

Rules and Regulations

Department of Labor

Veterans' Employment and Training Service

20 CFR Part 1002

RIN 1293-AA14

Notice of Rights and Duties

Under the Uniformed Services Employment and Reemployment Rights Act

**AGENCY:** Veterans' Employment and Training Service, Department of Labor.

**ACTION:** Final rule.

**SUMMARY:** On March 10, 2005, the Veterans' Employment and Training Service (VETS) of the Department of Labor (Department or DOL) issued an interim final rule to implement a requirement of the Veterans Benefits Improvement Act of 2004 (VBIA), Pub. Law No. 108-454 (Dec. 10, 2004). The VBIA amended the Uniformed Services Employment and Reemployment Rights Act (USERRA) by adding a requirement that employers provide a notice of the rights, benefits, and obligations of employees and employers under USERRA. The text of this notice was included in the interim final rule,

and the Department sought comment on that text. This preamble to the final rule addresses comments received during the comment period. This final rule does not affect the Department's pending proposal to implement USERRA, which was published in the *Federal Register* of September 20, 2004.

**EFFECTIVE DATE:** This rule will be effective on [INSERT DATE THIRTY DAYS AFTER PUBLICATION DATE]

**FOR FURTHER INFORMATION CONTACT:** For information, contact Mr. Kenan Torrans, Office of Operations and Programs, Veterans' Employment and Training Service (VETS), U.S. Department of Labor, Room S1316, 200 Constitution Ave., NW, Washington, DC 20210. Telephone: 202-693-4731 (this is not a toll-free number). Electronic mail: [torrans-william@dol.gov](mailto:torrans-william@dol.gov). For press inquiries, contact Michael Biddle, Office of Public Affairs, U.S. Department of Labor, Room S-1032, 200 Constitution Avenue, NW, Washington, DC 20210. Telephone: 202-693-5051 (this is not a toll-free number). Electronic mail: [biddle.michael@dol.gov](mailto:biddle.michael@dol.gov).

Individuals with hearing or speech impairments may access the telephone numbers above via TTY by calling the toll-free Federal Information Relay Service at 1-800-877-8339.

**SUPPLEMENTARY INFORMATION:**

## I. Background

The Veterans Benefits Improvement Act of 2004 (VBIA), Pub. Law No. 108-454 (Dec. 10, 2004), amended several provisions of the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), 38 U.S.C. §§ 4301-4333. In part, the VBIA imposed a new requirement, codified at 38 U.S.C. § 4334, that “Each employer shall provide to persons entitled to rights and benefits under [USERRA] a notice of the rights, benefits, and obligations of such persons and such employers under [USERRA].” Employers may provide the notice by posting it where employee notices are customarily placed. However, employers are free to provide the notice to employees in other ways that will minimize costs while ensuring that the full text of the notice is provided (e.g., by handing or mailing out the notice, or distributing the notice via electronic mail).

The VBIA required the Secretary of Labor to make available to employers the text of the required notice not later than March 10, 2005, ninety days after the enactment of the VBIA. The publication of the interim final rule containing the text of the notice was pursuant to this Congressional mandate. Effective March 10, 2005, the VBIA requires employers to provide the notice “to persons entitled to rights and benefits” under USERRA.

The VBIA also created a demonstration project under which approximately half of the claims against Federal executive agencies arising under USERRA will be transferred by the Department of Labor to the Office of Special Counsel. Section 204(a) of the VBIA directs the “Secretary of Labor and the Office of Special Counsel [to] carry out a demonstration project under which certain claims against Federal executive agencies under [USERRA] are referred to ... the Office of Special Counsel for assistance, including investigation and resolution of the claim as well as enforcement of rights with respect to the claim.” Under this demonstration project, the Secretary of Labor transfers to OSC those cases involving Federal executive agency employees with odd-numbered social security numbers. The demonstration project began on February 8, 2005, and will end on September 30, 2007.

USERRA provides employment and reemployment rights for members of the uniformed services, including veterans and members of the Reserve and National Guard. Under USERRA, service members who leave their civilian jobs for military service can perform their duties with the knowledge that they will be able to return to their jobs with the same pay, benefits, and status they would have attained had they not been away on duty. USERRA also prohibits employers from discriminating against these individuals in employment because of their military service.

Over 500,000 members of the National Guard and Reserve have been mobilized since the President’s declaration of a national emergency following the attacks of September 11, 2001. As service members conclude their tours of duty and return to civilian

employment, it is important that employees be fully informed of their USERRA rights, benefits, and obligations. It is also important for service members to know how the Department can assist them in enforcing these rights. Providing employees with a notice of the USERRA rights, benefits, and obligations of employees and employers advances these dual objectives of informing the public about both the rights and obligations established by USERRA and about the availability of the Department's assistance in protecting those rights.

The Department invited the public to comment on the interim final rule, and the comment period closed on May 9, 2005. The Department received five timely comments regarding the proposed text of the employer notice, and fully considered each comment. The Department adopted proposed revisions to the text of the notice recommended in two of the five comments, all of which are discussed below.

The Department received one comment from Representatives Steve Buyer and Lane Evans, the Chairman and Ranking Member of the Committee on Veteran's Affairs, U.S. House of Representatives. This comment suggests that the text of the notice should reference the role given to the U.S. Office of Special Counsel (OSC) during the demonstration project referred to above, and should also include the OSC's contact information and logo. The Department agrees that a comprehensive notice of rights and obligations under USERRA should include the fact that certain claims by employees of Federal executive agencies may be referred to the OSC for investigation and resolution pursuant to the demonstration project. In response to this comment, the Department will

make available text of a separate notice appropriate for distribution to federal employees by federal executive agencies, available on VETS Web site (at <http://www.dol.gov/elaws/userra.htm>), and that text includes reference to OSC's role in investigating and resolving some complaints against Federal executive agencies during the period of the demonstration project. The Department further agrees that the inclusion of the insignia of other agencies would be a useful reminder to both employees and employers that USERRA requires a multi-agency partnership in its administration and enforcement. To that end, the Department has developed and made available on its Web site (at <http://www.dol.gov/elaws/userra.htm>) two posters – one for use by private and State employers and one for use by Federal agency employers – that can be posted in order to comply with the notification mandate of 38 U.S.C. 4334(a). The two posters include the logos and telephone numbers of VETS as well as the other agencies that assist VETS in the administration and enforcement of USERRA. OSC's logo and telephone number, as well as a brief description of the demonstration project, appear on the poster that is appropriate for use by Federal agencies.

The Members' comment more specifically suggests that the text of the notice should state that individuals needing "assistance in filing a complaint with OSC, or information about [ ] USERRA rights, please telephone" or e-mail OSC directly. The VBIA's establishment of the demonstration project does not alter USERRA's basic structure or the Department's primary administrative responsibility to provide assistance, receive complaints, and investigate all but "certain" claims against Federal administrative agencies. VBIA Sec. 204(a). For those "certain" claims, defined in the VBIA as

USERRA claims that also involve a “prohibited personnel practice” in violation of 5 U.S.C. 1212 (VBIA Sec. 204(b)) or USERRA claims filed by claimants with odd-numbers social security numbers (VBIA Sec. 204(c)), the Department must first identify and then refer such claims to OSC. VBIA Sec. 204(a). Including OSC as a primary contact point in the text of the notice, as suggested by the comment, may confuse claimants, delay the processing of claims, and ultimately hinder the utility of the demonstration project. It is crucial that the text of the notice provide simple, clear, and accurate information and guidance about contacting DOL, the initial and the primary contact agency for all USERRA problems. By contrast, while the DOL will include on the poster’s borders other agencies’ insignia and telephone numbers to reflect the unique multi-agency partnership at work, those depictions do not provide substantive advice to individuals on actions to take with USERRA-related problems and therefore do not result in potential confusion to individuals needing USERRA assistance or a delay in processing their claims.

The Department received a comment from an attorney employed by the Federal Emergency Management Agency (FEMA). This comment seeks mention of USERRA protection for members of the National Disaster Medical System (NDMS). Under 42 U.S.C. 300hh-11(e)(3), a section of the statute that created the NDMS, certain service in the NDMS is considered to be service in the uniformed services for the purposes of USERRA, although the appointee is not considered to be a member of the uniformed services. Because this service is the only USERRA-covered service not contained in

USERRA itself and, as a result, may be overlooked, the Department has modified the proposed text of the notice in response to this comment.

Another comment sought guidance on the logistics of employer posting: how long must a USERRA poster remain on a bulletin board; can new employees be notified by e-mail, and if so, how often must they be notified; and, will some combination of e-mail notice and internet posting suffice? The VBIA requires only that employers “provide” to their employees a notice of their rights and benefits under USERRA, and compliance with this requirement may be met by posting a notice of such rights and benefits “where employee notices are customarily placed.” 38 U.S.C. 4334. There are a number of alternative means by which an employer may achieve compliance with this requirement, and the Department does not want to unduly restrict the use of all alternatives by sanctioning some but not others. As a result, the Department advises employers to use their best judgment and discretion in determining the means by which to provide notice to employees of their rights under USERRA and in achieving compliance with the notice requirement.

Another comment recommends that the Department include the text of the notice of rights in two particular locations on its Web site. The text of the notice is available on the VETS Web site at <http://www.dol.gov/vets/programs/userra/poster.htm> and on the Department’s elaws Web site at <http://www.dol.gov/elaws/userra.htm>.



The final comment received requests that the text of the notice advise that “spouses and dependants” of service members are protected against discrimination and retaliation. USERRA’s anti-discrimination provisions protect those individuals that are a past or present member of the uniformed service, have applied for membership in the uniformed service, or are obligated to serve in the uniformed service. USERRA’s anti-retaliation provisions protect those individuals that assist in the enforcement of USERRA rights, including testifying or making a statement in connection with a proceeding under USERRA, even if that person has no service connection. In those cases in which spouses and dependents of individuals serving in the uniformed service themselves meet these requirements, USERRA’s protections would apply, and the text of the notice makes clear these prerequisites. To the extent that the comment seeks an affirmative statement that spouses and dependents are protected from discrimination by their own employers because they are related to an individual covered by USERRA, such a request exceeds the coverage of the statute.

## II. Administrative Information

Executive Order 12866--Regulatory Planning and Review: The final rule has been drafted and reviewed in accordance with Executive Order 12866, section 1(b), Principles of Regulation. The Department has determined that this proposed rule is not an “economically significant” regulatory action under section 3(f)(1) of Executive Order 12866. Based on a preliminary analysis of the data, the rule is not likely to: (1) have an annual effect on the economy of \$100 million; (2) create a serious inconsistency or

otherwise interfere with an action taken or planned by another agency; or (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof. As a result, the Department has concluded that a full economic impact and cost/benefit analysis is not required for the final rule under Section 6(a)(3) of the Order.

Regulatory Flexibility Act: Under the Regulatory Flexibility Act, Public Law 96-354 (94 Stat. 1164; 5 U.S.C. §601 *et seq.*), Federal agencies are required to analyze the anticipated impact of proposed rules on small entities. VETS has notified the Chief Counsel for Advocacy, Small Business Administration, and made the certification pursuant to the Regulatory Flexibility Act at 5 U.S.C. 605(b), that this final rule will not have a significant economic impact on a substantial number of small entities.

The basis for that certification is that this final rule will not have a significant economic impact on any employers because it only makes available to them information required to be posted or disseminated by statute. This information concerns employee rights, benefits, and obligations already available under Federal law. Accordingly, VETS concludes that the final rule will not have a significant economic impact on a substantial number of small business entities. Therefore, under the Regulatory Flexibility Act, 5 U.S.C. 605(b), a regulatory flexibility analysis is not required.

The Internal Revenue Service received 29,916,033 business tax returns in Fiscal Year 2003. <http://www.irs.gov/pub/irs-soi/03db03nr.xls>. The Small Business Administration

(SBA) estimates that of all business tax returns filed, approximately 23 percent are filed by firms that employ employees. <http://www.sba.gov/advo/laws/rfaguide.pdf>. As a result, taking 23 percent of the 29.9 million returns filed in FY 2003, there were approximately 6,880,690 private employers with employees in FY 2003. For purposes of comparison, the U.S. Census Bureau cites a figure of at least 7,743,444 business establishments with employees for the year 2002, the most recent year for which such statistics are available. See <http://www.census.gov/econ/census02/advance/TABLE1.HTM>. Consequently, VETS estimates that in FY2005 fewer than 8,000,000 private employers with employees are potentially covered by this final rule. Assuming a cost of \$0.15 for reproducing a copy of the notice and 0.1 hour of clerical time at \$19.05 per hour (based on National Compensation Survey: Occupational Wages in the United States, July 2002, Bureau of Labor Statistics, U.S. Department of Labor, June 2003) to post or otherwise disseminate the notice, the per-employer cost for providing employees the notice contained in this rule is approximately \$2.00 and the total cost for all private employers to comply is less than \$16,000,000. Consequently, VETS concludes that the cost of compliance will not have a significant economic impact on a substantial number of small entities.

Unfunded Mandates Reform Act of 1995: This final rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year, and it will not significantly or uniquely affect small governments. USERRA applies to all public employers. The Census Bureau lists a total of 265,641 state and local governments in its 2002 Compendium of Public

Employment; <http://www.census.gov/prod/2004pubs/gc023x2.pdf>. Consequently, VETS estimates that fewer than 300,000 state and local employers are covered by this final rule. Assuming a cost of \$0.15 for reproducing a copy of the notice and 0.1 hour of clerical time at \$19.05 per hour (based on National Compensation Survey: Occupational Wages in the United States, July 2002, Bureau of Labor Statistics, U.S. Department of Labor, June 2003) to post or otherwise disseminate the notice, the per-employer cost for providing employees the notice contained in this rule is less than \$2.00 and the total cost for all state and local employers to comply is less than \$600,000, and as discussed above the total cost for all private employers to comply is less than \$16,000,000. Therefore, no actions are necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Small Business Regulatory Enforcement Fairness Act of 1996: This final rule is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Act of 1996 (SBREFA). The standards for determining whether a rule is a major rule as defined by section 804 of SBREFA are similar to those used to determine whether a rule is an “economically significant regulatory action” within the meaning of Executive Order 12866. Because VETS certified that this final rule is not an economically significant rule under Executive Order 12866, VETS certifies that it also is not a major rule under SBREFA. It will not result in an annual effect on the economy of \$100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-

based companies to compete with foreign-based companies in domestic and export markets.

Executive Order 13132--Federalism: This final rule will not have a substantial direct effect on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 13132, VETS has determined that this final rule does not have sufficient federalism implications to warrant the preparation of a summary impact statement.

Paperwork Reduction Act: The public disclosure of information supplied by the Federal government to the recipient for the purpose of disclosure to the public is not included within the definition of "collection of information" under the Paperwork Reduction Act (PRA). See 5 C.F.R. § 1320.3(c)(2). Here, the notice made available by this final rule is supplied by the Department of Labor. Consequently, the Department concludes that the Paperwork Reduction Act is inapplicable to this final rule.

Congressional Review Act: Consistent with the Congressional Review Act, 5 U.S.C. 801, *et seq.*, the Department will submit to Congress and to the Comptroller General of the United States, a report regarding the issuance of this Final Rule prior to the effective date set forth at the outset of this document.

OMB has determined that this rule is not a "major rule" as defined by the Congressional Review Act (Section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996). This rule will not result in an annual effect on the economy of \$100,000,000 or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

List of Subjects in 20 CFR Part 1002

Administrative practice and procedure, Employment, Enforcement, Labor, Veterans, and Working Conditions.

For the reasons stated in the Preamble, the Veterans' Employment and Training Service, Department of Labor, amends part 1002 of chapter IX of title 20 of the Code of Federal Regulations to read as follows:

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

1. The Authority citation for Part 1002 continues to read as follows:

**Authority:** Veterans Benefits Improvement Act of 2004 (VBIA), Pub. L. 108-454 (Dec. 10, 2004), 38 U.S.C. 4334.

2. The Appendix to Part 1002 is revised to read as follows:

**Appendix to Part 1002 – Notice of Your Rights Under USERRA**

Pursuant to 38 U.S.C. 4334(a), each employer shall provide to persons entitled to rights and benefits under USERRA a notice of the rights, benefits, and obligations of such persons and such employers under USERRA. The requirement for the provision of notice under this section may be met by the posting of one of the following notices where employers customarily place notices for employees. The following texts are provided by the Secretary of Labor to employers pursuant to 38 U.S.C. 4334(b). Text A is appropriate for use by employers in the private sector and for State government employers. Text B is appropriate for use by Federal Executive Agencies.

Text A – For Use by Private Sector and State Government Employers

**YOUR RIGHTS UNDER USERRA**

**A. THE UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT**

USERRA protects the job rights of individuals who voluntarily or involuntarily leave employment positions to undertake military service or certain types of service in the National Disaster Medical System. USERRA also prohibits employers from discriminating against past and present members of the uniformed services, and applicants to the uniformed services.

## **B. REEMPLOYMENT RIGHTS**

You have the right to be reemployed in your civilian job if you leave that job to perform service in the uniformed service and:

- you ensure that your employer receives advance written or verbal notice of your service;
- you have five years or less of cumulative service in the uniformed services while with that particular employer;
- you return to work or apply for reemployment in a timely manner after conclusion of service; and
- you have not been separated from service with a disqualifying discharge or under other than honorable conditions.



If you are eligible to be reemployed, you must be restored to the job and benefits you would have attained if you had not been absent due to military service or, in some cases, a comparable job.

### **C. RIGHT TO BE FREE FROM DISCRIMINATION AND RETALIATION**

If you:

- are a past or present member of the uniformed service;
- have applied for membership in the uniformed service; or
- are obligated to serve in the uniformed service;

then an employer may not deny you

- initial employment;
- reemployment;
- retention in employment;
- promotion; or
- any benefit of employment.

because of this status.

In addition, an employer may not retaliate against anyone assisting in the enforcement of USERRA rights, including testifying or making a statement in connection with a proceeding under USERRA, even if that person has no service connection.

#### **D. HEALTH INSURANCE PROTECTION**

- If you leave your job to perform military service, you have the right to elect to continue your existing employer-based health plan coverage for you and your dependents for up to 24 months while in the military.
- Even if you don't elect to continue coverage during your military service, you have the right to be reinstated in your employer's health plan when you are reemployed, generally without any waiting periods or exclusions (e.g., pre-existing condition exclusions) except for service-connected illnesses or injuries.

#### **E. ENFORCEMENT**

- The U.S. Department of Labor, Veterans' Employment and Training Service (VETS) is authorized to investigate and resolve complaints of USERRA violations.

For assistance in filing a complaint, or for any other information on USERRA, contact VETS at 1-866-4-USA-DOL or visit its Web site at <http://www.dol.gov/vets>. An interactive online USERRA Advisor can be viewed at <http://www.dol.gov/elaws/userra.htm>.

- If you file a complaint with VETS and VETS is unable to resolve it, you may request that your case be referred to the Department of Justice for representation.
- You may also bypass the VETS process and bring a civil action against an employer for violations of USERRA.

*The rights listed here may vary depending on the circumstances. The text of this notice was prepared by VETS, and may be viewed on the internet at this address:*

**<http://www.dol.gov/vets/programs/userra/poster.htm>**. *Federal law requires employers to notify employees of their rights under USERRA, and employers may meet this requirement by displaying the text of this notice where they customarily place notices for employees.*

Text B – For use by Federal Executive Agencies

## **YOUR RIGHTS UNDER USERRA**

### **A. THE UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT**

USERRA protects the job rights of individuals who voluntarily or involuntarily leave employment positions to undertake military service or certain types of service in the National Disaster Medical System. USERRA also prohibits employers from discriminating against past and present members of the uniformed services, and applicants to the uniformed services.

### **B. REEMPLOYMENT RIGHTS**

You have the right to be reemployed in your civilian job if you leave that job to perform service in the uniformed service and:

- you ensure that your employer receives advance written or verbal notice of your service;
- you have five years or less of cumulative service in the uniformed services while with that particular employer;
- you return to work or apply for reemployment in a timely manner after conclusion of service; and
- you have not been separated from service with a disqualifying discharge or under other than honorable conditions.

If you are eligible to be reemployed, you must be restored to the job and benefits you would have attained if you had not been absent due to military service or, in some cases, a comparable job.

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In addition, an employer may not retaliate against anyone assisting in the enforcement of USERRA rights, including testifying or making a statement in connection with a proceeding under USERRA, even if that person has no service connection.

#### **D. HEALTH INSURANCE PROTECTION**

- If you leave your job to perform military service, you have the right to elect to continue your existing employer-based health plan coverage for you and your dependents for up to 24 months while in the military.
- Even if you don't elect to continue coverage during your military service, you have the right to be reinstated in your employer's health plan when you are reemployed, generally without any waiting periods or exclusions (e.g., pre-existing condition exclusions) except for service-connected illnesses or injuries.

#### **E. ENFORCEMENT**

- The U.S. Department of Labor, Veterans' Employment and Training Service (VETS) is authorized to investigate and resolve complaints of USERRA violations.

For assistance in filing a complaint, or for any other information on USERRA, contact VETS at 1-866-4-USA-DOL or visit its Web site at <http://www.dol.gov/vets>. An interactive online USERRA Advisor can be viewed at <http://www.dol.gov/elaws/userra.htm>. In some cases involving USERRA claims against Federal executive agencies, a complaint filed with VETS before September 30, 2007, may be transferred to the Office of Special Counsel for investigation and resolution pursuant to a demonstration project established under Section 204 of the Veterans Benefits Improvement Act of 2004, Pub. Law No. 108-454 (Dec. 10, 2004).

- If VETS is unable to resolve a complaint that has not been transferred for investigation under the demonstration project, you may request that your case be referred to the Office of Special Counsel for representation.
- You may also bypass the VETS process and bring a civil action against an employer for violations of USERRA.

*The rights listed here may vary depending on the circumstances. The text of this notice was prepared by VETS, and may be viewed on the internet at this address:*

**<http://www.dol.gov/vets/programs/userra/poster.htm>**. *Federal law requires employers to notify employees of their rights under USERRA, and employers may meet this requirement by displaying the text of this notice where they customarily place notices for employees.*

U.S. Department of Labor  
Veterans' Employment and Training Service  
1-866-487-2365

Signed at Washington, DC this \_\_\_\_\_ day of December, 2005.

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Charles S. Ciccolella

Assistant Secretary for Veterans' Employment and Training