

# LAW REVIEW 810

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CATEGORY: 1.19-USERRA Enforcement

## **Attempt to Expedite USERRA Enforcement Process**

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On Dec. 13, 2007, Sens. Edward M. Kennedy (DMass.), Daniel K. Akaka (DHawaii), and Barack Obama (DIll.), introduced S. 2471, the proposed USERRA Enforcement Improvement Act. The bill was referred to the Senate Veterans' Affairs Committee, which Sen. Akaka chairs.

The Uniformed Services Employment and Reemployment Rights Act (USERRA) was enacted in 1994, replacing a law that can be traced back to 1940. USERRA is codified in Title 38, U.S. Code, sections 4301-4334 (38 U.S.C. 4301-4334).

Section 4322 of USERRA permits a person claiming USERRA rights against any employer (federal, state, local, or private sector) to file a written complaint with the Veterans' Employment and Training Service of the U.S. Department of Labor (DOL-VETS). S. 2471 would amend section 4322 to require DOL-VETS to notify the complainant within five days after receiving the complaint of his or her rights under sections 4322-24 of USERRA, and it would require DOL-VETS to complete its investigation within 90 days after receipt of the complaint.

Under the current law, after DOL-VETS completes its investigation the complainant is permitted to request that DOL-VETS refer the case file to the attorney general of the United States, if the employer is a state or local government or a private employer. (Those case files are referred to the Employment Litigation Section of the Civil Rights Division, U.S. Department of Justice.) S. 2471 would amend section 4323(a) (1) by requiring DOL-VETS to refer the case file to the attorney general not later than 15 days after receiving such a request.

Section 4323(a)(1) also provides that the attorney general may appear and act as attorney for the complainant and file suit in the appropriate U.S. District Court, if the attorney general is "reasonably satisfied that the person on whose behalf the complaint is referred [from DOL-VETS to the attorney general] is entitled to the rights or benefits sought." S. 2471 would require the attorney general to make a decision within 45 days as to whether or not he or she will appear and act as attorney for the complainant and to notify the complainant of the decision.

Section 4324(a)(1) of USERRA, as currently written, provides for DOL-VETS to refer USERRA cases (upon request of the complainant) to the Office of Special Counsel (OSC), if the prospective defendant (employer) is a federal executive agency. S. 2471 would require DOL-VETS to refer such cases to OSC within 15 days of the receipt of such a request and would require OSC to make its decision on representation of the complainant within 45 days after receiving the referral from DOL-VETS.

S. 2471 would also expand upon the congressional reporting requirements imposed on DOL-VETS, the attorney general, and OSC under section 4332 of USERRA. The bill would also require quarterly reports to Congress from the Government Accountability Office (GAO), concerning cases in which DOL-VETS, the attorney general, or OSC had missed these new deadlines. These GAO reports will give these agencies an incentive to meet the deadlines.

I strongly support S. 2471, but I want to see language added making it clear that it is the complainant (person claiming USERRA rights) who is the intended beneficiary of these deadlines, and that the deadlines do not constitute a statute of limitations. In other words, if DOL-VETS, the attorney general, or OSC misses one of these deadlines, that missed deadline should not be grounds for dismissing the case.

I would also like to see Congress improve upon the attorney fee provisions of section 4323(h)(2) with respect to state and local governments and private employers, and 4324(c)(4) with respect to federal agencies as employers. The attorney fee award for the prevailing plaintiff should be something more than the attorney's reasonable hourly

rate multiplied by the number of hours the attorney reasonably spent on the case. If the attorney is any good and has a reputation, he or she probably has clients who are willing and able to pay that hourly fee up front, without the contingency and delay involved in winning the case. In order to give established and effective attorneys a real incentive to undertake USERRA cases for veterans who cannot afford to pay up front, the law should provide for the court or the Merit Systems Protection Board to award the prevailing attorney double the normal, reasonable hourly rate.

I think USERRA claimants are generally better off with private counsel, if they can find diligent and effective counsel who are willing to undertake the case on the contingency of the employer paying the fee (upon prevailing). A private attorney approaches the case as an advocate, not a neutral. A private attorney is usually capable of deciding whether to take the case and then sending a demand letter to the employer and filing suit, within a month or so after the client contacts the attorney. A private attorney can and will consider possible causes of action and remedies under numerous federal and state laws, not just USERRA.