

**Uniformed Services Employment
and Reemployment Rights Act of 1994
(USERRA)**

**Fiscal Year 2008
Annual Report
to Congress**

October 2009



**Office of the Assistant Secretary
for Veterans' Employment and Training
U.S. Department of Labor**

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Introduction:

The Uniformed Services Employment and Reemployment Rights Act of 1994, 38 U.S.C. §§ 4301-4335, (USERRA) was signed into law on October 13, 1994. USERRA prohibits discrimination in employment based on an individual's: prior service in the uniformed services; 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 Fiscal Year 2008 report was prepared under 38 U.S.C. § 4332(a), which requires the Secretary of Labor, after consultation with the Attorney General and the Special Counsel, to prepare and transmit an annual report to Congress containing the following information for the preceding fiscal year:

1. The number of cases reviewed by the Department of Labor 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.
3. The number of cases referred to the Attorney General or the Special Counsel pursuant to Section 4323 or 4324, respectively, during such fiscal year and the number of actions initiated by the Office of Special Counsel before the Merit Systems Protection Board pursuant to Section 4324 during such fiscal year.
4. The number of complaints filed by the Attorney General pursuant to Section 4323 during such fiscal year.
5. The number of cases reviewed by the Secretary of Labor and the Secretary of Defense through the National Committee for Employer Support of the Guard and Reserve of the Department of Defense that involve the same person.
6. With respect to the cases reported on pursuant to paragraphs 1, 2, 3, 4, and 5 –
 - A. the number of such cases that involve a disability-related issue; and
 - B. the number of such cases that involve a person who has a service-connected disability.
7. The nature and status of each case reported pursuant to paragraph 1, 2, 3, 4, or 5.

8. With respect to the cases reported on pursuant to paragraphs 1, 2, 3, 4, and 5 the number of such cases that involve persons with different occupations or persons seeking different occupations, as designated by the Standard Occupational Classification System.
9. An indication of whether there are any apparent patterns of violation of the provisions of this chapter together with an explanation thereof.
10. Recommendations for administrative or legislative action that the Secretary of Labor, the Attorney General, or the Special Counsel considers necessary for the effective implementation of this chapter, including any action that could be taken to encourage mediation, before claims are filed under this chapter, between employers and persons seeking employment or reemployment.

Overview of USERRA Protections

USERRA generally requires U.S. employers, regardless of size or location of operation (United States, its territories, or any foreign country) to reemploy eligible veterans returning to their civilian employment after a period of service in the uniformed services. It requires employers, with certain exceptions, to provide training to restore competency in duties, and to restore seniority, status, pay, pensions, and other benefits that would have accrued but for the employee's absence due to military service. Under USERRA, employers are generally liable for funding their share, if any, to the civilian retirement plan(s) of the service members. 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.

The Department of Labor and the Department of Defense share responsibility for promoting a clear understanding of USERRA among employers and individuals regarding their respective rights and responsibilities under USERRA. The Department of Labor's Veterans' Employment and Training Service (VETS) and the Department of Defense's Employer Support of the Guard and Reserve (ESGR) provide extensive public education, outreach and compliance assistance with the goal of preventing violations caused by ignorance or misunderstanding of the law, and ensuring that protected individuals understand their rights and know what assistance is available to them to secure those rights.

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

This report begins by describing the levels of federal assistance available, beginning with outreach and education and continuing through informal dispute resolution, formal investigation and resolution, referral, and finally, consideration of whether to provide legal representation. A section highlighting significant program activities and achievements for the fiscal year follows. Finally, the report responds to each of the statutorily-mandated reporting requirements described in the introduction to this report.

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

OVERVIEW

ESGR is a Department of Defense (DoD) directorate within the Defense Human Resources Activity. ESGR provides information, education, and, when necessary, informal dispute resolution for Guard and Reserve members, as designated through Department of Defense Directive 1250.1. The ESGR mission is to gain and maintain employer support for Guard and Reserve service by recognizing outstanding support, increasing awareness of the law, and resolving conflict through mediation. 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 their 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 Guard and Reserve in the context of the DoD Total Force Policy.
- Assist in preventing, resolving, or reducing employer and/or employee problems and misunderstandings that result from Guard or Reserve service, training, or duty requirements through information and dispute resolution services.
- Assist in educating Guard and Reserve members regarding their obligations and responsibilities to employers.
- Use the military chain of command to promote better understanding of the importance of maintaining positive working relations between employers and their Reserve Component employees in order to sustain Guard and Reserve participation.

Today, more than 4,500 volunteers serve on local ESGR Field Committees. With help and resources from the National ESGR Headquarters in Arlington, Virginia, the 56 ESGR Field Committees conduct employer and military outreach programs and Ombudsmen services to further the understanding of and compliance with USERRA regulations.

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

ESGR OUTREACH

ESGR's awareness and recognition programs include the voluntary participation by employers in the Statement of Support Program and recognition of employers who go "above and beyond" the requirements of USERRA.

Employers who sign a Statement of Support are those who pledge:

1. They fully recognize, honor and enforce the Uniformed Services Employment and Reemployment Rights Act.
2. Their managers and supervisors will have the tools they need to effectively manage those employees who serve in the Guard and Reserve.
3. They will continually recognize and support our country's service members and their families in peace, in crisis, and in war.

The ESGR Awards Program is designed to recognize employers for employment policies and practices that are supportive of their employees' participation in the Guard and Reserve.

All ESGR employer recognition and awards originate from nominations by individual Reserve Component members, acknowledging individual supervisors through the Patriot Award, and culminating in national recognition of the most outstanding employers with the annual Secretary of Defense Employer Support Freedom Award.

During FY08, ESGR recognized 14,071 supervisors of RC members through the Patriot Award. During the same time period, 44,861 employers participated in the Statement of Support Program, and ESGR's National Committee received 2,199 nominations for the Secretary of Defense Employer Support Freedom Award.

ESGR OMBUDSMAN SERVICES

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

ESGR signed a Memorandum of Understanding (MOU) in 2005 with the Department of Labor (DOL) that established timelines to resolve USERRA cases, and improved information sharing between the two agencies. DOL has working relationships with the Department of Justice (DOJ) and the Office of Special Counsel (OSC) that oversees the enforcement of USERRA violations. These inter-agency relationships have considerably improved services provided to all customers regarding USERRA compliance. The MOU between ESGR and the DOL stipulates that when a case cannot be resolved by ESGR within 7 working days if it involves pay issues, or 14 working days for non-pay issues, ESGR will close the case and notify the parties that the service member may file a case with DOL or retain private counsel.

ESGR has a national network of over 850 volunteer Ombudsmen to help resolve USERRA compliance issues. ESGR's volunteers receive training on USERRA and dispute resolution techniques, and serve as third-party neutrals 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 Services Program is available to RC members and their employers to address USERRA conflicts without litigation. RC members may also file complaints directly with the Department of Labor, which has authority to investigate USERRA violations and legal authority to subpoena records during an investigation.

ESGR operates and maintains a Customer Service Center (CSC) that acts as the initial entry point for ESGR's USERRA complaints and information requests. The CSC provides expedient, expert telephonic and email responses to service members and employers on all USERRA related matters.

DOL'S USERRA OUTREACH AND CASE MANAGEMENT PROCESS

VETS PUBLIC EDUCATION AND COMPLIANCE ASSISTANCE CAMPAIGN

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 536,000 individuals on USERRA. In FY 2008 alone, VETS presented USERRA information to over 97,000 people. Briefings to mobilizing and demobilizing members of the 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.

VETS INVESTIGATIVE PROCESS

USERRA investigations are complaint driven. An individual who believes that his or her USERRA rights have been violated may file a complaint with VETS online or by submitting a signed form in person or via mail or facsimile. Some complaints originate with the National Committee for Employer Support of the Guard and Reserve, with the subsequent VETS filing. 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 promptly and avoid litigation if possible. 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, their fellow employees, and their communities."* 38 U.S.C. § 4301.

At any point during the investigative process, the claimant may elect to withdraw the complaint 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.

DOL REFERRAL PROCESS

Upon completion of the investigation, if VETS does not resolve the case to the claimant's satisfaction, VETS advises the claimant in a written closing letter of his or her right to have the case referred to either the DOJ or to the OSC, as appropriate. VETS must refer a claim if the claimant so requests, regardless of whether VETS has found merit in the complaint. As part of the referral process, before the case is sent to DOJ or OSC, the Department of Labor's Office of the Solicitor (SOL) conducts a legal review of the case file and ensures that appropriate documentation necessary for litigation is included.

DEPARTMENT OF JUSTICE ENFORCEMENT

When a claimant requests referral of a claim that involves a non-Federal employer, DOL refers the case to the Attorney General for review. If the Attorney General is reasonably satisfied that the service member is entitled to relief, the Attorney General may exercise DOJ's prosecutorial authority and commence an action in federal court on behalf of the service member. If the employer is a State or State agency, the action is brought in the name of the United States. In all other cases, the United States files suit in the name of the service member.

On September 28, 2004, the Attorney General and the Secretary of Labor signed an 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.

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 77 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.

DOJ, VETS and SOL work collaboratively to meet the MOU's goals, and fully utilize the integrated case management system that was put in place in FY 2006. This case management system has increased communication between the agencies and allows for more accurate and uniform case tracking by both DOJ and DOL.

If DOL does not resolve a claim against a State or private employer, upon the claimant's request VETS and the 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 investigative file and analysis and decides whether to provide representation to the service member, or, if the employer is a State, to seek relief on the service member's behalf. If DOJ determines that it will not offer representation, or seek relief on the service member's behalf, it will inform the service member of this decision and notify him or her that he or she has the right to proceed with private counsel. In all cases, ELS ensures that each USERRA referral receives careful consideration and is processed as expeditiously as practicable.

In FY 2009, DOJ will continue to work with DOL to ensure that referrals are promptly and carefully processed and that each meritorious referral is resolved to the satisfaction of the service member and the government. While DOJ will continue to aggressively pursue litigation when warranted, it seeks to resolve meritorious referrals without contested litigation whenever practicable.

OFFICE OF SPECIAL COUNSEL ENFORCEMENT

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

FY 2008 Program Activities and Achievements

VETS made a number of significant improvements to its USERRA case processing and data quality in FY 2008. Most importantly, in February 2008, VETS implemented a new USERRA Operations Manual. The manual was created as an electronic document, and allows investigators to toggle from instructions to the corresponding section of the law or the appropriate regulation. The manual also provides templates for many of the important communications that occur routinely in the course of an investigation. Because the templates are electronic, investigators are able to customize them to address the unique circumstances of a particular investigation, yet still retain the uniformity of the investigative process, including advising claimants whose claims are not resolved of their right to have their cases referred to DOJ or OSC.

An essential component of the Operations Manual's implementation was the launching of a series of regional training conferences. These conferences, which were mandatory for all investigators, consisted of two and one half days of classroom training on USERRA law and regulations, identification of USERRA issues, VETS' investigative procedures, use of the Operations Manual and VETS' investigative database, and customer service. In addition, DOL's Office of the Solicitor provided instruction on referrals, the use of subpoenas and a discussion of recent case law. The Department of Justice participated in one of the conferences, discussing the

role of DOJ in USERRA; the session was so successful that plans were made to include DOJ in all of the FY 2009 training conferences.

VETS also tested a program of Regional Audits of USERRA case files in two of VETS' six regions in FY 2008. Internal auditors from outside the audited regions reviewed randomly selected USERRA case files from each investigator, and discussed their findings with the investigator. The regions were then briefed on the overall findings of the audit of their USERRA case files, and provided recommendations for improvement. The audit program proved so valuable for investigators and managers that plans were made to audit all six regions starting in FY 2009.

Finally, VETS took proactive, aggressive action in FY 2008 to safeguard the privacy of USERRA claimants. In the light of news reports on breaches of electronic data in both the government and private sectors, VETS moved its USERRA investigative database out of a secure contractor facility to its current location in the Department behind the DOL firewall, with information technology (IT) security expertise provided by the Department's IT specialists. This new IT relationship has resulted in enhanced protection of the privacy information of our claimants, and also allowed VETS to focus more on its clients – the veterans who seek our assistance.

Another important investment in VETS' USERRA program was initiated in FY 2008, but will not yield results until FY 2009. VETS and DOL's Center for Program Planning and Results contracted for a rigorous process review of the USERRA program. The research will examine VETS' current investigative process and identify program improvement strategies to increase efficiency and effectiveness.

DOL/OSC DEMONSTRATION PROJECT

Pursuant to continuing resolutions passed by Congress, the USERRA Demonstration Project (established by Sec. 204 of the Veterans' Benefits Improvement Act (VBIA) of 2004) was extended from its original termination date of September 30, 2007, through December 31, 2007. During the project, OSC investigated Federal sector USERRA claims brought by persons whose social security numbers had an odd-numbered terminal digit, and VETS retained Federal sector cases filed by individuals with even-numbered social security numbers. OSC received 37 Federal sector USERRA cases in the three months of FY 2008 that the demonstration project was in place. VETS opened and investigated 166 new Federal sector USERRA claims during FY 2008, 30 of which were opened during the final three months of the demonstration project.

MANDATED REPORTING REQUIREMENTS

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

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

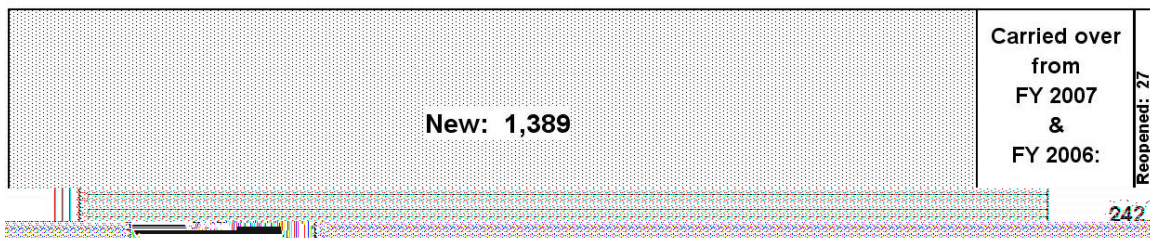
The Department of Labor reviewed 1,389 new unique cases in FY 2008.¹ Reviewed cases are those cases opened in conjunction with a signed or electronically filed VETS 1010 complaint form.

The table below provides the numbers of new unique USERRA cases handled by the Federal government in FY 2005 – FY 2008.

| Fiscal Year | FY 2004 | FY 2005 | FY 2006 | FY 2007 | FY 2008 |
|---------------------------------|----------------|----------------|----------------|----------------|----------------|
| New VETS Cases | 1,349 | 1,140 | 1,265 | 1,226 | 1,389 |
| OSC Cases (Federal only) | 0 | 112 | 169 | 139 | 37 |
| Total New Cases | 1,349 | 1,252 | 1,434 | 1,365 | 1,426 |

In FY 2008, the Department of Labor also carried over an additional 241 unique cases from FY 2007, and one unique case from FY 2006. During FY 2008, the Department reopened 24 cases from FY 2007 and three from FY 2006 and earlier. In sum, DOL reviewed a total of 1,658 unique cases in FY 2008.

VETS reviewed a total of 1,658 cases in FY 2008.



¹ 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.

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.

During FY08, ESGR received 13,090 contacts by telephone, email and facsimile. Of those contacts 2,664 resulted in actual USERRA cases for which ESGR Ombudsmen services were provided.

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

In FY 2008, the Attorney General's DOJ Civil Rights Division received 100 case referrals from DOL through VETS and SOL.

In FY 2008, OSC received 15 case referrals from DOL through VETS and SOL. Three additional cases were carried over from prior fiscal years.

OSC provided representation before the Merit Systems Protection Board (MSPB) in one case, which was still pending before the MSPB at the end of FY 2008. The case involved was not a referral from DOL but was a complaint received directly by OSC pursuant to the USERRA Demonstration Project described earlier in this report.

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

The Department of Justice filed 11 USERRA complaints in FY 2008. Ten of these cases have now settled and one remains in active litigation.

5. THE NUMBER OF CASES REVIEWED BY THE SECRETARY OF LABOR AND THE SECRETARY OF DEFENSE THROUGH THE NATIONAL COMMITTEE FOR EMPLOYER SUPPORT OF THE GUARD AND RESERVE OF THE DEPARTMENT OF DEFENSE THAT INVOLVE THE SAME PERSON.

ESGR provided VETS with the names of the 2,664 individuals who had cases reviewed by ESGR Ombudsmen in FY 2008, the date of each claim and the name of the employer involved in each case. VETS compared the ESGR data to its own data² on cases opened from October 1, 2007 through October 31, 2008³. This comparison resulted in 309 likely matches; thus it appears that 12% of FY 2008 ESGR cases were subsequently opened as VETS cases.

² Absent data on the specific allegation(s) involved, case matching cannot be made with complete confidence.

³ October was included to capture late FY 2008 ESGR cases that were filed with VETS early in FY 2009.

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

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

Thirty-six of the new unique cases, or 2.6 percent, of those reviewed by DOL in FY 2008, involved a disability-related issue. Of the 2664 cases reviewed by ESGR, twenty (less than 1 percent) involved a disability-related issue. Of the cases referred for consideration of litigation, one of those referred to DOJ and one of those referred to OSC involved a disability-related issue. None of the cases in which OSC initiated action, and none of the cases filed by DOJ in FY 2008 involved a disability-related issue. Of the 309 cases reviewed by DOL and ESGR that involved the same person, 11 (3.6%) involved a disability-related issue.

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

This is a new reporting requirement of the Veterans' Benefits Improvement Act of 2008, which was enacted on October 10, 2008. VETS implemented procedures in FY 2009 for collecting data on claimants who report a service connected disability, and will report on this category in future annual reports.

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

CASES REVIEWED BY THE DEPARTMENT OF LABOR

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

| Cases Opened by VETS in FY 2008: USERRA ISSUE | VETS CASES ALLEGING ISSUE * | |
|--|--|----------------|
| | NUMBER | PERCENT |
| Military obligations discrimination | 495 | 35.6% |
| Reinstatement | 347 | 25.0% |
| Other non-seniority benefits | 55 | 4.0% |
| Promotion | 92 | 6.6% |
| Vacation | 36 | 2.6% |
| Status | 62 | 4.5% |
| Pay rate | 53 | 3.8% |
| Reasonable accommodation/ retraining for non-qualified/non-disabled | 5 | 0.4% |
| Discrimination as retaliation for any action | 129 | 9.3% |
| Seniority | 41 | 3.0% |
| Pension | 46 | 3.3% |
| Initial hiring discrimination | 58 | 4.2% |
| Layoff | 64 | 4.6% |
| Special protected period discharge | 18 | 1.3% |
| Health benefits | 24 | 1.7% |
| Reasonable accommodations/retraining for disabled | 36 | 2.6% |
| Other | 98 | 7.1% |

* Note: Because many USERRA cases involve multiple issues, the number of cases in this chart exceeds the 1,389 new unique cases reported in FY08 and the combined percentages exceed 100%.

DOL closed 1,387 cases in FY 2008 under the following closure codes: no merit 429 (31 percent); administrative 182 (13 percent); claim granted 217 (16 percent); claim settled 165 (12 percent); claim withdrawn 193 (14 percent); not eligible 61 (4 percent); referred 140 (10 percent). An explanation of case closure codes follows.

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 REVIEWED BY THE SECRETARY OF DEFENSE UNDER THE NATIONAL COMMITTEE FOR EMPLOYER SUPPORT OF THE GUARD AND RESERVE

Ombudsmen services covered an array of USERRA issues that included 1,207 complaints involving job reinstatement and reemployment problems; 1,451 complaints involving some type of military discrimination and 6 cases involving possible retaliation or reprisal.

ESGR resolved 1,899 of the 2,664 Ombudsmen cases. There were 765 USERRA matters in which the employee and employer could not reach an agreement. In these instances ESGR Ombudsmen informed both parties that the employee (service member) had the options to file a case with DOL or seek assistance through a private attorney.

In recognition of Congressional interest in being able to compare USERRA data across agencies, VETS and ESGR developed the following crosswalk that aligns the issues identified in ESGR case data with VETS data on issues the USERRA cases filed involving membership in the Guard and Reserve.

Crosswalk of USERRA Issues, FY 2008

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

Primary Categories

ESGR Ombudsman Cases "Problem Codes"

VETS Complaint Cases "Issue Codes" *

| | | | | |
|--|---|---|---|-----|
| Discrimination | A2 Bonus | 25 | } ID - Military Obligations Discrimination | 457 |
| | B6.2, B6.3, B6.4, B6.6 Discrimination | 814 | | |
| | A1 Discrimination ("Pay") | 154 | | |
| | B5 Harassment | 222 | | |
| | B3.1, B3.3, B3.4, B3.8 Work Schedule (Other subparts of B3 do not crosswalk) | 123 | | |
| | B6.1 Hiring or job placement Discrimination | 113 | II - Initial Hiring Discrimination | 37 |
| 1,451 Ombudsman Cases (55%) | | 494 Issues in 491 Complaint Cases (42% of Complaint Cases) | | |

| | | | | |
|--|--|---|--|-----|
| Reinstatement/ Reemployment | A3 Medical Benefits | 76 | IH - Health Benefits | 22 |
| | A4 Retirement Benefits | 36 | IP - Pension | 30 |
| | A5 Seniority-related benefits | 71 | IS - Seniority | 29 |
| | A6.1 Other benefits...available to other employees | 4 | IB - Other Non-Seniority Benefits | 54 |
| | A6.2, A6.3 Other benefits | 22 | IZ - Status | 55 |
| | {N/A} | | IL - Layoff | 52 |
| | B4 Vacation Time | 120 | IV - Vacation | 34 |
| | B1 Notifying employer about military duty | 10 | } IR - Reinstatement | 302 |
| | B2 Granting military leave | 60 | | |
| | C1 Eligibility for reemployment | 24 | | |
| | C2 Time limits for reemployment | 12 | | |
| | C3 Changes in employer circumstances | 1 | | |
| | C4.2, C4.3, C4.4, C4.5, C4.7, C4.8 Job placement | 460 | IT - Promotion | 78 |
| | C4.1 Employee denied promotion | 42 | IA - Reasonable Accommodations/Retraining for Disabled | 25 |
| | C4.6 Job placement...Employer does not accommodate returning disabled employee | 20 | IW - Reasonable Accommodations/Retraining for Non-Qualified/Non-Disabled | 4 |
| | {N/A} | | IM - Pay Rate | 45 |
| {N/A} | | IF - Special Protected Period Discharge | 17 | |
| C5 Termination Protection | 249 | | | |
| 1,207 Ombudsman Cases (45%) | | 747 Issues in 615 Complaint Cases (53% of Complaint Cases) | | |

| | | | | |
|---------------------------------------|---------------|--|---|----|
| Reprisal | B6.5 Reprisal | 6 | } ID2 - Discrimination as Retaliation for any Action | 88 |
| | D1.4 Reprisal | 0 | | |
| 6 Ombudsman Cases (<1%) | | 88 Issues in 88 Complaint Cases (8% of Complaint Cases) | | |

* 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%.

CASES REFERRED TO THE DEPARTMENT OF JUSTICE

The 100 cases referred to the Civil Rights Division in FY 2008 involved a number of USERRA issues. Thirty-nine (39) of these cases involved allegations of termination, 25 involved reemployment allegations, while 21 involved allegations of loss or denial of benefits, such as loss of pay, reduction or loss of pension or health benefits, and loss of seniority. The remaining cases involved various forms of discrimination, with 12 involving failure to promote, 7 involving failure to hire, and 4 involving actions affecting the service member's terms and conditions of employment, such as discipline or harassment. The remaining three of these cases involved allegations of retaliation for asserting USERRA protection.⁴

In FY 2008, the Civil Rights Division received 27 case referrals from DOL where DOL found that the case had merit and recommended that DOJ offer representation to the service member. ELS offered representation in three of these cases and declined representation in three cases. In one case, the service member withdrew his referral request. The remaining 20 cases were still under consideration by ELS at the end of the fiscal year.

DOJ received an additional 73 case referrals from DOL in FY 2008 with a recommendation that the case lacked merit and representation should be declined. Based on DOL's recommendation and the ELS's independent analysis of the merits of each case, ELS declined representation in 67 case referrals. Six of these non-merit referrals were pending at the end of the fiscal year.

CASES REFERRED TO THE OFFICE OF THE SPECIAL COUNSEL

Of the 15 cases referred to the Office of Special Counsel in the fiscal year, six involved discrimination allegations, six involved an allegation of reemployment violations, one involved the allegation of both issues, and two alleged discrimination and reemployment violations as well as retaliation. Of the three cases carried over from previous fiscal years, one alleged disabled veteran discrimination and two alleged both discrimination and reemployment violations.

During FY 2008, OSC closed 13 cases, ten of which were referred during FY 2008. There were five cases pending action at OSC at the end of FY 2008, all of which were referred during the same fiscal year.

CASES REVIEWED BY DOL AND ESGR INVOLVING THE SAME PERSON

Issues involved in 309 cases reviewed by DOL and ESGR that appear to have involved the same person included allegations of the following issues:

⁴ Several cases involved multiple issues. Each issue was counted separately.

| USERRA ISSUE | CASES ALLEGING ISSUE * | |
|---|------------------------|---------|
| | NUMBER | PERCENT |
| Military obligations discrimination | 118 | 38.2% |
| Reinstatement | 87 | 28.2% |
| Other non-seniority benefits | 10 | 3.2% |
| Promotion | 19 | 6.2% |
| Vacation | 8 | 2.6% |
| Status | 17 | 5.5% |
| Pay rate | 16 | 5.2% |
| Reasonable accommodation/ retraining for non-qualified/non-disabled | 2 | 0.7% |
| Discrimination as retaliation for any action | 28 | 9.1% |
| Seniority | 10 | 3.2% |
| Pension | 6 | 1.9% |
| Initial hiring discrimination | 11 | 3.6% |
| Layoff | 18 | 5.8% |
| Special protected period discharge | 6 | 1.9% |
| Health benefits | 5 | 1.6% |
| Reasonable accommodations/retraining for disabled | 11 | 3.6% |
| Other | 17 | 5.5% |

* Note: Many USERRA cases involve multiple issues, and VETS records all the USERRA issues involved in a case. As a result, the number of cases in this chart exceeds the 309 ESGR and VETS cases involving the same person, and the combined percentages exceed 100%. Case matching between FY08 ESGR cases and VETS cases opened 10/1/2007 to 10/31/2008 is based on claim dates, claimant names, and employer names.

DOL closed 259 of these 309 likely matches by October 31, 2008, under the following closure codes: no merit 83 (32 percent); administrative 18 (7 percent); claim granted 46 (18 percent); claim settled 43 (17 percent); claim withdrawn 33 (13 percent); not eligible 10 (4 percent); referred 26 (10 percent). An explanation of VETS case closure codes appears in the explanation of the status of cases reviewed by DOL.

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

This is a new reporting requirement of the Veterans' Benefits Improvement Act of 2008, which was enacted on October 10, 2008. VETS implemented procedures in FY 2009 for collecting data on the occupations involved in the USERRA claims it receives, and will report on this category in future reports.

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

No patterns of violations of USERRA became apparent in FY 2008. The Department of Labor will continue to monitor its USERRA cases to identify trends as they arise.

10. 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.

The following are recommendations from the Department of Labor:

- **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.

- **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, and also clarifying that neither a merger nor a transfer of assets is a prerequisite to the application of the multifactor test.



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