



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

**FISCAL YEAR 2007**

**ANNUAL REPORT**

**TO**

**CONGRESS**

**JANUARY 2009**

Office of the Assistant Secretary  
Veterans' Employment & Training  
U.S. Department of Labor

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, Purposes and Sense of Congress.

# TABLE OF CONTENTS

LETTER FROM ASSISTANT SECRETARY CHARLES CICCOLELLA	i
INTRODUCTION	1
PROGRAM OVERVIEW	2
USERRA OUTREACH AND CASE MANAGEMENT PROCESS OVERVIEW	2
ESGR OUTREACH	2
THE VETS INVESTIGATIVE PROCESS	3
VETS REFERRAL PROCESS	4
DOJ ENFORCEMENT	4
OSC ENFORCEMENT	5
FY 2007 PROGRAM ACTIVITIES AND ACHIEVEMENTS	5
DOL/OSC DEMONSTRATION PROJECT	5
MANDATED REPORTING REQUIREMENTS	6
APPENDIX	12







Greetings,

I am pleased to present the U.S. Department of Labor Veterans' Employment and Training Service (VETS) Fiscal Year 2007 Annual Report on the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA).

Our nation remains at war. This war has changed the environment in which VETS operates, and we have responded to these changes by first and foremost doing everything we can to assist service members returning from the Global War on Terror. Primary among those efforts is investigating complaints filed by service members under USERRA. At no time since World War II has the United States relied so heavily on its Reserve and National Guard forces in responding to global contingencies. These forces are no longer just part of the nation's strategic reserve forces. They are also operational forces, often experiencing multiple deployments and engaging in the same missions as the active duty military. As a result, today's USERRA cases are increasingly complex and often involve multiple employment issues. VETS has responded by enhancing and expanding the training and other tools provided to our nationwide staff of professional investigators.

The vast majority of employers support their employees who wear our nation's uniform by complying with USERRA. Service members and employers have a better understanding of the law than ever before, thanks to the Department of Labor's USERRA Regulations that went into effect in January 2006, and to the extensive outreach conducted by VETS and our Federal USERRA partners: the Department of Labor's Office of the Solicitor; the Department of Defense's Employer Support of the Guard and Reserve (ESGR); the Department of Justice Civil Rights Division's Employment Litigation Section (DOJ); and the U.S. Office of Special Counsel (OSC). Since the terrorist attacks of September 11, 2001, VETS alone has briefed approximately 438,000 individuals on USERRA's important protections.

Complaints can, however, result from an employer's failure to fully understand its responsibilities, and many complaints are resolved when ESGR or VETS explains to an employer how the law applies to its particular situation. If an employer refuses to comply, VETS offers to refer the service member's complaint to the appropriate Federal agency (OSC, if a Federal employer, and DOJ for all other employers) for consideration of representation.

This year's report shows once again that VETS and our Federal partners are staunch defenders of USERRA rights and that we continue to send a strong message to employers that USERRA violations will not be tolerated. In addition, VETS makes several recommendations for legislative action that we believe will improve the administration and enforcement of USERRA. We will continue to ensure that service men and women returning from the Global War on Terror are well received by employers and properly reintegrated into their civilian jobs.

Sincerely,

  
Charles S. Ciccolella



## Introduction

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 based on 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 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 reviewed by the Secretary of Defense under the National Committee for Employer Support of the Guard and Reserve of the Department of Defense during the fiscal year for which the report is made.<sup>1</sup>
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.
4. The number of complaints filed by the Attorney General pursuant to Section 4323 during such fiscal year.
5. The nature and status of each case reported pursuant to paragraph 1, 2, 3, or 4.
6. An indication of whether there are any apparent patterns of violation of the provisions of this chapter together with an explanation thereof.
7. 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.

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<sup>1</sup> VETS is of the view that this provision does not govern its Fiscal Year 2007 reporting obligations because the requirement was added to USERRA after the close of Fiscal Year 2007 pursuant to § 595 of the National Defense Authorization Act for Fiscal Year 2008, Pub.L.No. 110-181 (Jan. 28, 2008). Nevertheless, VETS has included pertinent information on this subject in the report's section on ESGR Outreach. VETS' Fiscal Year 2008 USERRA Annual Report will include such information in the "Mandated Reporting Requirements" section.

## **Program Overview**

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 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, veteran or non-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 OUTREACH AND CASE MANAGEMENT PROCESS OVERVIEW**

VETS conducts an aggressive 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 over 438,000 individuals on USERRA. In FY 2007 alone, VETS presented USERRA information to over 85,000 people. Briefings to mobilizing and demobilizing members of the National Guard and Reserves are given in collaboration with the Department of Defense's Employer Support of the Guard and Reserve. Together, the two agencies strive to ensure that every Guard and Reservist participates in a USERRA briefing upon mobilization and demobilization from active military service.

USERRA investigations are complaint driven. An individual who believes that his or her USERRA rights have been violated may file a VETS complaint form, the VETS 1010, directly with VETS, through an on-line submission or by submitting a signed form in person or via mail or facsimile. Some cases result from complaints originally reviewed by the National Committee for Employer Support of the Guard and Reserve, with the subsequent submission of a VETS 1010 complaint form filed with VETS.

### **ESGR OUTREACH**

Employer Support of the Guard and Reserve (ESGR) is a Department of Defense agency that seeks to promote a culture in which all American employers support and value the military service of their employees. It does so by recognizing outstanding support, increasing awareness of the law, and resolving conflicts through informal mediation.

Support remains strong among the approximately 125,000 employers of members of the National Guard and Reserves. The number of employers that signed a "Statement of Support" for the Guard and Reserve increased from 10,909 in FY05 to 11,396 in FY06 to 20,520 in FY07. Additionally, the number of inquiries for USERRA information has been increasing over the past 3 years, from 616 in FY05 to 4,613 in FY06 to 10,742 in FY07.

ESGR is working with the uniformed services and the Department of Labor to raise awareness of USERRA and to provide USERRA training to all Reserve component members. In fact, in FY07, ESGR's 4,500 volunteers provided USERRA briefings to more than 232,000 service members.

These actions have resulted in decreasing employment conflicts between service members and their employers. Service member complaints to the ESGR ombudsman services have declined for the past four years, from 486 per month average in FY04 to a 390 per month average for FY05 to a 262 per month average for FY06 to a 198 per month average for FY 2007.

The Department of Defense requires members of the Reserve components to provide DoD information on their civilian employment. The resulting civilian employment information database has enabled ESGR to prioritize its outreach efforts to employers of members of the Reserve components. These continuing efforts of awareness and support are made possible by the extensive work being done by grassroots volunteers across the country (an estimated 153,000 volunteer hours for FY 2007). The Department of Defense has also provided ESGR significantly more resources over the past five years to better serve its customers and ESGR now has 143 full-time staff around the country in addition to almost 4,500 volunteers. The Defense Department also has a National Customer Service Center that operates 12 hours per day during the workweek to provide better customer service.

ESGR is an essential partner to VETS in providing services to Guard and Reserve members seeking assistance under USERRA. Under the terms of a 2006 Memorandum of Understanding (MOU) between the two agencies, 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.

During FY 2007, ESGR received 13,116 inquiries. Of those, 10,742 (82 percent) were information-only, and 2,374 (18 percent) resulted in actual USERRA cases for mediation. ESGR resolved 1,742 (73 percent) of the 2,374 cases mediated. When a case is not resolved, ESGR recommends to the service member that he or she file a complaint with VETS.

Of the 2,374 Ombudsman cases, 59 percent reported reinstatement/reemployment problems, while 41 percent involved possible discrimination. Less than one percent of reported problems involved possible reprisal.

#### **THE VETS INVESTIGATIVE PROCESS**

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

The assigned investigator collects and reviews pertinent documentary evidence and interviews available witnesses, under authority of subpoena if necessary. In order to ensure that investigations are of the highest quality and are conducted in a uniform and timely manner, VETS investigators are trained to follow the agency's rigorous operating procedures. Investigators do not contact an employer or initiate an investigation before the signed or electronically filed VETS 1010 has been received.

If the evidentiary record 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 and avoid litigation. This is in keeping with the law's stated 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.

At any point during the investigative process, the claimant may elect to withdraw the case and pursue enforcement through private counsel. In addition, a claimant whose case is being investigated by VETS may also be represented by a third party, but VETS will continue its efforts only as long as the third

party does not interfere with the investigation.

### **VETS REFERRAL PROCESS**

Upon completion of the investigation, if the claimant is not fully satisfied with VETS' resolution of the case, VETS advises the claimant in a written closing letter of his or her right to have the case referred to either the U.S. Department of Justice (DOJ) or to the U.S. Office of Special Counsel (OSC), as appropriate. VETS must refer a claim if the claimant so requests, regardless of whether VETS has found merit in the complaint.

### **DOJ ENFORCEMENT**

If VETS cannot resolve a service member's case, the service member may ask VETS to refer the service member's USERRA claim against a private or State employer to the Attorney General for review. If the Attorney General is reasonably satisfied that the service member is entitled to relief, then the Attorney General may exercise DOJ's prosecutorial authority and represent the service member in Federal court in the service member's USERRA claim.

VETS and DOJ Memorandum of Understanding. On September 28, 2004, the Attorney General and the Secretary of Labor signed a Memorandum of Understanding (MOU) outlining each agency's respective 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, expediting the processing of many USERRA referrals and the prompt resolution of claims.

DOJ, VETS, and the DOL's Office of the Solicitor work collaboratively to meet the MOU's goals, and continue to refine the integrated case management system that was put in place in the last fiscal year. This case management system has increased communication between the agencies and allows for more accurate and uniform case tracking by both DOJ and DOL.

In the MOU, the Attorney General reassigned responsibility for handling USERRA referrals from the Civil Division to the Civil Rights Division. Within the Civil Rights Division, USERRA referrals are assigned to the Employment Litigation Section (ELS). ELS is made up of approximately 70 attorneys, paralegals, and support staff. Over the past 40 years, ELS attorneys have prosecuted and resolved some of the most complicated employment discrimination cases in the country. This experience made ELS well-suited to assume responsibility for enforcing USERRA.

Enforcement Procedures. If DOL does not resolve a claim against a State or private employer, upon the claimant's request VETS and the DOL Office of the Solicitor (SOL) will refer the claim to the Attorney General. Each referral includes: (1) the VETS investigative file; (2) a 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 (3) an SOL legal analysis and recommendation regarding the merit of the claim.

Upon receipt of an unresolved USERRA claim from DOL, ELS reviews the complete DOL investigative file and analysis and decides whether to provide representation to the service member. If the Department of Justice is reasonably satisfied that the service member is entitled to relief, DOJ will represent the service member and attempt to resolve the matter – including instituting litigation if necessary. If DOJ determines that it will not represent the servicemember, it will inform the service member that representation will not be provided and that he or she has the right to proceed with private

counsel. In all cases, ELS seeks to ensure that each USERRA referral receives careful attention and is processed as expeditiously as practicable.

In FY 2008, 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 litigation whenever practicable.

#### **OSC 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 are addressed in a manner very similar to that employed in DOJ referrals discussed above.

### **FY 2007 Program Activities and Achievements**

VETS is committed to continuously improving its USERRA outreach, investigations, case management, and coordinating with its partners in other Federal agencies that share responsibility for administering and enforcing USERRA.

In FY 2007, VETS implemented shared access to its USERRA electronic case and data management system. The enhanced USERRA Information Management System (UIMS) allows VETS' USERRA Federal partners (SOL, OSC, DOJ and ESGR) to access the system, allowing all four agencies to obtain aggregate data and access pertinent case information. Currently, VETS, SOL, DOJ and OSC use the UIMS to report USERRA case activities. It should be noted that although each Federal agency also maintains an internal system for monitoring its USERRA activities, VETS' enhanced UIMS provides a centralized means to track cases from their inception to resolution.

In recognition of congressional interest in being able to compare USERRA data across agencies, DOL developed a crosswalk to align the issues identified in ESGR case data with its own data on issues in USERRA cases it investigated. The results of that crosswalk are included as an appendix to this report. Additional enhancements to VETS' USERRA case processing and data quality were initiated in late FY 2007 and will be fully implemented in FY 2008. For example, in FY 2007 all VETS USERRA investigators received new instructions on notifying claimants of their right to referral, and on properly recording claim closure dates in case files and in the electronic database. These instructions will be formalized in VETS' revised USERRA Operations Manual, which will be released in FY 2008.

VETS is also planning to implement a new Quality Assurance Review process for all USERRA cases. This process will require a higher-level supervisory review of VETS' case handling efforts before a claimant is notified of the agency's determination so as to ensure that investigators adhere to agency procedures and standards, and that data entered into the VETS database are accurate. The Quality Assurance Review mechanism will be tested in the near future in select states and, if it is judged to be effective in identifying whether an investigator has appropriately followed required procedures, including accurately identifying and addressing the USERRA issues involved in a timely manner, will be expanded to all states.

#### **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. The demonstration project was scheduled to end September 30, 2007, but Congress extended the project through December 31, 2007. During the project, VETS retained even-numbered Federal sector cases. VETS investigators received training from OSC on identifying cases in which other prohibited personnel practices are alleged (so-called “mixed claims”) and immediately forwarded cases containing such allegations to OSC. In FY 2007, OSC received and opened 139 cases under the demonstration project; 90 of those cases came from VETS, and 49 were filed directly with OSC. During the same time, DOL opened 131 USERRA cases involving Federal employers.

**MANDATED REPORTING REQUIRMENTS**

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 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 1,226 new unique cases in FY 2007.<sup>2</sup> Reviewed cases are those cases opened in conjunction with a signed or electronically filed VETS 1010 complaint claim form. The Department of Labor also carried over an additional 198 unique cases from FY 2006, and during FY 2007 reopened 25 other unique cases from FY 2006 and six from FY 2005 and earlier. In sum, DOL reviewed a total of 1,455 unique cases in FY 2007.

**VETS reviewed a total of 1,455 cases in FY 2007.**

<b>New: 1,226</b>	<b>Carried over from FY 2006: 198</b>	<b>Reopened: 31</b>
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The GAO has expressed concern that individuals who file a VETS 1010 form be counted as only one unique case in VETS’ reporting. Accordingly, this report includes only unique cases reviewed, with the count eliminating the following areas where duplication might have existed in previous reports:

- Cases filed by the claimant multiple times for the same complaint (i.e., duplicates);
- Cases closed in one state and reopened by VETS after reassignment to another state based on the location of the employer; and
- Cases closed and subsequently reopened by VETS at the claimant’s request.

<sup>2</sup> 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.



In order to provide Congress the ability to compare the number of USERRA complaints in FY 2007 to those in previous years, VETS recalculated complaints reported in our USERRA Annual Report to Congress in FY 2004, 2005 and 2006, eliminating duplications in the same manner as done for FY 2007. New unique cases for FY 2004 – 2007 are reported in the table below.

<b>Fiscal Year</b>	<b>FY 2004</b>	<b>FY 2005</b>	<b>FY 2006</b>	<b>FY 2007</b>
<b>New VETS Cases</b>	1,349	1,140	1,265	1,226
<b>OSC Cases</b>	0	112	169	139
<b>Total New Cases</b>	<b>1,349</b>	<b>1,252</b>	<b>1,434</b>	<b>1,365</b>

**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.**

In FY 2007, the Attorney General’s DOJ Civil Rights Division received 59 case referrals from DOL through VETS and SOL.

In FY 2007, the Office of Special Counsel received four case referrals from DOL through VETS and SOL. Four additional cases were carried over from FY 2006.

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

In FY 2007, DOJ, which includes the Civil Rights Division and U.S. Attorney Offices, filed six complaints in Federal district court on behalf of USERRA claimants and resolved three cases through consent decrees. Settlements were negotiated in seven additional cases.

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

**CASES REVIEWED BY THE DEPARTMENT OF LABOR**

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

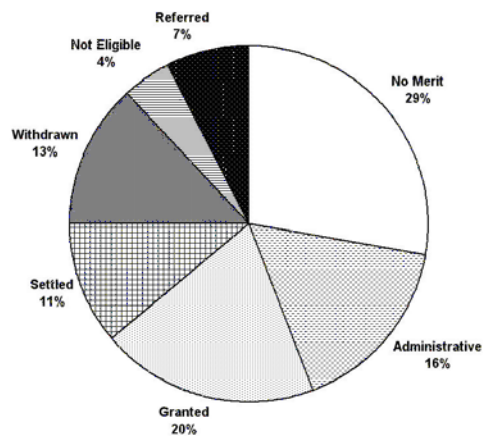
<b>USERRA ISSUE</b>	<b>CASES ALLEGING ISSUE*</b>	
	<b>NUMBER</b>	<b>PERCENT</b>
Military obligations discrimination	450	36.7%
Reinstatement	256	20.9%
Other non-seniority benefits	36	2.9%
Promotion	88	7.2%
Vacation	44	3.6%

USERRA ISSUE	CASES ALLEGING ISSUE*	
	NUMBER	PERCENT
Status	78	6.4%
Pay rate	95	7.8%
Reasonable accommodation/ retraining for non-qualified/non-disabled	2	0.2%
Discrimination as retaliation for any action	84	6.9%
Seniority	74	6.0%
Pension	61	5.0%
Initial hiring discrimination	80	6.5%
Layoff	53	4.3%
Special protected period discharge	19	1.6%
Health benefits	32	2.6%
Reasonable accommodations/retraining for disabled	24	2.0%
Other	149	12.2%

\* Note: Because many USERRA cases involve multiple issues, the number of cases in this chart exceeds the 1,226 new unique cases reported in FY07 and the combined percentages exceed 100%.

DOL closed 1,246 cases in FY 2007 under the following closure codes: no merit 347 (28 percent); administrative 202 (16 percent); claim granted 247 (20 percent); claim settled 140 (11 percent); claim withdrawn 162 (13 percent); not eligible 56 (5 percent); referred 92 (7 percent). An explanation of case closure codes follows.

Reasons for VETS FY 2007 case closures



#### **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 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:** When the employer grants all of the claimant's entitlements.
- **CLAIM SETTLED:** When the claimant and the employer agree to settle the claim 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 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 THE DEPARTMENT OF JUSTICE**

In FY 2007, the Civil Rights Division received 59 case referrals from DOL. In 14 of these cases, DOL found that the case had merit and recommended that DOJ offer representation to the service member. ELS investigated 12 of these case referrals and forwarded the remaining two cases to the appropriate U.S. Attorney's Office (USAO) for investigation. ELS offered representation in three of these cases and declined representation in one case. The remaining eight cases remained under investigation by ELS at the end of the fiscal year. Six cases referred to USAOs, including the two referred in fiscal year 2007, remained open at the end of the fiscal year.

In FY 2007, ELS declined representation in 63 case referrals, including 19 processed in previous fiscal years. These decisions were based upon DOL's recommendation that the cases lacked merit and ELS's independent analysis of the merits of each case.

The cases referred to the Civil Rights Division in FY 2007 involved a number of USERRA issues, as indicated in the following table:

USERRA ISSUE	CASES ALLEGING ISSUE*	
	NUMBER	PERCENT
Termination	18	30%
Improper reinstatement	15	25%
Loss or denial of benefits, such as loss of pay, reduction or loss of pension or health benefits, and loss of seniority	13	22%
Forms of discrimination		
• Failure to promote	5	8%
• Failure to hire	4	7%
• Actions affecting terms and conditions of employment	2	3%
Retaliation for asserting USERRA protection	3	5%

\* One case involved two issues. In this case, each issue was counted separately.

In FY 2007, DOJ – which includes the Civil Rights Division and USAOs – filed six complaints in Federal district court on behalf of USERRA claimants and resolved three cases through consent decrees. Settlements were negotiated in seven additional cases.

**CASES REFERRED TO THE OFFICE OF THE SPECIAL COUNSEL**

Of the four cases referred to the Office of Special Counsel in the fiscal year, two involved discrimination allegations, one involved an allegation of reemployment, and one involved the allegation of both issues. During FY 2007, three of the four cases were closed. In all three of the closed cases, OSC agreed with DOL’s recommendation not to provide representation. Of the cases carried over, two involved discrimination, one involved reemployment, and one involved both; during FY07, one of the cases was closed, and OSC provided representation before the Merit Systems Protection Board (MSPB) in one case, which was still pending before the MSPB at the end of FY07.

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

The Department of Labor has encountered a number of cases involving private employers who supply workers to Federal agencies pursuant to Federal contracts. Depending on the facts and circumstances of the particular case, both the private employer and the Federal agency may be responsible as joint employers for securing applicable USERRA rights. However, litigation of the private employer’s responsibilities falls in the Federal courts, while litigation of the Federal agency’s responsibilities goes to the Merit Systems Protection Board. VETS will continue to monitor such cases to determine whether there may be an emerging pattern and the statutory scheme presents an obstacle to obtaining USERRA remedies in such cases.

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.**

**Successor in Interest:** USERRA defines “employer” very broadly, and includes a “successor in interest.” 38 U.S.C. § 4303(4)(A)(iv). The Department of Labor’s regulations provide, in general, that an employer is a “successor in interest” where there is a substantial continuity in operations, facilities and workforce from the former employer, and stipulate that the determination of whether an employer is a successor in interest must be made on a case-by-case basis using a multifactor test. 20 C.F.R. § 1002.35. However, one Federal court, in a decision made prior to the promulgation of the regulations, held that an employer could not be a successor in interest unless there was a merger or transfer of assets from the first employer to the second. *See Coffman v. Chugach Support Services, Inc.*, 411 F.3d 1231 (11th Cir. 2005); *but see Murphree v. Communications Technologies, Inc.*, 460 F. Supp.2d 702 (E.D. La. 2006) (applying 20 C.F.R. § 1002.35 and rejecting the *Coffman* merger or transfer of assets requirement). Congress should consider clarifying the definition of “successor in interest” by incorporating the Department’s multifactor test for successor in interest into the statute.

**Optional Continuation of Coverage under Employer Health Plan:** USERRA section 4317 gives an employee the right to continue coverage under a health plan during a period of military service, but does not expressly preclude an employer from requiring continuation of such coverage (and charging the employee for his/her share of the premiums) during a period of service. Congress should consider clarifying that USERRA provides service members with the option of electing to continue an employer-provided health plan. This could be accomplished by amending section 4317 to expressly provide that an employer may not require an employee to continue health plan coverage during a period of service that exceeds 30 days.

# Appendix

## Crosswalk of USERRA Issues, FY 2007

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

Primary Categories	ESGR Ombudsman Cases "Problem Codes"	VETS Complaint Cases "Issue Codes" *
<b>Discrimination</b>	A2 Bonus	39
	B6.2, B6.3, B6.4, B6.6 Discrimination	276
	A1 Discrimination ("Pay")	173
	B5 Harassment	182
	B3.1, B3.3, B3.4, B3.8 Work Schedule (Other subparts of B3 do not crosswalk)	125
	B6.1 Hiring or job placement Discrimination	114
	<b>909 Ombudsman Cases (41%)</b>	<b>441 Issues in 433 Complaint Cases (44% of Complaint Cases)</b>
	ID - Military Obligations Discrimination	405
	II - Initial Hiring Discrimination	36
<b>Reinstatement/ Reemployment</b>	A3 Medical Benefits	71
	A4 Retirement Benefits	40
	A5 Seniority-related benefits	91
	A6.1 Other benefits...available to other employees	1
	A6.2, A6.3 Other benefits	18
	{N/A}	
	B4 Vacation Time	98
	B1 Notifying employer about military duty	5
	B2 Granting military leave	74
	C1 Eligibility for reemployment	18
	C2 Time limits for reemployment	27
	C3 Changes in employer circumstances	9
	C4.2, C4.3, C4.4, C4.5, C4.7, C4.8 Job placement	299
	C4.1 Employee denied promotion	4
	C4.6 Job placement...Employer does not accommodate returning disabled employee	24
	{N/A}	
	{N/A}	
C5 Termination Protection	541	
<b>1,320 Ombudsman Cases (59%)</b>	<b>704 Issues in 514 Complaint Cases (52% of Complaint Cases)</b>	
	IH - Health Benefits	30
	IP - Pension	41
	IS - Seniority	54
	IB - Other Non-Seniority Benefits	23
	IZ - Status	70
	IL - Layoff	45
	IV - Vacation	37
	IR - Reinstatement	215
	IT - Promotion	73
	IA - Reasonable Accommodations/Retraining for Disabled	15
	IW - Reasonable Accommodations/Retraining for Non-Qualified/Non-Disabled	1
	IM - Pay Rate	82
	IF - Special Protected Period Discharge	18
<b>Reprisal</b>	B6.5 Reprisal	5
	D1.4 Reprisal	0
	<b>5 Ombudsman Cases (&lt;1%)</b>	<b>59 Issues in 59 Complaint Cases (6% of Complaint Cases)</b>
	ID2 - Discrimination as Retaliation for any Action	59

\* To facilitate comparisons with ESGR data, VETS' data in this chart reflects only National Guard & Reserve (NG&R) complaint cases, whereas ALL complaint cases were reflected earlier in this Report in the "Mandated Reporting Requirements" section. Many of VETS' NG&R complaint cases involved multiple Issue Codes, and some multiple-Issue cases involved multiple Categories; thus, VETS' total percentage of NG&R complaint cases among the three Primary Categories in this chart exceeds 100%.



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/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.

## 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

Publication Date—January 2006

## FOR USE BY FEDERAL EXECUTIVE AGENCIES



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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



1-800-336-4590

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**USERRA annual reports are available for fiscal years 1995–1999 and 2004–2006. 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 2007 and is the fourth report to Congress under the reinstated reporting requirement.**



**OFFICE OF VETERANS' EMPLOYMENT AND TRAINING SERVICE  
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