

# USERRA

UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT OF 1994

# FY 2011

ANNUAL REPORT TO CONGRESS

JULY 2012



PREPARED BY  
**OFFICE OF THE ASSISTANT SECRETARY  
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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.

# TABLE OF CONTENTS

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INTRODUCTION	i
OVERVIEW OF USERRA PROTECTIONS	1
USERRA SERVICES PROVIDED BY THE DEPARTMENT OF DEFENSE’S EMPLOYER SUPPORT FOR THE GUARD AND RESERVE (ESGR)	2
OVERVIEW	2
ESGR OUTREACH	3
ESGR OMBUDSMEN SERVICES	3
DEPARTMENT OF LABOR (DOL) USERRA OUTREACH AND CLAIMS INVESTIGATION	4
VETERANS’ EMPLOYMENT AND TRAINING SERVICE (VETS) PUBLIC EDUCATION AND COMPLIANCE ASSISTANCE EFFORTS	4
VETS INVESTIGATIVE PROCESS	4
DOL REFERRAL PROCESS	5
DEPARTMENT OF JUSTICE (DOJ) ENFORCEMENT	5
OFFICE OF SPECIAL COUNSEL (OSC) ENFORCEMENT	6
DOL’S FY 2011 PROGRAM ACTIVITIES AND ACHIEVEMENTS	7
MANDATED REPORTING REQUIREMENTS	8

## **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 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 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 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.

This Fiscal Year 2011 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 the National Committee for Employer Support of the Guard and Reserve of the Department of Defense that involve the same person.
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; 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 pursuant to paragraph 1, 2, 3, 4, or 5.

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.
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 (United States, its territories, or any foreign country) 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. Employers are prohibited from discriminating on the basis of service in the military, the National Disaster Medical System, or 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. 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.

DOL and DOD share responsibility for promoting a clear understanding of USERRA among employers and individuals concerning their respective rights and responsibilities under USERRA. DOL's Veterans' Employment and Training Service (VETS) and DOD's ESGR provide extensive public education, outreach, and compliance assistance with the goal 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.

There are three levels of Federal assistance available to individuals who believe their USERRA rights may have been violated. ESGR Ombudsmen services are the most informal level at which resolution can be sought. If the issue cannot be resolved by the ESGR Ombudsman, or if the individual prefers to bypass informal resolution, VETS receives, formally investigates and attempts to resolve complaints filed by aggrieved parties. If, following VETS' investigation and attempts at resolution, the claimant is not fully satisfied with the outcome, VETS informs the individual of his or her right to have the case referred for consideration of legal representation at no cost to the claimant. Referrals are made to the Department of Justice (DOJ) in cases involving a private or state or local government employer, or to Office of Special Counsel<sup>1</sup> (OSC) in cases involving a Federal employer. Claimants also have the right at any time to withdraw their case to pursue enforcement at their own expense, either on their own or with the assistance of a private attorney.

This report begins by describing the levels of Federal assistance available, beginning with outreach and education and continuing through informal dispute resolution, formal investigation and resolution, referral, and finally, consideration of and provision of legal representation, as appropriate. A section highlighting significant program activities and achievements for the fiscal

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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.

year follows. Finally, the report responds to each of the statutorily-mandated reporting requirements described in the introduction to this report.

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

### **OVERVIEW**

ESGR is an agency within DOD whose mission is to gain and maintain employer support for Guard and Reserve service by advocating relevant initiatives, recognizing outstanding support, increasing awareness of the law, and resolving conflict between employers and Service Members. As such, ESGR is the principal advocate within DOD dedicated to providing its customers and stakeholders with information about USERRA.

ESGR has conducted outreach to Reserve Component (RC) members and their employers since its inception in 1972. Hundreds of thousands of RC members and employers have benefited from ESGR products and services. With Guard and Reserve forces making up nearly 50 percent (50%) of our military strength and ongoing global operations, civilian employers' support is critical to our national defense now more than ever.

ESGR has national and local organizational structure to support the following functions:

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

Today, more than 4,800 volunteers serve across the nation in all 50 states, U.S. territories and the District of Columbia. With help and resources from the Headquarters ESGR in Arlington, Virginia, the 54 ESGR State Committees conduct employer and military outreach programs, which also include participants from the volunteer ombudsmen services program. ESGR ombudsmen are specifically trained in USERRA and neutral mediation techniques, resolving conflicts between service members and employers, furthering the understanding of and compliance with USERRA regulations. ESGR conducts proactive outreach programs and provides responsive Ombudsmen services in support of its mission. In FY 2011, ESGR volunteers briefed over 153,000 employers and almost 475,000 service members to inform both on the responsibilities and rights under USERRA.

### *Outreach Programs*

ESGR conducts awareness and recognition programs aimed at employers of RC members to engender positive support for Guard and Reserve service. These programs include the voluntary participation by employers in the Statement of Support Program and recognition of employers who go “above and beyond” the requirements of USERRA.

Employers who sign a Statement of Support pledge that:

1. They fully recognize, honor and enforce USERRA.
2. Their managers and supervisors will have the tools they need to effectively manage those employees who serve in the Guard and Reserve.
3. They will continually recognize and support our country’s Service Members and their families in peace, in crisis, and in war.

The ESGR awards program is designed to recognize employers for employment policies and practices that are supportive of their employees’ participation in the Guard and Reserve.

Several employer recognition and awards originate from nominations by individual Service Members, recognizing individual supervisors through the Patriot Award, and culminating in national recognition of the most outstanding employers with the annual Secretary of Defense Employer Support Freedom Award.

During FY 2011, ESGR recognized 16,560 supervisors of RC members with the Patriot Award. During the same time period, 45,140 employers signed Statements of Support, and Headquarters ESGR received 4,049 nominations for the 2011 Secretary of Defense Employer Support Freedom Award.

### *Ombudsman Services*

The primary means of assisting Guard and Reserve members with USERRA conflicts is through a nationwide Ombudsman Services Program that reduces, resolves and helps prevent employer and/or employee misunderstandings and problems. The Ombudsman Services Program provides education, information, and neutral third-party services in order to resolve employee/employer USERRA conflicts. ESGR is not an enforcement agency, and does not participate in formal litigation processes.

ESGR signed an updated Memorandum of Understanding (MOU) in 2010 with DOL that continued organizational cooperation and established calendar day time limits to resolve USERRA cases, improving and expediting information sharing between the two agencies. DOL has working relationships with DOJ and OSC overseeing the enforcement of USERRA violations. These inter-agency relationships have considerably improved services provided to all customers regarding USERRA compliance. The MOU between ESGR and DOL stipulates that when a case cannot be resolved by ESGR within 14 and 30 calendar days, ESGR will close the case and notify the parties that the Service Member may file a case with DOL or retain private counsel.

ESGR has a national network of more than 600 volunteer ombudsmen to help resolve USERRA



compliance issues. ESGR's volunteers receive training on USERRA and dispute resolution techniques, and serve as a neutral third-party between the employer and employee to inform and educate all involved parties on the requirements of the law and to assist in finding a mutually agreeable solution.

The ESGR Ombudsman Services Program is available to RC members and their employers to address USERRA conflicts without litigation. RC members may also file complaints directly with DOL, which has Congressional authority to investigate USERRA violations and legal authority to subpoena records during an investigation.

ESGR operates and maintains a Customer Service Center (CSC) that acts as the initial entry point for USERRA complaints, inquiries and information requests. The CSC provides prompt, expert, telephonic and email responses to Service Members and employers on all USERRA related matters. During FY 2011, ESGR received 29,727 contacts by telephone, email and facsimile. Of those contacts, 2,884 resulted in actual USERRA cases for mediation purposes. These mediation efforts covered an array of USERRA issues that included 1,123 complaints involving some type of military discrimination, 1,557 complaints involving job reinstatement and reemployment problems, and 115 complaints involving possible retaliation or reprisal. There were 582 USERRA matters in which ESGR was unable to obtain an agreement between the employee and employer. In these instances, ESGR ombudsmen informed both parties that the employee (Service Member) had the option to file a case with DOL or seek assistance through a private attorney.

ESGR and DOL/VETS will continue to track problems, coordinate issues, and identify trends in future fiscal years, as a key part of both agencies' efforts to improve services to the Guard and Reserve.

## **DOL'S USERRA OUTREACH AND CLAIMS INVESTIGATION**

### **VETS PUBLIC EDUCATION AND COMPLIANCE ASSISTANCE EFFORTS**

VETS conducts a robust public outreach campaign to educate Service Members, employers, and others on their rights and responsibilities under USERRA. Since the terrorist attacks of September 11, 2001, VETS has briefed more than 800,000 individuals on USERRA. In FY 2011 alone, VETS presented USERRA information to more than 72,000 people. Briefings to mobilizing and demobilizing members of the Guard and Reserves are given in collaboration with ESGR. Together, the two agencies strive to ensure that every RC member receives a USERRA briefing upon mobilization and demobilization from active military service.

### **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 by submitting a signed form in person or via mail or facsimile. Some complaints originate with ESGR and are subsequently filed with VETS. Upon receipt of an electronically-filed or signed completed 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, under authority of subpoena if necessary. 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 and in the agency's rigorous 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 if possible.

VETS has 90 days to complete its investigation, unless the claimant agrees to an extension of time 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 and pursue enforcement through private counsel. A claimant whose case is being investigated by VETS may be concurrently represented by a third party, but VETS will continue its efforts only as long as the third party does not interfere with the investigation.

#### **DOL 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 the DOJ or to the OSC, as appropriate. VETS must refer a claim if the claimant so requests, regardless of whether VETS has found merit in the case. DOL has 60 days to complete this referral process, unless the claimant agrees to an extension of time.

#### **DEPARTMENT OF JUSTICE ENFORCEMENT**

If VETS cannot resolve a Service Member's case against a private-sector employer, the Service Member may ask VETS to refer the Service Member's USERRA case to the Attorney General for review. 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.

On September 28, 2004, the Attorney General and the Secretary of Labor signed a MOU outlining each agency's respective role in handling claims arising under USERRA. The MOU confirmed DOJ's and DOL's longstanding commitment to ensuring that Service Members' USERRA rights are protected. The MOU modified the procedures regarding the conduct of USERRA investigations and referrals, expediting the processing of many USERRA referrals and the prompt resolution of claims.

In the MOU, the Attorney General reassigned responsibility for handling USERRA referrals from the Civil Division to the Civil Rights Division. DOJ, VETS, and the DOL's Office of the Solicitor (SOL) work collaboratively to meet the MOU's goals, and continue to refine the

integrated case management system that was put in place in FY 2006. This case management system has increased communication between the agencies and allows for more accurate and uniform case tracking by both DOJ and DOL.

If DOL does not resolve a complaint against a State or private employer, upon the claimant's request VETS will refer the case to the Attorney General. Each referral includes: (1) the VETS investigative file; and (2) 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.

Upon receipt of an unresolved USERRA case from DOL, DOJ reviews the complete DOL investigative file and analysis and decides whether to provide representation to the Service Member, or, if the employer is a State, to seek relief on the Service Member's behalf. If DOJ determines that it will not offer representation, or seek relief on the Service Member's behalf, it will inform the Service Member of this decision and notify 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.

The Civil Rights Division continues its aggressive enforcement of USERRA against private, state and local employers, through litigation, facilitated settlements, outreach and advocacy. Since the Civil Rights Division assumed USERRA enforcement authority in 2004, we have filed 76 USERRA lawsuits and favorably resolved 116 USERRA complaints either through consent decrees obtained in those suits or through facilitated private settlements. In addition, over the past year, DOJ has engaged in outreach and coordination to groups of servicemembers and employers nationwide, including to the American Bar Association, the National Association of State Attorneys General, and the National Association of Public Pension Attorneys. Finally, DOJ has actively participated as *amicus curiae* in appeals involving the important rights of servicemembers, including the Supreme Court case *Staub v. Proctor Hospital*, the Second Circuit appeal in *Serrichio v. Wachovia Securities*, and the First Circuit appeal in *Rivera-Melendez v. Pfizer Pharmaceuticals, LLC*.

In FY 2012, 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.

## **OFFICE OF SPECIAL COUNSEL ENFORCEMENT**

OSC's enforcement responsibilities apply in 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 very similar to that employed in DOJ referrals discussed above, and also include SOL legal analysis and recommendation regarding the merit of the claim.

### **USERRA DEMONSTRATION PROJECT**

The Veterans' Benefits Act of 2010, Pub. L. No. 111-275 (VBA of 2010), established a new 36-

month USERRA Demonstration Project for complaints against Federal government agencies. Under the project, which began on August 9, 2011, OSC will investigate and attempt to resolve all Federal complaints filed by Service Members whose Social Security Number (SSN) ends in an odd digit or who allege a related Prohibited Personnel Practice (PPP) allegation under 5 U.S.C. § 2302(b) (regardless of SSN). VETS will continue to investigate and attempt to resolve the remaining Federal complaints (those associated with even-numbered SSNs and no related PPP allegation) and all non-Federal complaints (those against private, state, and local employers). During Fiscal Year 2011, OSC reviewed 28 complaints and VETS reviewed 19 complaints under the project.

## **DOL'S FY 2011 PROGRAM ACTIVITIES AND ACHIEVEMENTS**

VETS continued to successfully implement the requirements of the Veterans' Benefits Improvement Act 2008, P.L. 110-389, for all claims filed during FY 2011. Despite a record 1,548 new complaints filed during FY 2011, VETS successfully closed each case within the statutory time frame, or when necessary obtained extensions from those claimants to continue its investigative efforts in their behalf.

VETS investigative staff, and in particular its Senior Investigators, has taken on greater responsibilities during FY 2011 in reviewing cases referred to DOJ for further review and possible representation in Federal District Court. VETS' Senior Investigators developed new quality assurance review (QAR) standards to ensure that all issues are correctly identified, and that all evidence necessary for correct determinations and conclusions has been obtained. This effort has resulted in development of a number of best practices, and has improved the overall quality of VETS' USERRA investigations.

In order to make the most effective use of limited time and resources, VETS held a number of training conferences for its field investigators and Senior Investigators to develop and instruct on the new QAR form, and also to develop a mechanism whereby Department attorneys could continue to provide advice and guidance in difficult investigations.

Lastly, pursuant to the VBA of 2010, VETS worked closely with OSC, the Government Accountability Office (GAO), and the Office of Personnel Management (OPM) to successfully initiate a three-year demonstration project between OSC and VETS to compare the performance of the two agencies across a number of dimensions. The law requires the collection of information on the performance of the two agencies in terms of customer satisfaction, cost, timeliness, case outcomes, and agency capacity. Under the terms of the demonstration project, VETS will receive all new USERRA complaints, and transfer approximately half of those complaints filed against Federal executive agencies to OSC for review, investigation, and resolution. In addition, OSC will receive those Federal-sector USERRA cases that also include allegations of PPPs which fall under its exclusive purview.

In order to implement the demonstration project, VETS and OSC entered into a MOU establishing how cases will be transferred, reported, and how OSC will receive funding for those cases it receives from VETS. VETS' USERRA Information Management System (UIMS), which collects and reports key information on USERRA cases, has been modified to collect and

show data related to the demonstration project, and the appropriate electronically-filed claims are automatically transferred to OSC for greatest efficiency. In addition, VETS established a cost tracking system specific to its investigations under the demonstration project to enable GAO to compare the costs of Federal USERRA investigations in the two agencies.

## **MANDATED REPORTING REQUIREMENTS**

SECTION 4332 OF USERRA, 38 U.S.C. § 4332 REQUIRES THE SECRETARY OF LABOR, AFTER CONSULTATION WITH THE ATTORNEY GENERAL AND THE SPECIAL COUNSEL, TO PREPARE AND TRANSMIT AN ANNUAL REPORT TO CONGRESS CONTAINING THE FOLLOWING INFORMATION FOR THE PRECEDING FISCAL YEAR:

**1. THE NUMBER OF CASES REVIEWED BY THE DEPARTMENT OF LABOR UNDER THIS CHAPTER DURING THE FISCAL YEAR FOR WHICH THE REPORT IS MADE.**

DOL reviewed 1,548 new unique cases in FY 2011 (OSC reviewed an additional 28 new unique cases as part of the USERRA Demonstration Project which began on 8/9/2011).<sup>2</sup> Reviewed cases are those cases opened in conjunction with a signed or electronically-filed VETS 1010 complaint form. The table below provides the numbers of new unique USERRA cases handled by the Federal government in FY 2006 – FY 2011.

<b>Fiscal Year</b>	<b>FY 2006</b>	<b>FY 2007</b>	<b>FY 2008</b>	<b>FY 2009</b>	<b>FY 2010</b>	<b>FY 2011</b>
<b>New VETS Cases (Federal and Non-Federal)</b>	1,265	1,226	1,389	1,431	1,438	1,548
<b>OSC Cases (Federal only)</b>	169	139	37	n/a*	n/a*	28
<b>Total New Cases</b>	<b>1,434</b>	<b>1,365</b>	<b>1,426</b>	<b>1,431</b>	<b>1,438</b>	<b>1,576</b>

In FY 2011, DOL also carried over an additional 285 unique cases (open investigations) from FY 2010. During FY 2011, the Department reopened 10 cases from FY 2010 and two from FY 2009 and earlier. In sum, DOL reviewed a total of 1,845 unique cases in FY 2011, and OSC reviewed an additional 28 unique cases.

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

During FY 2011, ESGR received 29,727 contacts by telephone, email and facsimile. Of those contacts, 2,884 resulted in actual USERRA cases for which ESGR Ombudsmen services were

<sup>2</sup> In this report, the count of “unique” cases eliminates duplications that result from a claimant filing the same complaint more than once, from a case being closed in one state and reopened in another for administrative purposes, and from a claimant reopening a claim that was previously closed.

\* OSC did not review new unique cases in FY 2009 and FY 2010 because the assignment of such cases to OSC under a demonstration project established by the Veterans Benefits Improvement Act of 2004 ended in FY 2008. However, OSC again began to review unique cases in FY 2011 under another demonstration project established by the VBA of 2010.

provided.

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 2011, DOL referred 130 cases to the Attorney General's Civil Rights Division and 36 cases to OSC. During the fiscal year, OSC represented one Service Member before the MSPB which resulted in a MSPB decision. The nature and status of these referred cases is reflected in mandatory reporting requirement number seven of this report.

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

DOJ filed 12 USERRA complaints in FY 2011. Nine of these cases have now settled and the remaining three cases are in active litigation.

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 2,883 individuals who had filed the 2,884 cases reviewed by ESGR Ombudsmen in FY 2011, and the date of each case. VETS compared the ESGR data to its own data<sup>3</sup> on cases initially opened from October 1, 2010 through October 31, 2011<sup>4</sup>. This comparison resulted in 299 likely matches; thus, it appears that 10% of FY 2011 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. Thirty-six of the new unique cases, or 2.4 %, of those reviewed by DOL in FY 2011, involved a disability-related issue.
- ii. Of the 2,884 cases reviewed by ESGR, 43 (1.5%) involved a disability-related issue.
- iii. Of the cases referred for consideration of litigation, six of those referred to DOJ and none of those referred to OSC involved a disability-related issue. The case filed by OSC before the MSPB did not involve a disability-related issue.
- iv. Of the 12 cases filed by DOJ in FY 2011, none involved a disability-related issue.
- v. With respect to the 299 cases reviewed by DOL and ESGR involving the

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

<sup>4</sup> October data was included to capture late FY 2011 ESGR cases that were filed with VETS early in FY 2012.

same person in FY 2011, nine (3.0%) involved a disability-related issue.

**B. THE NUMBER OF SUCH CASES THAT INVOLVE A PERSON WHO HAS A SERVICE-CONNECTED DISABILITY.<sup>5</sup>**

- i. In FY 2011, VETS asked claimants whether they had a service-connected disability. VETS obtained responses from 1,522 claimants, 16% (251) of whom reported having a service-connected disability.
- 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 for consideration of litigation, 11 of those referred to DOJ and eight of those referred to OSC involved a claimant who reported a service-connected disability.
- iv. No information is available on the number of cases among the 12 cases filed by DOJ in FY 2011 that involved a person with a service-connected disability.
- v. With respect to the 299 cases reviewed by VETS and ESGR involving the same person in FY 2011, VETS obtained responses from all these claimants, 11% (32) of whom reported having a service-connected disability.

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<sup>5</sup> Data regarding claimants' service-connected disability status was not collected by VETS before FY 2009, so such information is not available for some cases active in FY 2011 that originated in previous years (such as referrals).

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:

Cases Opened by VETS in FY 2011: USERRA ISSUE	VETS CASES ALLEGING ISSUE*	
	NUMBER	PERCENT
Military obligations discrimination	610	39.4%
Reinstatement	405	26.2%
Other non-seniority benefits	75	4.8%
Promotion	117	7.6%
Vacation	50	3.2%
Status	62	4.0%
Pay rate	63	4.1%
Reasonable accommodation/ retraining for non-qualified/non-disabled	4	0.3%
Discrimination as retaliation for any action	124	8.0%
Seniority	47	3.0%
Pension	37	2.4%
Initial hiring discrimination	102	6.6%
Layoff	51	3.3%
Special protected period discharge	42	2.7%
Health benefits	27	1.7%
Reasonable accommodations/retraining for disabled	36	2.3%
Other	58	3.7%

\* Note: Because many USERRA cases involve multiple issues, the number of cases in this chart exceeds the 1,548 new unique cases reported by VETS in FY 2011 and the combined percentages exceed 100%.

DOL closed 1,675 cases in FY 2011 under the following closure codes: no merit, 561 (33%); administrative, 132 (8%); claim granted, 253 (15%); claim settled, 156 (9%); claim withdrawn, 290 (17%); not eligible, 79 (5%); referred, 183 (11%); merit, not resolved, 19 (1%); merit undetermined, 2 (< 1%). An explanation of case closure codes follows.



#### **CASE CLOSURE CODES EXPLAINED**

- **ADMINISTRATIVE CLOSURE:** A case should be closed administratively under any of the following circumstances:
  - **Lack of Interest** – Administrative closure is appropriate when the claimant clearly displays lack of interest or is obviously uncooperative. Examples are failure to reply to VETS’ letters, failure to give VETS a change of address, failure to supply information that could be easily obtained, failure to attend scheduled meetings or conferences, and failure to make a written request for referral after being given the opportunity to do so.
  - **Continued Unauthorized Contact by Third Party with Employer** – Although a claimant is entitled to be represented either by VETS or by a third party under USERRA, he or she may not be simultaneously represented by both parties if the representation interferes with the investigation. If the claimant insists on being represented by a third party in a USERRA case, and that representation interferes with a VETS 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 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 1,123 complaints involving some type of military discrimination, 1,557 complaints involving job reinstatement and reemployment problems; and 115 cases involving possible retaliation or reprisal.

ESGR resolved 2,302 of its 2,884 Ombudsman cases. There were 582 USERRA matters in which the employee and employer could not reach an agreement. In these instances ESGR Ombudsmen informed both parties that the employee (Service Member) 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 UIMS data.

## Crosswalk of USERRA Issues, FY 2011

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 1027	ID - Military Obligations Discrimination 534
	Initial Hiring Discrimination 96	II - Initial Hiring Discrimination 68
	<b>1,123 Ombudsman Cases (39%)</b>	<b>602 Issues in 595 Complaint Cases (46% of Complaint Cases)</b>
<b>Reinstatement/ Reemployment</b>	Health Benefits 62	IH - Health Benefits 25
	Pension 30	IP - Pension 29
	Seniority 63	IS - Seniority 37
	Other Non-Seniority Benefits 50	IB - Other Non-Seniority Benefits 71
	Status 34	IZ - Status 57
	Layoff 85	IL - Layoff 44
	Vacation 150	IV - Vacation 43
	Reinstatement 799	IR - Reinstatement 343
	Promotion 126	IT - Promotion 103
	Reasonable Accommodations/Retraining for Disabled 43	IA - Reasonable Accommodations/Retraining for Disabled 23
	Reasonable Accommodations/Retraining for Non-Qualified/Non-Disabled 6	IW - Reasonable Accommodations/Retraining for Non-Qualified/Non-Disabled 3
	Pay Rate 98	IM - Pay Rate 55
	Special Protected Period Discharge 11	IF - Special Protected Period Discharge 38
<b>1,557 Ombudsman Cases (54%)</b>	<b>871 Issues in 580 Complaint Cases (45% of Complaint Cases)</b>	
<b>Reprisal</b>	Discrimination as Retaliation for any Action 115	ID2 - Discrimination as Retaliation for any Action 94
	<b>115 Ombudsman Cases (4%)</b>	<b>94 Issues in 94 Complaint Cases (7% 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 both VETS and ESGR in this chart total less than 100% for each agency, because ESGR's Case counts and VETS' Issue counts here do not include the uncategorized "Other" Problem/Issue Code, thereby excluding 89 "Other" ESGR Cases and 32 "Other" VETS Issues from this chart.

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

#### **CASES REFERRED TO THE DEPARTMENT OF JUSTICE**

In FY 2011, the Civil Rights Division received 42 referrals from DOL in which DOL found that the complaints had merit and recommended that DOJ offer representation to the Service Member. DOJ offered representation in 13 referrals, facilitated settlement in 10 referrals, and declined representation in 17 referrals. As the United States government does not directly represent Service Members in cases against a State, no formal representation declination is necessary for referrals involving State employers. Accordingly, the remaining two of the 42 referrals that DOJ did not pursue in litigation resulted from DOJ's determination not to pursue litigation on behalf of the United States against a State agency.

DOJ received an additional 88 referrals from DOL in FY 2011 with a recommendation that the complaints lacked merit and representation should be declined. Based on DOL's recommendation and DOJ's independent analysis of the merits of each referral, DOJ declined representation in 74 referrals, facilitated settlement in four referrals, and one referral was withdrawn by the Service Member. The remaining nine referrals that DOJ did not pursue in litigation resulted from DOJ's determination not to pursue litigation on behalf of the United States against a State agency.

The cases referred to the Civil Rights Division in FY 2011 involved a number of USERRA issues. Approximately 31% (40) of these cases involved allegations of termination and/or discharge, approximately 42% (54) of these cases involved reemployment allegations, while approximately 12% (16) 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 18% (23) involving failure to promote, approximately 5% (6) involving failure to hire, approximately 5% (6) involving service connected disability, and approximately 45% (58) involving actions affecting the Service Member's terms and conditions of employment, such as discipline or harassment. The remaining 9% (12) of these cases involved allegations of retaliation for asserting USERRA protection.<sup>6</sup>

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

During Fiscal Year 2011, DOL referred 36 cases to OSC at the request of the Service Member. Additionally, 12 cases referred to OSC during the previous fiscal year remained pending at the beginning of Fiscal Year 2011. Thus, 48 total cases were pending at OSC during the fiscal year.

In 36 of the 48 cases, the Service Member alleged discrimination based on uniformed service, including termination, non-promotion, non-selection, or improper denial of employment benefits; in 12 cases, violations of reemployment rights; in four cases, retaliation for exercising USERRA rights; and in one case, disabled Veteran discrimination.<sup>7</sup>

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<sup>6</sup> Several cases involved multiple issues. Each issue was counted separately.

<sup>7</sup> The totals do not add up to 48 cases because some cases contain multiple allegations (i.e., there were 53 allegations in the 48 cases).

Of the 48 total cases, OSC closed 31 cases during Fiscal Year 2011, while 17 cases remained pending at the end of the fiscal year. During the fiscal year, OSC provided legal representation to four Service Members, successfully resolving three of those matters (the other remained pending at the end of the fiscal year) and informally obtained corrective action for two other Service Members. In one litigation matter before the MSPB, OSC achieved a favorable decision for the Service Member.

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

The Department of Justice filed 12 USERRA complaints in FY 2011. Nine of these cases have now settled and the remaining three cases are in active litigation.

v. **CASES REVIEWED BY DOL AND ESGR INVOLVING THE SAME PERSON**

DOL's response to Mandated Reporting Requirement # 5 of this report indicates that in comparing ESGR data on USERRA cases during the fiscal year, 299 likely matches were identified. This figure indicates that first ESGR, and subsequently DOL, handled the same individuals' claims. The claims included allegations of the following issues:

USERRA ISSUE	CASES ALLEGING ISSUE*	
	NUMBER	PERCENT
Military obligations discrimination	106	35.5%
Reinstatement	73	24.4%
Other non-seniority benefits	11	3.7%
Promotion	18	6.0%
Vacation	8	2.7%
Status	19	6.3%
Pay rate	12	4.0%
Reasonable accommodation/ retraining for non-qualified/non-disabled	0	0.0%
Discrimination as retaliation for any action	21	7.0%
Seniority	8	2.7%
Pension	8	2.7%
Initial hiring discrimination	7	2.3%
Layoff	10	3.3%
Special protected period discharge	8	2.7%
Health benefits	5	1.7%
Reasonable accommodations/retraining for disabled	9	3.0%
Other	6	2.0%

\* Note: Many USERRA cases involve multiple issues, and VETS records all the USERRA issues involved in a case. As a result, the number of cases in this chart exceeds the 299 ESGR and VETS cases involving the same person, and the combined percentages exceed 100%. Matching of FY 2011 ESGR cases and VETS cases initially opened 10/1/2010 to 10/31/2011 is based on claim dates and claimant names.

DOL closed 298 of these 299 likely matches by May 31, 2012, under the following closure codes: no merit, 91 (31%); administrative, 30 (10%); claim granted, 53 (18%); claim settled, 33 (11%); claim withdrawn, 43 (14%); not eligible, 10 (3%); referred, 34 (11%); merit, not resolved, 4 (1%); merit undetermined, 0. An explanation of VETS case closure codes appears in the explanation of the status of cases reviewed by DOL.

**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. Therefore, SOCS code data is not available for cases filed only with ESGR.

VETS was able to obtain the SOCS code in 97% (1,503) of the unique complaints filed in FY 2011. That data reveal that 21% of complaints involved Protective Services occupations. Another 11% involved Office and Administrative Support occupations, and 9% involved Transportation and Material Moving occupations.

With respect to cases reviewed by VETS and ESGR likely involving the same person in FY 2011, VETS obtained the SOCS code in 97% (291) of the 299 cases. That data reveal that 23% of those cases involved Protective Services occupations. Another 11% involved occupations in Transportation and Material Moving, and 9% involved Office and Administrative Support occupations.

With respect to cases referred to the Attorney General's DOJ Civil Rights Division from DOL through VETS and SOL in FY 2011, VETS obtained the SOCS code in 50% (65) of the 130 cases. That data reveal that 25% of those cases involved Protective Services occupations, and 8% involved each of the following occupation categories: Transportation and Material Moving; Office and Administrative Support; and Education, Training, and Library.

VETS obtained the Standard Occupational Classification System (SOCS) code in 44% (16) of the 36 cases referred to OSC from DOL through VETS and SOL in FY 2011. That data reveal that 19% of cases involved Business and Financial Operations, with five other occupational categories each involving 13% of these cases.

## Occupations Involved in FY 2011 USERRA CASES<sup>8</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	21%	25%	13%	23%
Office and Administrative Support	11%	8%	13%	9%
Transportation and Material Moving	9%	8%	13%	11%
Management	6%	5%	13%	6%
Installation, Maintenance, and Repair	6%	5%	0%	6%
Healthcare Practitioners and Technical	6%	3%	13%	7%
Sales and Related	6%	6%	0%	7%
Production	5%	6%	6%	7%
Business and Financial Operations	6%	6%	19%	6%
Construction and Extraction	4%	6%	0%	3%
Food Preparation and Serving Related	3%	0%	0%	2%
Education, Training, and Library	3%	8%	0%	3%
Computer and Mathematical	3%	3%	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 2011. DOL will continue to monitor USERRA cases to identify trends as they arise.

<sup>8</sup> The following occupations accounted for 2% or fewer within each case/referral category shown in this chart (*with exceptions as noted here*): Military Specific (*Exception: 6% of Referrals to OSC and 3% of Referrals to DOJ*); Farming, Fishing, and Forestry; Legal; Life, Physical, and Social Science (*Exception: 6% of Referrals to OSC*); Healthcare Support; Architecture and Engineering (*Exception: 5% of Referrals to DOJ*); Building and Grounds Cleaning and Maintenance; Community and Social Services; Personal Care and Service (*Exception: 3% of Referrals to DOJ*); and Arts, Design, Entertainment, Sports, and Media occupations.

**10. 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.**

**RECOMMENDATION FROM DOJ AND DOL:** *Ensure that USERRA is consistent with other civil rights laws by allowing the United States to always serve as the plaintiff to vindicate the public interest in ensuring the statute is enforced; to preserve the right of the aggrieved Service Member to intervene in such suits or to bring his or her own suit where the Attorney General has declined to file suit; and to allow the Attorney General the authority to compel production of evidence.*

The Departments of Justice and Labor urge Congress to act on three provisions of the “Servicemembers Rights Enforcement Improvement Act,” S. 2299, which would strengthen the Attorney General’s authority to enforce USERRA significantly. First, S. 2299 would amend USERRA to allow the Attorney General, acting on behalf of the United States, to serve as a plaintiff in all USERRA suits, rather than only in suits filed against State employers. This amendment would make USERRA operate more like other civil rights laws by allowing the United States to always serve as the plaintiff to vindicate the public interest in ensuring the statute is enforced. At the same time, it would preserve the right of the aggrieved Service Member to intervene in such suits or to bring his or her own suit where the Attorney General has declined to file suit.

S. 2299 also would grant independent authority to the Attorney General to investigate and file suit to challenge employment policies or practices that establish a pattern or practice of violating USERRA. This amendment would strengthen significantly the DOJ’s ability to enforce USERRA to address a systemic violation (such as a policy prohibiting extended absences, including absences for military service) that could adversely affect the employment rights of multiple Service Members.

Finally, to support the proposed pattern-or-practice authority, S. 2299 would further amend USERRA to provide the Attorney General with civil investigative demand (CID) authority to compel the production of existing documents and unsworn answers to written questions from the custodian of such documents. DOL has subpoena power in its investigations under USERRA. The Attorney General, however, has no pre-suit investigatory authority. Because the proposal for pattern-or-practice authority includes the authority to initiate an investigation, Congress should provide the Attorney General with some investigative tools. The CID proposal in S. 2299 is more than reasonable because it is narrow in scope and would be subject to the same limitations that apply to DOJ’s authority under the False Claims Act. DOJ and DOL look forward to working with Congress on these USERRA provisions.



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USERRA annual reports are available for fiscal years (FY) 1995-1999 and 2004-2011. 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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