

(1) Update, as appropriate, the States' estimates of TAP workload and reserve sufficient funds for that purpose from the total amount available for allocation to the States. Beyond TAP workload, no funds will be reserved for exigent circumstances because the shortfall in the appropriation will be the primary exigent circumstance to be addressed.

(2) Apply proportionally the remaining balance available for basic grant allocations to the States for that fiscal year. The proportion will be calculated by dividing the remaining balance available for allocation by the total estimated State basic grant allocations for that fiscal year. The proportion resulting from that calculation will be applied to each State's estimated basic grant allocation to calculate the amount to be awarded.

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

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

GENERAL PROVISIONS

Sec.

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

Subpart B—Anti-Discrimination and Anti-Retaliation

PROTECTION FROM EMPLOYER DISCRIMINATION AND RETALIATION

- 1002.18 What status or activity is protected from employer discrimination by USERRA?
- 1002.19 What activity is protected from employer retaliation by USERRA?
- 1002.20 Does USERRA protect an individual who does not actually perform service in the uniformed services?

- 1002.21 Do the Act's prohibitions against discrimination and retaliation apply to all employment positions?
- 1002.22 Who has the burden of proving discrimination or retaliation in violation of USERRA?
- 1002.23 What must the individual show to carry the burden of proving that the employer discriminated or retaliated against him or her?

Subpart C—Eligibility for Reemployment

GENERAL ELIGIBILITY REQUIREMENTS FOR REEMPLOYMENT

- 1002.32 What criteria must the employee meet to be eligible under USERRA for reemployment after service in the uniformed services?
- 1002.33 Does the employee have to prove that the employer discriminated against him or her in order to be eligible for reemployment?

COVERAGE OF EMPLOYERS AND POSITIONS

- 1002.34 Which employers are covered by USERRA?
- 1002.35 Is a successor in interest an employer covered by USERRA?
- 1002.36 Can an employer be liable as a successor in interest if it was unaware that an employee may claim reemployment rights when the employer acquired the business?
- 1002.37 Can one employee be employed in one job by more than one employer?
- 1002.38 Can a hiring hall be an employer?
- 1002.39 Are States (and their political subdivisions), the District of Columbia, the Commonwealth of Puerto Rico, and United States territories, considered employers?
- 1002.40 Does USERRA protect against discrimination in initial hiring decisions?
- 1002.41 Does an employee have rights under USERRA even though he or she holds a temporary, part-time, probationary, or seasonal employment position?
- 1002.42 What rights does an employee have under USERRA if he or she is on layoff, on strike, or on a leave of absence?
- 1002.43 Does an individual have rights under USERRA even if he or she is an executive, managerial, or professional employee?
- 1002.44 Does USERRA cover an independent contractor?

COVERAGE OF SERVICE IN THE UNIFORMED SERVICES

- 1002.54 Are all military fitness examinations considered "service in the uniformed services?"
- 1002.55 Is all funeral honors duty considered "service in the uniformed services?"

Pt. 1002

20 CFR Ch. IX (4-1-06 Edition)

- 1002.56 What types of service in the National Disaster Medical System are considered "service in the uniformed services?"
- 1002.57 Is all service as a member of the National Guard considered "service in the uniformed services?"
- 1002.58 Is service in the commissioned corps of the Public Health Service considered "service in the uniformed services?"
- 1002.59 Are there any circumstances in which special categories of persons are considered to perform "service in the uniformed services?"
- 1002.60 Does USERRA cover an individual attending a military service academy?
- 1002.61 Does USERRA cover a member of the Reserve Officers Training Corps?
- 1002.62 Does USERRA cover a member of the Commissioned Corps of the National Oceanic and Atmospheric Administration, the Civil Air Patrol, or the Coast Guard Auxiliary?

ABSENCE FROM A POSITION OF EMPLOYMENT NECESSITATED BY REASON OF SERVICE IN THE UNIFORMED SERVICES

- 1002.73 Does service in the uniformed services have to be an employee's sole reason for leaving an employment position in order to have USERRA reemployment rights?
- 1002.74 Must the employee begin service in the uniformed services immediately after leaving his or her employment position in order to have USERRA reemployment rights?

REQUIREMENT OF NOTICE

- 1002.85 Must the employee give advance notice to the employer of his or her service in the uniformed services?
- 1002.86 When is the employee excused from giving advance notice of service in the uniformed services?
- 1002.87 Is the employee required to get permission from his or her employer before leaving to perform service in the uniformed services?
- 1002.88 Is the employee required to tell his or her civilian employer that he or she intends to seek reemployment after completing uniformed service before the employee leaves to perform service in the uniformed services?

PERIOD OF SERVICE

- 1002.99 Is there a limit on the total amount of service in the uniformed services that an employee may perform and still retain reemployment rights with the employer?
- 1002.100 Does the five-year service limit include all absences from an employment position that are related to service in the uniformed services?

- 1002.101 Does the five-year service limit include periods of service that the employee performed when he or she worked for a previous employer?
- 1002.102 Does the five-year service limit include periods of service that the employee performed before USERRA was enacted?
- 1002.103 Are there any types of service in the uniformed services that an employee can perform that do not count against USERRA's five-year service limit?
- 1002.104 Is the employee required to accommodate his or her employer's needs as to the timing, frequency or duration of service?

APPLICATION FOR REEMPLOYMENT

- 1002.115 Is the employee required to report to or submit a timely application for reemployment to his or her pre-service employer upon completing the period of service in the uniformed services?
- 1002.116 Is the time period for reporting back to an employer extended if the employee is hospitalized for, or convalescing from, an illness or injury incurred in, or aggravated during, the performance of service?
- 1002.117 Are there any consequences if the employee fails to report for or submit a timely application for reemployment?
- 1002.118 Is an application for reemployment required to be in any particular form?
- 1002.119 To whom must the employee submit the application for reemployment?
- 1002.120 If the employee seeks or obtains employment with an employer other than the pre-service employer before the end of the period within which a reemployment application must be filed, will that jeopardize reemployment rights with the pre-service employer?
- 1002.121 Is the employee required to submit documentation to the employer in connection with the application for reemployment?
- 1002.122 Is the employer required to reemploy the employee if documentation establishing the employee's eligibility does not exist or is not readily available?
- 1002.123 What documents satisfy the requirement that the employee establish eligibility for reemployment after a period of service of more than thirty days?

CHARACTER OF SERVICE

- 1002.134 What type of discharge or separation from service is required for an employee to be entitled to reemployment under USERRA?
- 1002.135 What types of discharge or separation from uniformed service will make the employee ineligible for reemployment under USERRA?

- 1002.136 Who determines the characterization of service?
- 1002.137 If the employee receives a disqualifying discharge or release from uniformed service and it is later upgraded, will reemployment rights be restored?
- 1002.138 If the employee receives a retroactive upgrade in the characterization of service, will that entitle him or her to claim back wages and benefits lost as of the date of separation from service?

EMPLOYER STATUTORY DEFENSES

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

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

≤FURLOUGH AND LEAVE OF ABSENCE

- 1002.149 What is the employee's status with his or her civilian employer while performing service in the uniformed services?
- 1002.150 Which non-seniority rights and benefits is the employee entitled to during a period of service?
- 1002.151 If the employer provides full or partial pay to the employee while he or she is on military leave, is the employer required to also provide the non-seniority rights and benefits ordinarily granted to similarly situated employees on furlough or leave of absence?
- 1002.152 If employment is interrupted by a period of service in the uniformed services, are there any circumstances under which the employee is not entitled to the non-seniority rights and benefits ordinarily granted to similarly situated employees on furlough or leave of absence?
- 1002.153 If employment is interrupted by a period of service in the uniformed services, is the employee permitted upon request to use accrued vacation, annual or similar leave with pay during the service? Can the employer require the employee to use accrued leave during a period of service?

HEALTH PLAN COVERAGE

- 1002.163 What types of health plans are covered by USERRA?
- 1002.164 What health plan coverage must the employer provide for the employee under USERRA?
- 1002.165 How does the employee elect continuing health plan coverage?

- 1002.166 How much must the employee pay in order to continue health plan coverage?
- 1002.167 What actions may a plan administrator take if the employee does not elect or pay for continuing coverage in a timely manner?
- 1002.168 If the employee's coverage was terminated at the beginning of or during service, does his or her coverage have to be reinstated upon reemployment?
- 1002.169 Can the employee elect to delay reinstatement of health plan coverage until a date after the date he or she is reemployed?
- 1002.170 In a multiemployer health plan, how is liability allocated for employer contributions and benefits arising under USERRA's health plan provisions?
- 1002.171 How does the continuation of health plan benefits apply to a multiemployer plan that provides health plan coverage through a health benefits account system?

Subpart E—Reemployment Rights and Benefits

PROMPT REEMPLOYMENT

- 1002.180 When is an employee entitled to be reemployed by his or her civilian employer?
- 1002.181 How is "prompt reemployment" defined?

REEMPLOYMENT POSITION

- 1002.191 What position is the employee entitled to upon reemployment?
- 1002.192 How is the specific reemployment position determined?
- 1002.193 Does the reemployment position include elements such as seniority, status, and rate of pay?
- 1002.194 Can the application of the escalator principle result in adverse consequences when the employee is reemployed?
- 1002.195 What other factors can determine the reemployment position?
- 1002.196 What is the employee's reemployment position if the period of service was less than 91 days?
- 1002.197 What is the reemployment position if the employee's period of service in the uniformed services was more than 90 days?
- 1002.198 What efforts must the employer make to help the employee become qualified for the reemployment position?
- 1002.199 What priority must the employer follow if two or more returning employees are entitled to reemployment in the same position?

SENIORITY RIGHTS AND BENEFITS

- 1002.210 What seniority rights does an employee have when reemployed following a period of unformed service?
- 1002.211 Does USERRA require the employer to use a seniority system?
- 1002.212 How does a person know whether a particular right or benefit is a seniority-based right or benefit?
- 1002.213 How can the employee demonstrate a reasonable certainty that he or she would have received the seniority right or benefit if he or she had remained continuously employed during the period of service?

DISABLED EMPLOYEES

- 1002.225 Is the employee entitled to any specific reemployment benefits if he or she has a disability that was incurred in, or aggravated during, the period of service?
- 1002.226 If the employee has a disability that was incurred in, or aggravated during, the period of service, what efforts must the employer make to help him or her become qualified for the reemployment position?

RATE OF PAY

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

PROTECTION AGAINST DISCHARGE

- 1002.247 Does USERRA provide the employee with protection against discharge?
- 1002.248 What constitutes cause for discharge under USERRA?

PENSION PLAN BENEFITS

- 1002.259 How does USERRA protect an employee's pension benefits?
- 1002.260 What pension benefit plans are covered under USERRA?
- 1002.261 Who is responsible for funding any plan obligation to provide the employee with pension benefits?
- 1002.262 When is the employer required to make the plan contribution that is attributable to the employee's period of unformed service?
- 1002.263 Does the employee pay interest when he or she makes up missed contributions or elective deferrals?
- 1002.264 Is the employee allowed to repay a previous distribution from a pension benefits plan upon being reemployed?
- 1002.265 If the employee is reemployed with his or her pre-service employer, is the employee's pension benefit the same as if he or she had remained continuously employed?

- 1002.266 What are the obligations of a multi-employer pension benefit plan under USERRA?
- 1002.267 How is compensation during the period of service calculated in order to determine the employee's pension benefits, if benefits are based on compensation?

Subpart F—Compliance Assistance, Enforcement and Remedies

COMPLIANCE ASSISTANCE

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

INVESTIGATION AND REFERRAL

- 1002.288 How does an individual file a USERRA complaint?
- 1002.289 How will VETS investigate a USERRA complaint?
- 1002.290 Does VETS have the authority to order compliance with USERRA?
- 1002.291 What actions may an individual take if the complaint is not resolved by VETS?
- 1002.292 What can the Attorney General do about the complaint?

ENFORCEMENT OF RIGHTS AND BENEFITS AGAINST A STATE OR PRIVATE EMPLOYER

- 1002.303 Is an individual required to file his or her complaint with VETS?
- 1002.304 If an individual files a complaint with VETS and VETS' efforts do not resolve the complaint, can the individual pursue the claim on his or her own?
- 1002.305 What court has jurisdiction in an action against a State or private employer?
- 1002.306 Is a National Guard civilian technician considered a State or Federal employee for purposes of USERRA?
- 1002.307 What is the proper venue in an action against a State or private employer?
- 1002.308 Who has legal standing to bring an action under USERRA?
- 1002.309 Who is a necessary party in an action under USERRA?
- 1002.310 How are fees and court costs charged or taxed in an action under USERRA?
- 1002.311 Is there a statute of limitations in an action under USERRA?
- 1002.312 What remedies may be awarded for a violation of USERRA?
- 1002.313 Are there special damages provisions that apply to actions initiated in the name of the United States?
- 1002.314 May a court use its equity powers in an action or proceeding under the Act?
- APPENDIX TO PART 1002—NOTICE OF YOUR RIGHTS UNDER USERRA

AUTHORITY: Section 4331(a) of the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), 38 U.S.C. 4331(a) (Pub. L. 103-353, 108 Stat. 3150).

SOURCE: 70 FR 75292, Dec. 19, 2005, unless otherwise noted.

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

GENERAL PROVISIONS

§ 1002.1 What is the purpose of this part?

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

§ 1002.2 Is USERRA a new law?

USERRA is the latest in a series of laws protecting veterans' employment

and reemployment rights going back to the Selective Training and Service Act of 1940. USERRA's immediate predecessor was commonly referred to as the Veterans' Reemployment Rights Act (VRRRA), which was enacted as section 404 of the Vietnam Era Veterans' Readjustment Assistance Act of 1974. In enacting USERRA, Congress emphasized USERRA's continuity with the VRRRA and its intention to clarify and strengthen that law. Congress also emphasized that Federal laws protecting veterans' employment and reemployment rights for the past fifty years had been successful and that the large body of case law that had developed under those statutes remained in full force and effect, to the extent it is consistent with USERRA. USERRA authorized the Department of Labor to publish regulations implementing the Act for State, local government, and private employers. USERRA also authorized the Office of Personnel Management to issue regulations implementing the Act for Federal executive agencies (other than some Federal intelligence agencies). USERRA established a separate program for employees of some Federal intelligence agencies.

§ 1002.3 When did USERRA become effective?

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

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

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

(b) USERRA also authorizes the Secretary of Labor to issue regulations implementing the Act with respect to