

**STATEMENT OF CHARLES CICCOLELLA  
DEPUTY ASSISTANT SECRETARY FOR VETERANS' EMPLOYMENT  
AND TRAINING  
U.S. DEPARTMENT OF LABOR  
BEFORE THE  
UNITED STATES HOUSE OF REPRESENTATIVES COMMITTEE ON  
VETERANS' AFFAIRS**

**June 23, 2004**

Chairman Smith, Ranking Member Evans, and other distinguished members of the House Veterans' Affairs Committee, the Department of Labor is pleased to have this opportunity to provide comments on compliance with the Uniformed Services Employment and Reemployment Rights Act (USERRA). As you know, USERRA has been very much in the news for nearly three years now. Within days after the attacks of September 11, 2001, the President authorized a partial mobilization, under which up to one million members of the Ready Reserve could be activated for up to 24 months. Since this historic mobilization began, over 385,854 of these citizen-soldiers have been called, of whom 156,667 currently remain on active duty. This includes 76 employees of the Department of Labor, 16 of whom currently remain on active duty.

USERRA is particularly important now as it provides reemployment rights to those men and women called from civilian jobs to serve in the nation's defense. In addition, the law prohibits employer discrimination against veterans and reservists because of their military service or obligations.

## *HISTORY*

USERRA's roots go back to 1940, when the Congress was considering the nation's first peacetime draft. At the same time, the lawmakers resolved to provide newly inducted service members the right to return to their pre-service employers. To achieve this, what came to be popularly known as the Veterans' Reemployment Rights (VRR) law was enacted.

By the early 1990s, the VRR law had become a complex and often difficult patchwork of legislative amendments and court decisions. It was severely tested by the mobilization and subsequent return of some 265,000 Guard and Reserve members from Operation Desert Shield/Desert Storm in 1991. USERRA revised and restructured the VRR law, continuing or clarifying most of its provisions. It also made some substantive changes.

The legislative history of USERRA makes it clear that pre-USERRA case law developed under the VRR remains useful in interpreting the statute, to the extent it is consistent with USERRA. For example, in fulfilling our obligations to administer and help enforce USERRA, we are ever mindful of the two principles laid down by the United States Supreme Court in its first reemployment rights case, *Fishgold v. Sullivan Drydock*. Those principles are as valid today as they were in 1946 – first, that the law is to be construed liberally to the benefit of those it protects; and second, that upon completion of service, the returning servicemember is to be reemployed in the position he or she would have occupied had employment continued during the period of service – this is known as the “escalator principle.”

USERRA is experiencing its greatest test due to the current war, as well as Operations Noble Eagle and Enduring Freedom. The Department of Labor believes that USERRA has worked extremely well in the face of its current challenges. I would like to turn now to our USERRA experiences and activities since September 11, 2001.

#### *CURRENT DATA*

Since USERRA was enacted in October 1994, the Veterans' Employment and Training Service (VETS) has reported periodically to this Committee on our activities related to the administration and enforcement of the statute. For Fiscal Years 1995 through 2001, which ended September 30, 2001, we reported a steady decline in the number of USERRA cases opened year-by-year. We opened nearly 1,400 cases in FY 1995, but by FY 2001 the number had declined to 895. In the wake of the mobilization that began in September 2001, this trend has reversed.

I should say here that while we have experienced an increase in cases opened, it is not proportional to the enormous number of men and women who have been called to duty. The nation's employer community is overwhelmingly supportive of employees who have been activated under the ongoing mobilization.

During FY 2002, we opened 1,195 new USERRA cases, an increase of less than 35 percent over the previous fiscal year. For FY 2003, the number of cases opened increased again, but at a lower rate. For that year, we opened 1,315 new USERRA cases, an increase of 10 percent over the previous year. As of mid-June, we had opened 979 new cases for FY 2004,

which, on an annualized basis, would yield a further increase of about 10 percent over FY 2003.

I can report with pride that the VETS' staff has been up to the challenge of dealing with the increased USERRA caseload. Despite the increase of USERRA claims filed, our case handling statistics have remained generally consistent with prior years. As of mid-June, we have closed 954 cases during FY 2004. We closed 86 percent of these cases within 90 days after opening and 93 percent within 120 days. Of the cases closed, slightly more than one-third of the claims filed were found to be without merit or the claimants were found to be not eligible for USERRA protection, and about another 25 percent were closed because the claimant withdrew or did not pursue the complaint. One-third of the claims were successfully resolved in favor of the claimant, either because the claim was granted, or a mutually agreeable settlement was achieved. About 7 percent of cases closed were referred for further legal action. Of those cases, about nine in ten were referred to the Department of Justice because they involved a non-Federal employer, and the remaining cases were referred to the Office of Special Counsel because they involve Federal executive agencies.

The percentage of USERRA complaints that are filed against governmental employers has remained fairly consistent in recent years. Since FY 2001, 30 to 35 percent of cases opened each year have involved public employers. Federal cases have made up 10 to 14 percent of the total, while State or local governments have accounted for around 20 percent.

With respect to the types of issues arising under USERRA, we have found that two issues have recurred with the greatest frequency. Those issues involve discrimination of employees, due to their status as either current or former members of the armed forces, and

reinstatement of demobilized service members seeking to return to their civilian employment. Here, the term “reinstatement” refers not only to those employees who were not reemployed in their former positions, but may also include cases in which the employees were improperly reinstated in positions that were not commensurate with the status or pay grade to which they would otherwise be entitled. Thus far, in fiscal year 2004, discrimination accounts for thirty-one percent of issues raised in USERRA cases, and reinstatement accounts for twenty-three percent of the issues raised in those cases.

#### *COMPLIANCE ASSISTANCE EFFORTS*

While our staff has been extremely effective at resolving complaints, a major focus for the Department remains the resolution of problems before complaints arise. Secretary Chao has made compliance assistance a priority with respect to all the laws administered and enforced by the Department, including USERRA.

Since September 2001, VETS’ staff nationwide have responded to more than 23,000 requests for USERRA information from employers, members of Congress, Guard and Reserve component members, the media and the general public. In addition, we have delivered USERRA briefings and presentations to more than 147,000 people nationwide. Most of these briefings were for members of mobilized Guard and Reserve units, but we have also reached many employers and employer groups. Just a few examples – Web casts for the U.S. Chamber of Commerce, the Society for Human Resource Management, the H.R. Policy Association (formerly known as the Labor Policy Association) and others; two appearances as a featured guest on the national FEDtalk radio broadcast; an appearance on a television broadcast to all the offices of the United States Attorneys and a nationwide

network of National Guard units; a television broadcast co-presented by the Department of Veterans Affairs that addressed USERRA entitlements for disabled veterans; and an interactive conference call with employer members of the Equal Employment Advisory Council.

In fulfilling our statutory obligations to provide help and educational outreach, we have received tremendous support and assistance from colleagues both inside and outside the Department of Labor. The Department's Office of the Solicitor has provided support in all areas, particularly by participating in briefings and helping us respond to technical questions. They also helped draft proposed USERRA regulations, which I am pleased to report are in the final stages of review and I expect the regulations to be available for public comment in September 2004.

Additionally, we have received numerous briefings and invaluable technical assistance support from the Employee Benefits Security Administration. The Employment Standards Administration has helped us develop interpretations of the relationships between USERRA and other laws, such as the Family and Medical Leave Act and the Fair Labor Standards Act. Our web site's resource guide for the general public was revised in March 2003 to update and clarify VETS position on pension issues. And, VETS participates in DOL's Internet based Employment Laws Assistance for Workers and Small Businesses (elaws) Advisor program, whereby the Department provides interactive Advisors for USERRA and other laws. The e-VETS Resource Advisor, a portal site to numerous web sites with information and resources helpful to veterans, has been released and is available through the VETS homepage as well as through the elaws Advisor program on the DOL web site.

In July 2002, a joint memorandum was issued on the “Protection of Uniformed Service Members’ Rights to Family and Medical Leave.” The memorandum was signed by the Solicitor of Labor, the Assistant Secretary for VETS, and the Administrator of the Wage and Hour Division. The memorandum is posted on the VETS’ web site.

Outside of the Department, I would like to mention the extraordinary efforts by our colleagues at the National Committee for Employer Support of the Guard and Reserve (ESGR) headed by General Bobby Hollingsworth, its Executive Director. Their small national staff and more than 4,000 volunteers nationwide perform prodigious service in promoting understanding between employers and their reservist-employees and in helping to informally resolve disputes when they arise. We would be hard pressed to do what we do without ESGR. Additionally, the Office of Personnel Management (OPM) remains a steadfast partner in helping to distribute information to federal agencies on the employment rights of the Reserve and National Guard. The Federal Government is the largest single employer of members of the Armed Forces Reserves, and we are proud of their dedication and commitment. You may be interested to know that Federal agencies have the authority to pay both the employee and government health benefit contributions for up to 18 months when employees are called to active duty. OPM took the lead in promulgating guidance and encouraging Federal agencies to pay the employees’ portion of the health benefit premiums. Finally, the Department of Justice and the Office of Special Counsel provide valuable assistance with respect to referred cases and providing technical assistance and outreach on USERRA.

## *LEGISLATION*

I am also pleased to present the Department's views on two introduced bills and a draft bill, which pertain primarily to protecting the employment rights of service members.

### *Safeguarding Schoolchildren of Deployed Soldiers Act of 2004*

H.R. 3779, the "Safeguarding Schoolchildren of Deployed Soldiers Act of 2004," would amend the Servicemembers Civil Relief Act to prevent the disruption of the education of children who change residence based on the military service of their parents. The Department defers to the Department of Defense for comment.

### *Patriotic Employer Act of 2004*

H.R. 4477, the "Patriotic Employer Act of 2004," would amend USERRA to require employers to post a notice of the rights and duties that apply under that Act. The Department is always interested in finding new and effective ways to convey the rights and responsibilities of employers under USERRA. As part of its ongoing compliance assistance efforts, the Department continues to reach out to employers and, as such, is not opposed to this bill.

### *USERRA Health Care Coverage Extension Act of 2004*

Section 2 of the draft bill, "USERRA Health Care Coverage Extension Act of 2004," would extend the period of USERRA continuation coverage from 18 to 24 months for service members who elect such coverage, which would align this coverage period with the length of time reservists can be mobilized under the current mobilization authority. The bill

provides that the 24-month period applies to all continuation coverage elections occurring on or after the date of enactment.

The Department supports the intent of this bill and would be pleased to work with the Committee on any technical issues.

In Section 3, the bill would reinstate the requirement to report on certain cases and complaints in consultation with the U.S. Attorney General and the U.S. Special Counsel. In the past, the Department found this requirement to be useful. As such, the Department has no objection to the reinstatement of these reporting requirements. The Department would defer to the Attorney General and the Special Counsel for their respective views on the implementation of this provision.

#### *CONCLUSION*

We remain committed to informing employers about USERRA and continuing our mission of protecting the reemployment rights of our service members, including the 76 service members employed by this Department. Mr. Chairman and members of the Committee, this concludes my statement. I will be happy to answer any questions.