

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 1999

PREPARED BY:

**OFFICE OF THE ASSISTANT SECRETARY
FOR VETERANS' EMPLOYMENT AND TRAINING**

**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 (USERRA, or the Act) was signed into law on October 13, 1994. The Act is codified at chapter 43, Title 38, United States Code, sections 4301-4333. USERRA is a sweeping revision of the predecessor Veterans' Reemployment Rights Act.

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 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.

The Act provides that the Secretary of Labor, through the Veterans' Employment and Training Service, will open cases on behalf of persons filing claims against private employers, State or local governments, or Federal executive agencies. Section 4332 of USERRA requires an annual report to the Congress on case processing activity for the previous fiscal year (FY). The reports were to begin in 1996 (covering FY 1995 activity) and continue annually through the year 2000 (covering FY 1999 activity). This is the final report. This report was prepared in consultation with the Attorney General and the United States Office of Special Counsel.

UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS

1. CASE ACTIVITY BY DEPARTMENT OF LABOR IN FY 1999

Cases Opened:

In FY 1999, the Veterans' Employment and Training Service (VETS), on behalf of the Secretary of Labor, opened 1,029 new cases and continued the investigation of 171 cases opened during the previous FY. Cases opened decreased 2% from the number of cases (1,051) opened in FY 1998.

Of the cases opened in FY 1999, 662 (64%) involved private employers, 210 (20%) involved States or political subdivisions of States, and 157 (15%) involved Federal employers. Of FY 1999 cases, 776 (75%) were opened for National Guard or Reserve members, 227 (22%) for military veterans, and 26 (3%) 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 1,029 cases opened in FY 1999, 1,333 issues were identified. Approximately 60% of the case issues involved hiring and firing. Included were: 458 case issues (34%) 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; 243 case issues (18%) involving refusal to reinstate or reemploy an individual following a period of military service; 37 (3%) concerning a

layoff because of military obligations; 55 (4%) that involved refusal by an employer to hire an individual because of military service or obligations; and 12 (1%) concerned termination of a person during the statutory period of protection from discharge without cause following reemployment.

Issues involving other than hiring and firing of claimants included: 59 (4%) on seniority; 29 (2%) on failure to provide non-seniority benefits; 61 (5%) on denied promotions; 45 (3%) on vacations; 38 (3%) 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; 45 (3%) on pay rates; 40 (3%) on status in employment; 63 (5%) on pension benefit plans; 22 (2%) on health benefits; and 120 case issues (9%) on various other issues not among the foregoing specified issue categories. There were no cases of reprisal against a person for testifying in a proceeding or assisting in an investigation. (Due to rounding of percentages, the total is less than 100%.)

Cases Resolved:

In FY 1999, VETS closed 1,020 cases, of which 853 (84%) were closed within 90 days or less, and 919 (90%) were closed in 120 days or less. At the end of FY 1999, two cases remained open for a period of greater than one year. Both of those cases

have since been closed.

Of the 1,020 closed cases, there were 398 (39%) USERRA claims resolved through VETS' mediation efforts. In these cases, VETS' actions helped bring about recovery of \$652,597 in lost wages and benefits for claimants. There were 72 (7%) closures because individuals chose to withdraw their claims during the investigation. In 314 (31%) cases, VETS' investigation resulted in a determination that the claim was without merit. In 43 (4%) cases, claimants were found to be not eligible for the remedies or benefits sought. In 135 cases (13%), 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 cases (6%) were processed for referral to either the Attorney General or the Office of Special Counsel. Referrals are covered in detail below.

Subpoenas:

During FY 1999, VETS issued no subpoenas under authority provided by section 4326 of USERRA.

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

Attorney General:

Upon the claimant's request, section 4323(a)(1) of the Act provides that VETS will refer to the Attorney General cases against private and State employers that are not resolved through VETS' efforts. The Civil Division of the Department of Justice and the United States Attorneys'

Offices (USAOs) act on behalf of the Attorney General on USERRA matters.

VETS refers cases 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 upon a review of the record, the Civil Division either forwards the case to the USAO for review and appropriate action or declines representation and returns it to the RSOL due to a lack of merit. In cases received from the Civil Division, the USAO makes an independent determination as to the case's merits. If reasonably satisfied that the claimant is entitled to the remedies or benefits sought, the USAO, in coordination with RSOL, represents the claimant and attempts to resolve the matter, through litigation if necessary.

In FY 1999, the Civil Division received 37 cases from VETS through RSOL. The Civil Division forwarded 12 cases to the USAOs, and declined representation in 23 based upon the Department of Labor's recommendation that they lacked merit. The remaining two cases were under review by the Civil Division at the close of FY 1999.

In 1999, USAOs filed complaints in district court on behalf of five (5) claimants. Settlements were negotiated in seven (7) cases. Four (4) of the

settlements were achieved post-filing. The remaining filed complaint is in the discovery stage. USAOs have negotiated three (3) additional settlements since the end of FY 1999. USAOs declined representation in ten (10) cases based on their findings that the cases lacked merit. For FY 1999, claimants recovered \$112,020 in lost wages and benefits after intervention by the Department of Justice. The three (3) settlements achieved since the end of the FY have yielded an additional \$55,000, for a total of \$167,020 recovered. This summary for the USAOs includes cases received prior to FY 1999.

Office of Special Counsel:

USERRA was intended to significantly strengthen the employment and reemployment rights of Federal employees who perform service in the uniformed services. With USERRA's enactment, VETS began to investigate claims brought by Federal employees. Also, section 4324(a)(1) of the Act provides Federal employees the opportunity to request referral of their cases to the Office of Special Counsel (OSC) who may represent them before the Merit Systems Protection Board (MSPB). This new provision parallels the assistance by the Attorney General available to claimants in cases involving State or private employers.

In FY 1999, the OSC received seven (7) referrals from the Department of Labor. Including one (1) referral that was pending at the end of FY 1998, OSC declined representation in three (3) cases. The OSC initiated no USERRA actions before the MSPB during FY 1999. Five

(5) USERRA referrals were pending at the end of FY 1999. Since the end of FY 1999, OSC has declined representation in two (2) of those cases.

3. TRENDS

The reports covering FYs 1997 and 1998 noted that in claims filed against Federal employers the cases that are not resolved quickly often tend to take more time to bring to closure than similar non-Federal cases. During FY 1997, the average age for non-Federal employer cases closed was 63 days, while the average age of Federal employer cases was 67 days. For FY 1998, the gap widened substantially, to 65 days for non-Federal employer cases versus 74 days for Federal employer cases. Also, while the total number of new cases opened in FY 1998 decreased nearly 16 percent from FY 1997, the number of Federal employer cases opened increased more than 50 percent, from 102 cases in FY 1997 to 155 cases in FY 1998. The trend with respect to numbers of cases opened was halted in FY 1999. In addition, the trend with respect to case processing time was significantly reversed last year. The number of cases overall, as well as the number of Federal employer cases opened, were within two percentage points of the previous year's totals. The average age for all cases closed in FY 1999 decreased from 64 to 59 days. For Federal employer cases, the decrease in average age at closure was remarkable: from 74 days in FY 1998 to 58 days in FY 1999, a year-to-year improvement of 16 days. Two factors that contributed to improvement in the area of Federal employer case handling are the continuing Federal employer USERRA

outreach conducted by VETS (described below), and the training on USERRA and other Federal employment laws and regulations provided to VETS staff at the National Veterans' Training Institute during FY 1999.

4. EFFORTS TO IMPROVE AWARENESS OF USERRA

USERRA Internet Advisor:

The USERRA Advisor system, introduced by Secretary Herman on November 24, 1997, provides electronic information on USERRA to employers as well as protected persons on the Department of Labor Internet home page at <http://www.dol.gov>. The Advisor can be found in the VETS section of the Department's "e-laws" page.

Employer Outreach:

Beginning in FY 1998 and continuing through FY 1999, Secretary Herman led a sweeping and aggressive USERRA educational outreach directed at employers. While the outreach focused primarily on discrimination protection under USERRA, it also included information on all the provisions of the Act. Specific actions were taken to reach both private and Federal employers.

During Summer 1998, VETS mailed USERRA informational materials to 60,000 Federal contractors and sub-contractors, including most of the Nation's largest corporations. VETS followed that mailing with an outreach to nearly 1,000 associations and other organizations that represent the full spectrum of private American employers.

Over the past two years, VETS has greatly expanded efforts to improve awareness of USERRA among Federal executive employers at all levels. As a major component of the Department's overall USERRA outreach campaign, VETS staff members have continued to seek opportunities to address human resources professionals within the executive branch. By November 1999, all cabinet agencies had been provided USERRA outreach briefings and/or educational materials. In addition, numerous other large agencies in the executive branch have hosted USERRA presentations, including the MSPB. These outreach efforts will continue indefinitely. VETS believes that establishing links with headquarters-level managers in the agencies will foster improved compliance throughout those agencies, down to the local office level.

5. LEGISLATIVE ACTION RECOMMENDATIONS:

VETS has no recommendations for new legislation to amend USERRA. Early in FY 1999, the Congress passed and the President signed veterans' legislation that contained three USERRA amendments. The amendments: provide USERRA coverage for persons employed overseas by U.S. employers; provide that the MSPB will adjudicate Veterans' Reemployment Rights Act claims against Federal employers arising prior to USERRA's enactment; and improve USERRA enforcement mechanisms for employees of State governments.