

**UNIFORMED SERVICES EMPLOYMENT
AND
REEMPLOYMENT RIGHTS ACT OF 1994**

USERRA is a federal statute that protects service members' and veterans' civilian employment rights. Among other things, under certain conditions, USERRA requires employers to put individuals back to work in their civilian jobs after military service. USERRA also protects service members from discrimination in the workplace based on their military service or affiliation.

SUBCHAPTER I--GENERAL

§ 4301. Purposes; sense of Congress

(a) The purposes of this chapter are--

(1) to encourage noncareer service in the uniformed services by eliminating or minimizing the disadvantages to civilian careers and employment which can result from such service;

(2) to minimize the disruption to the lives of persons performing service in the uniformed services as well as to their employers, their fellow employees, and their communities, by providing for the prompt reemployment of such persons upon their completion of such service; and

(3) to prohibit discrimination against persons because of their service in the uniformed services.

(b) It is the sense of Congress that the Federal Government should be a model employer in carrying out the provisions of this chapter.

§ 4302. Relation to other law and plans or agreements

(a) Nothing in this chapter shall supersede, nullify or diminish any Federal or State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that establishes a right or benefit that is more beneficial to, or is in addition to, a right or benefit provided for such person in this chapter.

(b) This chapter supersedes any State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by this chapter, including the establishment of additional prerequisites to the exercise of any such right or the receipt of any such benefit.

§ 4303. Definitions

For the purposes of this chapter--

(1) The term 'Attorney General' means the Attorney General of the United States or any person designated by the Attorney General to carry out a responsibility of the Attorney General under this chapter.

(2) The term 'benefit', 'benefit of employment', or 'rights and benefits' means any advantage, profit, privilege, gain, status, account, or interest (other than wages or salary for work performed) that accrues by reason of an employment contract or agreement or an employer policy, plan, or practice and includes rights and benefits under a pension plan, a health plan, an employee stock ownership plan, insurance coverage and awards, bonuses, severance pay, supplemental unemployment benefits, vacations, and the opportunity to select work hours or location of employment.

(3) The term 'employee' means any person employed by an employer. Such term includes any person who is a citizen, national or permanent resident alien of the United States employed in a workplace in a foreign country by an employer that is an entity incorporated or otherwise organized in the United States or that is controlled by an entity organized in the United States, within the meaning of Section 4319(c) of this title.

(4)(A) Except as provided in subparagraphs (B) and (C), the term 'employer' means any person, institution, organization, or other entity that pays salary or wages for work performed or that has control over employment opportunities, including--

(i) a person, institution, organization, or other entity to whom the employer has delegated the performance of employment-related responsibilities;

(ii) the Federal Government;

(iii) a State;

(iv) any successor in interest to a person, institution, organization, or other entity referred to in this subparagraph; and

(v) a person, institution, organization, or other entity that has denied initial employment in violation of section 4311.

(B) In the case of a National Guard technician employed under section 709 of title 32, the term 'employer' means the adjutant general of the State in which the technician is employed.

(C) Except as an actual employer of employees, an employee pension benefit plan described in section 3(2) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002(2)) shall be deemed to be an employer only with respect to the obligation to provide benefits described in section 4318.

(5) The term 'Federal executive agency' includes the United States Postal Service, the Postal Rate Commission, any nonappropriated fund instrumentality of the United States, any Executive agency (as that term is defined in section 105 of title 5) other than an agency referred to in section 2302(a)(2)(C)(ii) of title 5, and any military department (as that term is defined in section 102 of title 5) with respect to the civilian employees of that department.

(6) The term 'Federal Government' includes any Federal executive agency, the legislative branch of the United States, and the judicial branch of the United States.

(7) The term 'health plan' means an insurance policy or contract, medical or hospital service agreement, membership or subscription contract, or other arrangement under which health services for individuals are provided or the expenses of such services are paid.

(8) The term 'notice' means (with respect to subchapter II) any written or verbal notification of an obligation or intention to perform service in the uniformed services provided to an employer by the employee who will perform such service or by the uniformed service in which such service is to be performed.

(9) The term 'qualified', with respect to an employment position, means having the ability to perform the essential tasks of the position.

(10) The term 'reasonable efforts', in the case of actions required of an employer under this chapter, means actions, including training provided by an employer, that do not place an undue hardship on the employer.

(11) Notwithstanding section 101, the term 'Secretary' means the Secretary of Labor or any person designated by such Secretary to carry out an activity under this chapter.

(12) The term 'seniority' means longevity in employment together with any benefits of employment which accrue with, or are determined by, longevity in employment.

(13) The term 'service in the uniformed services' means the performance of duty on a voluntary or involuntary basis in a uniformed service under competent authority and includes: active duty, active duty for training, initial active duty for training, inactive duty training, full-time National Guard, a period for which a person is absent from a position of employment for the purpose of an examination to determine the fitness of the employment for the purpose of performing funeral honors duty as authorized by section 12503 of title 10 or section 115 of title 32.

(14) The term 'State' means each of the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, and other territories of the United States (including the agencies and political subdivisions thereof).

(15) The term 'undue hardship', in the case of actions taken by an employer, means actions requiring significant difficulty or expense, when considered in light of--

(A) the nature and cost of the action needed under this chapter;

(B) the overall financial resources of the facility or facilities involved in the provision of the action; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such action upon the operation of the facility;

(C) the overall financial resources of the employer; the overall size of the business of an employer with respect to the number of its employees; the number, type, and location of its facilities; and

(D) the type of operation or operations of the employer, including the composition, structure, and functions of the work force of such employer; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the employer.

(16) The term 'uniformed services' means the Armed Forces, the Army National Guard and the Air National Guard when engaged in active duty for training, inactive duty training, or full-time National Guard duty, the commissioned corps of the Public Health Service, and any other category of persons designated by the President in time of war or national emergency.

§ 4304. Character of service

A person's entitlement to the benefits of this chapter by reason of the service of such person in one of the uniformed services terminates upon the occurrence of any of the following events:

- (1) A separation of such person from such uniformed service with a dishonorable or bad conduct discharge.
- (2) A separation of such person from such uniformed service under other than honorable conditions, as characterized pursuant to regulations prescribed by the Secretary concerned.
- (3) A dismissal of such person permitted under section 1161(a) of title 10.
- (4) A dropping of such person from the rolls pursuant to section 1161(b) of title 10.

SUBCHAPTER II--EMPLOYMENT AND REEMPLOYMENT RIGHTS AND LIMITATIONS; PROHIBITIONS

§ 4311. Discrimination against persons who serve in the uniformed services and acts of reprisal prohibited

(a) 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, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation.

(b) An employer may not discriminate in employment against or take any adverse employment action against any person because such person (1) has taken an action to enforce a protection afforded any person under this chapter, (2) has testified or otherwise made a statement in or in connection with any proceeding under this chapter, (3) has assisted or otherwise participated in an investigation under this chapter, or (4) has exercised a right provided for in this chapter. The prohibition in this subsection shall apply with respect to a person regardless of whether that person has performed service in the uniformed services.

(c) An employer shall be considered to have engaged in actions prohibited- (1) under subsection (a), if the person's membership, application for membership, service, application for service, or obligation for service in the uniformed services is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such membership, application for membership, service, application for service, or obligation for service; or

(2) under subsection (b), if the person's (A) action to enforce a protection afforded any person under this chapter, (B) testimony or making of a statement in or in connection with any proceeding under this chapter, (C) assistance or other participation in an investigation under this chapter, or (D) exercise of a right provided for in this chapter, is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such person's enforcement action, testimony, statement, assistance, participation, or exercise of a right.

(d) The prohibitions in subsections (a) and (b) shall apply to any position of employment, including a position that is described in section 4312(d)(1)(C) of this title.

§ 4312. Reemployment rights of persons who serve in the uniformed services

(a) Subject to subsections (b), (c), and (d) and to section 4304, any person whose absence from a position of employment is necessitated by reason of service in the uniformed services shall be entitled to the reemployment rights and benefits and other employment benefits of this chapter if--

(1) the person (or an appropriate officer of the uniformed service in which such service is performed) has given advance written or verbal notice of such service to such person's employer;

(2) the cumulative length of the absence and of all previous absences from a position of employment with that employer by reason of service in the uniformed services does not exceed five years; and

(3) except as provided in subsection (f), the person reports to, or submits an application for reemployment to, such employer in accordance with the provisions of subsection (e).

(b) No notice is required under subsection (a)(1) if the giving of such notice is precluded by military necessity or, under all of the relevant circumstances, the giving of such notice is otherwise impossible or unreasonable. A determination of military necessity for the purposes of this subsection shall be made pursuant to regulations prescribed by the Secretary of Defense and shall not be subject to judicial review.

(c) Subsection (a) shall apply to a person who is absent from a position of employment by reason of service in the uniformed services if such person's cumulative period of service in the uniformed services, with respect to the employer relationship for which a person seeks reemployment, does not exceed five years, except that any such period of service shall not include any service--

(1) that is required, beyond five years, to complete an initial period of obligated service;

(2) during which such person was unable to obtain orders releasing such person from a period of service in the uniformed services before the expiration of such five-year period and such inability was through no fault of such person;

(3) performed as required pursuant to section 10147 of title 10, under section 502(a) or 503 of title 32, or to fulfill additional training requirements determined and certified in writing by the Secretary concerned, to be necessary for professional development, or for completion of skill training or retraining; or

(4) performed by a member of a uniformed service who is--

(A) ordered to or retained on active duty under section 688, 12301(a), 12301(g), 12302, 12304, or 12305 of title 10 or under section 331, 332, 359, 360, 367, or 712 of title 14;

(B) ordered to or retained on active duty (other than for training) under any provision of law because of a war or national emergency declared by the President or the Congress, as determined by the Secretary concerned;

(C) ordered to active duty (other than for training) in support, as determined by the Secretary concerned, of an operational mission for which personnel have been ordered to active duty under section 12304 of title 10;

(D) ordered to active duty in support, as determined by the Secretary concerned, of a critical mission or requirement of the uniformed services; or

(E) called into Federal service as a member of the National Guard under chapter 15 of title 10 or under section 12406 of title 10.

(d)(1) An employer is not required to reemploy a person under this chapter if--

(A) the employer's circumstances have so changed as to make such reemployment impossible or unreasonable;

(B) in the case of a person entitled to reemployment under subsection (a)(3), (a)(4), or (b)(2)(B) of section 4313, such employment would impose an undue hardship on the employer;

or

(C) 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.

(2) In any proceeding involving an issue of whether--

(A) any reemployment referred to in paragraph (1) is impossible or unreasonable because of a change in an employer's circumstances,

(B) any accommodation, training, or effort referred to in subsection (a)(3), (a)(4), or (b)(2)(B) of section 4313 would impose an undue hardship on the employer, or

(C) the employment referred to in paragraph (1)(C) is for a brief, nonrecurrent period and there is no reasonable expectation that such employment will continue indefinitely or for a significant period, the employer shall have the burden of proving the impossibility or unreasonableness, undue hardship, or the brief or nonrecurrent nature of the employment without a reasonable expectation of continuing indefinitely or for a significant period.

(e)(1) Subject to paragraph (2), a person referred to in subsection (a) shall, upon the completion of a period of service in the uniformed services, notify the employer referred to in such subsection of the person's intent to return to a position of employment with such employer as follows:

(A) In the case of a person whose period of service in the uniformed services was less than 31 days, by reporting to the employer--

(i) not later than the beginning of the first full regularly scheduled work period on the first full calendar day following the completion of the period of service and the expiration of eight hours after a period allowing for the safe transportation of the person from the place of that service to the person's residence; or

(ii) as soon as possible after the expiration of the eight-hour period referred to in clause (i), if reporting within the period referred to in such clause is impossible or unreasonable through no fault of the person.

(B) In the case of a person who is absent from a position of employment for a period of any length for the purposes of an examination to determine the person's fitness to

perform service in the uniformed services, by reporting in the manner and time referred to in subparagraph (A).

(C) In the case of a person whose period of service in the uniformed services was for more than 30 days but less than 181 days, by submitting an application for reemployment with the employer not later than 14 days after the completion of the period of service or if submitting such application within such period is impossible or unreasonable through no fault of the person, the next first full calendar day when submission of such application becomes possible.

(D) In the case of a person whose period of service in the uniformed services was for more than 180 days, by submitting an application for reemployment with the employer not later than 90 days after the completion of the period of service.

(2)(A) A person who is hospitalized for, or convalescing from, an illness or injury incurred in, or aggravated during, the performance of service in the uniformed services shall, at the end of the period that is necessary for the person to recover from such illness or injury, report to the person's employer (in the case of a person described in subparagraph (A) or (B) of paragraph (1)) or submit an application for reemployment with such employer (in the case of a person described in subparagraph (C) or (D) of such paragraph). Except as provided in subparagraph (B), such period of recovery may not exceed two years.

(B) Such two-year period shall be extended by the minimum time required to accommodate the circumstances beyond such person's control which make reporting within the period specified in subparagraph (A) impossible or unreasonable.

(3) A person who fails to report or apply for employment or reemployment within the appropriate period specified in this subsection shall not automatically forfeit such person's entitlement to the rights and benefits referred to in subsection (a) but shall be subject to the conduct rules, established policy, and general practices of the employer pertaining to explanations and discipline with respect to absence from scheduled work.

(f)(1) A person who submits an application for reemployment in accordance with subparagraph (C) or (D) of subsection (e)(1) or subsection (e)(2) shall provide to the person's employer (upon the request of such employer) documentation to establish that-

(A) the person's application is timely;

(B) the person has not exceeded the service limitations set forth in subsection (a)(2) (except as permitted under subsection (c)); and

(C) the person's entitlement to the benefits under this chapter has not been terminated pursuant to section 4304.

(2) Documentation of any matter referred to in paragraph (1) that satisfies regulations prescribed by the Secretary shall satisfy the documentation requirements in such paragraph.

(3)(A) Except as provided in subparagraph (B), the failure of a person to provide documentation that satisfies regulations prescribed pursuant to paragraph (2) shall not be a basis for denying reemployment in accordance with the provisions of this chapter if the failure occurs because such documentation does not exist or is not readily available at the time of the request of the employer. If, after such reemployment, documentation becomes available that establishes that such person does not meet one or more of the requirements referred to in subparagraphs (A), (B), and (C) of paragraph (1), the

employer of such person may terminate the employment of the person and the provision of any rights or benefits afforded the person under this chapter.

(B) An employer who reemploys a person absent from a position of employment for more than 90 days may require that the person provide the employer with the documentation referred to in subparagraph (A) before beginning to treat the person as not having incurred a break in service for pension purposes under section 4318(a)(2)(A).

(4) An employer may not delay or attempt to defeat a reemployment obligation by demanding documentation that does not then exist or is not then readily available.

(g) The right of a person to reemployment under this section shall not entitle such person to retention, preference, or displacement rights over any person with a superior claim under the provisions of title 5, United States Code, relating to veterans and other preference eligibles.

(h) In any determination of a person's entitlement to protection under this chapter, the timing, frequency, and duration of the person's training or service, or the nature of such training or service (including voluntary service) in the uniformed services, shall not be a basis for denying protection of this chapter if the service does not exceed the limitations set forth in subsection (c) and the notice requirements established in subsection (a)(1) and the notification requirements established in subsection (e) are met.

§ 4313. Reemployment positions

(a) Subject to subsection (b) (in the case of any employee) and sections 4314 and 4315 (in the case of an employee of the Federal Government), a person entitled to reemployment under section 4312, upon completion of a period of service in the

uniformed services, shall be promptly reemployed in a position of employment in accordance with the following order of priority:

(1) Except as provided in paragraphs (3) and (4), in the case of a person whose period of service in the uniformed services was for less than 91 days--

(A) in the position of employment in which the person would have been employed if the continuous employment of such person with the employer had not been interrupted by such service, the duties of which the person is qualified to perform; or

(B) in the position of employment in which the person was employed on the date of the commencement of the service in the uniformed services, only if the person is not qualified to perform the duties of the position referred to in subparagraph (A) after reasonable efforts by the employer to qualify the person.

(2) Except as provided in paragraphs (3) and (4), in the case of a person whose period of service in the uniformed services was for more than 90 days--

(A) in the position of employment in which the person would have been employed if the continuous employment of such person with the employer had not been interrupted by such service, or a position of like seniority, status and pay, the duties of which the person is qualified to perform; or

(B) in the position of employment in which the person was employed on the date of the commencement of the service in the uniformed services, or a position of like seniority, status and pay, the duties of which the person is qualified to perform, only if the person is not qualified to perform the duties of a position referred to in subparagraph (A) after reasonable efforts by the employer to qualify the person.

(3) In the case of a person who has a disability incurred in, or aggravated during, such service, and who (after reasonable efforts by the employer to accommodate the disability) is not qualified due to such disability to be employed in the position of employment in which the person would have been employed if the continuous employment of such person with the employer had not been interrupted by such service--

(A) in any other position which is equivalent in seniority, status, and pay, the duties of which the person is qualified to perform or would become qualified to perform with reasonable efforts by the employer; or

(B) if not employed under subparagraph (A), in a position which is the nearest approximation to a position referred to in subparagraph (A) in terms of seniority, status, and pay consistent with circumstances of such person's case.

(4) In the case of a person who (A) is not qualified to be employed in (i) the position of employment in which the person would have been employed if the continuous employment of such person with the employer had not been interrupted by such service, or (ii) in the position of employment in which such person was employed on the date of the commencement of the service in the uniform services for any reason (other than disability incurred in, or aggravated during, service in the uniformed services), and (B) cannot become qualified with reasonable efforts by the employer, in any other position which is the nearest approximation to a position referred to first in clause (A)(i) and then in clause (A)(ii) which such person is qualified to perform, with full seniority.

(b)(1) If two or more persons are entitled to reemployment under section 4312 in the same position of employment and more than one of them has reported for such

reemployment, the person who left the position first shall have the prior right to reemployment in that position.

(2) Any person entitled to reemployment under section 4312 who is not reemployed in a position of employment by reason of paragraph (1) shall be entitled to be reemployed as follows:

(A) Except as provided in subparagraph (B), in any other position of employment referred to in subsection (a)(1) or (a)(2), as the case may be (in the order of priority set out in the applicable subsection), that provides a similar status and pay to a position of employment referred to in paragraph (1) of this subsection, consistent with the circumstances of such person's case, with full seniority.

(B) In the case of a person who has a disability incurred in, or aggravated during, a period of service in the uniformed services that requires reasonable efforts by the employer for the person to be able to perform the duties of the position of employment, in any other position referred to in subsection (a)(3) (in the order of priority set out in that subsection) that provides a similar status and pay to a position referred to in paragraph (1) of this subsection, consistent with circumstances of such person's case, with full seniority.

§ 4314. Reemployment by the Federal Government

(a) Except as provided in subsections (b), (c), and (d), if a person is entitled to reemployment by the Federal Government under section 4312, such person shall be reemployed in a position of employment as described in section 4313.

(b)(1) If the Director of the Office of Personnel Management makes a determination described in paragraph (2) with respect to a person who was employed by a Federal

executive agency at the time the person entered the service from which the person seeks reemployment under this section, the Director shall--

(A) identify a position of like seniority, status, and pay at another Federal executive agency that satisfies the requirements of section 4313 and for which the person is qualified; and

(B) ensure that the person is offered such position.

(2) The Director shall carry out the duties referred to in subparagraphs (A) and (B) of paragraph (1) if the Director determines that--

(A) the Federal executive agency that employed the person referred to in such paragraph no longer exists and the functions of such agency have not been transferred to another Federal executive agency; or

(B) it is impossible or unreasonable for the agency to reemploy the person. (c) If the employer of a person described in subsection (a) was, at the time such person entered the service from which such person seeks reemployment under this section, a part of the judicial branch or the legislative branch of the Federal Government, and such employer determines that it is impossible or unreasonable for such employer to reemploy such person, such person shall, upon application to the Director of the Office of Personnel Management, be ensured an offer of employment in an alternative position in a Federal executive agency on the basis described in subsection (b).

(d) If the adjutant general of a State determines that it is impossible or unreasonable to reemploy a person who was a National Guard technician employed under section 709 of title 32, such person shall, upon application to the Director of the Office of Personnel

Management, be ensured an offer of employment in an alternative position in a Federal executive agency on the basis described in subsection (b).

§ 4315. Reemployment by certain Federal agencies

(a) The head of each agency referred to in section 2302(a)(2)(C)(ii) of title 5 shall prescribe procedures for ensuring that the rights under this chapter apply to the employees of such agency.

(b) In prescribing procedures under subsection (a), the head of an agency referred to in that subsection shall ensure, to the maximum extent practicable, that the procedures of the agency for reemploying persons who serve in the uniformed services provide for the reemployment of such persons in the agency in a manner similar to the manner of reemployment described in section 4313.

(c)(1) The procedures prescribed under subsection (a) shall designate an official at the agency who shall determine whether or not the reemployment of a person referred to in subsection (b) by the agency is impossible or unreasonable.

(2) Upon making a determination that the reemployment by the agency of a person referred to in subsection (b) is impossible or unreasonable, the official referred to in paragraph (1) shall notify the person and the Director of the Office of Personnel Management of such determination.

(3) A determination pursuant to this subsection shall not be subject to judicial review.

(4) The head of each agency referred to in subsection (a) shall submit to the Select Committee on Intelligence and the Committee on Veterans' Affairs of the Senate and the Permanent Select Committee on Intelligence and the Committee on Veterans' Affairs of the House of Representatives on an annual basis a report on the number of

persons whose reemployment with the agency was determined under this subsection to be impossible or unreasonable during the year preceding the report, including the reason for each such determination.

(d)(1) Except as provided in this section, nothing in this section, section 4313, or section 4325 shall be construed to exempt any agency referred to in subsection (a) from compliance with any other substantive provision of this chapter.

(2) This section may not be construed--

(A) as prohibiting an employee of an agency referred to in subsection (a) from seeking information from the Secretary regarding assistance in seeking reemployment from the agency under this chapter, alternative employment in the Federal Government under this chapter, or information relating to the rights and obligations of employee and Federal agencies under this chapter; or

(B) as prohibiting such an agency from voluntarily cooperating with or seeking assistance in or of clarification from the Secretary or the Director of the Office of Personnel Management of any matter arising under this chapter.

(e) The Director of the Office of Personnel Management shall ensure the offer of employment to a person in a position in a Federal executive agency on the basis described in subsection (b) if--

(1) the person was an employee of an agency referred to in section 2302(a)(2)(C)(ii) of title 5 at the time the person entered the service from which the person seeks reemployment under this section;

(2) the appropriate officer of the agency determines under subsection (c) that reemployment of the person by the agency is impossible or unreasonable; and

(3) the person submits an application to the Director for an offer of employment under this subsection.

§ 4316. Rights, benefits, and obligations of persons absent from employment for service in a uniformed service

(a) A person who is reemployed under this chapter is entitled to the seniority and other rights and benefits determined by seniority that the person had on the date of the commencement of service in the uniformed services plus the additional seniority and rights and benefits that such person would have attained if the person had remained continuously employed.

(b)(1) Subject to paragraphs (2) through (6), a person who is absent from a position of employment by reason of service in the uniformed services shall be--

(A) deemed to be on furlough or leave of absence while performing such service; and

(B) entitled to such other rights and benefits not determined by seniority as are generally provided by the employer of the person to employees having similar seniority, status, and pay who are on furlough or leave of absence under a contract, agreement, policy, practice, or plan in effect at the commencement of such service or established while such person performs such service.

(2)(A) Subject to subparagraph (B), a person who--

(i) is absent from a position of employment by reason of service in the uniformed services, and

(ii) knowingly provides written notice of intent not to return to a position of employment after service in the uniformed service, is not entitled to rights and benefits under paragraph (1)(B).

(B) For the purposes of subparagraph (A), the employer shall have the burden of proving that a person knowingly provided clear written notice of intent not to return to a position of employment after service in the uniformed service and, in doing so, was aware of the specific rights and benefits to be lost under subparagraph (A).

(3) A person deemed to be on furlough or leave of absence under this subsection while serving in the uniformed services shall not be entitled under this subsection to any benefits to which the person would not otherwise be entitled if the person had remained continuously employed.

(4) Such person may be required to pay the employee cost, if any, of any funded benefit continued pursuant to paragraph (1) to the extent other employees on furlough or leave of absence are so required.

(5) The entitlement of a person to coverage under a health plan is provided for under section 4317.

(6) The entitlement of a person to a right or benefit under an employee pension benefit plan is provided for under section 4318.

(c) A person who is reemployed by an employer under this chapter shall not be discharged from such employment, except for cause--

(1) within one year after the date of such reemployment, if the person's period of service before the reemployment was more than 180 days; or

(2) within 180 days after the date of such reemployment, if the person's period of service before the reemployment was more than 30 days but less than 181 days.

(d) Any person whose employment with an employer is interrupted by a period of service in the uniformed services shall be permitted, upon request of that person, to use

during such period of service any vacation, annual, or similar leave with pay accrued by the person before the commencement of such service. No employer may require any such person to use vacation, annual, or similar leave during such period of service.

(e)(1) An employer shall grant an employee who is a member of a reserve component an authorized leave of absence from a position of employment to allow that employee to perform funeral honors duty as authorized by section 12503 of title 10 or section 115 of title 32.

(e)(2) For the purposes of section 4312(e)(1) of this title, an employee who takes an authorized leave of absence under paragraph (1) is deemed to have notified the employer of the employee's intent to return to such position of employment.

§ 4317. Health plans

(a)(1) In any case in which a person (or the person's dependents) has coverage under a health plan in connection with the person's position of employment, including a group health plan (as defined in section 607(1) of the Employee Retirement Income Security Act of 1974), and such person is absent from such position of employment by reason of service in the uniformed services, or such person becomes eligible for medical and dental care under chapter 55 of title 10 by reason of subsection (d) of section 1074 of that title, the plan shall provide that the person may elect to continue such coverage as provided in this subsection. The maximum period of coverage of a person and the person's dependents under such an election shall be the lesser of--

(A) the 24-month period beginning on the date on which the person's absence begins;

or

(B) the day after the date on which the person fails to apply for or return to a position of employment, as determined under section 4312(e).

(2) A person who elects to continue health-plan coverage under this paragraph may be required to pay not more than 102 percent of the full premium under the plan (determined in the same manner as the applicable premium under section 4980B(f)(4) of the Internal Revenue Code of 1986) associated with such coverage for the employer's other employees, except that in the case of a person who performs service in the uniformed services for less than 31 days, such person may not be required to pay more than the employee share, if any, for such coverage.

(3) In the case of a health plan that is a multiemployer plan, as defined in section 3(37) of the Employee Retirement Income Security Act of 1974, any liability under the plan for employer contributions and benefits arising under this paragraph shall be allocated--

(A) by the plan in such manner as the plan sponsor shall provide; or

(B) if the sponsor does not provide--

(i) to the last employer employing the person before the period served by the person in the uniformed services, or

(ii) if such last employer is no longer functional, to the plan.

(b)(1) Except as provided in paragraph (2), in the case of a person whose coverage under a health plan was terminated by reason of service in the uniformed services, or by reason of the person's having become eligible for medical and dental care under chapter 55 of title 10 by reason of subsection (d) of section 1074 of that title, an exclusion or waiting period may not be imposed in connection with the reinstatement of such coverage upon reemployment under this chapter if an exclusion or waiting period

would not have been imposed under a health plan had coverage of such person by such plan not been terminated as a result of such service or eligibility. This paragraph applies to the person who is reemployed and to any individual who is covered by such plan by reason of the reinstatement of the coverage of such person.

(2) Paragraph (1) shall not apply to the coverage of any illness or injury determined by the Secretary of Veterans Affairs to have been incurred in, or aggravated during, performance of service in the uniformed services.

(3) In the case of a person whose coverage under a health plan is terminated by reason of the person having become eligible for medical and dental care under chapter 55 of title 10 by reason of subsection (d) of section 1074 of that title but who subsequently does not commence a period of active duty under the order to active duty that established such eligibility because the order is canceled before such active duty commences, the provisions of paragraph (1) relating to any exclusion or waiting period in connection with the reinstatement of coverage under a health plan shall apply to such person's continued employment, upon the termination of such eligibility for medical and dental care under chapter 55 of title 10 that is incident to the cancellation of such order, in the same manner as if the person had become reemployed upon such termination of eligibility.

Sec. 4318. Employee pension benefit plans

(a)(1)(A) Except as provided in subparagraph (B), in the case of a right provided pursuant to an employee pension benefit plan (including those described in sections 3(2) and 3(33) of the Employee Retirement Income Security Act of 1974) or a right provided under any Federal or State law governing pension benefits for governmental

employees, the right to pension benefits of a person reemployed under this chapter shall be determined under this section.

(B) In the case of benefits under the Thrift Savings Plan, the rights of a person reemployed under this chapter shall be those rights provided in section 8432b of title 5. The first sentence of this subparagraph shall not be construed to affect any other right or benefit under this chapter.

(2)(A) A person reemployed under this chapter shall be treated as not having incurred a break in service with the employer or employers maintaining the plan by reason of such person's period or periods of service in the uniformed services.

(B) Each period served by a person in the uniformed services shall, upon reemployment under this chapter, be deemed to constitute service with the employer or employers maintaining the plan for the purpose of determining the nonforfeitability of the person's accrued benefits and for the purpose of determining the accrual of benefits under the plan.

(b)(1) An employer reemploying a person under this chapter shall, with respect to a period of service described in subsection (a)(2)(B), be liable to an employee pension benefit plan for funding any obligation of the plan to provide the benefits described in subsection (a)(2) and shall allocate the amount of any employer contribution for the person in the same manner and to the same extent the allocation occurs for other employees during the period of service. For purposes of determining the amount of such liability and any obligation of the plan, earnings and forfeitures shall not be included. For purposes of determining the amount of such liability and for purposes of section 515 of the Employee Retirement Income Security Act of 1974 or any similar

Federal or State law governing pension benefits for governmental employees, service in the uniformed services that is deemed under subsection (a) to be service with the employer shall be deemed to be service with the employer under the terms of the plan or any applicable collective bargaining agreement. In the case of a multiemployer plan, as defined in section 3(37) of the Employee Retirement Income Security Act of 1974, any liability of the plan described in this paragraph shall be allocated--

(A) by the plan in such manner as the sponsor maintaining the plan shall provide; or

(B) if the sponsor does not provide--

(i) to the last employer employing the person before the period served by the person in the uniformed services, or

(ii) if such last employer is no longer functional, to the plan.

(2) A person reemployed under this chapter shall be entitled to accrued benefits pursuant to subsection (a) that are contingent on the making of, or derived from, employee contributions or elective deferrals (as defined in section 402(g)(3) of the Internal Revenue Code of 1986) only to the extent the person makes payment to the plan with respect to such contributions or deferrals. No such payment may exceed the amount the person would have been permitted or required to contribute had the person remained continuously employed by the employer throughout the period of service described in subsection (a)(2)(B). Any payment to the plan described in this paragraph shall be made during the period beginning with the date of reemployment and whose duration is three times the period of the person's services in the uniformed services, such payment period not to exceed five years.

(3) For purposes of computing an employer's liability under paragraph (1) or the employee's contributions under paragraph (2), the employee's compensation during the period of service described in subsection (a)(2)(B) shall be computed--

(A) at the rate the employee would have received but for the period of service described in subsection (a)(2)(B), or

(B) in the case that the determination of such rate is not reasonably certain, on the basis of the employee's average rate of compensation during the 12-month period immediately preceding such period (or, if shorter, the period of employment immediately preceding such period).

(c) Any employer who reemploys a person under this chapter and who is an employer contributing to a multiemployer plan, as defined in section 3(37) of the Employee Retirement Income Security Act of 1974, under which benefits are or may be payable to such person by reason of the obligations set forth in this chapter, shall, within 30 days after the date of such reemployment, provide information, in writing, of such reemployment to the administrator of such plan.

Sec. 4319. Employment and reemployment rights in foreign countries.

(a) LIABILITY OF CONTROLLING UNITED STATES EMPLOYER OF FOREIGN

ENTITY- If an employer controls an entity that is incorporated or otherwise organized in a foreign country, any denial of employment, reemployment, or benefit by such entity shall be presumed to be by such employer.

(b) INAPPLICABILITY TO FOREIGN EMPLOYER- This subchapter does not apply to foreign operations of an employer that is a foreign person not controlled by or United States employer.

(c) DETERMINATION OF CONTROLLING EMPLOYER- For the purpose of this section, the determination of whether an employer controls an entity shall be based upon the interrelations of operations, common management, centralized control of labor relations, and common ownership or financial control of the employer and the entity.

(d) EXEMPTION- Notwithstanding any other provision of this subchapter, an employer, or an entity controlled by an employer, shall be exempt from compliance with any of section 4311 through 4318 of this title with respect to an employee in a workplace in a foreign country, if compliance with that section would cause such employer, or such entity controlled by an employer, to violate the law of the foreign country in which the workplace is located.'

SUBCHAPTER III--PROCEDURES FOR ASSISTANCE, ENFORCEMENT, AND INVESTIGATION

§ 4321. Assistance in obtaining reemployment or other employment rights or benefits

The Secretary (through the Veterans' Employment and Training Service) shall provide assistance to any person with respect to the employment and reemployment rights and benefits to which such person is entitled under this chapter. In providing such assistance, the Secretary may request the assistance of existing Federal and State agencies engaged in similar or related activities and utilize the assistance of volunteers.

§ 4322. Enforcement of employment or reemployment rights

(a) A person who claims that--

(1) such person is entitled under this chapter to employment or reemployment rights or benefits with respect to employment by an employer; and

(2)(A) such employer has failed or refused, or is about to fail or refuse, to comply with the provisions of this chapter; or

(B) in the case that the employer is a Federal executive agency, such employer or the Office of Personnel Management has failed or refused, or is about to fail or refuse, to comply with the provisions of this chapter, may file a complaint with the Secretary in accordance with subsection (b), and the Secretary shall investigate such complaint.

(b) Such complaint shall be in writing, be in such form as the Secretary may prescribe, include the name and address of the employer against whom the complaint is filed, and contain a summary of the allegations that form the basis for the complaint.

(c) The Secretary shall, upon request, provide technical assistance to a potential claimant with respect to a complaint under this subsection, and when appropriate, to such claimant's employer.

(d) The Secretary shall investigate each complaint submitted pursuant to subsection (a). If the Secretary determines as a result of the investigation that the action alleged in such complaint occurred, the Secretary shall attempt to resolve the complaint by making reasonable efforts to ensure that the person or entity named in the complaint complies with the provisions of this chapter.

(e) If the efforts of the Secretary with respect to any complaint filed under subsection (a) do not resolve the complaint, the Secretary shall notify the person who submitted the complaint of--

(1) the results of the Secretary's investigation; and

(2) the complainant's entitlement to proceed under the enforcement of rights provisions provided under section 4323 (in the case of a person submitting a complaint against a

State or private employer) or section 4324 (in the case of a person submitting a complaint against a Federal executive agency or the Office of Personnel Management).

(f) This subchapter does not apply to any action relating to benefits to be provided under the Thrift Savings Plan under title 5.

§ 4323. Enforcement of rights with respect to a State or private employer

(a) ACTION FOR RELIEF-(1) A person who receives from the Secretary a notification pursuant to section 4322(e) of this title of an unsuccessful effort to resolve a complaint relating to a State (as an employer) or a private employer may request that the Secretary refer the complaint to the Attorney General. If the Attorney General is responsibly satisfied that the person on whose behalf the complaint is referred is entitled to the rights or benefits sought, the Attorney General may appear on behalf of, and act as attorney for, the person on whose behalf the complaint is submitted and commence an action for relief under this chapter for such person. In the case of such an action against a State (as an employer), the action shall be brought in the name of the United States as the plaintiff in the action.

(2) A person may commence an action for relief with respect to a complaint against a State (as an employer) or a private employer if the person--

(A) has chosen not to apply to the Secretary for assistance under section 4322(a) of this title;

(B) has chosen not to request that the Secretary refer the complaint to the Attorney General under paragraph (1); or

(C) has been refused representation by the Attorney General with respect to the complaint under such paragraph .

(b) JURISDICTION-(1) In the case of an action against a State (as an employer) or a private employer commenced by the United States, the district courts of the United States shall have jurisdiction over the action.

(2) In the case of action against a State (as an employer) by a person, the action may be brought in a State court of competent jurisdiction in accordance with the laws of the State.

(3) In the case of an action against a private employer by a person, the district courts of the United States shall have jurisdiction of the action.

(c) VENUE-(1) In the case of an action by the United States against a State (as an employer), the action may proceed in the United States district court for any district in which the State exercises any authority or carries out any function.

(2) In the case of an action against a private employer, the action may proceed in the United States district court for any district in which the private employer of the person maintains a place of business.

(d) REMEDIES-(1) In any action under this section, the court may award relief as follows:

(A) The court may require the employer to comply with the provisions of this chapter.

(B) The court may require the employer to compensate the person for any loss of wages or benefits suffered by reason of such employer's failure to comply with the provisions of this chapter.

(C) The court may require the employer to pay the person an amount equal to the amount referred to in subparagraph (B) as liquidated damages, if the court determines that the employer's failure to comply with the provisions of this chapter was willful.

(2)(A) Any compensation awarded under subparagraph (B) or (C) of paragraph (1) shall be in addition to, and shall not diminish, any of the other rights and benefits provided for under this chapter.

(B) In the case of an action commenced in the name of the United States for which the relief includes compensation awarded under subparagraph (B) or (C) of paragraph (1), such compensation shall be held in a special deposit account and shall be paid, on order of the Attorney General, directly to the person. If the compensation is not paid to the person because of inability to do so within a period of 3 years, the compensation shall be converted into the Treasury of the United States as miscellaneous receipts.

(3) A State shall be subject to the same remedies, including prejudgment interest, as may be imposed upon any private employer under this section.

(e) EQUITY POWERS- The court may use its full equity powers, including temporary or permanent injunctions, temporary restraining orders, and contempt orders, to vindicate fully the rights of benefits of persons under this chapter.

(f) STANDING- An action under this chapter may be initiated only by a person claiming rights or benefits under this chapter under subsection (a) or by the United States under subsection (a)(1).

(g) RESPONDENT- In any action under this chapter, only an employer or a potential employer, as the case may be, shall be a necessary party respondent.

(h) FEES, COURT COSTS- (1) No fees or court costs may be charged or taxed against any person claiming rights under this chapter.

(2) In any action or proceeding to enforce a provision of this chapter by a person under subsection (a)(2) who obtained private counsel for such action or proceeding, the court

may award any such person who prevails in such action or proceeding reasonable attorney fees, expert witness fees, and other litigation expenses.

(i) INAPPLICABILITY OF STATE STATUTE OF LIMITATIONS- No State statute of limitations shall apply to any proceeding under this chapter.

(j) DEFINITION- In this section, the term 'private employer' includes a political subdivision of a State.'

§ 4324. Enforcement of rights with respect to Federal executive agencies

(a)(1) A person who receives from the Secretary a notification pursuant to section 4322(e) may request that the Secretary refer the complaint for litigation before the Merit Systems Protection Board. The Secretary shall refer the complaint to the Office of Special Counsel established by section 1211 of title 5.

(2)(A) If the Special Counsel is reasonably satisfied that the person on whose behalf a complaint is referred under paragraph (1) is entitled to the rights or benefits sought, the Special Counsel (upon the request of the person submitting the complaint) may appear on behalf of, and act as attorney for, the person and initiate an action regarding such complaint before the Merit Systems Protection Board.

(B) If the Special Counsel declines to initiate an action and represent a person before the Merit Systems Protection Board under subparagraph (A), the Special Counsel shall notify such person of that decision.

(b) A person may submit a complaint against a Federal executive agency or the Office of Personnel Management under this subchapter directly to the Merit Systems Protection Board if that person--

(1) has chosen not to apply to the Secretary for assistance under section 4322(a);

(2) has received a notification from the Secretary under section 4322(e);

(3) has chosen not to be represented before the Board by the Special Counsel pursuant to subsection (a)(2)(A); or

(4) has received a notification of a decision from the Special Counsel under subsection (a)(2)(B).

(c)(1) The Merit Systems Protection Board shall adjudicate any complaint brought before the Board pursuant to subsection (a)(2)(A) or (b), without regard as to whether the complaint accrued before, on, or after October 13, 1994. A person who seeks a hearing or adjudication by submitting such a complaint under this paragraph may be represented at such hearing or adjudication in accordance with the rules of the Board.

(2) If the Board determines that a Federal executive agency or the Office of Personnel Management has not complied with the provisions of this chapter relating to the employment or reemployment of a person by the agency, the Board shall enter an order requiring the agency or Office to comply with such provisions and to compensate such person for any loss of wages or benefits suffered by such person by reason of such lack of compliance.

(3) Any compensation received by a person pursuant to an order under paragraph (2) shall be in addition to any other right or benefit provided for by this chapter and shall not diminish any such right or benefit.

(4) If the Board determines as a result of a hearing or adjudication conducted pursuant to a complaint submitted by a person directly to the Board pursuant to subsection (b) that such person is entitled to an order referred to in paragraph (2), the

Board may, in its discretion, award such person reasonable attorney fees, expert witness fees, and other litigation expenses.

(d)(1) A person adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board under subsection (c) may petition the United States Court of Appeals for the Federal Circuit to review the final order or decision. Such petition and review shall be in accordance with the procedures set forth in section 7703 of title 5.

(2) Such person may be represented in the Federal Circuit proceeding by the Special Counsel unless the person was not represented by the Special Counsel before the Merit Systems Protection Board regarding such order or decision.

§ 4325. Enforcement of rights with respect to certain Federal agencies

(a) This section applies to any person who alleges that--

(1) the reemployment of such person by an agency referred to in subsection (a) of section 4315 was not in accordance with procedures for the reemployment of such person under subsection (b) of such section; or

(2) the failure of such agency to reemploy the person under such section was otherwise wrongful.

(b) Any person referred to in subsection (a) may submit a claim relating to an allegation referred to in that subsection to the inspector general of the agency which is the subject of the allegation. The inspector general shall investigate and resolve the allegation pursuant to procedures prescribed by the head of the agency.

(c) In prescribing procedures for the investigation and resolution of allegations under subsection (b), the head of an agency shall ensure, to the maximum extent practicable,

that the procedures are similar to the procedures for investigating and resolving complaints utilized by the Secretary under section 4322(d).

(d) This section may not be construed--

(1) as prohibiting an employee of an agency referred to in subsection (a) from seeking information from the Secretary regarding assistance in seeking reemployment from the agency under this chapter, or information relating to the rights and obligations of employees and Federal agencies under this chapter; or

(2) as prohibiting such an agency from voluntarily cooperating with or seeking assistance in or of clarification from the Secretary or the Director of the Office of Personnel Management of any matter arising under this chapter.

§ 4326. Conduct of investigation; subpoenas

(a) In carrying out any investigation under this chapter, the Secretary's duly authorized representatives shall, at all reasonable times, have reasonable access to and the right to interview persons with information relevant to the investigation and shall have reasonable access to, for purposes of examination, and the right to copy and receive, any documents of any person or employer that the Secretary considers relevant to the investigation.

(b) In carrying out any investigation under this chapter, the Secretary may require by subpoena the attendance and testimony of witnesses and the production of documents relating to any matter under investigation. In case of disobedience of the subpoena or contumacy and on request of the Secretary, the Attorney General may apply to any district court of the United States in whose jurisdiction such disobedience or contumacy occurs for an order enforcing the subpoena.

(c) Upon application, the district courts of the United States shall have jurisdiction to issue writs commanding any person or employer to comply with the subpoena of the Secretary or to comply with any order of the Secretary made pursuant to a lawful investigation under this chapter and the district courts shall have jurisdiction to punish failure to obey a subpoena or other lawful order of the Secretary as a contempt of court.

(d) Subsections (b) and (c) shall not apply to the legislative branch or the judicial branch of the United States.

SUBCHAPTER IV--MISCELLANEOUS PROVISIONS

§ 4331. Regulations

(a) The Secretary (in consultation with the Secretary of Defense) may prescribe regulations implementing the provisions of this chapter with regard to the application of this chapter to States, local governments, and private employers.

(b)(1) The Director of the Office of Personnel Management (in consultation with the Secretary and the Secretary of Defense) may prescribe regulations implementing the provisions of this chapter with regard to the application of this chapter to Federal executive agencies (other than the agencies referred to in paragraph (2)) as employers. Such regulations shall be consistent with the regulations pertaining to the States as employers and private employers, except that employees of the Federal Government may be given greater or additional rights.

(2) The following entities may prescribe regulations to carry out the activities of such entities under this chapter:

(A) The Merit Systems Protection Board.

(B) The Office of Special Counsel.

(C) The agencies referred to in section 2303(a)(2)(C)(ii) of title 5.

§ 4332. Reports

The Secretary shall, after consultation with the Attorney General and the Special Counsel referred to in section 4324(a)(1) and no later than February 1, 2005, and annually thereafter, transmit to the Congress, a report containing the following matters for the fiscal year ending before such February 1:

(1) The number of cases reviewed by the Department of Labor under this chapter during the fiscal year for which the report is made.

(2) The number of cases referred to the Attorney General or the Special Counsel pursuant to section 4323 or 4324, respectively, during such fiscal year.

(3) The number of complaints filed by the Attorney General pursuant to section 4323 during such fiscal year.

(4) The nature and status of each case reported on pursuant to paragraph (1), (2), or (3).

(5) An indication of whether there are any apparent patterns of violation of the provisions of this chapter, together with an explanation thereof.

(6) Recommendations for administrative or legislative action that the Secretary, the Attorney General, or the Special Counsel considers necessary for the effective implementation of this chapter, including any action that could be taken to encourage mediation, before claims are filed under this chapter, between employers and persons seeking employment or reemployment.

§ 4333. Outreach

The Secretary, the Secretary of Defense, and the Secretary of Veterans Affairs shall take such actions as such Secretaries determine are appropriate to inform persons entitled to rights and benefits under this chapter and employers of the rights, benefits, and obligations of such persons and such employers under this chapter.

§ 4334. Notice of rights and duties

(a) Requirement to provide notice.--Each employer shall provide to persons entitled to rights and benefits under this chapter a notice of the rights, benefits, and obligations of such persons and such employers under this chapter. The requirement for the provision of notice under this section may be met by the posting of the notice where employers customarily place notices for employees.

(b) Content of notice.--The Secretary shall provide to employers the text of the notice to be provided under this section.

LEGAL CONSIDERATIONS

It is important to recognize that there are legal considerations that must be factored into any agency's decisions regarding health and wellness issues, fitness for duty, limited or light duty and the reemployment of law enforcement officers returning from military assignments. It is recommended that policies and practices dealing with these issues be made in consultation with agency legal counsel whose advice can keep agency administrators from making well-intentioned, but legally unsound, decisions. The following discussion points out some of the laws and legal considerations that should be taken into account when dealing with health, wellness and fitness issues.

Family and Medical Leave Act (FMLA) amended to address military family leave

Enacted in 1993, the FMLA is now firmly entrenched in the workplace and routinely administered by human resource professionals. It has remained virtually unchanged since its inception until recently. In January 2008, President Bush signed into law the National Defense Authorization Act (NDAA) which amended the FMLA as it relates to military family leave. The amendments became effective on January 28, 2008 and provide two important new leave rights related to military service – a new qualifying reason for leave and a new leave entitlement.

The complete text of the amendments to the FMLA can be accessed at <http://www.dol.gov/esa/whd/fmla/fmlaAmended.htm>. Summarized below are some of the military family leave provisions that reflect significant changes to the FMLA.

- The terms “parent,” “spouse,” and “son or daughter,” have been expanded to include “next of kin” (meaning nearest blood relative) in a service member’s family. 29 USC § 2611(18).

- A “covered service member” means a member of the Armed Forces, including the National Guard or Reserves, who is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list, for a serious injury or illness. 29 USC § 2611(16).
- The term “serious injury or illness” describes an injury or illness incurred by the service member in the line of duty or active duty that may render the service member medically unfit to perform the duties of the member’s office, grade, rank, or rating. 29 USC § 2611(19).
- In addition to the four FMLA qualifying events that entitle an eligible employee to 12 workweeks of leave during any 12-month period, an eligible employee is now entitled to that same leave because of a “qualifying exigency” arising out of the fact that the spouse, son, daughter or parent of the employee is on active duty or has been notified of an impending call or order to active duty. 29 USC § 2612(a)(1)(E).
- An eligible employee who is the spouse, son, daughter, parent or next of kin of a covered service member shall be entitled to a total of 26 workweeks of leave during a 12-month period to care for the service member. 29 USC § 2612(a)(3).
- During a single 12-month period, an eligible employee shall be entitled to a combined total of 26 workweeks of leave for leave taken for the “qualifying exigency” and the care of a service member who is ill or injured as defined in the amendments. 29 USC § 2612(a)(4).

- The military family leave can be taken intermittently or on a reduced leave schedule. 29 USC § 2612(b)(1).

Although the above amendments were adopted and became effective on January 28, 2008, the regulation defining what constitutes a “qualifying exigency” has not yet been adopted. The U. S. Department of Labor, in its notice poster announcing the new military leave rights, states that “employers are encouraged to provide this type of leave [i.e. for a “qualifying exigency”] to qualifying employees in the interim.” (A copy of the notice poster is provided as an attachment to this paper). Until such time as a final regulation is enacted defining a “qualifying exigency,” employers are left to guess what might constitute such an exigency. In this interim period, guidance can be found in statements made by key members of the United States House of Representatives about this provision. Representative Jason Altmire, who introduced the provision, stated:

What this legislation does is allow family members of our brave men and women serving in the Guard and Reserve to use Family and Medical Leave Act time to see of, to see the deployment, or to see the members return when they come back, and to use that, importantly, to deal with economic issues, and get the household economics in order . . . It will allow military families to use family and medical leave time to manage issues such as childcare and financial planning that arise as a result of the deployment of an immediate family member. Federal Register, Vol. 73, No. 28, February 11, 2008, at 7927.

Representative Tom Udall, who co-sponsored the provision, stated:

For every soldier who is deployed overseas, there is a family back home faced with new and challenging hardships. The toll extends beyond emotional stress. From raising a child to managing household finances to day-to-day events, families have to find the time and resources to deal with the absence of a loved one. The Altmire-Udall amendment would allow spouses, parents or children of military personnel to use Family and Medical Leave Act benefits for issues related directly to the deployment of a soldier. Federal Register, Vol. 73, No. 28, February 11, 2008 at 7927.

Representative George Miller added:

These deployments and extended tours are not easy on families, and two-parent households can suddenly become a single-parent household and one parent is left alone to deal with paying the bills, going to the bank, picking up the kids from school, watching the kids, providing emotional support to the rest of the family. You have got to deal with these predeployment preparations. Federal Register, Vol. 73, No. 28, February 11, 2008 at 7927.

Until the final regulation is enacted that provides the interpretation of what constitutes a “qualifying exigency,” evaluate each request on a case-by-case basis with the above statements as a guide. Include the agency’s human resource professionals and legal counsel in the decision making process for decisions on this issue.

Americans with Disabilities Act (ADA)

The ADA has implications in a number of areas explored in this paper, such as physical fitness standards, fitness for duty and other medical examinations, and light duty, as well as the safety concerns presented by law enforcement officers who suffer from disabilities and cannot adequately perform the essential functions of their jobs.

The duty to accommodate and the safety concerns that are ever present in law enforcement require a balancing of these sometimes competing interests and law enforcement agency administrators should include human resource professionals and legal counsel in the evaluative process when dealing with issues impacted by the ADA.

The ADA prohibits discrimination in all employment practices against an applicant and employee who is considered to be a “qualified individual” with a disability. 42 USC § 12111(8). A “qualified individual” with a disability is an individual who can perform the essential functions of the job with or without an accommodation. 42 USC §

12111(8). A disability is defined as a physical or mental impairment that substantially limits one or more major life activities. 42 USC §12102(2)(A). The Equal Employment Opportunities Commission (EEOC) defines a physical or mental impairment as follows:

(1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or (2) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. 29 C.F.R. § 1630.2(h)(1998).

A major life activity is defined as “functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

The ADA also protects an individual who has a record of a disability, 42 USC § 12102(B), or is regarded as having a disability, regardless of whether the person actually has the disability. 42 USC 12102(2)(C).

The United States Supreme Court, in *Sutton v. United Air Lines*, 527 U.S. 471, 482-84 (1999) established that individuals must be evaluated in light of any corrective or mitigating measures:

We conclude that respondent is correct that the approach adopted by the agency guidelines—that persons are to be evaluated in their hypothetical uncorrected state—is an impermissible interpretation of the ADA. Looking at the Act as a whole, it is apparent that if a person is taking measures to correct for, or mitigate, a physical or mental impairment, the effects of those measures—both positive and negative—must be taken into account when judging whether that person is “substantially limited “ in a major life activity and thus “disabled” under the Act.

* * * * *

For instance, under this view, courts would almost certainly find all diabetics to be disabled, because if they failed to monitor their blood sugar levels and administer insulin, they

would almost certainly be substantially limited in one or more major life activities. A diabetic whose illness does not impair his or her daily activities would therefore be considered disabled simply because he or she has diabetes. Thus, the guidelines approach would create a system in which persons often must be treated as members of a group of people with similar impairments, rather than as individuals. This is contrary to both the letter and the spirit of the ADA.

The protections of the ADA do not apply if a disabled person cannot perform the essential functions of the job, even with an accommodation. However, if a person can perform a job's essential functions and is a qualified individual, the ADA prohibits discrimination in areas such as job application procedures, hiring, and advancement. 42 USC § 12112(a). Under the ADA, an employer discriminates by using qualification standards or selection criteria that have a tendency to screen out an individual with a disability or a class of individuals with disabilities unless the standard or selection criteria is shown to be "job-related for the position in question and is consistent with business necessity." 42 USC § 12112(b)(6). For instance, a blanket exclusion of all disabled law enforcement officers constitutes unlawful discrimination on the basis of a disability because the exclusion is based on generalizations or stereotypes about the effects of a particular disability on an individual. *Stillwell v. Kansas City Bd. of Police Comm'rs.*, 872 F. Supp. 682, 686 (W.D. Mo. 1995).

Agencies have an obligation to engage in an interactive process with an employee who is requesting a reasonable accommodation to determine if the individual is a qualified individual with a disability and to determine whether or not a reasonable accommodation can be fashioned. An employer is required to make reasonable accommodation to the known physical or mental limitations of a qualified individual

unless the accommodation would pose an undue hardship on the employer. *Sch. Bd. of Nassau County v. Arline*, 480 U.S. 273, 289 n. 17 (1987).

In certain cases where an employer can show that the employee poses a “direct threat” that cannot be eliminated by a reasonable accommodation, the employer is not mandated to accommodate the individual. 42 USC §12113(a)-(b). The determination that an applicant or employee with a disability does pose a “direct threat” to the health and safety of others must be based on objective facts related to that particular individual’s present ability to safely perform the essential functions of the job. 29 CFR § 1630.2(r)(1998).

This case-by-case determination as to whether an individual poses a significant risk of harm to others requires the employer to identify the specific behavior exhibited by the individual with the disability. The employer then should consider these four factors: (1) The duration of the risk; (2) The nature and severity of the potential harm; (3) The likelihood that the potential harm will occur; and (4) The imminence of the potential harm. 29 C.F.R. § 1630(2)(r)(1998).

The issue frequently arises as to whether light-duty or limited duty constitutes a reasonable accommodation. In the law enforcement context, light or limited duty assignments are made for sworn law enforcement officers who suffer temporary disability but are expected to return to full-duty status at some point in the future. Usually, salaries of law enforcement officers and civilians within the same department or agency reflect that the sworn officers are compensated for physical abilities and hazardous duty and receive higher compensation than civilians who do not face those demands. This makes it very difficult to reasonably accommodate a sworn officer by

placing him or her in a light or limited duty position that removes those physical requirements and hazardous duties, while still paying him or her the salary of a full-duty law enforcement officer. One court recognized this problem, observing that the plaintiff police officer with a disability “did not desire a position as a dispatcher, but rather wanted a new position: dispatcher with a police officer’s salary.” *Conklin v. City of Englewood*, 98 F.3d 1341 (6th Cir. 1996). His request that the department “employ him as a dispatcher and pay him as a police officer” was an “unreasonable accommodation.” *Id.*

Similarly, the court in *Santos v. Port Authority of New York and New Jersey*, 1995 WL 431336, ruled against a police officer with a permanently injured foot who had been allowed to perform a “light duty” assignment for more than two years and who wanted to keep that assignment permanently. The court determined that “no rational fact finder could conclude that the essential functions of the job of a police officer do not include duties well beyond the limited clerical work that plaintiff is capable of performing.” *Id.* The court ruled that “a showing by plaintiff that he can satisfactorily perform light duty functions is insufficient, for these duties do not encompass all of the essential duties of a ...police officer” and that “an accommodation that eliminates an essential function of the job is not reasonable.” *Id.*

The ADA does not require an employer to create a permanent light duty position. *Watson v. Lithonia*, 304 F.3d 749 (7th Cir. 2002), *cert. denied* 537 U.S. 1193 (2003). It has been deemed to be unreasonable to require an employer to create new jobs that are tailored to each employee’s abilities. *Id.* at 251. *See also, Champ v. Baltimore County*, 884 F. Supp. 991, 999-1000 (D. Md. 1995)(holding that city allowing a police

officer to perform light-duty position for 16 years did not convert it to a permanent position and police officer's ADA claim failed because he could not perform the essential functions of a police officer, such as effecting an arrest); *Allen v. Hamm*, 2006 WL 436054 (D. Md.)(Federal court finds that a police department policy abolishing permanent light-duty positions for disabled officers did not violate the ADA even if officers were not individually assessed for suitable positions. Management's employment decisions were based on reasonable physical criteria and applied on an individualized basis); *Ensslin v. Twp. of N. Bergen*, 646 A. 2d 452 (N.J. Super.A.D. 1994)(Appellate court affirms termination of paraplegic police sergeant; department was not required to create a permanent administrative position to accommodate his disability nor was it required to waive performance of essential functions of police officer job); *Santos v. Port Auth. N.Y.*, 1995 WL 431336 (S.D.N.Y.)(Department that does not maintain any permanent restricted duty positions was not required to accommodate a disabled police officer. ADA does not require employer to restructure jobs by eliminating essential functions).

Law enforcement agencies somewhat routinely require law enforcement officers to undergo fitness for duty examinations. That subject is explored in other sections of this paper. When ordering an employee to submit to a fitness for duty evaluation, agencies should be aware that these evaluations may implicate the ADA. Specifically, the ADA provides that an employer:

shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.

42 U.S.C § 12112(d)(4)(A). Conversely, the ADA does not prohibit such exams when they are job-related and consistent with business necessity. 42 U.S.C. § 12112(d)(4)(B). It is well-recognized that “the ADA does not, indeed cannot, require a police department to forgo a fitness for duty examination to wait until a perceived threat becomes real or questionable behavior results in injuries.” *Watson v. City of Miami Beach*, 177 F.3d 932, 935 (11th Cir. 1999).

An employer is entitled to inquire into the mental health of its employees when there are legitimate concerns about the employee and public safety. *Krocka v. City of Chicago*, 203 F. 3d 507, 515 (7th Cir. 2000)(It was entirely reasonable and responsible for the Chicago police department to evaluate the police officer’s fitness for duty once it learned that he was experiencing difficulties with his mental health). In the context of police officers, employers do not violate the ADA by ensuring that officers are psychologically fit for duty. *Watson v. City of Miami Beach*, 177 F. 3d 932, 935 (11th Cir. 1999)(holding that police department did not violate the ADA by requiring a fitness for duty evaluation of an officer who displayed hostile behavior towards other officers and the public). *See, also, Miller v. City of Springfield*, 146 F. 3d 612, 615 (8th Cir. 1998)(no ADA violation where police department did not hire an applicant who failed a psychological examination); *Metzenbaum v. John Carroll Univ.*, 987 F. Supp. 610, 615-16 (N.D. Ohio 1997)(no violation of ADA to request mental health records of a campus police officer that displayed bizarre behavior); *Barnes v. Cochran*, 944 F. Supp. 897, 901-02 (S.D. Fla. 1996)(ADA not violated by not hiring a deputy sheriff applicant with a history of Vietnam flashbacks, and who experienced nightmares, blackouts, and hallucinations under stress).

Title VII of the Civil Rights Act -- Sex Discrimination and Physical Ability Tests

Title VII protects women and minorities from employment practices that discriminate against them. Physical agility testing has been challenged in the past as being a form of sex discrimination. One such test became the focus of a lawsuit brought by the federal government against the City of Erie, Pennsylvania, alleging that the city's physical agility test constituted sex discrimination. The test included a 220-yard obstacle course which included: a six-foot high wall the applicants were required to climb over; a window opening three feet above the ground the applicants were required to climb through; a platform two feet off the ground and eight feet long the applicants were required to crawl under; and a four-foot wall the applicants were required to climb over. *U.S. v. City of Erie, PA*, 411 F. Supp2d 524, 530 (W.D. Pa 2005). In addition, the test required applicants to perform 17 push-ups and 9 sit-ups. All aspects of the test were to be completed within 90 seconds. *Id.* Over the years, modifications to the test were made to make it fairer to women. A chain link fence was added to the obstacle course to give the applicants an option of climbing either the wooden fence or the chain link fence and the number of push-ups was reduced from 17 to 13. *Id.* at 533.

There were significantly disproportionate pass rates for men and women. In 1996, for instance, women passed the test at the rate of 4.3 percent while men passed the test at the rate of 53.7 percent. Over the seven year period between 1996 and 2002, women passed the test at the rate of 12.9 percent while the men passed at the rate of 71 percent. *Id.* at 534.

The federal government brought suit against the City of Erie alleging that the physical agility test violated Title VII of the Civil Rights Act because it unfairly

discriminated against women. The court found that the city could not prove that the test was job related as required by Title VII. The court specifically found that the City did not prove the validity of the push-ups or sit-ups component of the test, concluding that both components were invalid. The court also was unconvinced that the test met Title VII's standard that the test be "consistent with business necessity." Finally, the court determined that the cut-off scores were set too high. *Id.* at 568-69.

Other cases have addressed claims asserted by females seeking to invalidate physical ability tests with divergent results. *See, e.g., Brunet v. City of Columbus*, 642 F. Supp. 1214 (S.D. Ohio 1986)(invalidating physical ability tests); *Hardy v. Stumpf*, 572 P.2d 1342 (Cal. 1978)(upholding physical ability tests). Writing for the University of Chicago Law Review in an article entitled "Physical Ability Tests and Title VII," David E. Hollar explained:

Because the Supreme Court precedent is so confusing and the terms "business necessity" and "job related" are seemingly redundant, lower courts have struggled to articulate a rule for analyzing physical test cases. Essentially, four major standards have developed. From most to least deferential to employers they are: manifest relationship, the *Spurlock* public safety doctrine, close approximation, and minimum qualifications.

Because these approaches include standards that show great deference to employer tests and those that would ban virtually any physical test used as a prerequisite for employment, they can yield substantially different results when applied to similar physical tests.

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When evaluating a present physical ability test or when considering implementing a new test, law enforcement agencies should evaluate the test with guidance from legal counsel in order to avoid the potential legal pitfalls created by the erratic legal decisions interpreting physical ability tests under Title VII.

Negligent Supervision and Retention Claims

Negligent supervision occurs when, during the course of employment, the employer becomes aware or should have become aware of problems with an employee that indicate his unfitness, and the employer fails to take further actions such as investigation, discharge, or reassignment. *Garcia v. Duffy*, 492 So.2d 435, 438-39 (Fla. Dist. Ct. App. 1986). A person making a negligent supervision claim must allege facts sufficient to show that once an employer received actual or constructive notice of problems with an employee's fitness, it was unreasonable for the employer not to investigate or take corrective action. *Id.* at 441. The employer's liability for negligent supervision is not, however, unlimited; not only must the employer owe a duty to the plaintiff but the breach of that duty must be the proximate cause of the plaintiff's harm. *Watson*, 552 So 2d at 1149. There must be a connection and foreseeability between the employee's employment history and the employee's conduct. *Id.*

The court in *Denis v. City of Newark*, 307 N.J. Super. 304, 314 (App. Div. 1998), recognized that liability may exist against a public entity for "its negligent retention of a police officer who presents a clear public danger." Such a claim exists if the employer knew or should have known of the officer's "dangerous propensities" and the "risk of injury" he presented to the public. *Id.*

Care should be taken when dealing with issues concerning the fitness of a law enforcement officer to perform his or her duties. Once an agency is aware or should be aware of a problem, failure to take appropriate actions to address the problem or ignoring the problem altogether can leave the agency vulnerable to claims such as negligent supervision and retention.

