



## USERRA: What Matters in Protecting Our Service Members' Employment Rights

**Veterans' Employment & Training Service**

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# Why USERRA is Important

- More than **684,000** Guard and Reserve members mobilized since September 11, 2001
- More than **560,000** have returned, with more than **123,000** remaining on active duty
- **Increase in USERRA complaints** received since 9/11/2001 averaging between 1,300-1,400 complaints annually
- Tremendous **increase in USERRA inquiries**





# USERRA Generally

- Prohibits employment discrimination on basis of past, current, or future military obligations
- Protects reemployment rights with pre-service employers for veterans, Reserve, and National Guard members
- Prohibits retaliation

***VETS investigates complaints from veterans, Reservists, and Guard members who feel that they have been disadvantaged due to their military status***





# USERRA Overview

## Uniformed Services Employment and Reemployment Rights Act (USERRA)

- Enacted in 1994, but its roots date back to 1940.
- Covers virtually all U.S. employers, regardless of size, both here and overseas





# Who is Covered?

- Anyone who performs, applies to perform, or has an obligation to perform:
  - Service in the armed forces: Active, Reserve and National Guard
  - Service in the U.S. Public Health Service Commissioned Corps
  - Service in the National Disaster Medical System
  - An examination to determine fitness for military service





# USERRA Codified

- [38 U.S.C. 4301-4335](#) (Statute)
- [20 C.F.R. 1002.1-1002.314](#) (non-Federal sector regulations)
- [5 C.F.R. 353.101-353.304](#)  
(Federal sector regulations)





# VETS USERRA Overview

- The Secretary of Labor, acting through the Veterans' Employment and Training Service (VETS) is charged with administering the USERRA statute itself. *See generally* **38 U.S.C. § 4102A**
- Pursuant to **38 U.S.C. §§ 4321, 4322, and 4331**, VETS shall assist any person with respect to employment and reemployment rights and benefits, will conduct investigations of alleged violations in both Federal and non-Federal sectors, and may prescribe regulations implementing the provisions of the statute with respect to States, local governments and private employers.





# Basic USERRA Protections

- Discrimination prohibited
  - Initial hiring
  - Promotions
  - Retention in employment
  - Employment benefits (seniority v. non-seniority)
- Benefits during service
  - Health plans
  - Other benefits





# USERRA Eligibility; 5 Criteria

- For USERRA protections, the employee must:
  - Be absent from civilian employment due to service
  - Provide advance notice to employer
  - Have 5 years or less service (w/ exceptions)
  - Submit timely application for reemployment
  - Have no disqualifying discharge





# Discrimination, Retaliation

- An employer may not take any adverse action against an employee ***due in any part*** to employee's military service or obligations
- An employer may not take any adverse action against an employee for exercise of his/her USERRA rights, or for rendering assistance in exercising those rights





# Comparative Analysis: (Discrimination, Retaliation)

1. Proximity in time between employee's military or protected activity and adverse employment action;
2. Inconsistencies between proffered reason and other actions of the employer;
3. Employer's expressed hostility towards members protected by USERRA together with knowledge of employee's military or protected activity; and
4. Disparate treatment of certain employees compared to other employees with similar work records or offenses.

*Grosjean v. Firstenergy*, 481 F. Supp. 878 (N.D. Ohio 2007)





# Reinstatement

- Returning employee must be promptly reinstated in same position of seniority, status, and rate of pay s/he would have attained had s/he remained continuously employed
- “Escalator Principle” dating back to 1946, ***Fishgold v. Sullivan Drydock***





# Reinstatement, continued

- Escalator principle may result in negative consequences in private sector; **BUT NOT IN FEDERAL SECTOR**
- Federal service-member employees may not be subject to RIF while on active duty
- Active duty does not toll contractual periods or term appointments





# USERRA Health Benefits

- 38 U.S.C. 4317(a)(1)(a)  
Employee may elect to continue employer-sponsored coverage for 24 months upon leaving for active duty.
- Similar to COBRA, but **no restriction on employer size**





# USERRA Health Benefits, Cont'd

- Employer may require payment up to 102% total cost of premium
- Employer not required to establish health plan where did not exist previously
- No requirement to initiate coverage at beginning of deployment if it did not previously exist





# USERRA Health Benefits Cont'd.

- Waiting periods subject to escalator principle
- May require employer to initiate coverage upon reemployment
- If continued coverage not elected, coverage must be promptly reinstated upon reemployment





# Pension Benefits

- 38 U.S.C. 4318; 20 C.F.R. 1002.259-1002.267—(most comments received in this area)
- **Employee considered to be in LWOP status while on active duty**
- USERRA incorporates ERISA definition of employee pension benefit plan





# Pension Benefits, Cont'd.

- Employer not required to make contribution until after reemployment
- If employee not required to contribute, employer must contribute NLT 90 days after reemployment
- Contributory plans: make-ups due anytime following reinstatement up to 3 times length of deployment





# Pension Benefits, Cont'd.

- If employee contributions required, employer not obligated to match until employee contributes
- Employee not required to provide full make-up contributions missed during active duty—may affect amount of pension, however





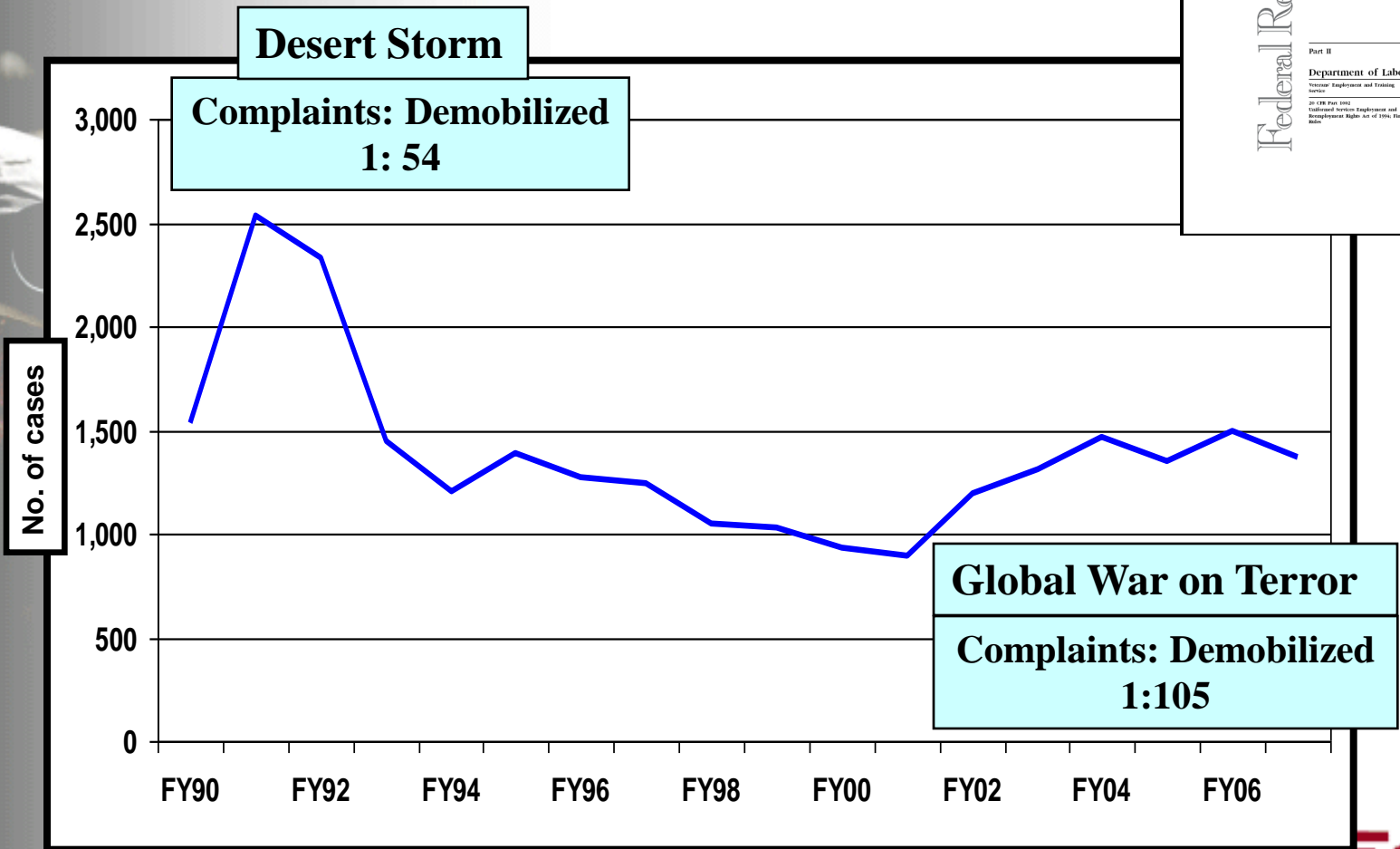
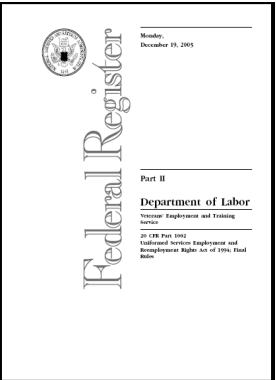
# Pension Benefits, Cont'd.

- If contribution amounts are contingent on salary, apply escalator principle to determine applicable rate of pay during deployment
- Pension matching/pay out not due until after reemployment
- If employee not reinstated, pension accrual ends when s/he left civilian employment





# USERRA Complaint ratio





# Compliance Assistance Efforts

- Outreach and education
- Briefings and technical assistance (Nearly 600,000 since 9/11)
- MOUs with DOJ and OSC
- Electronic complaint forms
- E-Laws USERRA Advisor
- Senior Investigators
- USERRA rights poster





# Enforcement Generally

- VETS investigators in all States
- Most cases resolved without litigation
- Referral of State and private sector cases to DOJ
- Referral of Federal executive branch cases to OSC





# VETS Investigation Process

- VETS' USERRA investigations are complaint driven
- Must be completed w/in 90 days, but can obtain an extension from claimant
- Complaints can originate from a variety of sources
  - Technical Assistance Requests
  - ESGR Referrals
  - VETS 1010 Complaint Form





# Investigation Process Continued

- No investigations or contacts with an employer initiated absent a signed 1010
- Once 1010 received, formal investigation opened within 5 business days. (e1010's processed more rapidly)
- All documentary evidence will be obtained, and all available identified witnesses interviewed
- VETS has subpoena power; increasingly used





# Investigation Process Cont'd.

- Until investigation complete, VETS neutral.
- Investigator is an advocate for the law, not employee or employer
- Following investigation, even if evidentiary record supports allegations made, VETS remains advocate for law
- Will attempt to obtain satisfactory resolution via negotiation/mediation





# Enforcement

- If negotiations unsuccessful; claimant may request referral to DOJ (private and State/local government entities), or to OSC (Federal executive agencies)
- Regardless of merit determination, claimant may request referral to DOJ/OSC for further review or resolution





# Enforcement Continued

- Once claimant requests referral, memorandum of referral (MOR) prepared
- Case is then referred to RSOL for de novo review of all evidence
- If evidentiary deficiencies exist, case returned to VETS for correction





# Enforcement Continued

- Following RSOL review, case is forwarded to DOJ/OSC for further de novo review and consideration
- DOJ/OSC make independent merit determinations taking VETS' findings into account; have 60 days to make those determinations
- Any evidentiary deficiencies noted, case returned to VETS for correction





# Enforcement Continued

- DOJ/OSC have independent discretion whether or not to offer representation in Federal District Court, or before MSPB
- At any point during investigative process, claimant may elect to withdraw case and pursue enforcement through private counsel





# FY 2007 Enforcement Results

## 1,246 Cases Closed

- 347 (28%) No Merit
- 487 (31%) Granted/Settled
- 92 (7%) Referred to DOJ/OSC
- 420 (34%) Withdrawn, Admin, Not eligible

**FY'07 VETS Recovered: \$1,925,464.20**  
**(FY'08 Recovered \$1,984,471.54)**





# General Considerations

- VETS may not offer representation or engage in investigation when claimant is actively represented by third party
- “Active representation” means third party obtaining evidence or contacting employer/witnesses directly
- **Third party acting as claimant’s agent is acceptable**
- VETS cannot discuss open cases with outside parties, including VSOs, media





# General Considerations

- Always best to avoid litigation; attempt to resolve disputes at lowest level possible
- Two-way communication essential for avoiding disputes
- Education highly effective in preventing disputes





# P.L. 110-389, VBIA of 2008

- 90-day time limit for USERRA investigations (longer if claimant agrees to an extension)
- 60-day limit for DOJ/OSC to make a merit determination
- Quarterly reports to Congress
- GAO program review
- **No Statutes of Limitations Apply**
- **Fed. Agencies must train their HR staff(s) on USERRA**





# Hot Issues

- Continuation of pension accrual to point of KIA
- Binding arbitration agreements (5<sup>th</sup> Cir.)
- **Punitive damages for intentional violations (similar to many State statutes)**
- Post-reinstatement manifestation of service-incurred injuries
- USERRA-like protections for family members under FMLA (DOL Wage & Hour Division)





# USERRA Contact Information

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# Questions?

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