

111TH CONGRESS
1ST SESSION

S. 263

To amend title 38, United States Code, to improve the enforcement of the Uniformed Services Employment and Reemployment Rights Act of 1994, and for other purposes.

IN THE SENATE OF THE UNITED STATES

JANUARY 15, 2009

Mr. CASEY (for himself and Mr. KENNEDY) introduced the following bill;
which was read twice and referred to the Committee on Veterans' Affairs

A BILL

To amend title 38, United States Code, to improve the enforcement of the Uniformed Services Employment and Reemployment Rights Act of 1994, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Servicemembers Access
5 to Justice Act of 2009”.

1 **SEC. 2. WAIVER OF SOVEREIGN IMMUNITY UNDER THE**
 2 **11TH AMENDMENT WITH RESPECT TO EN-**
 3 **FORCEMENT OF USERRA.**

4 (a) IN GENERAL.—Section 4323 of title 38, United
 5 States Code, is amended—

6 (1) in subsection (b) by striking paragraph (2)
 7 and inserting the following new paragraph:

8 “(2) In the case of an action against a State (as an
 9 employer) by a person, the action may be brought in the
 10 appropriate district court of the United States or State
 11 court of competent jurisdiction.”;

12 (2) by redesignating subsection (i) as subsection
 13 (j); and

14 (3) by inserting after subsection (h) the fol-
 15 lowing new subsection:

16 “(i) WAIVER OF STATE SOVEREIGN IMMUNITY.—(1)
 17 A State’s receipt or use of Federal financial assistance for
 18 any program or activity of a State shall constitute a waiver
 19 of sovereign immunity, under the 11th amendment to the
 20 Constitution or otherwise, to a suit brought by—

21 “(A) a person who is or was an employee in
 22 that program or activity for the rights or benefits
 23 authorized the person by this chapter;

24 “(B) a person applying to be such an employee
 25 in that program or activity for the rights or benefits
 26 authorized the person by this chapter; or

1 “(C) a person seeking reemployment as an em-
 2 ployee in that program or activity for the rights or
 3 benefits authorized the person by this chapter.

4 “(2) In this subsection, the term ‘program or activity’
 5 has the meaning given that term in section 309 of the
 6 Age Discrimination Act of 1975 (42 U.S.C. 6107).”.

7 (b) APPLICATION.—The amendments made by sub-
 8 section (a) shall apply to—

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

13 (2) to all actions or complaints filed under such
 14 chapter 43 that are commenced after the date of the
 15 enactment of this Act.

16 **SEC. 3. UNENFORCEABILITY OF AGREEMENTS TO ARBI-**
 17 **TRATE DISPUTES ARISING UNDER USERRA.**

18 (a) IN GENERAL.—Chapter 43 of title 38, United
 19 States Code, is amended by inserting after section 4327
 20 the following new section:

21 **“§ 4328. Unenforceability of agreements to arbitrate**
 22 **disputes**

23 “(a) PROTECTION OF EMPLOYEE RIGHTS.—Notwith-
 24 standing any other provision of law, any clause of any
 25 agreement between an employer and an employee that re-

1 quires arbitration of a dispute arising under this chapter
 2 shall not be enforceable.

3 “(b) EXCEPTIONS.—

4 “(1) WAIVER OR AGREEMENT AFTER DISPUTE
 5 ARISES.—Subsection (a) shall not apply with respect
 6 to any dispute if, after such dispute arises, the par-
 7 ties involved knowingly and voluntarily agree to sub-
 8 mit such dispute to arbitration.

9 “(2) COLLECTIVE BARGAINING AGREEMENTS.—

10 Subsection (a) shall not preclude the enforcement of
 11 any of the rights or terms of a valid collective bar-
 12 gaining agreement.

13 “(c) VALIDITY AND ENFORCEMENT.—Any issue as to
 14 whether this section applies to an arbitration clause shall
 15 be determined by Federal law. Except as otherwise pro-
 16 vided in chapter 1 of title 9, the validity or enforceability
 17 of an agreement to arbitrate referred to in subsection (a)
 18 or (b)(1), shall be determined by a court, rather than the
 19 arbitrator, irrespective of whether the party resisting arbi-
 20 tration challenges the agreement to arbitrate specifically
 21 or in conjunction with other terms of the agreement.

22 “(d) APPLICATION.—This section shall apply with re-
 23 spect to all contracts and agreements between an employer
 24 and an employee in force before, on, or after the date of
 25 the enactment of this section.”.

1 (b) CLERICAL AMENDMENT.—The table of sections
 2 for such chapter is amended by inserting after the item
 3 relating to section 4326 the following new item:

“4328. Unenforceability of agreements to arbitrate disputes.”.

4 (c) APPLICATION.—The provisions of section 4328 of
 5 title 38, United States Code, as added by subsection (a),
 6 shall apply to—

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

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

14 **SEC. 4. ENHANCED REMEDIES FOR ENFORCEMENT OF**
 15 **USERRA.**

16 (a) STATE AND PRIVATE EMPLOYERS.—Section
 17 4323(d) of title 38, United States Code, is amended—

18 (1) by redesignating paragraphs (2) and (3) as
 19 paragraphs (4) and (5), respectively;

20 (2) in paragraph (4) (as so redesignated)—

21 (A) by inserting after “compensation” each
 22 place it appears the following: “or damages”;

23 (B) by striking “subparagraph (B) or (C)
 24 of paragraph (1)” the first place it appears and
 25 inserting “paragraph (1) or (3), or both,”; and

1 (C) by striking “subparagraph (B) or (C)
 2 of paragraph (1)” the second place it appears
 3 and inserting “paragraph (1) or (3), or both”;
 4 and

5 (3) by striking the subsection designation and
 6 heading and paragraph (1) and inserting the fol-
 7 lowing:

8 “(d) REMEDIES.—(1) A State or private employer
 9 who violates the provisions of this chapter shall be liable
 10 to any person affected—

11 “(A) for damages in the amount of—

12 “(i) any wages, salary, benefits, or other
 13 compensation denied or lost by such person by
 14 reason of the violation; or

15 “(ii) in a case in which wages, salary, ben-
 16 efits, or other compensation have not been de-
 17 nied or lost to the person, any actual monetary
 18 losses sustained by the person as a result of the
 19 violation;

20 “(B) the interest on the amount described in
 21 subparagraph (A) calculated at the prevailing inter-
 22 est rates over the period of time for which the dam-
 23 ages are due; and

24 “(C) an additional amount as liquidated dam-
 25 ages equal to the sum of the amount described in

1 subparagraph (A) and the interest described in sub-
2 paragraph (B), or \$10,000, whichever is greater ex-
3 cept that, if the employer proves to the satisfaction
4 of the court that the act or omission giving rise to
5 the person's action was in good faith and that the
6 employer had reasonable grounds for believing the
7 act or omission was not a violation of the provisions
8 of this chapter, the court may award, in its discre-
9 tion, no liquidated damages or award any amount of
10 liquidated damages not to exceed 100 percent of the
11 compensation or damages awarded under subpara-
12 graph (A) and the interest described in subpara-
13 graph (B).

14 “(2) In any action under this section, the court may
15 require the employer to comply with the provisions of this
16 chapter.”.

17 (b) PUNITIVE DAMAGES.—Section 4323(d) of such
18 title is further amended by inserting after paragraph (2)
19 (as inserted by subsection (a)(3) of this section) the fol-
20 lowing new paragraph:

21 “(3) In the case of a violation of the provisions of
22 this chapter by a State or private employer with 25 or
23 more employees, the court shall require the employer to
24 pay the person affected punitive damages if the court de-
25 termines that the employer's violation of the provisions of

1 this chapter was done with malice or reckless indifference
 2 to the rights of the person under this chapter.”.

3 (c) RIGHT TO JURY TRIAL.—Section 4323(d) of such
 4 title is further amended by adding at the end the fol-
 5 lowing:

6 “(6) A person who commences an action under this
 7 section shall be entitled to a trial by jury.”.

8 (d) FEDERAL GOVERNMENT EMPLOYERS.—Para-
 9 graph (2) of section 4324(c) of such title is amended to
 10 read as follows:

11 “(2) If the Board determines that a Federal executive
 12 agency or the Office of Personnel Management has vio-
 13 lated the provisions of this chapter relating to the employ-
 14 ment or reemployment of a person by the agency, the
 15 Board shall enter an order requiring the agency or Office
 16 to comply with such provisions and to compensate such
 17 person—

18 “(A) for damages in the amount of—

19 “(i) any wages, salary, benefits, or other
 20 compensation denied or lost by such person by
 21 reason of the violation; or

22 “(ii) in a case in which wages, salary, ben-
 23 efits, or other compensation has not been de-
 24 nied or lost to the person, any actual monetary

1 losses sustained by the person as a result of the
2 violation;

3 “(B) the interest on the amount described in
4 subparagraph (A) calculated at the prevailing inter-
5 est rates over the period of time for which the dam-
6 ages are due; and

7 “(C) an additional amount as liquidated dam-
8 ages equal to the sum of the amount described in
9 subparagraph (A) and the interest described in sub-
10 paragraph (B), or \$10,000, whichever is greater; ex-
11 cept that, if the Federal executive agency or the Of-
12 fice of Personnel Management proves to the satisfac-
13 tion of the Board that the act or omission giving rise
14 to such person’s complaint was in good faith and
15 that the agency or Office had reasonable grounds for
16 believing that the act or omission was not a violation
17 of the provisions of this chapter, the Board may
18 award, in the discretion of the Board, no liquidated
19 damages or award any amount of liquidated dam-
20 ages not to exceed 100 percent of the compensation
21 or damages awarded under subparagraph (A) and
22 the interest described in subparagraph (B).”.

23 (e) APPLICATION.—The amendments made by this
24 section shall apply to—

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

5 (2) to all actions or complaints filed under such
 6 chapter 43 that are commenced after the date of the
 7 enactment of this Act.

8 **SEC. 5. REQUIRED AWARD OF ATTORNEY FEES IN ACTIONS**
 9 **TO ENFORCE PROVISIONS OF USERRA.**

10 (a) ENFORCEMENT OF RIGHTS WITH RESPECT TO
 11 A STATE OR PRIVATE EMPLOYER.—Section 4323(h)(2) of
 12 title 38, United States Code, is amended by striking
 13 “may” and inserting “shall”.

14 (b) ENFORCEMENT OF RIGHTS WITH RESPECT TO
 15 FEDERAL EXECUTIVE AGENCIES.—Section 4324(c)(4) of
 16 such title is amended by striking “the Board may, in its
 17 discretion, award” and inserting “the Board shall award”.

18 (c) APPLICATION.—The amendments made sub-
 19 sections (a) and (b) shall apply to—

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

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

4 **SEC. 6. CLARIFYING THE DEFINITION OF “SUCCESSOR IN**
 5 **INTEREST”.**

6 (a) IN GENERAL.—Section 4303(4) of title 38,
 7 United States Code, is amended by adding at the end the
 8 following new subparagraph:

9 “(D)(i) The term ‘successor in interest’ shall be
 10 determined for purposes of subparagraph (A)(iv) on
 11 a case-by-case basis using a multi-factor test which
 12 considers the following factors regardless of the form
 13 of the succession:

14 “(I) Substantial continuity of the same
 15 business operations.

16 “(II) Use of the same plant.

17 “(III) Continuity of work force.

18 “(IV) Similarity of jobs and working condi-
 19 tions.

20 “(V) Similarity of supervisory personnel.

21 “(VI) Similarity in machinery, equipment,
 22 and production methods.

23 “(VII) Similarity of products or services.

24 “(ii) The successor’s lack of notice or awareness
 25 of a potential or pending claim under this chapter

1 at the time of a merger, acquisition, or other form
 2 of succession shall not be considered when applying
 3 the multi-factor test under clause (i).”.

4 (b) APPLICATION.—The amendment made by sub-
 5 section (a) shall apply to—

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

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

13 **SEC. 7. CLARIFYING THAT USERRA PROHIBITS WAGE DIS-**
 14 **CRIMINATION AGAINST MEMBERS OF THE**
 15 **ARMED FORCES.**

16 (a) IN GENERAL.—Section 4303(2) of title 38,
 17 United States Code, is amended by striking “(other than
 18 wages or salary for work performed)” and inserting “(in-
 19 cluding wages or salary)”.

20 (b) APPLICATION.—The amendment made by sub-
 21 section (a) shall apply to—

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

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

4 **SEC. 8. REQUIRING EQUITABLE RELIEF WHEN APPRO-**
 5 **PRIATE.**

6 (a) IN GENERAL.—Section 4323(e) of title 38,
 7 United States Code, is amended—

8 (1) by striking “The court shall use,” and in-
 9 serting “(1) The court shall use,”; and

10 (2) by adding at the end the following new
 11 paragraph:

12 “(2) Notwithstanding rule 65 of the Federal Rules
 13 of Civil Procedure or any other provision of law, for pur-
 14 poses of determining whether to issue an injunction or re-
 15 straining order pursuant to paragraph (1)—

16 “(A) an employer’s denial of reemployment or
 17 retention in employment shall constitute irreparable
 18 harm to a person who is denied reemployment or re-
 19 tention in employment if an injunction to reinstate
 20 such person is not issued, and such person shall be
 21 considered to have no adequate remedy at law;

22 “(B) if the court balances the hardships be-
 23 tween the parties, there shall be a rebuttable pre-
 24 sumption that the balance of harm to a person who
 25 is denied reemployment or retention in employment

1 if an injunction to reinstate such person is not
 2 issued outweighs the harm to such person’s employer
 3 or former employer if an injunction is issued to rein-
 4 state such person; and

5 “(C) if the court considers the public interest or
 6 public policy, there shall be a rebuttable presumption
 7 that the issuance of an injunction to reinstate a per-
 8 son who is denied reemployment or retention in em-
 9 ployment is in the public interest and advances pub-
 10 lic policy.”.

11 (b) APPLICATION.—The amendments made by sub-
 12 section (a) shall apply to—

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

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

20 **SEC. 9. REQUIREMENT THAT FEDERAL AGENCIES PROVIDE**
 21 **NOTICE TO CONTRACTORS OF POTENTIAL**
 22 **USERRA OBLIGATIONS.**

23 (a) CIVILIAN AGENCIES.—The Federal Property and
 24 Administrative Services Act of 1949 (41 U.S.C. 251 et

1 seq.) is amended by adding at the end the following new
 2 section:

3 **“SEC. 318. NOTICE TO CONTRACTORS OF POTENTIAL OBLI-**
 4 **GATIONS RELATING TO EMPLOYMENT AND**
 5 **REEMPLOYMENT OF MEMBERS OF THE**
 6 **ARMED FORCES.**

7 “Each contract for the procurement of property or
 8 services that is entered into by the head of an executive
 9 agency shall include a notice to the contractor that the
 10 contractor may have obligations under chapter 43 of title
 11 38, United States Code.”.

12 (b) ARMED FORCES.—

13 (1) IN GENERAL.—Chapter 137 of title 10,
 14 United States Code, is amended by adding at the
 15 end the following new section:

16 **“§ 2334. Notice to contractors of potential obligations**
 17 **relating to employment and reemploy-**
 18 **ment of members of the armed forces**

19 “Each contract for the procurement of property or
 20 services that is entered into by the head of an executive
 21 agency shall include a notice to the contractor that the
 22 contractor may have obligations under chapter 43 of title
 23 38.”.

1 (2) CLERICAL AMENDMENT.—The table of sec-
 2 tions for such chapter is amended by adding at the
 3 end the following new item:

“2334. Notice to contractors of potential obligations relating to employment and
 reemployment of members of the armed forces.”.

4 **SEC. 10. CLARIFYING THAT PROVISIONS OF SECTION 4302**
 5 **OF TITLE 38, UNITED STATES CODE, APPLY**
 6 **TO BOTH SUBSTANTIVE AND PROCEDURAL**
 7 **RIGHTS.**

8 Section 4302 is amended by inserting “substantive
 9 or procedural” before “right or benefit” each place it oc-
 10 curs.

11 **SEC. 11. COMPTROLLER GENERAL OF THE UNITED STATES**
 12 **STUDY ON EFFECTIVENESS OF FEDERAL**
 13 **PROGRAMS OF EDUCATION AND OUTREACH**
 14 **ON EMPLOYER OBLIGATIONS UNDER**
 15 **USERRA.**

16 (a) STUDY REQUIRED.—The Comptroller General of
 17 the United States shall conduct a study on the effective-
 18 ness of Federal programs of education and outreach on
 19 employer obligations under chapter 43 of title 38, United
 20 States Code.

21 (b) CONTENTS OF STUDY.—In carrying out the study
 22 required by subsection (a), the Comptroller General
 23 shall—

1 (1) assess current practices and procedures of
2 Federal agencies for educating employers about their
3 obligations under chapter 43 of title 38, United
4 States Code;

5 (2) identify best practices for bringing the em-
6 ployment practices of small businesses into compli-
7 ance with such chapter;

8 (3) determine whether the Employer Support
9 for the Guard and Reserve, the Small Business Ad-
10 ministration, or other agencies could collaborate to
11 develop a program to educate employers regarding
12 their obligations under such chapter; and

13 (4) determine the effect on recruitment and re-
14 tention in the National Guard and Reserves of the
15 failure of employers to meet their reemployment ob-
16 ligations under such chapter.

17 (c) REPORT TO CONGRESS.—Not later than Decem-
18 ber 31, 2009, the Comptroller General shall submit to
19 Congress a report on the study conducted under sub-
20 section (a), including the following:

21 (1) The findings of the Comptroller General
22 with respect to such study.

23 (2) The recommendations of the Comptroller
24 General for the improvement of education and out-

1 reach for employers with respect to their obligations
 2 under chapter 43 of title 38, United States Code.

3 **SEC. 12. TECHNICAL AMENDMENTS.**

4 (a) AMENDMENT TO CONGRESSIONAL ACCOUNT-
 5 ABILITY ACT OF 1995.—Section 206(b) of the Congres-
 6 sional Accountability Act of 1995 (2 U.S.C. 1316(b)) is
 7 amended by striking “under paragraphs (1), (2)(A), and
 8 (3) of section 4323(c) of title 38, United States Code”
 9 and inserting “under subsection 4323(d) of title 38,
 10 United States Code”.

11 (b) AMENDMENT TO SECTION 416 OF TITLE 3,
 12 UNITED STATES CODE.—Section 416(b) of title 3, United
 13 States Code, is amended by striking “under paragraphs
 14 (1) and (2)(A) of section 4323(c) of title 38” and inserting
 15 “under section 4323(d) of title 38”.

16 (c) AMENDMENT TO SECTION 4324 OF TITLE 38,
 17 UNITED STATES CODE.—Section 4324(b)(4) of title 38,
 18 United States Code, is amended by inserting before the
 19 period the following: “declining to initiate an action and
 20 represent the person before the Merit Systems Protection
 21 Board”.

○