

112TH CONGRESS
2D SESSION

S. 3233

To amend title 38, United States Code, to improve the enforcement of employment and reemployment rights of members of the uniformed services, and for other purposes.

IN THE SENATE OF THE UNITED STATES

MAY 23, 2012

Mr. CASEY (for himself and Mr. WYDEN) 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 employment and reemployment rights of members of the uniformed services, 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 2012”.

1 **SEC. 2. WAIVER OF SOVEREIGN IMMUNITY UNDER THE**
 2 **11TH AMENDMENT WITH RESPECT TO EN-**
 3 **FORCEMENT OF EMPLOYMENT AND REEM-**
 4 **PLOYMENT RIGHTS OF MEMBERS OF THE**
 5 **UNIFORMED SERVICES.**

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

8 (1) in subsection (b), by striking paragraph (2)
 9 and inserting the following new paragraph:

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

14 (2) by redesignating subsection (i) as subsection
 15 (j); and

16 (3) by inserting after subsection (h) the fol-
 17 lowing new subsection:

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

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

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

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

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

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

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

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

19 **SEC. 3. UNENFORCEABILITY OF AGREEMENTS TO ARBI-**
20 **TRATE DISPUTES REGARDING EMPLOYMENT**
21 **AND REEMPLOYMENT RIGHTS OF MEMBERS**
22 **OF THE UNIFORMED SERVICES.**

23 (a) IN GENERAL.—Subchapter III of chapter 43 of
24 title 38, United States Code, is amended by adding at the
25 end the following new section:

1 **“§ 4328. Unenforceability of agreements to arbitrate**
2 **disputes**

3 “(a) PROTECTION OF EMPLOYEE RIGHTS.—Notwith-
4 standing any other provision of law, any clause of any
5 agreement between an employer and an employee that re-
6 quires arbitration of a dispute arising under this chapter
7 shall not be enforceable.

8 “(b) EXCEPTIONS.—(1) Subsection (a) shall not
9 apply with respect to any dispute if, after such dispute
10 arises, the parties involved knowingly and voluntarily
11 agree to submit such dispute to arbitration.

12 “(2) Subsection (a) shall not preclude the enforce-
13 ment of any of the rights or terms of a valid collective
14 bargaining agreement.

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

24 “(d) APPLICATION.—This section shall apply with re-
25 spect to all contracts and agreements between an employer

1 and an employee in force before, on, or after the date of
 2 the enactment of this section.”.

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

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

6 (c) APPLICATION.—The provisions of section 4328 of
 7 title 38, United States Code, as added by subsection (a),
 8 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 pending on or after the date of
 15 the enactment of this Act.

16 **SEC. 4. ENHANCED REMEDIES FOR ENFORCEMENT OF EM-**
 17 **PLOYMENT AND REEMPLOYMENT RIGHTS OF**
 18 **MEMBERS OF THE UNIFORMED SERVICES.**

19 (a) STATE AND PRIVATE EMPLOYERS.—Section
 20 4323(d) of title 38, United States Code, is amended—

21 (1) by redesignating paragraphs (2) and (3) as
 22 paragraphs (4) and (5), respectively;

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

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

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

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

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

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

13 “(A) for damages in the amount of—

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

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

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

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

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

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

23 “(3) In the case of a violation of this chapter by a
24 State or private employer with 25 or more employees, the
25 court shall require the employer to pay the person affected

1 punitive damages if the court determines that the employ-
 2 er’s violation of this chapter was done with malice or reck-
 3 less indifference to the rights of the person under this
 4 chapter.”.

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

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

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

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

20 “(A) for damages in the amount of—

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

24 “(ii) in a case in which wages, salary, ben-
 25 efits, or other compensation has not been de-

1 nied or lost to the person, any actual monetary
 2 losses sustained by the person as a result of the
 3 violation;

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

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

24 (e) APPLICATION.—The amendments made by this
 25 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 EMPLOYMENT AND REEMPLOY-**
 10 **MENT RIGHTS OF MEMBERS OF THE UNI-**
 11 **FORMED SERVICES.**

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

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

20 (c) APPLICATION.—The amendments made sub-
 21 sections (a) and (b) 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. 6. 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. 7. REQUIREMENT THAT FEDERAL AGENCIES PROVIDE**
 21 **NOTICE TO CONTRACTORS OF POTENTIAL**
 22 **OBLIGATIONS RELATING TO EMPLOYMENT**
 23 **AND REEMPLOYMENT RIGHTS OF MEMBERS**
 24 **OF THE UNIFORMED SERVICES.**

25 (a) CIVILIAN AGENCIES.—

1 (1) IN GENERAL.—Chapter 47 of title 41,
 2 United States Code, is amended by adding at the
 3 end the following new section:

4 **“§ 4712. Notice to contractors of potential obligations**
 5 **relating to employment and reemploy-**
 6 **ment rights of members of the uniformed**
 7 **services**

8 “Each contract for the procurement of property or
 9 services that is entered into by the head of an executive
 10 agency shall include a notice to the contractor that the
 11 contractor may have obligations under chapter 43 of title
 12 38, United States Code.”.

13 (2) CLERICAL AMENDMENT.—The table of sec-
 14 tions at the beginning of chapter 47 of such title is
 15 amended by inserting after the item relating to sec-
 16 tion 4711 the following new item:

“4712. Notice to contractors of potential obligations relating to employment and
 reemployment rights of members of the uniformed services.”.

17 (b) ARMED FORCES.—

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

1 **“§ 2336. Notice to contractors of potential obligations**
 2 **relating to employment and reemploy-**
 3 **ment rights of members of the uniformed**
 4 **services**

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

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

“2336. Notice to contractors of potential obligations relating to employment and
 reemployment rights of members of the uniformed services.”.

13 **SEC. 8. CLARIFYING THAT PROVISIONS OF SECTION 4302**
 14 **OF TITLE 38, UNITED STATES CODE, APPLY**
 15 **TO BOTH SUBSTANTIVE AND PROCEDURAL**
 16 **RIGHTS.**

17 Section 4302 of title 38, United States Code, is
 18 amended by inserting “substantive or procedural” before
 19 “right or benefit” each place it occurs.

1 **SEC. 9. COMPTROLLER GENERAL OF THE UNITED STATES**
2 **STUDY ON EFFECTIVENESS OF FEDERAL**
3 **PROGRAMS OF EDUCATION AND OUTREACH**
4 **ON EMPLOYER OBLIGATIONS REGARDING**
5 **EMPLOYMENT AND REEMPLOYMENT RIGHTS**
6 **OF MEMBERS OF THE UNIFORMED SERVICES.**

7 (a) STUDY REQUIRED.—The Comptroller General of
8 the United States shall conduct a study on the effective-
9 ness of Federal programs of education and outreach on
10 employer obligations under chapter 43 of title 38, United
11 States Code.

12 (b) CONTENTS OF STUDY.—In carrying out the study
13 required by subsection (a), the Comptroller General
14 shall—

15 (1) assess current practices and procedures of
16 Federal agencies for educating employers about their
17 obligations under chapter 43 of title 38, United
18 States Code;

19 (2) identify best practices for bringing the em-
20 ployment practices of small businesses into compli-
21 ance with such chapter;

22 (3) determine whether the Employer Support
23 for the Guard and Reserve, the Small Business Ad-
24 ministration, or other agencies could collaborate to
25 develop a program to educate employers regarding
26 their obligations under such chapter; and

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

5 (c) REPORT TO CONGRESS.—Not later than Decem-
6 ber 31, 2012, the Comptroller General shall submit to
7 Congress a report on the study conducted under sub-
8 section (a), including the following:

9 (1) The findings of the Comptroller General
10 with respect to such study.

11 (2) The recommendations of the Comptroller
12 General for the improvement of education and out-
13 reach for employers with respect to their obligations
14 under chapter 43 of title 38, United States Code.

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