

# LAW REVIEW 763

(November 2007)

1.19: USERRA Enforcement

## **HR for Federal Agencies**

**The Office of Personnel Management has specific responsibilities under USERRA.**

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Congress enacted the Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. 4301-4334, in 1994, as the long-overdue recodification of a law that can be traced back to 1940. In sections 4314, 4315, and 4331, Congress assigned important responsibilities to the director of the Office of Personnel Management (OPM).

Congress created OPM in 1978, when it enacted the Civil Service Reform Act (CSRA), splitting up the organization formerly known as the Civil Service Commission (CSC)-there was criticism that the CSC improperly combined administrative, prosecutorial, and adjudicative functions. The adjudicative functions of the old CSC were assigned to the Merit Systems Protection Board, a quasi-judicial agency also created by the CSRA. The prosecutorial functions of the CSC were assigned to the newly created Office of Special Counsel (OSC). The CSC functions as the personnel office for the executive branch were assigned to OPM.

Section 4331(b)(1) of USERRA gives the director of OPM the authority to prescribe regulations (in consultation with the secretary of labor and the secretary of defense) about the application of USERRA to federal executive agencies. OPM adopted such regulations within a year after the enactment of USERRA and published them in the *Federal Register* on Sept. 1, 1995 (60 F.R. 45650). The OPM USERRA regulations are published at 5 C.F.R. (Code of Federal Regulations) 201-211. The OPM regulations are not particularly comprehensive or helpful.

Similarly, the secretary of labor has the authority to prescribe regulations about the application of USERRA to state and local governments and private employers (38 U.S.C. 4331(a)). The Department of Labor (DOL) took more than 11 years, after President Bill Clinton signed USERRA into law on Oct. 13, 1994, to promulgate the USERRA regulations, issuing them on Dec. 19, 2005. The DOL USERRA regulations are codified at 20 C.F.R. Part 1002. When the DOL regulations finally emerged, they were comprehensive and helpful. I invite your attention to Law Review 0604.

What we need now is for the director of OPM to prescribe new USERRA regulations based on the DOL regulations. OPM should adopt the DOL regulations *word for word*, other than a handful of subsections that require slight wording changes, based on the unique circumstances of federal employment. Most of the DOL regulations can be adopted verbatim.

USERRA's first section expresses the "sense of Congress that the Federal Government should be a model employer in carrying out the provisions of this chapter" (38 U.S.C. 4301(b)). Making the DOL USERRA regulations apply to federal agencies is necessary to implement this sense of Congress.

OPM also has important operational responsibilities under sections 4314(b), 4314(c), 4314(d), and 4315(d) of USERRA. Section 4314(b) applies to the situation of a person who was employed by a federal executive agency before leaving for voluntary or involuntary service in the uniformed services, and the agency either no longer exists by the time the service member returns, or because of the "changed circumstances" of an agency it is "impossible or unreasonable" for that agency to reemploy the returning veteran.

In this situation, the OPM director is required to identify a position (in another agency) of like seniority, status, and pay that satisfies the requirements of section 4313 of USERRA and for which the person is qualified "*and ensure that the person is offered such position*" (38 U.S.C. 4314(b)(1) (emphasis supplied)).

The language of section 4314(b)(1) could hardly be clearer. In this situation, OPM is required to find a suitable alternative position for the returning veteran and to order that federal agency to reemploy the veteran. It is *not* sufficient for OPM to tell the veteran in this situation: "Here is the website address for USAJobs. Go find your own position and apply."

OPM has like responsibilities in the following scenarios:

- a. The returning veteran's pre-service position was in the judicial branch or legislative branch of the federal government, and the judicial branch or legislative branch employer finds it "impossible or unreasonable" to reemploy the veteran. 38 U.S.C. 4314(c). See Law Review 34.
- b. The adjutant general of a state determines that it is "impossible or unreasonable" to reemploy a person who left a job as a National Guard technician appointed under 32 U.S.C. 709. 38 U.S.C. 4314(d). See Law Review 155.
- c. A federal intelligence agency, as described in 5 U.S.C. 2302(a)(2)(C)(ii), determines that it is impossible or unreasonable to reemploy a person who was employed by such agency before leaving such position for uniformed service. 38 U.S.C. 4315(e).

These are important USERRA responsibilities under OPM's auspices.