

Fiscal Year 1995 Report to Congress on the
EMPLOYMENT AND REEMPLOYMENT RIGHTS OF
MEMBERS OF THE UNIFORMED SERVICES

The Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA or the Act) was signed into law on October 13, 1994. This Act is codified at title 38, chapter 43, United States Code. USERRA is a complete revision of the predecessor Veterans' Reemployment Rights Statute. Section 4332 of the Act requires an annual report to the Congress on case processing activity for the preceding fiscal year (FY) beginning in 1996 and continuing annually through the year 2000. This is the first such report and covers actions taken during FY 1995. This report is made in consultation with the Attorney General and the United States Special Counsel.

While USERRA revised and clarified previously existing law and case law, it also includes several new provisions. The Act provided for the first time, a means whereby employees of the Federal government could be assisted in the protection of their rights by the Secretary of Labor (Secretary) and the Office of Special Counsel, an independent agency charged with investigating and prosecuting prohibited personnel practices and enforcing other federal employment laws. The Act also provided a mechanism for the enforcement of the employment and reemployment rights of employees of Federal non-appropriated fund activities. USERRA strengthened the role of the Department of Labor (DOL) by clarifying the authority of the DOL to conduct investigations and by providing the Secretary with the authority to issue subpoenas. Additionally, the Act provided persons exercising rights and persons assisting in investigations conducted under USERRA protection from employer retaliation.

1. Cases Reviewed by the Department of Labor in FY 1995:

Cases Opened:

In FY 1995, the Veterans' Employment and Training Service (VETS) on behalf of the Secretary opened 1,387 new cases and continued the investigation of 167 cases opened in the previous fiscal year. Cases opened increased 15% over the number of cases (1208) opened in FY 1994. This increase is partially attributable to cases opened on behalf of employees of the Federal government. The remainder of the increase may be attributed to the extensive publicity and education efforts of the Departments of Defense and Labor following the enactment of USERRA.

Of the cases opened in FY 1995, 1079 (77.7%) involved private employers, 232 (16.6%) involved states or the political subdivisions of states, and 76 (5.4%) involved Federal agencies. Cases were opened on behalf of 1069 (77%) Reserve component personnel, 289 (21%) veterans, and 29 (2%) persons who were undergoing examination for military service.

Many cases involved multiple issues. Of the cases investigated in FY 1995, 494 involved complaints of employer refusal to reinstate or reemploy the individual following a period of

military service; 469 cases involved discharge from employment because of military service or obligation; 48 cases involved the refusal of an employer to hire an individual with a military obligation; 28 cases involved discharging individuals during the period of protection from discharge without cause; and 13 cases involved complaints of improper layoffs because of military obligation, or layoffs because military service was not properly credited to seniority. The cases involving issues other than the hiring or firing of claimants included 138 cases that involved issues pertaining to seniority; 91 cases involved denied promotions; 91 cases involved vacation; 85 cases involved the accommodation or retraining of servicemembers; 83 cases involved pay rates; 50 cases involved employee pension benefit plan issues; 45 cases involved issues pertaining to health benefit plans; and 14 cases involved the retraining or reasonable accommodations for disabled servicemembers.

VETS issued one subpoena under the authority USERRA provides the Secretary. The case involved a single employer and eight claimants.

Cases Resolved:

In FY 1995, VETS closed 1,252 cases, of which 85 percent (1,059) were closed in 90 days or less and 91 percent (1,144) were closed in 120 days or less. At the close of FY 1995 only one case remained open for a period greater than one year. This case, which involves an employee of the District of Columbia, has remained open pending issuance of payment by the District under the settlement agreement. Investigation and processing continue for the remaining 301 cases which were opened in FY 1995.

The individuals received all, or substantially all, of that to which they were entitled under the law in 399 cases. Mutually agreeable settlements occurred in 164 cases. Individuals who withdrew their claims during the investigation numbered 136.

Investigations resulted in determination that the claims were without merit in 323 cases and that claimants were not eligible for benefits under USERRA in 57 cases. The claimant's not cooperating with the investigation, not responding to requests for additional information, or simultaneously pursuing the same claim with the assistance of a third party resulted in 104 cases being administratively closed. Sixty-seven cases were processed for referral to the Attorney General and one case was processed for referral to the Special Counsel.

VETS' actions resulted in \$710,062 in lost wages and benefits being recovered for claimants.

2. Cases Referred to the Attorney General and Special Counsel:

Attorney General:

Upon the request of the claimants, VETS refers complaints involving private employers or states and their political subdivisions to the Attorney General when unable to achieve a satisfactory resolution. The Civil Division of the Department of Justice (DOJ) and the U.S. Attorneys act on behalf of the Attorney General in USERRA matters.

The DOL forwards to the DOJ a packet that contains the investigative file, analysis and recommendation of the investigator, review and recommendation of the Regional Administrator of VETS, and legal analysis and opinion of the Regional Solicitor of Labor. Based on a review of this packet, DOJ refers the case to the U.S. Attorney for further review and appropriate action or denies the claimant representation. If the U.S. Attorney is reasonably satisfied that the claimant is entitled to the benefits sought, he or she may provide representation in the appropriate U.S. district court. The statute also provides for a private right of action.

In FY 1995, the DOJ received 51 referrals from the Secretary. Based on the initial review DOJ forwarded 26 (51%) of these cases to U.S. Attorneys and DOJ declined representation in 21(41%) of these cases. At the end of FY 95 the remaining four cases (8%) were still under review.

In FY 1995, U.S. Attorneys filed complaints in district court on behalf of 10 claimants, represented two claimants at trial, and negotiated settlements in 11 cases. Two individuals withdrew their claims after the U.S. Attorneys filed complaints on their behalf. U.S. Attorneys declined to provide representation in 14 cases and returned one case to the DOL for the development of additional evidence.

Claimants recovered \$236,033 in lost wages and benefits as a result of the efforts of the Department of Justice.

Office of Special Counsel:

As stated previously, USERRA clarified and significantly strengthened the employment and reemployment rights of Federal employees who perform in a uniformed service. In doing so, the Act provided new responsibilities for the Office of Special Counsel(OSC).

Under USERRA, an individual who receives notification from the Secretary of an unsuccessful effort to resolve a complaint of violation of reemployment rights between the individual and a federal executive agency may request that the Secretary refer the complaint for adjudication by the Merit Systems Protection Board (MSPB). If such a request is made, the Secretary refers the complaint to the OSC in the same manner as referrals made to the DOJ. If reasonably satisfied that the claimant is entitled to the rights or benefits sought, the Special Counsel may appear as counsel for the claimant and initiate an action before the MSPB. The Special Counsel may also represent the claimant before the

U.S. Court of Appeals for the Federal Circuit on appeal from an MSPB decision. If the Special Counsel declines to initiate an action before the MSPB, the Special Counsel shall notify the claimant of that decision. The claimant may then file a complaint directly with the MSPB.

In FY 1995 the OSC received one USERRA referral from the DOL. That case was still being considered by the OSC at the close of FY 1995.

3. Trends:

The number of cases opened on behalf of Reserve component personnel continues to increase as a percentage of the total number of cases opened. In FY 1992, 59% of cases were opened on behalf of Reserve component personnel. This percentage increased to 69% in FY 1993, increased to 75% in FY 1994, and increased again to 77% in FY 1995. This steady increase may be attributed to the growing use of the Reserve components to provide for national security, and the decreasing number of personnel in the Active components.

4. Legislative Action Recommendations:

The Assistant Secretary of Labor for Veterans' Employment and Training testified in support of certain technical amendments to title 38, chapter 43, before the Subcommittee on Education, Training, Employment and Housing of the House Committee on Veterans' Affairs on August 2, 1995. These amendments continue to be needed to provide for the effective implementation of USERRA. Accordingly, we suggest title 38, chapter 43 be amended to:

1. Accurately reflect the totality of the character of the service requirement of section 4304, which establishes the events that terminate entitlement to rights under chapter 43.
2. Clarify the circumstances under which the President can designate groups of persons to have rights under chapter 43.
3. Clarify that the standards and burden of proof set out in this chapter apply to both the anti-discrimination and anti-reprisal provisions, and that the anti-discrimination and anti-reprisal provisions are applicable to the "brief, nonrecurrent" positions described in section 4312(d)(1)(C).
4. Clarify that protection under this chapter includes not only the period of uniformed service, but also the period prior to entering service that is required to prepare for and travel to the site where the uniformed service is performed.
5. Clarify that the exemption from the cumulative period of service that an individual can serve and still be protected

by chapter 43 is restricted to service in support - either directly or indirectly - of a war or a national emergency declared by the President or the Congress.

6. Provide conformity between section 4312(d)(2)(C) and section 4312(d)(1)(C) in describing the type of position excluded from protection by chapter 43.

7. Clarify the time limit during which missed payments can be made into an employee pension benefit plan.

8. Clarify the right of the Secretary to have access to witnesses during investigations under chapter 43.

Not previously testified to, but also required for the effective implementation of this chapter is an amendment to clarify that the use of vacation or other accrued time off to perform service in a uniformed service is the option of the servicemember, and cannot be required by the employer.

These amendments to chapter 43, title 38, are incorporated in H.R. 2289, which was approved by the House of Representatives in December 1995, and then referred to the Senate Veterans' Affairs Committee.

Additionally, changes to the Internal Revenue Code are required to reconcile the qualification provisions of the Code that apply to employee pension benefit plans with the requirements of USERRA. The President's FY 1997 budget submission contains tax code revisions to accomplish these changes.