

Service Member and Veteran Employment Protections for a New Era of Global Conflict

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July 15, 2024

In the lead-up to America's entry into World War II, as the United States watched the Battle of Britain unfold across the Atlantic, Congress established the first reemployment protections for military members with the Selective Training and Service Act of 1940. Those protections were modified several times during the early Cold War years, until 1974, when Congress amended and recodified them in the Veterans Reemployment Rights Act. In the post-Vietnam War era, the military underwent a fundamental realignment when today's all-volunteer force replaced the longstanding practice of conscription. Responding to this sea change, in 1994 Congress enacted the Uniformed Service Employment and Reemployment Rights Act.

Looking at this history, a trend emerges: Congress has revisited veteran employment protections at major geopolitical junctures. USERRA was born in the afterglow of the Soviet Union's collapse, when America's military dominance was on full display. As USERRA marks its 30th birthday this year, the state of America's national security is markedly different than in 1994, defined in large part by 9/11 and the resultant Global War on Terrorism. Today's military depends more on Reserve and National Guard forces, which have deployed more frequently and in greater numbers than ever before. These circumstances, along with an unprecedented recruitment crisis, have brought to the forefront the role of parttime military personnel with civilian careers. Altogether, the time is ripe for Congress to take a hard, comprehensive look at USERRA and address weaknesses in the law that have become apparent since its passage three decades ago.

Lawmakers' attention should focus first on the most glaring weakness of USERRA—its enforcement structure, which is split among three federal agencies: the U.S. Department of Justice's Civil Rights Division, the U.S. Department of Labor's Veterans' Employment and Training Service, and, in the case of federal employees, the U.S. Office of Special Counsel. VETS is charged with investigating and conciliating USERRA complaints, whereas the DOJ and OSC are responsible for litigating USERRA claims on behalf of the federal government. A fourth federal agency, the U.S. Department of Defense, is also naturally involved with USERRA issues.

The practical effect of USERRA's divided enforcement authority has been a lack of official guidance interpreting the law as well as a lack of coordinated outreach efforts aimed at increasing the law's visibility to the public. As a result, USERRA often flies under the radar of both employers and employees, and when it is detected, the extent of its protections is not always readily understandable. This leaves employers uncertain of their obligations toward their military-affiliated employees and employees ignorant of the scope of their

rights. In 2020, the U.S. Equal Employment Opportunity Commission, which does not enforce USERRA, stepped into the void, issuing several technical assistance documents addressing the application of the Americans with Disabilities Act and USERRA to disabled veterans and their employers. The release of this guidance, which was limited to addressing USERRA's application in the context of disability, highlighted the absence of official guidance in other areas.

Comparing USERRA enforcement with the employment anti-discrimination enforcement by the EEOC is illustrative. In 2022, VETS completed 1,049 compliance assistance events, which aided more than 4,000 individuals nationwide. In contrast, the EEOC held 3,302 outreach and training events, which provided more than 225,906 individuals nationwide with information about employment discrimination and their rights and responsibilities in the workplace. In 2022, VETS received 1,009 complaints whereas the EEOC received 73,485 complaints. In 2022, the DOJ filed two USERRA lawsuits while the EEOC filed 91 discrimination actions. Over the last 20 years, the DOJ has filed around 115 USERRA lawsuits whereas the EEOC has filed well more than 4,000 cases.

On top of fixing USERRA's enforcement structure, Congress should consider methods to incentivize voluntary compliance with the statute's requirements. When enacting Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination based on race and other protected characteristics, Congress intended voluntary compliance, not government and private enforcement action, to serve as the primary means of achieving the goal of equal employment opportunity. One way to offset the burdens that frequent and prolonged military leaves of absence impose on business efficiency and production is to provide a tax credit for losses or expenses directly caused by employees' military obligations and reemployment. While incentivizing voluntary compliance with USERRA, tax relief would also promote employment opportunities for service members.

Underscoring that USERRA enjoys bipartisan support, the act has been amended several times since 1994, most recently to extend protections to National Guard members performing duty under state authority. There are other proposed amendments pending now. However, to ensure the law continues to advance its primary objectives of encouraging noncareer military service and minimizing employment disruptions for both employees and employers, Congress must first grapple with the central problems that limit USERRA's effectiveness: its enforcement structure and lack of provisions supporting voluntary compliance.

In the country's current National Defense Strategy, which highlights the turbulent geopolitical moment, Secretary of Defense Lloyd Austin wrote that the Department of Defense "owes it to our All-Volunteer Force and the American people to provide a clear picture of the challenges we expect to face in the crucial years ahead—and we owe them a clear and rigorous strategy for advancing our defense and security goals." The same can be said of what the federal government owes the American public with veterans' employment

protections: a clear law with a rigorous strategy for ensuring broad understanding and compliance.

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