



USERRA

UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT OF 1994

FY 2012

ANNUAL REPORT TO CONGRESS

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PREPARED BY
OFFICE OF THE ASSISTANT SECRETARY
FOR VETERANS' EMPLOYMENT AND TRAINING
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The purposes of the Uniformed Services Employment and Reemployment Rights Act (USERRA) are: to encourage non-career service in the uniformed services by eliminating or minimizing the disadvantages to civilian careers and employment which can result from such service; to minimize the disruption to the lives of persons performing service in the uniformed services as well as to their employers, their fellow employees, and their communities, by providing for the prompt reemployment of such persons upon their completion of such service; and to prohibit discrimination against persons because of their service in the uniformed services. It is the sense of Congress that the Federal Government should be a model employer in carrying out the provisions of USERRA.

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Introduction:

The Uniformed Services Employment and Reemployment Rights Act of 1994, 38 U.S.C. §§ 4301-4335 (USERRA), was signed into law on October 13, 1994. USERRA prohibits discrimination in employment based on an individual's prior service in the uniformed services; an individual's current service in the uniformed services; or intent to join the uniformed services. An employer is prohibited from discriminating against a person because of such person's attempt to enforce his or her rights under the Act. In addition, an employer may not retaliate against an individual for filing a USERRA claim, testifying, or otherwise providing assistance in any proceeding under the Act. USERRA also provides reemployment rights with the pre-service employer following qualifying service in the uniformed services. In general, the protected person is entitled to be reemployed with the status, seniority, and rate of pay as if continuously employed during the period of service. USERRA applies to private employers, the Federal government, and State and local governments. It also applies to United States employers operating overseas.

This Fiscal Year 2012 report was prepared in accordance with 38 U.S.C. § 4332(a), which requires the Secretary of Labor, after consultation with the Attorney General and the Special Counsel, to prepare and transmit an annual report to Congress containing the following information for the preceding fiscal year:

1. The number of cases reviewed by the Department of Labor (DOL) under this chapter during the fiscal year for which the report is made.
2. The number of cases reviewed by the Secretary of Defense under the National Committee for Employer Support of the Guard and Reserve (ESGR) of the Department of Defense (DOD) during the fiscal year for which the report is made.
3. The number of cases referred to the Attorney General or the Special Counsel pursuant to Section 4323 or 4324, respectively, during such fiscal year and the number of actions initiated by the Office of Special Counsel (OSC) before the Merit Systems Protection Board (MSPB) pursuant to Section 4324 during such fiscal year.
4. The number of complaints filed by the Attorney General pursuant to Section 4323 during such fiscal year.
5. The number of cases reviewed by the Secretary of Labor and the Secretary of Defense through ESGR of the Department of Defense that involve the same person.
6. With respect to each of the cases referenced above:
 - A. the number of such cases that involve a disability-related issue; and
 - B. the number of such cases that involve a person who has a service-connected disability.
7. The nature and status of each of the cases case referenced above.

8. With respect to each of the cases referenced above, the number of such cases that involve persons with different occupations or persons seeking different occupations, as designated by the Standard Occupational Classification System.
9. An indication of whether there are any apparent patterns of violation of the provisions of this chapter together with an explanation thereof.
10. Recommendations for administrative or legislative action that the Secretary of Labor, the Attorney General, or the Special Counsel considers necessary for the effective implementation of this chapter, including any action that could be taken to encourage mediation, before claims are filed under this chapter, between employers and persons seeking employment or reemployment.

Overview of USERRA Protections

USERRA generally requires U.S. employers, regardless of size or location of operation (United States, its territories, or any foreign country) to reemploy eligible veterans returning to their civilian employment after a period of service in the uniformed services. It requires employers, with certain exceptions, to provide training to restore competency in duties, and to restore seniority, status, pay, pensions, and other benefits that would have accrued but for the employee's absence due to military service. Under USERRA, employers are generally liable for funding their share, if any, to the civilian retirement plan(s) of employed service members. Employers are prohibited from discriminating on the basis of service in the military, the National Disaster Medical System, or the commissioned corps of the Public Health Service. USERRA also protects anyone – veteran or non-veteran – from reprisal for either exercising rights, or assisting in any proceeding under the statute. Eligibility requirements for service members seeking reemployment generally provide that the absence must be due to service; advance notice (oral or in writing) must be given to the employer; the cumulative period(s) of service while employed by the employer must not exceed five years; the application for reemployment must be timely; and the discharge from service must not be disqualifying.

DOL and DOD share responsibility for promoting a clear understanding of USERRA among employers and individuals concerning their respective rights and responsibilities under USERRA. DOL's Veterans' Employment and Training Service (VETS) and DOD's ESGR provide extensive public education, outreach, and compliance assistance with the goal of preventing violations caused by ignorance or misunderstanding of the law, and ensuring that protected individuals understand their rights and know what assistance is available to help them secure those rights. The Office of Personnel Management (OPM) and all Federal agencies have a responsibility for promoting USERRA awareness on account of the training law requirement at 38 U.S.C. § 4335.

There are three levels of Federal assistance available to individuals who believe their USERRA rights may have been violated. ESGR Ombudsmen services are the most informal level at which resolution can be sought. If the issue cannot be resolved by the ESGR Ombudsman, or if the individual prefers to bypass informal resolution, VETS formally investigates complaints received and attempts to resolve those complaints. If, following VETS' investigation and attempts at resolution, the claimant is not fully satisfied with the outcome, VETS informs the individual of his or her right to have the case referred for consideration of legal representation at no cost to the claimant. Referrals are made to the Department of Justice (DOJ) in cases involving a private or State or local government employer, or to the Office of Special Counsel¹ (OSC) in cases involving a Federal employer. Claimants also have the right at any time to withdraw their case to pursue enforcement at their own expense, in U.S. District Court or before the MSPB, either on their own or with the assistance of a private attorney.

This report begins by describing the levels of Federal assistance available, beginning with outreach and education, and continuing through informal dispute resolution, formal investigation and

¹ The U.S. Office of Special Counsel (OSC) is an independent federal investigative and prosecutorial agency. OSC's primary mission is to safeguard the merit system by protecting federal employees and applicants from prohibited personnel practices, including protections included in USERRA.

resolution, referral, and finally, consideration of and provision of legal representation, as appropriate. Finally, the report responds to each of the statutorily-mandated reporting requirements described in the introduction to this report.

USERRA SERVICES PROVIDED BY THE DEPARTMENT OF DEFENSE'S EMPLOYER SUPPORT OF THE GUARD AND RESERVE

OVERVIEW

ESGR is a DOD operational committee whose mission is to gain and maintain employer support for Guard and Reserve service by advocating relevant initiatives, recognizing outstanding support, increasing awareness of the law, and resolving conflict between employers and service members. As such, ESGR is the principal advocate within DOD dedicated to providing its customers and stakeholders with information about USERRA.

ESGR has conducted outreach to Reserve Component (RC) service members and their employers since its inception in 1972. Hundreds of thousands of RC service members and employers have benefited from ESGR products and services. With Guard and Reserve forces making up nearly 50 percent (50%) of our military strength and ongoing global operations coupled with humanitarian response, civilian employers' support is critical to our national defense now more than ever.

ESGR has national and local organizational structure to support the following functions:

- Operate a proactive program directed at U.S. employers, employees, and communities that ensures understanding and appreciation of the role of the Guard and Reserve in the context of the DOD Total Force Policy.
- Assist in preventing, resolving, or reducing employer and/or employee problems and misunderstandings that result from Guard or Reserve service, training, or duty requirements through information services and mediation.
- Assist in educating Guard and Reserve members regarding their obligations and responsibilities to employers.
- Use the military chain of command to promote better understanding of the importance of maintaining positive working relations between employers and their RC employees, in order to sustain military participation.

Today, more than 4,900 volunteer ombudsmen serve across the nation in all 50 States, the District of Columbia, Guam-CNMI, Puerto Rico, and the U.S. Virgin Islands. With help and resources from the Headquarters ESGR in Arlington, Virginia, the 54 ESGR State Committees conduct employer and military outreach programs, which also include participants from the volunteer ombudsmen services program. ESGR ombudsmen are specifically trained in USERRA and neutral mediation techniques, resolving conflicts between service members and employers, furthering the understanding of and compliance with USERRA regulations. ESGR conducts proactive outreach programs and provides responsive ombudsmen services in support of its mission. In FY 2012, ESGR volunteers influenced 161,440 employers and 482,916 service members, informing both groups on the responsibilities and rights under USERRA.

Outreach Programs

ESGR conducts awareness and recognition programs aimed at employers of RC service members to engender positive support for Guard and Reserve service. These programs include the voluntary participation by employers in the Statement of Support Program and recognition of employers who go “above and beyond” the requirements of USERRA.

Employers who participate in the Statement of Support Program pledge that:

1. They fully recognize, honor and enforce USERRA.
2. Their managers and supervisors will have the tools they need to effectively manage those employees who serve in the Guard and Reserve.
3. They appreciate the values, leadership, and unique skills service members bring to the workforce and will encourage opportunities to hire Guardsmen, Reservists, and veterans.
4. They will continually recognize and support our country’s service members and their families in peace, in crisis, and in war.

The ESGR awards program is designed to recognize employers for employment policies and practices that are supportive of their employees’ participation in the National Guard and Reserve. Several employer awards originate from nominations submitted by service members, recognizing supervisors with the Patriot Award, and culminating in national recognition of the most outstanding employers with the annual Secretary of Defense Employer Support Freedom Award.

During FY 2012, ESGR recognized 12,073 supervisors of RC service members with the Patriot Award. HQ ESGR received 3,236 nominations for the 2012 Secretary of Defense Employer Support Freedom Award. During the same time period, 54,889 employers signed Statements of Support.

Ombudsman Services

The primary means of assisting National Guard and Reserve members with USERRA conflicts is through a nationwide Ombudsman Services Program that reduces, resolves and helps prevent employer and/or employee misunderstandings and problems. The Ombudsman Services Program provides education, information, and neutral third-party services in order to resolve employee/employer USERRA conflicts. ESGR is not an enforcement agency, and does not participate in formal litigation processes.

ESGR signed an updated Memorandum of Understanding (MOU) in 2010 with DOL that continued organizational cooperation and established calendar-day time limits to resolve USERRA cases, improving and expediting information sharing between the two agencies. DOL has working relationships with DOJ and OSC overseeing the enforcement of USERRA violations. These inter-agency relationships have considerably improved services provided to all customers regarding USERRA compliance. The MOU between ESGR and DOL stipulates that when a case cannot be resolved by ESGR within 14 and 30 calendar days, ESGR will close the case and notify the parties that the service member may file a case with DOL or retain private counsel. ESGR has a national network of more than 650 volunteer ombudsmen to help resolve USERRA compliance issues. ESGR’s volunteers receive training on USERRA and dispute resolution techniques, and serve as a neutral third-party between the employer and employee to inform and educate all involved parties on the requirements of the law and to assist in finding a mutually agreeable solution.

The ESGR Ombudsman Services Program is available to RC service members and their employers to address USERRA conflicts without litigation. RC service members may also file complaints directly with DOL, which has Congressional authority to investigate USERRA violations and legal authority to subpoena records during an investigation.

ESGR operates and maintains a Customer Service Center (CSC) that acts as the initial entry point for USERRA complaints, inquiries and information requests. The CSC provides prompt, expert, telephonic and email responses to service members and employers on all USERRA related matters. During FY 2012, ESGR received 21,521 contacts by telephone and email. Of those contacts, 2,793 resulted in actual USERRA cases for mediation purposes. ESGR mediation efforts also covered an array of USERRA issues that included 1,271 complaints involving some type of military discrimination, 764 complaints involving job reinstatement and reemployment problems, and 15 complaints involving possible retaliation or reprisal. There were 627 complex USERRA cases in which ESGR was unable to obtain an agreement between the employee and employer. In these instances, ESGR ombudsmen informed both parties that the employee had the option to file a case with DOL or seek assistance through a private attorney.

ESGR and VETS will continue to track problems, coordinate issues, and identify trends in future fiscal years, as a key part of both agencies' efforts to improve services to the National Guard and Reserve.

DOL'S USERRA OUTREACH AND CLAIMS INVESTIGATION

VETS PUBLIC EDUCATION AND COMPLIANCE ASSISTANCE EFFORTS

VETS conducts a robust public outreach campaign to educate service members, employers, and others on their rights and responsibilities under USERRA. Since the terrorist attacks of September 11, 2001, VETS has briefed more than 950,000 individuals on USERRA. In FY 2012 alone, VETS presented USERRA information to more than 75,000 people. Briefings to mobilizing and demobilizing members of the Guard and Reserves are given in collaboration with ESGR. Together, the two agencies strive to ensure that every RC member receives a USERRA briefing upon mobilization and demobilization from active military service.

VETS INVESTIGATIVE PROCESS

USERRA investigations are complaint-driven. An individual who believes that his or her USERRA rights have been violated may file a complaint with VETS online or by submitting a signed form in person or via mail or facsimile. Some complaints originate with ESGR and are subsequently filed with VETS. Upon receipt of an electronically-filed or signed completed complaint form (the VETS 1010, available to the public online through VETS' web page), VETS immediately opens a formal investigation. A brief notification of process rights, written in easy-to-understand question-and-answer format, is sent to each claimant within five days of VETS' receipt of a complaint.

The assigned investigator collects and reviews pertinent documentary evidence and interviews necessary witnesses, under authority of subpoena if necessary. To ensure investigations are of the highest quality and are conducted in a uniform and timely manner, VETS investigators are

extensively trained in the legal aspects of USERRA and in the agency's rigorous operating procedures.

If the evidence compiled in a USERRA investigation supports the allegations made, the agency will attempt to obtain satisfactory resolution through negotiation or mediation. VETS encourages all parties to resolve disputes promptly and avoid litigation if possible.

VETS has 90 days to complete its investigation, unless the claimant agrees to an extension of time for VETS to continue the investigation and attempt to resolve the case. At any point during the investigative process, the claimant may elect to withdraw the complaint from VETS and pursue the claim with private counsel. A claimant whose case is being investigated by VETS may be concurrently represented by a third party including private counsel, but VETS will continue its efforts only as long as the third party does not interfere with the investigation.

CASE REFERRAL PROCESS

Upon completion of the investigation, if VETS does not resolve the case to the claimant's satisfaction, VETS advises the claimant in a written closing letter of his or her right to have the case referred to either DOJ or to the OSC, as appropriate. VETS must refer a claim if the claimant so requests, regardless of whether VETS has found merit in the complaint. DOL has 60 days to complete this referral process, unless the claimant agrees to an extension of time.

DEPARTMENT OF JUSTICE ENFORCEMENT

The Department of Justice and the Department of Labor work collaboratively to meet the goal of ensuring service members' USERRA rights are protected. If DOL cannot resolve a service member's USERRA claim, the service member may ask DOL to refer the service member's claim to the Attorney General for review. Each DOL referral includes: (1) the VETS investigative file; and (2) a memorandum analyzing the case and providing a recommendation as to whether representation should be provided or declined.

Upon receipt of an unresolved USERRA claim from DOL, DOJ reviews the complete DOL investigative file and analysis. If the Attorney General is reasonably satisfied that the service member is entitled to relief, the Attorney General may exercise DOJ's prosecutorial authority and commence an action in Federal court on behalf of the service member. If the employer is a State or State agency, the action is brought in the name of the United States. In all other cases, the United States files suit in the name of the service member. If DOJ determines that it will not offer representation to the service member, it informs the service member of this decision and notifies him or her that he or she has the right to proceed with private counsel. In all cases, DOJ ensures that each USERRA referral receives careful consideration and is processed as expeditiously as practicable.

The Department of Justice continues to ramp up its enforcement of USERRA against private, State and local employers, through litigation, facilitated settlements, outreach and advocacy. Since 2004, DOJ has filed 77 USERRA lawsuits seeking relief for service members and favorably resolved 119 USERRA complaints either through consent decrees obtained in those suits or through facilitated private settlements. In addition, over the past year, DOJ has engaged in outreach and coordination to groups of service members and employers nationwide, including the American Bar Association, the

National Association of State Attorneys General, and the National Association of Public Pension Attorneys. DOJ also has sent to Congress proposed legislation that would strengthen protections and increase DOJ's enforcement authority. Among other things, this legislation would give DOJ authority to initiate pattern or practice litigation to address systemic violations affecting multiple service members. Finally, DOJ has actively participated as *amicus curiae* in appeals involving the important rights of service members, including the Supreme Court case *Staub v. Proctor Hospital*, the Second Circuit case *Serrichio v. Wachovia Securities*, and the First Circuit case *Rivera-Melendez v. Pfizer Pharmaceuticals, LLC*. DOJ also intervened and participated as *amicus curiae* to defend USERRA's constitutionality in *Weaver v. Madison City Board of Education* (N.D. Ala.), filed in 2012, and *Ramirez v. State of New Mexico Youth and Family Services* (N.M. App.), filed in 2013.

In FY 2013, DOJ will continue to work with DOL to ensure that referrals are promptly and carefully processed and that each meritorious referral is resolved to the satisfaction of the service member and the government. While DOJ will continue to aggressively pursue litigation when warranted, it seeks to resolve meritorious referrals without contested litigation whenever possible.

OFFICE OF SPECIAL COUNSEL ENFORCEMENT

OSC's enforcement responsibilities apply in Federal sector USERRA cases. Pursuant to an existing MOU between DOL and OSC, case referrals from DOL to OSC following a VETS investigation are addressed in a manner very similar to that employed in DOJ referrals discussed above, and also include a written legal analysis from the Solicitor's Office which includes a recommendation regarding the merit of the claim.

USERRA IN THE FEDERAL SECTOR

The Federal government is committed to being a model employer under USERRA. In July of 2012, President Obama issued a Memorandum reaffirming the Administration's commitment to the employment and reemployment rights of service members and veterans and reiterating that the "Federal Government, as our Nation's largest employer, has a responsibility to adopt best practices with respect to employing returning service members." The President established a USERRA Employment Protection Working Group to coordinate and review agency efforts to implement model practices and comply with the statute. DOL, DOJ, OSC, and other key Federal agencies participated.

The Working Group led Federal agencies in the establishment of training protocols for senior leaders and managers, human resources professionals, legal departments, and service members, so that all front-line agency personnel understand their role in USERRA. On September 10, 2013, the U.S. Office of Personnel Management issued guidance in response to the President's Memorandum on ways to improve USERRA protection policies and practices. This guidance contains strategies and data improvements for agencies to use to help strengthen their response to USERRA. A focus on continuous engagement with service members before, during and after their military service will help ease their transition from active duty to the civilian Federal workforce, which will in turn help further the goal of making the Federal government a model employer and help agencies comply with USERRA. In addition, continued identification and sharing of best practices will ensure that the most effective approaches are used to assist our veterans and service members as they search for employment or return to their civilian jobs with the Federal government.

USERRA DEMONSTRATION PROJECT

VETS and OSC have been collaborating on implementing and supporting the General Accountability Office’s (GAO) assessment of a three-year demonstration project, mandated by the Veterans’ Benefits Act of 2010, Pub. L. No. 111-275 (VBA of 2010), to compare the performance of VETS and OSC in the handling of USERRA complaints against Federal government agencies across a number of dimensions, such as timeliness, case outcomes, and cost effectiveness. Under the Demonstration Project, which began on August 9, 2011, OSC investigates and attempts to resolve all Federal complaints filed by Service Members whose Social Security Number (SSN) ends in an odd digit or who allege a related Prohibited Personnel Practice (PPP) allegation under 5 U.S.C. § 2302(b) (regardless of SSN). VETS investigates and attempts to resolve the remaining Federal complaints (those associated with even-numbered SSNs that have no related PPP allegation), and all non-Federal complaints (those against private, State, and local employers).²

During Fiscal Year 2012, USERRA Demonstration Project cases were distributed as follows:

Demonstration Project Cases	Cases Pending at Start of FY 2012	New Cases Opened in FY 2012³	Total Cases Reviewed in FY 2012	Cases Closed in FY 2012	Cases Pending at Start of FY 2013
VETS	14	114	128	100	28
OSC	28	150	178	90	88

In order to implement the demonstration project, VETS and OSC entered into a MOU establishing how cases will be transferred, reported, and how OSC will receive funding for those cases it receives from VETS. VETS’ USERRA Information Management System (UIMS), which collects and reports key information on USERRA cases, has been modified to collect and show data related to the demonstration project, and the appropriate electronically filed claims are automatically transferred to OSC for greatest efficiency. In addition, VETS established a cost tracking system specific to its investigations under the demonstration project to enable GAO to compare the costs of federal USERRA investigations in the two agencies.

To further comply with the VBA of 2010, VETS and OSC developed and implemented a customer satisfaction survey (CSS) to measure USERRA claimants’ overall satisfaction with the investigative process and to offer them an opportunity to comment on the manner in which their claims were handled. Recognizing that the responses to the CSS may be based on the outcome of a particular case, VETS and OSC developed a series of questions designed to elicit unbiased information in such

² USERRA complaints received by OSC under the Demonstration Project are separate and apart from USERRA cases referred to OSC by DOL under 38 U.S.C. Sec. 4324 (see “CASES REFERRED TO THE OFFICE OF THE SPECIAL COUNSEL”).

³ Investigations of certain USERRA Demonstration Project cases that started in one agency were found to belong properly with the other agency for completion of the investigation, under Project guidelines. For Annual Report tracking purposes, each such case is counted under the agency that completed the investigation. In FY 2012, OSC initiated investigation on two Demonstration Project cases that were later forwarded to VETS for completion of the investigation. Those two cases are counted under VETS’ totals.

areas as professionalism, oral and written communication, courtesy, access to VETS or OSC staff, and the claimants' view of the overall quality of the investigation.

MANDATED REPORTING REQUIREMENTS

SECTION 4332 OF USERRA, 38 U.S.C. § 4332 REQUIRES THE SECRETARY OF LABOR, AFTER CONSULTATION WITH THE ATTORNEY GENERAL AND THE SPECIAL COUNSEL, TO PREPARE AND TRANSMIT AN ANNUAL REPORT TO CONGRESS CONTAINING THE FOLLOWING INFORMATION FOR THE PRECEDING FISCAL YEAR:

1. THE NUMBER OF CASES REVIEWED BY THE DEPARTMENT OF LABOR UNDER THIS CHAPTER DURING THE FISCAL YEAR FOR WHICH THE REPORT IS MADE.

DOL reviewed 1,275 new unique cases in FY 2012 (OSC reviewed an additional 150 new unique cases as part of the USERRA Demonstration Project which began on 8/9/2011).⁴ Reviewed cases are those cases opened in conjunction with a signed or electronically-filed VETS 1010 complaint form. The table below provides the numbers of new unique USERRA cases handled by the federal government in FY 2007 – FY 2012.

Fiscal Year	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012
New VETS Cases (Federal and Non-Federal)	1,226	1,389	1,431	1,438	1,548	1,275
OSC Cases (Federal only)	139	37	n/a*	n/a*	28	150
Total New Cases	1,365	1,426	1,431	1,438	1,576	1,425

In FY 2012, DOL also carried over an additional 179 unique cases (open investigations) from FY 2011, and OSC also carried over from FY 2011 an additional 28 unique cases (open investigations, as part of the USERRA Demonstration Project). During FY 2012, the Department reopened 10 cases from FY 2011 and two from FY 2010 or earlier. In sum, DOL reviewed a total of 1,466 unique cases in FY 2012, and OSC reviewed an additional 178 unique cases.

2. THE NUMBER OF CASES REVIEWED BY ESGR, ON BEHALF OF THE SECRETARY OF DEFENSE, DURING THE FISCAL YEAR.

During FY 2012, ESGR received 21,521 contacts by telephone and email. Of those contacts, 2,793 resulted in actual USERRA cases for which ESGR Ombudsmen services were provided.

⁴ In this report, the count of “unique” cases eliminates duplications that result from a claimant filing the same complaint more than once, from a case being closed in one State and reopened in another for administrative purposes, and from a claimant reopening a claim that was previously closed.

* OSC did not review new unique cases in FY 2009 and FY 2010 because the assignment of such cases to OSC under a demonstration project established by the Veterans Benefits Improvement Act of 2004 ended in FY 2008. However, OSC again began to review unique cases in FY 2011 under another demonstration project established by the VBA of 2010.

3. THE NUMBER OF CASES REFERRED TO THE ATTORNEY GENERAL OR THE SPECIAL COUNSEL PURSUANT TO SECTION 4323 OR 4324, RESPECTIVELY, DURING SUCH FISCAL YEAR AND THE NUMBER OF ACTIONS INITIATED BY THE OFFICE OF THE SPECIAL COUNSEL BEFORE THE MERIT SYSTEMS PROTECTION BOARD PURSUANT TO SECTION 4324 DURING SUCH FISCAL YEAR.

In FY 2012, DOL referred 111 cases to the Attorney General's Civil Rights Division and 23 cases to OSC. During the fiscal year, OSC did not represent any Service Members before the MSPB which resulted in a MSPB decision. The nature and status of these referred cases is reflected in mandatory reporting requirement number seven of this report.

4. THE NUMBER OF COMPLAINTS FILED BY THE ATTORNEY GENERAL PURSUANT TO SECTION 4323 DURING SUCH FISCAL YEAR.

DOJ filed nine USERRA complaints in FY 2012. Eight of these cases have now settled and the remaining case is in active litigation.

5. THE NUMBER OF CASES REVIEWED BY THE SECRETARY OF LABOR AND ESGR THAT INVOLVE THE SAME PERSON.

ESGR provided VETS with the names of 2,793 individuals who had filed the 2,793 cases reviewed by ESGR Ombudsmen in FY 2012, and the date of each case. VETS compared the ESGR data to its own data⁵ on cases initially opened from October 1, 2011 through October 31, 2012⁶. This comparison resulted in 258 likely matches; thus, it appears that 9% of FY 2012 ESGR cases were subsequently opened as VETS cases.

6. WITH RESPECT TO THE CASES REPORTED ON PURSUANT TO PARAGRAPHS 1, 2, 3, 4, AND 5—

A. THE NUMBER OF SUCH CASES THAT INVOLVE A DISABILITY-RELATED ISSUE.

- i.** Twenty-three of the new unique cases, or 1.8%, of those reviewed by DOL in FY 2012, involved a disability-related issue.
- ii.** Forty-one of the new unique cases, or 1.5% of those reviewed by ESGR in FY 2012, involved a disability-related issue.
- iii.** Of the cases referred for consideration of litigation, two of those referred to DOJ and none of those referred to OSC involved a disability-related issue.
- iv.** Of the nine cases filed by DOJ in FY 2012, none involved a disability-related issue.
- v.** With respect to the 258 cases reviewed by DOL and ESGR involving the same person in FY 2012, four (1.6%) involved a disability-related issue.

⁵ Absent more specific data on the employer(s) and specific allegation(s) involved, case matching cannot be made with complete confidence.

⁶ October data was included to capture late FY 2012 ESGR cases that were filed with VETS early in FY 2013.

B. THE NUMBER OF SUCH CASES THAT INVOLVE A PERSON WHO HAS A SERVICE-CONNECTED DISABILITY.

- i. In FY 2012, VETS asked claimants whether they had a service-connected disability. Among the 1,275 new unique claims VETS received, VETS obtained responses from 1,261 claimants, 21% (261) of whom reported having such a disability. Among these 261 claimants who reported having a service-connected disability, 21 also claimed a USERRA-related disability issue. Among the remaining 1,000 claimants who responded but did not report having a service-connected disability, two claimed a USERRA-related disability issue.
- ii. No information is available on the number of cases handled by ESGR that involved a person with a service-connected disability.
- iii. Of the cases referred for consideration of litigation, 19 of those referred to DOJ involved a claimant who reported a service-connected disability, with four of those claimants also claiming a USERRA-related disability issue. Eight of those referred to OSC involved a claimant who reported a service-connected disability, with two of those claimants also claiming a USERRA-related disability issue.
- iv. Of the nine cases filed by DOJ in FY 2012, one involved a person with a service-connected disability; however, none of those nine claimants also claimed a USERRA-related disability issue.
- v. With respect to the 258 cases reviewed by VETS and ESGR involving the same person in FY 2012, VETS obtained service-connected disability responses from 255 of these claimants, 16% (42) of whom reported having such a disability. Four claimants among the 42 who reported having a service-connected disability also claimed a USERRA-related disability issue.

7. THE NATURE AND STATUS OF EACH CASE REPORTED PURSUANT TO PARAGRAPH 1, 2, 3, 4, OR 5.

i. CASES REVIEWED BY THE DEPARTMENT OF LABOR

The following issues were raised in the new unique USERRA cases reviewed by DOL:

Cases Opened by VETS in FY 2012 USERRA ISSUE	VETS CASES ALLEGING ISSUE*	
	NUMBER	PERCENT
Military obligations discrimination	471	36.9%
Reinstatement	347	27.2%
Other non-seniority benefits	39	3.1%
Promotion	66	5.2%
Vacation	46	3.6%
Status	38	3.0%
Pay rate	74	5.8%
Reasonable accommodation/ retraining for non-qualified/non-disabled	5	0.4%
Discrimination as retaliation for any action	87	6.8%
Seniority	49	3.8%
Pension	44	3.5%
Initial hiring discrimination	90	7.1%
Layoff	38	3.0%
Special protected period discharge	25	2.0%
Health benefits	17	1.3%
Reasonable accommodations/retraining for disabled	23	1.8%
Other	37	2.9%

* Note: Because many USERRA cases involve multiple issues, the number of cases in this chart exceeds the 1,275 new unique cases reported by VETS in FY 2012 and the combined percentages exceed 100%.

DOL closed 1,290 cases in FY 2012 under the following closure codes: no merit, 427 (33%); administrative, 86 (7%); claim granted, 227 (18%); claim settled, 116 (9%); claim withdrawn, 228 (18%); not eligible, 53 (4%); referred, 125 (10%); merit, not resolved, 25 (2%); merit undetermined, 3 (<1%).⁷ An explanation of case closure codes follows.

⁷ Combined closure code percentages exceed 100% due to the effects of rounding each code to a whole percentage.

CASE CLOSURE CODES EXPLAINED

- **ADMINISTRATIVE CLOSURE:** A case should be closed administratively under any of the following circumstances:
 - **Lack of Interest** – Administrative closure is appropriate when the claimant clearly displays lack of interest or is obviously uncooperative. Examples are failure to reply to multiple VETS’ letters, failure to give VETS a change of address, failure to supply information that could be easily obtained, failure to attend scheduled meetings or conferences, and failure to make a written request for referral after being given the opportunity to do so.
 - **Continued Unauthorized Contact by Third Party with Employer** – Although a claimant is entitled to be represented either by VETS or by a third party under USERRA, he or she may not be simultaneously represented by both parties if the representation interferes with the investigation. If the claimant insists on being represented by a third party in a USERRA case, and that representation interferes with a VETS investigation, he or she will be informed that VETS can no longer continue its involvement in the case and that the case will be administratively closed.
- **CLAIM GRANTED:** When the employer grants all of the claimant's entitlements.
- **CLAIM SETTLED:** When the claimant and the employer agree to settle the case for less than the claimant's full entitlements under USERRA.
- **WITHDRAWN CLAIM:** When the claimant informs VETS in writing of his/her desire to withdraw the claim.
- **NOT ELIGIBLE:** If a case has already been opened, and VETS finds that the claimant does not meet the eligibility requirements in the statute, the case should be discussed with the claimant and, with his/her concurrence, closed on the basis of no eligibility.
- **NO MERIT:** The claimant is not entitled to relief for reasons other than failure to meet eligibility requirements.
- **CASES REFERRED:** Unsettled cases are closed only when they are referred to the Regional Solicitor's Office for appropriate referral action.
- **MERIT, NOT RESOLVED:** When the completed investigation finds merit to the complaint, but VETS is unable to obtain a satisfactory resolution.
- **MERIT UNDETERMINED:** When the investigation is not complete but the statutory deadline for case completion (or an extension previously agreed to by the claimant) is reached and the claimant does not agree to a further extension.

ii. CASES REVIEWED BY THE ESGR ON BEHALF OF THE SECRETARY OF DEFENSE

ESGR Ombudsman services covered an array of USERRA issues that included 1,271 complaints involving some type of military discrimination, 764 complaints involving job reinstatement and reemployment problems; and 15 cases involving possible retaliation or reprisal during FY 2012.

ESGR resolved 2,166 of its 2,793 Ombudsman cases. There were 627 USERRA Ombudsman cases in which the employee and employer could not reach an agreement. In these instances ESGR Ombudsmen informed both parties that the employee had the option to file a case with DOL or seek assistance through a private attorney.

The following crosswalk aligns the issues identified in ESGR case data with VETS UIMS data.

Crosswalk of USERRA Issues, FY 2012

ESGR Ombudsman Services ↔ VETS' National Guard & Reserve Complaint Cases

Primary Categories

ESGR
Ombudsman Cases
"Problem Codes"
(Converted to VETS' Issue Codes)

VETS
Complaint Cases
"Issue Codes" *

Discrimination	Military Obligations Discrimination	1183	ID - Military Obligations Discrimination	403
	Initial Hiring Discrimination	89	II - Initial Hiring Discrimination	83
	1,272 Ombudsman Cases (47%)		486 Issues in 482 Complaint Cases (44% of Complaint Cases)	

	Health Benefits	46	IH - Health Benefits	12
	Pension	28	IP - Pension	40
	Seniority	44	IS - Seniority	43
	Other Non-Seniority Benefits	51	IB - Other Non-Seniority Benefits	30
	Status	69	IZ - Status	34
	Layoff	89	IL - Layoff	33

iii. CASES REFERRED TO THE DEPARTMENT OF JUSTICE OR THE OFFICE OF SPECIAL COUNSEL

CASES REFERRED TO THE DEPARTMENT OF JUSTICE

In FY 2012, the Civil Rights Division received 41 referrals from DOL where DOL found that the claims had merit and recommended that DOJ offer representation to the service member. DOJ offered representation in 12 cases, facilitated 11 settlements, and declined representation in 13 cases (one due to the service member obtaining private counsel). Two referrals were withdrawn by the service member, and two referrals involved State agencies and DOJ declined to pursue litigation. With respect to the remaining referral, DOL was able to settle the matter before DOJ decided whether to offer representation.

DOJ received an additional 70 referrals from DOL in FY 2012 with a recommendation that the claims lacked merit and representation should be declined. Based on DOL's recommendation and DOJ's independent analysis of the merits of each referral, DOJ declined representation with respect to 57 referrals. Two referrals were withdrawn by the service member, and the remaining 11 referrals involved State agencies and, in agreement with DOL, DOJ declined to pursue litigation.

The cases referred to the Civil Rights Division in FY 2012 involved a number of USERRA issues. Approximately 26% (29) of these cases involved allegations of termination and/or discharge, approximately 33% (37) of these cases involved reemployment allegations, while approximately 18% (20) of these cases involved allegations of loss or denial of benefits, such as loss of pay, assignment, reduction or loss of pension or health benefits, and loss of seniority. The remaining cases involved various forms of discrimination, with approximately 13% (14) involving failure to promote, approximately 12% (13) involving failure to hire, approximately 2% (2) involving service-connected disability, and approximately 61% (68) involving actions affecting the service member's terms and conditions of employment, such as discipline or harassment. The remaining 5% (5) of these cases involved allegations of retaliation for asserting USERRA protection.⁸

CASES REFERRED TO THE OFFICE OF THE SPECIAL COUNSEL

During Fiscal Year 2012, DOL referred 23 cases to OSC at the request of the service member, under 38 U.S.C. Sec. 4324. Additionally, 18 cases referred to OSC during the previous fiscal year remained pending at the beginning of Fiscal Year 2012.⁹ Thus, 41 total cases were pending at OSC during the fiscal year. OSC did not file any actions with the U.S. Merit Systems Protection Board during the fiscal year, but obtained corrective action for four service members, including two service members for whom OSC provided legal representation.

In 33 of the 41 cases, the service member alleged discrimination based on uniformed service, including termination, non-promotion, non-selection, or improper denial of employment benefits; in 10 cases, violations of reemployment rights; and in five cases, retaliation for exercising USERRA rights.¹⁰

⁸ Several cases involved multiple issues. Each issue was counted separately.

⁹ One referral counted here as pending at the beginning of FY 2012 had actually been referred by DOL to OSC during FY 2011; however, that case file was not received by OSC until FY 2012.

¹⁰ The totals do not add up to 41 cases because some cases contain multiple allegations (i.e., there were 48 allegations in the 41 cases).

Of the 41 total cases, OSC completed 30 cases during Fiscal Year 2012, while 11 cases remained pending at the end of the fiscal year. OSC did not file any actions with the U.S. Merit Systems Protection Board during the fiscal year, but obtained corrective action for four service members, including two service members for whom OSC provided legal representation

USERRA cases referred to OSC by DOL under 38 U.S.C. Sec. 4324 are separate and apart from USERRA complaints received by OSC under the current USERRA Demonstration Project (*see* “**USERRA DEMONSTRATION PROJECT**”).

iv. COMPLAINTS FILED BY THE ATTORNEY GENERAL

The Department of Justice filed nine USERRA complaints in FY 2012. Eight of these cases have now settled and the remaining case is in active litigation.

v. CASES REVIEWED BY DOL AND ESGR INVOLVING THE SAME PERSON

DOL’s response to Mandated Reporting Requirement # 5, setting forth the number of cases reviewed by DOL and DOD through ESGR that involve the same person, indicates that in comparing ESGR data on USERRA cases during the fiscal year, 258 likely matches were identified. This figure indicates that first ESGR, and subsequently DOL, handled the same individuals’ claims. The claims included allegations of the following issues:

CASES REVIEWED BY DOL AND ESGR INVOLVING THE SAME PERSON USERRA ISSUE	CASES ALLEGING ISSUE*	
	NUMBER	PERCENT
Military obligations discrimination	107	41.5%
Reinstatement	71	27.5%
Other non-seniority benefits	6	2.3%
Promotion	8	3.1%
Vacation	3	1.2%
Status	12	4.7%
Pay rate	16	6.2%
Reasonable accommodation/ retraining for non-qualified/non-disabled	1	0.4%
Discrimination as retaliation for any action	16	6.2%
Seniority	17	6.6%
Pension	7	2.7%
Initial hiring discrimination	6	2.3%
Layoff	6	2.3%
Special protected period discharge	6	2.3%
Health benefits	5	1.9%
Reasonable accommodations/retraining for disabled	4	1.6%
Other	5	1.9%

* Note: Many USERRA cases involve multiple issues, and VETS records all the USERRA issues involved in a case. As a result, the number of cases in this chart exceeds the 258 ESGR and VETS cases involving the same person, and the combined percentages exceed 100%. Matching of FY 2012 ESGR cases and VETS cases initially opened 10/1/2011 to 10/31/2012 is based on claim dates and claimant names.

DOL closed all of these 258 likely matches by May 31, 2013, under the following closure codes: no merit, 85 (33%); administrative, 19 (7%); claim granted, 48 (19%); claim settled, 26 (10%); claim withdrawn, 42 (16%); not eligible, 8 (3%); referred, 22 (9%); merit, not resolved, 7 (3%); merit undetermined, 1 (<1%). An explanation of VETS case closure codes appears in the explanation of the status of cases reviewed by DOL.

VETS' Data For 258 Likely Case Matches with FY 2012 ESGR Cases*

VETS' USERRA Issue Codes	VETS' Close Codes									NUMBER OF CASES:	PERCENT:
	Administrative	Claim Granted	Claim Settled	Claim Withdrawn	Merit Undetermined	Merit, Not Resolved	No Merit	Not Eligible	Referred		
Military Obligations Discrimination	8	15	12	21	1	5	43	2	7	114	44.2%
Reinstatement	4	19	11	9	0	6	22	4	5	80	31.0%
Other Non-Seniority Benefits	0	1	0	2	0	0	4	0	1	8	3.1%
Promotion	0	1	0	3	0	0	3	0	2	9	3.5%
Vacation	0	2	0	2	0	0	0	0	0	4	1.6%
Status	0	3	1	4	0	1	4	0	1	14	5.4%
Pay Rate	0	4	3	4	0	1	5	0	2	19	7.4%
Reasonable Accommodations/Retraining for Non-Qualified/Non-Disabled	1	1	0	0	0	0	0	0	0	2	0.8%
Discrimination as Retaliation for any Action	2	1	0	7	0	0	8	0	0	18	7.0%
Seniority	2	4	2	7	0	0	1	0	1	17	6.6%
Pension	1	4	0	0	0	0	0	1	2	8	3.1%
Initial Hiring Discrimination	0	1	1	1	0	0	3	0	0	6	2.3%
Layoff	2	0	1	1	0	0	2	0	0	6	2.3%
Special Protected Period Discharge	0	1	2	2	0	1	2	0	0	8	3.1%
Health Benefits	1	0	0	1	0	0	3	0	0	5	1.9%
Reasonable Accommodations/Retraining for Disabled	0	0	0	1	0	0	0	1	2	4	1.6%
Other	0	2	0	0	0	0	2	0	1	5	1.9%
NUMBER OF CASES:	21	59	33	65	1	14	102	8	24	327	
PERCENT:	8.1%	22.9%	12.8%	25.2%	0.4%	5.4%	39.5%	3.1%	9.3%		126.7%

* Note: Many USERRA cases involve multiple issues, and VETS records all the USERRA issues involved in a case. As a result, the number of cases in this chart exceeds the 258 ESGR and VETS cases involving the same person, and the combined percentages exceed 100%. Matching of FY 2012 ESGR cases and VETS cases initially opened 10/1/2011 to 10/31/2012 is based on claim dates and claimant names.

8. WITH RESPECT TO THE CASES REPORTED ON PURSUANT TO PARAGRAPHS 1, 2, 3, 4, AND 5, THE NUMBER OF SUCH CASES THAT INVOLVE PERSONS WITH DIFFERENT OCCUPATIONS OR PERSONS SEEKING DIFFERENT OCCUPATIONS, AS DESIGNATED BY THE STANDARD OCCUPATIONAL CLASSIFICATION SYSTEM.

VETS is the only federal agency that collected occupational data on USERRA claimants and recorded the respective Standard Occupational Classification System (SOCS) code in FY 2012. Therefore, SOCS code data is not available for cases filed only with ESGR.

VETS was able to obtain the SOCS code in 98% (1,252) of the unique complaints filed in FY 2012. That data reveal that 21% of complaints involved Protective Service occupations. Another 11% involved Office and Administrative Support occupations, and 9% involved Transportation and Material Moving occupations.

With respect to cases reviewed by VETS and ESGR likely involving the same person in FY 2012, VETS obtained the SOCS code in all but one of the 258 cases. That data reveal that 23% of those cases involved Protective Service occupations, 9% involved Office and Administrative Support occupations, and each of the following occupational categories involved 7% of these cases: Management; Sales and Related; Installation, Maintenance, and Repair; and Healthcare Practitioners and Technical.

With respect to cases referred to the Attorney General's DOJ Civil Rights Division from DOL in FY 2012, VETS obtained the SOCS code in all but two of the 111 cases. That data reveals that 25% of those cases involved Protective Service occupations. Two other occupational categories each involved 11% of these cases: Transportation and Material Moving; and, Management.

VETS obtained the SOCS code in all 23 of the cases referred to OSC from DOL through VETS and SOL in FY 2012. That data reveals that 22% of cases involved Business and Financial Operations, 17%

involved Protective Service occupations, and three other occupational categories each involved 13% of these cases: Office and Administrative Support; Healthcare Practitioners and Technical; and, Life, Physical, and Social Science.

Occupations Involved in FY 2012 USERRA CASES¹¹				
As designated by the Standard Occupational Classification System (SOCS)				
SOCS Job Family	Percentage of Cases involving SOCS Code			
	VETS Cases	Referrals to		Common to VETS & ESGR
		DOJ	OSC	
Protective Service	21%	25%	17%	23%
Office and Administrative Support	11%	6%	13%	9%
Transportation and Material Moving	9%	11%	4%	6%
Management	8%	11%	4%	7%
Sales and Related	7%	3%	0%	7%
Installation, Maintenance, and Repair	7%	3%	0%	7%
Production	5%	2%	0%	4%
Healthcare Practitioners and Technical	4%	6%	13%	7%
Food Preparation and Serving Related	4%	2%	0%	2%
Business and Financial Operations	4%	6%	22%	2%
Education, Training, and Library	3%	6%	0%	5%

9. AN INDICATION OF WHETHER THERE ARE ANY APPARENT PATTERNS OF VIOLATION OF THE PROVISIONS OF THIS CHAPTER, TOGETHER WITH AN EXPLANATION THEREOF.

No patterns of violations of USERRA became apparent in FY 2012. DOL will continue to monitor USERRA cases to identify trends as they arise.

¹¹ The following occupations accounted for 2% or fewer within each case/referral category shown in this chart (*with exceptions as noted here*): Architecture and Engineering (*Exception: 4% of Cases Common to VETS & ESGR*); Arts, Design, Entertainment, Sports, and Media; Building and Grounds Cleaning and Maintenance; Community and Social Services; Computer and Mathematical (*Exceptions: 4% of Referrals to both DOJ & OSC, and 5% of Cases Common to VETS & ESGR*); Construction and Extraction (*Exception: 5% of Referrals to DOJ*); Farming, Fishing, and Forestry; Healthcare Support (*Exception: 4% of Referrals to OSC*); Legal (*Exceptions: 6% of Referrals to DOJ & 4% of Referrals to OSC*); Life, Physical, and Social Science (*Exception: 13% of Referrals to OSC*); Military Specific; and, Personal Care and Service occupations.

10. RECOMMENDATION FOR ADMINISTRATIVE OR LEGISLATIVE ACTION THAT THE SECRETARY, THE ATTORNEY GENERAL, OR THE SPECIAL COUNSEL CONSIDERS NECESSARY FOR THE EFFECTIVE IMPLEMENTATION OF THIS CHAPTER, INCLUDING ANY ACTION THAT COULD BE TAKEN TO ENCOURAGE MEDIATION, BEFORE CLAIMS ARE FILED UNDER THIS CHAPTER, BETWEEN EMPLOYERS AND PERSONS SEEKING EMPLOYMENT OR REEMPLOYMENT.

RECOMMENDATION FROM DOJ AND DOL: *Strengthen the United States’ ability to enforce USERRA, in the following ways: Ensure that USERRA is consistent with other civil rights laws by allowing the United States to bring suit in its own name as the plaintiff, to vindicate the public interest in ensuring the statute is enforced; to challenge identified patterns and practices that violate the law; to preserve the right of the aggrieved Service Member to intervene in such suits or to bring his or her own suit where the Attorney General has declined to file suit; and to allow the Attorney General the authority to compel production of evidence.*

The Departments of Justice and Labor urge Congress to strengthen the United States’ ability to enforce USERRA, including by the means set forth in two provisions of the “Putting Our Veterans Back to Work Act of 2013,” S. 6, which would significantly strengthen the Attorney General’s authority to enforce USERRA. First, Section 401 of S. 6 would amend USERRA to allow the Attorney General, acting on behalf of the United States, to serve as a plaintiff in all USERRA suits, rather than only in suits filed against State employers. At the same time, it would preserve the right of the aggrieved Service Member to intervene in such suits or to bring his or her own suit where the Attorney General has declined to file suit.

S. 6 would also grant independent authority to the Attorney General to investigate and file suit to challenge employment policies or practices that establish a pattern or practice of violating USERRA. This amendment would strengthen significantly DOJ’s ability to enforce USERRA to address a systemic violation (such as a policy prohibiting extended absences, including absences for military service) that could adversely affect the employment rights of multiple Service Members.

Finally, to support the proposed pattern-or-practice authority, Section 404 of S. 6 would further amend USERRA to provide the Attorney General with civil investigative demand authority to compel the production of existing documents and unsworn answers to written questions from the custodian of such documents. DOL has subpoena power in its investigations under USERRA. The Attorney General, however, has no pre-suit investigatory authority. Because the proposal for pattern-or-practice authority includes the authority to initiate an investigation, Congress should provide the Attorney General with some investigative tools. The civil investigative demand proposal in S. 6 is narrow in scope and would be subject to the same limitations that apply to DOJ’s authority under the False Claims Act.

DOJ and DOL look forward to working with Congress on these USERRA provisions.

USERRA annual reports are available for fiscal years (FY) 1995-1999 and 2004-2012. No reports are available for FY 2000-2003 because the reporting requirement expired in FY 2000. It was reinstated by Section 202 of the Veterans Benefits Improvement Act of 2004, P.L. 108-454, 118 Stat. 2598 (December 2004).



OFFICE OF VETERANS' EMPLOYMENT AND TRAINING
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