

Congress Amended USERRA To Put Deadlines on DOL, DOJ, and OSC

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[Update on Sam Wright](#)

1.4—USERRA enforcement

On 10/10/2008, President George W. Bush signed into law the Veterans Notice Clarification Act of 2008.³ This long and complicated act made many changes to title 38 of the United States Code, which pertains to veterans. This article is about the changes made to the Uniformed Services Employment and Reemployment Rights Act (USERRA), which was signed into law 14 years earlier, on 10/13/1994. The 2008 act amended several sections of USERRA by adding deadlines on actions to be taken by the Department of Labor (DOL), the Department of Justice (DOJ), and the Office of Special Counsel (OSC). The 2008 legislative history explains what was changed and the rationale for the changes:

¹ I invite the reader's attention to www.roa.org/lawcenter. You will find more than 1600 "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Servicemembers Civil Relief Act (SCRA), the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), the Uniformed Services Former Spouse Protection Act (USFSPA), and other laws that are especially pertinent to those who serve our country in uniform. You will also find a detailed Subject Index, to facilitate finding articles about very specific topics. The Reserve Officers Association (ROA) initiated this column in 1997. I am the author of more than 1400 of the articles.

² BA 1973 Northwestern University, JD (law degree) 1976 University of Houston, LLM (advanced law degree) 1980 Georgetown University. I served in the Navy and Navy Reserve as a Judge Advocate General's Corps officer and retired in 2007. I am a life member of ROA. For 42 years, I have worked with volunteers around the country to reform absentee voting laws and procedures to facilitate the enfranchisement of the brave young men and women who serve our country in uniform. I have also dealt with the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Veterans' Reemployment Rights Act (VRRA—the 1940 version of the federal reemployment statute) for 36 years. I developed the interest and expertise in this law during the decade (1982-92) that I worked for the United States Department of Labor (DOL) as an attorney. Together with one other DOL attorney (Susan M. Webman), I largely drafted the proposed VRRA rewrite that President George H.W. Bush presented to Congress, as his proposal, in February 1991. On 10/13/1994, President Bill Clinton signed into law USERRA, Public Law 103-353, 108 Stat. 3162. The version of USERRA that President Clinton signed in 1994 was 85% the same as the Webman-Wright draft. USERRA is codified in title 38 of the United States Code at sections 4301 through 4335 (38 U.S.C. 4301-35). I have also dealt with the VRRA and USERRA as a judge advocate in the Navy and Navy Reserve, as an attorney for the Department of Defense (DOD) organization called Employer Support of the Guard and Reserve (ESGR), as an attorney for the United States Office of Special Counsel (OSC), as an attorney in private practice, and as the Director of the Service Members Law Center (SMLC), as a full-time employee of ROA, for six years (2009-15). Please see Law Review 15052 (June 2015), concerning the accomplishments of the SMLC. My paid employment with ROA ended 5/31/2015, but I have continued the work of the SMLC as a volunteer. You can reach me by e-mail at SWright@roa.org.

³ Public Law 110-389, 122 Stat. 4163.

Section 302 of the Committee [Senate Committee on Veterans' Affairs] bill, which is derived from S. 2471, would create deadlines for the Department of Labor, the Attorney General [DOJ], and the Office of Special Counsel to provide assistance to servicemembers who believe that their rights under the Uniformed Services Reemployment Rights Act of 1994 have been violated.

Background. USERRA, chapter 43 of title 38, United States Code, provides reemployment and employment rights to service members, veterans, and those who seek to join a uniformed service. USERRA encourages Americans to serve in the Armed Forces and reduces the disruption that service members face when returning to the civilian workforce. Because the National Guard and Reserve have become an essential part of the military's operational force, it is imperative that employer comply with USERRA and that the statute be rigorously enforced by the federal government. If individuals lack confidence that their USERRA rights will be respected or enforced, they will be far less likely to join or continue to serve in the Reserve forces.

Individuals can privately enforce their rights under USERRA by filing a complaint in federal or state court, or, in the case of a complaint against a federal employer, by submitting a complaint to the Merit Systems Protection Board (MSPB). In addition, individuals can request assistance from the federal government by filing a complaint with the Department of Labor's Veterans' Employment and Training Service (DOL VETS), which investigates and attempts to resolve complaints, and, if requested, will refer complaints for litigation. DOL VETS refers complaints against federal agencies to the Office of Special Counsel (OSC) and complaints against private employers and state and local governments to the Attorney General. The Special Counsel or Attorney General may represent individuals before the MSPB or in federal court, respectively.

Although the sample size was small and the margin of error high, the Department of Defense's 2006 Status of Forces Survey of Reserve Component members does suggest that some service members are increasingly dissatisfied with federal enforcement of USERRA and, in particular, the length of time it takes for USERRA claims to be investigated and resolved or referred for litigation. From 2004 to 2006, the percentage of Reserve Component members who responded that they were dissatisfied with how their complaints were handled by DOL VETS increased from 27 to 44 percent. During the same period, the percentage of those who said that the government's response to their complaints was untimely rose from 32 to 38 percent.

The Government Accountability Office (GAO) has also found significant delays in the handling of USERRA complaints. In its July 2007 report, "Military Personnel Improved Quality Controls Needed over Service Members' Employment Rights Claims at DOL," GAO found that in the six cases when DOL VETS could not resolve complaints of federal

employees, who then sought referral for litigation, an average of eight months was required for DOL VETS to both investigate and refer those complaints to OSC. *Id.* at 23. In addition, GAO estimated that the average processing time of all USERRA complaints received by DOL VETS ranged from 53 to 86 days and concluded that the reporting on the number and percentage of claims it closes within 90, 120, and 365 days was not reliable. In one case, DOL VETS did not refer the case for litigation until seven years after a complaint was filed.

Committee Bill. Section 302 of the Committee bill would amend a number of sections in chapter 43 of title 38 so as to expedite federal enforcement of USERRA by imposing deadlines on action by DOL VETS, OSC, and the Attorney General to complete the tasks assigned to them under the statute:

- a. Within 5 days of receiving a USERRA complaint, DOL VETS would be required to notify a complainant in writing about his or her rights to receive governmental assistance, including the right to request a referral and the relevant deadlines that the federal agencies must meet.
- b. Within 90 days of receiving the complaint, DOL VETS would be required to complete its assistance and investigation and notify the complainant of the results and his or her rights, including the right to request a referral and the deadlines federal agencies must meet.
- c. Within 48 days after receiving a request for a referral, DOL would be required to refer a complaint to the OSC or the Attorney General.
- d. Within 60 days of receiving a referral, OSC or the Attorney General would be required to determine whether to provide legal representation to the complainant and notify the complainant of that decision

These deadlines are not intended to adversely affect or diminish any of the rights of an individual to enforce his or her rights under USERRA or the ability of the government to enforce the rights of the service member. Nor are the deadlines intended to constitute or create any type of defense that an employer could raise in a judicial or administrative proceeding, or to deprive the MSPB, a federal court, or a state court of jurisdiction over a complaint or action filed under USERRA. Moreover, if the Secretary [of Labor], the Attorney General, or the Special Counsel is unable to complete a specific task by the relevant deadline, the agency may complete the task within a time period agreed to by the complainant and the agency.⁴

⁴ 2008 Amendments, Senate Committee Report, September 9, 2008. S. Rep. 110-449, 2008 WL 4149915, 2008 USCCAN 1722 (Legislative History). You can find this Report in Appendix B-7 of *The USERRA Manual*, by Kathryn Piscitelli and Edward Still. The quoted paragraphs can be found at pages 872-75 of the 2017 edition of the *Manual*.

The final quoted paragraph of the legislative history raises an important point that I raised at the time—that these deadlines are for the benefit of service members and veterans whose USERRA rights have been violated, and not for the benefit of lawbreaking employers. The 2008 amendment added section 4327 to USERRA, as follows:

(a) Effect of noncompliance of Federal officials with deadlines.

(1) The inability of the Secretary, the Attorney General, or the Special Counsel to comply with a deadline applicable to such official under section 4322, 4323, or 4324 of this title--

(A) shall not affect the authority of the Attorney General or the Special Counsel to represent and file an action or submit a complaint on behalf of a person under section 4323 or 4324 of this title;

(B) shall not affect the right of a person--

(i) to commence an action under section 4323 of this title;

(ii) to submit a complaint under section 4324 of this title; or

(iii) to obtain any type of assistance or relief authorized by this chapter;

(C) shall not deprive a Federal court, the Merit Systems Protection Board, or a State court of jurisdiction over an action or complaint filed by the Attorney General, the Special Counsel, or a person under section 4323 or 4324 of this title; and

(D) shall not constitute a defense, including a statute of limitations period, that any employer (including a State, a private employer, or a Federal executive agency) or the Office of Personnel Management may raise in an action filed by the Attorney General, the Special Counsel, or a person under section 4323 or 4324 of this title.

(2) If the Secretary, the Attorney General, or the Special Counsel is unable to meet a deadline applicable to such official in section 4322(f), 4323(a)(1), 4323(a)(2), 4324(a)(1), or 4324(a)(2)(B) of this title, and the person agrees to an extension of time, the Secretary, the Attorney General, or the Special Counsel, as the case may be, shall complete the required action within the additional period of time agreed to by the person.

(b) Inapplicability of statutes of limitations. If any person seeks to file a complaint or claim with the Secretary, the Merit Systems Protection Board, or a Federal or State court under this chapter alleging a violation of this chapter, there shall be no limit on the period for filing the complaint or claim.⁵

⁵ 38 U.S.C. 4327. Section 4327(b) established a new rule, effective 10/10/2008, that *no statute of limitations limits the time within which a lawsuit or legal action can be filed in federal or state court or the MSPB*. Please see Law Review 18050 (June 2018) for a detailed discussion of section 4327(b).