

(ii) the functions of the Director of OMB relating to budgetary, administrative, or legislative proposals.

(b) This memorandum shall be implemented consistently with applicable law and subject to the availability of appropriations.

(c) This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

(d) Independent agencies are strongly encouraged to comply with the requirements of this memorandum.

The Director of the Office of Personnel Management is hereby authorized and directed to publish this memorandum in the Federal Register.

BARACK OBAMA.

#### § 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.

(Added Pub. L. 103-353, §2(a), Oct. 13, 1994, 108 Stat. 3150.)

#### PRIOR PROVISIONS

A prior section 4302, added Pub. L. 93-508, title IV, §404(a), Dec. 3, 1974, 88 Stat. 1596, §2022; amended Pub. L. 97-295, §4(71), Oct. 12, 1982, 96 Stat. 1310; Pub. L. 98-620, title IV, §402(36), Nov. 8, 1984, 98 Stat. 3360; renumbered §4302 and amended Pub. L. 102-568, title V, §506(a), (c)(1), Oct. 29, 1992, 106 Stat. 4340, 4341, related to procedures to enforce reemployment rights, prior to the general amendment of this chapter by Pub. L. 103-353. This section, as in effect on the day before Oct. 13, 1994, continues to apply to reemployments initiated before the end of the 60-day period beginning Oct. 13, 1994, see section 8 of Pub. L. 103-353, as amended, set out as an Effective Date under section 4301 of this title.

Another prior section 4302 was renumbered section 7602 of this title.

#### EFFECTIVE DATE

Section effective with respect to reemployments initiated on or after the first day after the 60-day period beginning Oct. 13, 1994, with transition rules, see section 8 of Pub. L. 103-353, set out as a note under section 4301 of this title.

#### § 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 the terms, conditions, or privileges of employment, including any advantage, profit, privi-

lege, gain, status, account, or interest (including 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.

(D)(i) Whether the term “successor in interest” applies with respect to an entity described in subparagraph (A) for purposes of clause (iv) of such subparagraph shall be determined on a case-by-case basis using a multifactor test that considers the following factors:

(I) Substantial continuity of business operations.

(II) Use of the same or similar facilities.

(III) Continuity of work force.

(IV) Similarity of jobs and working conditions.

(V) Similarity of supervisory personnel.

(VI) Similarity of machinery, equipment, and production methods.

(VII) Similarity of products or services.

(ii) The entity’s lack of notice or awareness of a potential or pending claim under this

chapter at the time of a merger, acquisition, or other form of succession shall not be considered when applying the multi-factor test under clause (i).

(5) The term “Federal executive agency” includes the United States Postal Service, the Postal Regulatory 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 duty, 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 person to perform any such duty, and a period for which a person is absent from 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 ac-

tions 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.

(Added Pub. L. 103-353, §2(a), Oct. 13, 1994, 108 Stat. 3150; amended Pub. L. 104-275, title III, §311(2), Oct. 9, 1996, 110 Stat. 3334; Pub. L. 105-368, title II, §212(a), Nov. 11, 1998, 112 Stat. 3331; Pub. L. 106-419, title III, §323(a), Nov. 1, 2000, 114 Stat. 1855; Pub. L. 107-14, §8(a)(1), (b)(2), June 5, 2001, 115 Stat. 35, 36; Pub. L. 109-435, title VI, §604(f), Dec. 20, 2006, 120 Stat. 3242; Pub. L. 111-275, title VII, §§701(a), 702(a), Oct. 13, 2010, 124 Stat. 2887; Pub. L. 112-56, title II, §251, Nov. 21, 2011, 125 Stat. 729.)

#### PRIOR PROVISIONS

A prior section 4303, added Pub. L. 93-508, title IV, §404(a), Dec. 3, 1974, 88 Stat. 1596, §2023; amended Pub. L. 97-295, §4(72), Oct. 12, 1982, 96 Stat. 1310; renumbered §4303 and amended Pub. L. 102-568, title V, §506(a), (c)(2), Oct. 29, 1992, 106 Stat. 4340, 4341, related to reemployment by the United States, by any territory, possession, or political subdivision thereof, or by the District of Columbia, prior to the general amendment of this chapter by Pub. L. 103-353. This section, as in effect on the day before Oct. 13, 1994, continues to apply to reemployments initiated before the end of the 60-day period beginning Oct. 13, 1994, see section 8 of Pub. L. 103-353, as amended, set out as an Effective Date under section 4301 of this title.

Another prior section 4303 was renumbered section 7603 of this title.

#### AMENDMENTS

2011—Par. (2). Pub. L. 112-56 inserted “the terms, conditions, or privileges of employment, including” after “means”.

2010—Par. (2). Pub. L. 111-275, §701(a), substituted “(including” for “(other than”.

Par. (4)(D). Pub. L. 111-275, §702(a), added subpar. (D).

2006—Par. (5). Pub. L. 109-435 substituted “Postal Regulatory Commission” for “Postal Rate Commission”.

2001—Par. (13). Pub. L. 107-14, §8(b)(2), made technical amendment to directory language of Pub. L. 106-419, §323(a)(1). See 2000 Amendment note below.

Pub. L. 107-14, §8(a)(11), struck out second period at end.

2000—Par. (13). Pub. L. 106-419, §323(a)(2), inserted before period at end “, and a period for which a person is absent from employment for the purpose of performing funeral honors duty as authorized by section 12503 of title 10 or section 115 of title 32.”

Pub. L. 106-419, §323(a)(1), as amended by Pub. L. 107-14, §8(b)(2), struck out “and” after “National Guard duty.”

1998—Par. (3). Pub. L. 105-368 inserted at end “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.”

1996—Par. (16). Pub. L. 104-275 inserted “national” before “emergency”.

#### EFFECTIVE DATE OF 2010 AMENDMENT

Pub. L. 111-275, title VII, §701(b), Oct. 13, 2010, 124 Stat. 2887, provided that: “The amendment made by subsection (a) [amending this section] shall apply to—

“(1) any failure to comply with a provision of or any violation of chapter 43 of title 38, United States Code, that occurs before, on, or after the date of the enactment of this Act [Oct. 13, 2010]; and

“(2) all actions or complaints filed under such chapter 43 that are pending on or after the date of the enactment of this Act.”

Pub. L. 111-275, title VII, §702(b), Oct. 13, 2010, 124 Stat. 2888, provided that: “The amendment made by subsection (a) [amending this section] shall apply to—

“(1) any failure to comply with a provision of or any violation of chapter 43 of title 38, United States Code, that occurs before, on, or after the date of the enactment of this Act [Oct. 13, 2010]; and

“(2) all actions or complaints filed under such chapter 43 that are pending on or after the date of the enactment of this Act.”

#### EFFECTIVE DATE OF 2001 AMENDMENT

Pub. L. 107-14, §8(b), June 5, 2001, 115 Stat. 36, provided that the amendment made by section 8(b) is effective Nov. 1, 2000, and as if included in the Veterans Benefits and Health Care Improvement Act of 2000, Pub. L. 106-419, as enacted.

#### EFFECTIVE DATE OF 2000 AMENDMENT

Pub. L. 106-419, title III, §323(c), Nov. 1, 2000, 114 Stat. 1856, provided that: “The amendments made by subsections (a) and (b) [amending this section and section 4316 of this title] shall take effect 180 days after the date of the enactment of this Act [Nov. 1, 2000].”

#### EFFECTIVE DATE OF 1998 AMENDMENT

Pub. L. 105-368, title II, §212(c), Nov. 11, 1998, 112 Stat. 3331, provided that: “The amendments made by this section [enacting section 4319 of this title and amending this section] shall apply only with respect to causes of action arising after the date of the enactment of this Act [Nov. 11, 1998].”

#### EFFECTIVE DATE OF 1996 AMENDMENT

Amendment by Pub. L. 104-275 effective Oct. 13, 1994, see section 313 of Pub. L. 104-275, set out as a note under section 4301 of this title.

#### EFFECTIVE DATE

Section effective with respect to reemployments initiated on or after the first day after the 60-day period beginning Oct. 13, 1994, with transition rules, see section 8 of Pub. L. 103-353, set out as a note under section 4301 of this title.

#### § 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.

(Added Pub. L. 103-353, §2(a), Oct. 13, 1994, 108 Stat. 3152.)

#### PRIOR PROVISIONS

Prior sections 4304 to 4306 were omitted in the general amendment of this chapter by Pub. L. 103-353. Those sections, as in effect on the day before Oct. 13, 1994, continue to apply to reemployments initiated before the end of the 60-day period beginning Oct. 13, 1994, see section 8 of Pub. L. 103-353, as amended, set out as an Effective Date under section 4301 of this title.

Section 4304, added Pub. L. 93-508, title IV, §404(a), Dec. 3, 1974, 88 Stat. 1598, §2024; amended Pub. L. 94-286, §2, May 14, 1976, 90 Stat. 518; Pub. L. 94-502, title VI, §608(3), Oct. 15, 1976, 90 Stat. 2405; Pub. L. 96-466, title V, §511, Oct. 17, 1980, 94 Stat. 2207; Pub. L. 99-576, title VII, §701(60), Oct. 28, 1986, 100 Stat. 3296; Pub. L. 102-12, §8(a)(1), (b)(1), Mar. 18, 1991, 105 Stat. 38; renumbered §4304 and amended Pub. L. 102-568, title V, §506(a), (c)(3), Oct. 29, 1992, 106 Stat. 4340, 4341, related to reemployment rights of persons who enlist in the Armed Forces or enter upon active duty.

Another prior section 4304 was renumbered section 7604 of this title.

Section 4305, added Pub. L. 93-508, title IV, §404(a), Dec. 3, 1974, 88 Stat. 1600, §2025; renumbered §4305, Pub. L. 102-568, title V, §506(a), Oct. 29, 1992, 106 Stat. 4340, directed the Secretary of Labor, through the Office of Veterans' Reemployment Rights, to render assistance in obtaining reemployment.

Section 4306, added Pub. L. 93-508, title IV, §404(a), Dec. 3, 1974, 88 Stat. 1600, §2026; renumbered §4306, Pub. L. 102-568, title V, §506(a), Oct. 29, 1992, 106 Stat. 4340, related to prior rights for reemployment in a case in which more than one person is entitled to be reemployed.

A prior section 4307, added Pub. L. 102-25, title III, §339(a), Apr. 6, 1991, 105 Stat. 91, §2027; renumbered §4307, Pub. L. 102-568, title V, §506(a), Oct. 29, 1992, 106 Stat. 4340, related to qualification for employment position, prior to repeal by Pub. L. 103-353, §8(d)(2), Oct. 13, 1994, 108 Stat. 3176, eff. Aug. 1, 1990.

#### EFFECTIVE DATE

Section effective with respect to reemployments initiated on or after the first day after the 60-day period beginning Oct. 13, 1994, with transition rules, see section 8 of Pub. L. 103-353, set out as a note under section 4301 of this title.

#### 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