

110TH CONGRESS  
2D SESSION

# S. 3432

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.

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## IN THE SENATE OF THE UNITED STATES

AUGUST 1, 2008

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

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## 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 2008”.

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 (j) as sub-  
13 section (k); and

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

16 “(j) 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 4326  
 20 the following new section:

21 **“§ 4327. 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:

“4327. Unenforceability of agreements to arbitrate disputes.”.

4 (c) APPLICATION.—The provisions of section 4327 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.—Section  
9 4324(c)(2) of such title is amended to read as follows:

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

17 “(A) for damages in the amount of—

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

21 “(ii) in a case in which wages, salary, ben-  
22 efits, or other compensation has not been de-  
23 nied or lost to the person, any actual monetary  
24 losses sustained by the person as a result of the  
25 violation;

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

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

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

23               (1) any failure to comply with a provision of or  
24               any violation of chapter 43 of title 38, United States

1 Code, that occurs before, on, or after the date of the  
2 enactment of this Act; and

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

6 **SEC. 5. REQUIRED AWARD OF ATTORNEY FEES IN ACTIONS**  
7 **TO ENFORCE PROVISIONS OF USERRA.**

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

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

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

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

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

1 **SEC. 6. CLARIFYING THE DEFINITION OF “SUCCESSOR IN**  
2 **INTEREST”.**

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

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

11 “(I) Substantial continuity of the same  
12 business operations.

13 “(II) Use of the same plant.

14 “(III) Continuity of work force.

15 “(IV) Similarity of jobs and working condi-  
16 tions.

17 “(V) Similarity of supervisory personnel.

18 “(VI) Similarity in machinery, equipment,  
19 and production methods.

20 “(VII) Similarity of products or services.

21 “(ii) The successor’s lack of notice or awareness  
22 of a potential or pending claim under this chapter  
23 at the time of a merger, acquisition, or other form  
24 of succession shall not be considered when applying  
25 the multi-factor test under clause (i).”.

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

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

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

10 **SEC. 7. CLARIFICATION THAT USERRA HAS NO STATUTE OF**  
11 **LIMITATIONS.**

12 (a) IN GENERAL.—Section 4323(i) of title 38, United  
13 States Code, is amended to read as follows:

14 “(i) ABSENCE OF A STATUTE OF LIMITATIONS PE-  
15 RIOD.—No Federal, State, or any other statute of limita-  
16 tions shall apply to any proceeding under this chapter, in-  
17 cluding the statute of limitations in section 1658(a) of title  
18 28.”.

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

21 (1) any failure to comply with a provision of or  
22 any violation of chapter 43 of title 38, United States  
23 Code, that occurs before, on, or after the date of the  
24 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. CLARIFYING THAT USERRA PROHIBITS WAGE DIS-**  
5                                   **CRIMINATION AGAINST MEMBERS OF THE**  
6                                   **ARMED FORCES.**

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

11          (b) APPLICATION.—The amendment 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. REQUIRING EQUITABLE RELIEF WHEN APPRO-**  
21                                   **PRIATE.**

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

1           (1) by striking “The court may use” and insert-  
2           ing “(1) The court shall use, in any case in which  
3           the court determines it is appropriate,”; and

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

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

10           “(A) an employer’s denial of reemployment or  
11           retention in employment shall constitute irreparable  
12           harm to a person who is denied reemployment or re-  
13           tention in employment if an injunction to reinstate  
14           such person is not issued, and such person shall be  
15           considered to have no adequate remedy at law;

16           “(B) if the court balances the hardships be-  
17           tween the parties, there shall be a rebuttable pre-  
18           sumption that the balance of harm to a person who  
19           is denied reemployment or retention in employment  
20           if an injunction to reinstate such person is not  
21           issued outweighs the harm to such person’s employer  
22           or former employer if an injunction is issued to rein-  
23           state such person; and

24           “(C) if the court considers the public interest or  
25           public policy, there shall be a rebuttable presumption

1 that the issuance of an injunction to reinstate a per-  
2 son who is denied reemployment or retention in em-  
3 ployment is in the public interest and advances pub-  
4 lic policy.”.

5 (b) APPLICATION.—The amendments made by sub-  
6 section (a) 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.

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