

USERRA

UNIFORMED SERVICES EMPLOYMENT AND
REEMPLOYMENT RIGHTS ACT OF 1994



FY 2017
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.

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Introduction

The Uniformed Services Employment and Reemployment Rights Act of 1994, 38 U.S.C. §§ 4301-4335 (USERRA), was signed into law on October 13, 1994. USERRA prohibits discrimination in employment based on an individual's prior service in the uniformed services; current service in the uniformed services; or intent to join the uniformed services. An employer is also prohibited from discriminating against a person because of such person's attempt to enforce his or her rights under the Act. In addition, an employer may not retaliate against an individual for filing a USERRA claim, testifying, or otherwise providing assistance in any proceeding under the Act. USERRA also provides reemployment rights with the pre-service employer following qualifying service in the uniformed services. In general, the protected person is entitled to be reemployed with the status, seniority, and rate of pay as if he or she had been continuously employed during the period of service. USERRA applies to private employers, the Federal Government, and State and local governments. It also applies to United States employers operating overseas and foreign employers operating within the United States.

This Fiscal Year (FY) 2017 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 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 Secretary 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, who 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(s), the claimant may request referral of his/her case to the Department of Justice (DOJ) for cases involving a private, State, or local government employer, and to OSC¹ 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

Employer Support of the Guard and Reserve (ESGR) is a Department of Defense (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 through its network of volunteers nationwide. ESGR develops and promotes supportive work environments for service members in the RCs through outreach, recognition, and educational opportunities that increase awareness of applicable laws.

ESGR is a volunteer-centric program that works to ensure all employers support and value the employment of RC members by providing outreach and informal mediation. Its nearly 3,800 volunteers operate in 54 State Committees located across all 50 states, the District of Columbia, Guam-CNMI, the U.S. Virgin Islands, and Puerto Rico. Headquarters (HQ) ESGR in Alexandria, Virginia, provides guidance and resources to the 54 ESGR State Committees that conduct employer and military outreach programs.

In FY 2017, ESGR volunteers engaged 81,695 employers and 209,927 service members, educating both groups on their responsibilities and rights under USERRA.

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.

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. ESGR conducts proactive outreach directed at U.S. employers, employees, and communities that ensures understanding and appreciation of the role of the National Guard and Reserve. It assists in preventing, resolving, or reducing employer and/or employee conflicts and misunderstandings that result from RC service, training, or duty requirements through information services and educating National Guard and Reserve members as well as their employers regarding Uniformed Services Employment and Reemployment Rights Act (USERRA) rights. 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 in order to sustain military participation.

Outreach programs also include the voluntary participation by employers in the Statement of Support Program, who 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 will 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 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. ESGR administers the Secretary of Defense Employer Support Freedom Award, the U.S. Government's highest honor bestowed on employers. This award is presented annually to a maximum of 15 select large, small, and public-sector employers who have demonstrated exceptional support to RC employees.

During FY 2017, ESGR recognized 10,281 supervisors of RC service members with the Patriot Award, received 3,064 nominations for the 2017 Secretary of Defense Employer Support Freedom Award, and obtained 7,834 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. The Ombudsman Services Program provides education, information, and neutral, informal third-party mediation services in order to resolve employee/employer USERRA conflicts. The program has over 500 volunteers nationwide that work to reduce, resolve, and help prevent employer and/or employee conflicts and misunderstandings. ESGR ombudsmen are specifically trained on the rights and responsibilities contained within USERRA, the use of neutral, informal mediation techniques to help resolve employment conflicts related to USERRA between employees and employers, and how to further an understanding of and compliance with USERRA.

ESGR is not an enforcement agency and does not participate in formal litigation processes.

In addition to the support provided by ESGR's Ombudsman Services Program, the Defense Personnel Family Support Center's Customer Service Center (CSC) assists Service members and employers by responding to USERRA-related inquiries and information requests from customers worldwide. The Ombudsman Services Program and the CSC work together closely to provide prompt, expert telephonic and email responses to service members and civilian employers and employees on all USERRA-related matters. During FY 2017, ESGR received 10,739 contacts by telephone and email; of which 1,801 contacts resulted in actual USERRA mediation cases. ESGR's mediation efforts covered an array of USERRA issues that included 1,160 complaints involving some type of military discrimination; 597 complaints involving job reinstatement; and 44 complaints involving possible retaliation or reprisal. There were 418 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 and track problems, coordinate efforts to resolve issues, and identify trends as part of their joint efforts to protect service members' rights and promote positive working relationships between service members and their civilian employers.

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 2017, VETS presented USERRA information to 7,000 individuals including service members, members of professional groups, and to members of the general public. To help facilitate these efforts, VETS maintains a USERRA page on its website at: www.dol.gov/vets, containing the USERRA elaws Advisor, frequently-asked-questions, and other useful information. 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 2017, VETS and OSC also collaborated to provide educational briefings to a number of Federal agencies. Also in FY 2017, 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 with VETS online or submit a signed form in person or via mail or facsimile. 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.

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. 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. Each DOL referral includes: (1) the VETS investigative file; and (2) a memorandum that analyzes the USERRA claim(s) and provides an assessment on whether or not the claim(s) has merit.

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 claim without commencing an action in court. 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 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.

In FY 2017, DOJ filed two complaints on behalf of service members and negotiated settlements in excess of \$233,500. For example, on June 1, 2017, DOJ reached a settlement agreement with the Pierce County Transportation Benefit Area Corporation of Pierce County, Washington, resolving allegations that Pierce Transit violated the employment rights of Washington Army National Guard Member Lieutenant Colonel C. Van Sawin. LTC Sawin is a United States Military Academy graduate, who served as a reservist between 2005 and 2006 and deployed to Iraq in support of Operation Iraqi Freedom. Following military reserve duties in 2016, Pierce Transit declined to re-employ LTC Sawin, stating that, while he was on active duty (in March 2016), it had laid him off following a reorganization that eliminated his position. Under the terms of the settlement agreement, Pierce Transit paid LTC Sawin \$105,000 to compensate him for lost and/or reduced wages and benefits, and other damages. Additionally, the settlement reduced the likelihood of future USERRA violations by requiring Pierce

Transit to adopt a USERRA policy, to provide training to its high-level officials and human resources staff on the USERRA rights and obligations of employers and covered employees, and to report allegations of violations of USERRA and certify its compliance therewith to DOJ for a period of two years.

DOJ also works closely with the Solicitor's Office at DOL in training VETS' investigators, discussing case trends, and collaborating on USERRA strategy. For example, the DOJ and the Solicitor's Office at DOL have a scheduled monthly call where all case referrals and case resolutions are discussed.

In FY 2018, 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. DOJ, on behalf of 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.

During FY 2017, 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. 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 these activities, and in an effort to broaden and strengthen partnerships with other Federal agencies in coordination with OSC, DOD, and OPM 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, promoting 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 THIS CHAPTER DURING THE FISCAL YEAR FOR WHICH THE REPORT IS MADE.

DOL reviewed 944 new unique² cases in FY 2017 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 Department of Labor and OSC in FY 2012 – FY 2017.

Figure 1. Unique USERRA Cases Reviewed by the Department of Labor and OSC³

Fiscal Year	FY 2012	FY 2013	FY 2014	FY 2015	FY 2016	FY 2017
Total New Cases	1,425	1,281	1,286	1,123	930	944
Total Cases	1,644	1,553	1,511	1,288	1,107	1,098

In FY 2017, DOL carried over an additional 140 unique cases (open investigations) from FY 2016. During FY 2017, DOL reopened 10 cases from FY 2016 and four from FY 2015 or earlier. In sum, DOL reviewed a total of 1,098 unique cases in FY 2017.

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

During FY 2017, ESGR received 10,739 contacts by telephone and email. Of those contacts, 1,801 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 2017, DOL referred 54 cases to the Attorney General and 17 cases to OSC. During the fiscal year, OSC did not initiate any actions before the MSPB. 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 two USERRA complaints in Federal court in FY 2017. Both of these cases were in active litigation in FY 2017.

² 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.

³ From FY 2011-FY 2014, OSC also reviewed unique cases under a demonstration project established by the Veterans Benefits Act of 2010. This table captures cases reviewed by OSC as well from FY 2012-2014. New unique cases reviewed by OSC totaled 150 in FY 2012; 137 in FY 2013; and, 146 in FY 2014. Unique case assignments to OSC under this demonstration project ended in FY 2014.

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 1,741 individuals who had filed the 1,801 cases reviewed by ESGR Ombudsmen in FY 2017, and the date of each case. VETS compared the ESGR data to its own data⁴ on cases initially opened between October 1, 2016 and October 31, 2017.⁵ This comparison resulted in 161 likely matches; thus, it appears that 9% 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.** Sixteen of the new unique cases first reviewed by VETS in FY 2017 (1.7%) involved a disability-related issue.
- ii.** Twenty-four of the ESGR cases first reviewed in FY 2017 (1.3%) involved a disability-related issue.
- iii.** Of the cases referred by DOL for consideration of litigation in FY 2017, none of those referred to DOJ and none of those referred to OSC involved a disability-related issue.
- iv.** Of the two USERRA complaints filed by DOJ in FY 2017, none involved a disability-related issue.
- v.** With respect to the 161 cases reviewed by DOL and ESGR involving the same person in FY 2017, three (1.9%) involved a disability-related issue.

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

- i.** In FY 2017, VETS asked claimants whether they had a service-connected disability. Among the 944 new unique cases VETS received, VETS obtained responses from 926 claimants, 255 (28%) of whom reported having such a disability. Among these 255 claimants, 11 also claimed a USERRA-related disability issue. Among the remaining 671 claimants who responded but did not report having a service-connected disability, five 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 to DOJ by DOL for consideration of litigation, 19 involved a claimant who reported a service-connected disability, and none included a USERRA-related disability issue. Eight of those referred to OSC by DOL involved a claimant who reported a service-connected disability, and none of the referred cases included a USERRA-related disability issue.
- iv.** Of the two USERRA complaints filed by DOJ in FY 2017, none involved a service-connected disability.

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

⁵ October VETS data was included to capture the ESGR cases that were opened late FY 2017 and may have been filed with VETS in October 2017.

- v. With respect to the 161 cases reviewed by VETS and ESGR involving the same person in FY 2017, VETS obtained service-connected disability responses from 157 of these claimants, 29 (18%) of whom reported having such a disability. One claimant among the 29 who reported having a service-connected disability also claimed a USERRA-related disability issue. Among the remaining 128 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 944 new unique cases reported by VETS in FY 2017 and the combined percentages exceed 100%.

USERRA ISSUE	VETS CASES ALLEGING ISSUE	
	NUMBER	PERCENT
Military obligations discrimination	393	41.6%
Reinstatement	162	17.2%
Other non-seniority benefits	21	2.2%
Promotion	62	6.6%
Vacation	13	1.4%
Status	18	1.9%
Pay rate	29	3.1%
Reasonable accommodation/ retraining for non-qualified/non-disabled	3	0.3%
Discrimination as retaliation for any action	110	11.7%
Seniority	13	1.4%
Pension	33	3.5%
Initial hiring discrimination	61	6.5%
Layoff	38	4.0%
Special protected period discharge	7	0.7%
Health benefits	8	0.8%
Reasonable accommodations/retraining for disabled	16	1.7%
Other	39	4.1%

DOL investigated and closed 926 cases in FY 2017 under the following closure codes (each code is explained in Figure 4):

Figure 3. Investigated and subsequently closed by VETS in FY 2017⁶	VETS CASES CLOSED	
	NUMBER	PERCENT
CLOSURE CODE		
No merit	344	37.1%
<i>Referrals requested in FY 2017: 33</i>		
Administrative	59	6.4%
Claim granted	95	10.3%
Claim settled	75	8.1%
<i>Referral requested in FY 2017: 1</i>		
Claim withdrawn	265	28.6%
Not eligible	44	4.8%
<i>Referrals requested in FY 2017: 2</i>		
Merit, not resolved	43	4.6%
<i>Referrals requested in FY 2017: 22</i>		
Merit undetermined	1	0.1%
<i>Referral requested in FY 2017: 1</i>		
TOTAL:	926	100.0%
<i>Total Referrals requested in FY 2017: 59⁷</i>		

⁶ Beginning with the FY 2017 USERRA Annual Report, “VETS Cases Closed” count in Figure 3 no longer counts cases whose investigation had been previously closed in past fiscal years but were requested by the claimant to be referred to DOJ or OSC in FY 2017. Instead, the Figure 3 “VETS Cases Closed” count only includes cases that were investigated and closed in the fiscal year for which the report represents.

⁷ In addition to the 59 cases requested for referral to DOJ or OSC in FY 2017 regarding FY 2017 cases closed, 13 other cases that were closed in past fiscal years were requested for referral to DOJ or OSC in FY 2017 – 10 for FY 2016 closures (2 “Merit, Not Resolved”; 7 “No Merit”; and 1 “Not Eligible”), and 3 for FY 2015 closures (2 “Merit, Not Resolved”; and 1 “Not Eligible”). In total there were 72 referrals requested in FY 2017.

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/her desire to withdraw the claim.
- **NOT ELIGIBLE:** If a case has already been opened, and VETS finds that the claimant does not meet the eligibility requirements in the statute, the case should be discussed with the claimant and, with his/her concurrence, closed on the basis of no eligibility.
- **NO MERIT:** The claimant is not entitled to relief for reasons other than failure to meet eligibility requirements.
- **CASES REFERRED:** Unsettled cases are closed only when they are referred to the Regional Solicitor's Office for appropriate referral action.
- **MERIT, NOT RESOLVED:** When the completed investigation finds merit to the complaint, but VETS is unable to obtain a satisfactory resolution.
- **MERIT UNDETERMINED:** When the investigation is not complete but the statutory deadline for case completion (or an extension previously agreed to by the claimant) is reached and the claimant does not agree to a further extension.

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

ESGR Ombudsman services covered an array of USERRA issues that included 1,160 complaints involving some type of military discrimination; 597 complaints involving job reinstatement; and 44 complaints involving possible retaliation or reprisal during FY 2017.

ESGR resolved 1,383 of its 1,801 Ombudsman cases. There were 418 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 2017

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 1104	ID - Military Obligations Discrimination 365
	Initial Hiring Discrimination 56	II - Initial Hiring Discrimination 32
	1,160 Ombudsman Cases (64.4%)	397 Issues in 395 Complaint Cases (53% of Complaint Cases)
Reinstatement/ Reemployment	Health Benefits 17	IH - Health Benefits 5
	Pension 13	IP - Pension 25
	Seniority 31	IS - Seniority 11
	Other Non-Seniority Benefits 11	IB - Other Non-Seniority Benefits 17
	Status 27	IZ - Status 15
	Layoff 7	IL - Layoff 30
	Vacation 67	IV - Vacation 13
	Reinstatement 287	IR - Reinstatement 130
	Promotion 60	IT - Promotion 46
	Reasonable Accommodations/Retraining for Disabled 24	IA - Reasonable Accommodations/Retraining for Disabled 8
	Reasonable Accommodations/Retraining for Non-Qualified/Non-Disabled 1	IW - Reasonable Accommodations/Retraining for Non-Qualified/Non-Disabled 3
	Pay Rate 50	IM - Pay Rate 22
	Special Protected Period Discharge 2	IF - Special Protected Period Discharge 5
597 Ombudsman Cases (33.1%)	330 Issues in 271 Complaint Cases (36.4% of Complaint Cases)	
Reprisal	Discrimination as Retaliation for any Action 44	ID2 - Discrimination as Retaliation for any Action 63
	44 Ombudsman Cases (2.4%)	63 Issues in 63 Complaint Cases (8.5% 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 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 20 "Other" VETS Issues and Cases from this chart.

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

In FY 2017, VETS/DOL received a total of 72 requests for referral to DOJ and OSC, and referred 71 cases to DOJ and OSC.⁸

CASES REFERRED TO THE DEPARTMENT OF JUSTICE

In FY 2017, the Civil Rights Division received a total of 54 referrals from DOL, of which 41 were from cases investigated by DOL in 2017 and 13 were from cases investigated by DOL prior to 2017. Seventeen of the 54 had been previously assessed by the DOL as having merit, and 37 had been assessed as not having merit.

Of the 17 cases that had been assessed as having merit by DOL, DOJ offered representation in eight cases, and declined representation in four cases (one of which resulted in a DOJ facilitated settlement). Two referrals involved State agencies as potential defendants, one of which DOJ declined to pursue litigation in agreement with DOL, and one of which resulted in a DOJ facilitated settlement. The remaining three referrals assessed as having merit were still under consideration by DOJ in FY 2017.

Of the 37 cases that had been assessed as having no-merit by DOL, based on DOL's assessment and DOJ's independent analysis of the merits of each referral, DOJ declined representation with respect to 27 referrals and offered representation in one referral. Four non-merit referrals involved state agencies; DOJ declined to pursue litigation in these four cases. The remaining five referrals were still under consideration by DOJ in FY 2017.

The cases referred to the Civil Rights Division in FY 2017 involved a number of USERRA issues. Approximately 26% (14) of these cases involved allegations of termination and/or discharge, approximately 28% (15) of these cases involved reemployment allegations, while approximately 6% (3) 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 allegations of discrimination, with approximately 4% (2) involving allegations of failure to promote, approximately 4% (2) involving allegations of failure to hire, and approximately 52% (28) involving allegations regarding 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.⁹

CASES REFERRED TO THE OFFICE OF THE SPECIAL COUNSEL

In FY 2017, OSC received a total of 17 referrals from DOL, of which 13 were from cases investigated by DOL in 2017 and four were from cases investigated by DOL prior to 2017. Additionally, five cases referred to OSC during previous fiscal years remained pending at the beginning of FY 2017. Thus, 22 total cases were pending at OSC during the fiscal year. OSC closed 19 of the 22 cases during FY 2017 (approximately 80% within the 60-day time limit), while three cases remained pending at the end of the fiscal year. OSC did not file any actions with the MSPB during the fiscal year.

⁸ Not all of the cases referred to DOJ and OSC in FY 2017 were pursuant to referral requests made in FY 2017 due to the timing of the fiscal year. Seventeen cases requested to be referred in FY 2016 were sent to DOJ and OSC in FY 2017. In addition, 17 cases requested to be referred in FY 2017 were not yet sent to DOJ and OSC at the close of FY 2017. Furthermore, one referral request to DOJ received by VETS in FY 2017 was withdrawn by the claimant, and thus was not delivered to DOJ.

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

The cases referred to OSC in FY 2017 involved a number of USERRA issues. Approximately 59% (13) of the 22 cases involved allegations of discrimination based on uniformed service, including termination, non-promotion, non-selection, or improper denial of employment benefits; 45% (10) involved allegations of violations of reemployment rights; and 9% (2) involved allegations of retaliation for exercising USERRA rights.¹⁰

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

DOJ filed two USERRA complaints in Federal court in FY 2017. Both of these cases were in active litigation in FY 2017. On July 25, 2017, DOJ filed a complaint against Farmacia Lugo, Inc., a business based in Puerto Rico, alleging that it violated the employment rights of U.S. Army Reservist Anna J. Santiago under USERRA. The complaint alleges that Santiago's military service was a motivating factor in Farmacia Lugo's decision to terminate her employment. Settlement negotiations are currently underway. On August 17, 2017, DOJ filed a complaint alleging that the City of Glendale, Arizona, violated the employment rights of Arizona Air National Guard member Captain Rebecca Cruz by terminating her employment shortly after receiving her orders for deployment. Captain Cruz has served the United States honorably as a member of the Arizona Air National Guard since 2007. According to the complaint, filed in the United States District Court for the District of Arizona, the City of Glendale hired Captain Cruz as a Management Analyst in its Public Works Department, knowing at that time that she also served as a member of the Guard. Approximately two months after she was hired, the Guard notified Cruz that she would need to attend military training for a new Air National Guard job classification to which she was being assigned. Cruz provided her military orders conveying that schedule to the City of Glendale, and six days later she was fired. The case is currently in discovery.

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

DOL closed all 161 of these likely matches by May 17, 2018, under the following closure codes: no merit, 62 (39%); administrative, 5 (3%); claim granted, 26 (16%); claim settled, 19 (12%); claim withdrawn, 32 (20%); not eligible, 5 (3%); referred, 0 (0%); merit, not resolved, 12 (7%); merit undetermined, 0 (0%). An explanation of VETS case closure codes appears in the explanation of the status of cases reviewed by DOL.

The following chart shows how the alleged issues in these 161 likely match cases were distributed among the various VETS' closure codes.

¹⁰ Some cases involved multiple issues. Each issue was counted separately.

Figure 6.

VETS' Data For 161 Likely Case Matches with FY 2017 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	1	0	0	0	0	0	0	0	1	0.6%
Reinstatement	0	10	1	1	0	0	0	0	0	12	7.5%
Other Non-Seniority Benefits	3	2	10	18	0	5	33	1	0	72	44.7%
Promotion	0	0	0	4	0	1	5	0	0	10	6.2%
Vacation	0	0	1	2	0	0	2	0	0	5	3.1%
Status	0	1	0	1	0	0	0	0	0	2	1.2%
Pay Rate	0	0	0	0	0	0	0	0	0	0	0.0%
Reasonable Accommodations/Retraining for Non-Qualified/Non-Disabled	0	1	2	2	0	2	3	1	0	11	6.8%
Discrimination as Retaliation for any Action	0	2	1	0	0	0	1	0	0	4	2.5%
Seniority	0	1	0	0	0	0	0	1	0	2	1.2%
Pension	0	7	0	0	0	1	0	0	0	8	5.0%
Initial Hiring Discrimination	2	0	5	3	0	4	19	1	0	34	21.1%
Layoff	0	2	2	0	0	0	1	0	0	5	3.1%
Special Protected Period Discharge	0	1	0	0	0	0	2	0	0	3	1.9%
Health Benefits	0	0	0	2	0	1	0	0	0	3	1.9%
Reasonable Accommodations/Retraining for Disabled	0	2	0	1	0	0	0	0	0	3	1.9%
Other	0	0	0	1	0	0	0	0	0	1	0.6%
NUMBER OF ISSUE CODES FOR EACH CLOSURE CODE:	5	30	22	35	0	14	66	4	0	176	
PERCENT OF ALL LIKELY MATCH CASES:	3.1%	18.6%	13.7%	21.7%	0.0%	8.7%	41.0%	2.5%	0.0%		109.3%

* **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 161 ESGR and VETS cases involving the same person, and the combined percentages exceed 100%. Matching of FY 2017 ESGR cases and VETS cases initially opened 10/1/2016 to 10/31/2017 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 2017. Therefore, SOCS code data is not available for ESGR mediation cases. The chart below shows the full distribution of the SOCS codes in FY 2017 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 923 (98%)¹¹ of the unique complaints filed in FY 2017, 20% of complaints involved Protective Service occupations; 12% involved Management occupations; and 11% involved Office and Administrative Support occupations.
- Out of 159 (99%)¹² of the cases reviewed by VETS and ESGR likely involving the same person in FY 2017, 19% of those cases involved Protective Service occupations; 13% involved Management occupations; and each of two categories (Office and Administrative Support, and Transportation and Material Moving) involved 9% of complaints.
- Out of the 54 cases referred to the Attorney General from DOL in FY 2017, 17% of those cases involved Healthcare Practitioners and Technical occupations; 15% involved Protective Service occupations; and 13% involved Management occupations.
- Out of the 17 cases referred to OSC from DOL through VETS in FY 2017, 29% of complaints involved Protective Service occupations, and each of two categories (Management, and Office and Administrative Support) involved 24% of complaints.

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

¹² Total is less than 100% because the SOCS code was not recorded for some cases.

Figure 7. Occupations Involved in FY 2017 USERRA CASES¹³

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%	15%	29%	19%
Management	12%	13%	24%	13%
Office and Administrative Support	11%	7%	24%	9%
Transportation and Material Moving	7%	9%	0%	9%
Business and Financial Operations	7%	6%	0%	5%
Healthcare Practitioners and Technical	6%	17%	6%	8%
Installation, Maintenance, and Repair	6%	4%	12%	9%
Construction and Extraction	4%	7%	0%	3%
Computer and Mathematical	4%	6%	0%	4%
Sales and Related	4%	6%	0%	1%

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 2017. DOL will continue to monitor USERRA cases to identify trends as they arise.

¹³ The following occupations accounted for 2% or fewer within each case/referral category shown in this chart (*with exceptions as noted here*): Healthcare Support (*Exception: 6% of Referrals to OSC*); Architecture and Engineering (*Exceptions: 5% of Cases Common to VETS & ESGR, and 3% of VETS Cases*); Education, Training, and Library (*Exception: 4% of Referrals to DOJ*); Production (*Exceptions: 4% of Referrals to DOJ, and 3% of VETS Cases*); Community and Social Services (*Exception: 3% of Cases Common to VETS & ESGR*); Arts, Design, Entertainment, Sports, and Media; Building and Grounds Cleaning and Maintenance; Farming, Fishing, and Forestry; Food Preparation and Serving Related; Legal; Life, Physical, and Social Science; Military Specific; and, Personal Care and Service occupations.

10. RECOMMENDATION FOR ADMINISTRATIVE OR LEGISLATIVE ACTION THAT THE SECRETARY, THE ATTORNEY GENERAL, OR THE SPECIAL COUNSEL CONSIDERS NECESSARY FOR THE EFFECTIVE IMPLEMENTATION OF THIS CHAPTER, INCLUDING ANY ACTION THAT COULD BE TAKEN TO ENCOURAGE MEDIATION, BEFORE CLAIMS ARE FILED UNDER THIS CHAPTER, BETWEEN EMPLOYERS AND PERSONS SEEKING EMPLOYMENT OR REEMPLOYMENT.

Recommendation from 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 legislative proposals.

USERRA annual reports are available for fiscal years (FY) 1995-1999 and 2004-2016. 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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