

DOL's Annual Report to Congress on USERRA for FY 2020

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Section 4332(a) of the Uniformed Services Employment and Reemployment Rights Act (USERRA) requires the Department of Labor (DOL) to prepare and file with Congress an annual report on its activities to enforce and administer USERRA during the previous fiscal year.³ DOL filed its annual report for Fiscal Year (FY) 2020⁴ in August 2021. At the end of this article, I have put a link to this report.

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. For 45 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 (VRRRA—the 1940 version of the federal reemployment statute) for 38 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 VRRRA 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 VRRRA 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 <mailto:swright@roa.org>.

³ 38 U.S.C. § 4332(a).

⁴ FY 2020 ran from 10/1/2019 until 9/30/2020.

The annual report is required to include, among other valuable information, the “Recommendations for the administrative or legislative action that the Secretary [of Labor], the Attorney General, or the Special Counsel considers necessary for the effective administration of this chapter [USERRA].”⁵ The recommendations made by the FY 2020 report are as follows:

Although the Attorney General and the Special Counsel have not offered any specific recommendations for administrative or legislative action at this time, the Secretary offers the recommendations set forth below. DOL supports changes to USERRA that will strengthen the United States’ ability to enforce USERRA and ensure that the statute is consistent with other civil rights laws. To these ends, DOL offers the following recommendations:

- a. We request amending USERRA to allow the Attorney General, acting on behalf of the United States, to serve as a plaintiff in all USERRA suits, rather than only in suits filed against State employers.
- b. We request the grant of independent authority to the Attorney General to investigate and file suit to challenge employment policies or practices that establish a pattern or practice of violating USERRA. This amendment would strengthen significantly DOJ’s ability to enforce USERRA to address a systemic violation (such as a policy prohibiting extended absences, including absences for uniformed service) that could adversely affect the employment rights of multiple service members.
- c. To support the proposed pattern-or-practice authority, we request amending USERRA to provide the Attorney General with civil investigative demand authority to compel the production of existing documents and unsworn answers to written questions from the custodian of such documents. DOL has subpoena power in its investigations under USERRA. The Attorney General, however, has no presuit investigatory authority. Because the proposal for pattern-or-practice authority includes the authority to initiate an investigation, Congress should provide the Attorney General with the appropriate investigative tools. DOL also supports changes to USERRA that would empower service members to more ably exercise their USERRA rights.

To this end, DOL offers the following additional recommendations:

- a. To guarantee the availability of procedural rights included in the statute, we request that Congress clarify that section 4302(b) of USERRA protects both substantive and procedural rights and benefits from reduction, limitation, or elimination.

⁵ 38 U.S.C. § 4332(a)(10).

b. We request that Congress clarify that the definition of “benefit,” “benefit of employment,” or “rights and benefits” in section 4303(2) includes procedural protections provided by the statute. In particular, to guarantee the procedural right of adjudication of USERRA rights, we recommend explicitly noting that agreements to arbitrate are unenforceable unless all parties consent to arbitration after a complaint on the specific claim has been filed in court or with the MSPB and all parties knowingly and voluntarily consent to have that particular claim subjected to arbitration.

c. To support the proposed pattern-or-practice authority, we request amending USERRA to preserve the right of the aggrieved service member to intervene in pattern-or-practice suits or to bring their own suit where the Attorney General has declined to file suit.

DOL looks forward to working with Congress on these proposed USERRA amendments.⁶

These proposals are consistent with the DOJ 2015 proposals to improve USERRA⁷ and with my own comprehensive 2015 proposals to improve USERRA.⁸ I want to highlight specifically the proposal to amend USERRA to clarify that section 4302(b) of USERRA⁹ supersedes and overrides any “agreement” to submit USERRA claims to binding arbitration that an employee may have been required by the employer to sign as a condition of employment or continued employment. That is an issue that is near and dear to my heart and that I have addressed in many of these “Law Review” articles, including Law Review 19035 (March 2019), Law Review 20001 (January 2020), and Law Review 21019 (March 2021).

I also want to highlight the proposal that the United States (not the named service member or veteran) should be the named plaintiff in any USERRA case initiated and prosecuted by DOJ. I discuss that proposal in detail and heartily endorse it in Law Review 18074 (August 2018).

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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

⁶ DOL FY 2020 Annual Report to Congress on USERRA Enforcement and Administration, page 22.

⁷ See Law Review 18074 (August 2018)

⁸ See Law Review 15089 (October 2015).

⁹ 38 U.S.C. § 4302(b).

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 eight¹⁰ 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 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 Organization of America
1 Constitution Ave. NE
Washington, DC 20002

Here is a link to the DOL annual report on USERRA enforcement and administration for FY 2020:

https://www.dol.gov/sites/dolgov/files/VETS/legacy/files/USERRA_Annual_FY2020.pdf

¹⁰ Congress recently established the United States Space Force as the 8th uniformed service.