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Hot Topic: Uniformed Services Employment and Re-employment Rights Act

Richard Stokes

Municipal Technical Advisory Service, Richard.Stokes@tennessee.edu

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UNIFORMED SERVICES EMPLOYMENT AND RE-EMPLOYMENT RIGHTS ACT

Richard L. Stokes, PHR, IPMA-CP, Human Resource Consultant

Recent and ongoing national events prompted this hot topic, which includes the most up-to-date information on employee military leave. Your city could be affected if you have employees who are in the National Guard or military reserve, who are planning to enlist or who are drafted. Military leave can affect your city's employee benefits and compensation packages and, ultimately, your city's budget.

The Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), 38 U.S.C. § 43, was signed into law on Oct. 13, 1994, and modified in 1996, 1998, 2000, 2004, 2005 and 2009. On Oct. 28, 2009, legislation was re-enacted with the changes becoming effective on Nov. 28, 2009. The new rules modified and strengthened some of the provisions of the Veterans' Reemployment Rights statute that affected all uniformed service members. The act protects the rights and benefits of public and private civilian employees who serve the country and expands the total amount of time an individual may be absent from work and retain reemployment rights.

On Jan. 28, 2008, President Bush signed into law H.R. 4986, the National Defense Authorization Act for FY 2008 (NDAA), Pub. L. 110-181. Among other things, section 585 of the NDAA amends the Family and Medical Leave Act of 1993 (FMLA)

to permit a "spouse, son, daughter, parent, or next of kin" to take up to 26 work weeks of leave (paid or unpaid) to care for a "member of the Armed Forces, including a member of 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." The NDAA also permits an employee to take FMLA leave for "any qualifying exigency (as the Secretary [of Labor] shall, by regulation, determine) arising out of the fact that the spouse, or a son, daughter or parent of the employee is on active duty (or has been notified of an impending call or order to active duty) in the Armed Forces in support of a contingency operation."

On Oct. 28, 2009, President Barack Obama signed a defense-spending bill into law that contained important new amendments to the Family and Medical Leave Act (FMLA). The National Defense Authorization Act for Fiscal Year 2010 (NDAA 2010) expanded FMLA provisions relating to "qualifying exigency leave" and military caregiver leave, both of which now include time off to care for veterans.

The general military leave law provides four basic entitlements to employees returning from active service. The first is prompt reinstatement. The

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second involves accrued seniority. The third is training or retraining to ensure that the employee can perform the functions of the job. And finally, the re-employed service member is entitled to special protection against discharge for 180 days following periods of service from 31 days to 180 days (except for cause). This protection is extended to one year for periods of service of 181 days or more.

Under USERRA, re-employment rights are required for any person who is absent from work because of service in the uniformed services. USERRA requires that returning service members be re-employed in the job they would have attained had they not been absent for military service, with the same seniority, status and pay, as well as other rights and benefits determined by seniority. 38 U.S.C. § 4316(a). Additionally, returning employees are entitled to any other benefits not based on seniority. 38 U.S.C. § 4316(b).

“Service in the uniformed services” means the performance of duty on a voluntary or involuntary basis in a uniformed service, including active duty, active duty for training, initial active duty for training, inactive-duty training, full-time National Guard duty, absences for examinations to determine fitness, funeral honors duty by National Guard or reserve members, and certain duties performed by National Disaster Medical System employees. 38 U.S.C. § 4303(13). The uniformed services consist of the Army, Army Reserves, Army National Guard, Navy, Naval Reserve, Marine Corps, Marine Corps Reserve, Air Force, Air Force Reserve, Air National Guard, Coast Guard, Coast Guard Reserve, Commissioned Corps of the Public Health Service, certain types of service in the National Disaster

Medical System, and any other category of persons designated by the president in time of war or emergency. 38 U.S.C. § 4303(16).

According to a Thompson Publishing Company’s Special Report, *Return From Duty, Return to Work: Understanding the Employer’s New USERRA Obligations* (2006), there is no exclusion for executive, managerial, or professional employees. The law even protects temporary, part-time, probationary, and seasonal employees, as well as employees on strike, layoff, or leave of absence. It does not, however, apply to individuals who act as independent contractors rather than as employees.

The Thompson Publishing Company Report also provides that “an employer cannot refuse to hire, re-employ, retain, promote, or deny any benefits to an individual because he or she is a member of a uniformed service, has applied for membership in the uniformed services, or must fulfill service obligations. It also is illegal for an employer to retaliate against someone who exercises his or her rights under USERRA.”

The law requires all affected civilian employees to provide their employers with advance notice (written or oral) of their military service orders. No notice, however, is required if military necessity prevents giving advance notice or if giving notice is impossible or unreasonable. 38 U.S.C. § 4312(a)(1).

Employees may also need additional time off before starting military service. 20 C.F.R. § 1002.115 of the regulations recognize that absences for military service may include a period of time between the date the employee leaves the job and the date the

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employee actually begins service. In addition, the Thompson Publishing Company Report suggests that “employees may need intermittent time off from work prior to military service for brief periods to put their affairs in order, for example, to interview child care providers, meet with bank officers regarding financial matters, or seek assistance for elderly parents.”

They also suggest that the amount of time an employee may need to prepare for military service will vary. “Relevant factors include the duration of the military service, the amount of notice given an employee called to military service, and the location of the service.”

The act expands the length of time an individual may be absent from work for military duty and retain re-employment rights from four to five years. 38 U.S.C. § 4312(c). The time depends on the length of the employee’s military service as outlined in 20 C.F.R. § 1002.115(a – c) below:

Service of fewer than 31 days (or any length of the absence that was for an examination to determine fitness to perform military service): The employee must report back to work not later than the beginning of the first full regularly scheduled work period on the first full calendar day following the completion of the military service and the expiration of eight hours after a period allowing for safe transportation from the place of military service to the employee’s residence. So, if an employee completes his or her period of service and arrives home at 10 p.m., an employer cannot require the employee to report to work until the beginning of the

next full regularly scheduled work period that begins at least eight hours after arriving home (in this example, no earlier than 6 a.m. the next morning). If it is impossible or unreasonable for the employee to report in that time frame through no fault of his or her own, the employee must report to work as soon as possible after the expiration of the eight-hour period.

Service for more than 30 but fewer than 181 days: The employee must submit an application for re-employment (written or oral) no later than 14 days after completing service. If this is impossible or unreasonable through no fault of the employee, the employee must submit the application no later than the next full calendar day after it becomes possible to do so.

Service for more than 180 days: The employee must submit an application for re-employment (written or oral) no later than 90 days after completing service.

Upon return, the employer may request that the employee who is absent for more than 30 days provide documentation that the employee’s application for re-employment is timely, that the employee has not exceeded the five-year service limitation, and that the employee’s separation from service was honorable. 38 U.S.C. § 4312(f).

Exceptions to the five-year service limitation include situations in which initial enlistments last longer than five years, periodic training is required, or there are involuntary active-duty extensions or recalls, especially during a time of national emergency. 38 U.S.C. § 4312(c). Additionally, employees

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recovering from injuries received during the service or training may have up to an additional two years to return to their jobs. 38 U.S.C. § 4313(e).

An employer is not required to re-employ a returning service member if the employer's circumstances have so changed as to make re-employment impossible or unreasonable 20 C.F.R. 1002.139(a). Thompson Publishing Company's Report provides an excellent example. The employer would not be required to create a useless job or reinstate an employee after a reduction in the workforce that reasonably would have included the service member. The employer cannot, however, refuse to re-employ the service member just because another employee was hired temporarily during the service member's absence.

20 C.F.R. § 1002.139 (c) and 38 U.S.C. § 4312(d) (1)(c) also provide that an employer is not required to re-employ a returning service member if the position vacated by the service member was for a brief, non-recurrent period and there was no reasonable expectation that the employment would continue indefinitely or for a significant period.

Re-employment must occur as soon as practicable under the circumstances of each case. Absent unusual circumstances, reemployment must occur within two weeks of the employee's application for reemployment. For example, prompt reinstatement after a weekend National Guard duty generally means the next regularly scheduled working day. On the other hand, prompt reinstatement following several years of active duty may require more time, because the employer may have to reassign or give notice to another employee who occupied the returning employee's position. 20 C.F.R. § 1002.181.

38 U.S.C. § 4313(a)(1) provides that after military service of 91 days or less, the military service person is entitled to reinstatement in the "escalator position," to the position in which he or she would have been employed if not for the interruption in employment. 20 C.F.R. § 1002.196(a) provides that the employer must make reasonable efforts to help the employee become qualified for that position. 20 C.F.R. § 1002.196(b) provides that if the employee cannot become qualified for that position, the employee is entitled to the position in which he or she was employed when military service started.

After military service of more than 90 days, an employee is entitled to reinstatement in the escalator position, however, 20 C.F.R. § 1002.191 provide that upon the specific circumstances the employer may have the option, or may be required, to re-employ the employee in a position other than the escalator position. The employer must make reasonable efforts to help the employee qualify for one of those positions. 20 C.F.R. § 1002.197(a). If the employee cannot become qualified, the employee is entitled to be placed in any other position that is the closest approximation to the escalator position. 20 C.F.R. § 1002.197(b). If there is no such position for which the employee is qualified, the employer must place the employee in any other position that is the closest approximation to the pre-service position. 20 C.F.R. § 1002.197(c).

Note: The employer is not required to reemploy the employee on his or her return from service if he or she cannot, after reasonable efforts by the employer, qualify for the appropriate reemployment position. 20 C.F.R. § 1002.198.

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The Thompson Publishing Company article states that “employers may treat missed opportunities for promotions differently, depending on whether the promotions are automatic or, as with many white collar jobs, based primarily on the employer’s discretion.” If an opportunity for promotion or eligibility for promotion that the employee missed during service is based on a skills test or examination, then the employer should give him or her a reasonable amount of time to adjust to the employment position and then give a skills test or examination. No fixed amount of time for permitting adjustment to reemployment will be deemed reasonable in all cases. 20 C.F.R. § 1002.193(b).

The Department of Labor (DOL) acknowledges that if a promotion is not based simply on seniority or other forms of automatic progression, but depends on the employer’s discretion, a re-employed veteran would have to demonstrate that it was reasonably certain that he or she would have received the benefit if he or she had remained continuously employed. 20 C.F.R. § 1002.194.

Employers must make “reasonable efforts” to allow the returning service member to qualify for the position to which the employee is entitled. “Reasonable efforts” include training and retraining that does not place an undue hardship on the employer. 20 U.S.C. § 1002.5(d)(i). The employer is not required to re-employ an individual into a position that he/she is not qualified to perform.

An employee leaving a job for military service is not required to decide at that time whether he or she intends to return to the employer upon completion of military service but can defer that decision until

after completing service. 20 U.S.C. § 1002.120. The employer may, however, prohibit the individual from seeking employment with a competitor.

The burden of proving that the employee does not intend to seek re-employment with that employer following military service still rest with the employer. The individual must provide “clear, written notice” of their intent not to return to the employment of the organization. With such notice, the employee loses all rights and benefits to re-employment.

Under USERRA, employee can obtain employment with a different employer while waiting for reinstatement without giving up re-employment rights with the first employer. But if this alternative employment during the application period violates the pre-service employer’s employment policies (such as a city’s prohibition against second jobs) to such a degree that it would be just cause for discipline or termination, then there is no right to re-employment. 20 U.S.C. § 1002.120. Additionally, a returning employee loses his or her re-employment rights if he or she is discharged from military service for dishonorable or bad conduct, other than honorable discharge, dismissed by general court-martial or dropped from the roll due to an absence for at least three months. 20 U.S.C. § 1002.135.

USERRA establishes re-employment rights to a job but does not require that employers pay employees their regular pay while absent for military service, although employers may choose to do so. 20 U.S.C. § 1002.151. Some employers provide “differential pay,” which is the difference between the employee’s military pay and civilian pay. Differential pay is not required but it is “a generous

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show of support by employers for their employees who are in service to the nation. According to 20 U.S.C. § 1002.151, if an employer provides additional benefits such as full or partial pay when the employee performs service, the employer is not excused from providing other rights and benefits to which the employee is entitled under the Act.

Under Tennessee state law, however, eligible service members are entitled to 20 days of paid leave per year for active duty. T.C.A. § 8-33-109. If an employee has not used his military leave thus far this year, he is entitled to the first 20 days of his service at full pay. Whether the organization supplements the difference between an employee's military pay and regular pay is a decision the employer can make. T.C.A. § 58-1-109 also provides that reservists called to duty by the governor "... in case of invasion, disaster, insurrection, riot, attack, or combinations ..." shall be paid from appropriated funds by the military. No member shall receive less than \$50 per day. No member shall receive less than \$55 per day when called to active duty in cases of grave emergencies.

20 U.S.C. § 1002.149 provides that an employer must treat an employee during his or her period of military service as being on furlough or leave of absence. The employee is entitled to the non-seniority rights and benefits that the employer generally provides to other employees who are on furlough or leave of absence with similar seniority, status, and pay.

During an employee's leave of absence for military service, decisions about employee benefits must be made. USERRA provides for health insurance

continuation coverage, and employees may elect to continue their health plan coverage while in the military. The plan must permit the employee (and dependents if the plan offers dependent coverage) to elect to continue the coverage for a period that is the shorter of the following two periods: the 24-month period beginning on the date on which the employee's absence begins, or the period beginning on the date on which the employee's absence begins and ending on the date on which the employee fails to return to the job or apply for re-employment. 20 U.S.C. § 1002.164(a).

20 U.S.C. § 1002.166 provides that the amount the employee must pay for continuing health coverage varies according to how long the employee is absent. If the individual's military service is fewer than 31 days, health coverage should be provided as if the employee had remained employed, and the employer cannot require the employee to pay more than the employee's share (if any) for coverage. If the military duty exceeds 31 days, the employee must be offered continued health care and may be required to pay up to 102 percent of the full premium (the employee's share plus the employer's share) for coverage. In any case, the payment obligation begins on the 31st day of absence. On return from service, health insurance must be reinstated, and a waiting period or exclusions for preexisting conditions cannot be imposed. 38 U.S.C. § 4317.

Pension plans that are tied to seniority are specifically covered by the law. The law provides that while away performing military service, the employee must be treated as not having incurred a break in employment. The military service also must be considered service for an employee for

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vesting and benefit-accrual purposes. The employer is liable for continuing to fund the plan and any resulting obligations.

If an employer offers a defined contribution plan, the employer must allocate its make-up contribution, the employee's contribution, and the employee's elective deferrals in the same manner that it would allocate these amounts for other employees. For defined benefit plans, the employee's accrued benefits will be increased for the period of service once he or she is re-employed and, if applicable, has re-paid any amount previously paid to the employee and made any employee contributions that are required under the plan. 20 U.S.C. § 1002.265(b).

A re-employed service member has the right to make contributions or elective deferrals but is not required to do so. The employee's right to make up missed contributions is conditioned on continued employment with the post-service employer. 20 U.S.C. § 1002.265(c).

Employee contributions to a pension plan that is not dependent on employee contributions must be made within 90 days following re-employment or when contributions are normally made for the year in which the military service was performed, whichever is later. 20 U.S.C. § 1002.262(a).

If employers match employee contributions, the re-employed service member may make his or her contributions or deferrals during the period starting with the date of re-employment and continuing for up to three times the length of the employee's immediate past period of military service, but the re-payment period may not exceed five years.

Employer contributions that are contingent on employee contributions or elective deferrals must be made according to the plan's terms. 20 U.S.C. § 1002.262(b).

The re-employed person is entitled to any accrued benefits from the employee's banked benefits. (38 U.S.C. § 4318). Vacation and sick leave accrual generally are not tied to seniority. However, if an employer allows employees to accrue vacation while on leave without pay, the employee in military service is entitled to the same benefit. USERRA provides that service members must, at their request, be allowed to use any vacation leave that had accrued before beginning their military service instead of unpaid leave. The employer, however, cannot force the employee to use vacation leave for military service. 38 U.S.C. § 4316(d). The employee is not entitled to use accrued sick leave unless the employer allows employees to use sick leave for any reason or allows employees on comparable furlough or leave of absence to use accrued paid sick leave.

The National Defense Authorization Act for FY 2010 established new benefits for service members and their families. The Family and Medical Leave Act now allows eligible employees to take time off for family emergencies resulting from a covered spouse, parent, or child being called to active military duty in the National Guard or Reserve called "qualifying exigency leave," and for emergencies resulting from the need to care for family members who become seriously ill or injured in the line of duty during active military service.

Qualifying exigency leave allows eligible employees of covered employers to take up to 12 weeks of

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FMLA leave arising from the fact that their spouse, child, or parent is on active duty or called to active duty in the armed forces in support of a “contingency operation.” The qualifying exigency leave applies to families of members of any regular component of the armed services. Now, an eligible employee whose spouse, parent or child is a member of the Armed Forces may take FMLA leave for a qualifying exigency related to the fact that they are deployed with the Armed Forces to a foreign county.

The regulation 29 C.F.R. § 825.126(a) contains a specific and exclusive list of reasons for qualifying exigency leave. They include:

- Short-notice deployment, meaning a call or order that is given seven or fewer calendar days before deployment. The employee can take up to seven days beginning on the date of notification.
- Military events and related activities, such as official military-sponsored ceremonies and family support and assistance programs sponsored by the military and related to the family member’s call to duty.
- Urgent (as opposed to recurring and routine) child-care and school activities such as arranging for child care.
- Financial and legal tasks, such as making or updating legal arrangements to deal with a family member’s active duty.
- Counseling for the employee or his or her minor child that is not already covered by the FMLA.
- Spending time with the covered service member on rest and recuperation breaks during deployment for up to five days per break.

- Post-deployment activities such as arrival ceremonies and reintegration briefings, or to address issues from the service member’s death while on active duty.
- Other purposes arising out of the call to duty, as agreed upon by the employee and employer.

Employees seeking qualifying exigency leave must give reasonable and practical notice if the exigency is foreseeable. The notice must (1) inform the employer that a covered family member is on active duty or call-to-active duty status, (2) give a listed reason for leave, and (3) give the anticipated length of absence. 29 C.F.R. § 825.302(c).

Regulation 29 C.F.R. § 825.309(d) provides that the employer may require certification for qualifying exigency leave by requiring the employee to provide a copy of the service member’s active duty orders; for example a DOL form WH-384 may be used for qualifying exigency certification. The regulations also allow employers to verify with a third party that an employee met with the third party (e.g., a teacher) during qualifying exigency leave.

The National Defense Authorization Act (NDAA) for FY 2010 also established a new “military caregiver” leave category. This type of leave allows an eligible employee to take up to 26 work weeks of leave during a 12-month period to care for a covered service member. The employee may be a spouse, parent, child, or next of kin of the service member. 29 C.F.R. § 825.127 defines a covered service members is redefined to include an individual in the regular armed forces, Reserves, Guard, with a serious injury or illness. A veteran is considered

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a covered service member if he or she meets both of the following:

- He or she is undergoing medical treatment, recuperation or therapy for a serious injury or illness that was incurred or aggravated while on active duty in the Armed Forces, whether or not the illness or injury manifested itself before or after the member became a veteran.
- He or she was a member of the Armed Forces, National Guard or Reserves at any time during the five-year period before he or she began treatment, recuperation or therapy. In other words, the FMLA now allows the caregiver to take up to 26 weeks of leave to care for a veteran for up to five years after the service member leaves military service.

The military caregiver regulations also establishes a new category of eligible employees called “next of kin.” Next of kin excludes a service member’s spouse, parents or children, and is defined in 29 C.F.R. § 825.122(d) as the following blood relatives, in order of priority:

- Blood relatives with legal custody of the service member by court order or statute
- Siblings
- Grandparents
- Aunts and uncles
- First cousins

The service member, however, may designate any specific blood relative as “next of kin” in writing. Employers can ask employees for reasonable documentation of family relationships; however, a single statement will suffice.

The NDAA establishes a different calendar for military caregiver leave. Military caregiver leave begins with the first date of caregiver leave and ends 12 months later. This differs from the regular FMLA, year and if an employee takes military caregiver FMLA leave, the employer will have to track FMLA use under the two calendars. The DOL’s regulations state that “once an employee takes military caregiver leave and has begun to use that type of FMLA during the military FMLA year, he/she can take a maximum of 26 weeks of FMLA leave for any purpose during that 12 month period. If he/she takes non-military FMLA leave during the military FMLA year to take care of his/her own serious health condition that counts against the maximum 26 weeks of FMLA leave the service member is entitled to during that 12 month period.” The employer continues to count the service member’s FMLA leave against his or her entitlement as measured during the regular FMLA year as well. 29 C.F.R. § 825.127(c)(1).

The maximum of 26 weeks of caregiver leave may be taken in a single block or intermittently during the employee’s military FMLA year. Military caregiver leave cannot be carried over from year to year; it runs during a single 12-month period. It is possible, however, for an eligible employee to take more than one military caregiver entitlement because this type of leave, according to the regulations, applies on a per-service-member, per-injury basis in a single 12-month period.

Dual employment in the case of spouses working for the same employer can result in further complications if they wish to take military caregiver FMLA leave. The employees may be limited to a combined total of 26 work weeks of leave during

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the single 12-month period if the leave is taken for the birth of a child or to care for a child after birth, for placement of a child for adoption or foster care or to care for the child after placement, to care for the employee's parent with a serious health condition, or to care for a covered service member with a serious illness or injury. 29 C.F.R. § 825.127(d).

NDAA 2010 also expanded the definition of a "serious injury or illness" to include care for covered service members whose pre-existing injury or illness was aggravated in the line of duty. 29 C.F.R. § 825.127(a)(1). Previously, the law allowed military caregiver leave only for serious injury or illness incurred while on active duty that rendered the service member medically unfit to perform the duties of his office, grade, rank, or rating and for which he was undergoing medical treatment, recuperation, therapy or outpatient treatment.

The regulation 29 C.F.R. § 825.126(a) establishes the definition of qualifying exigency. It includes (1) short term deployment, (2) military events and related activities, (3) childcare and school activities, (4) financial and legal arrangements, (5) counseling, (6) rest and recuperation, (7) post deployment activities and (8) additional activities agreed to by the employer and employee.

Employers may require certification of the need for caregiver and qualifying exigency leave using the DOL forms. The qualifying exigency form can be found at <http://www.dol.gov/whd/forms/WH-384.pdf>. The certification for serious injury or illness of a covered service member form can be found at <http://www.dol.gov/whd/forms/WH-385.pdf>.

Employees seeking to use military caregiver leave must follow existing FMLA notice rules, including the requirement to work with employers to schedule leave without unduly disrupting operations.

Feel free to contact the MTAS human resources consultants, Bonnie Jones at (865) 974-0411 or Richard L. Stokes, PHR, IPMA-CP, at (615) 532-6827, for copies of the Uniformed Services Employment and Reemployment Rights Act.

Additional information about the act may be obtained from the U.S. Department of Labor's Veterans' Employment and Training Service at (800) 336-4590 or on the Internet at <http://www.dol.gov/dol/vets>.

A summary of the revised bill may be found at www.govtrack.us/congress/bill.xpd?bill=h111-2647&tab=summary.

In Tennessee, you can contact the Region IV representatives of the Veterans' Employment and Training Service for more information at the following locations:

Veterans' Employment and Training Service
U.S. Department of Labor
P.O. Box 280656
Nashville, Tennessee 37228-0656
(615) 736-7680
(615) 741-2135
(615) 736-5037
Fax: (615) 741-4241

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Veterans' Employment and Training Service

U.S. Department of Labor
1309 Poplar Ave.
Memphis, Tennessee 38104-2006
(901) 543-7853
Fax: (901) 543-7882

Veterans' Employment and Training Service

U.S. Department of Labor
350 Pageant Lane, Suite 406
Clarksville, Tennessee 37040
(931) 572-1688
Fax: (931) 648-5564

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