

DOD Instruction 1205.12 Is Wrong and Should Be Rewritten

By Captain Samuel F. Wright, JAGC, USN (Ret.)²

1.3.1.2—Character and duration of service

1.3.1.3—Timely application for reemployment

1.7—USERRA regulations

1.8—Relationship between USERRA and other laws/policies

For almost 25 years, starting soon after President Bill Clinton signed the Uniformed Services Employment and Reemployment Rights Act (USERRA) into law on 10/13/1994, the Department of Defense (DOD) has published poorly written and misleading “guidance” on the meaning of USERRA.³ I am referring to DOD Instruction (DODI) 1205.12. The current version is dated 2/24/2016, with Change 1 dated 5/20/2016. ***At the end of this article, you will find the text of the current version.***

When the original version of this instruction was published about two years after the enactment of USERRA, I saw a notice about it in the *Federal Register*. The notice was poorly written and was ambiguous as to whether it was about a proposed instruction, published for notice and comment, or whether the published instruction was final.

¹ I invite the reader’s attention to www.roa.org/lawcenter. You will find more than 1900 “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 1700 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 43 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 (VRA—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 VRA 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 VRA 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 Somebody should remind DOD that it does not have rulemaking authority under USERRA. Section 4331 of USERRA, 38 U.S.C. 4331, gives rulemaking authority to the Department of Labor (DOL), the Office of Personnel Management (OPM), the Merit Systems Protection Board (MSPB), and the Office of Special Counsel (OSC), but not DOD.

The *Federal Register* notice listed a Colonel Branson at the Pentagon (Office of the Assistant Secretary of Defense for Reserve Affairs) as the point of contact, and it provided Colonel Branson's telephone number. I called Colonel Branson and told him that I had seen the *Federal Register* notice, to which he responded: "What the f... is the *Federal Register*?" He told me that the published version was final and that he was not interested in my comments and suggestions. It was a very frustrating conversation.

Like the original version, the current version of DODI 1205.12 contains a fundamental error about the computation of USERRA's 5-year limit on the cumulative duration of an individual's period or periods of uniformed service, related to his or her employer relationship with a specific civilian employer. The current version states:

USERRA imposes a 5-year cumulative limit on *absences* from each place of civilian employment, due to uniformed service, except that any such period of service must not include any service excluded [from the computation of the 5-year limit] pursuant to Section 4312(c) of Reference (b) [USERRA].⁴

Section 4312(c) of USERRA sets forth the 5-year limit and its exceptions as follows:

- (c) Subsection (a) [the right to reemployment] shall apply to a person who is absent from a position of employment by reason of service in the uniformed services *if such person's cumulative period of service in the uniformed services, with respect to the employer relationship for which a person seeks reemployment, does not exceed five years*, except that any such period of service shall not include any service—
- (1) that is required, beyond five years, to complete an initial period of obligated service;
 - (2) during which such person was unable to obtain orders releasing such person from a period of service in the uniformed services before the expiration of such five-year period and such inability was through no fault of such person;
 - (3) performed as required pursuant to section 10147 of title 10 [10 USCS § 10147], under section 502(a) or 503 of title 32 [32 USCS § 502(a) or 503], or to fulfill additional training requirements determined and certified in writing by the Secretary concerned, to be necessary for professional development, or for completion of skill training or retraining; or
 - (4) performed by a member of a uniformed service who is—
 - (A) ordered to or retained on active duty under section 688, 12301(a), 12301(g), 12302, 12304, 12304a, 12304b, or 12305 of title 10 [10 USCS § 688, 12301(a), 12301(g), 12302, 12304, 12304a, 12304b, or 12305] or under section 331, 332, 359, 360, 367, or 712 of title 14 [14 USCS § 2127, 2128, 2308, 2309, 2314, or 3713];
 - (B) ordered to or retained on active duty (other than for training) under any provision of law because of a war or national emergency declared by the President or the Congress, as determined by the Secretary concerned;

⁴ DODI 1205.12, Enclosure 2, section 2(c), page 7 (emphasis supplied).

(C) ordered to active duty (other than for training) in support, as determined by the Secretary concerned, of an operational mission for which personnel have been ordered to active duty under section 12304 of title 10 [10 USCS § 12304];

(D) ordered to active duty in support, as determined by the Secretary concerned, of a critical mission or requirement of the uniformed services;

(E) called into Federal service as a member of the National Guard under chapter 15 of title 10 [10 USCS §§ 331 et seq.] or under section 12406 of title 10 [10 USCS § 12406]; or

(F) ordered to full-time National Guard duty (other than for training) under section 502(f)(2)(A) of title 32 [32 USCS § 502(f)(2)(A)] when authorized by the President or the Secretary of Defense for the purpose of responding to a national emergency declared by the President and supported by Federal funds, as determined by the Secretary concerned.⁵

It is the person's "cumulative period of service in the uniformed services", not the cumulative *absences* from the civilian job, that is subject to the cumulative 5-year limit. The period of *absence* from the civilian job will almost always be at least a few days longer than the period of *service*.

For example, Mary Jones, a petty officer in the Navy Reserve, was on active duty for exactly one year, from 10/1/2018 until 9/30/2019. Her last day at her civilian job, before the active duty period began, was 9/15/2018, 15 days before her active duty period began. The Department of Labor (DOL) USERRA Regulation provides, in pertinent part, as follows:

If the employee is ordered to perform an extended period of service in the uniformed services, he or she may require a reasonable period of time off from the civilian job to put his or her personal affairs in order, before beginning the service. Taking such time off is also necessitated by the uniformed service.⁶

After she was released from active duty on 9/30/2019, Mary waited 80 days (until 12/19/2019) to apply for reemployment. Because her period of active duty lasted longer than 180 days, Mary had 90 days (until 12/29/2019) to apply for reemployment.⁷ Mary's application for reemployment on Day 80 after her active duty release date was timely.

Mary was absent from her civilian job for one year and 95 days (15 days before the active duty period began and 80 days after it ended). The one-year period of active duty counts toward Mary's cumulative 5-year limit with her current civilian employer, unless the period is exempt under one of the exemptions set forth in section 4312(c). USERRA protects Mary's absence from her civilian job for the entire period of one year and 95 days, but the 15 days before and 80 days after do not count toward her 5-year limit.⁸

⁵ 38 U.S.C. 4312(c) (emphasis supplied).

⁶ 20 C.F.R. 1002.74(b).

⁷ 38 U.S.C. 4312(e)(1)(D).

⁸ Please see Law Review 19052 (June 2019).

It is important that DOD and the services get it right when they try to explain USERRA to civilian employers, because employers will try to twist the words to deny USERRA rights to employees. DODI 1205.12 should be rewritten as soon as possible.

I have several more objections to the way that DODI 1205.12 is written and the way that it is being applied. I will express those objections in succeeding articles in this “Law Review” series.⁹

Please join or support ROA

This article is one of 1900-plus “Law Review” articles available at www.roa.org/lawcenter. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997. New articles are added each month.

ROA is almost a century old—it was established in 1922 by a group of veterans of “The Great War,” as World War I was then known. One of those veterans was Captain Harry S. Truman. As President, in 1950, he signed our congressional charter. Under that charter, our mission is to advocate for the implementation of policies that provide for adequate national security. For many decades, we have argued that the Reserve Components, including the National Guard, are a cost-effective way to meet our nation’s defense needs.

Indeed, ROA is the *only* national military organization that exclusively supports America’s Reserve and National Guard.

Through these articles, and by other means, we have sought to educate service members, their spouses, and their attorneys about their legal rights and about how to exercise and enforce those rights. We provide information to service members, without regard to whether they are members of ROA or eligible to join, but please understand that ROA members, through their dues and contributions, pay the costs of providing this service and all the other great services that ROA provides.

If you are now serving or have ever served in any one of our nation’s seven uniformed services, you are eligible for membership in ROA, and a one-year membership only costs \$20. Enlisted personnel as well as officers are eligible for full membership, and eligibility applies to those who are serving or have served in the Active Component, the National Guard, or the Reserve.

If you are eligible for ROA membership, please join. You can join on-line at www.roa.org or call ROA at 800-809-9448.

If you are not eligible to join, please contribute financially, to help us keep up and expand this effort on behalf of those who serve. Please mail us a contribution to:

Reserve Officers Association
1 Constitution Ave. NE
Washington, DC 20002

⁹ See footnote 1.



Department of Defense **INSTRUCTION**

NUMBER 1205.12

February 24, 2016

Incorporating Change 1, Effective May 20, 2016

USD(P&R)

SUBJECT: Civilian Employment and Reemployment Rights for Service Members, Former
Service Members and Applicants of the Uniformed Services

References: See Enclosure 1

1. **PURPOSE.** This instruction reissues DoD Instruction (DoDI) 1205.12 (Reference (a)) to establish policy, assign responsibilities, and provide procedures for informing Service members and individuals, who apply for uniformed service, of their civilian employment and reemployment rights, benefits, and obligations pursuant to chapter 43 of Title 38, United States Code (referred to in this instruction as the Uniformed Services Employment and Reemployment Rights Act (USERRA) of 1994) (Reference (b)), specifically sections 4312(a) and 4333 of Reference (b).

2. **APPLICABILITY.** This instruction:

a. Applies to OSD, the Military Departments (including the Coast Guard at all times, including when it is a Service in the Department of Homeland Security by agreement with that Department), the Office of the Chairman of the Joint Chiefs of Staff and the Joint Staff, the Combatant Commands, the Office of the Inspector General of the Department of Defense, the Defense Agencies, the DoD Field Activities, and all other organizational entities within the DoD (referred to collectively in this instruction as the “DoD Components”).

b. Does not apply to the National Disaster Medical System or to the Commissioned Corps of the Public Health Service.

3. **POLICY.** It is DoD policy to support non-career uniformed service by taking appropriate actions to inform and assist uniformed Service members and former Service members and individuals who apply

for uniformed service of their rights, benefits, and obligations in accordance with Reference (b).

4. RESPONSIBILITIES.

a. Under Secretary of Defense for Personnel and Readiness (USD(P&R)).

(1) In addition to the responsibilities in Paragraph 4d, the USD(P&R) has overall responsibility for DoD policy pertaining to total force management.

(2) Develops and oversees the implementation of DoD policy pertaining to civilian employment and reemployment rights, benefits, and obligations.

b. Assistant Secretary of Defense for Manpower and Reserve Affairs (ASD(M&RA)). Under the authority, direction, and control of USD(P&R), the ASD(M&RA), with input from the Department of Labor's Veterans Employment and Training Service (DOL-VETS) and the Office of Personnel Management (OPM), advises the USD(P&R) on policies and procedures to promote and inform non-career uniformed Service members and employers on civilian employment and reemployment rights, benefits and obligations in accordance with USERRA.

c. Director, Department of Defense Human Resources Activity (DoDHRA). Under the authority, direction, and control of the USD(P&R), the Director, DoDHRA, provides administrative support to the Employer Support of the Guard and Reserve (ESGR).

d. OSD and DoD Component Heads. The OSD and DoD Component heads develop and implement procedures within their respective Components that are appropriate and in accordance with public law and DoD policy pertaining to providing information to persons entitled to rights, benefits, and obligations afforded under USERRA at Reference (b).

5. PROCEDURES. See Enclosure 2.

6. RELEASABILITY. **Cleared for public release**. This instruction is available on the DoD Issuances Website at <http://www.dtic.mil/whs/directives>.

7. SUMMARY OF CHANGE 1. The change to this issuance is administrative and removes "non-career service" from the glossary.

8. EFFECTIVE DATE. This instruction is effective February 24, 2016.



Robert O. Work

Deputy Secretary of Defense

Enclosures

1. References
2. Procedures
3. Agencies Providing USERRA Assistance

Glossary

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ENCLOSURE 1

REFERENCES

- (a) DoD Instruction 1205.12, "Civilian Employment and Reemployment Rights of Applicants for, and Service Members and Former Service Members of the Uniformed Services," April 4, 1996, as amended (hereby cancelled)
- (b) Chapter 43 of Title 38, United States Code
- (c) Part 1002 of Title 20, Code of Federal Regulations
- (d) Title 32, Code of Federal Regulations
- (e) Employer Support of the Guard and Reserve Website, <http://www.esgr.mil>
- (f) Department of Labor Veterans' Employment and Training Service Website, <http://www.dol.gov/elaws/vets/userra/1010.asp>

ENCLOSURE 2

PROCEDURES

1. SERVICE MEMBER INFORMATION AND ASSISTANCE

a. The DoD Component heads and the Commandant of the Coast Guard will:

(1) Inform the personnel in Paragraph 1a(1)(a) and (b) of their general employment and reemployment rights, benefits, and obligations as described in USERRA.

(a) Civilian employees who apply for uniformed service.

(b) Civilian employees who are current members of the uniformed services who perform or participate on a voluntary or involuntary basis on active duty, inactive duty, or full-time National Guard duty.

(2) Provide subject-matter experts to serve as points of contact (POCs) to assist applicants for and members of the uniformed service in matters related to employment and reemployment rights, benefits, and obligations.

(3) Provide initial and annual refresher training for all human resources officials, supervisors, employees, and uniformed Service members.

b. The Secretaries of the Military Departments and the Commandant of the Coast Guard will:

(1) Provide an annual review of USERRA information to employees of the uniformed services.

(2) Upon completion of a period of active duty extending beyond 30 days, and before separation from active duty, advise Active and Reserve Component Service members covered by USERRA of their employment and reemployment rights, benefits, and obligations as provided under USERRA.

(3) Advise members of the uniformed services that as employees they must fulfill certain obligations in order to achieve eligibility for reemployment rights as specified in USERRA. At a minimum, advice given will include the following USERRA notification and reporting requirements for returning to civilian employment:

(a) Advance Notification of Military Service. To be eligible for reemployment rights as specified in USERRA, employees must provide advance notice of absence due to uniformed service to their civilian employers except when giving such notice is prevented by military necessity, or otherwise impossible or unreasonable under all the circumstances.

1. DoD recommends persons applying for and/or performing uniformed service to provide advance notice in writing to their civilian employers of pending absence.

2. Although oral notice is allowed pursuant to USERRA, written notice of pending uniformed service provides documentary evidence that this basic prerequisite to retaining reemployment rights was fulfilled by the Service member and serves to avoid unnecessary disputes.

3. . Regardless of the means of providing advance notice, whether oral or written, it should be provided as early as possible. The DoD recommends that advance notice to civilian employers be provided at least 30 days prior to departure for uniformed service when feasible, based upon the time the Service member receives confirmation of upcoming uniformed service duty. While the notice may be informal and does not need to follow any particular format, some acceptable methods of providing notice include:

a. Giving notice on behalf of the employee by an appropriate officer in the uniformed Service member's chain of command. Written notice is preferred.

b. . Providing the employer a copy of the unit's annual training schedule for the duty served on those dates, or by providing the employer in advance with a signed standardized letter with blanks in which the Service member has filled in the appropriate military duty dates.

c. . Providing advance notification letters. Sample letters are provided by the ESGR, DoD's primary office for all matters concerning employer support of the National Guard and Reserve. ESGR information is provided in Enclosure 3 of this instruction.

(b) Reemployment Reporting Requirements. As described in USERRA, when notifying employers of their intent to return to work after completing uniformed service, employees must meet specific time-lines. Depending on the length of service, these time-lines span from less than 24 hours up to 90 days after completing uniformed service.

1. . Sample return notification letters are provided by the ESGR.

2. When the period of service exceeds 30 days from civilian employment, the Service member is required to provide documentation of service performed if requested by the employer.

a. As a matter of policy, the Military Departments strongly recommend commanders and Service members provide verification of uniformed service absence to civilian employers regardless of the duration of service upon request. Failure of an employee to comply with this recommendation does not affect the legal responsibilities of the employer under USERRA, including prompt reemployment.

b. Types of documentation satisfying this requirement are detailed in part 1002 of Title 20, Code of Federal Regulations (Reference (c)).

(c) 5-Year Service Limit. USERRA imposes a 5-year cumulative limit on absences from each place of civilian employment, due to uniformed service, except that any such period of service must not include any service excluded pursuant to section 4312(c) of Reference (b).

(d) Character of Service. Service members must not have been separated from service under a disqualifying discharge.

(4) Determine and certify in writing, periods of service exempt from USERRA's 5-year cumulative limit. Established exempt periods must be reviewed and recertified via policy memorandum, at a minimum, every 2 years. Failure to comply with this administrative requirement does not affect the continued validity of exempt periods certified in a writing that is more than 2 years old.

(a) Determine and certify in writing those additional training requirements not already exempt from USERRA 5-year cumulative service limit, that are necessary for the professional development or skill training or retraining for members of the National Guard or Reserve. When the Secretary concerned certifies those training requirements, performance of uniformed service to complete a certified training requirement is exempt from USERRA 5-year cumulative service limit.

(b) Determine and certify in writing those periods of active duty when a Service member is ordered to, or retained on, active duty (other than for training) under any provision of law because of a war or national emergency officially declared by the President or Congress. Such orders with the purpose of direct or indirect support of the war or national emergency will be annotated accordingly, since these periods of service are exempt from USERRA 5-year cumulative service limit.

(c) Determine, and certify in writing, those periods of active duty performed by a member of the National Guard or Reserve that are designated by the Secretary concerned as a critical mission or critical requirement, and for that reason, are exempt from USERRA 5-year cumulative service limit.

1. The authority for determining what constitutes a critical mission or requirement will not be delegated below the Assistant Secretary level. The designation of a critical requirement to gain the necessary experience to qualify for specific key senior leadership positions will be used judiciously, and the necessary experience and projected key leadership positions fully documented in the determination and certification.

2. This authority must not be used to grant exemptions to avoid USERRA 5-year cumulative service limit or to extend individuals in repeated statutory tours.

(5) Issue orders that span the entire period of service when ordering a member of the National Guard or Reserve to active duty for a mission or requirement and reflect USERRA 5-year cumulative exemption status as appropriate.

(a) Order modifications will be initiated as required, to ensure continuous active duty should the period required to complete the mission or requirement change. Order modifications will be completed, as required, to reflect qualifying 5-year exemption, as applicable; or an official Statement of Service must be generated, indicating original qualifying orders as exempt under proper authority, and retained in the Service member's personnel file.

(b) Orders must indicate exemption under USERRA from the 5-year cumulative service limit on uniformed service absence from employment when applicable. Specify the statutory or Secretarial authority for those orders when such authority meets one or more of the exemptions from USERRA 5-year cumulative service limit. Orders qualifying for exemption should include a status reflecting the exemption status and authority.

(6) Document the length of a Service member's initial period of military service obligation performed on active duty.

(7) Document those circumstances that prevent a Service member from providing advance notification of uniformed service to a civilian employer because of military necessity or when advance notification is otherwise impossible or unreasonable.

(8) Designate those officers, who are authorized by the Secretary, concerned to provide advance notification of service to a civilian employer on behalf of a Service member or applicant for uniformed service.

(9) Provide documentation, upon request, from a Service member or former Service member that may be used to satisfy the Service member's entitlement to statutory reemployment rights and benefits. Appropriate documentation may include, as necessary:

(a) The inclusive dates of the initial period of military service obligation performed on active duty.

(b) Any period of service during which a Service member was required to serve because he or she was unable to obtain a release from active duty through no fault of the Service member.

(c) The cumulative length of all periods of active duty performed.

(d) The authority under which a Service member was ordered to active duty when such service was exempt from USERRA 5-year cumulative service limit.

(e) The date the Service member was last released from active duty, active duty for special work, initial active duty for training, active duty for training, inactive duty training, annual training, or full-time National Guard duty. This documentation establishes the timeliness of reporting to, or submitting application to return to, a position of civilian employment.

(f) A statement indicating service requirements prevented providing a civilian employer with advance notification of pending service, when applicable.

(g) Proof that the Service member's entitlement to reemployment benefits has not been terminated because of the character of service as provided in section 4304 of USERRA.

(h) A statement that sufficient documentation verifying a particular period of service, does not exist, when appropriate.

(10) Establish a central POC at each Reserve Component headquarters or Reserve regional command and each National Guard State headquarters who can render assistance to:

(a) Members of the National Guard or Reserve about employment and reemployment rights, benefits, and obligations.

(b) Employers of National Guard and Reserve members about duty or training requirements arising from a member's uniformed service or service obligation.

(11) Inform Reserve Component Service members of services provided by ESGR. ESGR's subject-matter expert POCs can render assistance with issues regarding employment and reemployment rights, benefits, and obligations under USERRA. More information about ESGR is contained in Enclosure 3 of this instruction.

2. EMPLOYER INFORMATION AND ASSISTANCE. The Military Departments will:

a. Provide verification of absence due to uniformed service to civilian employers upon request, regardless of the duration of service-related absence.

b. Provide verification of discharge status upon employer request.

c. Designate a Reserve Component representative who must be either a commander or officer in charge with the military authority to delay, defer, cancel, or reschedule military service.

(1) The designated Reserve Component representative will consider, unless prevented by military necessity or it is otherwise impossible or unreasonable under the circumstances, written requests from civilian employers of National Guard and Reserve members to adjust the Service member's absences from civilian employment.

(2) The civilian employer must submit a written justification explaining how the National Guard and Reserve member's absence imposes adverse financial or severe operating impact to the civilian employer and advise as to when the hardship due to the Service member's absence is anticipated to end.

(3) The designated representative:

(a) Has discretion to delay, defer, cancel, or reschedule military service, so long as it does not negatively affect military operations.

(b) May make arrangements, other than adjusting the period of absence, to accommodate such requests when it serves in the best interest of the military and is reasonable to do so.

(4) Section 104.6(b)(3) of Title 32, Code of Federal Regulations (Reference (d)) does not create any right of action against the government by any party.

ENCLOSURE 3

AGENCIES PROVIDING USERRA ASSISTANCE

1. ESGR. ESGR is a DoD Field Activity under the authority, direction, and control of the ASD (M&RA).

a. ESGR is the primary DoD office for all matters concerning employer support of the National Guard and Reserve, and serves as the lead proponent for USERRA matters within DoD.

b. ESGR informs Service members and their civilian employers regarding their rights and responsibilities governed by USERRA.

c. ESGR does not have enforcement authority for USERRA, but serves as a free resource for Service members and employers.

d. ESGR's trained ombudsmen provide neutral, informal alternative dispute mediation services between Service members and employers for issues relating to compliance with USERRA. Headquarters ESGR Ombudsman Services representatives may be contacted by phone: (800) 336-4590, or email: osd.userra@mail.mil.

e. ESGR's Website (Reference (e)) provides local and State contact information. Additionally, the website provides links to multiple resources for both Service members and employers.

2. DOL-VETS

a. A person may file a complaint with the DOL-VETS or initiate private legal action, if alleging that an employer, including any Federal Executive Agency or the OPM, has failed or refused, or is about to fail or refuse, to comply with employment or reemployment rights and benefits under USERRA.

b. Using ESGR's mediation services is not a prerequisite for filing a complaint with DOL- VETS. The complaint may be filed in writing or electronically. Instructions and the forms can be accessed at the DOL-VETS Website (Reference (f)).

c. The DOL-VETS receives complaints from veterans and Service members who believe their USERRA rights were violated. DOL-VETS investigates these complaints, and if the evidence supports a conclusion that a claimant's USERRA rights have been violated, will work with the employer and the employee to obtain an appropriate resolution. If those efforts are unsuccessful—regardless of the outcome—the employee or claimant may request that his or her case be referred to the Department of Justice (DOJ) or the Office of Special Counsel (OSC) for further review and consideration of representation in U.S. District Court or before the Merit Systems Protections Board (MSPB) as appropriate.

3. DOJ

a. DOJ is the agency under the Attorney General that enforces USERRA matters involving State and local government employers and private-sector employers. DOJ receives USERRA cases referred by DOL-VETS.

b. DOJ reviews USERRA cases to determine if representation is appropriate. In cases found to have merit, the Attorney General will commence court action on behalf of the Service member, to be prosecuted by DOJ attorneys.

4. OSC

a. OSC is an independent, Federal, investigative and prosecutorial agency. OSC, in conjunction with the Department of Labor, investigates and enforces USERRA claims involving Federal Government employers. OSC receives USERRA Federal cases referred by DOL-VETS.

b. OSC reviews USERRA cases to determine if representation is appropriate. In cases found to have merit, OSC will initiate an action before the MSPB, also an independent, Federal agency, serving as the guardian of Federal merit systems. If OSC declines representation, the claimant may still file an appeal with the MSPB.

GLOSSARY

PART I. ABBREVIATIONS AND ACRONYMS

ASD(M&RA)	Assistant Secretary of Defense for Manpower and Reserve Affairs
DoDHRA	Department of Defense Human Resources Activity
DoDI	DoD instruction
DOL-VETS	Department of Labor Veterans' Employment and Training Service DOJ Department of Justice
ESGR	Employer Support of the Guard and Reserve
MSPB	Merit Systems Protection Board
OPM	Office of Personnel Management
OSC	Office of Special Counsel
POC	point of contact
USD(P&R)	Under Secretary of Defense for Personnel and Readiness USERRA Uniformed Services Employment and Reemployment Rights Act

PART II. DEFINITIONS

Unless otherwise noted, these terms and their definitions are for the purposes of this instruction.

critical mission. An operational mission that requires the skills or resources available in a Reserve Component or components.

critical requirement. A requirement in which the incumbent possesses unique knowledge, extensive experience, and specialty skill training to successfully fulfill the duties or responsibilities in support of the mission and operation or exercise. Also, a requirement in which the incumbent must gain the necessary experience to qualify for key senior leadership positions within his or her Reserve Component.

military necessity. For the purpose of determining when providing advance notice of uniformed service is not required, a mission, operation, exercise, or requirement that is classified or a pending or ongoing mission, operation, exercise, or requirement that may be compromised or

otherwise adversely affected by public knowledge is sufficient justification for not providing advance notice to an employer.

officer. For determining those Service officials authorized to provide advance notice to a civilian employer of pending uniformed service by a Service member or an individual who has applied for uniformed service, an officer will include all commissioned officers, warrant officers, and non-commissioned officers authorized by the Secretary concerned to act in this capacity.

uniformed services. The Armed Forces, the Army National Guard and the Air National Guard when engaged in active duty for training, inactive duty training, or full-time National Guard duty, and any other category of persons designated by the President in time of war or national emergency.