

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

FISCAL YEAR 2009
ANNUAL REPORT
TO CONGRESS
OCTOBER 2010

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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, Purposes and Sense of Congress.

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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 any proceeding 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 entitled 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 also applies to United States employers operating overseas.

This Fiscal Year 2009 report was prepared in accordance with 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. Employers are prohibited from discriminating on the basis of service in the military, the National Disaster Medical System, or the commissioned corps of the Public Health Service. USERRA also protects anyone – Veteran or non-Veteran – from reprisal for either exercising rights, or assisting in any proceeding under the statute. Eligibility requirements for Service Members seeking reemployment generally provide that the absence must be due to service; advance notice (oral or in writing) must be given to the employer; the cumulative period(s) of service while employed by the employer must not exceed five years; the application for reemployment must be timely; and the discharge from service 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 concerning 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 and provision of legal representation, as appropriate. 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 PROVIDED BY THE DEPARTMENT OF DEFENSE'S EMPLOYER SUPPORT OF THE GUARD AND RESERVE

OVERVIEW

ESGR is a DOD organizational element with a vision to develop and promote a culture in which all American employers support and value the military service of their employees with ESGR as the principal advocate within DoD. Its mission is to develop and promote employer support for Guard and Reserve service by advocating relevant initiatives, recognizing outstanding support, increasing awareness of applicable laws, and resolving conflict between employers and service members.

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. With Guard and Reserve forces making up nearly 50 percent of our military strength and ongoing global operations, civilian employers' support is critical to our national defense now more than ever.

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 services and informal mediation.
- 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, almost 4,600 ESGR volunteers serve across the nation in all 50 states, U.S. territories and the District of Columbia. With help and resources from the National ESGR Headquarters in Arlington, Virginia, the 54 ESGR field offices conduct employer and military outreach programs, as well as Ombudsmen services to further the understanding of and compliance with USERRA regulations. ESGR conducts proactive outreach programs and provides responsive Ombudsmen services in support of its mission.

ESGR OUTREACH

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 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 USERRA.
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 National Guard and Reserve. All employer recognition and awards originate from nominations by individual RC members, recognizing 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 FY09, ESGR recognized 14,571 supervisors of RC members through the Patriot Award. During the same time period, 54,965 employers signed Statements of Support, and ESGR's National office received 3,202 nominations for the 2009 Secretary of Defense Employer Support Freedom Award.

ESGR OMBUDSMAN SERVICES

The primary means of assisting National Guard and Reserve members with USERRA conflicts is a nationwide Ombudsman Program that reduces, resolves, and helps prevent employer and/or employee misunderstandings and problems. The Ombudsman Program provides education, information, and informal mediation services to resolve employee/employer USERRA conflicts. ESGR is not an enforcement agency, and does not participate in formal litigation processes.

ESGR has signed a Memorandum of Understanding (MOU) with the Department of Labor (DOL) that establishes timelines to resolve USERRA cases, and clarifies information-sharing rights and responsibilities between the two agencies. DOL has working relationships with the Department of Justice (DOJ) and the Office of Special Counsel (OSC) offices that oversee the enforcement of USERRA violations. These inter-agency relationships have enhanced ESGR's USERRA compliance services.

Among its many volunteers, ESGR has a national network of more than 800 volunteer Ombudsmen to help resolve USERRA compliance issues. ESGR's volunteers receive training on USERRA and dispute resolution techniques, and serve as a neutral third-party between the employer and employee to inform and educate all involved parties on the requirements of the law and to assist in finding a mutually agreeable resolution.

The ESGR Ombudsman Services Program is available at no cost to RC members and their employers who seek to resolve USERRA questions and differences without litigation. RC members may also file complaints directly with DOL, which has Congressional 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 USERRA complaints, inquiries and information requests. The CSC provides prompt

and expert telephonic and email responses to Service Members and employers on all USERRA-related matters.

DOL'S USERRA OUTREACH AND CLAIMS INVESTIGATION

VETS PUBLIC EDUCATION AND COMPLIANCE ASSISTANCE EFFORTS

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 more than 634,000 individuals on USERRA. In FY 2009 alone, VETS presented USERRA information to more than 98,000 people. Briefings to mobilizing and demobilizing members of the Guard and Reserves are given in collaboration with ESGR. Together, the two agencies strive to ensure that every RC member receives 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 ESGR and are subsequently filed with VETS. Upon receipt of an electronically-filed or signed completed complaint form (the VETS 1010), VETS immediately opens a formal investigation. A brief notification of process rights, written in easy-to-understand question-and-answer format, is sent to each claimant within five days of VETS' receipt of a claim.

The assigned investigator collects and reviews pertinent documentary evidence and interviews necessary witnesses, under authority of subpoena if necessary. To ensure investigations are of the highest quality and are conducted in a uniform and timely manner, VETS investigators are extensively trained in the legal aspects of USERRA and in the agency's rigorous operating procedures.

If the evidence 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.

VETS has 90 days to complete its investigation, unless the claimant agrees to an extension of time for VETS to continue the investigation and attempt to resolve the case. At any point during the investigative process, the claimant may elect to withdraw the complaint and pursue enforcement through private counsel. A claimant whose case is being investigated by VETS may be concurrently 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, DOL's Office of the Solicitor (SOL) conducts a legal review of the case file and ensures that appropriate documentation necessary for litigation is included. DOL has 60 days to complete this referral process, unless the claimant agrees to an extension of time.

DEPARTMENT OF JUSTICE ENFORCEMENT

If VETS cannot resolve a Service Member's case, the Service Member may ask VETS to refer the Service Member's USERRA claim 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 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.

In the MOU, the Attorney General reassigned responsibility for handling USERRA referrals from the Civil Division to the Civil Rights Division. 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 tracks the status and progress of every USERRA referral. This case management system has increased communication between the agencies and allows for more accurate and uniform case tracking and reporting.

If DOL does not resolve a claim against a state or private employer, upon the claimant's request the claim is referred 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, regarding 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, DOJ reviews the complete DOL 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, DOJ ensures that each USERRA referral receives careful consideration and is processed as expeditiously as practicable.

In FY 2010, 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.

DOL's FY 2009 PROGRAM ACTIVITIES AND ACHIEVEMENTS

On October 10, 2008, the Veterans' Benefits Improvement Act of 2008 (VBIA 2008) P.L. 110-389, was signed into law. The law's amendments to USERRA established new statutory timeframes for VETS investigations, DOL referrals, and DOJ and OSC decisions regarding the provision of legal representation. Other VBIA 2008 provisions require a notification of rights to be provided to claimants within five days of VETS receiving their USERRA complaint, and quarterly reports by DOL, DOJ, and OSC on the agencies' success in meeting their respective statutory timeframes. In addition, the mandatory reporting elements of this report were expanded to include, among other things, reporting on the different occupations involved in USERRA claims.

VETS successfully implemented the new requirements of the VBIA 2008 for all claims filed on or after October 10, 2008. New procedures were established to ensure that within five days of VETS' receipt of a complaint, every claimant received a clear and comprehensive notification of rights. New data collection protocols were also implemented to identify the Standard Occupational Code (SOC) for the occupation involved in the USERRA claim, and to learn whether the claimants self-identified as having a service-connected disability.

Investigators received instructions on how to finalize investigations within 90 days, and were trained to identify investigations that might exceed 90 days. If an investigation is likely to exceed 90 days, or the limit of a previous extension, investigators must contact the claimant regarding the status of the investigation and request consent to an extension of time. Two new closing codes were established for cases in which the statutory deadline was reached (or a subsequent extension expired). One of those new closing codes, "Merit, Not Resolved," is used when VETS believes that the evidence substantiates part or all of a claimant's USERRA allegations, but a resolution acceptable to both claimant and employer cannot be reached. The other new closing code, "Merit Undetermined," is to be used in cases in which the investigation is not completed before a deadline, and the claimant does not consent to an extension of time. Finally, VETS and SOL collaborated on procedures to ensure that the DOL referral process is completed within 60 days, unless the claimant agrees to an extension of time. Data fields were

added to VETS' USERRA Information Management System to catalog and report on new information necessitated by the VBIA 08.

In conjunction with annual training conferences in each of its six regions, VETS conducted regional audits of USERRA case files in each region. These audits, which were tested in FY 2008 and fully implemented in FY 2009, were conducted by internal auditors from outside the audited regions. Randomly selected USERRA case files from each investigator were reviewed and the audit team's findings were discussed with the investigator. The regions were then briefed on the findings of the audit, and provided recommendations for improvement. Audit findings will be used to target future USERRA training objectives and to gauge regional and national program enhancements.

Another important activity in FY 2009 was the completion of an independent assessment of VETS' USERRA process, cosponsored by VETS and DOL's Center for Program Planning and Results. The research examined VETS' current investigative process and recommended several program improvement strategies to increase efficiency and effectiveness. VETS is currently assessing those recommendations and will begin implementation, as appropriate, in FY 2010.

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 1,431 new unique cases in FY 2009.¹ 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 2004 – FY 2009.

Fiscal Year	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009
New VETS Cases	1,349	1,140	1,265	1,226	1,389	1,431
OSC Cases (Federal only)	n/a	112	169	139	37	n/a
Total New Cases	1,349	1,252	1,434	1,365	1,426	1,431

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.

In FY 2009, the Department of Labor also carried over an additional 244 unique cases from FY 2008, and two unique cases from FY 2007. During FY 2009, the Department reopened 17 cases from FY 2008 and five from FY 2007 and earlier. In sum, DOL reviewed a total of 1,699 unique cases in FY 2009.

2. THE NUMBER OF CASES REVIEWED BY ESGR, ON BEHALF OF THE SECRETARY OF DEFENSE, DURING THE FISCAL YEAR.

During FY09, ESGR received 31,544 contacts by telephone, email and facsimile. Of those contacts 2,475 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 2009, the Attorney General's DOJ Civil Rights Division received 175 case referrals from DOL through VETS and SOL.

During Fiscal Year 2009, DOL referred 41 cases to OSC at the request of the Service Member. Additionally, five cases referred to OSC during the previous fiscal year remained pending at the beginning of Fiscal Year 2009. Thus, 46 total cases were pending at OSC during the fiscal year.

The nature and status of these referred cases is reflected in mandatory reporting requirement number seven of 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 22 USERRA complaints in FY 2009. The nature and status of those complaints is included in mandatory reporting requirement number seven of this report.

5. THE NUMBER OF CASES REVIEWED BY THE SECRETARY OF LABOR AND ESGR THAT INVOLVE THE SAME PERSON.

ESGR provided VETS with the names of the 2,475 individuals who had cases reviewed by ESGR Ombudsmen in FY 2009, 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,

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

2008 through October 31, 2009³. This comparison resulted in 295 likely matches; thus it appears that 12 percent of FY 2009 ESGR cases were subsequently opened as VETS cases.

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.

- i. Twenty-eight of the new unique cases, or two percent, of those reviewed by DOL in FY 2009, involved a disability-related issue.
- ii. Of the 2,475 cases reviewed by ESGR, 14 (less than one percent) involved a disability-related issue.
- iii. 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. OSC did not initiate any actions before the MSPB in FY 2009.
- iv. Of the 22 cases filed by DOJ in FY 2009, none involved a disability-related issue.
- v. Of the 295 cases reviewed by DOL and ESGR that involved the same person, six (two percent) involved a disability-related issue.

B. THE NUMBER OF SUCH CASES THAT INVOLVE A PERSON WHO HAS A SERVICE-CONNECTED DISABILITY.⁴

- i. In FY 2009, VETS asked claimants whether they had a service-connected disability. VETS obtained responses from 1,341 claimants, 17 percent (232) of whom reported having a service-connected disability.
- ii. No information is available on the number of cases handled by ESGR that involved a person with a service-connected disability,
- iii. Of the cases referred for consideration of litigation, nine of those referred to DOJ and seven of those referred to OSC involved a claimant who reported a service-connected disability.
- iv. Among the 22 cases filed by DOJ in FY 2009, one claimant reported having a service-connected disability.
- v. With respect to the 295 cases reviewed by VETS and ESGR involving the same person in FY 2009, VETS obtained responses from 282 claimants, 11 percent (33) of whom reported having a service-connected disability.

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

³ October data was included to capture late FY 2009 ESGR cases that were filed with VETS early in FY 2010.

⁴ Data regarding claimants' service-connected disability status was not collected by VETS before FY 2009, so such information is not available for some cases active in FY 2009 that originated in previous years (such as referrals).

i. 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 2009: USERRA ISSUE	VETS CASES ALLEGING ISSUE*	
	NUMBER	PERCENT
Military obligations discrimination	490	34.2%
Reinstatement	392	27.4%
Other non-seniority benefits	51	3.6%
Promotion	94	6.6%
Vacation	35	2.5%
Status	67	4.7%
Pay rate	74	5.2%
Reasonable accommodation/ retraining for non-qualified/non-disabled	6	0.4%
Discrimination as retaliation for any action	125	8.7%
Seniority	47	3.3%
Pension	53	3.7%
Initial hiring discrimination	79	5.5%
Layoff	103	7.2%
Special protected period discharge	20	1.4%
Health benefits	20	1.4%
Reasonable accommodations/retraining for disabled	28	2.0%
Other	63	4.4%

* Note: Because many USERRA cases involve multiple issues, the number of cases in this chart exceeds the 1,431 new unique cases reported in FY09 and the combined percentages exceed 100 percent.

DOL closed 1,448 cases in FY 2009 under the following closure codes: no merit, 454 (31 percent); administrative, 108 (seven percent); claim granted, 222 (15 percent); claim settled, 182 (13 percent); claim withdrawn, 229 (16 percent); not eligible, 71 (five percent); referred, 167 (12 percent); merit, not resolved, 12 (one percent); merit undetermined, 3 (< one 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, and that representation interferes with a VETS investigation, 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 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.
- **MERIT, NOT RESOLVED:** When the completed investigation finds merit to the claim, but VETS is unable to obtain a satisfactory resolution.
- **MERIT UNDETERMINED:** When the investigation is not complete but the statutory deadline for case completion (or an extension previously agreed to by the claimant) is reached and the claimant does not agree to a further extension.

ii. CASES REVIEWED BY THE ESGR ON BEHALF OF THE SECRETARY OF DEFENSE

ESGR Ombudsmen services covered an array of USERRA issues that included 1,555 complaints involving some type of military discrimination, 918 complaints involving job reinstatement and reemployment problems; and two cases involving possible retaliation or reprisal.

ESGR resolved 1,982 of its 2,475 Ombudsmen cases. There were 493 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 option to file a case with DOL or seek assistance through a private attorney.

The following crosswalk aligns the issues identified in ESGR case data with VETS UIMS data.

Crosswalk of USERRA Issues, FY 2009

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

Primary Categories	ESGR Ombudsman Cases "Problem Codes"	VETS Complaint Cases "Issue Codes" *
Discrimination	A2 Bonus	18
	B6.2, B6.3, B6.4, B6.6 Discrimination	938
	A1 Discrimination ("Pay")	124
	B5 Harassment	225
	B3.1, B3.3, B3.4, B3.8 Work Schedule (Other subparts of B3 do not crosswalk)	86
	B6.1 Hiring or job placement Discrimination	164
	1,555 Ombudsman Cases (63%)	489 Issues in 483 Complaint Cases (41% of Complaint Cases)
Reinstatement/ Reemployment	A3 Medical Benefits	45
	A4 Retirement Benefits	19
	A5 Seniority-related benefits	60
	A6.1 Other benefits...available to other employees	3
	A6.2, A6.3 Other benefits	7
	{N/A}	
	B4 Vacation Time	137
	B1 Notifying employer about military duty	9
	B2 Granting military leave	33
	C1 Eligibility for reemployment	3
	C2 Time limits for reemployment	7
	C3 Changes in employer circumstances	3
	C4.2, C4.3, C4.4, C4.5, C4.7, C4.8 Job placement	352
	C4.1 Employee denied promotion	48
	C4.6 Job placement...Employer does not accommodate returning disabled employee	14
	{N/A}	
	{N/A}	
C5 Termination Protection	178	
	918 Ombudsman Cases (37%)	838 Issues in 684 Complaint Cases (58% of Complaint Cases)
Reprisal	B6.5 Reprisal	2
	D1.4 Reprisal	0
		2 Ombudsman Cases (<1%)
		97 Issues in 97 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%.

iii. CASES REFERRED TO THE DEPARTMENT OF JUSTICE OR THE OFFICE OF SPECIAL COUNSEL

CASES REFERRED TO THE DEPARTMENT OF JUSTICE

The 175 cases referred to the Civil Rights Division in FY 2009 involved a broad range of USERRA issues. Approximately 25 percent (44) of these cases involved allegations of

termination and/or discharge, approximately 46 percent (80) of these cases involved reemployment issues, and approximately 12 percent (21) of these cases 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 approximately 10 percent (18) involving failure to promote, approximately .01 percent (2) involving failure to hire, and approximately 33 percent (58) involving actions affecting the Service Member's terms and conditions of employment, such as discipline or harassment. The remaining .05 percent (9) of these cases involved allegations of retaliation for asserting USERRA protection.⁵

In FY 2009, the Civil Rights Division received 65 case referrals from DOL where DOL found that the case had merit and recommended that DOJ offer representation to the Service Member. DOJ offered representation in 20 referrals, facilitated settlement in seven referrals, and declined representation in 34 referrals. In three referrals, the Service Member withdrew his or her referral request. The remaining referral remained under consideration by DOJ at the end of the fiscal year.

DOJ received an additional 110 case referrals from DOL in FY 2009 with a recommendation that the case lacked merit and representation should be declined. Based on DOL's recommendation and DOJ's independent analysis of the merits of each referral, DOJ declined representation in 107 referrals, facilitated settlement in one such referral, and DOL facilitated settlement in another referral. DOJ representation was offered in the remaining non-merit referral.

CASES REFERRED TO THE OFFICE OF THE SPECIAL COUNSEL

During Fiscal Year 2009, DOL referred 41 cases to OSC at the request of the Service Member. Additionally, five cases referred to OSC during the previous fiscal year remained pending at the beginning of Fiscal Year 2009. Thus, 46 total cases were pending at OSC during the fiscal year. In 80.4 percent of the cases, the Service Member alleged discrimination based on military service, including termination, non-promotion, non-selection, or denial of employment benefits; in 26.1 percent, violations of reemployment rights; in 15.2 percent, retaliation for exercising USERRA rights; and in 4.3 percent, disabled Veteran discrimination.⁶

Of the 46 total cases, OSC completed 39 cases during Fiscal Year 2009, while seven cases remained pending at the end of the fiscal year. While OSC did not initiate any new actions before the MSPB during the fiscal year, OSC sought and obtained corrective action for four Service Members and offered legal representation to three other Service Members, whose claims OSC expects to file with the MSPB during Fiscal Year 2010. OSC also successfully litigated a previously filed case before the MSPB during the fiscal year.

iv. COMPLAINTS FILED BY THE ATTORNEY GENERAL

Fourteen of the 22 USERRA complaints filed by DOJ during Fiscal Year 2009 have settled and eight remain in active litigation.

⁵ Several cases involved multiple issues. Each issue was counted separately.

⁶ The totals do not add up to 100 percent because some cases contain multiple allegations.

v. **CASES REVIEWED BY DOL AND ESGR INVOLVING THE SAME PERSON**

DOL's response to Mandated Reporting Requirement # 5 of this report indicates that in comparing ESGR data on USERRA cases during the fiscal year, 295 likely matches were identified. This figure indicates that first ESGR, and subsequently DOL, handled the same individuals' claims. The claims included allegations of the following issues:

USERRA ISSUE	CASES ALLEGING ISSUE*	
	NUMBER	PERCENT
Military obligations discrimination	110	37.3%
Reinstatement	84	28.5%
Other non-seniority benefits	5	1.7%
Promotion	15	5.1%
Vacation	6	2.0%
Status	16	5.4%
Pay rate	13	4.4%
Reasonable accommodation/ retraining for non-qualified/non-disabled	1	0.3%
Discrimination as retaliation for any action	25	8.5%
Seniority	12	4.1%
Pension	9	3.1%
Initial hiring discrimination	10	3.4%
Layoff	30	10.2%
Special protected period discharge	8	2.7%
Health benefits	5	1.7%
Reasonable accommodations/retraining for disabled	6	2.0%
Other	5	1.7%

* 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 295 ESGR and VETS cases involving the same person, and the combined percentages exceed 100 percent. Matching of FY09 ESGR cases and VETS cases opened 10/1/2008 to 10/31/2009 is based on claim dates, claimant names, and employer names.

DOL closed 218 of these 295 likely matches by October 31, 2009, under the following closure codes: no merit, 66 (30 percent); administrative, 12 (6 percent); claim granted, 39 (18 percent); claim settled, 36 (17 percent); claim withdrawn, 35 (16 percent); not eligible, 3 (1 percent);

referred, 22 (10 percent); merit, not resolved, 4 (2 percent); merit undetermined, 1 (< 1 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.

VETS implemented procedures in FY 2009 for collecting data on the occupations involved in the USERRA claims it receives. VETS is the only federal agency that collected occupational data on these claimants and recorded the respective Standard Occupational Classification System (SOCS) code. Therefore, SOCS code data is not available for cases filed only with ESGR.

VETS was able to obtain the SOCS code in 90 percent (1,289) of the unique claims filed in FY 2009. That data reveal that 17 percent of claims involved Protective Services occupations. Another 13 percent involved Office and Administrative Support occupations, and 10 percent involved Transportation and Material Moving occupations.

With respect to cases reviewed by VETS and ESGR likely involving the same person in FY 2009, VETS obtained the SOCS code in 92 percent (270) of the 295 cases. That data reveal that 16 percent of claims involved Protective Services occupations. Another 13 percent involved Office and Administrative Support occupations, and 10 percent involved occupations in Transportation and Material Moving.

With respect to cases referred to the Attorney General's DOJ Civil Rights Division from DOL through VETS and SOL in FY 2009, VETS obtained the SOCS code in 30 percent (53) of the 175 cases.⁷ That data reveal that 23 percent of claims involved Protective Services occupations, and 11% involved Office and Administrative Support occupations.

VETS obtained the Standard Occupational Classification System (SOCS) code in 41 percent (17) of the 41 cases referred to OSC from DOL through VETS and SOL in FY 2009.⁸ That data reveal that 13 percent of claims involved Protective Services occupations, and 13 percent involved Business and Financial Operations occupations.

⁷ These 175 cases include all but six of the 22 referral cases filed by the Attorney General in FY 2009. Because those six cases were originally filed by the claimants prior to FY 2009, no SOCS data was recorded; therefore, no separate SOCS data category is provided here for the 22 cases filed by the Attorney General in FY 2009.

⁸ OSC did not initiate any new actions before the MSPB during FY 2009.

Occupations Involved in FY 2009 USERRA CASES⁹

As designated by the Standard Occupational Classification System (SOCS)

SOCS Job Family	Percentage of Cases involving SOCS Code			
	VETS Cases	Referrals to		Common to VETS & ESGR
		DOJ	OSC	
Protective Service	17%	23%	13%	16%
Office and Administrative Support	13%	11%	8%	13%
Transportation and Material Moving	10%	8%	4%	10%
Installation, Maintenance, and Repair	7%	6%	0%	9%
Production	7%	9%	0%	5%
Management	6%	9%	8%	9%
Healthcare Practitioners and Technical	6%	9%	8%	5%
Sales and Related	5%	2%	0%	4%
Business and Financial Operations	4%	2%	13%	2%
Construction and Extraction	3%	2%	4%	4%
Computer and Mathematical	3%	2%	0%	5%
Food Preparation and Serving Related	3%	0%	0%	3%
Education, Training, and Library	3%	4%	0%	3%

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 2009. DOL will continue to monitor USERRA cases to identify trends as they arise.

⁹ The following occupations accounted for 2 percent or fewer within each case/referral category shown in this chart (with exceptions as noted here): Architecture and Engineering (Exception: 4 percent of Referrals to DOJ); Building and Grounds Cleaning and Maintenance (Exception: 4 percent of Referrals to OSC); Life, Physical, and Social Science (Exception: 4 percent of Referrals to OSC); Community and Social Services; Personal Care and Service; Legal; Healthcare Support; Arts, Design, Entertainment, Sports, and Media; Farming, Fishing, and Forestry; and Military Specific occupations.

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.
- **Clarify that USERRA prohibits wage discrimination against members of the armed forces.** USERRA’s definition of the terms “benefit”, “benefit of employment”, or “rights and benefits” as set forth at 38 U.S.C. § 4303(2), includes “...any advantage, profit, privilege, gain, status, account, or interest (*other than wages or salary for work performed*) that accrues by reason of an employment contract or agreement or an employer policy, plan, or practice...” (italics added). The parenthetical clause “other than wages or salary for work performed” is believed to have been included in the definition to ensure that employers would not be required to pay wages to service members who are absent due to a period of military service. However, the clause has been wrongly interpreted by at least one court to exempt wages and salary from the class of protected employment benefits under USERRA. *Gagnon v. Sprint Corp.*, 284 F.3d 839 (8th Cir. 2002) (USERRA does not protect against

th Cir. 2008) (“The USERRA exempts employers from an obligation to pay benefits that are ‘wages or salary for work performed.’”).

The Department of Labor considers it a violation of USERRA for an employer to reduce an individual’s wages or salary for work performed” on the basis of that person’s uniformed service obligations. DOL therefore recommends that Congress consider clarifying that USERRA prohibits wage discrimination on the basis of a person’s military service obligations.

USERRA annual reports are available for fiscal years (FY) 1995-1999 and 2004-2009. No reports are available for FY 2000-2003 because the reporting requirement expired in FY 2000. It was reinstated by Section 202 of the Veterans Benefits Improvement Act of 2004, P.L. 108-454, 118 Stat. 3598 (December 2004.)



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