

**STATEMENT FOR THE RECORD
OF
MICHAEL MICHAUD
ASSISTANT SECRETARY FOR
VETERANS' EMPLOYMENT AND TRAINING
U.S. DEPARTMENT OF LABOR**

**BEFORE THE
COMMITTEE ON VETERANS' AFFAIRS
U.S. SENATE**

June 29, 2016

Chairman Isakson, Ranking Member Blumenthal, and Members of the Committee, thank you for the opportunity to provide the views of the Department of Labor (DOL) on pending legislation aimed at helping the men and women who served, or are serving, this country succeed in the civilian workforce. As Assistant Secretary of the Veterans' Employment and Training Service (VETS), I look forward to working with the Committee to ensure that these brave and committed individuals have the employment support, assistance and opportunities they deserve.

While this hearing will address numerous bills pending before the Committee, my statement will focus on Ranking Member Blumenthal's draft legislation, which would make a number of important amendments to the Uniformed Services Employment and Reemployment Rights Act of 1994, 38 U.S.C. §§ 4301-4335, (USERRA or the Act), which is enforced by VETS, the Department of Justice (DOJ), and the U.S. Office of Special Counsel (OSC). My statement also will briefly discuss S. 2958, which would "establish a pilot program on partnership agreements to construct new facilities for the Department of Veterans' Affairs."

USERRA prohibits discrimination in employment based on an individual's prior service in the uniformed services; current service in the uniformed services; or intent to join the uniformed services. An employer is also prohibited from discriminating against a person because of such person's attempt to enforce his or her rights under the Act. In addition, an employer may not retaliate against an individual for filing a USERRA claim or testifying or otherwise providing assistance in any proceeding under the Act. USERRA also provides reemployment rights with the pre-service employer following qualifying service in the uniformed services. In general, the protected person is entitled to be reemployed with the status, seniority, and rate of pay as if he or she had been continuously employed during the period of service. USERRA applies to private employers, the Federal Government, and State and local governments. It also applies to United States employers operating overseas and foreign employers operating within the United States.

USERRA protects civilian job rights and benefits for veterans and members of the Uniformed Services. VETS provides assistance to those persons experiencing service connected problems with their civilian employment, and provides information about USERRA to employers. In Fiscal Year (FY) 2015, the Department reviewed a total of 1,288 USERRA cases. 77 of those cases were referred to DOJ and OSC for further review and possible litigation in either U.S. District Court or before the Merit Systems Protection Board (MSPB). In addition, DOL staff provided technical assistance to more than 10,000 service members and other individuals in FY 2015, and well over a million individuals since September 11, 2001. The rights USERRA affords our service members and veterans are critical, and we are committed to doing everything possible to ensure those rights are protected and preserved.

S. XXXX – A bill to amend title 38, United States Code, to clarify the scope of procedural rights of members of the uniformed services with respect to their employment and reemployment rights, to improve the enforcement of such employment and reemployment rights, and for other purposes.

DOL strongly supports the Ranking Member’s draft bill. The significant USERRA improvements it would provide mirror those we have urged the Congress to enact, as reflected both in the Administration’s recent legislative proposal, and in several of our USERRA Annual Reports to Congress. We applaud this effort to strengthen enforcement of USERRA, and believe the proposed statutory amendments, some of which are discussed in more detail, below, will address several critical issues.

Section 1 of the draft bill is intended to make clear the scope of employment and reemployment rights of covered individuals, by clarifying the definitions of “rights” and “benefits” under USERRA, and by clarifying the status of arbitration agreements under the Act. These amendments guarantee the availability and protection of procedural rights included in the statute, ensuring that USERRA operates to safeguard both substantive and procedural rights and benefits from reduction, limitation, or elimination. We are particularly grateful that, to ensure the procedural right of adjudication of USERRA claims, the bill expressly provides that agreements to arbitrate are unenforceable “unless all parties consent to arbitration after a complaint on the specific claim has been filed in court or with the MSPB and all parties knowingly and voluntarily consent to have that particular claim subjected to arbitration.”

DOL supports limiting the ability to consent to arbitration until after a claim is filed in court or with the MSPB because, at that stage of the adjudication process, claimants already have a sense of their rights and likely have consulted with an attorney. Section 1(c)(2) is not necessary, and is potentially harmful, because there may well be other circumstances, not specifically provided for, where a claimant’s agreement might not be voluntary. DOL believes that the determination as to whether a USERRA claimant’s consent to arbitrate is voluntary is best left to the adjudicator, who will decide that question based upon the particular facts and circumstances of the case.

Federal judicial circuits are presently divided as to whether USERRA protections apply to procedural as well as substantive rights. It has long been the Department's interpretation of USERRA, as well as that of DOJ and OSC, that USERRA applies to procedural rights, regardless of how such rights may be construed. Clarifying that USERRA applies to both procedural and substantive rights provides certainty in legal interpretation, and would resolve the ambiguity that currently exists among Federal judicial circuits. It also reassures our service members and veterans that they have proper recourse when they believe their USERRA rights have been violated.

The amendments contained in Section 2 of the bill would make a number of substantial improvements to the enforcement of employment and reemployment rights with respect to a State or private employer. Significantly, subsection (a) would strengthen enforcement under USERRA by allowing the United States to serve as a plaintiff in all suits filed by the Attorney General (AG), rather than only in those suits filed against State employers. This amendment would ensure that USERRA is consistent with other civil rights laws by allowing the United States to bring suit in its own name as the plaintiff, to vindicate the public interest in ensuring the statute is enforced. The aggrieved person on whose behalf the AG files suit would retain the right to intervene in such suits, or to bring his or her own action if the AG declines to file suit.

This section also grants independent authority to the AG to investigate and file suit to challenge employment policies or practices that establish a pattern or practice of violating USERRA. This amendment, modeled after Title VII of the Civil Rights Act of 1964 (42 U.S.C. §2000e-6(a)), would strengthen significantly DOJ's ability to enforce USERRA to address a systemic violation (such as an employer policy prohibiting extended absences, including absences for military service) that could adversely affect the employment rights of multiple service members.

In support of this new pattern-or-practice authority, the bill also would amend USERRA to provide the AG with the authority to issue civil investigative demands to compel the production of relevant documentary materials and unsworn answers to written questions from the custodian of such documents. DOL has the power to issue subpoenas in the conduct of its investigations under USERRA. However, with no investigatory role under current law, the AG has no authority to compel the production of evidence prior to filing suit. Because the section now empowers the AG to initiate an investigation, this further amendment would provide appropriate and much-needed investigative tools.

Finally, DOL also supports other amendments section 2 would make to enable service members and veterans to more ably exercise their USERRA rights, and to enhance the available remedies for violations of USERRA rights. For instance, subsection (b) explicitly abrogates sovereign immunity to eliminate any question whether Congress intends that USERRA claimants be able to bring an action against a State employer in State court or federal district court. And, subsection (d) adds compensatory and punitive damage provisions that are similar to damages provisions in Title VII of the Civil Rights Act of 1964.

S. 2958 – a bill to establish a pilot program on partnership agreements to construct new facilities for the Department of Veterans’ Affairs

This bill would authorize the Secretary of Veterans’ Affairs to enter into up to five partnership agreements with certain designated entities to conduct one or more super construction projects; major medical facility projects; or major construction projects to construct new cemeteries, or develop additional gravesites or columbarium niches at existing cemeteries. Section 1(b) of the bill provides that this authority may be carried out “notwithstanding any other provision of law (including section 8103(e) of title 38, United States Code), except for Federal laws relating to environmental and historic preservation; and, subchapter IV of chapter 31 of title 40, United States Code (commonly referred to as the ‘Davis Bacon Act’).”

Like VA, DOL strongly supports the bill’s authorization of these partnership agreements, provided the legislation does not roll back key civil rights protections for veterans and other employees who will be working to construct the facilities resulting from these partnership agreements. These safeguards protect millions of workers, including veterans. DOL looks forward to working with the Committee to revise the language of section 1(b) to ensure that S. 2958 provides VA the authority it needs while maintaining the applicability of laws that protect against employment discrimination or that otherwise ensure equal employment opportunities.

Conclusion

Every day, we at DOL do our best to serve the civilian employment needs of our veterans, transitioning service members, and military families. It is the least we can do to honor the tremendous sacrifices made by our service men and women and their families. Secretary Perez and VETS strongly believe that the reforms included in Ranking Member Blumenthal's draft bill to amend USERRA will not only help our veterans and service members find good jobs, but also ensure that they can retain their civilian employment when they must leave it to serve our nation. We look forward to working with the Committee on these important issues and are available to provide any technical assistance you request with respect to these proposed amendments. DOL also stands ready to assist the Committee and VA to make certain that S. 2958 does not operate to exclude veterans and other workers from important equal opportunity and employment protections.

I again thank the Committee for your commitment to our nation’s veterans and service members and for the opportunity to submit this statement for the record.