

**COMMENTS OF  
THE BUILDING AND CONSTRUCTION DEPARTMENT,  
AFL-CIO,  
ON THE SECRETARY OF LABOR'S PROPOSED RULES  
UNDER  
THE UNIFORMED SERVICES EMPLOYMENT AND  
REEMPLOYMENT RIGHTS ACT OF 1994, AS  
AMENDED ("USERRA")**



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## **INTRODUCTION**

The Building and Construction Trades Department, AFL-CIO (“BCTD”) is a federation of fifteen National and International Unions representing more than 1,000,000 laborers and mechanics employed in the construction industry throughout the United States.

Because of the importance of the Uniformed Services Employment and Reemployment Rights Act of 1994 (“USERRA”) to its members, the BCTD now files these Comments in response to the invitation of the Secretary of the Department of Labor (“Secretary”) to comment on the proposed USERRA rules set forth in the Federal Register on September 20, 2004 at 69 FR 56266 – 56301.

In Part One of these Comments, the BCTD will address issues that are specific to, or otherwise important to, the construction industry. In Part Two, the BCTD will address issues of general importance to all individuals covered under USERRA.

### **PART ONE: ISSUES IN THE CONSTRUCTION INDUSTRY**

#### **I. The Hiring Hall as an “Employer”**

Section 1002.38 of the proposed rules poses the question “Can a hiring hall be my employer?” and answers that question in the affirmative, stating expressly:

Yes. If you are a longshoreman, stagehand, construction worker, or you work in certain other industries, you may frequently work for many different employers. A hiring hall operated by a union or an employer association typically assigns you to your jobs. In these industries, it may not be unusual for you to work your entire career in a series of short term job assignments. The definition of “employer” [under USERRA] includes a person, institution, organization, or other entity to which the employer has delegated the performance of

employment related-responsibilities. 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, the hiring hall has reemployment responsibilities to you. USERRA's anti-discrimination and anti-retaliation provisions also apply to the hiring hall.

69 FR 56288-289

The Secretary also describes the hiring hall as a "single employer." In the Preamble, for example, the Secretary explains that USERRA's five-year service limitation "applies only to the cumulative period of uniformed service by the employee with respect to one particular employer, and does not include periods of service during which the individual was employed by a different employer." 69 FR 56270 at col. 1 The Secretary then goes on to note, "however, that under these proposed regulations a hiring hall out of which an individual may work for several different employers is considered to be a *single employer*." *Id.* (emphasis added).

As explained in more detail below at Section I.A., however, hiring halls in the unionized construction industry do not share the characteristics the Secretary contends would make them an "employer" or "single employer." Instead, those characteristics are attributes of the members of the multi-employer group that are required to obtain applicants through a given hiring hall arrangement. The BCTD therefore asks that the Secretary eliminate section 1002.38 entirely.<sup>1</sup>

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<sup>1</sup> The BCTD is not taking the position that a hiring hall (more appropriately called a "hiring hall operator" (*see* Section I.A., below)) can never be an "employer" under USERRA, which specifies that the definition of "employer" includes any entity to which the employer delegates the performance of any employment related function. The hiring hall/hiring hall operator does not, however, perform the functions the Secretary sets forth in proposed rule 1002.38.

In addition, for the reasons detailed below at Section I.B., it is important that the Secretary clarify which entity *can* constitute a single employer in the hiring hall context. Thus, the BCTD proposes that the Secretary add the following subsection to the rules' definition of employer:

§ 1002.5(d)(4) In industries in which exclusive hiring halls are utilized, all employers who are required to obtain applicants through a given hiring hall arrangement, may constitute a single employer under the Act.

**A. A Hiring Hall is an “Arrangement,” Not an “Employer.”**

In the unionized construction industry, as well as in many other industries that utilize hiring hall systems, a hiring hall is not, in and of itself, a tangible or legal entity. Rather, it is an arrangement by which a particular group of employers are supplied with a reliable source of job applicants. The employer pays no fees to operate the system; the hiring hall operator pays no salary or benefits to the workers it refers to the employer and does not make any actual hiring or assignment decisions.

In the Department of Labor's own view, an exclusive hiring hall in the unionized construction industry is an *arrangement* by which a local union registers applicants for work and then refers them, on request, in some pre-determined order, to employers with whom the unions have collective bargaining relationships.<sup>2</sup> See U.S. Department of Labor, *Exclusive Union Work Referral Systems in the Building Trades* 23-25 (1970). See also Herbert R. Northrup, *Open Shop Construction Revisited* 377 (1985) (“According to a recent study by the Business Roundtable,

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<sup>2</sup> Applicants register on what is typically referred to as the “out-of-work list.”

hiring hall provisions are found in 60 percent of the union [collective bargaining] agreements in the construction industry”). And the same collective bargaining agreements that embody the employer’s commitment to turn to the union as its first source of labor, generally also require that the employer participate in the multi-employer health and welfare funds, including pension plans, that cover the union’s members. *See Imel v. Laborers Pension Trust Fund of Northern California*, 904 F.2d 1327, 1334 (9<sup>th</sup> Cir. 1990) (“the multi-employer group [that utilizes the hiring hall arrangement] is a consistent entity, bound by its collective bargaining agreements with the Union and its participation in the trust which created the [Pension] Fund”).

These hiring hall arrangements are necessitated by the nature of the construction industry itself, in which jobs are frequently of short duration, and where skilled workers are often needed on relatively short notice, as the Secretary acknowledged. *See* 69 FR at 56288-289.

Under an exclusive hiring hall arrangement in the construction industry, the employer (*i.e.*, the construction contractor) determines the number of applicants referred. The employer also usually has the right to reject any applicant for any lawful reason and the right to hire employees from other sources if the union cannot supply them within a specific time period, typically 48 hours. Northrup, *Open Shop Construction* at 377 (most hiring hall agreements allow employers to reject applicants referred by a union). When a job ends, the employer lays the employees

off. The laid-off workers then re-register on the out-of-work list and await referral to a new construction employer.

Thus, the hiring hall operator under such an exclusive arrangement does not perform any of the functions the Secretary identifies as rendering the “hiring hall” an employer under USERRA. That is, the multi-employer group generally does not delegate either the hiring function or the assignment function to the hiring hall operator. Instead, the actual employer (*i.e.*, the construction contractor) specifies the number of workers it needs, and the hiring hall operator dispatches a sufficient number of applicants on a pre-determined basis (most often in the order in which out of work journeymen have signed the “out-of-work list”). The employer then exercises its right to hire or reject applicants referred by the hiring hall operator for any lawful reason.

**B. To Protect the Returning Service Member’s Rights, the Employer is More Appropriately Defined as the Multi-Employer Group Utilizing the Hiring Hall Arrangement.**

Both the federal courts and the Secretary have, in other contexts, recognized the importance of defining the employer, under an exclusive hiring hall arrangement, as the multi-employer group.

For example, the statute requires that the member return to the same civilian employer he or she left in order to qualify for reemployment rights and benefits. *See* 38 U.S.C. §4312. Because of the short duration of most jobs in the construction industry, however, it is more likely than not that a returning service member will not be employed by the same construction contractor from which he or

she departed for military service. In addressing this problem, the Court of Appeals for the Ninth Circuit has held that, where the employee returns to employment with *any one of the employers* who utilize a particular hiring hall under a collective bargaining agreement with a union, the service member has returned to the same “employer” under USERRA. *See Imel v. Laborers Pension Trust Fund of Northern California*, 904 F.2d 1327, 1334 (9<sup>th</sup> Cir. 1990) (concluding that, because the returning service member went to work for another contractor who utilized the Union’s hiring hall (*i.e.*, all employers in the Northern California construction industry with contracts with the union), he returned to the same “employer”).

Indeed, the Secretary has confirmed this view in her discussion of entitlement to pension plan benefits under a multi-employer pension plan, which is the usual pension arrangement in the hiring hall context. For example, the Secretary clarified that any service member who participates in a multi-employer pension plan “does not have to be reemployed by the same employer for whom he or she worked prior to the period of service in order to be reinstated in the pension plan. As long as the employer [who first employs the returning service member] is a contributing employer to the plan, the service member is entitled to be treated as though he or she experienced no break in service under the plan.” 69 FR 56279 at col. 2-3

Another important example of the need to define the employer as the “multi-employer group” involves the fact that a service member must actually be employed, or be on lay-off status, with a *specific* employer to be entitled to reemployment



rights under USERRA. As noted, however, at the end of any construction job under a hiring hall arrangement, the construction employer lays off the worker and he or she re-signs the out-of-work list and awaits referral to *another* construction employer within the group. Thus, at the time a construction worker departs for military service, the employee may simply be on the out-of-work list and have no employment relationship with any *individual* employer in the group. Nor can it be said that the individual has an employment relationship with the hiring hall, which, as stated, is not a tangible entity and does not employ anyone. The only logical and fair interpretation of the statute in this situation is that the employee has an employment relationship, by virtue of his or her lay-off status, with the entire multi-employer group, because he or she has a reasonable expectation of reemployment with one or more members of the multi-employer group. *See, e.g., Akers v. Arnett*, 597 F. Supp. 557, 561 (S.D. Tex. 1983) *aff'd*, 748 F.2d 283 (5<sup>th</sup> Cir. 1984) (a dock worker who was referred out of a long shore hiring hall to any one of a group of employers could reasonably expect that his opportunity to work for any one of the stevedoring companies who utilized the hiring hall would be “indefinite and continuous”)

Yet another example involves the five-year per “employer” limit on USERRA coverage. In the Preamble, the Secretary explains that USERRA’s five year service limitation “applies only to the cumulative period of uniformed service by the employee with respect to *one particular employer*, and does not include periods of service during which the individual was employed by a different employer.” 69 FR

56270 at col. 1 The Secretary then goes on to note, “however, [ ] under these proposed regulations a hiring hall out of which an individual may work for several different employers is considered to be a single employer.” *Id.*

Here again, the use of the term “hiring hall” to stand in for the employer is misleading, as the hiring hall does not actually hire, or employ, any individual. The Secretary’s intent is obviously to prevent an employee who is referred through a hiring hall system from taking advantage of the five-year limit by claiming that he or she runs a separate five-year “clock” with *each* of the employers to whom he or she is referred under the hiring hall arrangement. Similarly, the Secretary also apparently intends to protect the service member by clarifying that the employer with regard to the relevant five-year period is not so broad as to comprise the entire construction industry.<sup>3</sup> Defining the employer here as the multi-employer group of employers who participate in a specific hiring hall arrangement would both be accurate *and* have the intended effect of preventing abuses under USERRA. At the same time, that definition would also protect an individual who may move to a different part of the country and work for various employers in the same industry who are grouped together under a different hiring hall arrangement. Otherwise, the worker would have to leave the industry in order to take advantage of his or her right to run the five-year clock with more than one individual employer.

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<sup>3</sup> In some parts of the Ninth Circuit’s decision in *IMEL*, it refers to the employer as the entire “industry.” While the court, in other sections of its decision, clarifies that it really meant the collective group of employers participating in the hiring hall arrangement, the reference to the entire “industry” has caused some confusion, which the Secretary has now dispelled.

The rights of and limitations on employees under this USERRA provision would thus be better defined by explaining that, in the exclusive hiring hall context, the members of the multi-employer group that are required to obtain applicants through a particular hiring hall may constitute a single employer.”<sup>4</sup>

## **II. The Employer Defense, That Employment Was Brief and Non-Recurrent, Does Not Apply To Exclusive Hiring Hall Arrangements in the Construction Industry.**

The Secretary notes in the Preamble that the proposed rules provide, as does the statute, that an employee is not entitled to reemployment benefits if “the employment from which the person leaves to serve in the uniformed services is for a brief, nonrecurrent period and there is no reasonable expectation that such employment will continue indefinitely or for a significant period.” 69 FR 65272 at col. 1

As discussed, and as acknowledged by the Secretary (at 69 FR 56288-89) employment that is obtained by referral through a hiring hall in the construction industry (as well as in other industries) will often be for a series of brief periods. While such employees may not have a specific expectation of reemployment by any *particular* member of the multi-employer group utilizing the hiring hall

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<sup>4</sup> The BCTD also urges the Secretary to make this same correction in any other section of the Preamble or the proposed rules that refers to the employer as the “hiring hall.” For example, section §1002.21 (prohibitions against discrimination) begins with a statement that the prohibitions against discrimination and retaliation apply to “all covered employers (including *hiring halls* and potential employers, *see* 1002.36 and 1002.38)...” (emphasis added). As stated, the hiring hall is not legally the employing entity: The Secretary should amend the phrase to state “(including any employer utilizing a hiring hall....”

arrangement, they do have reasonable expectations that one or more of those employers will employ them again, and that such employment, collectively, will continue indefinitely or for a significant period. As the court explained in *Akers v. Arnett*, 597 F. Supp. 557, 561 (S.D. Tex. 1983) *aff'd*, 748 F.2d 283 (5<sup>th</sup> Cir. 1984), a dock worker who was referred out of a long shore hiring hall to any one of a group of employers was not a “temporary” employee, because he could reasonably expect that his opportunity to work for any one of the stevedoring companies who utilized the hiring hall and participated in the pension plan would be “indefinite and continuous.”

The Secretary should, therefore, add a clarification to proposed section 1002.139(a) to explain that: “this defense does not apply to employment that is obtained by referral through an exclusive hiring hall arrangement.”

### **III. The Status of Returning Apprentices in the Construction Industry**

The Secretary seeks comments on whether her interpretation of merit pay increases that are conditioned upon the employee passing a skills or performance evaluation “best effectuates the purpose of this provision, or whether the issue of merit pay requires more detailed treatment in these regulations.” 60 FR 56277 at col. 2. Here, the Secretary states that:

the employer should allow a reasonable period of time for the employee [whose merit pay increase depends upon the passing of a skills test or performance evaluation] to become acclimated in the escalator position before such an evaluation is administered. In order that the employee is not penalized financially for his or her military service, the employee must be reemployed at the higher rate of pay, assuming that it is reasonably certain that the employee would otherwise have attained the merit pay increase during the period of military service.

*Id.* (emphasis added)

The BCTD seeks clarification that this rule, should it go into effect, does *not* apply to apprentices in programs approved by the U.S. Department of Labor’s Office of Apprenticeship Training, Employer and Labor Services (“OATELS”), because advancement under such programs, and thus increased wages, depends on far more than simply passing a skills or performance test.

Any contrary view would be at odds with the decision of the United States Supreme Court in *Tilton v. Missouri Pacific Railroad Co.*, 11 L. Ed. 2d 590 (1964)). In that case, the Supreme Court held that “a returning veteran cannot claim a promotion that depends solely on completion of a prerequisite period of employment *training* unless he first works that period.” *Id.* at 598 (emphasis added). An OATELS-approved program is analogous to the situation described in *Tilton*, where advancement is contingent upon the employee first completing a prerequisite period of training. It is not comparable to the testing situation described in the Preamble, where a merit pay increase simply depends upon the passing of a skills or performance evaluation.

Unions and employers design, organize, manage and finance apprenticeship programs under a set of “apprenticeship standards,” which are registered with OATELS, or with a State Apprenticeship Council (“SAC”) recognized by OATELS. Apprenticeship training standards typically establish levels of apprenticeship and detail requirements for advancement to the next level. Employers and unions establish pay grades that accompany each level. *See, e.g.*, “National Guideline

Apprenticeship and Training Standards for Electrical Joint Apprenticeship and Training Committees Representing the National Electrical Contractors Association and the International Brotherhood of Electrical Workers” 1977 (Approved and Certified by the U.S. Department of Labor) at 10-11 (“NECA/IBEW Standards”).

The reasons for such intensive training programs are, typically, to develop the apprentice into a fully competent, highly skilled, safety conscious and productive journey-level craftsman. *See, e.g., id.* at iv. Program sponsors typically find that such an achievement can only be accomplished through a highly structured program devoted to appropriate guidance, personal commitment and consistent discipline. *See, e.g., id.*

To advance from one level to the next, each apprentice generally must satisfactorily complete, at a minimum, substantial on the job (OJT) training hours (for example, approximately 1,500 hours per year over a five year period), as well as related classroom training away from the jobsite. *See, e.g., id.* at 11, 19-20. Under the NECA/IBEW standards, apprentices are evaluated every four months during the first year of the program, and yearly thereafter. *See id.* at 27. An apprentice may not advance to the next level unless his or her performance is satisfactory both in the classroom and on the jobsites on which he or she has worked. *Id.* Employers must report on an apprentice’s job performance each month. *Id.* If an apprentice does not advance, he or she may be placed on probation, or even terminated from the program. *Id.* Thus, there is no provision under these programs for advancing

apprentices to the next level and thus paying them a “merit” pay increase, on the basis of merely passing a single skills test or performance evaluation.

The BCTD thus asks the Secretary to clarify that its proposed requirement, that an employer pay a returning service member at an advanced pay rate while the employee is waiting to take a test or undergo a skills evaluation upon which the advanced rate is contingent, does not apply to apprentices under an OATELS-approved apprenticeship and training program.

### **III. The Basis for Employer Pension Contributions in the Construction Industry**

Neither the statute nor the proposed regulations address how employer contributions to a pension plan should be calculated when they depend upon hours worked, in an industry such as construction, where such hours worked are vulnerable to both seasonal variations and market fluctuations.

The Secretary does discuss in the Preamble how to determine pension contributions that are based on compensation, and in other situations where the rate cannot be determined with reasonable certainty, such as when the person works on commission, or depends to a large extent on tips. The Secretary advises (as does the statute), that employer contributions in such cases may be based on “the service member’s average compensation rate during the twelve-month period before the service period.” 69 FR 56279 at col. 2. The Secretary also clarifies that, “for an employee who worked fewer than 12 months before entering the service, the entire employment period just prior to the service period may be used.” *Id.*

The BCTD urges the Secretary to add a rule that would ask and answer similar questions in the construction industry, where contributions are based on hours worked. The rule can be based only in part on the above model, because the Secretary's model does not account for seasonal and market variations.

For example, basing pension contributions on hours worked during the preceding year could unduly disadvantage or unduly advantage a service member who works in the construction industry, if total employment hours in the year before he or she left were significantly higher or lower than during the term of service. Similarly, basing contributions on a shorter period worked just prior to departure could unduly disadvantage or unduly advantage a service member if he worked during a season where employment opportunities are typically much lower than in other seasons. For example, an employee who worked in the construction industry in the four winter months, and then was absent during the four spring months, would be unduly disadvantaged if his or her pension plan contributions were based on the winter months. This is because construction work opportunities during winter are fairly limited, while opportunities during the spring months in which the employee was absent would almost certainly have been much greater.

The BCTD, therefore, proposes that the Secretary address this problem by adding a rule:

**§1002.268 How is my employer's contribution to my pension plan calculated during my period of service when my compensation is calculated on the basis of "hours worked"?**



In many pension benefit plans, the hours you work determine the amount of the contribution your employer must make on your behalf to the pension plan.

(a) Where the contribution to which you are entitled is based on the hours you work, the calculation of the required contribution must be made using the hours you would have worked during your period of military service, but for your absence due to military service.

(b) Where the hours you generally work are subject to seasonal variations and/or market fluctuations, such as occurs, for example, in the construction industry, the plan may determine the required contribution on the basis of any reasonable method that accounts for such variations and fluctuations.

This solution would prevent the service member from being disadvantaged if he or she left for the service during a period of economic downturn that was then followed by a recovery during his or her absence. It would also insure parity with other employees by preventing the service member from receiving more credit than he or she was due if, for example, he or she left during a period of high employment, which was followed by a period of low employment during his or her absence. Similarly, variations in work opportunities dependent upon seasonal considerations would be leveled. Because of the intricacies involved in taking into consideration such variations, the exact method used is best left to the pension plan trustees, as long as the method chosen is reasonable.

## **PART TWO: ISSUES OF GENERAL APPLICABILITY**

### **I. Application of USERRA's Anti-discrimination Provisions in the Refusal-to-Hire Context**

The Secretary seeks comment on “the application of the anti-discrimination provisions of the Act to potential employers.” 69 FR 56267 at col. 2.

Because the statute expressly protects applicants for employment, there is no question that it applies to potential employers.<sup>5</sup> Thus, the Secretary's inquiry is really directed to the *manner* in which the statute applies to a potential employer who refuses to employ an applicant because of his or her military service obligations.

As the Secretary states in the Preamble to the proposed rules (60 FR 56267 at col. 3), Congress and the courts have made it clear that the burdens of proof under USERRA's discrimination section are those used under the National Labor Relations Act ("NLRA"), as set forth in *Wright Line*, 251 NLRB 1083 (1980), *enf'd*, 662 F.2d 899 (1<sup>st</sup> Cir. 1981), and approved by the Supreme Court in *NLRB v Transportation Management Corp.*, 462 U.S. 393, 401 (1983).

Under that standard, the claimant bears the initial burden of proving that his or her protected status (here, military service obligations) was *a* motivating factor in the employer's decision not to hire him or her. If he or she does so, a violation of the Act has been established. The employer then has the opportunity to escape liability altogether by mounting an affirmative defense, under which it bears the burden of proving that it would have taken the same action anyway, regardless of the applicant's protected status (here, military service obligations). *See Transportation Management*, 462 U.S. at 395. As the Supreme Court observed, if the reasons the employer proffers as its affirmative defense are pretextual, it will

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<sup>5</sup> "A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service shall not be denied *initial employment*...." 38 USC §4311(a)

not have met its burden and will be found to have committed an unfair labor practice. *Id.* at 398.

The Secretary does not need to reinvent the wheel to apply this standard under USERRA. There are numerous cases interpreting the NLRA as it applies in the “refusal-to-hire” context, using the standard approved in *Transportation Management*. Under that standard, the following examples would be resolved as indicated below.

(1) An employer asks an applicant whether she has Reserve or National Guard obligations, and then, after the applicant says yes, denies the applicant the job. The claimant can establish, on these facts, that military service obligations were a motivating factor in the employer’s decision not to hire her. The employer fails to establish any non-military service related reason for not hiring the applicant. The claimant prevails.

(2) An employer asks an applicant whether she has Reserve or National Guard obligations, and then, after the applicant says yes, denies the applicant the job. The claimant, on these facts, establishes that military service obligations were a motivating factor in the employer’s decision not to hire her. The employer then establishes, however, that it would not have hired the applicant in any event, because it hired an applicant who was better qualified for the job. The employer prevails. *See, e.g., Merit Electric Co.*, 328 NLRB 212 (1999) (General Counsel established that the employer’s anti-union sentiments were a motivating factor in

its refusal to hire a union organizer; the employer escaped liability for a refusal-to-hire violation, however, by establishing that it hired a more qualified applicant).

(3) A National Guard member applies for a job after it has been announced that his unit will be shipping out for Iraq within a few months, and he gives the employer this information. The employer declines to hire him. The applicant, on these facts, establishes that military service is a motivating factor in the employer's decision. The employer fails to establish any non-military service related reason for not hiring the applicant. The claimant prevails.

(4) A National Guard member applies for a job after it has been announced that his unit will be shipping out for Iraq within a few months, and he gives the employer this information. The employer declines to hire him. The applicant, on these facts, establishes that military service is a motivating factor in the employer's decision. The employer establishes, however, that it adhered to a longstanding written policy of giving preference to former employees, and that it did in fact hire a former employee for the position. The employer prevails. *See, e.g., Zurn/N.E.P.C.O.*, 329 NLRB 484 (1999).

(5) A National Guard member applies for a job after it has been announced that his unit will be shipping out for Iraq within a month, and he gives the employer this information. The employer declines to hire him. The claimant, on these facts, establishes that military service is a motivating factor in the employer's decision. The employer then proffers evidence that it has a longstanding written policy of giving preference to former employees, and that it did in fact hire

former employees to fill the open positions. Other evidence, however, establishes that the employer also hired applicants who were not former employees, some of whom were less qualified than the applicant with military service obligations. The employer's defense is found to be pretextual, thus the employer fails to meet its burden of proving its affirmative defense and the claimant prevails. *See, e.g., Fluor Daniel, Inc.*, 333 NLRB 427 (2001), *enfd in relevant part*, 332 F.3d 961 (6<sup>th</sup> Cir. 2003).

The Secretary should, therefore, explain that USERRA's anti-discrimination provisions apply to potential employers in the manner described above.

## **II. Proof of Employer Intent to Discriminate Is Not Part of a Claimant's Burden of Proof Under USERRA's Reemployment Provisions.**

The Secretary seeks comment on the proper interpretation of the statute regarding the burden of proof for relief under section 4312 (reemployment entitlements), *i.e.*, whether the burden under section 4312 incorporates the "intent" requirements of the discrimination section (4311). 69 FR 56268 at col. 3.

The BCTD agrees with the Secretary that sections 4311 (discrimination) and 4312 (reemployments rights) are separate and distinct. 69 FR 56268 at col. 2. To hold otherwise would be to incorporate the motivational test of section 4311 into the section that guarantees certain rights to service members absolutely, without regard to any employer intent to discriminate. Because service members are *entitled* to such benefits if they meet the eligibility criteria set forth in the statute,<sup>6</sup>

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<sup>6</sup> "[A]ny person whose absence from a position of employment is necessitated by reason of service in the uniformed services is *entitled* to the reemployment rights

the addition of an “intent” test under these proposed regulations would clearly exceed the scope of the Secretary’s authority.

Moreover, there are other distinctions between the sections that reinforce Congress’ view of them as separate and distinct. For example, the discrimination provisions (Section 4311) apply to a broader range of potential discriminatees than do the Act’s reemployment provisions. Thus applicants with past, present or future military obligations, as well as current employees who are retired service members, are protected from discrimination under Section 4311, but are not afforded reemployment rights with the employer at issue under Section 4312. Similarly, employees with no past, present or future military service obligations at all are also protected under USERRA’s anti-retaliation provisions (Section 4311), but have no rights under Section 4312 (reemployment).

As the Secretary notes in the Preamble, the contrary decision of the Court of Appeals for the Sixth Circuit, *Curby v. Archon*, 216 F.3d 549, 556 (6<sup>th</sup> Cir. 2000), is an anomaly among other federal appellate court decisions to have considered the question, and which have found that the two sections separate and distinct. *See* 69 FR 56268 at col. 2 and cases cited therein. The Sixth Circuit’s decision is plainly wrong because it fails to articulate any understanding that the rights guaranteed under Section 4312 are in the nature of *entitlements*, once the service member establishes that he or she has met all five of the qualifying criteria.

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and benefits and other employment benefits of this chapter if [he or she meets the criteria set forth below and in section 4304 (character of service)].... 38 USC §4312(a) (emphasis added).

### **III. Health Care Benefits**

The BCTD asks that the Secretary clarify exactly when an employee is entitled to continue under an employer-sponsored health care program at no additional cost to the employee. The statute as written is confusing on this point.

The statute appears to read as if an employee who is absent for more than 30 days is entitled to employer-sponsored health-care coverage at no additional cost to himself or herself for those first 30 days. Yet military law experts have advised the BCTD that such coverage eligibility is actually linked to the length of military service specified in the employee's orders, which triggers when the military's health care system (TRICARE) becomes available to the service member. Benefits under TRICARE apparently are not available for persons ordered to service for less than 31 days, but are available *from day one* for persons ordered to service for more than 30 days.

The result of this, according to military authorities, is that employees are not eligible for employer-sponsored health care at no additional cost to themselves for the first 30 days of their absence *if their orders are for longer than 30 days*, because TRICARE is available from day one. Instead, they are eligible to maintain the employer's plan from day one (up to a maximum of 18 months), but can be charged up to 102% of the employer's cost.

The BCTD asks the Secretary to clarify whether this interpretation, which is not spelled out in the statute or the proposed rules, is accurate.

**May 12, 2005**