

USERRA

UNIFORMED SERVICES EMPLOYMENT AND
REEMPLOYMENT RIGHTS ACT OF 1994

FY 2015

ANNUAL REPORT TO
CONGRESS • JULY 2016

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 or 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) 2015 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 (SOCS).
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, 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 away on military service.

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, and 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 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, State, or local government employer, or to OSC¹ 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, in U.S. District Court or before the MSPB, either on their own or with the assistance of a private attorney.

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.

This report begins by describing the levels of Federal assistance available, starting with outreach and education and continuing through informal dispute resolution, formal investigation and resolution, referral, and 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 a program within the 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 service members and their employers since its inception in 1972. Hundreds of thousands of 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:

- Operates a proactive outreach program, directed at U.S. employers, employees, and communities, ensures understanding and appreciation of the role of the National Guard and Reserve in the context of the DOD Total Force Policy.
- Assists in preventing, resolving, or reducing employer and/or employee problems and misunderstandings that result from military service, training, or duty requirements through information services and mediation.
- Assists in educating service members regarding their obligations and responsibilities to employers.
- Uses the military chain of command to promote better understanding of the importance of maintaining positive working relations between employers and their service member employees, in order to sustain military participation.

Today, more than 4,500 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 4,500 volunteers serve as Ombudsmen. The ESGR Headquarters in Alexandria, Virginia, provides guidance and resources to the 54 ESGR State Committees that conduct employer and military outreach programs. These employer and military outreach programs also include participants from the volunteer Ombudsman 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 2015, ESGR volunteers reached out to 131,376 employers and 416,157 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 take the following pledge:

We fully recognize, honor and comply with the Uniformed Services Employment and Re-Employment Rights Act.

We will provide our managers and supervisors with the tools they need to effectively manage employees who serve in the Guard and Reserve.

We appreciate the values, leadership and unique skills service members bring to the workforce and will encourage opportunities to hire Guardsmen, Reservists, and Veterans.

We will continually recognize and support our country’s service members and their families, in peace, in crises, 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 2015, ESGR recognized 10,128 supervisors of service members with the Patriot Award. ESGR received 2,960 nominations for the 2015 Secretary of Defense Employer Support Freedom Award. During the same period, 45,118 employers signed Statements of Support.

Ombudsman Services

The primary means of assisting service 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 investigation or 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 580 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 from customers world-wide. The CSC provides prompt, expert telephonic and email responses to service members and civilian employers on all USERRA-related matters. During FY 2015, ESGR received 18,322 contacts by telephone and email; of which 1,802 contacts resulted in actual USERRA mediation cases. ESGR's mediation efforts covered an array of USERRA issues that included 864 complaints involving some type of military discrimination, 744 complaints involving job reinstatement and reemployment problems, and 169 complaints involving possible retaliation or reprisal. There were 467 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 2015, VETS presented USERRA information to 7,600 individuals including service members, members of professional groups, and to members of the general public. 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 service member receives a USERRA briefing upon mobilization and demobilization from active military service. In FY 2015, VETS and OSC also collaborated to provide educational briefings to a number of Federal agencies.

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 hard-copy 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, and may use an administrative subpoena to obtain the necessary evidence. 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, in investigative techniques, and in the agency's 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 VETS obtains an extension of time from the claimant 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 OSC, as appropriate, for consideration of legal representation at no cost to the claimant. 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 VETS obtains an extension of time from the claimant.

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 against a non-Federal employer, 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 an assessment as to whether the allegations raised in the complaint are supported by the evidence obtained through VETS' investigation.

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 the Attorney General determines that it will not offer representation, or seek relief on the service member's behalf, 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 95 USERRA lawsuits and favorably resolved 151 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* No. 13-14624 (11th Cir.) (affirming district court), filed in 2014, and

Ramirez v. State of New Mexico Youth and Family Services (N.M. S.Ct, No. S-1-SC-34613.), filed in 2014. The United States also filed a statement of interest in 2014 in *Joseph v. Virgin Islands*, CV No. ST-11-CV-419, in order to defend Congress's authority to subject territories, like the United States Virgin Islands, to private suits in territorial courts under USERRA.

DOJ also has been working with DOL in training VETS' investigators through both live and remote training sessions in order to ensure that VETS staff are fully prepared to defend and protect service members' civil rights under USERRA.

In FY 2016, 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, in order to achieve the best possible result for the service member. The United States will also continue to seek out opportunities to participate as *amicus curiae* and file statements of interest on behalf of service members as part of DOJ's enforcement powers under the statute.

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.

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 under USERRA. In September 2013, in response to the President's Memorandum directing executive departments and agencies to take steps to ensure robust compliance with USERRA, OPM issued guidance containing strategies and data improvement suggestions for agencies to use to help strengthen their response to USERRA. The memorandum emphasized to Federal agencies that 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. 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. During FY 2015, VETS and OSC professional staff conducted outreach to a number of Federal agencies, teaching and training agency staff on the law and best practices set forth in OPM's guidance. VETS and OSC continue to collaborate in this effort, which has earned praise from agencies who received the training.

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 1,123 new unique cases in FY 2015.² In that regard, 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 unique USERRA cases reviewed by the Federal Government in FY 2010 – FY 2015.

Fiscal Year	FY 2010	FY 2011	FY 2012	FY 2013	FY 2014	FY 2015
New VETS Cases (Federal and Non-Federal)	1,438	1,548	1,275	1,144	1,140	1,123
New OSC Cases (Federal only)	n/a*	28	150	137	146	n/a*
Total New Cases	1,438	1,576	1,425	1,281	1,286	1,123
Total Cases*	1,701	1,873	1,644	1,553	1,511	1,288

In FY 2015, DOL carried over an additional 157 unique cases (open investigations) from FY 2014. During FY 2015, DOL reopened six cases from FY 2014 and two from FY 2013 or earlier. In sum, DOL reviewed a total of 1,288 unique cases in FY 2015.

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

During FY 2015, ESGR received 18,322 contacts by telephone and email. Of those contacts, 1,802 resulted in actual USERRA cases which were reviewed by ESGR Ombudsmen.

² 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 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. OSC again began to review unique cases in FY 2011 under the demonstration project established by the Veterans Benefits Act of 2010. Unique case assignments to OSC under the latter demonstration project ended in FY 2014. OSC did not review new unique cases in FY 2015.

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 2015, DOL referred 60 cases to the Attorney General and 17 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 seven USERRA complaints in FY 2015. Six of these cases settled in FY 2015. The remaining case was in active litigation in FY 2015.

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 1,733 individuals who had filed the 1,802 cases reviewed by ESGR Ombudsmen in FY 2015, and the date of each case. VETS compared the ESGR data to its own data³ on cases initially opened between October 1, 2014 and October 31, 2015.⁴ This comparison resulted in 200 likely matches; thus, it appears that 11% of FY 2015 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-two of the new unique cases first reviewed by VETS in FY 2015 (2.0%) involved a disability-related issue.
- ii.** Fifteen of the ESGR cases first reviewed in FY 2015 (0.8%) involved a disability-related issue.
- iii.** Of the cases referred by DOL for consideration of litigation in FY 2015, two of those referred to DOJ (3.3%) and none of those referred to OSC involved a disability-related issue.
- iv.** Of the seven USERRA complaints filed by DOJ in FY 2015, none involved a disability-related issue.
- v.** With respect to the 200 cases reviewed by DOL and ESGR involving the same person in FY 2015, one (0.5%) involved a disability-related issue.

³ Absent more specific data on the employer(s) and specific allegation(s) involved, case matching cannot be made with complete confidence.

⁴ October VETS data was included to capture the ESGR cases that were opened late FY 2015 and may have been filed with VETS in October 2015.

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

- i.** In FY 2015, VETS asked claimants whether they had a service-connected disability. Among the 1,123 new unique cases VETS received, VETS obtained responses from 1,105 claimants, 307 (28%) of whom reported having such a disability. Among these 307 claimants, 21 also claimed a USERRA-related disability issue. Among the remaining 798 claimants who responded but did not report having a service-connected disability, one 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 by DOL for consideration of litigation, ten of those referred to DOJ involved a claimant who reported a service-connected disability, and two of the referred cases included a USERRA-related disability issue. Nine 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 seven USERRA complaints filed by DOJ in FY 2015, two involved a service-connected disability.
- v.** With respect to the 200 cases reviewed by VETS and ESGR involving the same person in FY 2015, VETS obtained service-connected disability responses from 195 of these claimants, 38 (19%) of whom reported having such a disability. One claimant among the 38 who reported having a service-connected disability also claimed a USERRA-related disability issue. Among the remaining 157 claimants who responded but did not report having a service-connected disability, none 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. Because many USERRA cases involve multiple issues, the number of cases in this chart exceeds the 1,123 new unique cases reported by VETS in FY 2015 and the combined percentages exceed 100%.

Cases Opened by VETS in FY 2015 USERRA ISSUE	VETS CASES ALLEGING ISSUE	
	NUMBER	PERCENT
Military obligations discrimination	444	39.6%
Reinstatement	210	18.7%
Other non-seniority benefits	21	1.9%
Promotion	74	6.6%
Vacation	20	1.8%
Status	22	2.0%
Pay rate	42	3.7%
Reasonable accommodation/ retraining for non-qualified/non-disabled	3	0.3%
Discrimination as retaliation for any action	124	11.0%
Seniority	25	2.2%
Pension	35	3.1%
Initial hiring discrimination	83	7.4%
Layoff	45	4.0%
Special protected period discharge	14	1.2%
Health benefits	11	1.0%
Reasonable accommodations/retraining for disabled	22	2.0%
Other	51	4.5%

DOL closed 1,122 cases in FY 2015 under the following closure codes:

Cases Closed by VETS in FY 2015 CLOSURE CODE	VETS CASES CLOSED	
	NUMBER	PERCENT
No merit	399	35.6%
Administrative	105	9.4%
Claim granted	131	11.7%
Claim settled	92	8.2%
Claim withdrawn	236	21.0%
Not eligible	53	4.7%
Referred	82	7.3%
Merit, not resolved	22	2.0%
Merit undetermined	2	0.2%

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 multiple VETS’ letters, failure to give VETS a change of address, failure to supply information that could be easily obtained, and failure to attend scheduled meetings or conferences.
 - Continued Unauthorized Contact by Third Party with Employer** – Although a claimant is entitled to be represented by a third party under USERRA while the case is investigated by VETS, if the representation interferes with the 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 potentially 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 864 complaints involving some type of military discrimination; 744 complaints involving job reinstatement and reemployment problems; and 169 cases involving possible retaliation or reprisal during FY 2015.

ESGR resolved 1,335 of its 1,802 Ombudsman cases. There were 467 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. It shows the number of cases for each separate issue. For three groupings of issues defined as “Primary Categories” - - Discrimination; Reinstatement/Reemployment; and, Reprisal – the crosswalk also shows both the total cases, and the percentage of all cases, for each Category.

Crosswalk of USERRA Issues, FY 2015

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 799	ID - Military Obligations Discrimination 409
	Initial Hiring Discrimination 65	II - Initial Hiring Discrimination 43
	864 Ombudsman Cases (49%)	452 Issues in 448 Complaint Cases (49% of Complaint Cases)
Reinstatement/ Reemployment	Health Benefits 23	IH - Health Benefits 10
	Pension 21	IP - Pension 25
	Seniority 45	IS - Seniority 18
	Other Non-Seniority Benefits 31	IB - Other Non-Seniority Benefits 19
	Status 58	IZ - Status 20
	Layoff 20	IL - Layoff 40
	Vacation 73	IV - Vacation 20
	Reinstatement 352	IR - Reinstatement 182
	Promotion 65	IT - Promotion 60
	Reasonable Accommodations/Retraining for Disabled 15	IA - Reasonable Accommodations/Retraining for Disabled 7
	Reasonable Accommodations/Retraining for Non-Qualified/Non-Disabled 2	IW - Reasonable Accommodations/Retraining for Non-Qualified/Non-Disabled 3
	Pay Rate 38	IM - Pay Rate 35
	Special Protected Period Discharge 1	IF - Special Protected Period Discharge 13
744 Ombudsman Cases (42%)	452 Issues in 356 Complaint Cases (39% of Complaint Cases)	
Reprisal	Discrimination as Retaliation for any Action 169	ID2 - Discrimination as Retaliation for any Action 85
	169 Ombudsman Cases (9%)	85 Issues in 85 Complaint Cases (9% 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 25 "Other" ESGR Cases and 28 "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 2015, the Attorney General received 18 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 seven cases, and declined representation in eight cases (DOJ facilitated settlement in two). Two referrals involved State agencies as potential defendants. DOJ filed a lawsuit in one state referral which settled in FY 2015, and declined to pursue litigation in agreement with DOL in the remaining State referral. The remaining referral was still under consideration by DOJ in FY 2015.

DOJ received an additional 42 referrals from DOL in FY 2015 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 34 referrals and offered representation in one referral. Seven referrals involved state agencies, all of which DOJ declined to pursue litigation in agreement with DOL.

The cases referred to the Civil Rights Division in FY 2015 involved a number of USERRA issues. Twenty-two (37%) of these cases involved allegations of termination and/or discharge, 16 (27%) involved reemployment allegations, while 7 (12%) involved allegations of loss or denial of benefits, such as loss of pay, assignment, reduction or loss of pension or health benefits, and loss of seniority. The remaining cases involved various forms of discrimination, with 10 (17%) involving failure to promote, 3 (5%) involving failure to hire, and 13 (22%) involving actions affecting the service member's terms and conditions of employment, such as hostile work environment, discipline or harassment. The remaining 4 (7%) cases involved allegations of retaliation for asserting USERRA protection.⁵

CASES REFERRED TO THE OFFICE OF THE SPECIAL COUNSEL

During FY 2015, DOL referred 17 cases to OSC at the request of the service member, under 38 U.S.C. Sec. 4324. Additionally, seven cases referred to OSC during previous fiscal years remained pending at the beginning of FY 2015. Thus, 24 total cases were pending at OSC during the fiscal year. OSC closed 20 of the 24 cases during FY 2015, with four cases pending at the end of the fiscal year. OSC did not file any actions with the MSPB during the fiscal year.

In 18 of the 24 cases, the service member alleged discrimination based on uniformed service, including termination, non-promotion, non-selection, or improper denial of employment benefits; in eight cases, violations of reemployment rights; and in one case, retaliation for exercising USERRA rights.⁶

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 USERRA Demonstration Project which began on 8/9/2011 and ended on 8/8/2014.

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

⁶ Some cases involved multiple issues. Each issue was counted separately.

iv. **COMPLAINTS FILED BY THE ATTORNEY GENERAL**

DOJ filed seven USERRA complaints in FY 2015. Six of these cases settled in FY 2015. The remaining case was in active litigation in FY 2015.

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, 200 likely matches were identified. This figure indicates that first ESGR, and subsequently DOL, handled the same individuals’ claims.

DOL closed 199 of these 200 likely matches by May 12, 2016, under the following closure codes: no merit, 75 (38%); administrative, 11 (6%); claim granted, 30 (15%); claim settled, 24 (12%); claim withdrawn, 28 (14%); not eligible, 5 (3%); referred, 17 (9%); merit, not resolved, 8 (4%); merit undetermined, 1 (1%).⁷ 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 200 likely match cases were distributed among the various VETS’ closure codes.

VETS' Data For 200 Likely Case Matches with FY 2015 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	0	0	0	0	0	0	0	1	0	1	0.5%
Reinstatement	0	1	0	1	0	1	2	0	1	6	3.0%
Other Non-Seniority Benefits	5	13	10	12	0	3	40	0	5	88	44.0%
Promotion	1	2	2	2	0	3	10	0	2	22	11.0%
Vacation	0	1	0	0	0	0	3	0	0	4	2.0%
Status	0	0	0	0	0	0	1	0	1	2	1.0%
Pay Rate	1	1	1	0	0	0	0	0	0	3	1.5%
Reasonable Accommodations/Retraining for Non-Qualified/Non-Disabled	1	0	0	1	0	0	6	0	0	8	4.0%
Discrimination as Retaliation for any Action	1	4	2	0	0	1	0	1	0	9	4.5%
Seniority	0	0	0	0	0	0	2	0	1	3	1.5%
Pension	0	2	0	1	1	1	1	0	2	8	4.0%
Initial Hiring Discrimination	0	13	10	11	0	3	10	4	8	59	29.5%
Layoff	0	0	1	0	0	1	1	1	0	4	2.0%
Special Protected Period Discharge	0	1	1	2	0	2	2	0	3	11	5.5%
Health Benefits	1	1	2	1	0	0	0	0	2	7	3.5%
Reasonable Accommodations/Retraining for Disabled	0	0	0	0	0	0	0	0	0	0	0.0%
Other	1	1	1	2	0	1	2	0	0	8	4.0%
NUMBER OF ISSUE CODES FOR EACH CLOSURE CODE:	11	40	30	33	1	16	80	7	25	243	
PERCENT OF ALL LIKELY MATCH CASES:	5.5%	20.0%	15.0%	16.5%	0.5%	8.0%	40.0%	3.5%	12.5%		121.5%

* One case still open as of 5/12/2016 is not shown in this chart. The issue code for this case: Special Protected Period Discharge.

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 200 ESGR and VETS cases involving the same person, and the combined percentages exceed 100%. Matching of FY 2015 ESGR cases and VETS cases initially opened 10/1/2014 to 10/31/2015 is based on claim dates and claimant names.

⁷ Combined closure code percentages exceed 100% due to the effects of rounding each code to a whole percentage.

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 2015. Therefore, SOCS code data is not available for ESGR mediation cases. The chart below shows the full distribution of the SOCS codes in FY 2015 USERRA cases, across four different categories: VETS cases; cases common to VETS and ESGR; referrals to DOJ; and, referrals to OSC. The predominant occupations found among each of these four categories of cases can be summarized as follows:

- Out of 1,103 (98%) of the unique complaints filed in FY 2015, 19% of complaints involved Protective Service occupations; 13% involved Office and Administrative Support occupations; and 8% involved Management occupations.
- Out of 194 (97%) of the cases reviewed by VETS and ESGR likely involving the same person in FY 2015, 22% of those cases involved Protective Service occupations, and each of four categories (Office and Administrative Support; Healthcare Practitioners and Technical; Production; and Transportation and Material Moving) involved 9% of complaints.
- Out of the 60 cases referred to the Attorney General from DOL in FY 2015, 20% of those cases involved Protective Service occupations. Another 15% involved Transportation and Material Moving occupations, and 10% involved Sales and Related occupations.
- Out of the 17 cases referred to OSC from DOL through VETS and SOL in FY 2015, each of two categories (Protective Service, and Healthcare Practitioners and Technical) involved 24% of complaints. Another 18% involved Management occupations, and 12% involved Business and Financial Operations occupations.

Occupations Involved in FY 2015 USERRA CASES⁸

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	19%	20%	24%	22%
Office and Administrative Support	13%	8%	6%	9%
Management	8%	5%	18%	3%
Healthcare Practitioners and Technical	7%	5%	24%	9%
Production	7%	3%	6%	9%
Business and Financial Operations	7%	3%	12%	5%
Transportation and Material Moving	6%	15%	6%	9%
Sales and Related	6%	10%	0%	7%
Installation, Maintenance, and Repair	6%	5%	0%	4%
Computer and Mathematical	4%	3%	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 2015. DOL will continue to monitor USERRA cases to identify trends as they arise.

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.

⁸ The following occupations accounted for 2% or fewer within each case/referral category shown in this chart (*with exceptions as noted here*): Education, Training, and Library (*Exception: 7% of Referrals to DOJ*); Arts, Design, Entertainment, Sports, and Media (*Exception: 6% of Referrals to OSC*); Building and Grounds Cleaning and Maintenance; Community and Social Services; Farming, Fishing, and Forestry; Healthcare Support; Legal; Life, Physical, and Social Science; Military Specific (*Exception: 3% of Referrals to DOJ*); Food Preparation and Serving Related; Construction and Extraction (*Exception: 5% of Cases Common to VETS & ESGR*); Architecture and Engineering (*Exception: 5% of Cases Common to VETS & ESGR*); and, Personal Care and Service occupations.

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; to allow the Attorney General the authority to compel production of evidence; and to guarantee availability of the procedural rights afforded by the statute.*

DOJ and DOL continue to urge Congress to strengthen the United States’ ability to enforce USERRA. Amending provisions could address several critical issues, some of which appear in the 2015 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.

To guarantee the availability of procedural rights included in the statute, we request that Congress clarify that section 4302(b) of USERRA protects both substantive and procedural rights and benefits from reduction, limitation, or elimination. We further request that Congress clarify that the definition of “benefit,” “benefit of employment” or “rights and benefits” in section 4303(2) includes procedural protections provided by the statute. In particular, to guarantee the procedural right of adjudication of USERRA rights, we recommend explicitly noting that agreements to arbitrate are unenforceable unless all parties consent to arbitration after a complaint on the specific claim has been filed in court or with the Merit Systems Protection Board and all parties knowingly and voluntarily consent to have that particular claim subjected to arbitration.

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 2004-2014. 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
U.S. Department of Labor | 200 Constitution Avenue, NW | Washington, DC