

USERRA

(Uniformed Services Employment and Reemployment Rights Act of 1994)

What Managers & Employees Should Know

Overview

- Enacted in 1994, but its roots date back to 1940
- Covers virtually every U.S. Employer, regardless of size, here and overseas
- Federal agencies are required to tell employees who enter the service about their entitlements, obligations, benefits, and appeal rights.

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
 - All service, voluntary or involuntary
 - Includes Active Duty, Active Duty for Training, Initial Active Duty for Training and absence for service fitness examination
 - Commissioned Corps of the Public Health Service
 - Service in the National Disaster Medical System

USERRA Codes & Regulations

- 38 U.S.C. 4301-4334 (Statute)
- 20 C.F.R. 1002.1-1002.314 (non-Federal sector regulations)
- 5 C.F.R. 353.101-353.304 (Federal sector regulations)

The Secretary of Labor, acting through the Veterans' Employment and Training Service (VETS) is charged with administering the USERRA statute itself.

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 is prohibited in:
 - Initial hiring
 - Promotions
 - Retention in employment
 - Employment benefits (seniority vs non-seniority)
- Benefits during service
 - Health Plans
 - Other benefits
 - TSP not covered under USERRA
- The law prohibits an agency from discriminating against or taking any reprisal against an applicant or employee because of his or her application, membership, or service in the Uniformed Services.

USERRA Eligibility

5 Criteria

- For USERRA protections and restoration rights, the employee must:
 - Be absent from civilian employment due to service
 - Provide advance notice to employer (except when prevented by military circumstances)
 - Have 5 years or less service (w/exceptions)
 - Submit timely application for reemployment
 - Have no disqualifying discharge (released under honorable or general conditions)

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

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*
- 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

Need for USERRA Regulations

- More than **667,000** Guard and Reserve members mobilized since September 11, 2001
- **Increase in USERRA complaints** received since 9/11/2001 rising to **1,465** complaints received during FY 2004
- Tremendous **increase in USERRA inquiries**

USERRA Complaint Ratio

- Chart showing that from Desert Storm in 1990 complaints spiked from 1500 to 2500 in 1992, but those have decreased to the lowest point in 2003, below 1000 and in FY 06-08 have risen back to 1500.

Compliance Assistance Efforts

- Outreach and education
- Briefings and technical assistance
(since 9/11: 457,243 briefed; 512,910 individual contacts)
- MOUs with ESGR, DOJ, OSC
- Electronic complaint forms
- E-Laws USERRA Advisor
- Senior Investigators
- USERRA rights poster

General Enforcement

- 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
- Notice of pending USERRA complaint(s) to Chief Human Capital Officer of Federal agencies

Investigation Process

- VETS' USERRA investigations are complaint driven
- 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 without 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, not usually necessary

Investigation Process (Continued)

- 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
- 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

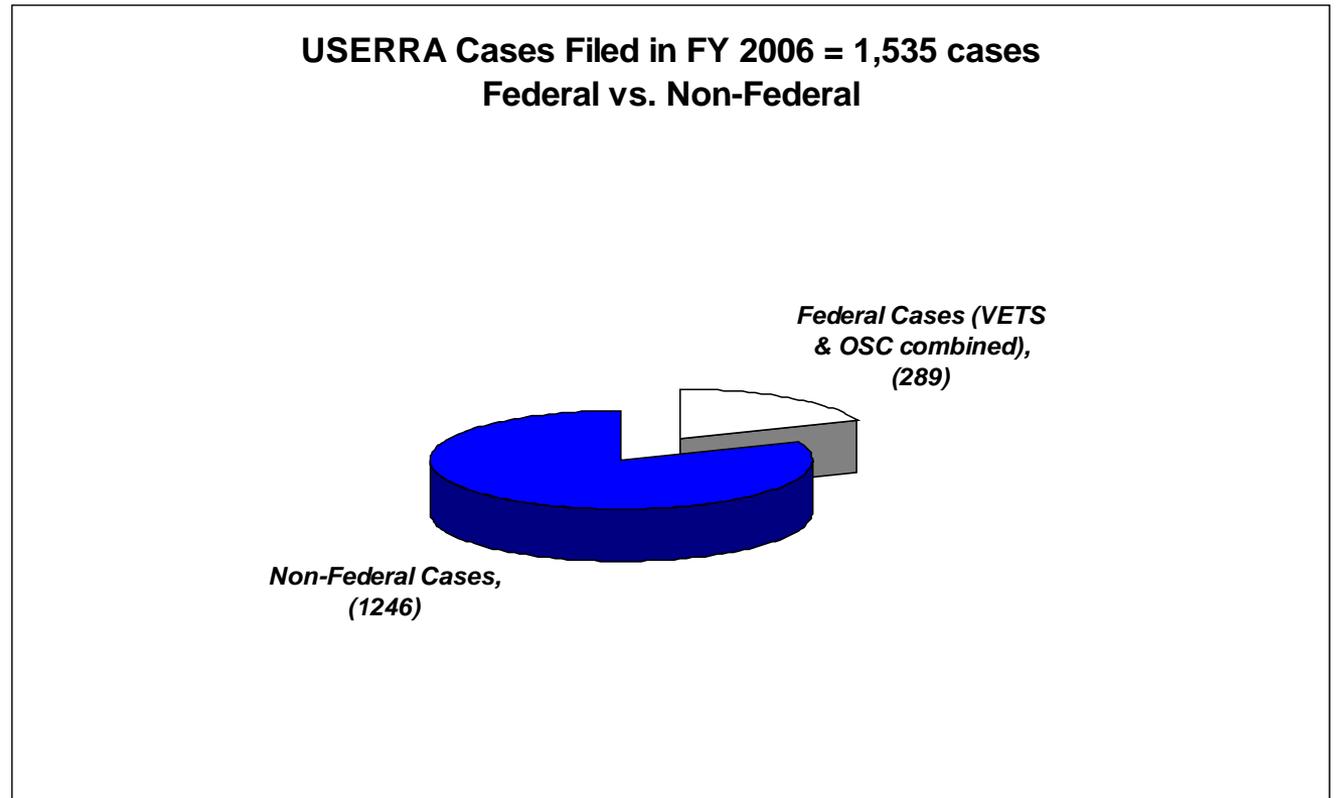
Enforcement (Continued)

- 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
- Any evidentiary deficiencies noted, case returned to VETS for correction
- 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

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
- 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

Federal vs Non-Federal Cases



Federal Sector Issues

- Punitive damages for intentional violations
- Disciplinary authority for will violations enforced by OSC
- Make USERRA a Prohibited Personal Practice under exclusive OSC jurisdiction
- Personal liability for Federal managers for willful violations

Resolving Employee Conflicts

- Employees in a Reserve component have an obligation to both the military and their civilian employers. Some conflicts may be unavoidable, and good-faith efforts by the employee are needed to resolve any differences
 - Agencies may not question the timing, frequency, duration, and nature of the uniformed service
 - Employees are obligated to try and minimize the agency's burden (by giving as much advanced notice as possible when their military service will interfere with their civilian work)

Resolving Employee Conflicts (Continued)

- When there is a conflict between Reserve duty and the legitimate needs of the agency:
 - Agency may contact appropriate military authorities to express concern, determine if the military service can be rescheduled or performed by another member.
- If military authorities determine that the service is necessary the agency is **required** to permit the employee to go

Time Limits for Restoration

- Employees who served:
 - < 31 days (or who leave to take a fitness exam for service) must report back for civilian duty at the beginning of the next regularly scheduled work day following their release from service and the expiration of 8 hours after a time for safe transportation back to the employees residence
 - > 30 days but < 181 days must apply for reemployment within 14 days of release from service
 - > 180 days have 90 days after completion of service to apply for restoration
- Employees who fail to return or apply within these time limits are subject to disciplinary action
- Agencies must reemploy as soon as practicable, but no later than 30 days after receiving the application. Agencies have the right to ask for documentation showing the length and character of the employee's service and the timeliness of the application

Positions to Which Restored

- Employees who served less than 91 days must be placed in the position for which they are qualified and would have attained if their employment had not been interrupted. If not qualified for such position after reasonable efforts by the agency to qualify the person, the employee is entitled to be placed in the position he or she left.
- Employees who served more than 90 days have essentially the same rights as above, except that the agency has the option of placing the employee in a position for which they are qualified, with like seniority, status, and pay.
- Employees with service-connected disabilities who are not qualified for the above must be reemployed in a position that most closely approximates the position they would have been entitled to, consistent with the circumstances in each case.
- Employees serving under time-limited appointment serve out the unexpired portions of their appointments upon return.

OPM Placement

- When an employee applies to OPM for restoration and OPM determines that it is impossible or unreasonable for an agency in the executive branch (other than an intelligence agency) to place a returning employee, OPM will order the employee placed in another agency.
- If the returning employee is a member of an intelligence agency, a non-career National Guard technician who was separated involuntarily from the Guard for reasons beyond his or her control, or a legislative or judicial branch employee, OPM will order the individual placed in another agency when the previous employer notifies OPM that it is impossible or unreasonable to reemploy the individual and he or she applies to OPM for placement assistance.

How Service is Credited

- Upon restoration, employees are generally entitled to be treated as though they had never left. This means that time spent in the uniformed service counts for seniority, within-grade increases, completion of probation, career tenure, retirement, and leave rate accrual.
- Employees do not earn sick or annual leave while off the rolls or in a non-pay status.

Employee Protections

- Employees who enter the Uniformed Services are not subject to a reduction in force while they are in service. After their return, they may not be discharged (except for cause) for one year if they served for more than 180 days, or for 6 months if they served for more than 30 but less than 181 days.
- The law prohibits an agency from discriminating against or taking any reprisal against an applicant or employee because of his or her application, membership, or service in the Uniformed Services.

Appeal Rights

- Individuals who believe their agency has not complied with the law or with OPM's regulations may file a complaint with the Department of Labor or appeal directly to the Merit Systems Protection Board.

Paid Military Leave

- Each fiscal year, employees under permanent appointments are entitled to 15 days (120 hours) of military leave, with pay, to perform active duty, active duty training, or inactive duty training as a member of the Reserve component or National Guard.
- Reservists may use military leave to cover drill periods or to perform funeral honors duty since both are considered inactive duty training for the purposes of military leave.
- Part-time employees and employees on uncommon tours of duty are entitled to military leave pro-rated according to the number of hours in the regularly scheduled tour of duty, e.g., an employee who works 20 hours a week earns 7 days (56 hours) of military leave.
- Employees may carry over 15 (120 hours) days of unused military leave into a new fiscal year. Therefore, potentially they may have a total of 30 (240 hours) days to use in any one fiscal year. That means that Reservists whose military duty spans two fiscal years may use up to 45 days of military leave at one time.

Paid Military Leave (Continued)

- Military leave should be credited to a full-time employee on the basis of an 8-hour workday. The minimum charge to leave is 1 hour. An employee may be charged military leave only for hours that the employee would otherwise have worked and received pay.
- Employees who request military leave for inactive duty training (which generally is 2, 4, or 6 hours in length) are charged only the amount of military leave necessary to cover the period of training and necessary travel.
- Members of the Reserves or and National Guard are not charged military leave for weekends and holidays that occurs within the period of military service.
- Upon request, an employee performing duty with the uniformed services is entitled to use either accrued annual leave or military leave for such service.

Life Insurance

- The life insurance of an employee, who takes leave without pay to enter uniformed service, can continue for up to 12 months. If the employee separates to enter the uniformed service, life insurance continues for up to 12 months, or until 90 days after the uniformed service ends, whichever is sooner. The insurance is provided at no cost to the employee.

Health Insurance

- Employees who enter the uniformed service can continue their health insurance for up to 12 months; although employees continue to pay their share of the premium.
- Employees who remain in the uniformed service longer than 12 months may continue health benefit coverage for up to an additional 6 months by paying 102 percent of the premium, i.e., the employee's share, the agency's share, and a 2 percent administrative fee.

Retirement Credit

- All uniformed service performed for the United States is generally creditable for civil service retirement. USERRA makes full-time National Guard duty creditable for retirement purposes if it interrupts creditable civilian service and is followed by restoration after August 1, 1990.
- To get credit for their uniformed service after August 1, 1990, employees are required to pay to the retirement fund 3 percent towards the Federal Employee's Retirement System (FERS) or 7 percent towards the Civil Service Retirement System (CSRS) of the military basic pay, or, if less, the amount of civilian retirement deductions which would have been withheld had the individual not entered military service. Interest is added under certain circumstances.

Thrift Savings (TSP)

- USERRA allows employees to make up the contributions to the thrift savings plan that they missed because of their uniformed service.

Where To Go For Help

- Employees with questions should first contact their Personnel or Human Resources Office.
- By law, the Department of Labor's Veterans' Employment and Training Service (VETS) at www.dol.gov/vets provides assistance to Federal employees or applicants.
- VETS staff tries to resolve disputes, and may also ask the Office of the Special Council (OSC) to represent the individual in an appeal before the Merit Systems Protection Board (MSPB).
- Other help is available from either of the following: The Ombudsman for the National Committee for Employer Support of the Guard and Reserve (ESGR) at 1-800-336-4590
- Any national Veterans' Service Organizations (VSO)
- OPM Service Center

USERRA Related Web Sites

- USERRA Advice – Reserve Officers Association (ROA) – Military Law Review
http://www.roa.org/site/PageServer?pagename+law_review_index
- USERRA FAQs – Employer Committee for the Support of the Guard & Reserve / DOD
<http://esgr.org/userrafaq.asp>
- Department of Labor Veterans' Employment and Training Service (VETS)
<http://www.dol.gov/compliance/laws/comp-userra.htm>