

# CHAPTER 1

## INTRODUCTION

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This book serves as a guide to veterans' rights to employment, reemployment, and a discrimination-free workplace in the federal sector, as defined by USERRA and VEOA. Those rights as applicable to the private sector are not covered in this guide.

### I. THE UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT OF 1994 (USERRA)—PUB. L. 103-353

#### A. HISTORY

USERRA was enacted to expand the scope and coverage of the Vietnam Era Veterans' Readjustment Assistance Act of 1974 (VEVRAA), Pub. L. 93-508, 88 Stat. 1578. The VEVRAA barred employment discrimination based only on an individual's obligations as a reservist.

Congress enacted USERRA to expand VEVRAA coverage. The remedies of USERRA are limited "to orders that the federal employer comply with the provisions... and to an award of lost wages and other benefits." H.Rep. 65, 103d Cong., 1st Sess. 39 (1993).

#### B. PURPOSE

The purpose of USERRA is to encourage noncareer military service by making it easy for participants to enter the civilian workforce. 38 USC 4301. USERRA accomplishes that purpose by providing rights in two kinds of cases: discrimination based on military service, and denial of an employment benefit on account of military service.

In a discrimination case, the appellant alleges that the agency has committed a prohibited action if motivated by a prohibited reason; that is, denies "initial employment, reemployment, retention in employment, promotion, or any benefits of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation...or discriminate[s] in employment against or take[s] any adverse employment action against any person because such person (1) has taken an action to enforce a protection afforded any person under this chapter, (2) has testified or otherwise made a statement in or in connection with any proceeding under this chapter, (3) has assisted or otherwise participated in an investigation under this chapter, or (4) has exercised a right provided for in this chapter..." 38

USC 4311; *Clavin v. USPS*, 99 MSPR 619, 622-23 (2005).

In a denial of an employment benefit case, the appellant must allege that he or she was denied reemployment, retention in employment, or promotion, on account of prior military service. 38 USC 4312–4318, 4322(a); *Bodus v. Dept. of Air Force*, 82 MSPR 508, 513 (1999); *Butterbaugh v. DOJ*, 336 F.3d 1332, 1336 (Fed. Cir. 2003). In reemployment cases, the appellant does not have to show any discriminatory motivation on the part of the agency. *Clavin v. USPS*, 99 MSPR 619, 623 (2005).

USERRA does not change other federal, state, or local laws, ordinances, contracts, or other agreements that establish rights or benefits that are more beneficial. It does supersede federal, state, or local laws, ordinances, contracts, or other agreements that reduce or eliminate benefits provided by USERRA. 38 USC 4302.

Regulations explaining USERRA provisions were promulgated both by the Department of Labor (DOL) at 20 CFR 1002 *et seq.*, and by the Department of Defense at 32 CFR Part 104.

## **II. THE VETERANS EMPLOYMENT OPPORTUNITIES ACT OF 1998 (VEOA)—PUB. L. 105-339**

### **A. HISTORY**

The Veterans Preference Act of 1944 was enacted to aid in the reentrance of veterans into the civilian, federal job force. Congress believed that veterans, whose lives had been disrupted by military service, were entitled to reemployment and rehabilitation aids to enable them to resume normal lives. *Deems v. Dept. of Treasury*, 100 MSPR 161, 164 (2005), *citing* Pub. L. No. 359, ch. 287, 58 Stat. 390, as amended. Veterans preference rights were created by statute to protect the rights of returning veterans. *Deems v. Dept. of Treasury*, 100 MSPR 161, 164 (2005) *citing* 5 USC 3304.

Congress subsequently had concerns that veterans preference rights were being circumvented by federal agencies, and passed VEOA, Pub. L. 105-339. *Deems v. Dept. of Treasury*, 100 MSPR 161, 165 (2005), *quoting* Senate Report No. 105-340 at 15, 16 (1998).

### **B. PURPOSE**

VEOA provides rights to a person who is a preference eligible, who makes a non-frivolous claim of a violation of rights by a federal agency under any statute or regulation relating to veterans preference, and who has exhausted his or her administrative remedies before the DOL.

Veterans preference in hiring occurs two ways. First, agencies may appoint

certain veterans non-competitively, such as those with service-connected disabilities of 30% or more, or may appoint any veteran to a non-competitive position that may be converted to a career appointment. Second, veterans and other preference eligibles receive preference, such as additions to their test scores, for competitive promotions. *Dean v. Dept. of Agriculture*, 99 MSPR 533, 540-41 (2005), *stay den'd* by 101 MSPR 347 (2006) *citing* 5 USC 3112, 3309; 5 CFR 337.101(a); 5 USC 1104(a)(2). Second, veterans preference is a factor in the competitive examining process, where preference eligibles get extra points for those positions involving ranking by numerical scores. *Patterson v. Dept. of Interior*, 424 F.3d 1151, 1156 (Fed. Cir. 2005).

In order to exhaust administrative remedies, the complainant has 60 days after the complained of event to file a complaint with the Secretary of Labor. When the complainant has exhausted his administrative remedies with the DOL, he or she may file an appeal with the Merit Systems Protection Board (MSPB) within 15 days after receiving a DOL letter stating the complaint could not be resolved, or 61 days or more after filing the complaint with no DOL response. 5 USC 3330a(d).

To establish VEOA jurisdiction before the MSPB, the complainant must make non-frivolous allegations concerning four things: (a) that the incident occurred on or after the effective date of VEOA (October 30, 1998), (b) that he or she is preference eligible, (c) that he or she experienced a violation of rights under a statute or regulation concerning veterans preference, and (d) that he or she has exhausted administrative processes before the DOL. 5 USC 3330a; *Abrahamsen v. Dept. of Veterans Affairs*, 94 MSPR 377, 379 (2003).