

**FROM THE BOARD OF DIRECTORS
OF THE OFFICE OF COMPLIANCE:**

**NOTICE OF PROPOSED RULEMAKING,
and request for comments from interested parties.**

**NEW PROPOSED REGULATIONS IMPLEMENTING CERTAIN
SUBSTANTIVE EMPLOYMENT RIGHTS AND PROTECTIONS
FOR VETERANS, AS REQUIRED BY 2 U.S.C. 1316, THE
CONGRESSIONAL ACCOUNTABILITY ACT OF 1995, AS
AMENDED (“CAA”).**

BACKGROUND:

The purpose of this Notice is to issue proposed substantive regulations which will implement Section 206 of the CAA which applies certain veterans’ employment and reemployment rights and protections to employing offices and employees covered by the CAA.

What is the authority under the CAA for these proposed substantive regulations?

The authority under the CAA for these proposed substantive regulations is found in two sections of the CAA. Section 206 of the CAA, 2 USC §1316, applies certain provisions of the Uniformed Services Employment and Reemployment Rights Act (“USERRA”), Title 38, Chapter 43 of the United States Code. Section 1316 of the CAA provides protections to eligible employees in the uniformed services from discrimination, denial of reemployment rights, and denial of employee benefits. Subsection 1316(c) requires the Board not only to issue regulations to implement these protections, but to issue regulations which are “the same as the most relevant substantive regulations promulgated by the Secretary of Labor . . .” This section provides that the Board may only modify the Department of Labor regulations if it can establish good cause as to why a modification would be more effective for application of the protections to the legislative branch.

The second section that provides authority to the Board to propose these regulations is found in section 1384. Section 1384 provides procedures for the rulemaking process in general.

Will these regulations, if approved, apply to all employees otherwise covered by the CAA?

Yes. USERRA's provisions, as applied by Section 206 of the CAA, prohibit discrimination and retaliation against eligible employees, who are defined by the CAA as covered employees performing service in the uniformed services. Section 207(a) of the CAA prohibits retaliation against covered employees under the CAA, regardless of whether they have performed service in the uniformed services. The distinction between eligible employees and covered employees is the performance of service in the uniformed services: eligible employees have performed service in the uniformed services; covered employees have not.

Do other veterans' employment rights apply via the CAA to legislative branch employing offices and covered employees?

No. However, another statutory scheme regarding uniformed service members' employment rights is incorporated, in part, through section 1316a of the CAA. Section 1316a applies sections 2108, 3309 through 3312 of the Veterans Employment Opportunities Act ("VEOA"), and subchapter I of chapter 35 of Title 5. These provisions accord certain hiring and retention rights to veterans of the uniformed services. The VEOA language of the CAA also requires the Board of Directors to issue substantive regulations patterned upon the most relevant substantive regulations (applicable with respect to the executive branch) which are promulgated to implement the provisions of VEOA. After engaging in extensive discussions with various stakeholders across Congress and the legislative branch to determine how best to address certain provisions within the regulations, the Board adopted the VEOA regulations and submitted them to Congress on March 21, 2008. Section 1316a of the CAA becomes effective once the regulations for this section are passed by Congress.

Which employment and reemployment protections are applied to eligible employees in 2 U.S.C. 1316?

USERRA was enacted in December 1994, and the Department of Labor final regulations for the executive branch became effective in 2006. USERRA's provisions ensure that entry and re-entry into the civilian workforce are not hindered by participation in military service. USERRA provides certain reemployment rights, protection from discrimination based on military service, denial of an employment benefit as a result of military service, and retaliation for enforcing USERRA protections.

The selected statutory provisions which Congress incorporated into the CAA and determined "shall apply" to eligible employees in the legislative branch include nine sections: sections 4303(13), 4304, 4311 (a)(b), 4312, 4313, 4316, 4317, 4318, and paragraphs (1), (2)(A), and (3) of 4323(c)¹ of title 38.

¹ As written in Section 206 of the CAA, reference is made to application of paragraphs (1), (2)(A), and (3) of section 4323(d). However, in USERRA, section 4323(d) is not comprised of paragraphs (1), (2)(A), and (3) - - section 4323(c) is comprised of those paragraphs. Because of this apparent typographical error, where the CAA references paragraphs (1), (2)(A), and (3) of section 4323(d), the Board refers to section 4323(c).

The first section, section 4303 (13), provides a definition for “service in the uniformed services.” This is the only definition in USERRA that Congress made applicable to the legislative branch. Section 4303(13) references Section 4304, which describes the “character of service” and illustrates situations which would terminate eligible employees’ rights to USERRA benefits.

Congress applied section 4311 to the legislative branch in order to provide discrimination and retaliation protections, respectively to eligible and covered employees. Interestingly, although Congress adopted these protections, it did not adopt the legal standard by which to establish a violation of this section of the regulations.

Sections 4312 and 4313 outline the reemployment rights that are provided to eligible employees. These rights are automatic under the statute, and if an employee meets the eligibility requirements, he or she is entitled to the rights provided therein.

Sections 4316, 4317, and 4318 provide language on the benefits given to eligible employees. The language in these sections is largely statutory and has been altered very little by the Board.

Are there veterans’ employment regulations already in force under the CAA? No. The Board has issued to the Speaker of the House and the President Pro Tempore of the Senate its Notice of Adoption of Substantive Regulations and Transmittal for Congressional Approval for VEOA. The Board awaits Congressional approval of those regulations.

Procedural Summary:

How are substantive regulations proposed and approved under the CAA?

Pursuant to section 304 of the CAA, 2 U.S.C. 1384, the procedure for proposing and approving such substantive regulations provides that:

- (1) the Board of Directors propose substantive regulations and publish a general notice of proposed rulemaking in the Congressional Record;
- (2) there be a comment period of at least 30 days after the date of publication of the general notice of proposed rulemaking;
- (3) after consideration of comments by the Board of Directors, the Board adopt regulations and transmit notice of such action (together with the regulations and a recommendation regarding the method for Congressional approval of the regulations) to the Speaker of the House and President [P]ro [T]empore of the Senate for publication in the Congressional Record;
- (4) there be committee referral and action on the proposed regulations by resolution in each House, concurrent resolution, or by joint resolution; and
- (5) final publication of the approved regulations in the Congressional Record, with an effective date prescribed in the final publication.

For more detail, please reference the text of 2 U.S.C. 1384. This Notice of Proposed Rulemaking is step (1) of the outline set forth above.

Are these proposed regulations also recommended by the Office of Compliance's Executive Director, the Deputy Executive Director for the Senate, and the Deputy Executive Director for the House of Representatives?

As required by section 304(b)(1) of the CAA, 2 U.S.C. 1384(b)(1), the substance of these regulations is also recommended by the Executive Director, the Deputy Executive Director for the Senate and the Deputy Executive Director for the House of Representatives.

Has the Board of Directors previously proposed substantive regulations implementing these veterans' employment rights and benefits pursuant to 2 U.S.C. 1316?

No.

What is the approach taken by these proposed substantive regulations?

The Board will follow the procedure as enumerated above and as required by statute. Once these regulations are proposed, the Board anticipates engaging in extensive discussion with stakeholders to ensure that the regulations contemplate and reflect the practices and policies particular to the legislative branch.

What responsibilities would employing offices have in effectively implementing these regulations?

The Board charges the employing offices with the responsibility to implement the applicable USERRA provisions, including the prohibitions on discrimination and retaliation, the obligation to reemploy service members who timely apply for reemployment, and to provide the eligible, covered employee with the employment benefits to which he or she is entitled under USERRA, as applied by the CAA.

Are there substantive differences in the proposed regulations for the House of Representatives, the Senate, and the other employing offices?

No. The Board of Directors has identified no “good cause” for varying the text of these regulations. Therefore, if these regulations are approved as proposed, there will be one text applicable to all employing offices and covered employees.

Are these proposed substantive regulations available to persons with disabilities in an alternate format?

This Notice of Proposed Regulations is available on the Office of Compliance web site, www.compliance.gov, which is compliant with section 508 of the Rehabilitation Act of 1973 as amended, 29 U.S.C. 794d. This Notice can also be made available in large print or Braille. Requests for this Notice in an alternative format should be made to: Annie Leftwood, Executive Assistant, Office of Compliance, 110 2nd Street, S.E., Room LA-200, Washington, D.C. 20540; 202-724-9250; TDD: 202-426-1912; FAX: 202-426-1913.

30 Day Comment Period Regarding the Proposed Regulations

How long do I have to submit comments regarding the proposed regulations?

Comments regarding the proposed regulations of the Office of Compliance set forth in this Notice are invited for a **period of thirty (30) days** following the date of the appearance of this Notice in the *Congressional Record*.

How do I submit comments?

Comments must be made in writing to the Executive Director, Office of Compliance, 110 Second Street, S.E., Room LA-200, Washington, D.C. 20540-1999. It is requested, but not required, that an electronic version of any comments be provided either on an accompanying computer disk or e-mailed to the Office of Compliance via its web site. Comments may also be submitted by facsimile to the Executive Director at 202-426-1913 (a non-toll-free number). Those wishing to receive confirmation of the receipt of their comments are requested to provide a self-addressed, stamped post card with their submission.

Am I allowed to view copies of submitted comments by others?

Yes. Copies of submitted comments will be available for review on the Office’s web site at www.compliance.gov, and at the Office of Compliance, 110 Second Street, S.E., Washington, D.C. 20540-1999, on Monday through Friday (non-Federal holidays) between the hours of 9:30 a.m. and 4:30 p.m.

Supplementary Information:

The Congressional Accountability Act of 1995, PL 104-1, was enacted into law on January 23, 1995. The CAA, as amended, applies the rights and protections of 12 federal labor and employment statutes to covered employees and employing offices within the legislative branch of the federal government. Included among those rights are the protections provided, in Section 206 of the CAA, to employees performing service in the uniformed services. These protections are the subject of these regulations.

Section 301 of the CAA (2 U.S.C. 1381) establishes the Office of Compliance as an independent office within the legislative branch.

More Detailed Discussion of the Text of the Proposed Regulations

Please note in the accompanying regulations that USERRA is applied by the CAA almost in its entirety. The subparts on eligibility and reemployment rights (subparts C, D, and E) were applied with minimal, if any, changes by the Board. The Board relied heavily on Section 1316(c) of the CAA which requires that these regulations be the same as those promulgated by the Secretary of Labor unless the Board finds and demonstrates good cause as to why a modification is needed to be more effective for implementation in the legislative branch. Where the Board determined that good cause existed to require a modification, the Board so modified. Otherwise, pursuant to Section 1316(c) of the CAA, the Board made no changes to the Department of Labor regulations.

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

The Purpose of Subpart A

This subpart gives an introduction to USERRA as applied by the CAA and clarifies the rights and benefits USERRA establishes for employees, and the duties it places on employing offices. USERRA affects employment, reemployment, and retention in employment, when employees serve or have served in the uniformed services.

It is noted that nothing in these regulations shall be construed to require an employing office to reduce any returning service members' employment and reemployment rights and protections that the office may currently afford to eligible employees. Nor does USERRA serve to place an eligible employee in a better position than he or she would have been in had he or she not performed service in the uniformed services.

It is also important to note that Section 1316(d)(2) of the CAA applies these protections to the Government Accountability Office and the Library of Congress. Should Congress extend Board jurisdiction over the Government Printing Office (“GPO”) in the future, Congress should take GPO’s existing veterans' preference policies into account, which may be based on independent statutory mandates.

USERRA is not new law

USERRA, as applied by the CAA, became effective as of January 23, 1996. Its purpose was to strengthen previous veterans' rights laws, such as the Veterans' Reemployment Rights Act ("VRRRA"), which was enacted as section 404 of the Vietnam Era Veterans' Readjustment Assistance Act of 1974. The Department of Labor issued its USERRA regulations, effective January 18, 2006.

Role of the Executive Director of the Office of Compliance

The role of the Executive Director of the Office of Compliance, under USERRA as applied by the CAA, differs from the role of the Secretary of Labor under the DOL regulations. The Executive Director provides a program of education and information to employees and employing offices regarding the application of the USERRA provisions and the Office of Compliance, and the Executive Director provides administrative procedures for the consideration of alleged violations. Because the Office of Compliance is an entity of the legislative branch, the Executive Director is not guided by Secretary's order 1-83, which allows the Secretary of Labor to delegate authority for the administration of the veterans reemployment rights program. (Memorandum of April 22, 2002 (67 FR 31827) Nor is the Executive Director responsible for carrying out the same functional authority vested in the Secretary of Labor, pursuant to USERRA.. Similarly, unlike the Secretary of Labor, the Board of Directors of the Office of Compliance has rulemaking authority, not the Executive Director.

Applicable Definitions

Section 206 of the CAA specifically makes applicable only one definition from USERRA to the CAA: service in the uniformed services. Rules of construction found in Section 225 (f)(1) of the CAA allow that except where inconsistent with definitions and exemptions provided elsewhere in the CAA, the definitions and exemptions found in USERRA will apply. Therefore, the definitions that are provided in these regulations are derived either from USERRA or from similar definitions under the CAA.

Types of Service in the Uniformed Services that are covered by USERRA

Because the definition of "service in the uniformed services" was applied directly to the legislative branch as it was written in USERRA, the types of service which receive protection under the CAA are the same types of service which receive protection under DOL regulations: all categories of military training and service, including duty performed on a voluntary or involuntary basis, in time of peace or war; persons serving in the active components of the Armed Forces; and certain types of service specified in 42 U.S.C. 300hh-11 by members of the National Disaster Medical System. However, the CAA limits protections to covered employees who are deemed eligible under Section 206(a).

USERRA vis-a-vis other laws, public contracts, and employing office practices

This subpart underscores the fact that USERRA allows an employing office to provide rights and benefits that are greater than those required by USERRA, but not lesser. It clarifies that an

employing office is not required to place an eligible employee in a better place than he/she would have been had he/she not served in the uniformed services. It clarifies that USERRA supersedes any State law, contract, agreement, policy, plan, practice, or other matter that reduces any right or benefit provided by USERRA. It does not, however, supersede, nullify, or diminish any Federal or State law, contract, agreement, policy, plan, practice, or other matter that establishes an employment right or benefit that is more beneficial than that provided under USERRA.

Subpart B - Anti-discrimination and Anti-retaliation; Protection from Employer Discrimination and Retaliation

This subpart provides protections for eligible employees against discrimination, as well as protections for both eligible and covered employees against retaliation. The Board has maintained the general application of this subpart and has determined that the prohibitions against discrimination and retaliation apply to all positions. Also consistent with DOL regulations, the Board maintains that reemployment rights and benefits do not apply to brief, nonrecurrent positions. The Board found good cause, however, to differentiate from the DOL regulations in certain sections of this subpart. Consequently, the Board has modified this subpart to be more effective for implementation in the legislative branch.

Unlike DOL, the Board makes a distinction between discrimination and retaliation. By not including in the CAA the USERRA standard to establish a violation of this subpart, Congress specifically excluded the “but for” standard which is applied in DOL’s USERRA regulations. Notably, the Board chose a different standard for 207(a) retaliation in its decision in *Britton v. Office of the Architect of the Capitol*, 02-AC-20 (CV, RP). In *Britton*, the Board considered Congress’ intentional exclusion of the “but for” standard in USERRA. As a result, the Board applied the *McDonnell Douglas* three-part standard², which it applies to 207 claims of retaliation.

Because Congress adopted a uniform remedy for most retaliation claims under the CAA, the Board has rejected an *ad hoc* approach and has chosen to apply this *Britton* standard to all claims of retaliation brought under Section 207(a) of the CAA. The Board also has chosen to apply the *Britton* standard for cases of retaliation brought under section 206. The Board does not propose a particular standard for claims of discrimination or retaliation brought by eligible employees under section 206.

As the Board has found good cause to make significant changes to this subpart, the numbering of the particular sections contained therein differs from those found in DOL’s regulations. To aide

² See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed. 2d 668 (1973).(Complainant in a Title VII case carries the initial burden of establishing a prima facie case of racial discrimination; the burden then shifts to the employer to articulate a legitimate, nondiscriminatory reason for the action; complainant then may show that employer’s stated reason for the action was a pretext.)

in a comparative review of the two sets of regulations, the Board has included an index, comparing DOL's numbering and the Board's numbering within each subpart.

USERRA's Discrimination protections

This subpart sets out that basic non-discrimination and non-retaliation protections of USERRA are applied to the legislative branch through these regulations. An employing office may not deny initial employment, reemployment, retention in employment, promotion, or any benefit of employment to an individual on the basis of his or her membership, application for membership, performance of service, application for service, or obligation for service in the uniformed services.

USERRA's Retaliation Protections

An employing office may not take any adverse employment action that is reasonably likely to deter future protected activity because of an eligible employee's service in the uniformed services or an eligible or covered employee's exercise of their rights under the statute. These protections are similar to those found in DOL's regulations, except that they are broadened to include retaliation protections as found in section 207(a) of the CAA.

USERRA's application to covered employees who do not actually perform service in the uniformed services

The CAA makes the protections under Section 206 of the CAA strictly applicable to "eligible employees." Such "eligible employees" are defined as those performing service in the uniformed services as defined by USERRA. Section 207 of the CAA provides protections against retaliation to those employees who are not eligible but who are otherwise covered by the CAA. So, there are three types of protection an "eligible employee" may receive under the CAA: discrimination protection as provided by 206 of the CAA, retaliation protection as provided by Section 206 of the CAA, and retaliation protection as provided by Section 207 of the CAA. Those employees who are not eligible for protection under Section 206 because they have not performed service in the uniformed services, but who otherwise are covered by the CAA, receive retaliation protections as provided by Section 207 of the CAA.

Subpart C - Eligibility for Reemployment

This subpart closely follows the Department of Labor regulations, as well as Section 4316 of USERRA. The Board saw no good cause to modify the regulations from those promulgated by the Secretary of Labor.

One item to note, however, is the multi-employer language. The Board recognizes that it is possible for an employee to work for two employing offices of the legislative branch, although it is not permitted for an employee to work for a Member office and a Committee at the same time. However, Section 1002.101 was included to discuss the five-year service limit requirement.

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

This subpart closely follows the Department of Labor regulations, as well as Section 4316 of USERRA. The Board saw no good cause to modify the regulations from those promulgated by the Secretary of Labor.

Subpart E—Reemployment Rights and Benefits

This subpart closely follows the Department of Labor regulations, as well as Section 4316 of USERRA. The Board saw no good cause to modify the regulations from those promulgated by the Secretary of Labor, with the exception of deleting language regarding assistance to employees from the Office of Personnel Management.

The DOL regulations explain that the Office of Personnel Management would assist an agency in obtaining suitable employment for a returning employee who was unable to qualify for the pre-service position or any other position. The corresponding statutory section is not one of the sections Congress applied to the legislative branch through Section 1316 of the CAA. Therefore, this language was removed from the text of the proposed regulations.

Subpart F—Compliance Assistance, Enforcement and Remedies

Compliance Assistance

This section discusses the role of the Office of Compliance in providing assistance to the covered community regarding the rights and benefits under USERRA, as applied by the CAA. The Board found “good cause” to modify the regulations in this subpart. The DOL regulations delineate the responsibilities of the Veterans’ Employment and Training Service (“VETS”) in providing assistance to persons and entities regarding their rights and benefits under USERRA. The Board realizes that this service is available to all service members by virtue of their service in the uniformed services and section 225(d)(2) of the CAA specifies that eligible employees may utilize any provisions of chapter 43 of title 38, USERRA, that are applicable.

The CAA, however, limits the application of USERRA to certain provisions, and provides a unique enforcement mechanism for eligible covered employees to remedy violations of USERRA, as applied by the CAA. Section 301(h) of the CAA charges the Office with providing a program of education and information for covered employees and employing offices. This subpart clarifies that covered employees and employing offices may seek education and information on USERRA, as applied by the CAA, from the Office of Compliance pursuant to section 301(h) of the CAA.

Initiating a Claim

The Board, in this subpart, sets out the procedures available for consideration of an allegation of a violation of USERRA brought under the CAA. The procedures are substantially the same as those followed by an employee who initiates a claim of discrimination under the CAA.

Enforcement of Rights and Benefits Against an Employing Office

The Board makes clear that eligible covered employees must utilize the procedures outlined in the CAA to bring a USERRA claim against a covered employing office. The Board modified these regulations where the CAA gives standing to bring an action under section 206 only to “eligible employees.” The Board makes clear that covered employees who are not also eligible, as defined in Subpart A, are protected from retaliation under section 207 of the CAA.

With respect to a necessary party in an action under CAA’s USERRA provisions, the Board found that only a covered employing office may be a necessary party respondent and that the confidentiality requirements of the CAA provide good cause to modify the regulation to disallow interested parties to intervene in an action at the hearing stage. However, the hearing officer has authority to require the filing of briefs, memoranda of law and the presentation of oral argument, as well as order the production of evidence and the appearance of witnesses.

The Board found that DOL regulations permitting an award of fees and court costs for an individual who has obtained counsel and prevailed in their claim against their employer is consistent with Section 225(a) of the CAA that permits a prevailing covered employee to be awarded reasonable fees and costs. However, to be more fully consistent with the CAA, the Board modified the language removing the requirement that the individual retain private counsel as a condition of such an award. The Board saw no cause to modify the USERRA regulation that does not permit costs to be assessed against an individual who has made a claim under USERRA, regardless of whether or not they prevailed in their claim.

The Board clarifies that while USERRA does not have a statute of limitations, the procedures for bringing a claim under part A of subchapter II which incorporates USERRA, requires that an action be commenced by requesting counseling by the Office of Compliance not later than 180 days after the date of the alleged violation.

The Board found that the remedies available under USERRA, as applied by the CAA, are the same as those available to other claimants under USERRA because the CAA adopts USERRA’s equitable and legal remedies and directs the hearing officer to award such remedies as are provided in the statute. In order to vest this authority in the hearing officer, the Board found that the authority of the hearing officer under the CAA is the same as the authority of the court under the DOL regulations in that the hearing officer, and not the Board, has the responsibility and authority to develop the record of proceedings and issue a decision that is the final agency decision, unless it is appealed to the Board. The Board’s authority to review a hearing officer’s decision is limited to a review of the record.

The Board deleted from its regulations the section on initiating actions in the name of the United States because such actions are not permissible under the CAA. And, in the final section of this subpart, the Board found no cause to modify the equity powers permitted under USERRA, as they are consistent with the authority permitted under the CAA, as stated above.