

**EXAMINING THE FUTURE OF WORKFORCE
PROTECTIONS FOR SERVICEMEMBERS**

HEARING

BEFORE THE

**SUBCOMMITTEE ON ECONOMIC
OPPORTUNITY**

OF THE

COMMITTEE ON VETERANS' AFFAIRS

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THURSDAY, MARCH 9, 2023

U.S. HOUSE OF REPRESENTATIVES
SUBCOMMITTEE ON ECONOMIC OPPORTUNITY
COMMITTEE ON VETERANS' AFFAIRS
Washington, D.C.

The subcommittee met, pursuant to notice, at 10:36 a.m., in room 390, Cannon House Office Building, Hon. Derrick Van Orden (chairman of the subcommittee) presiding.

Present: Representatives Van Orden, Ciscomani, Crane, Levin, Mrvan, McGarvey, and Ramirez.

OPENING STATEMENT OF DERRICK VAN ORDEN, CHAIRMAN

Mr. VAN ORDEN. The subcommittee will come to order.

Good morning.

Before we get to the subcommittee's first hearing of the 118th Congress, I want to introduce myself. My name is Derek Van Orden. I represent the Third congressional District of the State of Wisconsin. I am a proud retired Navy Seal, served our country for 26 years. I did five combat tours during that time. I am a 100 percent service-connected disabled veteran. I get all my health care through the VA, and I have utilized a lot of the programs myself and with my family and my shipmates that we cover under this purview.

I am also incredibly excited to be working with Ranking Member Levin and other members of the subcommittee to serve those who have served us and given us our freedom. During this last Congress, Representative Levin and Representative Moore did amazing work by enacting meaningful legislation and conducting oversight over the VA. And under your leadership, this committee was not bipartisan, it was nonpartisan. I think that is the highest compliment you can give anybody in this town, and I intend to follow your example, and I expect every member of this committee to do the same, because the issues we are dealing with here supersede politics. I hope to continue to work with my ranking member in this Congress, especially on the Transition Assistance Program, the programs for homeless veterans, and improving the GI Bill.

I recognize myself for an opening statement.

Pleased to be here today to discuss the Uniformed Services Employment and Reemployment Rights Act of 1994, or USERRA, and the impact it has had on our service members and veterans. While I am thankful for the Department of Veterans Affairs Employment Training Services Program to be here today, I would like to say

that I am not extremely disappointed that the Department of Defense (DOD) declined to participate in this important hearing on a program affecting those who serve our country, I am angry at them. DoD's employer support of the Guard and Reserve Program has a vital role in protecting service members and educating employees about USERRA rights and making sure our men and women transition from uniform to veteran.

As more National Guard and Reserve units are called upon active duty, I hope in the future the Department of Defense makes protecting these service members and their jobs while they are on active duty a priority, especially when the Department continues to experience a recruiting shortage. At a minimum, I expect them to show up.

USERRA, which was signed in law in 1994, does an incredibly important job of making sure that when service member returns to civilian life, they have employee protections and are not negatively impacted for protecting our country. This is not a workforce development or maintenance issue, this is a national security issue, as our National Guard and Reservists are integral to maintaining our freedoms.

When I was a SEAL platoon chief in Iraq, I had 50 Pennsylvania National Guard Operational Control (OPCON) to my unit. They were incredibly professional. One of them was a welder and I hoped that when he finished serving our country, that he had his job waiting for him back in Pennsylvania. It is incredibly important that we ensure that happens.

My goal for today is to hear you, sir, the Department of Labor VETS, about their effort to implement a law and hear what we can do to help make your job easier to carry out the goal of a law. American businesses have been, and I know will continue to be, supportive of the mission of the National Guard, but there needs to be a balance of this mission and its impact on businesses ability to survive. This is especially true after COVID lockdowns and the rising inflation created by some poor economic choices of the Biden Administration. I am also looking forward to listening to the comments from our second panel on how USERRA can be improved and what they are hearing about implementing this law from a practitioner's point of view.

To be clear, the law is the law and I will not stand for those companies or government entities who wave the flag and post patriotic videos on Veterans Day and Memorial Day, but then fail to support our service members and their families when they are deployed. Not on my watch.

Thank you all for being here today. Look forward to hearing your comments and recommendations. With that, I yield to Ranking Member Levin for your opening statement, sir.

OPENING STATEMENT OF MIKE LEVIN, RANKING MEMBER

Mr. LEVIN. Thank you. Well, first, I want to congratulate you, Mr. Chairman, on being selected to chair the subcommittee. I am very grateful that in our interactions you have demonstrated a tremendous commitment to the work that we do on the subcommittee. As you said, it is not partisan in any way. I want to make sure that we carry forward with the legacy that we have had these last 4

years, first with Ranking Member Bilirakis, good friend from Florida, and then, of course, with Ranking Member Moore from Alabama. I hope to follow in their footsteps as ranking member to do the work of this committee in a nonpartisan bipartisan way. I also want to commend the staff. The House Veterans' Affairs Committee (HVAC) staff also works collaboratively, and we very much appreciate that. Both the majority staff, minority staff, and we look forward to that continued collaboration.

We accomplished a lot in the 4 years that I was able to chair the subcommittee. We improved education standards, we increased access to the home loan benefit, we housed more homeless veterans. Again, none of that possible without that hard work on both sides of the aisle. I look forward to visiting western Wisconsin. I welcome you to San Diego. Hopefully, we will catch it during a really good, you know, beautiful—well, every time of year is a beautiful time of year in San Diego.

Mr. VAN ORDEN. I officially accept that invitation.

Mr. LEVIN. Excellent. All right, we have it on the record.

That brings us to the work that continues. We have got a tremendous amount more to do. The subject today, I think, is certainly an example of that.

The Uniformed Services Employment and Reemployment Rights Act, or USERRA, is one of the bedrock laws which ensure that service members are not punished professionally for their commitments to our Nation's defense. Building upon the Veterans Reemployment Rights Act, Congress passed USERRA to ensure that no service member loses their job or is discriminated against when they answer the call of duty. Under USERRA, the Department of Labor investigates around 1000 violations each year, and fortunately, resolves the vast majority without needing to refer the case to the Department of Justice (DOJ). However, this law is not comprehensive for many service members and for their families, does not cover military spouses, nor, in my view, does it adequately allow for covered service time commensurate with the length of a service member's employment. Also, many service members are forced into arbitration clauses in their employment contracts, giving our service members a Sophie's Choice between a paycheck and the USERRA rights.

That is why our committee is actively working on legislation to cover military spouses and their families and finally end forced arbitration clauses.

It is no secret that our services are not meeting their recruitment goals. For example, the Army National Guard only managed 66 percent of their goal the last fiscal year. Making it easier to serve while still pursuing a civilian life will bring more individuals to the service, where we can continue to offer the excellent benefits this committee oversees, such as the GI bill, home loan program, and more. I hope these are all places where our committee can continue to work in a collaborative fashion.

Look forward to hearing from our witnesses—good to see you again—to learn more about gaps in the law, gaps also in the enforcement of the law, and how we can address those gaps.

With that, I will yield my time back to the chairman.

Mr. VAN ORDEN. Thank you, Ranking Member Levin.

I will now introduce our witness panel.

Our first witness is from the Department of Labor, Mr. James Rodriguez, a veteran of the United States Marine Corps, an assistant secretary of Veterans Employment and Training Service.

Sir, I am going to ask the Department of Labor (DOL) witness on our panel to stand and raise your right hand, please.

Thank you. Let the record reflect that the witness has answered in the affirmative.

[Witness sworn]

Mr. Rodriguez, you are now recognized for 5 minutes to deliver your opening statement.

STATEMENT OF JAMES RODRIGUEZ

Mr. RODRIGUEZ. Good morning, Chairman Van Orden, Ranking Member Levin, and distinguished members of the subcommittee.

My name is James Rodriguez and I serve as the assistant secretary for the U.S. Department of Labor Veterans Employment and Training Service (DOL VETS), commonly known as USERRA. Thank you again for the opportunity to join you all today.

DOL VETS, with the support of our interagency partners proudly administers, interpreter and enforces the Uniformed Services Employment and Reemployment Rights Act of 1994, better known as USERRA.

As described in my written testimony, I first want to highlight my overall theme for this hearing, which is USERRA is critical to U.S. national security interests because USERRA supports the recruitment, retention, and readiness of the all volunteer force. Based on the national importance of USERRA, we welcome the opportunity to work with Congress, veteran service organizations, and others to continuously improve USERRA.

I also want to recognize three of our interagency partners that assist VETS in administering USERRA, the Department of Defense's employer support of the Guard Reserve, the U.S.

Department of justice, and the U.S. Office of Special Counsel.

For the remainder of my oral testimony, I will highlight three important messages that support the overall theme of this testimony.

First, VETS delivers positive USERRA outcomes for employees and employers alike. VETS conducts robust public outreach to educate service members, employers, and others on the USERRA rights and responsibilities. Since the terror attacks of September 11, 2001, which resulted in the single greatest mobilization of Reserve components, VETS has briefed more than 1 million individuals on USERRA. So far this fiscal year, VETS has already conducted over 500 compliance assistance events nationwide, informing employees and employers alike of their rights and responsibilities under USERRA. When VETS is unable to resolve a USERRA issue through compliance assistance, a service member or veteran can submit a claim to VETS for investigation. When this occurs, VETS assigned the case to a trained USERRA investigator, and on average, over the past 3 years, VETS has closed 943 cases for investigations per year. When VETS investigators find a violation of USERRA, they work diligently with both the claimant and the employer to resolve the case to their mutual satisfaction.

Of cases in which VETS found a violation of USERRA in Fiscal Year 2021, VETS resolved 85 percent of those cases. VETS has also converted its 6 regional senior investigators to 1800 series, or full time investigators, and hired an additional 10 full-time 1800 series investigators to serve among the 6 national regions.

Second, VETS identified gaps in service delivery and coverage that Congress may want to address. Military spouses are not presently covered under USERRA. Removing barriers to military spouse employment could minimize some of the disadvantages and disruptions that Congress sought to address in enacting USERRA. It could also alleviate a significant stress around military families while recognizing the vital role of military spouses in the retention, recruitment, and readiness of the all volunteer force. Employment protections could easily help military spouses build successful careers without frequent interruption and restarts. They could bolster the financial stability of their families, especially during their service member's transition from military service to civilian life.

Third, VETS asked for future congressional support to provide full funding of the VETS Federal Administration appropriation. VETS USERRA program does not have an independent budget. It is funded exclusively through the VETS Federal Administration appropriation. In Fiscal Year 2022, the President's budget request for the VETS Federal Administration was \$52.5 million, but Congress only appropriated 46 million. In Fiscal Year 2023, the President's budget request for the VETS Federal Administration was just over \$53.7 million, but Congress only appropriated \$47 million. Appropriations below the budget. Requests have negatively impacted VETS' efforts to digitally modernize our paperless, VETS Case Management System, otherwise known as VCMS, that will enhance the customer service experience of our Veterans Service members, their families and their employers.

In closing, VETS looks forward to working with the subcommittee to ensure that USERRA remains of fundamental importance to the recruitment, retention, and readiness of the all volunteer force. VETS is also committed to continued collaboration with our interagency partners to provide positive USERRA outcomes to employees and employers alike.

Chairman Van Orden, ranking Member Levin, distinguished members of the subcommittee, thank you for the opportunity to highlight important work VETS is doing in support of our veterans, service members, military spouses who have served our country, and I look forward to any questions you may have.

[THE PREPARED STATEMENT OF JAMES RODRIGUEZ APPEARS IN THE APPENDIX]

Mr. VAN ORDEN. Thank you, Mr. Rodriguez.

The written statement of Mr. Rodriguez will be entered into the hearing record.

We will now proceed to questioning, and I recognize myself for 5 minutes.

Mr. Rodriguez, in your testimony, said that in 2021, DOL VETS resolved 85 percent of the claims to the satisfaction of claimant. This means there is 15 percent that were not resolved to their satisfaction. Were those all referred to the DOL or the OSC, Office of Special Counsel? Those 15 percent?

Mr. RODRIGUEZ. Well, Mr. Chairman, what we do once we finish our part of the investigation, working with the claimant, then we give them the option to have that claim referred to DOJ. It is entirely up to the claimant. Once the claimant decides to do that, then we do refer to DOJ. We have a good track record within DOJ that if a claimant does get referred to there, that they have a good track record of resolving that claim. However, if it is not to their satisfaction, then the claimant can also take it to civilian court if they decide to do so.

Mr. VAN ORDEN. Of the 15 percent that is not resolved to the satisfaction of the claimant, do you have an idea—I am just trying to get a grasp of how many people we are talking about here.

Mr. RODRIGUEZ. I do not have the exact number in front of me, sir, but I would be glad to provide that in a response, written testimony, response back to you that would be I do not have the exact number this time.

Mr. VAN ORDEN. That would be awesome. Appreciate it greatly.

Then they have to pay—if they decide to go to a civilian court that is paid out of pocket by the service member, is that correct?

Mr. RODRIGUEZ. That is correct.

Mr. VAN ORDEN. Okay, writing that one down.

I also just want to acknowledge the fact, we talked about this briefly, that it is very clear that military spouses are the most over-educated and underemployed demographic. We are going to try to work that out. There are several different groups that work with military spouses, but you are absolutely correct that transition period when you are twice the husband and half the paycheck, it would be fantastic to have the spouse being able to pick up that slack. Thank you very much, sir.

I am going to yield back my time so that my colleagues can have time to speak.

I now recognize Mr. Levin.

Mr. LEVIN. Thank you, Mr. Chairman.

Secretary Rodriguez, good to see you again. Thanks for being here today. I know we are here to talk about USERRA. I will ask about that shortly. While you are here, I want to ask you a few questions about another law that DOL VETS is responsible for enforcing, and that is the Vietnam Era Veterans Readjustment Assistance Act of 1974, also known as VEVRAA.

Last year, my staff inquired with DOL about VETS' Fiscal Year 2021 report to Congress, which omitted VEVRAA data as required by statute. I appreciate that DOL at that time committed to provide the available data in future reports, but I want to make sure this does not happen again. Why was the data excluded from the Fiscal Year 2021 report? What specific steps is DOL taking to ensure it will be included in the future?

Mr. RODRIGUEZ. Ranking Member Levin, I take full responsibility for that not being submitted. What I will tell you that we have been working with our colleagues at the Office of Federal Contractor Compliance who has the ability to capture this data, which we are working with them to try to find the right data from the State levels, but also looking at what data is the most relevant to the report requests. We are still in the process of doing that. I can

assure you that we will work through this to provide the report to you.

Mr. LEVIN. Thank you. We appreciate you following up, appreciate your taking full responsibility.

One thing DOL did mention is that it may not have the mechanisms to track or collect the number of qualified covered veterans receiving priority and employment referrals, but I will mention that DOL committed to making sure they figure out a path forward to track and report this information. Have you taken any specific steps since we brought this up with your office?

Mr. RODRIGUEZ. We have. We have been working with the Office of Federal Contractor Compliance looking at what data they currently have and what data they do not have. Our teams have been working with their teams to figure out again what information is the most relevant. We have had numerous conversations with them at various levels of our organization. We plan to continue that to figure out how we can again conceptualize the right report, and we are still in the process of working on it.

Mr. LEVIN. Okay, we appreciate your following up, and it is important priority as we have got constituents specifically who are impacted by the lack of this data being included as per required by statute. We appreciate it.

I will turn to USERRA. And—actually, I will hold for now. I will wait until our next witness.

I yield back.

Mr. VAN ORDEN. Thank you very much.

I now recognize Mr. Ciscomani for Arizona for 5 minutes.

Mr. CISCOMANI. Thank you, Chairman. I look forward to working with you and the continued leadership of this subcommittee. I want to thank all the witnesses for coming here to testify on this important topic.

I am proud to represent Arizona's 6th congressional District with over 70,000 veterans that call my district home. My district has the ninth highest concentration of veterans for any congressional district in the U.S. I know intimately that the work that we do here must be focused on advancing bipartisan solutions for those who fought to protect our country.

Mr. Rodriguez, thank you for being here. Thank you for joining us. Thank you as well for your service.

In your testimony, you speak about the need to break down the barriers to military spouse employment by including USERRA for military spouses. How many spouses, do you have an idea, would be included in this new rule?

Mr. RODRIGUEZ. Congressman, based off the data that we currently have working through with our DoD partners, capturing data from things that they have also looked at as far as research, almost a million—right under a million military spouses would be affected by a change in USERRA.

Mr. CISCOMANI. Thank you.

Do you have an estimate of how many more USERRA cases and Department of Labor VETS would see if military spouses were included in USERRA.

Mr. RODRIGUEZ. How many more cases we would see?

Mr. CISCOMANI. Mm-hmm.

Mr. RODRIGUEZ. We are still working through that number. What we do know, though, is that in our current situation, with the amount of investigators we have, we would have to update the amount of investigators, hire new investigators to help with those claims. We are still going through the estimates right now, but we do not have an exact number of how many more places we would have.

Mr. CISCOMANI. Would the same be true for the cost of this, the final price tag that you think would impose on this new rule? If you extended the benefits to spouses, any estimate on the cost that the private sector would have for implementing such a change?

Mr. RODRIGUEZ. We do not have an estimate on the cost at this time.

Mr. CISCOMANI. Okay.

Do you think spouse USERRA claims would be more difficult to verify and adjudicate with this change?

Mr. RODRIGUEZ. I think based off of our track record with USERRA claims processing as the chairman—and has been mentioned in our written testimony, 87 percent of our cases are roughly adjudicated. I have full confidence that we would be able to resolve the same amount of cases if we had military spouses as part of the USERRA process.

Mr. CISCOMANI. Okay.

Then going back to the other two questions that you do not have all the details on this, is this something that you could get in terms of the cost and also the cost of the private sector? Obviously, that would be an estimated cost of that. Also the estimated on the Department of Labor VETS would see on the caseload increase there as well. Just to get an idea of what would be coming

Mr. RODRIGUEZ. We would be glad to do that, Congressman. We would be glad to submit that information back to you post hearing.

Mr. CISCOMANI. Thank you, Mr. Rodriguez.

I yield back my time, Mr. Chair.

Mr. VAN ORDEN. Thank you, Mr. Ciscomani.

I now recognize Mr. Mrvan from Indiana for 5 minutes.

Mr. MRVAN. Thank you, Chairman.

At this time, I just like to ask a question about USERRA. When you speak to employers about USERRA what do they say and why do you think some employers have USERRA violations?

Mr. RODRIGUEZ. Congressman, I speak to employers all the time, and I can tell you, for the most part, almost every employer wants to hire veterans, Guard Reserve, because they know how valuable they are to their bottom line. They know it is good for business. They know the value that veterans bring to their industries. For the most part, every organization wants to hire veterans, and they can not hire enough veterans for that part.

Mr. MRVAN. What is the motivation for the violations, do you think?

Mr. RODRIGUEZ. I think most of it is a lack of education. I think when you look at the lack of education with regards to how to employ someone who is a Guard Reserve and they are in the process of getting orders maybe the first time, and the organization may not have ever had someone that was Guard Reserve that worked for them. What we try to do is mitigate that by providing outreach,

providing education to employers who ask of us. By being proactive in providing that outreach, our investigators are constantly—when they are not investigating, they are constantly providing training and education to organizations.

Mr. MRVAN. One of my questions new to the committee, a National Guardsman is deployed, comes back, there is a disruption in employment. How do they prove discrimination?

Mr. RODRIGUEZ. Well, if they feel like they are discriminated, they can file a claim with us directly and let our investigators do the work. The investigators will work with the claimant and the employer to try to come to a resolution. If they feel like they have been discriminated, they have every right to file a claim.

Mr. MRVAN. Then one of my follow-up questions for military spouses. As the chairman talked about, the DOL VETS considers other statutes that may improve the—has the DOL considered other statutes that may improve the employment situation for military spouses rather than USERRA?

Mr. RODRIGUEZ. We looked at other statutes, we have done a lot of research. We still feel that USERRA is the best avenue for that.

Mr. MRVAN. Okay.

With that, I yield back.

Thank you. Thank you for your service and your wife's service.

Mr. RODRIGUEZ. Thank you, sir.

Mr. VAN ORDEN. Thank you, Mr. Mrvan.

I now recognize Mr. Crane from Arizona for 5 minutes.

Mr. CRANE. Thank you, Mr. Chairman. Man, I never thought I would say that. Holy cow. This town is in trouble.

Mr. VAN ORDEN. Nothing like a friend.

Mr. CRANE. If you guys only knew this guy, I mean, you would be concerned as I am.

Thank you guys for showing up today.

You know, I am also from Arizona. Like my colleague, Mr. Ciscomani here, I represent a rural district, a lot of patriots, a lot of veterans up there. I also formerly owned a veteran owned business where we hired a lot of veterans. It was called Bottle Breacher. Have you ever heard of it, Mr. Rodriguez?

Mr. RODRIGUEZ. I have heard of it now because I looked it up.

Mr. CRANE. Okay. It is kind of disappointing, Mr. Rodriguez, I have got to tell you. I am disappointed that you never had a bottle breacher, because I know some vets out there most certainly did.

A couple of questions I have for you real quick, sir. In your experience, what type of entity is most likely to have a USERRA claim brought to DOL VETS? Small or large business, private, public, or nonprofit?

Mr. RODRIGUEZ. Congressman, I can tell you it varies. I think every category that you mentioned are likely to have a USERRA claim against them just because, again, as I mentioned earlier, it could be a lack of information about the USERRA process, a lack of information about the service members rights. It could be either one of those. Could be Federal Government, could be State government. Every one of those entities that you listed could fall into that category.

Mr. CRANE. I recognize that, Mr. Rodriguez, but have you seen any trends?

Mr. RODRIGUEZ. Trends? We have trends. I do not have that data in front of me. I would be glad to provide the trends to you. I do not have that data in front of me, but we do.

Again, when you look at industries, they vary. Our veterans are employed in every single industry, as you know. I do not have those exact trends in front of me, but I would be glad to provide those to you.

Mr. CRANE. Thank you, sir.

Next question. Some veteran service organizations in our second panel are concerned that DOL VETS investigators are not consistently conducting such oversight as is required by the USERRA operations manual. They have also stated that DOL VETS has wrongly investigated claims. Why has DOL VETS refused to send this manual to anyone?

Mr. RODRIGUEZ. Well, Congressman, I could tell you our manual has been updated and based off of policies. We are sticking to the policies that are currently in place. If the policies dictate that we do not release the manual right now, we are going to stick to the policies.

I can give you some areas of improvement that we have had where often folks do not realize that the areas that we have improved when it comes to investigations, if I may

One of those things, we have created specialized full-time Investigator 800 series, as I mentioned, positions in our 6 regions exclusively in investigations. We have updated our investigators' manual also to emphasize the importance of conducting witness interviews, as well as the use of subpoena power to obtain evidence. We have also implemented a report of investigation for each case as a tool for investigators to plan their investigation and conduct case analysis for supervisors, to conduct frequent and meaningful reviews throughout the course of investigation. We continuously looked at ways to improve our investigative training. We are definitely taking a proactive approach to ensuring that our investigators are well trained and well positioned to support our service members when they file a claim.

Mr. CRANE. Just a real quick follow up there, real quick. Why again has DOL VETS refused to send this manual out? What is the purpose of keeping it in house?

Mr. RODRIGUEZ. At this point, I can tell you right now that I will have to review that. I know that is been a practice of ours. I will definitely review the practice and figure out if we can we can release it. In our current practice right now, we are not releasing it.

Mr. CRANE. Can you please get back to us on that, Mr. Rodriguez?

Mr. RODRIGUEZ. I definitely will.

Mr. CRANE. I yield back my time, Mr. Chairman.

Mr. VAN ORDEN. Thank you, Mr. Crane. I appreciate that greatly.

Mr. Rodriguez, I would like you to take a note on that. I would like this committee to have access to that manual. I think it is incredibly important that we have transparency amongst your position and mine.

Mr. RODRIGUEZ. I agree, Mr. Chairman.

Mr. VAN ORDEN. All right. Let us get her done.

At this point I would like to recognize Mr. McGarvey from Kentucky for 5 minutes, sir.

Mr. MCGARVEY. Thank you, Mr. Chairman. I appreciate it.

Thank you so much. Thank you for your testimony. Thank you for being in here and highlighting the importance of USERRA. I am glad to know that our service members and vets back home in Louisville, Kentucky, have some legal protection, both when active and when they return.

Always been looking out for workers and employees. I am proud to advocate for the protection of USERRA. In my opinion, no employer should have the ability to discriminate against any workers, whether on the basis of being a veteran, race, gender, you name it. We know that USERRA offers some level of recourse for veterans, but like so many things, we need to make sure that these protections are enforced with deliberate speed and that they do not just exist on paper.

Mr. Rodriguez, what do you think Congress should do to improve the enforcement of USERRA?

Mr. RODRIGUEZ. Congressman, that is a great question, as I wholeheartedly believe that there are ways to improve USERRA. I know the committee has worked on this in the past, and what we want to do is continue to work with the committee to find ways to improve it.

If I can, I would like to highlight a couple of ways that we can work with the committee to improve USERRA.

One, eliminate mandatory arbitration agreements. I think we have all agreed that that is something that is a disadvantage to our service members.

Two, permitting pattern or practice claims.

Three, voting or avoiding State sovereign immunity defenses and then authorizing late payment penalties. One of the biggest challenges we have is when a resolution is agreed upon between the claimant and the employer, then one of the challenges we have is ensuring that that individual does receive their compensation in a timely manner. We want to ensure that if there is a way to create penalties, if you will, for someone who does not meet that obligation, then we would more than happy to work with the committee on that.

Allowing DOJ representation for all plaintiffs as well as including DOJ pattern or practice authority and then adding DOJ civil investigative demand authority.

Those are ways that we have looked at in depth that we figure can definitely help improve the USERRA process.

Mr. MCGARVEY. I really appreciate you sharing that. I think those are good steps that we can take to help protect our veterans and help protect our service members.

My brother right now is in his 20th year of active duty and likely to get deployed again soon. I know in talking to him and to so many other active duty service members, one of the things that they are concerned about when preparing for active duty is, of course, leaving families behind. This applies when we talk about USERRA looking at it with spouses. If Congress expanded USERRA to cover military spouses, would you all have the capacity to enforce it?

Mr. RODRIGUEZ. One of the things, when we look at the ability to expand USERRA spouses, we know that is something that is well founded, well needed. It is something that many organizations have talked about in the past, and we are having even more robust conversations about that now. When we talk about it, the capacity of it from a budget standpoint, unfortunately, I cannot speak about the budget at this point because it has not been released. We definitely would want to work with Congress to look at the ability to have more capacity, if you will, to protect military spouses.

Mr. MCGARVEY. Yes, I think that is something we would love to talk with you about and work with you on as well is strengthening USERRA to protect our active duty and our vets, and also that expansion to spouses. As we know, whether it is service here, whether it is service in the military, you do not serve alone. Making sure that military spouses are protected, I think, is important as well.

Thank you for your testimony.

I yield back.

Mr. VAN ORDEN. Thank you, Mr. McGarvey.

I now recognize Ms. Ramirez from Illinois for 5 minutes.

Ms. RAMIREZ. Good morning. Thank you, Chairman Van Orden and Ranking Member Levin, for taking the time to consider this real critical issue enacting to protect military service members, veterans, and their families from employment discrimination due to their service.

I represent Illinois Third congressional District, and it is the district that starts in the northwest side of the city of Chicago, and it goes to Elgin in West Chicago in the suburbs. There are many critical infrastructure improvements needed there that will benefit greatly from Infrastructure Investment and Jobs Act. We need to build and support and empower the workforce with the livable wages to actually carry out the work. We know we have a long way to go to do that. Employers should know that Uniformed Service Employment and Reemployment Rights Act requires them to treat employees who take leave from Uniformed Service duty respectfully and without discrimination. This includes veterans with all rights and benefits that they would have earned in their civilian employment had it not been interrupted.

Additionally, employers must protect an employee's job seniority when performing Uniformed Service duties. Employers must understand their obligations under this law to properly support the Uniformed Service personnel to ensure compliance with USERRA requirements. Doing so will protect both employees serving in Uniformed Services, as well as the integrity of the entire organization.

With that said, Mr. Rodriguez, I want to talk a little bit about hourly versus salary employees. Does the Uniformed Service Employment and Reemployment Rights Act, USERRA, allow employees to continue to accrue vacation time during their military service?

Mr. RODRIGUEZ. Yes, it does, Congresswoman.

Ms. RAMIREZ. Great, great. What about for hourly employees? Do they accrue vacation time as well?

Mr. RODRIGUEZ. Yes, if they are afforded vacation time as part of their roles and responsibilities, then that is protected USERRA.

Ms. RAMIREZ. Great. How are hourly employees treated differently from salaried employees under the law?

Mr. RODRIGUEZ. They are not treated any differently than any of the other employees.

Ms. RAMIREZ. Okay.

Now, in terms of health insurance, can you explain how health insurance coverage is or is not protected for hourly employees?

Mr. RODRIGUEZ. Under the current USERRA Law, if they have health insurance coverage, then it is protected. All of their rights, all of their benefits are protected under USERRA.

Ms. RAMIREZ. That is really important to hear, and I think it is important as we talk about how we provide the protections and the benefits that our veterans deserve and certainly those that are going back to active duty.

I want to talk a little bit also about arbitration. What is the difference between substantive and procedural rights that may be affected by mandatory arbitration clauses?

Mr. RODRIGUEZ. The legal definition is pretty complicated, as you can imagine, and I definitely can make sure that you have that legal definition. I wanted to not—convey that accurately, but what I can tell you, when we look at mandatory arbitration, depending on what courts or look at it from the circumstances and the other piece of it, they can decipher it differently. One of the things that we want to ensure that veterans are not forced to have arbitration as a supplement over USERRA. We want ensure that their rights are protected through USERRA. That is one of the things that we would look forward to working with the committee to ensure that we find ways to protect those rights and veterans are not forced into arbitration prior to having the ability to file USERRA claim.

Ms. RAMIREZ. Thank you, Mr. Rodriguez.

I just want to thank you for your attention to this critical matter. As you can tell here in our subcommittee, we look forward to discussing how we can further educate public and private employers on USERRA so that the Uniformed Services personnel serving our country receive legal entitlements without discrimination or reprisal. I know that together we can ensure that service members and veterans are protected from employment discrimination due to their uniformed service duties. Thank you.

I yield back.

Mr. VAN ORDEN. Thank you, Ms. Ramirez.

Thank you, Mr. Rodriguez. You are excused. I hope that you and your staff will stay for the second panel. I am just going to tell you, Semper Fi, Devil Dog. Keep it on.

Mr. RODRIGUEZ. Thank you, Mr. Chairman, Ranking Member Levin, and members of the subcommittee, it is been a pleasure and Semper Fi.

Mr. VAN ORDEN. All right.

Okay, we are going to go ahead and get set up for the second panel. Take a 5 minute break.

[Recess]

Mr. VAN ORDEN. Committee will come to order.

In our second panel, we have several veteran service organizations. Colonel Patton from The Reserve Organization Of America, Mr. Mike Hadley, director Of Legislative Affairs at The National

Guard Association Of The United States, Mr. Kevin Hollinger, the legislative director of Enlisted Association of The National Guard Of The United States, and Mr. Jonathan Taylor, principal at Gupta Wessler.

I would now like to welcome the witnesses on our second panel to the witness table.

Let the record reflect that the witnesses have answered in the affirmative.

[Witnesses sworn]

Colonel Patton, you are now recognized for 5 minutes to deliver your opening statement.

STATEMENT OF GILBERT L. PATTON

Colonel PATTON. Good morning, Chairman Van Orden, Ranking Member Levin, and distinguished members of the House Veterans Affairs Economic Opportunity Subcommittee.

On behalf of the congressionally chartered Reserve Organization of America, thank you for the opportunity to participate in this important oversight hearing on protecting the employment and reemployment rights of our Nation's service members and veterans.

The Reserve Organization of America, or ROA, commends the subcommittee's commitment to fortifying the integrity of USERRA to ensure that service members are not disadvantaged in their civilian careers because of their military service, that they are promptly reemployed in their civilian jobs upon return from duty, and that they are not discriminated against by employers because of past, present or future military service. In this spirit, ROA offers the following insights into how to better gauge the effectiveness of existing USERRA protections, modernize regulations governing USERRA enforcement, and ensure DOL VETS personnel are properly resourced and trained.

First, ROA urges the members of this subcommittee to support amending Section 4332 of USERRA to require the Secretary of Labor to fulfill additional reporting requirements, including reporting the number of closed case reviews conducted by the Agency, and the number of disposed cases found to have been originally closed by DOL VETS with substantive errors. Current law requires the Department of Labor to report each year on the number of USERRA complaints received, the number of cases substantiated, and the number of cases referred to the Department of Justice or to the Office of Special Counsel. However, this data is merely transactional, and while it may serve to demonstrate the taskload of USERRA complaints filed by DOL VETS for budgetary purposes, it does not provide any indicators as to the accuracy or the completeness of how the complaints were processed.

I served in the United States Air Force for 31 years. One of the most valuable lessons I learned first early on as an officer, then as an operational unit commander, and then as well as a leader of large headquarters staff organizations, is that you get what you inspect and you get what you measure. Without a proper inspection of DOL VETS performance to effectively execute the various provisions currently in USERRA law, we do not get a proper measure of USERRA. To correct this, ROA urges the members of the subcommittee to support directing a Government Accountability Office

(GAO) study to examine DOL VETS performance of its statutory responsibilities under USERRA.

I might suggest that the scope of that would include the findings of past GAO reports and past Department of Labor inspector general reports, and the evaluation of the previously assured corrective actions by DOL VETS to each of those reports.

The desired end State of the study is to measure the capability and the preparedness of DOL VETS to ensure service members and veterans are truly protected under USERRA, identify potential changes in ensuring compliance with USERRA, and provide recommendations that would improve USERRA enforcement. While these studies may take time to develop and unfold, an action that can be taken now is to update the Department of Labor's regulations under 20 Code of Federal Regulation (CFR) that it promulgates that drive how USERRA is implemented. DOL's regulations currently serve as the primary basis for training and providing references to the investigators charged with preserving USERRA rights and benefits of service to members and veterans. However, these regulations in 20 CFR were last promulgated in 2005, and there have been several amendments to USERRA since then. The regulations are 13 years out of date to the most recent amendments to USERRA that were enacted.

ROA believes DOL should be compelled by Congress to update their regulations on a more regular basis to ensure that investigators and staff are equipped with what is required to completely fulfill their statutory responsibilities under USERRA. Further, ROA encourages the members of the subcommittee to take a proactive approach in pulling back the curtain on how DOL currently enforces USERRA and has enforced USERRA in the past.

Under Federal Freedom Information Act (FOIA) law, each agency of the Federal Government shall make available to the public, and I quote, "administrative staff manuals and instructions to staff that affect the member of the public." Despite this, DOL has invoked an exemption to avoid the release of its own USERRA operations manual, based on the assertion that the manual is compiled for "law enforcement purposes" and that its release would "disclose guidelines for law enforcement investigations or prosecutions that, if disclosed, could reasonably be expected to risk circumvention of the law". There is nothing known to ROA to be within that manual that could remotely or much less reasonably be construed to provide an advantage to any party trying to circumvent a USERRA regulation or the law. ROA believes it is wholeheartedly necessary to immediately make the manual in its entirety public for the purposes of ensuring its processes and procedures are truly aligned with the text and the intent of USERRA.

On behalf of ROA, thank you for your support of our young men and women in the reserve components, your support for their employers and for our Nation's veterans. Thank you for providing ROA with this opportunity to testify before you today. I look forward to any questions you might have.

[THE PREPARED STATEMENT OF GILBERT L. PATTON APPEARS IN THE APPENDIX]

Mr. VAN ORDEN. Thank you, Colonel Patton.

I now recognize Mr. Hadley for 5 minutes to deliver your opening statement.

STATEMENT OF MIKE HADLEY

Mr. HADLEY. Chairman Van Orden, Ranking Member Levin, and other distinguished members of the committee, on behalf of almost 445,000 members of the National Guard Association of the United States and nearly 450,000 members of the National Guard, we truly appreciate the opportunity to share our thoughts on today's topic for the hearing. We thank you for your oversight and attention paid to the issues affecting those that have served and are currently serving our Nation.

The operational tempo of the National Guard has increased significantly over the past 20 years, and even more so recently. From overseas deployments in support of Combatant Commands, the pandemic, civil unrest, wildfires and floods, the National Guard has remained always ready.

In 2021 alone, the National Guard executed over 10 million man days. This has put an immense strain on our service members, families, and employers. National Guard soldiers and Airmen are unique in that they simultaneously manage civilian careers alongside their military careers. This has become even more challenging as military requirements expand. Regardless of what the law says, we know that Guard members' ability to find and maintain steady employment has been impacted and challenged. USERRA is in place to protect against discriminations of our soldiers and airmen. Employers must be educated in regarding existing law and USERRA protections and should be expanded where the gaps exist.

The 116th Congress contract has made great progress in the Veterans Healthcare Benefits Improvement Act and which ensured coverage for specific areas of State active duty. However, those protections only covered duty beyond 14 days. State National Guard response missions are often less than those 2 week time periods. We ask that the Committee remove this limit to protect all State active duty, regardless of the length.

Another area of concern is the time off for treatment of service-connected disabilities. Military duty can be physically strenuous and injuries can occur. As members return from their missions, they should be given the time for appointments, rehabilitation, physical therapy, whether the Department of Veterans Affairs or other private healthcare facilities. The service members should focus on improving their healthcare without concern for retribution from their employer.

That said, a healthy soldier airmen is one that has healthcare coverage. Today there are currently over 60,000 National Guard members that do not have health care of any sort. This is a key readiness issue. It is imperative that all service members have the access to healthcare needed to meet their medical deployment requirements. We ask all members to support the Healthcare for our Troops Act, affording zero care or Tricare coverage, will dramatically increase readiness, solve turbulence in moving on and off healthcare plans, and ultimately save money. It will also provide additional cost savings benefit to the employer who would not need to provide health care to this employee.

We understand that the challenge the military service can place on employers. An additional way to encourage our employers is through the Reserve Employers Comprehensive Relief and Uniform Incentives Act. The RECRUIT Act would authorize an annual tax credit for small business employers who employ National Guard and Reserve members and would go a long way in supporting communities. National Guard Association of the United States (NGAUS) supports and encourages the reintroduction of this bill in the 118th Congress.

I thank you again for inviting NGAUS here to testify today. Your efforts are critical to the well being of our service members and the success of our National Guard. I look forward to continuing our work together and sincerely appreciate the steadfast leadership from the members and their staffs in advocating for the men and women of the National Guard.

Thank you.

[THE PREPARED STATEMENT OF MIKE HADLEY APPEARS IN THE APPENDIX]

Mr. VAN ORDEN. Thank you, Mr. Hadley. The written statement of Mr. Hadley will be entered into the hearing record, as will Colonel Patton's.

Mr. Hollinger, you are now recognized for 5 minutes to deliver your opening statement.

STATEMENT OF KEVIN HOLLINGER

Mr. HOLLINGER. Chairman Van Orden, ranking Member Levin, and members of the Committee, thank you for the opportunity to be here today and provide our thoughts on USERRA protection.

Enlisted Association of the National Guard of the United States (EANGUS) is the only professional military service organization dedicated solely to the enlisted members of the National Guard. Unfortunately, National Guard service members frequently do not receive the same comparable benefits or afforded the same protections as active duty component and in some cases, even other reserve component service members, due to the duty status under which they are working. Today, EANGUS would like to address three concerns regarding USERRA protection affecting the National Guard. An employer's ability to use forced arbitration as a means of settling legal issues concerning USERRA, noncovered state funded service in uniform, noncovered family members.

Removing forced arbitration is important legislation that will empower service members and their families against the practice of forced arbitration. This much too standard dispute process strips our service members of their rights under the Service Member Civil Relief Act, SCRA, and USERRA. Forced arbitration is a one sided nontransparent process in which service members have very little chance to achieve a favorable outcome when their rights and protections set forth under these Federal laws are violated. Service members need this legal protection restored without delay, not another study to show what they already know, that forced arbitration hurts them and their families and renders rights granted by SCRA and USERRA virtually meaningless. EANGUS urges the 118th Congress to introduce and pass legislation removing forced arbitration from USERRA and SCRA.

The next concern I would like to discuss is non covered, state funded service in uniform. State active duty is available for Governors and adjudicate generals to use for various State concerns like State environmental disasters, civil unrest, or fulfill community needs. If a service member do not fall under one of the following three categories, they will not be protected by USERRA. State active duty for 14 or more days, State active duty in support of the national emergency, State active duty in support of a major disaster declared by the President. Since March 2020, the National Guard has activated over 320,000 service members in support of many overseas and domestic activities. From combat missions in places like Afghanistan to running COVID tests and vaccine sites in the U.S. Our dedicated service members of the National Guard must know that their job is safe and available when they return.

In *Torres v. The Texas Department of Public Safety*, the Supreme Court considered whether the State, by ratifying the Constitution, gave Congress the power to authorize suits against states using its constitutional war powers. In the opinion authored by Stephen Justice Breyer, he stated Congress's ability to build and maintain the Armed Forces fits the test outline and PennEast's test. Thus, in joining together to form a union, the State agrees to sacrifice their sovereign immunity for the good of the common defense.

With that opinion, we now know all duty statuses performed by National Guard should be considered by Congress therein. EANGUS would urge the 118th Congress to ensure USERRA protections for all Reserve and National Guard duties without timelines and regardless of who orders them the duty.

The third concern I would like to discuss, USERRA protection for spouses. Everyone knows the sacrifice of the Reserve and National Guard personnel being pulled from their everyday lives and thrust into service of our country, but imagine if you were removed from your spouse at a moment's notice. If you still have or have had small children, how hard would it be for your spouse to make up for your absence? Well, that is how being a National Guard spouse works. Spouses often must take time away from their employment to figure out new schedules. At a moment's notice, they become the sole head of household. Army General Raymond Odierno often said, our country is great because of our military, our military is great because of our service members, and our service members are great because of our families. I think putting these three things together is the correct answer. EANGUS would urge the 118th Congress to legislate USERRA protection for spouses of activated Reserve and Guard service members.

Finally, I would like to say military and veteran law and policies are often developed without understanding or appreciation for the essential distinction between the National Guard and active duty service. The members of the National Guard regularly lose out, and so do their families. These past 3 years have shown America how important the National Guard is to everyday life. Regardless of the mission, a pandemic assistance, civil unrest, capital security, or overseas direct combat assistance, the National Guard has selflessly answered that call. Despite many of these activations happening at a moment's notice, the National Guard did not hesitate.

They faithfully served their country and communities and accomplished the mission.

Thank you for your time and I look forward to your questions.

[THE PREPARED STATEMENT OF KEVIN HOLLINGER APPEARS IN THE APPENDIX]

Mr. VAN ORDEN. Thank you, Mr. Hollinger. The written statement of Mr. Hollinger will be entered into the hearing record.

Mr. Taylor, you are now recognized for 5 minutes to deliver your opening statement.

STATEMENT OF JONATHAN E. TAYLOR

Mr. TAYLOR. Chairman Van Orden, ranking Member Levin, and distinguished members of the subcommittee, thank you for inviting me to testify today.

I want to make three points.

First, USERRA has never been more important than it is today. Since September 11, our country has heavily relied on Reservists and National Guard members to defend us. These service members account for nearly half of the 2 million people in our military, and they are essential to our safety. Most days, they go about their lives like anyone else working their civilian jobs, caring for their families, worried about their finances. They are also trained soldiers who balance their roles as civilians with ongoing military obligations, so they can stand ready to be called to active duty at a moment's notice.

USERRA is the key statute that protects these service members in the workplace. It is the reason that when they are called to serve their country, they do not have to worry that their jobs will be there for them when they get back. Nor do they have to worry that they will be disadvantaged or discriminated against simply because they answered the call to serve. Take these protections away, and our military would have a hard time convincing people to join the Reserves.

For that reason, as one Senate report put it, it is imperative that employers comply with USERRA. Employers often fail to do so. When that happens, Congress has given service members the tools to protect themselves. They can go straight to court. There, they can shine a light on their employer's practices, present their case to a neutral judge and jury, rely on the rule of law, and obtain a written decision that can be appealed and reviewed by the political branches. None of that will happen if they are forced against their will into secret arbitration, which leads to point two.

USERRA has never been more at risk than it is today. When it was enacted in 1994, forced arbitration was barely a thing. Now it is everywhere. Corporations have learned from their lawyers that they can escape accountability for violating the law by inserting fine print into their take it or leave it contracts. As a result, getting a job increasingly requires checking one's rights at the door. Most nonunion private sector employers in the United States, over 60 million American workers are now subject to forced arbitration. Service members are no exception. Despite strong statutory language to the contrary, including a provision barring enforcement of any contract that impairs USERRA's rights, several courts have held that USERRA permits employers to impose forced arbitration

on service members. That violates the statute's text and purpose, but more than that, it is immoral and unwise.

A real life example helps to make the point. In 2012, a reservist named Kevin Ziober was called to active duty in Afghanistan. On his last day of work before his deployment, his employer threw him a party to celebrate his service, but afterward, they summoned him to a room and told him he was being fired. This meant that as Kevin was heading to a war zone, he now had to worry about how to pay his bills when he returned. That is the last thing that should be on a service member's mind as they go to war, and it is exactly why USERRA exists. After kicking him out of his job, his employer then kicked him out of court, invoking a forced arbitration clause. Service members like Kevin deserve better. Fortunately, as judges have noted, Congress can fix this problem. Now is the time for it to do so and clarify what should already be clear, forced arbitration has no place in USERRA.

Last, this is not a partisan issue. Over 80 percent of Republicans, Democrats, and Independents support Federal legislation to end forced arbitration, and those percentages are surely higher when it comes to our troops. If nothing else, basic fairness dictates as much. Our service members fight for our freedom and defend our Constitution, the least we can do is preserve their freedom to decide how to protect themselves and defend their constitutional rights. Forced arbitration is the opposite of these values.

As the Bush department of Defense observed, waiver is not a matter of choice and take it or leave it contracts of adhesion. The very reason we have a bill of rights in the first place is because the original Constitution lacked a right to a civil jury trial. As John Adams said, representative government and trial by jury are the heart and lungs of liberty.

Eliminating forced arbitration for USERRA claims is not just about fairness to individual service members, it is also about empowering them as a group and protecting us as a Nation. Forced arbitration does not channel cases into a better system for resolving disputes, it extinguishes them entirely. For those precious few cases that actually get arbitrated, the secret nature of the proceeding means that even if a service member can beat the odds and win, no one else benefits. No one will become aware of the unlawful practice or the fact that they might have a claim, nor will Congress have any idea about how the statute is being applied and whether it needs to be amended.

Add it all up, and the upshot is plain, forced arbitration badly undermines compliance with USERRA and it makes us less safe.

I am happy to answer your questions.

[THE PREPARED STATEMENT OF JONATHAN E. TAYLOR APPEARS IN THE APPENDIX]

Mr. VAN ORDEN. Thank you, Mr. Taylor. The written statement of Mr. Taylor will be entered into the record, the hearing record.

We will now proceed to questions and I recognize myself for 5 minutes.

You guys may not have noticed it, but in the spirit of our opening statements, you just saw bipartisanship take place. Colonel, I spoke to Ranking Member Levin, we are going to get a hold of the GAO and we are going to make sure that they start a study to re-

port what is going on with the actual—we want the real numbers for this arbitration. Mr. Rodriguez will be made aware of this. We will apparently have to send him a letter because he did not—where are you?

There you are, Devil Dogs. Sneaking in the back on me. Mr. Rodriguez, we are going to get that to you. We want real numbers because, as we said, opening up the statement, we really want to help our veterans, and you owe us transparency, and we owe you honesty. How does that sound? Pretty good. All right? Good. Good call.

Colonel, thank you for your 31 years of service. I appreciate it. As a Navy guy, it is really hard for me to say that, but I mean it. I know you are in the Air Force and still good to go.

The committee staff, our staff, has heard that they have concerns since the Biden Administration has taken over the DOL, that the DOL VETS, the Department of Labor, have been difficult to reach when regarding these issues. What does DOL VETS, what do you need to hear from these folks, and how many times have you tried to talk and bring up these issues with DOL VETS? What do you guys need to hear specifically regarding to USERRA?

Colonel PATTON. Thank you for the question, Mr. Chairman.

I would say, in the preceding 3 years, so that actually spans the first half of the current Administration and the trailing end of the previous Administration as well, that we have been trying to reach out on a regular basis and reaching out into various levels of the organization at the action officer level, if you will, at the State level leadership, at the region level leadership and at the national office. I can get you fairly accurate numbers as to the exact number of engagements of each, but suffice it to say, they have been regular. Deliberately we have tried to reach out at different levels within the organization to at least get to consensus on defining the problem. Until we get to consensus on defining the problem, there is not much hope in getting to consensus on getting to the solution.

Mr. VAN ORDEN. Roger that. I would really appreciate that data so we have a solid metric that we can bring.

Colonel PATTON. Thank you, sir.

Mr. VAN ORDEN. You bet.

One follow up for you. While DOL VETS administers USERRA, my subcommittee has legislative jurisdiction over this issue. Is your staff willing to discuss the issues with our staff and work toward ensuring your Reserve Officer Association's concerns are listened to and legislated?

Colonel PATTON. Absolutely, Mr. Chairman.

Mr. VAN ORDEN. Fantastic.

I yield back.

Colonel PATTON. Thank you, sir.

Mr. VAN ORDEN. I now recognize Ranking Member Levin for 5 minutes.

Mr. LEVIN. Thank you, Chairman, and thanks to all our witnesses for being with us and for your testimony.

I have been a strong supporter and am a strong supporter of strengthening benefits and protections for our Guard and Reserve members. It has been a pleasure working with many of you and others that are not here over the past 4 years, particularly on GI

Bill Parity. We are going to continue to work very hard on that, and I look forward to our continued partnership on many of these issues.

One area for improvement I want to explore is USERRA's, limitation that the cumulative length of service that causes a person's absences from a position may not exceed 5 years. I want to ask each of you, we will start on your side, is the 5 year window adequate for employees who stay with one employer for a long period of time? Colonel Patton will start with you.

Colonel PATTON. I will start off, ranking member, by stating that there are exceptions or allowances to the 5 year limit, first off. I am going to paraphrase, but those are for things such as readiness training. Training is not all done upfront one shot, you know, and then you are trained for life. Certainly our tactics, our procedures, our equipment, our technology evolves over time, units are re-missioned over time. There is developmental education that, that a military member receives perhaps in their 30's or their 40's that just would not have the same efficacy giving it to an 18 year old military member. There are allowances for all sorts of those things. I would say in a very generalized sense, that those allowances are fairly adequate.

Having operationalized the Reserve component in the 1990's, and then the demands that were then placed on the operationalized Reserve components soon after 9/11 have certainly then invoked other exceptions that require a military member to be—if they deploy over and over and over again, they may exceed that limit with a particular employer. There are exceptions in the law and those exceptions are granted to different levels within the executive branch, depending on which status in which the member is called to service.

Mr. LEVIN. Thank you.

I want to make sure to get everybody in, and we only have 5 minutes, so I will go to Mr. Hadley.

Colonel PATTON. Thank you, sir.

Mr. HADLEY. Thank you, sir.

Yes, I would agree with the first witness' unit statement there. I do not think that it is an easy one size fits all kind of provision that is in there. There is a lot of unique circumstances that occur throughout the, you know, the course of a service member's life and employment life as well. I think that we need to, you know, explore that and look for ways that we can capture that and then accommodate those needs.

Mr. LEVIN. Thank you.

Mr. Hollinger.

Mr. HOLLINGER. As the enlisted member, we are going to keep it really direct and say no, it is absolutely not enough time. I served 22 years in both the Army active duty and in the National Guard, I have 11 combat deployments. If this rule would have solely been enforced on me, I would not have had a job. As we stay in longer, our senior leadership becomes extremely important and vital to our success. Because of that fact, we are very loyal on the outside. Five years is not enough, sir.

Mr. LEVIN. Thank you.

Mr. Taylor, you get the last word here.

Mr. TAYLOR. Sure, I will keep it brief.

I have not studied the issue carefully enough to offer an opinion, but what Mr. Hollinger just said sounded pretty good to me.

Mr. LEVIN. Let me ask you, Mr. Hollinger, can you speak to any instance in which you have seen a service member personally impacted by the 5 year window? I think you just mentioned your own experience.

Mr. HOLLINGER. I only have one example. I am not going to use his name because I have not talked to him about it, but it was in northern Indiana at one of the steel mills. As he came on his seventh deployment, and it was about 2015, he was told not to come back. Now, his union was very strong and just sent him to a new steel mill when he got back. That did come into effect.

Mr. LEVIN. Got you.

One last question for you, Mr. Hollinger. You noted in your testimony the U.S. Supreme Court decision *Torres v. Texas Department of Public Safety*. It held that states may not invoke sovereign immunity to avoid liability under USERRA. That is not specifically codified in law, is my understanding. What is your position on the decision and can you speak to the need for legislation on the issue?

Mr. HOLLINGER. Well, I think government accountability, especially when it comes to employment, is the utmost importance. I think the government sets the standard for all the rest of us to follow. I think the government standard needs to be a lot higher and make sure that they are following the law.

As far as that decision, I truly do believe that an individual that is affected at a state level does need that easy path through opening the case in their name, in a Federal court or in a state court is imperative. It is very, very hard for especially lower enlisted individuals to wait 5, 6, 7 years for a case to work through DOJ or through DOL and try to get resolution. We need—

Mr. LEVIN. Thank you.

Mr. HOLLINGER [continuing]. to take care of—

Mr. LEVIN. Over time, but thank you all for your testimony and your service.

I yield back to the chairman.

Mr. VAN ORDEN. Thank you, Raking Member Levin.

I will recognize Mr. Ciscomani from Arizona for 5 minutes.

Mr. CISCOMANI. Thank you, Mr. Chairman. Thank you again to all the witnesses for coming here with us today to testify.

Questions for the Colonel. In your testimony, you suggested that another agency might be more appropriate to administer USERRA. How do you think it would benefit service members to have another agency administer the program and part of that, what issues would you foresee with moving the program out of the Department of Labor?

Colonel PATTON. Thank you for the question, Mr. Ciscomani.

To be clear, I did not make that as a recommendation or certainly did not intend to in my oral remarks. It is merely an acknowledgement that it is our understanding that there is a discussion going on within staffs, potential legislation that might do so.

As far as the challenges to another agency, I would foresee that those could be very similar to the challenges that the current agency has with consistent USERRA enforcement.

Mr. CISCOMANI. Based on the discussions that are going on, how would you think it would benefit?

Colonel PATTON. Certainly this will be my own opinion, but as a veteran, having worked through the systems, if you will, of veterans benefits both with the Department of Labor and the Department of Veterans Affairs, I might suggest the Department of Veterans Affairs has kind of had that watershed moment culturally already in terms of how it responds to and provides to veterans needs, particularly their statutory needs. That Department of Veterans Affairs might be further down the road of being veteran focused and able to be responsive to those veterans benefits. That is purely my personal opinion.

Mr. CISCOMANI. It will be noted as that.

Colonel PATTON. Pretty speculative as well, so.

Mr. CISCOMANI. Understood. Thank you for your thoughts on that, Colonel.

Colonel PATTON. Thank you, sir.

Mr. CISCOMANI. Thank you for your service.

Mr. Hollinger, for your membership, how long does it usually take for a claim to be resolved by the Department of Labor, in your experience?

Mr. HOLLINGER. I do not have that exact number up. I would say a lot of times by the time it gets to the Department of Labor, what would be the variation on that? I would say it would probably be somewhere around a year.

Mr. CISCOMANI. About a year? How long would it generally take for a claim to be resolved, do you think, in Department of Veteran Affairs or Department of Justice?

Mr. HOLLINGER. Well, I am not advocating for it to go anywhere else, I am advocating for them to be able to bring it in their name into a courtroom of their local jurisdiction or the Federal side. I am not advocating for another department or another bureaucracy at all, sir.

Mr. CISCOMANI. Okay.

Now, do you think that most businesses are aware of the protections afforded to serve as members by USERRA? What steps could we take to make sure that more businesses are aware?

Mr. HOLLINGER. I believe that the education needs to come a lot through the military service community. So myself. So a business that is not that is not aware of how USERRA works, please refer them to me.

Number two, I think most businesses are very patriotic and love this country. I think the wear down of a 20 plus year war has fatigued a lot of businesses and kind of hurts the decisionmaking process every once in a while. I think most of these cases would be settled outside of a courtroom if they were opened in the name of the individual.

Mr. CISCOMANI. Got you.

Thank you so much, Mr. Chairman. I yield back.

Mr. VAN ORDEN. Thank you, Mr. Ciscomani.

I now recognize Mr. McGarvey from Kentucky for 5 minutes.

Mr. MCGARVEY. Thank you, Mr. Chairman. Thank you, Mr. Hollinger. I appreciate what you just said too, about the fact that we are 20 years going on this. I mentioned my brother in the pre-

vious panel who got commissioned in May 2002 and watching what he has gone through in his career, the number of deployments, how hard that is on families.

I want to continue to hit a little bit on the questions I was talking with Mr. Rodriguez about, about spousal protections. I mean we know what we are asking our men and women who are willing to put on a uniform to keep this country safe to do, and that is whether it is being activated, whether it is being deployed, whether it is going to a natural disaster if you are in the Guard, something like that. We expect a lot, it will require a lot, and there is honestly not often a ton of notice on when you are leaving or a lot of certainty on the date you actually come back.

Dr. Taylor, you told the story about the individual who was given the party, and in the same day given a party by the employer let go on going to active duty. This is tough. This is tough on readiness of our Force. I again want to go back to the spousal part of it.

Mr. Hollinger, I know you know just as much as probably anybody about what our members go through when they are activated, called to serve, and you know the difficulty that their spouses go through when that happens. Could you speak a little bit more about why expanding USERRA protections to spouses would improve our readiness and well-being of our National Guard and service members?

Mr. HOLLINGER. Well, I think everybody in this room is aware of how important our spouses are. Mine sits right behind me, right over here in the blue dress. Anyway.

Mr. MCGARVEY. Thank you both for your service.

Mr. HOLLINGER. The spouses are the most critical aspect of what we see every day and what makes the National Guard function. Without them, everything ceases to maneuver. Retention, recruiting, all of this stuff will suffer greatly without the spouses. When a spouse is thrust into that environment where they have to be the sole caregiver to their household, it takes tremendous dedication, patience, intelligence. They are the heartbeat of what happens in the National Guard. They need that protection just like they are active duty service members.

As I said earlier, I deployed 11 times. That is the easiest thing in the world to do is deploy. I had great leadership that said, go that way, do great things for America, and I did that. My spouse who sits at home does not have that same leadership to say, hey, go that way. Make sure your kids do great things for America. She has to figure that out on her own. I think that is the important part that we need to focus on, is how important the spouses are every single day.

Mr. MCGARVEY. Amen. Thank you for sharing that.

I am going to ask you the same question that basically I asked Mr. Rodriguez as well. If you could just tell us what Congress should be doing to improve the enforcement of USERRA and what are you hearing from your membership in that regard?

Mr. HOLLINGER. To make sure that the enforcement, I think DOL is making great strides going forward. I think if we support them, continue to support them, I think the right individuals are probably in place there. I am very fortunate when it comes to the DOL and very pro what they are doing today. I have an individual,

not sure if he is still back there. I have called him commander two different times, I have called him friend and now I call him co-worker. I think he is the right guy to have there. I think Mr. Rodriguez is the right guy to have there, and I think DOL will do great things.

Mr. MCGARVEY. Thank you. I appreciate it. Mr. Hollinger, thank you for your service and to your spouse, thank you for your service as well.

I yield back.

Mr. VAN ORDEN. Thank you very much, Mr. McGarvey. I appreciate it greatly.

This panel is excuse from the witness table.

I want to thank our witnesses for appearing today to discuss this national security issue, because that is what USERRA is. We have got to make sure that our service members are protected while they serve overseas or in the United States in emergency declarations. We also have to make sure that DOL VETS continues to do their good work. In the future, I do not hope, but I expect to see the Department of Defense here as witnesses as well. Their absence is duly noted, and it is unacceptable. USERRA, SCRA, and the Transitional Assistance Program (TAP) programs are important programs that this committee has jurisdiction over, but the Department of Defense administers them, and we need them to show up to do their job.

With that, I yield to Ranking Member Levin for any concluding remarks he may have.

Mr. LEVIN. I associate myself with the chairman's comments regarding the Department of Defense. This is something that would consistently frustrate me throughout my 4 years as chairman. Getting all the relevant folks to attend these hearings is essential for us to do our work on this subcommittee, and we are grateful to those of you who are here and who stayed for our second panel. I also want to congratulate the chairman on a fine first hearing of our subcommittee. I am looking forward to really an excellent couple of years.

With that, I will yield back.

Mr. VAN ORDEN. Well, thank you, Ranking Member Levin.

I want to thank you all for coming here today. Your participation is vital so that we can help do what is right by our veterans.

I ask unanimous consent that all members have 5 legislative days to revise and extend their remarks and include extraneous material.

Without objection, so ordered.

The hearing is adjourned.

[Whereupon, at 11:57 a.m., the subcommittee was adjourned.]

A P P E N D I X

PREPARED STATEMENT OF WITNESSES

Prepared Statement of James Rodriguez

TESTIMONY OF
JAMES D. RODRIGUEZ
ASSISTANT SECRETARY
VETERANS' EMPLOYMENT AND TRAINING SERVICE
U.S. DEPARTMENT OF LABOR

BEFORE THE

SUBCOMMITTEE ON ECONOMIC OPPORTUNITY
COMMITTEE ON VETERANS' AFFAIRS
U.S. HOUSE OF REPRESENTATIVES

March 9, 2023

Introduction

Chairman Van Orden, Ranking Member Levin, and distinguished Members of the Subcommittee, thank you for the invitation to testify today. I commend the Subcommittee for its efforts to promote economic opportunities for America's veterans and for examining the future of workforce protections for service members. For over 25 years, the Uniformed Services Employment and Reemployment Rights Act (USERRA) has protected the employment and reemployment rights of our Nation's uniformed service members and has played an important role in the recruitment, retention, and readiness of the All-Volunteer Force. The Department of Labor's (DOL) Veterans' Employment and Training Service (VETS) proudly administers USERRA, with the support of our interagency partners at the Department of Defense (DOD), Employer Support of the Guard and Reserve (ESGR), the Department of Justice (DOJ), and the Office of Special Counsel (OSC). I welcome the opportunity to share our vision for the future of USERRA and to share factors that decrease USERRA's ability to protect those who serve our Nation.

It has been an honor to lead DOL VETS for the last two years. My wife Vanessa and I both served on active duty in the Marine Corps, and we have two wonderful daughters who in many ways grew up having to serve with us. So, this isn't just a job for me, it's my life's mission. I have been truly impressed by the talent, dedication, and commitment of our DOL VETS team, as well as by the high level of cooperation and collaboration with our interagency partners. The vision of VETS is to enable all veterans, transitioning service members, and military spouses to reach their full potential in the workplace. Living up to full potential does not just mean getting a job; it means maximizing the value of one's unique capabilities. By improving access to the employment and reemployment rights under USERRA and harnessing America's collective support for our military and their families, we help our veterans, transitioning service members, and military spouses reach their full potential. Achieving this vision not only helps veterans, service members, their families, and the organizations they serve, but it is also good for America's prosperity and security. Veterans, service members, and military spouses comprise some of the most capable, committed, and resilient talent pools in the Nation, and they have

much to contribute to the national labor force and economy as we continue to emerge from the pandemic.

The Importance of USERRA to National Security and Maintaining the All-Volunteer Force

When Congress enacted USERRA in 1994, it did so with three purposes in mind. First, to encourage service in the all-volunteer uniformed services by eliminating or minimizing the disadvantages to civilian careers and employment which can result from such service. Second, to minimize the disruption to the lives of persons performing such service, as well as to their employers, their fellow employees, and their communities, by providing for prompt reemployment of such persons upon completion of such service. Third, to prohibit discrimination against persons because of their service in the uniformed service. Congress has also stated its sense that the Federal Government should be a model employer in carrying out the provisions of USERRA.

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 retaliating against a person because of such person's attempt to enforce their rights, or the rights of others, under the Act. In addition, an employer may not retaliate against an individual for filing a USERRA claim, testifying, or otherwise aiding 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 re-employed with the seniority, status, and rate of pay as if they 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.

Based on calculations, there were more than 1 million service members eligible for USERRA protections at the end of 2022.¹ This sum included 265,179 members of the Reserve Components (RC) that are comprised of Reserve and National Guard troops and 870,797 members of the Active Components of the U.S. Armed Forces, as reported by the Defense Manpower Data Center (DMDC)² in its strength accounting report. These figures represent only those RC members who were activated for Operation Noble Eagle, Operation Enduring Freedom, Operation Iraqi Freedom, Operation New Dawn, Operation Inherent Resolve, and Operation Freedom Sentinel. Additional RC members served on active duty for training and domestic operations during this period.

USERRA provides fundamental support to our All-Volunteer Force. USERRA's reemployment protections ensure that our service members will not be penalized for temporarily leaving their civilian careers and employment when activated to defend our Nation. USERRA's anti-discrimination provisions protect our veterans and service members from adverse employment

^{1,2} Total number of U.S. Armed Forces and Selected Reserves for December 31, 2022, reported by Department of Defense, Defense Manpower Data Center, in Armed Forces Strength Figures for December 31, 2022, and Selected Reserves by Rank/Grade December 31, 2022, accessible at <https://dwp.dmdc.osd.mil/dwp/app/dod-data-reports/workforce-reports>.

actions motivated, at least in part, by their protected status as a past, present, or future member of the uniformed services. USERRA's anti-retaliation provisions ensure that anyone, regardless of their status in the uniformed services, can assert their own rights or defend the rights of others under USERRA, and be protected against retaliatory employment actions. The existence of these important rights, as well as Federal authority to investigate, resolve, and enforce violations of those rights, removes barriers to, relieves stress from, and recognizes service in, the uniformed services. By doing so, USERRA's employment and reemployment protections encourage and facilitate the recruitment, retention, and readiness of the All-Volunteer Force.

Delivering Positive USERRA Outcomes for Both Employees and Employers

Under USERRA, Congress authorized the Secretary of Labor, through DOL VETS, to assist any person or entity with the employment and reemployment rights and benefits provided under the statute. Congress also authorized DOL VETS to take such outreach actions as deemed appropriate to inform both persons entitled to rights and benefits under USERRA and employers of the rights, benefits, and obligations of such persons and such employers under USERRA. DOL VETS conducts a robust public outreach campaign to educate service members, employers, and others on their rights and responsibilities under USERRA. Since the terrorist attacks of September 11, 2001, which resulted in the single greatest mobilization of the Reserve and National Guard, DOL VETS has briefed more than one million individuals on USERRA. So far this fiscal year, DOL VETS has already conducted over 500 compliance assistance events nationwide, informing employees and employers alike of their rights and responsibilities under USERRA.

As an example of a successful compliance assistance event, the Attorney for the Town of Davie, Florida contacted DOL VETS' Florida field office seeking to receive an overview of USERRA and assistance addressing concerns regarding employer compliance with USERRA. The Town of Davie coordinated with the DOL VETS Atlanta region to include USERRA training as part of its annual training for supervisors. Three training sessions, including a question-and-answer session, were conducted between April and May of 2021. In total, training was provided to over 160 Town of Davie municipal supervisors and managers.

In another example, on May 14, 2021, the DOL VETS' Maine State Director partnered with the Maine ESGR Chair, and other ESGR ombudsmen, to present a USERRA briefing during the Maine Annual Human Resources Convention. Training focused on the status of mobilized National Guard members, and RC employees, and an overview of their rights and responsibilities. Over 1,000 human resource professionals from throughout Maine attended the training, with several following up with VETS after the event seeking additional information.

When DOL VETS is unable to resolve a USERRA issue through compliance assistance, a servicemember or veteran can submit a claim to DOL VETS for investigation. When this occurs, DOL VETS assigns the case to a trained USERRA investigator. On average over the past three years, DOL VETS has closed 943 cases for investigation per year. When DOL VETS investigators find a violation of USERRA, the investigator works diligently with both the claimant and the employer to resolve the case to the satisfaction of both parties. Of cases in which DOL VETS found a violation of USERRA in FY 2021, DOL VETS resolved 87% of

those, which is the highest resolution rate in the history of the program.

Upon completion of the investigation, if DOL VETS does not resolve the case to the claimant's satisfaction, DOL VETS advises the claimant in a closing letter of their right to have the case referred to either DOJ or to OSC, as appropriate, for consideration of legal representation at no cost to the claimant. If a claimant requests that their case be referred, DOL VETS must refer the claim regardless of whether VETS has determined that the submitted complaint was substantiated by the facts and evidence obtained during the investigation. Each DOL VETS' case referral contains a memorandum analyzing the USERRA claim and providing an assessment of whether the complaint was substantiated.

As an example of successful cooperation between DOL VETS and DOJ, on September 1, 2021, DOJ filed a complaint, which included claimants from five cases referred from DOL VETS, in the United States District Court for the District of Guam against the Territory of Guam and the Government of Guam Retirement Fund. Brought in the name of the United States, the complaint alleges that defendants deny its service member-employees' pension credit and retirement benefits if those employees use donated leave while on military duty, in violation of USERRA. USERRA requires employers to treat employees as having uninterrupted service with the employer for time on military duty, including for pension accrual purposes. The complaint is based on the allegations of five current or retired Guam employees who served on active duty in the military, were denied pension credit for portions of their military service served while using donated leave, and, as a result, will have reduced pension benefits for the rest of their lives, but the United States' complaint alleges that defendants' practices may have illegally denied benefits to many other service members. The United States' complaint seeks damages on behalf of all affected service member-employees and injunctive relief requiring defendants to comply with USERRA. On December 21, 2021, the Court denied defendants' motions to dismiss the complaint. The case is currently in litigation.

Identified Gaps to USERRA Service Delivery and Coverage
Military Spouses Do Not Currently Have Employment Protections under USERRA

In March 2022, the Secretary of Labor and I participated in a military spouse roundtable outreach event at Joint Base Lewis-McChord outside Tacoma, Washington. A military spouse in attendance told a compelling story of how she had to leave her position as a Federal employee to keep her family together when her Active-Duty Army husband received orders to serve overseas. I've heard similar stories over and over again from spouses working in both the public and private sector. They tell me about their challenges in building portable careers, and the financial impact this has on their families, as they struggle to find employment at each new duty station and lose out on the benefits of sustained employment, including opportunities to advance or contribute to retirement accounts. Difficulties may include failure to obtain gainful employment due to an employer's perception that such would only be for a short term, often resulting in a military spouse not fully utilizing their education and experience, not working to their full earning potential, or simply delaying their professional careers adversely impacting their families' quality of life. Research shows that barriers to military spouse employment negatively

impact national security and the national economy.³ USERRA prohibits employers from discriminating against USERRA-protected persons in employment, including initial hiring and promotion, and requires employers to reemploy such protected persons on return from absences due to uniformed service. Military spouses are not presently covered under USERRA; however, our review of the issue has shown that USERRA anti-discrimination and reemployment protections to eligible military spouses could go a long way toward breaking down barriers to military spouse employment.

According to the latest (2021) DoD Report on Demographics: A Profile of the Military Community, from the Office of the Deputy Assistant Secretary of Defense for Military Community and Family Policy,⁴ the total number of military spouses of Active-Duty service members was 594,110. Of these military spouses, over 90% were female and 21% were unemployed. The total number of military spouses of Selected Reserve (Reserve and National Guard) was 354,255. Of these military spouses, over 85% were female and 7% were unemployed. The total number of these military spouses in FY 2020 was 944,329.

The latest data from the Bureau of Labor Statistics revealed that U.S. unemployment rate for January 2023 was 3.4%. At 21%, the unemployment rate for Active-Duty military spouses is over six times the national rate, and, at 7%, the unemployment rate for Reserve and National Guard military spouses is more than double the national rate.⁵

Research shows that support for military spouse employment is important to eliminating obstacles to the recruitment, retention, and readiness of the All-Volunteer Force.⁶ Maintaining traditional employment and advancing in careers while relocating every few years—and taking care of children and the bulk of domestic responsibilities, often on their own—has historically been a hardship that military spouses have found extremely difficult to overcome. Choosing the life of a military spouse should not mean that the spouse must give up career aspirations of their own to support their service member.⁷

In addition to helping maintain the All-Volunteer Force, support for military spouse employment can also have a positive impact on the national economy. The same research also showed that economic implications of low military spouse employment are felt beyond the military spouse and their immediate family.⁸ Higher employment rates among military spouses can have a

³ See Executive Order 13473 (September 25, 2008), in which President George W. Bush authorized noncompetitive appointments in the civil service for military spouses, and stated that “It shall be the policy of the United States to provide for the appropriately expedited recruitment and selection of spouses of members of the Armed Forces...as part of the effort of the United States to recruit and retain in military service, skilled and experienced members of the Armed Forces...” Regarding military spouse impact on national economy, see “The Military Spouse Employment Dilemma: The Multi-Million Dollar Question That No One Is Asking... Until Now.” National Military Spouse Network. 2022.

⁴ <https://download.militaryonesource.mil/12038/MOS/Reports/2021-demographics-report.pdf>

^{5,6} For U.S. unemployment data, see <https://www.bls.gov/cps/>. For military spouse unemployment rate, see <https://download.militaryonesource.mil/12038/MOS/Reports/2021-demographics-report.pdf>

⁷ See Chrisinger, “Roadmap to Employment Stability for Military Spouses. Five Recommendations to Build Financial Security Throughout the Military Lifecycle,” National Military Spouse Network, 2021.

⁸ See Sorenson Impact Center, “Social Cost Analysis of the Unemployment and Underemployment of Military Spouses,” David Eccles School of Business at the University of Utah, 2016.

positive economic impact and contribute to economic growth. When military spouses can build a successful career, it can also bolster a family's financial stability both during service and as the service member transitions to civilian employment. Similarly, a spouse's inability to find employment or their job dissatisfaction can also increase family and relationship stress, lower overall satisfaction with the military, and affect retention decisions for service members. Military spouses also face economic challenges in qualifying for job-related benefits like career development opportunities and vesting of employer contributions to retirement funds due to frequent relocations resulting in job loss or change. This can lead to lower lifetime earnings and inhibit the long-term financial stability of the family.⁹ One study has estimated that adverse military spouse employment conditions represent a social cost ranging from approximately \$710 million to \$1.07 billion per year.¹⁰

For military spouses, difficulty finding and maintaining meaningful employment is a source of significant stress. According to the 2021 Blue Star Families Military Family Lifestyle Survey, military spouse employment is a top-five military life issue for nearly half (47%) of active-duty spouse respondents and a quarter of active-duty service member respondents (25%). The length of time they have been out of the workforce remains among the top barriers to employment for those active-duty spouse respondents (25%) who are not working but need or want to work. Relocation also remains a top barrier; a third (33%) of employed active-duty spouse respondents who report that they will be looking for a new job in the next 12 months will be doing so due to a relocation/permanent change of station (PCS). Spouse employment relieves financial pressure for military families; 68% of spouse respondents who are not currently working but are seeking employment also report their financial situation causes them "some stress" or a "great deal of stress," compared to only 44% of their employed counterparts.

Reserve and National Guard spouses are also impacted by their service member's absences due to deployments. According to the 2019 DoD Office of the Deputy Assistant Secretary of Defense for Military Community and Family Policy Survey of Reserve Component Spouses, released in 2021, increased stress was an issue for half of military spouses during their service member's deployment. While 76% of military spouses of Reserve members who experienced a deployment in the preceding 24 months were employed at some point during the most recent deployment, 58% took time off from work, 31% reduced the number of hours worked, and 7% left their job.

Employment challenges for military spouses may begin before they even enter the labor market.¹¹ Military spouses participate in the labor force at rates considerably lower than their civilian counterparts. A pair of studies by the RAND Corporation found that 42.4% to 42.8% of military spouses are not in the labor force compared to only 25.5% of an adjusted civilian spouse comparison group.¹² According to the 2014 Military Spouse Employment Report from the Institute for Veterans and Military Families, there are many potential reasons for the lower rate of labor force participation by military spouses, including frequency of moves, inability to find

⁹ See Kamarck, Schwemle, and Plagakis, "Military Spouse Employment," Congressional Research Service, 2020.

¹⁰ See Sorenson Impact Center, *supra*.

¹¹ See Chrisinger, *supra*.

¹² See Lim and Schulker, "Measuring Underemployment Among Military Spouses," Rand Corporation, 2010; and Heaton and Krull, "Unemployment Among Post-9/11 Veterans and Military Spouses After the Economic Downturn," Rand Corporation, 2012.

employment that matched skill and education levels, inability to find employment that is flexible enough to accommodate their military spouse's schedule, childcare issues, or stigmatization of the military lifestyle and the impact on employability. Regardless of the causes, some military spouses face enough difficulty finding employment that it is preventing them from even seeking employment.¹³

Research on the perceptions of military spouses has found that more than half believe that their spouse's military service has hurt their work and career opportunities.¹⁴ The 2017 Hiring Our Heroes survey on Military Spouses in the Workplace: Understanding the Impacts of Spouse Unemployment on Military Recruitment, Retention, and Readiness of spouses of Active-Duty and recently separated service members found that a host of unique factors impact both a military spouse's new job prospects and their perceptions of their marketability to potential employers. Forty-one percent of military spouses say the greatest employment challenge for spouses like them is that employers may not want to hire them because they might move in the future. Other factors impacting a military spouse's ability to find a job include difficulty explaining gaps in their resume (28%), and inability to transfer professional licenses from one state to another (22%). Twenty-eight percent of respondents reported declining to identify themselves as a military spouse to prospective employers.

Removing barriers to military spouse employment would not only minimize some of the disadvantages and disruptions that Congress sought to address in enacting USERRA, but also alleviate a significant stressor on military families and recognize the vital role of military spouses in the retention, recruitment, and readiness of the all-volunteer force. Employment protections would also help military spouses build successful careers without frequent interruption and re-starts; bolster the financial stability of their families, including during their service member's transition from military service to civilian life; and promote the vesting of retirement benefits and long-term financial stability -- all of which would have a positive impact on the national economy and our national security.

Previously Identified Gaps in USERRA

In its FY 2021 DOL USERRA Annual Report¹⁵ to Congress, DOL VETS identified the following areas of potential improvement to USERRA to empower service members to exercise their USERRA rights:

- Currently, the statute governing USERRA does not explicitly supersede mandatory arbitration agreements in employment in the same way that it supersedes any other agreement that reduces, limits, or eliminates any right or benefit under USERRA. Also, USERRA does not state specifically that it protects both substantive and procedural rights and benefits in employment, such as the procedural right of adjudication of USERRA rights. The absence of statutory language in USERRA that agreements to arbitrate are

¹³ See Chrisinger, *supra*.

¹⁴ See Werber Castaneda and Harrell, "Military Spouse Employment: A Grounded Theory Approach to Experiences and Perceptions," *Armed Forces and Society*, vol. 34, no. 3 (2008); and U.S. Chamber of Commerce, "Military Spouses in the Workplace," June 2017.

¹⁵ https://www.dol.gov/sites/dolgov/files/VETS/legacy/files/USERRA_Annual_FY2021.pdf

unenforceable unless all parties consent to arbitration after a complaint on the specific claim has been filed in court or with the Merit Systems Protection Board, and all parties knowingly and voluntarily consent to have that claim subjected to arbitration, has resulted in contrary court decisions and confusion for employees and employers.

- Because USERRA does not authorize the Attorney General independently to investigate and file suit to challenge employment policies or practices that establish a pattern or practice of violating USERRA, it also does not preserve the right of the aggrieved service member to intervene in pattern or practice suits, or to bring their own suit where the Attorney General has declined to file suit.
- USERRA does not yet codify the U.S. Supreme Court's decision in *Torres v. Texas Department of Public Safety*, 597 U.S. ____ (June 29, 2022), which held that States may not invoke sovereign immunity to avoid liability under USERRA. The Torres decision stands to improve the enforcement of reemployment rights under USERRA with respect to a state employer by allowing aggrieved service members and veterans to file suits against State employers in state and federal courts.

Another area of potential improvement to USERRA identified by DOL VETS is that USERRA currently does not impose a deadline for satisfaction of the monetary terms of an agreed-upon resolution of a USERRA violation, nor an additional time-elapsed penalty for continued delays in satisfying such a resolution. As a result, aggrieved service members may be denied prompt monetary resolution of their meritorious claims, and USERRA cases can languish in a pseudo-collections period beyond the 90-day statutory deadline for investigation and resolution established by Congress.

Additionally in its FY 2021 DOL USERRA Annual Report to Congress, DOL VETS also identified the following areas of potential improvement to USERRA to strengthen the United States' ability to enforce USERRA and ensure that the statute is consistent with other civil rights laws:

- Although USERRA is applicable to Federal, State, and private employers, the Attorney General, acting on behalf of the United States, is not currently authorized to serve as a plaintiff in all USERRA suits, only in those suits filed against State employers.
- Currently, USERRA does not authorize the Attorney General independently to investigate and file suit to challenge employment policies or practices that establish a pattern or practice of violating USERRA. Such independent authority would significantly strengthen DOJ's ability to enforce USERRA to address a systemic violation (such as a policy prohibiting extended absences, including absences for uniformed service) that could adversely affect the employment rights of multiple service members.
- Similarly, USERRA does not empower the Attorney General with civil investigative demand authority to compel the production of existing documents and unsworn answers to written questions from the custodian of such documents. While DOL VETS has subpoena power in its investigations under USERRA, the Attorney General currently has no pre-suit investigatory authority.

USERRA Funding via the DOL VETS' Federal Administration Appropriation

The USERRA program is funded through the DOL VETS' Federal Administration appropriation. In FY 2022, the President's Budget request for the DOL VETS Federal Administration and USERRA appropriation was just over \$52 million, but Congress only appropriated \$46 million. In FY 2023, the President's Budget request for Federal Administration was nearly \$54 million, but Congress only appropriated \$47 million. Appropriations below the Budget requests have negatively impacted DOL VETS' ability to hire and train enough investigators to conduct USERRA investigations.

Notably, appropriations below the Budget request levels have also negatively impacted DOL VETS' efforts to digitally modernize our paperless VETS' Case Management system, otherwise known as the VCMS, that will enhance the customer service experience of our veterans, service members, their families, and their employers. The VCMS allows DOL VETS to collect, organize, and analyze investigative material for USERRA investigations. VETS investigators rely on VCMS to:

- timely collect, organize, and follow-up on documentary evidence and witness interviews;
- correctly analyze investigative material; and
- make accurate, consistent, and equitable determinations.

USERRA investigations involve both domestic and sometimes international employers and claimants and are investigated using DOL VETS staff that are located in each state and territory in the United States, making the electronic case management system like the VCMS important.

Lack of funding also endangers DOL VETS' ability to provide ongoing support for the VCMS, such as meeting the Section 508 requirements of the Rehabilitation Act, that require the equitable filing and processing of claims from claimants who have protected status, including claimants with service-connected disabilities. Specifically, claimants who have a service-connected disability make up a significant portion of the cases filed with DOL VETS. In FY 2021, of the 1,117 investigations conducted under USERRA, 33% of claims filed came from persons who self-identified as a veteran or service member with a service-connected disability.

Conclusion

DOL VETS looks forward to working with the Subcommittee to ensure that USERRA continues to support our service members when they are called to serve our Nation, and that remains of fundamental importance to the recruitment, retention, and readiness of the All-Volunteer Force. DOL VETS is committed to continued collaboration with our interagency partners to provide positive USERRA outcomes to employees and employers to minimize the disruption to the lives of veterans, service members, their families, their employers, their fellow employees, and their communities. DOL VETS requests your support in funding our ongoing USERRA efforts so that DOL VETS may continue to provide the high level of customer service that our veterans, service members, their families, and their employers deserve.

Chairman Van Orden, Ranking Member Levin, distinguished members of the subcommittee,

thank you for the opportunity to highlight the important work DOL VETS is doing in support of our veterans, service members, and military spouses who have served our country. I am happy to answer any questions you may have.

Prepared Statement of Gilbert L. Patton



**OFFICIAL STATEMENT OF
COL. GILBERT L. PATTON, U.S. Air Force (Ret.)**

**BEFORE THE
HOUSE COMMITTEE ON VETERANS' AFFAIRS
SUBCOMMITTEE ON ECONOMIC OPPORTUNITY**

**ON
"EXAMINING THE FUTURE OF WORKFORCE
PROTECTIONS FOR SERVICEMEMBERS"**

March 9, 2023

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1 Constitution Avenue N.E.
Washington, DC 20002-5618
www.roa.org

The Reserve Officers Association of the United States, now doing business as the Reserve Organization of America, is a military service organization incorporated under Internal Revenue Service Code section 501(c)(19), and comprising all ranks of servicemembers, veterans, and family members of our nation's eight uniformed services separated under honorable conditions.

ROA was founded in 1922 by General of the Armies John "Black Jack" Pershing, during the drastic reductions of the Army after World War I. It was formed to support a strong national defense and focused on the establishment of a corps of reserve officers who would be the heart of a military expansion in the event of war. Under ROA's 1950 congressional charter, our purpose is unchanged: To promote the development and execution of policies that will provide adequate national defense. We do so by developing and offering expertise on the use and resourcing of America's reserve components.

Executive Director:

Maj. Gen. Jeffrey E. Phillips, U.S. Army (Ret.)

202-646-7701

Director, Legislation and Military Policy:

Matthew L. Schwartzman

202-646-7713

DISCLOSURE OF FEDERAL GRANTS OR CONTRACTS

The Reserve Officers Association of the United States, now doing business as the Reserve Organization of America, has not received any grants, contracts, or subcontracts from the federal government in the past three years.

CURRICULUM VITAE

Colonel Gilbert L. Patton retired in May 2019 after 31 years of combined enlisted and commissioned service in the United States Air Force. Colonel Patton most recently served as Vice Commander, 171st Air Refueling Wing, Coraopolis, Pennsylvania. In that leadership role, he expertly assured the readiness and employment of 1,260 Airmen assigned to 19 squadrons within the Wing, the Wing's sixteen KC-135T aircraft, and both fixed and deployable air traffic control facilities at Johnstown-Cambria County Airport. Colonel Patton was commissioned in 1992 from the Academy of Military Science. He completed undergraduate pilot training at Columbus AFB, Mississippi in 1993 and is a distinguished graduate of the KC-135A Combat Crew Training School, Castle AFB, California.

STATEMENT

Chairman Van Orden, Ranking Member Levin, and distinguished members of the House Committee of Veterans' Affairs Economic Opportunity Subcommittee, on behalf of the congressionally chartered Reserve Organization of America (ROA), thank you for the opportunity to participate in this oversight hearing entitled "Examining the Future of Workforce Protections for Servicemembers."

Throughout my 31-year career as an Air Force officer, I have transitioned countless times between several active and inactive duty statuses in service to our nation, both in the homeland and abroad, and in peace and war.

It is a privilege to share not only my insights as a recently former member of the reserve force, but also to emphasize the importance of the Uniformed Services Employment and Reemployment Rights Act in enabling military preparedness, fortifying the integrity of a reserve component member's dual-career path (and by extension, financial readiness), and ensuring national security.

After the Cold War, and even more extensively after September 11, 2001, national security doctrine and military policy shifted away from a strategic reserve force structure in favor of an operational reserve force structure, wherein uniformed members are expected to be "called up" frequently and repeatedly throughout their military reserve careers.

Some low-density, high-demand military capabilities of the past three decades have existed exclusively in the reserve components, either due to their high overhead costs when not needed for deployment and/or because they require skills for which our reserve component members receive much of their specialized training and experience within their civilian-sector careers.

For the nation to maintain military readiness and the sustainability of our operational reserve force, and the ability of reserve component members to rapidly and repeatedly transition in and out of uniform (to fulfill specialized military training and operational requirements), Congress must ensure that the door between each member's military and civilian responsibilities (to both their employers and families) swings both ways.

To that end, in 1994, Congress enacted USERRA to ensure the availability, readiness, and sustainability of the "newly" operationalized reserve force. Further, Congress charged the U.S. Secretary of Labor (through the Veterans Employment and Training Service, DOL VETS) with being the first line of defense to assure that our servicemembers' employment and reemployment rights are investigated and fully provided for in accordance with the law.

But going back to at least 2007, as evidenced by multiple Government Accountability Office investigations and as testified before the Senate Committee on Veterans' Affairs, the Department of Labor has "fail[ed] our service men and women in their administration of USERRA."¹

¹ Senate Committee on Veterans' Affairs Hearing 110-403, p. 57 of transcript

Upon hearing that testimony from GAO, members of that committee concluded that the fundamental failings of DOL VETS are the result of a “cultural” problem that ROA believes still pervades within the agency.²

In addition to ROA’s recent and first-hand experiences in attempting to assist distressed reservists in their often-mishandled USERRA cases, the record would indicate that DOL VETS’ failures in performance are systemic.

As such, in now “Examining the Future of Workforce Protections for Servicemembers,” we must first examine the present. Congress *must* ensure that any enhancements to USERRA are built first upon a foundation on which servicemembers’ rights and protections (under the current law) are being fully and properly pursued and fulfilled. But that foundation is currently broken, and any legislative enhancements built upon it risk the same fate of mediocrity and underperformance.

In fact, during an exit meeting with the outgoing assistant secretary of veterans employment and training (during the final days of the preceding administration), the assistant secretary shared with ROA leadership his concerns that there is still room for improvement in the agency’s culture and accountability in the service of veterans’ USERRA rights.³

A senior Air Force officer once mentored me, “you get what you inspect; you get what you measure.” Therein lies the first substantive solution to addressing the long-term, systemic shortfalls of DOL’s execution and oversight of USERRA.

ENHANCED REPORTING

Current law requires DOL to report the number of USERRA complaints it receives each year, the number of cases it substantiates, and the number of cases that are referred to the U.S. Department of Justice or the Office of Special Counsel, as appropriate.⁴

This data is merely transactional. And while it may serve to demonstrate the task load of USERRA complaints processed by DOL VETS for budgetary purposes, it does not provide any indicators as to the accuracy or the completeness of how the complaints were processed.

Whereas DOL VETS’ own internal *USERRA Operations Manual* establishes procedures for the conduct of closed-case reviews, ROA urges Congress to amend Section 4332 of USERRA to require the Secretary of Labor to additionally report the number of closed-case reviews conducted in each reporting period, the number of disposed cases found to have been originally closed by DOL VETS with substantive errors that affected a veteran’s rights and relief under USERRA, and summaries of every case that DOL VETS disposed of by deeming it without merit, and for which a court or other federal agency subsequently affirmed the merit of the veteran’s complaint.

² Senate Committee on Veterans’ Affairs Hearing 110-403, p. 16 of transcript

³ Comments by then-Assistant Secretary John Lowry, made in person during a December-2020 meeting with key National Staff of the Reserve Organization of America

⁴ 38 U.S.C. § 4332(b)(1)(A)

Further, ROA requests that Congress direct GAO to study DOL VETS' performance of its statutory responsibilities under USERRA, the scope of which should specifically include the previous deficiencies as identified in numerous earlier GAO reports and DOL Office of Inspector General findings.

The desired end state of this study is better measurement of the capability and preparedness of DOL VETS to uphold its statutory obligations to servicemembers under USERRA, identification of potential challenges DOL VETS faces in ensuring compliance with USERRA, and provision of recommendations that would improve USERRA enforcement.

MODERNIZE PERSONNEL MANAGEMENT PRACTICES AND UPDATE REGULATIONS

Whether the role of USERRA investigations remains within DOL VETS or is migrated to another government agency, such as the Department of Veterans Affairs, it *must* be further professionalized.

DOL VETS' USERRA investigators complete three online courses and eight and a half days of classroom training.⁵ DOL's regulations (as outlined under 20 CFR §§ 1002.1 – 1002.314) for implementing USERRA law are the primary bases for training and providing references to DOL investigators (personnel charged with preserving the USERRA rights and benefits of veterans), rather than the USERRA law itself.

However, these regulations (the primary references provided to DOL investigators in the *Manual*) were last promulgated in 2005 and are now *13 years out of date* with the most recent amendments to USERRA.

ROA firmly believes DOL should be compelled to update its regulations on a more regular basis to ensure investigators and staff are consistently trained on up-to-date USERRA provisions to completely fulfill their statutory responsibilities under USERRA.

Specifically, DOL's regulations:

- Explicitly contradict current USERRA law in terms of veterans' wage and salary protections.⁶
- Completely omit provisions of USERRA law that were added by Congress in 2010 to protect veterans' jobs and benefits when their employer is succeeded because of a merger that occurs during the veteran's USERRA-protected military service.⁷

⁵ Obtained from DOL VETS National Veterans' Training Institute, March 4, 2023

⁶ 38 U.S.C. § 4302(2) vs. 20 CFR § 1002.5(b)

⁷ 38 U.S.C. § 4303(4) vs. 20 CFR § 1002.5(d)

- Omit numerous statuses of uniformed service for which USERRA has been amended (to include legal protections of employment and benefits as a result of that uniformed service).⁸
- Fail to provide for the protection(s) afforded under USERRA to reservists who are involuntarily ordered to active duty for domestic emergencies.⁹
- Fail to provide the protections of USERRA law to veterans performing involuntary active duty in preparation for planned deployments.¹⁰

And yet, these are the regulations that DOL trains its investigators on and often processes veterans' USERRA complaints in accordance with.

ROA has published nearly 2,000 USERRA law reviews on its Servicemembers Law Center to help educate both servicemembers and employers on the intricacies and practicalities of USERRA. Submitted separately in support of this written statement is Law Review 21033, *DOL USERRA Regulations Need To Be Updated*. The submission describes these regulations in greater detail.

The *Manual* is an overarching compilation of the agency's administrative procedures and standards by which its handling of a USERRA complaint materially affects the proper disposition of a veteran's rights under USERRA.

Under federal FOIA law, each agency of the federal government shall make available for inspection by the public "administrative staff manuals and instructions to staff that affect a member of the public."¹¹

Despite this, the agency has invoked an exemption¹² to avoid the release of the *Manual* (in whole or in part) based on the assertion that the *Manual* is compiled for "law enforcement purposes" and that its release "would disclose guidelines for law enforcement investigations or prosecutions" such that, if disclosed, "could *reasonably* be expected to risk circumvention of the law."

There is nothing known by ROA to be contained within the *Manual* that could remotely (or "reasonably") provide an advantage to any party trying to circumvent a USERRA investigation or the law.

Rather, the *Manual* is the sole standard of administrative procedures by which a member of the public can be assured that DOL VETS and its staff have acted accountably in the performance of their statutory responsibilities under USERRA.

⁸ 38 U.S.C. § 4303(13) vs. 20 CFR § 1002.5(l); 38 U.S.C. § 4303(16) vs. 20 CFR § 1002.5(o); P.L. 116-315, which added protections for National Guard members when performing state active duty, vs. the explicit contradictions of DOL's 20 CFR § 1002.57; P.L. 116-259, which added protections to service in the Commissioned Corps of the National Oceanic and Atmospheric Administration, vs. the explicit contradictions of DOL's 20 CFR § 1002.62

⁹ P.L. 114-92, 129 Stat. 726

¹⁰ 20 CFR § 1002.103 omits the provisions of 38 U.S.C 4312(c), as amended by P.L. 114-92, 129 Stat. 726

¹¹ 5 USC § 552(a)(2)(C). This subsection is part of the Freedom of Information Act (FOIA).

¹² 5 USC § 552(b)(7)(E)

From ROA's perspective, DOL VETS is hiding its administrative procedures behind FOIA exemptions to avoid transparency and accountability. As such, ROA urges DOL VETS to immediately make the *Manual* public in its entirety to ensure its processes and procedures are truly aligned with the text and intent of USERRA.

CONCLUSION

ROA appreciates the opportunity to offer our expertise and insight on how to improve USERRA oversight, execution, and enforcement to protect the employment and re-employment rights of reserve component servicemembers nationwide.

ROA is invested in ensuring the readiness and sustainability of our reserve components, strategic and operational. Congress enacted USERRA to ensure the same outcomes.

ROA believes that a more collaborative and transparent relationship with DOL VETS would better serve reserve component servicemembers and their employers. By addressing the many deficiencies identified herein and, even more fundamentally, the underlying culture that has allowed these deficiencies to become systemic, ROA is confident the integrity of USERRA can be upheld.

All too often military and veterans' law and policy are developed without an understanding of or appreciation for the important distinctions between reserve and active duty service. The members of the Reserve and National Guard invariably lose out. And so, too, their families. That means America's military readiness loses out. *We cannot afford that loss.*

ROA extends its sincerest gratitude for this hearing and stands ready to provide added support on the issues covered in this statement and on other areas of mutual interest.



BIOGRAPHY



UNITED STATES AIR FORCE

COLONEL GILBERT L. PATTON

Colonel Gilbert L. Patton retired in May 2019 after 31 years of combined enlisted and commissioned service in the United States Air Force. Colonel Patton most recently served as Vice Commander, 171st Air Refueling Wing, Coraopolis, Pennsylvania. In that leadership role, he expertly assured the readiness and employment of 1,260 Airmen assigned to 19 squadrons within the Wing, the Wing's sixteen KC-135T aircraft, and both fixed and deployable air traffic control facilities at Johnstown-Cambria County Airport.

Colonel Patton was commissioned in 1992 from the Academy of Military Science. He completed undergraduate pilot training at Columbus AFB, Mississippi in 1993 and is a distinguished graduate of the KC-135A Combat Crew Training School, Castle AFB, California.

Colonel Patton is a Joint Qualified Officer (DOD Level III) who has commanded operational deployments in 109 countries under the control of the Commander, United States Special Operations Command. Additionally, he is appointed by the Secretary of the Air Force as a Regional Affairs Strategist, with designated specialty in Latin America, as well as with substantial experience in the former-Soviet republics of the Caucasus and Central Asia. He has served in joint assignments both as a personnel officer and as a headquarters-level comptroller.



Colonel Patton previously commanded the 171st Operations Group and, while operationally deployed overseas, the 506th Expeditionary Air Refueling Squadron.

EDUCATION

1991 Bachelor of Science, Aeronautical Science, Embry-Riddle Aeronautical University
 1993 KC-135A Combat Crew Training School (Distinguished Graduate)
 1998 C/KC-135 Central Flight Instructor Course
 1998 Master of Science, Management, Embry-Riddle Aeronautical University
 2005 Planning, Programming, Budget, & Execution (PPBE) Course, Headquarters USAF
 2007 Air Command and Staff College, Air University
 2008 Air War College, Air University
 2009 Lean Six Sigma Black Belt Course, IBM Corporation
 2010 State Partnership Program State Director's Course, Defense Institute of Security Assistance Management
 2011 Inter-American Defense College, Organization of American States
 2011 Central Asia and Caucasus Regional Course, National War College
 2011 Advanced Joint Professional Military Education, Joint Forces Staff College
 2012 Master of Defense & Security Strategy, Academia Nacional de Estudios Políticos y Estratégicos, Ministry of National Defense, Republic of Chile
 2012 Financial Manager Course, Army National Guard Professional Education Center
 2013 Enhanced Defense Financial Management Training, American Society of Military Comptrollers
 2015 Safety and Accident Investigation Board President Course, Air Force Safety Center
 2015 Senior Officer Legal Orientation Course, The Judge Advocate General's School
 2015 United States Air Force Operations Course for Group Commanders
 2015 Senior Leader Mission Generation Course, Air University

ASSIGNMENTS

1. August 1987 – May 1990, Enlisted, United States Air Force Reserve
2. August 1991 – April 1992, Pilot Trainee, 170th Air Refueling Group, McGuire AFB, N.J.
3. April 1992 – April 1993, Student, Undergraduate Pilot Training, Columbus AFB, Miss.
4. May 1993 – September 1993, Student, KC-135A Combat Crew Training School, Castle AFB, Calif.
5. September 1993 – August 1995, KC-135E Pilot, 150th Air Refueling Squadron, McGuire AFB, N.J.
6. August 1995 – June 1998, C-135B & KC-135E Aircraft Commander, Detachment 2, 108th Air Refueling Wing, McGuire AFB, N.J.
7. June 1998 – December 2002, C-135B & KC-135E Instructor Aircraft Commander, 150th Air Refueling Squadron, McGuire AFB, N.J.
8. December 2002 – February 2004, Personnel Officer and Reserve Force Officer, Selective Service System (joint assignment), Waterford, Mich.
9. February 2004 – July 2005, Air Tasking Order Coordinator, 112th Air Operations Squadron, State College, Pa.
10. July 2005 – June 2007, Special Operations Forces/Mobility Programmer (and C-32B pilot), Headquarters, United States Air Force, Washington, D.C.
11. June 2007 – July 2010, Chief, Program Integration Branch (ANG) (and C-40C pilot), Headquarters, United States Air Force, Washington, D.C.
12. July 2010 – June 2011, Student, Inter-American Defense College, Fort Lesley J. McNair, Washington, D.C.
13. June 2011 – September 2014, Chief, Resource Oversight Division, Comptroller (joint assignment), National Guard Bureau, Arlington, Va.
14. September 2014 – March 2018, Commander, 171st Operations Group, Coraopolis, Pa. and, while deployed, Commander, 508th Expeditionary Air Refueling Squadron, Andersen AFB, Guam
15. March 2018 – April 2019, Vice Wing Commander, 171st Air Refueling Wing, Coraopolis, Pa.

FLIGHT INFORMATION:

Rating: Command Pilot
 Military Flight Hours: More than 10,900
 Military Aircraft Flown: C-32B, C-40C, C-135B, KC-135A/E/R/T, T-37B, T-38A

MAJOR AWARDS AND DECORATIONS

Legion of Merit
 Defense Meritorious Service Medal
 Meritorious Service Medal with one oak leaf cluster
 Air Force Commendation Medal with one oak leaf cluster
 Joint Service Achievement Medal
 Combat Readiness Medal with four oak leaf clusters
 National Defense Service Medal with one bronze star
 Global War on Terrorism Service Medal
 Armed Forces Service Medal with one oak leaf cluster
 Humanitarian Service Medal
 Nuclear Deterrence Operations Service Medal
 Armed Forces Reserve Medal with 'M' Device
 Pennsylvania Maj Gen Thomas R. While, Jr. Medal
 Pennsylvania Gen Thomas J. Stewart Medal with two oak leaf clusters
 New Jersey Commendation Medal

EFFECTIVE DATE OF PROMOTION

Second Lieutenant April 9, 1992
 First Lieutenant June 3, 1994
 Captain July 12, 1996
 Major July 12, 2003
 Lieutenant Colonel Nov. 30, 2007
 Colonel Dec. 17, 2011

Prepared Statement of Mike Hadley

Chairman Van Orden, Ranking Member Levin, and other distinguished members of the committee:

On behalf of the almost 45,000 members of the National Guard Association of the United States and the nearly 450,000 members of the National Guard, we truly appreciate this opportunity to share our thoughts on today's topic for hearing. We thank you for your oversight and the attention paid to the issues affecting those who have served and are currently serving our Nation.

The operational tempo for the National Guard has increased significantly over the past 20 years, and even more so recently. From overseas deployments in support of combatant commands, the pandemic, civil unrest, wildfires, and floods, the National Guard has remained "Always Ready." In 2021 alone, the National Guard executed over 10 million man-days. This has put an immense strain on our servicemembers, families, and employers. National Guard Soldiers and Airmen are unique in that they simultaneously manage a civilian career alongside their military careers. This has become ever more challenging as military requirements expand.

Regardless of what the law says, we know Guard members' ability to find and maintain steady employment has been impacted and challenged. USERRA is in place to protect against discrimination of our Soldiers and Airmen. Employers must be educated regarding existing law and USERRA protections should be expanded where gaps exist. The 116th Congress made great progress with the Veterans Health Care and Benefits Improvement Act which ensured coverage for specific areas of State Active Duty. However, those protections only cover duty beyond 14 days. State National Guard response missions are often less than two weeks. We ask that the committee remove this limit to protect all State Active Duty, regardless of length.

Another area of concern is time off for treatment of service-connected disabilities. Military duty can be physically strenuous, and injuries can occur. As members return from missions, they should be given time for appointments, rehabilitation, or physical therapy, whether at the Department of Veterans Affairs or other private health care facilities. The service member should focus on improving their health without concern of retribution from their employer.

That said, a healthy Soldier or Airman is one that has health care coverage. There are currently 60,000 National Guard members that do not have health care of any sort. This is a key readiness issue. It is imperative all service members have access to the health care needed to meet medical deployability requirements. We ask all members to support the **Healthcare for our Troops Act**. Affording zero-cost TRICARE coverage will dramatically increase readiness, solve turbulence moving on and off health plans, and ultimately save money. It will also provide an additional cost-saving benefit to the employer who would not need to provide coverage to that employee.

We understand the challenges military service can place on employers. An additional way to encourage our employers is through the **Reserve Employers Comprehensive Relief and Uniform Incentives Act**. The **RECRUIT Act** would authorize an annual tax credit for small business employers who employ Guard and Reserve members and would go a long way in supporting our communities. NGAUS supports and encourages the reintroduction of this bill in the 118th Congress.

I thank you again for inviting NGAUS to testify. Your efforts are critical to the well-being of our service members and the success of our National Guard. I look forward to continuing our work together and sincerely appreciate the steadfast leadership from the members and their staffers in advocating for the men and women of the National Guard.

Prepared Statement of Kevin Hollinger



EANGUS Testimony

**House Committee on Veterans' Affairs Subcommittee on
Economic Opportunity**

**Hearing on
Examining the
Future of
Workforce
Protections for
Servicemembers.**

March 9, 2023

Enlisted Association of the National Guard of the United States

**1 Massachusetts Avenue N.W., Suite 880
Washington, DC 20001**

The Enlisted Association of the National Guard of the United States (EANGUS) was formally organized in 1972 to increase the voice of enlisted persons in the National Guard. As such, EANGUS is a non-profit organization dedicated to the principles of providing an adequate national defense and promoting safeguarding and improving the status, welfare, and professionalism of enlisted National Guard members, veterans, retirees, and their families through legislation, employment, education, emergency resources, and partnerships. Beginning with twenty-three states, EANGUS now represents all 50 States, Guam, Puerto Rico, the U.S. Virgin Islands, and the District of Columbia, and has an association comprised of those who serve the National Guard on a national tour, with a constituency base of over 450,000 Soldiers and Airmen, their families, and tens of thousands of retired members.

EANGUS is a non-profit organization dedicated to promoting the status, welfare, and professionalism of Enlisted members of the National Guard by supporting legislation that provides adequate staffing, pay, benefits, entitlements, equipment, and installations for the National Guard. The Legislative Goals of EANGUS are published annually. The goals and objectives were established through the resolution process, with resolutions passed by association delegates at the annual conference. These resolutions include the issues that EANGUS will pursue in Congress and the Department of Defense. Resolutions stay in force for two years.

President:		
	Master Sgt. Daniel B. Reilly, Air Force National Guard (ret.)	202-646-7706
Executive Director:		
	Sgt. Maj. Matthew G. Krenz, Army National Guard (ret.)	202-646-7726
Director, Legislation and Military Policy:		
	Kevin C Hollinger .	202-670-1826

DISCLOSURE OF FEDERAL GRANTS OR CONTRACTS

The Enlisted Association of the National Guard of the United States (EANGUS) is a member-supported organization. EANGUS has not received grants, contracts, or subcontracts from the federal government in the past three years. All other activities and services of the associations are accomplished free of any direct federal funding.

BIO of Kevin Hollinger

**Kevin Hollinger EANGUS Legislative Director**

Kevin Hollinger focuses on legislation that advocates for national security and readiness of the Enlisted National Guard. Mr. Hollinger served for over 22 years in the Army and National Guard and completed multiple deployments in Iraq, Afghanistan, Kosovo, and South America. Kevin has specialized in RC legislation for over eight years. He completed his Juris Doctorate from The John Marshal Law School and is currently an LLM student. Mr. Hollinger can be reached at Kevin@eangus.org or 202-670-1826

Statement

Chairman Van Orden, Ranking Member Levin, and Members of the Committee:

Thank you for the opportunity to provide this opening statement.

I am Kevin Hollinger, the Legislative Director for the Enlisted Association of the National Guard of the United States, also known as EANGUS.

EANGUS was formally organized in 1972 to increase the voice of enlisted persons in the National Guard. As such, EANGUS is a non-profit organization dedicated to providing partnerships. Adequate national defense and promoting safeguarding and improving the status, welfare, and professionalism of enlisted National Guard members, veterans, retirees, and their families through legislation, employment, education, emergency resources and

Beginning with twenty-three states, EANGUS now represents all 50 states, Guam, Puerto Rico, the U.S. Virgin Islands, and the District of Columbia, and has an association comprised of those who serve the National Guard on a national tour, with a constituency base of over 450,000 Soldiers and Airmen, their families, and tens of thousands of retired members. EANGUS is the only Professional Military and Veteran Service Organization dedicated solely to Enlisted Members of the National Guard. As such, we are keenly focused on ensuring that current and former enlisted National Guard members and their families are provided adequate pay, benefits, entitlements, and compensation commensurate with their dedicated service and contribution to our nation. For many years, Citizen Soldiers and Airmen have answered their nation's call when asked, often standing shoulder-to-shoulder with their Active, Component Counterparts. However, these selfless heroes frequently do not receive the same comparable benefits or are afforded the same protections as the

Active Component and, in some cases, even other Reserve Component Service members, due to the duty status under which they are working. With this stated, we look forward to discussing these issues and how we can ensure that these great Americans are equally recognized for their service.

EANGUS appreciates the opportunity to discuss the Uniformed Services Employment and Reemployment Rights Act (USERRA). While we will not address every proposed act, this does not indicate EANGUS's support for or opposition to these other bills. EANGUS's focus today aligns with our By-laws, Articles of Incorporation, and the resolutions brought by our members.

I want to use my time today to discuss three issues that EANGUS has with USERRA protection affecting the National Guard.

1. An employer's ability to use Forced Arbitration as a means to settle legal issues concerning USERRA
2. Non-covered state-funded service in uniform
3. Non-covered family members

Forced Arbitration

Removing Forced Arbitration is important legislation that will empower Servicemembers and their families against the practice of Forced Arbitration. This much too standard dispute process strips our Servicemembers of their rights under the Servicemembers Civil Relief Act (SCRA) and the Uniformed Services Employment and Reemployment Rights Act (USERRA). Forced Arbitration is a one-sided, non-transparent process in which Servicemembers have very little chance of achieving a favorable outcome when their rights and protections set forth under these federal laws are violated.

In 1994, Congress passed USERRA, a bipartisan law protecting Servicemembers from employment discrimination based on their military obligations. Unfortunately, due to forced arbitration clauses in employment contracts, Servicemembers must relinquish their USERRA rights to get or keep a job. Thus, when an employer violates USERRA, Servicemembers cannot hold the employer publicly accountable.

Servicemembers need their legal protections restored without delay, not another study to show what they already know-that Forced Arbitration hurts them and their families and renders rights granted by SCRA and USERRA virtually meaningless. H.R. 2196, Justice for Servicemembers Act, introduced during the 117th Congress, would have restored their ability to enforce USERRA and SCRA and hold wrongdoers accountable. EANGUS supported this bill and strongly advocated for it to be lawfully re-introduced and passed.

As EANGUS has advocated for this issue for many years, we have heard the opposition to this legislation state, "it will cost businesses millions of dollars if legislation prevents them from using forced arbitration." I'm here to tell you it will not cost any law-abiding business a dollar. It will only hold accountable those who choose not to follow the law.

Non-covered state-funded service in uniform

State Active Duty is a status available for the Governor or the Adjutant General to use for various state concerns like state environmental disasters, civil unrest, or to fill community needs. If the servicemembers do not fall under one of the following categories, they will not be protected by USERRA;

1. State Active Duty for 14 Days or more
2. State Active duty in support of a National Emergency
3. State Active Duty in support of a Major Disaster declared by the President

Since March 2020, the National Guard has activated over 320,000 servicemembers to support many overseas and domestic activities, from combat missions in places like Afghanistan to running COVID testing and vaccine sites in the US. We have even seen National Guard Servicemembers used as substitute teachers and bus drivers. I can assure you that their sacrifice and dedication are no different if they are driving a bus or fighting for our freedom overseas. Our dedicated Servicemembers of the National Guard must know that their job is safe and available when they return.

In the past, EANGUS has heard statements like, "this is a state issue," or "They knew what they were signing up for." I don't believe this could be further from the truth. Young National Guard Servicemembers rarely understand what type of order they are on and how that affects their rights. They wear their uniform and go to work, unaware of their duty status. A piece of paper does not determine their dedication.

In *Torres v. Texas Department of Public Safety*, the Supreme Court considered whether the states, by ratifying the Constitution, gave Congress the power to authorize suits against states using its constitutional war powers. In the opinion authored by Justice Stephen Breyer, he stated, "Congress's ability to build and maintain the Armed Forces fits the test outlined in *PennEast's* test. Thus, in joining together to form a Union, the States agreed to sacrifice their sovereign immunity for the good of the common defense." With that opinion, we now know it is something to be considered by the US Congress. Therein EANGUS would urge the 118th Congress to ensure USERRA protection for all Reservist and National Guardsmen duties.

USERRA Protection For Spouces

It is easy to see the sacrifice of the Servicemember. Unless you have lived under a rock for the last 20 + years, everyone knows the sacrifice of the Reservist and National Guard personnel. They know how they are pulled from their everyday lives and thrust into service of our country. The Reserves and National Guard have proven to be a critical part of our nation's defense. But imagine if you were removed from your spouse at a moment's notice and if you still have or have had small children. How hard would it be for your spouse to make up for your absence? Well, that's how being a National Guard spouse works. Civil unrest, natural disasters, filling in for teachers in your local area, or combatting these issues are never convenient for families.

Spouses often must take time away from their employment to figure out new schedules. At a

moment's notice, they become the sole head of the house. Handling time off is often the only way for spouses to get acclimated. Their dedication to our national defense is more critical and complex than their National Guard spouse.

Army Gen. Raymond Odierno often said, "our country is great because of our military, our military is great because of our Servicemembers, and our Servicemembers are great because of our families." I think putting these things together is the correct answer.

EANGUS would urge the 118th Congress to legislate USERRA protection to spouses of activated Reserve and National Guard Servicemembers.

CONCLUSION

EANGUS appreciates the opportunity to offer thoughts regarding these critical legislative issues. Military and veterans' laws and policies are often developed without an understanding of or appreciation for the essential distinctions between the reserve and active-duty service. The members of the National Guard invariably lose out. And so do their families.

These past three years have shown America how important the National Guard is to everyday life. The National Guard has activated over 320,000 Servicemembers since 2020 for missions including but not limited to, Pandemic assistance, Civil unrest, overseas direct combat assistance, and Capitol security. These activations were often at a moment's notice, and the National Guard did not hesitate; they accomplished the mission.

Ensuring that our National Guard veterans are adequately cared for after service is critical to the National Guard recruiting and retention problem. As stated above, "the National Guard does not hesitate; they accomplish the mission." We are now asking the same from Congress; please do not hesitate. Ensure our nation's heroes are adequately cared for during and after their service. Thank you for your time, and I look forward to your questions.

Prepared Statement of Jonathan Taylor

Chairman Van Orden, Ranking Member Levin, and distinguished members of the Subcommittee: Thank you for inviting me to testify today. My name is Jonathan Taylor. I am a principal at Gupta Wessler PLLC, a law firm focused on Supreme Court and appellate advocacy. Since joining the firm over a decade ago, I have argued some of the most important cases under the Uniformed Services Employment and Reemployment Rights Act, including *White v. United Airlines*, 987 F.3d 616 (7th Cir. 2021), *Travers v. Federal Express*, 8 F.4th 198 (3d Cir. 2021), and *Clarkson v. Alaska Airlines*, 59 F.4th 424 (9th Cir. 2023). I have also represented parties in several key arbitration cases, including *American Express v. Italian Colors Restaurant*, 570 U.S. 228 (2013). And I have represented a bipartisan group of 20 Members of Congress, including past members of this Committee, in a case at the intersection of these two subjects—*Ziober v. BLB Resources*, 137 S. Ct. 2274 (2017).

My testimony today makes a few basic points:

First, USERRA’s provisions are essential to protecting reservists and National Guard members—and thus to protecting the Nation as a whole. USERRA has never been more important than it is today. Since September 11th, our military has relied heavily on reservists and National Guard members to defend us at home and abroad. These servicemembers work civilian jobs, while simultaneously devoting countless hours to ensuring military readiness so they can be deployed at a moment’s notice. USERRA helps them balance their civilian lives with their military responsibilities, providing a broad set of substantive and procedural protections.

In doing so, USERRA also helps fulfill its primary goal: “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.” 38 U.S.C. § 4301(a). As a Senate Report put it in 2008: “Because the National Guard and Reserves have become an essential part of the military’s operational force, it is imperative that employers comply with USERRA.”

But employers often fail to comply with USERRA. And when that happens, Congress has given servicemembers the tools to protect themselves: They can go straight to court. There, they can shine a light on their employer’s practices, make arguments to a neutral judge and a jury of their peers, and obtain a written decision that can be appealed, if necessary, and reviewed by the political branches to ensure the proper development of the law. But none of that will happen if they are forced, against their will, into secret arbitration.

Which leads to point two: Forced arbitration threatens reservists and National Guard members—stripping them of their freedoms and immunizing violations of their rights—and thus threatens the Nation as a whole. Even as USERRA has grown in importance, it has never been more at risk than it is today. When USERRA was enacted in 1994, forced arbitration was barely a thing. Now it’s everywhere. Big corporations have learned from their lawyers that they can escape public accountability for violating the law simply by inserting fine print into their take-it-or-leave-it contracts. As a result, getting a job increasingly requires checking one’s rights at the door: More than half of nonunion private-sector employees in the United States—over 60 million American workers—are now subject to forced arbitration.

Servicemembers are no exception. Despite strong statutory language to the contrary, several courts have held that (as currently written) USERRA permits employers to impose forced arbitration on servicemembers. That is incompatible with USERRA’s text and purpose. But more than that: It is immoral and unwise. So it is of vital importance that Congress clarify what should already have been clear: forced arbitration has no place in USERRA.

Third, this is not a partisan issue. Overwhelming majorities of Democrats, Republicans, and independents—80 percent or more of each—support federal legislation to end forced arbitration across the board. But if there’s any area where those numbers should approach total agreement, it is for the hundreds of thousands of patriots who risk their lives in service to our country.

If nothing else, basic fairness dictates as much. These men and women fight for our freedom and for our Constitution. The least we can do is preserve *their* freedom to decide for themselves how to protect their own interests, and *their* constitutional rights to a day in court and a civil trial by jury. Forced arbitration is the opposite of these bedrock values. As the Bush Department of Defense observed in 2006: “Waiver isn’t a matter of ‘choice’ in take-it-or-leave-it contracts of adhesion.” And the very reason the Constitution has a Bill of Rights in the first place is because the original document lacked a right to a civil jury trial. As John Adams once said:

“[R]epresentative government and trial by jury are the heart and lungs of liberty. Without them we have no other fortification against being ridden like horses, fleeced like sheep, worked like cattle and fed and clothed like swine and hounds.” We should all be able to agree that, if anyone deserves constitutional fortification against such a fate, it’s the men and women who voluntarily serve in our Nation’s military.

But eliminating forced arbitration for USERRA claims isn’t just about fairness to individual servicemembers; it’s also about empowering them as a group and protecting our country as a whole. The reality (and this is backed up by empirical data) is that forced arbitration doesn’t channel cases into a better system for resolving disputes. It extinguishes cases altogether. And for those precious few cases that actually get arbitrated, the secret nature of the proceeding means that, even if the servicemember can beat the odds and prevail, *no one else* will benefit. No one will become aware of the unlawful practice or the fact that they might have a claim. Nor will Congress have any idea about how the statute is being applied in such proceedings, and hence whether it needs to be strengthened or amended. Add it all up and the upshot is plain: Forced arbitration badly undermines compliance with USERRA.

And ultimately, it makes us less safe. USERRA is critical to military recruiting and retention efforts. “If individuals lack confidence that their USERRA rights will be respected or enforced, they will be less likely to join or continue to serve in the Armed Forces, especially in the Reserve Forces.” S. Rep. No. 110–449, at 24 (2008). Congress must act and reverse that trend.

I.

Congress has long recognized that when someone puts on a uniform to serve in our military, we owe them certain obligations in return. One of the most basic obligations is the assurance that, when they have discharged their duties, they will be able to return to their jobs without being penalized for serving their country—an obligation, in other words, “to compensate for the disruption of careers and the financial setback [from] military service.” 140 Cong. Rec. S7670–71 (June 27, 1994) (statement of Sen. Rockefeller).

To make good on this solemn obligation—and to advance a “national policy to encourage service in the United States Armed Forces,” H.R. Rep. No. 448, 105th Cong., 2d Sess. 2 (1998)—Congress has repeatedly expanded and strengthened workplace protections in “a long line of federal veterans’ rights laws enacted” since World War II. *DeLee v. city of Plymouth, Ind.*, 773 F.3d 172, 174 (7th Cir. 2014). The most recent and comprehensive of these statutes is USERRA, which Congress passed in 1994 to “strengthen existing employment rights of veterans of our armed forces.” *Id.* at 174–75.

In the run-up to USERRA, Congress kept a watchful eye on the development of this area of law. During the 1970’s and 80’s, “more than 600 court cases” were issued interpreting the scope of USERRA’s predecessor statute and “occasional confusion resulted.” 137 Cong. Rec. S6058–66, S6065 (May 16, 1991) (Statement of Sen. Specter). Congress eventually concluded that the existing statute was too “complex and difficult to understand,” 139 Cong. Rec. H2203–02, H2209 (May 4, 1993), and was “sometimes ambiguous, thereby allowing for misinterpretations,” H.R. Rep. 103–65(I), at 18 (1993). These misinterpretations took too narrow a view of the law, thwarting the ability of veterans and reservists to vindicate their rights. As Senator Rockefeller explained in 1993: “over the last 53 years the [law] has become a confusing and cumbersome patchwork of statutory amendments and judicial constructions that, at times, hinder the resolution of claims.” 139 Cong. Rec. S5181–91, S5182 (Apr. 29, 1993). Congress felt the need “to restate past amendments in a clearer manner and to incorporate important court decisions interpreting the law,” while correcting the misinterpretations. 137 Cong. Rec. S6035, S6058 (May 16, 1991) (statement of Sen. Cranston).

The result was USERRA. Enacted just three years after the Persian Gulf War served as a fresh reminder of the urgent need for reform, the statute sought to “clarify, simplify, and, where necessary, strengthen the existing veterans’ employment and reemployment rights provisions.” H.R. Rep. No. 103–65(I) at 18. Its text identifies three core objectives: (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 “provid[e] for the prompt reemployment of such persons upon their completion of such service,” and (3) “to prohibit discrimination against persons because of their service.” 38 U.S.C. § 4301(a). These objectives have taken on “particular interest” and importance in the years since USERRA’s passage “because of the large number of reservists [that were] called up

for military duty as a result of the conflicts in Iraq and Afghanistan.” *Gordon v. Wawa, Inc.*, 388 F.3d 78, 79–80 (3d Cir. 2004); see *Army Reserve: A Concise History*, Office of Army Reserve History 15 (2013), <https://perma.cc/3UHS-D5UN> (noting that many hundreds of thousands National Guard members and reservists have served on active duty in the War on Terror).

USERRA seeks to accomplish its broad objectives by establishing a broad set of substantive and procedural rights. Substantively, the statute guarantees servicemembers the right to be promptly reemployed upon return from military service, to be free from discrimination based on military service, to take military leave from civilian jobs, and to receive (while on such leave) any benefits that their employer provides to employees on comparable forms of leave. 38 U.S.C. §§ 4311, 4112, 4113, 4316. Further, unlike most federal employment statutes, USERRA applies to all public and private employers in the United States, regardless of their size. *Id.* §§ 4303(4), 4314(a), (d).

To make these rights real, Congress created a “broad remedial scheme.” *Davis v. Advoc. Health Ctr. Patient Care Express*, 523 F.3d 681, 684 (7th Cir. 2008). The scheme is premised on the idea that the best way to protect servicemembers is to empower them to protect themselves. USERRA doesn’t require soldiers to first plead their case to a bureaucrat in Washington, DC, or otherwise exhaust administrative remedies. To the contrary, it authorizes them to go straight to court, to “commence an action for relief” in any district where their private employer has a place of business, 38 U.S.C. § 4323(a)(3), (b)(3), (c)(2), and “authorize[s] suits against State employers.” *Torres v. Tex. Dep’t of Pub. Safety*, 142 S. Ct. 2455, 2466 (2022). USERRA also forbids the assessment of fees or costs, *id.* § 4323(h)(1), and has no statute of limitations, *id.* § 4327(b). And, on top of all this, Congress included a robust anti-waiver provision, barring enforcement of “any” contract or State law “that reduces, limits, or eliminates in any manner any right or benefit provided by [USERRA].” *Id.* § 4302(b). Congress intended for this provision to apply to both substantive and procedural rights, “including the establishment of additional prerequisites to the exercise of any [statutory] right” or benefit. *Id.*

These expansive substantive and procedural provisions don’t just protect our servicemembers. They also protect our country. Experience has shown that, at any point, the United States may be required to wage war anywhere in the world. Experience has also shown that creating a massive peacetime standing army, backed by a national draft, is undesirable and infeasible. So our military has instead turned (with ever increasing reliance) to reservists and National Guard members to ensure that we have the fighting force necessary to meet modern challenges and defend against global threats.

Today, about 800,000 people—nearly half the country’s two million servicemembers—are reservists or National Guard members. These people make enormous personal sacrifice for our country. Most days, they go about their lives like anyone else—working their day jobs, caring for their families, worried about their finances, volunteering in their communities, and so on. But they’re also trained soldiers who balance their roles as civilians with ongoing military obligations that allow them to stand ready to be called into active duty. By doing so, they “provide[] the mechanism for manning the Armed Forces of the United States.” *Ala. Power Co. v. Davis*, 431 U.S. 581, 583 (1977).

That’s where USERRA comes in: To convince people to shoulder these burdens and sign up for the reserves, Congress has recognized that we must offer them some assurances in return. USERRA is indispensable to this effort: “Because the National Guard and Reserves have become an essential part of the military’s operational force, it is imperative that employers comply with USERRA. . . . If individuals lack confidence that their USERRA rights will be respected or enforced, they will be less likely to join or continue to serve in the Armed Forces, especially in the Reserve Forces.” S. Rep. No. 110–449, at 24 (2008); see also S. Rep. No. 104–371, at 27–28 (1996) (similar); H.R. Rep. No. 105–448, at 2 (1998) (emphasizing that USERRA is “particularly important today to such persons who are integral to this country’s defense” because “the Guard and Reserve are frequently called to active duty to carry out missions integral to the national defense”). Undermining USERRA thus “threaten[s] not only a long-standing policy protecting individuals’ employment rights, but also raise[s] serious questions about the United States’ ability to provide for a strong national defense.” H.R. Rep. No. 105–448, at 5–6.

Or as counsel for the United States told the U.S. Supreme Court just last year: “[Reservists and National Guard members] never been more important to the military than they are right now.

And one of the first questions that [a prospective reservist] will ask when they’re considering whether to join the military is, well, do I get to keep my job?

You know, does my employer have to let me take leave for training exercises or be deployed?

And it really does matter in the real world for the Army to be able to tell them, yes, your employer does have to do that. In fact, . . . the brochure that the Army gives to its recruits lists the USERRA protections as part of the incentive package that they receive to join the military. And it would matter a great deal in the real world if it was harder for the United States to recruit Guardsmen and Reservists for the military. Obviously, . . . the national security needs are unpredictable, and the government doesn't know when it's going to need to deploy troops overseas, and being able to have a supply . . . of forces to defend the Nation is one of the most existential jobs of the Federal Government in the first place."

Tr. of Oral Argument in *Torres v. Tex. Dep't of Pub. Safety*, at 67–68.

II.

The War on Terror isn't the only pertinent development in the years since USERRA's passage. Since 1994, many employers have begun quietly stripping their employees (including their servicemember employees) of their legal rights through forced arbitration. These clauses are added to the fine print of take-it-or-leave-it form contracts and require employees to give up their right to a day in court and instead pursue their cases in forced arbitration. Companies write these clauses in their favor, picking their preferred arbitral forum. The arbitrators are often selected by the companies (or else have a financial incentive to side with them to secure their business in the future). Arbitrators also conduct their work in secret, and their decisions are exceedingly difficult to reverse in court given the highly deferential standard of judicial review.

A few years ago, the Economic Policy Institute estimated that more than half of nonunion private-sector employees in the United States are now subject to forced arbitration. See Alexander J.S. Colvin, *The growing use of mandatory arbitration: Access to the courts is now barred for more than 60 million American workers*, Economic Policy Institute (April 6, 2018), <https://perma.cc/A3FZ-7LLJ/>. That's roughly 60 million American workers—a number that has been steadily rising each year. Further, forced arbitration is more common in low-wage workplaces and among larger employers and has disproportionate effects on women and Black employees. *Id.*

Although Congress might not have had forced arbitration firmly in mind when it enacted USERRA, there should be little doubt that forced arbitration is utterly incompatible with the statute. Yet several courts of appeals have held otherwise. Relying on a 1925 law called the Federal Arbitration Act—and more recent Supreme Court decisions that have interpreted that statute far beyond its text and original meaning—these courts have held that USERRA permits employers to force servicemembers out of court and into arbitration. See *Ziober v. BLB Resources*, 839 F.3d 814, 816 (9th Cir. 2016) (citing cases).

One of these cases involved was brought by a Navy reservist named Kevin Ziober. In 2012, 4 years into his service, Lieutenant Ziober was called into active duty—a 1-year deployment to Afghanistan. He expected to fulfill his service obligations and then return to work once he returned home. On his last day of work before being deployed, Lieutenant Ziober's employer threw him an office-wide party to celebrate his military service. Dozens of colleagues, as well as the company's CEO and president, turned out for the celebration. They watched as he "dug into a cake decorated with an American flag and the words, 'Best Wishes Kevin' in red, white and blue." Margot Roosevelt, *Navy reservist wants a day in court, not arbitration*, OC Register, June 6, 2016, <http://bit.ly/2qAaOuu>. They feted him with balloons, cards, and a gift—prompting him to text family members: "What a great sendoff!" *Id.* But just hours after the party ended, Lieutenant Ziober was summoned to a meeting with the head of human resources, as well as his supervisor and the company's attorney. They told him that he was being fired. Then, when he tried to enforce his USERRA rights in court upon returning home, his employer compounded the indignity by telling him that he would have to arbitrate his claims instead.

This is plainly not what Congress envisioned when it enacted USERRA. But the good news is that Congress can do something about that. It can do what it has done many times in the past: strengthen and clarify the statute to fix judicial decisions that have incorrectly limited servicemembers' rights.

III.

Congress shouldn't hesitate to do so. When Americans are polled about forced arbitration, it's no contest: they hate it. And despite the hyper-partisan era in which we now live, this sentiment is widely shared by voters across the political spectrum. Overwhelming majorities of Republicans, Democrats, and independents support federal legislation to end forced arbitration in general. In this context, in particular, public opinion likely approaches unanimity.

And for good reason: For one thing, eliminating forced arbitration for servicemembers is a moral imperative. Our servicemembers protect our freedom and defend our Constitution. It is not too much to ask that we protect *their* freedom and defend *their* constitutional rights.

For another thing, eliminating forced arbitration would help to ensure that USERRA's rights are made real. It would empower servicemembers to make their own choices about how to enforce their own rights and whether to avail themselves of the procedural protections under the statute. It would also empower them to protect the interests of their fellow servicemembers—whether by serving as a representative plaintiff in a class action, by seeking to enjoin an unlawful policy, by creating judicial precedent to govern future cases, or by providing a public record of illegality that can be used for the benefit of others. To strip servicemembers of their ability to serve their peers in these ways, as forced arbitration does, only compounds the harms that it inflicts. And it only further weakens USERRA—inhibiting development of the law, allowing violations to go unnoticed and unpunished, and reducing compliance.

For still another, eliminating forced arbitration would ensure that small-dollar cases, in particular, can be vindicated. For these cases, especially, forced arbitration cuts off compensation and deterrence. This can be seen empirically by looking the results that people actually obtain out of arbitration. In the consumer context, for example, data compiled by the Consumer Financial Protection Bureau shows that few consumers with low-value cases are able to successfully advocate for themselves when forced to seek individual relief (which is what forced arbitration typically requires). And when I say “few,” I mean that in an absolute sense, not a relative sense: Of the hundreds of millions of consumers that interact with banks, credit cards, student loans, payday loans, debt collectors, and other companies, only *four of them* (yes, you read that right) have won affirmative relief on cases of \$1,000 or less in arbitration. By contrast, between 2008 and 2012, at least 34 million consumers of the same universe of companies received compensation through class actions. More than 400 consumer financial class-action settlements garnered more than \$2 billion in cash relief for consumers and more than \$600 million in in-kind relief. And those numbers don't capture the additional benefits of industry-changing injunctions and deterrence of future bad practices.

Finally, forced arbitration of USERRA claims undermines our national defense. As the military has emphasized, USERRA is critical to its recruiting and retention efforts. “[T]he brochure that the Army gives to its recruits lists the USERRA protections as part of the incentive package that they receive to join the military,” so “it would matter a great deal in the real world” if those protections continue to be weakened through forced arbitration, by making it “harder for the United States to recruit Guardsmen and Reservists for the military.” Tr. of Oral Argument in *Torres*, at 67–68. “If individuals lack confidence that their USERRA rights will be respected or enforced, they will be less likely to join or continue to serve in the Armed Forces, especially in the Reserve Forces.” S. Rep. No. 110–449, at 24 (2008). Congress shouldn't let that happen. It's long past time to step in and stop this slide in its tracks.

If it did so, this would not be the first time that Congress has acted to protect national security by ensuring that servicemembers are not subject to forced arbitration. The bipartisan Military Lending Act prohibits forced arbitration in consumer credit contracts with servicemembers. See 10 U.S.C. § 987(e) (making certain extensions of credit to servicemembers unlawful where “the creditor requires the borrower to submit to arbitration”); *id.* § 987(f)(1) (making a knowing violation a misdemeanor); 80 Fed. Reg. 43559 (July 22, 2015) (expanding definition of covered consumer credit and banning arbitration clauses in such products). Congress did so at the request of the Department of Defense, which found that this was a key part of protecting servicemembers from predatory lending—an issue that had threatened national security and war readiness. See Report on Predatory Lending Practices Directed at Members of the Armed Forces and their Dependents 7, 14, 21, 51 (Aug. 9, 2006). When Department of Defense expanded the scope of the Military Lending Act's prohibition of forced arbitration to include a broader array of financial services, it reaffirmed that the personal financial well-being of service members is “at

the core” of servicemember retention and maintaining national military readiness. 80 Fed. Reg. 43600 (July 22, 2015).

Congress should make a similar judgment as to the rights provided by USERRA. Doing so would simply clarify what the statute should already mean, and restore servicemembers’ ability to choose to enforce their rights in court, as envisioned by a bipartisan Congress. And it would impose no burden to, or cost on, the federal government. Congress should act without delay.

STATEMENTS FOR THE RECORD

Prepared Statement of Department of Defense

Chairman Van Orden, Ranking Member Levin, distinguished members of the Committee, thank you for the opportunity to present the Department of Defense statement for the record for this oversight hearing on the Uniformed Services Employment and Reemployment Rights Act (USERRA).

Across America, our Guard and Reserve Service members are trained, equipped, and ready with the critical capabilities needed to compete globally across a full range of military operations and to provide support to their local communities. In today's complex security environment, these citizen Service members leverage their professional skills while serving in uniform, adding value and depth to America's military force with skills, education, and expertise acquired in the private sector. These Service members are also teachers, first responders, doctors, lawyers, academics, scientists, engineers, cyber specialists, transportation specialists, and administrators at all levels. These Service members depend on the support of their families and communities, especially their civilian employers, to thrive in their military roles.

More than 50 years ago, the Department of Defense recognized the value of the support civilian employers provide to military employees, and in 1972 created the Employer Support of the Guard and Reserve (ESGR) office to gain and maintain employer support for an all-volunteer Force. Over the decades since, ESGR's mission expanded to include educating employers and Service members about the rights and responsibilities of USERRA. The Act is intended to ensure these Service members are not disadvantaged in their civilian careers because of their service, are promptly reemployed in civilian jobs upon their return from duty, and are not discriminated against in employment because of military status or obligations.

In support of the Secretary of Defense's priority to "Take Care of Our People," ESGR accomplishes its mission through effective military and employer outreach services, employer recognition programs, and a broad range of assistance services. These services provide education on the applicability of USERRA and emphasize the importance of the National Guard and Reserve in our Nation's defense. Ensuring Service members understand their rights and benefits under USERRA is a key example of implementing the Secretary's priority to "Take Care of Our People."

In recent years, the Department has leaned heavily on our Guard and Reserve, such as during the COVID-19 pandemic when those Service members were critical in supporting public health initiatives and maintaining services across the country. As Guard and Reserve Service members have played increasingly important roles in protecting our Nation, it is equally important that their employment rights are protected. Educating and informing Service members and their families about USERRA's rights, benefits, and protections is important for the Department to recruit and retain the all-volunteer Force integrated between Active and Reserve components. Prospective Guard and Reserve Service members need confidence their civilian careers will not be adversely impacted by their uniformed service responsibilities, to ensure the Department's reliance on Reserve Component forces can support overall mission readiness.

ESGR plays a central role in protecting those rights, recognizes and supports employers to honor those rights. It works as a volunteer-centric program, with a nationwide network of over 2,800 dedicated volunteers with diverse backgrounds, who assist with employment concerns of Guard and Reserve Service members. These volunteers represent all walks of life; business executives, small business owners, civic leaders, retired military members, and patriotic citizens who have never served in the Armed Forces, but want to give back. In Fiscal Year 2022, ESGR volunteers served more than 180,000 hours to provide education and increase awareness on the rights and responsibilities under USERRA, reaching 125,496 employers and 234,095 Service members.

ESGR's proactive efforts to increase awareness of related laws and DoD policies helps prevent disputes between Service members and their employers. By pre-

venting disagreements through reduced confusion, ESGR's efforts serve as mission enablers by allowing Service members to concentrate on military service requirements. ESGR engages with Guard and Reserve leadership and appropriate staff elements through formal information sharing venues (e.g., office calls with Guard and Reserve Chiefs) and ad hoc communication in support of their readiness efforts. This sustained coordination at the staff level is critical to mutual success.

In addition, ESGR's Customer Service Center employs trained subject matter experts who provide prompt, telephonic and email responses to Service members and civilian employers on USERRA-related matters. In Fiscal Year 2022, ESGR responded to more than 13,000 inquiries and provided free confidential mediation services in over 1,100 cases with a 76 percent resolution rate. Nearly 400 ESGR volunteer ombudsmen across the country assist employers and Service members daily with USERRA matters, helping to resolve civilian employment conflicts that arise because of military service. These volunteers, along with ESGR headquarters staff, provide assistance, at no cost, to help Service members resolve workplace issues and improve relationships with civilian employers.

ESGR also assists employers by addressing concerns about the timing, frequency, and duration of service by connecting employers with the appropriate Guard or Reserve points of contact within chain-of-command. This could mean assisting a small business employer to contact a military commander and request a flexible drill schedule that supports their continuity of business operations or ensuring that an employer understands the rights of Service members under USERRA. Although misunderstanding occasionally exist between employers and Reserve Component Service members during military duty, ESGR provides assistance to alleviate stress between parties and supports stronger communication, through the involvement of military chain-of-command, advanced notification of military service, and open-lines of communication while the employee is away.

ESGR's role regarding USERRA is limited to conducting outreach that does not conflict with investigations or other legal actions. ESGR assistance does not include cases where a Service member files a formal complaint with the Department of Labor Veterans' Employment and Training Service (DOL VETS) or when a Service member retains private legal representation. Regardless of the outcome of an ESGR USERRA mediation case, Service members can still file a case with the DOL VETS. ESGR and DOL VETS, however, work in collaboration to ensure USERRA educational materials are accurate and that all volunteer Ombudsmen are properly trained.

ESGR also offers a robust tiered awards program to recognize the many employers who go above what is required by law to support military employees. This support includes helping Guard and Reserve families by checking in after a natural disaster, sending care packages during an extended deployment, and continuing pay and benefits when a Reservist is activated. Most employer awards originate from Patriot Award nominations, submitted by Service members who recognize supportive supervisors. During Fiscal Year 2022, ESGR recognized 6,871 supervisors with Patriot Awards. ESGR is also currently reviewing 1,863 nominations for the Secretary of Defense Employer Support Freedom Award, the Secretary of Defense's highest honor bestowed on employers. The Freedom Award is presented annually to a maximum of 15 large, small, and public-sector employers who have demonstrated exceptional support to Guard or Reserve employees.

In addition, during Fiscal Year 2022, ESGR obtained 5,245 Statements of Support from employers across the Nation. The intent of the program is to increase employer support through encouragement to act as advocates for employee participation in the military. Service members who know they have employer support, are more likely to stay in the Service and help recruit others. Employers who sign Statements of Support pledge that they will:

- Fully recognize, honor, and comply with the USERRA.
- Provide managers and supervisors with the tools they need to effectively manage employees who serve in the National Guard and Reserve.
- Appreciate the values, leadership, and unique skills Service members bring to the workforce, and encourage opportunities to hire Guardsmen, Reservists, transitioning Service members, and Veterans.
- Continually recognize and support our country's Service members and their families, in peace, in crises, and in war.

CONCLUSION:

In the two decades since September 11, 2001, over one million Guard and Reserve Service members have mobilized as part of the Total Force. Currently, over 30,000 are deployed to 23 countries in direct support of Geographic Combatant Commands,

while stateside Service members directly support local communities through service related to natural disasters, declared emergencies, and more. ESGR and the Department of Defense as a whole remain committed to our National Guard and Reserve Service members and their civilian employers as they deal with the challenges and complexities of balancing civilian and military life. Taking care of our Service members is one of Secretary Austin's top priorities. As important members of the Total Force, the Department will continue to provide our Reserve Component Service members and their families with the resources, services, and support they need.

In closing, Mr. Chairman, the Department of Defense thanks you, the Ranking Member, and the members of this Subcommittee for your outstanding and continuing support of the men and women who proudly wear the uniform in defense of our great Nation.

