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Opinion: Congress Should Amend USERRA

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We believe that, given the continuing pressure on the Guard and Reserve as a result of unit activations and individual call-ups, Congress should amend the Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. Section 4301-33, to make it more effective. Unless major surgery is performed, this important statute will not provide the effective protection Reservists need—and the country as a whole needs in order to continue to attract and retain Reservists.

Two areas of concern in USERRA are its procedures for adjudication and available remedies.

At present, a victim of private sector employer misconduct under the law can sue directly or can lodge a complaint with the United States Department of Labor's Veterans' Employment and Training Service (VETS). If such a complaint is filed, VETS will investigate, and if it finds a violation, can ask the Justice Department to bring a lawsuit in the employee's name against the violator.

What is important about this alternative is that the Justice Department has discretion in the matter and brings very, very few such cases, largely because of the limited resources available and the difficulty of persuading overworked United States Attorneys' Offices that these cases merit the expenditure of their own scarce resources. As a practical matter, the Reservist may well have to rely on private lawyers to vindicate his or her USERRA rights. As we explain, this in turn makes it all the more critical to address the adequacy of the statutory remedial scheme.

The remedy for this situation is to dramatically shift the statutory architecture. Instead of relying on civil actions in district court, whether brought by the Justice Department or by the Reservist, Congress should amend the statute to give Reservists access to the adjudicatory process the Labor Department's Office of Administrative Law Judges (OALJ) provides for whistleblowers under a number of federal health and safety statutes, victims of black lung disease, and others. That process has been successful in achieving fair results and developing a coherent body of law. Of note, although cases that are tried before OALJ's administrative law judges can be pursued by the Office of the Solicitor of the Department of Labor (the agency's general counsel—although this is infrequent), the complainant can also present his or her own case or can have his or her attorney handle the matter before OALJ.

When the case is over and a decision has been rendered and reviewed by

the Labor Department's Administrative Review Board, the losing party—whether the employer or the employee—may seek review in a United States Court of Appeals. USERRA cases should be shifted out of the district courts and assigned to OALJ, subject to this same kind of appellate review. Doing so—and adding a statutory deadline for final agency action—will make the entire process faster, more effective, and probably cheaper for everyone. Above all, USERRA cases will not have to compete with other, arguably more pressing matters on the dockets of the federal district courts.

USERRA remedies also need reform—indeed, this is probably an even more urgent need than altering the adjudicatory process. At present, the remedies available under the statute are broad but incomplete. A prevailing Reservist can receive make-whole relief such as lost pay and benefits as well as reinstatement on the job, attorneys fees and expenses. If the violation is willful, the compensatory (or "liquidated") damages can be doubled. But it is an unfortunate fact of life that these remedies, as broad as they are, lack an ingredient needed to make USERRA litigation attractive to lawyers. Thus, actual damages in these cases, even when doubled, may be quite modest, and the statute does not provide for punitive damages even in the most egregious cases. As a result, USERRA litigation is not going to provide the kind of powerful incentive that attorneys in private practice seek in order to accept cases on a contingent fee. This in turn means that only those Reservists who can afford to pay counsel on an hourly rate will be realistically in a position to invoke their rights. But those Reservists are the ones least in need of the statute, or so one would think.

So, if Congress wants to make protection of Reservists a reality, it has to do more surgery on the statute than it has been disposed to do thus far. This is not to say that the choices are easy ones. After all, the regulatory regime cannot be made so onerous that employers will think twice about hiring Reservists in the first place. There are competing interests, but the first step is to take careful stock of the shortcomings of the statute.

Our recommendation is that Congress require an independent study that would identify and seek to reconcile the competing interests, assess the effectiveness of the current procedures and remedies, and fashion something new and better if, as we believe, the current arrangements are less effective than they could be. Particularly as the nation comes increasingly to rely on the Guard and Reserve in the war on terrorism and other defense responsibilities, this will be an increasingly urgent task.

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