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OPM Director Announces Zero Tolerance for USERRA Violations

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1.1.1.8—USERRA Applies to Federal Government

1.4—USERRA Enforcement

1.8—Relationship between USERRA and other Laws/Policies

On March 27, 2012, the Honorable John Berry (Director of the United States Office of Personnel Management or OPM) announced: "This administration has zero tolerance for violations of the Uniformed Services Employment and Reemployment Rights Act [USERRA]." I hope that the Director and OPM will follow through on this long-awaited announcement.

Congress enacted USERRA in 1994, as a complete rewrite of the Veterans' Reemployment Rights Act (VRRA), which dates back to 1940. 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). Despite Congress' expectation that the Federal Government would be the best employer with respect to USERRA compliance, in fact the Federal Government is the worst employer.

I have two specific suggestions as to how to prevent USERRA violations within the Federal Government.

TRAIN FEDERAL SUPERVISORS IN USERRA

In 2008, Congress amended USERRA by adding a new section 4335, as follows:

(a) Training Required.— The head of each Federal executive agency shall provide training for the human resources personnel of such agency on the following:

(1) The rights, benefits, and obligations of members of the uniformed services under this chapter.

(2) The application and administration of the requirements of this chapter by such agency with respect to such members.

(b) Consultation.— The training provided under subsection (a) shall be developed and provided in consultation with the Director of the Office of Personnel Management.

(c) Frequency.— The training under subsection (a) shall be provided with such frequency as the Director of the Office of Personnel Management shall specify in

order to ensure that the human resources personnel of Federal executive agencies are kept fully and currently informed of the matters covered by the training.

(d) Human Resources Personnel Defined.— In this section, the term “human resources personnel”, in the case of a Federal executive agency, means any personnel of the agency who are authorized to recommend, take, or approve any personnel action that is subject to the requirements of this chapter with respect to employees of the agency.

Title 38, United States Code, section 4335 (38 U.S.C. 4335).

Congress added this section almost four years ago, but the required training has not been and is not being provided. I lay that failure directly at the feet of OPM. ROA and the Service Members Law Center are available to train federal supervisors and HR professionals concerning USERRA.

HOLD FEDERAL SUPERVISORS PERSONALLY ACCOUNTABLE WHEN THEY WILLFULLY VIOLATE USERRA

To promote USERRA compliance within the Federal Government, federal supervisors and personnel officials who willfully violate USERRA must be held personally accountable and must pay a price, from their own pockets, for willfully violating USERRA.

Under section 2302 of title 5 of the United States Code, there are 12 enumerated “Prohibited Personnel Practices” or PPPs. A federal employee can be disciplined by the Merit Systems Protection Board (MSPB), up to and including removal from federal service, for committing a PPP. Number 11 on the PPP list is as follows: “take or fail to take, recommend, or approve a personnel action if taking or failing to take such an action would violate a veterans’ preference requirement.” 5 U.S.C. 2302(b)(11). I propose to add “or the Uniformed Services Employment and Reemployment Rights Act” to the end of this subsection.

I propose that federal supervisors and HR professionals who willfully violate USERRA should lose their jobs and their federal careers. If this were to happen even a handful of times, and if it were to be publicized federal supervisors and personnel officials would be powerfully deterred from violating USERRA, but under the law as currently written such personal accountability is not even theoretically possible.

I hope that Director Berry’s words will be more than empty rhetoric. To make those words meaningful, it is necessary to train federal supervisors in USERRA and to hold them personally accountable when they willfully violate this law.