

# USERRA

UNIFORMED SERVICES EMPLOYMENT AND  
REEMPLOYMENT RIGHTS ACT OF 1994



## FY 2016

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THE ASSISTANT SECRETARY FOR VETERANS' EMPLOYMENT AND TRAINING

UNITED STATES DEPARTMENT OF LABOR

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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) 2016 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, DOD, and the U.S. Office of Personnel Management (OPM) 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 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. OPM administers USERRA for the Federal Government, and issues guidance on ways to improve USERRA protection policies and practices. Further, USERRA requires OPM and all Federal agencies to provide USERRA awareness training to human resources personnel.

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 formally investigates complaints received and attempts to resolve those complaints. 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, State, or local government employer, or to OSC<sup>1</sup> 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, 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 levels of Federal assistance available, starting with outreach and education and continuing through informal dispute resolution, formal investigation and resolution, referral, and consideration of and provision of legal representation, as appropriate. 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**

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 4,000 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 2016, ESGR volunteers engaged 130,851 employers and 350,316 service members, educating both groups on their responsibilities and rights under USERRA.

### *Outreach Programs*

ESGR conducts awareness and recognition programs aimed at employers of RC service members to engender positive support for National Guard and Reserve service. ESGR conducts proactive outreach directed at U.S. employers, employees, and communities that ensures understanding and appreciation of

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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.



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 crisis, 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, 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 2016, ESGR recognized 10,627 supervisors of RC service members with the Patriot Award, received 2,424 nominations for the 2016 Secretary of Defense Employer Support Freedom Award, and obtained 26,864 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 600 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 regulations.

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

In addition to ESGR's ombudsman program, it also operates and maintains a Customer Service Center (CSC) for USERRA inquiries and information requests from customers worldwide. The CSC provides prompt, expert telephonic and email responses to service members and civilian employers and employees on all USERRA-related matters. During FY 2016, ESGR received 15,155 contacts by



telephone and email; of which 1,554 contacts resulted in actual USERRA mediation cases. ESGR's mediation efforts covered an array of USERRA issues that included 897 complaints involving some type of military discrimination; 578 complaints involving job reinstatement; and 53 complaints involving possible retaliation or reprisal. There were 357 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, VETS has briefed more than one million individuals on USERRA. In FY 2016, VETS presented USERRA information to 9,200 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](http://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 2016, VETS and OSC also collaborated to provide educational briefings to a number of Federal agencies. Also in FY 2016, VETS launched 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. Some complaints originate with ESGR and are subsequently filed with VETS. 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. A claimant whose case is being investigated by VETS may be concurrently represented by a third party, including private counsel, but VETS will continue its efforts only as long as the third party does not interfere with the investigation. An example of interference would be contacting the employer or potential witnesses.

#### **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 a 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 cannot 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 analyzing the case and providing an assessment on whether or not the claim(s) have merit.

Upon receipt of an unresolved USERRA claim from DOL, DOJ reviews 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 settle the claims without commencing an action in court. If DOJ determines that it will not offer representation, 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.

DOJ continues to bolster its enforcement of USERRA against private, state and local employers through litigation, facilitated settlements, outreach, and advocacy. Since 2004, DOJ has filed 99 USERRA lawsuits and favorably resolved 168 USERRA complaints either through consent decrees obtained in those suits or through facilitated private settlements.

In recent years, DOJ has actively participated as *amicus curiae* in appeals involving the important rights of service members, 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*. DOJ most recently filed an amicus brief with, and argued before, the Supreme Court of Virginia in *Clark v. Virginia Dept. of State Police*, 793 S.E.2d 1 (Va. 2016). DOJ's brief argued that sovereign immunity didn't apply and USERRA's jurisdictional provision subjects all states to private suit in their own courts, regardless of whether a state has consented to suit. The brief argued that Congress has the authority to subject states to suit under the War Powers clauses of the Constitution, which gives Congress the power to declare war, raise and support an army and navy, and regulate the land and naval forces. The Supreme Court of Virginia disagreed and held that Virginia's sovereign immunity barred Clark's USERRA complaint.

The United States also filed a statement of interest in 2014 in the Superior Court of the Virgin Islands, *Joseph v. Virgin Islands*, CV No. ST-11-CV-419, in order to defend Congress's authority to subject territories, like the United States Virgin Islands, to private suits in territorial courts under USERRA. The Superior Court of the Virgin Islands allowed the claimant to proceed with his USERRA lawsuit in a 2016 order denying a motion to dismiss his claims.

DOJ also works closely with the Solicitor's Office at DOL in training VETS' investigators through both live and remote training sessions, discussing case trends, and collaborating on USERRA strategy. For example, 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 2017, 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 2016, 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 930 new unique cases in FY 2016.<sup>2</sup> Reviewed cases are those 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 Federal Government in FY 2011 – FY 2016.

**Figure 1. Unique USERRA Cases Reviewed by the Federal Government<sup>3</sup>**

<b>Fiscal Year</b>	<b>FY 2011</b>	<b>FY 2012</b>	<b>FY 2013</b>	<b>FY 2014</b>	<b>FY 2015</b>	<b>FY 2016</b>
<b>Total New Cases</b>	<b>1,576</b>	<b>1,425</b>	<b>1,281</b>	<b>1,286</b>	<b>1,123</b>	<b>930</b>
<b>Total Cases</b>	<b>1,873</b>	<b>1,644</b>	<b>1,553</b>	<b>1,511</b>	<b>1,288</b>	<b>1,107</b>

In FY 2016, DOL carried over an additional 167 unique cases (open investigations) from FY 2015. During FY 2016, DOL reopened 10 cases from FY 2015 and none from FY 2014 or earlier. In sum, DOL reviewed a total of 1,107 unique cases in FY 2016.

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

During FY 2016, ESGR received 15,155 contacts by telephone and email. Of those contacts, 1,554 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 2016, DOL referred 61 cases to the Attorney General and 16 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 four USERRA complaints in Federal court in FY 2016. Two of these cases settled in FY 2016. The remaining two cases were in active litigation in FY 2016.

<sup>2</sup> In this report, the term “new unique cases” means cases first received by VETS or OSC in a given year. This count eliminates duplications that result from a claimant filing the same complaint more than once; a case being closed in one State and reopened in another for administrative purposes; or a claimant reopening a claim that was previously closed.

<sup>3</sup> From FY 2011-FY 2014, OSC also reviewed unique cases under a demonstration project established by the Veterans Benefits Act of 2010. New unique cases reviewed by OSC totaled 28 in FY 2011; 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 1,476 individuals who had filed the 1,554 cases reviewed by ESGR Ombudsmen in FY 2016, and the date of each case. VETS compared the ESGR data to its own data<sup>4</sup> on cases initially opened between October 1, 2015 and October 31, 2016.<sup>5</sup> This comparison resulted in 123 likely matches; thus, it appears that 8% of FY 2016 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.** Twenty of the new unique cases first reviewed by VETS in FY 2016 (2.2%) involved a disability-related issue.
- ii.** Fourteen of the ESGR cases first reviewed in FY 2016 (0.9%) involved a disability-related issue.
- iii.** Of the cases referred by DOL for consideration of litigation in FY 2016, two of those referred to DOJ (3.3%) and none of those referred to OSC involved a disability-related issue.
- iv.** Of the four USERRA complaints filed by DOJ in FY 2016, none involved a disability-related issue.
- v.** With respect to the 123 cases reviewed by DOL and ESGR involving the same person in FY 2016, one (0.8%) involved a disability-related issue.

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

- i.** In FY 2016, VETS asked claimants whether they had a service-connected disability. Among the 930 new unique cases VETS received, VETS obtained responses from 907 claimants, 237 (26%) of whom reported having such a disability. Among these 237 claimants, 19 also claimed a USERRA-related disability issue. Among the remaining 670 claimants who responded but did not report having a service-connected disability, one 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, 17 involved a claimant who reported a service-connected disability, and two included a USERRA-related disability issue. Ten 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 four USERRA complaints filed by DOJ in FY 2016, one involved a service-connected disability.

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

<sup>5</sup> October VETS data was included to capture the ESGR cases that were opened late FY 2016 and may have been filed with VETS in October 2016.

- v. With respect to the 123 cases reviewed by VETS and ESGR involving the same person in FY 2016, VETS obtained service-connected disability responses from 122 of these claimants, 16 (13%) of whom reported having such a disability. One claimant among the 16 who reported having a service-connected disability also claimed a USERRA-related disability issue. Among the remaining 106 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 930 new unique cases reported by VETS in FY 2016 and the combined percentages exceed 100%.

<b>USERRA ISSUE</b>	<b>VETS CASES ALLEGING ISSUE</b>	
	<b>NUMBER</b>	<b>PERCENT</b>
Military obligations discrimination	391	42.0%
Reinstatement	173	18.6%
Other non-seniority benefits	26	2.8%
Promotion	53	5.7%
Vacation	21	2.3%
Status	15	1.6%
Pay rate	28	3.0%
Reasonable accommodation/ retraining for non-qualified/non-disabled	1	0.1%
Discrimination as retaliation for any action	117	12.6%
Seniority	19	2.0%
Pension	31	3.3%
Initial hiring discrimination	64	6.9%
Layoff	21	2.3%
Special protected period discharge	2	0.2%
Health benefits	6	0.6%
Reasonable accommodations/retraining for disabled	20	2.2%
Other	32	3.4%

DOL closed 963 cases in FY 2016 under the following closure codes:

<b>Figure 3. Closed by VETS in FY 2016</b> <b>CLOSURE CODE</b>	<b>VETS CASES CLOSED</b>	
	<b>NUMBER</b>	<b>PERCENT</b>
No merit	283	29.4%
Administrative	85	8.8%
Claim granted	108	11.2%
Claim settled	87	9.0%
Claim withdrawn	252	26.2%
Not eligible	44	4.6%
Referred	82	8.5%
Merit, not resolved	20	2.1%
Merit undetermined	2	0.2%

An explanation of case closure codes follows.

**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 897 complaints involving some type of military discrimination; 578 complaints involving job reinstatement; and 53 complaints involving possible retaliation or reprisal during FY 2016.

ESGR resolved 1,197 of its 1,554 Ombudsman cases. There were 357 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 2016**

ESGR Ombudsman Services ↔ VETS' National Guard &amp; Reserve Complaint Cases

Primary Categories	<b>ESGR</b> Ombudsman Cases "Problem Codes" (Converted to VETS' Issue Codes)	<b>VETS</b> Complaint Cases "Issue Codes" *
<b>Discrimination</b>	Military Obligations Discrimination 853	ID - Military Obligations Discrimination 361
	Initial Hiring Discrimination 44	II - Initial Hiring Discrimination 37
	<b>897 Ombudsman Cases (59%)</b>	<b>398 Issues in 396 Complaint Cases (54% of Complaint Cases)</b>
<b>Reinstatement/ Reemployment</b>	Health Benefits 23	IH - Health Benefits 5
	Pension 13	IP - Pension 23
	Seniority 35	IS - Seniority 12
	Other Non-Seniority Benefits 19	IB - Other Non-Seniority Benefits 24
	Status 54	IZ - Status 13
	Layoff 41	IL - Layoff 18
	Vacation 67	IV - Vacation 19
	Reinstatement 238	IR - Reinstatement 147
	Promotion 43	IT - Promotion 39
	Reasonable Accommodations/Retraining for Disabled 14	IA - Reasonable Accommodations/Retraining for Disabled 10
	Reasonable Accommodations/Retraining for Non- Qualified/Non-Disabled 0	IW - Reasonable Accommodations/Retraining for Non- Qualified/Non-Disabled 0
	Pay Rate 30	IM - Pay Rate 22
	Special Protected Period Discharge 1	IF - Special Protected Period Discharge 2
<b>578 Ombudsman Cases (38%)</b>	<b>334 Issues in 264 Complaint Cases (36% of Complaint Cases)</b>	
<b>Reprisal</b>	Discrimination as Retaliation for any Action 53	ID2 - Discrimination as Retaliation for any Action 66
	<b>53 Ombudsman Cases (3%)</b>	<b>66 Issues in 66 Complaint Cases (9% of Complaint Cases)</b>

\* To facilitate comparisons with ESGR data, VETS' data in this chart reflects only National Guard & Reserve (NG&R) complaint cases, whereas ALL complaint cases were reflected earlier in this Report in the "Mandated Reporting Requirements" section. Also, the percentages of NG&R complaint cases among the three Primary Categories for VETS in this chart total less than 100%, because VETS' Issue and Case counts here do not include the uncategorized "Other" Problem/Issue Code, thereby excluding 26 "Other" VETS Issues and Cases 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 2016, the Civil Rights Division received a total of 61 referrals from DOL. Twenty-four were assessed as having merit, and 37 were assessed as not having merit.

Of the cases that were assessed as having merit, DOJ offered representation in five cases, and declined representation in 11 cases (four of which DOJ facilitated settlement). Four referrals involved State agencies as potential defendants, one of which DOJ declined to pursue litigation in agreement with DOL, and three of which were still under consideration by DOJ in FY 2016. The remaining four referrals assessed as having merit were still under consideration by DOJ in FY 2016.

Of the 37 cases assessed as having non-merit, based on DOL's assessment and DOJ's independent analysis of the merits of each referral, DOJ declined representation with respect to 23 referrals and offered representation in two referrals. Eleven referrals involved state agencies; DOJ declined to pursue litigation in 10 of these cases. One of the eleven cases was still under consideration by DOJ in FY 2016. The remaining non-merit referral continued to be under consideration by DOJ in FY 2016.

The cases referred to the Civil Rights Division in FY 2016 involved a number of USERRA issues. Approximately 25% (15) of these cases involved allegations of termination and/or discharge, approximately 28% (17) of these cases involved reemployment allegations, while approximately 10% (6) of these cases involved allegations of loss or denial of benefits, such as loss of pay, assignment, reduction or loss of pension or health benefits, and loss of seniority. The remaining cases involved various forms of discrimination, with approximately 5% (3) involving failure to promote, approximately 5% (3) involving failure to hire, and approximately 51% (31) involving actions affecting the service member's terms and conditions of employment, such as hostile work environment, discipline or harassment. The remaining 8% (5) of these cases involved allegations of retaliation for asserting USERRA protection.<sup>6</sup>

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

During FY 2016, DOL referred 16 cases to OSC at the request of the service member, under 38 U.S.C. Sec. 4324. Additionally, four cases referred to OSC during previous fiscal years remained pending at the beginning of FY 2016. Thus, 20 total cases were pending at OSC during the fiscal year. OSC closed 15 of the 20 cases during FY 2016, with five cases pending at the end of the fiscal year. OSC did not file any actions with the MSPB during the fiscal year.

In 15 of the 20 cases, the service member alleged discrimination based on ununiformed service, including termination, non-promotion, non-selection, or improper denial of employment benefits; in five cases, violations of reemployment rights; and in two cases, retaliation for exercising USERRA rights.<sup>7</sup>

USERRA cases referred to OSC by DOL under 38 U.S.C. § 4324 are separate and apart from USERRA complaints received by OSC under the USERRA Demonstration Project which began on 8/9/2011 and ended on 8/8/2014.

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

<sup>7</sup> Some cases involved multiple issues. Each issue was counted separately.

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

DOJ filed four USERRA complaints in Federal court in FY 2016. Two of these cases settled in FY 2016. The remaining two cases were in active litigation in FY 2016.

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

DOL closed all 123 of these likely matches by May 17, 2017, under the following closure codes: no merit, 45 (37%); administrative, 8 (7%); claim granted, 19 (15%); claim settled, 17 (14%); claim withdrawn, 27 (22%); not eligible, 1 (1%); referred, 2 (2%); merit, not resolved, 4 (3%); merit undetermined, 0 (0%).<sup>8</sup> 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 123 likely match cases were distributed among the various VETS’ closure codes.

**Figure 6.**  
**VETS' Data For 123 Likely Case Matches with FY 2016 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	0	0	0	0	1	0	0	0	1	0.8%
Reinstatement	0	2	0	1	0	0	0	0	0	3	2.4%
Other Non-Seniority Benefits	5	7	8	13	0	1	28	0	1	63	51.2%
Promotion	1	0	1	1	0	0	4	0	0	7	5.7%
Vacation	0	0	2	1	0	1	1	0	0	5	4.1%
Status	0	0	0	1	0	0	0	0	0	1	0.8%
Pay Rate	0	1	0	0	0	0	0	0	0	1	0.8%
Reasonable Accommodations/Retraining for Non-Qualified/Non-Disabled	1	0	2	1	0	0	2	0	0	6	4.9%
Discrimination as Retaliation for any Action	0	1	0	0	0	0	1	0	0	2	1.6%
Seniority	0	0	0	1	0	0	1	0	0	2	1.6%
Pension	0	1	0	0	0	0	0	0	0	1	0.8%
Initial Hiring Discrimination	1	6	5	6	0	2	9	1	1	31	25.2%
Layoff	0	1	0	0	0	0	0	0	0	1	0.8%
Special Protected Period Discharge	0	1	0	1	0	0	2	0	0	4	3.3%
Health Benefits	0	0	1	1	0	1	1	0	0	4	3.3%
Reasonable Accommodations/Retraining for Disabled	0	0	0	0	0	0	0	0	0	0	0.0%
Other	0	2	0	1	0	0	0	0	0	3	2.4%
<b>NUMBER OF ISSUE CODES FOR EACH CLOSURE CODE:</b>	<b>8</b>	<b>22</b>	<b>19</b>	<b>28</b>	<b>0</b>	<b>6</b>	<b>49</b>	<b>1</b>	<b>2</b>	<b>135</b>	
<b>PERCENT OF ALL LIKELY MATCH CASES:</b>	<b>6.5%</b>	<b>17.9%</b>	<b>15.4%</b>	<b>22.8%</b>	<b>0.0%</b>	<b>4.9%</b>	<b>39.8%</b>	<b>0.8%</b>	<b>1.6%</b>		<b>109.8%</b>

\* **NOTE:** Many USERRA cases involve multiple issues, and VETS records all the USERRA issues involved in a case. As a result, the numbers of cases and issues in this chart exceed the 123 ESGR and VETS cases involving the same person, and the combined percentages exceed 100%. Matching of FY 2016 ESGR cases and VETS cases initially opened 10/1/2015 to 10/31/2016 is based on claim dates and claimant names.

<sup>8</sup> Combined closure code percentages exceed 100% due to the effects of rounding each code to a whole percentage.

**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 2016. Therefore, SOCS code data is not available for ESGR mediation cases. The chart below shows the full distribution of the SOCS codes in FY 2016 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 911 (98%) of the unique complaints filed in FY 2016, 18% of complaints involved Protective Service occupations; 12% involved Office and Administrative Support occupations; and 9% involved Management occupations.
- Out of 122 (99%) of the cases reviewed by VETS and ESGR likely involving the same person in FY 2016, 22% of those cases involved Protective Service occupations; 13% involved Office and Administrative Support occupations; and 10% involved Transportation and Material Moving occupations.
- Out of the 61 cases referred to the Attorney General from DOL in FY 2016, 36% of those cases involved Protective Service occupations. Another 8% involved Management occupations, and each of four categories (Transportation and Material Moving; Business and Financial Operations; Production; and, Healthcare Practitioners and Technical) involved 7% of complaints.
- Out of the 16 cases referred to OSC from DOL through VETS and SOL in FY 2016, each of two categories (Protective Service, and Office and Administrative Support) involved 19% of complaints, and each of three categories (Business and Financial Operations; Life, Physical, and Social Science; and, Military Specific) involved 13% of complaints.

**Figure 7. Occupations Involved in FY 2016 USERRA CASES<sup>9</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	18%	36%	19%	22%
Office and Administrative Support	12%	5%	19%	13%
Management	9%	8%	6%	7%
Healthcare Practitioners and Technical	8%	7%	6%	7%
Transportation and Material Moving	8%	7%	0%	10%
Business and Financial Operations	6%	7%	13%	5%
Production	5%	7%	0%	5%
Sales and Related	5%	0%	0%	7%
Installation, Maintenance, and Repair	4%	2%	0%	5%
Computer and Mathematical	4%	0%	0%	0%

**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 2016. DOL will continue to monitor USERRA cases to identify trends as they arise.

<sup>9</sup> The following occupations accounted for 2% or fewer within each case/referral category shown in this chart (*with exceptions as noted here*): Education, Training, and Library (*Exception: 3% in each of two categories: VETS Cases, and Referrals to DOJ*); Arts, Design, Entertainment, Sports, and Media; Building and Grounds Cleaning and Maintenance (*Exception: 6% of Referrals to OSC*); Community and Social Services (*Exception: 5% of Referrals to DOJ*); Farming, Fishing, and Forestry; Healthcare Support; Legal (*Exception: 6% of Referrals to OSC*); Life, Physical, and Social Science (*Exception: 13% of Referrals to OSC*); Military Specific (*Exception: 13% of Referrals to OSC*); Food Preparation and Serving Related (*Exception: 3% of Cases Common to VETS & ESGR*); Construction and Extraction (*Exception: 3% in each of three categories: VETS Cases; Referrals to DOJ; and, Cases Common to VETS & ESGR*); Architecture and Engineering (*Exception: 3% of Referrals to DOJ*); 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.



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USERRA annual reports are available for fiscal years (FY) 1995-1999 and 2004-2015. 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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