

Number 102, December 2003:
Does USERRA Apply to Non-Appropriated Fund Activities?

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Yes. A non-appropriated fund activity is a Federal entity whose funding comes from the profits from sales in the exchanges, not from funds appropriated by Congress. The enforcement mechanism of the Uniformed Services Employment and Reemployment Rights Act (USERRA), including enforcement against "Federal executive agencies," is discussed in detail in Law Review 12 (November 1999), Law Review 67 (March-April 2003), and Law Review 93 (October 2003). The forum for Federal-sector USERRA cases is the Merit Systems Protection Board (MSPB), a quasi-judicial Federal agency. The claimant may be represented by the Office of Special Counsel or by private counsel that the claimant retains. If the claimant proceeds with private counsel and prevails, the MSPB may, in its discretion, award the claimant reasonable attorneys' fees, expert witness fees, and litigation expenses. See 38 U.S.C. 4324(c)(4).

Please note that USERRA defines the term "Federal executive agency," and the definition expressly includes "any nonappropriated fund instrumentality of the United States." 38 U.S.C. 4303(5). USERRA's legislative history elaborates on this expanded coverage, as follows: "It is the Committee's [House Committee on Veterans' Affairs] intent that the definition of 'agency in the executive branch' include the United States Postal Service, non-appropriated fund instrumentalities of the United States (e.g., military exchanges and officers' clubs), and other specified entities. The intent is to give employees of these entities the same reemployment rights as those extended to other Federal employees." House Report No. 103-65, 1994 United States Code Congressional and Administrative News 2449, 2455 (emphasis supplied).

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