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## **The Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) and the Federal Government's Shortcomings**

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Elyne M. Vaught\*

We have sent our young men and women to make enormous sacrifices in Iraq, and spent vast resources abroad at a time of tight budgets at home . . . [T]hrough this remarkable chapter in the history of the United States and Iraq, we have met our responsibility. Now, it's time to turn the page.<sup>1</sup>

### I. INTRODUCTION

On August 31, 2010, President Barack Obama officially declared an end to combat missions in Iraq.<sup>2</sup> To soldiers seeking to advance their civilian careers, such as Army Reserve Brigadier General Michael Silva, news like this must have been inviting. It meant the end to numerous deployments overseas to fight in a war that seemed never-ending and the promise of returning home to a career placed on hold one too many times. Instead, General Silva was fired from his civilian job upon returning home after a

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<sup>1</sup> Helene Cooper & Sheryl Gay Stolberg, *Obama Declares an End to Combat Mission in Iraq*, N.Y. TIMES, Aug. 31, 2010, [http://www.nytimes.com/2010/09/01/world/01/military.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2010/09/01/world/01/military.html?pagewanted=all&_r=0) (last visited Nov. 20, 2012) (President Obama addressing the nation from the Oval Office).

<sup>2</sup> *Id.*

year of commanding a brigade<sup>3</sup> in Iraq.<sup>4</sup> As a civilian, General Silva worked as a contract employee for the Customs and Border Patrol.<sup>5</sup> After he was fired, General Silva filed a Uniformed Services Employment and Reemployment Rights Act claim (USERRA)—which protects returning service members from wrongful termination—against Customs. USERRA prohibits employment discrimination against a service member on the basis of past or current military obligations.<sup>6</sup> Employers cannot deny service members any of the following: initial employment, reemployment, retention in employment, promotion, or any other benefit that a service member is entitled to based on past or current military obligations.<sup>7</sup> USERRA provides protection for members of the active and reserve components of the United States armed forces when it comes to civilian job rights and benefits.<sup>8</sup>

Since USERRA was signed into law in 1994, it has helped returning service members get promptly reemployed in the same position that they would have been in had they never deployed for military service.<sup>9</sup> Moreover, USERRA ensures that the service member maintains the same seniority, status, pay, and other rights as if he or she never left.<sup>10</sup> The Justice Department, charged with enforcing the provisions of USERRA against

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<sup>3</sup> See generally *Operational Unit Diagrams*, U.S. ARMY OFFICIAL HOMEPAGE, <http://www.army.mil/info/organization/unitsandcommands/oud/> (last visited Dec. 5, 2013) (describing that a typical army brigade can consist of approximately 3,000 to 5,000 soldiers).

<sup>4</sup> Steve Vogel, *Returning Military Members Allege Job Discrimination—by Federal Government*, WASH. POST, Feb. 19, 2012, [http://articles.washingtonpost.com/2012-02-19/world/35445701\\_1\\_service-members-federal-government-userra/2](http://articles.washingtonpost.com/2012-02-19/world/35445701_1_service-members-federal-government-userra/2).

<sup>5</sup> *Id.*

<sup>6</sup> *Other Workplace Standards: Reemployment and Nondiscrimination Rights for Uniformed Services Members*, U.S. DEP'T OF LABOR, <http://www.dol.gov/compliance/guide/userra.htm> (last updated Sept. 2009).

<sup>7</sup> *Id.*

<sup>8</sup> *DOL's Fiscal Year 2011 USERRA Report to Congress*, U. S. DEP'T OF LABOR, <http://www.dol.gov/vets/programs/userra/> (last visited May 1, 2013).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

state and local government employers and private employers, declined to take action in General Silva's claim without providing a reason for such refusal; however, after further review, General Silva eventually won his claim.<sup>11</sup>

Many soldiers may not be as fortunate as General Silva was in his fight to regain his civilian career due to difficulties in navigating the contours of USERRA and the employer's lack of education on such issues. Service members face an uphill battle in trying to prevail on a USERRA claim. The burden is on them to prove that they were discharged because of their military service and for no other reason.<sup>12</sup> This onerous burden of proof may deter many from filing formal USERRA complaints in the first place.

The United States federal government is undoubtedly the largest employer of Reservist and National Guard members.<sup>13</sup> Approximately 123,000 of the 850,000 individuals serving in this "part-time"<sup>14</sup> capacity are federal employees in the civilian sector.<sup>15</sup> As of December 18, 2012, the

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<sup>11</sup> See Vogel, *supra* note 4, at 2.

Silva, who reached a confidential settlement with Customs, remains angry that the Justice Department did not pursue the case. "They refused to give any kind of explanation," he said. "The whole burden is put on the serving soldier to defend your case." The former brigadier general's experience is not unusual. Some employees penalized for their military service describe being forced to wend their way through a frustrating bureaucracy before they get recourse. Sometimes, veterans and advocates say, they never get it.

*Id.*

<sup>12</sup> See *Goico v. Boeing Co.*, 347 F. Supp. 2d 955, 983 (D. Kan. 2004) (holding that an employee making a USERRA discrimination claim bears the initial burden of showing by preponderance of the evidence that the employee's military service was a substantial or motivating factor in adverse employment action).

<sup>13</sup> Vogel, *supra* note 4, at 1.

<sup>14</sup> See *Types of Military Service FAQ*, TODAY'S MILITARY (last visited Dec. 5, 2013), <http://www.todaymilitary.com/frequently-asked-military-questions/types-of-military-service-faq> (Part-time refers to a soldier who serves in the Reserves or National Guard component of the Armed Services).

<sup>15</sup> Vogel, *supra* note 4, at 1.

total number of National Guard and Reserve service members activated to active duty<sup>16</sup> was 56,865. By the end of 2014, when the United States' withdrawal of troops from Afghanistan is expected to be complete,<sup>17</sup> an influx of returning service members will seek reemployment back in the civilian workforce without delay.<sup>18</sup> More specifically, many of these members will seek reemployment with the federal government. Thus, if the legislative intent behind USERRA is to promote non-career service in the military by eliminating or minimizing the disadvantages to civilian careers and employment,<sup>19</sup> USERRA must be effective in its application not only to

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<sup>16</sup> See *US Military – Active Duty*, ABOUT.COM (last visited Dec. 5, 2013), <http://usmilitary.about.com/cs/generalinfo/g/actdu.htm> (“Active-duty” refers to soldiers that operate on a full-time basis).

<sup>17</sup> See, e.g., Deb Riechmann, *Afghanistan Drawdown: 202 Bases Closed, NATO Says*, THE HUFFINGTON POST (Aug. 26, 2012, 10:55 AM), [http://www.huffingtonpost.com/2012/08/26/afghanistan-drawdown-bases-closed\\_n\\_1831164.html](http://www.huffingtonpost.com/2012/08/26/afghanistan-drawdown-bases-closed_n_1831164.html) (discussing that NATO has closed more than 200 bases in Afghanistan and transferred nearly 300 others to local forces, a concrete step toward its 2014 target of handing over security responsibility).

<sup>18</sup> News Release, U.S. Dep’t of Def., Nat’l Guard (in Fed. Status) and Reserve Activated as of Dec. 18, 2012, (Dec. 19, 2012), *available at* <http://www.defense.gov/releases/release.aspx?releaseid=15754>. The total number currently on active duty from the Army National Guard and Army Reserve is 40,732; Navy Reserve, 5,098; Air National Guard and Air Force Reserve, 8,020; Marine Corps Reserve, 2,368; and the Coast Guard Reserve, 647. This brings the total National Guard and Reserve personnel who have been activated to 56,865. *Id.*

<sup>19</sup> See 38 U.S.C. § 4301 (1994):

(a) The purposes of this chapter are

- (1) to encourage noncareer service in the uniformed services by eliminating or minimizing the disadvantages to civilian careers and employment which can result from such service;
- (2) to minimize the disruption to the lives of persons performing service in the uniformed services as well as to their employers, their fellow employees, and their communities, by providing for the prompt reemployment of such persons upon their completion of such service; and
- (3) to prohibit discrimination against persons because of their service in the uniformed services.

state and private companies, but also to the federal government—especially since it is purported to be the “model employer.”<sup>20</sup>

Amendments made to USERRA appear to have been effective over the years in bolstering enforcement against state and private employers; however, federal employees seeking similar protections actually have fewer rights than their state and private sector counterparts.<sup>21</sup> In fact, the federal government is the biggest offender of USERRA. According to the Department of Labor (DOL), in 2011, more than 18 percent of the 1,548 complaints of violations of USERRA involved federal agencies.<sup>22</sup> Although the current administration has made decreasing veterans’ unemployment rates a priority,<sup>23</sup> advocates for veterans claim that the process of challenging alleged USERRA violations by the federal government is extremely difficult.<sup>24</sup> Despite the existence of USERRA, employees are

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(b) It is the sense of Congress that the Federal Government should be a model employer in carrying out the provisions of this chapter.

*Id.*

<sup>20</sup> *Id.*

<sup>21</sup> See THE HR SPECIALIST: NEW YORK EMPLOYMENT LAW, *Reports Shows Uncle Sam is Biggest USERRA Violator*, BUSINESS MANAGEMENT DAILY (May 2, 2012, 11:00 AM), <http://www.businessmanagementdaily.com/30493> (discussing that the federal government is the largest single employer of military reservists, 14 percent of whom work for Uncle Sam. During federal fiscal year 2010, the Department of Labor sought legal action on 43 USERRA cases involving federally employed reservists. But the Department of Justice only pursued three of them.).

<sup>22</sup> U.S. DEP’T OF LABOR, USERRA FY 2011 ANNUAL REPORT TO CONGRESS13 (July 2012), available at <http://www.dol.gov/vets/programs/userra/2011USERRAReport.pdf> [hereinafter USERRA Report].

<sup>23</sup> See Memorandum for the Heads of Executive Departments and Agencies on Ensuring the Uniformed Services Employment and Reemployment Act (USERRA) Protections (July 19, 2012) [hereinafter Presidential Memo] (discussing efforts directed at the various federal agencies to take steps to enhance recruitment of and promote employment opportunities for veterans).

<sup>24</sup> Employment Law Group, *Federal Government is Top Violator of USERRA, Making it Difficult for Veterans to Obtain and Keep Jobs*, USERRA RIGHTS BLOG (Feb. 3, 2012, 3:39 PM) [hereinafter Top Violator], <http://www.userrightsblog.com/c/news/3036-federal-government-is-top-violator-of-userra-making-it-difficult-for-veterans-to-obtain->

being penalized for unfair reasons. Specifically, complaints against federal government employers range from situations where employees were penalized for being absent from their jobs when they were on active duty to federal agencies that simply refused to rehire returning reservist and guard members.<sup>25</sup> Thus, the real issue that needs to be addressed is the federal government's lack of compliance with USERRA.<sup>26</sup>

Accordingly, the focus of this article will be on how USERRA fails to address the real issue at hand: the federal government's increased noncompliance. First, this article will discuss the background of USERRA. It will provide an overview of USERRA's purpose coupled with a discussion of whom and what is covered under the Act. Moreover, this section will look at redressability under USERRA and what that means for state and private employers as well as federal government employers. Second, the article will address the possible defenses that are available to employers to combat USERRA allegations. Finally, the article will examine other state jurisdictions and their respective approaches to USERRA claims. The primary focus here is to consider what other states are doing more efficiently and recommend the implementation of some of their principles into the federal plan to encourage compliance. Within this section, I will discuss proposals that I believe are needed to effectively address the federal government's shortcomings when it comes to complying with USERRA.

This article serves to suggest a number of proposals that may help compel the federal government to comply with the provisions of USERRA. By no means does this article offer a complete remedy to the issue at hand. It only offers suggestions that would help move the federal government towards compliance. First, there needs to be an economic incentive for the

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and-keep-jobs.html (claiming "that no government agency has oversight over resolving USERRA claims").

<sup>25</sup> HR SPECIALIST, *supra* note 21.

<sup>26</sup> *See id.*

federal government to comply with USERRA. As it stands now, federal employers that violate USERRA are only liable for back pay, whereas private and state employers may be liable for liquidated damages in addition to back pay and lost benefits (double the amount).<sup>27</sup> Moreover, the independent agency charged with informally adjudicating federal USERRA claims holds sole discretion in determining whether attorney's fees and other litigation costs should be ordered for the service member.<sup>28</sup> I will be arguing that there should be a mandate *requiring* the award of attorney's fees and litigation costs along with back pay. In other words, I am arguing for "double the damages." Thus, there needs to be an emphasis on economic penalties for federal employers' noncompliance with USERRA. A tighter economic grip will help incentivize compliance. Second, I will be arguing for the implementation of a provision in USERRA making it a criminal offense to discriminate against a service member on the basis of military obligations. Currently, only civil penalties exist for violating USERRA. An examination of two states that handle USERRA-like claims as a criminal offense—Missouri and Washington—will be discussed to see what could be done to implement similar approaches directed at federal government compliance. Finally, in order to improve USERRA's enforcement in the federal government sector, employee-employer contracts that bind employees into mandatory arbitration for USERRA disputes should be deemed unenforceable.<sup>29</sup> Allowing employers to hold service members to

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<sup>27</sup> Vogel, *supra* note 4, at 1.

<sup>28</sup> 38 U.S.C. § 4324(c)(4) (1994):

If the Board determines as a result of a hearing or adjudication conducted pursuant to a complaint submitted by a person directly to the Board pursuant to subsection (b) that such person is entitled to an order referred to in paragraph (2), the Board *may*, in its discretion, award such person reasonable attorney fees, expert witness fees, and other litigation expenses.

*Id.* (emphasis added).

<sup>29</sup> See MATHEW R. TULLY, PROPOSALS TO IMPROVE USERRA 5 (2011).

mandatory arbitration would turn USERRA on its face by taking any discrimination claims based on military obligations out of the control of USERRA. Essentially, the service member is stripped of all protections under USERRA upon signing on the dotted line of an employment agreement.

## II. BACKGROUND OF THE UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT ACT (USERRA) OF 1994

The Administration strongly believes that every man or woman who has served in our country's uniformed services deserves the full protection of our employment laws, including USERRA. No discrimination or unfair treatment based on one's service will be tolerated. We must do our utmost to ensure that all service members' employment and reemployment rights are respected.<sup>30</sup>

Reservists and Guard members have played an important role in the United States since the days of the American Revolution. Initially, "citizen-soldiers"<sup>31</sup> owed their allegiance only to their respective states as members of the various state militias.<sup>32</sup> Today, the modern militia is the National Guard.<sup>33</sup> There are now seven distinct federal military reserve forces: Army National Guard, Army Reserve, Naval Reserve, Air National Guard, Air Force Reserve, Marine Corp Reserve, and Coast Guard Reserve.<sup>34</sup> Many citizens volunteer to participate in these forces, as evidenced by the latest

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<sup>30</sup> Presidential Memo, *supra* note 23.

<sup>31</sup> See, e.g., Gregg Zoroya, *Army to Expand Citizen Soldiers' Training Periods*, USA TODAY, July 30, 2012, <http://usatoday30.usatoday.com/news/military/story/2012-07-30/army-guard-reserve-training/56595948/1> (describing "citizen-soldiers" as just another term for Reserve and National Guard soldiers).

<sup>32</sup> *Id.*

<sup>33</sup> See generally Frederick B. Wiener, *The Militia Clause of the Constitution*, 54 HARV. L. REV. 181 (1940).

<sup>34</sup> See NORTH ATLANTIC TREATY ORGANIZATION, NATIONAL RESERVE FORCES STATUS 1 (2004), available at <http://www.nato.int/nrfc/database/usa.pdf> (describing the basic organization principles by military branch.).

Defense Authorization Act allowing for a total of 852,733 Reservist as of September 30, 2013.<sup>35</sup> The number of service members on active duty in 2010 was just above 1.4 million.<sup>36</sup> Thus, it is safe to say that a large majority of service members returning over the months to come will be a part of these Reserve/National Guard forces.

Many of the nation's reservists and guard members face ongoing employment problems. In addition to a sluggish economy, service members are returning to both public and private sector employers who are hesitant to retrain, promote, or reemploy them, in part because of fear that these individuals will be called up again.<sup>37</sup> As of 2012, the unemployment rate of Americans who have served in the military at any time since September 2001 declined by 2.2 percentage points from 12.1 percent (2011) to 9.9

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<sup>35</sup> National Defense Authorization Act for Fiscal Year 2013, H.R. 4310, 112<sup>th</sup> Cong. (2012), available at <http://www.gpo.gov/fdsys/pkg/BILLS-112hr4310enr/pdf/BILLS-112hr4310enr.pdf>.

<sup>36</sup> U.S. CENSUS BUREAU, MILITARY PERSONNEL ON ACTIVE DUTY BY RANK OR GRADE: 1990 TO 2010 (2012), available at <http://www.census.gov/compendia/statab/2012/tables/12s0511.pdf>.

<sup>37</sup> See Tammy Binford, *Veterans Soldiering Through Tough Job Market*, HRHERO BLOG (May 20, 2012), <http://blogs.hrhero.com/diversity/2012/05/20/veterans-soldiering-on-through-tough-job-market/>.

Ted Daywalt, CEO and president of VetJobs, a company that connects employers with veterans through a job-placement website, appeared before a panel of the House Committee on Veterans Affairs in February. He pointed to a 2007 Department of Defense policy on call-ups of the National Guard as a reason many recent veterans have trouble finding employment. The policy means Guard members finishing a long deployment face the potential of another long deployment soon after returning to the workforce. Daywalt told the panel that employers are hesitant to hire Guard members because of the policy.

*Id.*

percent (2012).<sup>38</sup> Despite this slight decline, returning service members seeking to advance their civilian careers are still affected by unemployment.

Under USERRA, employers are required by law to rehire returning service members.<sup>39</sup> The law prohibits discrimination based on military service, preserves workers' seniority and other benefits, and requires employers to make reasonable efforts to accommodate disabled veterans.<sup>40</sup> In 2008, the United States Merit Systems Protection Board (MSPB), which adjudicates claims of federal employers' violations of USERRA, received 533 cases from veterans accusing the federal government of violating their rights.<sup>41</sup> In 2010, that figure nearly doubled to 1,012 cases.<sup>42</sup> The MSPB

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<sup>38</sup> Economic News Release, U.S. Dep't of Labor, Bureau of Labor Statistics, Employment Situation of Veteran's Summary (2012), available at [www.bls.gov/news.release/vet.nr0.htm](http://www.bls.gov/news.release/vet.nr0.htm).

<sup>39</sup> *Id.* at § 4301(a)(2) (“[T]o minimize the disruption to the lives of persons performing service in the uniformed services as well as to their employers, their fellow employees, and their communities, by providing for the prompt reemployment of such persons upon their completion of such service”).

<sup>40</sup> *See* § 4311(a).

A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation.

*Id.*

<sup>41</sup> U.S. MERIT SYS. PROTEC. BD., U.S. MERIT SYSTEMS PROTECTION BOARD FISCAL YEAR 2009 ANNUAL REPORT 1 (2010) [hereinafter MSPB 2009 ANNUAL REPORT], available at <http://www.mspb.gov/netsearch/viewdocs.aspx?docnumber=546704&version=548287&application=ACROBAT>.

<sup>42</sup> U.S. MERIT SYS. PROTEC. BD., U.S. MERIT SYSTEMS PROTECTION BOARD FISCAL YEAR 2010 ANNUAL REPORT 13 (2011) [hereinafter MSPB 2010 ANNUAL REPORT], available at <http://www.mspb.gov/netsearch/viewdocs.aspx?docnumber=576602&version=578315&application=ACROBAT>.

issued over 8,200 decisions in the fiscal year 2011, about four percent more than the 7,863 decisions issued in fiscal year 2010.<sup>43</sup>

Such a dramatic increase in the number of violations on the part of federal government employers has compelled senior White House staff to respond. In late 2012, the White House's personnel chief, John Berry, called on senior federal executives to ensure that Guard and Reserve troops returning to their federal jobs were not penalized for their military service. In a memo sent to President Obama's Management Council and the Chief Human Capital Officers Council, Berry affirmatively stated, "This Administration has zero tolerance for violations of the Uniformed Services Employment and Reemployment Rights Act."<sup>44</sup> The moment these remarks were made, Berry cited encouraging news that the recent Bureau of Labor Statistics figures showed a drop in veterans' unemployment rates—from 12.1 percent in 2011 to 7.6 percent in 2012.<sup>45</sup> However, another group released a survey that same week indicating that the unemployment numbers among returning Iraq and Afghanistan veterans stood at 16.7 percent.<sup>46</sup>

#### *A. Purpose of USERRA*

The legislative intent behind USERRA is to encourage non-career service in the uniformed services by eliminating or minimizing the disadvantages to civilian careers and employment that can result from such service.<sup>47</sup>

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<sup>43</sup> U.S. MERIT SYS. PROTEC. BD., U.S. MERIT SYSTEMS PROTECTION BOARD FISCAL YEAR 2012 ANNUAL REPORT 7 (2013) [hereinafter MSPB 2012 ANNUAL REPORT], available at <http://www.mspb.gov/netsearch/viewdocs.aspx?docnumber=792967&version=795988&application=ACROBAT>.

<sup>44</sup> Steve Vogel, *Berry Calls for 'Zero Tolerance' for Federal USERRA Violations*, WASH. POST, Mar. 29, 2012, [http://www.washingtonpost.com/blogs/federal-eye/post/berry-calls-for-zero-tolerance-for-federal-userra-violations/2012/03/28/gIQAy0PEhS\\_blog.html](http://www.washingtonpost.com/blogs/federal-eye/post/berry-calls-for-zero-tolerance-for-federal-userra-violations/2012/03/28/gIQAy0PEhS_blog.html) (statements from the White House's personnel chief).

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* (study conducted by a group called "Iraq and Afghanistan Veterans of America").

<sup>47</sup> 38 U.S.C. § 4301(a)(1) (1994).

USERRA is intended to establish a “floor, not a ceiling, for employment and reemployment rights and benefits” of covered employees.<sup>48</sup> Therefore, federal or state laws, private contracts, or agreements that provides a greater right or benefit than USERRA will not be affected.<sup>49</sup> Thus, the primary goal that USERRA seeks to reach is to minimize disruption to the following: service members performing military obligations; employers; fellow employees; and communities by providing for prompt reemployment upon completion of service.<sup>50</sup> The statutory language explicitly states that it is the intent of Congress that the federal government should be held to the standard of a model employer in carrying out the provisions of USERRA.<sup>51</sup>

An “employee” eligible for USERRA protection is defined simply as “any person employed by an employer,” which includes a citizen, national, or permanent resident alien of the United States who works in a foreign country for an employer that is incorporated or otherwise organized in the United States.<sup>52</sup> Federal regulations further define employee to include

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<sup>48</sup> See § 4302(b) (1994).

This chapter *supersedes any State law* (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by this chapter, including the establishment of additional prerequisites to the exercise of any such right or the receipt of any such benefit.

*Id.* (emphasis added).

<sup>49</sup> See § 4302(a) (1994).

Nothing in this chapter shall supersede, nullify or diminish any Federal or State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that establishes a right or benefit that is more beneficial to, or is in addition to, a right or benefit provided for such person in this chapter.

*Id.*

<sup>50</sup> 38 U.S.C. § 4301(a) (1994).

<sup>51</sup> 38 U.S.C. § 4301(b) (1994).

<sup>52</sup> See § 4303(3)

former employees of employers, so that anyone bringing a USERRA claim against a former employer has standing as an employee to do so.<sup>53</sup> USERRA protections apply not only to service members who are currently employed, but also to those seeking employment.

An “employer” is broadly defined under USERRA. It applies to “any person, institution, organization, or entity that pays salary or wages for work performed or that has control over employment opportunities;”<sup>54</sup> this definition includes persons to whom the employer has delegated employment related responsibilities to.<sup>55</sup> In the case of General Silva, who was fired from his contract position with the United States Customs and Border Patrol, the independent contracting firm that hired Silva would not give immunity to Customs from liability under USERRA because employment related responsibilities were delegated to them.<sup>56</sup> Therefore, a

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The term “employee” means any person employed by an employer. Such term includes any person who is a citizen, national, or permanent resident alien of the United States employed in a workplace in a foreign country by an employer that is an entity incorporated or otherwise organized in the United States or that is controlled by an entity organized in the United States, within the meaning of section 4319(c) of this title.

*Id.*

<sup>53</sup> 20 C.F.R. § 1002.5(c) (2006) (defining “employee” to include the former employees of an employer).

<sup>54</sup> 38 U.S.C. § 4303(4)(A) (1994) (defining employer to include the Federal Government and/or State).

<sup>55</sup> See *Brandsasse v. City of Suffolk*, 72 F. Supp. 2d 608 (E.D. Va. 1999) (holding that the City of Suffolk and its director of personnel, who had authority over hiring and firing for the city, were both subject to liability as “employers”); *But see Jones v. Wolf Camera, Inc.*, CIV.A.3:96-CV-2578-D, 1997 WL 22678 (N.D. Tex. Jan. 10, 1997) (holding that the two supervisors were not persons to whom the employer had delegated the performance of employment related responsibilities, thereby rejecting defendants’ argument in motion to dismiss that they, as individual supervisors, and not corporate officers with operational control, could not be held liable as “employers” under USERRA).

<sup>56</sup> See *Vogel*, *supra* note 4, at 2.

company or governmental agency cannot circumvent the reaches of USERRA by hiring an independent contractor to fulfill its staffing needs.

An individual, who performs a service-related duty in the military, either voluntarily or involuntarily, is automatically guaranteed the protections provided by USERRA.<sup>57</sup> Employees that leave their civilian employment due to military service are entitled to certain rights and benefits of reemployment by the same employer.<sup>58</sup> Eligibility for most military benefits depends on the character of the service. For example, USERRA protections are not available to those service members who have received a Dishonorable or Bad Conduct Discharge,<sup>59</sup> a Dismissal,<sup>60</sup> or an Under Other Than Honorable Conditions Discharge.<sup>61</sup>

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<sup>57</sup> § 4303(13) (USERRA protects both an individual who volunteers for service and those who are activated involuntarily to active duty against their own free will):

The term “service in the uniformed services” means the performance of duty on a voluntary or involuntary basis in a uniformed service under competent authority and includes active duty, active duty for training, initial active duty for training, inactive duty training, full-time National Guard duty, a period for which a person is absent from a position of employment for the purpose of an examination to determine the fitness of the person to perform any such duty....

*Id.*

<sup>58</sup> 38 U.S.C. § 4312(a) (“[A]ny person whose absence from a position of employment is necessitated by reason of service in the uniformed services shall be entitled to the reemployment rights and benefits and other employment benefits of this chapter . . .”).

<sup>59</sup> See *Military Justice 101-Part 3: Enlisted Administrative Separations*, ABOUT.COM, <http://usmilitary.about.com/od/justicelawlegislation/l/aadischarge1.htm> (last visited Dec. 12, 2012) (This type of discharge is a punishment adjudged as sentence at court martial. It applies to enlisted members of the armed forces only).

<sup>60</sup> *Id.* A dismissal is the only authorized discharge that can be adjudged against commissioned officers in a court martial. *Id.*

<sup>61</sup> *Id.* This characterization of discharge is the lowest that can result from an administrative involuntary separation from the service. Citation. Each Service Secretary promulgates regulations regarding procedures and characterization of service for involuntary separations. *Id.*

*B. Redressability of Grievances Through USERRA*

The service member has five means of redressing grievances through USERRA regarding employment and reemployment discrimination in private, state, and federal claims: 1) the Department of Defense's Employer Support of the Guard and Reserve (ESGR); 2) the Department of Labor's Veterans' Education Training Services; 3) referral to the Department of Justice; 4) the Office of Special Counsel (OSC) in cases involving a federal employer;<sup>62</sup> or 3) a private right of action involving private counsel. The focus of this article will be on USERRA claims involving violations by federal employers.

**1. Department of Defense's Employer Support of the Guard and Reserve (ESGR)**

The first option is the ESGR program. It is designed to recognize employers that implement policies that incentivize and offer support of their employees' participation in the armed services.<sup>63</sup> The ESGR is an agency within the DOD whose mission is to gain and maintain employer support for service members by advocating relevant initiatives, recognizing outstanding support, increasing awareness of USERRA, and resolving conflicts between employers and service members.<sup>64</sup> The informal ESGR process has national and local organizational structures to support the following goals: 1) operate a proactive program directed at US employers, employees, and communities that ensures understanding and appreciation<sup>65</sup> of employees who are service members; 2) assist in preventing, resolving, or reducing employer and/or employee problems and misunderstandings

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<sup>62</sup> 38 U.S.C. § 4323; *See also* USERRA Report, *supra* note 22, at 1.

<sup>63</sup> USERRA Report, *supra* note 22, at 3.

<sup>64</sup> *What is ESGR*, EMPLOYER SUPPORT OF THE GUARD AND RESERVE, <http://www.esgr.mil/About-ESGR/What-is-ESGR.aspx> (last visited Nov. 20, 2012); *See* USERRA Report, *supra* note 22, at 2.

<sup>65</sup> USERRA Report, *supra* note 22, at 2.

that result from Guard or Reserve service, training, or duty requirements through information services and mediation;<sup>66</sup> 3) assist in educating Guard and Reserve members regarding their obligations and responsibilities to employers;<sup>67</sup> and 4) use the military chain of command to promote better understanding of the importance of maintaining positive working relations between employers and their Reserve Component employees to sustain Guard and Reserve participation.<sup>68</sup>

In order to promote the goals mentioned above, ESGR conducts awareness and recognition programs aimed at employers of service members to engender support for military service.<sup>69</sup> Nevertheless, participation in these programs remains voluntary on the part of the employer, thus limiting its effectiveness to those employers willing to commit. Employers that choose to pledge support must sign a Statement of Support.<sup>70</sup> An employer that signs a Statement of Support pledges that he or she will adhere to the following: 1) fully recognize, honor, and enforce USERRA; 2) ensure managers and supervisors have the tools they need to effectively manage those employees who serve in the armed services; and

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<sup>66</sup> *Id.*

<sup>67</sup> *See id.*; *See also Frequently Asked Questions*, EMPLOYER SUPPORT OF THE GUARD AND RESERVE, <http://www.esgr.mil/USERRA/Frequently-Asked-Questions.aspx> (last visited Nov. 21, 2012)

In general, if the employee has been absent from a position of civilian employment by reason of service in the uniformed services, he or she will be eligible for reemployment under USERRA by meeting the following criteria: 1) The employer had advance notice of the employee's military obligation; 2) The employee has been away from this employer five years or less due to military obligations (excluding exemptions); 3) The employee returns to work in a timely manner as defined under USERRA; and 4) The employee has not been separated from uniformed services with a disqualifying discharge or under other than honorable conditions.

*Id.*

<sup>68</sup> USERRA Report, *supra* note 22, at 2.

<sup>69</sup> *Id.* at 3.

<sup>70</sup> *Id.*

3) continually recognize and support service members and their families in peace, in crisis, and in war.<sup>71</sup> Once an employer pledges to honor and enforce USERRA, it is entered into the ESGR's awards program.

Individual supervisors are eligible for several ESGR awards based on their pledge to enforce USERRA. For example, the Patriot Award is offered to individual supervisors, while the annual Secretary of Defense Employer Support Freedom Award is awarded to the most outstanding employers in the nation.<sup>72</sup> During the fiscal year 2011, ESGR awarded 16,560 supervisors with the Patriot Award and 15 employers with the Secretary of Defense Employer Support Freedom Award.<sup>73</sup> Not a single federal employer was among ESGR award recipients. This minor discrepancy, albeit revealing, counteracts the federal government's aim to be a "model employer"<sup>74</sup> in carrying out the USERRA provisions.

The ESGR process gives the service member the opportunity to confront USERRA violations in an informal setting. The ESGR Ombudsmen<sup>75</sup> Services Program is the most informal level at which resolutions for USERRA claims may be achieved.<sup>76</sup> The Ombudsman services offered through ESGR are the primary means of assisting service members with USERRA related claims.<sup>77</sup> The Ombudsman Services Program provides education, information, and neutral third-party services in order to resolve

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<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> DEP'T OF DEF., EMPLOYER SUPPORT OF THE GUARD AND RESERVE 2011 YEAR IN REVIEW 15 (2012), available at [http://www.dod.mil/pubs/foi/Personnel\\_and\\_Personnel\\_Readiness/Personnel/13-F-0014\\_ESGR\\_Year\\_in\\_Review\\_FY11.pdf](http://www.dod.mil/pubs/foi/Personnel_and_Personnel_Readiness/Personnel/13-F-0014_ESGR_Year_in_Review_FY11.pdf); See Past Recipients, THE FREEDOM AWARD, <http://www.FreedomAward.mil/CurrentRecipientsView.aspx> (last visited Nov. 23, 2012) for a list of the specific employers recognized.

<sup>74</sup> 38 U.S.C. § 4301.

<sup>75</sup> See, e.g., MERRIAM WEBSTER'S COLLEGIATE DICTIONARY (11<sup>th</sup> ed. 2005) (defining "ombudsman" as "one that investigates, reports on, and helps settle complaints").

<sup>76</sup> USERRA Report, *supra* note 22, at 1.

<sup>77</sup> *Id.* at 3.

USERRA conflicts.<sup>78</sup> However, ESGR is not an enforcement agency, meaning any conclusions reached by the Ombudsman are not binding by law. Moreover, the investigations and settlements undertaken by the ESGR and the Ombudsman are not considered to be a part of the litigation process.<sup>79</sup> Thus, service members are able to file directly with Department of Labor's Veterans' Education Training Services (VETS), which has Congressional authority to investigate USERRA violations and legal authority to subpoena records during an investigation.<sup>80</sup>

## **2. Department of Labor's Veterans' Education Training Services (VETS)**

The second means of redressing grievances through USERRA is a formal investigation by the VETS. If the issue cannot be resolved with the ESGR, or if the individual opts to bypass the informal stage, then VETS receives and formally investigates the claim.<sup>81</sup> If the service member decides to file a claim through VETS, he or she must complete a questionnaire that asks about military information, the employer's information, and whether the claim relates to employment or reemployment discrimination.<sup>82</sup> Once the

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<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *See* 38 U.S.C. § 4321 (1994).

The Secretary (through the Veterans' Employment and Training Service) shall provide assistance to any person with respect to the employment and reemployment rights and benefits to which such person is entitled under this chapter. In providing such assistance, the Secretary may request the assistance of existing Federal and State agencies engaged in similar or related activities and utilize the assistance of volunteers.

*Id.* *See Veterans' Employment and Training Services (VETS)*, U.S. DEP'T OF LABOR., <http://www.dol.gov/vets/> (last visited Nov. 23, 2012); *See also* USERRA Report, *supra* note 22, at 4.

<sup>81</sup> USERRA Report, *supra* note 22, at 1.

<sup>82</sup> *VETS/USERRA/VP Form 1010*, U.S. DEP'T OF LABOR., <http://www.dol.gov/elaws/vets/vetpref/vets-1010.pdf> (last visited Nov. 21, 2012) (showing an example of the form VETS requires reservists complete in order to receive Department of Labor assistance in

service member files the complaint, VETS conducts an investigation.<sup>83</sup> There is no threshold requirement for VETS to meet in order to initiate a formal investigation. If VETS determines that the employer has violated USERRA in any capacity, then it makes “reasonable efforts” to ensure the employer is in compliance with the Act.<sup>84</sup> Should the employer fail to comply with USERRA based on VETS recommendations, then, at the service member’s request, VETS has the option to work with the Department of Labor’s Solicitor’s office (SOL). SOL provides legal analysis and recommendations regarding the merit of claims and refers cases to the United State’s Attorney General’s office.<sup>85</sup>

### 3. The Department of Justice (DOJ)

The third means of redressing grievances if the service member is not satisfied with the outcome reached by VETS is to have the case referred to the DOJ for consideration of legal representation at no cost to the service

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resolving their grievance. It contains seven questions regarding reemployment problems and three questions regarding hiring discrimination).

<sup>83</sup> See Employees’ Benefits, 20 C.F.R. § 1002.289 (2006).

In carrying out any investigation, VETS has, at all reasonable times, reasonable access to and the right to interview persons with information relevant to the investigation. VETS also has reasonable access to, for purposes of examination, the right to copy and receive any documents of any person or employer that VETS considers relevant to the investigation.

*Id.*

<sup>84</sup> See *id.*

<sup>85</sup> See 38 U.S.C. § 4323(a)(1) (1994).

If the Attorney General is reasonably satisfied that the person on whose behalf the complaint is referred is entitled to the rights or benefits sought, the Attorney General may appear on behalf of, and act as attorney for, the person on whose behalf the complaint is submitted and commence an action for relief under this chapter for such person.

*Id.*

member.<sup>86</sup> Referred cases to the DOJ are those involving state or local government employers.<sup>87</sup> If the Attorney General is reasonably satisfied that the service member is entitled to relief, then the DOJ's prosecutorial authority may be asserted, and the DOJ may commence an action in federal court on behalf of the service member.<sup>88</sup> The DOJ brings an action in the name of the United States in a state court only if the employer is the state,<sup>89</sup> in any other instance, the United States files suit in the name of the service member.<sup>90</sup> This structure is due to jurisdictional concerns. Under USERRA, a federal district court lacks jurisdiction over a USERRA action brought by an individual against a state as an employer. The plain language of the statute and its legislative history demonstrates that Congress intended that actions brought by individuals against a state be commenced in state court.<sup>91</sup> However, recent recommendations from DOL and DOJ suggest that all USERRA claims—not just those against state employers—be handled more like other civil rights laws where the United States serves as the plaintiff.<sup>92</sup>

#### 4. The Office of Special Counsel (OSC)

In cases involving federal employers violating USERRA, the Office of Special Counsel's (OSC) enforcement authority is implicated.<sup>93</sup> The OSC is

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<sup>86</sup> USERRA Report, *supra* note 22, at 1.

<sup>87</sup> *Id.* at 6 (Each referral includes: (1) the VETS investigative file; and (2) 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).

<sup>88</sup> *Id.* at 5.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *See* Townsend v. Univ. of Alaska, 543 F.3d 478, 482 (9th Cir. 2008) (finding that the federal district court lacks jurisdiction over USERRA actions by individuals against state as employers).

<sup>92</sup> USERRA Report, *supra* note 22, at 24.

<sup>93</sup> 38 U.S.C. § 4324(a)(1) (2010) ("A person . . . may request that the Secretary refer the complaint for litigation before the Merit Systems Protection Board. Not later than 60 days after the date the Secretary receives such a request, the Secretary shall refer the complaint to the Office of Special Counsel . . .").

an independent federal investigative and prosecutorial agency whose authority derives completely from USERRA.<sup>94</sup> If the Special Counsel is reasonably satisfied that the service member is entitled to relief under USERRA, then, upon the request of the service member, it may appear on behalf of and act as attorney for him or her in front of the Merit Systems Protection Board (MSPB).<sup>95</sup> However, as discussed below, the service member may elect to proceed with private counsel in front of the MSPB.<sup>96</sup>

The MSPB is an independent, quasi-judicial agency in the Executive branch<sup>97</sup> created to protect federal merit systems and the rights of individuals within those systems.<sup>98</sup> MSPB carries out its statutory responsibilities and authorities primarily by adjudicating individual employee appeals. It also reviews the actions of the Office of Personnel Management (OPM) to assess the degree to which those actions may affect merit.<sup>99</sup> If the Board determines that the federal employer has not complied with the provisions of USERRA, then it may enter an order requiring the federal employer to comply and compensate such person for any loss of wages or benefits suffered due to the lack of prompt compliance.<sup>100</sup>

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<sup>94</sup> See *Introduction to OSC*, U.S. OFFICE OF SPECIAL COUNSEL, <http://www.osc.gov/Intro.htm> (last updated Jan. 21, 2010) for a more thorough discussion of the Office of Special Counsel.

<sup>95</sup> 38 U.S.C. § 4324(2)(A).

<sup>96</sup> See *id.* at (b) (“A person may submit a complaint against a Federal executive agency or the Office of Personnel Management under this subchapter directly to the Merit Systems Protection Board if that person . . .”).

<sup>97</sup> See *About MSPB*, U.S. MERIT SYS. PROT. BD., <http://www.mspb.gov/About/about.htm> (last visited Jan. 2, 2013) for a more thorough description of the MSPB.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> 38 U.S.C. § 4324(c)(2)

If the Board determines that a Federal executive agency or the Office of Personnel Management has not complied with the provisions of this chapter relating to the employment or reemployment of a person by the agency, the Board shall enter an order requiring the agency or Office to comply with such

In addition, the MSPB has discretion to award attorney's fees and litigation costs.<sup>101</sup> However, this discretion has presented issues that are twofold. First, USERRA claimants need attorneys to help them navigate the adversarial process such as filing briefs with the court or making arguments before the judge. Attorneys handling such matters should not be expected to offer his or her services without the guarantee of being compensated. The attorney fee provision was implemented to incentivize attorney involvement; however, the impact of this incentive is diminished by the realization that the assurance of attorney's fees is not guaranteed.<sup>102</sup> Second, courts are more likely not to disturb the MSPB's decision not to award attorney's fees unless such decision is (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) obtained without procedures required by law, rule, or regulation having been followed; or (3) unsupported by substantial evidence.<sup>103</sup>

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provisions and to compensate such person for any loss of wages or benefits suffered by such person by reason of such lack of compliance.

*Id.*

<sup>101</sup> See *id.* § 4324(c)(4).

If the Board determines as a result of a hearing or adjudication conducted pursuant to a complaint submitted by a person directly to the Board pursuant to subsection (b) that such person is entitled to an order referred to in paragraph (2), the Board may, in its discretion, award such person reasonable attorney fees, expert witness fees, and other litigation expenses.

*Id.*

<sup>102</sup> TULLY, *supra* note 29, at 12.

<sup>103</sup> 5 U.S.C. § 7703(c)(1)-(3) (1978); accord *Phillips v. U.S. Postal Serv.*, 695 F.2d 1389, 1390 (Fed.Cir.1982); See also, *Jacobsen v. Dep't of Justice*, 500 F.3d 1376, 1379 (Fed. Cir. 2007) (holding that USERRA Section 4324(c)(4) does not require that the petitioner be a "prevailing party" who may only be awarded attorney fees in the "interest of justice"); See also *Sacco v. U.S.*, 452 F.3d 1305, 1309 (Fed.Cir. 2006) (holding that rather, section 4324(c)(4) merely requires that the Board have issued an "order" requiring the agency to correct its violation of USERRA. Congress left the decision whether to award reasonable attorney fees, expert witness fees, and other litigation expenses to the Board's discretion. In such a case where Congress left the precise application of a fees-

## 5. Assistance of Private Counsel

The fifth option of redressing grievances is the choice to file a complaint directly against an employer with the assistance of private counsel.<sup>104</sup> If the employer is either a private company or the local government, then the complaint is filed in any federal district where the employer maintains a place of business.<sup>105</sup> Accordingly, if a service member elects to initiate a private suit against an employer, then no court costs or fees will be charged to the service member claiming USERRA violations.<sup>106</sup> However, if the complaint is against a federal employer, then it must be filed with the MSPB.<sup>107</sup>

The remedies a court can provide vary. Relief may include forcing the employer to hire the service member, requiring the employer to pay the service member for back wages or benefits lost due to the employer's failure to comply with USERRA; or, if the court determines that the employer's actions were willful, then it may require the employer to pay the service member liquidated damages in the form of actual damages.<sup>108</sup> However, actual damages may be extremely small if the USERRA claimant who was unlawfully denied reemployment has quickly found another job with another employer that pays just the same or more.<sup>109</sup> Additionally, the court has the discretion to award attorney and expert witness fees to a

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permitting provision to the Board's discretion, and in the absence of any Constitutional challenge thereto, we accord broad deference to the Board's decision to deny fees).

<sup>104</sup> A reservist files their complaint in federal court if the employer is a private entity and files in state court if the employer is a state government entity. *See* 38 U.S.C. § 4323(b)(1)-(3).

<sup>105</sup> 38 U.S.C. §4323(c)(2); A political subdivision of a state is deemed to be a private employer for purposes of USERRA enforcement under §4323. *See* 38 U.S.C. §4323(i). Political subdivisions of states do not have Eleventh Amendment immunity. *See* Hopkins v. Clemson Agric. College, 221 U.S. 636, 645 (1911).

<sup>106</sup> *See id.* § 4323(d).

<sup>107</sup> *See generally* 38 U.S.C. §4324.

<sup>108</sup> *Id.*

<sup>109</sup> Tully, *supra* note 29, at 10.

service member who prevails in a private right of action under USERRA.<sup>110</sup> The benefit in such an award is that the service member is not deterred from seeking out private counsel; however, a potential downside is that the service member may be on the hook for attorney's fees if he or she fails to prevail.

A private right of action brought under USERRA differs tremendously than a private right of action under a Title VII claim. For instance, under Title VII, a potential plaintiff bringing the claim must first exhaust his or her administrative remedies,<sup>111</sup> such as presenting the claim before the Equal Employment Opportunity Commission (EEOC) or its state or local equivalent.<sup>112</sup> No such requirement exists under USERRA. A service member filing a USERRA claim need not exhaust the administrative remedies<sup>113</sup> available to him or her before seeking a private right of action.<sup>114</sup> A private right of action would expedite the process and ensure that the service member has his or her claim heard in front of a court.

## 6. Court's Burden-Shifting Analysis

When a service member claims that an employer violated USERRA's provisions, courts apply a burden-shifting analysis to decide whether the

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<sup>110</sup> See 38 U.S.C. § 4323(h)(2).

In any action or proceeding to enforce a provision of this chapter by a person under subsection (a)(2) who obtained private counsel for such action or proceeding, the court may award any such person who prevails in such action or proceeding reasonable attorney fees, expert witness fees, and other litigation expenses.

*Id.*

<sup>111</sup> *Discrimination: Overview-Title VII*, PRACTICAL LAW COMPANY (PLC) (2013), <http://us.practicallaw.com/3-503-3975#a1052369> (last visited Dec. 15, 2013).

<sup>112</sup> *Id.*

<sup>113</sup> See *supra* Part II.B.1-2.

<sup>114</sup> Harvey Sanders & Jeri Hagen, *Policies Guide Employers, Reservists*, SANDERS & SANDERS (Nov. 5, 2001), <http://www.wnyemploymentlaw.com/Article7.shtml>.

employer used the service member's military service as a basis for its adverse employment decision.<sup>115</sup> When applying this burden-shifting analysis, courts interpret USERRA liberally in favor of the service member.<sup>116</sup> The court begins its analysis when the service member establishes a prima facie case of discrimination.<sup>117</sup> This is accomplished by a showing of a preponderance of the evidence that the service member's military status was a motivating factor in the employer's adverse employment decision,<sup>118</sup> though it does not have to be the sole cause for the employer's decision.<sup>119</sup> A motivating factor "is one of the factors that a truthful employer would list if asked for the reasons for its decision."<sup>120</sup> Once the service member successfully establishes a prima facie case under USERRA, the burden shifts to the employer to demonstrate that the service member's protected status was not a motivating factor in the adverse employment decision.<sup>121</sup> For instance, in the case of General Silva, all he had to do was allege that the United States Customs and Border Patrol fired him because of his military status. Then, the burden would shift to Customs to offer proof that General Silva's military status did not play a role in its decision to release him.

### *C. Defenses*

USERRA provides four statutory defenses that an employer can use to refuse reemployment to a service member returning from military service. The following are the defenses:

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<sup>115</sup> See *Sheehan v. Dep't of the Navy*, 240 F.3d 1009, 1013 (Fed. Cir. 2001) (describing USERRA's burden-shifting analysis).

<sup>116</sup> *McGuire v. United Parcel Serv.*, 152 F.3d 673, 676 (7th Cir. 1998).

<sup>117</sup> *Sheehan*, 240 F.3d at 1013 n.3.

<sup>118</sup> *Id.* at 1013.

<sup>119</sup> *Sanguinetti v. United Parcel Serv.*, 114 Fla. Supp. 2d 1313, 1318 (S.D. Fla. 2000), *aff'd*, 254 F.3d 75 (11th Cir. 2001).

<sup>120</sup> *Id.* (quoting *Brandsasse v. City of Suffolk*, 72 F. Supp. 2d 608, 617 (E.D. Va. 1999)).

<sup>121</sup> *Brandsasse*, 72 F. Supp. 2d at 617.

Whether the service member is “qualified” for the position upon return from service;<sup>122</sup>

Whether the employer’s circumstances have changed so much that it would be impossible or unreasonable to reemploy the service member;<sup>123</sup>

Whether the employer would suffer undue hardship in reemploying the service member;<sup>124</sup> and

Whether the deployment was for only a brief, nonrecurring period and there was no expectation that employment was to continue indefinitely for an extended period of time.<sup>125</sup>

The aforementioned defenses are not exhaustive by any means. Other defenses that are conceivable consist of the following: whether the service member’s classification was a motivating factor in the employer’s decision; whether the employer would have taken the same action regardless of the service member’s status; and last but not least, whether the service member actually reapplied for the position in the appropriate manner and within the allotted time frame. Each of these defenses can prove to be barriers to employment and reemployment.

For instance, an employer is not required to reemploy an otherwise eligible returning service member if the employer’s “circumstances have so changed as to make such reemployment impossible or unreasonable.”<sup>126</sup> This exception, however, has been narrowly construed. An employer’s defense that the “mere low work load, layoffs, and hiring freeze” precluded

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<sup>122</sup> See 38 U.S.C. § 4312(f)(4) (“requests for documentation cannot be interposed for the purposes of delay or avoidance by requiring documentation that does not exist or that may not be readily available”).

<sup>123</sup> See *id.* § 4312(d)(1)(A). This exception has been interpreted to avoid the necessity of an employer having to create a useless job. See, e.g., *Cole v. Swint*, 961 F.2d 58, 60 (5th Cir. 1997).

<sup>124</sup> § 4312(d)(1)(B).

<sup>125</sup> § 4312(d)(1)(C).

<sup>126</sup> § 4312(d)(1)(A).

it from rehiring a returning service member was found to be insufficient by a court to prevail against a USERRA claim.<sup>127</sup> Another court decision recited a similar principle:

The statutory exemption excusing a refusal to re-employ a veteran where reinstatement would be unreasonable is a very limited exception to be applied only where reinstatement would require creation of a useless job or where there has been a reduction in the work force that would reasonably have included the veteran.<sup>128</sup>

Therefore, a court will likely not render reemployment impossible or unreasonable merely because another employee occupies the returning service member's position.

In the case of an employer raising the defense of "undue hardship," he or she is not required to reemploy a returning service member if such employment would impose an unreasonable burden on the employer.<sup>129</sup> In determining whether the employer would suffer undue hardship, courts tend to consider the nature and costs of the necessary action, the overall financial resources of the employer, and the size of the employer in terms of its employees and facilities.<sup>130</sup> Thus, under the provisions of USERRA, an employer must make reasonable efforts, including refresher training, to accommodate a returning service member, unless doing so would cause an "undue hardship" to the employer.<sup>131</sup>

An employer is not required to reemploy an otherwise eligible returning service member if that service member, prior to departing for service, had only been employed for a brief, non-recurrent period; and there is no

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<sup>127</sup> See *Dunlap v. Grupo Antolin Kentucky, Inc.*, No. 5:05-CV-00029-R, 2007 WL 855335, at \*2 (W.D. Ky. Mar. 14, 2007).

<sup>128</sup> *Lapine v. Town of Wellesley*, 167 F. Supp. 2d 132, 138 (D. Mass. 2001) (quoting *Davis v. Halifax County Sch. Sys.*, 508 F. Supp. 966, 968 (E.D.N.C. 1981)).

<sup>129</sup> 38 U.S.C. § 4312(d)(1)(B).

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

reasonable expectation that such employment will continue indefinitely or for a significant period.<sup>132</sup> A reasonable expectation that employment would continue indefinitely would be an employment agreement that explicitly or implicitly promises the employee a specific duration of employment. The burden of proof, however, is on the employer to show that the employment was in fact brief and non-recurrent.<sup>133</sup>

### III. PROPOSALS TO BOLSTER THE FEDERAL GOVERNMENT'S COMPLIANCE WITH USERRA

The Federal Government, as our Nation's largest employer, has a responsibility to adopt best practices with respect to employing returning service members. Attracting and retaining the best talent means ensuring fair treatment for individuals who have served our country. Close attention must be paid to our returning service members to ensure that we protect their reemployment rights, and effectively manage their reintegration when they return from service.<sup>134</sup>

On July 19, 2012, President Barack Obama expressed in a Presidential Memorandum the importance of the federal government's role in ensuring the success of USERRA and the need to be a "model employer."<sup>135</sup> However, this is not new language. As a matter of fact, the call for the federal government to be a model employer has been discussed and fought for since the inception of USERRA.<sup>136</sup> For instance, three years prior to the passage of USERRA, members of the Senate stressed the importance that the federal government not only be a model employer, but that it also needs

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<sup>132</sup> See 38 U.S.C. § 4312(d)(2).

<sup>133</sup> See *id.*

<sup>134</sup> Presidential Memo, *supra* note 23.

<sup>135</sup> See *id.*

<sup>136</sup> See § 4301(b).

to be *the* model employer.<sup>137</sup> Moreover, in the very same hearing before the Committee on Veterans' Affairs, Assistant Secretary of Defense for Reserve Affairs—Stephen M. Duncan—reemphasized that the proposed new chapter (38 U.S.C. § 4324) would make it clear that the federal government should be a model employer with respect to the purposes and policies set out in the employment rights law for members of the uniformed services.<sup>138</sup>

While USERRA preempts any state law that is more restrictive, it does not preempt any laws that provide greater protections to service members.<sup>139</sup> Therefore, it is beneficial to study a few of the states that provide greater protections in certain areas than USERRA for service members in order to apply the same principles to bolster the federal government's compliance. Most states have their own version of USERRA-like laws that mirror the federal statute. However, a few state laws differ on some approaches, particularly with remedies. Accordingly, an examination

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<sup>137</sup> *Legislation Relating to Reemployment Rights, Educational Assistance, and the U.S. Court of Veterans Appeals: Hearing Before the Comm. on Veterans' Affairs*, 102<sup>nd</sup> Cong. 20 (1991) (statement of Deputy Assistant Att'y Gen. Schiffer).

Mr. Schiffer: I think, first of all, Mr. Chairman, without saying that any individual case is not important, that the problem arises more in the abstract, in all honesty, than it does in reality. We have not the slightest quarrel with the notion that the Federal Government should be not just a model employer but indeed the model employer.

*Id.*  
<sup>138</sup> *Legislation Relating to Reemployment Rights, Educational Assistance, and the U.S. Court of Veterans Appeals: Hearing Before the Comm. on Veterans' Affairs*, 102<sup>nd</sup> Cong. 184 (1991) (statement of Assistant Secretary of Defense for Reserve Affairs Duncan).

Mr. Duncan: The proposed new chapter would make it clear that the federal government should be a model employer with respect to the purposes and policies set out in the employment rights law for members of the uniformed services.

*Id.*  
<sup>139</sup> See 38 U.S.C. § 4302(b).

of Wyoming, Missouri, and Washington State USERRA-like laws will shed light on unique variations to determine whether the principles from these laws could possibly be used to help bolster the federal government's compliance with USERRA.

Three options exist to help bolster the federal government's compliance with USERRA and eradicate its failures from the numbers of the past fiscal year.<sup>140</sup> These options are 1) creating an economic incentive that would require federal employers to pay as much damages as a state or private employer; 2) considering implementing a criminal remedy that would make it a misdemeanor for a federal employer to violate the provisions of USERRA; and 3) making employee-employer contracts that bind employees into mandatory arbitration unenforceable for USERRA disputes.

*A. Create an Economic Incentive to Encourage Compliance Based on Wyoming's Model*

The Wyoming version of USERRA is codified in the Military Service Relief Act of 1998 (MSRA).<sup>141</sup> The economic incentives utilized to bolster enforcement via MSRA should be implemented into the federal scheme. MSRA provides very similar employment protections for service members as USERRA. Under MSRA, the policy driving the law is "that its citizens who serve their country and state and who leave their employment, homes, and education shall not be penalized nor economically disadvantaged because of such service."<sup>142</sup> Similar to USERRA, the purpose of MSRA is "to prevent [service members] from being disadvantaged and to prohibit discrimination against persons because of their uniformed services when they return to civilian life."<sup>143</sup>

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<sup>140</sup> See USERRA Report, *supra* note 23, at 13 for a statistical analysis breakdown of federal government employers that have violated USERRA for the FY 2011.

<sup>141</sup> See generally WYO. STAT. ANN. §§ 19-11-101-24 (1998).

<sup>142</sup> § 19-11-102(a).

<sup>143</sup> § 19-11-102(b).

There are two key differences between MSRA and USERRA: 1) award of damages and 2) attorney's fees. First, state district courts have the authority to order an employer to comply with MSRA, award compensation for lost wages and benefits stemming from the alleged MSRA violations, *and* award liquidated damages for willful violations.<sup>144</sup> This is significant because, unlike USERRA where a federal employer may only be liable for back pay,<sup>145</sup> MSRA makes the employer liable not only for back pay, but also for liquidated damages—double damages.<sup>146</sup>

Second, there is a key difference in that MSRA has a provision for an award of litigation costs and attorney's fees. An award of attorney's fees is mandated under MSRA<sup>147</sup> whereas it is discretionary under USERRA.<sup>148</sup> If the action is based on the anti-discrimination or reinstatement provisions, then the prevailing service member will be awarded a judgment for administrative or litigation costs incurred in connection with the action, in addition to attorney's fees.<sup>149</sup> This is significant because the award of attorney's fees incentivizes lawyers to accept MSRA involved claims without worrying about compensation.

As it stands right now, if the MSPB determines that a federal employer has not complied with the provisions of USERRA, then it will enter an

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<sup>144</sup> See *id.* § 19-11-121(b)(i)-(iii) (describing the term, “double damages”).

<sup>145</sup> See 38 U.S.C. § 4324(c)(2) (requiring the Board shall enter an order requiring the agency or Office to comply with such provisions and to compensate such person for any loss of wages or benefits suffered by such person by reason of such lack of compliance).

<sup>146</sup> WYO. STAT. ANN. § 19-11-121(b)(i)-(iii) (1998).

<sup>147</sup> § 19-11-123.

<sup>148</sup> See 38 U.S.C. § 4324(c)(4) (leaving the award of attorney's fees and other litigation costs in the hands of the MSPB).

<sup>149</sup> WYO. STAT. ANN. § 19-11-105(a)(i)-(ii) The statute requires the service member to first exhaust an employer's internal administrative remedies, if any, and the service member must refrain from “unreasonably protract[ing] such proceeding.” *Id.* at (b), (d). Litigation costs include court costs, expert witness fees (with some conditions), costs connected with any study or report necessary to prepare the party's case, and attorney's fees not to exceed \$75.00 per hour, unless a higher rate is approved by the court. *Id.* at (e)(vi)(A)-(C).

order requiring the agency to comply with the provisions and to compensate the service member for any loss of wages or benefits suffered due to lack of compliance.<sup>150</sup> Additionally, if the MSPB determines as a result of the hearing or adjudication conducted pursuant to the complaint submitted by a service member directly, the MSPB *may*, in its discretion, award the service member *reasonable* attorney fees, expert witness fees, and other litigation expenses.<sup>151</sup> The key language here is “may.” In other words, where the federal government is an employer, USERRA as it stands might not allow a service member to recover for attorney’s fees and other litigation expenses.<sup>152</sup> The inability to recover for attorney’s fees and other litigation costs can be highly problematic, especially since it is highly likely that the service member bringing this action has no other source of income to support litigation costs, let alone everyday living expenses. Additionally, there is no section in the statutory language allowing for the recovery of liquidated damages due to willful violations.

The absence of such language, or section, shows why it is imperative to adopt and implement a remedy similar to the one listed in Wyoming’s MSRA. Under MSRA, a service member is awarded, in conjunction with lost wages and benefits, liquidated damages for willful violations.<sup>153</sup> For instance, if the service member is fired from his or her job in violation of USERRA, and then finds another job a month or so later with loss of wages totaling \$600, then under MSRA the service member could recover that \$600 in addition to liquidated damages that may equal the same amount or more if the violation was willful. However, under USERRA, the service member that suffered unemployment from the federal government in a

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<sup>150</sup> § 4324(c)(2).

<sup>151</sup> § 4324(c)(4).

<sup>152</sup> *Id.*

<sup>153</sup> *See* WYO. STAT. ANN. § 19-11-121 (b)(i)-(iii) (“double damages”).

similar scenario would only be able to recover the \$600 and not the liquidated damages.

Thus, violators of MSRA's provisions are required to pay double the damages. If the federal government can implement some sort of double-damage remedy similar to Wyoming's MSRA, then it would likely incentivize the federal government to comply with USERRA, especially since government agencies are working with an ever decreasing budget and the need to be cost-efficient should compel compliance. Similarly, USERRA's ineffectiveness to mandate mandatory award of attorney's fees and litigation costs by leaving such a decision to the discretion of the MSPB proves quite insensitive to the needs of service members.<sup>154</sup> At this point in the process, the service member would have gone through several channels before even reaching the MSPB, thus expending a great deal of financial resources to do so.<sup>155</sup> Therefore, where Wyoming's MSRA makes it mandatory to award attorney's fees and other litigation costs associated with the claim, such as expert witnesses and special tests, USERRA should follow suit.<sup>156</sup> Instead of leaving sole discretion in the hands of the MSPB to determine whether the service member is entitled to attorney's fees, USERRA should be written to mandate such an award, thus reducing the risk of placing the service member in a financial bind that normally accompanies such claims.

*B. "Criminal" Remedy Based on the Missouri and Washington State Model*

The second solution would compel federal employers' compliance with USERRA through the use of a criminal remedy. As it stands, the remedies

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<sup>154</sup> See 38 U.S.C. § 4324(c)(4) (2010) (the MSPB has discretion to either award attorney's fees and other litigation costs or not).

<sup>155</sup> The service member would have gone through ESGR, DOL VETS, OSC, and then finally the MSPB. See *supra* Part II.

<sup>156</sup> See WYO. STAT. ANN. § 19-11-123 for the statutory language regarding mandatory award of attorney's fees.

that are available under the existing USERRA provisions apply only to civil damages.<sup>157</sup> Currently, federal employers are only liable for lost wages and benefits and perhaps attorney's fees if the MSPB decides to award it.<sup>158</sup> Thus, I am proposing that USERRA adopts the Missouri and Washington criminal remedy approach to handling claims involving USERRA-like actions.

### **1. The Missouri Approach**

Missouri offers a criminal solution that should be considered when discussing ways to compel federal government compliance with USERRA. In Missouri, it is considered a misdemeanor for any officer or agent of the state or of any county, municipality, school district, or other political subdivision to refuse to permit service members to take military leaves of absence from employment up to 15 calendar days per fiscal year without loss of pay, time, regular leave, impairment of efficiency rating, or any other rights or benefits.<sup>159</sup> More specifically, the Missouri statute gives state public employees the optional remedy of seeking criminal charges against a public employer for refusing to pay an employee for military leave up to 15 calendar days.

### **2. The Washington Approach**

Washington State's Militia Affairs statute (MA) would add the threat of a criminal proceeding and a willful element to the federal USERRA provisions. By adding a willful element, it would only allow for those federal employers that willfully violate USERRA to be criminally

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<sup>157</sup> See generally 38 U.S.C. § 4324 (2010).

<sup>158</sup> *Id.*

<sup>159</sup> See MO. ANN. STAT. § 105.270 (1984) (The criminal provision of subsection three arguably applies only to subsection three, but it applies to "any of the provisions of this section").

charged.<sup>160</sup> MA forbids an employer from willfully depriving a member of the Washington Army Reserve or National Guard of employment or reemployment.<sup>161</sup> The statute makes it a crime to willfully deprive the service member of employment.<sup>162</sup>

This willful standard is undeniably more stringent than USERRA's "motivating factor" requirement.<sup>163</sup> Under the MA statute, a service member must prove that the employer did not hire him *solely* because he or she did not want to hire national guardsman, whereas under USERRA, the service member only has to show that his or her status was one reason for not being hired or rehired.<sup>164</sup> If the service member successfully proves that an employer willfully discriminated against him or her, then the court must either fine the employer \$500 or *impose a six month jail term* to the employer.<sup>165</sup>

Although a fine under Washington law is significantly less than the large sums of money awarded under USERRA, an important takeaway to implement into USERRA in order to bolster the federal government's compliance would be its threat of criminal charges.<sup>166</sup> Similar to the threat of criminal proceedings in Missouri's MSRA, Washington State's MA statute would have a similar effect. However, before implementing the threat of criminal charges, USERRA would have to adopt the same "willful" language contained in Washington's MA statute in order to

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<sup>160</sup> WASH. REV. CODE ANN. §§ 38.04.010-040 (1989).

<sup>161</sup> § 38.40.040; *See, e.g.*, § 38.40.050 (forbidding an employer from discharging a national guardsman employee because of their National Guard status). Washington law also forbids any organization, business, or club from barring a national guardsman from admission because of their status. *Id.*; *See also* § 38.40.110 (the punishment for such a violation is a \$100 fine and a sanction barring them from conducting business for 30 days).

<sup>162</sup> WASH. REV. CODE ANN. § 38.40.040.

<sup>163</sup> *Cf.* 38 U.S.C. § 4311(c)(1) (1996).

<sup>164</sup> *Compare* WASH. REV. CODE ANN. § 38.40.040, *with* 38 U.S.C. § 4311(c)(1).

<sup>165</sup> WASH. REV. CODE ANN. § 38.40.040.

<sup>166</sup> *See id.*

prevent its abuse and answer the critics who may think that criminal charges are too extreme for an employer who may not intentionally fire a service member because of his or her military status.

***a.) A Case Against the Civil Remedy-Only Approach for Federal Employer Violators***

This “criminal” remedy may seem extreme, considering the fact that an employer may face criminal misdemeanor charges for refusing to pay a service member two weeks worth of pay. As it stands now, a federal employer who violates USERRA is subject to the very same civil penalties as a state or private employer albeit one exception: the federal employer is not required to provide for liquidated damages.<sup>167</sup> This is problematic because the federal employer is only liable for actual damages, which may be extremely small in cases where the fired service member finds employment relatively quickly. For instance, if a service member who was fired finds a job within a week, and the damages for one week of unemployment are \$600, then the federal employer will only be liable for that amount, which is \$600, and nothing more.

In 2007, the Pentagon released data indicating that approximately 11,000 service members were denied prompt reemployment, while an additional 22,000 service members lost seniority or pay when they returned.<sup>168</sup> Yet, surveys showed that only 23 percent of those members sought help via USERRA while a disturbing 77 percent just thought it wasn’t even worth

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<sup>167</sup> See § 4324(c)(2) (2010) (requiring federal government employers only to pay lost wages); See also Samuel F. Wright & Greg T. Rinckey, ‘Welcome Home, You’re Fired’: A Harsh Reality Awaits Many Returning Veterans Who Find Themselves Locked Out of the Civilian Jobs They Had to Leave When They Deployed; the Law Guarantees That They Can Return to Those Jobs, TRIAL, 27 (2008).

<sup>168</sup> Col. Steve Strobridge, *As I See it—Put More Teeth in USERRA*, MILITARY OFFICERS ASS’N OF AM. (MOAA) (Dec. 2007), [http://www.moaa.org/main\\_article.aspx?id=2944](http://www.moaa.org/main_article.aspx?id=2944). /main\_article.aspx?id=2944 (describing a Pentagon data released to the Senate Health, Education, Labor, and Pensions Committee hearing in Nov. 2007).

the fight and that such a claim wouldn't make much of a difference.<sup>169</sup> This data reveals that the civil remedies currently available under USERRA, specifically regarding federal employers, are not the best available options.

***b.) A Case for a Criminal Approach to USERRA Violations Involving Federal Employers***

National security concerns are implicated once an employer violates USERRA; the weight of public policy cannot go unheard. This is particularly true when the federal government is the employer. The policies of maintaining a trained and prepared national military force, ensuring national security, and encouraging individuals to volunteer for reserve duty justifies the "criminal" remedy in cases where the employer indirectly hinders national military readiness. This idea is embodied in the Missouri law, which seems to weigh national security concerns much more heavily than the appearance of extreme corrective behavior by labeling an employer a criminal.

Being labeled a criminal offender in America (regardless of whether for a misdemeanor or felony) is essentially the modern equivalent to a "scarlet letter"<sup>170</sup> because of the stigma<sup>171</sup> attached to such a conviction. Also known as the "collateral sentencing consequences" of a criminal record,<sup>172</sup>

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<sup>169</sup> *Id.* (explaining that a majority of service members chose not to file complaints because they "thought it wasn't worth the fight, didn't know how to file a complaint, didn't think it would make any difference, or feared reprisal from their employer").

<sup>170</sup> Megan C. Kurlychek, Robert Brame & Shawn D. Bushway, *Scarlet Letters and Recidivism: Does an Old Criminal Record Predict Future Offending?*, 5 CRIMINOLOGY & PUB. POLICY 1101 (2006).

<sup>171</sup> See generally Eric Rasmusen, *Stigma and Self-Fulfilling Expectations of Criminality*, 39 J. L. & ECON. 519, 520 (1996) (defining "stigma" as "the reluctance [of people] to interact with [a person] who has a criminal record . . . [s]tigma can be either economic [ ] or social").

<sup>172</sup> Kurlychek et al., *supra* note 170, at 484 ("Collateral consequences are ethically, if not legally, problematic because they amplify punishment beyond the sanctions imposed by the criminal justice system").

individuals with a criminal record are frequently denied many socioeconomic opportunities that many without a record take for granted, such as license privileges and the attainment of employment.<sup>173</sup>

A 2001 study of 619 Los Angeles employers that focused on the employers' prospective willingness to hire ex-offenders and their actual hiring of ex-offenders further revealed the collateral effect of a criminal record.<sup>174</sup> Over 40 percent of employers indicated that they would "probably not" or "definitely not" be willing to hire an applicant with a criminal record, about 35 percent indicated that their response "depends on the crime," and only about 20 percent indicated that they would "definitely" or "probably" consider an applicant with a criminal history.<sup>175</sup> The most intriguing part of this study was that the industries most willing to and who actually hired ex-offenders were "skewed towards manufacturing, construction, and transportation, or those industries that likely have fewer jobs that require customer contact."<sup>176</sup> Moreover, employers willing to hire ex-offenders were "disproportionately those with a large fraction of unskilled jobs" and those that were "large in size" and had a "high turnover rate."<sup>177</sup> None of the employers that expressed their willingness to hire an ex-offender were federal government employers.

Missouri considers it a criminal offense for any officer or agent of the state or of any county, municipality, school district, or other political

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<sup>173</sup> Devah Pager, *Double Jeopardy: Race, Crime, and Getting a Job*, 2005 WIS. L. REV. 617, 620–21 (2005).

<sup>174</sup> See generally Harry J. Holzer, Steven Raphael & Michael A. Stoll, *Employer Demand for Ex-Offenders: Recent Evidence from Los Angeles* (URBAN INSTITUTE 2013), available at [http://www.urban.org/uploadedpdf/410779\\_ExOffenders.pdf](http://www.urban.org/uploadedpdf/410779_ExOffenders.pdf) (last updated Mar. 1, 2003).

<sup>175</sup> *Id.* at 6–9 (Only "about 20 percent of employers responded that they hired at least one ex-offender over the past year." Suggesting, a "fear of litigation may substantially deter employers from hiring applicants with criminal history records").

<sup>176</sup> *Id.* at 12.

<sup>177</sup> *Id.*

subdivision to refuse to permit service members to take military leaves of absence from employment up to 15 calendar days per fiscal year without loss of pay, time, regular leave, impairment of efficiency rating, or any other rights or benefits.<sup>178</sup> Washington's MA has similar protections to Missouri's MSRA; in Washington, a willful deprivation of employment may lead to a fine or six months imprisonment.<sup>179</sup>

An integration of a similar provision allowing the MSPB to order criminal convictions for willful violators of the USERRA provisions would hasten compliance on the part of the federal employer. Depending on the federal government agency the claim is being filed against, the employer who violated the service member's rights may lose his or her job because of the stringent employment requirements of that agency. For federal government agencies that require security clearances, continuous employment is based on passing a background check.<sup>180</sup> Difficulties in passing these background checks vary on the level of security clearance needed, but the requirement results in many qualified personnel being denied employment because of a criminal record.<sup>181</sup> Thus, it would be imperative for the federal employer to comply with the provisions of USERRA out of fear of being stigmatized a criminal and possibly relieved of duty permanently due to the inability to obtain or maintain a security clearance. Moreover, as mentioned above, national military readiness in the form of national security should be seriously considered despite the harshness that a criminal remedy might bring. In other words, if the actions

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<sup>178</sup> See MO. ANN. STAT. § 105.270 (The criminal provision of subsection three arguably applies only to subsection three, but it applies to "any of the provisions of this section").

<sup>179</sup> WASH. REV. CODE ANN. § 38.40.040 (2006).

<sup>180</sup> See *Government Careers: Getting a security clearance*, WASH. POST (Oct. 9, 2012), [http://articles.washingtonpost.com/2012-10-09/jobs/35501246\\_1\\_security-clearance-agencies-positions/5](http://articles.washingtonpost.com/2012-10-09/jobs/35501246_1_security-clearance-agencies-positions/5).

<sup>181</sup> *Criminal Records and Employment*, NATIONAL LAW EMPLOYMENT PROJECT (Oct. 2, 2013), [http://www.nelp.org/site/issues/category/criminal\\_records\\_and\\_employment/](http://www.nelp.org/site/issues/category/criminal_records_and_employment/).

of the federal employer (violating USERRA when he or she chooses to fire a returning service member) hinder the military readiness by discouraging citizens from volunteering in the armed services, then the harsh proposition made here should be viewed in a favorable context.

The implications of being labeled a criminal for willfully violating USERRA would extend beyond just the label of a “misdemeanor.” A defendant may also experience other repercussions that are considered to be collateral consequences, such as the loss of a professional license, which is most likely the employer’s main source of livelihood.<sup>182</sup> For instance, a federal government attorney that violates USERRA by firing a service member may have his or her bar license revoked because of a criminal charge. As of December 2001, there were approximately 64 million—30 percent of the nation’s adult population—people in the United States with a criminal record.<sup>183</sup> In most jurisdictions, being charged with a crime can trigger such collateral implications.

Being subject to collateral consequences has been called a form of “civil death.”<sup>184</sup> Civil death refers to the notion that “a person convicted of a crime, whether misdemeanor or felony, may be subject to disenfranchisement (or deportation if a noncitizen), criminal registration and community notification requirements, and the ineligibility to live, work, or be present in a particular location.”<sup>185</sup> Some are not allowed to live

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<sup>182</sup> *Id.*

<sup>183</sup> U.S. DEP’T OF JUSTICE, EMPLOYMENT STANDARDS THAT ENCOURAGE THE EMPLOYMENT OF QUALIFIED PEOPLE CRIMINAL HISTORIES 1 (Oct. 2005), *available at* <http://www.justice.gov/olp/pdf/employmentstdsummary.pdf>; *see also* U.S. DEP’T OF JUSTICE, SURVEY OF STATE CRIMINAL HISTORY INFORMATION SYSTEMS, 2001: A CRIMINAL JUSTICE INFORMATION POLICY REPORT (Aug. 2003), *available at* <http://www.bjs.gov/content/pub/pdf/sschis01.pdf>.

<sup>184</sup> Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789, 1790 (2012).

<sup>185</sup> *Id.*

outside of civil confinement at all. In addition, the person may be subject to occupational debarment.

The collateral consequences of a criminal conviction are not the same as the social consequences of a conviction. Social consequences include loss of a job and social stigma. These social side effects of criminal charges (whether or not they lead to convictions) are mainly because arrests and legal proceedings in the United States are public, and any federal government agency under the microscope for a USERRA violation may break due to political pressure from the various branches being exerted at an ever increasing speed in light of social media.

*C. Make Employee-Employer Contracts That Bind Employees into Arbitration Unenforceable for USERRA Disputes*

In order to fully exercise the protections provided by USERRA, the federal government should not be able to contract out of USERRA. The existing law states the following:

This chapter supersedes any State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by this chapter, including the establishment of additional prerequisites to the exercise of such right or the receipt of any such benefit.<sup>186</sup>

Despite the plain language of the statutory language set out above, the Fifth and the Sixth Circuits have decided recent cases by telling another story. In both circuits, courts have held that USERRA does not override employee-employer agreements that are crafted to bind employees to submit future USERRA disputes about USERRA rights to binding arbitration, in lieu of filing suit or filing a formal complaint with DOL-VETS.<sup>187</sup> There needs to

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<sup>186</sup> 38 U.S.C. 4302(b).

<sup>187</sup> See *Garrett v. Circuit City Stores, Inc.*, 449 F.3d 672 (5th Cir. 2006); *Landis v.*

be language in USERRA that defeats such intentions that force employees into binding arbitration agreements. A bill introduced to Congress in 2008 contained a proposed new section to USERRA that would deem employee-employer contracts that are subject to binding arbitration unenforceable.<sup>188</sup>

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Pinnacle Eye Care LLC, 537 F.3d 559 (6th Cir. 2008).

<sup>188</sup> See Proposed new section: 4328 to USERRA, H.R. 7178, 110th Cong. (2008).

(a) Protection of Employee Rights- Notwithstanding any other provision of law, any clause of any agreement between an employer and an employee that requires arbitration of a dispute arising under this chapter shall not be enforceable.

(b) Exceptions-

(1) WAIVER OR AGREEMENT AFTER DISPUTE ARISES-Subsection

(a) shall not apply with respect to any dispute if, after such dispute arises, the parties involved knowingly and voluntarily agree to submit such dispute to arbitration.

(2) COLLECTIVE BARGAINING AGREEMENTS- Subsection (a) shall not preclude the enforcement of any of the rights or terms of a valid collective bargaining agreement.

(c) Validity and Enforcement- Any issue as to whether this section applies to an arbitration clause shall be determined by Federal law. Except as otherwise provided in chapter 1 of title 9, the validity or enforceability of an agreement to arbitrate referred to in subsection (a) or (b)(1) shall be determined by a court, rather than the arbitrator, irrespective of whether the party resisting arbitration challenges the agreement to arbitrate specifically or in conjunction with other terms of the agreement.

(d) Application- This section shall apply with respect to all contracts and agreements between an employer and an employee in force before, on, or after the date of the enactment of this section.

(b) Clerical Amendment- The table of sections for such chapter is amended by inserting after the item relating to section 4327 the following new item: 4328. Unenforceability of agreements to arbitrate disputes.

(c) Application- The provisions of section 4328 of title 38, United States Code, as added by subsection (a), shall apply to-

(1) any failure to comply with a provision of or any violation of chapter 43 of title 38, United States Code, that occurs before, on, or after the date of the enactment of this Act; and

USERRA's legislative history makes it apparent that such agreements should not be enforced. For instance, section 4302(b) in essence preempts any laws regulating employment agreements that provide fewer rights.<sup>189</sup> It was the committee's intent that, even if a person protected under USERRA intentionally or unintentionally signs a mandatory arbitration agreement, any such arbitration decision shall not be binding as a matter of law.<sup>190</sup> Moreover, a waiver of future statutory rights, such as a binding arbitration agreement that an employer may seek as a condition of employment, may never be enforced because it goes against the public policy concerns of USERRA. The waiver of such a statutory right must already exist in order for such a right to be waived.<sup>191</sup>

#### IV. CONCLUSION

The federal government must continue to improve outreach to the uniformed services, veteran, Guard, and Reserve communities; improve agencies' USERRA training and guidance; and ensure that service members and veterans in federal employment receive the full extent of their employment protections, including USERRA protections.<sup>192</sup>

Despite USERRA declaring the federal government as the "model employer," federal employers remain the top violators of USERRA, making it extremely difficult for returning service members to obtain and keep jobs. There is a widespread problem of the federal government penalizing and denying jobs to reserve and active-duty military members. In the fiscal year

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(2) to all actions or complaints filed under such chapter 43 that are pending on or after the date of the enactment of this Act.

*Id.*

<sup>189</sup> *Peel v. Florida Dep't of Transp.*, 600 F.2d 1070 (5th Cir. 1979); *Cronin v. Police Dep't of the City of New York*, 675 F. Supp. 847 (S.D.N.Y. 1987).

<sup>190</sup> *See Kidder v. Eastern Airlines, Inc.*, 469 F. Supp. 1060, 1064-65 (S.D. Fla. 1978).

<sup>191</sup> *See Leonard v. United Airlines, Inc.*, 972 F.2d 155, 159 (7th Cir. 1992).

<sup>192</sup> Presidential Memo, *supra* note 23.

2011, over 18 percent of the 1,548 complaints of USERRA violations involved federal agencies.<sup>193</sup> Although President Obama's administration has made it a priority to decrease veterans' unemployment rates, advocates for veterans claim that the process of challenging alleged USERRA violations by the federal government are extremely difficult for service members. The federal government has little incentive to fix this problem because it faces no extreme penalties for USERRA violations other than being ordered to pay lost wages and benefits.<sup>194</sup> This differs tremendously from the private and state employers who risk being ordered to pay double lost wages to the service member.<sup>195</sup>

To effectively address this issue, I have proposed three incentives that should compel, or at least inch federal employers closer to, such compliance. First, there needs to be an economic incentive that would require federal employers to pay more than just back wages to a service member. Second, a "criminal" remedy that threatens criminal charges for willful violators should be codified within the text of USERRA in order to compel adherence and effectively address a USERRA claim. Finally, binding arbitration via employee-employer agreements should be considered unenforceable because they go against the legislative history of USERRA. It is my hypothesis that these three proposals would truly bolster the effectiveness of USERRA.

If the federal government can implement some sort of "double damage" remedy similar to Wyoming's MSRA, then it would likely incentivize the federal government to comply with USERRA, especially since government agencies are working with an ever decreasing budget, and the need to be cost-efficient should compel compliance in light of threatening government shutdowns and debt ceiling debates that call into question the economic

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<sup>193</sup> USERRA Report, *supra* note 22, at 8.

<sup>194</sup> See 38 U.S.C. § 4324 (2010).

<sup>195</sup> *Id.* § 4323(d).

vitality of the United States. Moreover, a mandate requiring that the employer pay the aggrieved service member's attorney's fees and litigation costs would further encourage federal government compliance. USERRA's ineffectiveness to mandate a mandatory award of attorney's fees and litigation costs by leaving such a decision to the discretion of the MSPB proves quite insensitive to the needs of a returning service member.<sup>196</sup> At this point in the adversarial process, the service member would have gone through several channels before even reaching the MSPB, and would have expended a great deal of financial resources to do so.<sup>197</sup> Therefore, where Wyoming's MSRA makes it mandatory to award attorney's fees and other litigation costs associated with the claim, such as expert witnesses and special tests, USERRA should follow suit.<sup>198</sup>

The risk of a criminal conviction should also be compelling to a federal employer that deals with USERRA claims. Both Missouri and Washington implements a provision directed at state and private employers that allows for criminal charges to be pursued in connection with civil damages.<sup>199</sup> The Washington approach would offer a willful knowledge element to the analysis to eradicate the fear of being too harsh on any one federal employer. In other words, employers that willfully violate USERRA may face criminal charges at the discretion of the court as outlined above.

The policies of maintaining a trained and ready national military force, maintaining national security, and encouraging individuals to volunteer for reserve duty justify the harsh "criminal" remedy in cases where the

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<sup>196</sup> See 38 U.S.C. § 4324(c)(4) (the MSPB has discretion to either award attorney's fees and other litigation costs or not).

<sup>197</sup> The service member would have had gone through ESGR, DOL VETS, OSC, and then finally the MSPB. See *supra* note? Part II.B.1-2.

<sup>198</sup> See WYO. STAT. ANN. § 19-11-123 for the statutory language regarding mandatory award of attorney's fees.

<sup>199</sup> See MO. ANN. STAT. § 105.270 (1984) (The criminal provision of subsection three arguably applies only to subsection three, but it applies to "any of the provisions of this section"); See also WASH. REV. CODE ANN. § 38.40.040 (2006).

employer indirectly hinders national military readiness. This focus on national security concerns embodies the Missouri law that seems to weigh national security much more heavily than the appearance of extreme corrective behavior by labeling an employer a criminal. Thus, implementing a similar provision into USERRA that speaks to the policy goals of maintaining national military readiness through encouraging individuals to serve in the military will force federal employers to comply out of fear of being stigmatized with a criminal label and possibly suffer collateral consequences such as losing a professional license.

Finally, it was the Committee's intent that, even if a person protected under USERRA intentionally or unintentionally signs a mandatory arbitration agreement, any such arbitration decision shall not be binding as a matter of law.<sup>200</sup> Moreover, a waiver of future statutory rights, such as a binding arbitration agreement that an employer may seek as a condition of employment, may never be enforced because it goes against the public policy concerns of USERRA. In other words, the waiver of such a statutory right must already exist in order for such a right to be waived.<sup>201</sup>

It is imperative that if the federal government seeks to be the "model employer" when it comes to USERRA claims, it needs to create incentives to ensure compliance behind closed doors. The three incentives that I have proposed provide a path towards increased federal government adherence to USERRA and should be considered in future legislation that seeks to bolster USERRA enforcement in the federal government sector and mirror the vision set by the current administration:

The Administration strongly believes that every man or woman who has served in our country's uniformed services deserves the full protection of our employment laws, including USERRA. No discrimination or unfair treatment based on one's service will be

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<sup>200</sup> See *Kidder v. Eastern Airlines, Inc.*, 469 F. Supp. 1060, 1064-65 (S.D. Fla. 1978).

<sup>201</sup> See *Leonard v. United Airlines, Inc.*, 972 F.2d 155, 159 (7th Cir. 1992).

tolerated. We must do our utmost to ensure that all service members' employment and reemployment rights are respected.<sup>202</sup>

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<sup>202</sup> Presidential Memo, *supra* note 23.