



# Department of Defense and Employer Partnerships

September, 29, 2022

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USERRA Training, Plans and Policy

[www.ESGR.mil](http://www.ESGR.mil)



# Agenda

- ESGR Overview and Mission
- Q&A – Did you know?
- Uniformed Services Employment & Re-employment Rights Act (USERRA)  
*Department of Labor (DOL)*



## Who is ESGR?

- Department of Defense Office, established in 1972 to promote cooperation and understanding between Reserve Component Service members and their Civilian Employers.
- ~ 3200 volunteers in 54 committees in states, territories
  - Volunteers from all sectors – public and private
  - **Join us!**



*Volunteer Centric...*  
*Mission focused*

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# Primary Employer Support of the Guard and Reserve Missions



## EMPLOYER OUTREACH

Promote a culture  
where all employers  
support and value  
military service through  
education, recognition,  
and mediation



## MILITARY OUTREACH

Make Service members  
aware of their rights  
and responsibilities  
under the law and the  
value of employer  
support and  
recognition



## OMBUDSMAN SERVICES

Provide information  
and informal, neutral  
mediation for issues  
or conflicts between  
employers and  
Service members

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# USERRA - Available Assistance

## ESGR Customer Service Center



### By Phone:

1-800-336-4590



### Option 1

8am-6pm Eastern, Monday through Friday



### ESGR Website:

ESGR.mil



# USERRA - Available Assistance



## Mediation

Employer Support  
of Guard and  
Reserve (ESGR)



## Investigation

Department of  
Labor (DOL)



## Appeals

Merit System  
Protection  
Board (MSPB)

*Private Attorney is always an option*

# USERRA Case and Inquiry Report

	FY 2022	FY 2021	FY 2020	FY 2019
Cases Assigned	1,005	1,171	1,306	1,471
Cases Resolved	839	956	1061	1194
Not Resolved	236	236	236	236
Resolution Rate	83%	82%	81%	81%
Average Days to Close	9	8	8	8
Number of Cases Closed within 14 days	798	982	1,101	1,245
Number of Inquiries	6,418	8,132	9,643	11,656
<b>Total Cases and Inquiries</b>	<b>7,423</b>	<b>9,303</b>	<b>10,949</b>	<b>13,127</b>



## Service Member Top 3 Reasons for Contacting ESGR



### 3. Military Obligation Discrimination – 33.94%

*Employees should not be denied rights or benefits of employment due to their performance of service in the Uniformed Services (1002.18)*



### 1. Reinstatement – 14.48%

*Employees should be reemployed with seniority, status, and pay they would have held with reasonable certainty had they not been absent for service. (1002.191-199)*



### 2. Vacation – 10.41%

*Issues such as time off in advance of service, documentation, notice, verification of service, types of protected service. This also captures inquiries regarding multiple USERRA issues.*





# Did You Know ???



Scan QR code  
or join at  
[slido.com](https://www.slido.com)  
#4181505



## Question #1

SGT Smith works as a Defense contractor for XYZ Contracting. After working with XYZ Contracting for 6 Years SGT Smith was called up on a 2-year military assignment. While away XYZ contract company lost the bid to continue providing services to the Department of Defense (DoD). When SM returned he was told while contract company would have held his position government official advised they were unhappy with SM performance due to his absence due to military service.

Which office is held responsible for adhering to USERRA C.F.R. 1002.35 Successor in Interest?

- A. XYZ Contract Co
- B. Department of Defense (DoD)
- C. Both XYZ and DoD
- D. Either XYZ or DoD



## Question #2 (A)

SGT Martin has been employed for the federal government for 4 years and has received the highest annual performance appraisal ratings for the past 4 years. SGT Martin was recently employed deployed for 18 months and while away learned of a position becoming available in his department for which the service member would have been qualified if it were not for the service member's absence due to military obligations. ESGR received questions from both the employer and from the service member regarding this situation.

### Employer Question

Since the Service member is away performing military service is there a requirement for Federal employers to write an annual performance appraisal for the service member to assist him in qualifying for the position or for any other reason?

- A. Yes
- B. No



## Question #2 (B)

### Service Member Question

I am interested in applying for a vacancy within my department but because I am deployed I am unable to attend the interview. Is there a requirement for my employer to accommodate my absence from the interview? Or am I automatically disqualified due to my absence?

- A. Employer cannot disqualify based on inability to attend interview and must interview SM in accordance with USERRA
- B. Inability to interview can be disqualifying if interview is condition of employment.



### Question #3

Service is returning from service obligation in the military service and has contacted his employer to make arrangement to return to work. SM informed supervisor that that he is expecting to return to the position that he left before military service obligation.

Supervisor informed Service member his position was filled by temporary replacement and at the time he did not have other RPA's within the organization except for a position with lower seniority, status, and pay. In accordance with USERRA what are the supervisor's options?

- A. He or she must be restored to any other position of lesser status and pay for which qualified, with full seniority.
- B. He or she must be restored to any other position of lesser status and seniority for which qualified, with same pay.



#### Question #4

Service member has informed his supervisor of impending military service and need to take time off (2 weeks) from civilian employer prior to his military report date. Supervisor informed the service member that any time off prior to military service will be charged to annual leave. Is the supervisor correct?

- A. Yes
- B. No

**USERRA: What Matters in  
Protecting Our Service Members'  
Employment Rights**

**Veterans' Employment & Training Service**





# Why USERRA is Important

- Nearly **1,056,000** Guard and Reserve members mobilized since September 11, 2001
- Nearly **1,024,000** have returned, with nearly **32,000** remaining on active duty as of September 19, 2022
- **Increase in USERRA complaints** received since 9/11/2001 averaging slightly under 1,000 complaints annually
- Tremendous **increase in USERRA inquiries**





# USERRA Generally

- Prohibits employment discrimination on basis of past, current, or future military obligations
- Protects reemployment rights with pre-service employers for veterans, Reserve, and National Guard members
- Prohibits retaliation



# USERRA Overview

## Uniformed Services Employment and Reemployment Rights Act (USERRA)

- Enacted in 1994, but its roots date back to 1940.
- Covers virtually all U.S. employers, regardless of size, both here and overseas



# Who is Covered?

- Anyone who performs, applies to perform, or has an obligation to perform:
  - Voluntary or involuntary service in the armed forces: **Active, Reserve and National Guard**
  - Service in the U.S. Public Health Service Commissioned Corps
  - Service in the National Disaster Medical System (NDMS), the National Language Service Corps (NLSC), and Urban Search and Rescue (USAR) **FEMA Reservists**
  - An examination to determine fitness for military service, funeral honors duty, et al



# Who is Covered, Cont'd

- **Recent Statutory Amendment (January 5, 2021) applies to National Guard members serving on certain types of State Active Duty:**
    - **14 days or more**
    - **In support of a National Emergency**
    - **In support of a Major Disaster**
- PL 116-315; 38 U.S.C. 4303(13)**





# USERRA Codified

- [38 U.S.C. 4301-4335 \(Statute\)](#)
- [20 C.F.R. 1002.1-1002.314 \(non-Federal sector regulations\)](#)
- [5 C.F.R. 353.101-353.304 \(Federal sector regulations\)](#)



# VETS USERRA Overview

- The Secretary of Labor, acting through the Veterans' Employment and Training Service (VETS) is charged with interpreting and administering the USERRA statute itself. *See generally*  
**38 U.S.C. § 4102A**



# Basic USERRA Protections

## Discrimination/Retaliation prohibited

- Initial hiring, retention in employment, reemployment, benefits of employment (seniority or non-seniority)
- Due in any part to a person's past, present or future status military service, status, or obligations
- Hostile Work Environment claims now recognized

## Benefits during service

- Health plan continuation of coverage
- Benefits after reinstatement:
  - Health plan, pension benefits, seniority



# Discrimination / Retaliation

An employer may not take any adverse action against an employee for exercise of his/her USERRA rights, or for rendering assistance in exercising those rights

38 U.S.C. 4311(a), (b); VOW Act (PL 112-56)





# Discrimination / Retaliation

**Adverse Action + Motivated by + Service or protected Activity = Primary Facie Case**

- Service or protected activity only needs to be a “motivating factor” in adverse employment action
- “A motivating factor” means that the service or protected activity was one of the reasons the employer took the action
- If the employee establishes a primary facie case, then both burdens of production and persuasion shift to the employer
- Claim fails where evidence show action would have taken place regardless of service.





# Comparative Analysis: (Discrimination, Retaliation)

1. Proximity in time between employee's military or protected activity and adverse employment action;
2. Inconsistencies between proffered reason and other actions of the employer;
3. Employer's expressed hostility towards members protected by USERRA together with knowledge of employee's military or protected activity; and
4. Disparate treatment of certain employees compared to other employees with similar work records or offenses.

*Sheehan v. Dep't. of the Navy*, 240 F.3d 1009 (Fed. Cir. 2001)



# Reinstatement

**“Any person whose absence from a position of employment is necessitated by reason of service in the uniformed services shall be entitled to the reemployment rights and benefits and other of other benefits of this chapter if. . .” five eligibility criteria are met**

**38 USC 4312**

- Returning employee must be promptly reinstated in same position of **seniority, status, and rate of pay** s/he would have attained had s/he remained continuously employed
- “Escalator Principle” dating back to 1946,

***Fishgold v. Sullivan Drydock***



# Reinstatement

- Includes seniority, status, and pay, plus wage increases, promotions, more responsibility, and pension benefits treated as no break in employment;
- Reasonable Certainty Standard: Must be reasonably certain that the employee would have attained the position and accrued the benefits.





# Reinstatement, continued

- Escalator principle may result in negative consequences in private sector (e.g., layoffs, terminations, transfers, etc.)
- Active duty does not toll contractual periods or term appointments



# USERRA Reemployment Eligibility; 5 Criteria

- For USERRA protections, the employee must:
  - Be absent from civilian employment due to service
  - Provide advance notice to employer
  - Have 5 years or less service (w/ exceptions)
  - Submit timely application for reemployment
  - Have no disqualifying discharge

**38 USC 4312**



# Reemployment - Responsibilities

- Employers may not impose additional requirements to reemployment such as requiring written orders in advance;
- Requires notice, not permission;
- Employers may ask military authorities to adjust if concerned over timing, frequency, or duration of service;
- Federal employees are expected to use influence over orders to minimize burden upon the agency.





# Reemployment-Responsibilities

- Employees may be required to provide documentation of service upon reemployment if requested and length of service is over 30 days;
- If documentation of service is not readily available, the employer cannot delay or deny reemployment.







# USERRA in the Federal Sector

- Federal agencies must notify employee before and after absences for periods of covered service of rights, obligations and benefits relating to Government employment.
- Employees must exercise all due diligence in ascertaining those rights and in seeking reemployment in a timely manner.
- See 5 C.F.R. § 353.104



## Escalator in the Federal Sector

- Protections against Reduction in Force (RIF), **5 C.F.R. § 353.209(a)**
  - If an employee's position is abolished, s/he should be reassigned to another escalator-commensurate position within the agency



## Escalator in the Federal Sector

- If it is “impossible or unreasonable” for an agency to reemploy the returning service member, the agency should first go to the Department and, if necessary, on to OPM which will offer placement assistance to identify an escalator-commensurate position. OPM will ensure an offer is made.



## Escalator in the Federal Sector

- Agency promotion plans must provide a mechanism by which absent employees can be considered.
- Agencies also have an obligation to consider employees absent for periods of covered service for “any incident or advantages of employment” (e.g., training, early retirement, et al) that they would have been entitled to if present.

See 5 C.F.R. § 353.106(c)



# Rights and Benefits While Absent

While away for uniformed service, employees:

- Are deemed to be on leave of absence or furlough;
- May elect to use accrued vacation, PTO, or similar leave, but cannot be compelled to do so;
- Are entitled to non-seniority rights/benefits available to similarly-situated employees





# Disability Provisions

- Standard is very similar to Americans with Disabilities Act of 1990 (ADA)
- For comparison – USERRA v. ADA, see: [www.eeoc.gov](http://www.eeoc.gov).
- USERRA escalator principle still applies.



## Disability Provisions, Cont'd.

- USERRA requires employer make reasonable efforts to accommodate service-incurred disability.
- If SM cannot perform duties of escalator position after employer's reasonable efforts, then should be placed in alternative position of like status, seniority, pay.



## Disability Provisions, Cont'd.

- If a position of like status, seniority and pay cannot be found within SM's ability to perform, employer may offer next best position available.
- Employer not required to create a position to accommodate if one does not exist.





## Disability Provisions, Cont'd.

- Department of Veterans Affairs (VA) provides assistive prosthetics, devices to aid in employer's accommodation efforts
- Few disabilities cannot be overcome through assistive technology
- USERRA violation to fail to make reasonable accommodation for service-incurred disability



# USERRA Health Benefits

38 U.S.C. 4317(a)(1)(a)

- Employee may elect to continue employer-sponsored coverage for 24 months upon leaving for active duty.
- Upon reemployment, health plan must be generally reinstated with no waiting period
- Similar to COBRA, but **no restriction on employer size**



# Compliance Assistance Efforts

- Outreach and education
- Briefings and technical assistance  
(Over 1M since 9/11)
- MOUs with DOJ and OSC
- Electronic complaint forms
- E-Laws USERRA Advisor
- Senior Investigators
- USERRA rights poster



# Enforcement Generally

- No statute of limitations
- VETS investigators in all States
- Most cases resolved without litigation
- Referral of State and private sector cases to DOJ
- Referral of Federal executive branch cases to OSC



# VETS Investigation Process

- VETS' USERRA investigations are complaint driven
- Must be completed w/in 90 days, but can obtain an extension from claimant
- Complaints can originate from a variety of sources
  - Technical Assistance Requests
  - ESGR Referrals
  - VETS 1010 Complaint Form



# Investigation Process Continued

- No investigations or contacts with an employer initiated absent a signed 1010
- Once 1010 received, formal investigation opened within 5 business days. (e1010's processed more rapidly)
- All documentary evidence will be obtained, and all available identified witnesses interviewed
- VETS has subpoena power; increasingly used



# Enforcement Continued

- DOJ/OSC have independent discretion whether or not to offer representation in Federal District Court, or before MSPB
- At any point during investigative process, claimant may elect to withdraw case and pursue enforcement through private counsel



# Remedies

## Remedies include:

- Reinstatement or promotion or restoration of lost seniority;
- Any lost wages and any lost benefits, such as restoring pension benefits or leave days;
- Ordering an employer to comply with USERRA;
- Liquidated damages (2x) for willful violations.







# General Considerations

- VETS may not offer representation or engage in investigation when claimant is actively represented by third party
- “Active representation” means third party obtaining evidence, contacting employer/witnesses directly in a manner that disrupts VETS’ investigation
- **Third party acting as claimant’s agent is acceptable**
- VETS cannot discuss open cases with outside parties, including VSOs, media



# General Considerations

- Always best to avoid litigation; attempt to resolve disputes at lowest level possible
- Two-way communication essential for avoiding disputes
- Education highly effective in preventing disputes



# USERRA Contact Information

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**Office of National Programs**  
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