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Via Facsimile, Electronic Mail, & U.S. Mail  
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Mr. Charles Dawson  
Office of Operations & Programs  
Veterans' Employment & Training Service  
U.S. Dept. of Labor, Room S1316  
200 Constitution Avenue, NW  
Washington, DC 20210

Re: Docket No. VETS-U-04  
Comment re Proposed  
Clarifications/Modifications to Regulations  
Implementing USERRA

Dear Mr. Dawson:

On behalf of the Association of Corporate Counsel ("ACC"), its Labor and Employment Section Policy Subcommittee submits the following comment to the Veteran' Employment and Training Service ("VETS) proposed "Regulations under the Uniformed Services Employment and Reemployment Rights Act of 1994, as Amended" as published for comment on September 19, 2004 in the Federal Register at 69 Fed. Reg. 56266 et seq.

The Association of Corporate Counsel (or ACC, formerly known as the American Corporate Counsel Association, or ACC) is a voluntary bar association for in-house legal counsel with over 16,000 individual members who represent over 7,000 private sector organizations. ACC has over 40 local chapters in the US and a growing number in other countries. Founded in 1982, ACC provides members with networking, practical resources, and advocacy on issues of importance to those whose

practice is defined by their in-house relationship to their client. ACC membership includes labor and employment counsel for a number of substantial Fortune 500 and other similarly sized public and private entities, many of which will be directly affected by the proposed regulations. The following comments are offered solely on behalf of the ACC Labor and Employment Policy Sub-Committee and may differ from those of individual members.

ACC generally views the proposed regulations favorably and agrees with VETS' desire to provide appropriate compliance guidance to employers and covered persons in and or returning from military service. ACC appreciates the efforts taken by the regulatory agencies in developing the proposed regulations. The proposed regulatory guidance will hopefully respond to many issues raised throughout the country. ACC submits the following comments for VETS' consideration before issuing final regulations and any interpretive guidelines.

**1. VETS should consider tailoring the Question and Answer format presented in the proposed regulations to both an employer and employee audience.**

The Q & A format employed is an excellent way to communicate what can often appear to be complex and confusing concepts, rights, and obligations. VETS' decision to use such a format is commendable. However, as drafted the Q & A's present a view to an audience consisting of covered military service personnel. Though such individuals are in valuable need of the information provided, employers (and their legal counsel) will normally have far greater access and need for information in insuring compliance with USERRA's provisions. The current regulations for the Family Medical Leave Act are a sound example of an objective Q & A format. Covered employees would be far better served if most of the Q & A format information were available in a readily published and employer or Veterans Affairs distributable pamphlet of which the regulations could obligate distribution upon commencement of any extended military leave or upon return.

**2. There appears to be confusion or misuse of the concept of "escalator" principle and the use of this principle in certain sections of these proposed regulations do not truly reflect the reemployment provisions of USERRA.**

In §1002.191, the concept is introduced and defined as "that if not for your period of military service, you could have been promoted (or alternatively demoted, transferred, or laid off) due to intervening events. The escalator principle requires that you be reemployed in a position that reflects with *reasonable certainty* the pay,

benefits, seniority, and other job perquisites, that you would have attained if not for the period of service.” (Emphasis added).

While this might be true in a seniority based employment system such as in collective bargaining unit or within government agencies with grades and time in grades, in most other businesses, especially those who have members of this Association, an individuals position, benefits or pay is not determined by time in that position but rather upon performance within a relevant group or the performance of the group itself. As §1002.149 correctly notes, following the provisions of 39 U.S.C. §4316 (b)(1)(B), a returning serviceman is entitled to the non-seniority rights and benefits generally provided by the employer to other employees with similar seniority, status, and pay that are on furlough or leave of absence. However, the escalator principle as outlined in §1002.191 and further amplified in §1002.193 seems to require presumed increases in benefits and pay based upon time and any past practice. Such a presumption may not be appropriate, if similar situated employees of furlough or leave of absence are not so escalated.

The proposed regulation in §1002.193 provide that seniority rights, status, and pay of an employment position should be determined in reference to a collective bargaining agreement, company policy or company practices. There appears to be a presumption of a contractual obligation when, in fact, policies and practices can change as a result of economic or business conditions. An employer might have given cost of living pay increases in the past but changed to performance-based increases during the relevant time period. Under the proposed regulations, what might have been a past policy or practice now appears to be a contractual obligation to a returning serviceperson.

**3. VETS should consider drafting the substantive provisions covering reinstatement utilizing the ‘escalator’ principle in a more lay-comprehensible manner and include specific job classification examples.**

As drafted §§ 1003.193 through 1002.199 may be fairly comprehensible to lawyers, human resource personnel, and regulatory professionals but specific concrete examples of job placements would probably flesh out any ambiguity or confusion with respect to employer reinstatement obligations.

Many job reinstatements are straightforward, wherein an employee returns to the exact position he or she held prior to commencing a covered military leave. However, some jobs involve apprenticeship issues and or skill set development that can be attained only by regular performance of the work for a significant period. As an example, in the electric utility industry, an employee might commence a military leave during a time when he/she occupies a certain skill level (e.g. fourth step apprentice who moves up through competency demonstration and time in grade at

six-month intervals until he/she moves from top step apprentice to journeyman). Upon return from a four year military leave, the escalator provision initially suggests that such an employee would be entitled to be returned to work at journeyman status (a position he/she would have likely achieved but for the military service). However, such an individual could not and should not be made a journeyman, as they will not have obtained the necessary practical skills, competencies, and experience. Accordingly, and as set forth in §1002.196(b) and §1002.197(b), such an individual should be reinstated to the position they last held rather than a theoretical escalator position. Another usable example might be an individual who works as a public accountant who, but for military service, would have been a CPA. He/she cannot be certified as a CPA but must be placed in an alternate or original position until he/she has completed the requisite job requirements of an escalated position.

Conversely, a meter reader, who may be eligible for contractual wage increases on a step scale, should be returned at the escalated rate of pay and at the top step to the extent no competency retraining is necessary and the compensation decisions are derivative of his/her time in service only. Getting a returning employee up to speed in any semi-skilled job should fit within the reasonable retraining time period provisions under the escalator position, whereas returning to a skilled position that would have been attained under an apprentice or other position with an extensive competency development period does not.

Finally, an example using hypothetical circumstances justifying placement of a returning individual in accord with § 1002.197(c) would be instructive. This would seem to involve situations wherein technological change has overtaken the knowledge base, training, and or experience of the employee, such as in the areas of software application development and process automation.

**4. VETS should consider providing more explanatory advice regarding application of the escalator principle to determining applicable compensation rates upon reinstatement/reemployment.**

Section 1002.236 addresses this issue somewhat clearly in many respects but does continue to presume that all benefit or pay increases are determined by time in grade. This section would also benefit from concrete examples. Utilizing the meter reader case above, and assuming the individual is covered by a collective bargaining agreement, one would expect the rate of pay upon reinstatement should reflect any contractually provided for compensation increases resulting from time in grade and or across the board negotiated increases, whether specific to a classification or all classification covered by the applicable CBA. If the rate of pay was \$10 per hour, and, but for the employee's four year absence, he would have received three step increases of \$.50 per hour and annual contractual increases of 3%, all should be incorporated in to his reinstatement rate.

Conversely, in the apprentice example above, the returning individual, who was an apprentice at the time his/her military leave commenced, is not qualified for placement in a journeyman classification upon return. The same would hold true for an individual needing sufficient experience to receive a professional credential (e.g. professional engineer, registered nurse etc.) An example showing that the individual's rate would be the current contractual or competitive rate for the position in which he/she has been placed would help explain the compensation obligations.

The provisions governing the inclusion of merit increases granted to employee incumbents holding the same of similar job classification held by the returning employee during the period of leave need a great deal more explanation. Moreover, it may simply be incorrect to say that a merit increase given to one incumbent should likewise inure to the benefit of the returning employee. Many so called annual merit adjustments are often driven by penetration into the compensation range typically experienced for a particular job classification in a geographic area or by the performance of individuals within a certain unit or classification. Many companies award pay raises based upon a scale ranging from outstanding, superior, average, below average, and poor. Pay raise pots might be divided on a percentage basis among higher-ranking employees, or equally among all with bonuses for outstanding, or leaving others with little or no raises. It cannot be presumed that because an individual got a 4% a previous year that the individual would have gotten 4% during his absence. Additionally, some employers alternate raises each year to motivate the performances of all.

Merit increases are difficult to assess within the "reasonable certainty" concept set forth in the regulation. More examples would seem to help employers make a fair determination of an appropriate competitive rate of compensation upon return. Perhaps employers should be guided to consider an average of the merit increases awarded but in no event less than the floor rate of increase given to a similarly situated incumbent as the returning employee. If the employee's performance was documented as being average prior to commencement of a leave, and during his/her absence, average performers received a minimum 2% increase per year, the employee should reap the benefit of such increases in determining his/her reinstatement upon return. On the other hand, merit increases issued based on the developing competencies of similarly situated employees should not be a factor in determining adjusted rates of compensation because there is no manner in which to determine whether the returning employee would have obtained with any reasonable certainty.

An example of eligibility for service rather than performance based profit sharing or company wide incentive compensation awarded during the employee's absence should also be considered.

Lastly, the proposed regulations should include an expedited administrative mechanism for resolving disputes about whether the employer's decisions as to a returning employee's status and compensation meets the requirements of §1002.236.

ACC recognizes that the proposed regulations and any concurrently published interpretive guidance are not intended to answer every possible question that may arise and that there may be instances where employers will need to adapt their circumstances to changing situations. However, ACC respectfully suggests that incorporation of a more neutral tone and inclusion of concrete examples on the escalator concept in both the placement and compensation provisions will better facilitates comprehension of the regulatory requirements and objectives by both employers and employees alike.

Respectfully submitted,

William Davis Harn  
Co-Chair, Policy Subcommittee  
ACC Labor & Employment Section

WDH:car:ACCA draft USERRA comment(final)..doc

bcc: Jacqueline Windley, ACC (for distribution)