



# USERRA

Uniformed Services Employment and Reemployment Rights Act of 1994

## FY 2018

Annual Report to Congress

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

INTRODUCTION	1
OVERVIEW OF USERRA PROTECTIONS	2
USERRA SERVICES PROVIDED BY THE DEPARTMENT OF DEFENSE’S	
EMPLOYER SUPPORT OF THE GUARD AND RESERVE	3
OVERVIEW	3
<i>Outreach Programs</i>	3
<i>Ombudsman Services</i>	4
<i>DOD USERRA Working Group</i>	5
DEPARTMENT OF LABOR’S USERRA OUTREACH AND CLAIMS INVESTIGATION	5
VETS PUBLIC EDUCATION AND COMPLIANCE ASSISTANCE EFFORTS	5
VETS INVESTIGATIVE PROCESS	5
CASE REFERRAL PROCESS	6
DEPARTMENT OF JUSTICE ENFORCEMENT	6
OFFICE OF SPECIAL COUNSEL ENFORCEMENT	7
USERRA IN THE FEDERAL SECTOR	7
MANDATED REPORTING REQUIREMENTS	8
1. THE NUMBER OF CASES REVIEWED BY THE DEPARTMENT OF LABOR UNDER USERRA DURING THE FISCAL YEAR FOR WHICH THE REPORT IS MADE.	8
<b><u>Figure 1. Unique USERRA Cases Reviewed by the Department of Labor and OSC</u></b>	8
2. THE NUMBER OF CASES REVIEWED BY SECRETARY OF DEFENSE UNDER THE NATIONAL COMMITTEE FOR EMPLOYER SUPPORT OF THE GUARD AND RESERVE DURING THE FISCAL YEAR.	8

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.	8
4.	THE NUMBER OF COMPLAINTS FILED BY THE ATTORNEY GENERAL PURSUANT TO SECTION 4323 DURING SUCH FISCAL YEAR.	9
5.	THE NUMBER OF CASES REVIEWED BY THE SECRETARY OF LABOR AND SECRETARY OF DEFENSE UNDER THE NATIONAL COMMITTEE FOR EMPLOYER SUPPORT OF THE GUARD AND RESERVE THAT INVOLVE THE SAME PERSON.	9
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.	9
	B. THE NUMBER OF SUCH CASES THAT INVOLVE A PERSON WHO HAS A SERVICE-CONNECTED DISABILITY.	9
7.	THE NATURE AND STATUS OF EACH CASE REPORTED ON PURSUANT TO PARAGRAPH 1, 2, 3, 4, OR 5.	11
	i. <b><u>CASES REVIEWED BY THE DEPARTMENT OF LABOR</u></b>	11
	<b><u>Figure 2. Cases Opened by VETS in FY 2018</u></b>	11
	<b><u>Figure 3. Investigated and subsequently closed by VETS in FY 2018</u></b>	12
	<b><u>Figure 4. Case Closure Codes Explained</u></b>	13
	ii. <b><u>CASES REVIEWED BY THE ESGR ON BEHALF OF THE SECRETARY OF DEFENSE</u></b>	13
	<b><u>Figure 5. Crosswalk of USERRA Issues, FY 2018</u></b>	14
	ESGR Ombudsman Services ↔ VETS’ National Guard & Reserve Complaint Cases	
	iii. <b><u>CASES REFERRED TO THE DEPARTMENT OF JUSTICE OR THE OFFICE OF SPECIAL COUNSEL</u></b>	15
	<u>CASES REFERRED TO THE DEPARTMENT OF JUSTICE</u>	15
	<u>CASES REFERRED TO THE OFFICE OF THE SPECIAL COUNSEL</u>	15
	iv. <b><u>COMPLAINTS FILED BY THE ATTORNEY GENERAL</u></b>	16
	v. <b><u>COMPLAINTS FILED BY THE OFFICE OF SPECIAL COUNSEL</u></b>	16
	vi. <b><u>CASES REVIEWED BY DOL AND ESGR INVOLVING THE SAME PERSON</u></b>	16
	<b><u>Figure 6. VETS’ Data for 161 Likely Case Matches with FY 2018 ESGR Cases</u></b>	17
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.	18
	<b><u>Figure 7. Occupations Involved in FY 2018 USERRA Cases</u></b>	19

9. AN INDICATION OF WHETHER THERE ARE ANY APPARENT PATTERNS OF VIOLATION OF THE PROVISIONS OF USERRA, TOGETHER WITH AN EXPLANATION THEREOF. 19
10. RECOMMENDATION FOR ADMINISTRATIVE OR LEGISLATIVE ACTION THAT THE SECRETARY, THE ATTORNEY GENERAL, OR THE SPECIAL COUNSEL CONSIDERS NECESSARY FOR THE EFFECTIVE IMPLEMENTATION OF USERRA, INCLUDING ANY ACTION THAT COULD BE TAKEN TO ENCOURAGE MEDIATION, BEFORE CLAIMS ARE FILED UNDER USERRA, BETWEEN EMPLOYERS AND PERSONS SEEKING EMPLOYMENT OR REEMPLOYMENT. 20

## INTRODUCTION

The Uniformed Services Employment and Reemployment Rights Act of 1994, 38 U.S.C. §§ 4301-4335 (USERRA or the Act), 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) 2018 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 USERRA 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 the cases reported on pursuant to paragraphs 1, 2, 3, 4, and 5 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 case reported on pursuant to paragraph 1, 2, 3, 4, or 5 above.
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 (SOCS).
9. An indication of whether there are any apparent patterns of violation of the provisions of USERRA 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 USERRA, including any action that could be taken to encourage mediation, before claims are filed under USERRA, 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 is statutorily tasked with providing assistance to any person with respect to USERRA employment and reemployment rights and benefits and may request the assistance of other Federal and State agencies engaged in similar or related activities to do so. DOL, DOD, and the Department of Veterans Affairs share responsibility for promoting a clear understanding of USERRA among employers and individuals concerning their respective rights and responsibilities under USERRA. In addition, USERRA requires all Federal agencies to provide USERRA awareness training to human resources personnel, in consultation with the U.S. Office of Personnel Management (OPM). OPM issues guidance on ways to improve USERRA protection policies and practices for Federal agencies. 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.

An individual who believes his or her USERRA rights have been violated may file a complaint with VETS, which will then investigate the claim(s). Alternatively, an individual may seek to informally mediate his or her claims utilizing ESGR Ombudsmen's informal mediation services to try to resolve his or her USERRA-related issues. Informal mediation is not required and an individual may file a complaint with VETS at any time. Once a complaint is filed with VETS, VETS will formally investigate the complaint and attempt to resolve those complaints found meritorious. If, following VETS' investigation, there is no resolution of the complaint, the claimant may request referral of his or her case to the Department of Justice (DOJ) for cases involving a private, State, or local government employer, and to OSC<sup>1</sup> for 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.

This report begins by describing the various roles each of the Federal agencies referenced above play in the administration of USERRA. Next, the report responds to each of the statutorily-mandated reporting requirements described in the introduction to this report. In addition, the report contains other information of interest, including USERRA case outcomes for cases closed by DOJ, OSC, and VETS.

## **USERRA SERVICES PROVIDED BY THE DEPARTMENT OF DEFENSE'S EMPLOYER SUPPORT OF THE GUARD AND RESERVE**

### **OVERVIEW**

ESGR is a DOD program established in 1972 to promote cooperation and understanding between Reserve Component (RC) service members and their civilian employers, and to assist in the informal resolution of USERRA-related employment conflicts arising from an employee's military commitment. ESGR helps develop and promote supportive work environments for service members in the RCs through employer outreach and recognition, and through educational opportunities that increase awareness of applicable laws.

ESGR is a volunteer-centric program with a nationwide network of nearly 3,750 volunteers that works to ensure all employers support and value the employment of RC members. ESGR volunteers operate out of 54 State Committees located across all 50 States, the District of Columbia, Guam and the Commonwealth of the Northern Mariana Islands, the U.S. Virgin Islands, and Puerto Rico. Headquarters (HQ) ESGR in Alexandria, Virginia, provides guidance, resources, and support to the 54 volunteer-led ESGR committees.

In FY 2018, ESGR volunteers engaged 95,229 employers and 268,662 service members, educating both groups on their rights and responsibilities under USERRA.

### *Outreach Programs*

ESGR conducts awareness and recognition programs aimed at employers of RC service members to engender positive support for National Guard and Reserve service. It also assists in preventing, resolving, or reducing employer/employee conflicts and misunderstandings that result from RC service,

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<sup>1</sup> 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.



training, or duty requirements by providing information and educating National Guard and Reserve members and employers about their rights and responsibilities under USERRA. ESGR also communicates directly with military units to promote better understanding of the importance of maintaining positive working relations between employers and their RC employees to sustain military participation and readiness.

Outreach programs also include the voluntary participation by employers in the Statement of Support Program. Employers who sign Statements of Support pledge that they will:

- Fully recognize, honor, and comply with the USERRA.
- Provide managers and supervisors with the tools they need to effectively manage employees who serve in the National Guard and Reserve.
- Appreciate the values, leadership, and unique skills service members bring to the workforce, and encourage opportunities to hire Guardsmen, Reservists, transitioning service members, and Veterans.
- Continually recognize and support our country's service members and their families, in peace, in crises, and in war.

Outreach programs also include the ESGR Awards Program, designed to recognize employers for 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 supportive supervisors with the Patriot Award. ESGR administers the Secretary of Defense Employer Support Freedom Award, the U.S. Government's highest honor bestowed on employers. The Freedom Award is presented annually to a maximum of 15 select large, small, and public-sector employers that have demonstrated exceptional support to RC employees.

During FY 2018, ESGR recognized 10,783 supervisors of RC service members with the Patriot Award, received 2,351 nominations for the 2018 Secretary of Defense Employer Support Freedom Award, and obtained 9,997 Statements of Support from employers across the Nation.

#### *Ombudsman Services*

ESGR assists National Guard and Reserve members with USERRA employment conflicts through its nationwide Ombudsman Services Program. While ESGR is not an enforcement agency and does not participate in formal litigation processes, the Ombudsman Services Program provides education, information, and neutral, informal third-party mediation services to resolve employee-employer USERRA conflicts. The program has over 500 volunteers nationwide that work to reduce, resolve, and help prevent employer-employee conflicts and misunderstandings related to uniformed service. ESGR ombudsmen are specifically trained on the rights and responsibilities outlined in USERRA, the use of neutral, informal mediation techniques to help resolve employment conflicts between service members and employers, and how to further an understanding of and compliance with USERRA regulations.

In addition to the Ombudsman Services Program, ESGR also operates a Customer Service Center (CSC) for USERRA-related inquiries and information requests from customers worldwide. The CSC provides prompt, expert telephonic and email responses to service members and civilian employers on USERRA-related matters. During FY 2018, ESGR received 17,568 contacts by telephone and email, of which 1,655 contacts resulted in actual USERRA mediation cases. ESGR's mediation efforts covered an array of USERRA-related issues that included 1,033 complaints involving some type of military discrimination; 602 complaints involving job reinstatement; and 20 complaints involving possible retaliation or reprisal. There were 429 USERRA mediation cases in which ESGR was unable to

facilitate an agreement between the employee and employer. In those instances, ESGR ombudsmen informed both parties that the employee had the right to file a case with DOL or seek assistance through a private attorney.

ESGR and DOL coordinate closely on USERRA-related issues, and track problems, coordinate issues, and identify trends as part of their efforts to protect service members' and employers' rights.

#### *DOD USERRA Working Group*

In June 2017, the Deputy Assistant Secretary of Defense for Reserve Integration (DASD RI) established a DOD USERRA Working Group, led by ESGR, to review USERRA application and policy in the context of current utilization rates of the RC. Participants in the USERRA Working Group include representatives from the DASD RI office, ESGR, each of the Military Departments and RC, and DOL. The working group's efforts in FY 2018 focused on clarifying DOD policies and processes to assist employers with verification of uniformed service and service dates, and to assist both service members and employers to better understand the authority under which orders are written in order to determine which periods of uniformed service count against the five-year service limitation for reemployment protections as established in USERRA.

## **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, which resulted in the single greatest mobilization of reserve components, VETS has briefed more than one million individuals on USERRA. In FY 2018, VETS presented USERRA information to 7,731 individuals, including service members, members of professional groups, and members of the general public. To help facilitate these efforts, VETS maintains a USERRA page on its website at: <https://www.dol.gov/agencies/vets/programs/userra>, containing compliance assistance materials such as the USERRA elaws Advisor, fact sheets, applicable laws and regulations, and other useful information. Briefings to mobilizing and demobilizing members of the Guard and Reserve are given in collaboration with ESGR. Together, VETS and ESGR strive to ensure that every service member receives a USERRA briefing upon mobilization and demobilization from active military service. In FY 2018, VETS and OSC also coordinated their efforts to provide technical assistance on USERRA to a number of Federal agencies. Also in FY 2018, VETS continued its customer satisfaction survey (CSS) to obtain feedback on its investigations from USERRA claimants and their employers. VETS will use the information gathered to improve and shape its USERRA program.

### **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 (Form 1010) with VETS online or submit a signed form in person or via mail or facsimile. Form 1010 is available to the public online through the VETS' web page. Upon receipt of an electronically-filed or signed and completed hard-copy Form 1010, VETS immediately opens a formal investigation. A brief notification of process rights, written in easy-to-understand question-and-answer format, is sent to each claimant within five days of VETS' receipt of a 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 or *pro se*.

#### **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 his or her case be referred, VETS must refer the claim regardless of whether VETS has found merit in the complaint. Each VETS' case referral contains a memorandum analyzing the USERRA claim and providing an assessment on whether or not the claim has merit. 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 is unable to resolve a service member's USERRA claim against a private, State, or local government employer, the service member may ask DOL to refer the service member's claim to the Attorney General for review.

Upon receipt of an unresolved USERRA claim from DOL, DOJ conducts an independent review of 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. DOJ also attempts to seek relief on the service member's behalf and to settle the claims without commencing an action in court when appropriate. If DOJ determines that it will not offer legal representation to a claimant, or seek relief on the service member's behalf, it informs the service member of this decision, in writing, and notifies him or her that he or she has the right to proceed with private counsel or *pro se*. 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 104 USERRA lawsuits and favorably resolved 185 USERRA complaints either through consent decrees obtained in those suits or through facilitated private settlements. Under the current administration, the Department of Justice has filed four complaints on behalf of service members and negotiated settlements in excess of \$710,000.

The Civil Rights Division of DOJ also works closely with the Solicitor's Office at DOL in training VETS investigators through both live and remote training sessions, discussing case trends, and collaborating on USERRA strategy. For example, DOJ and the Solicitor's Office at DOL have a scheduled monthly call where all case referrals and case resolutions are discussed.

In FY 2019, 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 Federal Government. While DOJ will continue to aggressively pursue litigation when warranted, it seeks to resolve meritorious referrals without contested litigation whenever possible, 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*.

## **OFFICE OF SPECIAL COUNSEL ENFORCEMENT**

OSC's enforcement responsibilities apply to Federal-sector USERRA cases. 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.

During FY 2018, VETS and OSC professional staff collaborated to provide technical assistance and guidance on a number of highly complex issues to 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 that received their guidance. These activities were conducted in furtherance of the idea that the Federal Government should be a model employer, particularly with respect to honoring its commitment to preserving and promoting service members' and veterans' employment rights.

Moving forward into the coming fiscal years, VETS plans to continue and increase these activities. Furthermore, in an effort to broaden and strengthen partnerships with other Federal agencies, VETS, in coordination with OSC, DOD, and OPM, will continue to work together to identify and share best practices to ensure that our Nation's veterans are well served. Through these partnerships, VETS can better respond to ideas and requests for assistance, promote veteran employment, and find additional ways to implement employer-driven ideas and initiatives.

# 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 USERRA DURING THE FISCAL YEAR FOR WHICH THE REPORT IS MADE.**

DOL reviewed 917 new unique<sup>2</sup> cases in FY 2018 opened pursuant to a submitted VETS 1010 complaint form. The table below provides the numbers of unique USERRA cases reviewed by DOL and OSC in FY 2013 – FY 2018.

**Figure 1. Unique USERRA Cases Reviewed by the Department of Labor and OSC<sup>3</sup>**

Fiscal Year	FY 2013	FY 2014	FY 2015	FY 2016	FY 2017	FY 2018
Total New Cases	1,281	1,286	1,123	930	944	917
Total Cases	1,553	1,511	1,288	1,107	1,098	1,095

In FY 2018, DOL carried over an additional 166 unique cases (open investigations) from FY 2017. During FY 2018, DOL reopened 10 cases from FY 2017 and two from FY 2016 or earlier. In sum, DOL reviewed a total of 1,095 unique cases in FY 2018.

**2. THE NUMBER OF CASES REVIEWED BY SECRETARY OF DEFENSE UNDER THE NATIONAL COMMITTEE FOR EMPLOYER SUPPORT OF THE GUARD AND RESERVE DURING THE FISCAL YEAR.**

During FY 2018, ESGR received 17,568 contacts by telephone and email. Of those contacts, 1,655 resulted in actual USERRA cases which were reviewed by ESGR Ombudsmen.

**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 2018, the Attorney General received 50 cases and OSC received 25 cases referred by DOL. During the fiscal year, OSC initiated action on one case before the MSPB. The nature and status of these referred cases is reflected in mandatory reporting requirement number seven of this report.

<sup>2</sup> This excludes duplicative cases such as cases that are filed multiple times by the same claimant with the same complaint or cases that have been previously investigated and have been reopened.

<sup>3</sup> This table captures unique cases also reviewed by OSC from FY 2011-FY 2014, under a demonstration project established by the Veterans Benefits Act of 2010. New unique cases reviewed by OSC totaled 137 in FY 2013 and 146 in FY 2014. Unique case assignments to OSC under this demonstration project ended in FY 2014.

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

DOJ filed two USERRA complaints in Federal court in FY 2018. Both of these cases were settled.

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

ESGR provided VETS with the names of 1,583 individuals who had filed the 1,655 cases reviewed by ESGR Ombudsmen in FY 2018, and the date of each case. VETS compared the ESGR data to its own data<sup>4</sup> on cases initially opened between October 1, 2017 and October 31, 2018.<sup>5</sup> This comparison resulted in 163 likely matches; thus, it appears that 10% of FY 2017 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. Eighteen of the new unique cases first reviewed by VETS in FY 2018 (2.0%) involved a disability-related issue.
- ii. Twelve of the ESGR cases first reviewed in FY 2018 (0.7%) involved a disability-related issue.
- iii. Of the referral cases received by DOJ and OSC from DOL in FY 2018 for consideration of litigation, one of those received by DOJ and none of those received by OSC involved a disability-related issue.
- iv. Of the two USERRA complaints filed by DOJ in FY 2018, none involved a disability-related issue.
- v. With respect to the 163 cases reviewed by DOL and ESGR involving the same person in FY 2018, two (1.2%) involved a disability-related issue.

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

- i. In FY 2018, VETS asked claimants whether they had a service-connected disability. Among the 917 new unique cases VETS received, VETS obtained responses from 884 claimants, 227 (26%) of whom reported having such a disability. Among these 227 claimants, 15 also claimed a USERRA-related disability issue. Among the remaining 657 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 referral cases received by DOJ from DOL in FY 2018 for consideration of litigation, 17 involved a claimant who reported a service-connected disability, and one included a

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<sup>4</sup> Absent more specific data on the employer(s) and specific allegation(s) involved, case matching cannot be made with complete confidence.

<sup>5</sup> October 2018 VETS data was included to capture the ESGR cases that were opened late FY 2018 and may have been filed with VETS in October 2018.

USERRA-related disability issue. Fourteen of the referral cases received by OSC from DOL in FY 2018 involved a claimant who reported a service-connected disability, and none included a USERRA-related disability issue.

- iv. Of the two USERRA complaints filed by DOJ in FY 2017, none involved a service-connected disability.
- v. With respect to the 163 cases reviewed by VETS and ESGR involving the same person in FY 2018, VETS obtained service-connected disability responses from 157 of these claimants, 25 (15.3%) of whom reported having such a disability. One claimant among the 25 who reported having a service-connected disability also claimed a USERRA-related disability issue. Among the remaining 132 claimants who responded but did not report having a service-connected disability, one 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 917 new unique cases reported by VETS in FY 2018 and the combined percentages exceed 100%.

<b>USERRA ISSUE</b>	<b>VETS CASES ALLEGING ISSUE</b>	
	<b>NUMBER</b>	<b>PERCENT</b>
Military obligations discrimination	402	43.8%
Reinstatement	140	15.3%
Other non-seniority benefits	26	2.8%
Promotion	56	6.1%
Vacation	19	2.1%
Status	14	1.5%
Pay rate	29	3.2%
Reasonable accommodation/ retraining for non-qualified/non-disabled	6	0.7%
Discrimination as retaliation for any action	109	11.9%
Seniority	14	1.5%
Pension	23	2.5%
Initial hiring discrimination	60	6.5%
Layoff	47	5.1%
Special protected period discharge	3	0.3%
Health benefits	11	1.2%
Reasonable accommodations/retraining for disabled	18	2.0%
Other	26	2.8%

DOL investigated and closed 920 cases in FY 2018 under the following closure codes (each code is explained in Figure 4):

<b>Figure 3. Investigated and subsequently closed by VETS in FY 2018</b>	<b>VETS CASES CLOSED</b>	
	<b>NUMBER</b>	<b>PERCENT</b>
<b>CLOSURE CODE</b>		
No merit	310	33.7%
<i>Referrals requested on cases closed in FY 2018: 34</i>		
Administrative	81	8.8%
<i>Referrals requested on cases closed in FY 2018: 1</i>		
Claim granted	94	10.2%
<i>Referrals requested on cases closed in FY 2018: 2</i>		
Claim settled	76	8.3%
Claim withdrawn	274	29.8%
Not eligible	36	3.9%
<i>Referrals requested on cases closed in FY 2018: 5</i>		
Merit, not resolved	47	5.1%
<i>Referrals requested on cases closed in FY 2018: 18</i>		
Merit undetermined	2	0.2%
<b>TOTAL:</b>	<b>920</b>	<b>100.0%</b>
<i>Total referrals requested on cases closed in FY 2018: 60<sup>6</sup></i>		

<sup>6</sup>In addition to the 60 cases that were investigated and closed by VETS, and requested for referral to DOJ or OSC in FY 2018, there were eight cases that requested for referral to DOJ or OSC in FY 2018. Five of those requests were from cases that were closed in FY 2017 (4 “No Merit”; and 1 “Merit, Not Resolved”); and 3 of those requests were from cases that were closed prior to FY 2017 (2 “No Merit”; and 1 “Merit, Not Resolved”). In total there were 68 referrals requested in FY 2018.

#### **FIGURE 4. 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 or 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 or 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 by DOL 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 1,033 complaints involving some type of military discrimination; 602 complaints involving job reinstatement; and 20 complaints involving possible retaliation or reprisal during FY 2018.

ESGR resolved 1,226 of its 1,655 Ombudsman cases. There were 429 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.

**Figure 5.**

**Crosswalk of USERRA Issues, FY 2018**

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" *
<b>Discrimination</b>	Military Obligations Discrimination 978	ID - Military Obligations Discrimination 366
	Initial Hiring Discrimination 55	II - Initial Hiring Discrimination 42
	<b>1,033 Ombudsman Cases (62.4%)</b>	<b>408 Issues in 407 Complaint Cases (53.0% of Complaint Cases)</b>
<b>Reinstatement/ Reemployment</b>	Health Benefits 25	IH - Health Benefits 10
	Pension 19	IP - Pension 20
	Seniority 46	IS - Seniority 13
	Other Non-Seniority Benefits 14	IB - Other Non-Seniority Benefits 20
	Status 21	IZ - Status 13
	Layoff 6	IL - Layoff 45
	Vacation 80	IV - Vacation 18
	Reinstatement 260	IR - Reinstatement 123
	Promotion 65	IT - Promotion 47
	Reasonable Accommodations/Retraining for Disabled 12	IA - Reasonable Accommodations/Retraining for Disabled 5
	Reasonable Accommodations/Retraining for Non-Qualified/Non-Disabled 1	IW - Reasonable Accommodations/Retraining for Non-Qualified/Non-Disabled 4
	Pay Rate 53	IM - Pay Rate 26
	Special Protected Period Discharge 0	IF - Special Protected Period Discharge 2
<b>602 Ombudsman Cases (36.4%)</b>	<b>346 Issues in 286 Complaint Cases (37.2% of Complaint Cases)</b>	
<b>Reprisal</b>	Discrimination as Retaliation for any Action 20	ID2 - Discrimination as Retaliation for any Action 65
	<b>20 Ombudsman Cases (1.2%)</b>	<b>65 Issues in 65 Complaint Cases (8.5% of Complaint Cases)</b>

\* 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 VETS in this chart total less than 100%, because VETS' Issue and Case counts here do not include the uncategorized "Other" Problem/Issue Code, thereby excluding 17 "Other" VETS Issues and Cases from this chart.

### iii. CASES REFERRED TO THE DEPARTMENT OF JUSTICE OR THE OFFICE OF SPECIAL COUNSEL<sup>7</sup>

#### CASES REFERRED TO THE DEPARTMENT OF JUSTICE

In FY 2018, the Civil Rights Division received a total of 50 referrals from DOL. Seventeen were assessed as having merit and 33 were assessed as not having merit. Out of the cases that were assessed as having merit, DOJ offered representation in six cases, and declined representation in six cases, one of which DOJ facilitated settlement. Three referrals involved State agencies as potential defendants, two of which DOJ declined to pursue litigation in agreement with DOL, and one of which DOJ facilitated settlement. The remaining two referrals were still under consideration by DOJ in FY 2018.

Out of the 33 cases assessed as having non-merit, based on DOL's assessment and DOJ's independent analysis of the merits of each referral, DOJ declined representation with respect to 30 referrals and offered representation in one referral. One referral involved a State agency, which DOJ declined to pursue litigation. The remaining referral was still under consideration by DOJ in FY 2018.

The cases referred to the Civil Rights Division in FY 2018 involved a number of USERRA issues. Approximately 28% (14) of these cases involved allegations of termination and/or discharge; approximately 34% (17) of these cases involved reemployment allegations, such as accommodation and disability; and approximately 12% (6) of these cases 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 approximately 4% (2) involving failure to promote, approximately 4% (2) involving failure to hire or recruit, and approximately 56% (28) involving actions affecting the service member's terms and conditions of employment, such as hostile work environment, discipline or harassment. The remaining 6% (3) of these cases involved allegations of retaliation for asserting USERRA protection.<sup>8</sup>

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

In FY 2018, OSC received a total of 25 referrals from DOL. Additionally, three cases referred to OSC during previous fiscal years remained pending at the beginning of FY 2018. Thus, 28 total cases were pending at OSC during the fiscal year. OSC closed 22 of the 28 cases during FY 2018 (approximately 80% within the 60-day time limit), while six cases remained pending at the end of the fiscal year. OSC also represented one service member in a USERRA appeal before the MSPB during FY 2018. The case is still pending.

The cases referred to OSC in FY 2018 involved a number of USERRA issues. Approximately 76% (19) of the 25 cases involved allegations of discrimination based on uniformed service, including termination, non-promotion, non-selection, or improper denial of employment benefits; 16% (4) involved allegations of violations of reemployment rights; and 28% (7) involved allegations of retaliation for exercising USERRA rights.<sup>9</sup>

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<sup>7</sup> In contrast with Figure 3 above, this section counts the referrals actually received by DOJ and OSC during FY 2018. Therefore this section includes referrals from requests that were made in FY 2017 that were received in FY 2018, and excludes requests that were made in FY 2018 that were not received until FY 2019.

<sup>8</sup> Several cases involved multiple issues. Each issue was counted separately.

<sup>9</sup> Some cases involved multiple issues. Each issue was counted separately.

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

DOJ filed two USERRA complaints in FY 2018. Both of these cases were settled.

On December 17, 2017, DOJ filed a complaint on behalf of Bobby Lindsay, a reservist in the Coast Guard who deployed for a three-month tour of duty after giving notice to his employer, Bridges Consulting, Inc. Towards the end of Mr. Lindsay's deployment, he notified his employer that he expected to return to work at the conclusion of his deployment, but Bridges Consulting responded that he was no longer an employee of the company. Mr. Lindsay extended his orders several times and several times requested reemployment. DOJ's complaint alleged both that Bridges Consulting failed to reemploy Mr. Lindsay in violation of USERRA's reemployment provisions and that Bridges Consulting terminated Mr. Lindsay on the basis of his membership in the Coast Guard, his absence to perform military service, and/or his military service obligations, in violation of USERRA's discrimination provisions.

On March 1, 2018, DOJ filed a complaint on behalf of Charles "Chip" O'Donnell, a U.S. Army Reservist who was terminated from his job as a program manager as part of a reduction in force less than a month after returning from military service, despite having more seniority than other program managers who were not terminated and positive performance reviews.

#### v. COMPLAINTS FILED BY THE OFFICE OF SPECIAL COUNSEL

OSC filed a USERRA case before the MSPB on March 14, 2018, seeking reinstatement of a U.S. Postal Service (USPS) employee, John D. Patrie. Mr. Patrie, a letter carrier in Maine, and a member of the Maine Air National Guard, had previously filed a USERRA complaint with VETS alleging that USPS denied him his USERRA rights when it failed to reinstate him in his escalator position following completion of his military service. USPS claimed that Mr. Patrie abandoned his civilian position in order to pursue a military career. Following a VETS investigation, which found that Mr. Patrie's allegations were substantiated, Mr. Patrie exercised his right to referral to OSC. On April 25, 2019, an administrative judge (AJ) with the MSPB issued a decision ordering USPS to reinstate Mr. Patrie retroactive to January 2016, and provide him with appropriate back pay and benefits. The USPS has appealed this decision to the MSPB.

#### vi. CASES REVIEWED BY DOL AND ESGR INVOLVING THE SAME PERSON

DOL's response to paragraph 5 of the Mandated Reporting Requirements, 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, 163 likely matches were identified. This figure indicates that first ESGR, and subsequently DOL, handled the same individuals' claims.

DOL closed all but one of these 163 likely matches by June 18, 2019, under the following closure codes: no merit, 57 (35.2%); administrative, 15 (9.3%); claim granted, 17 (10.5%); claim settled, 17 (10.5%); claim withdrawn, 43 (26.5%); not eligible, 4 (2.5%); and merit, not resolved, 8 (4.9%); merit undetermined, 1 (0.6%). 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 163 likely match cases were distributed among the various VETS' closure codes.

**Figure 6.**

**VETS' Data For 163 Likely Case Matches with FY 2018 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	[Still Open as of 6/18/2019]			
0.2%	Military Obligations Discrimination	0	0	0	1	0	0	1	0	0	2	1	
0.3%	Reinstatement	0	6	0	0	0	0	1	0	0	7	4	
	Other Non-Seniority Benefits	14	2	8	24	1	2	30	2	1	84	51.5%	
	Promotion	0	0	0	2	0	0	4	0	0	6	3.7%	
	Vacation	0	0	1	2	0	1	1	0	0	5	3.1%	
	Status	0	0	0	0	0	0	0	0	0	0	0.0%	
	Pay Rate	0	1	0	0	0	0	0	0	0	1	0.6%	
	Reasonable Accommodations/Retraining for Non-Qualified/Non-Disabled	1	0	1	3	0	1	4	0	0	10	6.1%	
	Discrimination as Retaliation for any Action	0	0	0	1	0	0	4	0	0	5	3.1%	
	Seniority	0	0	0	0	0	0	3	0	0	3	1.8%	
	Pension	0	9	0	0	0	0	2	2	0	13	8.0%	
	Initial Hiring Discrimination	0	1	6	6	0	3	9	1	0	26	16.0%	
	Layoff	0	0	0	1	0	0	1	0	0	2	1.2%	
	Special Protected Period Discharge	0	0	0	3	0	0	3	0	0	6	3.7%	
	Health Benefits	0	0	0	1	0	0	1	0	0	2	1.2%	
	Reasonable Accommodations/Retraining for Disabled	0	0	0	1	0	0	0	0	0	1	0.6%	
	Other	0	1	1	0	0	1	0	0	0	3	1.8%	
<b>NUMBER OF ISSUE CODES FOR EACH CLOSURE CODE:</b>		<b>15</b>	<b>20</b>	<b>17</b>	<b>45</b>	<b>1</b>	<b>8</b>	<b>64</b>	<b>5</b>	<b>1</b>	<b>176</b>		
<b>PERCENT OF ALL LIKELY MATCH CASES:</b>		<b>9.2%</b>	<b>12.3%</b>	<b>10.4%</b>	<b>27.6%</b>	<b>0.6%</b>	<b>4.9%</b>	<b>39.3%</b>	<b>3.1%</b>	<b>0.6%</b>		<b>108.0%</b>	

\* 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 163 ESGR and VETS cases involving the same person, and the combined percentages exceed 100%. Matching of FY 2018 ESGR cases and VETS cases initially opened 10/1/2017 to 10/31/2018 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 2018. Therefore, SOCS code data is not available for ESGR mediation cases. The chart below shows the full distribution of the SOCS codes in FY 2018 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 888 (97%)<sup>10</sup> of the unique complaints filed in FY 2018, 20% of complaints involved Protective Service occupations; 11% involved Management occupations; and 9% involved Office and Administrative Support occupations.
- Out of 159 (98%)<sup>11</sup> of the cases reviewed by VETS and ESGR likely involving the same person in FY 2018, 19% of those cases involved Protective Service occupations, and each of three categories (Management; Office and Administrative Support; and Transportation and Material Moving) involved 9% of complaints.
- Out of the 50 referral cases received by the Attorney General from DOL in FY 2018, 20% of those cases involved Protective Service occupations; 16% involved Management occupations; and 12% involved Transportation and Material Moving occupations.
- Out of the 25 referral cases received by OSC from DOL in FY 2018, 24% of complaints involved Protective Service occupations; 20% involved Business and Financial Operations occupations; and 16% involved Management occupations.

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<sup>10</sup> Total is less than 100% because the SOCS code was not recorded for some cases.

<sup>11</sup> Total is less than 100% because the SOCS code was not recorded for some cases.

**Figure 7. Occupations Involved in FY 2018 USERRA CASES<sup>12</sup>**

**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%	20%	24%	19%
Management	11%	16%	16%	9%
Office and Administrative Support	9%	8%	8%	9%
Transportation and Material Moving	8%	12%	0%	9%
Installation, Maintenance, and Repair	8%	6%	4%	8%
Business and Financial Operations	6%	4%	20%	7%
Healthcare Practitioners and Technical	6%	4%	0%	7%
Production	5%	4%	0%	5%
Computer and Mathematical	4%	2%	0%	3%
Sales and Related	4%	0%	0%	2%

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

No patterns of violations of USERRA became apparent in FY 2018. DOL will continue to monitor USERRA cases to identify trends as they arise.

<sup>12</sup> 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 (*Exceptions: 3% of VETS Cases; 4% of Referrals to DOJ; and 4% of Referrals to OSC*); Community and Social Services (*Exceptions: 3% of VETS Cases; 4% of Referrals to DOJ; and 3% of Cases Common to VETS & ESGR*); Food Preparation and Serving Related (*Exception: 5% of Cases Common to VETS & ESGR*); Construction and Extraction (*Exceptions: 4% of Referrals to DOJ, and 3% of Cases Common to VETS & ESGR*); Education, Training, and Library (*Exceptions: 10% of Referrals to DOJ, and 3% of Cases Common to VETS & ESGR*); Life, Physical, and Social Science (*Exception: 12% of Referrals to OSC*); Building and Grounds Cleaning and Maintenance (*Exception: 8% of Referrals to OSC*); Arts, Design, Entertainment, Sports, and Media (*Exception: 4% of Referrals to OSC*); Healthcare Support; Farming, Fishing, and Forestry; Legal; 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 USERRA, INCLUDING ANY ACTION THAT COULD BE TAKEN TO ENCOURAGE MEDIATION, BEFORE CLAIMS ARE FILED UNDER USERRA, BETWEEN EMPLOYERS AND PERSONS SEEKING EMPLOYMENT OR REEMPLOYMENT.**

**Recommendation from DOL:** None at this time.

**Recommendation from DOJ:** DOJ has sent to Congress proposed legislation that would strengthen protections for service members under USERRA and increase DOJ's enforcement authority. Among other things, this legislation would give DOJ authority to initiate pattern or practice litigation to address systemic violations of service members' rights, rather than having to wait to receive a referral from DOL. The legislation would also add jurisdiction in State courts for service members seeking to enforce their USERRA rights through private litigation. DOL concurs with these recommendations.

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USERRA annual reports are available for fiscal years (FY) 1995-1999 and 2004-2018. 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).



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