

LAW REVIEW 1243

May 2012

Senator Introduces Bill to Improve USERRA

By Captain Samuel F. Wright, JAGC, USN (Ret.)

1.4—USERRA Enforcement

On April 18, 2012, Senator Patty Murray of Washington introduced S. 2299, the proposed Servicemembers Rights Enforcement Improvement Act of 2012 (SREIA), on behalf of herself, Senator Mark Begich (D-AK), Senator Sheldon Whitehouse (D-RI), Senator John Rockefeller (D-WV), and Senator Daniel Akaka (D-HI). The bill was referred to the Senate Committee on Veterans' Affairs, which Senator Murray chairs.

If enacted, this bill would make several important improvements to the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Servicemembers Civil Relief Act (SCRA).^[1] Congress enacted USERRA in 1994, as a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRA), which dates back to 1940. USERRA is codified in title 38, United States Code, sections 4301 through 4335 (38 U.S.C. 4301-35).

Section 4323(a) of USERRA currently reads as follows:

(a) Action for Relief.—

(1) A person who receives from the Secretary [of Labor] a notification pursuant to section [4322\(e\)](#) of this title of an unsuccessful effort to resolve a complaint relating to a State (as an employer) or a private employer may request that the Secretary refer the complaint to the Attorney General. Not later than 60 days after the Secretary receives such a request with respect to a complaint, the Secretary shall refer the complaint to the Attorney General. If the Attorney General is reasonably satisfied that the person on whose behalf the complaint is referred is entitled to the rights or benefits sought, the Attorney General may appear on behalf of, and act as attorney for, the person on whose behalf the complaint is submitted and commence an action for relief under this chapter for such person. In the case of such an action against a State (as an employer), the action shall be brought in the name of the United States as the plaintiff in the action.

(2) Not later than 60 days after the date the Attorney General receives a referral under paragraph (1), the Attorney General shall—

(A) make a decision whether to appear on behalf of, and act as attorney for, the person on whose behalf the complaint is submitted; and

(B) notify such person in writing of such decision.

(3) A person may commence an action for relief with respect to a complaint against a State (as an employer) or a private employer if the person—

(A) has chosen not to apply to the Secretary for assistance under section [4322\(a\)](#) of this title;

(B) has chosen not to request that the Secretary refer the complaint to the Attorney General under paragraph (1); or

(C) has been refused representation by the Attorney General with respect to the complaint under such paragraph.

38 U.S.C. 4323(a).

If enacted, the SREIA would amend section 4323(a) to read as follows:

(a) Action for Relief.—

(1) A person who receives from the Secretary [of Labor] a notification pursuant to section [4322\(e\)](#) of this title of an unsuccessful effort to resolve a complaint relating to a State (as an employer) or a private employer may request that the Secretary refer the complaint to the Attorney General. Not later than 60 days after the Secretary receives such a request with respect to a complaint, the Secretary shall refer the complaint to the Attorney General. If the Attorney General is reasonably satisfied that the person on whose behalf the complaint is referred is entitled to the rights or benefits sought, the Attorney General may commence an action for relief under this chapter. The person on whose behalf the complaint is referred may, upon timely application, intervene in such action, and may obtain such appropriate relief as is provided in subsections (d) and (e).

(2)(A) Not later than 60 days after the date the Attorney General receives a referral under paragraph (1), the Attorney General shall transmit, in writing, to the person on whose behalf the complaint is submitted—

(i) if the Attorney General has made a decision to commence an action for relief under paragraph (1) relating to the complaint of the person, notice of the decision; and

(ii) if the Attorney General has not made such a decision, notice of when the Attorney General expects to make such a decision.

(B) If the Attorney General notifies a person that the Attorney General expects to make a decision under subparagraph (A)(ii), the Attorney General shall, not later than 30 days after the Attorney General makes such a decision, notify, in writing, the person of such decision.

(3) Whenever the Attorney General has reasonable cause to believe that a State (as an employer) or a private employer is engaged in a pattern or practice of resistance to the full enjoyment of the rights and benefits provided for under this chapter, and that the pattern or practice is of such a nature and is intended to deny the full exercise of such rights and benefits, the Attorney General may commence an action for relief under this chapter.

(4) A person may commence an action for relief with respect to a complaint against a State (as an employer) or a private employer if the person—

(A) has chosen not to apply to the Secretary for assistance under section [4322\(a\)](#) of this title;

(B) has chosen not to request that the Secretary refer the complaint to the Attorney General under paragraph (1); or

(C) has been notified by the Attorney General that the Attorney General does not intend to commence an action for relief under paragraph (1) with respect to the complaint under such paragraph.

Under USERRA as currently enacted, when the Attorney General files a USERRA case against a state the named plaintiff is the United States of America, but in all other USERRA cases filed by the Attorney General the named plaintiff is the individual veteran or Reserve Component member. As I explained in [Law Review 1178](#) (October 2011)[\[2\]](#), Assistant Attorney General for Legislative Affairs Ronald Weich sent identical letters to Speaker of the House John A. Boehner and Vice President (President of the Senate) Joseph R. Biden, Jr. on September 20, 2011. In those letters, Mr. Weich proposed several USERRA amendments. One of his suggestions was to make the United States of America the named plaintiff in any USERRA case initiated by the Attorney General. In Law Review 1178, I endorsed that proposal.

If enacted, the SREIA would implement this Weich proposal. The individual claimant would be permitted to intervene, seeking individual relief. On behalf of the United States, the Attorney General could seek broad relief, not limited to one individual. I think that this amendment would greatly improve the effectiveness of USERRA enforcement with respect to systemic USERRA violations.

In Law Review 1230 (March 2012), I summarized the USERRA lawsuit filed by the Attorney General against United Airlines (UAL) on March 13, 2012, in the United States District Court for the District of Colorado. In accordance with USERRA as currently written, the Attorney General filed the lawsuit on behalf of a single UAL pilot (TenEyck LaTourrette) who is a member of the Air National Guard, although scores if not hundreds of other UAL pilots are similarly affected by the same systemic UAL USERRA violation. Under current law, the Attorney General is limited to seeking relief for one individual at a time. If the SREIA were enacted, the Attorney General could seek relief for hundreds of affected individuals in a single lawsuit. I respectfully submit that the *LaTourrette* case is an excellent example of the kind of case that would benefit from this proposed amendment.

Section 5 of the SREIA would amend section 4324 of USERRA by giving the Office of Special Counsel (OSC) subpoena power to obtain testimony and documents from federal executive agencies, officials, and employees, with respect to enforcement of USERRA against such agencies as employers. As I explained in [Law Review 1080](#), section 105 of the Veterans' Benefits Act of 2010 (Public Law 111-275) mandated a new three-year demonstration project about USERRA enforcement against federal executive agencies, as employers. The demonstration project began in August 2011 and runs until August 2014. During that period, OSC both investigates and litigates USERRA complaints against federal executive agencies if the complainant has an odd Social Security Number.[\[3\]](#) The subpoena power that the SREIA would give to OSC would be most useful in those USERRA cases that OSC is investigating under the demonstration project.

The enactment of S. 2299 would improve USERRA enforcement with respect to federal agencies, state and local governments, and private employers. Readers—please contact your Senators and ask them to join Senators Murray, Begich, Whitehouse, Rockefeller, and Akaka as co-sponsors of this bill. Also, please ask your United States Representatives to introduce and support an identical companion bill in the House of Representatives.

[1] This article covers the proposed USERRA improvements. [Law Review 1244](#) covers the proposed SCRA improvements.

[2] I invite the reader's attention to www.servicemembers-lawcenter.org. You will find 743 articles about USERRA and other laws that are particularly pertinent to those who serve our country in uniform, along with a detailed Subject Index and a search function, to facilitate finding articles about very specific topics.

[3] If the complainant's Social Security Number is even, the Department of Labor (DOL) investigates the complaint and refers it to OSC only if the DOL investigation does not result in resolution.