

U. S. DEPARTMENT OF LABOR

**Assistant Secretary
for
Veterans' Employment and Training**

**UNIFORMED SERVICES EMPLOYMENT
AND REEMPLOYMENT RIGHTS ACT OF 1994
(USERRA)
ANNUAL REPORT
TO
CONGRESS

FOR FISCAL YEAR 2004**

PREPARED BY:

**OFFICE OF THE ASSISTANT SECRETARY
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**U. S. DEPARTMENT OF LABOR
200 Constitution Avenue, N.W.
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INTRODUCTION

The Uniformed Services Employment and Reemployment Rights Act of 1994, 38 U.S.C. 4301-4334, (USERRA) was signed into law on October 13, 1994. USERRA prohibits discrimination in employment on the basis of an individual's: prior service in the uniformed services; current obligations as a member of the uniformed services; or, intent to join the uniformed services. An employer is prohibited from discriminating against a person because of such person's attempt to enforce his or her rights under the Act. In addition, an employer may not retaliate against an individual who has testified or otherwise assisted in an investigation under the Act. USERRA also provides reemployment rights with the pre-service employer following qualifying service in the uniformed services. In general, the protected person is to be reemployed with the status, seniority, and rate of pay as if continuously employed during the period of service. USERRA applies to private employers, the Federal Government, and State and local governments. It applies to United States employers operating overseas as well.

This Report was prepared under Section 4332 of USERRA, 38 U.S.C. 4332, which requires the Secretary of Labor, in consultation with the Attorney General and the Special Counsel, to prepare and transmit an annual Report to Congress containing the following matters for the preceding fiscal year:

- (1) The number of cases reviewed by the Department of Labor under this chapter during the fiscal year for which the report is made.
- (2) The number of cases referred to the Attorney General or the Special Counsel pursuant to section 4323 or 4324, respectively, during such fiscal year.
- (3) The number of complaints filed by the Attorney General pursuant to section 4323 during such fiscal year.
- (4) The nature and status of each case reported on pursuant to paragraph (1), (2), or (3).
- (5) An indication of whether there are any apparent patterns of violation of the provisions of this chapter, together with an explanation thereof.
- (6) Recommendations for administrative or legislative action that the Secretary, the Attorney General, or the Special Counsel considers necessary for the effective implementation of this chapter, including any action that could be taken to encourage mediation, before claims are filed under this chapter, between employers and persons seeking employment or reemployment.

USERRA Annual Reports are available for Fiscal Years 1996-1999. No reports are available for FY 2000-2003 because the reporting requirement expired in 2000. Section 202 of the Veterans Benefits Improvement Act of 2004, Pub. L. No. 108-454, 118 Stat. 3598 (Dec. 10, 2004) reinstated the reporting requirement, and made it retroactive to fiscal year 2004. This is the first report to Congress under the reinstated reporting requirement, covering fiscal year 2004.

UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS

1. CASE ACTIVITY BY DEPARTMENT OF LABOR IN FY 2004

Cases Opened

In FY 2004, the Veterans' Employment and Training Service (VETS), on behalf of the Secretary of Labor, opened 1,465 new cases and continued the investigation of 204 cases opened during the previous FY. Cases opened increased 11% from the number of cases (1,315) opened in FY 2003.

Of the cases opened in FY 2004, 975 (67%) involved private employers, 313 (21%) involved States or political subdivisions of States, and 177 (12%) involved Federal employers. Of FY 2004 cases, 1280 (87%) were opened for National Guard or Reserve members, 149 (10%) for military veterans, and 36 (2%) for persons with no prior or current military membership (applicants for military service, for example).

Many of the cases opened by VETS involved multiple USERRA issues. Of the 1,465 cases opened in FY 2004, 2,066 issues were identified. The nature of the issues in these cases follows (due to rounding of percentages, and multiple-issue cases, the total does not equal 100%).

Approximately 57% of the case issues involved hiring and firing. Included were: 591 case issues (29%) involving employment discrimination because of an individual's military service or obligations

or because of an individual's actions to enforce the protections of USERRA; 440 case issues (21%) involving refusal to reinstate or reemploy an individual following a period of military service; 61 (3%) concerning a layoff because of military obligations; 52 (3%) that involved refusal by an employer to hire an individual because of military service or obligations; and 41 (2%) concerning termination of a person without cause following reemployment.

The issues not involving hiring and firing of claimants included: 139 (7%) on status in employment; 122 (6%) on pay rates; 119 (6%) on denied promotions; 103 (5%) on seniority; 63 (5%) on pension benefit plans; 59 (3%) on vacations; 55 (3%) on failure to provide non-seniority benefits; 31 (2%) on health benefits; 23 (1%) on reasonable employer efforts to accommodate, retrain, or otherwise qualify for work a returning disabled service member; 6 (<1%) on reasonable employer efforts to accommodate, retrain, or otherwise qualify for work a non-disabled returning service member; and 161 case issues (8%) on various other matters not among the foregoing issue categories. There were no cases of reprisal against a person for testifying in a proceeding or assisting in an investigation.

Cases Resolved

In FY 2004, VETS closed 1,440 cases, of which 1213 (84%) were closed within 90

days or less, and 1324 (92%) were closed within 120 days or less. At the end of FY 2004, one case remained open for a period of greater than one year. That case has since been closed.

Of the 1,440 closed cases, there were 486 (34%) USERRA claims resolved through VETS' mediation efforts. In these cases, VETS' actions helped bring about recovery of \$1,132,457 in lost wages and benefits for claimants. There were 133 (9%) closures because individuals chose to withdraw their claims during the investigation. In 476 cases (33%), VETS' investigation resulted in a determination that the claim was without merit. In 38 cases (3%), claimants were found to be not eligible (e.g., claimants lacked proper military orders, had disqualifying discharges, or other defect which precluded making merit determinations) for the remedies or benefits sought. In 204 cases (14%), there was administrative closure by VETS because the claimant failed to cooperate with the investigation or simultaneously pursued the claim with the assistance of a third party. The remaining 103 cases (7%) were processed for referral.

Subpoenas

During FY 2004, VETS issued one subpoena under authority provided by section 4326 of USERRA.

2. CASES REFERRED TO THE ATTORNEY GENERAL AND OFFICE OF SPECIAL COUNSEL

Attorney General

Section 4323(a)(1) of the USERRA, 38 U.S.C. 4323(a)(1), provides that, upon the claimant's request, VETS will refer to the Attorney General cases against private and State employers that are not resolved through VETS' efforts. Formerly the Civil Division, and now the Civil Rights Division of the Department of Justice (DOJ), and the United States Attorneys' Offices (USAOs) act on behalf of the Attorney General in USERRA matters.

At the outset of FY 2004, responsibility for enforcing USERRA complaints against private or State governmental agencies lay with the Civil Division of DOJ. In September, 2004, the Attorney General directed that those responsibilities be transferred to the Civil Rights Division of DOJ.

In addition, on September 20, 2004, the Secretary of Labor, Elaine Chao, and the U.S. Attorney General, John Ashcroft, signed a Memorandum of Understanding (MOU) which confirms the commitment of DOL and DOJ to ensuring that claimants' USERRA rights are protected. The MOU sets forth the procedures for referring USERRA cases from DOL to DOJ, and is intended to allow DOJ to become involved in the referral process at an earlier point in time. It is anticipated that, through the new MOU, case processing and referral will be streamlined, allowing for timely resolution of complaints. DOL and DOJ are working together to develop procedures to implement the directives of the new MOU.

VETS refers cases to the Civil Rights

Division (formerly to the Civil Division) through the Department of Labor's Regional Solicitors (RSOL). Each referral includes: the VETS investigative file; a memorandum analyzing the case and providing a recommendation, based upon the facts and the law, as to whether representation should be provided or declined; and the RSOL's analysis and recommendation.

Based on a review of the record and the DOL Recommendation, the Civil Rights Division makes an independent determination as to the merits of each case. If reasonably satisfied that the claimant is entitled to the remedies or benefits sought in accordance with USERRA, the Civil Rights Division will provide representation to the claimant and attempt to resolve the matter, through litigation if necessary. The MOU provides that, under appropriate circumstances, DOL attorneys may be designated as Special Assistant United States Attorneys to assist in the prosecution of USERRA cases. If, based on an independent review of the record and DOL's recommendation, the Civil Rights Division determines not to go forward with the case, the claimant is advised of that determination and of his or her right to proceed with private counsel.

In FY 2004, the Civil Division received 55 cases from VETS through RSOL. The Civil Division forwarded 14 cases to the USAOs, and declined representation in 27 cases based upon the Department of Labor's recommendation that they lacked merit and the Division's independent analysis of the merits of the case. The Civil Division forwarded 14 cases to the Civil Rights Division after the September 20, 2004,

MOU was signed. Those 14 cases were under Civil Rights Division review at the close of FY 2004.

The cases referred to the Civil Division involved a number of USERRA issues. Thirty-three (33) cases involved allegations of discrimination based on the employees' military obligations, and 27 cases involved allegations of improper reinstatement. (There was some overlap here as 10 cases involved both discrimination and improper reinstatement issues.) The remaining cases involved a variety of USERRA issues, including improper layoffs; loss of seniority, pay, and status; and initial hiring discrimination.

In FY 2004, USAOs did not file any complaints in Federal District Court on behalf of USERRA claimants. (One complaint was filed in October 2004.) Settlements were negotiated in two (2) cases. USAOs declined representation in eleven (11) cases (including eight (8) cases from FY 2003) based on their findings that the cases lacked merit. Eleven (11) cases remained under USAO review at the end of FY 2004 (including three (3) cases from FY 2003).

Office of Special Counsel

Section 4324(a)(1) of the USERRA, 38 U.S.C. 4324(a)(1), provides that, upon the claimant's request, VETS will refer to the Office of Special Counsel (OSC) cases against Federal executive branch employers that are not resolved through VETS' efforts. Each VETS referral to OSC includes: the VETS investigative file; a memorandum

analyzing the case and providing a recommendation, based upon the facts and the law, as to whether representation should be provided or declined; and the RSOL's analysis and recommendation.

Based on a review of the record and the DOL Recommendation, the OSC makes an independent determination as to the merits of each case. Additionally, OSC may obtain additional information from the claimant and the involved agency. If reasonably satisfied that the claimant is entitled to the remedies or benefits sought in accordance with USERRA, the OSC will provide representation to the claimant and attempt to resolve the matter, through litigation if necessary. If, based on an independent review of the record and DOL's recommendation, the OSC determines not to go forward with the case, the claimant is advised of that determination and of his or her right to file a USERRA appeal against the involved agency with the Merit Systems Protection Board (MSPB).

In FY 2004, the OSC received fourteen (14) referrals from the Department of Labor. In addition, four (4) referrals were pending at the end of FY 2003 and were carried over to FY 2004. OSC declined representation in six (6) cases, and filed two (2) USERRA actions before the MSPB during FY 2004. Twelve (12) USERRA referrals were under OSC review at the end of FY 2004.

Of the cases referred to OSC, six involved allegations of initial hiring discrimination, one involved allegations of denial of a promotion secondary to military obligations discrimination, one involved allegations of failure to properly reinstate and denial of

seniority benefits, and the remaining cases involved general allegations of discrimination.

3. TRENDS

The most recent report to Congress on USERRA covered fiscal year 1999. Since that time, the September 11, 2001, terrorist attacks and subsequent mobilization of the components of the National Guard and Reserve forces have resulted in significant increases in employment-related issues. While the aggregate number of USERRA complaints received since September 11, 2001, is higher than the number of similar complaints received in the last comparable mobilization during Operation Desert Shield/Desert Storm, the number of complaints received as a percentage of the number of personnel mobilized for military duty since September 11, 2001, is approximately thirty (30) percent lower than the percentage of complaints received during Operation Desert Storm. During Operation Desert Storm, for example, some 265,000 Guard members and Reservists were mobilized and VETS received a USERRA-like complaint from one (1) out of every fifty-four (54) reservists. As of December 30, 2004, however, more than 459,418 reservists had been mobilized since September 2001, but only one (1) in every 76 reservists filed a complaint related to employment. This decrease may be attributed in part to the enactment of USERRA in 1994; the compliance assistance efforts of the Department of Labor and its USERRA partners; and the overwhelming support of the employer community for those employees who have been called to active duty.

In FY 1999 the average age for all cases closed was 59 days. In FY 2004, the average age for all cases closed was 53 days. These numbers are highly significant, because despite an approximate 40 percent increase in the number of USERRA cases filed in 2004, the Department of Labor has reduced the average case processing time by six (6) days, without increasing its investigative staff. The Department considers the fact that the average age for case closures has been kept below 60 days while experiencing a 40% increase in claims and no corresponding increase in staff to be attributable in part to USERRA outreach efforts conducted by VETS, and training in the law and other Federal employment laws and regulations provided to VETS' staff at the National Veterans' Training Institute.

4. EFFORTS TO IMPROVE AWARENESS OF USERRA

Outreach and Compliance Assistance

VETS engages in a wide variety of compliance assistance activities in order to fulfill its statutory obligation to provide educational outreach under USERRA. The ongoing mobilization of Reserve component forces that began shortly after the attacks of September 11, 2001, has created additional challenges for VETS' compliance assistance outreach efforts. With nearly 460,000 members of the Guard and Reserve mobilized since September 2001, there has been a significant increase in requests for USERRA information from reservists, their employers, the media, and the general public.

VETS Website and USERRA Advisor

The VETS homepage and an interactive online USERRA Advisor provide general information on VETS and USERRA and contain links to a wide variety of compliance information. The information contained on the website is easy to use. There is an interactive question-and-answer component to the USERRA Advisor itself, designed to answer specific questions related to employer and employee rights and responsibilities under USERRA. The Advisor also contains an online complaint form (VETS Form 1010) which potential claimants can complete online, print, sign, and then submit to the local VETS office in the State in which the employer is located. The USERRA Advisor can be viewed at <http://www.dol.gov/elaws/userra.htm>, and the VETS website is at <http://www.dol.gov/vets>.

Telephone and Email Advice

The VETS website and the USERRA Advisor contain instructions on how to contact VETS via e-mail or telephone in the event that a veteran, potential claimant, business owner, human resources staff member, or member of the general public has questions which cannot be answered by the interactive Advisor. E-mail and telephone inquiries are directed to the appropriate VETS staff member who can respond to each particular inquiry.

USERRA information is also provided on the Department of Labor's toll-free help line (1-866-4-USA-DOL). Trained staff answer basic questions and refer callers to VETS staff or to the USERRA Advisor for

additional information. This service has been available since September 2001, and to date, has accounted for an average of one (1) percent of the total calls to the Department's toll-free line.

Seminars, Workshops and Briefings

VETS conducts an aggressive outreach program consisting of speaking engagements, seminars, and workshops. VETS staff regularly provides briefings to National Guard and Reserve units, individuals, employers, legal offices, and professional and business associations. VETS National Office professional staff members have conducted a number of briefings before Federal and private agencies during FY 2004, including the Drug Enforcement Administration, Department of Transportation, U.S. Chamber of Commerce, and others. In FY 2004, for example, VETS provided technical assistance to over 8,500 members of the National Guard, Reservists, members of the media, and employers, and provided briefings to more than 54,000 of those individuals. (From September 11, 2001, to the end of FY 2004, VETS has provided technical assistance to more than 185,800 individuals of all affiliations.)

VETS continues to enjoy a close working relationship with the National Committee for Employer Support of the Guard and Reserve (ESGR), which operates under the aegis of the Department of Defense. VETS has and will continue to engage in a constructive partnership with ESGR, to conduct outreach briefings, seminars, and to provide general information on USERRA to a wide range of employers, associations,

Federal and State agencies, employees, and active duty, National Guard, and Reserve units. VETS plans to finalize a draft MOU with ESGR in fiscal year 2005.

Training and Educational Materials

VETS use of training and educational materials, as well as its outreach efforts, expanded during FY 2004, and it is anticipated that such efforts will continue to grow. When the final USERRA regulations are published, for example, VETS plans to issue a USERRA Handbook which will include those final regulations. VETS has approved a number of fact sheets, frequently asked questions (FAQs) with answers, and informational brochures containing basic facts regarding USERRA. These materials are all subject to periodic updates as required by changes in the law and other developments.

USERRA Regulations

On September 20, 2004, the Department published, for the first time, proposed regulations implementing USERRA for States, local governments and private employers, written in a "plain English" easy to read question and answer format. The notice of proposed rulemaking (NPRM) can be found at 69 Fed. Reg. 56,266 (2004) and on the VETS website at <http://www.dol.gov/vets/regs/fedreg/proposed/2004020844.htm>. The notice and comment period ended on November 19, 2004. The Department of Labor is reviewing the comments and preparing the final regulation, which VETS intends to publish as a final rule later in 2005. VETS has responded to numerous inquiries

regarding the proposed regulations, and the overall public response to the proposed USERRA regulations has been overwhelmingly positive.

5. LEGISLATIVE CHANGES THAT WILL REQUIRE ADMINISTRATIVE ACTION IN FY2005

The Veterans Benefits Improvement Act of 2004, Pub. L. No. 108-454 (December 10, 2004) (VBIA), made four changes to USERRA that will be implemented in fiscal year 2005: an employer notice requirement, an extension of USERRA's health plan continuation requirements; an OSC demonstration project, and the reinstatement of the USERRA Annual Report to Congress.

Employer Notice Requirement

VBIA added a new section to USERRA, 38 U.S.C. 4334, which requires employers to provide to persons entitled to rights and benefits under USERRA a notice of USERRA rights, benefits, and obligations. This requirement becomes effective on March 10, 2005. The Department of Labor is required to provide to employers the text of the USERRA notice. The Department will report on the implementation of this provision in its fiscal year 2005 USERRA Annual Report to Congress.

Extension of Health Care Coverage

VBIA amended Section 4317(a)(1)(A), 38 U.S.C. § 4317(a)(1)(A), to extend from 18 months to 24 months the maximum period that an employee may elect to continue coverage under his or her employer's health plan when mobilized for active duty in the

uniformed services. The amendment is effective for elections made on or after the December 10, 2004, enactment of VBIA. This change was made to accommodate mobilizations of 24-month duration. The Department will highlight this change in its outreach and compliance assistance activities.

Demonstration Project for Referral of USERRA Claims Against Federal Agencies to the Office of Special Counsel

VBIA created a demonstration project under which about half of the claims against Federal executive agencies arising under USERRA will be transferred by the Department of Labor to OSC. The demonstration project will begin on February 8, 2005, and will end on September 30, 2007. The Department will report on the implementation of this provision in its fiscal year 2005 USERRA Report to Congress.

Annual Report to Congress

VBIA reinstated the requirement that the Secretary of Labor, in consultation with the Attorney General and the Special Counsel, prepare and transmit a USERRA Annual Report to Congress. This is the first Report prepared under this reinstated reporting requirement.

6. LEGISLATIVE ACTION RECOMMENDATIONS

The USERRA NPRM noted several areas where the Department proposed clarifications as a result of judicial decisions interpreting USERRA. The Department of

Labor is reviewing comments pertaining to the NPRM. After consideration of those comments and publication of the final USERRA Regulation, the Department may offer recommendations for legislative action in its USERRA Annual Report to Congress for fiscal year 2005 concerning any matters that are not addressed in the final USERRA Regulation.