

**U. S. DEPARTMENT OF LABOR**

**UNIFORMED SERVICES EMPLOYMENT  
AND REEMPLOYMENT RIGHTS ACT OF 1994  
(USERRA)  
ANNUAL REPORT  
TO  
CONGRESS**

**FOR FISCAL YEAR 2005**

**PREPARED BY:**

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# INTRODUCTION

The Uniformed Services Employment and Reemployment Rights Act of 1994, 38 U.S.C. 4301-4334, (USERRA) was signed into law on October 13, 1994. USERRA prohibits discrimination in employment on the basis of an individual's: prior service in the uniformed services; current obligations as a member of the uniformed services; or, intent to join the uniformed services. An employer is prohibited from discriminating against a person because of such person's attempt to enforce his or her rights under the Act. In addition, an employer may not retaliate against an individual who has testified or otherwise assisted in an investigation under the Act. USERRA also provides reemployment rights with the pre-service employer following qualifying service in the uniformed services. In general, the protected person is to be reemployed with the status, seniority, and rate of pay as if continuously employed during the period of service. USERRA applies to private employers, the Federal Government, and State and local governments. It applies to United States employers operating overseas as well.

This Report was prepared under Section 4332 of USERRA, 38 U.S.C. 4332, which requires the Secretary of Labor, in consultation with the Attorney General and the Special Counsel, to prepare and transmit an annual Report to Congress containing the following matters for the preceding fiscal year:

- (1) The number of cases reviewed by the Department of Labor under this chapter during the fiscal year for which the report is made.
- (2) The number of cases referred to the Attorney General or the Special Counsel pursuant to section 4323 or 4324, respectively, during such fiscal year.
- (3) The number of complaints filed by the Attorney General pursuant to section 4323 during such fiscal year.
- (4) The nature and status of each case reported on pursuant to paragraph (1), (2), or (3).
- (5) An indication of whether there are any apparent patterns of violation of the provisions of this chapter, together with an explanation thereof.
- (6) Recommendations for administrative or legislative action that the Secretary, the Attorney General, or the Special Counsel considers necessary for the effective implementation of this chapter, including any action that could be taken to encourage mediation, before claims are filed under this chapter, between employers and persons seeking employment or reemployment.

USERRA Annual Reports are available for Fiscal Years 1996-1999 and 2004. No reports are available for FY 2000-2003 because the reporting requirement expired in 2000. It was reinstated by Section 202 of the Veterans Benefits Improvement Act of 2004, Pub. L. No. 108-454, 118 Stat. 3598 (Dec. 10, 2004).

# UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS

## **1. CASE ACTIVITY BY DEPARTMENT OF LABOR IN FISCAL YEAR 2005**

### **Cases Opened**

In FY 2005, the Veterans' Employment and Training Service (VETS), on behalf of the Secretary of Labor, opened 1,241 new cases and continued the investigation of 229 cases opened during the previous two FYs. Cases opened decreased 15% from the number of cases (1,465) opened in FY 2004. There are three issues felt to be responsible for this decline in case activity. They include the September 2004 publication of the proposed USERRA regulations; the implementation of the Demonstration Project with The Office of Special Counsel (OSC) on Federal USERRA cases; and finally the continuing outreach to the employer community.

Of the cases opened in FY 2005, 827 (67%) involved private employers, 268 (21%) involved States or political subdivisions of States, and 146 (12%) involved Federal employers. Of FY 2005 cases, 1,054 (85%) were opened for National Guard or Reserve members, 159 (13%) for military veterans, and 28 (2%) for persons with no prior or current military membership (applicants for military service, for example).

Many of the cases opened by VETS involved multiple USERRA issues. In the 1,241 cases opened in FY 2005, 1,760 issues were identified. The nature of the issues in these cases follows (due to rounding of percentages, and multiple-issue cases, the

total does not equal 100%).

Approximately 54% of the case issues involved hiring and firing. Included were: 491 case issues (28%) of employment discrimination because of an individual's military service or obligations or because of an individual's actions to enforce the protections of USERRA; 310 case issues (18%) of refusal to reinstate or reemploy an individual following a period of military service; 57 (3%) of a layoff because of military obligations; 51 (3%) of refusal by an employer to hire an individual because of military service or obligations; and 35 (2%) of termination of a person without cause following reemployment.

The issues not involving hiring and firing of claimants included: 103 (6%) on status in employment; 113 (6%) on pay rates; 101 (6%) on denied promotions; 90 (5%) on seniority; 67 (4%) on pension benefit plans; 46 (3%) on vacation leave; 54 (3%) on failure to provide non-seniority benefits; 42 (2%) on health benefits; 22 (1%) on reasonable employer efforts to accommodate, retrain, or otherwise qualify for work a returning disabled service member; 8 (0.5%) on reasonable employer efforts to accommodate, retrain, or otherwise qualify for work a non-disabled returning service member; and 170 case issues (10%) on various other matters not among the foregoing main issue categories.

### **Cases Resolved**

In FY 2005, VETS closed 1,246 cases (5 more than were opened), of which 1,001 (80%) were closed within 90 days or less, and 1,100 (88%) were closed within 120 days or less. At the end of FY 2005, no cases remained open for a period of greater than one year.

Of the 1,246 closed cases, there were 392 (31%) USERRA claims resolved through VETS' mediation efforts. In these cases, VETS' actions helped bring about recovery of \$1,707,166 in lost wages and benefits for claimants. There were 109 (9%) closures because individuals chose to withdraw their claims during the investigation. In 424 cases (34%), VETS' investigation resulted in a determination that the claim was without merit. In 48 cases (4%), claimants were found to be not eligible (e.g., claimants lacked proper military orders, or had disqualifying discharges or other defects which precluded reaching a merit determination) for the remedies or benefits sought. In 180 cases (14%), there was administrative closure by VETS because the claimant failed to cooperate with the investigation or simultaneously pursued the claim with the assistance of a third party. The remaining 93 cases (8%) were processed for referral.

### **Subpoenas**

During FY 2005, VETS issued two subpoenas under authority provided by section 4326 of USERRA.

## **2. CASES REFERRED TO THE ATTORNEY GENERAL AND OFFICE OF SPECIAL COUNSEL**

### **Attorney General**

#### *Introduction*

On September 28, 2004, the Attorney General signed a Memorandum of Understanding (MOU) with the Department of Labor (DOL) outlining each agency's role in handling claims arising under USERRA. The MOU confirmed the Department of Justice's (DOJ) and DOL's longstanding commitment to ensuring that service members' USERRA rights are protected. The MOU modified the procedures regarding the conduct of USERRA investigations and referrals, speeding the processing of many USERRA referrals and allowing for prompt resolution of complaints. Over the past year, DOJ, VETS, and the DOL Office of the Solicitor have worked cooperatively to meet the MOU's goals and will continue in FY 2006 to develop new ways to improve the process.

#### *Employment Litigation Section*

In the MOU, the Attorney General assigned responsibility for handling USERRA referrals from the Civil Division to the Civil Rights Division's Employment Litigation Section (ELS). The ELS is made up of approximately sixty attorneys, paralegals, and support staff. ELS's primary responsibility is to enforce provisions of Title VII of the Civil Rights Act of 1964 against state and local government employers. Over the past forty years, ELS attorneys have investigated, litigated and resolved some of the most complicated employment discrimination cases in the country. This experience has made ELS

well-suited for its new USERRA responsibilities.

Since the signing of the MOU, members of ELS's management staff have regularly participated in monthly USERRA conference calls with the National Office of the Solicitor and the Regional Solicitors' (RSOL) offices. These monthly teleconferences allow both agencies to discuss developing USERRA issues, and provide ELS the opportunity to share any issues it may be experiencing in processing USERRA referrals. In addition, DOJ has taken measures to ensure attorneys handling USERRA referrals receive training in USERRA jurisprudence. Each ELS attorney was required to attend a formal training program in March 2005, which included live presentations by experienced USERRA attorneys for DOJ's Civil Division, U.S. Attorney offices, and DOL's Office of the Solicitor. Each attorney joining ELS receives USERRA training materials and is encouraged to view a video recording of the previous training session. DOJ periodically provides legal education to ELS staff to keep the office updated on USERRA developments.

#### *USERRA Complaint Processing*

ELS has sought to ensure that each USERRA referral receives careful attention and that each referral is processed as expeditiously as possible, with the appropriate result for the veteran. USERRA complaints are initially filed with DOL. DOL investigates such complaints, makes determinations as to whether they have merit and attempts to voluntarily resolve those complaints it determines have merit. If DOL does not resolve a complaint against

a state or private employer, upon the claimant's request, VETS and the RSOL will refer the complaint to the Attorney General. Each referral includes: the VETS investigative file; a memorandum analyzing the case and providing a recommendation, based upon the facts and the law, as to whether representation should be provided or declined; and the RSOL's analysis and recommendation.

Upon receipt of an unresolved USERRA complaint from the DOL, ELS reviews DOL's investigative file accompanying the complaint and makes a determination as to whether to extend representation to the complainant. Under USERRA, DOJ has authority to appear on behalf of a claimant in a suit filed in federal district court. If DOL is reasonably satisfied that the claimant is entitled to the rights or benefits being sought, DOJ, in coordination with RSOL, represents the claimant and attempts to resolve the matter, including instituting litigation if necessary. If, after an independent review of the file and DOL's recommendation, DOJ determines the case lacks merit, DOJ informs the claimant that the Attorney General declines representation and that the claimant has the right to proceed with private counsel. After completing its review of the file or after final resolution of a complaint, DOJ returns the file to RSOL for appropriate action.

#### *USERRA Complaints and Consent Decrees*

In FY 2005 DOL referred 123 USERRA complaints to DOJ, more than double the number of complaints referred to DOJ in FY 2004. ELS processed 119 of these complaints and referred four to United States Attorneys offices (USAO) for

investigation. During FY 2005, DOJ filed 7 (6 by ELS and 1 by USAO) complaints in federal court and entered into three consent decrees. USAO closed one case referred by DOJ in a previous fiscal year. Eleven cases remained under USAO review at the end of FY 2005, including eight cases referred in previous fiscal years.

ELS attorneys are currently litigating two cases in federal district court, *Ortiz v. International Ethical Laboratories, Inc. (IEL)* filed in Puerto Rico and *Jennifer A. Veryzer v. Mills & Murphy Software Systems, Inc.* filed in the Middle District of Florida. The *Colon* complaint alleges that IEL violated USERRA by failing to reemploy Mr. Colon Ortiz upon his return from military service and by discharging him. The *Veryzer* complaint alleges that Mills & Murphy violated USERRA by terminating Ms. Veryzer's employment due to her active military service in the Georgia Air National Guard and by failing to reemploy her after completion of her active military service. In addition, ELS attorneys are assisting the USAO in the Western District of Pennsylvania with the case of *Michael McLaughlin v. Newark Paper Board*, filed by that office in October 2004. The *McLaughlin* complaint alleges that Newark Paper Board violated USERRA when it refused to reemploy Mr. McLaughlin upon his return from annual two week reserve duty.

In FY 2006, DOJ will continue to work with DOL to ensure referrals are promptly and carefully processed and that each meritorious referral is resolved to the satisfaction of the veteran and the government. While DOJ will continue to aggressively pursue litigation when

warranted, it seeks to resolve meritorious referrals without litigation whenever practicable. Avoidance of litigation allows the veteran to receive relief without having to endure often lengthy delays inherent in litigation, and provides DOJ the opportunity to leverage its resources to assist a greater number of claimants.

Of the 123 cases received from DOL, ELS declined representation in seventy-six based upon DOL's recommendation that they lacked merit and the Civil Rights Division's independent analysis of the merits of the case.

The cases referred to the Civil Rights Division involved a number of USERRA issues. Approximately 42% (52) of these cases involved allegations of termination, another approximately 23% (28) of these cases involved allegations of improper reinstatement, while approximately 15% (19) of these cases involved allegations of various forms of discrimination such as failure to promote, failure to hire, and improper discipline. The remaining approximately 20% (24) of these cases involved a variety of USERRA issues, including loss of pay, loss or reduction in benefits or leave, and loss of seniority. There was some overlap in these cases because many of the cases involved both allegations of discrimination in addition to the underlying adverse action. In those instances, ELS staff placed the case in the most appropriate category.

#### **Office of Special Counsel**

Section 4324(a)(1) of the USERRA, 38

U.S.C. 4324(a)(1), provides that, upon the claimant's request, VETS will refer to the Office of Special Counsel (OSC) cases against Federal executive branch employers that are not resolved through VETS' efforts. Each VETS referral to OSC includes: the VETS investigative file; a memorandum analyzing the case and providing a recommendation, based upon the facts and the law, as to whether representation should be provided or declined; and the RSOL's analysis and recommendation.

Based on a review of the record and the DOL Recommendation, the OSC makes an independent determination as to the merits of each case. Additionally, OSC may obtain additional information from the claimant and the involved agency. If reasonably satisfied that the claimant is entitled to the remedies or benefits sought in accordance with USERRA, the OSC will provide representation to the claimant and attempt to resolve the matter, through litigation if necessary. If, based on an independent review of the record and DOL's recommendation, the OSC determines not to go forward with the case, the claimant is advised of that determination and of his or her right to file a USERRA appeal against the involved agency with the Merit Systems Protection Board (MSPB).

*Matters Referred to the Special Counsel pursuant to 38 U.S.C. § 4324*

*Number of Referrals Received by OSC*

At the start of FY 2005, OSC had 12

USERRA referrals that were pending (i.e., carried over from FY 2004). OSC received 30 USERRA referrals from the U.S. Department of Labor in fiscal year 2005.

*Disposition of Referrals*

OSC processed (i.e., reviewed, conducted supplemental investigation, and resolved, closed, or designated for MSPB litigation) 36 referrals during the fiscal year. Six USERRA referrals were pending at the end of the FY 2005.

OSC declined representation in 28 referrals. The Special Counsel obtained corrective action in six referrals including the successful resolution of three matters that were pending before the MSPB. OSC was unable to settle three meritorious claims and designated those matters for litigation before the MSPB. One of those three matters was filed with the MSPB in FY 2005.

OSC processed 24 of the 30 cases received in FY 2005. Those cases were processed in an average of 92 days.

*Nature of Referrals Received*

The 30 referrals in FY 2005 were comprised of 18 discrimination cases (60% of total referrals), 11 reemployment cases including two Active Guard Reserve matters (37%), and one retaliation case (3%).



<b>USERRA Matters Referred to the Special Counsel pursuant to 38 U.S.C. § 4324</b>			
	<b>FY03</b>	<b>FY04</b>	<b>FY05</b>
Pending referrals carried over from previous fiscal year	8	4	12
Referrals received from DOL during fiscal year	7	14	30
Pending Referrals closed	11	6	36
Pending referrals at the end of the fiscal year	4	12	6
Closed cases where corrective action was obtained (including corrective actions obtained in matters referred to litigation)	3	1	6
Closed cases where no corrective action was obtained	8	5	25
Closed cases designated for litigation	0	0	5
Litigation closed; no corrective action obtained	n/a	n/a	n/a
Litigation closed; corrective action obtained	n/a	n/a	3
Litigation pending	n/a	n/a	2

*Special Counsel's Recommendation for Administrative Action*

The Special Counsel has no proposal for administrative action regarding cases investigated by VETS and referred to OSC pursuant to 38 U.S.C. § 4324. OSC participates in monthly telephone conference meetings with U.S. Department of Labor's Office of the Solicitor and VETS, along with those other agencies having administrative or enforcement

responsibilities under USERRA, to identify, discuss, and address issues relating to section 4324 referrals. In addition, OSC meets regularly with VETS staff to discuss relevant issues concerning the section 4324 referrals and issues pertaining to case transfers effected under the ongoing pilot demonstration project.

**3. TRENDS**

The most recent report to Congress on USERRA covered fiscal year 2004. Since the terrorist attacks of September 11, 2001, the subsequent mobilization of the components of the National Guard and Reserve forces have resulted in significant increases in employment-related issues. While the aggregate number of USERRA complaints received since September 11, 2001, is higher than the number of similar complaints received in the last comparable mobilization during Operation Desert Shield/Desert Storm, the number of complaints received as a percentage of the number of personnel mobilized for military duty since September 11, 2001, is approximately thirty-three (33) percent lower than the percentage of complaints received during Operation Desert Storm. During Operation Desert Storm, for example, some 265,000 Guard members and Reservists were mobilized and VETS received a USERRA-like complaint from one (1) out of every fifty-four (54) demobilized reserve component members. As of September 30, 2005, however, more than 518,000 reserve component members had been mobilized since September 2001, but only one (1) in every 81 demobilized reserve component members filed a complaint related to employment. This decrease may be attributed in part to the

enactment of USERRA in 1994; the compliance assistance efforts of DOL and its USERRA partners; and the overwhelming support of the employer community for those employees who have been called to active duty.

In FY 2004 the average age for all cases closed was 53 days. In FY 2005, the average age for all cases closed was 59 days, an increase of 6 days per case. These numbers are significant, because despite an approximate 13 percent decrease in the number of USERRA cases filed in 2005, the significant increase in the lengths of deployments have resulted in cases that are more complicated in nature and take more time to investigate and resolve. The Department considers the fact that the average age for case closures has been kept below 60 days while conducting more complicated investigations with no corresponding increase in staff to be attributable in part to USERRA outreach efforts conducted by VETS, and training in the law and other Federal employment laws and regulations provided to VETS' staff at the National Veterans' Training Institute.

#### **4. EFFORTS TO IMPROVE AWARENESS OF USERRA**

##### **Outreach and Compliance Assistance**

VETS engages in a wide variety of compliance assistance activities in order to fulfill its statutory obligation to provide educational outreach under USERRA. The ongoing mobilization of Reserve component forces that began shortly after the attacks of September 11, 2001, has created additional challenges for VETS' compliance assistance outreach efforts. With over 518,000

members of the Guard and Reserve mobilized since September 2001, there has been a significant increase in requests for USERRA information from reservists, their employers, the media, and the general public.

##### *VETS Website and USERRA Advisor*

The VETS homepage and an interactive online USERRA Advisor provide general information on VETS and USERRA and contain links to a wide variety of compliance information. The information contained on the website is easy to access. There is an interactive question-and-answer component to the USERRA Advisor itself, designed to answer specific questions related to employer and employee rights and responsibilities under USERRA. The Advisor also contains an online complaint form (VETS Form 1010) that potential claimants can complete online, print, sign, and then submit to the local VETS office in the State in which the employer is located. In July 2005, VETS implemented an electronic complaint filing component (E-1010 filing system). This E-1010 System allows claimants to file their complaints electronically. There were 114 USERRA complaints filed utilizing this system in FY 2005. The USERRA Advisor can be viewed at <http://www.dol.gov/elaws/userra.htm>, and the VETS website is at <http://www.dol.gov/vets>.

##### *Telephone and Email Advice*

The VETS website and the USERRA Advisor contain instructions on how to contact VETS via e-mail or telephone in the event that a veteran, potential claimant, business owner, human resources staff

member, or member of the general public has questions which cannot be answered by the interactive Advisor. E-mail and telephone inquiries are directed to the appropriate VETS staff member who can respond to each particular inquiry.

USERRA information is also provided on DOL's toll-free help line (1-866-4-USA-DOL). Trained staff answer basic questions and refer callers to VETS staff or to the USERRA Advisor for additional information. This service has been available since September 2001, and to date, has accounted for an average of 1 percent of the total calls to DOL's toll-free line.

#### *Seminars, Workshops and Briefings*

VETS conducts an aggressive outreach program consisting of speaking engagements, seminars, and workshops. VETS staff regularly provides briefings to National Guard and Reserve units, individuals, employers, legal offices, and professional and business associations. VETS National Office professional staff members have conducted a number of briefings before Federal agencies and private groups during FY 2005, including the American Bar Association, Society of Professional Benefits Administrators, Fortune 500 Conference, and others. In FY 2005, for example, VETS provided over 10,000 technical assistance sessions for members of the National Guard, Reservists, members of the media, employers, and others, which included briefings to more than 104,500 people. (From September 11, 2001, to the end of FY 2005, VETS has provided technical assistance to more than 301,100 individuals of all affiliations.)

VETS continues to enjoy a close working relationship with the National Committee for Employer Support of the Guard and Reserve (ESGR), which operates under the aegis of the Department of Defense. VETS has and will continue to engage in a constructive partnership with ESGR, to conduct outreach briefings, seminars, and to provide general information on USERRA to a wide range of employers, associations, Federal and State agencies, employees, and active duty, National Guard, and Reserve units. VETS finalized a MOU with ESGR in August 2005.

#### *Training and Educational Materials*

VETS use of training and educational materials, as well as its outreach efforts, expanded during FY 2005, and it is anticipated that such efforts will continue to grow. Now that the final USERRA regulations have been published, VETS has commenced efforts to issue a USERRA Handbook which will provide additional guidance to parties seeking to comply with the final regulations. VETS has also issued a number of fact sheets, frequently asked questions (FAQs) with answers, and informational brochures containing basic facts regarding USERRA. These materials are subject to periodic updates as required by changes in the law and other developments.

#### **USERRA Regulations**

On December 19, 2005, the Department published, for the first time, final regulations implementing USERRA for States, local governments and private employers, written in a "plain English" easy to read question and answer format. The Final Regulation

was effective January 18, 2006, and can be found at 70 Fed. Reg. 75,245-75,313 and on the VETS website at <http://www.dol.gov/vets/regs/fedreg/final/2005023961.htm>.

The authority to publish regulations for USERRA has existed since the law was signed in 1994. Previous administrations decided that publication of regulations was unnecessary. The current administration, seeing the need for greater clarification and awareness of the protections USERRA affords, early on decided to promulgate implementing regulations. That decision was validated by the current mobilization of Guard and Reserve forces in the war on terrorism. It was determined that a clear and comprehensive rule in support of the Department's long-standing policy of interpreting USERRA in a way most favorable to service members and veterans would be given the full weight of law.

The Department's Notice of Proposed Rulemaking (NPRM) for USERRA was published in September 2004. The final rule is a product of a lengthy deliberative process, which included a public comment period that resulted in approximately 80 timely comments (raising over 300 issues) from a wide variety of sources including individual employers, employees, employer associations, service members and service member organizations, human resource specialists, health and pension plan administrators, and others. A comprehensive review of these comments, which appears in the preamble to the final rule, resulted in several changes that were included in the final USERRA regulations.

## **5. LEGISLATIVE CHANGES THAT REQUIRED ADMINISTRATIVE ACTION IN FY2005**

The Veterans Benefits Improvement Act of 2004, Pub. L. No. 108-454 (December 10, 2004) (VBIA), made four changes to USERRA that resulted in implementing action during fiscal year 2005: an employer notice requirement; an extension of USERRA's health plan continuation requirements; an OSC demonstration project and the reinstatement of the USERRA Annual Report to Congress.

### **Employer Notice Requirement**

The VBIA added a new section to USERRA, 38 U.S.C. 4334, which requires employers to provide to persons entitled to rights and benefits under USERRA a notice of USERRA rights, benefits, and obligations. This requirement became effective on March 10, 2005. The Department of Labor published an interim final rule containing the text of the USERRA Poster on March 10, 2005 and made it available on the VETS website in English and Spanish language versions, for the use of employers in meeting the notice requirement. The final approved version of the USERRA Poster, effective January 18, 2006, was published in the Federal Register on December 19, 2005. It may be found on the VETS website at <http://www.dol.gov/vets/regs/fedreg/final/2005023960.htm>. DOL also prepared and published a *Federal* USERRA Rights Poster.

### **Extension of Health Care Coverage**

VBIA amended Section 4317(a)(1)(A), 38

U.S.C. § 4317(a)(1)(A), to extend from 18 months to 24 months the maximum period that an employee may elect to continue coverage under his or her employer’s health plan when mobilized for active duty in the uniformed services. The amendment is effective for elections made on or after the December 10, 2004, enactment of VBIA. This change was made to accommodate mobilizations of 24-months’ duration. The Department has highlighted this change in its outreach and compliance assistance activities.

**Demonstration Project for Referral of USERRA Claims Against Federal Agencies to the Office of Special Counsel**

In late 2004, Congress further expanded OSC’s role in enforcing USERRA and protecting the employment rights of federal employees and applicants. Pursuant to a demonstration project established by section 204 of the Veterans Benefits Improvement Act of 2004 (VBIA), P.L. 108-454, OSC has the exclusive authority to investigate federal sector USERRA claims brought from February 8, 2005 through September 30, 2007 by persons whose social security number ends in an odd-numbered digit.

During the project period, OSC also receives and investigates all federal sector USERRA claims containing a related prohibited personnel practice allegation over which OSC has jurisdiction regardless of the person’s social security number (so-called “mixed claims”). Pursuant to section 204(d)(1) of VBIA, OSC shall administer the demonstration project and DOL shall cooperate with OSC in carrying out the demonstration project.

In order to inform service members and federal agencies of OSC’s new role in enforcing USERRA, the USERRA Unit substantially modified OSC’s web page.

The changes describe OSC’s role under the demonstration project and explain the manner in which certain federal claimants may seek OSC’s assistance for alleged violation of their USERRA rights. To make the claim filing process easier and speedier for service members, the USERRA Unit created a new claim form solely for filing USERRA claims with OSC. Form OSC-14 “Complaint of Possible Violation of USERRA” has been approved by the U.S. Office of Management and Budget and has been in use since March 2005. The unit also maintains telephonic and web-based “hotlines” for answering USERRA-related questions from the public and private sectors.

<b>Summary of USERRA Demonstration Project Activity by OSC’s USERRA Unit</b>			
			<b>FY05</b>
Pending cases carried over from previous fiscal year			0
Cases opened			112
Cases closed			57
Cases pending at the end of the fiscal year			55
Closed cases where corrective action was obtained			12
Closed cases where no corrective action was obtained			43
Closed cases referred for litigation			0

### **Annual Report to Congress**

The VBIA reinstated the requirement that the Secretary of Labor, in consultation with the Attorney General and the Special Counsel, prepare and transmit a USERRA Annual Report to Congress. This is the second Report prepared under this reinstated reporting requirement.

### **[6. LEGISLATIVE ACTION RECOMMENDATIONS**

#### **Veterans' Employment and Training Service Recommendations for Legislative Action**

VETS does not have any legislative recommendations at this time.

#### **Special Counsel's Recommendation for Legislative Action**

USERRA has a liquidated damages provision for non-federal cases. USERRA, however, does not authorize OSC to seek disciplinary action against Federal employees who knowingly violate USERRA. Accordingly, the Special Counsel believes that the law should be amended so that OSC may seek disciplinary action from the MSPB against Federal employees for willful violations of the law. Specifically, the Special Counsel proposes legislation that would mirror the provisions of 5 U.S.C. § 1215 but which would apply to all federal sector employers.

#### **Additional Information Regarding Recent Developments That May Have Potential**

### **Impact on USERRA Enforcement: Garrett v. Circuit City**

Congress should be aware of the potential impact of the recent decision by the Fifth Circuit Court of Appeals in which the Court found that, under the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* (FAA), an arbitration agreement between an employer and employee precluded the employee from filing suit against the employer in U.S. District Court under section 4323(b)(3) of USERRA. *Garrett v. Circuit City*, 449 F.3d 672 (5th Cir. 2006), *overruling Garrett v. Circuit City*, 338 F. Supp.2d 717 (N.D. Tex. 2004).

#### **Background Regarding the Decision by the Fifth Circuit**

Under the FAA, once a person has entered into a valid arbitration agreement, that person is held to arbitration "unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." *Garrett*, 449 F.3d at 674 (*quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626-27 (1985)). The District Court in *Garrett* found that section 4302(b) of USERRA, which provides that USERRA supersedes any agreement that "reduces, limits, or eliminates in any manner any right or benefit provided by [USERRA], including the establishment of additional prerequisites to the exercise of any such right or the receipt of any such benefit," evinced such congressional intent, relying in part on the legislative history of that section:

[section 4302(b)] would reaffirm that additional resort to mechanisms such as grievance procedures or

arbitration or similar administrative appeals is not required. . . It is the Committee's intent that, even if a person protected under the Act resorts to arbitration, any arbitration decision shall not be binding as a matter of law. . . H.R. Rep. No. 103-65, Pt. 1, at 20 (1993).

*Garrett*, 338 F. Supp.2d at 721-22.

The Fifth Circuit did not find either section 4302(b) or the above legislative history convincing evidence of a Congressional intent. *See Garrett*, 449 F.3d at 680.

#### VETS Planned Actions in Response to the Fifth Circuit Decision

VETS, after consultation with the Office of the Solicitor of Labor and the Department of Justice Civil Rights Division, believes that the decision of the Fifth Circuit does not infringe on VETS' statutory responsibility to investigate and resolve USERRA complaints in cases where employees have entered into arbitration agreements, nor does the decision preclude the Department of Justice from providing representation to USERRA complainants in such cases. *See Garrett*, 449 F.3d at 681. Accordingly, VETS intends to continue to accept, investigate, and assist in the resolution of USERRA complaints in cases where there is an arbitration agreement. In such cases, VETS will work with the Office of the Solicitor of Labor and the Department of Justice to assure that USERRA rights and remedies are protected, and that our service members have access to all available means of protecting their USERRA entitlements as Congress intended.