

U. S. DEPARTMENT OF LABOR

**Assistant Secretary
for
Veterans' Employment and Training**

**UNIFORMED SERVICES EMPLOYMENT
AND REEMPLOYMENT RIGHTS ACT OF 1994
(USERRA)
ANNUAL REPORT**

**TO
CONGRESS**

FOR FISCAL YEAR 1998

PREPARED BY:

**OFFICE OF THE ASSISTANT SECRETARY
FOR VETERANS' EMPLOYMENT AND TRAINING**

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INTRODUCTION

The Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA, or the Act) was signed into law on October 13, 1994. The Act is codified at chapter 43, Title 38, United States Code, sections 4301-4333. USERRA is a sweeping revision of the predecessor Veterans' Reemployment Rights Act.

Section 4332 of USERRA requires an annual report to the Congress on case processing activity for the previous fiscal year (FY) beginning in 1996 and continuing annually through the year 2000. This is the fourth such report and covers actions taken during FY 1998. This report was prepared in consultation with the Attorney General and the United States Office of Special Counsel.

UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS

1. CASE ACTIVITY BY DEPARTMENT OF LABOR IN FY 1998

Cases Opened:

In FY 1998, the Veterans' Employment and Training Service (VETS), on behalf of the Secretary of Labor, opened 1,051 new cases and continued the investigation of 198 cases opened during the previous FY. Cases opened decreased 15.6% from the number of cases (1,245) opened in FY 1997.

Of the cases opened in FY 1998, 692 (66%) involved private employers, 204 (19%) involved States or political subdivisions of States, and 155 (15%) involved Federal employers. Of FY 1998 cases, 815 (78%) were opened for National Guard or Reserve members, 210 (20%) for military veterans, and 26 (2%) for persons with no prior or current military membership (applicants, for example).

Many of the cases opened by VETS involved multiple USERRA issues. Of 1,051 cases opened in FY 1998, 1,394 issues were identified. Approximately 61% of the case issues involved hiring and firing. Included were: 448 case issues (32%) involving employment discrimination because of an individual's military service or obligations or because of an individual's actions to enforce the protections of USERRA; 270 case issues (19%) involving refusal to reinstate or reemploy an individual following a period of military service; 46 (3%) concerning

layoff because of military obligations; 37 (3%) that involved refusal by an employer to hire an individual because of military service or obligations; and 6 (<1%) concerned termination of a person during the statutory period of protection from discharge without cause following reemployment.

Issues involving other than hiring and firing of claimants included: 67 (5%) on seniority; 46 (3%) on failure to provide non-seniority benefits; 39 (3%) on denied promotions; 56 (4%) on vacations; 47 (3%) on reasonable employer efforts to accommodate, retrain, or otherwise qualify for work a returning disabled service member; 8 (1%) on reasonable employer efforts to accommodate, retrain, or otherwise qualify for work a non-disabled returning service member; 67 (5%) on pay rates; 59 (4%) on status in employment; 56 (4%) on pension benefit plans; 23 (2%) on health benefits; and 117 case issues (8%) on various other issues not among the foregoing specified issue categories. (Due to rounding of percentages, the total exceeds 100%.)

Cases of Reprisal:

Section 4311(b) of USERRA provides that an employer may not discriminate in employment or take any adverse employment action against any person because such person (1) has taken an action to enforce a protection afforded any person under this Act, (2) has testified or otherwise made a statement in or in connection with any proceeding

under this Act, (3) has assisted or otherwise participated in an investigation under this Act, or (4) has exercised a right provided for in this Act. In FY 1998, there were no such cases opened by VETS.

Cases Resolved:

In FY 1998, VETS closed 1,055 cases, of which 802 (76%) were closed within 90 days or less, and 892 (85%) were closed in 120 days or less. At the end of FY 1998, 7 cases remained open for a period of greater than one year. Six of those cases have since been closed. The remaining case is being prepared for referral.

Of the 1,055 closed cases, there were 425 (40%) USERRA claims resolved through VETS' mediation efforts. In these cases, VETS' actions helped bring about recovery of \$1,098,588 in lost wages and benefits for claimants. There were 88 (8%) closures because individuals chose to withdraw their claims during the investigation. In 284 (27%) cases, VETS' investigation resulted in a determination that the claim was without merit. In 33 (3%) cases, claimants were found to be not eligible for the remedies or benefits sought. In 175 cases (17%), there was administrative closure by VETS because the claimant failed to cooperate with the investigation or simultaneously pursued the claim with the assistance of a third party. The remainder of cases (approximately 5%) were processed for referral to either the Attorney General or the Office of Special Counsel. Referrals are covered in detail below.

Subpoenas:

VETS issued five subpoenas (to a single

employer) during FY 1998 under authority provided by section 4326 of USERRA. The employer served complied with the subpoenas.

2. CASES REFERRED TO THE ATTORNEY GENERAL AND OFFICE OF SPECIAL COUNSEL

Attorney General:

Upon the claimant's request, section 4323(a)(1) of the Act provides that VETS will refer to the Attorney General cases against private and State employers that are not resolved through VETS' efforts. The Civil Division of the Department of Justice and the United States Attorneys' Offices (USAOs) act on behalf of the Attorney General on USERRA matters.

VETS refers cases to the Civil Division through the Department of Labor's Regional Solicitors (RSOL). Each referral includes: the VETS investigative file; a VETS memorandum analyzing the case and providing a recommendation, based upon the facts and the law, as to whether representation should be provided or declined; and the RSOL's analysis and recommendation.

Based upon a review of the record, the Civil Division either forwards the case to the USAO for review and appropriate action or declines representation and returns it to the RSOL due to a lack of merit. In cases received from the Civil Division, the USAO makes an independent determination as to the case's merits. If reasonably satisfied that the claimant is entitled to the remedies or benefits sought, the USAO, in coordination with RSOL, represents the

claimant and attempts to resolve the matter, through litigation if necessary.

In FY 1998, the Civil Division received 54 cases from VETS through RSOL. The Civil Division forwarded 16 cases to the USAOs and declined representation in 33 based upon the Department of Labor's recommendation that they lacked merit. The remaining five cases were under review by the Civil Division at the close of FY 1998. In addition, Civil Division attorneys representing the United States and assisted by Department of Labor attorneys have intervened at the invitation of the presiding Federal district court judge in a USERRA case. In that case, the Department of Justice is defending the constitutionality of the private right of action granted by USERRA against a State as employer.

In 1998, USAOs filed complaints in district courts on behalf of nine claimants, represented two claimants at trial, and negotiated settlements in nine cases. The USAOs declined representation in eleven cases based on their findings that the cases lacked merit. For the year 1998, claimants recovered \$357,229 in lost wages and benefits after intervention by the Department of Justice.

Office of Special Counsel:

USERRA significantly strengthened the employment and reemployment rights of Federal employees who perform service in the uniformed services. With USERRA's enactment, VETS was authorized to investigate claims brought by Federal employees. Also, section 4324(a)(1) of the Act provides Federal employees the opportunity to request referral of their

cases to the Office of Special Counsel (OSC) who may represent them before the Merit Systems Protection Board (MSPB). This new provision parallels the assistance by the Attorney General available to claimants in cases involving State or private employers.

In FY 1998, the OSC received five cases from the Department of Labor. The OSC declined representation in two of those cases as well as one case that was carried over from FY 1997. The OSC initiated no USERRA actions before the MSPB during FY 1998. Three USERRA referrals were pending at the end of FY 1998. In two of those, the OSC has since declined representation. The remaining referral remains under review.

3. TRENDS

In last year's report, we noted that in cases where claims are filed against Federal employers, the cases that are not resolved quickly often tend to take more time to bring to closure than similar non-Federal cases. During FY 1997, the average age for non-Federal cases closed was 62.9 days, while Federal cases closed averaged 67.3 days. For FY 1998, the gap widened, to 64.0 days for non-Federal vs. 73.6 days for Federal. Also, while the total number of new cases opened in 1998 decreased nearly 16% compared to the previous FY, the number of Federal cases opened increased more than 50%, from 102 in 1997 to 155 in 1998. While the majority of cases filed against Federal employers ultimately prove to be without merit, the length of time they take to resolve is a concern to VETS. Education of Federal executive agencies on

USERRA, described below, was a priority for VETS during the past year. Additionally, VETS investigators are receiving focused training on Federal employment laws and regulations during FY 1999. These educational efforts are expected over time to yield improvement in this area.

4. EFFORTS TO IMPROVE AWARENESS OF USERRA

USERRA Advisor:

The USERRA Advisor system, introduced by Secretary Herman on November 24, 1997, provides electronic information on USERRA to employers as well as protected persons on the Department of Labor Internet home page at <http://www.dol.gov>. The Advisor can be found in the VETS section of the Department's "e-laws" page.

Employer Outreach:

During FY 1998, Secretary Herman led a sweeping and aggressive USERRA educational outreach directed at employers. While the outreach focused primarily on discrimination protection under USERRA, it included information on all the provisions of the Act. Specific actions were taken to reach both private and Federal employers.

Private Employer Outreach:

During Summer 1998, VETS mailed USERRA informational materials to 60,000 Federal contractors and sub-contractors, including most of the Nation's largest corporations. VETS followed that mailing with an outreach to nearly 1,000 associations and other organizations that represent American

employers. Using mailing lists developed within the Department, VETS sent information to entities that represent the spectrum of businesses, from the U.S. Chamber of Commerce to the Maple Flooring Manufacturing Association.

Federal Employer Outreach:

During FY 1998, VETS greatly expanded efforts to improve awareness of USERRA among Federal employers at all levels. In March 1998, Secretary Herman sent a memorandum on USERRA to all cabinet members. At the same time, the Deputy Secretary of Labor made a presentation to fellow members of the President's Management Council urging them to promote awareness of the Act within their departments and agencies. During the ensuing months, VETS staff have been seeking opportunities to address human resources professionals within the executive branch. By the end of the FY, presentations had been made to nearly 400 personnel and legal staff. More than a dozen agencies and departments were contacted, including the MSPB. These outreach efforts will continue indefinitely. VETS believes that establishing links with headquarters-level managers in the agencies will foster improved compliance throughout those agencies, down to the local office level.

5. LEGISLATIVE ACTION RECOMMENDATIONS:

VETS has no recommendations for new legislation to amend USERRA. Shortly after the end of FY 1998, the Congress passed and the President signed veterans legislation that contained three USERRA amendments in which we expressed a

strong interest in last year's report. The amendments: provide USERRA coverage for persons employed overseas by U.S. employers; provide that the MSPB will adjudicate VRR law claims against Federal employers arising prior to USERRA's enactment; and improve USERRA enforcement mechanisms for employees of State governments.