

USERRA

UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT OF 1994



FY 2013

ANNUAL REPORT TO CONGRESS
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PREPARED BY
OFFICE OF THE ASSISTANT SECRETARY
FOR VETERANS' EMPLOYMENT AND TRAINING



UNITED STATES DEPARTMENT OF LABOR

The purposes of the Uniformed Services Employment and Reemployment Rights Act (USERRA) are: to encourage non-career service in the uniformed services by eliminating or minimizing the disadvantages to civilian careers and employment which can result from such service; to minimize the disruption to the lives of persons performing service in the uniformed services as well as to their employers, their fellow employees, and their communities, by providing for the prompt reemployment of such persons upon their completion of such service; and to prohibit discrimination against persons because of their service in the uniformed services. It is the sense of Congress that the Federal Government should be a model employer in carrying out the provisions of USERRA.

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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 service in the uniformed services; or intent to join the uniformed services. An employer is also 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 for filing a USERRA claim, testifying, or otherwise providing assistance 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 he or she had been 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 and foreign employers operating within the United States.

This Fiscal Year (FY) 2013 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 (DOL) 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 (ESGR) of the Department of Defense (DOD) 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 (OSC) before the Merit Systems Protection Board (MSPB) 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 ESGR of DOD that involve the same person.
6. With respect to each of the cases referenced above:
 - 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 of the cases referenced above.

8. With respect to each of the cases referenced above, 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) as well as foreign employers operating in the United States or its territories, 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 employed service members.

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.

Employers are also 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.

DOL, DOD, and the U.S. Office of Personnel Management (OPM) share responsibility for promoting a clear understanding of USERRA among employers and individuals concerning their respective rights and responsibilities under USERRA. DOL's Veterans' Employment and Training Service (VETS) and DOD's ESGR provide extensive public education, outreach, and compliance assistance with the goals 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 help them secure those rights. OPM administers USERRA for the Federal Government, and issues guidance on ways to improve USERRA protection policies and practices. Further, USERRA requires the OPM and all Federal agencies to provide USERRA awareness training to human resources personnel.

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 formally investigates complaints received and attempts to resolve those complaints. 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 (DOJ) in cases involving a private or State or local government employer, or to OSC¹ in cases involving a Federal employer. Claimants also have the right at any

¹ The U.S. Office of Special Counsel (OSC) is an independent Federal investigative and prosecutorial agency. OSC's primary mission is to safeguard the merit system by protecting Federal employees and applicants from prohibited personnel practices, including protections included in USERRA.

time to withdraw their case to pursue enforcement at their own expense, in U.S. District Court or before the MSPB, 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. 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 an office within DOD that facilitates and promotes a cooperative culture of employer support for National Guard and Reserve service by developing and advocating mutually beneficial initiatives; recognizing outstanding employer support; increasing awareness of applicable laws and policies; resolving potential employment conflicts between employers and their service members; and acting as the employers' principal advocate within DOD.

ESGR has conducted outreach to Reserve Component (RC) service members and their employers since its inception in 1972. Hundreds of thousands of RC service members and employers have benefited from ESGR products and services. With National Guard and Reserve forces making up nearly 50% of our military strength, the support of civilian employers is now more critical than ever to our national defense.

ESGR has a national and local organizational structure that provides support to:

- Operate a proactive outreach 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 mediation.
- Assist in educating National Guard and Reserve members regarding their obligations and responsibilities to employers.
- Use the military chain of command to promote better understanding of the importance of maintaining positive working relations between employers and their RC employees, in order to sustain military participation.

Today, more than 4,700 ESGR volunteers serve across the nation in all 50 states, the District of Columbia, Guam-CNMI, Puerto Rico, and the U.S. Virgin Islands; 700 of those 4,700 serve as Ombudsmen. The Headquarters (HQ) ESGR in Alexandria, Virginia, provides guidance and resources to the 54 ESGR State Committees that conduct employer and military outreach programs. These employers and military outreach programs also include participants from the volunteer ombudsmen services program. ESGR Ombudsmen are specifically trained in USERRA using neutral mediation techniques, resolving employment conflicts between service members and employers, and furthering the understanding of and compliance with USERRA regulations. ESGR conducts

proactive outreach programs and provides responsive Ombudsman Services in support of its mission. In FY 2013, ESGR volunteers influenced 161,488 employers and 494,270 service members, informing both groups on responsibilities and rights under USERRA.

Outreach Programs

ESGR conducts awareness and recognition programs aimed at employers of RC service 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 participate in the Statement of Support Program pledge that:

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 appreciate the values, leadership, and unique skills service members bring to the workforce and will encourage opportunities to hire Guardsmen, Reservists, and veterans.
4. 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. Most employer awards originate from nominations submitted by service members, recognizing supervisors with the Patriot Award. In addition, the Secretary of Defense Employer Support Freedom Award is the U.S. Government’s highest honor bestowed on employers, and is presented annually to a maximum of 15 select large, small, and public-sector employers who have demonstrated exceptional support to National Guard and Reserve employees.

During FY 2013, ESGR recognized 11,044 supervisors of RC service members with the Patriot Award. HQ ESGR received 2,899 nominations for the 2013 Secretary of Defense Employer Support Freedom Award. During the same period, 57,887 employers signed Statements of Support.

Ombudsman Services

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

ESGR and DOL collaborate under an interagency Memorandum of Understanding (MOU) that sustains the organizations’ cooperation in managing and resolving USERRA cases and expedites the sharing of information between the two agencies. The MOU between ESGR and DOL stipulates that when a case cannot be resolved by ESGR within 14 to 30 calendar days, 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 700 volunteer Ombudsmen that assist in helping to resolve

USERRA compliance issues throughout the nation. ESGR's ombudsmen volunteers receive training on USERRA and dispute resolution techniques. They also serve as a neutral third party between the employer and employee to inform and educate all involved parties on the requirements of the law, as well as to work to obtain a mutually agreeable solution to the dispute.

ESGR operates and maintains a Customer Service Center (CSC) that acts as the initial entry point for USERRA complaints, inquiries and information requests with DOD. The CSC provides prompt, expert telephonic and email responses to service members and employers on all USERRA-related matters. During FY 2013, ESGR received 19,938 contacts by telephone and email; of which 2,544 contacts resulted in actual USERRA mediation cases. ESGR's mediation efforts covered an array of USERRA issues that included 1,112 complaints involving some type of military discrimination, 1,149 complaints involving job reinstatement and reemployment problems, and 213 complaints involving possible retaliation or reprisal. There were 560 USERRA mediation cases in which ESGR was unable to obtain an agreement between the employee and employer. In those instances, ESGR Ombudsmen informed both parties that the employee (service member) had the right to file a case with DOL or seek assistance through a private attorney.

ESGR and VETS will continue to track problems, coordinate issues, and identify trends in future fiscal years, as a key part of both agencies' efforts to improve services to the National Guard and Reserve.

DEPARTMENT OF LABOR'S USERRA OUTREACH AND CLAIMS INVESTIGATION

VETS PUBLIC EDUCATION AND COMPLIANCE ASSISTANCE EFFORTS

VETS conducts a robust 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 one million individuals on USERRA. In FY 2013 alone, VETS presented USERRA information to more than 47,000 people. Briefings to mobilizing and demobilizing members of the Guard and Reserve 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 submit 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 and completed complaint form (the VETS 1010, available to the public online through VETS' web page), 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 complaint.

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 investigative techniques 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.

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 from VETS and pursue the claim with private counsel. A claimant whose case is being investigated by VETS may be concurrently represented by a third party, including private counsel, but VETS will continue its efforts only as long as the third party does not interfere with the investigation. An example of interference would be contacting the employer or potential witnesses.

CASE 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 DOJ or to the OSC, as appropriate. If a claimant requests that a case be referred, VETS must refer the claim regardless of whether VETS has found merit in the complaint. VETS has 60 days to complete this referral process, unless the claimant agrees to an extension of time.

DEPARTMENT OF JUSTICE ENFORCEMENT

DOJ and DOL work collaboratively to meet the goal of ensuring service members' USERRA rights are protected. If DOL cannot resolve a service member's USERRA claim, the service member may ask DOL to refer the service member's claim to the Attorney General for review. Each DOL referral includes: (1) the VETS investigative file; and (2) a memorandum analyzing the case and providing a recommendation as to whether representation should be provided or declined.

Upon receipt of a referred USERRA claim from DOL, DOJ reviews the complete DOL investigative file and analysis. 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. If DOJ determines that it will not offer representation to the service member, it informs the service member of this decision and notifies 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.

DOJ continues to ramp up its enforcement of USERRA against private, State and local employers through litigation, facilitated settlements, outreach, and advocacy. Since 2004, DOJ has filed 83 USERRA lawsuits seeking relief for service members and favorably resolved 128 USERRA complaints either through consent decrees obtained in those suits or through facilitated private settlements.

DOJ has actively participated as *amicus curiae* in appeals involving the important rights of service members, including the Supreme Court case *Staub v. Proctor Hospital*, the Second Circuit appeal in *Serrichio v. Wachovia Securities*, and the First Circuit appeal in *Rivera-Melendez v. Pfizer Pharmaceuticals, LLC*. DOJ also intervened and participated as *amicus curiae* to defend USERRA's constitutionality in *Weaver v. Madison City Board of Education* (N.D. Ala.), filed in 2012, and the right of service members to file private USERRA claims against States in *Ramirez v. State of New Mexico Youth and Family Services* (N.M. App.), filed in 2013.

In FY 2014, 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 possible.

OFFICE OF SPECIAL COUNSEL ENFORCEMENT

OSC's enforcement responsibilities apply to Federal-sector USERRA cases. Pursuant to an existing MOU between DOL and OSC, case referrals from DOL to OSC following a VETS investigation are addressed in a manner similar to that used in DOJ referrals discussed above, and also include a written legal analysis from DOL's Solicitor's Office that includes a recommendation regarding the merit of the claim.

USERRA IN THE FEDERAL SECTOR

The Federal Government is committed to being a model employer under USERRA. OPM is responsible for administering USERRA policy for the Federal government to ensure it meets that goal. In July 2012, President Obama issued a Memorandum reaffirming the Administration's commitment to the employment and reemployment rights of service members and veterans and reiterating that the "Federal Government, as our Nation's largest employer, has a responsibility to adopt best practices with respect to employing returning service members." The President established a USERRA Employment Protection Working Group to coordinate and review agency efforts to implement model practices and comply with the statute. DOL, DOJ, OPM, OSC, and other key Federal agencies participated.

The Working Group led Federal agencies in the establishment of training protocols for senior leaders and managers, human resources professionals, legal departments, and service members, so that all front-line agency personnel understand their role in USERRA. On September 10, 2013, OPM issued guidance in response to the President's Memorandum on ways to improve USERRA protection policies and practices. This guidance contains strategies and data improvement guidance for agencies to use to help strengthen their response to USERRA. A focus on continuous engagement with service members before, during and after their military service will help ease their transition from active duty to the civilian Federal workforce, which will in turn help further the goal of making the Federal Government a model employer and help agencies comply with USERRA. In addition, continued identification and sharing of best practices will ensure that the most effective approaches are used to assist veterans and service members as they search for employment or return to their civilian jobs in the Federal Government.

USERRA DEMONSTRATION PROJECT

VETS and OSC have been collaborating on implementing and supporting the U.S. Government Accountability Office’s (GAO) assessment of a three-year demonstration project, mandated by the Veterans’ Benefits Act of 2010, Pub. L. No. 111-275 (VBA of 2010), to compare the performance of VETS and OSC in the investigation of USERRA complaints against Federal government agencies across a number of dimensions, such as timeliness, case outcomes, and cost effectiveness. Under the Demonstration Project, which began on August 9, 2011, OSC investigates and attempts to resolve all Federal complaints filed by service members whose Social Security Numbers (SSN) end in an odd digit or who allege a related Prohibited Personnel Practice (PPP) allegation under 5 U.S.C. § 2302(b) (regardless of SSN). VETS investigates and attempts to resolve the remaining Federal complaints (those associated with even-numbered SSNs that have no related PPP allegation) and all non-Federal complaints (those against private, State, and local employers).²

During FY 2013, USERRA Demonstration Project cases were distributed as follows:

Demonstration Project Cases	Cases Pending at Start of FY 2013³	New Cases Opened in FY 2013⁴	Total Cases Reviewed in FY 2013	Cases Closed in FY 2013	Cases Pending at Start of FY 2014
VETS	14	102	116	102	14
OSC	88	137	225	154	71

In order to implement the demonstration project, VETS and OSC entered into a MOU establishing how cases will be transferred, reported, and how OSC will receive funding for those cases it receives from VETS. VETS’ USERRA Information Management System (UIMS), which collects and reports key information on USERRA cases, has been modified to collect and show data related to the demonstration project, and the appropriate electronically filed claims are automatically transferred to OSC for greatest efficiency. In addition, VETS established a cost-tracking system specific to its investigations under the demonstration project to enable GAO to compare the costs of Federal USERRA investigations in the two agencies.

To further comply with the VBA of 2010, VETS and OSC developed and implemented a customer satisfaction survey (CSS) to measure USERRA claimants’ overall satisfaction with the investigative process and to offer them an opportunity to comment on the manner in which their claims were handled. VETS and OSC developed a series of questions designed to elicit unbiased information in

² USERRA complaints received by OSC under the Demonstration Project are separate and apart from USERRA cases referred to OSC by DOL under 38 U.S.C. § 4324 (see “CASES REFERRED TO THE OFFICE OF THE SPECIAL COUNSEL”).

³ FY 2012 Annual Report to Congress reported that VETS closed 100 Demonstration Project cases in FY 2012, but that number did not include 14 FY 2011 cases carried over into FY 2012 that were ultimately closed in FY 2012. Thus, the corrected total count for VETS Demonstration Project cases closed in FY 2012 was 114; and, as a result, the corrected count for “Cases Pending at Start of FY 2013” is reduced to 14, instead of the 28 shown in the FY 2012 Report.

⁴ Investigations of certain USERRA Demonstration Project cases begun in one agency that were found to properly belong with the other agency were transferred as appropriate for completion of the investigation, under Project guidelines. For Annual Report tracking purposes, each such case is counted under the agency that completed the investigation.

such areas as professionalism, oral and written communication, courtesy, access to VETS or OSC staff, and the claimants' view of the overall quality of the investigation.

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.

DOL reviewed 1,144 new unique cases in FY 2013 (OSC reviewed an additional 137 new unique cases as part of the USERRA Demonstration Project that began on 8/9/2011).⁵ 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 2008 – FY 2013.

Fiscal Year	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012	FY 2013
New VETS Cases (Federal and Non-Federal)	1,389	1,431	1,438	1,548	1,275	1,144
OSC Cases (Federal only)	37	n/a*	n/a*	28	150	137
Total New Cases	1,426	1,431	1,438	1,576	1,425	1,281

In FY 2013, DOL also carried over an additional 174 unique cases (open investigations) from FY 2012, and OSC also carried over from FY 2012 an additional 88 unique cases (open investigations, as part of the USERRA Demonstration Project). During FY 2013, DOL reopened six cases from FY 2012 and four from FY 2011 or earlier. In sum, DOL reviewed a total of 1,328 unique cases in FY 2013, and OSC reviewed an additional 225 unique cases.

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

During FY 2013, ESGR received 19,938 contacts by telephone and email. Of those contacts, 2,544 resulted in actual USERRA cases for which ESGR Ombudsmen services were provided.

⁵ In this report, the term “new unique cases” means cases first received by VETS or OSC in a given year. This count eliminates duplications that result from a claimant filing the same complaint more than once; a case being closed in one State and reopened in another for administrative purposes; or a claimant reopening a claim that was previously closed.

* OSC did not review new unique cases in FY 2009 and FY 2010 because the assignment of such cases to OSC under a demonstration project established by the Veterans Benefits Improvement Act of 2004 ended in FY 2008. However, OSC again began to review unique cases in FY 2011 under another demonstration project established by the VBA of 2010.

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 2013, DOL referred 83 cases to the Attorney General's Civil Rights Division and seven cases to OSC. During the fiscal year, OSC did not represent any service members before the MSPB that resulted in a MSPB decision. 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.

DOJ filed six USERRA complaints in FY 2013: three of these cases have now settled; DOJ withdrew as counsel from one case due to a private settlement; and, the remaining two cases are in active litigation.

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 2,403 individuals who had filed the 2,544 cases reviewed by ESGR Ombudsmen in FY 2013, and the date of each case. VETS compared the ESGR data to its own data⁶ on cases initially opened between October 1, 2012 and October 31, 2013⁷. This comparison resulted in 270 likely matches; thus, it appears that 11% of FY 2013 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.** Fifteen of the new unique cases first reviewed by VETS in FY 2013 (1.3%) involved a disability-related issue.
- ii.** Forty of the ESGR cases first reviewed in FY 2013 (1.6%) involved a disability-related issue.
- iii.** Of the cases referred for consideration of litigation, one of those referred to DOJ and none of those referred to OSC involved a disability-related issue.
- iv.** Of the six cases filed by DOJ in FY 2013, none involved a disability-related issue.
- v.** With respect to the 270 cases reviewed by DOL and ESGR involving the same person in FY 2013, three (1.1%) involved a disability-related issue.

⁶ Absent more specific data on the employer(s) and specific allegation(s) involved, case matching cannot be made with complete confidence.

⁷ October data was included to capture late FY 2013 ESGR cases that were filed with VETS early in FY 2014.

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

- i.** In FY 2013, VETS asked claimants whether they had a service-connected disability. Among the 1,144 new unique cases VETS received, VETS obtained responses from 1,130 claimants, 23% (260) of whom reported having such a disability. Among these 260 claimants who reported having a service-connected disability, 13 also claimed a USERRA-related disability issue. Among the remaining 870 claimants who responded but did not report having a service-connected disability, two claimed a USERRA-related disability issue.
- 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, 24 of those referred to DOJ involved a claimant who reported a service-connected disability, and none of the referred cases included a USERRA-related disability issue. Four of those referred to OSC involved a claimant who reported a service-connected disability, and none of the referred cases included a USERRA-related disability issue.
- iv.** Of the six cases filed by DOJ in FY 2013, one involved a person with a service-connected disability, and none of those six cases included a USERRA-related disability issue.
- v.** With respect to the 270 cases reviewed by VETS and ESGR involving the same person in FY 2013, VETS obtained service-connected disability responses from 264 of these claimants, 16% (43) of whom reported having such a disability. Two claimants among the 43 who reported having a service-connected disability also claimed a USERRA-related disability issue. Among the remaining 221 claimants who responded but did not report having a service-connected disability, two claimed a USERRA-related disability issue.

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

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 2013 USERRA ISSUE	VETS CASES ALLEGING ISSUE*	
	NUMBER	PERCENT
Military obligations discrimination	435	38.0%
Reinstatement	290	25.3%
Other non-seniority benefits	43	3.8%
Promotion	83	7.3%
Vacation	21	1.8%
Status	38	3.3%
Pay rate	51	4.5%
Reasonable accommodation/ retraining for non-qualified/non-disabled	6	0.5%
Discrimination as retaliation for any action	86	7.5%
Seniority	36	3.1%
Pension	41	3.6%
Initial hiring discrimination	78	6.8%
Layoff	30	2.6%
Special protected period discharge	21	1.8%
Health benefits	18	1.6%
Reasonable accommodations/retraining for disabled	15	1.3%
Other	38	3.3%

* Note: Because many USERRA cases involve multiple issues, the number of cases in this chart exceeds the 1,144 new unique cases reported by VETS in FY 2013 and the combined percentages exceed 100%.

DOL closed 1,193 cases in FY 2013 under the following closure codes: no merit, 384 (32%); administrative, 103 (9%); claim granted, 210 (18%); claim settled, 132 (11%); claim withdrawn, 199 (17%); not eligible, 46 (4%); referred, 97 (8%); merit, not resolved, 22 (2%); merit undetermined, 0 (0%).⁸ An explanation of case closure codes follows.

⁸ Combined closure code percentages exceed 100% due to the effects of rounding each code to a whole percentage.

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 multiple 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 case, 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 case 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 complaint, 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 Ombudsman services covered an array of USERRA issues that included 1,112 complaints involving some type of military discrimination; 1,149 complaints involving job reinstatement and reemployment problems; and 213 cases involving possible retaliation or reprisal during FY 2013.

ESGR resolved 1,984 of its 2,544 Ombudsman cases. There were 560 USERRA Ombudsman cases in which the employee and employer could not reach an agreement. In these instances ESGR Ombudsmen informed both parties that the employee 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 data.

Crosswalk of USERRA Issues, FY 2013

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

Primary Categories

ESGR
Ombudsman Cases
"Problem Codes"
(Converted to VETS' Issue Codes)

VETS
Complaint Cases
"Issue Codes" *

Discrimination	Military Obligations Discrimination	1014	ID - Military Obligations Discrimination	400
	Initial Hiring Discrimination	98	II - Initial Hiring Discrimination	44
	1,112 Ombudsman Cases (45%)		444 Issues in 441 Complaint Cases (46% of Complaint Cases)	
Reinstatement/ Reemployment	Health Benefits	41	IH - Health Benefits	14
	Pension	19	IP - Pension	34
	Seniority	39	IS - Seniority	27
	Other Non-Seniority Benefits	21	IB - Other Non-Seniority Benefits	38
	Status	120	IZ - Status	34
	Layoff	44	IL - Layoff	23
	Vacation	84	IV - Vacation	20
	Reinstatement	567	IR - Reinstatement	249
	Promotion	101	IT - Promotion	74
	Reasonable Accommodations/Retraining for Disabled	40	IA - Reasonable Accommodations/Retraining for Disabled	10
	Reasonable Accommodations/Retraining for Non-Qualified/Non-Disabled	4	IW - Reasonable Accommodations/Retraining for Non-Qualified/Non-Disabled	5
	Pay Rate	66	IM - Pay Rate	45
	Special Protected Period Discharge	3	IF - Special Protected Period Discharge	19
1,149 Ombudsman Cases (46%)		592 Issues in 447 Complaint Cases (46% of Complaint Cases)		
Reprisal	Discrimination as Retaliation for any Action	213	ID2 - Discrimination as Retaliation for any Action	61
	213 Ombudsman Cases (8%)		61 Issues in 61 Complaint Cases (6% 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. Also, the percentages of NG&R complaint cases among the three Primary Categories for both VETS and ESGR in this chart total less than 100% for each agency, because ESGR's Case counts and VETS' Issue counts here do not include the uncategorized "Other" Problem/Issue Code, thereby excluding 70 "Other" ESGR Cases and 27 "Other" VETS Issues from this chart.

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

CASES REFERRED TO THE DEPARTMENT OF JUSTICE

In FY 2013, the Civil Rights Division received 22 referrals from DOL in which DOL found the claims to be meritorious and recommended that DOJ offer representation to the service member. DOJ offered representation in 10 cases (one of which DOJ facilitated settlement, and one of which was withdrawn by the service member due to a private settlement), facilitated two settlements, and declined representation in seven cases. Two referrals involved State agencies: in one of these referrals, DOJ facilitated a settlement, and in the other, DOJ pursued litigation. The remaining referral is still pending.

DOJ received an additional 61 referrals from DOL in FY 2013 with a finding of non-merit and a recommendation that DOJ decline to litigate the case. Based on DOL's recommendation and DOJ's independent analysis of the merits of each referral, DOJ declined representation with respect to 55 referrals. The remaining six referrals involved State agencies and, in agreement with DOL, DOJ declined to pursue litigation.

The cases referred to the Civil Rights Division in FY 2013 involved a number of USERRA issues. Approximately 42% (35) of these cases involved allegations of termination and/or discharge, approximately 34% (28) involved reemployment allegations, and approximately 18% (15) involved allegations of loss or denial of benefits, such as loss of pay, assignment, reduction or loss of pension or health benefits, or loss of seniority. These cases also involved various forms of discrimination, with approximately 12% (10) involving failure to promote, approximately 4% (3) involving failure to hire, 1% (1) involving service connected disability, and approximately 61% (51) involving actions affecting the service member's terms and conditions of employment, such as discipline or harassment. Eleven percent (9) of these cases involved allegations of retaliation for asserting USERRA protection.⁹

CASES REFERRED TO THE OFFICE OF THE SPECIAL COUNSEL

During Fiscal Year 2013, DOL referred seven cases to OSC at the request of the service member, under 38 U.S.C. Sec. 4324. Additionally, 11 cases referred to OSC during previous fiscal years remained pending at the beginning of Fiscal Year 2013. Thus, 18 total cases were pending at OSC during the fiscal year. OSC closed 12 of the 18 cases during Fiscal Year 2013, with six cases pending at the end of the fiscal year. OSC did not file any actions with the MSPB during the fiscal year.

In 12 of the 18 cases, the service member alleged discrimination based on uniformed service, including termination, non-promotion, non-selection, or improper denial of employment benefits; in five cases, violations of reemployment rights; and in one case, retaliation for exercising USERRA rights.

USERRA cases referred to OSC by DOL under 38 U.S.C. § 4324 are separate and apart from USERRA complaints received by OSC under the current USERRA Demonstration Project (*see*

⁹ Several cases involved multiple issues. Each issue was counted separately.

“USERRA DEMONSTRATION PROJECT”).

iv. COMPLAINTS FILED BY THE ATTORNEY GENERAL

DOJ filed six USERRA complaints in FY 2013. Two of these cases have now settled. DOJ withdrew as counsel from one case due to a private settlement and the remaining three cases are in active litigation.

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

DOL’s response to Mandated Reporting Requirement # 5, setting forth the number of cases reviewed by DOL and DOD through ESGR that involve the same person, indicates that in comparing ESGR data on USERRA cases during the fiscal year, 270 likely matches were identified. This figure indicates that first ESGR, and subsequently DOL, handled the same individuals’ claims.

DOL closed 268 of these 270 likely matches by May 13, 2014, under the following closure codes: no merit, 80 (30%); administrative, 16 (6%); claim granted, 55 (21%); claim settled, 43 (16%); claim withdrawn, 29 (11%); not eligible, 12 (4%); referred, 22 (8%); merit, not resolved, 11 (4%); merit undetermined, 0 (0%). An explanation of VETS case closure codes appears in the explanation of the status of cases reviewed by DOL.

The following chart shows how the alleged issues in these 270 likely match cases were distributed among the various VETS’ closure codes:

VETS' Data For 270 Likely Case Matches with FY 2013 ESGR Cases*

VETS' USERRA Issue Codes	VETS' Closure Codes									NUMBER OF CASES FOR EACH ISSUE CODE:	PERCENT OF ALL LIKELY MATCH CASES:
	Administrative	Claim Granted	Claim Settled	Claim Withdrawn	Merit Undetermined	Merit, Not Resolved	No Merit	Not Eligible	Referred		
Military Obligations Discrimination	7	21	21	12	0	6	36	5	12	120	44.4%
Reinstatement	6	21	14	7	0	2	18	5	7	80	29.6%
Other Non-Seniority Benefits	0	1	0	1	0	0	1	0	0	3	1.1%
Promotion	0	3	2	2	0	2	9	0	2	20	7.4%
Vacation	0	3	0	1	0	0	2	0	1	7	2.6%
Status	1	2	2	1	0	0	1	1	0	8	3.0%
Pay Rate	0	9	1	0	0	0	2	0	0	12	4.4%
Reasonable Accommodations/Retraining for Non-Qualified/Non-Disabled	0	0	0	0	0	0	1	0	0	1	0.4%
Discrimination as Retaliation for any Action	0	4	0	1	0	0	6	0	2	13	4.8%
Seniority	0	4	1	1	0	1	3	1	0	11	4.1%
Pension	0	4	2	1	0	0	0	0	1	8	3.0%
Initial Hiring Discrimination	0	0	1	2	0	0	2	0	0	5	1.9%
Layoff	1	0	4	0	0	2	5	1	0	13	4.8%
Special Protected Period Discharge	0	0	1	0	0	2	2	0	0	5	1.9%
Health Benefits	0	1	0	0	0	0	1	0	0	2	0.7%
Reasonable Accommodations/Retraining for Disabled	0	1	0	1	0	0	1	1	0	4	1.5%
Other	1	1	0	0	0	0	2	1	0	5	1.9%
NUMBER OF ISSUE CODES FOR EACH CLOSURE CODE:	16	75	49	30	0	15	92	15	25	317	
PERCENT OF ALL LIKELY MATCH CASES:	5.9%	27.8%	18.1%	11.1%	0.0%	5.6%	34.1%	5.6%	9.3%		117.4%

* Two cases still open as of 5/13/2014 are not shown in this chart. The issue codes for these two cases: One involved Reinstatement, and the other involved Discrimination as Retaliation for any Action. **NOTE:** Many USERRA cases involve multiple issues, and VETS records all the USERRA issues involved in a case. As a result, the numbers of cases and issues in this chart exceed the 270 ESGR and VETS cases involving the same person, and the combined percentages exceed 100%. Matching of FY 2013 ESGR cases and VETS cases initially opened 10/1/2012 to 10/31/2013 is based on claim dates and claimant names.

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 is the only Federal agency that collected occupational data on USERRA claimants and recorded the respective Standard Occupational Classification System (SOCS) code in FY 2013. Therefore, SOCS code data is not available for cases filed only with ESGR.

VETS was able to obtain the SOCS code in 98% (1,126) of the unique complaints filed in FY 2013. That data reveals that 20% of complaints involved Protective Service occupations. Another 11% involved Transportation and Material Moving occupations, and 10% involved Office and Administrative Support occupations.

With respect to cases reviewed by VETS and ESGR likely involving the same person in FY 2013, VETS obtained the SOCS code in all but six of the 270 cases. That data reveals that 19% of those cases involved Protective Service occupations, 10% involved Production occupations, and 9% involved Transportation and Material Moving occupations.

With respect to cases referred to the Attorney General's DOJ Civil Rights Division from DOL in FY 2013, VETS obtained the SOCS code in all but one of the 83 cases. That data reveals that 21% of those cases involved Protective Service occupations. Another 15% involved Management occupations, and 9% involved Installation, Maintenance, and Repair occupations.

VETS obtained the SOCS code in all seven of the cases referred to OSC from DOL through VETS and SOL in FY 2013. That data reveals that 43% of cases involved Business and Financial Operations, 29% involved Office and Administrative Support occupations, and 14% of the cases involved: Protective Service occupations or Healthcare Practitioners and Technical occupations.

Occupations Involved in FY 2013 USERRA CASES¹⁰

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	20%	21%	14%	19%
Office and Administrative Support	10%	7%	29%	7%
Transportation and Material Moving	11%	7%	0%	9%
Management	7%	15%	0%	7%
Sales and Related	7%	6%	0%	6%
Installation, Maintenance, and Repair	5%	9%	0%	7%
Production	7%	2%	0%	10%
Healthcare Practitioners and Technical	6%	5%	14%	6%
Food Preparation and Serving Related	3%	2%	0%	4%
Business and Financial Operations	4%	5%	43%	4%
Education, Training, and Library	3%	5%	0%	3%
Construction and Extraction	3%	4%	0%	4%

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 2013. DOL will continue to monitor USERRA cases to identify trends as they arise.

¹⁰ The following occupations accounted for 2% or fewer within each case/referral category shown in this chart (*with exceptions as noted here*): Architecture and Engineering (*Exception: 5% of Referrals to DOJ, and 3% of Cases Common to VETS & ESGR*); Arts, Design, Entertainment, Sports, and Media; Building and Grounds Cleaning and Maintenance; Community and Social Services; Computer and Mathematical; Farming, Fishing, and Forestry; Healthcare Support; Legal; Life, Physical, and Social Science; Military Specific; and, Personal Care and Service occupations.

10. RECOMMENDATION 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.

RECOMMENDATION FROM DOJ AND DOL: *Strengthen the United States' ability to enforce USERRA, in the following ways: Ensure that USERRA is consistent with other civil rights laws by allowing the United States to bring suit in its own name as the plaintiff, to vindicate the public interest in ensuring the statute is enforced; to challenge identified patterns and practices that violate the law; to preserve the right of the aggrieved service member to intervene in such suits or to bring his or her own suit where the Attorney General has declined to file suit; and to allow the Attorney General the authority to compel production of evidence.*

DOJ and DOL urge Congress to strengthen the United States' ability to enforce USERRA. Amending provisions could address several critical issues, some of which appear in the 2013 DOJ legislative package. First, we request amending USERRA to allow the Attorney General, acting on behalf of the United States, to serve as a plaintiff in all USERRA suits, rather than only in suits filed against State employers. Second, we request the grant of independent authority to the Attorney General to investigate and file suit to challenge employment policies or practices that establish a pattern or practice of violating USERRA. This amendment would strengthen significantly DOJ's ability to enforce USERRA to address a systemic violation (such as a policy prohibiting extended absences, including absences for military service) that could adversely affect the employment rights of multiple service members.

Third, to support the proposed pattern-or-practice authority, we request amending USERRA to provide the Attorney General with civil investigative demand authority to compel the production of existing documents and unsworn answers to written questions from the custodian of such documents. DOL has subpoena power in its investigations under USERRA. The Attorney General, however, has no pre-suit investigatory authority. Because the proposal for pattern-or-practice authority includes the authority to initiate an investigation, Congress should provide the Attorney General with the appropriate investigative tools.

We also recommend other changes that would allow for service members to more ably exercise their USERRA rights. DOJ and DOL support changes that would allow USERRA claimants to sue their own State in Federal or State courts.

In addition, to guarantee the availability of complete adjudication of USERRA protections, it is requested that the Act be amended to make arbitration clauses unenforceable unless all parties consent to arbitration after a dispute arises.

DOJ and DOL look forward to working with Congress on these USERRA provisions.

USERRA annual reports are available for fiscal years (FY) 1995-1999 and 2004-2013. 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. 2598 (December 2004).



OFFICE OF VETERANS' EMPLOYMENT AND TRAINING

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