


NVLSP

THE PACT ACT: A PRIMER FOR VETERANS SERVICE OFFICERS

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AGENDA


- Background
- Title I: Expansion of Health Care Eligibility
- Title II: Toxic Exposure Presumption Process
- Title III: Improving the Establishment of SC Process for Toxic-Exposed Vets
- Title IV: Presumptions of SC
- Summary of other key Titles of Act



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BACKGROUND


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PUBLIC LAW

- **8/10/2022: President Biden signed into law**
- “Sergeant First Class Heath Robinson Honoring our Promise to Address Comprehensive Toxics Act of 2022” or the “Honoring our PACT Act of 2022”
- Public Law No. 117-168


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VBA GUIDANCE

- **12/22/2022: VA issued VBA Letter 20-22-10**
- Processing Claims Involving Public Law 117-168, Sergeant First Class Heath Robinson Honoring our Promise to Address Comprehensive Toxics Act of 2022 or the Honoring our PACT Act of 2022 (hereinafter referred to as the “PACT Act”
- *See Processing Claims, Sergeant First Class Heath Robinson Honoring Our Promise To Address Comprehensive Toxics Act of 2022, or the Honoring Our PACT Act of 2022, 87 Fed. Reg. 78,543 (Notification of sub-regulatory guidance Dec. 22, 2022)*


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VBA GUIDANCE

- **12/22/2022: VA issued VBA Letter 20-22-10 (cont'd)**
- VA claims processors must apply guidance in policy letter when processing disability compensation claims and appeals
- Guidance effective 1/1/2023
- Will be incorporated into Manual M21-1


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THE BASICS


- **VA has also started the process of updating its regulations to conform with the PACT Act**
 - *Updating Presumptive Radiation Locations Based on the PACT Act*, 88 Fed. Reg. 15,277 (Mar. 13, 2023) (amending 38 C.F.R. § 3.309(d)(3)(ii))
 - *Reevaluation of Claims for Dependency and Indemnity Compensation*, 88 Fed. Reg. 17,166 (proposed Mar. 22, 2023) (proposing new 38 C.F.R. § 3.333)
 - *Update VA Adjudication Regulations To Authorize the Use of Electronic Notification for VA Benefit Claims and Appeals*, 88 Fed. Reg. 36,261 (proposed June 2, 2023)

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TITLE I: EXPANSION OF HEALTH CARE ELIGIBILITY


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KEY SECTIONS

- **102: Definitions Relating to Toxic-Exposed Vets**
- **103: Expansion of Health Care for Specific Categories of Toxic-Exposed Vets and Vets Supporting Certain Overseas Contingency Operations**
- **111: Expansion of Period of Eligibility for Health Care for Certain Vets of Combat Service**

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DEFINITIONS RELATING TO TOXIC-EXPOSED VETERANS (SEC. 102) 


• **“Toxic Exposure” includes:**

A. A toxic exposure risk activity, which is any activity that:

1. Requires a corresponding entry in an exposure tracking record system for the Vet
2. Secretary of VA determines qualifies as such when taking into account what is reasonably prudent to protect the health of Vets

• 38 U.S.C. §§ 101(37)(A); 1710(e)(4)

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DEFINITIONS RELATING TO TOXIC-EXPOSED VETERANS (SEC. 102) 


• **“Toxic Exposure” includes:**

B. An exposure to a substance, chemical, or airborne hazard identified in a list to be created under 38 U.S.C. § 1119(b)(2)

- VA Secretary must establish and maintain the list, in collaboration with the Secretary of Defense

• 38 U.S.C. § 101(37)(B); 1119(b)(2)(A)

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DEFINITIONS RELATING TO TOXIC-EXPOSED VETERANS (SEC. 102) 

• **“Toxic-Exposed Veteran”:**

- Any Vet described in 38 U.S.C. § 1710(e)(1)
 - Vietnam-era herbicides
 - Radiation
 - SW Asia during Persian Gulf War 8/1990-11/1998
 - In theater of combat ops or in combat after 11/11/1998
 - DOD chem and bio weapons testing 1962-1973
 - Camp Lejeune for at least 30 days 8/1/1953-12/31/1987
 - Toxic-exposure risk activity participant

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DEFINITIONS RELATING TO TOXIC-EXPOSED VETERANS (SEC. 102)

• “Toxic-Exposed Veteran”:

- Any Vet described in 38 U.S.C. § 1710(e)(1) (cont’d)
 - Covered Vet in 38 U.S.C. § 1119(c)
 - On/after 8/2/1990:
 - Bahrain
 - Iraq
 - Kuwait
 - Oman
 - Qatar
 - Saudi Arabia
 - Somalia
 - U.A.E
 - On/after 9/11/2001:
 - Afghanistan
 - Djibouti
 - Egypt
 - Jordan
 - Lebanon
 - Syria
 - Yemen
 - Uzbekistan
 - Any other relevant country per Sec VA

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DEFINITIONS RELATING TO TOXIC-EXPOSED VETERANS (SEC. 102)

• “Toxic-Exposed Veteran”:

- Any Vet described in 38 U.S.C. § 1710(e)(1) (cont’d)
 - Vet who deployed in support of:
 - Operation Enduring Freedom
 - Operation Freedom’s Sentinel
 - Operation Iraqi Freedom
 - Operation New Dawn
 - Operation Inherent Resolve
 - Resolute Support Mission

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SEC. 103

• Expansion of Health Care for Specific Categories of Toxic-Exposed Veterans and Veterans Supporting Certain Overseas Contingency Operations

- Amends 38 U.S.C. § 1710(e)



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EXPANSION OF VA HEALTH CARE FOR TOXIC-EXPOSED VETS 

- VA must furnish hospital care (including mental health services and counseling), medical services, and nursing home care, for any illness, to any Vet “who is a toxic-exposed veteran, in accordance with [38 U.S.C. § 1710(e)]”
- 38 U.S.C. § 1710(a)(2)(F)
- Toxic-exposed Vets will qualify for at least Priority Group 6

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EXPANSION OF VA HEALTH CARE FOR TOXIC-EXPOSED VETS 


- **New groups of toxic-exposed Vets:**
 1. Vets who participated in a toxic exposure risk activity while serving on active duty, active duty for training, or inactive duty training
 2. “Covered veterans” who served in certain locations during certain periods (listed in new 38 U.S.C. § 1119(c));
 3. Those who deployed in support of a specified contingency operation
- 38 U.S.C. § 1710(e)(1)(G), (H), (I)

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ELIGIBILITY DATES
38 U.S.C. § 1710(e)(6) 

- For Vets in first two new groups (participated in a toxic exposure risk activity and “covered veterans”), eligibility will be phased in:
 - 10/1/2024: Vets discharged or released from active service 8/2/1990 – 9/11/2001
 - 10/1/2026: Vets discharged or released from active service 9/12/2001 – 12/31/2006
 - 10/1/2028 – Vets discharged or released from active service 1/1/2007 – 12/31/2012
 - 10/1/2030 - Vets discharged or released from active service 1/1/2013 – 12/31/2018


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ELIGIBILITY DATES 38 U.S.C. § 1710(e)(6)

- Vets in third new group (deployed in support of a specified contingency operation) will not be eligible until 10/1/2032
- VA Secretary may move up any eligibility start date, as long as VA has the resources to do so
- Many Vets also eligible for VA health care based on other factors


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EXPANSION OF ELIGIBILITY FOR HEALTH CARE FOR CERTAIN VETERANS OF COMBAT SERVICE

- Sec. 111 of PACT Act amends 38 U.S.C. § 1710(e)(3)
- For Vets who served on active duty in a theater of combat operations during a period of war after the Persian Gulf War, or in combat against a hostile force during a period of hostilities after 11/11/1998, and
- have a discharge/release date after 9/11/2001 (previously 1/27/2003)
- expands period of eligibility to enroll in VA health care system (for hospital care, medical services, and nursing home care for any illness) from 5 years following discharge to 10 years following discharge


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EXPANSION OF ELIGIBILITY FOR HEALTH CARE FOR CERTAIN VETERANS OF COMBAT SERVICE

- If discharged/released from active service after 9/11/2001 and before 10/1/2013, and did not enroll to receive such VHA medical services before 10/1/2022
- Created a 1 year eligibility period, from 10/1/2022-9/30/2023 to enroll in VA health care system (for hospital care, medical services, or nursing home care for any illness)

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EXPANSION OF ELIGIBILITY FOR HEALTH CARE FOR CERTAIN VETERANS OF COMBAT SERVICE 

- Amends 38 U.S.C. § 1710(e)(1)(D) to clarify who is eligible to enroll in VA health care system based on active duty service in a theater of combat operations during a period of war after the Persian Gulf War
 - "... a veteran who served on active duty in a theater of combat operations . . . during a period of war after the Persian Gulf War (including any veteran who, in connection with service during such period, received the Armed Forces Expeditionary Medal, Service Specific Expeditionary Medal, Campaign Specific Medal, or any other combat theater award established by a Federal Statute or an Executive Order)"

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TITLE II - TOXIC EXPOSURE PRESUMPTION PROCESS 

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KEY SECTIONS 

- 202: Improvements to Ability of VA to Establish Presumptions of SC Based on Toxic Exposure
- 203: Outreach to Claimants for Disability Comp Pursuant to Changes in Presumptions of SC
- 204: Reevaluation of Claims for DIC involving Presumptions of SC


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38 U.S.C. § 1171

- **Procedures to determine presumptions of SC based on toxic exposure; definitions**
 - Provides basic framework of procedures
 - Defines Individual Longitudinal Exposure Record (ILER) as:
 - Service records
 - Any database maintained by DOD and shared w/VA to serve as central portal for exposure-related data that compiles, collates, presents, and provides available occupational and environmental exposure info to support the needs of DOD and VA
 - Any successor system to that database


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38 U.S.C. § 1172

- **Annual Notice and Opportunity for Public Comment:**
 - At least once a year, VA must publish in Federal Register notice of the formal evaluations it plans to conduct, seek public comment, and publish responses
 - VA must create a working group of VHA and VBA personnel to assess cases in which Vets or their dependents may have experienced toxic exposure during active service and report recommendations to VA and Congress annually
 - VA must initiate formal evaluation w/in 30 days of report


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38 U.S.C. § 1173

- **Formal evaluation of recommendations**
 - VA must establish a process to conduct a formal evaluation of working group recommendations, which covers scientific evidence, claims data, and other factors
 - Formal evaluation must determine strength of evidence for a positive association between toxic exposure and illness, and categorize as: sufficient; equipoise and above; below equipoise; or against
 - W/in 120 days evaluation is commenced, group must submit to VA Secretary recommendation regarding establishment of presumptive SC for exposure/illness


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38 U.S.C. § 1174

- **Regulations regarding presumptions of SC based on toxic exposure**
 - W/in 160 days of receiving recommendation re establishing presumptive SC, VA must:
 - Commence issuing regs establishing presumption, OR
 - Publish notice in Fed. Reg. that presumption not warranted
 - VA may issue regs removing presumption for illness if evidence suggests lack of positive association between disease and toxic exposure
 - Vet awarded SC or survivor awarded DIC prior to removal of presumption will continue to be entitled to comp/DIC


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38 U.S.C. § 1176

- **Agreement with National Academies of Sciences, Engineering, and Medicine concerning toxic exposures**
 - VA must enter into a 5 year agreement with the academies to review and summarize scientific evidence, and assess its strength, regarding the association between military toxic exposures and adverse health conditions
 - May be extended in 5-year increments
 - First report was supposed to be issued by 8/10/2023, and additional reports at least every 2 years thereafter, but no reports have been released yet


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CONFORMING AMENDMENTS

- **New process for determining toxic-exposure presumptions also applies to herbicide-related conditions and Persian Gulf War illnesses**
 - 38 U.S.C. §§ 1116, 1116B, and 1118 updated accordingly


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38 U.S.C. § 1167


- Outreach pursuant to changes in presumptions of SC
 - When a law, reg, or court decision/settlement establishes or modifies a presumption of SC, VA must identify all claims for comp that were previously denied that might have been decided differently based on change
 - Must conduct outreach to inform claimants they may submit a supplemental claim based on change
 - Notice on VA's website
 - Notify Veterans Service Orgs
 - Directly contact each claimant!

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38 U.S.C. § 1167

- Rule applies to presumptions established / modified on or after 8/10/2022
 - Letters for PACT Act presumptions sent to Vets in a phased approach
- Nothing requires an effective date for SC earlier than the date a presumption of SC is established or modified
- Rule is different for DIC!




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VA GUIDANCE

- If previously denied claim affected by new or modified presumption, to have claim readjudicated, Vet must file VA Form 20-0995, *Decision Review Request: Supplemental Claim*
 - “New and relevant” evidence is not required!
 - Liberalizing law sufficient to trigger readjudication on merits based on new theory of service connection
 - VBA Letter 20-22-10, § 4.2


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38 U.S.C. § 1305

- **Reevaluation of DIC determinations pursuant to changes in presumptions of SC**
 - When a law, reg, or court decision/settlement establishes or modifies a presumption of SC, VA must identify all DIC claims that were previously denied that might have been decided differently based on change
 - Allow claimant to have claim reevaluated
 - If DIC now granted, VA must assign effective date as if the new presumption was in effect at the time of the prior claim


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38 U.S.C. § 1305

- VA must conduct outreach to inform DIC claimants they may request to have claim reevaluated based on change re presumption
 - **Notice on VA's website**
 - **Notifying Veterans Service Orgs**
 - **Directly contacting each claimant!**
- Rule applies to presumptions established / modified on or after 8/10/2022
- There is no time limit for requesting reevaluation of previously denied DIC claim


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VA FORM UPDATES


- VA added a question to allow claimants to elect reevaluation of a previously denied DIC claim based on new eligibility under the PACT Act to:
 - **VA Form 21P-534EZ, Application for DIC, Survivors Pension, and/or Accrued Benefits**
 - **VA Form 21P-535, Application for Dependency and Indemnity Compensation by Parent(s) (Including Accrued Benefits and Death Compensation When Applicable)**

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TITLE III - IMPROVING THE ESTABLISHMENT OF SERVICE CONNECTION PROCESS FOR TOXIC-EXPOSED VETERANS


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KEY SECTIONS

- 302: Presumptions of Toxic Exposure
- 303: Medical Nexus Exams for Toxic Exposure Risk Activities


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38 U.S.C. § 1119

- Presumptions of Toxic Exposure
- If a Vet files a claim for SC with evidence of a disability and toxic exposure during active service, VA may consider:
 1. Any record of the Vet in an exposure tracking record system (such as the ILER); AND
 2. If **no record** of the Vet in an exposure tracking record system indicates Vet was subject to a toxic exposure during active service, **the totality of the circumstances of the service of the Vet**

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38 U.S.C. § 1119

- VA must presume that a “covered veteran” had in-service exposure to substances, chemicals, and airborne hazards identified in list to be established and maintained by VA, in collaboration with SECDEF
- List may include end dates for presumptions of exposure, but cannot be earlier than last day of Persian Gulf War in 38 U.S.C. § 101(33)
- Rebuttable with affirmative evidence of no exposure

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“COVERED VETERANS” 38 U.S.C. § 1119(c)(1)(A), (B)

- Vets who, on or after 8/2/1990, performed active service while assigned to a duty station in, including airspace above:
 - Bahrain, Iraq, Kuwait, Oman, Qatar, Saudi Arabia, Somalia, U.A.E.
- Vets who, on or after 9/11/2001, performed active service while assigned to a duty station in, including airspace above:
 - Afghanistan, Djibouti, Egypt, Jordan, Lebanon, Syria, Yemen, Uzbekistan, any other country determined relevant by VA Secretary


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EXPANDED VA DEFINITION OF “COVERED VETERAN”

- To conform with its definition of “Southwest Asia theater of operations,” VA also considers an individual a “covered Veteran” if Vet, on or after 8/2/1990, performed active service in or above:
 - Neutral zone between Iraq and Saudi Arabia
 - Gulf of Aden
 - Gulf of Oman
 - Persian Gulf
 - Arabian Sea
 - Red Sea
- VBA Letter 20-22-10, § 4.3


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38 U.S.C. § 1168

- **Medical nexus exams for toxic exposure risk activities**
- **VA must provide a medical exam and obtain a medical nexus opinion if Vet (not DIC claimant) submits a claim for SC and there is**
 1. Evidence of a disability,
 2. Evidence of participation in a toxic exposure risk activity during active service,
 3. An indication of an association between the disability and the toxic exposure risk activity, and
 4. Insufficient evidence to **GRANT** service connection


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VA MEDICAL EXAMS / OPINIONS

- **Exam / opinion may be needed when:**
 - Claimed condition not subject to a presumption of SC
 - Vet does not have qualifying service in a recognized location, but may have other exposures shown in the totality of evidence
 - Severity of disability needs to be determined for evaluation


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38 U.S.C. § 1168

- **Medical nexus opinion provider must consider:**
 1. Total potential exposure through all of Vet's applicable military deployments
 - Provided by claims processor to examiner
 2. Synergistic, combined effect of all toxic exposure risk activities of Vet
 - But not the synergistic, combined effect of each of the substances, chemicals, and airborne hazards in list to be created under § 1119(b)(2)


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VA GUIDANCE

- **Claims impacted by law include those related to “garrison exposures”**
 - Environmental exposure that may have been experienced while stationed on a military base
 - Includes exposure to substances such as asbestos, fuels, lead, and perfluoroalkyl and polyfluoroalkyl substances (PFAS)
 - VBA Letter 20-22-10, § 4.3


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VA GUIDANCE

- **Medical exam / opinion NOT required if there is no indication of an association between the claimed condition and the toxic exposure**
 1. Non-presumptive claims based on physical trauma (blunt force, repetitive use, penetrating)
 2. Mental disorders
 3. Conditions determined by VA Secretary to have no positive association with herbicide exposure
 4. Disabilities that manifested during service or with an etiology not associated w/ toxic exposure
- VBA Letter 20-22-10, § 4.3

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VA GUIDANCE

- **Exception to the exception:**
 - Even if medical exam / opinion would not normally be required because it falls in categories 1, 2, or 3 on the previous slide, VA must order exam if Vet submits competent medical or scientific evidence of an association between the disability and the in-service toxic exposure
 - **Ex: private medical opinion indicating a link between Vet’s tongue cancer and his herbicide exposure**

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TITLE IV - PRESUMPTIONS OF SERVICE CONNECTION

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KEY SECTIONS

- **401: Treatment of Vets who participated in cleanup of Enewetak Atoll as Radiation-Exposed Vets for purposes of presumption of SC of certain disabilities by VA**
- **402: Treatment of Vets who Participated in Nuclear Response Near Palomares, Spain, or Thule, Greenland, as Radiation-Exposed Vets for Purposes of Presumption of SC of Certain Disabilities by VA**
- **403: Presumptions of SC for Diseases Associated with Exposures to Certain Herbicide Agents for Vets Who Served in Certain Locations**

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KEY SECTIONS

- **404: Addition Of Additional Diseases Associated with Exposure to Certain Herbicide Agents for Which There is a Presumption of SC for Vets Who Served in Certain Locations**
- **405: Improving Compensation for Disabilities Occurring in Persian Gulf War Vets**
- **406: Presumption of SC for Certain Diseases Associated with Exposure to Burn Pits and Other Toxins**
- **407: Rule of Construction**

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APPLICABILITY DATE FOR NEW PRESUMPTIONS


- Although PACT Act provides that, for most Vets, the presumptions discussed in this part of the training—regarding locations of exposures and service connection of disabilities—would go into effect on various dates over the coming years, VA is treating all new presumptions as applicable on **8/10/2022**
- VBA Letter 20-22-10, § 5

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RADIATION EXPOSURE

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38 U.S.C. § 1112(c)(3)(B)

- “Radiation-exposed veterans” are entitled to presumptive SC for several cancers listed in § 1112(c)(2)
- PACT Act updates list of “radiation-risk activities” that qualify person as a radiation-exposed Vet:
 - v. Cleanup of Enewetak Atoll during the period beginning **1/1/1977** and ending **12/31/1980**

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38 U.S.C. § 1112(c)(3)(B)



vi. Onsite participation in the response effort following the collision of a U.S. Air Force B-52 bomber and refueling plane that caused the release of four thermonuclear weapons in the vicinity of **Palomares, Spain**, during the period beginning **1/17/1966** and ending **3/31/1967**

vii. Onsite participation in the response effort following the on-board fire and crash of a U.S. Air Force B-52 bomber that caused the release of four thermonuclear weapons in the vicinity of **Thule Air Force Base, Greenland**, during the period beginning **1/21/1968** and ending **9/25/1968**


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AGENT ORANGE EXPOSURE / PRESUMPTIVE CONDITIONS


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BACKGROUND



- Vets who served in certain locations during certain time periods are presumed to have been exposed to herbicides (Agent Orange)
- Vets with presumed herbicide exposure (and others who can prove actual exposure) are entitled to presumptive SC for numerous disabilities

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38 U.S.C. § 1116

- PACT Act makes several changes to statute on presumptive SC for diseases associated with herbicide exposure:
 - Broadens language regarding who qualifies for presumptive SC from Vets who served in the Republic of Vietnam to Vets who “performed covered service”
 - Does NOT impact prior presumptions for Blue Water Navy Vietnam Vets, Vets who served along the Korean DMZ, and Vets who served on C-123 aircraft that sprayed AO during the Vietnam war

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38 U.S.C. § 1116(d) (new)

- “Covered service” is active service performed:
 - 1) In the **REPUBLIC OF VIETNAM** during the period beginning 1/9/1962 and ending 5/7/1975
 - 2) In **THAILAND AT ANY U.S. OR ROYAL THAI BASE** during the period beginning 1/9/1962 and ending 6/30/1976, without regard to where on the base the Vet was located or what military job specialty the Vet performed
 - Includes Vets on a ship that called on a Thailand coastal base
 - Does not include service in territorial waters of Thailand
 - Applies to claims by children of Vets for benefits for spina bifida, but NOT other birth defects


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38 U.S.C. § 1116(d) (new)

- “Covered service” is active service performed:
 - 3) In **LAOS** during the period beginning 12/1/1965 and ending 9/30/1969
 - 4) In **CAMBODIA AT MIMOT OR KREK, KAMPONG CHAM PROVINCE** (now in Tboung Khmum province) during the period beginning 4/16/1969 and ending 4/30/1969

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38 U.S.C. § 1116(d) (new)

5) On **GUAM or AMERICAN SAMOA, or IN THE TERRITORIAL WATERS THEREOF**, during the period beginning on **1/9/1962** and ending **7/31/1980**

6) On **JOHNSTON ATOLL or ON A SHIP THAT CALLED AT JOHNSTON ATOLL** during the period beginning **1/1/1972** and ending **9/30/1977**

- Does not apply to service in offshore territorial waters of Johnston Island


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38 U.S.C. § 1116(a)(2)

- PACT Act adds 2 NEW herbicide-related presumptive conditions:
 1. Monoclonal gammopathy of undetermined significance (MGUS)
 - Abnormal “M” protein in blood
 - Usually asymptomatic, but may lead to blood cancer
 - Rated under the DC 7712, multiple myeloma
 2. Hypertension
- No 10% manifestation requirement for SC for either condition


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RETROACTIVE BENEFITS


- VA shall award retroactive benefits for claims based on MGUS and hypertension only to DIC claimants
- *Nehmer* effective date rules do not apply to these presumptions or future Agent Orange presumptions
- See VBA Letter 20-22-10, § 4.4

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PERSIAN GULF WAR ILLNESSES


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BACKGROUND

- **38 U.S.C. § 1117 – Compensation for disabilities occurring in Persian Gulf War Vets**
 - Provides for presumptive SC for qualifying chronic disabilities in Persian Gulf War Vets
 - Undiagnosed illnesses
 - MUCMIs
- **PACT Act makes a number of changes to § 1117**

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REDUCTION OF THRESHOLD OF ELIGIBILITY

- **PACT Act eliminates requirement that a qualifying chronic disability manifest in the SW Asia theater of operations during the Persian Gulf War, or to a degree of at least 10% disabling during an applicable presumptive period (previously prior to 12/31/2026)**
 - Amends § 1117(a)(1); Removes current § 1117(b)
- **VA will now pay comp for qualifying chronic disabilities that manifest to any degree at any time**
 - VBA Letter 20-22-10, § 4.4

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EXPANSION OF DEFINITION OF "PERSIAN GULF VETERAN"



• Pre-PACT Act, § 1117(f) defined Persian Gulf Vet as a Vet who served on active duty in the "Southwest Asia theater of operations" during the Persian Gulf War

• VA defines SW Asia Theater of Operations in 38 C.F.R. § 3.317(e)(2) as:

- > Iraq
- > Saudi Arabia
- > Kuwait
- > Bahrain
- > Qatar
- > U.A.E.
- > Oman
- > Gulf of Aden
- > Gulf of Oman
- > Persian Gulf
- > Arabian Sea
- > Red Sea
- > Airspace above these areas

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EXPANSION OF DEFINITION OF "PERSIAN GULF VETERAN"



• In addition to "Southwest Asia theater of operations", PACT Act adds:

- Afghanistan
- Israel
- Egypt
- Turkey
- Syria
- Jordan




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BURN PITS & OTHER TOXINS



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PRE-PACT ACT REGULATION

- 38 C.F.R. § 3.320, Claims based on exposure to particulate matter, was in effect when PACT Act enacted
- Provides 2 rebuttable presumptions:
 - Presumed exposure to fine particulate matter (FPM) for certain Vets
 - Presumed SC for certain diseases


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PRE-PACT ACT REGULATORY PRESUMPTION OF EXPOSURE

- Under § 3.320, Vets presumed to have been exposed to FPM if they served in:
 - SW Asia theater of operations (Iraq, Kuwait, Saudi Arabia, neutral zone between Iraq and Saudi Arabia, Bahrain, Qatar, UAE, Oman, Gulf of Aden, Gulf of Oman, Persian Gulf, Arabian Sea, Red Sea, and airspace above these areas)
 - Dates: 8/2/1990 – present (date TBD)
 - Afghanistan, Djibouti, Syria, or Uzbekistan
 - Dates: 9/19/2001 – present (date TBD)


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PRE-PACT ACT REGULATORY PRESUMPTION OF SC

- Under § 3.320(a)(2) & (3), chronic diseases presumed SC if Vet exposed to FPM:
 - Asthma
 - Rhinitis
 - Sinusitis, to include rhinosinusitis
 - 9 rare respiratory cancers
- Non-cancers must have manifested w/in 10 years of separation from a period of service during which Vet presumed to have been exposed to FPM


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CHANGES TO VA REGULATION

- VA will revise § 3.320 to add exposures, countries, and diseases, and has already removed manifestation periods, per PACT Act
- VA claims processors are no longer applying § 3.320 as written
- VA claims processors are following guidance in VBA Letter 20-22-10, which follows or is more favorable than PACT Act

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38 U.S.C. § 1120

- **Presumption of SC for certain diseases associated with exposure to burn pits and other toxins**
- Rebuttable presumption of SC for 23 diseases/types of disease for “covered veterans”

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“COVERED VETERANS” 38 U.S.C. § 1119(c)(1)(A), (B)

- Vets who, on or after 8/2/1990, performed active service while assigned to a duty station in, including airspace above:
 - Bahrain, Iraq, Kuwait, Oman, Qatar, Saudi Arabia, Somalia, U.A.E.
- Vets who, on or after 9/11/2001, performed active service while assigned to a duty station in, including airspace above:
 - Afghanistan, Djibouti, Egypt, Jordan, Lebanon, Syria, Yemen, Uzbekistan, any other country determined relevant by VA Secretary

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EXPANDED VA DEFINITION OF "COVERED VETERAN"



• As in § 3.320, VA also considers an individual a "covered Veteran" if Vet, on or after 8/2/1990, performed active service in or above:

- Neutral zone between Iraq and Saudi Arabia
- Gulf of Aden
- Gulf of Oman
- Persian Gulf
- Arabian Sea
- Red Sea
- VBA Letter 20-22-10, § 4.3

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PRESUMPTIVE DISEASES 38 U.S.C. § 1120(b)



- | | |
|---|--|
| • Asthma <u>diagnosed after service</u> | • COPD |
| • Head cancer (any type) | • Constrictive bronchiolitis or obliterative bronchiolitis |
| • Neck cancer (any type) | • Emphysema |
| • Respiratory cancer (any type) | • Granulomatous disease |
| • Gastrointestinal cancer (any type) | • Interstitial lung disease |
| • Reproductive cancer (any type) | • Pleuritis |
| • Lymphoma cancer (any type) | • Pulmonary fibrosis |
| • Kidney cancer | • Sarcoidosis |
| • Brain cancer | • Chronic sinusitis |
| • Melanoma | • Chronic rhinitis |
| • Pancreatic cancer | • Glioblastoma |
| • Chronic bronchitis | |

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PRESUMPTIVE DISEASES 38 U.S.C. § 1120(b)



- No requirement that disease manifest during a certain period after service or to a certain disabling degree
- List can be expanded to include any other disease the VA Secretary determines has a positive association with a substance, chemical, or airborne hazard in the list to be created by § 1119(b)(2)
- Must use the process set forth in Title II of the PACT Act (38 U.S.C. §§ 1171-1176)

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VA GUIDANCE ON ASTHMA

- VA will implement the PACT Act presumption for asthma *without* the language qualifying that it be diagnosed after covered service, but
 - If Vet diagnosed with asthma prior to or during service, VA must consider entitlement to SC under other theories of SC, such as direct or aggravation
 - Presumption will only apply if asthma is diagnosed after service
 - VBA Letter 20-22-10, § 4.4


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OTHER VA GUIDANCE

- Only chronic diseases qualify for presumption
 - Acute and transitory conditions do not qualify
- Skin cancers, other than melanoma, only qualify for presumptive SC if the location is the head or neck
- Only primary cancers may be considered as a presumptive disease
 - Metastatic or secondary cancers do not qualify
- VBA Letter 20-22-10, Attachment A, includes numerous diagnoses that fall w/in categories of types of cancers and other diseases listed in Act


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UPDATE

- **7/2023:** VA announced that it will assess whether there is an association between fine particulate matter from airborne hazards and open burn pits and:
 - Acute leukemias
 - Chronic leukemias
 - Multiple myeloma
 - 88 Fed. Reg. 48,291 (July 26, 2023)

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ADVOCACY ADVICE


- Many Vets have had claims for SC for disabilities now entitled to presumptive SC under the PACT Act pending since prior to 8/10/2022
- VA and BVA have been granting many such claims on a presumptive basis, effective 8/10/2022, but denying or failing to address direct SC, which could warrant an effective date prior to 8/10/2022
- Seek review of / appeal such decisions and argue earlier effective date warranted under direct SC theory
 - Will usually need a favorable private or VA medical nexus opinion, or continuity of symptoms if a chronic condition under 38 C.F.R. § 3.309(a)

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TITLE VIII – RECORDS AND OTHER MATTERS


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KEY SECTIONS

- **803: Correction of Exposure Records by Members of The Armed Forces and Vets**
 - VA and DOD shall provide a way for Vets to update their records to reflect exposures to occupational or environmental hazards in the ILER
- **804: Federal Cause of Action Relating to Water At Camp Lejeune, NC**
- **807: Authorization of Electronic Notice in Claims Under Laws Administered by The Secretary of VA**


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CAMP LEJEUNE JUSTICE ACT

- **Sec. 804: Federal Cause of Action Relating to Water at Camp Lejeune, North Carolina**
- An individual, or legal representative of an individual, who resided, worked, or was otherwise exposed (including in utero exposure) for not less than 30 days during the period beginning 8/1/1953 and ending 12/31/1987, to water at Camp Lejeune that was supplied by, or on behalf of, the U.S., may bring an action in the U.S. District Court for the Eastern District of NC to obtain appropriate relief for harm that was caused by exposure to the water at Camp Lejeune


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CAMP LEJEUNE JUSTICE ACT

- **These are not VA claims!**
- **Person must prove relationship between the water and the harm with evidence sufficient to show that a causal relationship exists or is at least as likely as not**
- **No presumptions for any specific diseases**


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CAMP LEJEUNE JUSTICE ACT

- **There is no set amount that a CLJA claim is worth**
- Based on the facts of each case, including the severity of the harm and strength of the evidence
 - Some law firms estimate between \$25K and \$500K
- Awards reduced by the amount of VA compensation, VA health care, Medicare, and Medicaid benefits the claimant previously received for the condition
- **VA benefits generally NOT affected by CLJA claim**
- Exception: DIC benefits based on Vet's total disability rating prior to death (not SC death) *may be* reduced


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CAMP LEJEUNE JUSTICE ACT

- **Individual must first file claim on CLJA Claim Form with Navy JAG Tort Claims Unit in Norfolk, VA and be denied**
 - Form/info can be found here:
www.jag.navy.mil/organization/code_15_Camp_Lejeune_Claims.htm
 - Detailed instructions on completing form:
www.jag.navy.mil/organization/documents/CLJA_Directions_Procedures.pdf
- **If illness or harm started on or before 8/10/2022, lawsuit must be filed by the later of:**
 - 8/10/2024, or
 - 180 days after date on which claim denied by Navy


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CAMP LEJEUNE JUSTICE ACT


- **Representation by lawyers**
 - NVLSP does NOT provide CLJA claim representation
 - Any lawyer hired should understand NC tort law and Federal Torts Claims Act
 - Most lawyers paid on contingency basis
 - If successful, lawyer takes agreed-upon percentage of award
 - Shop around for lowest rate
 - Only agree to fee based on percentage of POST-offset CLJA award (or claimant may owe attorney money)
 - Make sure claimant understands retainer agreement before signing!

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ELECTRONIC NOTICE

- **Sec. 807: Authorization of Electronic Notice in Claims Under Laws Administered by the Secretary of Veterans Affairs**
 - Updates several statutes to allow VA and BVA to provide notice (to include notice of decisions) electronically, if claimant or claimant's representative elects such notice
 - Election may be removed at any time
 - 38 U.S.C. §§ 5100, 5104, 5104B, 5112, 7104, 7105, 7105A, 7266



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QUESTIONS?



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