



BILLING CODE: 5001-06

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, DoD.

ACTION: Final rule.

SUMMARY: The purpose of this rule is to establish policy, assign responsibilities, and promulgate procedures for informing current and former uniformed Service members of the Department of Defense (DoD) and individuals who apply for uniformed service with DoD of their rights, benefits, and obligations under USERRA and its implementing regulations. This rule does not apply to Service members who have served or applied to serve with the National Disaster Medical Response System or with the Commissioned Corps of the Public Health Service. Additionally, the rule establishes procedures for DOD components' responsibilities related to fulfilling their USERRA obligations.

DATES: This rule is effective on [INSERT DATE of publication in the Federal Register].

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

SUPPLEMENTARY INFORMATION: This final 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>.

Preamble Outline

I. Authority

II. Executive Summary

III. Background

IV. Summary of Significant Changes to the Final Rule

A. Purpose

B. Definitions

C. Policy

D. Procedures

V. Administrative Requirements

A. Executive Order 12866, Regulatory Planning and Review and Executive Order 13563,

Improving Regulation and Regulatory Review

B. Section 202, Public Law 104-4, Unfunded Mandates Reform Act

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

D. Section 96-511, Paperwork Reduction Act (44 U.S.C. Chapter 35)

E. Executive Order 13132, Federalism

I. Authority

This action is authorized by 38 U.S.C. 4312(b) and 38 U.S.C. 4333.

II. Executive Summary

A. Purpose

The purpose of this part is to establish policy, assign responsibilities, and promulgate procedures for informing current and former uniformed Service members of the Department of Defense (DoD) and individuals who apply for uniformed service with DoD of their rights, benefits, and obligations under USERRA and its implementing regulations at 20 CFR part 1002 (applicable to States, local governments, and private employers) and 5 CFR part 353 (applicable to the Federal Government). This part does not apply to Service members who have served or applied to serve with the National Disaster Medical Response System or with the Commissioned Corps of the Public Health Service. Additionally, the rule establishes procedures for DoD components' responsibilities related to fulfilling their USERRA obligations.

B. Legal Authority

38 U.S.C. chapter 43, specifically to 38 USC 4312(b) and 38 USC 4333.

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.

C. Summary of the Major Provisions of the Regulatory Action in Question

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 with DoD are aware of their rights, benefits, and obligations under USERRA.
- b. Describes policies that serve to inform uniformed Service members, former Service members, and individuals who apply for uniformed service with DoD of their rights under USERRA.

D. Costs and Benefits

The average cost of \$2,475 for Federal agencies such as DOL and the Office of Special Counsel (OSC) to formally investigate has saved the Federal government over \$6.9 million dollars annually (GAO Highlights 15-77, November 2014). 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 Years 2012, 2013 and 2014 (FY (12, 13 and 14)), ESGR received 21,521; 19,938; 16,089 contacts by telephone and email, respectively. Of those contacts, 2,793 in FY 12; 2,544 in FY 13; and 2,374 in FY 14 resulted in actual USERRA cases for mediation purposes. ESGR mediators are unpaid volunteers whose services are accepted pursuant to 10 U.S.C. § 1588. As such, the only cost to the general public is general administrative expenses in managing the mediation program. 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.

E. Background

This rule is designed to provide information about the USERRA consistent with its implementing regulations at 20 CFR part 1002 and 5 CFR part 353 to DoD Service members,

former Service members, individuals who apply, and their employers, and about an informal mediation program run by the Employer Support of the Guard and Reserve (ESGR).

Additionally, the rule establishes procedures for DOD components' responsibilities related to fulfilling their USERRA obligations.

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 and 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.

III. Background

The Department of Defense (hereinafter the "Department" or "DoD") published a proposed rule in the Federal Register on July 28, 2014 (79 FR 43700-43704). The public comment period for the proposed rule ended on September 26, 2014. Fourteen comments were received. This preamble addresses the comments and the Department's responses.

IV. Summary of Significant Changes to the Final Rule

This section contains the Department's responses to the comments received on the proposed rule.

A. Purpose

Comment: One comment stated the Department does not have the authority under 38 U.S.C. chapter 43, but instead assigned duties are listed in 38 U.S.C. 4312(b) and 38 U.S.C. 4333.

38 U.S.C. 4312(b) provides the determination of “military necessity” sufficient to excuse an employee from giving advance notice of unformed service to his or her employer “shall be made pursuant to regulations prescribed by the Secretary of Defense.” 38 U.S.C. 4333 directs the Secretary of Defense to take such actions as the Secretary deems appropriate to inform Service members and employers of the rights, benefits, and obligations under USERRA.

Response: The Department has clarified in the preamble that the authority for this rulemaking stems from two statutory provisions of USERRA -- 38 U.S.C. 4312(b) and 38 U.S.C. 4333, which state the Secretary of Defense may take such actions as the Secretary deems appropriate for informing Service members and employers of their rights and obligations under USERRA. In addition, the Department has revised the Authority citation in the table of contents of the rule to reflect these provisions.

B. Definitions

Comment: One comment requested the authority for determining what constitutes a critical mission and critical requirement be at the Assistant Secretary level.

Response: The Department stated in the final rule that authority for determining what constitutes a critical mission or requirement will not be delegated below the Assistant Secretary level.

Comment: One commenter suggested the two definitions be amended to include a reference to §104.6(a)(2)(iv)(C)(1) where the proposed rule stated that the responsible party must be at the Assistant Secretary’s or higher level official.

Response: The Department stated in the final rule that authority for determining what constitutes a critical mission or requirement will not be delegated below the Assistant Secretary level, no additional reference is necessary.

Comment: One comment requested deletion of “impossible or unreasonable” when giving advance notice of uniformed service.

Response: The Department recognized that 38 U.S.C. 4312(b) defined “impossible or unreasonable” and has removed the definition of “impossible or unreasonable” from the final rule.

Comment: One commenter addressed the use of “non-career service” which should be deleted based on the one-time use of it. The commenter added that the term is shorthand for service that does not exceed the Act’s five-year limit.

Response: The Department concurred with the removal of “non-career service.” USERRA protections are not limited to non-career Service members. The commenters correctly pointed out that 38 U.S.C. 4301(a) protects both non-career and career Service members.

C. Policy

Comment: One commenter stated that policy of §104.4 is “to support non-career uniformed service by taking appropriate actions to . . . assist uniformed Service members.” Continuous or repeated active service that results in eligibility for a regular retirement from the Armed Forces is not considered “non-career service” according to the definition in §104.3. By implication, does this mean that the DoD will not offer its assistive services, such as Employer Support of the Guard and Reserve (ESGR), to Service members who voluntarily commit to service beyond their initial obligation? The commenter requested clarification of what ways, specifically, does the DoD intend its regulations to be limited to the support of “non-career uniformed service.”

Response: The Department concurs with the commenter’s concerns and has since removed the definition of non-career service and relies instead on the definition of uniformed services in 38 U.S.C. 4303(16) and the statutory requirements for reemployment at 38 U.S.C. 4312 for

purposes of determining an individual's eligibility to receive DoD's assistive services. The Department offers its services to all Service Members, Former Service Members and Applicants of the Uniformed Services. The commenter must refer to 38 U.S.C. 4312 and corresponding DOL regulations for the applicability of USERRA. The reemployment rights provision of USERRA, is applicable to uniformed members whose cumulative years of military service do not exceed five years with one employer. To help clarify, it may be of assistance to direct the commenter to the preamble to the DOL regulations of USERRA, which explains, "Section 1002.101 clarifies that the five-year period pertains only to the cumulative period of uniformed service by the employee with respect to one particular employer, and does not include periods of service during which the individual was employed by a different employer. Therefore, the employee is entitled to be absent from employment with a particular employer because of service in the uniformed services for up to five years and still retain reemployment rights with that employer; this period starts anew with each new employer." (70 FR 75246-75313, December 19, 2005). The commenter mentioned the term "double dippers." USERRA protections with regard to reemployment are not applicable to situations where cumulative service exceeds five years with one employer. The Military Department Secretaries determine which orders are exempt from the five-year service limits.

D. Procedures

Comment: A commenter addressed advance notice concerns stating the proposed rule did not address the fact that an appropriate officer of the uniformed service concerned may provide the notice.

Response: The Department stated in the final rule that an employee or an appropriate officer of the uniformed services may provide the advance notice. See §104.6(a)(2)(iii)(A)(3)(i).

Comment: A commenter stated wording in §104.6(a)(2)(iii)(A)(3) may be confusing and open the door to contradictory interpretations of the employee's obligation to provide advance notice of military service. The first sentence of §104.6(a)(2)(iii)(A)(3) states that the advance notice "should be provided as early as possible" and recommends the advance notice be provided "at least 30 days prior to departure for service." That language is consistent with the current 32 CFR 104.6(a)(2)(i)(B) provision which states that the advance notice "should be provided as early as practicable." But the second sentence of the proposed §104.6(a)(2)(iii)(A)(3) seemingly adds a qualifier to the "as early as possible" policy by inserting new language linking the time frame for providing the advance notice to "the time the Service member receives confirmation of upcoming uniformed service duty" (emphasis added). The commenter was concerned that this addition of confirmation of service orders will actually result in reduced periods of advance notice, because some Service members may interpret this as suggesting they withhold notice until they receive a second set of orders confirming the initial set of orders. The employer's past experience is that most individual Service members will get notification from the unit that he/she will be tasked for an upcoming mission sometimes weeks or even months in advance, although the mission won't get funded and/or orders cut until a point very near the time of the mission. If the Service member waited until final orders are cut to give notification to the employer, the employer wouldn't learn about an individual's planned departure on military leave until very near the actual departure time. That runs contrary to the "as early as possible" goal.

Response: The Department has recommended a minimum of 30 days to trigger notice prior to departure. A Service member cannot be certain of the departure date, which is an objective point in time, until he/she receives confirmation of military duty. Nothing in this section prohibits a Service member from providing advance notice when he or she first learns that he or she might

perform future military duty. The commenter was concerned that this guidance could reduce advance notification. The Department has revised the regulatory text to make clear that this provision is a recommendation only and not mandatory.

Comment: One of the commenters stated a notice of “at least 30 days prior to departure for uniformed service when feasible” conflicts with USERRA. The commenter further added that an employee’s failure to provide such a notice may result in prejudice. An employer might view the regulatory recommendation as a gauge to apply in evaluating the employee. For instance, an employee might receive a negative performance review and consequent loss of a raise for not meeting the Department’s recommended notice standard.

Response: The Department’s recommendation in §104.6(a)(2)(iii)(A)(3) that employees provide at least 30 days advance notice to their employer is just that: a recommendation. Whenever an employee is questioned as to whether they provided advance notice, they should show that they met the requirement. The Department’s 30-day recommendation is not dispositive, but can be used as a benchmark for analyzing whether advance notice was provided on a case-by-case basis. The recommendation does not improperly regulate any mandated standard. It is true that Service members and employers may look to the benchmark as a reasonable standard, but it does not preclude them from considering extenuated circumstances.

Comment: The commenter recommended a correction to clarify the duration of a period of service rather than a length of a Service member’s absence as it relates to providing documentation to an employer. Because only a period of uniformed service of more than 30 days can trigger an obligation for a returning employee to submit certain service-related documentation to his or her employer upon request, §104.6(a)(2)(iii)(B)(2) needs to be clarified to so reflect. Rather than measuring just the length of the period of service, the proposed rule

erroneously measures the length of the entire “absence from civilian employment due to military service.”

Response: The Department concurred and modified §104.6(a)(2)(iii)(B)(2) for clarification to specify the period of military service instead of absence from civilian employment. The change clarifies and is consistent with the statute and DOL regulation.

Comment: Two commenters objected to imposing on Service members’ obligations concerning civilian employment not authorized by USERRA. Obliging all returning Service members to give their employers “documentation of absence due to uniformed service,” §104.6(a)(2)(iii)(B)(2)(i), as the Department has acknowledged, exceeds USERRA’s requirements. Section 4312(f)(1) of USERRA requires employees returning from service periods exceeding 30 days to furnish employers upon request documentation showing that their application for reemployment is timely; that they have not exceeded the five-year service limit; and that their separation or dismissal from service was not under disqualifying conditions. Proposed §104.6(a)(2)(iii)(B)(2)(i) directly conflicts with Section 4312(f)(1) of USERRA. It is inconsistent with Section 4312(f)(1) of USERRA because it would apply to Service members returning from a period of service shorter than 31 days; it would apply in the absence of any employer request for documentation.

Response: The Department concurs and has adjusted language in the final rule to state “As a matter of policy the Military Departments strongly recommend Commanders and Service members provide verification of uniformed service absence to civilian employers regardless of the duration of service upon request.” Failure of an employee to comply with this policy requirement, does not affect the legal responsibilities of the employer under USERRA including prompt reemployment. DOL is the regulating party that can implement the statute in a way that

impacts employers. The proposed rule at §104.6(a)(2)(iii)(B)(2)(i) stated that it “is not intended to, and should not, affect the legal responsibilities of the employer. . .”

Comment: Two commenters stated the proposed §104.6(a)(2)(iii)(C) erroneously states that USERRA’s five-year cumulative service limit is computed on the basis of “absences from each place of civilian employment, due to uniformed service.” The five-year cumulative limit is instead determined on the basis of duration of non-exempt period of service in a uniformed service performed during an employment relationship.

Response: The Department concurred and adjusted the five-year cumulative service limit for clarification. USERRA imposes a five-year cumulative limit on the absences from each place of civilian employment, due to uniformed service, except that any such period of service shall not include any service excluded pursuant to 38 U.S.C. 4312(c).

Comment: Two commenters objected to §104.6(b)(3) to the extent it requires that the military departments accede to civilian employers’ unilaterally made requests to adjust Reserve and National Guard members’ “absences from civilian employment due to uniformed service.” USERRA is designed to encourage voluntary service in the Reserves and National Guard. See 38 U.S.C. 4301(a). So long as an employee has not exceeded the five-year service limit, USERRA places no restriction on the timing, frequency, duration, or nature of the employee’s service in the uniformed services. 38 U.S.C. 4312(h). Nor does the Act grant a civilian employer any right to impose such a restriction. In fact, an employer acts unlawfully if it denies an employee permission to leave to perform military service, 20 CFR 1002.87. Allowing the military departments to change Service members’ military schedules when unilaterally asked to do so by civilian employers may discourage the voluntarism that USERRA seeks to achieve. USERRA preserves the freedom of employees to volunteer to

perform military service when they choose. Interference by employers in the scheduling of employees' military service would remove that freedom and potentially discourage employees from volunteering to perform military service. Such deleterious consequences could be avoided by requiring that a military department obtain a Service member's consent prior to granting a request of the Service member's civilian employer to change the Service member's schedule.

Response: The Department concurred and adjusted §104.6(b)(3) so that the Reserve Component representatives will consider requests from civilian employers of National Guard and Reserve members and adjust a Service member's absences when it serves the best interest of the military and is reasonable to do so. The change is now consistent with 20 CFR 1002.104.

Comment: One commenter addressed reemployment timeline requirements. The commenter requests reconsideration of the timelines for reemployment. The commenter states the period of military service disrupts personal time with family and getting back to a sense of normalcy takes time.

Response: The Department does not control or make policy on reemployment timelines. The DOL regulates the reemployment timelines and evaluates each reemployment situation on a case-by-case basis due to the Service member's unique circumstances. USERRA at 38 U.S.C. § 4312, provides that a Service member who served less than 31 days, as the employee, must report back to the employer not later than the beginning of the first full regularly-scheduled work period on the first full calendar day following the completion of the period of service, and the expiration of eight hours after a period allowing for safe transportation from the place of that service to the employee's residence. In accordance with DOL regulation at 20 CFR § 1002.115, for a period of service between 31 days and less than 181 days, he or she must submit an application for reemployment (written or verbal) with the employer not later than 14

days after completing service. If the employee's period of service in the uniformed services was for more than 180 days, he or she must submit an application for reemployment (written or verbal) not later than 90 days after completing service. See 20 CFR §§ 1002.115 and 1002.181 for additional information.

V. Administrative Requirements

Regulatory Procedures

A. 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.

B. Sec. 202, Pub. L. 104-4, "Unfunded Mandates Reform Act" (2 U.S.C. Chapter 25)

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 one year of \$100 million in 1995 dollars, updated annually for inflation. In 2014, that threshold is approximately \$141 million. This final rule will not mandate any requirements for State, local, or tribal governments, nor will it affect private sector costs.

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

We certify this final 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.

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

This final 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.

E. 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 final rule 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 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, specifically 38 U.S.C. 4312(b) and 38 U.S.C. 4333.

§ 104.1 Purpose.

The purpose of this part is to establish policy, assign responsibilities, and promulgate procedures for informing current and former uniformed Service members of the Department of Defense (DoD) and individuals who apply for uniformed service with DoD of their rights, benefits, and

obligations under USERRA and its implementing regulations at 20 CFR part 1002 (applicable to States, local governments, and private employers) and 5 CFR part 353 (applicable to the Federal Government). Additionally, this part establishes procedures for DOD components' responsibilities related to fulfilling their USERRA obligations

§ 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"). This part does not apply to the National Disaster Medical Response System or with the Commissioned Corps of the Public Health Service.

§ 104.3 Definitions.

Unless otherwise noted, the following 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.

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.

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 4303.) The National Disaster Medical Response System and the Commissioned Corps of the Public Health Service are not governed by this Rule and are therefore excluded from its definition of uniformed services. However, their Service members and applicable employees remain protected under Title 38 U.S.C. Chapter 43 and its definition of Uniformed Services.

§ 104.4 Policy.

It is DoD policy to support 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 total force management in accordance with DoD Directive 5124.02

(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 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 providing information to persons entitled to rights, benefits, and obligations afforded under USERRA at 38 U.S.C. Chapter 43.

§ 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. While the notice may be informal and does not need to follow any particular format, some 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 the period of service exceeds 30 days from civilian employment, 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 strongly recommend Commanders and Service members provide verification of uniformed service absence to civilian employers regardless of the duration of service upon request. Failure of an employee to comply with this recommendation, does not, affect the legal responsibilities of the employer under USERRA including prompt reemployment.

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

(C) Five-Year Service Limit. USERRA imposes a five-year cumulative limit on the absences from each place of civilian employment, due to uniformed service, except that any such period of service shall not include any service excluded pursuant to 38 U.S.C. 4312(c).

(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 five-year cumulative limit. Established exempt periods must be reviewed and recertified via policy memorandum, at a minimum, every two 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 two years old.

(A) Determine and certify in writing those additional training requirements not already exempt from USERRA five-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 five-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 five-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 five-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 five-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 five-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 five-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 five-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 five-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 five-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 a Reserve Component representative who must be either a Commander or Officer in Charge with the military authority to delay, defer, cancel, or reschedule military service. The designated Reserve Component representative will consider, unless prevented by military necessity or otherwise impossible or unreasonable under all the circumstances, written requests from civilian employers of National Guard and Reserve members to adjust the Service member's absences from civilian employment. The civilian employer must submit a written justification explaining how the National Guard and Reserve member's absence imposes adverse financial or severe operating impact to the civilian employer, and advise as to when the hardship due to the Service member's absence is anticipated to end. The designated representative has discretion to delay, defer, cancel, or rescheduled military service, so long as it does not negatively affect military operations. The designated representative may make arrangements, other than adjusting

the period of absence, to accommodate such requests when it serves in the best interest of the military and is reasonable to do so. Section 104.6(b)(3) does not create any right of action against the government by any party.

(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) DOL-VETS receives complaints from veterans and service members who believe their USERRA rights were violated. DOL-VETS investigates these complaints, and if the evidence supports a conclusion that a claimant's USERRA rights have been violated, will work with the employer and employee to obtain an appropriate resolution. If those efforts are unsuccessful—regardless of the outcome – the employee/claimant may request that his or her case be referred to DOJ or OSC for further review and consideration of representation in U.S. District Court or before the Merit Systems Protection Board (MSPB) as appropriate.

(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 agency that enforces USERRA matters involving State and local government employers and private-sector employers. OSC receives USERRA cases referred by DOL-VETS.

(ii) OSC reviews USERRA cases to determine if representation is appropriate. In cases found to have merit, OSC will 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: February 24, 2016.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2016-04306 Filed: 2/29/2016 8:45 am; Publication Date: 3/1/2016]