

LAW REVIEW¹ 22032

May 2022

Improve the Performance of DOL-VETS in Enforcing USERRA.

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1.4—USERRA enforcement

Q: I am a Sergeant Major (E-9)³ in the Marine Corps Reserve (USMCR) and a life member of the Reserve Organization of America (ROA).⁴ On the civilian side, I am a teacher for a local public school system. For many years, the superintendent of the school district, the principal of the school where I work, and other school district leaders have given me a hard time about

¹ I invite the reader's attention to www.roa.org/lawcenter. You will find more than 2300 "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 specific topics. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997. I am the author of more than 90% of the articles, but we are always looking for "other than Sam" articles by other lawyers.

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, and I currently serve as a national officer of the organization. For 46 years, I have collaborated 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 40 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 The factual set-up for this article is hypothetical but realistic.

⁴ At the 2018 national convention, members of the Reserve Officers Association amended the ROA Constitution to expand membership eligibility to include anyone who is serving or has served our country in any one of the eight uniformed services, including enlisted personnel as well as officers. ROA also adopted a new "doing business as" (DBA) name, the Reserve Organization of America, to emphasize that the organization represents and seeks to recruit as members all Reserve Component personnel, from E-1 through O-10.

my USMCR service and my absences from work necessitated by my service, although all those absences have been protected by the Uniformed Services Employment and Reemployment Rights Act (USERRA).

I have read with great interest many of your “Law Review” articles about USERRA and other laws that are especially pertinent to those of us who serve our country in the Reserve Components (RC) of the armed forces. I have also referred many of my USMCR colleagues, commanders, and subordinates to your Law Review Library.

I believe that the school district has violated my USERRA rights, and the amount of money involved, in lost salary and pension credit, is substantial. I understand, from reading some of your articles, that I can either retain a lawyer and sue the school district in federal court, or I can file a formal complaint under USERRA with the Veterans’ Employment and Training Service of the United States Department of Labor (DOL-VETS), and hope that agency resolves my issue or refers my case to the United States Department of Justice (DOJ) for free legal representation. Which course of action do you recommend?

A: That depends. There are advantages to going with DOL-VETS and DOJ.⁵ The chief advantage is that you get free legal representation. Win or lose, you pay nothing to a lawyer for representing you.

The chief advantage of proceeding with private counsel is that you get *an advocate rather than a neutral*. Also, if you retain your own lawyer, that lawyer can consider many legal theories, not just USERRA. When you rely on DOL-VETS and DOJ, only USERRA will be considered.

I have been critical of DOL-VETS and DOJ when they have served USERRA complainants poorly.⁶ I have also praised these agencies when they have done well.⁷ Rather than simply examining anecdotal evidence about the performance of DOL-VETS and DOJ, a more scientific and effective way to examine the effectiveness of these agencies is by looking to diligent reviews of these agencies by knowledgeable third parties, like the United States Government Accountability Office (GAO) and the Inspector General (IG) of DOL.

Government Accountability Office

⁵ See Law Review 21054 (September 2021) with respect to the USERRA enforcement mechanism with respect to USERRA complaints against state and local governments and private employers. See also Law Review 21027 (April 2021) with respect to USERRA complaints against federal agencies.

⁶ See Law Reviews 67, 197, 06023, 07034, 07058, 11052, 11081, and 13126.

⁷ See Law Reviews 148, 07007, 09030, 09031, 10031, 10051, 11011, 12030, 12032, 12040, 12061, 12069, 13084, 13090, 13131, 14029, 14076, 16050, 16115, 18025, 19039, 19047, 21008, 21053, and 21064.

The Government Accountability Office, formerly known as the General Accounting Office, is a Legislative Branch agency that was established in 1921. On its website, it describes its role as follows:

GAO provides Congress, the heads of executive agencies, and the public with timely, fact-based, non-partisan information that can be used to improve government and save taxpayers billions of dollars.

Our work is done at the request of congressional committees or subcommittees or is statutorily required by public laws or committee reports, per our Congressional Protocols.⁸

Numerous GAO audits and reports⁹, and GAO testimony as to those reports, have highlighted, at least as far back as 2007, a “cultural” problem in DOL’s performance of its responsibilities USERRA.¹⁰ GAO testified that it “has conducted multiple investigations into the efficiency of USERRA enforcement. The reports unanimously conclude that the Department of Labor...[is] failing our service men and women in their administration of USERRA.”¹¹ Comments by the then-outgoing (now former) Assistant Secretary of Labor for Veterans Employment and Training in December 2020 indicate his concerns then that there is still much work to be done to improve the agency’s culture and accountability in the service of veterans’ USERRA rights.¹²

Though the Assistant Secretary for Veterans’ Employment and Training has previously assured that corrective actions will be taken for GAO findings,¹³ Senate hearing testimony,¹⁴ and DOL OIG audit findings¹⁵ via incorporation of those corrective actions into its *USERRA Operations Manual*, the agency’s reluctance to disclose the contents of those administrative provisions in accordance with federal law¹⁶ provides no public transparency or accountability to those assurances.

⁸ See <https://www.gao.gov/about/what-gao-does>.

⁹ GAO-06-60, GAO-07-259, GAO-07-907, GAO-08-254T, GAO-08-397R, GAO-09-1SP, GAO-11-312R, GAO-13-29

¹⁰ Senate Committee on Veterans’ Affairs Hearing 110-403, p. 16 of transcript

¹¹ Senate Committee on Veterans’ Affairs Hearing 110-403, p. 57 of transcript

¹² Comments by then-Assistant Secretary John Lowry, in a December-2020 meeting as reported by participating National Staff of the Reserve Organization of America. The Assistant Secretary of Labor for Veterans’ Employment and Training, like other appointees at the Assistant Secretary level and above, must be nominated by the President and confirmed by the Senate. Like almost all of the political appointees of President Trump, Assistant Secretary Lowry left office on 1/20/2021, when President Biden was inaugurated. President Biden has nominated a qualified person for that position, and the Senate Veterans’ Affairs Committee has endorsed the nomination, but the full Senate has not yet conducted a vote on this important nomination.

¹³ In DOL’s responses to GAO-07-097, GAO-08-229T, and GAO-08-254T

¹⁴ Comments by the Assistant Secretary for Veterans Employment and Training before the Senate Committee on Veterans’ Affairs, Hearing 110-403

¹⁵ Memo from J.S. Shellenberger, Deputy (and Acting) Assistant Secretary for Veterans Education and Training, dated October 19, 2017. Subject: Response to the Office of the Inspector General (OIG) Draft Audit Report No. 06-18-001-02-001, *VETS’ Processing of USERRA Claims*

¹⁶ 5 U.S.C. § 552

Congress should require GAO to accomplish an audit and produce a report to Congress on DOL VETS' performance of its statutory responsibilities under USERRA. The scope of such audit and report should include the USERRA performance deficiencies and corrective actions assured by DOL in response to previous GAO audits¹⁷ and in the DOL Office of the Inspector General's 2017 audit of DOL VETS.¹⁸

Inspector General of the Department of Labor

Like every federal agency, the Department of Labor (DOL) has an Inspector General (IG) and a staff of that official. The most-recent audit of DOL VETS' performance of its statutory responsibilities under USERRA was conducted by the DOL IG in 2017.¹⁹ Numerous substantive findings were identified in the audit, for which DOL VETS assured corrective actions.²⁰ There has been no follow-up audit of similar scope to determine whether those corrective actions were put in place nor to determine the effectiveness of those corrective actions.

DOL Quarterly and Annual Reports to Congress

USERRA requires the Secretary of Labor²¹ to investigate each complaint submitted under USERRA and that, "If the Secretary determines as a result of the investigation that the action alleged in such complaint occurred, the Secretary shall attempt to resolve the complaint by making reasonable efforts to ensure that the person or entity named in the complaint complies with the provisions of [USERRA]."²² USERRA goes on to require that the Secretary of Labor transmit an annual report to Congress containing the number of USERRA cases reviewed by DOL in that fiscal year²³ as well as quarterly reports to Congress, the Secretary of Defense, the Attorney General, and the Special Counsel²⁴ detailing the number of cases for which the Secretary of Labor did not fulfill its investigatory responsibilities under USERRA.²⁵

¹⁷ GAO-07-097, GAO-08-229T, and GAO-08-254T

¹⁸ Memo from Elliott P. Lewis, Assistant Inspector General for Audit, dated October 30, 2017. Subject: DOL OIG Audit No. 06-18-001-02-001

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²¹ Of course, this language does not mean that the Secretary individually must conduct these investigations. USERRA makes clear that the responsibilities imposed upon "the Secretary" are to be accomplished "through the Veterans' Employment and Training Service." 38 U.S.C. § 4321.

²² 38 U.S.C. § 4322(d)

²³ 38 U.S.C. § 4332(a)(1)

²⁴ The Special Counsel of the United States is nominated by the President and must be confirmed by the Senate. The Special Counsel heads up the Office of Special Counsel (OSC), which has important responsibilities under USERRA as well as many other important responsibilities. When DOL-VETS investigates a complaint that a federal executive agency, as employer, has violated USERRA, DOL-VETS refers the case file to OSC rather than DOJ. See 38 U.S.C. § 4324(a)(1).

²⁵ 38 U.S.C. § 4332(b)(1)(A)

While much prominence is placed within DOL’s Annual Report to Congress as to the number of USERRA cases it reviews each year, such that the illustrated task load might suggest DOL VETS’ quantitative performance of USERRA and could be used as a basis by which Congress allocates resources to the agency, Congress’ measure of DOL VETS’ *qualitative* performance of USERRA lacks sufficient statutory reporting requirements in order to convey to Congress the extent to which veterans’ USERRA rights are not actually being fulfilled by the agency. The quarterly reporting requirements of the Secretary of Labor should be clarified and amended in USERRA²⁶ so as to specifically include:

- The number of USERRA cases closed within the quarter on which closed-case reviews were then proactively conducted in accordance with DOL VETS’ *USERRA Operations Manual*, so as to quantify DOL VETS’ compliance with its own quality-assurance guidelines.
- The number of disposed USERRA cases that were subsequently found within the quarter to have been originally closed by DOL VETS with substantive errors that adversely affected a veteran’s or employer’s rights and relief under USERRA.
- Summaries of each and every USERRA case in which DOL VETS originally disposed of the case by deeming it without merit, and for which the Department of Justice or a court subsequently affirmed the merit of the veteran’s complaint.

Section 4332(a)(1) of USERRA²⁷ should likewise be amended to require the Secretary of Labor to report these same three performance metrics to Congress in the Secretary’s annual report.

ROA recommendations

ROA encourages DOL to recommit its efforts in fulfillment of its statutory responsibilities under USERRA and to ensure that veterans and service members receive consistent, thorough investigations and supervisory oversight of their USERRA complaints in accordance with USERRA,²⁸ DOL regulations implementing USERRA,²⁹ and the DOL-VETS’ *USERRA Operations Manual*.

ROA urges DOL, and offers its collaboration with DOL, to:

- Revise outdated DOL regulations implementing USERRA so that those regulations, which guide DOL personnel in their performance of USERRA and also guide employers in

²⁶ 38 U.S.C. § 4332(b)(1)(A)

²⁷ 38 U.S.C. § 4332(a)(1)

²⁸ 38 U.S.C. §§ 4322, 4323, and 4324.

²⁹ 20 C.F.R. Part 1002.

complying with this law, fully comply with the numerous, enacted revisions to USERRA and fulfill Congress' intent.³⁰

- Provide transparency to DOL VETS' administrative processes and procedures in fulfilling its statutory USERRA responsibilities. Most notably, DOL VETS should reassess the legal sufficiency of the bases and extent to which it currently invokes exemptions under the Freedom of Information Act (FOIA) to disclosing administrative processes and procedures that effect how it performs its statutory responsibilities. Without transparency, to the extent as is required by law, there is no accountability.

ROA urges Congress to:

- Amend the USERRA subsection that establishes the DOL VETS' requirements for both its quarterly and annual reports to Congress so that the reports include:
 - o The number of disposed cases on which closed-case reviews have been conducted by DOL VETS.
 - o The number of disposed cases that are then found to have been originally closed by DOL VETS with substantive errors that affected a veteran's rights and relief under USERRA.
 - o Summaries of each/every case in which DOL VETS originally disposed of the case by deeming it without merit, and for which a court or another federal agency subsequently affirmed the merit of the veteran's complaint.
- Direct the Government Accountability Office (GAO) to accomplish an audit and produce a report to Congress of DOL VETS' performance of its statutory responsibilities under USERRA, the scope of which should include previous deficiencies as identified in numerous earlier GAO and DOL Office of the Inspector General findings.

USERRA Regulations

DOL VETS USERRA investigators are trained to primarily reference DOL's regulations in 20 C.F.R. Part 1002 to evaluate a veteran's USERRA complaint, and yet DOL has not kept those regulations consistent with several amendments to USERRA law since the DOL USERRA

³⁰ The current DOL USERRA regulations were promulgated in 2005 and are badly out-of-date because of statutory amendments over the last 17 years. See Law Review 21033 (May 2021). In that article, I have identified the exact provisions of the USERRA regulations that need to be amended because of statutory amendments since 2005, and I suggested exactly how those provisions need to be rewritten. Law Review 21033 also includes, at the end of the article, a copy of a letter that Major General (Retired) Jeffrey Phillips, ROA's Executive Director, sent to the Secretary of Labor, urging him to update the USERRA regulations and to take action to improve the performance of DOL-VETS. The Secretary has not responded to this ROA letter.

regulations were promulgated in 2005. As such, veterans' USERRA rights risk not being consistently investigated and enforced in full accordance with the law.

Eleven years after USERRA was enacted in October 1994, DOL implemented USERRA by publishing its USERRA regulations in December 2005. These 2005 regulations are still the basis for DOL investigators' training and reference in investigating a veteran's USERRA complaint, and yet these regulations have contained omissions and discrepancies from what is provided for in USERRA for as long as 12 years.

DOL regulations explicitly contradict the provisions of USERRA law in terms of veterans' wage and salary protections.³¹ DOL regulations completely omit provisions of USERRA law that were added by Congress in 2010 to protect veterans' jobs and benefits when their employer is succeeded as a result of a merger, etc. that occurs during the veteran's USERRA-protected military service.³² DOL regulations omit numerous statuses of uniformed service for which USERRA has been amended to include legal protections of employment and benefits as a result of that uniformed service.³³ DOL regulations fail to provide for the protections under USERRA law³⁴ to reservists who are involuntarily ordered to active duty for domestic emergencies. DOL regulations fail to provide the protections of USERRA law to veterans performing involuntary active duty in preparation for planned deployments.³⁵

DOL's regulations implementing USERRA are the primary basis for training and providing references to DOL investigators that are charged with preserving the USERRA rights and benefits of veterans, and yet DOL's regulations are up to 12 years out of date with the text of USERRA that provide for those veteran's rights and benefits. DOL must update its regulations in order to ensure that its investigators and staff are consistently and completely fulfills its statutory responsibilities to veterans under USERRA.

DOL Transparency

DOL VETS internally publishes its *USERRA Operations Manual* as the primary guidance to its investigators to establish a framework for how a veteran's complaint of a violation of the veteran's USERRA rights is to be processed by the agency. The *USERRA Operations Manual* is administrative in nature and sets out staff roles in the conduct of a USERRA investigation.

The *Manual* guides the DOL VETS investigator in the administrative procedures of receiving a veteran's complaint and opening an investigation, and it establishes milestones and timelines in

³¹ 38 U.S.C. § 4303(2) vs. 20 CFR § 1002.5(b)

³² 38 U.S.C. § 4304(4) vs. 20 CFR § 1002.5(d)

³³ 38 U.S.C. § 4303(13) vs. 20 CFR § 1002.5(l); 38 U.S.C. § 4303(16) vs. 20 CFR § 1002.5(o); P.L. 116-315, which added protections for National Guard members when performing state active duty, vs. the explicit contradictions of DOL's 20 CFR § 1002.57; P.L. 116-259, which added protections to service in the Commissioned Corps of the National Oceanic and Atmospheric Administration, vs. the explicit contradictions of DOL's 20 CFR § 1002.62

³⁴ P.L. 114-92, 129 Stat. 726

³⁵ 20 CFR § 1002.103 omits the provisions of 38 U.S.C 4312(c), as amended by P.L. 114-92, 129 Stat. 726

the conduct of an investigation, the complainant's rights, filing of documentation, rules of evidence, compulsory requirements to interview witnesses, protest procedures if the veteran has stated concern of the handling of his or her complaint, and quality assurance review of how the veteran's complaint was handled. As such, the correctness of the actions of the agency and the investigator in their performance of DOL's statutory responsibilities on behalf of the veteran are to be evaluated against the backdrop of the *USERRA Operations Manual*.

It is federal law that each agency of the federal government shall make available for inspection by the public "administrative staff manuals and instructions to staff that affect a member of the public."³⁶ DOL VETS' *USERRA Operations Manual* is the overarching compilation of the agency's administrative procedures and standards by which its handling of a USERRA complaint materially affects the proper disposition of a veteran's rights under USERRA. Both the spirit and the explicit requirements of this law³⁷ require that DOL VETS provide maximum transparency to the public as to how it administers its USERRA responsibilities. Absent such transparency, there is no accountability on the part of DOL VETS as to whether or how it fulfills both its statutory responsibilities under USERRA and its own regulations as published in the *Federal Register* on behalf of the veteran and the public at large.

Nevertheless, DOL has avoided all known attempts by both veterans and legal practitioners, acting either on behalf of individual veterans or the public at large, from obtaining, in whole or in part, information contained within the *USERRA Operations Manual* that administratively affects a veteran's rights under USERRA. DOL quite questionably invokes an exemption³⁸ to the release of its administrative *USERRA Operations Manual* based on its assertion that the *Manual* is compiled for "law enforcement purposes" and that its release "would disclose guidelines for law enforcement investigations or prosecutions" such that, if disclosed, "could reasonably be expected to risk circumvention of the law."³⁹

There is nothing known to be contained within the *USERRA Operations Manual* which could remotely (much less "reasonably") provide an advantage to any party trying to circumvent a USERRA investigation or the law. Instead, the *USERRA Operations Manual* is the sole standard of administrative procedures by which a member of the public can be assured that DOL VETS and its staff have acted in *fulfillment* of their statutory responsibilities under USERRA.

To the extent that DOL VETS questionably exercises this exemption from disclosure with such a broad brush, it further casts doubt on its ability to be held accountable to the public by its contravention of considering "whether partial disclosure of [the *USERRA Operations Manual*] is possible" and by not taking any discernible or "reasonable steps necessary to segregate and release nonexempt information."⁴⁰ Without any such public transparency as to the guidelines

³⁶ 5 U.S.C. § 552(a)(2)(C). This subsection is part of the Freedom of Information Act (FOIA).

³⁷ 5 U.S.C. § 552

³⁸ 5 U.S.C. § 552(b)(7)(E)

³⁹ *Id.* (emphasis supplied).

⁴⁰ 5 U.S.C. § 552(a)(8)(A)(ii)

or standards by which DOL VETS fulfills its statutory responsibilities of USERRA, there is no accountability to the affected public as to its performance of those responsibilities.

Summary

While the veteran or Reserve Component service member is not required to utilize DOL-VETS and DOJ to enforce his or her USERRA rights, there are many cases where DOL-VETS and DOJ must act if USERRA is to be enforced. USERRA's legislative history clearly shows that Congress intended to "Require the Secretary of Labor, through the Veterans' Employment and Training Service, to provide assistance in obtaining employment or reemployment to any person entitled to rights or benefits under chapter 43 [USERRA]."⁴¹ It is essential that DOL-VETS improve its performance of its USERRA responsibilities.

Please join or support ROA

This article is one of 2,300-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 on 10/1/1922 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 almost a century, we have argued that the Reserve Components, including the National Guard, are a cost-effective way to meet our nation's defense needs.

Through these articles, and by other means, including amicus curiae ("friend of the court") briefs that we file in the Supreme Court and other courts, we educate service members, military spouses, attorneys, judges, employers, DOL investigators, ESGR volunteers, congressional and state legislative staffers, and others about the legal rights of service members and about how to exercise and enforce those rights. We provide information to service members, without regard to whether they are members of ROA, 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 eight⁴² uniformed services, you are eligible for membership in ROA, and a one-year membership only costs \$20 or \$450 for a life membership. 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

⁴¹ House Committee Report, House Committee on Veterans' Affairs, April 28, 1993, H.R. Rep. 103-65 (Part 1). This committee report is reprinted in its entirety in Appendix D-1 of *The USERRA Manual*, by Kathryn Piscitelli and Edward Still. The quoted sentence can be found on page 798 of the 2021 edition of the *Manual*.

⁴² Congress recently established the United States Space Force as the 8th uniformed service.

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:

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