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113TH CONGRESS
2D SESSION

H. R. 5375

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 HOUSE OF REPRESENTATIVES

JULY 31, 2014

Ms. SCHWARTZ (for herself, Mr. DOYLE, Mr. CONNOLLY, Mr. CARTWRIGHT, Mr. BRADY of Pennsylvania, Mr. FATTAH, Mr. COURTNEY, and Ms. BONAMICI) introduced the following bill; which was referred to the Committee on Veterans' Affairs, and in addition to the Committees on Armed Services and Oversight and Government Reform, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

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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.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the ''Servicemembers Access to Justice Act of 2014''.

SEC. 2. WAIVER OF SOVEREIGN IMMUNITY UNDER THE ELEVENTH AMENDMENT WITH RESPECT TO ENFORCEMENT OF EMPLOYMENT AND REEMPLOYMENT RIGHTS OF MEMBERS OF THE UNIFORMED SERVICES.

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

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

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

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

(3) by inserting after subsection (h) the following new subsection:

''(i) WAIVER OF STATE SOVEREIGN IMMUNITY.—(1) A State's receipt or use of Federal financial assistance for any program or activity of a State shall constitute a waiver of sovereign immunity, under the eleventh amendment to the Constitution or otherwise, to a suit brought by—

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

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

"(C) a person seeking reemployment as an employee in that program or activity for the rights or benefits authorized the person by this chapter.

"(2) In this subsection, the term 'program or activity' has the meaning given that term in section 309 of the Age Discrimination Act of 1975 (42 U.S.C. 6107).".

(b) APPLICATION.—The amendments made by subsection (a) shall apply to—

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

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

SEC. 3. UNENFORCEABILITY OF AGREEMENTS TO ARBITRATE DISPUTES REGARDING EMPLOYMENT AND REEMPLOYMENT RIGHTS OF MEMBERS OF THE UNIFORMED SERVICES.

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

"§ 4328. Unenforceability of agreements to arbitrate disputes

''(a) PROTECTION OF EMPLOYEE RIGHTS.—Notwithstanding any other provision of law, any clause of any agreement between an employer and an employee that requires arbitration of a dispute arising under this chapter shall not be enforceable.

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

''(2) Subsection (a) shall not preclude the enforcement of any of the rights or terms of a valid collective bargaining agreement.

''(c) VALIDITY AND ENFORCEMENT.—Any issue as to whether this section applies to an arbitration clause shall be determined by Federal law. Except as otherwise provided in chapter 1 of title 9, the validity or enforceability of an agreement to arbitrate referred to in subsection (a) or (b)(1), shall be determined by a court, rather than the arbitrator, irrespective of whether the party resisting arbitration challenges the agreement to arbitrate specifically or in conjunction with other terms of the agreement.

''(d) APPLICATION.—This section shall apply with respect to all contracts and agreements between an employer

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

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

''4328. Unenforceability of agreements to arbitrate disputes.''.

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

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

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

SEC. 4. ENHANCED REMEDIES FOR ENFORCEMENT OF EMPLOYMENT AND REEMPLOYMENT RIGHTS OF MEMBERS OF THE UNIFORMED SERVICES.

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

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

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

(A) by inserting ''or damages'' after ''compensation'' each place it appears;

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

(C) by striking ''subparagraph (B) or (C) of paragraph (1)'' the second place it appears and inserting ''paragraph (1) or (3)''; and

(3) by striking the subsection enumerator and heading and paragraph (1) and inserting the following:

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

''(A) for damages in the amount of—

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

''(ii) in a case in which wages, salary, benefits, or other compensation have not been denied or lost to the person, any actual monetary losses sustained by the person as a result of the violation;

''(B) the interest on the amount described in subparagraph (A) calculated at the prevailing interest rates over the period of time for which the damages are due; and

"(C) an additional amount as liquidated damages equal to the sum of the amount described in subparagraph (A) and the interest described in subparagraph (B), or $10,000, whichever is greater except that, if the employer proves to the satisfaction of the court that the act or omission giving rise to the person's action was in good faith and that the employer had reasonable grounds for believing the act or omission was not a violation of the provisions of this chapter, the court may award, in its discretion, no liquidated damages or award any amount of liquidated damages not to exceed 100 percent of the compensation or damages awarded under subparagraph (A) and the interest described in subparagraph (B).

"(2) In any action under this section, the court may require the employer to comply with the provisions of this chapter.".

(b) PUNITIVE DAMAGES.—Section 4323(d) of such title is further amended by inserting after paragraph (2) (as inserted by subsection (a)(3) of this section) the following new paragraph:

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

punitive damages if the court determines that the employer's violation of this chapter was done with malice or reckless indifference to the rights of the person under this chapter.''.

(c) RIGHT TO JURY TRIAL.—Section 4323(d) of such title is further amended by adding at the end the following:

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

(d) FEDERAL GOVERNMENT EMPLOYERS.—Paragraph (2) of section 4324(c) of such title is amended to read as follows:

''(2) If the Board determines that a Federal executive agency or the Office of Personnel Management has violated the provisions of this chapter relating to the employment or reemployment of a person by the agency, the Board shall enter an order requiring the agency or Office to comply with such provisions and to compensate such person—

''(A) for damages in the amount of—

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

''(ii) in a case in which wages, salary, benefits, or other compensation has not been de-

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

''(B) the interest on the amount described in subparagraph (A) calculated at the prevailing interest rates over the period of time for which the damages are due; and

''(C) an additional amount as liquidated damages equal to the sum of the amount described in subparagraph (A) and the interest described in subparagraph (B), or $10,000, whichever is greater; except that, if the Federal executive agency or the Office of Personnel Management proves to the satisfaction of the Board that the act or omission giving rise to such person's complaint was in good faith and that the agency or Office had reasonable grounds for believing that the act or omission was not a violation of the provisions of this chapter, the Board may award, in the discretion of the Board, no liquidated damages or award any amount of liquidated damages not to exceed 100 percent of the compensation or damages awarded under subparagraph (A) and the interest described in subparagraph (B).''.

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

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

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

SEC. 5. REQUIRED AWARD OF ATTORNEY FEES IN ACTIONS TO ENFORCE EMPLOYMENT AND REEMPLOYMENT RIGHTS OF MEMBERS OF THE UNIFORMED SERVICES.

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

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

(c) APPLICATION.—The amendments made by subsections (a) and (b) shall apply to—

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

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

SEC. 6. REQUIRING EQUITABLE RELIEF WHEN APPROPRIATE.

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

(1) by striking ''The court shall use,'' and inserting ''(1) The court shall use,''; and

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

''(2) Notwithstanding rule 65 of the Federal Rules of Civil Procedure or any other provision of law, for purposes of determining whether to issue an injunction or restraining order pursuant to paragraph (1)—

''(A) an employer's denial of reemployment or retention in employment shall constitute irreparable harm to a person who is denied reemployment or retention in employment if an injunction to reinstate such person is not issued, and such person shall be considered to have no adequate remedy at law;

''(B) if the court balances the hardships between the parties, there shall be a rebuttable presumption that the balance of harm to a person who is denied reemployment or retention in employment

if an injunction to reinstate such person is not issued outweighs the harm to such person's employer or former employer if an injunction is issued to reinstate such person; and

"(C) if the court considers the public interest or public policy, there shall be a rebuttable presumption that the issuance of an injunction to reinstate a person who is denied reemployment or retention in employment is in the public interest and advances public policy.".

(b) APPLICATION.—The amendments made by subsection (a) shall apply to—

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

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

SEC. 7. REQUIREMENT THAT FEDERAL AGENCIES PROVIDE NOTICE TO CONTRACTORS OF POTENTIAL OBLIGATIONS RELATING TO EMPLOYMENT AND REEMPLOYMENT RIGHTS OF MEMBERS OF THE UNIFORMED SERVICES.

(a) CIVILIAN AGENCIES.—

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

"§ 4713. Notice to contractors of potential obligations relating to employment and reemployment rights of members of the uniformed services

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

(2) CLERICAL AMENDMENT.—The table of sections at the beginning of chapter 47 of such title is amended by inserting after the item relating to section 4712 the following new item:

''4713. Notice to contractors of potential obligations relating to employment and reemployment rights of members of the uniformed services.''.

(b) ARMED FORCES.—

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

"§ 2338. Notice to contractors of potential obligations relating to employment and reemployment rights of members of the uniformed services

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

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

''2338. Notice to contractors of potential obligations relating to employment and reemployment rights of members of the uniformed services.''.

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

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

SEC. 9. COMPTROLLER GENERAL OF THE UNITED STATES STUDY ON EFFECTIVENESS OF FEDERAL PROGRAMS OF EDUCATION AND OUTREACH ON EMPLOYER OBLIGATIONS REGARDING EMPLOYMENT AND REEMPLOYMENT RIGHTS OF MEMBERS OF THE UNIFORMED SERVICES.

(a) STUDY REQUIRED.—The Comptroller General of the United States shall conduct a study on the effectiveness of Federal programs of education and outreach on employer obligations under chapter 43 of title 38, United States Code.

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

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

(2) identify best practices for bringing the employment practices of small businesses into compliance with such chapter;

(3) determine whether the Employer Support for the Guard and Reserve, the Small Business Administration, or other agencies could collaborate to develop a program to educate employers regarding their obligations under such chapter; and

(4) determine the effect on recruitment and retention in the National Guard and Reserves of the failure of employers to meet their reemployment obligations under such chapter.

(c) REPORT TO CONGRESS.—Not later than December 31, 2015, the Comptroller General shall submit to Congress a report on the study conducted under subsection (a), including the following:

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

(2) The recommendations of the Comptroller General for the improvement of education and outreach for employers with respect to their obligations under chapter 43 of title 38, United States Code.

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