

LAW REVIEW 1080

Congress Orders a New Demonstration Project on USERRA Enforcement

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1.1.1.8—USERRA Applicability to Federal Government

1.4—USERRA Enforcement

On October 13, 2010, President Obama signed into law the Veterans' Benefits Act of 2010 (VBA-2010), Public Law 111-275. This important new law makes several welcome amendments to the Uniformed Services Employment and Reemployment Rights Act (USERRA).

Section 105 of VBA-2010 orders the Department of Labor (DOL) and the Office of Special Counsel (OSC) to conduct a new demonstration project (DP) on the enforcement of USERRA with respect to federal executive agencies as employers. In the Veterans' Benefits Improvement Act of 2004, Congress ordered the first demonstration project, which lasted from February 2005 to December 2007. That project is described in detail in Law Review 0605 (Feb. 2006).

The new DP will last for 36 months. Like the 2005-07 DP, the new DP only relates to USERRA complaints against federal agencies as employers, not cases against state or local governments or private employers. Federal agency cases account for 15-20% of the USERRA case load.

During the new DP, USERRA cases against federal agencies as employers will be referred to OSC directly, rather than DOL-VETS, if the claimant has a Social Security Number (SSN) ending in an odd digit or the claimant with an even SSN also has a related Prohibited Personnel Practice case that is within OSC's jurisdiction. DOL-VETS and OSC are required to report to the Comptroller General (head of the Government Accountability Office or GAO) on the details of the DP, and the Comptroller General will report to Congress.

The 36-month DP will begin after the Comptroller General makes this report. The Comptroller General will also report to Congress during the DP and after it has run its course. I am informed that the OSC USERRA Unit is already gearing up for this new expansion of its responsibilities.

The OSC is a federal executive agency created by the Civil Service Reform Act of 1978 (CSRA). OSC's mission is to enforce merit principles within the Executive Branch of the Federal Government. OSC is headed by the Special Counsel of the United States, an official who is appointed by the President and confirmed by the Senate, for a five-year term. The 1994 enactment of USERRA gave OSC important new responsibilities with respect to USERRA enforcement within the Federal Government.

To understand the context of the DP, you must first understand USERRA's enforcement mechanism in general. USERRA applies to essentially all employers in this country, including the Federal Government, state and local governments, and private employers, regardless of size. Only religious institutions, Indian tribes, international organizations

(United Nations, World Bank, etc.), and foreign embassies are exempt from USERRA enforcement.

Congress enacted USERRA in 1994, as a long-overdue recodification of the Veterans' Reemployment Rights Act, which goes back to 1940. USERRA is codified in title 38, United States Code, sections 4301-4335 (38 U.S.C. 4301-4335).

Unlike Title VII of the Civil Rights Act of 1964 and other federal employment laws, USERRA has no "exhaustion of remedies" requirement, and you do not need a "right to sue letter." You can initiate a USERRA case against a local government or private employer by filing suit against the employer in the United States District Court for any district where the local government exercises jurisdiction or where the private employer maintains a place of business. 38 U.S.C. 4323(c)(2).

You can initiate such a lawsuit in your own name and with your own lawyer. If you proceed with your own lawyer and prevail, the court may award you reasonable attorney fees, expert witness fees, and other litigation expenses. 38 U.S.C. 4323(h)(2).

Cases against federal agencies, as employers or prospective employers, are not brought in court. Rather, such cases are adjudicated by the Merit Systems Protection Board (MSPB), a quasi-judicial federal agency created by the CSRA. If you proceed with private counsel and prevail, the MSPB may order the agency to pay reasonable attorney fees. 38 U.S.C. 4324(c)(4). If you have a USERRA case against a federal agency, you can initiate the case in the MSPB. You need not make a complaint to DOL or OSC, and you do not need a right to sue letter. 38 U.S.C. 4324(b)(1).

If you want free help from the Federal Government, you can file a USERRA complaint against any employer (federal, state, local, or private sector) with the Veterans' Employment & Training Service of DOL (DOL-VETS). 38 U.S.C. 4322(a). The agency is required to investigate your complaint. 38 U.S.C. 4322(d).

The agency is required to complete its investigation within 90 days after receipt of your complaint. 38 U.S.C. 4322(f). Congress adopted this 90-day deadline in 2008. There has been some improvement in DOL-VETS timeliness, but the agency frequently misses this 90-day deadline. When this occurs, the agency asks the claimant for a waiver, to permit the agency to complete its investigation.

If DOL-VETS fails to resolve your complaint against any employer, the agency is required to inform you of the results of its investigation and of your right to proceed to an enforcement proceeding through the AG, the OSC, or a court or the MSPB directly. 38 U.S.C. 4322(e). DOL-VETS frequently fails to comply with this notification requirement.

Upon receipt of the notice of the results of the DOL-VETS investigation, you (the claimant) have the right to request that your case be referred to the AG or the OSC. 38 U.S.C. 4323(a), 4324(a). Your case will be referred to the AG if the prospective defendant is a state or local government or private employer, and to OSC if the employer is a federal agency.

DOL-VETS is *required* to refer your case to the AG or OSC, *even if DOL-VETS believes the case is without merit*. 38 U.S.C. 4323(a), 4324(a). I am aware of at least two cases where OSC brought an enforcement action in the MSPB and obtained relief for the claimant,

although the DOL-VETS referral recommendation was negative. The final call as to whether the U.S. Government will provide legal representation to the USERRA claimant is to be made by the AG or OSC, not by DOL-VETS.

If you want free legal help from the AG or OSC, you must go through DOL-VETS. But under the DP, while it is in effect, you will be able to go to OSC directly if you have an SSN ending in an odd digit or if your USERRA claim is closely related to a PPP case that is already within OSC's jurisdiction. If you want to proceed in your own name with your own lawyer, you may do so, without even consulting with DOL-VETS, the AG, or OSC. The majority of USERRA cases filed in court and in the MSPB are filed by private counsel, not the AG or OSC. The DP only deals with those cases involving federal agencies as employers where the claimant seeks free help from the Federal Government (DOL and/or OSC) in enforcing his or her USERRA rights.