

Comment Questionnaire
Department of Labor
USERRA Proposed Regulations

The Department of Labor (DOL) has issued new proposed regulations on the Uniformed Services Employment and Reemployment Rights Act (USERRA), which is codified in 38 United States Code section 4301 *et seq.* The proposed regulations can be found at <http://www.dol.gov/vets/regs/fedreg/proposed/2004020844.htm>.

According to DOL, the proposed rules contain no new substantive changes, but are designed to clarify and explain the existing law. The new rules are likely to be effective 30 days after publication of the final rule. The final rule will be published after DOL considers all the comments and drafts the final rule. Comments are due to DOL by November 19, 2004.

WorldatWork will submit a comment to DOL on these proposed regulations and encourages you to convey your thoughts and challenges regarding USERRA and relate the impact these proposed regulations will have on employers. This is another opportunity for WorldatWork members to help shape public policy.

Your comments can be submitted through the WorldatWork comment. All comments submitted to WorldatWork will be treated as confidential and you will remain anonymous. Please submit your comments to Jeff Kros, WorldatWork's Government Relations Manager, by Tuesday, November 9, 2004. You may email Jeff at jkros@worldatwork.org or fax your comments to 866-816-2962 (toll free). If you have any question, please feel free to call Jeff at 480-922-2027.

WorldatWork has reviewed the proposed regulations and would like you to respond to **any or all** of the specific issues DOL has raised. Additionally, you may submit a comment on any issue pertaining to the proposed regulations. The following are the specific issues WorldatWork would like to address.

Issue 1

USERRA prohibits discrimination against past and present members (and applicants) of the uniformed services. The regulations clarify that the protections extend to any employment position regardless of the duration of the position or even if the position is temporary. The proposed regulation also places the burden of proving the discrimination on the employee. How has the anti-discrimination provisions affected your employer?

Issue 2

USERRA requires service members to meet five (5) criteria to establish eligibility for re-employment: 1) the absence was due to service in the uniformed services; 2) the employer was given advanced notice; 3) the service member has 5 years or less of cumulative service while working for that employer; 4) the service member must return for work in a timely manner; and 5) the service member was honorably discharged. The proposed regulations interpret the law to place the burden of proof on the **employer** to show that the service member did not meet one (or more) of the five requirements and is not entitled to re-employment. Do you agree with the Department's interpretation?

Issue 3

Under USERRA, there are 8 specific exceptions to the requirement that a service member serve no more than 5 years in the uniformed services while working for a single employer and still retain re-employment rights. The proposed regulations add a ninth exception: the service member is still entitled to re-employment if he or she re-enters the uniformed services to mitigate economic loss due to the employer's unlawful refusal to re-employ the service member. Does this ninth exception fit the spirit and intent of USERRA?

Issue 4

For employee/service members who have served less than 31 days, DOL interprets USERRA to require the employee/service member to report back to the employer at the beginning of the first full shift on the first full day following the completion of service, provided the employee has a period of eight hours to rest following safe transportation to the person's residence. Does the DOL interpretation best effectuate USERRA's requirements?

Issue 5

Service members are entitled to non-seniority based rights and benefits while they are absent from employment due to military service. The rights and benefits must be the same as other employees who are on leave of absence or furlough. DOL interprets this provision to include those rights and benefits that came into effect during the period of service. Does this interpretation best effectuate USERRA's requirements?

Issue 6

USERRA provides that an employee who "knowingly" states in writing that he or she will not return to the employment position after his or her tour of duty will lose non-seniority rights and benefits. The proposed regulations state that the employee does NOT waive seniority-based rights and benefits or reemployment rights upon such a waiver. Does DOL's interpretation seem consistent with USERRA?

Issue 7

USERRA allows service members to elect to continue health plan coverage through their employer while they are serving in the uniformed services. The law does not address how service members elect to continue coverage, but the proposed regulations allow health plan administrators to adopt reasonable requirements how continuing coverage must be elected. Does this latitude to health plan administrators seem reasonable? Should there be a date certain by which time continuing health plan coverage must be elected? What issues do you see if an employee wants to delay reinstatement to a health plan after re-employment?

Issue 8

Under the law, returning service members who meet the 5 criteria for re-employment must be reinstated “promptly”, which the DOL interprets “as soon as practical under the circumstances.” The proposed regulations require reinstatement to occur within two weeks after application for re-employment, absent unusual circumstances. Is the two week requirement a reasonable interpretation under USERRA?

Issue 9

In 1946, the Supreme Court established the concept of the “escalator position”, meaning that a returning service member “does not step back on the seniority ladder at the point he stepped off, he steps back on at the precise point he would have occupied had he kept his position continuously during the war.” The proposed regulations address the point where a service member misses a promotional exam. The proposed regulations require that a make-up exam be administered, and if the service member is successful on the make-up exam, he or she must be promoted or placed on a promotion list effective on the date the promotion or placement on a list would have occurred but for the military service. DOL would like to know if its treatment of make-up exams is sufficient to effectuate the escalator provision codified in USERRA.

Issue 10

In the case where a returning service member is not qualified for the “escalator position”, USERRA does not require an employer to reinstate a returning service member in an employment position if he or she does not have the ability to perform the essential tasks of the position. DOL interprets whether a task is “essential” by looking at the actual performance requirements of the position rather than the criteria enumerated in the job description. Does DOL’s interpretation best effectuate the purpose of the law?

Issue 11

The “escalator principle” in USERRA also requires the returning service member to receive the rate of pay he or she would have received but for the military service. The proposed regulations require employers to determine, with reasonable certainty, any merit increases or promotional increases the returning service member would have received had he or she not entered military service. Do you believe the DOL interpretation of USERRA is accurate with regard to rate of pay? Should the regulations contain more detail?

Issue 12

USERRA provides that once the service member is re-employed, he or she is treated as not having a break in service with the employer that maintains a pension plan. The proposed regulations outline how and when returning employees can make-up contributions to a defined contribution plan and what the employers' responsibilities are to certain plans. Additionally, DOL requires that employer contributions to a pension plan that are not contingent on employee contributions or elective deferrals must be made no later than thirty days after the date of the person's re-employment. Do you have any comments on how and when the proposed regulations allow employees to make-up contributions to a pension plan? Is the thirty-day requirement for employers too long or too short?

Issue 13

DOL proposes that the regulations become effective 30 days after publication of the final rule in the *Federal Register*. Is this an adequate amount of time for your employer to come into full compliance?

Issue 14

Do you have any comments about the proposed regulations that were not addressed in the above 13 topics?