; and
(2) is subsequently restored to or reemployed in a position which is subject to this chapter, pursuant to chapter 43 of title 38.
(b)(1) Each employee to whom this section applies may contribute to the Thrift Savings Fund, in accordance with this subsection, an amount not to exceed the amount described in paragraph (2).
(2) The maximum amount which an employee may contribute under this subsection is equal to--
(A) the contributions under section 8432(a) which would have been made, over the period beginning on date of separation or commencement of leave-without-pay status (as applicable) and ending on the day before the date of restoration or reemployment (as applicable); reduced by
(B) any contributions under section 8432(a) actually made by such employee over the period described in subparagraph (A).
(3) Contributions under this subsection--
(A) shall be made at the same time and in the same manner as would any contributions under section 8432(a);
(B) shall be made over the period of time specified by the employee under

paragraph (4)(B); and
(C) shall be in addition to any contributions then actually being made under section 8432(a).
(4) The Executive Director shall prescribe the time, form, and manner in which an employee may specify--
(A) the total amount such employee wishes to contribute under this subsection with respect to any particular period referred to in paragraph (2)(B); and
(B) the period of time over which the employee wishes to make contributions under this subsection.
The employing agency may place a maximum limit on the period of time referred to in subparagraph (B), which cannot be shorter than two times the period referred to in paragraph (2)(B) and not longer than four times such period.
(c) If an employee makes contributions under subsection (b), the employing agency shall make contributions to the Thrift Savings Fund on such employee's behalf--
(1) in the same manner as would be required under section 8432(c)(2) if the employee contributions were being made under section 8432(a); and
(2) disregarding any contributions then actually being made under section 8432(a) and any agency contributions relating thereto.
(d) An employee to whom this section applies is entitled to have contributed to the Thrift Savings Fund on such employee's behalf an amount equal to--
(1) 1 percent of such employee's basic pay (as determined under subsection (e)) for the period referred to in subsection (b)(2)(B); reduced by
(2) any contributions actually made on such employee's behalf under section 8432(c)(1) with respect to the period referred to in subsection (b)(2)(B).
(e) For purposes of any computation under this section, an employee shall, with respect to the period referred to in subsection (b)(2)(B), be considered to have been paid at the rate which would have been payable over such period had such employee remained continuously employed in the position which such employee last held before separating or entering leave-without-pay status to perform military service.
(f)(1) The employing agency may be required to pay lost earnings on contributions made pursuant to subsections (c) and (d). Such earnings, if required, shall be calculated retroactively to the date the contribution would have been made had the employee not separated or entered leave without pay status to perform military service.
(2) Procedures for calculating and crediting the earnings payable pursuant to paragraph (1) shall be prescribed by the Executive Director.
(g) Amounts paid under subsection (c), (d), or (f) shall be paid--
(1) by the agency to which the employee is restored or in which such employee is reemployed;
(2) from the same source as would be the case under section 8432(e) with respect to sums required under section 8432(c); and
(3) within the time prescribed by the Executive Director.
(h)(1) For purposes of section 8432(g), in the case of an employee to whom this

section applies--
(A) a separation from civilian service in order to perform the military service on which the employee's restoration or reemployment rights are based shall be disregarded; and
(B) such employee shall be credited with a period of civilian service equal to the period referred to in subsection (b)(2)(B).
(2)(A) An employee to whom this section applies may elect, for purposes of section 8433(d), or paragraph (1) or (2) of section 8433(h), as the case may be, to have such employee's separation (described in subsection (a)(1)) treated as if it had never occurred.
(B) An election under this paragraph shall be made within such period of time after restoration or reemployment (as the case may be) and otherwise in such manner as the Executive Director prescribes.
(i) The Executive Director shall prescribe regulations to carry out this section..
(2) The table of sections for chapter 84 of title 5, United States Code, is amended by inserting after the item relating to section 8432a the following:
8432b. Contributions of persons who perform military service..
(b) Preservation of Certain Rights.--(1) Section 8433(d) of title 5, United States Code, is amended by striking subsection (e). and inserting subsection (e), unless an election under section 8432b(h)(2) is made to treat such separation for purposes of this subsection as if it had never occurred..
(2) Paragraphs (1) and (2) of section 8433(h) are each amended by striking the period at the end and inserting , or unless an election under section 8432b(h)(2) is made to treat such separation for purposes of this paragraph as if it had never occurred..
(c) Election To Resume Regular Contributions Upon Restoration or Reemployment.--Section 8432 of title 5, United States Code, is amended by adding at the end the following:
(i)(1) This subsection applies to any employee--
(A) to whom section 8432b applies; and
(B) who, during the period of such employee's absence from civilian service (as referred to in section 8432b(b)(2)(B))--
(i) is eligible to make an election described in subsection (b)(1); or
(ii) would be so eligible but for having either elected to terminate individual contributions to the Thrift Savings Fund within 2 months before commencing military service or separated in order to perform military service.
(2) The Executive Director shall prescribe regulations to ensure that any employee to whom this subsection applies shall, within a reasonable time after being restored or reemployed (in the manner described in section 8432b(a)(2)), be afforded the opportunity to make, for purposes of this section, any election which would be allowable during a period described in subsection (b)(1)(A)..
(d) Applicability to Employees Under CSRS.--Section 8351(b) of title 5, United States Code, is amended by adding at the end the following:

(11) In applying section 8432b to an employee contributing to the Thrift Savings Fund after being restored to or reemployed in a position subject to this subchapter, pursuant to chapter 43 of title 38--
(A) any reference in such section to contributions under section 8432(a) shall be considered a reference to employee contributions under this section;
(B) the contribution rate under section 8432b(b)(2)(A) shall be the maximum percentage allowable under subsection (b)(2) of this section; and
(C) subsections (c) and (d) of section 8432b shall be disregarded..
(e) Effective Date; Applicability.--This section and the amendments made by this section--
(1) shall take effect on the date of enactment of this Act;
and
(2) shall apply to any employee whose release from military service, discharge from hospitalization, or other similar event making the individual eligible to seek restoration or reemployment under chapter 43 of title 38, United States Code, occurs on or after August 2, 1990.
(f) Rules for Applying Amendments to Employees Restored or Reemployed Before Effective Date.--In the case of any employee (described in subsection (e)(2)) who is reemployed or restored (in the circumstances described in section 8432b(a) of title 5, United States Code, as amended by this section) before the date of enactment of this Act, the amendments made by this section shall apply to such employee, in accordance with their terms, subject to the following:
(1) The employee shall be deemed not to have been reemployed or restored until--
(A) the date of enactment of this Act, or
(B) the first day following such employee's reemployment or restoration on which such employee is or was eligible to make an election relating to contributions to the Thrift Savings Fund, whichever occurs or occurred first.
(2) If the employee changed agencies during the period between the date of actual reemployment or restoration and the date of enactment of this Act, the employing agency as of such date of enactment shall be considered the reemploying or restoring agency.
(3)(A) For purposes of any computation under section 8432b of such title, pay shall be determined in accordance with subsection (e) of such section, except that, with respect to the period described in subparagraph (B), actual pay attributable to such period shall be used.
(B) The period described in this subparagraph is the period beginning on the first day of the first applicable pay period beginning on or after the date of the employee's actual reemployment or restoration and ending on the day before the date determined under paragraph (1).
(4) Deem section 8432b(b)(2)(A) of such title to be amended by striking ending on the day before the date of restoration or reemployment (as applicable) and inserting ending on the date determined under section 4(f)(1) of the Uniformed Services Employment and Reemployment Rights Act of 1994.

Sec. 5. REVISION OF FEDERAL CIVIL SERVICE RETIREMENT BENEFIT PROGRAM FOR RESERVISTS.

(a) Creditable Military Service Under CSRS.--Section 8331(13) of title 5, United States Code, is amended in the flush matter by inserting or full-time National Guard duty (as such term is defined in section 101(d) of title 10) if such service interrupts creditable civilian service under this subchapter and is followed by reemployment in accordance with chapter 43 of title 38 that occurs on or after August 1, 1990 before the semicolon.

(b) Pay Deductions for Military Service Under CSRS.--Section 8334(j) of such title is amended--

(1) in paragraph (1)--

(A) by striking Each employee and inserting (A) Except as provided in subparagraph (B), each employee; and

(B) by adding at the end the following:

(B) In any case where military service interrupts creditable civilian service under this subchapter and reemployment pursuant to chapter 43 of title 38 occurs on or after August 1, 1990, the deposit payable under this paragraph may not exceed the amount that would have been deducted and withheld under subsection (a)(1) from basic pay during civilian service if the employee had not performed the period of military service.; and

(2) in paragraph (2), immediately before the comma at the end of subparagraph (B), by inserting following the period of military service for which such deposit is due.

(c) Creditable Military Service Under FERS.--Section 8401(31) of such title is amended in the flush matter by inserting or full-time National Guard duty (as such term is defined in section 101(d) of title 10) if such service interrupts creditable civilian service under this subchapter and is followed by reemployment in accordance with chapter 43 of title 38 that occurs on or after August 1, 1990 before the semicolon.

(d) Pay Deductions for Military Service Under FERS.--Section 8422(e) of such title is amended--

(1) in paragraph (1)--

(A) by striking Each employee and inserting (A) Except as provided in subparagraph (B), each employee; and

(B) by adding at the end the following:

(B) In any case where military service interrupts creditable civilian service under this subchapter and reemployment pursuant to chapter 43 of title 38 occurs on or after August 1, 1990, the deposit payable under this paragraph may not exceed the amount that would have been deducted and withheld under subsection (a)(1) from basic pay during civilian service if the employee had not performed the period of military service.; and

(2) in paragraph (2), immediately before the comma at the end of subparagraph (B), by inserting following the period of military service for which such deposit is due.

(e) Technical Amendments.--Title 5, United States Code, is amended as follows:
(1) In section 8401(11), by striking out 1954 in the flush matter above clause (i) and inserting in lieu thereof 1986.
(2) In section 8422(a)(2)(A)(ii), by striking out 1954 and inserting in lieu thereof 1986.
(3) In section 8432(d), by striking out 1954 in the first sentence and inserting in lieu thereof 1986.
(4) In section 8433(i)(4), by striking out 1954 and inserting in lieu thereof 1986.
(5) In section 8440--
(A) by striking out 1954 in subsection (a) and inserting in lieu thereof 1986; and
(B) by striking out 1954 in subsection (c) and inserting in lieu thereof 1986.

Sec. 6. TECHNICAL AMENDMENT.

(a) Technical Amendment.--Section 9(d) of Public Law 102-16 (105 Stat. 55) is amended by striking out Act the first place it appears and inserting in lieu thereof section.
(b) Effective Date.--The amendment made by subsection (a) shall take effect as if included in Public Law 102-16 to which such amendment relates.

Sec. 7. INCREASE IN AMOUNT OF LOAN GUARANTY FOR LOANS FOR THE PURCHASE OR CONSTRUCTION OF HOMES.

Subparagraphs (A)(i)(IV) and (B) of section 3703(a)(1) of title 38, United States Code, are each amended by striking out $ 46,000 and inserting in lieu thereof $ 50,750.

Sec. 8. TRANSITION RULES AND EFFECTIVE DATES.

(a) Reemployment.--(1) Except as otherwise provided in this Act, the amendments made by this Act shall be effective with respect to reemployments initiated on or after the first day after the 60-day period beginning on the date of enactment of this Act.
(2) The provisions of chapter 43 of title 38, United States Code, in effect on the day before such date of enactment, shall continue to apply to reemployments initiated before the end of such 60-day period.
(3) In determining the number of years of service that may not be exceeded in an employee-employer relationship with respect to which a person seeks reemployment under chapter 43 of title 38, United States Code, as in effect before or after the date of enactment of this Act, there shall be included all years of service without regard to whether the periods of service occurred before or after such date of enactment unless the period of service is exempted by the chapter 43 that is applicable, as provided in paragraphs (1) and (2), to the reemployment concerned. Any service begun up to 60 days after the date of the enactment of this act, which is served up to 60 days after the date of the enactment of this act pursuant to orders issued under section 502(f) of title 32, united states code, shall be considered under chapter 43 of title 38, united states code, as in effect on the day before such date of enactment. Any service pursuant to orders issued

under such section 502(f) served after 60 days after the date of the enactment of this act, regardless of when begun, shall be considered under the amendments made by this act.
(4) A person who initiates reemployment under chapter 43 of title 38, United States Code, during or after the 60-day period beginning on the date of enactment of this Act and whose reemployment is made in connection with a period of service in the uniformed services that was initiated before the end of such 60-day period shall be deemed to have satisfied the notification requirement of section 4312(a)(1) of title 38, United States Code, as provided in the amendments made by this Act, if the person complied with any applicable notice requirement under chapter 43, United States Code, as in effect on the day before the date of enactment of this Act.
(b) Discrimination.--The provisions of section 4311 of title 38, United States Code, as provided in the amendments made by this Act, and the provisions of subchapter III of chapter 43 of such title, as provided in the amendments made by this Act, that are necessary for the implementation of such section 4311 shall become effective on the date of enactment of this Act.
(c) Insurance.--(1) The provisions of section 4316 of title 38, United States Code, as provided in the amendments made by this Act, concerning insurance coverage (other than health) shall become effective with respect to furloughs or leaves of absence initiated on or after the date of enactment of this Act.
(2) With respect to the provisions of section 4317 of title 38, United States Code, as provided in the amendments made by this Act, a person serving a period of service in the uniformed services on the date of enactment of this Act, or a family member or personal representative of such person, may, after the date of enactment of this Act, elect to reinstate or continue a health plan as provided in such section 4317. If such an election is made, the health plan shall remain in effect for the remaining portion of the 18-month period that began on the date of such person's separation from civilian employment or the period of the person's service in the uniformed service, whichever is the period of lesser duration.
(d) Disability.--(1) Section 4313(a)(3) of chapter 43 of title 38, United States Code, as provided in the amendments made by this Act, shall apply to reemployments initiated on or after August 1, 1990.
(2) Effective as of August 1, 1990, section 4307 of title 38, United States Code (as in effect on the date of enactment of this Act), is repealed, and the table of sections at the beginning of chapter 43 of such title (as in effect on the date of enactment of this Act) is amended by striking out the item relating to section 4307.
(e) Investigations and Subpoenas.--The provisions of section 4326 of title 38, United States Code, as provided in the amendments made by this Act, shall become effective on the date of the enactment of this Act and apply to any matter pending with the Secretary of Labor under section 4305 of title 38, United States Code, as of that date.
(f) Previous Actions.--Except as otherwise provided, the amendments made by this Act do not affect reemployments that were initiated, rights, benefits, and

duties that matured, penalties that were incurred, and proceedings that begin before the end of the 60-day period referred to in subsection (a).

(g) Rights and Benefits Relative to Notice of Intent Not To Return.--Section 4316(b)(2) of title 38, United States Code, as added by the amendments made by this Act, applies only to the rights and benefits provided in section 4316(b)(1)(B) and does not apply to any other right or benefit of a person under chapter 43 of title 38, United States Code. Such section shall apply only to persons who leave a position of employment for service in the uniformed services more than 60 days after the date of enactment of this Act.

(h) Employer Pension Benefit Plans.--(1) Nothing in this Act shall be construed to relieve an employer of an obligation to provide contributions to a pension plan (or provide pension benefits), or to relieve the obligation of a pension plan to provide pension benefits, which is required by the provisions of chapter 43 of title 38, United States Code, in effect on the day before this Act takes effect.

(2) If any employee pension benefit plan is not in compliance with section 4318 of such title or paragraph (1) of this subsection on the date of enactment of this Act, such plan shall have two years to come into compliance with such section and paragraph.

(I) Definition.--For the purposes of this section, the term service in the uniformed services shall have the meaning given such term in section 4303(13) of title 38, United States Code, as provided in the amendments made by this Act.

APPENDIX B

LEGISLATIVE HISTORY OF USERRA

LEGISLATIVE HISTORY
UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT OF 1994

P.L. 103-353, see page 108 Stat. 3149
DATES OF CONSIDERATION AND PASSAGE
House: May 4, 1993; September 13, 1994
Senate: November 2, 1993; September 28, 1994
Cong. Record Vol 139 (1993)
Cong. Record VoL 140 (1994)
House Report (Veterans' Affairs Committee)
No. 103-65, Apr. 28,1993
[To accompany H.R. 995]
Senate Report (Veterans' Affairs Committee)
No. 103-168, Oct. 18, l993
[To accompany S. 843]
The House bill was passed in lieu of the Senate bill. The House Report (this page) is set out below. An Explanatory Statement (page 2493) and a President's Signing Statement (page 2515-l) follows.

HOUSE REPORT NO. 103-65
[page 1** **CAVEAT**: Page numbers are edited to allow printing of this report and may not be entirely accurate.]

The Committee on Veterans' Affairs, to whom was referred the bill (H.R. 995) to amend title 38, United States Code, to improve reemployment rights and benefits of veterans and other benefits of employment of certain members of the uniformed services, and for other purposes, having considered the same, reports favorably thereon with an amendment, by unanimous voice vote, and recommends that the bill as amended do pass.
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INTRODUCTION
On February 18, 1993, the Honorable G.V. (Sonny) Montgomery, Chairman of the Subcommittee on Education, Training and Employment and of the full Committee, introduced H.R. 99o, a bill to improve reemployment rights and benefits of veterans and of members of the uniformed services. Original cosponsors of the bill included Mr. Stump, Mr. Penny, Mr. Smith of New Jersey, Mr. Slattery, Mr. Clyburn, and Mr. Quinn. Other cosponsors include Ms. Waters, Ms. Brown of Florida, Mr. Everett, Mr. Hefner, Mr.
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Richardson, Mr. Stenholm, Mr. Payne of Virginia, Mr. Parker, and Mr. Bishop.

The Subcommittee met on March 25, 1993, and voted unanimously to recommend H.R. 995, as amended, to the full Committee. On April 1, 1993, the full Committee unanimously approved H.R 995, as amended, and ordered the bill reported to the House.

SUMMARY OF MAJOR PROVISIONS OF H.R. 995, As REPORTED

The reported bill would:

1. Supply statutory definitions for terms used in the new chap ter 43, title 38, U.S.C.

2. Continue to prohibit discrimination or acts of reprisal against an employee or applicant for employment because of a past, current, or future military obligation, and add protections for persons who assist in investigation and testify in any proceeding.

3. Provide that reemployment rights protection shall apply to an individual if such person 6 period of service, with respect to the employment relationship for which a person seeks reemployment does not, with certain exceptions, exceed five years.

4. Require an individual to return to work or apply for reemployment within certain time limits based on the length of time in the uniformed services.

5. Reaffirm that the timing, frequency, and duration of a person's training or service, or the nature of such training or service in the uniformed services, shall not be a basis for denying employment or reemployment protection so long as the training or service does not exceed certain limitations and, when possible, the servicemember shall provide notice to his or her employer that the absence from employment is because of military commitments.

6. Reaffirm that a protected individual is generally entitled to reemployment in the same position which would have been attained if he or she had been continuously employed.

7. Require an employer to make reasonable efforts to qualify or requalify a protected returning individual for an appropriate position.

8. Require an employer to make reasonable efforts to accommodate the service-connected disability of a protected person.

9. Reaffirm that a person reemployed under chapter 43 is entitled to the seniority, and other rights and benefits determined by seniority, that would have been attained if he or she had remained continuously employed.

10. Provide that a protected person would, at the person's request, continue to be covered by employer-provided insurance for up to 31 days at the employer's expense and up to 18 months at the person's expense, unless the employer chooses to fund the entire cost.

11. Provide that, in the case of employer sponsored health benefits, no exclusion from coverage or waiting period can be imposed for a non-service-connected physical condition of covered persons which developed before or during military service.

12. Require an individual, except when it is impossible or unreasonable, to give verbal or written advance notice to an employer regarding an anticipated absence due to military service.

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13. Require the Secretary of Labor, through the Veterans' Employment and Training Service, to provide assistance in obtaining employment or reemployment to any person entitled to rights or benefits under chapter 43.

14. Require that federal employees be provided representation by the Office of Special Counsel before the Merit Systems Protection Board when necessary to enforce reemployment rights with the Federal Government.

15. Provide for the discretionary assessment of liquidated damages against any employer who willfully violates the Act's requirements.

16. Authorize the Secretary of Labor to subpoena documents and witnesses in relation to the investigation of cases under chapter 43.

17. Require the Secretary of Labor to transmit to the Congress an annual report concerning cases related to chapter 43.

BACKGROUND

For over four years, an executive branch task force on veterans' reemployment rights worked on the revision of chapter 43. Members of the task force included representatives of the Departments of Labor, Defense and Justice, and the Office of Personnel Management.

During the 102nd Congress, the Committee worked closely with the Federal agency representatives on the task force and with their invaluable guidance and assistance, developed H.R. 1578, the Uniformed Services Employment and Reemployment Rights Act of 1991. This measure was approved by the House on May 14, 1991. The Senate approved the bill with Senate amendments on October 1, 1992. On October 6, 1992, the House agreed to the Senate amendments with amendments. Differences between the House and Senate bills were not resolved before the adjournment of the 102nd Congress. H.R. 995, as amended, is substantially the same as H.R. 1578, as approved by the House on October 6th.

The Veterans' Reemployment Rights (VRR) provisions of Federal law, which safeguard employment and reemployment rights in civilian employment of members of the uniformed services, have been in effect for over fifty years. Although the law has effectively served the interests of veterans, members of the Reserve Components, the Armed Forces and employers, the current statute is complex and sometimes ambiguous, thereby allowing for misinterpretations. Members of the uniformed services and employers have, on occasion, expressed confusion and uncertainty regarding their rights and responsibilities under current chapter 43, title 38 United States Code. Additionally, the implementation of the Total Force policy, under which members of the Reserve Components have been tasked with greater responsibility for every phase of military preparedness, has rendered the current structure of the reemployment rights provisions somewhat antiquated and cumbersome. Accordingly, the primary goals of the Committee, in undertaking the revision of chapter 43, were to clarify, simplify, and, where necessary, strengthen the existing veterans' employment and reemployment rights provisions.

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For example, because of increased responsibilities, Selected Reservists are sometimes required to train for extended periods. Additionally, because of the diverse designations of the type of training or duty for which servicemembers have been called, uncertainty regarding individuals' eligibility for reemployment rights has arisen in some cases. To clarify this uncertainty, protections and responsibilities imposed under H.R. 995, would be based on actual time spent in the uniformed service and not on the designation of the service or type of training performed.

Moreover, new section 4303 would define significant terms used throughout the Act ih an effort to avoid misinterpretation of those terms. The bar to employment-related discrimination against members of the uniformed services included in the Committee bill reaffirms the actions taken by Congress in 1968 and 1986 to make such practices violative of the law. Further, under current law, only members of the Reserve Components leaving for active duty for training or inactive duty training are required to provide notice to their employers that they would be absent from employment because of military service. Under the Committee bill, all persons leaving their civilian jobs to enter military service would be required to provide notice, except when doing so is impossible or unreasonable. These and other provisions which clarify, simplify or strengthen current law are discussed in more detail in the following section of the Committee report.

The provisions of Federal law providing members of the uniformed services with employment and reemployment rights, protection against employment-related discrimination, and the protection of certain other rights and benefits, have been eminently successful for over fifty years. Therefore, the Committee wishes to stress that the extensive body of case law that has evolved over that period, to the extent that it is consistent with the provisions of this Act, remains in full force and effect in interpreting these provisions. This is particularly true of the basic principle established by the Supreme Court that the Act is to be "liberally construed." See Fishgold v. Sulliuan Drydock and Repair Corp., 328 U.S. 275, 285 (1946); Alabama Power Co. v. Davis, 431 U.S. 581. 584 (1977)

DISCUSSION AND ANALYSIS

Section 1. Short Title

Section 1 of H.R. 995, as amended, would provide that this Act may be cited as the "Uniformed Services Employment and Reemployment Rights Act of 1993 "

Section 2. Revision of chapter 43 of title 38, U.S.C.

Section 2 of the reported bill would effectively replace the current employment and reemployment rights provisions found in chapter 43, title 38, U.S. Code. Current law would be in effect, however, for all applications for employment, reemployment or other actions protected under those provisions prior to the 61st day following enactment of this ACt, unless otherwise noted. See section 4 of the reported bill

SUBCHAPTER I--PURPOSES, RELATION TO OTHER LAW, AND DEFINITIONS

Section 4301. Purposes, Sense of Congress

Section 4301 would state the purposes of the Act. These are the same purposes that were the basis of the enactment of the initial provisions in 1940 and have been the basis for all subsequent amendments and recodifications. This section would also state that the Congress expects the Federal Government to be a model employer in carrying out the provisions applicable to it under this chapter

Section 4302. Relation to other law and plans or agreements

Section 4302(a) would reaffirm that, to the extent that a Federal or state law or employer plan or practice provides greater rights than those provided under the Committee bill, those greater rights would not be preempted by chapter 43.

Section 4302(b) would reaffirm a general preemption as to State and local laws and ordinances, as well as to employer practices and agreements, which provide fewer rights or otherwise limit rights provided under amended chapter 43 or put additional conditions on those rights. See Peel v. Florida Department of Transportation. 600 F.2d 1070 (5th Cir. 1979); Cronin v. Police Dept. of City of New York, 675 F. Supp. 847 (S.D. N.Y. 1987) and Fishgold, supra, 328 U.S. at 285, which provide that no employer practice or agreement can reduce, limit or eliminate any right under chapter 43. Moreover, this section would reaffirm that additional resort to mechanisms such as grievance procedures or arbitration or similar administrative appeals is not required. See McKinney v. Missouri- ,K-T R.Co., 357 U.S. :265, 270 (1958); Beckley v. Lipe-Rollway Corp., 448 F. Supp. 563, 567 (N.D.N.Y. 1978). It is the Committee's intent that, even if a person protected under the Act resorts to arbitration, any arbitration decision shall not be binding as a matter of law. See Kidder v. Eastern Airlines, Inc., 469 F. Supp. 1060, 1064-65 (S.D. Fla. 1978).

The Committee wishes to stress that rights under chapter 43 belong to the claimant, and he or she may waive those rights, either explicitly or impliedly, through conduct. Because of the remedial purposes of chapter 43, any waiver must, however, be clear, convincing, specific, unequivocal, and not under duress. Moreover, only known rights which are already in existence may be waived. See Leonard v. United Airlines, Inc., 972 F.2d. 155, 159 (7th Cir. 1992). An express waiver of future statutory rights, such as one that an employer might wish to require as a condition of employment, would be contrary to the public policy embodied in the Committee bill and would be void.

Section 4303. Definitions

Section 4303 would define terms which have been undefined in previous reemployment statutes. This section would also define terms that are new.

Section 4303(1) would define "Attorney General." While the Attorney General of the United States retains full authority to enforce the provisions of this Act in Federal Court, including in the appellate courts, the cases are mostly handled by the United States Attorney for the appropriate district, usually with the assistance of Department of Labor attorneys. This system has worked well in the past and should continue to be utilized in the future.

Section 4303(2) would define "benefit, "benefit of employment" and employment related "rights and benefits." These are the rights, incident to employment, which are protected under chapter 43. These rights are broadly defined to include all attributes of the employment relationship which are affected by the absence of a member of the uniformed services because of military service. The list of benefits is illustrative and not intended to be all inclusive.

Section 4303(3) would define "employee", in the same expansive manner as under the Fair Labor Standards Act, 29, U.S.C. 203(e) except that "temporary" employees are not covered. See Section 4303(8). The term ' employee" would include former employees of an employer (see Bailey v. USX Corp., 850 F.2d 1506, 1509 (11th Cir. 1988)) and the issue of independent contractor versus employee should be treated in the same manner as under the Fair Labor Standards Act. See Brock v. Mr. W. Fireworks, Inc., 814 F.2d 1042 (5th Cir. 1987).

Section 4303(4) would define "employer" and is to be broadly construed. It includes not only what may be considered a "traditional" single employer relationship, but also (1) those under which a servicemember works for several employers in industries such as construction, longshoring, etc. where the employees are referred to employment, and (2) those where more than one entity may exercise control over different aspects of the employment relationship. See, e.g., Adams v. Mobile County Personnel Board, 115 LRRM 2936 (S.D. Ala. 1982); Magnuson v. Peak Technical Services, Inc., 808 F. Supp. 500, 507-511 (E.D. Va. 1992). This definition would also include potential employers in the case of a failure to hire an applicant as well as entities to which certain employment-related responsibilities have been delegated, such as pension funds. See Imel v. Laborers Pension Trust Fund, 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). This chapter would apply, as does current law, to all employers regardless of the size of the employer or the number of employees. See Cole v. Swint, 961 F.2d 58, 60 (5th Cir. 1992).

This provision would also have the effect of placing liability on a successor in interest, as is true under current law. The Committee intends that the multi-factor analysis utilized by the court in Leib v. Georgia-Pacific Corp., 925 F.2d 240 (8th Cir. 1991) is to be the model for successor in interest issues, except that the successor's notice or awareness of a reemployment rights claim at the time of merger or acquisition should not be a factor in this analysis. In actual practice, it is possible that the successor would not have notice that one or more employees are absent from employment because of military

responsibilities and a returning service person should not be penalized because of that lack of notice.

Section 4303(4)(B) would provide that the employer of a National Guard technician shall be the Adjutant General of the State where the technician is employed. Because of the mix of 2454

State and Federal attributes of National Guard technicians, these persons have had difficulty enforcing their rights under the existing reemployment statute. The purpose of this provision is to clarify that National Guard technicians are to be considered to be State employees for purposes of chapter 43, but not necessarily for any Other purpose, except as otherwise provided by law.

Section 4303(4)(C) would provide that an employee pension benefit plan is to be considered an employer only in specified circumstances.

Section 4303(5) would define "Federal Government." It is the Committees intent that the definition of "agency in the executive branch" include the United States Postal Service, non-appropriated fund instrumentalities of the United States, (e.g., military exchanges and officers' clubs), and other specified entities. The intent is to give employees of those entities the same reemployment rights as those extended to other Federal employees.

Section 4303(6) would define "health plan" as arrangements under which health services are provided or expenses are paid.

Section 4303(7) would define "notice." The Committee wishes to make it clear that the new requirement that all employees leaving their civilian jobs give notice of that intention, regardless of the nature of the military activity, is satisfied by any written or verbal notice made to the employer or a responsible representative of the employer. The notice may be given by the individual employee, his authorized representative or by the uniformed service.

Section 4303(8) defines "other than temporary position." The intent of this definition is to utilize the concepts formulated or reiterated by the court in Stevens v. Tennessee Valley Authority, 687 F.2d 158 (6th Cir. 1982), including the examples given of both temporary and other than temporary positions. The Committee specifically endorses the court's determination that all of the characteristics of a servicemember's employment be considered, including whether the employment left would have continued for a significant or indefinite period.

Section 4303(9) would define "qualified." This term is intended to ensure that, before a returning serviceperson can be found not to be qualified for a particular position, the employer must prove that, after reasonable efforts have been undertaken to help the person become qualified, he or she cannot perform the essential tasks of the position, not necessarily all of the tasks.

Section 4303(10) would define 'reasonable efforts." Reasonable efforts would be required to help qualify otherwise unqualified returning servicepersons, whether

unqualified by reason of a service connected disability or because of technological advances, so long as such efforts did not create undue hardships on the employer. These efforts are to include, but are not limited to, training or re training in the workplace and physical modification of equipment or provision of mechanical aids to assist in operating equipment.

Section 4303(11) would define "Secretary" to mean the Secretary of Labor or a designated representative, unless otherwise stated

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Section 4303(12) would define "seniority" to mean longevity in employment, including the period of employment prior to military service, the time between leaving the job and entering military service, the period of military service, and the time between discharge or release from military service and reemployment.
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Section 4303(13) would define "service in the uniformed services" to include all types of military training or service, including active duty, active duty for training, initial active duty for training and inactive duty training, etc. Under current law, entitlements and eligibility criteria for reemployment rights differ based upon categories of military training or duty. It is the Committee's view that those distinctions are no longer appropriate for reemployment rights purposes and only lead to confusion and anomalous results in some cases.

Section 4303(14) would define "State" to include the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, and other territories of the United States, together with the agencies and political subdivisions of each.

Section 4303(15) would define "undue hardship" as an action requiring significant difficulty or expense, taking into consideration certain specified factors.

Section 4303(16) would define "uniformed services" to include all five armed services and their reserve components. In addition, the commissioned corps of the Public Health Service would be added to the categories of beneficiaries of the reemployment rights statute. This section would also give the President the authority to designate any other category of persons a "uniformed service" during time of war or national emergency.

SUBCHAPTER 11-EMPLOYMENT AND REEMPLOYMENT RIGHTS AND LIMITATIONS; PROHIBITIONS

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

Current law protects Reserve and National Guard personnel from termination from their civilian employment or other forms of discrimination based on their military

obligations. Section 4311(a) would reenact the current prohibition against discrimination which includes discrimination against applicants for employment, (see Beattie v. The Trump Shuttle, Inc, 758 F. Supp. 30 (D.D.C. 1991)), current employees who are active or inactive members of Reserve or National Guard units, current employees who seek to join Reserve or National Guard units (see Boyle v. Burke, 925 F.2d 497 (1st Cir. 1991)), or employees who have a military obligation in the future such as a person who enlists in the Delayed Entry Program which does not require leaving the job for several months. See Trulson v. Trane Co., 738 F.2d 770, 775 (7th Cir. 1984). The Committee intends that these anti-discrimination provisions be broadly construed and
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strictly enforced. The definition of employee, which also includes former employees, would protect those persons who were formerly employed by an employer and who have had adverse action taken against them by the former employer since leaving the former employment.

If the employee is unlawfully discharged under the terms of this section prior to leaving for military service, such as under the Delayed Entry Program, that employee would be entitled to reinstatement for the remainder of the time the employee would have continued to work plus lost wages. Such a claim can be pursued
before or during the employee's military service, and processing of the claim should not await completion of the service, even if for only lost wages

Section 4311(b) would reaffirm that the standard of proof in a discrimination or retaliation case is the so-called "but for" test and that the burden of proof is on the employer, once a prima facie case is established. This provision is simply a reaffirmation of the original intent of Congress when it enacted current section 202l(b)(3) of title 38, in 1968. See Hearings on H.R. 11509 Before Subcommittee No. 3 of the House Committee on Armed Services 89th Cong., 1st Sess. at 5320 (Feb. 23,1966). In 1986, when Congress amended section 2021(bX3) to prohibit initial hiring discrimination against Reserve and National Guard members, Congressman G.V. Montgomery (sponsor of the legislation and Chairman of the House Committee on Veterans Affairs) explained that, in accordance with the 1968 legislative intent cited above, the courts in these discrimination cases should use the burden of proof analysis adopted by the National Labor Relations Board and approved by the Supreme Court under the National Labor Relations Act. See 132 Cong. Rec. 29226 (Oct. 7, 1986) (statement of Cong. Montgomery) citing NLRB v. Transportation Management Corp., 462 U.S. 393 (1983).

This standard and burden of proof is applicable to all cases brought under this section regardless of the date of accrual of the cause of action. To the extent that courts have relied on dicta from the Supreme Court's decision in Monroe v. Standard Oil Co., 452 U.S. 549, 559 (1981), that a violation of this section can occur only if the military obligation is the sole factor (see Sawyer v. Swift & Co., 836 F.2d 1257, 1261 (1Oth Cir. 1988)), those decisions have misinterpreted the original legislative intent and history of 38 U.S.C. 2021(b)(3) and are rejected on that basis.

Section 4311(c) makes explicit that the anti-retaliation provisions contained in the reported bill apply to persons who not only file a complaint, either with his or her employer (see Henry v. Anderson County, Tenn., 522 F. Supp. 1112, 1115 (E.D. Tenn. 1981)), or with a governmental agency, but applies as well to persons who testify in any proceeding under chapter 43, even if that person was not the subject of the proceeding, and to persons who assist or otherwise participate in an investigation under chapter 43, even if those persons were not the subject of the investigation. Accordingly, a person protected under this section need not be a member of the uniformed services.

Section 4212-Reemployment rights of persons who serve in the uniformed services

Section 4312(a) would provide an unqualified right to reemployment to persons who leave other than temporary positions to serve on any type of military duty, whether voluntary or involuntary, if the notice requirement of subsection (a)(l) is met, the cumulative length of military service found in subsection (a)(2) is not exceeded and the reporting or application requirement of subsection (e) is complied with. This section applies with equal force to employers of private employees, state and local governments and the Federal Government.

The only other exceptions to the unqualified right to reemployment would be the provisions in subsection (d), which provide that the employer need not reemploy the person if the employer's circumstances have so changed as to make it impossible or unreasonable to reemploy or, in the case of a person not qualified after reasonable efforts, if reemployment would create an undue hardship.

The very limited exception of unreasonable or impossible, which is in the nature of an affirmative defense, and for which the employer has the burden of proof (see Watkins Motor Lines, Inc. v. deGalliford, 167 F.2d 274, 275 (5th Cir. 1948); Davis v. Halifax City. Sch. System, 508 F. Supp. 966, 969 (E.D. N.C. 1981)), is only applicable "where reinstatement would require creation of a useless job or where there has been a reduction in the work force that reasonably would have included the veteran." Davis, supra, 508 F. Supp. at 968. "It is also not sufficient excuse that another person has been hired to fill the position vacated by the veteran nor that no opening exists at the time of application," Davis, supra. See also Fitz v. Bd. of Education of Port Huron, 662 F. Supp. 1011, 1015 (E.D. Mich. 1985) aff'd. 802 F.2d 457 (6th Cir. 1986); Anthony v. Basic American Foods, 600 F. Supp. 352, 357 (N.D. Cal. 1984); Goggin v. Lincoln St. Louis, 702 F.2d 698, 709 (8th Cir. 1983).

The other limited exception, undue hardship, is also in the nature of an affirmative defense, for which the employer also has the burden of proof, and applies only where a person is not qualified for a position due to disability or other bona fide reason after reasonable efforts have been undertaken to qualify the person. The issue of whether

attempts to qualify a person become an undue hardship is to be dealt with in accordance with the factors set out in section 4303(15)(B) of this chapter.

Section 4312(a)(1) would generally require an individual who leaves a civilian job for service in the uniformed services to give written or verbal notice of the forthcoming military absence from employment to his or her employer. Under current law, only a member of the Selected Reserve must notify his or her employer before leaving work for active duty for training or inactive duty training. See 38 U.S.C. 2024(d). There is no current requirement to notify the employer before leaving for active duty or initial active duty for training. See Winders v. People Exp. Airlines, Inc., 595 F. Supp. 1512, 1518 (D. N.J. 1984) aff'd. 770 F.2d 1078 (3rd Cir. 1985). An individual who does not indicate in any way that he or she is leaving because of military duty would no longer be protected (unless the exception provided in section 4312(b) is applicable),
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but an individual who leaves for two or more reasons, one of which is for military duty, would continue to be protected. See Adams v. Mobile County Personnel Board, 115 LRRM 2936 (S.D. Ala. 1982). This new notice requirement is effective 60 days after enactment of the Committee bill and applies only to persons who leave their jobs for military service after that date. The notice requirement of current section 2024(d) of title 38 would continue in effect during that 60 day period.

Section 4312(b) would provide that the employee is excused from the requirement to give his or her employer advance notice of military leave if doing so is impossible or unreasonable because of military necessity or for other legitimate reasons. During the 1983 Grenada operation, for example, members of the National Guard and Reserve were called to active duty with little notice, and notifying their civilian employers was impossible for many individuals without jeopardizing military security. It is also made clear, in unambiguous language, that the determination as to whether military necessity precluded notification shall be made by the uniformed services and shall not be subject to judicial review.

The Committee believes that the employee should make every effort, when possible, to give timely notice. The issue of timely notice should be considered on a case-by case basis. In the event that an employee is notified by military authorities at the last minute of impending military duty, resulting short notice given to the employer should be considered timely. On the other hand, last minute notice, which could have been given earlier by the employee but was unjustifiably not given, and which causes severe disruption to the employer's operation, should be viewed unfavorably. Lack of a timely notification which does not result in harm to the employer should not be a sufficient basis to deny reemployment rights.

The Committee does not intend that the requirement to give notice to one's employer in advance of service in the uniformed services be construed to require the employee to decide, at the time the person leaves a job, whether he or she will seek reemployment upon release from active service. One of the basic purposes of the

reemployment statute is to maintain the servicemember's civilian job as an "unburned bridge." Not until the individual's discharge or release from service and/or transportation time back home, which triggers the application time, does the servicemember have to decide whether to recross that bridge. See Fishgold, supra, 328 U.S. at 284: "He is not pressed for a decision immediately on his discharge, but has the opportunity to make plans for the future and readjust himself to civilian life."

Section 4312(c) is a major revision of current chapter 43. Under existing 6ections 2024(a) and (b) of title 38, U.S.C., a person is permitted to remain on active duty for up to four years and still have reemployment rights. However, under those sections, voluntary enlistees are permitted to remain on active duty for up to five years if the period beyond four years is an extension "at the request and for the convenience of the Federal Government" or if the person was unable to obtain orders relieving such person from active duty. Under proposed section 4312(c) of chapter 43, the limit on duration would generally be five years. It is the Committee's view that this approach would clarify and simplify the current law's confusing "four plus one" limitation.
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Additionally, under current law, service limitations apply only to active duty service. Thus, an employee who serve6 four years on active duty, returns to his or her pre-service employer, trains one weekend a month and two weeks in the summer as a National Guardsman for several years and then enters upon a three-year Active Guard/Reserve tour of duty, would have reemplovment rights with his or her employer upon release from that AGR tour of duty. See King v. St. Vincent's Hospital, 502 U.S. 215, 112 S. Ct. 5701, 116 L.Ed.2d 578 (1991).

Because of the blurring of the distinctions between the types of military service, e.g., active duty vs. active duty for training, it is.no longer rational or equitable to make rights and obligations under chapter 43 dependent on the distinctions between types of service. Rather, under the reported bill, almost all types of service would be cumulatively considered toward the service limits, an approach the Committee considers appropriate because employment and reemployment rights are intended to protect non-career servicepersons. See Smith v. Missouri-Pacific R. Co., 313 F.2d 676, 682, 683 (8th Cir. 1963). Accordingly, H.R. 995 would establish a basic five-year limitation on total military service during the period of employment with the employer against whom reemployment rights are asserted. See Hall v. Chicago & Eastern III. R. Co., 240 F. Supp. 797, 800 (N.D. III. 1964).

In order, however, to ensure that the Armed Forces have an adequate supply of trained personnel, certain exceptions to the five years basic limitation would be established by the Committee bill. Section 4312(c)(1) would provide that the cumulative period of service may exceed five years if the additional time is necessary to complete an initial obligated service requirement. Because of the very high training costs for some military specialties, such as the Navy s nuclear power program, the services sometimes

impose initial active service obligations exceeding five years upon persons serving in those specialties. The intent of this section is to ensure that a person leaving active duty upon completion of his or her initial active service obligation should have reemployment rights even if his or her period of continuous active service exceeds five years.

Section 4312(c)(2) would provide that the cumulative period of service may exceed five years if the person was unable to obtain orders releasing him or her from active service through no fault of such person. This provision is similar to the existing reemployment statute.

During time of war or national emergency, a person may be involuntarily retained on active duty beyond his or her expiration of date of obligated active service, which was the case for some persons in connection with Operation Desert Shield/Storm. Additionally, there are other circumstances in which a person may be retained on active duty beyond his or her date of obligated active service. For example, the obligated active service date of a member of the Navy or Marine Corps serving on a vessel may be extended until the vessel returns to the United States if the obligated active service date comes while the vessel is at sea. See 10 U.S.C. 5540. As another example, a person may be retained on active duty beyond his or her obligated active service date if that individual is suspected of a military criminal offense. See 10 U.S.C. 802(a)(l).
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If the member is retained on active duty for court-marital and then acquitted, or if military authorities later decide not to proceed with the charges, the Committee intends that it shall be irrebuttably presumed that the members inability to obtain orders releasing him or her from active service on his or her obligated active service date was through no fault of such member.
Section 4312(c)(3) would exclude statutorily mandated National Guard and Reserve training requirements from the cumulative five-year limit. The cited sections of titles 10 and 32 of the United States Code generally require a minimum of 14 or 15 days of full-time duty for training each year and 48 inactive-duty training periods (typically one weekend a month for drills) to be performed each year

Also excluded from the five-year limit would be additional training requirements determined by the Secretary of the service concerned to be necessary to meet individual professional development or skill needs whether or not entered into voluntarily. Absent these exclusions from the five-year cumulative limit, National Guard and Reserve members could be subject to loss of reemployment protections simply as the result of their completion of mandatory training or other training necessary to meet military needs.

Section 4312(c)(4) would exclude service performed on active duty (other than for training) during periods of war or national emergency or in support of critical operational missions as determined by the Secretary concerned as follows:

Subparagraph (A) would exclude service performed following active duty subject to the specific provisions of title 10, United States Code, enumerated in this

subparagraph. These authorities provide for the involuntary order to active duty or involuntary retention on active duty of members of the Armed Forces in certain emergency or national security related situations.

Subparagraph (B) would provide a more general exclusion for service performed on active duty (other than for training) during a war or national emergency. This exclusion would cover active duty service during such a period even if none of the specific statutory authorities named in subparagraph (A) were invoked. An example would be an order to active duty during a war or national emergency under a law or joint resolution related to a specific crisis situation.

Subparagraph (C) would provide an exclusion from the five year cumulative period for service on active duty (other than for training) in support of an operational mission for which personnel have been ordered to active duty under the Presidential authority to order members of the Selected Reserve to active duty involuntarily under other than war or national emergency conditions. Section 673b of title 10, United States Code, currently authorizes the President to order up to 200,000 Reservists to active duty for up to 180 days. This subparagraph is intended to treat volunteers supporting such missions the same as those involuntarily ordered to serve. The Secretary of the service concerned would determine which missions would be protected under this subparagraph.

Subparagraph (D) would provide an exclusion from the five year cumulative limit for members ordered to active duty in support of a critical mission or requirement of the uniformed
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services. This provision would allow the Secretary of the service concerned to designate volunteers serving in support of operation missions during a period where no involuntary recall or call up was in effect. Recent examples would be Reservists who served on active duty in support of Operation Just Cause or Operation Urgent Fury.
Subparagraph (E) would provide an exclusion from the five year cumulative limit for members of the National Guard called into Federal Service by the President to suppress an insurrection or interference with State and Federal Law, to execute the laws of the United States, or to repel an invasion.

Under current law, the deadline for returning servicemembers to report to their preservice employer for reemployment depends on the type or category of service. Under proposed section 4312(e), the time limits for applying for reemployment would depend strictly on the length or duration of the military service from which the serviceperson is being discharged or released. This is based on the same rationale as outlined above relative to service limitations. Application for reemployment would be required to be made, either in writing or verbally, to the employer or to a representative of the employer who has either the authority to act on the application or who is in a position to forward the request for reemployment to someone who has the authority. See Shadle v. Superwood Corp., 858 F.2d 437 (8th Cir. 1988).

With regard to military service of less than 31 days, servicemembers would ordinarily be required to report for work at the beginning of the first regularly scheduled working period on the next working day after release from service. An employee, however, must be allowed a reasonable time to arrive back at his or her residence, a reasonable time to rest, and a reasonable time to travel to the place of employment. For example, an employer could not require a reservist who returns home from weekend duty at 10:00 p.m. to report to work at 12:30 a.m. that night, even if it is the beginning of the next regularly scheduled working period the next day. The Committee believes that an employee must be in a position to arrive at work rested in order to perform safely at work. On the other hand, if the shift began at 6:00 am, the employee who arrives home at 10:00 pm the night before would be required to report to that shift.

For individuals performing military service of 31-180 days, a 14-day reporting deadline would be established, and a 90-day reporting deadline would be established for those performing military service of more than 180 days. These 14 and 90 day deadlines would begin to run upon the employee's completion of military service.

Section 4312(e)(2)(A) would provide that these reporting deadlines would be extended by up to two years for a person who is hospitalized or is convalescing from a service-connected illness or injury.

Section 4312(f) would avoid the potential inflexibility of the reporting deadlines by establishing that absences beyond the deadline would not necessarily deprive an employee of all reemployment rights, but that he or she be would be subject to the employer's rules and practices (including deviations from rules) dealing with unexcused absences.

Section 4312(g) would require that, when reporting for reemployment, a returning servicemember, if requested, shall provide whatever documentation is available to establish that he or she has made timely application, has not exceeded the service limitations of section 4312(c) and has been discharged or released from military service under honorable conditions. To the extent that such documentation is not in existence or not readily available, an employer cannot deny reinstatement on the basis of a lack of such documentation. It is, however, incumbent on the employee to obtain the documentation, if requested, as soon as it is in existence or available. If the documentation subsequently obtained shows that the person is not eligible for reemployment rights, that person may be prospectively terminated from employment and would not be eligible for accrued benefits contingent on reemployment under section 4315 of this chapter.

Section 4312(h) would provide that a person returning from service in the uniformed services to Federal employment could not displace an employee with a superior claim under the Veterans' Preference Act, such as a disabled veteran. A returning veteran who finds his or her preservice position occupied by another veteran with a

superior claim under the Veterans Preference Act would have reemployment rights in some other position.

Section 4312(i) is a codification and amplification of the Supreme court's ruling in King v. St. Vincent's Hospital, 112 S.Ct. 570 (1991), which held that there was no limit as to how long a National Guardsman could serve on active duty for training and still have reemployment rights under former section 2024(d) of title 38. This new 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 limitations under section 4312(C) and the servicemember has complied with the requirements under sections 4312(a) and (e).

The Committee believes, however, that instances of blatant abuse of military orders should be brought to the attention of the appropriate military authorities (see Hilliard v. New Jersey Army National Guard, 527 F. Supp. 405, 411-412 (D. N.J. 1981)), and that voluntary efforts to work out acceptable alternatives could be attempted. However, there is no obligation on the part of the servicemember 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. Good employer-employee relations dictate, however, that voluntary accommodations be attempted by both parties when appropriate.

Section 4313. Reemployment Positions

Section 4313, in conformance with the principle that rights, benefits and obligations would no longer be based on the type or nature of military service or training, but rather on the length of service or training, would require that the position to which a returning serviceperson shall be reinstated would be determined by the length of service or training.

Section 4313(a)(l), which would apply to periods of service of less than 91 days, would require that a protected individual be reemployed in the "escalator position, first enunciated by

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the Supreme Court in Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275, 284-285 (1946), wherein it was stated that the returning serviceperson "steps back on the seniority escalator at the precise point the person would have occupied had he or she kept the position continuously during the war.' Thus, whatever position the returning serviceperson would have attained, with reasonable certainty (see Tilton v. Missouri Pacific R. Co., 376 U.S. 169, 180 (1964)), but for the absence for military service, would be the position guaranteed upon return. This could be the same position or a higher, lower, or lateral (e.g., a transfer) position or even possibly layoff or severance status (See

Derepkowski v. Smith-Lee Co., Inc., 371 F. Supp. 1071 (E.D. Wis. 1974)), depending on what has happened to the employment situation in the servicemember's absence.

The Committee intends to affirm the interpretation of "reasonable certainty" as "a high probability" (see Schilz v. City of Taylor Mich., 825 F.2d 944, 946 (6th Cir. 1987)), which has sometimes been expressed in percentages. See Montgomery v. Southern Electric Steel Co., 410 F.2d 611, 613 (5th Cir. 1969) (90 percent success of probationary employees becoming permanent meets reasonable certainty test); Pomrening v. United Air Lines, Inc., 448 F.2d 609, 615 (7th Cir. 1971) (86 percent pass rate of training class meets reasonable certainty test).

If, however, the returning servicemember is not qualified to perform in the escalator position, after reasonable efforts to qualify the person, the preservice position must then be offered. The claim that a returning serviceperson is not qualified for the "escalator" position must be proven by the employer and only after reasonable efforts by the employer to enable the serviceperson to become qualified have been undertaken and exhausted.

Under section 4313(a)(2), unlike the situation where a servicemember has served for less than 91 days and is entitled strictly to the "escalator" position, when the time in service is more than 90 days, the employer would have the option, as is the case under current law, of reemploying that person in the "escalator" position or one of like seniority, status and pay. Since seniority and pay are easily determined, the critical factor for determining equivalency is status.

Although not the subject of frequent court decisions, courts have construed status to include "opportunities for advancement, general working conditions, job location, shift assignment, [and], rank and responsibility." Monday v. Adams Packing Assoc., Inc., 85 LRRM 2341, 2343 (M.D. Fla. 1973). See Hackett v. State of Minn., 120 Labor Cases (CCH) 1111,050 (D. Minn. 1991). A reinstatement offer in another city is particularly violative of like status (See Armstrong v. Cleaner Services, Inc., 79 LRRM 2921, 2923 (MD Tenn. 1972)), as would be reinstatement in a position which does not allow for the use of specialized skills in a unique situation.

Section 4313(a)(3) would address the issue of the position to be granted a serviceperson disabled while in military service, regardless of length of service, and who is not qualified for the "escalator" position after reasonable efforts to accommodate the disability That obligation would be to reemploy the returning servicemember in an equivalent position in terms of seniority, status
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and pay for which the person is qualified or can become qualified with reasonable efforts by the employer. If no such position exists, the nearest approximate position in terms of seniority, status and pay would be required to be found. If a position other than the "escalator" position is offered to a returning disabled servicemember, full company seniority for all purposes is always to be accorded the disabled serviceperson, regardless

of whether seniority follows an employee under other circumstances. See Hembree v. Georgia Power Co., 637 F.2d 423 (5th Cir. 1981); Ryan v. City of Philadelphia, 559 F. Supp. 783 (E.D. Pa. 1983) aff' d. 732 F.2d 147 (3rd Cir. 1984).

Section 4313 (a)(4) would require the reemployment of returning servicepersons who are not found qualified for their "escalator" positions for any reason other than disability, regardless of length of services but who can qualify for a lesser position in terms of status and pay. This provision is primarily intended to deal with employees who return to technologically-advanced situations for which they cannot qualify, but who can perform in another position not necessarily in their "escalator" line. They too would receive full company seniority for all purposes in the new position.

Section 4313(b)(1) provides that when an employee leaves a job to enter military service and is replaced by another employee who leaves the same job to enter military service, both employees have reemployment rights. As between the two veterans, the one who left the job first has priority over the other. If the replacement returns from military service first, he or she is entitled to restoration in the position, subject to the possibility of being displaced by the veteran who left the position first.

Section 4313(b)(2) deals with the situation where the replacement employee is displaced by the veteran who left the position first and provides for placement in the same manner as under section 4313(a)(1), (a)(2), or (a)(3) as the case may be.

The provisions of section 4313 require prompt reinstatement. The Committee recognizes that what is prompt depends on the circumstances of each case. However, reinstatement after weekend National Guard duty would, in most cases, be the next scheduled working day, while reinstatement after five years on active duty may require giving notice to an incumbent employee who may have to be "bumped." The Committee intends that any undue delay in reinstatement would be subject to a claim for lost wages.

Section 4314. Reemployment by the Federal Government

It is the intent of the Committee, as expressed in section 4314(a), that the obligation to reemploy a federal employee is the same as that for a private sector or state or local government employee. However, subsection (b) provides that where, upon return from military service, the position or agency in the executive branch no longer exists or the agency that employed the person claims that it is impossible or unreasonable to reemploy him or her, for a sufficient reason, the Director of the Office of Personnel Management (OPM) would be responsible for placing the servicemember in an equivalent position in the Executive Branch of the Federal
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Government. The concept of impossible or unreasonable in this section is to be interpreted the same as in section 4312(d)(1)(A). Current law requires the Director of OPM to "determine whether or not there is" such an equivalent position. Section 4314(b) would instead require the Director to "identify" such an equivalent position somewhere in the Executive Branch of the Federal Government. If OPM cannot locate a position which

is fully equivalent in terms of seniority, status, and pay to the position that the servicemember occupied before his or her military service, then OPM would be required to identify the closest approximation consistent with the person's qualifications and the circumstances of his or her case.

Sections 4314(c) and (d) would apply to returning servicemembers who were employed by the legislative or judicial branch of the Federal Government, or as National Guard technicians prior to their military service. If those legislative or judicial branch employers or the Adjutant General of the State find it is impossible or unreasonable to reemploy such returning servicemembers, OPM would be required to identify for them positions in the executive branch, in the same manner, as discussed above, for the Executive Branch.

Section 4315. Rights, benefits, and obligations of persons absent from employment for service in a uniformed service

Section 4315 is applicable to all persons who have reemployment rights under this chapter regardless of whether they were employed by a private employer, a state or local government or the Federal Government.

Section 4315(a) would recodify the "escalator" principle as it applies to seniority and all rights and benefits which flow from seniority, calculated as if the person had never left employment. For example, in determining how much vacation (length of vacation) a servicemember is entitled to in the years following reinstatement, all time away from work (period between leaving the job and entering military service, period of military service, and period between discharge or release from military service and reemployment) would be required to be considered under this section, together with the pre-military service period of employment. Thus, if vacations increase from one to two weeks after five years of company service, a serviceperson who worked for one year, served two years on active duty and has worked for two years after reemployment, would be entitled to two weeks vacation after these five years.

Section 4315(b) would reaffirm that a departing serviceperson is to be placed on a statutorily-mandated military leave of absence while away from work, regardless of the employer's policy. Thus. terminating a departing serviceperson, or forcing him or her to resign, even with a promise of reemployment, is of no effect. See Green v. Oktibbeha County Hospital, 526 F. Supp. 49, 54 (N.D. Miss 1981); Winders v. People Exp. Airlines, Inc. 595 F. Supp. 1512, 1518 (D. N.J. 1984) aff'd. 770 F.2d 1078 (3d Cir. 1985).

Accordingly, while away on military leave, the servicemember would be entitled to participate in whatever non-seniority related benefits are accorded other employees on non-military leaves of absence. See Winders, supra. In contrast, benefits which are seniority based

would not be limited to the treatment accorded employees on non-military leaves of absence, but are to be accorded, after reemployment, as if the servicemember had

remained continuously employed under the escalator principle. The Committee intends to affirm the decision in Waltermyer v. Aluminum Co. of America, 804 F.2d 821 (3rd Cir. 1986) that, to the extent the employer policy or practice varies among various types of non-military leaves of absence, the most favorable treatment accorded any particular leave would also be accorded the military leave, regardless of whether the non-military leave is paid or unpaid Thus, for example, an employer cannot require servicemembers to reschedule their work week because of a conflict with reserve or National Guard duty, unless all other employees who miss work are required to reschedule their work. *Cf.* Rumsey v. New York State Dept. of Corr. Services, 124 LRRM 2914 (N.D.N.Y. 1987). However, servicemembers are not entitled to receive benefits beyond what they would have received had they remained continuously employed.

The last sentence of this subsection would require the employee to pay his or her share of the cost of the continued benefit only if that is a requirement for all other employees on non-military leave of absence. Insurance provided by an employer would, however, be treated as provided for in subsection (c).

Section 4315(c)(1) would provide that an employee on military leave shall, at his or her request, be covered by insurance provided by the employer for up to 18 months. This protection is similar to the continuation of health insurance under the so called COBRA provisions of the Employee Retirement Income Security Act, 29 U.S.C. 1161, et seq., but applies to all individuals entering the uniformed services, without limiting qualifications such as the size of the workforce of the person's employer. The individual employee may be required to pay the entire cost of continuing insurance coverage under section 4315(c)(1), except in the case of persons serving periods of training or service for 30 or fewer days. In the case of these short tours, the employer is required to continue the insurance coverage, and the individual employee may only be required to pay the employee share, if any. Dependents of Reserve Component members are entitled to participate in the military health care system, including CHAMPUS, only when the member has been called to serve for at least 31 days. The Committee intends Section 4315(c)(1) to ensure that there be no gap in health insurance coverage of the reservist's family while the reservist is performing military training.

Section 4315(c)(2), which was first enacted as an amendment to current 38 U.S.C. 2021(b), effective March 18, 1991, is discussed in House Report 101-862 (October 13, 1990) at 4, which states that "....a reemployed servicemember is entitled to the health insurance benefits provided by an employer as if he or she had never been called to active duty [for training] and his or her employment had not been interrupted." The term "health benefits" is used generically in this section to include insurance plans, self-funded employer health plans (often administered by insurance companies), and health maintenance organizations, which provide health care directly to employees. It should also be noted that the prohibition on applying exclusionary clauses or
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waiting periods is a general prohibition applicable to all health benefit plans. A contract provision to the contrary is void. Thus, upon reinstatement after military service, there should be no lapse in coverage, no waiting period, and no exclusion for pre existing conditions, either for the employee or for his or her dependents This provision would foreclose any reliance upon Gentile v United States Trucking Corp. 355 F. Supp. 960 (S.D.N.Y. 1973) aff'd. 499 F2d 752 (2d Cir. 1974). to reach a Contrary result. The uniformed services themselves and the Department of Veterans Affairs will provide health care for service-connected disabilities.

Section 4315(d) would relate the period of special protection against discharge without cause to the length, and not the type, of military service or training. Under current law, there is a one year period of special protection against discharge without cause after return from active duty and six months protection after return from initial active duty for training. There is no explicit protection for employees returning from active duty for training or inactive duty training regardless of length. Under this provision, the protection would begin only upon proper and complete reinstatement. See O'Mara v. Peterson. Sand & Gravel Co., 498 F.2d 896, 898 (7th Cir. 1974).

The purpose of this special protection is to ensure that the returning serviceperson has a reasonable time to regain civilian skills and to guard against a bad faith or pro forma reinstatement. As expressed in Carter v. United States, 407 F. 2d 1238, 1244 (D.C. Cir. 1968), "cause" must meet two criteria: (1) it is reasonable to discharge employees because of certain conduct and (2) the employee had notice expressed or fairly implied, that such conduct would be notice for discharge. The burden of proof to show that the discharge was for cause is on the employer. See Simmons v. Didario 796 F.Supp. 166,172 (E.D. Pa. 1992).

The limitation upon the duration of the period of special protection should not be considered to be a limitation upon the duration of other rights under chapter 43. See Oakley v. Louisville and Nashville R. Co., 338 U.S. 278, 284-85 (1949). Similarly, the expiration of the period of special protection does not end the protection against discrimination contained in proposed section 4311. It is to be understood, however, that good cause exists if the '"escalator" principle would have eliminated a person's job or placed that person on layoff in the normal course.

Section 4315(e) would allow an employee leaving for military service to use, at his or her choice, accrued vacation leave during the military absence if such vacation leave could have otherwise been used during this period. While current law prohibits an employer from forcing a reservist or National Guardsman to use paid vacation leave (see Hilliard v. New Jersey Army National Guard. 527 F. Supp. 405, 412 (D.N.J. 1981)), which would still be the case. it does not explicitly allow such use if desired by the servicemember

Section 4316. Employee pension benefit plans

This section is intended to set forth the rules applicable to the crediting of pension benefits for periods of military service for returning servicemembers.

Under the Supreme Court's decision in Alabama Power Co. v Davis, 431 U.S. 581 (1977), service in the military is to be credited for both vesting and benefit accrual for pension purposes if the benefit is a reward for length of service and it is reasonably certain that the benefit would have accrued had the employee not been away in military service. The protections of these sections apply equally to both defined benefit plans and defined contribution plans, so long as the specific plan at issue meets the requirement of Alabama Power that the benefit is a reward for length of service. See Reilly v. New England Teamsters, 737 F.2d 1274, 1281-82 (2d Cir. 1984). The same would be true of those profit-sharing plans which are in reality rewards for length of service. To the extent that Raypole v. Chemi-trol Chemical Co., Inc., 754 F.2d 169 (6th Cir. 1985) suggests differently, it is hereby rejected. These protections apply to all persons who have rights under this Act and its predecessors since 1940.

Sections 4316(a)(2)(A) and (B) would make explicit the rights of reemployed servicemembers in their pension plans, such as no break in employment service would be considered to have occurred, no forfeiture of benefits already accrued would be allowed, and there would be no necessity to requalify for participation in the pension plan by reason of absence for military service.

Section 4316(b)(1)(A) is intended to provide the pension plan with a claim against the employer for amounts that may be required to fund obligations arising under this section. In the case of a multiemployer plan, this provision would enable the plan to pursue its existing remedies under section 515 of the Employee Retirement Income Security Act, 29 U.S.C. 1145, for failure to make the required contributions, in the event that neither the plan nor the collective bargaining agreement pursuant to which the plan is maintained provides for any such funding obligations.

Section 4316(b)(1)(B) provides that a returning veteran is entitled to have earnings and any employer contribution which is determined without reference to the number of, or compensation of, plan participants credited to such person's pension account to the same extent as they would have been credited had such person remained continuously employed instead of serving in the uniformed service. With regard to forfeitures, this section would permit, but not require, the allocation of forfeitures to such person's pension account.

Section 4316(b)(2)--If the plan is contributory (i.e., provides for employee contributions as well as employer contributions), the portion of such accrued benefit that is derivable from employee contributions would be required to be calculated only to the extent that the reemployed serviceperson makes the required employee contribution to the plan. No interest or penalty shall be charged on the employee contribution, nor shall the employee be credited with interest that would have been earned on such contribution. However, if a reemployed serviceperson has withdrawn his or her pension plan monies, in whole or in part, prior to entering military service, such person must be allowed to voluntarily repay the withdrawn amounts (together with the interest that would have been earned had the monies not been withdrawn) and receive the appropriate credit in the pension plan. The period of repayment is subject to negotiation between
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the employer and employee, and such negotiations are to be carried out in good faith for the purpose of determining a reasonable period. *Cf:* Leonard v. United Air Lines, Inc., 972 F.2d 155 (7th Cir. 1992). Section 4316(b)(3) provides that if there is a need to use imputed earnings of an employee to calculate pension benefits during a period when in fact there were no earnings because of the absence in military service, the employee's preservice rate of pay will be used or if no fixed rate was in effect, the average earnings of the 12 months immediately preceding military service shall be used.

Section 4316(c) would require that, where military service might result in additional pension liability, the administrator of a multiemployer pension plan be notified that a contributing employer has reemployed a veteran under chapter 43. Such a notification would provide the plan the opportunity to take whatever steps may be required to protect its interests. Unlike administrators of single employer pension plans, administrators of multiemployer plans are generally not in a position to be aware of the fact that a contributing employer has reemployed a person who may have a pension claim arising from a period of military service.

Section 4317. Character of Service

The characterization of service applied by the uniformed service (usually on the Department of Defense Form 214) is intended to be binding on both the veteran and the employer and no other characterization or notation in the Form 214 or any other document shall be relevant. See Hall v. Chicago & Eastern III. R. Co., 240 F. Supp. 797, 800 (N.D. Ill. 1964). An upgrade of an "other than honorable" discharge shall give rise to reemployment rights only if the upgrade is retroactive and only if the veteran otherwise meets the eligibility criteria, including having made a timely application for reemployment both after the original discharge and after the upgrade. See Robertson v. Richmond, Fredericksburg & Potomac R. Co., 178 F. Supp. 734 (E.D. Va. 1959).

SUBCHAPTER III--PROCEDURES FOR ASSISTANCE, ENFORCEMENT, AND INVESTIGATIONS

Section 4321. Assistance in obtaining employment or reemployment

Section 4321 would reaffirm that the Secretary of Labor shall provide assistance in obtaining rights and benefits under chapter .43 for persons who claim that private employers or state or local governments have, or are about to, deny them such rights and benefits. This section would additionally allow federal employees to supply to the Secretary of Labor for assistance in resolving reemployment rights claims, just like employees of private employers or state or local governments. The Secretary's record of success since the reemployment rights assistance function was transferred from the Selective Service System in 1946 has been impressive, with over 95 percent of the cases received being satisfactorily resolved without resort to referral for litigation. Volunteer groups such as those supporting the work of the National Committee for

Employer Support of the Guard and Reserve (NCESGR) have also contributed to the success of amicable resolution of cases at an early stage, and these groups should be encouraged to continue their assistance with proper training.

Section 4322. Enforcement of employment or reemployment rights

Section 4322(a) is similar to current section 2022, title 38, USC. with certain refinements and additions. Under section 4322(a), the Secretary of Labor would retain the responsibility for investigating complaints filed by private sector and state and local government
employees The Secretary will have the additional responsibility, however, of investigating complaints filed by federal employees, including employees of the Postal Service.

Section 4322(b) provides the mechanism for filing a complaint and directs the Secretary to provide technical assistance in specified circumstances.

Section 4322(c)(1)(A) provides that where an amicable settlement cannot be reached, in the case of a private or state or local government employer, legal referral would be required to be made to the Attorney General by the Secretary upon request by the claimant.

The determination as to whether the Attorney General shall offer legal representation to a claimant under chapter 43 is to be made solely upon an assessment of the merits of the claimant's case If the Attorney General determines that the Federal Government should provide legal representation, the Attorney General would be required to assign responsibility for providing such representation to the appropriate United States Attorney or to a Department of Justice attorney, or, as is suitable, to the Solicitor of Labor.

Under section 4322(c)(1)(B), if the Attorney General declines to provide representation, or if for any reason the claimant does not desire to be represented by Federal Government counsel, the claimant could file suit through private counsel retained at his or her own expense or pro se. This is in accordance with the practice under the existing reemployment statute.

With reference to federal employees, under section 4322(c)(2)(A), absent a settlement of a claim by the Secretary, and if the Secretary is reasonably satisfied that a violation has occurred, the claim would, upon request by the claimant, be required to be forwarded to the Office of Special Counsel (OSC) for litigation before the Merit Systems Protection Board (MSPB). The same option to proceed with private counsel before the MSPB is also available to federal employees pursuant to section 4322(c)(2)(B).

Section 4322(d) provides for the litigation of contested cases in federal district court on behalf of employees of private employers and State or local governments.

Section 4322(d)(2) provides that the courts are empowered to require employers to comply with the provisions of this chapter, to compensate the employee for any loss of wages or benefits, and to award liquidated damages in the case of willful violations. A violation shall be considered to be willful if the employer or potential employer "either knew or showed reckless disregard for the matter of
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whether its conduct was prohibited by the [provisions of this chapter]." Hazen Paper Co. v. Biggins, 61 U S.L.W. 4323, 4327 (U.S. Supp. Ct., decided April 20, 1993).

Section 4322(d)(3)(A) precludes the imposition of fees or court costs for persons claiming rights or benefits under this chapter.

Section 4322(d)(3)(B) would permit a prevailing servicemember who is an employee of a private employer or state or local government, to be awarded attorney's fees and other litigation expenses if the case is pursued through private counsel. Section 4322(d)(4) would make explicit that the federal district court may use its full equity powers, including issuance of temporary restraining orders, where appropriate.

Section 4322(d)(5) would provide that only persons claiming rights or benefits under chapter 43 may initiate an action, i.e., no declaratory judgment actions by employers, prospective employers or other entities (such as pension plans or unions) can be filed.

Section 4322(d)(6) would reaffirm present law that only the employer (or prospective employer) is a necessary party respondent in an action initiated under this chapter. See Muir v. U.S. Steel Corp, 41 F.R.D. 428 (E.D. Pa. 1967).

Section 4322(d)(7) would reaffirm the 1974 amendment to chapter 43 that no State statute of limitation shall apply to any action under this chapter. It is also intended that state statutes of limitations not be used even by analogy. See Steuens v. Tennessee Valley Authority, 712 F.2d 1047, 1056-1057 (6th Cir. 1983). Moreover, the Committee reaffirms, as was made clear in the 1974 legislative history, "that the time spent by the government agencies charged with the administration and enforcement of this Act in investigation, negotiation, and preparation for suit shall [not] be charged against the veteran in any consideration of a time-barred defense," i.e., laches. Senate Report No. 93-907, 93rd Cong., 2d Sess. at 111112 (June 10, 1974). See Lemmon v. Santa Cruz County, Cal., 686 F. Supp. 797, 805 (N.D. Cal. 1988). Additionally, in dealing with the prejudice element of the laches defense, it was also made clear in Senate Report No. 93-907 at 113 "that the 'bumping of employees . . . [does not] constitute prejudice to the employer . . . " To the same effect, the payment of back wages or lost benefits, by itself, does not constitute prejudice in the laches context. See Goodman v. McDonnell Douglas Corp., 606 F.2d 800, 808 (8th Cir. 1979); Cornetta v. United States, 851 F.2d 1372, 1380-82 (Fed. Cir. 1988).

Section 4322(d)(8) would make explicit that states are subject to the same remedies as imposed on private sector employers for violations of chapter 43 in

conformance with the decision in Reopell v. Comm. of Mass., 936 F.2d 12 (1st Cir. 1991).

In terms of the monetary remedies awarded under chapter 43, the principle that lost wages or other benefits lost because of violations of chapter 43 are to be calculated on a pay period-by-pass period basis is hereby affirmed. See Dyer v. Hinky Dinky, Inc., 710 F.2d 1348, 1351-52 (8th Cir. 1983). Also affirmed by the Committee are the decisions in Steuens v. Tennessee Valley Authority, 699 F.2d 314, 316 (6th Cir. 1983) and Hanna v. American Motors Corp., 774 F.2d 1300, 1312-1313 (7th Cir. 1984), which hold that a veteran or reservist does not waive his or her rights under the Act by refusing an offer of reemployment which extends anything less
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than full statutory guarantees, including proper seniority, position, pay and lost wages and benefits.

Section 4322(e) would give to the Merit Systems Protection Board (MSPB) the jurisdiction to decide contested cases concerning Federal sector reemployment rights, including cases brought by former Federal employees and employees or former employees of non-appropriated fund instrumentalities of the United States MSPB determinations would be reviewable by the United States Court of Appeals for the Federal Circuit in the same manner that MSPB determinations generally are reviewable.

The Office of Special Counsel would be required to represent a Federal sector claimant if the claimant requests OSC assistance and if the OSC is reasonably satisfied that the claimant is entitled to the benefits that he or she seeks. If the claimant does not wish to have OSC representation, or if the OSC is not reasonably satisfied that the claimant is entitled to the benefits that he or she seeks~ the claimant could appeal to the MSPB on his or her own behalf or through private counsel retained at the individual's own expense.

The Office of Special Counsel would be required to provide representation before the MSPB but not on appeal from the MSPB to the Federal Circuit or the Supreme Court. A person claiming reemployment rights with respect to the Federal Government as employer could appeal to the Federal Circuit from an adverse MSPB determination However, such a person would need to retain private counsel at his or her own expense at this level.

The remedies available to federal employees are limited, however, to orders that the employer comply with the provisions of this chapter and to an award of lost wages and other benefits.

Section 4322. Conduct of investigation; subpoenas

Section 4323 would provide the Department of Labor (DOL) with administrative subpoena authority for its investigations. The reemployment rights statutes have not previously given DOL such authorityw although the Department has had such authority

under most statutes that it is charged with enforcing. This subpoena provision is typical of many such provisions in regulatory statutes. Some reemployment investigations have lasted an inordinate time, and the lack of subpoena authority has significantly contributed to such delays. The Committee expects that this new authority would enable the Department of Labor to enforce reemployment rights in a more timely and effective manner. This subpoena power shall be enforceable in Federal District Court.
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SUBCHAPTER IV-MISCELLANEOUS PROVISIONS

Section 4331. Regulations

Section 4331 would give the Secretary of Labor the authority to promulgate regulations in conformance with the policies of this Act. The Department of Labor has not previously had such authority, although several courts, including the Supreme Court, have given a "measure of weight" to the statutory interpretations expressed in the Department's Veterans' Reemployment Rights Handbook and Veterans' Reemployment Rights Legal Guide and Case Digest and Supplements. See, e.g, Monroe v. Standard Oil Co. 452 U.S. 549, 563 n.l4 (1981); Leib v. Georgia - Pacific Corp., 925 F.2d 240, 245 (8th Cir. 1991); Shadle v. Superwood Corp., 858 F.2d 437, 440 (8th Cir. 1988); Dyer v. Hinky Dinky, Inc., 710 F.2d 1348, 1352 (8th Cir. 1983); Smith v. Industrial Employers and Distributors Association, 546 F.2d 314, 319 (9th Cir. 1976), cert. denied, 431 U.S. 965 (1977), Helton v. Mercury Freight Lines, Inc., 444 F.2d 365, 368 n.4 (5th Cir. 1971). It is the intent of the Committee that the Department of Labor shall maintain and update these publications, which shall reflect the policies of this Act.

Section 4331(b)(1) would extend to the Director of the Office of Personnel Management the authority to "issue regulations giving full force and effect to the provisions of this section ' for the Executive Branch of the Federal Government. The current regulations may be found in Part 353 of Title 5 of the Code of Federal Regulations. Because it is intended that the Federal Government be a model employer with respect to the policies of chapter 43, the OPM regulations under this Act must be consistent with the Department of Labor regulations dealing with State and local governments and private employers. Therefore, the Director of OPM must consult with the Secretary of Labor and the Secretary of Defense before promulgating such regulations.

Section 4331(b)(2) would authorize the Merit Systems Protection Board and the Office of Special Counsel to prescribe regulations to carry out their responsibilities under chapter 43.

Section 4332. Reports

Section 4332 would require the Secretary of Labor, after consultation with the Attorney General and the Office of Special Counsel, to provide an annual report to Congress concerning actions taken under chapter 43 during the prior fiscal year. The Committee wishes to ensure that such information is regularly and promptly provided. In order to fulfill its oversight responsibilities, the Committee must have access to recent statistics and information, and this annual report will enable the Committee to conduct effective oversight.

Section 4333. Outreach

Section 4333 mandates certain outreach activities to be undertaken by the Secretaries of Labor, Defense, and Veterans Affairs.

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Section 2(b) of the reported bill would make conforming amendments to titles 38, 5, 10, and 28 of the United States Code.

Section 3. Exemption from Minimum Service Requirements

Section 3 of the bill provides for an exemption from the minimum service requirements of title 38, United States Code.

Section 4. Thrift Savings Plan

Section 4 of H.R. 995 allows Federal and Postal employees who separate or enter leave-without-pay status to perform military service to make up contributions to the Thrift Savings Plan (TSP) missed because of military service.

Federal and Postal employees who separate from service or who enter leave-without-pay status to perform military service cease to be eligible to make contributions to the TSP or have their employing agencies contribute to their accounts during their period of military service. The TSP is a deferred compensation arrangement similar to private sector 401(k) plans. The structure of the TSP is based on the premise that contributions by employees must be deferred from current civilian pay in order for an employee to enjoy the tax benefits of deferred income, which are an integral part of the TSP.

Under current law, Federal and Postal employees who return from active military service have certain reemployment and restoration rights. These include the rights to obtain retirement credit under the Civil Service Retirement System (CSRS) or under the basic annuity provisions of the Federal Employees' Retirement System (FERS) for the period of military service. Employees who separate from service or who enter leave-without-pay status to perform active military duty have not contributed to the TSP or receive agency contributions under current law. Since the TSP is an important component of retirement benefits for employees covered by FERS, a change in current law will clarify the obligation to provide the opportunity for these employees to gain full retirement credit for their period of military service.

Section 4 authorizes an employee who separates from service or enters leave-without-pay status to perform military service and is subsequently restored or reemployed to a position covered by CSRS or FERS, pursuant to chapter 43 of title 38, United States Code, to make up missed contributions to the TSP. The maximum amount an employee may contribute is equal to the amount an employee would have been eligible to contribute, subject to the applicable statutory maximums, reduced by any contributions actually made during the period of military service. (Employees may use military or annual leave to cover periods of military service. Since employees on military and annual leave continue to receive civilian basic pay, contributions continue to be made to the Thrift Savings Fund for such periods.)

Under Section 4, an employing agency must give an employee up to two times, and may give an employee up to four times the length of his or her military service to make up TSP contributions, although an employee may choose to make up contributions sooner. Make-up
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contributions shall be made at the same time, in the same manner, and in addition to, contributions the employee is otherwise eligible to make. If an employee is entitled to agency matching contributions based on make-up contributions, the agency shall make such contributions in the same manner as regular matching contributions. Agency matching contributions attributable to employee make-up contributions shall be in addition to any matching contributions to which the employee is already entitled. Upon reemployment or restoration, the employing agency will pay any agency automatic contributions to which the employees would have been entitled during the make-up period. Lost earnings will be Paid on any matching or automatic contributions made up under these provisions.
The period of military service will be counted towards service required for vesting in T-SP agency automatic contributions, and any separation to perform military service will not cause forfeiture of such contributions if the employee is subsequently reemployed or restored pursuant to chapter 43 of title 38, United States code. Persons who received involuntary TSP payments as a result of their separation to perform military service will have the right to restore those payments to the plan. Employees who have been restored or reemployed before the date of enactment of this Act shall be entitled to make up contributions for the period beginning with their absence from civilian service and continuing through either the date of enactment or the first TSP open season from which the employee is eligible, whichever occurs first.

More specifically, section 8432b(a) provides that the new section applies to any employee who separates from service or enters leave-without-pay status to perform military service and is subsequently restored to or reemployed in a position subject to chapter 84 of title 5, United States Code, pursuant to chapter 43 of title 38 United States Code.

Section 8432b(b) provides that each employee to whom this section applies may contribute to the Thrift Savings Fund, in accordance with this subsection. The maximum amount which an employee may contribute under this subsection is equal to the maximum amount an employee would have been eligible to contribute for the period of military service, not counting any period during which the employee would not otherwise have been eligible to contribute reduced by any contributions actually made during the period o military service.

Contributions under this subsection shall be made at the same time and in the same manner as would any contributions made under section 8432(a) of title 5, United States Code; shall be mad over the period of time specified by the employee under paragraph 4(B) of this subsection; and shall be in addition to any contribution then actually being made under section 8432(a) (regarding contributions to the Thrift Savings Plan).

The Executive Director of the Federal Retirement Thrift Investment Board shall prescribe the time, form, and manner i which an employee may specify the total amount such employee wishes to contribute under this subsection with respect to any particular period of active duty referred to in paragraph (2)(B) of the section and the period of time over which the employee wishes make contributions under this subsection. The employing agency may impose a

maximum limit on the make-up period, however such limit shall not be shorter than two times the period refer to in paragraph (2)(B) no longer than four times that period. Section 8432b(c) provides that, if an employee makes contributions under subsection (b), the employing agency shall make contributions to the Thrift Savings Fund on the employee's behalf in the same manner as would be required by section 8432(cX2) of title United States Code (regarding agency matching contributions), the employee contributions were being made under section 8432 (regarding employee contributions). In carrying out this subsection agencies shall disregard any contributions then actually being made under section 8432(a) (regarding employee contributions) a any agency contributions relating thereto.

Section 8432b(d) provides that an employee who is covered section 8432b is entitled to have contributed to the Thrift Savings fund on such employee's behalf by the employing agency
amount equal to one percent of such employee's basic pay, as determined under section 8432(e), for the period referred to in subsection (b)(2)(B) of section 8432b (regarding the period of military service) reduced by any contributions actually made on such employee's behalf under section 8432(c)(1) (regarding agency automatic contributions) with respect to the period referred to in sect 8432(b)(2)(B) (regarding the period of military service).

Section 8432b(e) provides that, for purposes of any computation under this section, an employee shall, with respect to the period of military service referred to in section 8432b(b)(2)(B), be considered to have been paid at the rate which the employing agency determines would have been payable over such period had such employee remained continuously employed in the position which such employee last held before separating or entering leave-without-pay status to perform military service.

Section 8432b(f) provides that, under rules to be prescribed by the Executive Director of the Federal Retirement Thrift Investment Board, an employing agency shall pay lost earnings on matching or agency automatic contributions retroactive to the date such contribution would have been made but for the period of military service.

Section 8432b(g) provides that amounts paid under subsections (c), (d), or (f) shall be paid by the agency to which the employee is restored or m which such employee is reemployed, from the same Source as would be the case under section 8432(e) of title 5, United States Code, with respect to sums required to be contributed by employing agencies under section 8432(c), and within the time prescribed by the Executive Director of the Federal Retirement Thrift Investment Board

Section 8432b(h) provides that, for purposes of section 8432(g) Of title 5, United States Code (regarding forfeitability of contributions), in the case of an employee to whom this section applies, a separation from Government service in order to perform military service on which the employee's restoration or reemployment rights are based shall be disregarded and such employee shall be credited with a period of civilian service equal to the period of military service referred to in section 8432b(2)(B).

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An employee to whom this section applies may elect, for purposes of section 8433(d) of title 5, United States Code (regarding the transfer of account balances to eligible retirement plans), or section 8433(h)(1) or 8433(h)(2) (regarding nonforfeitable account balances of less than $3,500), to have such employee's separation (described in section 8432b(a)(1)), treated as if it had never occurred. An election under this subsection shall be made within such period of time after restoration or reemployment, as the case may be, and otherwrise in such manner as the Executive Director of the Federal Retirement Thrift Investment Board prescribes.

Section 8432b(i) requires the Executive Director of the Federal Retirement Thrift Investment Board to prescribe regulations to carry out section 8432b

Section 4(a)(2) of the bill amends the table of sections for chapter 84 of title 5, United States Code, to include the new section 8432b.

Section 4(b) amends section 8433(d) (regarding the transfer of account balances to eligible retirement plans) and 8433(h) (regarding nonforfeitable account balances of $3,500 or less) of title 5, United States Code, to allow employees who separate from service in order to perform military service to elect under section 8432b(f)(2) of title 5,

United States Code, to treat such separation as if it had never occurred for purposes of section 8433(d) and 8433(h).

Section 4(c) amends section 8432 of title 5, United States Code, by adding a new subsection (i).

The new subsection (i) provides that an employee to whom section 8432b of title 5, United States Code, applies and who, during the period of such employee's military service, is eligible to make an election under section 8432(b)(1) (regarding elections to make contributions to the Thrift Savings Fund), or would have been eligible but for having either elected to terminate individual contributions to the Thrift Savings Fund within 2 months before commencing military service or separated in order to perform military service, may be afforded the opportunity, within a reasonable time after being restored or reemployed, to make any election that would be allowable during a period described under section 8432(b)(1)(A) (regarding elections to make contributions to the Thrift Savings Fund). The Executive Director of the Federal Retirement Thrift Investment Board shall prescribe regulations to carry out this section.

Section 4(d) of the bill amends section 8351(b) of title 5, United States Code, by adding a new paragraph (11).

Paragraph (11) states that, in applying section 8432b of title 5, United States Code, to an employee contributing to the Thrift Savings Fund after being restored or reemployed, pursuant to chapter 43 of title 38, United States Code, with respect to a position subject to subchapter III of chapter 83 of title 5, United States Code (regarding the Civil Service Retirement System), any reference in such section to contributions under section 8432(a) shall be considered a reference to employee contributions under section 8351, the contribution rate to be assumed under section
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8432(b)(2)(A) shall be the maximum percentage allowable under section 8351(b)(2), and subsections (c) and (d) of section 8432b (regarding agency contributions), shall be disregarded.

Section 4(e) of the bill provides that section 4 and the amendments made by section 4 shall be effective on the date of enactment of this Act and shall apply to any employee whose eligibility for restoration or reemployment occurs on or after August 2, 1990.

Section 4(f) provides that, in the case of an employee restored or reemployed under circumstances described in section 8432b(a) of title 5, United States Code, before the date of enactment of this Act, the amendments made by this section shall apply subject to the following: (1) the employee shall be deemed not to have been reemployed or restored under the date of enactment of this Act or the first day following such employee's reemployment or restoration on which such employee is or was eligible to make an election relating to contributions to the Thrift Savings Fund, whichever occurs or occurred first; (2) if the employee changed agencies during the period between the date

of actual reemployment or restoration and the date of enactment of this Act, the employing agency as of the date of enactment shall be considered the reemploying or restoring agency; (3) for purposes of any computation under section 8432b of title 5, United States Code, pay shall be determined in accordance with section 8432b(e) except that with respect to the period beginning on or after the date of the employee's actual reemployment or restoration and ending on the day before the date of enactment of this Act or the first day following such employee's reemployment or restoration on which such employee is or was eligible to make an election relating to contributions to the

Thrift Savings Plan, whichever occurred first, actual pay attributable to such period shall be used; and (4) the maximum amount which an employee may contribute is equal to the contributions under section 8432(a) of title 5, United States Code, which an employee would have been eligible to make over the period beginning on the date of separation or commencement of leave-without-pay status and ending on the date determined under section 4(f)(1) of this Act.

Section 5 of the bill makes a technical amendment to a previously passed public law.

Section 6 Effective Dates

Sections 6(a)(1) and (2) of H.R. 995, as amended, are transition provisions which would provide that the Committee bill shall only become effective with respect to reemployments initiated more than 60 days after enactment of this Act. The current law would remain in effect for 60 days after enactment of this Act.

Section 6(a)(3) of the reported bill would provide that, for purposes of the five-year service limitation provisions of section 4312(c), military service performed prior to the date of enactment of H.R. 995 shall be considered toward the five-year limitation only to the extent that such period of military service would have counted toward the service limitations under current law. For example, if a National Guardsman served four years on active duty from 1980-1984,

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returned to his preservice employer in 1984 and then served three years from 1987-1990 in an Active Guard/Reserve (AGR) tour of full-time National Guard duty (defined as active duty for training for purposes of title 38, USC), under current law only the four years of active duty /would count toward the service limitations of the amended Act. If the three year AGR tour began later than 60 days after the enactment of this Act, and was fully completed, this National Guardsman would not have reemployment rights after discharge from that AGR tour unless one of the exclusion provisions of section 4312(c) was applicable.

Section 6(b) of the reported bill would require that the new anti-retaliation provisions of section 4311(c) of this Act, as opposed to those already in effect under current law, as recodified in sections 4311(a) and (b), are to become effective on the date

of enactment of the Committee bill as to causes of action which accrue on and after that date. These new provisions include retaliation protection against persons who testify or assist in any proceeding, investigation or lawsuit under this Act and apply regardless of any period of military service.

Section 6(c) of H.R. 995, which concerns the right of an employee to continue insurance coverage for up to 18 months while in the military service under section 4315(c), shall be effective on the date of enactment of this Act, except that a person who entered active military service between August 1, 1990 and the date of enactment of this Act and who is still in the military, may elect to reinstate or continue coverage for the remaining portion of the 18 months that began upon his or her leaving to enter military service. Thus, effective on or after the date of enactment of this Act, an employee in the military on the effective date of enactment of this Act could
choose to continue insurance coverage for whatever time remains of 18 months after leaving the employ of the employer to enter military.

Section 6(d) of the reported bill would provide that the disability provisions of new section 4313(a)(3) shall apply to reemployments initiated on or after August 1, 1990 and are meant to supersede ab initio the provisions of section 2027 of current law effect as of that date.

Section 6(e) of the reported bill provides instructions concerning the cases to be included in the reports that are to be made the Secretary of Labor.

Section 6(f) of the reported bill is a savings provision.

[Congressional Record: September 13, 1994]

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UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT OF 1993

Mr. MONTGOMERY. Mr. Speaker, I ask unanimous consent to take from the Speaker's table the bill (H.R. 995) to amend title 38, United States Code, to improve reemployment rights and benefits of veterans and other benefits of employment of certain members of the uniformed services, and for other purposes, with a Senate amendment thereto, and concur in the Senate amendment with an amendment.

[Actual Amendment Language deleted.]

Mr. MONTGOMERY (during the reading). Mr. Speaker, I ask unanimous consent that the Senate amendment and the House amendment to the Senate amendment be considered as read and printed in the Record. The SPEAKER pro tempore. Is there objection to the request of the gentleman from Mississippi?

There was no objection.

The SPEAKER pro tempore. Is there objection to the original request of the gentleman from Mississippi?

Mr. STUMP. Mr. Speaker, reserving the right to object, I shall not object, but I take this time to yield to the gentleman from Mississippi for an explanation of the House amendment to the Senate amendment to H.R. 995.

Mr. MONTGOMERY. Mr. Speaker, the amendments under consideration today reflect a compromise between the House bill (H.R. 995), which we passed in May 1993, and the Senate amendments, which cleared the Senate last November. Since that time, we have been working out our differences and responding to concerns raised about certain aspects of this legislation.

Mr. Speaker, this measure, which would replace current chapter 43, title 38, United States Code, is an update of a measure first enacted by the Congress in 1940, on the eve of World War II. It was one of the most important measures enacted to ensure the readjustment of veterans to civilian life following military service. H.R. 995, as amended, continues what has been our national policy for over 50 years--that is, it assures the citizen-soldier that he or she can return to the civilian job held prior to entering military service and can return without any loss of seniority. Additionally, this compromise clarifies and updates chapter 43 to reflect current employment conditions as well as current conditions of military service. Mr. Speaker, although the joint explanatory statement accompanying this measure explains the compromise in detail, I'd like to summarize some of the important rights provided to veterans under H.R. 995, as amended:

(1) A servicemember would be free to perform military service of limited duration, either in active military service or in the Reserve, without fear of reprisal or other adverse action by his employer. Except for certain types of military service, the total service may not exceed 5 years.

(2) To address employers' concerns about unexplained absences, the servicemember would now be required to provide notice of impending military service whenever possible, and, when requested by the employer, to document honorable service upon return to civilian employment.

(3) A servicemember who leaves a civilian job would continue to be deemed on furlough or leave of absence and would be entitled to other rights and benefits that are available to other employees on leave of absence.

(4) The bill clarifies the servicemember's right to continue employer-sponsored health insurance.

(5) While guaranteeing a veteran's right to pension benefits which would have accrued during military service, regardless of the nature of the pension plan, the bill would make it plain that pension plans will not have to pay earnings or forfeitures on make-up contributions.

(6) A servicemember returning to Federal employment would be assured that employer-provided and contributory pension benefits could be restored with little if any loss of benefits.

Mr. Speaker, there are several matters related to this important legislation that I want to comment on in more detail. First, I want to express the committee's strong disagreement with the recent decision in

Rumsey v. N.Y. State Dept. of Corr. Services, 19 F.3d 83 (2nd Cir. 1994), which limited the protection given reservists on active duty for training only to ``substantial rights'' such as discharge, demotion, or failure to promote. While the amended act speaks in terms of ``benefit, benefits of employment or rights and benefits,'' and no longer uses the term ``incident or advantage of employment,'' the intent has always been to have an expansive interpretation, such as that expressed by the sixth circuit in Monroe v. Standard Oil Co., 613 F.2d 641, 645 (6th Cir. 1980), aff'd. 452 U.S. 549 (1981). ``[I]ncidents or advantages of employment * * * is intentionally framed in general terms to encompass the potential limitless variation in benefits of employment that are conferred by an untold number and variety of business concerns.''

Additionally, I want to stress that new section 4311, which prohibits discrimination and related acts of reprisal against persons who serve in the uniformed services, reaffirms that the standard of proof in a discrimination or retaliation case is the so-called but for test and that the burden of proof is on the employer, once a prima facie case is established. This standard and burden of proof apply to all cases, regardless of when the cause of action occurred, except for those new causes of action created in new section 4311(c).

It should be noted that, because of the blurring of the distinctions between the types of military service, for example, active duty versus active duty for training, it is no longer rational or equitable to make rights and obligations under chapter 43 dependent on the distinctions between types of service. Rather, under section 4312 of H.R. 995, as amended, most types of service would be cumulatively considered toward the service limits. Because employment and reemployment are intended to protect noncareer servicepersons, the committee considers this to be an appropriate approach. Accordingly, the measure we are considering today would generally establish a 5-year limitation on total military service during the period of employment with the employer against whom reemployment rights are asserted.

Section 4312(e) of H.R. 995, as amended, would base time limits for applying for reemployment strictly on the length or duration of the military service from which the serviceperson is being discharged or released. Under current law, the deadline for returning servicemembers to report to their preservice employer for reemployment depends on the type of category of service. It is the committee's view that this is a far more rational approach to this issue because both the employer and the serviceperson are affected by the length of time the servicemember is away from his or her civilian employment. The nature of the individual's service is unimportant and has no effect.

I want to also focus on principles related to new section 4313, concerning reemployment positions. This section would address the issue of the position to be granted a serviceperson disabled while in military service, regardless of length of service, and who is not qualified for the ``escalator'' position after reasonable efforts to accommodate the disability. That obligation would be to reemploy the returning servicemember in an equivalent position in terms of seniority, status, and pay for which the person is qualified or can become qualified with reasonable efforts by the employer. If no such position exists, the nearest approximate position in terms of seniority, status, and pay would be required to be found. If a position other than the ``escalator'' position is offered to a returning disabled servicemember, full company seniority for all purposes is always to be accorded the disabled serviceperson, regardless of whether seniority follows an employee under other circumstances. New section 4313 would also require the reemployment of returning servicepersons who are not found qualified for their ``escalator'' positions for any reason other than disability, regardless of length of service, but who can qualify for a lesser position in terms of status and pay. This provision is primarily intended to deal with employees who return to technologically advanced situations for which they cannot qualify but who can perform in another position not necessarily in their ``escalator'' line. They, too, would receive full company seniority for all purposes in the new position.

Section 4317 of H.R. 995, as amended, would provide that an employee on military leave shall, at his or her request, be covered by insurance provided by the employer for up to 18 months. This protection is similar to the continuation of health insurance under the so-called COBRA provisions of the Employee Retirement Income Security Act, 29 U.S.C. 1161, et seq., but applies to all individuals entering the uniformed services, without limiting qualifications such as the size of the work force of the person's employer. The individual employee may be required to pay not more than 102 percent of the full cost of

continuing insurance coverage, except in the case of persons serving periods of training or service for 30 or fewer days. In the case of these short tours, the employer is required to continue the insurance coverage, and the individual employee may only be required to pay the employee share, if any. Dependents of Reserve component members are entitled to participate in the military health care system, including CHAMPUS, only when the member has been called to serve for at least 31 days. The committee intends new section 4317 to ensure that there is no gap in health insurance coverage of the reservist's family while the reservist is performing military training.

It should be noted that new section 4312(a)(1) would generally require an individual who leaves a civilian job for service in the uniformed services to give written or verbal notice of the forthcoming military absence from employment to his or her employer. Under current law, only a member of the Selected Reserve must notify his or her employer before leaving work for active duty for training or inactive duty for training. There is no current requirement to notify the employer before leaving work for active duty or initial active duty for training. Under the measure we are considering today, an individual who does not indicate in any way that he or she is leaving because of military duty would no longer be protected--unless the exception provided in new section 4312(b) is applicable, but an individual who leaves for two or more reasons, one of which is for military duty, would continue to be protected.

Sections 4316(a) and 4316(b)(1) of the compromise measure would reaffirm that a departing serviceperson is to be placed on a statutorily mandated military leave of absence while away from work, regardless of the employer's policy. Thus, terminating a departing serviceperson, or forcing him or her to resign, even with a promise of reemployment, is of no effect. Accordingly, while away on military leave, the servicemember would be entitled to participate in whatever nonseniority related benefits are accorded other employees on nonmilitary leaves of absence. In contrast, benefits which are seniority based would not be limited to the treatment accorded employees on nonmilitary leaves of absence, but are to be accorded, after reemployment, as if the servicemember had remained continuously employed under the escalator principle. Section 4316(b)(2), however, provides that a person who is absent from a position of employment because of service in the uniformed services and knowingly provides written notice of intent not to return to a position of employment after service in the uniformed service, is not entitled to rights and benefits not determined by seniority. I want to emphasize that the employer would have the burden of proving that a person providing written notice of intent not to return to a position of employment was fully aware of the consequences of this action.

Mr. Speaker, the issue of pension rights and benefits of persons serving in the Armed Forces is an important and sometimes controversial aspect of this legislation. In trying to clarify the status of existing law, the committee has learned that a very powerful industry has developed since the first reemployment rights bill was signed by President Roosevelt in 1940. Although the strength of this industry is not surprising, given the growth of American pension plans, the organized resistance to clarification of existing law with respect to veterans' pension rights stands in marked contrast to the widespread cooperation between employers and the Government in resolving fundamental issues related to veterans' reemployment rights.

This cleft between a supportive and generous employer community, which admittedly bears a burden when employees enter military service, and the at times stingy and antagonistic pension community is a mystery to me, Mr. Speaker. Parts of the pension community apparently fail to understand the necessity for a strong national defense, and that the existing veterans reemployment law imposes justifiable burdens on employers. I say justifiable because we are talking about providing for and contributing to the common defense of this country. The preamble to the Constitution of the United States declared the purpose of this far-reaching undertaking was ``to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity.'' Domestic tranquility, our individual freedoms and liberty, and the general welfare would be unattainable objectives if we did not have a strong common defense. As we learned when our Nation was attacked in 1941, just as our ancestors learned when the United States was invaded in the early part of the 19th century, a strong national defense is the essential underpinning to all of the other purposes of the Constitution.

The linkage between the purposes of the veterans reemployment law and the promotion of the common defense was ignored by some pension industry representatives in their discussion of this legislation, so I wish to remind my colleagues of the importance of this law to our Nation's defense. Most Americans today take for granted that we have a strong and protective military force, but this was not always the case. In the late 1930's, as the storm clouds of war and the leveling effect of tyranny were observed in Europe, our ability to defend this Nation against a determined aggressor was suspect. In spite of the changes in attitude and national policy which resulted from the harbingers of world war, such as the adoption of compulsory military service and a great strengthening of the defense industries, the Nation was stunned by the sudden Japanese attack on Pearl Harbor which destroyed much of the Pacific fleet. It is unlikely the most knowledgeable observers would have predicted this event even 1 year before this act of aggression took place, so it is worth noting how rapidly events on the world stage can unfurl.

Although few would compare the political situation in the world today with that which existed when the first veterans' reemployment rights legislation was enacted in 1940, it is important, Mr. Speaker, to examine the present and future roles of the defense forces of this country. Even as the notion of defending this country against foreign aggressors fades into distant memory, the United States has undertaken a much larger peacekeeping mission worldwide. Our Nation is debating what role the American military should play in response to situations in distant parts of the world involving anarchy, starvation, and allegations of genocide. It's a slightly different question than the one confronted by the Congress on the eve of World War II, but there are similarities. Defending the United States against foreign aggressors is the simple role given such prominence by the authors of the Constitution; however, in view of the prominence of American interests and American personnel throughout the globe, a simplistic reading of this role may make it impossible to fulfill in a meaningful way.

Today, much of our national policy is focused on efforts to strengthen our national economic base--on plans to enable the engine of the national economy to run smoother and stronger, ever more powerful. In a fast-changing world, it too often goes unremarked that the U.S. military strength serves as a deterrent to aggressive leaders throughout the world, thus making it possible for the Nation to do business abroad. Clearly, the perception of a nation willing to respond to aggressive actions harmful to its national interests protects and provides an advantage to American companies operating in a global market.

Mr. Speaker, restoring the citizen-soldier to the position he or she would have obtained had he or she remained continuously employed is the principle which undergirds the veterans reemployment law. In the words of the law, the veteran is to be restored ``without loss of seniority.'' Although there are certain benefits ``that might have flowed from experience, effort, or chance to which he cannot lay claim under the statute,'' McKinney v. Missouri-K.-T. R. Co., 357 U.S. 265, 271 (1958), the Supreme Court has determined that if ``the benefit would have accrued, with reasonable certainty, had the veteran been continuously employed by the private employer, and if it is in the nature of a reward for length of service, it is a `perquisite of seniority'' protected by the law. Alabama Power Co. v. Davis, 431 U.S. 581, 589 (1977). While the Alabama Power decision noted that pension benefits are a current cost of employing potential pension recipients and that current compensation may be reduced in favor of more favorable pension benefits, the Court affirmed that pension plans are a reward for length of service and consequently are a protected perquisite of seniority.

Thus, in 1977, some 37 years after the law was first enacted, the claims of Mr. Davis for pension rights which he earned during World War II were finally settled. Because the amount of an employee's pension benefit is usually not determinable until the end of the employee's tenure with the employer, and is generally calculated at the end of the employee's working life, an employer failure to observe the requirements of the existing law that the veteran be made whole may go unnoticed for several decades. Although Congress has several times amended the veterans reemployment law, it was the administration's 1991 proposal to rewrite the law which brought the question of veterans' rights to employer contributions in certain pension plans to the Congress' attention. In Alabama Power, the Supreme Court raised, but refused to decide, the rights of persons who are participants in defined contribution plans. Since there is a clear trend toward increasing employer reliance on such plans, which do not guarantee a particular benefit level to retirees, but which base the ultimate benefit on the employer's and in some cases, the employee's, contribution, the Court's refusal to rule on this issue has caused concern among participants in defined

contribution plans who leave jobs for military service and except to be fully restored when they return. Although there are clear differences in the manner in which defined benefit and defined contribution plans are funded and administered, the distinction between these two types of plans is merely one of convenience and cost so far as the employer is concerned. In both types of plans, the employer makes a payment of a certain amount in order to provide an incentive to the employee to continue working for the employer. The only difference is that in one type of plan, the employer. The only difference is that in one type of plan, the employer pays an amount calculated by actuaries as necessary to meet a certain benefit level, while in the defined contribution plan, the employer is free to contribute an amount that will not produce any guaranteed benefit level. There is no reason to view this distinction as one that would change the nature of the benefit to the employee.

In 1991, when the Department of Labor transmitted its proposal to recodify the veterans reemployment law, it specifically treated those veterans whose employers happened to maintain a defined contribution plan as second-class citizens. Then-Secretary of Labor Lynn Martin wrote:

> If the employee is a participant in a defined contribution plan, the employee's period of service in the uniformed services will be treated as service with the employer or employers for purposes of vesting but not for purposes of benefit accrual. The exception of defined contribution plans (such as profit sharing plans) from the obligation to provide benefit accruals was made because such accruals represent the contributions actually made to the plan participants' individual accounts, and are more properly characterized as current compensation than as perquisites of seniority.

Uniformed Services Employment and Reemployment Rights Act of 1991 (H.R. 1578), House Report 56, 102d Congress, 1st Sess. 63 (1991).

Mr. Speaker, I think this was a callous and short-sighted position taken by the administration in 1991, and our committee rejected it when we reported the legislation now under discussion as well as the bill which was considered and passed by the House in the 102d Congress. Most employees are not in a position to negotiate the manner in which their employer provides pension benefits, and to attempt to change the character of such a benefit based on the manner in which the employer chooses to pay for it seems disingenuous and conflicts with the underlying principle of the existing law, which is that the returning servicemember is to be made whole. It is clear that, given the court's persistent finding that the law is to be liberally construed in favor of the returning servicemember, and notwithstanding the Supreme Court's declination in Alabama Power to find that such plans have always been covered by the law, the administration had concluded that such plans were covered unless express language to the contrary were enacted.

The House bill and the Senate amendments have both rejected the previous administration's position that pension benefits should be characterized as current compensation. Although it is apparent that defined contribution plans differ from employer to employer and, by definition, offer no guaranteed benefit to qualifying employees, there is not such uncertainty about the amount which an absent employee accrues under defined contribution plans that such benefits should be excluded from the perquisites of seniority. Cf. Tilton v. Missouri Pacific Railroad Co., 357 U.S. 265, 270 (1963) (``To exact such certainty as a condition for insuring a veteran's seniority rights would render these statutorily protected rights without real meaning."). To deny such rights to employees who serve in the military undermines the fundamental principle that the employee should not be disadvantaged by military service.

An additional consequence of the Court's failure to conclusively determine that all pension benefits, including benefits derived from defined contribution plans, are protected perquisites of seniority is the creation of confusion and dissent among the many factions involved in the funding and administration of pension benefits. This confusion is made worse by the fact that when the Congress enacted the Employee Retirement Income Security Act [ERISA] of 1974, it made no provision to deal with the pension rights of returning servicemembers who had faithfully served their country. So far as this committee has been able to learn, there is no reflection of the veterans pension rights at issue here in any of the regulations implementing that law or the laws granting employers favorable tax treatment for contributions made to

such plans. The committee has learned that since ERISA does not include specific rules which require make-up contributions, many employers or pension plan administrators may have erroneously concluded that such contributions are not required under existing law. This is not the view of this committee or the House, and since the issue was raised by the administration's 1991 proposal, we have determined to resolve it once and for all. In arriving at our decision, we have not been unmindful of the compliance burden which may result from a clarification of this issue. Further, although we note the interest of the tax-writing committees in clarifying that such employer contributions would be tax-deductible, this issue is not addressed in this legislation because it is not an issue within our committee's jurisdiction.

The Supreme Court determined in Alabama Power that service in the military is to be credited for both vesting and benefit accrual purposes because the benefit is a reward for length of service and it is reasonable certain that the benefit would have accrued had the employee not been away in military service. The protections of the law apply equally to both defined benefit plans and defined contribution plans, so long as the specific plan at issue meets the requirement of Alabama Power. See Reilly v. New England Teamsters, 737 F.2d 1274, 1281-82 (2d Cir. 1984). The same would be true of those profit-sharing plans which are rewards for length of service. To the extent that Raypole v. Chemi-trol Inc., 754 F.2d 169 (6th Cir. 1985) suggests differently, it is wrongly decided. The decision in Raypole clearly does not reflect the intent of Congress when it drafted the original act. Congress intended to assure civilians called to the colors that they would not be disadvantaged while in service compared to workers whose lives were not similarly interrupted. The Raypole opinion, relying on the Alabama Power decision, found that when the Supreme Court ``expressly withheld its views on whether defined contribution plans are to be treated differently from defined benefit plans * * *'' it meant that profit sharing plans were not to receive the full enforcement of this law, see Alabama Power Co., 431 U.S. 593 n. 18, 97 S.Ct. 2002, 2009 n. 18 (1977). The result in this case is that a veteran would clearly be denied a benefit which almost certainly would have accrued had he not gone into the service, a benefit which can not be reasonably distinguished from the pension benefits at issue in Alabama Power.

The decision in Raypole ignores the Congress' intent that the law be interpreted broadly so the veteran will ``* * * not be disadvantaged by serving his country.'' See McKinney v. Missouri-Kansas-Texas Railroad Co., 357 U.S. 265, 270 (1957). The Raypole court also stated that ``[w]e do not believe that Congress intended the Act to operate such that veterans share in the earnings from profits which they did not create at the expense of those who did'' in reaching its final conclusion. See Raypole at 174. But this reasoning is also at odds with the intent of Congress because this rule as applied would place the veteran in the same position as an employee who had been fired and then eventually rehired. Congress did not intend for this to occur because it weighed the costs to the employer in drafting the original act, and determined that any perceived injustice to employers were more than offset by the benefits gained in achieving domestic tranquility through an adequately manned military. Defined contribution plans, including profit sharing plans, are covered by the act because ``no practice of employers or agreements between employers and unions can cut down the service adjustment benefits which Congress has secured the veteran under the Act.'' See Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275, 285 (1946). This coverage applies to all persons who have rights under this act and its predecessors since 1940.

Section 8(h) of the compromise agreement contains two substantive provisions which speak to this issue. First, the bill provides that ``[n]othing in this Act shall be construed to relieve an employer of an obligation to provide contributions to a pension plan * * * in effect on the day before this Act takes effect.'' It is the House's view that returning servicemembers have always been entitled to employer contributions that would have been made during military service, and that the provisions of proposed section 4318 are merely a restatement of the existing law. However, it should be noted that--

The strong deference accorded legislation in the field of national economic policy is no less applicable when that legislation is applied retroactively. Provided that the retroactive application of a statute is supported by a legitimate legislative purpose furthered by rational means, judgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches. Pension Benefit Guaranty Corp. v. R.A. Gray & Co., 467 U.S. 717, 729 (1984). Thus, even if this legislation were found to be retroactive, instead of merely clarifying current law which I believe is the case, given the purpose of the law and the means of achieving it, the Congress' power to enact such legislation cannot be

doubted. There can be no question about the substantial role which the provision of reemployment rights to former servicemembers has played in our national defense, especially during the time of the All-Volunteer Force. It is one of a number, but certainly one of the most important, inducements to persons to leave civilian life for a time and serve their country. I wish to emphasize that this inducement is not provided to the career soldier, and that it is tailored to be as unobtrusive as possible given the need to recruit young men and women to defend the national interest.

The value of this law was most recently demonstrated during the Persian Gulf war, when hundreds of thousands of reservists and National Guard members were forced to leave their civilian jobs to form part of a force which ejected the Iraqi army from Kuwait and preserved a key economic and political alliance with Kuwait. Second, the bill would provide noncomplying plans with 2 years to bring the terms of those plans into compliance with the act. This compliance may entail recalculating pensions already being paid to employees whose pensions were calculated without the benefit of makeup contributions during the employee's military service. Although pension industry representatives have expressed apprehension about potential noncompliance with this measure or ERISA, the committee has learned from extensive discussion with pension industry experts that noncompliance with pension law requirements is an everyday occurrence, and that there is nothing remarkable about a company discovering a liability that it was previously unaware of and making a multimillion-dollar retroactive contribution to the plan maintained for its employees. In contrast, compliance with the existing veterans reemployment law should not be a multimillion-dollar adjustment, since the number of persons who leave a civilian employer and return to that employer within the time limits established by the law is relatively small. One estimate is that fewer than 30,000 persons would be entitled to such makeup contributions from a defined contribution pension plan in a recent year--fiscal year 1992--with an average per-enrollee makeup contribution of $1,900 covering the entire period of military service. The number of enrollees and amount per enrollee would be much smaller for years prior to 1992.

According to the Congressional Research Service, the percent of workers covered by defined contribution plans more than tripled--from 11 million to 35 million workers--from 1975 to 1990. Spread across the millions of employers and billions of dollars which such plans accept in contributions each year--private pension plan assets exceeded $3 trillion in 1993, while contributions to such plans in 1990 amounted to $75.8 billion--compliance with the existing law, even if it is done with a lump-sum contribution, poses an almost insignificant burden on the employer community. It should also be noted that the compromise does not include the House-passed provision requiring employers to make up earnings on employer contributions or to reallocate or otherwise add to the veteran's account forfeitures which were distributed to other employees' accounts during the period of military service. To address employer and pension plan administrator concerns about possible noncompliance, the compromise includes a 2-year window for noncomplying plans to make up employer contributions which were required, but not made, under existing law. The committee understands that other technical and conforming changes may also be recommended by the committees with jurisdiction over ERISA and the tax code. Mr. Speaker, since 1940, this law has protected veterans' employment rights. Pension rights have been and will continue to be an important aspect of employment seniority. Preserving the veteran's right to such benefits regardless of the way in which such benefits are calculated is consistent with the original intention of the 1940 act, which ``was to preserve for the returning veterans the rights and benefits which would have automatically accrued to them had they remained in private employment rather than responding to the call of their country.'' Accardi v. Pennsylvania R.R. Co., 383 U.S. 225, 229-30 (1966). Their response to that call is the basis for all of the bounties which residents of this great Nation enjoy today, and the House honors that response by its action here today.

Mr. Speaker, this compromise is important to our national defense efforts, and I urge all my colleagues to support it. There follows an explanatory statement comparing the House bill, the Senate amendment, and the compromise agreement.

Explanatory Statement on H.R. 995

H.R. 995 reflects a compromise agreement that the Senate and House of Representatives Committees on Veterans' Affairs have reached on certain bills considered in the Senate and the House of

Representatives during the 103d Congress. These measures are H.R. 995, which the House passed on May 4, 1993, (hereinafter referred to as ``House bill''), and the text of S. 843, which the Senate passed on November 8, 1993, as an amendment to H.R. 995 (hereinafter referred to as ``Senate amendment'').

The Committees on Veterans' Affairs of the Senate and the House of Representatives have prepared the following explanation of H.R. 995 as amended (hereinafter referred to as the ``compromise agreement''). Differences between the provisions contained in the compromise agreement and the related provisions in the above-mentioned House bill and Senate amendment are noted in this document, except for clerical corrections, conforming changes made necessary by the compromise agreement, and minor drafting, technical, and clarifying changes.

Scope Of Coverage

Current law: Section 4301(a) provides that an individual must have left a position (other than temporary) in the employ of an employer in order to perform training or service in the Armed Forces to be eligible for reemployment rights and benefits.

House bill: Proposed new section 4312(a) would provide that an individual must have left a position (other than temporary) in the employ of an employer for voluntary or involuntary service in the uniformed service to be entitled to a leave of absence or, upon completion of service, to reemployment.

Proposed new section 4303(8) would define ``other than a temporary position'' to mean a position of employment as to which there is a reasonable expectation that it will continue indefinitely.

Senate amendment: Proposed new section 4312(a) is similar to the provision in the House bill, but would not exclude individuals who held temporary positions when they entered the uniformed services from eligibility for reemployment rights and benefits. Also, proposed new section 4303 would not define the term ``other than a temporary position.''

Compromise agreement: Section 4312(d)(1)(C) would provide that an employer is not required to reemploy an individual if his or her employment prior to military service was for a brief, nonrecurrent period and there was no reasonable expectation that it would continue indefinitely or for a significant period.

The compromise agreement would not, therefore, include a definition of the term ``other than temporary position.''

Prohibition Against Discrimination And Acts Of Reprisal

Current law: Section 4301(b)(3) provides that an individual may not be denied hiring, retention in employment, or any promotion or other incident or advantage of employment because of any obligation as a member of a Reserve component of the Armed Forces.

House bill: Proposed new section 4311 would provide that (1) an individual may not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment because of present or past application for or membership in a uniformed service, or obligation for future service; (2) an employer is considered to have committed a prohibited act of discrimination or reprisal against an individual if the individual's service, application, or obligation for service was a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of the service, application, or obligation for service; (3) an employer may not discriminate against or take any adverse employment action against any individual because that individual has filed a claim under the Act, sought assistance concerning an alleged violation, testified in a proceeding, assisted or otherwise participated in an investigation, or exercised any right under the reemployment law; and (4) the prohibitions regarding discrimination will apply with respect to an individual regardless of whether that individual has performed service in the uniformed services.

Senate amendment: Proposed new section 4311 is substantively identical to the House provision but would extend protection under the reemployment law to employees in a foreign country.

Compromise agreement: Section 4311 does not contain protection for employees in a foreign country.

Maximum Period Of Service For Coverage

Current law: Under section 4304, an individual is permitted to remain on active duty for a total of four years and still retain reemployment rights. An additional year of eligibility for reemployment rights is granted if an individual remains on active duty beyond the four-year period at the request of, and for the convenience of, the Federal Government. Active duty for training and inactive duty does not count toward the five years.

House bill: Subsections (a) and (c) of proposed new section 4312 would provide for a five-year limit on an individual's cumulative length of absence from a position of employment with the employer by reason of service in the uniformed services for the purposes of reemployment rights and benefits. This would include all types of service except (1) service required beyond five years to complete an initial period of obligated service; (2) service from which the individual, through no fault of his or her own, is unable to obtain a release from service within the five-year limit; (3) service for statutorily mandated training or to fulfill additional training requirements determined by the Secretary of Defense to be necessary for individual professional skill development; (4) service resulting from an order to, or retention on, active duty during a war or national emergency under a law or joint resolution related to a specific crisis situation; (5) service resulting from an order to active duty in support of an operational mission for which personnel have been ordered to active duty in section 673b of title 10, United States Code; (6) service resulting from an order to active duty in support, as determined by the Secretary concerned, of a critical mission or requirement of the uniformed services; or (7) service resulting from an order to active duty by the President of members of the National Guard to suppress an insurrection, repel an invasion by a foreign nation, suppress a rebellion, or execute laws of the United States that the President is unable to execute with the regular army.

Senate amendment: Subsections (a) and (c) of proposed new section 4312 are substantively identical to the House provision, but with additional coverage of Coast Guard personnel ordered to or retained on active duty under circumstances excepted for other uniformed service personnel.

Compromise agreement: Subsections (a) and (c) of section 4312 contain the Senate provision.

Applications For Reemployment

Current law: Section 4301(a) requires that an individual who is inducted into the Armed Forces generally must make application for reemployment within 90 days after separation. Section 4304(a) requires the same application obligation of an individual who enlists in the Armed Forces. Subsections (c) and (g) of section 4304 require that a member of a Reserve component who is ordered to an initial period of active duty for training of not less than 12 consecutive weeks or who is ordered to active duty other than for training under section 673b of title 10, generally must make application for reemployment within 31 days after separation; section 4304(d) provides that all other individuals required to perform active duty for training or inactive duty training must report to work at the beginning of the next regularly scheduled working period after expiration of the last calendar day necessary to travel from the place of training to the place of employment following the employee's release, or within a reasonable time thereafter if delayed return is due to factors beyond the employee's control.

Under current law, if an individual is hospitalized incident to active duty, the application for reemployment generally must be made within the foregoing timeframes determined by the individual's type or category of military training or service. However, the application period begins upon discharge from hospitalization of not more than one year instead of beginning on the date of discharge from service.

House bill: Proposed new section 4312(e)(1) would require that (1) if the service was for less than 31 days or for the purpose of an examination to determine fitness to enter service, an individual entitled to reemployment must report to the employer for reemployment at the beginning of the first full regularly scheduled working period on the first calendar day following the completion of service and the expiration of eight hours after a time for safe transportation back to his or her residence or as soon as possible after the expiration of the eight-hour period if reporting within that period is impossible or unreasonable through no fault of the individual; (2) if the period of service was 31 days or more but less than 181 days, an individual entitled to reemployment must submit an application to the employer no later than 14 days following completion of service or as soon as possible thereafter if submitting an application within the period is

impossible or unreasonable through no fault of the individual; (3) if the period of service was 181 days or more, an individual entitled to reemployment must submit an application no later than 90 days following completion of service or as soon as possible thereafter if submitting an application within the period is impossible or unreasonable through no fault of the individual.

Proposed new section 4312(e)(2) would provide for an extension of the time limits specified in subsection (e)(1) by up to two years if an individual is hospitalized for, or convalescing from, an injury or illness incurred or aggravated by military service. The two-year period would be extended by the minimum time required to accommodate the circumstance beyond the individual's control which makes reporting within the time limit impossible or unreasonable.

Senate amendment: Proposed new section 4312(e)(1) is substantively identical to the House provision, but without possible extension for events beyond the individual's control if the period of service was 31 days or more.

Proposed new section 4312(e)(2) is substantively identical to the House provision.

Compromise agreement: Section 4312(e)(1) contains the House provision regarding service of less than 31 days or for the purpose of an examination to determine fitness to enter service; the House provision regarding service of 31 days or more but less than 181 days, modified to make specific the time beyond 14 days within which the returning employee must make application for reemployment; and the Senate provision regarding service of more than 180 days.

Section 4312(e)(2) includes the provision relating to an extension of time in the case of an illness or injury.

Section 4312(e)(3) provides that a failure to report or apply within the time limits does not automatically forfeit the person's reemployment rights, but subjects the person to the employer's rules, policies, or practices pertaining to absence from work.

Documentation Upon Return

Current law: No provision.

House bill: Proposed new section 4312(g) would provide that: (1) when reporting for reemployment, an individual, upon request, must provide to the employer documentation to establish the timeliness of the application for reemployment, that the individual did not exceed the applicable time-in-service limitation, and that the character of service was satisfactory; (2) notwithstanding a failure to provide documentation, an employer must reemploy an individual if the failure occurs because such documentation does not exist or is not readily available at the time of the request, with the condition that if, after reemployment, documentation becomes available that establishes that one or more of the eligibility requirements was not met, the employer may terminate the individual's employment and the provision of any rights or benefits afforded the individual prospectively; and (3) it is unlawful for an employer to delay or attempt to defeat a reemployment obligation by demanding documentation that does not then exist or is not then readily available.

Senate amendment: Proposed new section 4312(f) contains documentation requirements substantively identical to those in the House bill except that, if an individual is absent from employment for more than 90 days, the employer may require documentation before making retroactive pension contributions.

Compromise agreement: Section 4312(f) contains the Senate provision.

Entitlement Limitations

Current law: No provision.

House bill: Proposed new section 4312(i) would provide that entitlement to protection under the reemployment law does not depend on the timing, frequency, duration of an individual's training or service or the nature of that service if the service does not exceed the service limitations and the applicable notice requirements are met.

Senate amendment: Proposed new section 4312(h) is substantively identical to the House provision.

Compromise agreement: Section 4312(h) contains this provision.

Position To Which Entitled Upon Reemployment

Current law: Section 4301(a) provides that a returning servicemember who was absent from an employment position (other than a temporary position) for service in the Armed Forces is generally entitled (1) if still qualified to perform the duties of that position, to be restored to that position or a position of like seniority, status, and pay; or (2) if not qualified to perform the duties of that position by reason of a disability sustained during service, to be offered and employed in a position the duties of which he or she is qualified to perform that will provide like seniority, status, and pay, or the nearest approximation consistent with the circumstances of the individual's case.

Section 4301(b)(2) provides that it is the sense of Congress that an individual must be so restored as to give the individual the status that he or she would have enjoyed but for the absence for service in the Armed Forces.

House bill: Proposed new section 4313(a)(1) would provide that an individual whose period of service was for fewer than 91 days must be reemployed promptly (1) in a position that he or she would have attained by remaining continuously employed, unless the employer can prove that the individual is not qualified or capable of becoming qualified with reasonable efforts by the employer, or (2) if not qualified or capable of becoming qualified for the new position, in the same position that he or she left. Proposed new section 4313(a)(2) would provide for a similar pattern of position offerings for an individual whose period of service was for 91 days or more, with the additional option that the employer may offer a position of like seniority, status, and pay to the new position or, as determined by whether the individual is qualified or capable of becoming qualified, the position that the individual left. Proposed new section 4313(a)(4) would provide that a returning servicemember who is not qualified to be employed in the position that he or she would have attained by remaining continuously employed or in the position that he or she left, for any reason other than disability incurred during the period of service, and who cannot become qualified with reasonable efforts by the employer, must be employed promptly in any other position of lesser status and pay the duties of which he or she is qualified to perform, with full seniority.

Senate amendment: Proposed new sections 4313(a) (1), (2), and (4) are similar to the House provisions but would provide that the employer may offer a position of like status and pay if the period of service was for more than 30 days.

Compromise agreement: Section 4313 generally follows the House bill.

Position To Which Entitled If Disabled

Current law: Section 4307 requires an employer to make reasonable accommodations to the known physical or mental limitations incurred in the military service of an individual to enable him or her to perform the essential functions of apposition, unless the employer can demonstrate that the accommodation would impose an undue hardship on the operation of the business. The terms ``reasonable accommodation'' and ``undue hardship'' have the same meanings as are provided in the Americans with Disabilities Act of 1990 (ADA) (Public Lawp101-336; 42 U.S.C. 12101 et seq.).

House bill: Proposed new section 4313(a)(3) would provide that if an individual is disabled because of a disability incurred during, or as a result of, a period of service in the uniformed services and is not qualified to be employed in the position that he or she would have attained if continuously employed or in the position that he or she left for service (even after reasonable efforts by the employer to accommodate the disability), the individual must be reemployed promptly (1) in any other position of similar seniority, status, and pay for which he or she is qualified or would become qualified with reasonable efforts by the employer; or (2) in a position which is the nearest approximation consistent with the circumstances of the individual's case.

Senate amendment: Proposed new section 4313(a)(3) is substantively identical to the House provision.

Compromise agreement: Section 4313(a)(3) contains this provision.

Two Or More Persons Entitled To Reemployment In The Same Position

Current law: Section 4306 provides that in any case in which two or more individuals are entitled to reemployment in the same position, the individual who left first has the prior right to be reemployed in that position, without prejudice to the reemployment rights of the other individual or individuals.

House bill: Proposed new section 4313(b) would provide that in any case in which two or more individuals are entitled to reemployment in the same position and more than one of them has reported for reemployment, (1) the individual who left the position first has the prior right to be reemployed in that position and (2) any individual not reemployed is entitled to be employed promptly in any other position which is equivalent in seniority, status, and pay for which the individual is qualified or would become qualified with reasonable efforts by the employer or in apposition which is the nearest approximation consistent with the circumstances of the individual's case.

Senate amendment: Proposed new section 4313(b) is substantively identical to the House provision.

Compromise agreement: Section 4313(b) contains this provision.

Reemployment By The Federal Government

Current law: Section 4303 provides that any individual who is entitled to reemployment and who was employed, immediately before entering the Armed Forces, by any agency in the executive branch of the Federal government or by the District of Columbia, must be reemployed by that agency or the successor to its functions, or by the District of Columbia. In cases in which the Director of the Office of Personnel Management (OPM) finds that (1) the agency is no longer in existence and its functions have not been transferred to any other agency, or (2) for any reason it is not feasible for the individual to be reemployed by the agency or the District of Columbia, the Director must determine whether or not there is another position in any other agency in the executive branch or in the government of the District of Columbia for which the individual is qualified and which is either vacant or held by an individual having a temporary appointment, and, if such a position exists, the individual must be offered the position and, if the individual so requests, be employed in the position.

In cases in which it is not possible for an individual who is entitled to reemployment rights to be restored to apposition that he or she left in the legislative branch and who is otherwise eligible to acquire a status for a transfer to a position in the competitive service, the Director of the OPM is required to search for a comparable position in the executive branch for which the individual having a temporary appointment, and, if such a position exists, it must be offered to the individual. An individual who was employed in the judicial branch must be restored to the position that the individual held immediately before entering the Armed Forces.

House bill: Proposed new section 4314 is similar to current law but would provide that (1) an individual is entitled to be reemployed according to the priorities set out in new section 4313; (2) the District of Columbia government is not considered part of the executive branch; and (3) in a case in which an employer in the legislative or judicial branch, or the adjutant general of a State in the case of a National Guard technician, determines that it is impossible or unreasonable to reemploy an individual who left to serve in the uniformed services and the individual is otherwise eligible to acquire a status for a transfer to a position in the competitive service, the Director of OPM must identify and offer an alternative position in the executive branch.

Senate amendment: Proposed new section 4314 is similar to the House provision but would require the Director of OPM to ensure that an individual whose reemployment in a Federal Government position--to include the legislative or judicial branch--or as a National Guard technician is impossible or unreasonable is offered an alternative position of employment in the executive branch.

Compromise agreement: Section 4314 contains the Senate provision.

Reemployment By Certain Federal Agencies

Current law: Although current Chapter 43 does not exempt federal intelligence community agencies--those listed in section 2302(a)(2)(C)(ii) of title 5, United States Code (the Federal Bureau of Investigation,

the Central Intelligence Agency, the Defense Intelligence Agency, the National Security Agency, and any Executive agency or unit the function of which is determined by the President to be the conduct of foreign intelligence or counterintelligence activities), section 403(c) of title 50, United States Code, provides that the Director of Central Intelligence may, in his or her discretion, terminate the employment of any officer or employee of the Agency whenever he or she deems such a termination necessary or advisable in the interests of the United States. Other intelligence community agencies have similar authority to make employment determinations with outside review.

House bill: No provision.

Senate amendment: Proposed new section 4315 would provide that the head of each agency referred to in section 2302(a)(2)(C)(ii) of title 5 must (1) prescribe procedures for ensuring that veterans' reemployment rights apply to the employees of that agency, and ensure, to the maximum extent practicable, that the procedures for reemployment in that agency are similar to those that apply to other executive branch employees; (2) upon making a determination that the reemployment of an individual is impossible or unreasonable, notify the individual and the Director of OPM of the determination; and (3) on an annual basis, submit to the Senate Select Committee on Intelligence and the Permanent Select Committee on Intelligence of the House of Representatives a report of the number of individuals whose reemployment with the agency was determined to be impossible or unreasonable during the year preceding the report and the reason for each determination.

Compromise agreement: Section 4315 contains the Senate provision, modified to require the heads of each agency to submit annual reports to the House and Senate Committees on Veterans' Affairs.

General Rights And Benefits

Current law: Section 4301(b)(1) provides that an individual reemployed under the veterans' reemployment rights law (1) shall be considered as having been on furlough or leave of absence during the period of service, (2) must be reemployed without loss of seniority, and (3) is entitled to participate in insurance or other benefits offered by the employer according to rules and practices relating to employees on furlough or leave of absence in effect with the employer at the beginning of the period of service. Section 4301(b)(2) provides that it is the sense of Congress that the reemployed individual should be so reemployed as to give the individual the status that he or she would have enjoyed if employed continuously during the period of active service.

House bill: Proposed new section 4315(a) would, as in current law, provide that upon reemployment under the veterans' reemployment rights law, a person would be entitled to the seniority and other rights and benefits determined by seniority that the individual had on the date of the beginning of uniformed service plus the additional seniority and rights and benefits the individual would have attained if the individual had remained continuously employed.

Proposed new section 4315(b) would provide that (1) an individual who performs service in the uniformed services would be considered to be on a furlough or leave of absence while in the uniformed services and would be entitled, while away, to rights and benefits, not determined by seniority, relating to other employees on furlough or leave of absence which were established, by contract, practice, policy, agreement, or plan effective at the beginning of the period of service or implemented while the individual is performing service; and (2) the individual may be required to pay the employee cost, if any, of any funded benefit continued to the extent other employees on furlough or leave of absence are required to pay.

Senate amendment: Subsections (a) and (b) of proposed new section 4316 are substantively identical to the House provision, except that subsection (b) would (1) provide that in the case of a multiemployer pension plan, liability will be allocated by the plan or if the plan does not provide, liability would be allocated to the last employer before the period of uniformed service; (2) clarify that the servicemember deemed to be on furlough or leave of absence because of uniformed service would not be entitled to any benefits which he or she would not otherwise be entitled if the individual were not on a furlough or leave of absence; (3) exempt entitlement for health insurance to care and treatment to the extent the individual would be entitled to the same care and treatment from the Federal Government during uniformed service; (4) preserve policy exclusion of disability insurance for persons in service in excess of 31 days; (5) preserve policy war-clause exclusions; and (6) limit the right of continued insurance coverages to the lesser of (a) 18 months from date of absence, or (b) the period of service plus period of notice of intent to return.

Compromise agreement: The compromise agreement addresses the seniority and non-seniority benefits in three sections--

proposed new sections 4316 (Rights, benefits, and obligations of persons absent from employment for service in a uniformed service), 4317 (Health plans), and 4318 (Employee pension benefit plans).

Subsection (a) of section 4316 contains the general provisions relating to seniority benefits as set forth in both the House bill and the Senate amendment.

Subsection (b) of section 4316 contains the general provisions relating to non-seniority benefits with a provision, in new subsection 4316(b)(2)(A), that provides that a person otherwise entitled to rights and benefits accorded to other employees on furlough or leave of absence may waive those rights and benefits if the person knowingly provides written notice of intent not to return to employment after military service. Basic waiver law would be applicable to such a knowing waiver.

Subsection 4316(b) contains the Senate provision relating to multiemloyee plans, modified to provide that, in the event the last employer is not functioning, liability would be allocated to the plan. Subsection (b) also contains the Senate provision clarifying that a servicemember deemed to be on a leave of absence because of uniformed service is not entitled to any benefits which a person would not be entitled if he or she was not on a leave of absence.

Although the compromise agreement for subsection 4316(b) does not contain the Senate exemptions relating to duplicate federal coverage, disability insurance, or war-clauses, nothing in this law is intended to overrule contract rights of coverage in the area of health, disability, and life insurance.

Retention Rights

Current law: Section 4301(b)(1)(A) provides that an individual who was inducted into the Armed Forces and who is then reemployed cannot be discharged from his or her position without cause for one year following reemployment. Subsections (c) and (g) of section 4304 provide that reservists who were ordered to an initial period of active duty for training of not less than twelve consecutive weeks or who were ordered voluntarily or involuntarily to active duty under section 673B of title 10 cannot be discharged from their positions without cause for six months after reemployment.

House bill: Proposed new section 4315(d) would provide that an individual reemployed under this chapter may not be discharged from employment, except for cause (1) if the period of service was more than 180 days, within one year; (2) if the period of service was more than 30 days but less than 181 days, within six months; or (3) if the period of service was less than 31 days, within a period of time equal to the period of service concerned.

Senate amendment: Proposed new section 4316(e) is similar to the House provision except that retention rights would not be provided to individuals serving for less than 31 days.

Compromise agreement: Section 4316(c) contains the Senate provision.

Accrued Leave

Current law: No provision.

House bill: Proposed new section 4315(e) would provide that any individual who is absent from a position (other than a temporary position) for voluntary or involuntary service in the uniformed services may use, during the period of service, accrued or other leave which the individual could have used if employment had not been interrupted for service.

Senate amendment: Proposed new section 4316(f) is similar to the House provision, except (1) temporary positions are not excluded, and (2) application would be limited to accumulated vacation or annual leave with pay.

Compromise agreement: Section 4316(d) contains the Senate provision, modified to add ``similar leave'' with pay to the types of leave that could be used.

Health Plans

Current Law: Section 4301(b)(1)(A) provides, among other things, that any reemployed person ``shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into" the Armed Forces.

Section 4301(b)(1)(B) provides that, in the case of employer-offered health insurance, an exclusion or waiting period may not be imposed in connection with coverage of a health or physical condition of a servicemember entitled to participate in that insurance, or a health or physical condition of any other individual who is covered by the insurance by reason of the coverage of the servicemember, if (1) the condition arose before or during the individual's period of training or service in the Armed Forces; (2) an exclusion or waiting period would not have been imposed for the condition during a period of coverage resulting from participation by the individual in the insurance; and (3) the condition of the individual has not been determined by the Secretary of Veterans Affairs to be service-connected.

House bill: Proposed new section 4313(c)(1) would provide that, notwithstanding the general provision that persons in military service are considered to be on furlough or leave of absence and are entitled to non-seniority rights and benefits which other employees on furlough or leave are entitled to, a person would be entitled to continuation of any insurance provided by the employer, including health insurance, for up to 18 months. The person could be required to pay the entire cost of any insurance benefit, except the person would only be responsible for the employee share of any insurance premium when the person was ordered to service of less than 31 days.

Proposed new section 4315(c)(2) is substantively identical to existing section 4301(b)(1)(B) (dealing with reinstatement of health coverage without exclusions or waiting periods).

Senate amendment: Proposed new section 4316(d)(1), dealing with an employee's right to continue health-plan coverage, would apply if the person's health-plan coverage ``would otherwise terminate due to an extended absence from employment for purposes of performing service in the uniformed services." A person who elects continuation coverage could be required to pay 102 percent of the full premium associated with such coverage except, in the case of service of less than 31 days, the person could not be required to pay more than the employee share. A person who elected continuation coverage would not be entitled to such coverage (1) to the extent that the person is entitled to care or treatment from the Federal Government, or (2) if the person failed to notify the employer of the person's intent to return to employment within the periods prescribed in section 4312(e) of the Senate bill.

Proposed new section 4316(d) would provide that, if an individual's coverage under an employer-sponsored health plan is terminated by reason of uniformed service, an exclusion or waiting period may not be imposed in connection with coverage of the servicemember or any other individual covered by the health plan upon reemployment by the employer, if an exclusion or waiting period would not have been imposed had coverage not been terminated. An exception would apply to disabilities that the Secretary of Veterans Affairs has determined to be service-connected.

Compromise agreement: Section 4317 requires the health plan to offer continuation coverage for up to 18 months to persons who have coverage in connection with employment and who are absent from such employment due to military service. The health plan may not require the person to pay more than the employee share for that coverage if the period of military service does not exceed 31 days. If the period of service exceeds 31 days, the employee may be required to pay not more than 102 percent of the full premium under the plan.

The compromise also includes provisions pertaining to allocation of liability in the case of a multiemployer plan and limiting the obligation to continue coverage to the day after the date on which the person fails to apply for or return to a position of employment.

With respect to reinstatement of health plan coverage following a period of service, the compromise generally follows the Senate provision, with a clarification that all persons who are covered by the plan by reason of the reinstatement of the coverage of the person who is reemployed would also have coverage reinstated without the imposition of an exclusion or waiting period.

Employee Pension Benefit Plans

Current law: Section 4321(b)(1)(A) provides that upon reemployment after military service, a person shall be restored without loss of seniority. In Alabama Power Co. v. Davis, 431 U.S. 581 (1977), the Supreme Court held that pension benefits were protected under the Act as ``perquisites of seniority'' because the real nature of the benefit is a reward for length of service.

House bill: Proposed new section 4316 would clarify the protection provided pension benefits under the Act. Section 4316 (a)(1)(A) would define the pension plans entitled to protection under the Act as any plan which falls within the definition of an employee pension benefit plan described in section 3(2) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. s 1002(2), as well as any federal, state or local government plan.

This definition would include profit-sharing plans to the extent that such plans provide retirement benefits to participants.

Sections 4316(a)(2)(A) and (B) would make explicit the rights of reemployed servicemembers in their pension plans, such as no break in employment service would be considered to have occurred, no forfeiture of benefits already accrued would be allowed, and there would be no necessity to requalify for participation in the pension plan by reason of absence for military service.

Section 4316(b)(1)(A) would provide a pension plan with a claim against the employer for amounts that may be required to fund obligations arising under this section. In the case of a multiemployer plan, this provision would enable the plan to pursue its existing remedies under section 515 of the Employee Retirement Income Security Act, 29 U.S.C. 1145, for failure to make the required contributions, in the event that neither the plan nor the collective bargaining agreement pursuant to which the plan is maintained provides for any such funding obligations.

Section 4316(b)(1)(B) would provide that a returning veteran is entitled to have earnings and any employer contribution which is determined without reference to the number of, or compensation of, plan participants credited to such person's pension account to the same extent as they would have been credited had such person remained continuously employed instead of serving in the uniformed service. With regard to forfeitures, this section would permit, but not require, the allocation of forfeitures to such person's pension account.

Section 4316(b)(2) would provide that, if the plan is contributory (i.e., provides for employee contributions as well as employer contributions), the portion of such accrued benefit that is derivable from employee contributions would be required to be calculated only to the extent that the reemployed serviceperson makes the required employee contribution to the plan. No interest or penalty would be charged on the employee contribution, nor would the employee be credited with interest that would have been earned on such contribution. However, if a reemployed serviceperson has withdrawn his or her pension plan monies, in whole or in part, prior to entering military service, such person must be allowed to voluntarily repay the withdrawn amount (together with the interest that would have been earned had the monies not been withdrawn) and receive the appropriate credit in the pension plan. The period of repayment would be subject to negotiation between the employer and employee.

Section 4316(b)(3) would provide that if there is a need to use imputed earnings of an employee to calculate pension benefits during a period when in fact there were no earnings because of the absence in military service, the employee's preservice rate of pay will be used or if no fixed rate was in effect, the average earnings of the 12 months immediately preceding military service shall be used.

Section 4316(c) would require that, where military service might result in additional pension liability, the administrator of a multiemployer pension plan be notified that a contributing employer has reemployed a veteran under chapter 43. Such a notification would provide the plan the opportunity to take whatever steps may be required to protect its interests. Unlike administrators of single-employer pension plans, administrators of multiemployer plans are generally not in a position to be aware of the fact that a contributing employer has reemployed a person who may have a pension claim arising from a period of military service.

Senate amendment: Proposed new section 4317 is similar to the House provisions with some changes (described below).

Section 4317(b)(1) would provide, in the case of a multiemployer pension plan, if the plan does not have a method of allocating liability for a returning servicemember, the last employer employing the person prior to military service shall be liable.

Section 4317(b)(2) would provide, with reference to the repayment of employee contributions, for the repayment period to be no shorter than the length of absence.

Section 4317(b)(4) would not allow earnings on contributions to a plan until the contributions are made and would not allow the reallocation of already allocated forfeitures to a returning servicemember's account.

Section 4317(d) would provide that no action need be taken which would cause the plan, participants, or the employer to suffer adverse tax or other consequences under the Internal Revenue Code.

Compromise Agreement: Section 4318 generally follows the House bill with several modifications.

The first modification is that, in a multiemployer context, section 4318(b)(1)(A) requires allocation of liability first to the plan in whatever manner the plan provides. If there is no provision made, the last employer of such person before military service would be responsible and, if there is no longer a functional last employer, the liability would revert to the plan.

The next modification is that section 4318(b)(2) now provides that repayment of employee contributions can be made over a period of three times the period of military service, not to exceed five years.

Under section 4318(b)(3), for purposes of computing an employer's liability or an employee's contributions, to the extent that they are based on an employee's earnings, the same ``reasonable certainty'' analysis as is applicable to pay rate cases would be applicable here.

It is the Committees' intent that earnings or losses on contributions made after return from military service not be credited until after the contributions are made and only prospectively and there is no requirement to reallocate already allocated forfeitures to a returning servicemember's account.

The Committees also intend that no pension rights accrue for a period of military service if the servicemember elects not to be reemployed, but the person's vested interest prior to entering military service would remain intact.

Assistance In Asserting Claims

Current law: Under section 4305, the Secretary of Labor, through the Office of Veterans' Reemployment Rights, is required (1) to render aid in the replacement in their former positions or reemployment of individuals who have satisfactorily completed a period of active duty in the Armed Forces or the Public Health Service and (2) to use existing Federal and State agencies engaged in similar or related activities and the assistance of volunteers.

House bill: Proposed new section 4321 is similar to current law, except that the Secretary would be authorized, rather than required, to use existing Federal and State agencies engaged in similar or related activities and the assistance of volunteers.

Proposed new section 4322 would specify (1) procedures for individuals to file reemployment complaints with the Secretary and (2) that the Secretary is authorized to conduct investigations and make efforts to obtain voluntary compliance from employers.

Senate amendment: Proposed new section 4321 is similar to the House provisions and in addition, would require that in cases in which the efforts of the Secretary to obtain voluntary compliance are unsuccessful, the Secretary must notify the individual who submitted the complaint of (1) the results of the investigation, and (2) the complainant's entitlement to request referral of the claim to the Office of the Special Counsel or the United States Attorney, depending on whether the employer is the Federal government or a State or private employer.

Compromise agreement: Sections 4321 and 4322 contain the Senate provisions.

Enforcement

State Or Private Employer

Current law: Under section 4302, in the case of a private or State employer who fails or refuses to comply with the reemployment laws, (1) the district court of the United States for the district in which the employer maintains a place of business, exercises authority, or carries out its function, has the power, upon the filing of a motion, petition, or other appropriate pleading by the individual entitled to the benefits of the

reemployment laws, to require the employer to comply with the reemployment law and to compensate the individual for any loss of wages or benefits suffered by reason of the employer's unlawful action; (2) the United States attorney or comparable official, if reasonably satisfied that an individual who applies for representation is entitled to the reemployment benefits, must appear and act as an attorney for the individual in the amicable adjustment of the claim or in the filing and prosecution of a complaint; (3) no fees or court costs may be taxed against an individual who applies for such benefits; (4) only the employer may be deemed a necessary party respondent; and (5) no State statute of limitations may apply to any proceedings.

House bill: Proposed new section 4322 is similar to current law except that it would provide that (1) if the Secretary of Labor, after investigation, is reasonably satisfied that a violation has occurred and efforts to obtain voluntary compliance are not successful, and if the claimant requests referral for litigation, the Secretary must refer the case to the Attorney General; (2) the Attorney General, if reasonably satisfied that the individual requesting representation is entitled to the rights or benefits sought, may appear and act as attorney for the claimant in the filing and prosecution of a complaint; (3) an individual may be represented before the District Court by a counsel of choice; (4) the court may award an individual who prevails a reasonable attorney's fee, expert witness fee, and other litigation expenses; (5) the court may use its full equity powers to vindicate rights under the Act; (6) a reemployment rights claim may only be initiated by an individual claiming such rights or benefits, not by an employer, prospective employer, or other entity with obligations under the reemployment law; (7) a State will be subject to the same remedies, including prejudgment interest, as may be imposed upon any private employer; and (8) if the District Court determines that the employer's failure to comply with the provisions of chapter 43 were willful, the court may require the State or private employer to pay, in addition to the compensation determined to be paid the person, an amount equal to that compensation as liquidated damages.

Senate amendment: Proposed new section 4322 is substantively identical to the House provision.

Compromise agreement: Section 4323 contains these provisions.

Federal Government As Employer

Current law: Section 4303(a) provides that the Director of the Office of Personnel Management is authorized and directed when the Director finds, upon appeal of the individual concerned, that any agency in the executive branch or the government of the District of Columbia has failed or refuses to comply with the provisions of the law relating to reemployment by the executive branch or the government of the District of Columbia, to issue an order requiring compliance and to compensate the individual for any loss of salary or wages suffered by reason of failure to comply, less any amounts received by the individual through other employment, unemployment compensation, or readjustment allowances.

House bill: Proposed new section 4322(e), which applies with respect to the Federal Government as employer, would provide that (1) if the Secretary, after investigation, is reasonably satisfied that a violation has occurred with respect to the Federal Government as employer and efforts to obtain voluntary compliance are not successful, and if the claimant requests that the claim be referred for litigation before the Merit Systems Protection Board (MSPB), the Secretary would be required to refer the case to the Office of the Special Counsel; (2) if the Special Counsel is reasonably satisfied that the individual requesting representation is entitled to the rights or benefits sought, the Special Counsel would be required to appear and act as an attorney for the claimant in filing and pursuing an appeal to the MSPB; (3) if the Special Counsel were to decline to represent an individual after receiving a referral from the Secretary or if an individual were to decide not to apply to the Secretary for assistance or to use the Special Counsel for representation, the individual may be represented before the MSPB by counsel of the individual's choice; (4) if the MSPB concludes that a Federal Government employer has failed or refused to comply with the reemployment laws or that the Director of OPM has not met his or her obligation under the reemployment law, it would require the employing agency or the Director to comply with the law and to compensate the individual for any loss of wages or benefits suffered by reason of the unlawful action; and (5) a claimant would be able to petition the United States Court of Appeals for the Federal Circuit to review a decision of the MSPB in which the claimant is denied the relief sought, but would not be represented by the Secretary or the Special Counsel before the Court of Appeals or the Supreme Court.

Senate bill: Proposed new section 4323 is substantively identical to the House provision but would provide that (1) the individual would be able to be represented before the MSPB by a representative of choice; (2) the MSPB would be able to award the individual reasonable attorney fees, expert witness fees,

and other litigation expenses; and (3) an individual would be able to be represented by the Special Counsel in an action for a review of a decision issued by the MSPB, unless the individual was not represented by the Special Counsel before the MSPB regarding this decision.

Compromise agreement: Section 4324 contains the Senate provision.

Federal Intelligence Agency As Employer

Current law: No provision.

House bill: No provision.

Senate amendment: Proposed new section 4324 would provide that any individual employed prior to service in the uniformed services by a federal intelligence agency--those listed in section 2302(a)(2)(C)(ii) of Title 5 (the Federal Bureau of Investigation, the Central Intelligence Agency, the Defense Intelligence Agency, the National Security Agency, or any Executive agency or unit the function of which is determined by the President to be the conduct of foreign intelligence or counterintelligence activities)--would be able to submit a complaint regarding reemployment to the Inspector General of the agency in question, who would be required to investigate and resolve the claim pursuant to procedures prescribed by the head of the agency, which must be, to the maximum extent practicable, similar to the provisions relating to the investigation and resolution of a claim by the Secretary of Labor.

Compromise agreement: Section 4325 contains the Senate provision.

Subpoenas

Current law: No provision.

House bill: Subsections (b) and (c) of proposed new section 4323 would provide that the Secretary may (1) require by subpoena the attendance and testimony of witnesses and the production of documents relating to any matter under investigation and (2) in the case disobedience of a subpoena, may request that the Attorney General apply to a district court of jurisdiction for an order enforcing the subpoena. Subpoena authority would not apply in the case where the employer is the Federal Government.

Senate amendment: Subsections (b) and (c) of proposed new section 4325 are substantively identical to the House provisions, but would not apply the subpoena authority to the legislative and judicial branches of the United States.

Compromise agreement: Section 4326 contains the Senate provision.

Regulations

Current law: Under Section 4303(a), the Director of the Office of Personnel Management (OPM) is authorized and directed to issue regulations relating to the reemployment in the executive branch or in the government of the District of Columbia.

House bill: Proposed new section 4331 would provide that (1) the Secretary of Labor, in consultation with the Secretary of Defense, would be authorized to prescribe regulations with regard to States, local governments, and private employers; (2) the Director of OPM, in consultation with the Secretaries of Labor and Defense, would be authorized to prescribe regulations with regard to the Federal Government as employer, and any such regulations would have to be consistent with regulations pertaining to States and private employers, except that employees of the Federal government may be given greater or additional rights; and (3) may be prescribed by the Merit Systems Protection Board and by the Office of Special Counsel to carry out their responsibilities.

Senate amendment: Proposed new section 4331 is substantively identical to the House provision but (1) would not authorize the Director of OPM to prescribe regulations giving Federal employees greater rights than employees of States and private employers, and (2) would authorize intelligence community agencies to prescribe regulations.

Compromise agreement: Section 4331 contains the House provision, modified to authorize intelligence community agencies to prescribe regulations.

Reports

Current law: No provision.

House bill: Proposed new section 4332 would require the Secretary of Labor, after consultation with the Attorney General and Special Counsel, to provide Congress no later than February 1, 1995, and each February 1 annually thereafter, a report concerning actions taken under chapter 43 during the prior fiscal year, including (1) the number of cases reviewed by the Department Labor; (2) the number of cases referred to the Attorney General or the Special Counsel; (3) the number of complaints filed by the Attorney General; (4) the nature and status of each case; (5) an indication of whether there are any apparent patterns of violation of the provisions of this chapter; and (6) recommendations for administrative or legislative action that the Secretary, Attorney General, or the Special Counsel considers necessary for the effective implementation of this chapter.

Senate amendment: Section 2(c) would require the Secretary of Labor, the Attorney General, and the Special Counsel to submit a report to Congress, not later than one year after the date of enactment, relating to the implementation of chapter 43.

Compromise agreement: Section 4332 contains the House provision, modified to provide that Congress be provided with an annual report on February 1 of each year for five years, beginning with 1996.

Outreach

Current law: No provision.

House bill: No provision.

Senate amendment: Proposed new section 4332 would require that the Secretaries of Labor, Defense, and Veterans Affairs to take appropriate actions to inform individuals entitled to reemployment rights and benefits and employers of the reemployment rights, benefits, and obligations.

Compromise agreement: Section 4333 contains the Senate provision.

Exemption From Minimum Service Requirements

Current law: Section 5303A(b)(1) of title 38 generally provides that an individual who is discharged or released from active duty before completing the shorter of 24 months of continuous active duty or the full period for which called or ordered to active duty is not eligible by reason of that period of active duty for any benefit under title 38 or any other law administered by the VA.

House bill: Section 3 would exclude reemployment benefits under chapter 43 of title 38 from the minimum service requirements.

Senate amendment: Section 3 is identical to the House provision.

Compromise agreement: Section 3 contains this provision.

Thrift Savings Plan

Current law: Under current law, Federal and Postal employees who return from active military service have certain reemployment and restoration rights, including the rights to obtain retirement credit under the Civil Service Retirement System (CSRS) or under the basic annuity provisions of the Federal Employees' Retirement System (FERS) for the period of military service. However, Federal and Postal employees who separate from service or who enter leave-without-pay status to perform military service cease to be eligible to make contributions to the Thrift Savings Plan (TSP) or to have their employing agencies contribute to their accounts during their period of military service. The TSP is a deferred compensation arrangement similar to private sectorp401(k) plans. The structure of the TSP is based on the premise that contributions by employees must be deferred from current civilian pay in order for an employee to enjoy the tax benefits of deferred income, which are an integral part of the TSP.

House bill: Section 4 would amend title 5, United States Code, principally by adding a proposed new section 8432b, so as to allow Federal and Postal employees who separate or enter leave-without-pay status to perform military service to make up contributions to the Thrift Savings Plan (TSP) missed because of

military service. The maximum amount an employee would be allowed to contribute would be equal to the amount an employee would have been eligible to contribute, subject to the applicable statutory maximums, reduced by any contributions actually made during period of military service (since these employees may use military or annual leave to cover periods of military service and since employees on military and annual leave continue to receive civilian basic pay, contributions continue to be made to the Thrift Savings Fund for such periods).

For purposes of any computation under this section, an employee would be, with respect to the period of military service, considered to have been paid at the rate which the employing agency determines would have been payable over such period had such employee remained continuously employed in the position which such employee last held before separating or entering leave-without-pay status to perform military service.

An employing agency would be required to give an employee up to two times, and may give an employee up to four times, the length of his or her military service to make up TSP contributions, although an employee may choose to make up contributions sooner. Make-up contributions would have to be made at the same time, in the same manner, and in addition to, contributions the employee is otherwise eligible to make.

If an employee is entitled to agency matching contributions based on make-up contributions, the agency would be required to make such contributions in the same manner as regular matching contributions. Agency matching contributions attributable to employee make-up contributions would be in addition to any matching contributions to which the employee is already entitled.

Upon reemployment or restoration, the employing agency would be required to pay lost earnings on contributions made by the employee as well as any agency automatic contributions to which the employee would have been entitled during the make-up period.

The period of military service would be counted towards service required for vesting in TSP agency automatic contributions, and any separation to perform military service would not cause forfeiture of such contributions if the employee is subsequently reemployed or restored pursuant to chapter 43 of title 38. Persons who received involuntary TSP payments as a result of their separation to perform military service would have the right to restore those payments to the plan.

Employees who have been restored or reemployed before the date of enactment of this Act would be entitled to make up contributions for the period beginning with their absence from civilian service and continuing through either the date of enactment or the first TSP open season from which the employee is eligible, whichever occurs first.

An employee would be allowed to elect, for purposes of transferring TSP account balances to eligible retirement plans or establishing nonforfeitability of account balances of less than $3,500, to have the employee's separation treated as if it had never occurred. An election for these purposes would have to be made within such period of time after restoration or reemployment, as the case may be, and otherwise in such manner as the Executive Director of the Federal Retirement Thrift Investment Board prescribes.

Senate amendment: Section 6 is substantively identical to the House provisions but does not include require the employing agency to pay lost earnings on retroactive contributions.

Compromise agreement: Section 4 follows the House bill with a modification giving the employing agency the discretion to pay lost earnings on retroactive contributions.

Revision Of Federal Civil Service Retirement Benefit Program For Reservists

Current law: Some Federal workers--those enrolled in Federal Employees' Retirement System (FERS)--who interrupt their civilian employment to serve on active duty in the military may be required to pay more to receive Federal civilian retirement credit for that service than they would have had to pay had they not gone on active duty.

In order to receive Federal civilian retirement credit for military service, Federal employees who are enrolled in FERS are required to pay 3 percent of their military pay. However, these employees pay only 0.8 percent of the civilian wages to receive retirement credit for their civilian Federal employment. As a result, when 3 percent of such an individual's military pay exceeds 0.8 percent of that individual's civilian pay, the individual would pay a larger dollar amount to receive retirement credit for military time than the individual would have paid had he or she remained in the civilian jobs.

House bill: No provision.

Senate amendment: Section 5 would amend sections 8334(j)(1) and 8422(e)(1) of title 5, United States Code, to provide that in the case of individuals enrolled in FERS (or in the Civil Service Retirement System, which does not have this anomaly) who have their Federal civilian service interrupted by military service and who are reemployed under chapter 43 of title 38 on or after August 1, 1990, the deposit into their retirement benefit program may not exceed the amount that would have been deducted and withheld from basic pay during civilian service if the employee had remained in continuous civilian service.

Section 5 also would amend sections 8331(13) and 8401(31) of title 5, to expand the definition of ``military service'' for both CSRS and FERS, respectively, by adding to the meaning full-time National Guard duty (as that term is defined in section 101(d) of title 10) if that service interrupts creditable civilian service and is followed by reemployment in accordance with chapter 43 of title 38 that occurs on or after August 1, 1990.

Compromise agreement: Section 5 includes this provision.

Increase In Amount Of Loan Guaranty For The Purchase Or Construction Of Homes

Current law: Section 3703(a)(1) of title 38 sets the maximum amount of a VA loan guaranty for loans for the purchase or construction of homes at $46.000, an amount that would support a no-down payment, VA-guaranteed home loan of $184,000.

House bill: No provision in H.R. 995. Section 1 of H.R. 949, as passed by the House on September 21, 1993, would amend section 3703(a)(1) to increase the maximum loan guaranty to $50,750 and thus increase the no-down payment VA-guaranteed home loans to $203,000.

Senate amendment: Section 10 is substantially identical to section 1 of H.R. 949.

Compromise agreement: Section 7 includes this provision.

Transition Rules And Effective Dates

Current law: No provision.

House bill: Section 6 of H.R. 995 would provide that (1) except as provided elsewhere, the amendments made by this Act would be effective with respect to reemployment initiated on or after the first day after the 60-day period beginning on the date of enactment; (2) the reemployment provisions contained in chapter 43 in effect on the day before the date of enactment would continue to apply to reemployment initiated before the end of the 60-day period; (3) for the purposes of the five-year service limitation, military service performed prior to the date of enactment would be considered only to the extent that period of military service would have counted toward the service limitations under current law; (4) the anti-discrimination provisions that are added by amendments to this Act would be effective on the date of enactment; (5) the insurance provision would be effective on the date of enactment, except that an individual on active duty on the date of enactment would be able to elect to reinstate or continue insurance coverage for the remaining portion of the 18 months that began on the date of separation from civilian employment; and (6) the disability provisions would be effective with respect to reemployments initiated on or after August 1, 1990.

The provisions of section 4311(a) defining the actions protected from discrimination or reprisal and the standard and burden of proof set forth in section 4311(b) are not additions to the Act but are a codification of existing law.

Senate amendment: Section 9 is substantively identical to the House provision with the additional provision that the provisions of proposed section 4325 regarding investigations and subpoenas would become effective on the date of enactment and apply to any matter pending with the Secretary of Labor.

Compromise agreement: Section 8 contains the Senate provision. It also contains a provision that the notice of intent not to return found in section 4316(b)(2) applies only to furlough or leave of absence rights and benefits under that section and does not apply to or waive any other right or benefit under the Act.

The compromise also provides that nothing in this Act would relieve an employer of an obligation to provide contributions to a pension plan (or provide pension benefits) which is required by the provisions of the existing chapter 43 of title 38, United States Code, in effect on the day before this Act takes effect. Any plan which is not in compliance with the requirements of the law would have two years from the date of enactment to come into compliance with the law.

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(Mr. STUMP asked and was given permission to revise and extend his remarks.)

Mr. STUMP. Mr. Speaker, continuing my reservation of objection, the Uniformed Services Employment and Reemployment Rights Act of 1994 has been several years in the making. It is bipartisan legislation we can be proud of. I particularly want to commend my good friend, the gentleman from Mississippi, Chairman Sonny Montgomery, for his consistent and tireless leadership on veterans' reemployment rights. He has maintained the focus on this legislative effort until we were able to reach a satisfactory compromise with the Senate. Also, I want to commend the ranking minority member of the Subcommittee on Education, Training, and Employment, Mr. Hutchinson, for his efforts and support on this vital legislation.

Mr. Speaker, I urge my colleagues to support the House amendment to the Senate amendment to H.R. 995. Mr. Speaker, of course, the compromise with the chairman of the Senate Veterans' Affairs Committee, Senator Rockefeller, and the ranking minority member, Senator Murkowski, enables us to bring this amendment to the floor today. I commend them as well for their willingness to resolve with us the differences between the House and Senate legislation.

Mr. Speaker, Chairman Montgomery has explained the basic legal rights provided by this measure, and I associate myself with his remarks. The careful and clear definition of the rights and obligations between veterans and their employers has never been more important. The current law defining veterans' employment and reemployment rights would be simplified, clarified, and improved. Among other things, enforcement mechanisms would also be strengthened. It is important for the individual men and women who willingly serve their country in uniform to know their rights to employment are fully protected and will be enforced. It is important for employers to know what is expected of them so that they can conduct their businesses accordingly and without undue burdens. And it is important for the nation to attract high quality people into our armed services, in part through assurances that they will be able to return to their civilian jobs after they have served. This is a measure which I believe is fair to employees and employers alike because it takes a balanced approach in recognizing their respective needs. Finally, Mr. Speaker, as Chairman Montgomery observed, H.R. 995 would raise the maximum amount of the VA home loan guarantee from $46,000 to $50,750. This would recognize the current realities of the marketplace and enable more veterans to meet their housing needs. Mr. Speaker, continuing my reservation of objection, I am glad to yield to the gentleman from Illinois [Mr. Sangmeister].

Mr. SANGMEISTER. Mr. Speaker, I thank the gentleman for yielding to me.

Mr. Speaker, I rise in support of H.R. 995, a bill to improve veterans reemployment rights. In particular, I wish to express my support for the provision in the conference bill which increases the VA loan guaranty from $46,000 to $50,750. This would increase VA no-downpayment loan limits from $184,000 to $203,000 and would keep VA up to date with market changes since Fannie Mae and Freddie Mac now purchase loans up to $203,150 on the secondary market. Housing prices in certain parts of the country prevent many veterans from buying a home without a downpayment. For example, according to data compiled by the National Association of Realtors, the median sales price of an existing single-family home during calendar year 1993 was $213,000 in Los Angeles, $254,800 in San Francisco, and $349,000 in Honolulu. Thus home loan guaranty purchasers in areas such as these must make significant downpayments in order to acquire a median-priced home. The increased guaranty would enable many veterans to purchase a home of their choice without a downpayment, which would otherwise be unavailable to them. The higher loan amounts will also produce greater revenues to VA through the loan fee. H.R. 949, which passed the House last fall contained a similar provision, and I am glad to see that it was incorporated in this bill. Mr. Speaker, I urge favorable consideration of this compromise measure.

Mr. STUMP. Mr. Speaker, I urge the House to support the House amendment to the Senate amendment to H.R. 995, and I withdraw my reservation of objection.

The SPEAKER pro tempore (Mr. Andrews of Texas). Is there objection to the initial request of the gentleman from Mississippi?

There was no objection.

A motion to reconsider was laid on the table.

EXCERPT of Senate Report 104-371, for S. 1711 (104th Congress, 2d Session), 24 September 1996. The entire report can be viewed at http://thomas.loc.gov/cgi-bin/cpquery/1?cp104:./temp/~cp104XQrK:e97939:

VETERANS' BENEFITS IMPROVEMENTS

TITLE IV--EMPLOYMENT AND REEMPLOYMENT RIGHTS OF MEMBERS OF THE UNIFORMED SERVICES

Title IV of the Committee bill is derived from Title III of H.R. 2289, a bill which was approved by the House of Representatives on December 12, 1995, and referred to the Committee on December 13, 1995. Title IV would make technical and clarifying amendments to the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), Public Law 103-353.

Background

Provisions of Federal law relating to the reemployment rights of members of the uniformed services date from the enactment of the Selective Training and Service Act of 1940. Since that time, employment and reemployment rights have remained an element of Federal law. They are currently codified in chapter 43 of title 38, United States Code.

During the 50-plus year history of veterans' reemployment laws, the uniformed forces have changed, most notably in recent years with the emergence of greater total force responsibilities assumed by reserve components. At the same time, civilian workplace practices, particularly compensation, benefits, and pension practices, have changed. Veterans' reemployment laws have been modified over the years in an effort to keep pace with such changes. In addition, an overlay of Federal case law has developed which, among other things, applies the law to evolving circumstances.

Nonetheless, by 1988, the desirability of undertaking a broad review of veterans' reemployment rights laws became apparent. An executive branch task force, comprised of employees of the Departments of Labor, Defense, and Justice, and the Office of Personnel Management, was formed to undertake such a review, and to formulate recommended revisions to veterans' reemployment rights laws. This task force developed recommendations and draft proposals over a 3-year period, and legislation to recodify veterans' reemployment rights laws was introduced in the 102nd Congress as a direct result of these task force deliberations.

H.R. 1578 was reported on May 9, 1991 (H. Rpt. 102-56), and approved by the House of Representatives on May 14, 1991. The Senate approved the House measure on October 1, 1992, with amendments derived from S. 1095, which had been reported by the Senate Committee on Veterans Affairs on November 7, 1991 (S. Rpt. 102-203). On October 6, 1992, the House agreed to the Senate measure, but with further amendments. Differences between the House and Senate bills had not been resolved when the 102nd Congress adjourned.

In the 103rd Congress, H.R. 995, a bill derived from H.R. 1578 as passed by the House on October 6, 1992, was reported on April 28, 1993 (H. Rpt. 103-65), and approved by the House on May 4, 1993. In the Senate, S. 843, derived from H.R. 1578, was reported on July 1, 1993 (S. Rpt. 103-158), and passed by the Senate on November 2, 1993. On November 8, 1993, the Senate approved H.R. 995, as amended to substitute the text of S. 843. On September 13, 1994, the House approved H.R. 995, as amended, with a further amendment, and on September 28, 1994, the Senate approved H.R. 995 as so amended, clearing the measure for the President. Public Law 103-353, the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), was signed into law by the President on October 13, 1994.

Public Law 103-353 was a relatively lengthy, complex, and technical piece of legislation. Accordingly, the Committee anticipated that the need for technical and clarifying amendments might become apparent when the enforcing agency (the Department of Labor), veterans service organizations, and employers began to implement USERRA. Recommended amendments of a technical and clarifying nature were, in fact, presented to the Committee informally by the Department of Labor, and to the House Committee on Veterans' Affairs. The Ranking Minority Member of the House Committee, the Honorable G.V. ('Sonny') Montgomery, introduced a bill, H.R. 1941, on June 28, 1995, which incorporated those recommended technical changes. Title III of H.R. 2289, as reported by the House Committee on Veterans' Affairs on December 11, 1995 (H. Rpt. 104-397), and as passed by the House on December 12, 1995, was derived from that bill. As indicated above, Title IV of S. 1711 is derived from Title III of H.R. 2289.

Committee Bill

Section 401. Purposes

Section 4304 of title 38, United States Code, states that rights specified in USERRA are terminated if the former service member is separated from service with a dishonorable or bad conduct discharge, is separated other than under honorable conditions as specified by regulation, or, in the case of commissioned officers, if the former service member is dismissed or dropped from the rolls in

accordance with 10 U.S.C. Sec. 1161. By necessary implication, USERRA rights are not terminated in circumstances of separation from the service under conditions other than those so specified.

Section 4301(a)(2) states that one of the purposes of USERRA is to `minimize the disruption to the lives of persons performing service * * * by providing for the prompt reemployment of such persons upon their completion of such service under honorable conditions * * *' (emphasis added). This language might unintentionally create ambiguity with respect to the intent of the Congress in stating in section 4304 that USERRA protections are terminated only under conditions as stated in that section and, at the same time, appearing to suggest in section 4301 that separation from service must have been `honorable.' More significantly perhaps, questions might be raised concerning when (if ever) separation might be less than `under honorable conditions,' and yet not be within the disqualifying circumstances specified in section 4304, and, if such `in between' circumstances might exist, whether or not USERRA protections are operative.

Section 401 of the Committee bill would eliminate these unintended ambiguities and questions by striking the words `under honorable conditions' from section 4301 of title 38. The Committee intends that section 4304, and that section alone, specifies when USERRA benefits are unavailable due to the character of service of the former service member.

Section 402. Definitions

Section 4303(16) of title 38, United States Code, defines `uniformed services' and includes within that definition `persons designated by the President in time of war or emergency.' The term `emergency,' as used in this context, has traditionally been associated with national emergencies; therefore, it is commonly modified by the term `national.' USERRA did not include the modifier `national' in its definition. It thereby potentially gives rise to questions whether a departure from traditional usage was intended and, if so, what scope did the Congress intend the term `emergency' to have.

The Committee bill would add the modifier `national' prior to the term `emergency' in the definition of `uniformed services' to preclude such confusion. The Committee intends that the statutory definition of those in the `uniformed services' include those designated by the President in times of `national emergency' as that term is commonly used.

Section 403. Discrimination against persons who serve in the uniformed services and acts of reprisal prohibited

Section 4311(b) of title 38, United States Code, provides that an employer will be found to have violated the anti-discrimination provisions of section 4311(a) if the employee's membership in, application for membership in, performance of duty in, or obligation to perform duty in the uniformed services is a motivating factor in the employer's action, unless the employer can prove that the action alleged to be discriminatory would have been taken in any case.

Section 4311(c)(1) provides that an employer may not retaliate against persons due to certain protected activities. In contrast to subsection 4311(b), however, that subsection does not set forth the standard for finding violations of this anti-retaliation provision, or the burden of proof to be borne by employers in defending against claims of retaliation.

The Committee bill would reorder section 4311 to specify the anti-discrimination protections in subsection (a), to specify the anti-retaliation protections in subsection (b), and to provide in subsection (c) that the standards and burdens of proof now described in subsection (b), as described above, would apply to both discrimination and retaliation claims.

The Committee bill would also reconfigure current subsection (c)(2) as subsection (d) to clarify that both the anti-discrimination and anti-retaliation prohibitions in section 4311 apply to any position of employment, including positions which are only for brief, nonrecurrent periods as described in section 4312(d)(1)(C).

Section 404. Reemployment rights of persons who serve in the uniformed services

Section 4312(a) of title 38, United States Code, specifies the reemployment rights of persons who are `absent from a position of employment by reason of service * * *' Section 4312(e) sets forth the timeframes within which persons eligible for such protections shall return to work after a period of service. Section 4312 currently contains no specific provision dealing with time off prior to performing service.

The Congress never intended that USERRA preclude service personnel from leaving civilian employment so as to arrive timely and safely at the site of service. Accordingly, the Committee bill would amend section 4312(a) so that employees must be given the time off `necessitated' by service. This provision is consistent with current law. See Sawyer v. Swift & Co., 610 F.Supp. 38, 41-42 (D. Kan. 1985), rev'd on other grounds 836 F.2d 1257 (10th Cir. 1988).

The protections afforded by section 4312 apply to persons whose cumulative service does not exceed 5 years. In defining 5 years for this purpose, section 4312(c)(4)(B) exempts service `during a war or during a national emergency * * *'

The Committee bill would amend section 4312(c)(4)(B) to require that for the exemption from the `5-year rule' to apply, the person affected would have to have been ordered or retained on active duty due to--and not merely coincident with--the war or national emergency.

Section 4312(d)(1)(C) provides that an employer is not required to reemploy a person who leaves for service from employment that was for a `brief, nonrecurrent period * * *' Section 4312(d)(2)(C) refers to proceedings involving questions of whether employment was `brief' or `nonrecurrent,' but that subsection uses different phraseology in describing such employment from that used in subsection (d)(1)(C).

The Committee bill would amend section 4312(d)(2)(C) to reflect phraseology that is consistent with that used in section 4312(d)(1)(C).

Section 405. Reemployment positions

Section 4313 of title 38, United States Code, details the positions to which service members are entitled upon reinstatement after service. Subsection 4313(a)(4) specifies the positions to which persons not qualified for their preservice or `escalator' positions, for reasons other than disability incurred in, or aggravated during, service, will be entitled.

Unlike the subsections of section 4313 which precede it, subsection (a)(4) of section 4313 does not provide, as a last resort, for reemployment in a position which is the nearest approximation of the reemployed person's preservice or `escalator' position. The Committee bill rectifies this unintended omission by adding such language to subsection 4313(a)(4). It also corrects a purely technical error in that section.

Section 406. Leave

Section 4316(d) of title 38, United States Code, expressly allows the service member to choose to use vacation, annual, or similar leave with pay while on military leave. This provision is intended to preclude an employer from forcing a service member to use leave, paid or unpaid, against his or her will. Notwithstanding this intent, as shown in the legislative history of section 4316(d), see H. Rept. 103-65 at 35, it has come to the Committee's attention that questions have arisen concerning this provision. Indeed, the Committee has learned that some employers are reportedly attempting to require that service members use vacation leave while in service when to do so is not pursuant to a service member's request.

The Committee bill would clarify that it is a violation of section 4316(d) for an employer to require a service member to use paid or unpaid vacation, annual, or similar leave when the use of such leave is not requested by the service member. This policy, as clarified in

the Committee bill, is consistent with existing law. See Hilliard v. New Jersey Army Nat'l Guard, 527 F. Supp. 405 (D. N.J. 1981); Graham v. Hall-McMillan Co., Inc., 925 F. Supp. 437 (N.D. Miss. 1996).

Section 407. Health plans

Section 4317 of title 38, United States Code, contains a number of purely technical errors. The Committee bill corrects them.

Section 408. Employee pension benefit plans.

Section 4318(b)(2) of title 38, United States Code, currently allows a reemployed service member to make employee contributions or elective deferrals over a period `whose duration is three times the period of the person's service in the uniformed services, not to exceed five years.'

The language of section 4318(b)(2) is susceptible to misinterpretation. Specifically, it could be argued that it is not entirely clear whether the phrase `not to exceed five years' refers to the period of service or to the period within which employee contributions may be made.

The Committee bill would amend the language of section 4318(b)(2) to clarify that reemployed persons shall be entitled to make employee contributions up to 5 years after returning to employment.

Section 409. Enforcement of employment or reemployment rights

Section 4322(d) of title 38, United States Code, requires that the Secretary of Labor `resolve [each] complaint' for enforcement of employment or reemployment rights which is filed. The actual resolution of each filed complaint by the Secretary of Labor is a desirable goal. However, as was recognized by the Congress by the use of the term `unsuccessful' in sections 4322(e) and 4323(a)(1), it is not an achievable one. The Committee bill would modify section 4322(d) to clarify that the Secretary must `attempt to' resolve each complaint. It would also modify sections 4322(e), 4323(a)(1), 4324(a)(1), and 4324(c)(2) to remove the value-laden term `unsuccessful.'

Section 4322(e) refers to the Department of Labor's duty, in the event that a complaint is not resolved by that agency, to notify persons of their rights to pursue other remedies. In the case of complaints against Federal agencies, those remedies are specified in section 4324. Claimants may proceed under section 4324 against the Office of Personnel Management (OPM) as an employer like any Federal agency, but may also seek redress under section 4324 against OPM to assure the execution of other OPM duties, for example, its duties on behalf of employees of the Federal Bureau of Investigation, the Central Intelligence Agency, and other agencies under section 4315(e). In order to clarify

that OPM has broader duties beyond those of being an employer of its own employees, the Committee bill would insert the phrase `or the Office of Personnel Management' after the term `Federal executive agency' in sections 4322(e)(2), 4324(b)(1), and 4324(c)(2).

Section 410. Enforcement of rights with respect to a State or private employer

Section 4323(a)(2)(A) of title 38, United States Code, refers to a claimant's `appl[ication] to the Secretary [of Labor] for assistance * * * under section 4322(c).' The provision under which such a complaint might be filed before the Department of Labor is section 4322(a), not section 4322(c). The Committee bill amends the citation to section 4322 in section 4323(a)(2)(A) accordingly. The same citation error appears in section 4324(b)(1). The Committee bill also corrects that erroneous citation.

Section 411. Enforcement of rights with respect to Federal executive agencies

As is explained above, the Committee bill deletes a reference from section 4324(a)(1) of title 38, United States Code, to `unsuccessful' efforts by the Secretary of Labor to resolve complaints; adds a reference in sections 4322(e)(2), 4324(b)(1), and 4324(c)(2) to the Office of Personnel Management; and corrects an erroneous citation to section 4322(c) in section 4324(b)(1). The Committee bill also makes a purely technical correction to section 4324(c)(2) by substituting the word `Office' for `employee'.

Section 412. Enforcement of rights with respect to certain Federal agencies

Section 4325(d)(1) of title 38, United States Code, currently allows a Federal employee to seek information from the Secretary of Labor concerning `alternative employment in the Federal government under this chapter * * *'

The Secretary of Labor does not maintain information concerning alternative Federal employment. Therefore, the Committee bill would strike language directing Federal employees to that improper source of information.

The Committee bill also makes a purely technical correction to section 4325(d)(1) by substituting the term `employees' for `employee'.

Section 413. Conduct of investigation; subpoenas

Section 4326(a) of title 38, United States Code, currently authorizes the Secretary of Labor to have reasonable access to the documents of any person or employer during the course of investigations under section 4322(d). This section does not currently authorize the Secretary to have reasonable access to persons for purposes of gathering evidence and testimony during the investigation.

The Committee bill would rectify this oversight by adding such authority.

Section 414. Transition rules and effective dates

Section 8(a) of USERRA sets forth the rules of transition from prior veterans' reemployment laws to USERRA. Generally, the provisions of USERRA apply to reemployment applications initiated on or after December 12, 1994, and the provisions of prior law apply to reemployment applications initiated prior to December 12, 1994. Those rules apply regardless of when the uniformed service underlying the reemployment application began or ended.

The Committee has been informed that the above transition rules could work a hardship on persons training under orders issued pursuant to section 502(f) of title 32, United States Code, which provides the authority for the voluntary or involuntary activation of National Guard personnel, if that service exceeds the basic 5-year service limit imposed by section 4312(c) of USERRA. This possibility is especially troubling in light of the Supreme Court decision in King v. St. Vincent's Hospital, 502 U.S. 215 (1991), where the Court held that, under the prior law, there was no service limitation with respect to service performed under orders issued pursuant to 32 U.S.C. Sec. 502(f).

The Committee bill would rectify the foregoing situation by providing that all service performed under orders issued pursuant to section 502(f) up to December 12, 1994, would be considered under the provisions of prior law for service limitation purposes, while all such service performed on or after December 12, 1994, would be considered under the provisions of USERRA, regardless of when the service began. Thus, for example, a service member who was ordered to active duty for training under orders issued pursuant to section 502(f) on January 15, 1990, and who was released from duty on January 30, 1996, would have the period January 15, 1990-December 11, 1994, considered under the service limitation provisions of prior law, while the period December 12, 1994-January 30, 1996, would be considered under the service limitation provisions of USERRA. The two time frames would then be combined to determine if the service limitations had been exceeded.

Section 8(c)(2) of USERRA provided that the provisions of section 4316 of title 38, United States Code relating to insurance coverage would apply to `a person on active duty * * *' Since the term `service in the uniformed service' applies to active duty service and other classes of service, the Committee bill would replace `active duty' with the phrase `person serving a period of service in the armed forces.'

APPENDIX C

Department of Defense Instruction 1205.12 [34 C.F.R. Part 104]

Civilian Employment and Reemployment Rights of Applicants for, and Service Members and Former Service Members of the Uniformed Services

January 23, 1998

[Federal Register: January 23, 1998 (Volume 63, Number 15)]
[Rules and Regulations]
[Page 3465-3472]
From the Federal Register Online via GPO Access [wais.access.gpo.gov]
[DOCID:fr23ja98-9]

DEPARTMENT OF DEFENSE

Office of the Secretary

32 CFR Part 104

[DoD Instruction 1205.12]
RIN 0790-AG52

Civilian Employment and Reemployment Rights of Applicants for, and Service Members and Former Service Members of the Uniformed Services

AGENCY: Department of Defense.

ACTION: Final rule.

SUMMARY: This part identifies DoD guidelines for implementing policy, assigns responsibilities, and prescribes procedures for informing Service members of their reemployment protections. It updates, codifies, and strengthens the civilian employment rights and benefits of Service members and individuals who apply for uniformed service, and specifies the

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obligations of Service members and applicants for uniformed service.

DATES: This part is effective February 1, 1998. Comments must be received no later than March 24, 1998.

FOR FURTHER INFORMATION CONTACT:
Colonel Rowan W. Bronson, OASD/RA (M&P), (703) 693-7490.

SUPPLEMENTARY INFORMATION:

Executive Order 12866, ``Regulatory Planning and Review''

It has been determined that 32 CFR part 104 does not pertain to a military or foreign affairs function of the United States. It is not a

significant regulatory action. This final rule does not:

(1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy; a section of the economy; productivity; competition; jobs; the environment; public health or safety; or State, local, or tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another Agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive Order.

Public Law 96-354, ``Regulatory Flexibility Act'' (5 U.S.C. 601)

It has been determined that this rule is not subject to the Regulatory Flexibility Act (5 U.S.C. 601) because it is related to a military or foreign affairs function of the United States. It would not, if promulgated, have a significant economic impact on a substantial number of small entities. The law provides employment and reemployment protections for Active and Reserve Component members, as well as individuals who apply to be members of the Uniformed Services.

Public Law 96-511, ``Paperwork Reduction Act'' (44 U.S.C. Chapter 35)

It has been determined that this part does not impose any reporting or recordkeeping requirements on the public under the Paperwork Reduction Act of 1995.

List of Subjects in 32 CFR Part 104

Government employees, Military personnel.

Accordingly, Title 32, Chapter 1, 32 CFR part 104, is added to read as follows:

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

Sec.

Appendix B to part 104--Sample Employer Notification Of Uniformed Service

Authority: 10 U.S.C. 1161.

Sec. 104.1 Purpose.

This part:

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

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

Sec. 104.2 Applicability.

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

Sec. 104.3 Definitions.

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

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

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

compared to the employees of the same seniority and status employed by the company.

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

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

Non-career service. The period of active uniformed service required to complete the initial uniformed service obligation; a period of active duty or full-time National Guard duty that is for a specified purpose and duration with no expressed or implied commitment for continued active duty; or participation in a Reserve component as a member of the Ready Reserve performing annual training, active duty for training or inactive duty training.

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Continuous or repeated active uniformed service or full-time National Guard duty that results in eligibility for a regular retirement from the Armed Forces is not considered non-career service.

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

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

Sec. 104.4 Policy.

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

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

(b) Providing assistance to Service members, former Service members and individuals who apply for uniformed service in exercising employment and reemployment rights and benefits.

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

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

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

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

Sec. 104.5 Responsibilities.

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

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

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

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

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

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

(1) Ensure compliance with this part.

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

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

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

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

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

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

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

Sec. 104.6 Procedures.

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

(a) Inform individuals who apply for uniformed service and members of a Reserve component who perform or participate on a voluntary or involuntary basis in active duty, active duty for special work, initial active duty for training, active duty for training, inactive duty training, annual training and full-time National Guard duty, of their employment and reemployment rights, benefits, and obligations as provided under 38 U.S.C. chapter 43 and described in Appendix A of this part. Other appropriate materials may be used to supplement the information contained in Appendix A of this part.

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

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

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

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

(B) Regardless of the means of providing advance notice, whether written or verbal, it should be provided as early as practicable. DoD strongly recommends that advance notice to civilian employers be provided at least 30 days prior to departure for uniformed service when it is feasible to do so.

(C) The advance notice requirement can be met by providing the employer with a copy of the unit annual training schedule or preparing a standardized letter. The sample employer notification letter in Appendix B of this part may be used for this purpose.

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

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

(iv) Their general reemployment rights and benefits.

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

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

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

(b) Inform Service members who are covered by the provisions of 38

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

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

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

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

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

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

(h) When appropriate, ensure that orders to active duty or orders retaining members on active duty specify the statutory or Secretarial

authority for those orders when such authority meets one or more of the exemptions from the 5-year cumulative service limit provided in 38 U.S.C. Chapter 43. If circumstances arise that prevent placing this authority on the orders, the authority shall be included in a separation document and retained in the Service member's personnel file.

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

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

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

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

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

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

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

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

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

(6) Whether service requirements prevent providing a civilian employer

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with advance notification of pending service.

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

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

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

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

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

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

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

Appendix A to Part 104--Civilian Employment and Reemployment Rights, Benefits and Obligations for Applicants for, and Service Members and Former Service Members of the Uniformed Services

A. Scope of Coverage

1. The Uniformed Services Employment and Reemployment Rights Act (USERRA) which is codified in 38 U.S.C. Chapter 43 provides protection to anyone absent from a position of civilian employment because of uniformed service if:

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

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

(2) DoD strongly encourages Service members and or applicants for service to provide advance notice to their civilian employer in writing for each period of pending uniformed service. Providing written advance notice is preferable to verbal advance notice since it easily establishes that this prerequisite to retaining reemployment rights was fulfilled. Regardless of the means of providing advance notice, whether written or verbal, it should be provided as early as practicable. Also, DoD strongly recommends that

Reserve component members provide advance notice to their civilian employers at least 30 days in advance when it is feasible to do so. The advance notice requirement can be met by providing the employer with a copy of the unit annual training schedule or preparing a standardized letter. The sample employer notification letter in Appendix B of this part may be used for this purpose;

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

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

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

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

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

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

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

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

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

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

e. An officer dismissed from any Armed Force or dropped from the rolls of any Armed Force as prescribed under 10 U.S.C. 1161.

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

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

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

B. Prohibition Against Discrimination and Acts of Reprisal

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

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

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

C. Exceptions to the Maximum Period of Service for Coverage

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

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

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

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

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

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

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

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

8. Performing service in the National Guard when ordered to active duty by the President to suppress an insurrection or rebellion, repel an invasion, or execute laws of the United States; and,
9. Voluntary recall to active duty of retired regular Coast Guard officers or retired enlisted Coast Guard members.

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D. Applications for Reemployment

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

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

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

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

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

E. Documentation Upon Return

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

a. He or she made application to return to work within the prescribed time period;

b. He or she has not exceeded the 5-year cumulative service limit; and

c. His or her reemployment rights were not terminated because of character of service as described in paragraphs A.2.d. and e. of this appendix.

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

F. Position To Which Entitled Upon Reemployment

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

a. The position the person would have attained if continuously employed (the ``escalator'' position) and if qualified to perform the duties; or,

b. The position in which the person was employed in when he or she departed for uniformed service, but only if the person is not qualified to perform the duties of the escalator position, despite the employer's reasonable efforts to qualify the person for the escalator position.

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

a. The escalator position, or a position of like seniority, status and pay, the duties of which the person is qualified to perform; or,

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

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

position of lesser status and pay that the person is qualified to perform, with full seniority.

G. Position To Which Entitled if Disabled

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

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

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

H. Reemployment by the Federal Government

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

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

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

I. Reemployment by Certain Federal Agencies

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

prescribed for private and other Federal agencies.

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

J. General Rights and Benefits

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

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

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

K. Loss of Rights and Benefits

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

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benefits. This includes all non-seniority based rights and benefits provided under any contract, plan, agreement, or policy in effect at the time of entry into uniformed service or established while performing such service, and are generally provided by the employer to employees having similar seniority, status and pay who are on furlough or leave of absence.

L. Retention Rights

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

1. Within 1 year after the date of reemployment if that person's

service was 181 days or more; or,

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

M. Accrued Leave

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

N. Health Plans

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

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

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

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

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

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

O. Employee Pension Benefit Plans

1. This section applies to individuals whose pension benefits are not provided by the Federal Employees' Retirement System (FERS) or the Civil Service Retirement System (CSRS), or a right provided under any Federal or State law governing pension benefits for governmental employees.

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

nonforfeitability of accrued benefits and accrual of benefits.

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

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

P. Federal Employees' Retirement System (FERS)

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

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

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

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

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

Q. Civil Service Retirement System (CSRS)

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

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

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

R. Information and Assistance

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

S. Assistance in Asserting Claims

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

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

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

T. Enforcement

1. State or Private Employers.

a. A person may request that the Secretary of Labor refer a complaint to the Department of Justice. If the Department of Justice is reasonably satisfied that the person is entitled to the rights or benefits sought, the Department of Justice may appear on behalf of, and act as attorney for, the complainant, and commence an action for appropriate relief, or the individual may commence an action on his or her own behalf in the appropriate Federal district court.

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

(1) Comply with the law;

(2) Compensate the person for any loss of wages or benefits

suffered; and

(3) If the court determines that the employer willfully failed to comply with the law, pay the person an amount equal to the amount of lost wages or benefits as liquidated damages.

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

(1) Has chosen not to seek the Secretary's assistance;

(2) Has chosen not to request that the Secretary refer the complaint to the Department of Justice; or

(3) Has refused the Department of Justice's representation of his or her complaint.

d. No fees or court costs shall be charged or taxed against any person filing a claim.

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The court may award the person who prevails reasonable attorney fees, expert witness fees, and other litigation expenses.

2. Federal Government as the Employer.

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

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

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

Appendix B to Part 104--Sample Employer Notification of Uniformed Service

This is to inform you that (insert applicant or Service member's name) must report for military training or duty on (insert date). My last period of work will be on (insert date), which will allow me sufficient time to report for military duty. I will be absent from my position of civilian employment for approximately (enter expected duration of duty as specified on your orders, and include the applicable period you have to return or submit notification of your return to work) while performing military training or duty unless extended by competent military authority or delayed by circumstances beyond my control. I otherwise expect to return to work on (insert date).

Signature and date

Employer acknowledgment and date

Dated: January 16, 1998.

L.M. Bynum,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 98-1583 Filed 1-22-98; 8:45 am]
BILLING CODE 5000-04-M

APPENDIX D

Department of Labor USERRA Publication for Service Members

A Non-Technical Resource Guide to the Uniformed Services Employment and Reemployment Rights Act (USERRA)

The U.S. Department of Labor
Veterans Employment and Training Service

January 1998

Introduction

The Department of Labor's Veterans' Employment and Training Service provides this guide to enhance the public's access to information about the application of the Uniformed Services Employment and Reemployment Rights Act (USERRA) in various circumstances. Aspects of the law may change over time. Every effort will be made to keep the information provided up-to-date.

USERRA applies to virtually all employers, including the Federal Government. While the information presented herein applies primarily to private employers, there are parallel provisions in the statute that apply to Federal employers. Specific questions should be addressed to the State director of the Veterans' Employment and Training Service listed in the government section of the telephone directory under U.S. Department of Labor.

Information about USERRA is also available on the Internet. An interactive syatem, "The USERRA Advisor," answers many of the most-often asked questions about the law. It can be found in the "E-Laws" section of the Department of Labor's home page. The Internet address is *http://www.dol.gov.*

Disclaimer

This user's guide is intended to be a non-technical resource for informational purposes only. Its contents are not legally binding nor should it be considered as a substitute for the language of the actual statute or the official USERRA Handbook.

Table of Contents

Employment and Reemployment Rights

The Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), enacted October 13, 1994 (Title 38 U.S. Code, Chapter 43, Sections 4301-4333, Public Law 103-353), significantly strengthens and expands the employment and reemployment rights of all uniformed service members.

Who's eligible for reemployment

"Service in the uniformed services" and "uniformed services" defined -- (38 U.S.C. Section 4303 (13 & 16)

Reemployment rights extend to persons who have been absent from a position of employment because of "service in the uniformed services." "Service in the uniformed services" means the performance of duty on a voluntary or involuntary basis in a uniformed service, including:

- Active duty
- Active duty for training
- Initial active duty for training
- Inactive duty training
- Full-time National Guard duty.
- Absence from work for an examination to determine a person's fitness for any of the above types of duty.

The "uniformed services" consist of the following:

- Army, Navy, Marine Corps, Air Force, or Coast Guard.
- Army Reserve, Naval Reserve, Marine Corps Reserve, Air Force Reserve, or Coast Guard Reserve.

- Army National Guard or Air National Guard.
- Commissioned Corps of the Public Health Service.
- Any other category of persons designated by the President in time of war or emergency.

"Brief Nonrecurrent" positions (Section 4312(d)(1)(C))

The new law provides an exemption for preservice positions that are "brief or nonrecurrent and that cannot reasonably be expected to continue indefinitely or for a significant period."

Advance Notice (Section 4312(a)(1))

The law requires all employees to provide their employers with advance notice of military service.

Notice may be either written or oral. It may be provided by the employee or by an appropriate officer of the branch of the military in which the employee will be serving. However, no notice is required if:

- military necessity prevents the giving of notice; or
- the giving of notice is otherwise impossible or unreasonable.

"Military necessity" for purposes of the notice exemption is to be defined in regulations of the Secretary of Defense. These regulations will be immune from court review.

Duration of Service (Section 4312(c))

The cumulative length of a person's absences from a position may not exceed five years.

Most types of service will be cumulatively counted in the computation of the five-year period.

Exceptions. Eight categories of service are exempt from the five-year limitation. These include:

(1) **Service required beyond five years to complete an initial period of obligated service (Section 4312(c)(1)).** Some military specialties, such as the Navy's nuclear power program, require initial active service obligations beyond five years.

(2) **Service from which a person, through no fault of the person, is unable to obtain a release within the five**

year limit (Section 4312(c)(2)). For example, the five-year limit will not be applied to members of the Navy or Marine Corps whose obligated service dates expire while they are at sea.
Nor will it be applied when service members are involuntarily retained on active duty beyond the expiration of their obligated service date. This was the experience of some persons who served in Operations Desert Shield and Storm.

(3) **Required training for reservists and National Guard members (Section 4312(c)(3)).** The two-week annual training sessions and monthly weekend drills mandated by statute for reservists and National Guard members are exempt from the five-year limitation. Also excluded are additional training requirements certified in writing by the Secretary of the service concerned to be necessary for individual professional development.

(4) **Service under an involuntary order to, or to be retained on, active duty during domestic emergency or national security related situations (Section 4312(c)(4)(A)).**

(5) **Service under an order to, or to remain on, active duty (other than for training) during a war or national emergency declared by the President or Congress (Section 4312(c)(4)(B)).** This category includes service not only by persons involuntarily ordered to active duty, but also service by volunteers who receive orders to active duty.

(6) **Active duty (other than for training) by volunteers supporting "operational missions" for which Selected Reservists have been ordered to active duty without their consent (Section 4312(c)(4)(c)).** Such operational missions involve circumstances other than war or national emergency for which, under presidential authorization, members of the Selected Reserve may be involuntarily ordered to active duty under Title 10, U.S.C. Section 12304. The recent U.S. military involvement in support of restoration of democracy in Haiti ("Uphold Democracy") was such an operational mission as is the current (as of 1998) operation in Bosnia ("Joint Endeavor").

This sixth exemption for the five-year limitation covers persons who are called to active duty after

volunteering to support operational missions. Persons involuntarily ordered to active duty for operational missions would be covered by the fourth exemption, above.

(7) **Service by volunteers who are ordered to active duty in support of a "critical mission or requirement" in times other than war or national emergency and when no involuntary call up is in effect (Section 4312 (c)(4)(D)).** The Secretaries of the various military branches each have authority to designate a military operation as a critical mission or requirement.

(8) **Federal service by members of the National Guard called into action by the President to suppress an insurrection, repel an invasion, or to execute the laws of the United States (Section 4312(c)(4)(E)).**

Disqualifying service (Section 4304)

When would service be disqualifying? The statute lists four circumstances:

(1) Separation from the service with a dishonorable or bad conduct discharge.

(2) Separation from the service under other than honorable conditions. Regulations for each military branch specify when separation from the service would be considered "other than honorable."

(3) Dismissal of a commissioned officer in certain situations involving a court martial or by order of the President in time of war **(Section 1161(a) of Title 10).**

(4) Dropping a individual from the rolls when the individual has been absent without authority for more than three months or who is imprisoned by a civilian court. **(Section 1161(b) of Title 10)**

Reporting back to work (Section 4312(e))

Time limits for returning to work now depend, with the exception of fitness-for-service examinations, on the duration of a person's military service.

Service of 1 to 30 days. The person must report to his or her employer by the beginning of the first regularly scheduled work day that would fall eight hours after the end of the calendar

day. For example, an employer cannot require a service member who returns home at 10:00 p.m. to report to work at 12:30 a.m. that night. But the employer can require the employee to report for the 6:00 a.m. shift the next morning.

If, due to no fault of the employee, timely reporting back to work would be impossible or unreasonable, the employee must report back to work as soon as possible.

Fitness Exam. The time limit for reporting back to work for a person who is absent from work in order to take a fitness-for-service examination is the same as the one above for persons who are absent for 1 to 30 days. This period will apply regardless of the length of the person's absence.

Service of 31 to 180 days. An application for reemployment must be submitted no later than 14 days after completion of a person's service. If submission of a timely application is impossible or unreasonable through no fault of the person, the application must be submitted as soon as possible. If the 14th day falls on a day when the offices are not open, or there is otherwise no one available to accept the application, the time extends to the next business day.

Service of 181 or more days. An application for reemployment must be submitted no later than 90 days after completion of a person's military service. If the 90th day falls on a day when the offices are not open, or there is otherwise no one available to accept the application, the time extends to the next business day.

Disability incurred or aggravated. The reporting or application deadlines are extended for up to two years for persons who are hospitalized or convalescing because of a disability incurred or aggravated during the period of military service.

The two-year period will be extended by the minimum time required to accommodate a circumstance beyond an individual's control that would make reporting within the two-year period impossible or unreasonable.

Unexcused delay. Are a person's reemployment rights automatically forfeited if the person fails to report to work or to apply for reemployment within the required time limits? No. But the person will then be subject to the employer's rules governing unexcused absences.

Documentation upon return (Section 4312(f))

An employer has the right to request that a person who is absent for a period of service of 31 days or more provide documentation showing that:

- the person's application for reemployment is timely;
- the person has not exceeded the five-year service limitation; and
- the person's separation from service was other than disqualifying under **Section 4304.**

Unavailable documentation. Section: 4312(f)(3)(A). If a person does not provide satisfactory documentation because it's not readily available or doesn't exist, the employer still must promptly reemploy the person. However, if, after reemploying the person, documentation becomes available that shows one or more of the reemployment requirements were not met, the employer may terminate the person. The termination would be effective as of that moment. It would not operate retroactively.

Pension contributions. Section 4312(f)(3)(B). Pursuant to **Section 4318**, if a person has been absent for military service for 91 or more days, an employer may delay making retroactive pension contributions until the person submits satisfactory documentation. However, contributions will still have to be made for persons who are absent for 90 or fewer days.

How to place eligible persons in a job

Length of service -- Section 4313(a)

Except with respect to persons who have a disability incurred in or aggravated by military service, the position into which a person is reinstated is based on the length of a person's military service.

1 to 90 days. Section 4313(a)(1)(A) & (B). A person whose military service lasted 1 to 90 days must be "promptly reemployed" in the following order of priority:

(1) **(Section 4313(a)(1)(A))** in the job the person would have held had the person remained continuously employed, so long as the person is qualified for the job or can become qualified after reasonable efforts by the employer to qualify the person; or, **(B)** in the position of employment in which the person was employed on the date of the commencement of the service in the uniformed services, only if the person is not qualified to perform the duties of the position referred to in subparagraph (A) after reasonable efforts by the employer to qualify the person.

(2) if the employee cannot become qualified for either position described above (other than for a disability incurred in or aggravated by the military service) even after reasonable employer efforts, the person is to be reemployed in a position that is the nearest approximation to the positions described above (in that order) which the person is able to perform, with full seniority. **(Section 4313(a)(4))**

With respect to the first two positions, employers do not have the option of offering other jobs of equivalent seniority, status, and pay.

91 or more days. Section 4313(a)(2). The law requires employers to promptly reemploy persons returning from military service of 91 or more days in the following order of priority:

(1) **Section 4313(a)(2)(A).** In the job the person would have held had the person remained continuously employed, or a position of like seniority status and pay, so long as the person is qualified for the job or can become qualified after reasonable efforts by the employer to qualify the person; or, **(B)** in the position of employment in which the person was employed on the date of the commencement of the service in the uniformed services, or a position of like seniority, status, and pay the duties of which the person is qualified to perform, only if the person is not qualified to perform the duties of the position referred to in subparagraph (A) after reasonable efforts by the employer to qualify the person.

(2) **Section 4313(a)(4).** If the employee cannot become qualified for the position either in (A) or (B) above: in any other position of lesser status and pay, but that most nearly approximates the above positions (in that order) that the employee is qualified to perform with full seniority.

"Escalator" position. The reemployment position with the highest priority in the reemployment schemes reflects the "escalator" principle that has been a key concept in federal veterans' reemployment legislation. The escalator principle requires that each returning service member actually step back onto the seniority escalator at the point the person would have occupied if the person had remained continuously employed.

The position may not necessarily be the same job the person previously held. For instance, if the person would have been promoted with reasonable certainty had the person not been absent, the person would be entitled to that promotion upon

reinstatement. On the other hand, the position could be at a lower level than the one previously held, it could be a different job, or it could conceivably be in layoff status.

Qualification efforts. Employers must make reasonable efforts to qualify returning service members who are not qualified for reemployment positions that they otherwise would be entitled to hold for reasons other than a disability incurred or aggravated by military service.

Employers must provide refresher training, and any training necessary to update a returning employee's skills in situation where the employee is no longer qualified due to technological advances. Training will not be required if it is an undue hardship for the employer, as discussed below.

If reasonable efforts fail to qualify a person for the first and second reemployment positions in the above schemes, the person must be placed in a position of equivalent or nearest approximation and pay that the person is qualified to perform (the third reemployment position in the above schemes).

"Prompt" reemployment. Section 4313(a). The law specifies that returning service members be "promptly reemployed." What is prompt will depend on the circumstances of each individual case. Reinstatement after weekend National Guard duty will generally be the next regularly scheduled working day. On the other hand, reinstatement following five years on active duty might require giving notice to an incumbent employee who has occupied the service member's position and who might possibly have to vacate that position.

Disabilities incurred or aggravated while in Military Service Section 4313(a)(3).

The following three-part reemployment scheme is required for persons with disabilities incurred or aggravated while in Military Service:

(1) The employer must make reasonable efforts to accommodate a person's disability so that the person can perform the position that person would have held if the person had remained continuously employed.

(2) If, despite reasonable accommodation efforts, the person is not qualified for the position in **(1)** due to his or her disability, the person must be employed in a position of equivalent seniority, status, and pay, so long as the employee is qualified to perform the duties

of the position or could become qualified to perform them with reasonable efforts by the employer.

(3) If the person does not become qualified for the position in either (1) or (2), the person must be employed in a position that, consistent with the circumstances of that person's case, most nearly approximates the position in (2) in terms of seniority, status, and pay.

The law covers all employers, regardless of size.

Conflicting reemployment claims Section 4313(b)(1) & (2)(A).

If two or more persons are entitled to reemployment in the same position, the following reemployment scheme applies:

- The person who first left the position has the superior right to it.
- The person without the superior right is entitled to employment with full seniority in any other position that provides similar status and pay in the order of priority under the reemployment scheme otherwise applicable to such person.

Changed circumstances Section 4312(d)(1)(A)).

Reemployment of a person is excused if an employer's circumstances have changed so much that reemployment of the person would be impossible or unreasonable. A reduction-in-force that would have included the person would be an example.

Undue hardship Section 4312(d)(1)(B).

Employers are excused from making efforts to qualify returning service members or from accommodating individuals with service-connected disabilities when doing so would be of such difficulty or expense as to cause "undue hardship."

Rights of reemployed persons

Seniority rights Section 4316(a)

Reemployed service members are entitled to the seniority and all rights and benefits based on seniority that they would have attained with reasonable certainty had they remained continuously employed.

A right or benefit is seniority-based if it is determined by or accrues with length of service. On the other hand, a right or benefit is not seniority-based if it is compensation for work performed or is subject to a significant contingency.

Rights not based on seniority Section 4316(b).

Departing service members must be treated as if they are on a leave of absence. Consequently, while they are away they must be entitled to participate in any rights and benefits not based on seniority that are available to employees on nonmilitary leaves of absence, whether paid or unpaid. If there is a variation among different types of nonmilitary leaves of absence, the most favorable treatment must be accorded the service member.

The returning employees shall be entitled not only to nonseniority rights and benefits available at the time they left for military service, but also those that became effective during their service.

Forfeiture of rights. Section 4316(b)(2)(A)(ii). If, prior to leaving for military service, an employee knowingly provides clear written notice of an intent not to return to work after military service, the employee waives entitlement to leave-of-absence rights and benefits not based on seniority.

At the time of providing the notice, the employee must be aware of the specific rights and benefits to be lost. If the employee lacks that awareness, or is otherwise coerced, the waiver will be ineffective.

Notices of intent not to return can waive only leave-of-absence rights and benefits. They cannot surrender other rights and benefits that a person would be entitled to under the law, particularly reemployment rights.

Funding of benefits. Section 4316(b)(4). Service members may be required to pay the employee cost, if any, of any funded benefit to the extent that other employees on leave of absence would be required to pay.

Pension/retirement plans

Pension plans, Section 4318, which are tied to seniority, are given separate, detailed treatment under the law. The law provides that:

- **Section 4318(a)(2)(A)**. A reemployed person must be treated as not having incurred a break in service with the employer maintaining a pension plan;

- **Section 4318(a)(2)(B)**. Military service must be considered service with an employer for vesting and benefit accrual purposes;

- **Section 4318(b)(1)**. The employer is liable for funding any resulting obligation; and

- **Section 4318(b)(2)**. The reemployed person is entitled to any accrued benefits from employee contributions only to the extent that the person repays the employee contributions.

Covered plan. Section 4318. A "pension plan" that must comply with the requirements of the reemployment law would be any plan that provides retirement income to employees until the termination of employment or later. Defined benefits plans, defined contribution plans, and profit sharing plans that are retirement plans are covered.

Multi-employer plans. Section 4318(b)(1). In a multi-employer defined contribution pension plan, the sponsor maintaining the plan may allocate among the participating employers the liability of the plan for pension benefits accrued by persons who are absent for military service. If no cost-sharing arrangement is provided, the full liability to make the retroactive contributions to the plan will be allocated to the last employer employing the person before the period of military service or, if that employer is no longer functional, to the overall plan.

Within 30 days after a person is reemployed, an employer who participates in a multi-employer plan must provide written notice to the plan administrator of the person's reemployment. **(4318(c))**

Employee contribution repayment period. Section 4318(b)(2). Repayment of employee contributions can be made over three times the period of military service but no longer than five years.

Calculation of contributions. Section 4318(b)(3)(A). For purposes of determining an employer's liability or an employee's contributions under a pension benefit plan, the employee's compensation during the period of his or her military service will be based on the rate of pay the employee would have received from the employer but for the absence during the period of service.

Section 4318(b)(3)(B). If the employee's compensation was not based on a fixed rate, the determination of such rate is not reasonably certain, on the basis of the employee's average rate of compensation during the 12-month period immediately preceding such period (or, if shorter, the period of employment immediately preceding such period).

Vacation pay Section 4316(d).

Service members must, at their request, be permitted to use any vacation that had accrued before the beginning of their military service instead of unpaid leave. However, it continues to be the law that service members cannot be forced to use vacation time for military service.

Health benefits Section 4317

The law provides for health benefit continuation for persons who are absent from work to serve in the military, even when their employers are not covered by COBRA. (Employers with fewer than 20 employees are exempt for COBRA.)

Section 4317(a)(1). If a person's health plan coverage would terminate because of an absence due to military service, the person may elect to continue the health plan coverage for up to 18 months after the absence begins or for the period of service (plus the time allowed to apply for reemployment), whichever period is shorter. The person cannot be required to pay more than 102 percent of the full premium for the coverage. If the military service was for 30 or fewer days, the person cannot be required to pay more than the normal employee share of any premium.

Exclusions/waiting periods. Section 4317(b). A waiting period or exclusion cannot be imposed upon reinstatement if health coverage would have been provided to a person had the person not been absent for military service. However, an exception applies to disabilities determined by the Veterans Administration to be service-connected.

Multi-employer. Section 4317(a)(3). Liability for employer contributions and benefits under multi-employer plans is to be allocated by the plan sponsor in such manner as the plan sponsor provides. If the sponsor makes no provision for allocation, liability is to be allocated to the last employer employing the person before the person's military service or, if that employer is no longer functional, to the plan.

Protection from discharge

Persons returning from active duty for training were not explicitly protected under the old law. Under USERRA, a reemployed employee may not be discharged without cause as follows:

- **Section 4316(c)(1).** For one year after the date of reemployment if the person's period of military service was for more than six months (181 days or more).

- **Section 4316(c)(2).** For six months after the date of reemployment if the person's period of military service was for 31 to 180 days.

Persons who serve for 30 or fewer days are not be protected from discharge without cause. However, they are protected from discrimination because of military service or obligation.

Protection from discrimination and retaliation

Discrimination -- Section 4311.

Section 4311(a). Employment discrimination because of past, current, or future military obligations is prohibited. The ban is broad, extending to most areas of employment, including:

- hiring;
- promotion;
- reemployment;
- termination; and
- benefits

Persons protected. Section 4311(a). The law protects from discrimination past members, current members, and persons who apply to be a member of any of the branches of the uniformed services.

Previously, only Reservists and National Guard members were protected from discrimination. Under USERRA, persons with past, current, or future obligations in all branches of the military are also protected.

Standard/burden of proof. Section 4311(c). If an individual's past, present, or future connection with the service is a motivating factor in an employer's adverse employment action against that individual, the employer has committed a violation,

unless the employer can prove that it would have taken the same action regardless of the individual's connection with the service. The burden of proof is on the employer once a *prima facie* case is established.

The enacted law clarifies that liability is possible when service connection is just one of an employer's reasons for the action. To avoid liability, the employer must prove that a reason other than service connection would have been sufficient to justify its action.

Both the standard and burden of proof now set out in the law apply to all cases, regardless of the date of the cause of action, including discrimination cases arising under the predecessor ("VRR") law.

Reprisals

Employers are prohibited from retaliating against anyone:

- who files a complaint under the law;
- who testifies, assists or otherwise participates in an investigation or proceeding under the law; or
- who exercises any right provided under the law.
- whether or not the person has performed military service **(section 4311(b))**.

How the law is enforced

Department of Labor

Regulations. Section 4331(a). The Secretary of Labor is empowered to issue regulations implementing the statue. Previously, the Secretary lacked such authority. However, certain publications issued by the U.S. Department of Labor had been accorded "a measure of weight" by the courts.

Veterans' Employment and Training Service. Reemployment assistance will continue to be provided by the Veterans' Employment and Training Service (VETS) of the Department of Labor. **Section 4321.** VETS investigates complaints and attempts to resolve them. Filing of complaints with VETS is optional. **Section 4322.**

Access to documents. Section 4326(a). The law gives VETS a right of access to examine and duplicate employer and employee documents that it considers relevant to an investigation. VETS also has the right of reasonable access to interview persons with information relevant to the investigation.

Subpoenas. Section 4326(b). The law authorizes VETS to subpoena the attendance and testimony of witnesses and the production of documents relating to any matter under investigation.

Government-assisted court actions

Section 4323(a)(1). Persons whose complaints are not successfully resolved by VETS may request that their complaints be submitted to the Attorney General for possible court action. If the Attorney General is satisfied that a complaint is meritorious, the Attorney General may file a court action on the complainant's behalf.

Private court actions Section 4323(a).

Individuals continue to have the option to privately file court actions. They may do so if they have chosen not to file a complaint with VETS, have chosen not to request that VETS refer their complaint to the Attorney General, or have been refused representation by the Attorney General.

Double damages. Section 4323(c)(1)(A)(iii). Award of back pay or lost benefits may be doubled in cases where violations of the law are found to be "willful." "Willful" is not defined in the law, but the law's legislative history indicates the same definition that the U.S. Supreme Court has adopted for cases under the Age Discrimination in Employment Act should be used. Under that definition, a violation is willful if the employer's conduct was knowingly or recklessly in disregard of the law.

Fees. Section 4323(c)(2)(B). The law, at the court's discretion, allows for awards of attorney fees, expert witness fees, and other litigation expenses to successful plaintiffs who retain private counsel. Also, the law bans charging of court fees or costs against anyone who brings suit (4323(c)(2)(A)).

Declaratory judgments. Section 4323(c)(4). Only persons claiming rights under the law may bring lawsuits. According to the law's legislative history, its purpose is to prevent employers, pension plans, or unions from filing actions for declaratory judgements to determine potential claims of employees.

Service Member Checklist

Service Member Obligations	Yes	No	Comments	Reference
1. Did the service member hold a job other than one that was brief, nonrecurring? (exception would be discrimination cases.)				Page 1
2. Did the service member notify the employer that he/she would be leaving the job for military training or service?				Page 2
3. Did the service member exceed the 5-year limitation limit on periods of service? (exclude exception identified in the law)				Page 2
4. Was the service member discharged under conditions other than disqualifying under section 4304?				Page 4
5. Did the service member make application or report back to the pre-service employer in a timely manner?				Page 4
6. When requested by the employer, did the service member provide readily available documentation showing eligibility for reemployment?				Page 5
7. Did the service member whose military leave exceeded 30 days elect to continue health insurance coverage? The employer is permitted to charge up to 102% of the entire premium in these cases.				Page 11

Employer Obligations

Employer Obligations:	Yes	No	Comments	Reference
1. Did the service member give advance notice of military service to the employer? (This notice can be written or verbal)				Page 2
2. Did the employer allow the service member a leave of absence? The employer cannot require that vacation or other personal leave be used.				Page 11
3. Upon timely application for reinstatement, did the employer timely reinstate the service member to his/her escalator position?				Page 6
4. Did the employer grant accrued seniority as if the returning service member had been continuously employed? This applies to the rights and benefits determined by seniority, including status, rate of pay, pension vesting, and credit for the period for pension benefit computations.				Page 9
5. Did the employer delay or attempt to defeat a reemployment rights obligation by demanding documentation that did not then exist or was not then readily available?				Page 5
6. Did the employer consider the timing, frequency, or duration of the service members training or service or the nature of such training or service as a basis for denying rights under this Statute?				Page 2
7. Did the employer provide training or retraining and other accommodations to persons with service-connected disabilities. If a disability could not be accommodated after reasonable efforts by the employer, did the employer reemploy the person in some other position he/she was qualified to perform which is the "nearest approximation" of the position to which the person was otherwise entitled, in terms of status and pay, and with full seniority?				Page 8
8. Did the employer make reasonable efforts to train or otherwise qualify a returning service member for a position within the organization/company? If the person could not be qualified in a similar position, did the employer place the person in any other position of lesser status and pay which he/she was qualified to perform with full seniority?				Page 7

9. Did the employer grant the reemployed person pension plan benefits that accrued during military service, regardless of whether the plan was a defined benefit or defined contribution plan?				Page 10
10. Did the employer offer COBRA-like health coverage upon request of a service member whose leave was more than 30 days? Upon the service member's election, did the employer continue coverage at the regular employee cost for service members whose leave was for less than 31 days?				Page 11
11. Did the employer discriminate in employment against or take adverse employment action against any person who assisted in the enforcement of a protection afforded any returning service member under this Statute.				Page 13
12. Did the employer in any way discriminate in employment, reemployment, retention in employment, promotion, or any benefit of employment on the basis of past or present membership, performance of service, application for service or obligation for military service.				Page 12
13. Did the employer satisfy the burden of proof where employment, reemployment or other entitlements are denied or when adverse action is taken when a service connection is the motivating factor in the denial or adverse action? Did the employer provide documentation that the action would have been taken in the absence of such membership?				Page 13

APPENDIX E

DoD National Committee for Employer Support of the Guard & Reserve (NCESGR) Materials for Service Members and Employers

USERRA Facts for Employers

Note: This material is for information only and should not be considered a legal authority. While this factsheet is directed to civilian employers of members of the National Guard and Reserve, it should be noted that Active component members, Public Health Service Commissioned Corps members, and certain others are also protected by the Uniformed Services Employment and Reemployment Rights Act (USERRA), if they meet the eligibility criteria. Contact the National Committee for Employer Support of the Guard and Reserve at (800) 336-4590 with specific questions regarding USERRA.

If you need more information concerning specific situations, please E-mail: NCESGR's WebMaster or call the National Committee at (800) 336-4590.

Note: Where applicable, a relevant section number of Title 38, United States Code, is provided in parentheses after the answer.

1. Is there a law governing a servicemember's right to reemployment rights after his or her completion of military training or service?

Yes. Since 1940, there has been such a law, known as the Veterans' Reemployment Rights (VRR). On October 13, 1994, President Clinton signed the Uniformed Services Employment and Reemployment Rights Act – a comprehensive revision of the VRR, USERRA became fully effective December 12, 1994, and is contained in Title 38, United States Code, at chapter 43. (Sections 4301 through 4333)

2. Who is eligible for reemployment rights under USERRA following military service?

The individual must meet five conditions, or "eligibility criteria." The individual:
a. must hold or have applied for a civilian job. (Note: Jobs employers can show to be held for a brief, nonrecurrent period with no reasonable expectation of continuing for a significant period do not qualify for protection.)
b. must have given written or verbal notice to the civilian employer prior to leaving the job for military training or service except when precluded by military necessity.
c. must not have exceeded the 5-year cumulative limit on periods of service.
d. must have been released from service under conditions other than dishonorable.
e. must report back to the civilian job in a timely manner or submit a timely application for reemployment. (generally, Section 4312)

3. Are there reemployment rights following voluntary military service? State callups?

USERRA applies to voluntary as well as involuntary military service, in peacetime as well as wartime. However, like the VRR law, USERRA does not apply to state callups of the National Guard for disaster relief, riots, etc. Any protection for such duty must be provided by the laws of the state or territory involved. (Section 4303)

4. When is prior notice to the civilian employer required? How is such notice to be given?

The person who is performing the service (or an official representative of the uniformed service) must give advance written or verbal notice to the employer. The notice requirement applies to all categories of training or service. Notice is not required if precluded by military necessity or, if the giving of such notice is otherwise impossible or unreasonable.

A determination of military necessity shall be made pursuant to regulations prescribed by the Department of Defense. It is reasonable to expect that situations where notice is not required will be rare. The law does not specify how much advance notice is required, but the Department of Defense advises members of the National Guard and Reserve that they should provide their employers as much advance notice as they can. (Section 4312)

5. Is an employer entitled to proof that military duty for which an employee was granted a leave of absence was actually performed?

Yes. USERRA provides that following periods of military service of 31 days or more, the returning employee must, upon the employer's request, provide documentation that establishes length and character of the service and the timeliness of the application for reemployment. Reemployment may not be delayed, however, if such documentation does not exist or is not readily available. In general, the following documents have been determined by the Secretary of Labor to satisfy proof of eligibility for reemployment: discharge papers, leave and earnings statements, school completion certificate, endorsed orders, or a letter from a proper military authority. While USERRA does not address documentation of shorter periods of military service, if doubt exists, an employer could contact the employee's military command with questions about a specific period of service. (Section 4312)

6. How is the 5-year limit computed?

Service in the uniformed services, except the types of service described below, counts toward the cumulative 5-year limit of military service a person can perform while retaining rights under USERRA. When a person starts a new job with a new employer, he or she receives a fresh 5-year entitlement. Duty performed

prior to the effective date of USERRA is addressed in question #8. USERRA's cumulative 5-year limit does not include certain kinds of military training or service. Exceptions to the 5-year limit can be grouped into three broad categories:

a. Unable (through no fault of the individual) to obtain release from service or service in excess of five years to fulfill an initial period of obligated service (generally imposed on Active component aviators or others who undergo extensive initial training in certain technical military specialties).

b. Required drills and annual training and other training duty certified by the military to be necessary for professional development or skill training/retraining.

c. Service performed during time of war or national emergency or for other critical missions/contingencies/military requirements. Involuntary service of this type is exempt from the 5-year limit. Voluntary service in support of the mission/contingency/military requirement is also exempt. (Section 4312)

7. Can an employee be required to use earned vacation while performing military service?

No. As under the VRR law, a person may not be forced to use earned vacation. Employees are entitled to earned vacation or leave in addition to time off to perform military service. A rare exception would be a case where there is a standard plant shutdown at a certain time of year and all employees must take their vacations during that period and an employee's period of military service happens to coincide with that period. (Section 4316)

8. Now that USERRA has been enacted, can a person serve an additional five years and still have reemployment rights?

Not necessarily. USERRA provides that military service performed prior to December 12, 1994, will count toward the USERRA 5-year limit if it counted against the limits contained in the old law. (transition rules—not codified)

9. How much time off is an employee entitled to prior to reporting for military service?

Although an exact amount of time is not specified in USERRA, an employee, at a minimum, needs to be given sufficient time to travel to the place where the military duty is to be performed.

10. After the completion of military service, what is the time frame within which a person has to report back to work or apply for reemployment?

For periods of service of up to 30 consecutive days, the person must report back to work for the first full regularly scheduled work period on the first full calendar day following the completion of the period of service and safe

transportation home, plus an 8-hour period for rest. If reporting back within this deadline is "impossible or unreasonable" through no fault of the employee, he or she must report back as soon as possible after the expiration of the 8-hour period.

After a period of service of 31-180 days, the person must submit a written or verbal application for reemployment with the employer not later than 14 days after the completion of the period of service. If submitting the application within 14 days is impossible or unreasonable through no fault of the employee, he or she must submit the application as soon as possible thereafter.

After a period of service of 181 days or more, the person must submit an application for reemployment not later than 90 days after completion of the period of service. These deadlines to report to work or apply for reemployment can be extended up to two years to accommodate a period during which a person was hospitalized for or convalescing from an injury or illness that occurred or was aggravated during a period of military service. (Section 4312)

In either case, the person does not automatically forfeit the right to reemployment, but will be "subject to the conduct rules, established policy, and general practices of the employer pertaining to explanations and discipline with respect to absence from scheduled work." (Section 4312)

11. Does USERRA give a person the right to benefits from the civilian employer during a period of military training or service?

Yes. USERRA gives an employee the right to elect continued health insurance coverage, for himself or herself and his or her dependents, during periods of military service. For periods of up to 30 days of training or service, the employer can require the person to pay only the normal employee share, if any, of the cost of such coverage. For longer tours, the employer is permitted to charge the person up to 102 percent of the entire premium. If the employee elects coverage, the right to that coverage ends on the day after the deadline for him or her to apply for reemployment or 18 months after the absence from the civilian job began, whichever comes first.

USERRA gives an employee and previously covered dependents the right to immediate reinstatement of civilian health insurance coverage upon return to the civilian job. The health plan cannot impose a waiting period and cannot exclude the returning employee based on preexisting conditions (other than for those conditions determined by the Federal government to be service-connected). This right is not contingent on an election to continue coverage during the period of service. (Section 4317)

To the extent that an employer offers other non-seniority benefits (e.g., holiday pay or life insurance coverage) to employees on furlough or a leave of

absence, the employer is required to provide those same benefits to an employee during a period of service in the uniformed services. If the employer's treatment of persons on leaves of absence varies according to the kind of leave (e.g., jury duty, educational, etc.), the comparison should be made with the employer's most generous form of leave. Of course, you must compare periods of comparable length. An employee may waive his or her rights to these other non-seniority benefits by knowingly stating, in writing, his or her intent not to return to work. However, such statement does not waive any other rights provided by USERRA. (Section 4316)

12. What is an employer required to provide to a returning servicemember upon reemployment?

There are four basic entitlements (if the eligibility criteria in answer #2 are met):

a. Prompt reinstatement (generally a matter of days, not weeks, but will depend on the length of absence).
b. Accrued seniority, as if continuously employed. This applies to rights and benefits determined by seniority as well. This includes status, rate of pay, pension vesting, and credit for the period for pension benefit computations.
c. Training or retraining and other accommodations. This would be particularly applicable in case of a long period of absence or service-connected disability.
d. Special protection against discharge, except for cause. The period of this protection is 180 days following periods of service of 31-180 days. For periods of service of 181 days or more, it is one year. (generally, Section 4313)

13. Is the returning employee always entitled to have the same job back?

No. USERRA provides that, if the period of service was less than 91 days, the person is entitled to the job he or she would have attained absent the military service, provided the person is, or can become, qualified for that job. If unable to become qualified for a new job after reasonable efforts by the employer, the person is entitled to the job he or she left.

For periods of service of 91 days or more, the employer may reemploy the returning employee as above (i.e., position that would have been attained or position left), or in a position of "like seniority, status and pay" the duties which the person is qualified to perform. (Section 4313)

14. What if a person is not qualified for the reemployment position?

If a person has been gone from the civilian job for months or years, civilian job skills may have been dulled by a long period without use. A person must be (or become) qualified to do the job to have reemployment rights, but USERRA requires the employer to make "reasonable efforts" to qualify that person. "Reasonable efforts" means actions, including training, that don't cause undue

hardship to the employer. If a person can't become qualified in the positions described in #13 after reasonable efforts by the employer, and if not disabled, the person must be employed in any other position of lesser status and pay, which he or she is qualified to perform, with full seniority. (Section 4313)

15. What if a returning servicemember is disabled?

USERRA also requires the employer to make "reasonable efforts" to accommodate persons with a disability incurred or aggravated during military service. If a person returns from military service and is suffering from a disability that cannot be accommodated by reasonable employer efforts, the employer is to reemploy the person in some other position he or she is qualified to perform and which is the "nearest approximation" of the position to which the person is otherwise entitled, in terms of status and pay, with full seniority.

A disability need not be permanent to confer rights under USERRA. For example, if a person breaks a leg during annual training, the employer may have an obligation to make reasonable efforts to accommodate the broken leg, or to place the person in another position, until the leg has healed. (Section 4313)

16. How does the new law address discrimination by an employer or prospective employer?

Section 4311(a) of USERRA provides as follows:

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

Section 4311(c)(1) further provides:

"An employer may not discriminate in employment against or take any adverse employment action against any person because such person has taken an action to enforce a protection afforded any person under this chapter, has testified or otherwise made a statement in or in connection with any proceeding under this chapter, has assisted or otherwise participated in an investigation under this chapter, or has exercised a right provided for in this chapter."

These two provisions provide a very broad protection against employer discrimination, much broader than the VRR law provided. The second provision prohibits, for the first time, reprisals against any person, without regard to military connection, who testifies or otherwise assists in an investigation or other proceeding under USERRA. (Section 4311)

17. Who has the burden of proof in discrimination cases?

The employer or prospective employer. USERRA provides that a denial of employment or an adverse action taken by an employer will be unlawful if a service connection was a motivating factor (not necessarily the only factor) in the denial or adverse action "unless the employer can prove that the action would have been taken in the absence of such membership, application for membership or obligation." (Section 4311)

18. Where do I go for information or assistance?

Employers should contact the National Committee for Employer Support of the Guard and Reserve (NCESGR). You can contact a NCESGR ombudsman toll-free at (800) 336-4590. Ombudsmen are trained to provide information and informal mediation services concerning civilian job rights of National Guard and Reserve members. As mediators, they act as neutrals, with a goal of helping bring about solutions to conflicts that are legal and equitable to each of the parties involved.

Sometimes, employers are particularly inconvenienced by the timing of proposed military duty by an employee-Reservist. For example, a scheduled drill weekend by a "key" employee may disrupt a major project, special product promotion, annual inventory, etc.

In such cases, NCESGR suggests employers contact the military commander involved to seek relief from the impending hardship. Experience has shown that commanders are sensitive to employer concerns and can often assist, when military requirements permit, by rescheduling the proposed military duty or assigning someone else to perform it.

Ombudsman Services

National Guardsmen, Reservists, or their employers who experience problems resulting from employee participation in the National Guard or Reserve, may request assistance from one of NCESGR's ombudsmen.

Ombudsmen provide information about rights and responsibilities under the law and seek a solution through mediation that can provide quick problem resolution. This service (whether local or national) is informal; discussions are not entered into personnel records. The objective is to eliminate misunderstandings and resolve difficulties to the satisfaction of all.

Each of the 54 ESGR committees have trained ombudsmen who are ready to assist in resolving employer-reservist conflicts. Most state committee ombudsmen are local business leaders; they understand both sides of the problem and can help mediate. State committee ombudsmen may be identified through unit commanders, state Adjutants General, or by calling the toll-free number below.

The first attempt to resolve a problem should be made at the employer-employee level. Often, a calm, objective discussion can reveal solutions if conducted in an atmosphere of mutual cooperation. If that fails, unit commanders should be consulted. Commanders have a vested interest in the problem and may be able to explain the situation or suggest compromises that will satisfy everyone's needs. If those efforts fail, e-mail us at the address below and we'll put you in touch with an ombudsman who is qualified to help and is sympathetic to the needs of both employers and employees. As with all communications, you should provide full details of the problem and an address and telephone number where you can be reached.

For more information about ESGR Ombudsman Services, NCESGR's WebMaster
National Committee for Employer
Support of the Guard and Reserve
1555 Wilson Blvd, Suite 200
Arlington, VA 22209-2405
Toll-Free: 800-336-4590

Please note: NCESGR's ombudsmen handle only employer-employee conflicts involving military service. Recruiting and inspector general complaints should be forwarded to the appropriate agencies. None of the sources listed above have authority to enforce the law. Cases that require legal advice or assistance are referred to the United States Department of Labor.

Employment and Reemployment Rights Questions and Answers for National Guard and Reserve Members

NOTE: This material is for information only and should not be considered a legal authority. While this factsheet is directed to members of the National Guard and Reserve, it should be noted that Active component members, Public Health Service Commissioned Corps members, and certain others are also protected by the Uniformed Services Employment and Reemployment Rights Act (USERRA), if they meet the eligibility criteria. Contact the National Committee for Employer Support of the Guard and Reserve at (800) 336-4590 with specific questions regarding USERRA.

1. Is there a law governing reemployment rights after military training or service?

Yes. Since 1940, there has been such a law, known as the Veterans' Reemployment Rights (VRR) law. On October 13, 1994, President Clinton signed the Uniformed Services Employment and Reemployment Rights Act, a comprehensive revision of the VRR law. USERRA became fully effective December 12, 1994, and is contained in Title 38, United States Code at chapter 43.

2. Am I eligible for reemployment rights under USERRA if I perform military service?

Yes, provided you meet five conditions, or "eligibility criteria":

a. You must hold a civilian job. (Note: Jobs that are held for a brief, nonrecurrent period with no reasonable expectation that the employment will continue indefinitely or for a significant period do not qualify for protection.)

b. You must give notice to your civilian employer that you will be leaving the job for military training or service.

c. You must not exceed the 5-year cumulative limit on periods of service.

d. You must be released from service under "honorable conditions."

e. You must report back to your civilian job in a timely manner or submit a timely application for reemployment.

3. Do I have reemployment rights following voluntary military service? State callups?

USERRA applies to voluntary as well as involuntary military service, in peacetime as well as wartime. However, like the VRR law, USERRA doesnot apply to state callups of the National Guard for disaster relief, riots, etc. Any protection for such duty must be provided by the laws of the state involved.

4. When is prior notice to my civilian employer required? How is such notice to be given?

It is necessary that the person who is performing the service (or an official representative of the uniformed service) give advance written or verbal notice to the employer. The notice requirement applies to all categories of training or service. Notice is not required if precluded by military necessity or, if the giving of such notice is otherwise impossible or unreasonable.

A determination of military necessity shall be made pursuant to regulations prescribed by the Department of Defense. It is reasonable to expect that situations where notice is not required will be rare. The law does not specify how much advance notice is required, but you should give your employer as much advance notice as possible.

5. How is the 5-year limit computed?

Service that you have performed, except the service described below, counts toward the cumulative 5-year limit of service you can perform while retaining rights under USERRA. When you start a new job with a new employer, you receive a fresh 5-year entitlement. Duty performed prior to the effective date of USERRA is addressed in question #8.

USERRA's cumulative 5-year limit does not include certain kinds of military training or service. Exceptions to the 5-year limit can be grouped into three broad categories:

a. Unable (through no fault of yours) to obtain orders releasing you from service or service in excess of five years to fulfill an initial period of obligated service, generally imposed on Active component aviators or others who undergo extensive initial training in certain technical military specialties.

b. Required drills and annual training and other training duty certified by the military to be necessary for professional development or skill training/retraining.

c. Service performed during time of war or national emergency or for other critical missions, contingencies, or military requirements. Involuntary service of this type is exempt from the 5-year limit. Voluntary service in support of a mission, contingency, or military requirement is also exempt.

6. I am a Federal employee, and I receive 15 days of paid military leave each year. My agency's personnel office has informed me that I have no right to time off from work for military training or service beyond this 15 days. Is that right?

No. As a Federal employee, you have the right to 15 days of paid military leave each fiscal year, under Title 5 U.S. Code. When you have exhausted your right to paid leave under Title 5, you still have the right to use your accrued civilian

leave or unpaid leave under USERRA, because USERRA applies to the Federal Government as well as all other civilian employers.

If you wish to continue your civilian pay uninterrupted and you have annual leave on the books, you can use that annual leave for your military training or service. USERRA gives you the explicit right to do this.

If your employer is a state or local government that grants paid military leave, the result would be the same. Most states and many local governments do grant employees paid military leave. When you have exhausted your paid leave, USERRA gives you the right to use of accrued vacation or unpaid leave of absence.

7. Can I be required to use my earned vacation while performing military service?

No. As under the VRR law, you may not be forced to use earned vacation. You are entitled to earned vacation or leave in addition to time off to perform military service. A rare exception would be a case where there is a standard plant shutdown at a certain time of year and all employees must take their vacations during that period and your period of military service happens to coincide with that period.

8. Now that USERRA has been enacted, can I serve an additional five years and still have reemployment rights?

Not necessarily. USERRA provides that military service performed prior to December 12, 1994, will count toward the USERRA 5-year limit if it counted against the limits in the old law.

9. After military service, how long do I have to report back to work or apply for reemployment?

For periods of service of up to 30 consecutive days, you must report back to work for the first full regularly scheduled work period on the day following the completion of the period of service and safe transportation home, plus an 8-hour period for rest. If reporting back within this deadline is "impossible or unreasonable" through no fault of your own, you must report back as soon as possible after the end of the 8-hour period.

After a period of service of 31-180 days, you must submit an application for reemployment, either written or verbal, with the employer not later than 14 days after the completion of the period of service. If submitting the application within 14 days is impossible or unreasonable through no fault of your own, you must submit the application as soon as possible thereafter.

After a period of service of 181 days or more, you must submit an application

for reemployment not later than 90 days after completion of the period of service. These deadlines to report to work or apply for reemployment can be extended up to two years to accommodate a period during which you were hospitalized for or convalescing from a service-connected injury or illness.

10. What if I am late in reporting back to work or applying for reemployment without a valid excuse?

In either case, you do not automatically forfeit your right to reemployment, but you will be "subject to the conduct rules, established policy, and general practices of the employer pertaining to explanations and discipline with respect to absence from scheduled work."

11. Does USERRA give me the right to benefits from my civilian employer during my military training or service?

Yes. USERRA gives you the right to elect continued health insurance coverage, for yourself and dependents, during periods of military service. For periods of up to 30 days of training or service, the employer can require you to pay only the employee share, if any, of the cost of such coverage.

For longer tours, the employer is permitted to charge you up to 102 percent of the entire premium. If you elect coverage, your right to that coverage ends on the day after the deadline for you to apply for reemployment or 18 months after your absence from your civilian job began, whichever comes first.

USERRA gives you and your previously covered dependents the right to immediate reinstatement of your civilian health insurance coverage upon return to your civilian job. There must be no waiting period and no exclusion of preexisting conditions (other than for those conditions determined to be service-connected). This right is not contingent on your having elected to continue that coverage during your period of service.

To the extent that your employer offers other non-seniority benefits (e.g., holiday pay or life insurance coverage) to employees on furlough or leave of absence, the employer is required to provide those same benefits to you, during your period of service in the uniformed services. If the employer's treatment of persons on leaves of absence varies according to the kind of leave (jury duty, educational, etc.), the comparison should be made with the employer's most generous form of leave. Of course, you must compare periods of comparable length.

12. To what am I entitled upon my application for reemployment?

You have four basic entitlements (if you meet the eligibility criteria in answer #2):

a. Prompt reinstatement (generally a matter of days, not weeks, but will depend on your length of absence).
b. Accrued seniority, as if you had been continuously employed. This applies to rights and benefits determined by seniority as well. This includes status, rate of pay, pension vesting, and credit for the period for pension benefit computations.
c. Training or retraining and other accommodations. This would be particularly applicable in case of a long period of absence or service-connected disability.
d. Special protection against discharge, except for cause. The period of this protection is 180 days following periods of service of 31-180 days. For periods of service of 181 days or more, it is one year.

13. When I return from military duty will I get my old job back?

USERRA provides that, if your period of service was less than 91 days, you are entitled to the job you would have attained if you hadn't left, provided that you are still, or can become, qualified for that job. If unable to become qualified for a new job after reasonable efforts by the employer, you are entitled to the job you left.

For periods of service of 91 days or more, the employer may reemploy you as above (i.e., position you would have attained or position you left), or in a position of "like seniority, status and pay" the duties of which you are qualified to perform.

14. What if I'm not qualified for my reemployment position? What if I'm injured or disabled?

If you have been gone from your civilian job for months or years, your civilian job skills may have been dulled by a long period without use. You must be qualified to do the job in order to have reemployment rights, but USERRA requires the employer to make "reasonable efforts" to qualify you.

"Reasonable efforts" means actions, including training, that don't cause undue hardship to the employer. If you can't become qualified in the positions described in #13 after reasonable efforts by your employer and you are not disabled, you must be employed in any other position of lesser status and pay, the duties of which you are qualified to perform, with full seniority.

USERRA also requires the employer to make "reasonable efforts" to accommodate a service-connected disability. If upon your return from military service you are suffering from a service-connected disability that cannot be accommodated by reasonable employer efforts, the employer is to reemploy you in some other position that you are qualified to perform and which is the "nearest approximation" of the position to which you are otherwise entitled, in terms of seniority, status, and pay.

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

15. Does the new law protect me from discrimination by my employer or a prospective employer?

Yes. Section 4311(a) of USERRA provides the following:

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

Section 4311(c)(1) further provides:

"An employer may not discriminate in employment against or take any adverse employment action against any person because such person has taken an action to enforce a protection afforded any person under this chapter, has testified or otherwise made a statement in or in connection with any proceeding under this chapter, has assisted or otherwise participated in an investigation under this chapter, or has exercised a right provided for in this chapter."

These two provisions provide a very broad protection against discrimination, much broader than the VRR law provided. The second provision prohibits, for the first time, reprisals against any person, without regard to military connection, who testifies or otherwise assists in an investigation or other proceeding under USERRA.

16. Who has the burden of proof in these cases?

The employer or prospective employer. USERRA provides that a denial of employment or an adverse action taken against you by an employer will be unlawful if your service connection was a motivating factor (not necessarily the only factor) in the denial or adverse action "unless the employer can prove that the action would have been taken in the absence of such membership, application for membership ... or obligation."

17. Where do I go for information or assistance?

National Guard and Reserve members with questions or concerns about their civilian job rights should first consult with their command.

For assistance, contact the National Committee for Employer Support of the Guard and Reserve (NCESGR). You can contact a NCESGR ombudsman toll-free at (800) 336-4590. Ombudsmen are trained to provide information and informal mediation services concerning civilian job rights of National Guard and Reserve members. If you believe your employer has violated your rights under USERRA and you wish to file a formal complaint, you should contact the Veterans' Employment and Training Service of the United States Department of Labor.

APPENDIX F

NCESGR/DOL-VETS
Points of Contact

NCESGR's Staff

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	Alaska	
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U.S. Department of Labor

July 29, 1998

VETS

Veterans' Employment and Training Service

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PREPARED BY

Office of the Assistant Secretary
for Veterans' Employment and Training
U.S. Department of Labor
Washington, D.C. 20210

VETERANS' EMPLOYMENT
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NOTE: Corrections and changes to this directory should be sent to the National Office, ATTN: Bob Sacoman

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Assistant Secretary
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Thomas S. Keefe
Deputy Assistant Secretary
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Abbreviations and Acronyms

ADVET	Assistant Director for Veterans' Employment and Training
ARAVET	Assistant Regional Administrator for Veterans' Employment and Training
ASVET	Assistant Secretary for Veterans' Employment and Training
DASVET	Deputy Assistant Secretary for Veterans' Employment and Training
DVET	Director for Veterans' Employment and Training
HVRP	Homeless Veterans' Reintegration Project
IPA	Intergovernmental Personnel Agreement
JTPA	Job Training Partnership Act
MSA	Management Services Assistant
N.O.	National Office
OASVET	Office of the Assistant Secretary for Veterans' Employment and Training
OAMB	Office of Agency Management and Budget
RAVET	Regional Administrator for Veterans' Employment and Training
SI	Senior Investigator
TAP	Transition Assistance Program
VPA	Veterans' Program Assistant
VPS	Veterans' Program Specialist
VRR	**Veterans' Reemployment Rights**

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