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14. ABSTRACT
The nation's Reserve forces underwent a transition in the 20th century from a strategic Reserve to an operational Reserve. In order to ensure the Reserve Component can sustain the increased demands placed upon it to augment and reinforce the Active Component, Congress has enacted multiple laws throughout the years to provide employment and reemployment rights protections to Reservists during times of military mobilization. This paper explores whether the current construct of those laws, USERRA, is adequately aligned with the utilization of the operational Reserve force and looks at currently perceived issues with USERRA and proposals to mitigate those issues in an attempt to identify areas or methods of improvement. This paper concludes that USERRA is adequately written to serve an operational Reserve force. USERRA violations do not stem from how the laws are written or the employment of the Reserve Component, but from a lack of knowledge by the Reservist, employer, or both. USERRA violation cases can be reduced through education initiatives targeting both Reservists and their employers. These initiatives can be accomplished through coordinated efforts of the Department of Defense and the Employer Support of the Guard and Reserve (ESGR) programs.

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TITLE:
EVALUATING THE UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT THROUGH THE LENS OF AN OPERATIONAL RESERVE FORCE

SUBMITTED IN PARTIAL FULFILLMENT
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EXECUTIVE SUMMARY

Title: Evaluating the Uniformed Services Employment and Reemployment Rights Act Through the Lens of an Operational Reserve Force

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Thesis: The Uniformed Services Employment and Reemployment Rights Act (USERRA) is adequately structured to support the nation's operational Reserve forces with anti-discrimination and reemployment protections but could benefit from increased awareness and understanding by service members and employers.

Discussion: The nation's Reserve forces underwent a transition in the 20th century from a strategic Reserve to an operational Reserve. In order to ensure the Reserve Component can sustain the increased demands placed upon it to augment and reinforce the Active Component, Congress has enacted multiple laws throughout the years to provide employment and reemployment rights protections to Reservists during times of military mobilization. This paper explores whether the current construct of those laws, USERRA, is adequately aligned with the utilization of the operational Reserve force and looks at currently perceived issues with USERRA and proposals to mitigate those issues in an attempt to identify areas or methods of improvement.

Conclusion: USERRA is adequately written to serve an operational Reserve force. USERRA violations do not stem from how the laws are written or the employment of the Reserve Component, but from a lack of knowledge by the Reservist, employer, or both. USERRA violation cases can be reduced through education initiatives targeting both Reservists and their employers. These initiatives can be accomplished through coordinated efforts of the Department of Defense and the Employer Support of the Guard and Reserve (ESGR) programs.

DISCLAIMER

THE OPINIONS AND CONCLUSIONS EXPRESSED HEREIN ARE THOSE OF THE INDIVIDUAL STUDENT AUTHOR AND DO NOT NECESSARILY REPRESENT THE VIEWS OF EITHER THE MARINE CORPS COMMAND AND STAFF COLLEGE OR ANY OTHER GOVERNMENTAL AGENCY. REFERENCES TO THIS STUDY SHOULD INCLUDE THE FOREGOING STATEMENT.

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PREFACE

As an Active Reserve Marine, I am charged with acting as an advocate for the Reserve force and ensuring those Reservists in my command are properly trained, equipped, and supported to augment and reinforce their active duty counterparts. For many years I have known the Employer Support of the Guard and Reserve existed, and that there are laws governing the relationship between Reservists and their civilian employers, but my knowledge of the subject was very shallow. I chose to write this paper about the Uniformed Services Employment and Reemployment Rights Act (USERRA), its sufficiency for the operational Reserves, and areas for possible improvement because I recognized that I was deficient in knowledge of a very important piece of legislation that can have a heavy influence on the careers of my Marines.

My primary method of research for this paper was to analyze the US Code, reports to Congress, law reviews, and other articles available online to familiarize myself with USERRA, its history, and issues of implementation over the last few decades. I also conducted interviews with representatives from Marine Forces Reserve, Employer Support of the Guard and Reserve, and the United States Department of Labor. These interviews provided valuable insight that challenged what I thought I knew about USERRA and helped me to form my thesis for this paper. The representatives I spoke with offered up previously undiscovered resources, which changed the direction of my research, resulting in a more complete understanding of USERRA and the interactions among all the entities involved before, during, and after a USERRA claim.

This paper analyzes the transformation of the Reserve forces from their strategic roots to their modern-day operational employment, provides an understanding of the laws and requirements contained within USERRA, and gives insight into some controversial issues regarding USERRA's implementation. Most importantly, I discuss the importance of USERRA education for employers and Reservists in order to prevent employment disputes.

I'd like to acknowledge and thank Col Sean Riddell, USMCR, for his mentorship, guidance, and the inspiration to take on this topic without a law background. I'd also like to thank Samuel Wright, Brian LeBlanc, and Marshall McDonald for taking the time to talk at length and share their extensive comprehension of USERRA. Lastly, I owe a big debt of gratitude to Dr. Jill Goldenziel for her patience and guidance throughout my research and writing process.

INTRODUCTION AND BACKGROUND

Military Reservists were once thought of as "weekend warriors" or perhaps a lesser version of their active duty counterparts. The common stereotype was of active service members as the varsity team and Reservists as the JV team. No longer. Today the lines between active and reserve have been blurred and Reservists are a vital part of our nation's security. The Reserve Component (RC) exist to augment and reinforce Active Component (AC) counterparts with well-trained, qualified, and equipped personnel to meet the defense of the nation at home and abroad.[1]

The RC faces many challenges in accomplishing its mission and is generally only afforded one weekend a month (regular drills) and two weeks a year (annual training exercises) to train Reservists. Even with the minimal training time available, Reservists are expected to execute their duties, both physically and mentally, on par with the AC. However, one thing often forgotten is that when a Reservist activates they leave behind an entire civilian life, outside the military, that they will need upon their return to support themselves and their families. In order to help alleviate worries of leaving their place of civilian employment, and to provide protections which ensure Reservists will be able to return to their jobs after training periods or active duty mobilization, Congress enacted the Uniformed Services Employment and Reemployment Rights Act (USERRA) of 1994. The laws governing the rights and responsibilities of civilian employers and Reserve service members are historically designed around the concept of a strategic Reserve force. However, at the time USERRA was authored, the RC had recently entered a transition to an operational Reserve. In the 21st century, Reserve units, detachments, and individual augments are activated and deployed more frequently than ever before. The high operational tempo combined with demanding training requirements often results in increased strain to the relationship of the service member to the employer. USERRA is not a perfect law but is a fairly comprehensive piece of legislation that has been adapted over the last two decades to support the operational Reserve, provide standards to the civilian employers enduring the

impacts of military related absences, and provide a framework for employment dispute resolution. USERRA's effectiveness is not limited by its content, but by an overall lack of knowledge and understanding of the laws within and the support resources available to assist Reserve service members and their civilian employers.

RESERVE COMPONENT HISTORY

The RC has played a critical role in defense since the founding of the United States. From the militias of America's Revolutionary and Civil Wars and throughout every major military conflict of US involvement throughout the 20th century, excluding the Vietnam War, members of the RC have left their civilian lives behind and taken up arms in defense of the nation.[2] Reservists were called to active duty en masse and heavily relied on for service in both World Wars, greatly bolstering the numbers of American fighting forces. Once their purpose was served they were placed back on the shelf to await the next conflict. Citizen-Soldiers did not have to wait long to be dusted off and put to task. The Korean War in 1951 and a Cold War show of force activation in 1961 of 200,000 RC Members demonstrated the US Military's continued reliance on Reserve personnel.[3] In this way, the RC was used as a strategic reserve force, only being activated to augment the AC during major military conflicts.[4]

It was not until the end of the Cold War that the RC began to emerge as an Operational Reserve force.[5] As with kinetic conflicts, the Cold War concluded with a major reduction of military personnel power within the United States AC and an increase in dependence on the RC. In 1987 the US military totaled 2.17 million, by the year 2000 its personnel strength had dwindled to 1.37 million, roughly 2/3 of its former size. [6] Continuing into the 1990s, large numbers of National Guard and Reserve were federalized or activated for Operations against Iraq in Kuwait. Since 9/11, hundreds of thousands of RC service members have been called to serve overseas in Iraq and Afghanistan.[7] Today, RC personnel serve all over the world alongside their AC counterparts conducting security cooperation missions, anti-terrorism and peacekeeping

operations, humanitarian assistance and disaster relief. They stand ready to answer the call for major combat operations should the need arise. RC members are no longer the "break glass in case of war" force of the previous centuries, they are written into operations plans and train alongside the AC to ensure they maintain a high state of combat readiness. The Department of Defense (DOD) has made AC/RC integration a top priority, increasing the operational and training tempos and demanding longer deployments of RC members. In its endeavor to achieve a balanced total force the DOD has turned what was once a strategic Reserve force into an operational Reserve, placing increased demand and strain on both service members and their civilian employers.

MARINE CORPS TOTAL FORCE INTEGRATION / OPERATIONAL RESERVE

The Total Force Policy of the DOD is not something new. As a defined concept it was developed following the Vietnam War, a conflict with very little RC involvement.[8] The complications of a shrinking defense budget, increasing manpower expenses, and pressure to end the draft forced lawmakers to consider ways to meet existing and future military obligations with fewer AC personnel, essentially do more with less. In March of 1969 President Nixon formed a working group tasked to evaluate the possibility of transitioning the US military to an all-volunteer force. Approximately one year later, the chairman of the working group, former Secretary of Defense Thomas Gates, confirmed that an all-volunteer force was achievable and sustainable.[9] In August of 1970, then Secretary of Defense Melvin Laird coined the phrase "Total Force," when he released the following statement:

> Within the Department of Defense, these economies will require reductions in overall strengths and capabilities of the active forces, and increased reliance on the combat and combat support units of the Guard and Reserves…. Emphasis will be given to concurrent considerations of the total forces, active and reserve, to determine the most advantageous mix to support national strategy and meet the threat. A total force concept will be applied in all aspects of planning, programming, manning, equipping and employing Guard and Reserve forces.[10]

Three years later, in August 1973, Secretary of Defense James Schlesinger turned Laird's Total Force concept into a reality by implementing it as an official administration policy.[11] Since that time, the idea of a Total Force has been fully embraced by the DOD and the AC of all military branches. The RC is now completely changed from its Strategic Reserve roots and is an essential partner to the active duty warfighters. As of 2016, the RC comprised 38% of US military personnel strength with members frequently and repeatedly deploying right alongside the AC forces. To illustrate the magnitude of increased RC use, as a Strategic Reserve prior to 1990 the RC provided a mere 3,000 active duty man-years of operational support to DOD on an annual basis. As an Operational Reserve, between the Gulf War and 9/11, that measurement increased to 35,000 active duty man-years annually and following 9/11 it increased to 146,000 man-years.[12] This increased demand on the RC has worked out very well from a service standpoint. For the individual, the increased training and operational tempo can place a great amount of strain on the relationship between the service member and their civilian employer. Recognizing this fact, lawmakers enacted USERRA in 1994 to prevent hiring discrimination and strengthen employment protection for military service members.[13]

DEVELOPMENT OF THE UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT

While the guidelines within USERRA aim to protect the Reservist and provide direction on responsibilities for both employee and employer to limit USERRA violations, it was not the first legislative work to do so. USERRA was born from two previous laws with similar intentions, the Veterans' Reemployment Rights laws (VRR) and the Selective Training and Service Act of 1940 (STSA).[14] These laws have been revised and amended numerous times over the years as the nature and manner in which the DOD wages war has evolved. It is a continuous process and one that will not likely end with USERRA.

Selective Training and Service Act of 1940

The STSA was designed to accomplish multiple goals. First and most well-known was its requirement that American males were properly registered for the draft. Second, it attempted to alleviate some of the stress and worry suffered by draftees about returning to civilian life after military service. Men being called up for duty in World War II had no guarantees that the careers they were leaving behind would be waiting for them when they returned. Upon completion of their duty, the STSA allowed drafted personnel the right to apply for reemployment with their former employer. In order to do so, the service member needed to submit for reinstatement with the employer within 90 days of the termination of orders. Once completed, the STSA granted the service member right to reemployment with the employer, or successor in interest should the company have changed ownership, in the original position or one of identical seniority, status, and income.[15] There are three important aspects of the STSA that have prevailed through the years and are still reflected in USERRA today. First, the service member's right to apply for reemployment with the previous employer upon termination of active duty orders if done within a specified time period. Second, the guideline that service members must officially request reinstatement with an employer and that it is not automatic. And finally, identification of the type of position and employer must provide to a service member upon reinstatement within the company or organization.[16] Although the STSA looked good on paper, in execution, it was far from perfect and required multiple revisions. From its imperfections came important lessons that helped to improve protections for Reservists and lay the groundwork for vital principles incorporated into USERRA.

Veterans' Reemployment Rights Laws

Following the Vietnam War, throughout the 1960s and 1970s the laws under the STSA governing the protection of rights for the Guard and Reserve underwent further revisions. The VRR laws, as they became known, were a compilation of acts that included the Military

Selective Service Act of 1967 and the Vietnam Era Veterans' Readjustment Assistance Act. While the VRR laws aimed to provide and refine the reemployment protections under the STSA, the collection of laws were also designed to encourage enlistment in the DOD's new all-volunteer force, specifically targeting the single-term volunteer and encouraging service member affiliation in the reserve forces upon separation.[17] The VRR laws provided protections for Service members against discrimination in hiring or reemployment based on service in the controversial Vietnam War, and it provided veterans preference in hiring with federal contractors. Veterans returning from Vietnam, whether Reservists or members of the AC being released from active duty, were then protected whether they had been previously employed by the federal government, a private company, or state and local governments.[18]

Transition to USERRA

As the DOD implemented the total force concept and transitioned to an all-volunteer force in the 1970s, policy makers recognized the impact these changes would have on the RC. Reservists were essential to war plans and in the event of armed conflict would be needed in greater numbers, for longer periods of time, and for more frequent deployments. The increased demand for Reservists meant increased challenges in the fight for RC reemployment rights. As written, the cumbersome and patchwork VRR laws could not manage the new Total Force. USERRA, then, was a pre-emptive measure. Initial talks and planning between the DOD and the Department of Labor (DOL) began in the mid-1980s.[19] The results of these discussions quickly pointed to the need for a complete rewrite of the VRR laws. However, the effort was not given priority until the Gulf War kicked off in 1990 and the DOD was able to see just how reliant on the RC the nation's military forces were. Thus, the laws governing job protections and reemployment rights for the RC were rewritten into a single comprehensive piece of legislation called USERRA. Although it has been amended as needed to fill gaps in its original form, USERRA has survived since 1994.[20]

IMPLEMENTING USERRA: REQUIRED TRAINING AND OBLIGATIONS FOR SERVICE MEMBERS AND CIVILIAN EMPLOYERS

US Code mandates that DOD components provide both initial and annual USERRA training to Reserve personnel. Additionally, any RC members who are activated for a period of more than 30 days are to be briefed again on their USERRA-protected rights and responsibilities before termination of active duty orders.[21] Marines unaware of the USERRA rights and obligations could unwittingly jeopardize the ability to return to the same job upon deactivation. To ensure Reserve Marines are properly educated on USERRA, Marine Forces Reserve (MARFORRES) published Force Order (ForO) 5420.1A which covers Employer Support of the Guard and Reserve (ESGR) programs. This order tasks subordinate elements, down to the Detachment level, with assigning ESGR representatives and implementing an ESGR program to provide annual and refresher USERRA trainings. Additionally, each unit's ESGR program is an inspectable item on the Force Readiness Assessment and Assistance Program (FRAAP) inspection to ensure maximum unit readiness.[22] The training Marine Reservists receive provides education on a set of general obligations, specified in USERRA, they must fulfill in order to be qualified for reemployment following a period of active duty. For this reason, it is imperative that RC service members fully understand the responsibilities they have to their civilian employer before and after activation.

Service Member Obligations

Four general conditions must be met for a Reservist to qualify for USERRA reemployment protection at their previous place of employment. The service member must give the employer prior written or verbal notice. Upon return, notification must be given to the employer of the desire for reemployment within specified timelines. The service member must have been released from active service with an honorable discharge, and a five-year limit of cumulative absence from the employer cannot be exceeded.[23]

The first obligation of a Reserve service member is to provide the civilian employer with advance notice of any military service. Understanding the often-unpredictable nature of the global security environment and the fact that crisis could lead to an immediate need for Reserve call-up to active duty, the verbiage outlining this obligation is intentionally left vague with broad parameters. DOD recommends a minimum of 30 days' notice to employers when practical; verbal notice is acceptable but written notice is preferred in order to mitigate any disputes upon completion of active duty service.[24] While the flexible nature of this obligation benefits DOD and Reservists, for the employer losing a valuable employee on such short notice it could be extremely problematic.

Similar to providing an employer notice on the front end of an active duty mobilization, Reservists must meet specific notification timelines upon their return to be eligible for reemployment rights. For service less than 31 days, notification to the employer should be made no later than the first full work day following the termination of active duty orders. For active duty service encompassing 31 to 180 days, notification should be made to the employer and application for reemployment submitted within 14 days. If the active duty period is 181 days or more, a Reservist must submit their notification and application for reemployment within 90 days. There is also additional timeline guidance provided in USERRA for instances in which a service member may be injured while on active duty and on medical hold, further complicating the issue.[25]

In addition to the notification requirements before and after periods of active duty, Reservists must also be separated from active service with an honorable discharge. Any characterization of service below honorable will nullify the service member's reemployment rights protections under USERRA.[26] The final obligation USERRA imposes on the service member is a five-year cumulative service limit. This five-year limit allows a Reservist's

reemployment rights to be protected through five years of absence due to military service for each civilian employer. As several types of service are exempt from this regulation, this can be very confusing for both the Reservist managing the five years of accumulated service as well as the employer. A solid education in USERRA is vital to understanding the five-year limit.

Civilian Employer Obligations

While ignorance of the USERRA laws does not lessen an employer's culpability should it violate them, a reasonable person could unintentionally infringe on a service member's reemployment rights due to unfamiliarity. Just as it is vital for service members to fulfill their obligations, it is also imperative for employers to fully understand the laws within USERRA as they apply to an employer's obligations to service members. While there could be countless "special cases" and circumstances of Reservists returning to their civilian occupations after military service, there are only a few parameters employers must adhere to when faced with the challenges of an RC employee. USERRA attempts to prevent any kind of discrimination in hiring, retention, career progression, or reemployment of a service member based on military affiliation. In general, an employer looking to deny employment or terminate a Reservist must ensure it has specific, valid, and documented justification that is in no way related to the employee's military service, such as a lack of required skills or qualifications for initial employment or a pattern of poor performance that justifies the dismissal.[27] The remaining guidelines revolve around the length of time a Reservist is absent from a place of employment due to military service and the positions qualified for upon return.

The Department of Labor has produced a useful pocket guide for service members and employers which clearly articulates reemployment position considerations. There are slight variations for a Reservist whose military duties cause separation from a civilian occupation for less than 90 days and more than 90 days, but generally the employer has the same obligations. Reservists are first entitled to return to the position they would have held had the absence never

occurred, even if that position is one of promotion, as long as the Reservist either holds appropriate qualifications for that job or can be reasonably trained by the employer. If it is not applicable that the Reservist would have advanced within the timeframe of the absence, or cannot be retrained by the employer, then he or she is entitled to return to the same position held prior to starting military orders. If for any reason neither of those positions are available, the employer must place the Reservist in a position that most closely matches the job he or she is entitled to hold, and provide full seniority benefits.[28] Simplified, the service member cannot be punished for voluntary or involuntary service to the country and will not have his or her civilian career progression stunted because of it. This concept, known as the "escalator principle," is one of the few things that has survived from STSA to USERRA. Returning service members must be provided positions of reemployment with the seniority and pay grade they would have held through natural career progression, even if it means employers must provide additional training for service members to achieve necessary skills.[29]

The escalator principle resulted from a momentous US Supreme Court case in 1946. The case, *Fishgold v. Sullivan Drydock and Repair Corp,* stemmed from vague language within the STSA regarding an employer's responsibility to provide the service member with a position of like seniority, status, and pay upon return from military service. In the *Fishgold* case, the court had to determine from what period of time seniority entitlement would be calculated: the length of time employed prior to being federalized/activated or that time plus the time away from employment on military leave. The court ruled in favor of the service member, granting that seniority would be calculated as one continuous time span, as if the individual never left.[30]

USERRA ENFORCEMENT

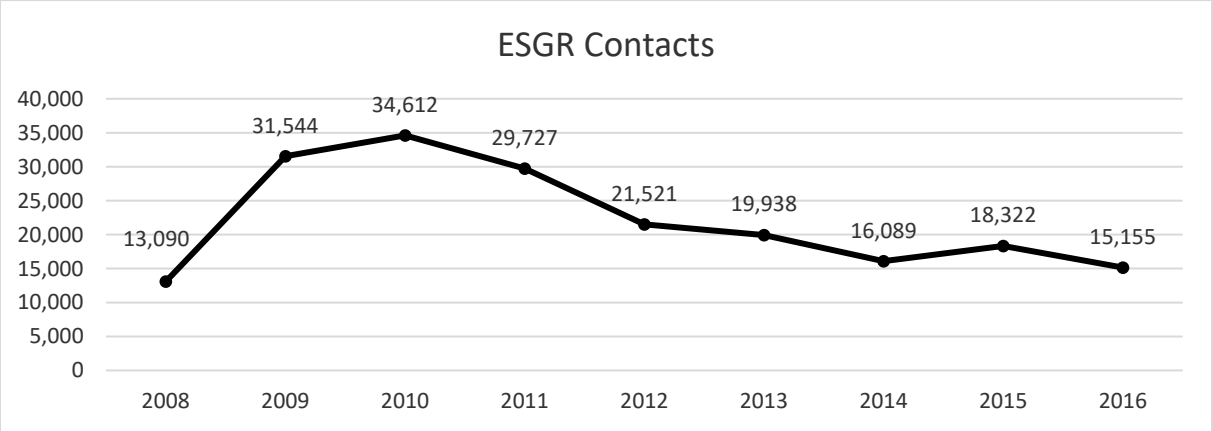
A Reservist who believes they are being discriminated against due to military affiliation or obligations has a range of options in seeking assistance. ESGR provides the least formal level of mediation. Following ESGR, the Department of Labor Veterans Employment Training Service

(VETS) offers information and technical assistance, investigation of complaints, and formal resolution services. If the Reservist's complaint cannot be solved via ESGR or VETS, a formal lawsuit can be filed through the Attorney General's office or through private court proceedings.[31]

Informal Resolution: Employer Support of the Guard and Reserve

ESGR predates USERRA by over 20 years. It was established in 1972 during the era of the VRR Laws in order to provide a knowledge bridge between Reservists and their civilian employers, and to provide a forum for resolution of disputes between the two.[32] ESGR coordinates thousands of volunteer ombudsmen nationwide who provide services free of charge to field complaints, investigate, offer advice, and if necessary, mediate between the service member and an employer through an informal resolution system. In addition to providing mediation services, if given the opportunity, ESGR is a resource to educate service members and employers on the roles and responsibilities within the law. ESGR also runs an annual incentive program that recognizes employers who demonstrate exceptional support of Reserve employees with DOD awards. ESGR receives tens of thousands of calls annually for possible USERRA violations, of those calls, a few thousand a year are substantiated and result in ESGR opening a case for mediation. Table 1 shows the number of contacts ESGR received annually between 2008 and 2016.

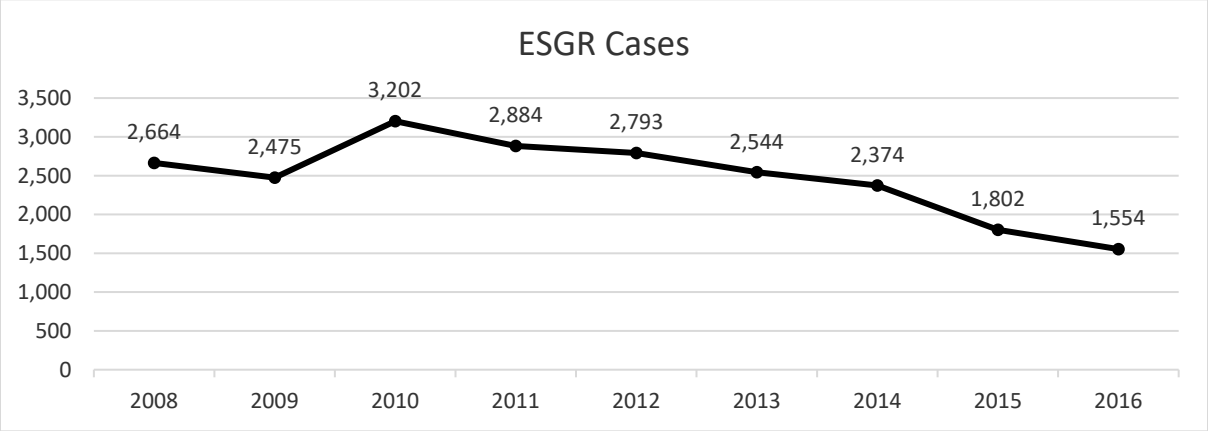
Table 1: ESGR Contacts



Data compiled from DOL annual USERRA reports to congress, 2008 to 2016. Available online at https://www.dol.gov/vets/updates/

Not every contact ESGR receives results in a need for a case to be opened and mediation to be conducted. Often service members or employers are not aware of USERRA or misinterpret the laws set forth within. The majority of the time the issue can be resolved through advice to the service member or a phone call to the employer to make them aware of the laws they may be violating. Table 2 depicts the number of actual cases between 2008 and 2016 that ESGR took on for mediation.[33]

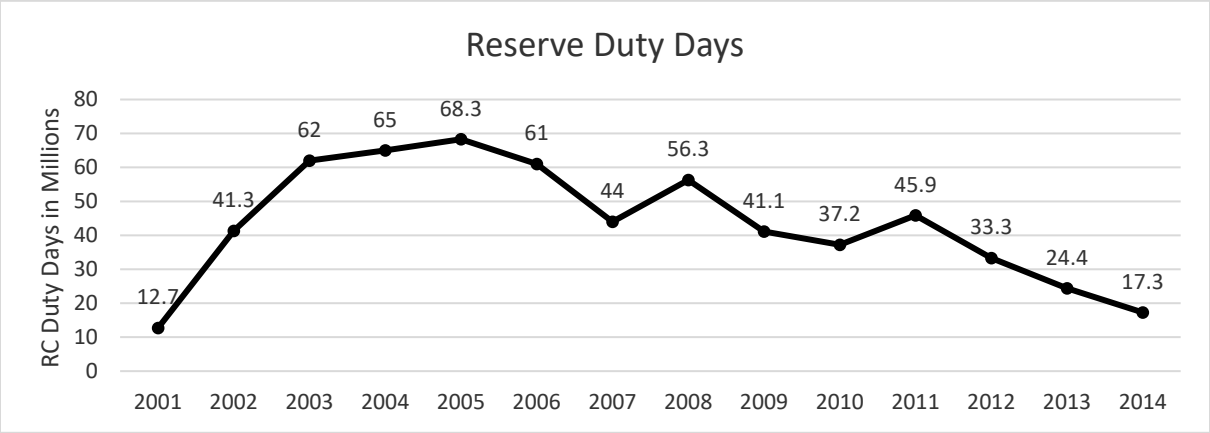
Table 2: ESGR Cases



Data compiled from DOL annual USERRA reports to congress, 2008 to 2016. Available online at https://www.dol.gov/updates/

A surface-level analysis reveals that a rough correlation can be observed between the number of contacts and cases to the number of RC members activated for operations in defense of the nation. Following the World Trade Center attacks on September 11, 2001, RC contribution increased from an average of 12.8 million duty days per year, to an average of 53.3 million duty days annually between 2001 and 2016. Naturally, the end of Operation Iraqi Freedom and the drawdown in Afghanistan resulted in a decrease of Reserve activation requirements. However, as of 2016 over 900,000 RC service members had activated since 9/11, and almost 30,000 remained on active duty in support of AC operations.[34] Table 3 displays the RC duty days from 2001 to 2014.

Table 3: Reserve Duty Days – 2001 to 2014



Data derived from Figure 1-4 of Reserve Forces Policy Board, *Improving the Total Force: Using the National Guard and Reserves* (Falls Church, VA: Office of the Secretary of Defense, November 2016), 26.

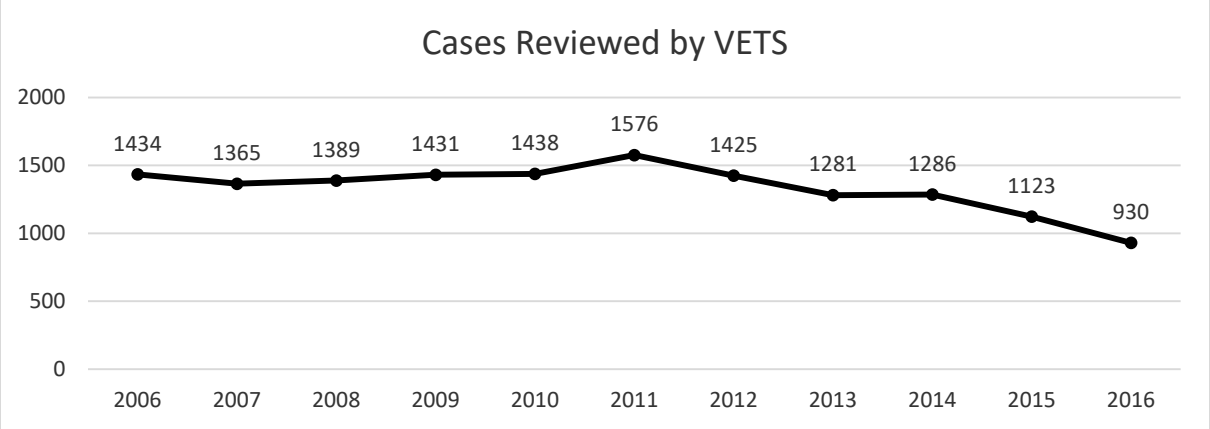
The association is the result of a standard cause and effect relationship where a higher number of activated Reservists leads to a higher, but proportional, occurrence of USERRA violation complaints. The inverse is also true, as the number of activated reservists decreases, so does the total workload for ESGR. The constant in the equation is the percentage of cases that ESGR substantiates for assistance, which averaged 12 percent annually between 2008 and 2016. 2008 was somewhat of an anomaly with 20% of ESGR contacts resulting in a case, one explanation being the sudden increase from 44 million duty days in 2007 to 56.3 million in 2008. From 2009 to 2016 ESGR contacts, ESGR cases, and Reserve duty days all trended in a decline. The percentage of ESGR contacts that resulted in a case remained relatively steady regardless of the total numbers, fluctuating slightly from eight percent in 2009, up to 15 percent in 2014, and then back down to 10 percent by 2016. Through evaluation of the data provided by a sample size of 199,998 ESGR contacts and 22,292 cases, it can be inferred that an average of 12 percent would remain constant regardless of the total number of Reservists activated. It is reassuring that only a fraction of the calls for assistance received by ESGR result in open cases, but due to the operational nature of today's Reserve forces, there are still thousands of cases involving USERRA violations each year. This does not mean that the system is broken, a certain number

of USERRA violations will naturally occur, but there may be a disconnect in USERRA compliance, perhaps partially as a result of a lack of education, that can be addressed to lower associated complaints and cases.[35] To further validate the above analysis, a similar pattern can be seen when looking at the numbers reported by VETS.

Formal Resolution: Department of Labor Veterans Employment Training Service

The VETS mission is to "prepare America's veterans, service members and their spouses, for meaningful careers, provide them with employment resources and expertise, protect their employment rights and promote their employment opportunities."[36] Although not all it does, VETS provides the next level of assistance for a Reservist disputing a USERRA violation by an employer. Many cases reviewed by VETS are referrals from ESGR where ombudsmen mediation was unsuccessful or the violation is significant enough that ESGR recommends immediate filing of the claim through VETS.[37] Whereas ESGR is informal voluntary mediation between the Reservist and the employer, USERRA provides VETS formal legal access to any documentary evidence the investigator considers pertinent, the ability to interview anyone with information relevant to the alleged violation, and the right to subpoena and collect official testimony from witnesses.[38] That is not to imply that a Reservist must go through ESGR prior to contacting VETS. The continuum of assistance is not a linear, numerical process, but instead a set of complimentary resources with varying degrees of power. The VETS website provides a wealth of educational information and an online "advisor" to assist Reservists in determining if they have a potential case. It is up to the Reservist to decide if the claim will be filed informally through ESGR or formally through VETS, dependent on the nature of the claim and type of assistance the Reservist feels will best fit the situation. According to ESGR, approximately 95% of USERRA violation claims are handled informally through ESGR assisted mediation. As seen in Table 4, a much smaller number of claims is handled annually by VETS than is handled by ESGR.

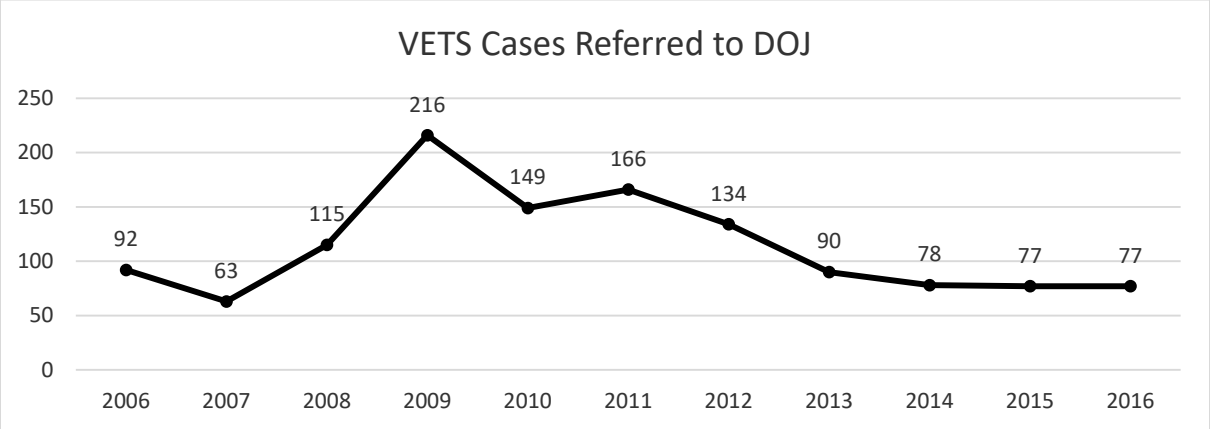
Table 4: VETS Cases



Data compiled from DOL annual USERRA reports to congress, 2006 to 2016. Available online at https://www.dol.gov/updates/

One promising explanation for the lower numbers of VETS cases is that the process is working; ESGR is able to handle the majority of the cases of potential or substantiated USERRA violations. Of the cases reviewed by VETS, most are determined to be of no actual breach of law or are successfully resolved by the legal processes available to the VETS representatives. As depicted in Table 5, VETS refers a very small number of cases to the Department of Justice (DOJ) for government-assisted court actions.

Table 5: DOJ Referral Cases



Data compiled from DOL annual USERRA reports to congress, 2006 to 2016. Available online at https://www.dol.gov/updates/

As previously discussed, an analysis of the number of annual VETS cases compared to the number referred to DOJ for adjudication reveals a similar pattern to the ESGR data analysis. The annual percentages derived from comparison of Table 4 and Table 5 further validate this

paper's claim that the USERRA conflict resolution system is working consistently and efficiency. On average, VETS is able to resolve 90 percent of its USERRA violation cases. In 2006, only six percent of cases were escalated to DOJ. By 2009 the referral percentage had grown to 15 percent but then saw a steady decline in the following years and was back down to eight percent by 2016.[39]

Formal Resolution: Government-Assisted and Private Court Actions

If VETS cannot resolve a USERRA complaint through its available resources, it will refer the case to the DOJ if requested by the service member (or the Office of Special Counsel in the case of a federal employee). The Attorney General will review the merits of the case, all pertinent facts, and any available evidence, and if satisfied the case is one where the laws of USERRA have been broken, will file a court action on behalf of the service member.[40]

ESGR, VETS, and representation by the DOJ are all provided at no cost to service members. If a Reservist has exhausted the avenues of assistance available through ESGR or VETS, and the DOJ has rejected their claim due to lack of merit or overwhelming caseload, the final option available is to file suit against an employer using a personally retained attorney. In private court actions though, the Reservist would be responsible for payment of attorney's fees unless the court elected to award payment of those fees to the service member by the employer.[41]

USERRA EVALUATION

USERRA requires the Secretary of Labor to prepare and submit an annual report to Congress that quantifies a list of mandated reporting requirements. The directed information includes items such as the number of USERRA violation cases reviewed by DOL, the number of cases reviewed by ESGR, and the number of cases referred to DOJ for litigation. DOL is also required to report on whether any apparent patterns can be identified regarding the types of violations occurring and to provide recommendations for any administrative or legislative actions that may assist in the implementation or enforcement of USERRA.[42] Available as far back as 2006, the

USERRA reports record only three instances where a pattern may have been present. The first pattern involved a minor procedural matter of whether military leave taken by federal employees should be calculated according to calendar days or business days. The second pattern focused on how federal employers facilitated reemployment of injured service members, and the third pattern was administrative in nature, concerning what documentation was required by federal employers when a service member desired to take leave in conjunction with his or her military service. These common violations were easily remedied through dialogue from DOL to employers and publication of documents to provide clarification. Only a handful of recommendations were made throughout the 10 years of reports and all were relatively insignificant clarifications to the law, handled by amendments, none requiring major substantive revisions.[43] When asked to report on USERRA statistics, it appears that the DOL does so relatively uncritically and is satisfied with the substance of USERRA. Other reviews, however, have identified areas in which USERRA can be improved to benefit the service member or the employer, but generally not both.

CURRENT USERRA CONFLICTS

In 2011 the DOD approached the RAND National Defense Research Institute with a request to investigate the effects of an operational RC on civilian employers and to consider whether or not changes to USERRA or ESGR support programs and RC activation policies might be advisable. Throughout the RAND study, researchers found two areas that have posed the most common challenges to courts: waiver of rights and hostile work environments.

As employers increasingly seek alternative methods of conflict resolution, service members' contractual waiver of USERRA rights is growing more prevalent. RAND subcategorized this issue into three areas. First are instances where a service member waives all rights by contract. An example of this would be a company offering a lump sum severance package in exchange for the Reservist's ability to file any possible USERRA suit. A concern

arises when courts then must attempt to value the contract agreement against the USERRA benefits and determine whether the contract provides advantages over the baseline set by USERRA.[44]

Second, waiver of rights is of concern with collective bargaining agreements negotiated between employee unions and federal employers. If federal unionized employees are terminated, they can either exercise their USERRA rights and file a lawsuit or a grievance through the union to allow negotiation, but they cannot do both. It is a difficult choice for Reservists as union representation can be less stressful than a lawsuit but does not provide access to legal counsel or the courts. Also, the results of a union negotiation cannot be appealed.[45]

The third area in which contractual waiver of rights proves to be problematic is with mandatory arbitration clauses. Employers often use arbitration agreements as a condition for hiring or retention to ensure that any legal dispute is handled outside of a costly courtroom. Contracts such as these appear to violate USERRA, but arbitration agreements are sometimes upheld, as this paper will discuss in a later section.[46]

Hostile working environments and whether they can be considered discriminatory is another issue that has caused courtroom controversy. Laws such as the Civil Rights Act, the Americans with Disabilities Act, and the Age Discrimination in Employment Act prohibit harassment based on a person's age, religion, race, gender, and various other characteristics. However, USERRA does not. The Fifth Circuit, for example, denied one service member's claim of discrimination because USERRA does not include the shared statutory language that the Civil Rights and Americans with Disabilities Acts do. The court argued that because Congress did not use the same language in USERRA, it did not intend the law to protect individuals from a hostile work environment.[47] In 2010 DOL submitted recommendations for inclusion of appropriate anti-discrimination language in USERRA. Congress revised USERRA in 2011 to

clarify its intent of protecting service members from discriminatory hostile work environments.[48] This is a perfect case to demonstrate the success of the legislative review process regarding USERRA and that, unlike its predecessors the STSA and VRR laws, the law does not currently need an overhaul.

USERRA FROM THE EMPLOYER'S STANDPOINT

The 2011 RAND study did a comprehensive dive into the activation impacts of an operational RC since USERRA's inception in 1994. The research acknowledged that DOD's shift to the total force policy resulted in a marked increase of Reserve service member duty days over the previous two decades, although, even accounting for the increased Reserve reliance, employers did not face any significant issues.[49] The RAND report explained that overall, only a small percent of companies in the US employ Reserve service members. Those companies that do have Reservists on the payroll employ only a small number. The percentage of Reserve service members whose military obligations caused issues for the employers as a result of a duty-related absence is even smaller, and only approximately one-third of those affected employers reported experiencing any requirement to adjust daily operations.[50]

Through its investigation, RAND identified four primary findings regarding the overall health and application of the USERRA laws. The first thing it noted is that, through USERRA, Reservists are afforded relatively straightforward protections consistent with other legislation regulating employment standards. Because of this, RAND concluded that a significant rewrite of USERRA was unnecessary on behalf of Reserve service members, although minor revisions would be welcome by many employers. Of note is the acknowledgment that some of the legal challenges regarding USERRA are a result of employer practices, such as the increasing use of rights waivers and other alternative methods of dispute resolution discussed previously. These issues, like the others discussed by RAND, may prompt congress to initiate changes through amendments to the law but do not call for sweeping changes to substance.[51]

Second, RAND was unable to identify any consistencies in USERRA-related impacts to employers and could only conclude that business impacts are highly varied and affected by a variety of factors. The study looked at workload management, temporary RC member replacement, business losses, the costs of health benefits, and reduction in productivity. While there was no consistency, issues with workload management were most commonly reported. RAND also noted that employers subject to longer Reserve absences were more likely to report business impacts, but many employers with Reservists absent for a year or more did not report any negative effects.[52] This is an important point to consider when discussing ways to improve USERRA. If no consistent employer impacts of the current law can be identified, there can be no reliable way of determining the overall impact of USERRA changes on employers.

RAND then looked at whether modifications to DOD policy or support programs would assist in impact mitigation. It explored options such as enforcement of DOD's often-waived dwell ratio for reservists of one year mobilized to five years demobilized. It also polled employers on their preference for gapped versus contiguous pre-deployment training and mobilizations for both short and long absences. Like the results of RAND's research into business impacts of military related absence, the results varied. The study determined that no one modification in DOD policy or programs would address the interests of all employers.[53] Sweeping changes to USERRA or Reserve policies that benefit some companies would surely have detrimental impacts on a large number of others.

The fourth of RAND's findings is the most important and one where the greatest collective improvements can be made to benefit employers and Reservists alike. RAND's analysis determined that employers have inadequate knowledge of USERRA laws, the obligations to which they must adhere, and to whom they can reach out for help. Those employers who were most familiar with USERRA and ESGR programs were unsure of their

ability to appropriately comply with the law. Less than half of the RC employers surveyed had any knowledge of the programs and support available through assets like ESGR.[54] Education initiatives to push USERRA awareness to employers would pay huge dividends by eliminating many of the employment disputes resulting from ignorance. For many companies, especially those small in size, the first time they hear of USERRA is when they are contacted by an ESGR ombudsman who informs them they are in violation of the law.[55] Increased awareness is the preemptive measure that will best curtail USERRA cases.

USERRA FROM THE SERVICE MEMBER'S STANDPOINT

While the RAND study focused on the impacts of USERRA on employers, it is also important to look at the law from the service member's standpoint and evaluate for any necessary changes. The Reserve Officers Association website houses over 1500 law review articles that provide critique, clarification, and guidance of USERRA related topics. Retired Navy Captain Samuel Wright, an expert on the topic and one of the original authors of the USERRA, developed these law reviews to assist service members and employers in navigating the often-turbulent waters of USERRA law. Law Review 15089, titled "Proposals to Improve USERRA," describes in detail recommendations for changes in substance and enforcement mechanisms that would provide more reemployment protections for Reservists, at the cost of less flexibility for employers. While the recommendations in Law Review 15089 cover a wide array of subjects contained within USERRA, this paper considers and evaluates only a few of the ideas most closely associated with the issues the RAND study uncovered, and those that would have the most substantial impact on the service member and employer relations.

Enforcement of USERRA: Arbitration Agreements

As previously discussed, the popularity of alternative dispute resolution methods, such as forced arbitration, continues to grow with employers. In an effort to avoid costly courtroom litigation, employers may choose to have employees sign an agreement to submit claims of dispute to a

binding arbitration process. Reserve service members subject to arbitration agreements with a civilian employer are placed between seemingly opposing methods of resolution when dispute arises related to active military service. USERRA states in Section 4302(b) that its laws take precedence over "any State law, contract, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by this chapter." Courts have ruled on more than one occasion that arbitration does not violate this USERRA clause.[56]

In one such case in 2006, *Garrett v. Circuit City Stores, Inc.*, 449 F.3D 672, Mr. Garrett, a Marine Reservist, brought a lawsuit against his former civilian employer under claims that he had been discriminated against and eventually fired based on his military affiliation. The district court sided with Mr. Garrett and ruled in his favor stating that Section 4302(b) of USERRA invalidated any arbitration agreement between an employer and employee. Circuit City appealed the decision of the district court and the case was referred to the Fifth Circuit Court of Appeals. The Fifth Circuit reversed the ruling of the district court under the interpretation that Section 4302(b) was not intended to exclude arbitration and that arbitration did not reduce the rights and benefits protected by USERRA. Arbitration is simply an alternative method of resolving employment dispute using the service member rights provided by USERRA as a guide. Further, the Fifth Circuit noted that having a case heard in federal district court is not one of the rights USERRA guards on behalf of the service member.[57]

Following the 5th Court's ruling in *Garrett v. Circuit City Stores, Inc.*, the 6th, 9th, and 11th Appeals Courts also found in favor of employers and upheld forced arbitration.[58] According to Wright, who disagrees with the courts, multiple issues can arise for service members who are forced to use arbitration when attempting to exercise their reemployment rights. Arbitration is governed by the Federal Arbitration Act of 1925. While an arbitrator is required under the Act to utilize the same resources as a federal district court judge, if the arbitrator misinterprets

USERRA the service member has no recourse to appeal. Wright argues that the arbitration process is set up to incentivize the arbitrator to rule in favor of the employer. An arbitrator known to be pro-employer will naturally be utilized more frequently and will continue to be rewarded with greater financial gains as a result. Financially, it benefits the arbitrator to rule against the service member.[59] In Law Review 15089, Wright suggests that "employers can make a mockery of USERRA by demanding that individuals agree to binding arbitration as a condition of initial employment or continued employment."[60] He offers specific wording to be added to USERRA in order to close the interpretation gap created by vague language. Most notable is the inclusion of proposed Section 4328, paragraph (a), which declares "any clause of any agreement between an employer and an employee… shall not be enforceable."[61]

Wright's recommendation, while admirable in its intention to provide the utmost protection for Reservists, casts a villainous shadow on employers who utilize forced arbitration, and paints the whole profession of arbitrators as either untrustworthy or easily manipulated. It is certainly possible these types of unfair practices occur, but the Federal Arbitration Act of 1925 cannot simply be ignored for fear of manipulation. Those issues aside, the courts have demonstrated a desire to keep USERRA consistent with other employment rights laws. Congress would find itself on a slippery slope by excepting USERRA from arbitration and not other anti-discrimination laws. Instead, the courts should uphold the Federal Arbitration Act of 1925 when dealing with USERRA violations and forced arbitration agreements, and Congress should modify the reporting requirements of the annual USERRA reports by tasking the DOL to observe such cases and notify Congress of any patterns specific to arbitration agreements that discriminate against reservists.

Enforcement of USERRA: Allow Injunctions to Prevent USERRA Violations

Just as increased awareness was previously proposed as a preemptive solution to reduce USERRA cases, exploration of other preemptive measures, such as emergency injunctions by the

courts, is also warranted. Section 4323(e) of USERRA addresses the court's equity powers and attempts to identify times when the courts to step in and act before a service member's employment or reemployment rights are violated. The verbiage in USERRA charges the courts to act, "using full equity powers, including temporary or permanent injunctions, temporary restraining orders, and contempt orders, to vindicate fully the rights or benefits of persons under this chapter."[62] The equity powers section is specifically applicable to situations in which a service member gives notice to his or her employer of upcoming military service and is informed by the employer that the position will be terminated, leaving no job to come back to. While it would be a blatant violation of USERRA for the employer to act on this threat, federal courts have ruled that injunctive action in these cases is inappropriate.[63]

The courts have two general criteria for evaluating requests for any sort of injunctive action. In order for emergency injunctions to be applied, the courts must first determine that inaction will cause irreparable damage to the plaintiff. Second, the court must evaluate that the plaintiff would likely win the case when taken to trial. In the circumstance of an employer threatening termination of a service member's job if he or she left to fulfill military obligation, the court's viewpoint is that the firing would not be irreparable because through legal suit, the employment can be reinstated, and back pay awarded.[64] Although USERRA calls for injunctions and other preemptive legal actions, there is a divide between what is written into law and the criteria the courts require met before enacting injunctions.

When Samuel Wright helped draft USERRA in the early 1990s he intended section 4323(e) to obligate the federal courts to impose injunctions to prevent USERRA violations, as he had seen similar reactive enforcement with the VRR law.[65] In 2008, amendments to the law attempted to fix the verbiage by changing it from "the court *may* use its full equity powers…" to

"the court *shall*…," however, because the courts still do not view a firing as irreparable damage, they will not enact emergency injunctions.[66]

Unless the courts change the defining characteristics that trigger injunctions, preemptive legal action for USERRA cases would be difficult. The courts are correct in the assessment that termination of employment, while possibly illegal, is not irreparable and a system is in place to facilitate justice. Furthermore, service members threatened with loss of a job have other tools at their disposal before jumping to the extreme measures of seeking court injunctions. ESGR is perfectly equipped to assist in such cases. Communication with the employer from an ombudsman relaying what the law states, pointing out the flagrant violation, and the penalties it would face if it chooses to proceed with a Reservist's termination may be more than enough incentive to prevent the action. Leverage of ESGR's assistance against an employer's potential USERRA violation, albeit informal, is the preemptive measure in place for these types of situations.

Enforcement of USERRA: Implement and Enforce Substantial Monetary Punitive Fines for Willful USERRA Violations

An employer who is knowledgeable in its USERRA obligations, has been preemptively contacted by ESGR, but still chooses to terminate a Reservist based on military duties is in willful violation of the law. In cases where the courts find an employer has willfully violated a service member's USERRA rights, the current law is written to allow awarding of actual damages plus an equal amount of liquidated damages to the Reservist. In an instance where a Reservist is unlawfully terminated but quickly finds another job, lost wages could be minimal, and the awarding of double damages ends up costing the employer very little. For cases where willful USERRA violation is substantiated by the courts, Law Review 15089 proposes a minimum liquidated damages fine of $50,000[67] Under this proposal, the amount of liquidated

damages a service member could be awarded would be the actual liquidated damages or $50,000, whichever amount is greater.

This is a dangerous proposition that could result in unintended consequences for Reservists seeking employment. The threat of such a hefty fine, which would sink many smaller companies, would likely create an unintended anti-RC bias amongst employers, inadvertently creating even more USERRA claims due to discrimination. Additionally, in cases where the willful violation is carried out by a supervisor or manager, the large punitive fine could be levied against the company and the owner, essentially punishing an entity with no direct influence in the infraction. A more realistic method of imposing punitive fines is to utilize a sliding scale based on the size of the company or its annual revenue. In this manner, the service member is awarded restitution for the wrongs committed against him or her, and the employer learns a valuable lesson about willful USERRA violation without being financially crushed in the process.

CONCLUSION

The current construct of the DOD places the RC as critical component of America's national defense. USERRA is a comprehensive, if imperfect law, which strives to find a balance between protecting Reservists and being overly cumbersome to employers. The courts and Congress are receptive to issues identified with USERRA and have demonstrated a willingness to amend the law for the purposes of keeping it consistent with other anti-discrimination and employment legislation. Data does not support the notion that USERRA was designed during times of a strategic reserve and therefore cannot support the 21st century operational Reserve. USERRA, combined with the support network of ESGR and VETS, has proven over time to be flexible enough to handle, through amendments, any flaws that exist or develop due to changes in force management. Efforts to further improve Reservist-employer relationships need not focus on the construct of the law, but on understanding of the law. The single initiative that would provide

the greatest benefit to both Reservists and employers would be an education campaign designed to ensure companies who employ Reserve service members are fully aware of all USERRA obligations and the resources available through ESGR. The awards program run by ESGR is a good incentive program and a step in the right direction, but it relies on the individual Reservist to nominate the employer, leaving room for error. More can be done to bridge the gap by direct interaction between Reserve Marine units and employers.

It would be an easy task to develop a civilian employee database as the DOD already requires Reservists to annually submit and validate Civilian Employment Information (CEI) records. As it benefits the services to ensure a healthy relationship between Reserve service members and civilian employers, DOD, in cooperation with ESGR, should develop a "welcome aboard" information package that is proactively sent to each company in the database with Reservist employees. ESGR has an existing "Employer Resource Guide" which could be used for this purpose, but they do not have access to the CEI.[68] Currently the ESGR resource guide is available for anyone to download from the ESGR website. This is only effective if an employer knows to look for it or obtains it through interaction with an ombudsman in the event an employer was involved with a USERRA violation. While ESGR does not have sufficient personnel or information access to proactively push education resources to all required employers, DOD does. MARFORRES should delegate the responsibility down to the company and detachment level, tasking the unit ESGR representatives to not only provide training to their Marines, but also communicate with each employer. Since ESGR's employer guide is already produced, and available via open-source, it can be transmitted digitally to employers in order to make it a valuable no-cost source for USERRA education and assist in elimination of USERRA violations resulting from ignorance.

Proactive communication by a Marine's direct chain of command to the employer, paired with submission of the ESGR Employer Resource Guide, could greatly reduce instances of USERRA rights violations. Implementation of this education campaign would only be mildly taxing on commands as they reach out to the employers of their currently assigned Marines. Once the program is established, commands should write the employer contact requirement into their new join procedures so that it occurs within the first week after a new Marine is checked into a unit. In this way, the Marine Corps can ensure the readiness of its Reserve Marines is sustained, and that positive relationships between Reservists and employers is promoted and maintained.

APPENDIX A: ACRONYMS

AC	Active Component
ADOS	Active Duty Operational Support
DC CD&I	Deputy Commandant, Combat Development and Integration
DOD	Department of Defense
DOJ	Department of Justice
DOL	Department of Labor
ESGR	Employer Support of the Guard and Reserve
ForO	Force Order
MARFORRES	Marine Forces Reserve
MCBUL	Marine Corps Bulletin
MOS	Military Occupational Specialty
RC	Reserve Component
SMCR	Selected Marine Corps Reserve
USERRA	Uniformed Services Employment and Reemployment Rights Act of 1994

NOTES

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[16] Ibid., 2.

[17] Ibid., 4.

[18] Ibid., 5.

[19] Ibid., 5-6.

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[24] Ibid., 10496.

[25] Regulations Under the Uniformed Services Employment and Reemployment Rights Act of 1994, 38 U.S.C. §§ 4301-4335 (1994), 687.

[26] Ibid., 684 – 685.

[27] Ibid., 685.

[28]United States Department of Labor, *USERRA: A Guide to the Uniformed Services Employment and Reemployment Rights Act*, Available online at https://www.dol.gov/vets/programs/userra/USERRA%20Pocket%20Pocket%20Guide.html.

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[44] Susan M. Gates, "APPENIDX A: USERRA History," 10-11.
[45] Ibid., 14.
[46] Ibid., 12-13.
[47] Ibid., 15-16.
[48] Susan M. Gates, "Supporting Employers," 54.
[49] Ibid., 79.
[50] Ibid., 80.
[51] Ibid., 80.
[52] Ibid., 81.
[53] Ibid., 56-70.
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[55] Marshall E. McDonald, National Case Manager for Employer Support of the Guard and Reserve, discussion with author, February 22, 2018.
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