

Congress of the United States

House of Representatives

COMMITTEE ON HOUSE ADMINISTRATION

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June 9, 2008

Chair Susan S. Robfogel
Office of Compliance
Adams Building
110 Second Street, S.E. Room LA-200
Washington, DC 20540-1999

Dear Ms. Robfogel and Members of the Board:

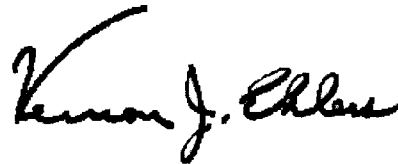
We want to thank the Board for its efforts in creating a body of proposed regulation regarding the Uniformed Services Employment and Reemployment Rights Act ("USERRA").

The Committee is submitting herewith comments on the proposed regulations for the Board's consideration. If you have any questions regarding the attached comments, please contact the Committee at (202) 225-2061.

Sincerely,



Robert A. Brady
Chairman



Vernon J. Ehlers
Ranking Member

Attachment

Comments

Section 206 of the CAA, 2 U.S.C. § 1316, incorporates specific provisions of USERRA. It also directs the OOC to issue regulations implementing the incorporated provisions of USERRA, and provides that such regulations shall “be the same as substantive regulations promulgated by the Secretary of Labor . . . except to the extent that . . . for good cause shown . . . a modification of such regulations would be more effective for the implementation of the rights and protections” of the incorporated USERRA provisions. The DOL issued final USERRA regulations on January 18, 2006. On April 16, 2008, the OOC issued its Notice of Proposed Rulemaking under Section 206, which was published in the Congressional Record for the House on May 8, 2008 (hereinafter referred to as “NPR”). *See* 154 Cong. Rec. H3338-01, 2008 WL 1987854 (daily ed. May 8, 2008).

A. Section 304 of the CAA Requires That the OOC Issue Three Separate Bodies of Regulations

Section 304 of the CAA provides the procedure for the issuance of regulations under the CAA. Subsection (a)(2)(B) states that the regulations “*shall* consist of 3 separate bodies of regulations” applying, respectively, to the Senate, the House of Representatives, and other covered employees and employing offices. 2 U.S.C. § 1384(a)(2)(B) (emphasis added). Despite this clear statutory mandate, the OOC has asserted that “there will be one text applicable to all employing offices and covered employees.” NPR at page 5. Even though the OOC believes one text might be more expedient, the statutory mandate of three separate sets of regulations cannot be disregarded. Further, as discussed herein, there are some modifications we recommend that may be specific to the House and/or not necessarily applicable to all other employing offices in the legislative branch. Therefore, parts of the revised version of the regulations may need to be tailored specifically to the House. We therefore recommend that the explicit statutory requirement that three separate sets of regulations be published separately in the Congressional Record be adhered to, or that the OOC provide further explanation for the departure from the statutory requirement.

B. Because the DOL USERRA Regulations Regarding Pension and Health Plans Are Inapposite to Employing Offices in the House, the OOC Should Delete These Regulatory Provisions From Its Proposed Regulations

The OOC proposes to adopt those parts of the DOL regulations governing health and pension plan coverage and benefits. *See* §§ 1002.163 - §§ 1002.171 (health plans) and §§ 1002.259 – 1002.267 (pension plans). These provisions are entirely inapposite to House employing offices and should not be adopted.

First, and perhaps most glaring, the OOC has failed to recognize or acknowledge that House employing offices do not provide health plan coverage or pension benefits to their employees. Rather, all House employees who have health plan coverage are provided such benefits pursuant to the Federal Employees Health Benefits Program

(FEHB). Similarly, those House employees who have pension plan benefits are covered under either the Civil Service Retirement System (CSRS) or the Federal Employees Retirement System (FERS), and/or the Thrift Savings Plan (TSP). The DOL regulations seem to largely implicate the circumstance where a private or non-federal employer provides coverage either directly or through a plan administered by a third party. Simply put, House employing offices do not provide health or retirement benefits to their employees and do not pay or administer contributions and/or premiums for such plans. For the OOC to adopt regulatory provisions that envision employing offices providing health plan coverage for their employees, making health plan premium payments on behalf of their employees, and making pension plan contributions for their employees, makes little sense and would likely lead to confusion. For example, questions in the proposed regulations such as “What health plan coverage must the employing office provide for the employee under USERRA,” §1002.164, are wholly inapplicable.

Second, the entitlement of House employees to health and pension plan benefits is already governed by statute and regulations issued by OPM. *See, e.g.*, 5 U.S.C. § 8901(1)(C) and 5 C.F.R. § 890.101 (defining employee under FEHB to include Congressional employees). In fact, OPM issued regulations that specifically address Federal employee rights under USERRA with respect to the FEHB. *See Restoration to Duty From Uniformed Service or Compensable Injury*, 60 FR 45650 (September 1, 1995) (“[t]he Office of Personnel Management (OPM) is issuing interim regulations on the restoration rights of Federal employees who leave their employment to perform duty with the uniformed services . . . [t]he FEHB regulations are amended to show that employees who separate to perform military service under the provisions of this Act [USERRA] are considered to be employees in nonpay status”) (final regulations issued at 64 FR 31485 (June 11, 1999)). Because Congressional employee rights under FEHB are governed by Title 5 of the U.S. Code, and because OPM has already issued regulations governing the rights of those serving in the uniformed services under the FEHB, the proposed OOC regulations addressing health plans should be withdrawn.

With respect to the portion of the OOC’s proposed regulations governing pension plans, as the OOC recognizes, USERRA does not govern the Thrift Savings Plan (TSP).¹ The proposed regulations are nonetheless inapposite. The only other pension plans available to House employees are through CSRS or FERS. However, CSRS and FERS are not subject to employing office control and employing offices do not administer or make contributions into such plans.² Thus, statements such as “[t]he employing office is

¹ USERRA states that “[i]n 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.” 38 U.S.C. § 4318(a)(1)(B). The OOC regulation on this point is consistent with the statutory language. § 1002.260(b). However, other provisions of the incorporated pension regulations, *e.g.*, regarding employer matching contributions to pension plans, are inconsistent with the recognition that the TSP is not covered by USERRA. § 1002.262(c).

² To the extent that the payroll office of the Office of the Chief Administrative Officer of the House (“CAO”) handles administrative functions associated with such

not required to make its contribution [for the employee's pension] until the employee is reemployed . . . [and] the employing office must make the contribution attributable to the employee's period of service no later than ninety days after the date of reemployment," § 1002.262(a), are entirely inapplicable (and again confusing).³ Further, OPM has issued regulations governing USERRA credit for Federal employees (including Congressional employees) under FERS and CSRS, thus making the OOC's issuance of regulations arguably governing FERS or CSRS unnecessary and beyond the OOC's authority. *See, e.g., 5 C.F.R. § 842.301 et seq.*

Because House employing offices themselves do not provide health or pension benefits, and because eligible House employees are covered under federal employee benefits statutes administered by OPM, there is "good cause" under Section 206(c)(2) for the OOC not to adopt the DOL USERRA regulatory provisions on these matters.

C. The OOC Has Misinterpreted The CAA's Definition of "Eligible Employee"

Section 206 of the CAA incorporates certain provisions of USERRA, making it unlawful for any employing office to (1) discriminate against an eligible employee; (2) deny any eligible employee reemployment rights as provided for under USERRA; and (3) deny any eligible employee benefits as provided for under USERRA. Section 206(a)(2)(A) defines "eligible employee" to include only "a covered employee performing service in the uniformed services." It is noteworthy that the Section 206 definition of "eligible employee" uses the present tense of the verb "performing" in describing who is an eligible employee, rather than also use the past tense ("who has performed service"). Similarly, Section 206 does not define eligible employee to include one who was previously a member of the uniformed services or one who applies or has applied to perform service in the uniformed services.

The Section 206(a)(2)(A) definition of eligible employee stands in marked contrast to the general USERRA statute's protection of individuals who currently serve, as well as to those who have previously served, to those who have an obligation to serve, and to those who have applied to serve in the uniformed services (regardless of whether they actually served). We recognize that USERRA's intent is to provide broad protections for those who serve and have served in the uniformed services and also that

plans, it does so solely as an administrator and liaison with OPM and similar executive branch agencies, and not in the capacity of an employing office under the CAA.

³ Further, one of the regulations the OOC proposes to adopt states that any retirement plan (other than the Thrift Savings Plan) "maintained by the employing office is covered by ERISA." § 1002.260(a). This is an incorrect statement of law. Both CSRS and FERS are creatures of statute and are benefits provided for United States Government employees. *See, e.g., 5 U.S.C. § 8401(11)(B)* (defining Congressional employees as employees under FERS). As such, CSRS and FERS are explicitly not covered by most parts of ERISA. *See 29 U.S.C. § 1003(b)(1)* (provision of ERISA stating that relevant portion of ERISA does not apply to governmental plans).

USERRA explicitly states that the Federal Government is to be a “model employer.” *See, e.g.*, 38 U.S.C. §4301(a)(3), (b). That said, the fact remains that the statutory language in Section 206 defining who is an “eligible employee” under the CAA’s incorporation of USERRA is narrow. We offer no comment on whether the drafters of Section 206(a)(2)(A) *intended* to provide a narrower definition of the class of employees protected than those protected by USERRA generally. Rather, when, as here, the statutory language is explicit, it controls. Thus, if Congress intended to incorporate the broader USERRA definition, the statute must be amended.⁴

Also, as explained below, there are some areas where the text of Section 206 incorporates provisions of USERRA, but portions of the incorporated text are at odds with the explicit language contained in Section 206. In addition, there is at least one clear technical error in Section 206, and this error implicates the remedies available under the CAA.⁵ The OOC has ignored the clear language of the statute in certain respects which

⁴ There is a notable inconsistency within the definition of “eligible employee.” Like the general USERRA statute, *see* footnote 1 *supra*, Section 206(a)(2)(A) provides that if an individual was dishonorably discharged, or discharged under conditions that are other than honorable, the individual is not protected. It does so by excluding such individuals from the definition of “eligible employee.” 2 U.S.C. § 1316(a)(2)(A). In other words, under Section 206(a)(2)(A), an employee who is performing service in the uniformed services is eligible so long as s/he has not been dishonorably discharged. This suggests, by negative implication, that an employee who *was* honorably discharged would be an “eligible employee.” Thus, in most cases, one who had previously been discharged (honorably or otherwise) would not be currently “performing service in the uniformed services.” This would make superfluous the provision excepting certain eligible employees from coverage based on the type of discharge they experienced. The tension in this language might conceivably be explained by a circumstance where a person currently performing service in one uniformed service (*e.g.*, Reserves) was previously honorably discharged by another uniformed service.

⁵ Because of a technical error in the CAA, there is no statutory authorization for the OOC’s proposal to adopt the liquidated damages remedies under USERRA (*see* OOC proposed regulation § 1002.312(c)). Section 206(b) states that the remedy for a violation shall be the same as the remedy “awarded under paragraphs (1), (2)(A), and (3) of section 4323(c) of Title 38” (emphasis added). The reference to 4323(c) is incorrect, because 4323(c) is the venue provision of USERRA and it does not contain “paragraphs (1), (2)(A), and (3).” Presumably, in Section 206(b), Congress meant to refer to 4323(d), which is the remedy section of USERRA and does have the three enumerated paragraphs. The OOC has recognized this error, however, its discussion of the error in footnote 1 at page 2 of the NPR is itself incorrect. The NPR’s footnote asserts that the CAA makes reference to “paragraphs (1), (2)(A), and (3) of section 4323(d)” [emphasis added] and that the CAA should have instead made reference to those paragraphs of section 4323(c). As noted, the CAA *does in fact* refer to section 4323(c). Accordingly, while the NPR correctly notes that there is an error in Section 206(b), it incorrectly identifies the error. And, in any case, because of this technical error, the liquidated damages remedy section of USERRA was not incorporated into the CAA. While a court might look beyond the

has resulted in regulations that are at odds with Section 206.

Further, in part due to some of these statutory draftsmanship issues, the OOC has proceeded to issue substantive regulations interpreting the general reprisal provision of the CAA located at Section 207. In doing so, it has exceeded its statutory authority under Section 206. The OOC's regulations should be withdrawn and redrafted so as not to exceed the scope of its rulemaking authority under Section 206, and to accurately reflect the plain language of Section 206. Alternatively, the OOC could assess whether Congress intends to amend Section 206 before reissuing the regulations.

1. The OOC Has No Authority to Reinterpret Section 206 to Cover Employees Who Are Not Currently Performing Service in the Uniformed Services

As noted above, Section 206 explicitly provides protections only for *eligible employees* – those who are “performing” service in the uniformed services. While ostensibly adopting this definition, *see* § 1002.5(f), in practice the OOC ignores the Section 206 definition. For instance, the NPR states: “eligible employees have performed service in the uniformed services; covered employees have not.” NPR at p. 2. To be consistent with the definition of eligible employee in Section 206, this phrase should instead read: “eligible employees are performing service in the uniformed services; covered employees are not.” Similarly, in the “Purpose of Subpart A,” the OOC states that “USERRA as applied by the CAA . . . affects employment . . . when employees serve *or have served* in the uniformed services.” *See* NPR at page 7 (emphasis added). Further, the proposed regulatory definition at § 1002.18 purports to define the discrimination protection to include those employees who are denied an employment benefit based on “*his or her membership, application for membership, performance of service, application for service, or obligation for service* in the uniformed services.” (emphasis added).⁶

The OOC's proposed definition of eligible employees thus clearly includes individuals who are not *currently performing service* in the uniformed services and is broader than the definition of eligible employee in Section 206(a)(2)(A). The OOC's misinterpretation permeates the regulations, both in terms of how eligible employee is defined and, on occasion by incorrectly using the generic terms “employee,” “individual” or “covered employee” when the term “eligible employee” should be used instead. *See*,

express language of the statute to Congress's intent and apply the liquidated damages provision, the fact remains that Section 206, as enacted, does not incorporate USERRA's liquidated damages provision. (Note that this is a separate point than the one we address at parts 30 and 33 of Section E below, where there is no dispute that the statutory provision upon which the OOC relied was explicitly not incorporated into the CAA.)

⁶ The OOC's discussion is at times contradictory on this point. For instance, the OOC also states that “the CAA limits protections to covered employees who are deemed eligible under Section 206(a),” thus omitting by reference those covered employees who are ineligible. *See* NPR at page 8.

e.g., §§ 1002.19, 1002.32(b), 1002.33, 1002.42 – 1002.43, 1002.102., 1002.288. *See also* listing of comments at Section E, *infra*. Accordingly, barring a statutory amendment revising this definition, the OOC’s proposed regulations and accompanying commentary should be revised to reflect that, as applied by the CAA, USERRA only protects employees who are currently “performing service in the uniformed services.”⁷

2. Section 206(c)(2) Does Not Authorize the OOC to Issue Regulations
Under the Anti-Reprisal Provision at Section 207

The OOC’s discussion of retaliation claims under Section 206 is somewhat difficult to follow and at times appears to be contradictory. For instance, in the penultimate paragraph of page 9 of the NPR, the OOC states that it has in fact “chosen to apply” a particular standard to “cases of retaliation brought under section 206.” However, in the very next sentence, the OOC states that it “does *not* propose a particular standard for claims of discrimination or retaliation brought by eligible employees under section 206.” (emphasis added). Similar inconsistencies appear throughout the OOC’s NPR. With that caveat, we posit below what we think the OOC has articulated.

Subsection 4311(b) of the general USERRA statute makes it unlawful to retaliate against an individual for having engaged in certain activity and makes it explicit that this applies to “any person” and “regardless of whether that person has performed service in the uniformed service.” The OOC states that “Congress applied section 4311 to the legislative branch in order to provide discrimination and retaliation protections, respectively to eligible *and covered employees*” and, on that basis, purports to interpret Section 206 as providing retaliation protection to non-eligible covered employees. NPR at p. 3 (emphasis added). Since 206(a)(1) of the CAA makes it unlawful to “discriminate” (which, as explained below, includes retaliation) only against “eligible employees,” the OOC’s interpretation is incorrect. This misinterpretation appears not only in the OOC’s commentary, but in the proposed regulatory language. *See, e.g.*, §§ 1002.19, 1002.20.

That said, in defining what it means to “discriminate,” subsection 206(a)(1) refers to “subsections (a) and (b) of section 4311.” Thus, while subsection 206(a)(1) expressly limits its protection to eligible employees, it incorporates subsection 4311(b) of USERRA, which in turn states that it is unlawful to retaliate against “any person.” The incorporated language from USERRA is thus arguably at odds with the explicit limitation in Section 206(a)(1) to eligible employees. The plainest reading of Section 206(a)(1) is

⁷ Further, under the CAA’s rule of construction, it is inappropriate for the OOC to adopt without modification the DOL’s regulations when the DOL’s regulations rely on the inapposite broader definitions of the general USERRA statute. *See* 2 U.S.C. § 1361(f)(1) (“*Except where inconsistent with the definitions and exemptions provided in this Act, the definitions and exemptions in the laws made applicable by this Act shall apply under this Act*”) (emphasis added).

that the reference to section 4311 refers to the fact that, as a substantive matter, retaliation is prohibited, not to who is protected.⁸

The OOC notes, correctly, that non-eligible covered employees are nonetheless protected from reprisal under Section 207 of the CAA. The OOC then purports to use its Section 206(c) rulemaking authority to issue regulations *under Section 207* because it prefers to avoid an “ad hoc approach” to retaliation claims under the CAA. *See* NPR at page 9. The OOC’s substantive rulemaking authority is controlled by the statutory language, not the OOC’s interpretation of expediency or its desire to avoid an “ad hoc approach.” The OOC has no substantive authority to issue regulations under Section 207.⁹

For these reasons, the proposed regulations should be revised to make clear that they do not include any substantive regulations under Section 207. Whether and to what extent *non-eligible* covered employees who attempt to assert a claim under Section 206 – a statutory provision that expressly does not cover them – may nonetheless be protected from reprisal under Section 207 is questionable and should be left to statutory interpretation by the courts, not legislation by fiat under the guise of rulemaking.

D. Other Issues

Following are other technical issues regarding the OOC’s proposed regulations. A number of these comments and changes are necessary for the reasons discussed above regarding the definition of “eligible employee” under Section 206(a)(2) and its differences from the general USERRA statute. That said, much of the regulations are adopted from the DOL’s regulations, which were based on the broader definitions of who is protected under the general USERRA statute. Accordingly, while we have attempted

⁸ Section 225(d)(2) of the CAA adds a wrinkle to this analysis. That provision is part of the overall remedies section of the CAA. After beginning with the heading “VETERANS”, Section 225(d) states that a “*covered employee* under section 206 may also utilize any provisions of chapter 43 of title 38, United States Code, that are applicable to that employee.” 2 U.S.C. § 1361(d)(2) (emphasis added). Thus, it appears that while only *eligible employees* are protected by the express language of Section 206, any covered legislative branch employee under the CAA – whether or not an eligible employee under Section 206 – has recourse for a violation of USERRA under the non-CAA procedures set out in USERRA. We also note that the USERRA statute itself ensures certain returning legislative branch uniformed service personnel who cannot be reemployed in the legislative branch the ability to be placed in a position in the executive branch. 38 U.S.C. § 4314(c). This provision is not part of the CAA.

⁹ At page 1 of the NPR, the OOC correctly identifies two statutory bases for its rulemaking authority. First, it identifies CAA Section 206(c) as the basis for issuing *substantive* regulations under Section 206. Second, it identifies CAA Section 304 which, it acknowledges, “provides procedures for the rulemaking process in general.” NPR at page 1. Neither of these statutory bases authorizes the OOC to issue *substantive* regulations *under Section 207*.

to identify some of the changes required, we recommend that the OOC conduct a wholesale review and revision of each and every regulation based on the differences between the general USERRA statute and the CAA as discussed above. Additionally, to the extent a regulatory provision mentioned or addressed employing offices outside of the House of Representatives, we did not comment on that aspect of the proposed regulations. *See, e.g.*, §§ 1002.5(g), (h), (j) (definitions applicable to the Architect of the Capitol, the Capitol Police Board, and the Senate).

1. There is a factually incorrect statement on page 10 of the NPR (under the heading “Subpart C – Eligibility for Reemployment”). The NPR states that “it is not permitted for an employee to work for a Member office and a Committee at the same time.” In the House, this is incorrect.
2. §1002.1: To be consistent with Section 206(a)(2)(A), delete the phrase “or have served.”
3. §1002.5(e): To be consistent with the definition of employee under Section 101(4) of the CAA, add the phrase “and a former employee” after the phrase “an applicant for employment.”
4. §1002.5(f): The reference to §1002.5(u) is incorrect; the reference should be to §1002.5(t).
5. §1002.5(i): To be consistent with the CAA’s definitional language and recognizing that there may be some joint employees of the House and Senate (*e.g.*, joint committees), the term “subparagraphs (2) through (10)” should be modified to read “subparagraphs (3) through (10).”
6. §1002.5(k): Subsection (4) goes beyond the definition of employing office in Section 101(9) of the CAA and should be deleted.
7. §1002.5(s): The OOC has deleted what was §1002.5(n)(2) from the DOL’s regulations; there is no good cause for deleting this provision and it should be reinserted.
8. §1002.18: To be consistent with Section 206(a)(2)(A), this section must be revised so that it is clear that it applies only to those currently performing service in the uniformed services.
9. §1002.19: To be consistent with Section 206(a)(2)(A), the term “individual” should be replaced with the term “eligible employee” each time it appears in this section.
10. §1002.20: To be consistent with Section 206(a)(2)(A), the first sentence should be revised to read as follows: “Under USERRA, as applied by the CAA, the prohibitions against discrimination and retaliation apply to eligible

employees in all positions within covered employing offices, including those positions that are for a brief, recurrent period . . .”

11. §1002.32: The term “employer” should be changed to “employing office” each time it appears in this section.
12. §1002.32(a): To be consistent with the definition of eligible employee in Subsection 206(a)(2)(A), and for clarity as applied to individual employing offices which may cease to exist while an eligible employee is performing service, the first clause of subsection (a) should be revised to read as follows: “In general, if an eligible employee has been absent from a position of employment in an employing office by reason of service in the uniformed services, he or she will be eligible for reemployment in that same employing office (if that employing office continues to exist at such time), by meeting the following criteria”
13. §1002.32(b): At the beginning of the second sentence, the word “eligible” should be inserted before the word “employee.”
14. §1002.33: As explained above, the term “covered employee” as it appears both in the question and response portions of this section should be replaced with the term “eligible employee.”
15. §1002.40: The second sentence of this provision is incorrect. An applicant for employment is considered a covered employee under the CAA; however, it is not correct to say that “[a]n employing office need not actually employ an individual to be his or her ‘employer’.” While the result is the same – an applicant who is otherwise an eligible employee – cannot be discriminated against in initial employment based on his or her performing service in the uniformed service, to say that the employing office is his or her employer is incorrect. Additionally, the remainder of §1002.40 and § 1002.41 must be substantially revised in light of the discussion above regarding the definition of eligible employee under Section 206(a)(2)(A).
16. §1002.42: To be consistent with Section 206(a)(2)(A), the word “eligible” should be inserted before the word “employee” each time the word “employee” appears in §1002.42. In addition, the phrase “covered employee” in the first sentence of §1002.42(c) should be changed to “eligible employee.”
17. §1002.43: The word “covered” should be replaced with “eligible.”
18. §1002.56: The statutory cite is incorrect. Instead of “42 U.S.C. 300hh 11(e)(3),” the cite should read “42 U.S.C. 300hh-11(d)(3).”
19. §1002.57(b): The last two sentences of subsection (b) should be removed because state law does not govern the actions of employing offices.

20. §1002.61(b): Subsection (b) should be deleted because, as discussed above, applying to be a member of the uniformed service is not “performing service” under Section 206(a)(2)(A) and, thus, someone who was only applying for service and not actually performing service would not be an eligible employee.
21. Subpart C et seq: Much of the remainder of Subpart C (and the remainder of the proposed regulations) uses the term “employee,” when, to be consistent with Section 206(a)(2)(A), the correct term should be “eligible employee.” The revised regulations should reflect these changes.
22. §1002.88: Delete the word “civilian” in the final sentence of this section.
23. §1002.102: The word “covered” should be replaced with “eligible.”
24. §1002.119: To avoid confusion, we recommend adding the words “within the employing office” after the phrase “a personnel or human resources officer.”
25. §1002.120: Employees of House employing offices are “at-will.” Therefore, the reference to termination and/or discipline for “cause” in this section is inapplicable and could be confusing. We recommend revising the reference to “cause for termination” and instead stating “a reason for termination.”
26. §1002.167(b): The citation in the second sentence is missing the letter “U.”
27. §1002.247: The OOC has modified the DOL’s regulation regarding the prohibition on discharge of a returning employee (depending on the length of the employee’s service). The phraseology OOC has chosen is confusing and it is unclear why the OOC departed from the DOL’s regulation. Further, in the commentary, the OOC stated that it was not departing from the DOL’s regulations in this section.
28. §1002.288: To be consistent with Section 206(a)(2)(A), the references to “covered employee” in this section, should be changed to “eligible employee.”
29. §1002.303: To be consistent with Section 206(a)(2)(A), this section should be modified to make clear that only “eligible employees” may bring claims under Section 206.
30. §1002.310: The first sentence of this provision (prohibiting the award of costs and fees against employees) is directly from the DOL regulation. This sentence of the DOL regulation is directly from subsection (h) of Section 4323 of

USERRA. Irrespective of the typographical error discussed *supra* at footnote 8, the CAA does not incorporate subsection (h) of Section 4323 and, accordingly, the DOL regulatory provision should not be included.

31. §1002.310: To be consistent with Section 206(a)(2)(A), the reference to “covered employee” in this section should be changed to “eligible employee.”
32. §1002.312(c): As noted above, Section 206 does not incorporate the remedies portion of USERRA (as noted, we believe this is a technical error). Unless and until the statutory technical error is revised, there is no statutory basis for a CAA-employee to recover liquidated damages under USERRA.
33. §1002.314 This provision (regarding equity powers of a hearing officer) is apparently based on subsection (e) of Section 4323 of USERRA. Irrespective of the typographical error discussed *supra* at footnote 8, the CAA does not incorporate subsection (e). Accordingly, there is no authority for the OOC to issue § 1002.314 and it should be deleted.