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**DEPARTMENT OF DEFENSE**

**Office of the Secretary**

**32 CFR Part 104**

**[Docket ID: DoD-2013-OS-0091]**

**RIN 0790-AJ00**

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

**AGENCY:** Under Secretary of Defense for Personnel and Readiness, Department of Defense (DoD).

**ACTION:** Proposed rule.

**SUMMARY:** This rule updates established policy, assigned responsibilities, and procedures for informing Service members and individuals who apply for uniformed service of their civilian employment and reemployment rights, benefits, and obligations. The purpose of this regulatory action is to support the non-career uniformed service by taking appropriate actions to inform and assist uniformed Service members and former Service members and individuals who apply for uniformed service of their rights, benefits, and obligations under Uniformed Services Employment and Reemployment Rights Act (USERRA).

**DATES:** Comments must be received by **[insert date 60 days from date of publication]**.

**ADDRESSES:** You may submit comments, identified by docket number and/or RIN number and title, by any of the following methods:

- Federal Rulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.

- Mail: Federal Docket Management System Office, 4800 Mark Center Drive, East Tower, Suite 02G09, Alexandria VA 22350-3100.

*Instructions:* All submissions received must include the agency name and docket number or Regulatory Information Number (RIN) for this Federal Register document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at <http://www.regulations.gov> as they are received without change, including any personal identifiers or contact information.

**FOR FURTHER INFORMATION CONTACT:** Curtis Bell, 571-372-0695.

**SUPPLEMENTARY INFORMATION:** This proposed rule is part of DoD's retrospective plan, completed in August 2011, under Executive Order 13563, "Improving Regulation and Regulatory Review." DoD's full plan and updates can be accessed at:

<http://www.regulations.gov/#!docketDetail;dct=FR+PR+N+O+SR;rpp=10;po=0;D=DOD-2011-OS-0036>.

## **Executive Summary**

### **a. Purpose.**

The purpose of this regulatory action is to support the non-career uniformed service by taking appropriate actions to inform and assist uniformed Service members, former Service members, and individuals who apply for uniformed service of their rights, benefits, and obligations under USERRA.

### **b. Legal Authority.**

38 U.S.C. chapter 43.

The purposes of this chapter are:

(1) to encourage non-career 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.

## **II. Summary of the Major Provisions.**

This regulatory action:

a. Establishes procedures to maintain oversight of an effective program to ensure that uniformed Service members, former Service members, and individuals who apply for uniformed service are aware of their rights, benefits, and obligations under USERRA.

b. Describes policies that serve to promote and inform uniformed Service members, former Service members, and individuals of their rights who apply for uniformed service of their rights under USERRA.

## **III. Costs and Benefits.**

Based on the estimated costs of \$3000 per USERRA case that DOL spends to formally investigate a claim, DoD ESGR saves the Federal government over \$8 million dollars annually. ESGR operates and maintains a Customer Service Center (CSC) that acts as the initial entry point for USERRA complaints, inquiries, and information requests. The CSC provides prompt, expert telephonic and email responses to Service members and employers on all USERRA related matters. During Fiscal Year 2012 (FY (12)), ESGR received 21,521 contacts by telephone and email. Of those contacts, 2,793 resulted in actual USERRA cases for mediation purposes. There is no cost to the general public, including the Service member. The approximate cost of \$3000 is the estimated cost for the DOL to investigate formal complaints if

ESGR's mediation program was not in place. The benefits of using ESGR services are Service members receive a timely response without additional cost.

#### **IV. Background.**

This rule is designed to provide information about the USERRA to Service members, former service members, individuals who apply, and their employers through an informal mediation program run by the Employer Support of the Guard and Reserve (ESGR). ESGR is a DoD operational agency whose mission is to gain and maintain employer support for Guard and Reserve service by advocating relevant initiatives, recognizing outstanding support, increasing awareness of the law, and resolving conflict between employers and Service members. As such, ESGR is the principal agency within DoD dedicated to providing its customers and stakeholders with an awareness about USERRA.

ESGR has provided outreach and USERRA assistance to Reserve Component (RC) Service members and their employers since its inception in 1972. Hundreds of thousands of RC Service members and employers have benefited from ESGR services. Considering the National Guard and Reserve forces make up nearly 50 percent of our military strength and ongoing global operations coupled with humanitarian response, civilian employers' support is critical to our National Defense now more than ever.

The Ombudsman Services Program provides education, information, and neutral third-party mediation services in order to resolve employee/employer USERRA conflicts. ESGR is not an enforcement agency, and does not participate in formal litigation processes.

ESGR signed an updated Memorandum of Understanding (MOU) in 2010 with the Department of Labor that continued organizational cooperation and improved services provided

to all customers regarding USERRA compliance. More than 650 volunteer ombudsmen help to resolve USERRA compliance issues throughout the Nation.

More than 4,900 volunteers support ESGR's mission and serve on ESGR State Committees maintaining employer support programs, providing informative briefings and mediation, and recognizing employers who go above and beyond in their dedication to employees who pledge to be both a citizen and protector of our Nation. Since ESGR's creation four decades ago, thousands of employers have been honored for their commitment to stand beside those who serve. As the use of our military evolves, many Guard and Reserve members will return from present-day conflicts, changing out of their boots and reintegrating into life at home. ESGR is committed to continue assisting the returning Service members by ensuring America's heroes have meaningful civilian employment when they come home. The benefit is that ESGR relieves DOL of the extra cases that may be filed by providing information which the inquirer can decide whether to pursue further action with the DOL.

### **Regulatory Procedures**

#### **Executive Order 12866, "Regulatory Planning and Review" and Executive Order 13563, "Improving Regulation and Regulatory Review"**

DoD consulted with the Office of Management and Budget (OMB) and determined this NPRM meets the criteria for a significant regulatory action under Executive Order 12866, as supplemented by [Executive Order 13563](#), and was subject to OMB review.

#### **Sec. 202, Pub. L. 104-4, "Unfunded Mandates Reform Act"**

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) (Pub. L. 104-4) requires agencies assess anticipated costs and benefits before issuing any rule whose mandates require spending in any 1 year of \$100 million in 1995 dollars, updated annually for inflation. In 2014,

that threshold is approximately \$141 million. This document will not mandate any requirements for State, local, or tribal governments, nor will it affect private sector costs.

**Public Law 96-354, “Regulatory Flexibility Act” (5 U.S.C. 601)**

We certify this proposed rule will not have a significant economic impact on a substantial number of small entities. Therefore, the Regulatory Flexibility Act, as amended, does not require us to prepare a regulatory flexibility analysis.

**Public Law 96-511, “Paperwork Reduction Act” (44 U.S.C. Chapter 35)**

This proposed rule does not create any new, or affect any existing collections, and therefore, does not require OMB approval under the Paperwork Reduction Act of 1995.

**Executive Order 13132, “Federalism”**

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a proposed rule (and subsequent final rule) that imposes substantial direct requirement costs on State and local governments, preempts State law, or otherwise has Federalism implications. This document will not have a substantial effect on State and local governments.

**List of Subjects in 32 CFR Part 104**

Government employees, Military personnel.

Accordingly 32 CFR part 104 is proposed to be revised to read as follows:

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

Sec.

104.1 Purpose.  
104.2 Applicability.  
104.3 Definitions.  
104.4 Policy.  
104.5 Responsibilities.  
104.6 Procedures.

**Authority:** 38 U.S.C. chapter 43.

**§104.1 Purpose.**

This part updates established policy, assigned responsibilities, and procedures for informing Service members and individuals who apply for uniformed service of their civilian employment and reemployment rights, benefits, and obligations pursuant to 38 U.S.C. chapter 43 (referred to in this part as the Uniformed Services Employment and Reemployment Rights Act (USERRA) of 1994).

**§104.2 Applicability.**

This part applies to:

The Office of the Secretary of Defense, the Military Departments (including the Coast Guard at all times, including when it is a Service in the Department of Homeland Security by agreement with that Department), the Office of the Chairman of the Joint Chiefs of Staff and the Joint Staff, the Combatant Commands, the Office of the Inspector General of the Department of Defense, the Defense Agencies, the DoD Field Activities, and all other organizational entities within the DoD (referred to collectively in this part as the “DoD Components”).

**§104.3 Definitions.**

Unless otherwise noted, these terms and their definitions are for the purposes of this part.

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 and 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.

Impossible or unreasonable. For the purpose of determining when providing advance notice of uniformed service to an employer is impossible or unreasonable, orders by competent military authority to report for uniformed service within 48 hours of notification, and reasons of military necessity are sufficient justification for not providing advance notice of pending uniformed service to an employer, as well as the unavailability of an employer or employer representative to whom notification can be given.

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. 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 will include all commissioned officers, warrant officers, and non-commissioned officers authorized by the Secretary concerned to act in this capacity.

Uniformed services. 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, and any other category of persons designated by the President in time of war or national emergency. (See 38 U.S.C. chapter 43.)

**§104.4 Policy.**

It is DoD policy to support non-career uniformed service by taking appropriate actions to inform and assist uniformed Service members and former Service members and individuals who apply for uniformed service of their rights, benefits, and obligations in accordance with 38 U.S.C. chapter 43.

**§104.5 Responsibilities.**

(a) The Under Secretary of Defense for Personnel and Readiness (USD(P&R)):

(1) In addition to the responsibilities in paragraph (d) of this section, the USD(P&R) has overall responsibility for DoD policy pertaining to civilian employment and reemployment rights, benefits, and obligations.

(2) Develops and oversees the implementation of DoD policy pertaining to civilian employment and reemployment rights, benefits, and obligations.

(b) Under the authority, direction, and control of USD(P&R), the Assistant Secretary of Defense for Reserve Affairs (ASD(RA)), with input from the Department of Labor's Veterans Employment and Training Service (DOL-VETS) and the Office of Personnel Management

(OPM), advises the USD(P&R) on policies and procedures to promote and inform non-career uniformed Service members and employers on civilian employment and reemployment rights, benefits and obligations in accordance with USERRA.

(c) Under the authority, direction, and control of the USD(P&R), the Director, Department of Defense Human Resources Activity (DoDHRA), oversees the Employer Support of the Guard and Reserve (ESGR).

(d) The OSD and DoD Component heads develop and implement procedures within their respective Components that are appropriate and in accordance with public law and DoD policy pertaining to civilian employment and reemployment rights, benefits, and obligations.

**§104.6 Procedures.**

(a) Service member information and assistance. (1) The Heads of the DoD Components and the Commandant of the Coast Guard will:

(i) Inform the personnel in paragraph (a)(1)(i)(A) and (B) of this section of their general employment and reemployment rights, benefits, and obligations as described in USERRA.

(A) Civilian employees who apply for uniformed service.

(B) Civilian employees who are current members of the uniformed services who perform or participate on a voluntary or involuntary basis in active duty, inactive duty, or full-time National Guard duty.

(ii) Provide subject-matter experts to serve as points of contact (POCs) to assist applicants for and members of the uniformed service in matters related to employment and reemployment rights, benefits, and obligations.

(iii) Provide initial and annual refresher training for all Human Resources officials, supervisors, employees, and uniformed Service members.

(2) The Secretaries of the Military Departments and the Commandant of the Coast Guard will:

(i) Provide an annual review of USERRA information to employees of the uniformed services.

(ii) Upon completion of a period of active duty extending beyond 30 days, and before separation from active duty, advise Active and Reserve Component Service members covered by USERRA of their employment and reemployment rights, benefits, and obligations as provided under USERRA.

(iii) Advise members of the uniformed services that as employees they must fulfill certain obligations in order to achieve eligibility for reemployment rights as specified in USERRA. At a minimum, advice given will include the following USERRA notification and reporting requirements for returning to civilian employment:

(A) Advance notification of military service. To be eligible for reemployment rights as specified in USERRA, employees must provide advance notice of absence due to uniformed service to their civilian employers except when giving such notice is prevented by military necessity, or otherwise impossible or unreasonable under all the circumstances.

(1) DoD recommends persons applying for and/or performing uniformed service to provide advance notice in writing to their civilian employers of pending absence.

(2) Although oral notice is allowed pursuant to USERRA, written notice of pending uniformed service provides documentary evidence that this basic prerequisite to retaining reemployment rights was fulfilled by the Service member and serves to avoid unnecessary disputes.

(3) Regardless of the means of providing advance notice, whether oral or written, it should be provided as early as possible. The DoD recommends that advance notice to civilian employers be provided at least 30 days prior to departure for uniformed service when feasible, based upon

the time the Service member receives confirmation of upcoming uniformed service duty. Other acceptable methods of providing notice include:

(i) Giving notice on behalf of the employee by an appropriate officer in the uniformed Service member's chain of command. Written notice is preferred.

(ii) Providing the employer a copy of the unit's annual training schedule for the duty served on those dates, or by providing the employer in advance with a signed standardized letter with blanks in which the Service member has filled in the appropriate military duty dates.

(iii) Providing advance notification letters. Sample letters are provided by the ESGR, DoD's primary office for all matters concerning employer support of the National Guard and Reserve. ESGR information is provided in §104.6(c) of this part.

(B) Reemployment reporting requirements. As described in USERRA, when notifying employers of their intent to return to work after completing uniformed service, employees must meet specific time-lines. Depending on the length of service, these time-lines span from less than 24 hours up to 90 days after completing uniformed service.

(1) Sample return notification letters are provided by ESGR.

(2) When absence from civilian employment due to uniformed service exceeds 30 days, the Service member is required to provide documentation of service performed if requested by the employer.

(i) As a matter of policy the Military Departments will require Service members to provide verification of absence due to uniformed service to civilian employers regardless of the duration of service-related absence. Failure of an employee to comply with this policy requirement, which exceeds the requirement of USERRA, is not intended to, and should not, affect the legal

responsibilities of the employer under USERRA including prompt reemployment to the Service member employee.

(ii) Types of documentation satisfying this requirement are detailed in 20 CFR part 1002.

(C) Five-Year Service Limit. USERRA imposes a 5-year cumulative limit on absences from each place of civilian employment, due to uniformed service.

(D) Character of service. Service members must not have been separated from service under a disqualifying discharge.

(iv) Determine and certify in writing periods of service exempt from USERRA's 5-year cumulative limit. Established exempt periods must be reviewed and recertified via policy memorandum, at a minimum, every 2 years. Failure to comply with this administrative requirement does not affect the continued validity of exempt periods certified in a writing that is more than 2 years old.

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

(B) Determine and certify in writing 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 officially declared by the President or Congress. Such orders with the purpose of direct or indirect support of the war or national emergency will be

annotated accordingly since these periods of service are exempt from USERRA 5-year cumulative service limit.

(C) Determine, and certify in writing, 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 from USERRA 5-year cumulative service limit.

(1) The authority for determining what constitutes a critical mission or requirement will not be delegated below the Assistant Secretary level. The designation of a critical requirement to gain the necessary experience to qualify for specific key senior leadership positions will be used judiciously, and the necessary experience and projected key leadership positions fully documented in the determination and certification.

(2) This authority must not be used to grant exemptions to avoid USERRA 5-year cumulative service limit or to extend individuals in repeated statutory tours.

(v) 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, and reflect USERRA 5-year cumulative exemption status as appropriate.

(A) Order modifications will be initiated, as required, to ensure continuous active duty should the period required to complete the mission or requirement change. Order modifications will be completed, as required, to reflect qualifying 5-year exemption, as applicable; or an official Statement of Service must be generated, indicating original qualifying orders as exempt under proper authority, and retained in the Service member's personnel file.

(B) Orders must indicate exemption under USERRA from the 5-year cumulative service limit on uniformed service absence from employment, when applicable. Specify the statutory or

Secretarial authority for those orders when such authority meets one or more of the exemptions from USERRA 5-year cumulative service limit. Orders qualifying for exemption should include a status reflecting the exemption status and authority.

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

(vii) 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.

(viii) Designate those officers 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.

(ix) 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:

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

(B) 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 through no fault of the Service member.

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

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

(E) 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.

(F) A statement indicating service requirements prevented providing a civilian employer with advance notification of pending service, when applicable.

(G) Proof that the Service member's entitlement to reemployment benefits has not been terminated because of the character of service as provided in section 4304 of USERRA.

(H) A statement that sufficient documentation verifying a particular period of service, does not exist, when appropriate.

(x) Establish a central point of contact (POC) at each Reserve Component headquarters or Reserve regional command and each National Guard State headquarters who can render assistance to:

(A) Members of the National Guard or Reserve about employment and reemployment rights, benefits, and obligations.

(B) Employers of National Guard and Reserve members about duty or training requirements arising from a member's uniformed service or service obligation.

(xi) Inform Reserve Component Service members of services provided by ESGR. ESGR's subject-matter expert POCs can render assistance with issues regarding employment and reemployment rights, benefits, and obligations under USERRA. More information about ESGR is contained in paragraph (c) of this section.

(b) Employer information and assistance. The Military Departments will:

(1) Provide verification of absence due to uniformed service to civilian employers upon request regardless of the duration of service-related absence.

(2) Provide verification of discharge status upon employer request.

(3) Designate Reserve Component representatives who must consider, and accommodate, requests from civilian employers of National Guard and Reserve members by adjusting Service member absences from civilian employment due to uniformed service, when such service has an adverse impact on the employer and does not conflict with military requirements. The designated representatives may make arrangements other than adjusting the period of absence to accommodate such requests when it serves the best interest of the military and is reasonable to do so.

(c) Agencies providing USERRA assistance—(1) ESGR. ESGR is a component of the DoDHRA, a DoD Field Activity under the authority, direction, and control of the USD(P&R).

(i) ESGR is the primary DoD office for all matters concerning employer support of the National Guard and Reserve, and serves as the lead proponent for USERRA matters within DoD.

(ii) ESGR informs Service members and their civilian employers regarding their rights and responsibilities governed by USERRA.

(iii) ESGR does not have enforcement authority for USERRA, but serves as a free resource for Service members and employers.

(iv) ESGR's trained ombudsmen provide neutral, informal alternative dispute mediation services between Service members and employers for issues relating to compliance with USERRA.

Headquarters ESGR Ombudsman Services representatives can be contacted by calling 1-800-336-4590.

(v) ESGR's Website (available at <http://www.esgr.mil>) provides local and State contact information. Additionally, the website provides links to multiple resources for both Service members and employers.

(2) DOL-VETS. (i) A person may file a complaint with the DOL-VETS or initiate private legal action, if alleging that an employer, including any Federal Executive Agency or the OPM, has failed or refused, or is about to fail or refuse, to comply with employment or reemployment rights and benefits under USERRA.

(ii) Using ESGR's mediation services is not a prerequisite for filing a complaint with DOL-VETS. The complaint may be filed in writing, or electronically. Instructions and the forms can be accessed at the DOL-VETS Website (available at <http://www.dol.gov/elaws/vets/userra/1010.asp>).

(iii) The DOL-VETS investigates each complaint and, if it is determined that the allegation(s) occurred, makes reasonable efforts to ensure compliance. If these efforts are unsuccessful, DOL-VETS then will notify the complainant of the results and advise the complainant of his or her entitlement to pursue enforcement by requesting the complaint be referred to the Department of Justice (DOJ), if the complaint involves a state or private employer, or to the Office of Special Counsel (OSC), for complaints involving Federal Executive Agencies.

(3) DOJ. (i) DOJ is the agency under the Attorney General that enforces USERRA matters involving State and local government employers and private-sector employers. DOJ receives USERRA cases referred by DOL-VETS.

(ii) DOJ reviews USERRA cases to determine if representation is appropriate. In cases found to have merit, the Attorney General will commence court action on behalf of the Service member, to be prosecuted by DOJ attorneys.

(4) OSC. (i) OSC is an independent, Federal, investigative and prosecutorial agency. OSC's enforcement responsibilities apply in Federal sector USERRA cases. OSC receives USERRA Federal cases referred by DOL-VETS.

(ii) If, after reviewing the complaint and investigative file, OSC is reasonably satisfied that the claimant is entitled to relief under USERRA, OSC may act as attorney for the claimant and initiate an action before the Merit Systems Protection Board (MSPB), also an independent, Federal agency, serving as the guardian of Federal merit systems. If OSC declines representation, the claimant may still file an appeal with the MSPB.

Dated: July 22, 2014.

Aaron Siegel,  
Alternate OSD Federal Register Liaison Officer,  
Department of Defense.

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