



USERRA

Uniformed Services Employment and Reemployment Rights Act of 1994

Prepared by the Office of the Assistant Secretary for Veterans' Employment and Training / **September 2023**



UNITED STATES DEPARTMENT OF LABOR

USERRA annual reports are available for fiscal years (FY) 1995-1999 and 2004-2022. 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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INTRODUCTION

The Uniformed Services Employment and Reemployment Rights Act of 1994, 38 U.S.C. §§ 4301-4335 (USERRA or the Act), 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 retaliating against a person because of their attempt to enforce their rights, or the rights of others, 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 re-employed with the seniority, status, and rate of pay as if they 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.

As reported by the Defense Manpower Data Center (DMDC) in its strength accounting reporting, there were a total of 772,910 members of the Reserve Components (RC), which are comprised of Reserve and National Guard troops, and 1,343,795 members of the Active Components of the U.S. Armed Forces, on duty as of September 30, 2022.

This Fiscal Year (FY) 2022 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 the Act.
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).
3. The number of cases referred to the Attorney General or the Special Counsel pursuant to Section 4323 or 4324, respectively, and the number of actions initiated by the Office of Special Counsel (OSC) before the Merit Systems Protection Board (MSPB) pursuant to section 4324.
4. The number of complaints filed by the Attorney General pursuant to Section 4323.
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), referenced above:
 - A. The number of those cases that involve a disability-related issue, and
 - B. The number of those 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 those cases that involve persons with different occupations or persons seeking different occupations, as designated by the Standard Occupational Classification (SOC) System.
9. An indication of whether there are any apparent patterns of violation of the provisions of the Act 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 the Act, including any action that could be taken to encourage mediation, before claims are filed under the Act, between employers and persons seeking employment or reemployment.

OVERVIEW OF USERRA PROTECTIONS

USERRA generally requires United States employers, regardless of size or location of operation, as well as foreign employers operating in the United States or its territories, to re-employ eligible veterans and uniformed service members returning to 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, seniority, status, pay, pensions, and other benefits that would have accrued but for the employee's absence due to uniformed 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 uniformed service. Uniformed service includes United States active duty (AD) and reserve component (RC) military organizations, and certain other non-military organizations including the Federal Emergency Management Agency's (FEMA) Urban Search and Rescue (US&R) Response System, the FEMA Civilian Reserves, the National Disaster Medical System (NDMS), the National Oceanic and Atmospheric Administration (NOAA), and Regular Corps and Ready Reserve Corps of the Commissioned Corps of the U.S. Public Health Service (PHS).

Eligibility requirements for service members seeking reemployment generally provide that the absence must be due to uniformed service; advance notice (oral or written) must be provided 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 a uniformed service. USERRA also protects anyone—veteran or non-veteran, service member or non-service member—from reprisals for either exercising rights or assisting in any proceeding under the Act.

DOL is statutorily tasked with providing assistance to any person with respect to USERRA employment and reemployment rights and benefits and may request the assistance of other federal and state agencies engaged in similar or related activities to do so. DOL, DOD, and the Department of Veterans Affairs share responsibility for promoting a clear understanding of USERRA among employers and individuals concerning their respective rights and responsibilities under USERRA. In addition, USERRA requires all federal agencies to provide USERRA awareness training to human resources personnel, in consultation with the Office of Personnel Management (OPM). OPM issues guidance on ways to improve USERRA protection policies and practices for federal agencies. 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.

An individual who believes that their USERRA rights have been violated may file a complaint with DOL, which will then investigate the claim(s). Alternatively, individuals may seek to informally resolve their claims using the ESGR Ombudsman's resolution services to attempt resolution of their USERRA-related issues. Informal resolution is not required, and an individual may file a complaint with DOL at any time. Additionally, individuals have a private right of action to pursue their USERRA claims without any administrative exhaustion requirements. Once a complaint is filed with DOL, VETS investigates the complaint, determines if the complaint is substantiated, and attempts to resolve those complaints, when appropriate. Following a completed USERRA investigation by VETS, if the claimant is unsatisfied with the outcome or determination, the claimant may request referral of their case to the Department of Justice (DOJ) for cases involving a private, state, or local government employer, and to OSC¹ for cases involving a federal government employer.

This report begins by describing the various roles each of the federal agencies referenced above play in the administration of USERRA. Next, the report responds to each of the statutorily mandated reporting requirements described in the introduction to this report. In

¹ 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.

addition, the report contains other information of interest, including USERRA case outcomes for cases closed by DOJ, OSC, and DOL.

USERRA SERVICES PROVIDED BY THE DEPARTMENT OF DEFENSE’S EMPLOYER SUPPORT OF THE GUARD AND RESERVE

1. Overview

More than 50 years ago, DOD recognized the need for civilian employers to support military employees. In 1972, the Employer Support of the Guard and Reserve (ESGR) was created to gain and maintain employer support for an all-volunteer Force. Over the decades since, ESGR’s mission expanded to include educating employers and service members about the rights and responsibilities of USERRA. The Act is intended to ensure that these service members are not disadvantaged in civilian careers because of their uniformed service, are promptly reemployed in civilian jobs upon their return from duty and are not discriminated against in employment because of military status or obligations.

In support of the Secretary of Defense’s priority to “Take Care of Our People,” ESGR accomplishes its mission through effective military and employer outreach services, employer recognition programs, and a range of assistance services. These services provide education on the applicability of USERRA and emphasize the importance of the National Guard and Reserve in our Nation’s defense. Ensuring that service members understand their rights and benefits under USERRA is a key example of implementing the Secretary’s priority to “Take Care of Our People.”

Headquartered in Alexandria, Virginia, ESGR provides guidance, resources, and support to its operations through a network of more than 2,800 volunteers who work towards the vision that all employers support and value the employment of National Guard and Reserve members. ESGR has a network of volunteers in the 50 States, the District of Columbia, Guam, the Commonwealth of the Northern Mariana Islands, the U.S. Virgin Islands, and Puerto Rico.

In Fiscal Year (FY) 2022, ESGR engaged 125,496 employers and 234,095 service members, educating them on their rights and responsibilities under USERRA and associated DOD policy.

2. Outreach Programs

ESGR conducts awareness and recognition programs for employers to prevent or reduce employer/employee conflicts and misunderstandings related to an employee’s uniformed service. ESGR also educates service members and employers about their rights and responsibilities under USERRA and related DOD policies and engages directly with military leaders to improve their understanding of USERRA, ESGR programs, and their role in championing positive working relationships with employers while maintaining military readiness.

ESGR's outreach efforts to employers include voluntary participation in the Statement of Support Program. Employers who sign Statements of Support 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 that service members bring to the workforce and encourage opportunities to hire members of the National Guard, Reservists, transitioning service members, and veterans.
- Continually recognize and support our country's service members and their families, in peace, in crises, and in war.

Outreach programs also include the ESGR Awards, designed to recognize employers for policies and practices that support their employees' participation in the National Guard and Reserve. Most employer awards originate from nominations submitted by service members, recognizing supportive 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. The Freedom Award is presented annually to a maximum of 15 large, small, and public-sector employers that have demonstrated exceptional support to National Guard and Reserve employees.

During FY 2022, ESGR recognized 6,871 supervisors of RC service members with the Patriot Award, received 2,777 nominations for the 2022 Secretary of Defense Employer Support Freedom Award, and obtained 5,245 Statements of Support from employers across the Nation.

3. Ombudsman Services and Customer Service Center

ESGR assists National Guard and Reserve members with unformed service-related employment conflicts through its nationwide Ombudsman Services program. While ESGR is not a USERRA-enforcement agency and does not participate in formal litigation processes, the Ombudsman Services program provides information, education, and neutral, informal third-party mediation services to help resolve employee-employer USERRA conflicts. More than 390 highly trained ombudsmen nationwide provide mediation and technical assistance to service members and employers about their USERRA rights and responsibilities. In addition, ESGR operates a Customer Service Center (CSC), which fields USERRA-related inquiries and information requests from customers worldwide. The CSC provides prompt, expert telephonic and email responses to service members and civilian employers on USERRA-related matters.

During FY 2022, ESGR received 13,924 contacts by telephone and email, of which 1,127 resulted in actual USERRA mediation cases. ESGR's mediation efforts covered an array of USERRA-related issues, including 407 complaints involving some form of military discrimination, 274 complaints involving job reinstatement, and nine complaints involving possible retaliation or reprisal. There were 264 USERRA mediation cases in which ESGR

could not 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 closely on USERRA-related issues, track problems, coordinate issues, and identify trends as part of their efforts to protect service members' and employers' rights.

DEPARTMENT OF LABOR'S USERRA OUTREACH AND CLAIMS INVESTIGATION

1. VETS' Public Education and Compliance Assistance Efforts

VETS conducts a robust public outreach campaign to educate uniformed-service members, employers, and others on their rights and responsibilities under USERRA. Since the terrorist attacks of September 11, 2001, which resulted in the single greatest mobilization of reserve component members in our Nation's history, VETS has briefed more than one million individuals on USERRA. VETS continued this outreach in FY 2022, presenting USERRA information to over 4,000 individuals, including service members, members of professional groups, and members of the public.

VETS' efforts to educate the public also include maintenance of our USERRA website, which contains a number of educational resource materials on the Act and its application to service members, veterans, employers, employees, and others, including the USERRA e-laws Advisor, frequently asked questions, and other useful information. It can be accessed at: <https://www.dol.gov/agencies/vets/programs/userra>.

Briefings to mobilizing and demobilizing members of the National Guard and Reserve are provided in collaboration with ESGR. Together, both agencies strive to ensure that service members receive a USERRA briefing upon mobilization and demobilization from active military service.

2. VETS' Investigative Process

USERRA investigations are complaint driven. An individual who believes that their USERRA rights have been violated may file a complaint (VETS Form 1010) with VETS online (<https://vets1010.dol.gov>) or submit a claim form by email, mail, or facsimile. VETS Form 1010 is available to the public online through the VETS' web page. Upon receipt of an electronically filed or signed and completed hard-copy VETS Form 1010, VETS opens an investigation by assigning each case to a qualified investigator. A 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, interviews necessary witnesses, and may use a subpoena to obtain necessary evidence. To ensure that 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, investigative

techniques, and the agency's operating procedures. If the evidence compiled during a USERRA investigation substantiates the claim, VETS will attempt to obtain satisfactory resolution through negotiation or settlement. VETS encourages all parties to resolve disputes promptly and avoid litigation in order to preserve the employee-employer relationship.

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. The 90-day period begins on the date on which a complaint is filed with VETS National Office. At any point during the investigative process, the claimant may elect to request suspension of an investigation and pursue the claim with private counsel or on a *pro se* basis.

3. Case Referral Process

Completed investigations that result in a determination of whether a submitted claim is substantiated by the evidence reviewed in the case² are eligible for referral to DOJ or OSC. If VETS does not resolve the case to the claimant's satisfaction, VETS advises the claimant in a closing letter of their 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 their case be referred, VETS must refer the claim regardless of whether VETS has determined that the submitted complaint was substantiated by the facts and evidence obtained during the investigation. Each VETS' case referral contains a memorandum analyzing the USERRA claim and providing an assessment of whether the complaint was substantiated. VETS has 60 days to complete this referral process unless VETS obtains an extension of time from the claimant. The 60-day period begins when the claimant's request for referral is filed with VETS National Office.

4. Program Initiatives

In FY 2022, VETS engaged in several program improvement initiatives, including redevelopment of the VETS Report of Investigation (ROI) within the VETS Case Management System (VCMS) and rewriting the USERRA Investigations Manual. Each of these efforts was aimed at increasing the quality and integrity of VETS' investigations, while clarifying the requirements for investigators and reducing variations in investigations throughout VETS.

The ROI is the backbone of VETS investigations and contains investigators' analysis of the facts and evidence collected during an investigation. It contains the evidence and facts necessary to support investigators' determination of whether the claim is substantiated. The revision of the ROI removed many of its subjective analysis elements, which were often

² Incomplete investigations, where cases are closed administratively or withdrawn at the request of a claimant prior to VETS determining if each complaint is substantiated, do not immediately receive referral rights upon closure. Claimants may request to reopen these cases, and upon completion of an investigation, may request referral of their case to DOJ or OSC.

open-ended paragraph format fields. These open-ended analysis elements were separated into individual case management tools and designed to allow identification of specific, objective data elements and facts, with the ability to connect obtained evidence to each data element or fact. The ROI further was enhanced to allow for section-by-section review by assigned ROI reviewers, with validation and controls that ensure that investigative requirements are met prior to an investigator making a determination of whether a claim is substantiated. The ROI redevelopment will play a key role in the future of VETS work to improve the quality and consistency within investigations.

In FY 2022, VETS also rewrote its USERRA Investigations Manual. The rewriting of the manual consolidated multiple tools, policies, procedures, and other guidance, which were previously published in a variety of sources, into a single published document. The rewrite also allowed VETS to reorganize the manual to be task-based, which allows investigators to more easily find information and guidance related to the specific step of the investigation that they are engaged in.

DEPARTMENT OF JUSTICE ENFORCEMENT

DOJ and DOL work collaboratively to meet the goal of ensuring that 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 complaint and providing an assessment of whether the claim(s) are substantiated.

Upon receipt of an unresolved USERRA claim from DOL, DOJ conducts an independent review of 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 to settle the claims without commencing an action in court. If DOJ determines that it will not offer legal representation to a claimant, or seek relief on the service member's behalf, it informs the service member of this decision, in writing, and notifies them that they have 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 vigorously enforce USERRA against private, state, and local employers, through litigation, facilitated settlements, outreach, and advocacy. Since DOJ assumed USERRA enforcement authority in 2004 and through the end of FY 2022, it has filed 115 USERRA lawsuits and favorably resolved 217 USERRA complaints, either through consent decrees obtained in those lawsuits or through facilitated private settlements. In FY 2022, the Department of Justice (DOJ) settled, or facilitated settlement, in seven cases and matters at a

total value in excess of \$224,000 in payments directly to the service members. DOJ also filed two complaints under USERRA in the name of the United States. For example, DOJ represented Garrett Woodard in a matter against the Withlacoochee River Electrical Corporation (WREC) for violating USERRA. Based on DOJ's investigation, WREC violated USERRA when it terminated Woodard as an Apprentice Line Technician in October 2020 based on poor performance ratings. However, the evidence displayed that Woodard experienced repeated criticism from Woodard's supervisor relating to Woodard's military service in the days leading up to Woodard's termination, and that Woodard's alleged "below-average" rating was based on an insufficient time frame for measuring performance. On January 14, 2022, the Parties entered into a settlement agreement whereby WREC paid Woodard \$80,000. DOJ jointly handled this matter with the U.S. Attorney's Office for the Middle District of Florida.

On January 26, 2022, DOJ settled the complaint of Colonel Bruce Becker with the Department of Labor (DOL) against Col. Becker's employer, the Missouri State Highway Patrol (MSHP). Becker alleged in a DOL complaint that the MSHP violated USERRA by improperly failing to reemploy Col. Becker in the proper escalator position which Col. Becker was entitled to upon return from military leave. In particular, the complaint alleged that Col. Becker should have been entitled to promotion to Sergeant and then Lieutenant with MSHP and, as a result, Becker lost promotion opportunities as well as wages. The January 2022 settlement required MSHP to retroactively promote Becker to a Sergeant and Supervising Sergeant position as well pay \$92,982.87 in lost pay, pension contributions, and other damages.

On May 10, 2022, DOJ facilitated a private settlement agreement between Michigan Air National Guardsman, Ryan Savage, and Savage's employer, the Griffin Claw Brewing Company. Savage alleged that Griffin Claw violated USERRA when it denied Savage's July 2021 request to be reemployed in the proper pre-service job after returning from a four-year military absence comprised of four separate service periods. During DOL's investigation of Savage's claim, the Company argued in its defense that it could not reemploy Savage because it had no open positions, a COVID-related business downturn prevented it from increasing staffing to accommodate Savage, and rehiring Savage would have required firing an incumbent employee. Under the Parties' settlement agreement, the Company paid Savage \$12,000 in compensation for lost wages.

On June 9, 2022, DOJ facilitated a settlement agreement that resolved the USERRA claim of U.S. Navy Reservist James Radtke against TapeSouth, Inc. Radtke alleged that TapeSouth violated USERRA when it did not promptly reemploy Radtke in the proper previous position upon the completion of a 112-day military service obligation on July 23, 2020, and that TapeSouth also violated USERRA when it officially terminated Radtke's employment on July 24, 2020. Under the settlement agreement, TapeSouth paid Radtke \$2,500 in monetary damages, provided Radtke with a neutral recommendation, and conducted USERRA training for all its employees.

On August 23, 2022, DOJ facilitated a settlement agreement that resolved the USERRA claim of Thomas P. Harwood III, a veteran of the U.S. Air Force Reserve, against American Airlines. Harwood alleged that American repeatedly both underfunded the make-up contributions it owed to Harwood's 401(k) account upon return from multiple military service obligations and then deposited them well after the 90-day limit provided by federal regulations. Under the settlement agreement, Harwood received \$15,671 in additional make-up contributions, and American provided USERRA training to all employees in its 401(k) department.

Finally on April 22, 2022, the U.S. District Court for the Eastern District of Virginia entered an order approving a settlement resolving ongoing litigation by DOJ against the Prince George County (Virginia) Police Department (PGCPD), and the Virginia Retirement System (VRS). In September 2021, working in conjunction with the United States Attorney's Office for the Eastern District of Virginia, DOJ filed a complaint in the U.S. District Court for the Eastern District of Virginia against PGCPD and VRS to enforce employment rights guaranteed to a member of the Virginia Army National Guard, Major Mark Gunn (Gunn). In its complaint, the United States alleged that Gunn, was called to active duty by the Virginia Army National Guard and, when Gunn returned from active-duty service, the PGCPD refused to allow Gunn to return to the detective position held prior to his military service. DOJ also alleged that the County denied Gunn employment benefits that Gunn would have accrued during the period of active-duty service, including a bonus awarded to County employees. Finally, DOJ alleged that the County's unlawful actions caused Gunn to prematurely leave employment with the PGCPD and return to active duty in the Virginia Army National Guard. The complaint sought to have Gunn retroactively reinstated to the proper prior detective position and to recover employment benefits that the County denied Gunn during Gunn's period of active-duty service, as well as the VRS pension credits and benefits that Gunn lost as a result of the County's alleged USERRA violations. On April 28, 2022, the Court finalized and approved the Parties March 14, 2022, settlement which provided full relief for Gunn, including monetary relief of \$12,756.00 and other retirement benefits.

DOJ has also worked 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 monthly call in which all complaint referrals and case resolutions are discussed. In FY 2023, DOJ continues 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 litigation whenever possible, in order to achieve the best possible result for the service member.

DOJ will also continue to seek out opportunities to participate as *amicus curiae* and file statements of interest on behalf of service members. In FY 2022, DOJ filed a brief in the Supreme Court as *amicus curiae* on behalf of the Petitioner in *Torres v. Texas Department of*

Public Safety, 142 S. Ct. 2455 (2022); [597 U.S. ____ \(June 29, 2022\)](#). On June 29, 2022, the Supreme Court decided in favor of the Petitioner, holding that a private plaintiff may bring a suit for money damages under USERRA against a state agency. In the brief, DOJ argued that Congress may subject States to private suit for money damages through legislation passed under Congress’s War Powers because States surrendered their sovereign immunity to such legislation when they joined the Union. The Supreme Court agreed with DOJ that Congress may exercise its Article I, section 8 power “[t]o raise and support Armies” and “[t]o provide and maintain a Navy” to authorize private damages suits against state employers under USERRA because the Constitution’s “[t]ext, history, and precedent show that the States, in coming together to form a Union, agreed to sacrifice their sovereign immunity for the good of the common defense.” 142 S. Ct. 2469; 597 U.S. at ____ (slip op. at 16).

OFFICE OF SPECIAL COUNSEL ENFORCEMENT

OSC’s enforcement responsibilities apply to federal-sector USERRA cases. 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 for the federal government to ensure that it meets that goal. In furtherance of this goal, VETS and OSC professional staff collaborate annually to provide technical assistance and guidance on many complex issues to federal agencies, teaching and training agency staff on the law and best practices set forth in OPM’s guidance. The training provided by VETS and OSC is well received by federal agencies, and VETS’ and OSC’s professional staff have been asked to return in subsequent years by those agencies to provide additional training. VETS and OSC continue to collaborate in this effort, which has earned praise from agency officials who received their guidance.

In FY 2023 and future years, VETS will continue its plans to increase these activities. Furthermore, to broaden and strengthen partnerships with other federal agencies, VETS, in coordination with OSC, DOD, and OPM, will continue to work with other federal partners to identify and share best practices to ensure that our nation’s veterans are well served. Through these partnerships, VETS can better respond to requests for assistance, more effectively promote veteran employment in the federal sector, and develop innovative approaches to collaborate with employers on veteran employment initiatives.

REPORTING REQUIREMENTS

The Secretary of Labor, after consultation with the Attorney General and the Special Counsel, is required, pursuant to 38 U.S.C. § 4332, 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 the Act.

DOL reviewed 1,009 new unique³ cases in FY 2022 opened pursuant to a submitted VETS Form 1010 complaint. The table below provides the numbers of unique USERRA cases reviewed by DOL from October 1, 2016, to September 30, 2022.

Figure 1. Unique USERRA Cases Reviewed by DOL

| | <i>FY 2017</i> | <i>FY 2018</i> | <i>FY 2019</i> | <i>FY 2020</i> | <i>FY 2021</i> | <i>FY 2022</i> |
|------------------|----------------|----------------|----------------|----------------|----------------|----------------|
| <i>New Cases</i> | 862 | 917 | 950 | 944 | 862 | 1,009 |
| <i>Total</i> | 1,098 | 1,095 | 1,127 | 1,117 | 994 | 1,160 |

During FY 2022, DOL carried over an additional 151 cases (open investigations) from FY 2021. During FY 2022, DOL reopened (at the claimants’ request) five cases from FY 2021. In sum, DOL reviewed a total of 1,160 unique cases in FY 2022.

2. The number of cases reviewed by the Secretary of Defense under the National Committee for Employer Support of the Guard and Reserve of the Department of Defense.

During FY 2022, ESGR received 13,924 contacts by telephone and email, of which 1,127 contacts resulted in actual USERRA mediation cases.

3. The number of cases referred to the Attorney General or the Special Counsel pursuant to section 4323 or 4324, respectively, and the number of actions initiated by the Office of the Special Counsel before the Merit Systems Protection Board pursuant to section 4324.

In FY 2022, DOL completed referral actions and transferred 34 cases to the Attorney General and 19 cases⁴ to OSC. During the fiscal year, OSC did not file any new USERRA complaints with the MSPB but continues to represent one service member in an appeal filed during a previous fiscal year that remains pending before the MSPB. The nature and status of these referred cases is reflected in reporting requirement number 7 of this report.

³ This excludes duplicative cases such as cases that are filed multiple times by the same claimant with the same complaint or cases that have been previously investigated and have been reopened.

⁴ Referral actions completed by DOL may not match the count of referrals accepted by DOJ or OSC during a fiscal year due to the gap in time between the date DOL transmits a referred case, and the date on which DOJ or OSC accepts a referred case in instances where such a gap crosses between one fiscal year and another.

A. Cases referred to the Attorney General or the Office of Special Counsel⁵

i. Cases referred to the Attorney General

In FY 2022, DOJ reviewed a total of 35 referrals from DOL. Ten were assessed as having merit and 25 were assessed as not having merit. Out of the referrals that were assessed as having merit, DOJ facilitated settlement in two referrals, two involved a state agency as a potential defendant, one of which DOJ declined to pursue litigation, while the other was still under consideration by DOJ in FY 2022. DOJ declined representation with respect to five referrals assessed as having merit, and the remaining referral was still under consideration by DOJ in FY 2022.

Out of the 25 cases categorized as non-meritorious, based on DOL's assessment and DOJ's independent analysis of the merits of each referral, DOJ declined representation with respect to 19 referrals. Five of these referrals involved a state agency, four of which DOJ declined to pursue litigation, and one of which was still under consideration by DOJ in FY 2022. The remaining referral was still under consideration by DOJ in FY 2022.

The cases referred to DOJ in FY 2022 involved several USERRA issues.⁶ Approximately 9% (3) of the referred cases involved allegations of termination and/or discharge; 45% (16) of the cases involved reemployment allegations, such as accommodation and disability; while 17% (6) of the 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, of which approximately 14% (5) involved failure to promote; and one case (3%) involved an allegation of retaliation for asserting USERRA protection. Finally, it is also worth noting that approximately 77% of all the cases referred (27) involved actions affecting the service member's terms and conditions of employment, such as hostile work environment, discipline, or harassment.

ii. Cases Referred to the Office of Special Counsel

During FY 2022, DOL referred 19 cases to OSC, at the service member's request, under 38 U.S.C. § 4324. Additionally, five cases referred to OSC during the previous fiscal year remained pending at the beginning of FY 2022. Thus, 24 total referral cases were pending at OSC during the fiscal year. OSC closed or resolved 15 of the 24 cases during the fiscal year, while nine cases remained pending at the end of the fiscal year. OSC did not file any new USERRA appeals with the U.S. Merit Systems Protection Board (MSPB) during FY 2022

⁵ In contrast with referrals completed by DOL, this section counts the referrals that DOJ and OSC accepted during FY 2022. Therefore, this section includes referrals from cases that were transmitted in FY 2021 that were accepted in FY 2022 and excludes cases that were transmitted in FY 2022 that were not accepted until FY 2023.

⁶ Several cases involved multiple issues. Each issue is counted separately.

but continues to represent one service member in an appeal filed during a previous fiscal year that remains pending.

In 16 of the 19 cases DOL referred to OSC during FY 2022, the service member alleged discrimination based on ununiformed service, such as termination, non-promotion, non-selection, or denial of employment benefits; in four cases, violations of reemployment rights, and in one case, retaliation for exercising USERRA rights (some cases contain multiple allegations).

B. The number of actions initiated by the Office of the Special Counsel before the Merit Systems Protection Board

OSC did not file any new USERRA appeals with the MSPB during FY 2022 but continues to represent one service member in an appeal filed during a previous fiscal year that remains pending before the MSPB.

4. The number of complaints filed by the Attorney General pursuant to section 4323.

The Department of Justice filed two USERRA complaints in FY 2022. One of those cases, *United States v. Illinois Department of Corrections*, was settled in FY 2022. The remaining case, *United States v. Kansas City Department of Health and Environment*, was in active litigation in FY 2022.

In *United States v. Illinois Department of Corrections*, the United States alleged that the Illinois Department of Corrections (IDOC) violated USERRA when it failed to reemploy Roderick Workman, a member of the Illinois Air National Guard since 1991, in Workman's escalator position as a Correctional Transportation Officer I (CTO I) after Workman returned from military service in December 2019. In its complaint, the United States claimed that the CTO I position was Workman's escalator position because it was reasonably certain that IDOC would have selected Workman had Workman been there to bid for the position based on Workman's seniority and qualifications. On June 7, 2022, the United States District Court for the Northern District of Illinois approved the Parties' joint proposed consent decree. Under the decree's terms, IDOC agreed to pay Workman \$9,026.71 in back pay and interest, amend its policies to make the "reasonable certainty" standard and escalator position explicit, and train its employees, including supervisors, on USERRA's protections. IDOC is revising its policies in line with the consent decree.

On June 27, 2022, DOJ, through the United States Attorney's Office for the District of Kansas, filed a lawsuit on behalf of Army National Guard Staff Sergeant Stacy Gonzales in *United States v. State of Kansas*. The complaint alleges that, upon Gonzales' return from active service overseas in 2007, Gonzales began to experience hostility from the Kansas Department of Health and Environment (KDHE) regarding Gonzales' military obligations. It further alleges that KDHE violated USERRA when it took action to eliminate Gonzales' position because Gonzales had an upcoming military deployment. The lawsuit seeks the

recovery of Gonzales' lost wages and other employment benefits, as well as liquidated damages. The Parties are currently in litigation.

The Department of Justice is still in litigation on two claims that were filed in previous fiscal years. On September 1, 2021, DOJ filed a complaint in the United States District Court for the District of Guam against the Territory of Guam and the Government of Guam Retirement Fund. Brought in the name of the United States, the complaint alleges that Defendants deny its service member-employees' pension credit and retirement benefits if those employees use donated leave while on military duty, in violation of USERRA. The complaint is based on the allegations of five current or retired Guam employees who served on active duty in the military, were denied pension credit for portions of their military service served while using donated leave, and, as a result, will have reduced pension benefits for the rest of their lives. The complaint alleges that Defendants' practices may have illegally denied benefits to many other service members as well. The complaint seeks damages on behalf of all affected service member-employees and injunctive relief requiring Defendants to comply with USERRA. On December 21, 2021, the Court denied Defendants' motions to dismiss. The case is currently in litigation.

DOJ also continues to litigate a case in the U.S. District Court for the Northern District of Illinois on behalf of a judge advocate, Derrick Strong, who alleges that the City of Chicago Fire Department (CFD) violated USERRA when it failed to provide Strong with an opportunity to take a promotional examination that Strong missed while deployed. Strong provides legal advice and overall legal support to the 416th Theater Engineer Command and is also employed as a cross-trained firefighter and emergency medical technician-basic (firefighter/EMT) for the CFD. In 2017, while Strong was deployed, the city administered a test for firefighters to become fire engineers. Strong alleges that the CFD violated USERRA by failing to provide Strong with an opportunity to take the test when Strong returned to work after Strong's honorable discharge from military service. In 2021, DOJ filed a complaint in *Strong v. City of Chicago*, and, during the litigation, the Northern District of Illinois denied the City's motion to dismiss the matter regarding Strong's request to take the fire engineer test. The case is currently stayed pending the entry of a settlement.

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 1,127 individuals who had filed cases reviewed by ESGR Ombudsmen in FY 2022, and the date of each case. VETS compared the ESGR data to its own data⁷ on cases initially opened between October 1, 2021, and September 30, 2022.

⁷ Matches between ESGR and VETS' cases are made by matching names and dates of ESGR interactions against VETS' claimants who self-identify as having engaged with ESGR initially. Therefore, matches are likely but not guaranteed without additional provision of personally identifiable information (PII).

This comparison resulted in 148 likely matches, so it appears that 7.6% of 2022 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 Those Cases that Involve a Disability-Related Issue

1. Thirty six of the 1,009 new unique cases first reviewed by DOL in FY 2022 (3.6%) involved a disability-related issue.
2. Seven of the ESGR cases first reviewed in FY 2022 (0.6%) involved a disability-related issue.
3. Of the 53 cases that were referred to DOJ and OSC in FY 2022, two of those transferred to DOJ and none of those transferred to OSC involved a disability-related issue.
4. Of the two USERRA cases filed by DOJ in FY 2022, none involved a disability-related issue.
5. With respect to the 148 cases reviewed by DOL and ESGR involving the same person in FY 2022, three involved a disability-related issue.

B. The Number of Those Cases that Involve a Person who has a Service-Connected Disability

1. In FY 2022, VETS asked claimants whether they had a service-connected disability. Among the 1,009 new unique cases investigated by VETS, VETS obtained responses from 980 claimants (97.1%), 452 (46.1%) of whom reported having such a disability. Among these 452 claimants, 35 also claimed a USERRA-related disability issue. Among the 528 claimants who responded but did not report having a service-connected disability, one claimed a USERRA-related disability issue.
2. No information is available on the number of cases handled by ESGR that involved a person with a service-connected disability.
3. Of the 34 cases referred to DOJ for consideration of litigation, 17 involved a claimant who reported a service-connected disability, and two involved a USERRA-related disability issue.
4. Of the 19 cases referred to OSC for consideration of litigation, 16 involved a claimant who reported a service-connected disability, and none involved a USERRA-related disability issue.
5. Of the two USERRA cases filed by DOJ in FY 2022, one involved a service-connected disability.
6. With respect to the 148 cases reviewed by DOL and ESGR involving the same person in FY 2022, 60 (40.5%) reported having a service-connected disability. Three of the claimants who reported having a service-connected disability also claimed a USERRA-related disability issue.

7. The nature and status of each case reported pursuant to paragraph 1, 2, 3, 4, or 5—

A. The Nature and Status of Cases Reviewed by DOL

i. Potential Violations of USERRA Investigated by DOL

USERRA cases can contain one or more issue codes that correspond to potential violations of USERRA. These potential violations are identified by the claimant during submission of their claim to VETS, or by the investigator during the investigation. The following USERRA issues were investigated in the new unique USERRA cases reviewed by DOL. Many USERRA cases involve multiple issues, so the number of cases in this chart exceeds the 1,009 new unique cases reported by VETS in FY 2022 and the combined percentages exceed 100%.

Figure 2. Potential Violations of USERRA Investigated by DOL

| <i>USERRA Issues in Completed Investigations</i> | <i>Number</i> | <i>Percentage</i> |
|---|---------------|-------------------|
| Military obligations discrimination | 437 | 43.3% |
| Reinstatement | 207 | 20.5% |
| Discrimination as retaliation for any action | 202 | 20% |
| Pay rate | 123 | 12.2% |
| Promotion | 110 | 10.9% |
| Other non-seniority benefits | 90 | 8.9% |
| Status | 90 | 8.9% |
| Seniority | 84 | 8.3% |
| Vacation | 81 | 8% |
| Health benefits | 80 | 7.9% |
| Other | 79 | 7.8% |
| Layoff | 71 | 7% |
| Pension | 50 | 5% |
| Special protected period discharged | 37 | 3.7% |
| Reasonable accommodations/retraining for disabled | 36 | 3.6% |
| Initial hiring discrimination | 28 | 2.8% |
| Reasonable accommodation/retraining for non-qualified/non-disabled | 11 | 1.1% |

ii. Cases Investigated and Subsequently Closed by DOL

Upon completion of an investigation, or the closure of a case for administrative purposes, investigators apply a closure code to each case. These closure codes are selected based on either the investigator's determination of whether any potential violations within a case were substantiated or not; the claimant's or claim's eligibility for coverage as defined by the Act; or the circumstances that may have led to an administrative closure. During FY 2022 VETS utilized eight closure codes including Claim Granted, Claim Settled, Merit Not Resolved, No Merit, Not Eligible, Merit Undetermined, Administrative, and Claim Withdrawn.⁸

The Claim Granted closure code is applied to cases when the employer grants all or substantially all the claimant's remedies that are due under the Act. Cases closed with the Claim Granted closure code can be reopened for investigation if a claimant provides new and material evidence to their assigned investigator. If a claimant is not satisfied with the outcome of the investigation or determination of the investigator, they may request referral of their claim to DOJ or OSC.

The Claim Settled closure code is applied to cases when the claimant and the employer agree to settle the case for less than the claimant's full entitlements under USERRA. Cases closed with the Claim Settled closure code can be reopened for investigation if a claimant provides new and material evidence to their assigned investigator, or if they believe the employer has not met their obligations under a settlement agreement. If a claimant is not satisfied with the outcome of the investigation or determination of the investigator, they may request referral of their claim to DOJ or OSC.

The Merit Not Resolved closure code is applied when VETS has determined that one or more potential violations within a case are substantiated by the facts and evidence, but VETS is unable to facilitate a settlement between the employer and claimant. Claimants may request referral of these completed investigations to DOJ or OSC. Claimants may also choose to continue to pursue relief in a court of competent jurisdiction or before the MSPB using private representation.

The No Merit closure code is applied to cases in which the investigator has determined that the potential violations are not substantiated by the evidence. Cases closed with the No Merit closure code can be reopened for investigation if a claimant provides new and material evidence to their assigned investigator. If a claimant is not satisfied with the outcome of the investigation or determination of the investigator, they may request referral of their claim to DOJ or OSC.

⁸ VETS has implemented changes to closure codes and closure types that will expand the subcategories of closure types that can be applied to cases in FY 2023. These closure codes and closure types will be updated and reflected in the FY 2023 DOL Annual Report to Congress.

The Not Eligible closure code is applied when an investigator determines that a submitted claim is not covered under USERRA, or when the claimant of a submitted claim is not eligible under USERRA. If a claimant disagrees with the VETS determination that the claim is not covered, or that the claimant is not eligible, under USERRA, they may request referral of their case to DOJ or OSC. If documentation of a claim or claimant's eligibility is made available at a later date, the claimant may also request that VETS reopen their case and continue investigation of their original claim.

The Merit Undetermined closure code was used when an investigator completed an investigation or investigated a claim up until a statutory deadline was reached and was unable to determine if a claim was or was not substantiated by the facts and evidence collected.⁹ Cases closed with a closure code of Merit Undetermined can request that VETS reopen its investigation, or request referral of their case to DOJ or OSC for consideration of representation.

The Administrative closure code is used to close cases prior to the completion of an investigation for one of two reasons.¹⁰ It can be applied when the claimant displays a lack of interest in their claim. Lack of interest is determined when, after multiple attempts to contact a claimant, an investigator sends a letter describing the lack of responsiveness and includes a request for a claimant to contact them within 10 days, after which the investigator will close the case administratively. The Administrative closure code may also be applied to a case if the investigator determines that the claimant has initiated a parallel federal court, state court, or MSPB proceeding that matches the claims and circumstances described in the complaint filed with VETS. Administrative closure codes are assigned to incomplete investigations and provide a claimant the right to reopen an investigation upon request.

The Claim Withdrawn closure code is applied when DOL receives a request in writing from the claimant requesting that VETS suspend investigation of their claim. Claim Withdrawn closure codes are used for incomplete investigations and provide a claimant the right to reopen an investigation upon request.

VETS investigated and closed 976 cases in FY 2022, including 830 cases that were new and unique cases in FY 2022.

⁹ The use of the closure code Merit Undetermined was discontinued during FY 2022.

¹⁰ In FY 2022 the DOL Solicitor's Office concluded that it is inappropriate for investigators to close cases administratively for reasons defined under a prior administrative closure type of "Continuous Unauthorized Contact by a Third Party." Therefore, this administrative closure type has been removed.

Figure 3. Cases Investigated and Subsequently Closed by DOL

| <i>CLOSURE CODE</i> | <i>NUMBER</i> | <i>PERCENT</i> |
|---------------------------|---------------|----------------|
| Claim Granted | 136 | 13.9% |
| Claim Settled | 75 | 7.7% |
| Merit Not Resolved | 26 | 2.7% |
| No Merit | 275 | 28.2% |
| Not Eligible | 68 | 7% |
| Merit Undetermined | 5 | 0.5% |
| Administrative | 97 | 9.9% |
| Claim Withdrawn | 294 | 30.1% |
| TOTAL: | 976 | 100.0% |

B. The Nature and Status of Cases Reviewed by ESGR

i. Cases Reviewed by ESGR on Behalf of the Secretary of Defense

ESGR’s mediation efforts covered an array of USERRA-related issues, including 407 complaints involving some form of military discrimination, 274 complaints involving job reinstatement, and nine complaints involving possible retaliation or reprisal. There were 264 USERRA mediation cases in which ESGR could not 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 closely on USERRA-related issues, track problems, coordinate issues, and identify trends as part of their efforts to protect service member’ and employer’ rights.

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 percentages of all cases, for each category.

Figure 4. Crosswalk of USERRA Issues, FY 2022

| Primary Categories | ESGR Ombudsman Cases “Problem Codes”¹¹ | VETS’ National Guard and Reserve Cases “Issue Codes”¹² |
|---|---|--|
| Discrimination | Military Obligation Discrimination 372 | ID – Military Obligations Discrimination 407 |
| | Initial Hiring Discrimination 25 | II – Initial Hiring Discrimination 25 |
| | 397 Ombudsman Cases (35% of Issues Mediated) | 432 Issues in 414 Complaint Cases (48.5% of Complaint Cases) |
| Reinstatement/ Reemployment | Health Benefits 25 | IH – Health Benefits 45 |
| | Pension 21 | IP - Pension 38 |
| | Seniority 27 | IS - Seniority 68 |
| | Other Non-Seniority Benefits 54 | IB – Other Non-Seniority Benefits 82 |
| | Status 53 | IZ - Status 74 |
| | Layoff 0 | IL - Layoff 65 |
| | Vacation 125 | IV - Vacation 74 |
| | Reinstatement 274 | IR - Reinstatement 189 |
| | Promotion 53 | IT - Promotion 93 |
| | Reasonable Accommodations/Retraining for Disabled 7 | IA – Reasonable Accommodations/ Retraining for Disabled 20 |
| | Reasonable Accommodation/Retraining for Non-Qualified Non-Disabled 6 | IW – Reasonable Accommodations/Retraining for Non-Qualified Non-Disabled 10 |
| | Pay Rate 70 | IM – Pay Rate 103 |
| | Special Protected Period Discharge 6 | IF – Special Protected Period Discharge 28 |
| 721 Ombudsman Cases (64% of Issues Mediated) | 953 Issues in 590 Complaint Cases (69.2% of Complaint Cases) | |
| Reprisal | Discrimination as Retaliation for any Action 9 | ID2 – Discrimination as Retaliation for any Action 131 |
| | 9 Ombudsman Cases (1% of Issues Mediated) | 131 Issues in 131 Complaint Cases (15.4% of Complaint Cases) |

¹¹ ESGR problem code descriptions have been converted to match each problem codes’ corresponding issue code as defined by VETS.

¹² To facilitate comparisons with ESGR data, VETS’ data in this chart reflects only National Guard and 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 64 stand-alone “Other” VETS issues and cases from this chart.

C. The Nature and Status of Cases Reviewed by the Attorney General and Special Counsel

i. Potential Violations of USERRA in Cases Reviewed by the Attorney General and Special Counsel

DOL referred 34 cases to the Attorney General and 19 cases to the Special Counsel during FY 2022. Each of these 53 cases includes one or more issue codes that correspond to potential violations of USERRA. These potential violations are identified by the claimant during submission of their claim to VETS, or by the investigator during the investigation. The following USERRA issues were investigated in the cases referred to the Attorney General and Special Counsel for review during FY 2022.

Figure 5. Potential Violations of USERRA in Cases Reviewed by the Attorney General and Special Counsel

| <i>USERRA ISSUES IN REFERRED CASES</i> | <i>NUMBER</i> | <i>PERCENT</i> |
|---|---------------|----------------|
| Discrimination as retaliation for any action | 19 | 35.8% |
| Military obligations discrimination | 13 | 24.5% |
| Reinstatement | 10 | 18.9% |
| Promotion | 9 | 17% |
| Other non-seniority benefits | 9 | 17% |
| Pay rate | 7 | 13.2% |
| Health benefits | 6 | 11.3% |
| Status | 4 | 7.5% |
| Seniority | 4 | 7.5% |
| Pension | 2 | 3.8% |
| Reasonable accommodations/retraining for disabled | 2 | 3.8% |
| Vacation | 1 | 1.9% |
| Other | 1 | 1.9% |
| Special protected period discharged | 1 | 1.9% |
| Reasonable accommodation/retraining for non-qualified/non-disabled | 1 | 1.9% |
| Initial Hiring Discrimination | 0 | 0% |
| Layoff | 0 | 0% |

ii. DOL Closure Codes Applied to Cases Referred to the Attorney General and Special Counsel

If a claimant is not reasonably satisfied with the outcome of a completed investigation where the investigator has made a determination, they are entitled to request referral of their case to the Attorney General or Special Counsel for consideration of representation. The following table displays the number of cases that were referred to the Attorney General or Special Counsel during FY 2022 under one of four closure codes applied by VETS. Cases closed with closure codes other than the four displayed below did not receive any requests for referral.

Figure 6. DOL Closure Codes Applied to Cases Referred to the Attorney General and Special Counsel

| <i>CLOSURE CODE</i> | <i>NUMBER</i> | <i>PERCENT</i> |
|---------------------------|---------------|----------------|
| No Merit | 27 | 50.9% |
| Not Eligible | 10 | 18.9% |
| Merit Not Resolved | 13 | 24.5% |
| Merit Undetermined | 3 | 5.7% |
| TOTAL: | 53 | 100.0% |

D. The Nature and Status of Complaints Filed by the Attorney General

DOJ filed two USERRA complaints in FY 2022. Both filed cases involved a Military Obligations Discrimination violation of USERRA. One case was closed as No Merit, while the other was closed as Merit Not Resolved.

E. The Nature and Status of Cases Reviewed by DOL and ESGR Involving the Same Person

DOL's response to paragraph five of the Mandated Reporting Requirements, 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, 148 likely matches were identified. This figure indicates that first ESGR, and subsequently DOL, handled the same individuals' claims.

DOL closed 112 of these 148 likely matches by September 30, 2022, under the following closure codes: No Merit: 27 (24.1%); Administrative: 8 (7.1%); Claim Granted: 20 (17.9%); Claim Settled: 10 (8.9%); Claim Withdrawn: 39 (34.8%); Not Eligible: 4 (3.6%); and Merit,

Not Resolved: 4 (3.6%). 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 148 likely matched cases were distributed among the various VETS' closure codes.

Figure 6. FY 2022 VETS/ESGR Likely Case Matches¹³

| | <i>No Merit</i> | <i>Administrative</i> | <i>Claim Granted</i> | <i>Claim Settled</i> | <i>Claim Withdrawn</i> | <i>Not Eligible</i> | <i>Merit Not Resolved</i> | <i>Still Open</i> | <i>Issue Totals</i> | <i>% of Total</i> |
|--|---------------------|-----------------------|--------------------------|--------------------------|----------------------------|-------------------------|-----------------------------------|-----------------------|-------------------------|-----------------------|
| <i>Military Obligations Discrimination</i> | 19 | 3 | 9 | 1 | 26 | 1 | 2 | 15 | 76 | 51.4% |
| <i>Reinstatement</i> | 5 | 2 | 7 | 8 | 10 | 0 | 0 | 8 | 40 | 27% |
| <i>Other Non- Seniority Benefits</i> | 2 | 1 | 2 | 0 | 4 | 0 | 0 | 5 | 14 | 9.5% |
| <i>Promotion</i> | 6 | 1 | 1 | 0 | 4 | 0 | 1 | 4 | 17 | 11.5% |
| <i>Vacation</i> | 3 | 2 | 3 | 0 | 3 | 0 | 0 | 2 | 13 | 8.8% |
| <i>Status</i> | 8 | 0 | 3 | 1 | 5 | 0 | 1 | 5 | 23 | 15.5% |
| <i>Pay Rate</i> | 5 | 0 | 3 | 1 | 2 | 0 | 3 | 6 | 20 | 13.5% |
| <i>Discrimination as Retaliation for any Action</i> | 5 | 1 | 1 | 1 | 7 | 0 | 1 | 7 | 23 | 15.5% |
| <i>Seniority</i> | 5 | 0 | 0 | 0 | 4 | 0 | 1 | 6 | 16 | 10.8% |
| <i>Pension</i> | 0 | 0 | 1 | 1 | 0 | 0 | 0 | 2 | 4 | 2.7% |
| <i>Initial Hiring Discrimination</i> | 1 | 0 | 0 | 0 | 1 | 0 | 0 | 2 | 4 | 2.7% |
| <i>Layoff</i> | 0 | 1 | 2 | 0 | 4 | 1 | 0 | 2 | 10 | 6.8% |
| <i>Special Protected Period Discharge</i> | 0 | 0 | 1 | 1 | 0 | 0 | 0 | 4 | 6 | 4.1% |
| <i>Health Benefits</i> | 2 | 0 | 0 | 0 | 0 | 1 | 1 | 0 | 4 | 2.7% |
| <i>Reasonable Accommodation/ Retraining for Disabled</i> | 0 | 0 | 0 | 0 | 2 | 0 | 0 | 1 | 3 | 2% |
| <i>Other</i> | 1 | 0 | 3 | 0 | 4 | 0 | 0 | 3 | 11 | 7.4% |
| <i>Closure Code Total</i> | 62 | 11 | 36 | 14 | 76 | 3 | 10 | 72 | 284 | |
| <i>% of Total</i> | 41.9% | 7.4% | 24.3% | 9.5% | 51.4% | 2% | 6.8% | 48.6% | | |

¹³ 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 exceeds the 148 ESGR and VETS cases involving the same person, and the combined percentages exceed 100%. Matching of FY 2022 ESGR cases and VETS cases initially opened October 1, 2021 to September 30, 2022 is based on claim dates and claimant names.

8. With respect to the cases reported on pursuant to paragraphs 1, 2, 3, 4, and 5, the number of those cases that involve persons with different occupations or persons seeking different occupations, as designated by the Standard Occupational Classification (SOC) System.

VETS is the only federal agency that collected occupational data on USERRA claimants and recorded the respective SOC code in FY 2022. Therefore, SOC code data is not available for ESGR cases. The chart below shows the full distribution of the SOC codes for FY 2022 USERRA cases, in four distinct 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:

1. Out of 997 (98.8%)¹⁴ of the new and unique complaints filed in FY 2022, 20.1% of complaints involved Protective Service occupations; 11.6% involved Management occupations; and 8.6% involved Office and Administrative Support occupations.
2. Out of 148 cases reviewed by DOL and ESGR, likely involving the same person in FY 2022, 24.3% of those cases involved Protective Service occupations; 14.2% involved Management occupations; and 10.1% involved Business and Financial Operations occupations.
3. Out of the 34 referrals transferred to DOJ in FY 2022, 26.5% of those cases involved Protective Service occupations; 14.7% involved Production occupations; and 8.8% involved Management occupations.
4. Out of the 19 referrals processed by DOL and forwarded to OSC from DOL in FY 2022, 21.1% of complaints involved Protective Service occupations, and Production occupations respectively; 21% involved Business and Financial Operations occupations; and 10.5% involved Legal occupations.

¹⁴ Total is less than 100% because the SOC code was not recorded for some cases.

**Figure 7. Occupations Involved in FY 2022 USERRA Cases -
as Designated by the Standard Occupational Classification System**

| <i>SOC Job Family</i> | <i>VETS Cases</i> | <i>DOJ Referrals</i> | <i>OSC Referrals</i> | <i>VETS & ESGR Cases</i> |
|---|-------------------|----------------------|----------------------|------------------------------|
| <i>Protective Service</i> | 20.9% | 26.5% | 21.1% | 24.3% |
| <i>Management</i> | 11.6% | 8.8% | 5.3% | 14.2% |
| <i>Office and Administrative Support</i> | 8.6% | 5.9% | 5.3% | 9.5% |
| <i>Business and Financial Operations</i> | 7.2% | 5.9% | 21% | 10.1% |
| <i>Transportation and Material Moving</i> | 6.9% | 2.9% | 0% | 8.8% |
| <i>Healthcare Practitioners and Technical</i> | 6.9% | 5.9% | 5.3% | 6.1% |
| <i>Production</i> | 3.9% | 14.7% | 21.1% | 1.4% |
| <i>Architecture and Engineering</i> | 3.9% | 5.9% | 0% | 2.7% |
| <i>Computer and Mathematical</i> | 3.7% | 5.9% | 5.3% | 2.7% |
| <i>Installation, Maintenance, and Repair</i> | 3.7% | 0.0% | 0% | 4.1% |
| <i>Construction and Extraction</i> | 3.2% | 2.9% | 0% | 1.4% |
| <i>Educational Instruction and Library</i> | 2.6% | 2.9% | 0% | 2.7% |
| <i>Food Preparation and Serving</i> | 2.6% | 2.9% | 0% | 0.7% |
| <i>Sales and Related</i> | 2.4% | 0.0% | 0% | 1.4% |
| <i>Community and Social Science</i> | 2.3% | 0.0% | 0% | 0.7% |
| <i>Arts, Design, Entertainment, Sports, and Media</i> | 1.8% | 0.0% | 0% | 1.4% |
| <i>Legal</i> | 1.6% | 5.9% | 10.5% | 0% |
| <i>Building and Grounds Cleaning and</i> | 1.5% | 2.9% | 0% | 2% |
| <i>Healthcare Support</i> | 1.5% | 0.0% | 0% | 2.7% |
| <i>Life, Physical, and Social Science</i> | 0.9% | 0.0% | 5.3% | 0% |
| <i>Military Specific</i> | 0.8% | 0.0% | 0.0% | 0.7% |
| <i>Personal Care and Service</i> | 0.7% | 0.0% | 0.0% | 0% |

9. An indication of whether there are any apparent patterns of violation of the provisions of the Act, with an explanation.

No patterns of violations of USERRA became apparent in FY 2022. DOL will continue to monitor USERRA cases to identify trends as they arise.

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 the Act, between employers and persons seeking employment or reemployment.

The Special Counsel has not offered any specific recommendations for administrative or legislative action. The Secretary of Labor offers the recommendations set forth below, which are supported by the Department of Justice.

1. First, DOL supports changes to USERRA to extend employment and reemployment protections to military spouses of uniformed service members as proposed in the [President's FY 2024 Budget \(Department of Labor section, page 101\)](#), which is aligned with President Biden's Unity Agenda and the Administration's emphasis on improving the economic security of military and veteran families.
2. DOL also supports changes to USERRA that would empower service members to more ably exercise their USERRA rights. To this end, DOL offers the following recommendations:
 - a. Amend USERRA to explicitly supersede mandatory arbitration agreements in employment in the same way that it supersedes any other agreement that reduces, limits, or eliminates any right or benefit under USERRA.
 - b. Amend USERRA to specifically state that it protects both substantive and procedural rights and benefits in employment, such as the procedural right of adjudication of USERRA rights.
 - c. Amend USERRA to explicitly state that agreements to arbitrate USERRA claims are unenforceable unless all parties knowingly and voluntarily consent to have their USERRA claim subjected to arbitration after a complaint on the specific claim has been filed in court or with the Merit Systems Protection Board.
 - d. Amend USERRA to preserve the right of the aggrieved service member to intervene in "pattern or practice" suits to be brought by the Attorney General, if those suits are authorized under USERRA, or to bring their own suit if the Attorney General has declined to file suit.
 - e. Amend USERRA to codify the U.S. Supreme Court's decision in *Torres v. Texas Department of Public Safety*, 142 S. Ct. 2455 (2022); [597 U.S. ____ \(June 29, 2022\)](#), which held that States may not invoke sovereign immunity to avoid liability under USERRA, to improve the enforcement of reemployment rights under USERRA with respect to a state employer by allowing aggrieved service members and veterans to file suits against state employers in state and federal courts.
 - f. Amend USERRA to impose a deadline for satisfaction of the monetary terms of an agreed-upon resolution of a USERRA violation, and an additional time-

elapsed penalty for continued delays in satisfying such a resolution, so that aggrieved service members will not be denied prompt monetary resolution of their meritorious claims, and USERRA cases will not languish in a pseudo-collections period beyond the 90-day statutory deadline for resolution established by Congress.

3. DOL also supports changes to USERRA that will strengthen the United States' ability to enforce USERRA and ensure that the statute is consistent with other civil rights laws. To these ends, DOL offers the following additional recommendations:
 - a. 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.
 - b. Amend USERRA to 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 would significantly strengthen DOJ's ability to enforce USERRA to address a systemic violation (such as a policy prohibiting extended absences, including absences for uniformed service) that could adversely affect the employment rights of multiple service members.
 - c. To support the proposed pattern-or-practice authority, amend USERRA to provide the Attorney General with civil investigative demand 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 the appropriate investigative tools.

DOL looks forward to working with Congress on these proposed USERRA amendments.

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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