

# NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER



815 16<sup>TH</sup> STREET, N.W., WASHINGTON, DC 20006 ☐ PHONE 202-737-5315 ☐ FAX 202-737-1308

**EDWARD C. SULLIVAN**  
CHAIRMAN

**RANDY G. DEFREHN**  
EXECUTIVE DIRECTOR  
E-MAIL: [RDEFREHN@NCCMP.ORG](mailto:RDEFREHN@NCCMP.ORG)

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VIA E-MAIL – [vets-public@dol.gov](mailto:vets-public@dol.gov)

Office of Operations and Programs  
Docket No. VETS-U-04  
Room S-1316  
U.S. Department of Labor  
200 Constitution Ave., NW  
Washington, DC 20210

**Re: Veterans' Employment and Training Service's proposed rule under the Uniformed Services Employment and Reemployment Rights Act of 1994 as amended ("USERRA"); Docket No. VETS-U-04**

Dear Madam or Sir:

The National Coordinating Committee for Multiemployer Plans ("NCCMP") appreciates the opportunity to comment on the Proposed Rules Implementing USERRA, which were published on September 20, 2004. We particularly appreciate your willingness to consider these comments at this stage in the development of the regulations.

The NCCMP is the only national organization devoted exclusively to protecting the interests of the approximately ten million workers, retirees, and their families who rely on multiemployer plans for retirement, health and other benefits. Our purpose is to assure an environment in which multiemployer plans can continue their vital role in providing benefits to working men and women. The NCCMP is a nonprofit organization, with members, plans and plan sponsors in every major segment of the multiemployer plan universe, including in the building and construction, retail food, trucking and service and entertainment industries.

The NCCMP's comments on the Proposed Rules focus on concerns common to multiemployer plans, identifying ways in which the proposed rules may complicate plan administration and raising questions about how returning veterans are to be treated. We also offer suggestions for modifications to address those concerns.

Multiemployer plans honor their participants who are called to national service, and obviously want to comply with the law. We believe, however, that the Proposed Regulations

create confusion about who is considered an “employer” that would hinder rather than help plans in meeting their obligations under USERRA. Moreover, the lack of clarity about employee rights and responsibilities has the potential to harm returning service members who may not take the necessary steps to protect their pension rights under USERRA because it is not clear what those steps are. For example, an employee who is used to being referred out to work from a union hall may be led to the incorrect belief that reporting back to the union to be referred out for work is sufficient.

In particular, we find that the Proposed Regulations are not clear on the issue of whether the reemploying “employer” in the multiemployer plan context should be construed to mean only the pre-service employer or any contributing employer to the multiemployer plan. Although there is language in the Preamble suggesting the latter, the notice and enforcement provisions seem to focus exclusively on the pre-service employer. We believe that the Proposed Regulations need to be modified to clarify this issue and, if the Department’s intent is that the reemploying employer could be any contributing employer to the multiemployer plan, to fill in certain gaps in the notice provisions. At the conclusion of our specific comments below, we attempt to summarize in table form the differences between a scheme that would require reemployment by the pre-service employer and a scheme that would permit reemployment by any contributing employer.

#### **I. Hiring Halls are Not Employers – Comment on Proposed Section 1002.38**

Section 1002.38 of the Proposed Rules states that a “hiring hall operated by a union or an employer association typically assigns you to your job. ... A hiring hall therefore is considered your employer if the hiring and job assignment functions have been delegated by an employer to the hiring hall. As your employer, a hiring hall has reemployment responsibilities to you.” In the NCCMP’s experience, however, this statement assumes that the union hiring hall has more power than it typically does and leaves unanswered many questions about employees’ entitlement to benefits upon their return from military service.

First, a distinction needs to be made between an exclusive hiring hall arrangement – where a collective bargaining agreement requires that an employer in need of labor go through the union to obtain referrals of employees available for work – and a non-exclusive hiring hall – which is more typical in the NCCMP’s experience – where employers may call the union for referral of employees off the “out-of-work” list but where employers and employees are also permitted to enter into employment relationships directly without going through the union. Even in an “exclusive” hiring hall, employers are generally free to reject employees referred by the union for any lawful reason and are also allowed to solicit workers themselves if no workers are available through the union within a specified period of time, such as 48 hours. In any event, the employer determines the number of employees it needs, makes the employment decisions with respect to employees referred by the union and assigns employees to specific jobs.

In light of the fact that the union hiring hall is not typically delegated hiring and job assignment functions, we believe it is improper for the Proposed Rules to suggest that even an exclusive hiring hall has the responsibility to *reemploy* the returning service member. That

would clearly not be true in the case of a union that simply maintains an out-of-work list from which it refers employees to employers seeking workers – which may also be referred to informally as a “hiring hall.” We are also concerned that the Proposed Rules’ suggestion that a hiring hall is an “employer” for purposes of the Act may create an impression that the union hiring hall, which does not exist as a separate legal entity and does not employ or pay the members it refers out, has other legal obligations of an “employer” under USERRA that it would have no way to fulfill, such as the requirement to offer continuation health coverage or to contribute to a pension plan on behalf of reemployed returning service members. The language of Proposed Section 1002.38 also raises a number of questions with regard to the meaning of other sections of the Proposed Rules in the multiemployer context, which will be addressed in more detail below.

## **II. Multiemployer Plans Exist in Industries Characterized by Work of Short Duration for Many Different Employers – Comment on Proposed Section 1002.41**

Multiemployer plans are common in industries characterized by work of relatively short duration and for many different employers. While the specific projects for which employees are employed may be of relatively short duration, often one “temporary” job for a particular employer is followed by another such job with that employer or with another employer that is also signatory to the collective bargaining agreement requiring contributions to the multiemployer employee benefit plan.

The NCCMP therefore suggests that Proposed Section 1002.41 be modified to make clear that the affirmative defense that the employee’s pre-uniformed service employment was for a brief, non-recurrent period and that the employee had no reasonable expectation of reemployment does not apply to employers in industries where the work is generally constant, but is characterized by brief periods of employment for multiple employers under the same or related collective bargaining agreements. Note that this suggests a difference in coverage and rights under USERRA based on union representation, since non-union workers with similarly sporadic employment patterns would probably not be covered due to the temporary, non-recurrent nature of their jobs.

## **III. Advance Notice to Employer – Comment on Proposed Section 1002.85**

Proposed Section 1002.85 requires that the employee give advance notice to the employer that the employee has been called up to perform military service. The NCCMP questions how this section applies in the context of an exclusive hiring hall – is the advance notice to be given to the pre-service employer, to the hiring hall or to both? What about in the case of a non-exclusive hiring hall, or where there is no hiring hall? To the extent that reemployment in the multiemployer context is understood by the Department to mean reemployment by any contributing employer, we suggest that the employee be required to give advance notice to the local union and that the local union be required to give such notice to the multiemployer plan administrator.

#### **IV. Limit on Total Amount of Protected Service – Comment on Proposed Section 1002.101**

Proposed Section 1002.101 states that an employee is entitled to a leave of five years from each employer for whom he or she works and that this time period starts to run again with each new employer. The Preamble states that under Proposed Section 1002.38, a hiring hall out of which an individual may work for several different employers is considered a single employer for the purpose of this five-year time limit. Fed. Reg. Vol. 69, No. 181 (Sept. 20, 2004) at 56270, c.1.

As noted above, however, in our comment on Proposed Section 1002.38, the reference to the hiring hall as employer is perhaps more confusing than helpful in the context of a multiemployer plan. We suggest that Proposed Section 1002.101 should be modified to reflect that the five-year time limit on service applies collectively to all employers that contribute to a given multiemployer plan, assuming that it is the Department's intent that reemployment for purposes of pension rights means reemployment by any contributing employer. To the extent that actual reemployment by the pre-service employer is the only event that triggers a returning service member's right to pension credits, then the five-year time limit should apply to each employer individually. Either way, we suggest that DOL clarify this matter in the text of regulations and not just by way of a comment in the Preamble thereto.

#### **V. Employee Must Submit Application for Reemployment to Pre-Service Employer and/or to Union Hiring Hall? – Comment on Proposed Sections 1002.115 and 1002.119**

Proposed Section 1002.115 states that the employee "must notify your pre-service employer of your intent to return to your employment position by either reporting to work or submitting a timely application for reemployment." Proposed Section 1002.119 specifies that the application must be submitted to the pre-service employer or to an agent or representative of the employer that has apparent responsibility for receiving employment applications. These sections raise some important questions in the multiemployer plan context.

Reading these sections in conjunction with Proposed Section 1002.38 regarding the hiring hall as employer for purposes of reemployment responsibilities, is it the DOL's intent that when a returning service member reports back to an exclusive union hiring hall after the period of service that he or she has met his or her obligations under Proposed Section 1002.115 to report to the pre-service employer for work or to submit a timely application for reemployment? Alternatively, is it necessary for the employee to timely report his desire to return to work to the pre-service employer even in the context of an exclusive hiring hall? Are the answers to these questions different in the context of a non-exclusive hiring hall, or a multiemployer situation that does not involve a hiring hall? We suggest that the DOL should clarify this issue because it is essential that employees know to whom they are obligated to timely report their desire to return to work after the period of military service in order that they may be afforded the protections of the statute.

Once DOL clarifies to whom an employee who is a participant in a multiemployer pension plan must report back to work or submit a timely application for reemployment, the NCCMP suggests that the notification requirement specify that the employee must include in that notification that he or she is returning to civilian employment from the uniformed services. The NCCMP makes this suggestion because, in the multiemployer plan context, where an employee may be employed by an employer on a short-term job and then, after a time, employed by that same employer on another short-term job, it would not necessarily be clear to the employer that the individual had been serving in the uniformed services in the interim – or even that the person had been absent from civilian employment. That would particularly be the case where the employee was excused from giving the employer the advance notice required by Proposed Section 1002.85 under the provisions of Proposed Section 1002.86. It certainly would not necessarily be clear to the union hiring hall that the individual was returning from military service, particularly where 1002.85 is not interpreted to require advance notice to the union hiring hall. And, most starkly, it would not be clear to some other contributing employer to the multiemployer plan, to the extent that “reemployment” by such other employer would assure the returning service member rights to the uninterrupted accrual of pension benefits. For these reasons, we suggest that the Proposed Regulation be modified to require that a participant in a multiemployer pension plan be required to give notice directly to the plan administrator that he or she is returning to work after a period of uniformed services.

## **VI. Pension Credits and Contributions Under USERRA – Comments on Proposed Sections 1002.259 – 1002.267**

### **a. Entitlement to Pension Credit from Multiemployer Pension Plan Dependent on Reemployment?**

Proposed Section 1002.259 states that, upon reemployment, a returning service member is to be treated as not having a break in service with the employer or employers maintaining a pension plan for purposes of participation, vesting and accrual of benefits. This section raises most directly the important question of whether “reemployment” means reemployment by the pre-service employer or employment by any contributing employer to the multi employer plan.

Reemployment by the pre-service employer is suggested by the use of the term “reemployment,” which implies being employed again by an employer that had previously employed the employee. It is also suggested by the entire scheme of employee rights and responsibilities under USERRA, although that may simply result from the fact that, other than the provisions specific to multiemployer plans, the statute was primarily designed with the typical single employer context in mind.

On the other hand, the notion that reemployment means employment by any contributing employer to the multiemployer plan is suggested by the provision imposing liability for missed employer contributions on the plan where the last employer is not functional. If the last employer is not functional, then the last employer could not reemploy the individual, so “reemployment” must mean employment by some other contributing employer to the plan. This view is also stated explicitly in the Preamble to the regulations, but the comment there does not

make clear whether it applies only in an exclusive hiring hall situation or in any multiemployer plan situation. *See* 69 Fed. Reg. 181 (Sept. 20, 2004) at 56279, c.2-3. Moreover, as this is a very important issue, we suggest that DOL's interpretation should be stated in the text of the regulations rather than just in the Preamble.

There is also the preliminary question of whether reemployment in the exclusive hiring hall context actually means reemployment (either by the pre-service employer or some other contributing employer) or could simply mean the employee's reporting his or her availability for work to the union hiring hall. This question arises because, in the exclusive hiring hall context, an employee can typically only obtain work, under the terms of the collective bargaining agreement, through referral from the union. The union cannot compel an employer to employ an individual, but rather can only respond with referrals to employer demands for workers. Thus, it is unclear the mechanism by which an employee in this context could ensure reemployment with the pre-service employer (or any other employer) in order to protect his or her pension rights. If reporting to the union hiring hall is sufficient for the employee to gain entitlement to pension rights, is the pre-service employer still liable for paying the missed employer contributions to the pension plan (if the plan does not provide otherwise)? If, on the other hand, actual reemployment is required to perfect such rights, as is suggested by the terms of the Proposed Regulations, is it DOL's intent that, notwithstanding the terms of the collective bargaining agreement requiring referral by the union, USERRA requires the individual to apply to the pre-service employer. If reemployment is construed to mean employment by any contributing employer to the multiemployer plan, is the employee permitted or required to apply to other contributing employers for reemployment? Must those other employers afford him or her USERRA rights of seniority and reemployment?

We note that the situation is somewhat different in the non-exclusive hiring hall situation where employees and employers can enter into employment relationships directly without going through the hiring hall. Here, there would not be the same concern as in the exclusive hiring hall context where there would be nothing further that the employee could do to protect his rights beyond putting his name on the referral list.

If employment by another contributing employer to the multiemployer plan is sufficient to perfect the employee's rights to pension credits, is the pre-service employer still liable to pay for the missed employer contributions for the period of military service even if the employee didn't return to work with that employer? The legislative history of USERRA is quoted in the Preamble (69 Fed. Reg. 181 at 56279, c.3) as suggesting the a multiemployer plan could adopt a policy where the employer for which the returning service member had the most service during a given period following release from the uniformed service may be considered the reemploying employer for purposes of the pension provision of USERRA. What cause of action would a multiemployer plan have to try to collect liability for missed employer contributions for the period of military service on a contributing employer other than the pre-service employer pursuant to the statute? Can that be clarified in the final regulations? (See further discussion on enforcement issues, below.)

**b. Thirty Day Period for Missed Employer Contributions and Employer Obligation to Notify Plan Should Depend on Returning Service Member's Notifying Employer of Uniformed Service**

Proposed Section 1002.262 provides that missed employer contributions to a pension plan are required to be made no later than 30 days after the employee's reemployment. Proposed Section 1002.266(b) provides that an employer that contributes to a multiemployer pension plan and that reemploys a returning service member must provide written notice to the plan administrator within 30 days. The problem with these requirements in the multiemployer plan context is that many such employers would have no way to know that an employee was returning to civilian employment from the uniformed services, particularly if reemployment is deemed in either or both the exclusive or non-exclusive hiring hall contexts, or in situations where there is no hiring hall, to include employment by some other contributing employer to the plan. Indeed, even if the reemploying employer was also the individual's pre-service employer, that employer may not know that the individual was performing uniformed service during the hiatus between periods of recurrent employment with that employer, given the often short-term duration of employment that typifies the multiemployer plan experience, if the employee is exempted from the advance notice provisions as discussed above. If the employer does not know that the employee is returning from the uniformed services, it will not know that it has an obligation to inform the pension plan under Proposed Section 1002.266(b), or in the case of the pre-service employer, that it has an obligation to pay missed employer contributions under Proposed Section 1002.262.

This problem of contemporaneous notice to the plan is particularly important in the multiemployer plan context where liability is allocated to the plan itself either by the terms of the plan or by Proposed Section 1002.266(a) (where the last employer is no longer functional). An individual may retire years or decades after the period of uniformed service and only at the time of retirement raise with the plan the issue of entitlement to pension credit for the period of uniformed service. Indeed, some of our plan affiliates are currently addressing such requests from veterans of the Korean and Vietnam conflicts. In such instances, the people who may have received the required notice from the returning service member are often long dead, their companies liquidated and supporting documents lost.

The NCCMP suggests, therefore, that the Proposed Regulations be modified to require the returning service member to give notice of his or her reemployment directly to the multiemployer plan administrator. The employer's obligation to make the missed employer contributions under Proposed Section 1002.262 would then be triggered by the plan administrator's sending notice to the employer that the employer has liability under USERRA and the terms of the plan document. As a failsafe, Proposed Section 1002.266(b) could retain the requirement that the reemploying employer notify the plan, but it should likewise be modified to clarify that the reemploying employer's obligation to notify the plan is contingent on the employee's having notified the employer that he or she was returning from military service. Proposed Section 1002.266(a) should be modified to provide that the plan's obligation to provide

pension credits absent employer contributions, if the employee's pre-service employer is no longer functional, is contingent on the plan's in fact receiving notice, either from the returning employee directly or from the post-service employer, that the employee has returned to employment covered by the plan from the uniformed services.

With regard to the time limit on missed employer contributions contained in Proposed Section 1002.262, once the plan administrator receives notice from the employee or the post-service employer the plan administrator will need time to provide the employer with the necessary information about what contributions are owed for the period of uniformed services, which may require the plan administrator to request documentation from the employee, which may take time for the employee to obtain. Accordingly, the NCCMP recommends that Proposed Section 1002.262 be modified to provide that the multiemployer plan administrator be given at least 90 days from the date it receives notice from the employee or from the post-service employer under Proposed Section 1002.266(b) to provide the employer with the amount of the missed employer contributions, and that the employer be given 30 days from the date of having received that information from the plan administrator to make the actual contributions to the pension fund.

Where the pre-service employer is not functional, and liability for missed employer contributions is not otherwise allocated by the terms of the plan, the plan itself is responsible for providing coverage to the returning service member under 38 U.S.C. § 4318(b)(1)(B)(ii) and Proposed Section 1002.266(a). If the pre-service employer is not functional, it is unclear who will give the plan the notice required by Proposed Section 1002.266(b). To avoid this problem, the NCCMP suggests that the Proposed Rules should specify that the returning service member is required to give such notice to the plan within 30 days after the date of his or her reemployment, whether or not its pre-service employer is functional, unless the plan adopts a rule waiving that notice requirement.

If DOL deems reemployment, in either or both the exclusive or non-exclusive hiring hall situations (and the non-hiring hall situation, as well) to include employment by any contributing employer to the plan, the NCCMP further suggests that Proposed Section 1002.262 be modified to reflect that, in the case of a multiemployer plan where the returning service member is timely reemployed by a contributing employer but the employee's pre-service employer is no longer functional and no other employer or employers is allocated the funding responsibility under the terms of the plan, the plan will have until 60 days after the end of the plan year in which the employee gave notice of timely reemployment to the plan to deposit the missed employer contributions required by Proposed Section 1002.266(a) in the employee's account. If the contribution responsibility is allocated to an employer that does not pay, or that has to be pursued to pay, the regulation should make it clear that the plan is not required to allocate funds representing missed contributions to the person's account until and unless the employer pays. (See further discussion of this point, below.)



**c. Determination of Hours of Service Credited for Period of Uniformed Services**

The Preamble to the Proposed Regulations provides that Proposed Section 1002.259 should be interpreted to require that the “reemployed service member is treated as though he or she had remained continuously employed for pension purposes.” Fed. Reg. Vol. 69, No. 181 (Sept. 20, 2004) at 56278. What this means as a practical matter is not clear in the context of a pension plan where hours of service determine the amount of the employer contribution or accrued service credit to which an employee is entitled. *Compare* Proposed Section 1002.267 (addressing this issue with regard to plans where compensation determines those amounts).

The statute and Proposed Section 1002.267 make clear that an employer’s liability will not be based on an assumption that the service member would have been continuously employed on a full-time basis, which would not be a reasonable assumption in industries, such as construction, which are characterized by intermittent or seasonal work of relatively short duration. Rather, pension credit will be based on a reasonable estimate of what the individual would have earned if he or she had not performed the period of military service. Likewise, where a pension plan gives service on the basis of hours worked instead of compensation received, employer or plan liability for employer contributions should be determined on the basis of the number of hours the employee would have actually worked during the period of military service or, if that amount is not reasonably certain, on the basis of a reasonable estimate of that amount derived from the average number of hours worked by the employee in the period prior to the period of military service.

In light of the fluctuations in hours worked in some industries, the NCCMP believes that the Proposed Regulations should provide multiemployer plans with flexibility to determine a reasonable means of determining an appropriate number of hours of service with which to credit a returning service member that reflects the number of hours that such an individual would have likely worked. Such reasonable means would include an hours of service analog to reconstructed compensation as set forth in 38 U.S.C. § 4318(b)(3) and Proposed Regulation § 1002.267 but may also include reasonable variations on that method to reflect the peculiarities of the industry involved. For example, in some industries it may be more accurate to take a three-year average of hours of work performed, instead of simply looking at the 12-month period prior to the period of military service, to correct for market fluctuations. Or, it may be appropriate to estimate likely hours worked in a given month by looking at the average number of hours worked in the same month in prior years, in order to correct for seasonal fluctuations in work availability. In this regard, the NCCMP agrees with and adopts by reference the comments of the Building and Construction Trades Department of the AFL-CIO (“BCTD”), with regard to the issue of how pension credits and employer contributions should be calculated when they depend on hours worked and recommends the changes suggested therein to the Secretary. *See* BCTD comments, copy enclosed herewith, at 13-15.

Although we have described the common situation in which “hours of service” are used for benefit credit purposes, some multiemployer plans use other units, such as days or weeks of covered work, to determine employer contributions and/or pension amounts. We suggest that the regulation make clear that a reference here to hours of service includes similar units of activity by employees covered by a collective bargaining agreement.

**d. Enforcement of Employer Obligation to Make Missed Contributions**

Proposed Section 1002.266(a) provides that the last employer that employed the employee prior to the period of uniformed services is responsible for making the employer contribution to the multiemployer plan, if the plan sponsor does not provide otherwise. The Proposed Rules do not specifically make clear, however, who is responsible for enforcing the requirement that the last employer make the missed employer contributions to the multiemployer pension plan.

USERRA and the Proposed Rules do make clear generally that an employee who has not received the benefits to which he or she is entitled under USERRA may file a complaint with the Secretary, 38 U.S.C. § 4322(a), and that if the Secretary does not resolve the matter administratively, the employee may request that the Secretary refer the matter to the Attorney General to bring a civil action on behalf of the employee, *Id.* § 4323(a)(1). If the employee chooses not to apply to the Secretary for assistance or is refused representation by the Attorney General, the employee may bring a civil action himself or herself. *Id.* § 4323(a)(2). What is not clear, however, is who is responsible for enforcing the employer’s obligation to make pension contributions owed to the pension plan to finance the pension credits that the plan is required by USERRA to extend to the returning service member.

This is particularly important to multiemployer plans because the ERISA regulations have been interpreted to require that a plan give an employee pension credit where required by those regulations regardless of whether the contribution to cover such credit is actually paid by the employer. *See, e.g.,* DOL Op. Ltr. 76-89 (Aug. 31, 1976) (opining that credit must be given solely on the basis of service performed for a participating employer, regardless of whether that employer is required to contribute for such service or has made or defaulted on his required contributions). The IRS has taken the same position, finding that the failure of a defined benefit plan to credit service if contributions therefor are not received by the plan violates the “definitely determinable” rule of the Internal Revenue Code. The NCCMP asks the DOL to clarify that such requirement does not apply to hours of service required to be credited under USERRA, which should only have to be credited by the pension plan if the missed employer contributions are actually made or if they cannot be made because the last employer is no longer functional (where responsibility for missed employer contributions is not otherwise allocated by the terms of the plan) under Proposed Section 1002.266. Otherwise, the regulations may create an incentive for the employer and returning service member not to pay the contributions and shift the liability to the plan and through it to the other contributing employers. If the plan is not able to enforce the contribution it cannot protect itself from liability by an exercise of diligence in collecting these amounts.

With regard to employer contributions that are required under the terms of the multiemployer plan or the terms of a collective bargaining agreement, employers are required to in fact make these contributions under ERISA § 515. The Secretary, acting under ERISA, does not have the authority to initiate an action to enforce section 515, per ERISA § 502(b)(2), however, and it is expected that the plan sponsor will do so as part of its fiduciary duty to act prudently to marshal plan assets for the benefit of participants and beneficiaries. In light of the fact that ERISA § 515 does not by its terms extend to contributions that are required under the terms of a statute such as USERRA, and in light of USERRA's provisions placing responsibility for enforcement of USERRA on the returning service member and the DOL, the NCCMP suggests that the DOL make clear that the obligation to enforce the employer's duty to make missed employer contributions rests with DOL and the returning service member and not with the multiemployer plan, and that the period of military service need not be credited until the contributions are actually made to the plan.

**e. Funding of Employer Contributions to an Individual Account Plan**

Proposed Section 1002.266(a) provides that if the last employer that employed the employee prior to the period of uniformed services is no longer functional, then the plan must nevertheless provide coverage and therefore contributions to the service member. The Proposed Rules do not provide how a defined contribution plan or 401(k) plan with employer matching contributions is to do this, however, other than by explaining in the Preamble that the legislative history makes clear that it is not to be accomplished "by reducing the account balances of other plan participants." Fed. Reg. Vol. 69, No. 181 (Sept. 20, 2004) at 56280, *quoting* S. Rep. No. 103-158 at 65 (1993).

The NCCMP questions whether it is the Secretary's intent that the employer contributions for an employer that is no longer functional can only come out of earnings on plan assets, or an allowance for plan administrative expenses, that have not yet been allocated to individual accounts. There are at least two problems with this. First, in years with negative investment earnings, plan administrative expenses are paid, directly or indirectly, out of individual accounts. Doing so with regard to missed employer contributions required under USERRA would contradict the legislative history requiring that USERRA contributions not be paid by reducing the account balances of other participants.

Second, the Internal Revenue Service has made clear, at least in the case of one taxpayer, that delinquent employer contributions may not be made up out of investment earnings. In an IRS Technical Advice Memorandum issued in or about April 1993 (redacted copy enclosed herewith), for example, the IRS stated that the fund trustees' proposal to substitute investment earnings for employer contributions required but not received by the plan was impermissible under Treas. Reg. 1.401-1(b)(1)(ii)'s requirement that a profit-sharing plan must provide a definite predetermined formula for allocating investment earnings. The IRS also stated that such a proposal would violate Rev. Rul. 80-155 which further holds that defined contribution plans are required to allocate trust earnings to participant accounts in accordance with a definite formula. *See* enclosed IRS T.A.M. at pp. 9-10. While we believe that the analysis should be different where, as in the case of USERRA, the law requires the plan itself to allocate funds to

participants' accounts regardless of payment by an employer, we are not aware that the IRS has addressed that point.

In light of these IRS pronouncements, the NCCMP requests that the Department raise this issue with the IRS so that the proposed regulations can make clear how a defined contribution plan may lawfully determine to allocate the liability for contributions to the plan when the last employer is functional, or pay that liability when the last employer is not functional, without putting the plan's tax qualification at risk. It appears that Internal Revenue Code § 414(u) was designed to take care of this concern, but it would be useful for the IRS to confirm that. Ideally, as with the other tax-qualification issues raised by USERRA, the requirement that multiemployer defined contribution plans make up the missed contributions for participants returning from uniformed service should be delayed until there is a workable means for them to do so.

## **VII. Meeting USERRA's Health Benefit Requirements Through Modified COBRA Procedures – Comment on Proposed Sections 1002.150, 1002.163 – 1002.169**

The Proposed Regulations make clear that employees who enter the uniformed services must be permitted to continue health coverage for the lesser of 18 months or the period of service. Proposed Section 1002.164. The Veterans Benefits Improvement Act of 2004 extended the period of continuation coverage required under USERRA to the lesser of the period of service or 24 months. P.L. 108-454.

For periods of service of 30 days or less, the employee may not be required to pay more than the normal employee contribution for such coverage. Proposed Section 1002.166. For periods of service of 31 days or more, the employee may be required to pay no more than 102% of the full premium under the plan. *Id.*

Section 1002.165 states that USERRA does not specify requirements for electing such continuation coverage and that health plan administrators may develop reasonable requirements addressing how continuing coverage may be elected. In light of the similarities between this requirement to provide continuation coverage and the requirements of the Consolidated Omnibus Budget Reconciliation Act of 1986 ("COBRA"), and in light of the extensive work the Secretary has done to provide health plan administrators with information about how to provide appropriate notices under COBRA, the NCCMP suggests that the instant Proposed Regulations make clear that employers and health plan administrators may meet their notification obligations under USERRA by following COBRA procedures provided that the COBRA notice is modified to reflect the differences between USERRA and COBRA (such as the new 24-month time period for USERRA continuation coverage). In other words, using modified COBRA procedures would be a safe harbor, though not necessarily the only reasonable means by which to implement the USERRA continuation coverage requirement.

Additionally, Proposed Regulation § 1002.150 provides that a returning service member is entitled to the "most favorable treatment [with regard to non-seniority benefits] accorded to any comparable form of leave." Under the Family and Medical Leave Act (FMLA), however, an eligible employee on family/medical leave is entitled to have the employer maintain health

coverage for that employee under the conditions coverage would have been provided if the employee had continued in employment during the period of leave. See 29 U.S.C. § 2614(c). The NCCMP suggests, therefore, that the proposed regulations should specify that USERRA does not contain the same requirement of continued employer provided health coverage during the period of leave, but rather that the USERRA requirements with regard to health coverage are those spelled out in Proposed Regulation §§ 1002.163 – 1002.169.

### VIII. Summary and Conclusion

As discussed above, the NCCMP believes that a fundamental issue that needs to be addressed by the proposed regulations is whether reemployment for purposes of entitlement to pension credit or contributions means reemployment by the pre-service employer or by any contributing employer to the multiemployer plan. The following table will summarize the specific issues that are raised by that issue:

Issue	If reemployment is by pre-service employer	If reemployment is by any contributing employer
To whom is advance notice given? 1002.85	to pre-service employer	to local union that refers employees out to contributing employers with requirement that local union notify plan administrator
Limit on total service 1002.101	five year limit should apply to pre-service employer	five year limit should apply collectively to all contributing employers to plan
To whom does employee report for reemployment? 1002.115, 119	to pre-service employer	to local union that refers employees out to contributing employers
Who must reemploy returning service member? 1002.259	pre-service employer	any contributing employer
Who pays employer contributions if plan does not allocate otherwise? 1002.266	pre-service employer if still functional, otherwise the plan	pre-service employer if still functional, otherwise the plan
Enforcement rights against whom with respect to right to reemployment?	pre-service employer	<b>Unclear</b>
What happens if pre-service employer is not functional?	<b>Unclear</b>	returning service member may be employed by any contributing employer and plan will be liable for credits or contributions for period of service

We hope that the above comments and tabular summary are helpful in highlighting the concerns we have with the regulations as proposed. With our expertise concerning multiemployer plans, we appreciate the opportunity to provide comments to the Secretary on the Proposed USERRA rules. We know that these matters are complex, and would welcome the opportunity to meet with VETS representatives to discuss these comments in further detail.

Sincerely,

Randy G. DeFrehn  
Executive Director

**Enclosure**

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