



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

**FISCAL YEAR 2006**

**ANNUAL REPORT  
TO  
CONGRESS**

**FEBRUARY 2008**

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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.

38 U.S.C. § 4301, Purpose and Sense of Congress.

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Greetings,

I am pleased to present the Fiscal Year 2006 (FY06) Annual Report on the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), summarizing the number of cases investigated and other accomplishments during FY06. VETS conducted outreach to a record number of employers and educated them on their USERRA obligations. Since the terrorist attacks of September 11, 2001, we have briefed approximately 250,000 Reservists and National Guard members on their rights under USERRA.

In 2006, we implemented a new case management process, created a shared electronic case and data management system, entered into a Memorandum of Understanding with the Employer Support of the Guard and Reserve (ESGR), promulgated USERRA final regulations, and created a corps of six regional senior investigators with a chief senior investigator in the national office. We believe these actions will help expedite effective processing of USERRA claims.

USERRA cases have become more complex than in the past and frequently involve multiple issues. This is due to longer and more frequent deployments of National Guard and Reserve members. In response, our USERRA investigators are re-doubling their efforts to resolve and document cases with greater attention to detail. Our Senior Investigators are focused on resolving the most difficult cases and on assisting investigations underway in their respective regions, as necessary.

We will continue to educate employers and service members about their responsibilities and rights under USERRA, and will do our best to ensure that our returning service men and women from the Global War on Terror are well received by employers and properly reintegrated into their civilian jobs.

Sincerely,

  
Charles S. Ciccolella

# INTRODUCTION

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The Uniformed Services Employment and Reemployment Rights Act of 1994, 38 U.S.C. §§ 4301-4334, (USERRA) was signed into law on October 13, 1994. USERRA prohibits discrimination in employment on the basis of an individual's: prior service in the uniformed services; current obligations as a member of 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 who has testified or otherwise assisted in an investigation 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 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 applies to United States employers operating overseas as well.

This report was prepared under Section 4332 of USERRA, 38 U.S.C. 4332, 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 under this chapter during the fiscal year for which the report is made.
2. The number of cases referred to the Attorney General or the Special Counsel pursuant to Section 4323 or 4324, respectively, during such fiscal year.
3. The number of complaints filed by the Attorney General pursuant to Section 4323 during such fiscal year.
4. The nature and status of each case reported pursuant to paragraph 1, 2, or 3.
5. An indication of whether there are any apparent patterns of violation of the provisions of this chapter together with an explanation thereof.
6. Recommendations 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.

**USERRA annual reports are available for fiscal years 1995–1999 and 2004–2005. No reports are available for fiscal years 2000–2003 because the reporting requirement expired in 2000. It was reinstated by Section 202 of the Veterans Benefits Improvement Act of 2004, P.L. 108-454, 118 Stat. 3598 (December 10, 2004). This Report covers Fiscal Year 2006 and is the third report to Congress under the reinstated reporting requirement.**

# PROGRAM OVERVIEW

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In order to foster better understanding of the USERRA program, the purpose of USERRA and the case management process are described below as a context for the congressionally- mandated information.

USERRA, 38 U.S.C. §§ 4301-4334, 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. USERRA mandates that employers may be liable for funding their share, if any, to the service member's retirement plans. Discrimination related to service in the military, the National Disaster Medical System or the commissioned corps of the Public Health Service is prohibited. USERRA protects anyone (civilian or veteran) from reprisal when either exercising rights under the statute itself, or when assisting in an investigation. Eligibility requirements for service members generally provide that the absence must be due to service; advance notice (orally or in writing) must be given to the employer; cumulative period(s) of service while employed by the employer must not exceed five years; application for reemployment must be timely; and that the discharge must not be disqualifying.

**USERRA CASE MANAGEMENT PROCESS OVERVIEW**  
USERRA investigations are complaint driven and may originate from a variety of sources. Cases originate with the filing of the VETS complaint form, VETS 1010, directly with VETS, including electronically through an on-line submission process. Cases can also be generated from complaints originally reviewed by the National Committee for Employer Support of the Guard and Reserve (ESGR), with the subsequent submission of a VETS 1010 complaint form filed with a VETS local field office. In addition, complaints may evolve from technical assistance requests.

## **ESGR OUTREACH**

The Department of Defense's ESGR maintains a national network of over 900 trained volunteer ombudsmen to educate USERRA stakeholders and to help resolve USERRA compliance issues. They are an essential component of USERRA education for America's employers. These volunteers receive

training on USERRA and dispute resolution techniques, and serve as the informal mediators between the employer and employee to inform and educate all parties on the requirements of the law. In situations in which the ESGR ombudsman assesses a claimant's position as meritorious, the ombudsman assists claimants and employers to reach agreeable solutions.

ESGR is an essential partner to DOL/VETS in providing services to Guard and Reserve members seeking assistance under USERRA. In 2006, DOL signed a Memorandum of Understanding (MOU) with ESGR to improve information sharing regarding USERRA cases. ESGR also maintains an informal working agreement with the Office of Special Counsel. Under the terms of the MOU with DOL, if ESGR is unable to resolve a matter it deems meritorious within 14 days, their ombudsmen will recommend that the claimant submit a VETS 1010 complaint form to pursue the matter through the VETS formal investigative process.

At the writing of this report, Congress is considering legislation that would require future USERRA Annual Reports to Congress to include information on complaints received by ESGR during the fiscal year (FY) covered by the report. In recognition of the Congress' interest, the Department requested and ESGR provided the information available for FY06, which is included as an Appendix to this report. The Department will work with ESGR to provide a format and appropriate reporting categories for such information in future reports.

## **THE VETS INVESTIGATIVE PROCESS**

Upon receipt of an electronically-filed or signed completed complaint form (the VETS 1010), VETS will open a formal investigation within five business days.

The assigned investigator will then undertake a review of all documentary evidence and will interview all available identified witnesses, under authority of subpoena if necessary. VETS investigators are advocates for the law, and the veteran. However, they must remain neutral until the investigation is complete. In order to ensure that investigations are of the highest quality and are conducted in a uniform and timely manner, VETS has developed standard operating

procedures setting forth standards that its investigators must meet in order to be considered fully successful in performing their assigned duties. These standard operating procedures not only ensure consistent quality in case administration, but are also highly useful in protecting the claimant's privacy, as well as avoiding potential conflicts of interest or other improprieties. VETS standard investigative procedures preclude investigators from contacting an employer or initiating an investigation before the signed or electronically-filed VETS 1010 has been received.

If the evidentiary record during a USERRA investigation supports the allegations made, VETS' role shifts from neutrality to that of advocate for the employee. The agency then attempts to obtain satisfactory resolution through negotiation or mediation. VETS encourages all parties to resolve disputes and avoid litigation. This is in keeping with the Purpose and Sense of Congress "*to minimize the disruption to the lives of persons performing service in the uniformed services as well as to their employers....*" 38 U.S.C. §4301.

A claimant whose case is being investigated by VETS may also be represented by a third party, so long as the third party does not interfere with VETS' investigation. Accordingly, if a third party representative contacts the employer during VETS' investigation, such unauthorized contact may result in VETS closing the case administratively.

#### **VETS REFERRAL PROCESS**

A claimant may request referral to the Department of Justice (DOJ) for claims involving private and State/local government entities or to the Office of Special Counsel (OSC) for claims involving Federal executive agencies. VETS must refer a claim if the claimant so requests, regardless of whether VETS has found merit in the complaint. Also, at any point during the investigative process, the claimant may elect to withdraw the case and pursue enforcement through private counsel.

#### **DOJ ENFORCEMENT**

If the Attorney General is reasonably satisfied that the claimant is entitled to relief, then the Attorney General may exercise his prosecutorial authority and represent the service member's USERRA claim. On September 28, 2004, DOL signed an MOU with the Attorney General outlining each agency's role in handling claims arising under USERRA. The MOU confirmed DOJ's and DOL's longstanding commitment to ensuring that service members' USERRA rights are protected.

The MOU modified the procedures regarding the conduct of USERRA investigations and referrals to improve the processing of many USERRA referrals and to allow for prompt resolution of complaints. DOJ, VETS, and DOL's Regional Solicitors Offices (RSOL) have worked cooperatively to meet the MOU's goals, including the recent implementation of a new integrated case management system that will increase communication between the agencies. DOJ, VETS, and RSOL will continue in FY07 to improve and refine the processes they have established to guarantee future success.

In the MOU, the Attorney General assigned responsibility for handling USERRA referrals to DOJ's Civil Rights Division. Within the Civil Rights Division, USERRA referrals are assigned to the Employment Litigation Section (ELS). ELS is made up of approximately seventy attorneys, paralegals, and support staff. Until the 2004 MOU, ELS's primary responsibility had been to enforce provisions of Title VII of the Civil Rights Act of 1964 against state and local government employers. Over the past forty years, ELS attorneys have investigated, litigated and resolved some of the most complicated employment discrimination cases in the country. This experience has made ELS well-suited to assume responsibility for enforcing USERRA.

Since the signing of the MOU, members of ELS's management staff regularly participate in monthly USERRA conference calls with DOL's National Office of the Solicitor and RSOL offices. These monthly teleconferences allow participants to discuss developing USERRA issues and provide ELS the opportunity to share any issues it may be experiencing in processing USERRA referrals. In addition, DOJ has taken measures to ensure attorneys handling USERRA referrals receive training in USERRA jurisprudence. Each attorney joining ELS receives USERRA training materials. DOJ periodically provides continuing legal education to update ELS staff on USERRA developments. Finally, ELS management staff actively participated in the creation and integration of the new USERRA case management information system.

#### **OSC ENFORCEMENT**

OSC's enforcement responsibilities apply in the Federal sector USERRA cases. Pursuant to an existing MOU between DOL and OSC, case referrals from DOL to OSC are addressed in a manner very similar to that employed in DOJ referrals discussed above.



# FY06 PROGRAM ACTIVITIES AND ACHIEVEMENTS

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In order to increase awareness of rights and responsibilities among USERRA stakeholders, the Secretary of Labor, under USERRA authority, directed the Department to promulgate regulations (an authority not previously exercised). Prepared in consultation with the Secretary of Defense, these regulations implement the law as it applies to States, local governments, and private employers. The USERRA regulations became effective January 18, 2006, and were codified as 20 C.F.R. Part 1002. Written in a plain-English question-and-answer format, the regulations cover all aspects of USERRA. In the rulemaking process, the Department of Labor reviewed more than 300 comments from 80 sources on the proposed rule to address topics important to employers and service members.

Employers, benefits associations, law firms, veterans, reserve component members and military attorneys were the principal source of substantive comments. Their collective recommendations involved health and pension benefits, reemployment positions, rate of pay, the form and timing of advance notice, employees' waivers of reemployment rights and various other issues. VETS carefully considered all comments. This process was critical to determining whether changes to the proposed rule were warranted.

The campaign to increase USERRA stakeholder awareness of rights and responsibilities continued in 2006 through periodic updates of the USERRA elaws Advisor ([www.dol.gov/elaws/userra.htm](http://www.dol.gov/elaws/userra.htm)), targeted outreach to stakeholders, USERRA training provided at the National Veteran Training Institute (NVTI), and a USERRA 101 basic online instruction (<http://nvti.cudenver.edu/USERRAcd/>). The USERRA online instruction course is primarily intended for use by VETS employees, as well as by ESGR ombudsmen. The purpose of this course is to introduce and reinforce understanding of the various employment and reemployment protections set forth in the USERRA statute itself. VETS continues to improve USERRA case management coordination and the program's operational efficiency across Federal agencies.

In April 2006, VETS commissioned a system enhancement project aimed at creating a shared electronic case and data management system. The enhanced USERRA Information Management System (UIMS) allows VETS' Federal partners with administrative and enforcement responsibilities under USERRA (OSC, DOL and ESGR) to access the system, thereby transforming the UIMS into a centralized system for tracking individual USERRA cases throughout their lifecycle. It should be noted that each of the stakeholder agencies still maintain their own systems for case tracking, but the VETS enhanced UIMS provides a centralized means for those agencies to track cases from their inception to resolution.

In July 2006, VETS designated a corps of six regional Senior Investigators and a Chief Senior Investigator in the VETS national office to provide training and guidance to regional investigative staffs, as well as to provide quality assurance reviews of existing USERRA cases and review closed USERRA cases. In addition, they are responsible for preparing memorandums of referral (MORs) and maintaining oversight of all compliance activities undertaken in their respective regions. They are also responsible for providing training at USERRA basic and investigator courses as well as Veterans' Employment Opportunity Act (VEOA) courses held at the National Veterans Training Institute (NVTI) in Denver, Colorado (to ensure that course material is current and properly applied).



...VETS is helping make the process seamless.



### **DOL/OSC Demonstration Project**

Section 204 of the Veterans Benefits Improvement Act of 2004 (VBIA), P.L. 108-454, established a three-year demonstration project by which OSC must investigate Federal sector USERRA claims brought by persons whose social security numbers have an odd-numbered terminal digit. VETS retains even-numbered Federal sector cases. VETS investigators have received training from OSC on identifying cases in which other prohibited personnel practices are alleged (so-called "mixed claims") and immediately refer those cases containing such allegations to OSC.

In FY06, OSC received and opened 169 cases under the demonstration project. Sixty-seven (67) percent (114/169) of those cases came from VETS, and thirty-three (33) percent (55/169) were filed directly by service members or their representatives with OSC. Twenty-five (25) percent (43/169) of the demonstration project cases opened in FY06 were mixed claims. The

remaining seventy-five (75) percent (126/169) were filed by service members having a social security number that ended in an odd-numbered digit whose claims did not also contain a prohibited personnel practice allegation.

The 169 demonstration project cases contained 176 USERRA allegations. The 176 allegations were comprised of 127 discrimination allegations (72%), 28 reemployment allegations (16%), 16 disabled veteran discrimination allegations (9%), and 5 retaliation allegations (3%).

OSC obtained corrective action in twenty-seven (27) percent (34/125) of the demonstration project cases closed in FY06.

The OSC demonstration project was scheduled to end September 30, 2007.



### **MANDATED REPORTING REQUIREMENTS**

THIS REPORT WAS PREPARED IN ACCORDANCE WITH SECTION 4332 OF USERRA, 38 U.S.C. § 4332, 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 MATTERS 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.**

The Department of Labor (VETS) reviewed 1357 cases in FY06. Reviewed cases are those cases opened in conjunction with a signed or electronically-filed 1010-form (complaint form). The Department of Labor also carried over an additional 217 cases from FY05. The GAO has expressed concern that individuals who file a VETS 1010 form be counted as only one case in VETS' reporting. The count of cases reviewed in FY06

eliminates one area where duplication might have existed in previous reports. That is, when cases were closed in one state and reopened in another based on the location of the employer. However, if a case is closed and subsequently reopened by VETS at the claimant's request, it may be counted as two cases. VETS will work to ensure that the FY07 report includes only unique cases.

#### **2. THE NUMBER OF CASES REFERRED TO THE ATTORNEY GENERAL OR THE SPECIAL COUNSEL PURSUANT TO SECTION 4323 OR 4324, RESPECTIVELY, DURING SUCH FISCAL YEAR.**

##### **Attorney General (DOJ)**

In FY06, 81 merit and non-merit USERRA complaints were referred to DOJ through DOL's Regional Solicitors. The DOJ Civil Rights Division's Employment Litigation Section (ELS) handled 75 of these complaints and referred 6 to United States Attorneys offices for investigation. ELS completed its own review of 29 referrals.

##### **U.S. Office of Special Counsel**

At the start of FY06, OSC had six USERRA referrals pending. OSC received and opened 11 merit and non-merit USERRA referrals from the U.S. Department of Labor in FY06.

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

**Attorney General (DOJ)**

In FY06, DOJ, which includes the Civil Rights Division and U.S. Attorneys' Offices (USAOs), filed 4 complaints in Federal District Court on behalf of

USERRA claimants and resolved 3 cases through consent decrees. Two of the consent decrees entered related to complaints filed in FY06, and one of the consent decrees related to a complaint filed in FY05.

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

**Cases Reviewed by DOL**

During FY06, DOL reviewed 1357 cases and 217 reviewed cases were carried over from FY05.

The total combined percentage of all USERRA issues alleged in the cases reported exceeds 100% because many USERRA cases involve multiple allegations. The nature of allegations reported are as follows: military obligations discrimination 33.6%; reinstatement 24.3%; other non-seniority benefits 9.1%; promotion 7.3%; vacation 6.1%; status 6.6%; pay rate 6.3%; reasonable accommodation/ retaining for non-qualified/non-

disabled 0.3%; discrimination as retaliation for any action 5.8%; seniority 5.4%; pension 4.4%; initial hiring discrimination 3.4%; layoff 3.1%; special protected period charge 2.5%; health benefits 1.9%; reasonable accommodations/retraining for disabled 1.7%; and other 11.6%.

DOL closed 1377 cases in FY06 under the following closure codes: no merit 383; administrative 280; claim granted 245; claim settled 169; claim withdrawn 136; not eligible 71; referred 93. An explanation of case closure codes follows.



**CASE CLOSURE CODES EXPLAINED**

- **ADMINISTRATIVE CLOSURE (AD):** 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 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 claim, 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 (CG):** When the employer grants all of the claimant's entitlements.
- **CLAIM SETTLED (CS):** When the claimant and the employer agree to settle the claim for less than the claimant's full entitlements under USERRA.
- **WITHDRAWN CLAIM (CW):** When the claimant informs VETS in writing of his/her desire to withdraw the claim.
- **NOT ELIGIBLE (NE):** 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 (NM):** The claimant is not entitled to any 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.

**Cases Referred to and Complaints filed by the Attorney General (DOJ)**

In FY06, the DOJ Civil Rights Division's Employment Litigation Section (ELS) received 81 case referrals from VETS through the Regional Solicitor of Labor (RSOL). The Civil Rights Division forwarded 6 cases to the USAOs, and declined representation in 71 cases, including 15 cases referred in previous years, based upon the division's independent analysis and the Department of Labor's recommendation that they lacked merit.

The cases referred to the Civil Rights Division in FY06 involved a number of USERRA issues. Approximately twenty-seven percent or 22 of these cases involved allegations of termination, another approximately twenty-four percent or 20 of these cases involved allegations of improper reinstatement, while approximately thirty-one percent or 25 of these cases involved allegations of various forms of discrimination such as failure to promote, failure to hire, improper discipline, and retaliation. The remaining approximately forty-four percent or 36 of these cases involved other USERRA issues, including loss of pay, loss or reduction in benefits or leave, and loss of seniority. There was some overlap because many of the cases involved allegations of discrimination in addition to the underlying adverse action. In those instances, ELS staff counted each issue separately.

In FY06, the Department of Justice filed 4 complaints in Federal District Court on behalf of USERRA claimants and resolved 3 cases through consent decrees. Settlements were negotiated in 3 cases. USAOs declined representation in 4 cases (including 3 cases

referred in FY05), based on their findings that the cases lacked merit. Eleven cases remained under USAO review at the end of FY06 (including 7 cases from previous fiscal years).

ELS attorneys are currently litigating *Woodall et al. v. American Airlines, Inc.* in the U.S. District Court for the Northern District of Texas. In that case, the complaint alleged class USERRA violations against American Airlines, Inc. The named plaintiffs were all military pilots who were also commercial pilots for American. The complaint alleged that, based upon American Airlines' audit of military leave taken by American Airlines pilots in 2001, American Airlines reduced the employment benefits of those pilots who had taken military leave, while not reducing the same benefits of those who had taken similar types of non-military leave. Specifically, the complaint alleged that non-military pilots were allowed to accrue sick leave and vacation time and bid on flights while similarly situated pilots on military leave were not allowed to do so.

In FY07, DOL will continue to work with DOJ to ensure referrals are promptly and carefully processed and that each meritorious referral is resolved to the satisfaction of the veteran and the government. While DOJ will continue to aggressively pursue litigation when warranted, it seeks to resolve meritorious referrals without litigation whenever feasible. Avoidance of litigation allows the veteran to receive relief without having to endure lengthy delays inherent in litigation, and provides DOJ the opportunity to leverage its resources to assist a greater number of claimants.

**Cases Referred to OSC**

**Nature of Referrals Received** – The 11 referrals received in FY06 were comprised of 7 discrimination cases (64% of total referrals), two reemployment cases (18%), and two cases containing both discrimination and reemployment allegations (18%).

**Disposition of Referrals** – OSC processed (i.e., reviewed, conducted supplemental investigations, and

resolved, closed, or designated as MSPB litigation) 14 referrals during the fiscal year. Three USERRA referrals were pending at the end of the fiscal year.

OSC declined representation in 11 referrals. The Special Counsel obtained corrective action in three referrals and also successfully resolved one referral that had been previously designated for litigation and was pending before the MSPB.

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

**Department of Labor**

**Federal Military Leave Cases** – The Department of Labor worked cooperatively and successfully during FY06 with officials from the Department of Defense and the Office of Personnel Management to address administratively an expected surge in cases rising from a decision by the U.S. Court of Appeals for the Federal Circuit in *Butterbaugh v. Department of Justice*, 336 F.3d 1332 (Fed. Cir. 2003). The court in that case held that, pursuant to 5 U.S.C. § 6323, Federal employees could be required to take military leave only on days which they were required to work and that agencies

should have allowed 15 workdays – not calendar days – of military leave for reserve training. Believing that administrative processing of *Butterbaugh* claims could produce quicker relief for service members than could be achieved through the normal USERRA investigation and litigation process, the Labor Department opened a dialog with DOD and OPM. These talks resulted in comprehensive guidance that now helps Federal human resource officers resolve these cases quickly and efficiently, leaving VETS investigators free to concentrate on other equally important USERRA matters.

**Office of the Special Counsel**

**Educating the Federal Sector and Preventing Future Violations via Systemic Relief** – In FY06, OSC identified two common USERRA violations. The first involved the manner in which a Federal employer handled the reemployment of injured service members. For example, many Federal employers were unaware of their obligation to seek placement assistance from the U.S. Office of Personnel Management upon determining that it was unable to reemploy the injured service member. The second violation concerned the kinds of documentation that federal employers demanded from service members requesting leave in

connection with military service.

In response to those problems, OSC created federal employer training documents that identify and explain federal employers’ obligations regarding these two issues. Whenever these issues are identified during the course of an OSC USERRA investigation, the training document is sent to the involved agency to be disseminated to managers and human resource staff. When such letters were sent, the agencies were grateful to receive appropriate guidance from OSC.

**6. RECOMMENDATIONS 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.**

a) Currently, a person who dies while serving on active duty will not receive any pension credit under USERRA because pension rights do not mature until reemployment. Congress may wish to consider amending USERRA to provide that if a person dies during an absence due to performance of active duty, the individual’s estate would receive proper credit for the period of service up to the date of death.

b) USERRA does not incorporate a statute of limitations and expressly precludes application of a State statute of limitations. At least one court, however, has held that the four-year general Federal statute of limitations, 28 U.S.C. 1658, applies to actions under USERRA. *Rogers v. City of San Antonio*, 2003 WL 1566502 (W.D. Texas), *reversed on other grounds*, 392 F.3d 758 (5th Cir. 2004). The Department of Labor’s regulations presume that there is no statute of limitations, but Congress may wish to consider amending USERRA to clarify that no statute of limitations may apply to USERRA.

# APPENDIX

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## Report of the Employer Support of the Guard and Reserve

Employer Support of the Guard and Reserve (ESGR) is a Department of Defense organization within the Office of the Assistant Secretary of Defense for Reserve Affairs (OASD/RA). ESGR provides information, education, and when necessary, informal mediation, for employers of Guard and Reserve members, as designated through Department of Defense Directive 1250.1. The ESGR mission is to gain and maintain active support from all public and private employers for the men and women of the National Guard and Reserve. As such, ESGR is the primary DOD organization dedicated to providing its customers and stakeholders with information about USERRA.

ESGR has conducted outreach to Reserve component (RC) members and the nation's employers since its inception in 1972. Hundreds of thousands of RC members and employers have benefited from ESGR products and services. Since the terrorist attacks of September 11, 2001, and the subsequent Global War on Terrorism, ESGR has ramped up its activity in step with the increased mobilization of the RC.

ESGR has a 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 National 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 National Guard or Reserve service, training, or duty requirements through information services and informal mediation.
- Assist in educating National 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 Reserve component employees, in order to sustain National Guard and Reserve participation.

Today, more than 4,000 volunteers serve on local ESGR Committees. With help and resources from the National ESGR Headquarters in Arlington, Virginia, the 56 ESGR Field Committees conduct employer support programs, including Ombudsmen services and employer outreach programs to further the understanding and compliance of USERRA regulations.

ESGR conducts both proactive outreach programs and offers reactive Ombudsmen services in support of its mission.

### Outreach Programs

ESGR conducts awareness and recognition programs aimed at employers of RC members to engender positive support for Guard and Reserve service. These programs include the voluntary participation by employers in the 5-Star Employer Program and recognition of employers who go "above and beyond" the requirements of USERRA.

Five-Star employers are those who have completed the following steps:

1. Sign Statement of Support – demonstrable compliance of USERRA
2. Review HR policy
3. Train supervisors and managers on USERRA
4. Provide "Above and Beyond" HR policy
5. Advocate for Guard/Reserve

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.



All employer recognition and awards originate from nominations by individual Reserve component members, and recognize individual supervisors through the Patriot Award, and culminate in national recognition of the most outstanding employers through the annual Secretary of Defense Employer Support Freedom Award.

During FY06, ESGR recognized 16,193 supervisors of RC members through the Patriot Award. During the same time period, 11,396 employers participated in the 5-Star Employer Program, and the National Committee on ESGR received 918 nominations for the Secretary of Defense Employer Support Freedom Award. In comparison, during FY05, ESGR recognized 18,102 supervisors of RC members through the Patriot Award. During the same time period, 10,909 employers participated in the 5-Star Employer Program, and ESGR received 1,492 nominations for the Freedom Award.

### **Ombudsman Services**

The primary means of assistance in preventing, resolving, or reducing employer and/or employee problems and misunderstandings that result from National Guard or Reserve membership is done through a nationwide Ombudsman Program. The Ombudsman Program provides information, informal mediation, and referral service to resolve employer conflicts. ESGR is not an enforcement agency and does not have statutory authority to offer formal legal counsel or to participate in any formal litigation process.

ESGR provides a national network of over 900 volunteer Ombudsmen to help resolve USERRA compliance issues. These volunteers receive training on USERRA and dispute resolution techniques, and serve as informal mediators between the employer and employee to inform and educate all parties on the requirements of the law and to assist in finding a mutually agreeable solution.

The ESGR Ombudsman Program is but one avenue available to RC members and their employers in resolving USERRA issues. The Department of Labor has Congressional authority to investigate USERRA violations. RC members and employers may also retain private counsel.

ESGR signed a Memorandum of Understanding (MOU) in 2006 with the Department of Labor (DOL) to improve information sharing regarding USERRA cases, and also has an informal working agreement with the Office of Special Counsel. These inter-agency relationships have considerably improved services provided to all customers regarding USERRA issues. ESGR classifies incoming queries to its Ombudsman Program as information-only queries, or as actual Ombudsman cases. Information-only queries are those resolved through a factual provision of the law. Cases are defined as a specific challenge due to perceived or actual violation of the law. The MOU between ESGR and the DOL stipulates that ESGR forward any case not informally resolved by ESGR after 14 days to the DOL.

During FY06, ESGR received 8,158 inquiries. Of those, 5,093 were information-only, and 3,065 were actual USERRA cases. Of those 3,065, ESGR resolved all but 87, and referred those 87 to the DOL. During FY05, ESGR received 7,897 inquiries. Of those, 3,761 were informational, and 4,136 were USERRA cases. ESGR resolved all but 141 of the 4,136 ombudsman cases, and referred the 141 to DOL.



FOR USE BY PRIVATE SECTOR AND STATE GOVERNMENT EMPLOYERS



# YOUR RIGHTS UNDER USERRA THE UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT

**USERRA protects the job rights of individuals who voluntarily or involuntarily leave employment positions to undertake military service or certain types of service in the National Disaster Medical System. USERRA also prohibits employers from discriminating against past and present members of the uniformed services, and applicants to the uniformed services.**

## REEMPLOYMENT RIGHTS

You have the right to be reemployed in your civilian job if you leave that job to perform service in the uniformed service and:

- ★ you ensure that your employer receives advance written or verbal notice of your service;
- ★ you have five years or less of cumulative service in the uniformed services while with that particular employer;
- ★ you return to work or apply for reemployment in a timely manner after conclusion of service; and
- ★ you have not been separated from service with a disqualifying discharge or under other than honorable conditions.

If you are eligible to be reemployed, you must be restored to the job and benefits you would have attained if you had not been absent due to military service or, in some cases, a comparable job.

## RIGHT TO BE FREE FROM DISCRIMINATION AND RETALIATION

If you:

- ★ are a past or present member of the uniformed service;
- ★ have applied for membership in the uniformed service; or
- ★ are obligated to serve in the uniformed service;

then an employer may not deny you:

- ★ initial employment;
- ★ reemployment;
- ★ retention in employment;
- ★ promotion; or
- ★ any benefit of employment

because of this status.

In addition, an employer may not retaliate against anyone assisting in the enforcement of USERRA rights, including testifying or making a statement in connection with a proceeding under USERRA, even if that person has no service connection.

The rights listed here may vary depending on the circumstances. This notice was prepared by VETS, and may be viewed on the internet at this address: <http://www.dol.gov/vets/programs/usama/pectar.htm>. Federal law requires employers to notify employees of their rights under USERRA, and employers may meet this requirement by displaying this notice where they customarily place notices for employees.

## HEALTH INSURANCE PROTECTION

- ★ If you leave your job to perform military service, you have the right to elect to continue your existing employer-based health plan coverage for you and your dependents for up to 24 months while in the military.
- ★ Even if you don't elect to continue coverage during your military service, you have the right to be reinstated in your employer's health plan when you are reemployed, generally without any waiting periods or exclusions (e.g., pre-existing condition exclusions) except for service-connected illnesses or injuries.

## ENFORCEMENT

- ★ The U.S. Department of Labor, Veterans Employment and Training Service (VETS) is authorized to investigate and resolve complaints of USERRA violations.
- ★ For assistance in filing a complaint, or for any other information on USERRA, contact VETS at **1-866-4-USA-DOL** or visit its **website at <http://www.dol.gov/vets>**. An interactive online USERRA Advisor can be viewed at <http://www.dol.gov/elaws/userra.htm>.
- ★ If you file a complaint with VETS and VETS is unable to resolve it, you may request that your case be referred to the Department of Justice for representation.
- ★ You may also bypass the VETS process and bring a civil action against an employer for violations of USERRA.



U.S. Department of Justice



U.S. Department of Labor  
1-866-487-2365



1-800-336-4590

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FOR USE BY FEDERAL EXECUTIVE AGENCIES



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- ★ you have five years or less of cumulative service in the uniformed services while with that particular employer;
- ★ you return to work or apply for reemployment in a timely manner after conclusion of service; and
- ★ you have not been separated from service with a disqualifying discharge or under other than honorable conditions.

If you are eligible to be reemployed, you must be restored to the job and benefits you would have attained if you had not been absent due to military service or, in some cases, a comparable job.

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- ★ If VETS is unable to resolve a complaint that has not been transferred for investigation under the demonstration project, you may request that your case be referred to the Office of Special Counsel for representation.
- ★ You may also bypass the VETS process and bring a civil action against an employer for violations of USERRA.

The rights listed here may vary depending on the circumstances. This notice was prepared by VETS, and may be viewed on the internet at this address: <http://www.dol.gov/vets/programs/userra/poster.htm>. Federal law requires employers to notify employees of their rights under USERRA, and employers may meet this requirement by displaying this notice where they customarily place notices for employees.



Office of Special Counsel  
202-254-3620



U.S. Department of Labor  
1-866-487-2365



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**OFFICE OF VETERANS' EMPLOYMENT AND TRAINING SERVICE  
U.S. DEPARTMENT OF LABOR  
200 CONSTITUTION AVENUE, NW  
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