

July 2007

MILITARY PERSONNEL

Improved Quality Controls Needed over Servicemembers' Employment Rights Claims at DOL





Highlights of [GAO-07-907](#), a report to congressional committees

Why GAO Did This Study

The Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) protects the employment and reemployment rights of federal and nonfederal employees who leave their employment to perform military service. The Department of Labor (DOL) investigates and attempts to resolve claims filed by servicemembers, and if not successful, DOL is to inform the federal claimants that they may request to have their claims referred to the Office of Special Counsel (OSC). Under a demonstration project, from February 8, 2005, through September 30, 2007, OSC is authorized to receive and investigate certain USERRA claims, with DOL continuing its investigative role for others. As required by Pub. L. No. 108-454, this report describes the (1) processes, (2) outcomes, and (3) major changes during the demonstration project. GAO selected a random sample of cases from DOL's and OSC's databases and traced data for selected elements from the electronic files to source case files.

What GAO Recommends

GAO recommends that the Secretary of Labor develop an internal review mechanism for all unresolved claims before they are closed and claimants are notified and establish internal controls to ensure the accuracy of data entered into DOL's database. DOL agreed with our recommendations.

www.gao.gov/cgi-bin/getrpt?GAO-07-907. To view the full product, including the scope and methodology, click on the link above. For more information, contact George H. Stalcup on (202) 512-9490 or at stalcup@gao.gov.

MILITARY PERSONNEL

Improved Quality Controls Needed over Servicemembers' Employment Rights Claims at DOL

What GAO Found

Since the start of the demonstration project on February 8, 2005, both DOL and OSC have had policies and procedures for receiving, investigating, and resolving USERRA claims against federal executive branch employers, with DOL investigating the ones from claimants with even-number social security numbers, and OSC those from claimants with odd social security numbers as well as those with related allegations of prohibited personnel practices. Under the demonstration project, DOL's process for investigating USERRA claims remains unchanged: DOL uses a nationwide network of over a hundred investigators from offices in every state. Under the demonstration project, OSC has instituted a centralized approach for investigating USERRA claims, with a single office of about half a dozen investigators and attorneys in its Washington, D.C., headquarters.

Data for reporting outcomes were not reliable at either agency. At DOL, inaccurate data were included in the agency's annual report to Congress, which could adversely affect Congress's ability to assess how well federal USERRA claims are processed and whether changes are needed in the future. GAO also found that DOL did not consistently notify claimants concerning the right to have their claims referred to OSC for further investigation or to bring their claims directly to the Merit Systems Protection Board. Citing GAO's preliminary findings, in December 2006, DOL officials required each region to revise its guidance regarding notifying claimants in the closure letter of their rights. GAO found that for the period of its review—February 8, 2005, through September 30, 2006—DOL received a total of 166 unique claims, although 202 claims were recorded as opened in DOL's database. Duplicate, reopened, and transferred claims accounted for most of this difference. During a review of a random sample of DOL's case files to assess the reliability of DOL's data, GAO found the closed dates in DOL's database, which it uses to report to Congress on the number and percentage of claims it closes within 90, 120, and 365 days, were not reliable. From the start of the demonstration project, through September 30, 2006, OSC received 269 claims and took an average of 115 days to process these claims. The closed dates in OSC's case tracking system were sufficiently reliable.

Three primary changes have occurred in federal employees' USERRA claims' processing since the demonstration project. First, two agencies now investigate claims from federal employees using two different models for investigations. Second, both DOL and OSC officials said cooperation and communication between the two agencies on claims has increased under the demonstration project, in turn raising awareness of issues related to servicemembers who are federal employees. Finally, technological enhancements have occurred, including an enhancement to DOL's database enabling the electronic transfer of information between agencies, which began in October 2006.

Contents

| | | |
|---------------------|---|-----------|
| Letter | | 1 |
| | Results in Brief | 3 |
| | Background | 6 |
| | DOL and OSC Both Had Policies and Procedures for Processing USERRA Claims during the Demonstration Project | 9 |
| | Under the Demonstration Project, Data Limitations at Both DOL and OSC and Inconsistent Notifications at DOL | 17 |
| | Three Primary Changes Have Occurred since the Demonstration Project Began | 24 |
| | Conclusion | 27 |
| | Recommendations for Executive Action | 28 |
| | Agency Comments and Our Evaluation | 28 |
| Appendix I | Objectives, Scope, and Methodology | 32 |
| | Objective 1: Describe DOL's and OSC's Policies and Procedures for Processing Federal Employees' USERRA Claims under the Demonstration Project | 32 |
| | Objective 2: Identify the Number of Federal Employees' USERRA Claims that DOL and OSC Received and the Outcomes of These Claims, Including Average Processing Times | 33 |
| | Objective 3: Identify Changes to Federal Employees' USERRA Claims' Processing since the Demonstration Project Began | 38 |
| Appendix II | Comments from the Department of Labor | 40 |
| Appendix III | Comments from the Office of Special Counsel | 42 |
| Appendix IV | GAO Contact and Staff Acknowledgments | 49 |
| Tables | | |
| | Table 1: Notifications of Rights in VETS's Closure Letters of Unresolved Claims from Sample of Case Files Reviewed | 20 |
| | Table 2: OSC Investigations Opened and Closed by Type of Claims from February 8, 2005, through September 30, 2006 | 22 |
| | Table 3: OSC Average Processing Time by Type of Claim from February 8, 2005, through September 30, 2006 | 22 |

| | |
|--|----|
| Table 4: Characteristics of DOL's and OSC's USERRA Claims' Processing Models | 24 |
|--|----|

Figure

| | |
|---|---|
| Figure 1: USERRA Claims' Processing under the Demonstration Project | 8 |
|---|---|

Abbreviations

| | |
|--------|---|
| DOL | Department of Labor |
| MSPB | Merit Systems Protection Board |
| OSC | Office of Special Counsel |
| USERRA | Uniformed Services Employment and Reemployment Rights Act of 1994 |
| VBIA | Veterans Benefits Improvement Act of 2004 |
| VETS | Veterans' Employment and Training Service |

This is a work of the U.S. government and is not subject to copyright protection in the United States. It may be reproduced and distributed in its entirety without further permission from GAO. However, because this work may contain copyrighted images or other material, permission from the copyright holder may be necessary if you wish to reproduce this material separately.



United States Government Accountability Office
Washington, DC 20548

July 20, 2007

Congressional Committees

The Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) protects the employment and reemployment rights of federal and nonfederal employees who leave their employment to perform military or other uniformed service.¹ USERRA also prohibits discrimination in employment against individuals because of their uniformed service, obligation to perform service, or membership or application for membership in the uniformed services. USERRA further prohibits employer retaliation against any individual who engages in protected activity under USERRA, regardless of whether the individual has performed service in the uniformed services.² USERRA applies to a wide range of employers, including federal, state, and local governments as well as private sector firms. This report focuses on servicemembers who are employees of, prior employees of, and applicants to federal executive branch agencies.³

Under USERRA, an employee of or applicant to a federal executive branch agency who believes that his or her USERRA rights have been violated may file a claim with the Department of Labor's (DOL) Veterans' Employment and Training Service (VETS), which investigates and attempts to resolve the claim. If DOL's VETS cannot resolve the claim, DOL is to inform claimants that they may request to have their claims referred to the Office of Special Counsel (OSC),⁴ an independent investigative and prosecutorial agency with the primary mission of

¹Pub. L. No. 103-353, 108 Stat. 3149, 38 U.S.C. §§ 4301-4334.

²Acting to exercise or enforce a USERRA right, testifying in any enforcement proceeding, or assisting in an investigation is protected activity under USERRA.

³For purposes of this report, we are using the term servicemember, but as discussed earlier, individuals who are not servicemembers (or who have merely applied to become a servicemember) may also be protected by USERRA's discrimination and retaliation prohibitions.

⁴DOL is also to inform claimants that they may file a complaint directly with the Merit Systems Protection Board. If DOL's VETS cannot resolve nonfederal USERRA claims, DOL is to inform claimants that they may request to have their claims referred to the U.S. Attorney General. The Department of Justice prosecutes nonfederal sector USERRA claims.

protecting the employment rights of federal employees and applicants for federal employment. OSC determines whether the evidence of referred claims is sufficient to resolve the claimants' USERRA allegations and, if so, seeks voluntary corrective action from the involved agency or initiates legal action against the agency before the Merit Systems Protection Board (MSPB).⁵

Under a demonstration project established by the Veterans Benefits Improvement Act of 2004 (VBIA),⁶ from February 8, 2005, through September 30, 2007, OSC is granted authorization to receive and investigate claims and seek corrective action for individuals whose social security numbers end in odd numbers. Claims by individuals whose social security numbers end in even numbers are to be investigated by VETS, with the referral process to OSC for these claims remaining unchanged. Under the demonstration project, OSC is also authorized to handle any USERRA claim brought by the USERRA claimant where OSC has authority to handle a related prohibited personnel practice claim.⁷ In addition, VBIA reinstated the requirement that the Secretary of Labor in consultation with the U.S. Attorney General and the Special Counsel prepare and transmit a USERRA annual report to Congress on, among other matters, the number of USERRA claims reviewed by DOL along with the number of claims referred to the Department of Justice or OSC. The annual report is also to address the nature and status of each claim and to state "whether there are any apparent patterns of violation."

Furthermore, VBIA mandates that the Comptroller General of the United States conduct periodic evaluations of the demonstration project and submit to Congress a report on these evaluations. We briefed you on our overall findings concerning the demonstration project on March 28, 2007, and this report provides additional details. Our objectives for the report were to (1) describe DOL's and OSC's policies and procedures for processing federal employees' USERRA claims under the demonstration project; (2) identify the number of federal employees' USERRA claims that DOL and OSC received during the demonstration project and the outcomes of these claims, including average processing times; and (3)

⁵An independent, quasi-judicial agency in the executive branch, MSPB serves as the guardian of federal merit principles.

⁶See section 204 of Pub. L. No. 108-454, 118 Stat. 3598, 3606-3608, 38 U.S.C. § 4301 note.

⁷There are 12 prohibited personnel practices including discrimination, retaliation, or unauthorized preference or improper advantage. 5 U.S.C. § 2302.

identify changes to federal employees' USERRA claims' processing since the demonstration project began.

To describe DOL's and OSC's policies and procedures for processing federal employees' USERRA claims under the demonstration project, we reviewed relevant documentation and interviewed knowledgeable DOL and OSC officials. To identify the number of federal employees' USERRA claims that DOL and OSC received and the outcomes of these claims, including average processing time, we reviewed and analyzed data downloaded from VETS's database, the USERRA Information Management System,⁸ and OSC's case tracking system, OSC 2000.⁹ This report covers the period from the start of the demonstration project on February 8, 2005, through fiscal year 2006. We also assessed the reliability of selected data elements on federal employee claims from VETS's database and OSC's case tracking system by tracing a statistically random sample of data to case files from the start of the demonstration project on February 8, 2005, through July 21, 2006. Unless otherwise stated in the report, the data were sufficiently reliable for the purposes of our review. To identify the extent to which changes have occurred in federal employee USERRA claims' processing since the demonstration project began, we reviewed USERRA and VBIA, how USERRA claims of federal executive branch employees and applicants for employment were processed before the demonstration project, and how such claims were being processed under the demonstration project by DOL and OSC. We also interviewed knowledgeable DOL and OSC officials. We conducted our review in Washington, D.C., from May 2006 through May 2007 in accordance with generally accepted government auditing standards.

Results in Brief

Since the start of the demonstration project on February 8, 2005, both DOL's VETS and OSC have had policies and procedures for receiving, investigating, and resolving USERRA claims against federal executive branch employers. VETS continues to conduct its investigation of USERRA claims using a nationwide network of over a hundred

⁸The USERRA Information Management System is a Web-based case management and reporting tool implemented by VETS in October 1996 that allows for automated collection and investigator input of information regarding USERRA claims and generation of reports for analysis of USERRA operations and outcomes.

⁹OSC 2000 was implemented by OSC in July 1999 and was designed to capture and record data from the initial filing of a claim until the closure and archiving of the case file and allows for queries that create a number of management and workload reports.

investigators from offices in every state. Under the demonstration project, OSC has instituted a centralized approach for investigating USERRA claims, with a single office of about half a dozen investigators and attorneys in its Washington, D.C., headquarters.

Data for reporting outcomes were not sufficiently reliable at either agency. At DOL, inaccurate data were included in the agency's annual report to Congress, which could adversely affect Congress's ability to assess how well federal USERRA claims are processed and whether changes are needed in the future. Concerning the number of federal employees' USERRA claims received for investigation, we found that for February 8, 2005, through September 30, 2006, VETS received a total of 166 unique claims, although 202 claims were recorded as opened in VETS's database. Duplicate, reopened, and transferred claims accounted for most of this difference. Additionally, during our review of a random sample of VETS's case files to assess the reliability of VETS's data, we found the dates recorded for case closure in VETS's database were not reliable; that is, VETS's database did not reflect the dates on the closure letters, which VETS uses to indicate completion of the investigation, in over 40 percent of sampled claims. VETS uses the date recorded for case closure in its database to report to Congress on the number and percentage of claims it closes within 90, 120, and 365 days. After identifying the correct dates from the sample case files reviewed, we estimated that the average processing time for the period of the sample ranged from 53 to 86 days. We also found that the closed code, which VETS uses to describe the outcomes of USERRA claims (i.e., claim granted, claim settled, no merit, withdrawn) was not sufficiently reliable for reporting specific outcomes of claims. From the start of the demonstration project through September 30, 2006, OSC received 269 claims and took an average of 115 days to process these claims. We found the closed dates in OSC's case tracking system to be sufficiently reliable; however, the corrective action data element, which OSC uses to describe the outcomes of USERRA claims, was not sufficiently reliable for reporting specific outcomes of claims.

During our review of the sample of case files, we found that VETS did not consistently notify claimants in writing of their right to have their claims referred to OSC or to bring their claims directly to MSPB if the case was not resolved by DOL. This may be due in part to the lack of consistent instructions to investigators in the VETS's *USERRA Operations Manual* as to when a claimant is to be notified of his or her right of referral and the content of that notification. For example, one chapter instructs investigators to notify the claimants of their right to referral if there is no voluntary compliance by the employer, regardless of whether the claim

has merit, but another chapter instructs investigators to advise claimants of their right only if the claimant does not concur with VETS's determination. Lack of an internal process to routinely review investigators' determinations, especially of unresolved claims, before claimants are notified may also have contributed to the inconsistent notification to servicemembers of their rights. Citing our preliminary findings, DOL officials required each region to revise its guidance concerning the notification of rights. This is a positive step. However, uniform guidance will continue to be lacking until VETS completes revisions to its *USERRA Operations Manual*, which is expected in October 2007, and reviews of investigators' determinations are not done on unresolved claims on a consistent basis.

Three primary changes have occurred in federal employees' USERRA claims' processing since the demonstration project. First, two agencies now investigate USERRA claims from federal employees using two different models for conducting investigations: (1) a nationwide approach by VETS that gives much authority to individual investigators in resolving and closing claims without review or approval of determinations on claims and (2) a centralized approach by OSC that has a single individual reviewing and approving determinations on all claims. Second, both DOL and OSC officials have said that cooperation and communication between the two agencies concerning USERRA claims has increased under the demonstration project, and that this in turn has raised awareness of the issues related to servicemembers who are federal employees. Third and finally, technological enhancements have occurred, primarily on the part of VETS since the demonstration project. For example, beginning with fiscal year 2007, an enhancement to VETS's database now enables the electronic transfer of information between agencies. In addition, VETS implemented electronic filing, which eliminates the need for initial data entry by staff and avoids the introduction of error when staff manually enter data.

We recommend that the Secretary of Labor direct the Assistant Secretary for Veterans' Employment and Training to (1) establish uniform procedures and ensure that investigators are trained regarding the notification of claimants on their right to refer claims to OSC or bring them directly to MSPB, (2) develop an internal review mechanism for all unresolved claims' determinations before claimants are notified of determinations and claims are closed, and (3) establish a plan for implementing internal controls to ensure the accuracy of data entered into VETS's database. We provided the Secretary of Labor and the Special Counsel with a draft of this report for their review and comment. DOL

agreed with our recommendations and in written comments discussed actions that it is taking to address the recommendations. A copy of DOL's written comments are in appendix II, and a copy of OSC's written comments are in appendix III.

Background

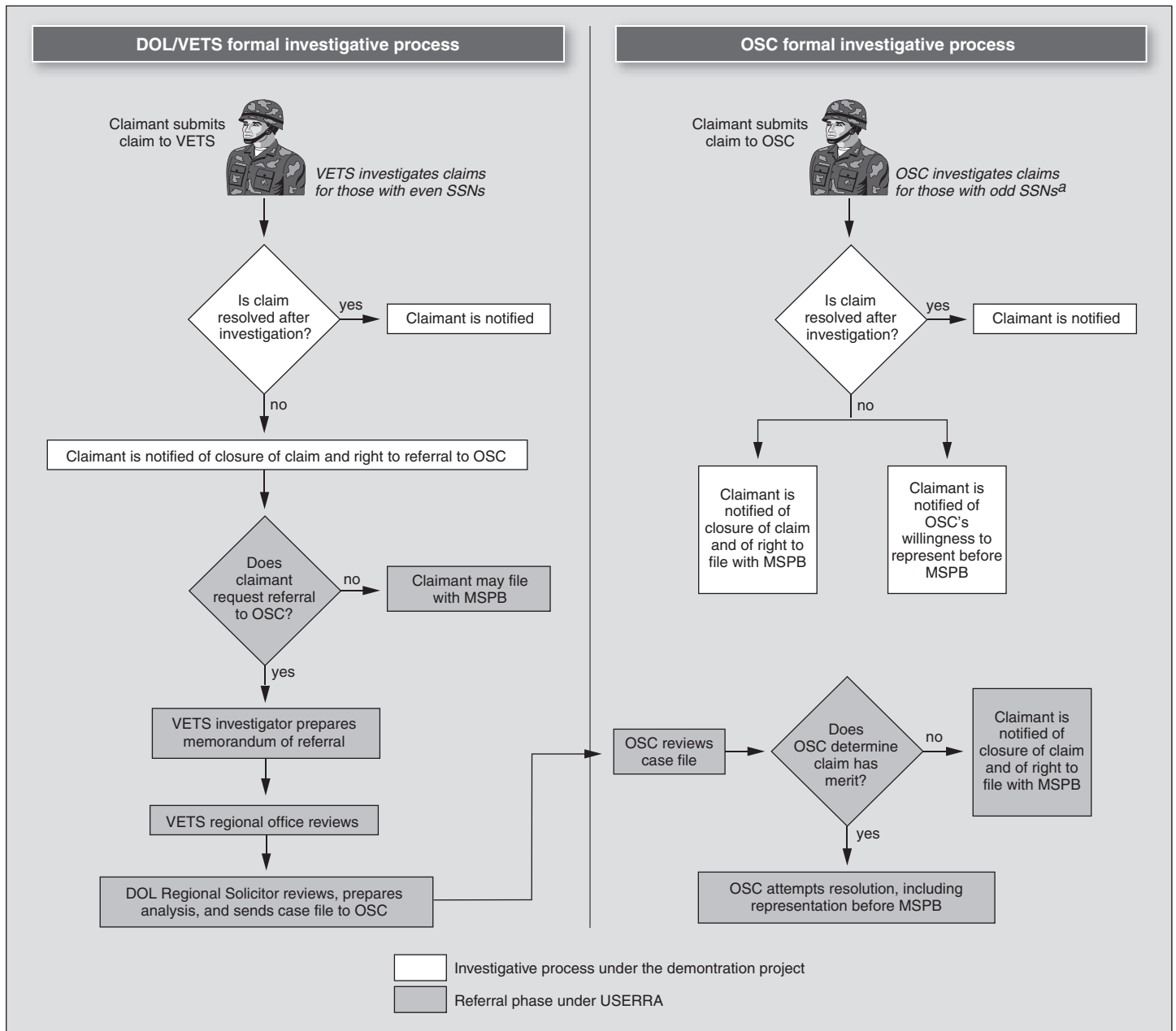
Before the demonstration project, VETS was authorized to investigate all USERRA claims filed against federal executive branch agencies as well as claims against state and local governments and private sector employers. Under the demonstration project, VETS is authorized to investigate claims filed against federal executive agencies by servicemembers with social security numbers ending in even numbers; its role in handling other nonfederal USERRA claims remains unchanged. In addition, under the demonstration project, OSC is authorized to investigate and seek corrective action for USERRA claims against federal executive agencies from servicemembers whose social security numbers end in odd numbers. Also, under the demonstration project, OSC is authorized to handle any USERRA claim filed against federal executive branch agencies where the claimant also brings a related prohibited personnel practice claim—that is, a “mixed claim.”

When a claimant with a social security number that ends in an odd digit submits a claim to VETS, VETS sends the claim information to OSC either electronically or via facsimile, depending on whether the claim was filed electronically or in hard copy. VETS also forwards OSC the claim information on all mixed claims. Similarly, when a claimant with a social security number that ends in an even digit submits a claim to OSC, OSC sends an e-mail notification and the file to VETS headquarters and informs the claimant of the transfer of the claim to VETS.

OSC's responsibility under USERRA for conducting independent reviews of certain claims after they are investigated by VETS remained unchanged during the demonstration project. For those claims VETS investigates and is unsuccessful in resolving, a claimant employed by a federal executive agency may request to have his or her USERRA claim referred to OSC. Before sending the referred claim to OSC, VETS prepares a memorandum of referral, which it sends with the investigative file to a VETS regional office for review; the regional office conducts a review and sends the file to a DOL regional Office of the Solicitor, which prepares a legal analysis of the claim and then refers the claim to OSC. OSC reviews the case file, and if satisfied that the evidence is sufficient to resolve the claimant's allegations and that the claimant is entitled to corrective action, OSC begins negotiations with the claimant's federal executive branch employer.

According to OSC, if an agreement for full relief via voluntary settlement by the employer cannot be reached, OSC may represent the servicemember before MSPB. If MSPB rules against the servicemember, OSC may appeal the decision to the U.S. Court of Appeals for the Federal Circuit. In instances where OSC finds that claims do not have merit, it informs servicemembers of its decision not to represent them and that they have the right to take their claims to MSPB without OSC representation. Figure 1 depicts USERRA claims' processing under the demonstration project.

Figure 1: USERRA Claims' Processing under the Demonstration Project



Sources: GAO (data), Art Explosion (images).

Note: VBIA did not change VETS's formal investigative process or the referral phase under the demonstration project.

^aOSC is also authorized to handle any USERRA claim where OSC has authority to handle a related claim—that is, one alleging a related prohibited personnel practice—brought by the USERRA claimant.

In October 2005, we issued a report that reviewed the extent to which the four USERRA coordinating agencies—DOL, OSC, and the Departments of Defense and Justice—(1) had data that indicate the level of compliance with USERRA, (2) conducted educational outreach, and (3) addressed servicemember complaints.¹⁰ In February 2007, we issued a report that assessed the status of the Department of Defense’s effort to capture reservists’ employer data, the four USERRA coordinating agencies’ processes to track and address reservists’ USERRA claims, and the agencies’ efforts to track reservists’ USERRA claims related to disabilities incurred while on active duty.¹¹

DOL and OSC Both Had Policies and Procedures for Processing USERRA Claims during the Demonstration Project

Within their different organizational structures, both DOL and OSC had policies and procedures for receiving, investigating, and resolving claims and, for DOL, referring claims to OSC.

Organizational Structure

DOL’s responsibility concerning servicemembers’ claims for USERRA rights and benefits is carried out primarily through the efforts of VETS, which is led by an assistant secretary supported by staff in a national office, six regions, and offices in every state. A VETS official said that in fiscal year 2006, of 189 VETS investigators authorized around the country to conduct USERRA investigations, 115 were assigned as primary investigators on USERRA claims during fiscal year 2006. The remaining 74 investigators include regional administrators and management who were

¹⁰GAO, *Military Personnel: Federal Management of Servicemember Employment Rights Can Be Further Improved*, [GAO-06-60](#) (Washington, D.C.: Oct. 19, 2005).

¹¹GAO, *Military Personnel: Additional Actions Needed to Improve Oversight of Reserve Employment Issues*, [GAO-07-259](#) (Washington, D.C.: Feb. 8, 2007).

authorized to investigate USERRA claims but were not assigned to any. VETS investigators also have responsibilities concerning a federal law requiring that preference be given to veterans in federal hiring and retention during reductions in force.¹² VETS investigators are required to complete three courses: one on the basics of USERRA law, one on advanced investigative techniques, and one on veterans' preference issues, which includes a section on prohibited personnel practices. In addition, in fiscal year 2006, VETS designated 7 senior investigators who are to conduct investigations, assist investigators, and review the work of investigators in their six respective regions and the national office.

To ensure consistency and understanding of relevant legal issues between offices and organizations, an official from DOL's Office of the Solicitor said that the Office of the Solicitor conducts a monthly conference call with the regional Solicitors' Offices in which officials from OSC and the Department of Justice take part. According to the senior investigator from VETS's national office, the senior investigators also conduct a monthly conference call and hold quarterly meetings in one of the regional offices around the country and invite participation from the Office of the Solicitor, the Department of Justice, OSC, and the Department of Defense's Employer Support of the Guard and Reserve, which provides informal assistance in resolving conflicts arising from an employee's military commitment before a formal claim is filed with VETS or OSC.

Along with their USERRA investigation and mediation responsibilities, which according to VETS officials take on average about one-third of VETS investigators' time, investigators conduct briefings to educate employers (federal and nonfederal) and servicemembers (at mobilizations and demobilizations) about USERRA requirements and responsibilities. In addition, they handle service-related employment and reemployment questions that are directed to their offices. According to VETS officials, after VETS provides technical assistance, including education and outreach briefings as well as informal requests for information, to servicemembers informally, many servicemembers decide not to file formal claims. In addition, after providing such assistance, VETS also encourages servicemembers to go to the Department of Defense's

¹²Under the Veterans Employment Opportunities Act of 1998, Pub. L. No. 105-339 (Oct. 31, 1998), an individual who believes his or her preference rights have been violated may file a complaint with VETS within 60 days after the alleged violation, and if VETS's efforts do not result in resolution of the complaint, the individual may appeal the matter to MSPB, 5 U.S.C. § 3330a.

Employer Support of the Guard and Reserve to try and resolve a concern through informal resolution. According to VETS's technical assistance logs, in fiscal year 2006, VETS received 7,044 telephone and 1,584 written (including e-mail) inquiries and conducted 1,088 presentations and briefings.

OSC uses a centralized approach for processing USERRA claims, under the demonstration project, in its Washington, D.C., headquarters and has a single individual (an attorney)—the USERRA Unit Chief—responsible for data entry, review, and oversight of the investigation, analysis, resolution, and prosecution of all USERRA claims. OSC established a USERRA Unit at its headquarters in January 2005 to investigate, mediate, and, as necessary, litigate USERRA and other federal employment rights claims involving servicemembers. OSC's USERRA Unit currently consists of the Unit Chief, three investigators, and three attorneys. According to OSC officials, the members of the USERRA Unit spend most of their time on USERRA claims, but they also handle other prohibited personnel practice claims brought by servicemembers and concerning servicemember issues.¹³ According to OSC, all new USERRA Unit members are provided with two structured USERRA training sessions. In addition, OSC's USERRA Unit Chief stated that he meets on a weekly basis with each unit member to discuss the status of his or her investigations and analyses, and the entire team meets on a biweekly basis (e.g., to discuss changes in the law, investigative techniques, and other issues that may affect the operations of the unit). OSC USERRA staff also have provided off-site education and outreach to federal agencies (e.g., human resources specialists and attorneys) about USERRA, including a seminar at the annual Federal Dispute Resolution Conference and a basic and advanced USERRA course at the Judge Advocate General's Legal Center and School in Charlottesville, Virginia.

Receiving Claims

A servicemember can file a formal USERRA claim against his or her civilian employer directly with DOL using a VETS Form 1010 electronically at <https://vets1010.dol.gov> or can file a signed printed copy of the claim form with the Secretary of Labor by mail or fax. Servicemembers also can file indirectly through the VETS electronic USERRA Advisor link, which contains an interactive question-and-answer component to answer

¹³For example, committing a knowing violation of veterans' preference rights is a prohibited personnel practice under 5 U.S.C. § 2302 (b)(11).

questions for potential claimants on employee and employer rights and responsibilities and provides access to the electronic VETS Form 1010. Electronic filing of claims directly enters the claimant's information into VETS's E-filing database first and then into VETS's database, records the date the claim was received, and sends an automatic response to the claimant. According to a DOL official, an individual other than the claimant may file a claim on behalf of a servicemember when the individual has a signed power of attorney that complies with the laws of the state where the claim is filed. The official said that although this happens rarely, it could happen when a servicemember is deployed; then a claim could be filed, for example, by a spouse or veteran's service organization.

Any person may contact OSC via mail, e-mail, telephone, fax, OSC's Internet hotline, or in person to seek technical assistance about USERRA or to file a claim. OSC will open an investigation once it receives information that allows OSC to determine whether it has jurisdiction over the allegation and to begin a focused inquiry—a form is not required to file a claim. The claimant may print out OSC-Form 14 and mail or fax it. The claimant also may save it as a portable document format file and e-mail it, as the form is not available for direct electronic filing.¹⁴ According to an OSC official, OSC is awaiting the outcome of the demonstration project before implementing electronic filing of USERRA claims. According to the USERRA Unit Chief, anyone may report USERRA violations on a claimant's behalf, but under the Privacy Act, the claimant must sign a consent form, which identifies three levels of confidentiality—none, partial, or complete—for OSC to open a case in its case tracking system. In addition, according to OSC, USERRA Unit investigators and attorneys may obtain the claimant's consent telephonically and document the telephone conversation, which is standard operating practice for all of OSC's investigative divisions.

Investigating Claims

Claims to be reviewed by VETS are assigned to an investigator located close to the claimant's worksite. According to a DOL official, each region has its own procedures for assigning an investigator to a claim, and regional administrators are responsible for determining the workload for their investigators. Unlike claims that are filed electronically, claims that

¹⁴OSC provides a direct electronic filing option for claims alleging prohibited personnel practices, OSC-Form 11, which has been used for filing USERRA claims.

are submitted to VETS by hard copy must be entered into VETS's database by an investigator once an investigation is begun. VETS's *USERRA Operations Manual* states that a case should be opened immediately upon receipt of a signed VETS Form 1010, unless the written information does not provide enough data to establish eligibility; in that case, the investigator should contact the claimant for clarification before opening a case.

At OSC, after entering the claim in OSC's case tracking system, the USERRA Unit Chief assigns the claim to either an investigator, or an attorney, or both, depending on the claim's complexity. The USERRA Unit Chief stated that investigators or attorneys are assigned according to their individual qualifications and caseloads. At the time a claim is opened in OSC's case tracking system, the USERRA Unit Chief sends an acknowledgement letter and consent form (if a signed form has not been received) to the claimant. When the claimant's original submission does not include enough information to begin an investigation, the USERRA Unit Chief may ask relevant questions in the acknowledgment letter. When the claimant's original submission raises issues over which OSC may not have jurisdiction, the acknowledgment letter is to inform the claimant of other potential avenues of redress.

VETS investigators and OSC investigators or attorneys are first to review the claim information. VETS's *USERRA Operations Manual* states that initially the investigator is to identify the alleged violation and the remedies available; identify the applicable section(s) of the statute; determine whether the claimant is eligible for USERRA assistance; and if not, open and close the case file and notify the claimant of the result. Although OSC's *USERRA Unit Operations Manual* states that the assigned investigator or attorney is to perform a similar initial review of the case, according to OSC, in everyday practice the USERRA Unit Chief performs this task during his initial review of the file when entering the claim into OSC's case tracking system and so informs the assigned investigator or attorney of his assessments.

Concerning evidence gathering, both agencies' general policy is to contact the employer during the investigation with the consent of the claimant. VETS requests the employer's position regarding the allegations of the claim and documentation to support that position. According to the VETS's *USERRA Operations Manual*, investigations seek evidence to determine whether the case has merit and generally include interviews and document reviews to develop evidence admissible in court. Within 30 days of starting a formal investigation, the investigator is to develop a

written investigative plan, which among other things, is to identify any evidence needed to make a factual determination; the means through which evidence is to be obtained (e.g., interview, records review); and all steps necessary to arrive at a determination of the merits of the claim. According to OSC, a typical USERRA investigation includes sending written questions to and requesting documents of the employer and, upon receipt of such evidence, interviewing relevant witnesses and subjects. Additionally, according to OSC's *USERRA Unit Operations Manual*, where appropriate, OSC also requests copies of e-mail communications between relevant witnesses.

Concerning legal analysis, an official from DOL's Office of the Solicitor said that if an investigator has a question or needs legal assistance, attorneys from the Office of the Solicitor are available for consultations at any time. The official said that attorneys from the Office of the Solicitor are only assigned when contacted by VETS investigators or when a regional office is contacted by the public. He added that an attorney from the Office of the Solicitor is assigned to every case that is a referral, which involves a legal review of a completed case file, but not to every case during an investigation. According to OSC's USERRA Unit Chief, a legal analysis is conducted during each USERRA investigation with investigators and attorneys using a collaborative team approach throughout the investigation.

Resolving Claims

According to the VETS's *USERRA Operations Manual*, a VETS investigator may hold a case resolution conference at any stage of the claims process when the investigator believes it may help the claimant and employer reach agreement, and should be attempted when the investigation has been completed and letters and telephone calls are unable to resolve the case. Once the VETS investigator completes the investigation and arrives at a determination on the claim, the investigator is to contact the claimant, discuss the findings, and send a letter to the claimant notifying him or her of VETS's determination. VETS's *USERRA Operations Manual* does not specify the date an investigator should record in VETS's database as the date the investigation is closed. VETS officials told us that the date closed in VETS's database should be the date of the closure letter, or if VETS requests additional information, the date by which the claimant needed to provide the information to avoid, for example, a determination of "no merit."

According to OSC's *USERRA Unit Operations Manual*, once the OSC investigator or attorney completes an investigation, he or she is to discuss

his or her determination with the USERRA Unit Chief. If the USERRA Unit Chief agrees that further investigation is not warranted on a case not having merit, the investigator or attorney is to submit for the USERRA Unit Chief's review and approval the summary of investigation, which includes the closure letter detailing the factual and legal basis of the determination and a rights letter providing information to the claimant about his or her right to file a USERRA appeal with MSPB. According to OSC, when a case has merit and cannot be resolved through discussions with the agency, the investigator or attorney may prepare a demand letter for the Unit Chief's review. The demand letter explains the factual and legal bases for OSC's determination and the relief being sought from the agency and is viewed by OSC as antecedent to formal litigation. OSC's *USERRA Unit Operations Manual* states that the assigned investigator or attorney is to provide the closing information to the USERRA Unit Chief to enter in OSC's case tracking system but does not specify the date to be used when closing a case. OSC's USERRA Unit Chief said that the date entered into OSC's case tracking system reflecting when the case is officially closed is the same as the date the closure letter is sent to the claimant.

Quality Assurance/Oversight

VETS has no internal process to routinely review investigators' determinations before claimants are notified of them. According to a VETS official, there is no requirement that a supervisor review investigators' determinations before notifying the claimant of the determination. Instead, VETS's policy of reviewing claims prior to notifying claimants of the determinations is limited to a random sample of 10 percent of all open claims at the regional level, to ensure that policies and procedures have been followed and all available witnesses have been interviewed, and to any claim that takes more than 90 days, to process to determine why the claim is still open. VETS officials said any claim still open after 90 days appears on a "red flag report" and is to be reviewed by the senior investigator for the region in which the claim is being processed. Other reviews take place after the claim has been closed. According to VETS officials, senior investigators are to review a random sample of 25 percent of closed claims at the regional level. Legal reviews by a DOL regional Office of the Solicitor only occur if a claimant requests to have his or her claim referred to OSC.

OSC's policy is that the USERRA Unit Chief, an attorney, provides ongoing guidance, reviews all work products in a case, and reviews and approves the letter notifying the claimant of OSC's determination and, in a case with merit, the demand letter to the agency, prior to sending the letters.

Request for Referral of Claims
from VETS to OSC

Under USERRA and the demonstration project, when VETS is unsuccessful in resolving servicemembers' claims, DOL is to notify servicemembers who filed claims against federal executive branch agencies that they may request to have their claims referred to OSC or file directly with MSPB. A VETS official estimated that about 7 percent of claimants ask for their claims to be referred to OSC or, for nonfederal servicemembers, the Department of Justice.

After Claimant Requests a
Referral, Two Additional
Reviews at DOL Take
Place

According to VETS's *USERRA Operations Manual*, after a claimant requests a referral to OSC in writing, the VETS investigator is to prepare a report of investigation called the memorandum of referral, which provides a description of the case and supporting documentation. This triggers two additional sequential reviews at DOL. The memorandum and the case file are then sent to a VETS regional office, which is to review the memorandum of referral to ensure that the investigation is thorough and that the documentation in the file is accurate and sufficient. According to VETS's *USERRA Operations Manual*, if the regional office review finds the investigation is incomplete, it is to return the file to the VETS investigator and request additional investigation on specific points. When the regional office is satisfied as to the scope and quality of the investigation, the regional office is to prepare a memorandum and forward it and the case file for review by a DOL regional Office of the Solicitor to assess the claim's legal basis and prepare a separate analysis before sending the file to OSC. A VETS regional office and a DOL regional Office of the Solicitor separately make recommendations on the merits of the claim.

Even if DOL finds that a claim has no merit, DOL is required by USERRA to send a federal sector claim to OSC if the claimant requested a referral. According to an official from the Office of the Solicitor, this office's review is not required by law or regulation, but the practice is established through memorandums of understanding with OSC and, for nonfederal claims, the Department of Justice. The official said that both agencies have indicated that they find the practice useful. He added that if OSC did not find the analyses to be valuable, the memorandum of understanding could be renegotiated so as to revise or discontinue the existing process. According to OSC's USERRA Unit Chief, OSC reviews the Office of the Solicitor's letter of referral, which OSC finds useful for providing a summary of a case, but does not rely on the Office of the Solicitor's legal analysis. Instead, OSC does an independent legal review of the case as required by USERRA to determine whether it is reasonably satisfied that the claimant is entitled to the rights and benefits sought.

Under the Demonstration Project, Data Limitations at Both DOL and OSC and Inconsistent Notifications at DOL

We found data limitations at both agencies that made claim outcome data unreliable. At DOL, data limitations affected DOL's annual report to Congress. We also found that DOL did not consistently notify claimants concerning the right to have their claims referred to OSC for further investigation or to bring their claims directly to MSPB if DOL did not resolve their claims.

VETS's Data Limitations Affect the Determination of the Number of Claims Processed, Outcomes, and Average Processing Time

Under VBIA, DOL is to prepare an annual report to Congress to include, among other matters, the number of claims reviewed, the number of cases referred to the U.S. Attorney General or OSC, and the nature (type) and status of each case. Specifically, VETS provides information on the number and percentage of claims opened by type of employer, issues raised—such as discrimination or refusal to reinstate—outcome, and total time to resolve.

The number of claims shown in VETS's database exceeded the number of unique claims VETS processed. Data from VETS's database showed that from the start of the demonstration project through September 30, 2006, DOL received 202 claims.¹⁵ We found, however, that of these 202 claims, VETS investigated a total of 166 unique claims during this time. The difference of 36 claims was a result of

- reopened claims for the same claimant being recorded as separate claims,
- duplicate filings (i.e., filed by the same claimant within 3 days and then closed),
- claims transferred to OSC after being opened in VETS's database (i.e., those with odd social security numbers and allegations of prohibited personnel practices),

¹⁵We excluded from our analysis claims brought by seven Transportation Security Administration security screeners and supervisory security screeners, who are not covered by USERRA.

-
- claims originally opened prior to the demonstration project, and
 - one veterans' preference claim erroneously opened as a USERRA claim.

Of the 166 unique claims investigated by VETS from the start of the demonstration project through September 30, 2006, it closed 155, or 93 percent of them. The remaining 11 claims were still being investigated as of September 30, 2006.

Because of our finding concerning the accuracy of the number of unique claims in VETS's database during the demonstration project, we reviewed the data DOL reported in its most recent USERRA annual report to Congress for fiscal year 2005. We found that DOL overstated the number of claims filed against federal executive branch agencies because it did not account for duplicate, reopened, transferred, and erroneously opened cases, resulting in an inaccurate number of investigations opened and closed. Specifically, DOL reported that it opened 146 claims involving federal employers, reflecting the number of claims in VETS's database for fiscal year 2005. Our analysis, however, showed that of the reported 146 claims, 117 were claims actually investigated by VETS in fiscal year 2005.

Additionally, during our review of a random sample of 54 VETS case files to assess the reliability of VETS's data, we found the closed dates in VETS's database did not match the date contained in the closure letter to the claimant in 22 of 52 claims reviewed.¹⁶ According to VETS officials, the date closed in VETS's database should agree with the date of the closure letter, or if VETS requests additional information, the date by which the claimant needed to provide the information to avoid, for example, a determination of "no merit." For those claims where there was not a match, the difference in the number of days between the actual closed date in the closure letter and in VETS's database averaged 67 days. Moreover, in nearly all claims where the closed dates in VETS's database did not match the date in the closure letter, the closed date in VETS's database preceded the date in the letter. VETS's *USERRA Operations Manual* is silent on the date to be used for the official closure of an

¹⁶We excluded claims if information was missing from the case file, thus preventing a comparison between data in VETS's database and the case file. Thus, 2 of the 54 claims in the sample were excluded for assessing the reliability of date closed. See app. I for additional information on our review of case files.

investigation in VETS's database, which could have contributed to some of the inaccuracies we found in closed dates.

Because DOL reports annually to Congress on the number and percentage of claims it closed within 90, 120, and 365 days, such inaccuracies in the number of claims reported and the closed dates also affect the quality of information reported to Congress on the time it takes VETS to process claims. VETS senior officials indicated that they had identified problems similar to those we found in a particular region concerning inaccurate closed dates. Citing our preliminary findings, in December 2006, one region issued a memorandum instructing investigators to make the closed date in VETS's database match the date of the closure letter to the claimant.

Because the closed dates entered in VETS's database were not sufficiently reliable, we could not use the dates for the time VETS spent on investigations in the database to accurately determine DOL's average processing time. Instead, we used the correct closed dates from the case files in our random sample and statistically estimated the average processing time for VETS's investigations from the start of the demonstration project through July 21, 2006—the period of our sample. Based on the random sample, there is at least a 95 percent chance that VETS's average processing time for investigations ranged from 53 to 86 days.

Additionally, during our review of case files, we found that the closed code, which VETS uses to describe the outcomes of USERRA claims (i.e., claim granted, claim settled, no merit, withdrawn) was not sufficiently reliable for reporting specific outcomes of claims. Therefore, the information that DOL reports to Congress on the number and percentage of claims by outcome is not reliable.

DOL Did Not Consistently Notify Claimants of Right of Referral

At the conclusion of an investigation when VETS is not successful in resolving the claim, USERRA requires VETS to notify servicemembers with claims against federal executive branch agencies of their right to have their claims referred to OSC or to bring their claims directly to MSPB. According to a VETS official, claimants should be notified in writing of the right to referral. For the 54 claims in our sample of VETS's case files, we found that in the 28 claims VETS was not successful in resolving (i.e.,

claims not granted or settled), VETS failed to notify claimants of the right to referral in the closure letter in half of these claims. VETS correctly notified five claimants and notified others of only some of their options.¹⁷ In addition, VETS incorrectly advised some servicemembers of a right applicable only to nonfederal claimants—to have their claims referred to the Department of Justice or to bring their claims directly to federal district court. Table 1 shows the extent to which claimants were notified in the closure letter of their right to have their unsuccessful claims referred.

Table 1: Notifications of Rights in VETS’s Closure Letters of Unresolved Claims from Sample of Case Files Reviewed

| Description of notification in closure letter | Number of claimants |
|---|---------------------|
| No notification provided | 14 ^a |
| Refer to OSC/bring directly to MSPB ^b | 5 |
| Refer to OSC | 1 |
| Bring directly to MSPB | 1 |
| Refer to the Department of Justice ^c | 1 |
| Refer to OSC/bring directly to federal district court ^d | 2 |
| Refer to the Department of Justice/ bring directly to federal district court ^{c,d} | 4 |
| Total | 28 |

Source: GAO analysis of VETS’s USERRA case files.

Notes: We excluded claims we could identify as (1) subject to the Defense Finance and Accounting Service administrative procedure to resolve claims under *Butterbaugh v. Department of Justice*, 336 F.3d. 1332 (Fed. Cir. 2003) holding that federal agencies had improperly charged reserve component members’ military leave for nonworkdays, (2) a veterans’ preference claim that was inadvertently opened as a USERRA claim, or (3) a file of a duplicate claim.

^aWe excluded two instances concerning withdrawals. If individuals withdraw their claims, VETS would not be obligated under USERRA to send a closure letter notifying those individuals of their right to have their claims referred to OSC or to bring their claims directly to MSPB.

^bThis is required by USERRA for claims against federal executive branch agencies.

^cReferral of claims to the Department of Justice is a right available to nonfederal claimants.

^dThe right to bring claims directly to federal district court is a right available to claimants of private employers and local government employers.

¹⁷See app. I for additional information on our analysis of claimants’ notification of their rights.

Two possible reasons for VETS's failure to notify servicemembers in writing of their rights include VETS's lack of an internal review process and the inconsistent guidance provided to investigators in its *USERRA Operations Manual*. As discussed earlier, we found that VETS has no internal process to routinely review claim determinations prior to informing claimants of such determinations or closing the claim.

Additionally, VETS failed to provide clear guidance in its *USERRA Operations Manual* on when to notify claimants of their right to referral, the content of the notification, or any guidance on notifying claimants of their right to bring their claims directly to MSPB. For example, one chapter instructs investigators to notify the claimants of their right to referral if there is no voluntary compliance by the employer, regardless of whether claim has merit, but in another instructs investigators to advise claimants of their right only if the claimant does not concur with the determination. Further, the sample closure letters to claimants contained in the manual are not consistent regarding notifying claimants; those that contain a notification advise claimants of a right to request referral to the U.S. Attorney General, a right applicable to nonfederal claimants. Additionally, VETS's *USERRA Operations Manual* does not instruct investigators to notify claimants of their right to bring their claims directly to MSPB. VETS senior officials indicated that they had identified problems similar to those we found in a particular region concerning the lack of consistent notification of the right to referral. It is not clear what course of action VETS took at that time.

Following a briefing on our preliminary findings in December 2006, a VETS official told us that because VETS's *USERRA Operations Manual* had not clearly articulated when and how to notify claimants of their rights, some investigators were not aware that claimants should be notified in writing at the end of the investigation. Citing our preliminary findings, VETS officials required each region to revise its guidance concerning the notification of rights. One region issued a memorandum providing specific additional guidance to investigators to notify claimants in the closure letter of their right to a referral or to bring their claims directly to MSPB and provided revised sample closure letters for federal and nonfederal USERRA claims, which other regions were to use as a model. Each region will have its own guidance until VETS completes

revisions to its *USERRA Operations Manual*,¹⁸ which VETS senior investigators began updating January 2007. The manual is expected to be issued in October 2007.

Claims Processed by OSC under the Demonstration Project

From the start of the demonstration project through fiscal year 2006, OSC received 269 USERRA claims and closed 176, or 65 percent of them.¹⁹ The remaining 93 claims were still being investigated as of September 30, 2006. More than 75 percent of these claims included only allegations of USERRA violations. The remaining were mixed claims—allegations of both USERRA violations and a related prohibited personnel practice. Table 2 shows the number and type of claims OSC received and closed during the demonstration project.

Table 2: OSC Investigations Opened and Closed by Type of Claims from February 8, 2005, through September 30, 2006

| Type of claim | Number opened | Number closed | Percentage closed |
|---------------|---------------|---------------|-------------------|
| USERRA only | 208 | 141 | 68 |
| Mixed | 61 | 35 | 57 |
| All | 269 | 176 | 65 |

Source: GAO analysis of OSC data.

Table 3 shows OSC's average processing time overall and for both USERRA only and mixed claims.

Table 3: OSC Average Processing Time by Type of Claim from February 8, 2005, through September 30, 2006

| Type of claim | Average processing time in days |
|---------------|---------------------------------|
| USERRA only | 113 |
| Mixed | 123 |
| All | 115 |

Source: GAO analysis of OSC data.

¹⁸VETS periodically has made changes to its *USERRA Operations Manual*, issued in 1995, through memorandums addressed to regional administrators and directors for Veterans' Employment and Training.

¹⁹We excluded from our analysis 10 claims brought by Transportation Security Administration security screeners and supervisory security screeners, who are not covered by USERRA.

We assessed the reliability of selected data elements in OSC's case tracking system in an earlier report.²⁰ We found the closed dates in OSC's case tracking system to be sufficiently reliable; however, the corrective action data element, which would be used for identifying the outcomes of USERRA claims, was not sufficiently reliable for reporting specific outcomes of USERRA claims.

Claims Referred Took Several Months to Process

We separately reviewed those claims that VETS investigated but could not resolve and for which claimants requested referral of their claims to OSC. For these claims, two sequential DOL reviews take place: A VETS regional office prepares a report of the investigation and makes a recommendation on the merits, and a regional Office of the Solicitor conducts a separate legal analysis and also makes a recommendation on the merits. From February 8, 2005, through September 30, 2006, 11 claimants asked VETS to refer their claims to OSC. Of those 11 claims, 6 claims had been reviewed by both a VETS regional office and a regional Office of the Solicitor and sent to OSC, and 5 were still at DOL. The Office of the Solicitor recommended litigation on 1 of the claims sent to OSC. For those 6 claims, it took from initial investigation through the regional office and regional Office of the Solicitor reviews an average of 247 days or about 8 months before the Office of the Solicitor sent the claims to OSC. Because of the data limitations concerning the reliability of investigations' closed dates in VETS's database, it was not possible to isolate the length of time for the two additional reviews.

Of the six referred claims that OSC received from DOL during the demonstration project, OSC declined to represent the claimant in five claims as of September 30, 2006, and was still reviewing one of them. OSC took an average of 61 days to independently review the claims and determine if the claims had merit and whether to represent the claimants.

²⁰GAO, *Office of Special Counsel Needs to Follow Structured Life Cycle Management Practices for Its Case Tracking System*, [GAO-07-318R](#) (Washington, D.C.: Feb. 16, 2007).

Three Primary Changes Have Occurred since the Demonstration Project Began

Three primary changes have occurred in federal employees' USERRA claims' processing since the start of the demonstration project. First, two agencies now receive and process claims with two different models for investigating USERRA claims from federal executive branch employees—a nationwide approach by VETS that gives much authority to individual investigators in resolving and closing claims and a centralized approach by OSC that has a single individual entering claims into the case tracking system, providing guidance, and reviewing all claims. Second, both DOL and OSC officials have said that since the demonstration project began, cooperation and communication concerning USERRA claims has increased, in turn raising awareness of the issues related to servicemembers who are federal executive branch employees. Finally, technological enhancements have occurred during the demonstration project. For example, an enhancement to VETS's database enables the electronic transfer of information between agencies. In addition, VETS implemented electronic filing, which eliminates the need for initial data entry by staff.

Two Models Used for Processing Claims

As we discussed earlier, under the demonstration project, two different models have been used for investigating USERRA claims from federal employees. Table 4 identifies characteristics of DOL's and OSC's models for processing USERRA claims.

Table 4: Characteristics of DOL's and OSC's USERRA Claims' Processing Models

| Characteristic | DOL | OSC |
|---------------------------|---|---|
| Structure of office | Nationwide network with investigators at VETS's offices in each state, six regional offices, and one national office. | Centralized USERRA Unit within OSC headquarters with investigators and attorneys working together on fact-finding and legal analysis. |
| Responsibilities of staff | Investigators process both federal and nonfederal USERRA and veterans' preference claims and provide outreach and education to servicemembers and employers. | Investigators and attorneys process federal employees' USERRA claims, process prohibited personnel practice claims filed by servicemembers, and provide outreach and education to employees and employers. |
| Investigative approach | Investigators are to investigate and attempt to resolve claims, prepare an investigative plan for claims taking more than 30 days, and send a letter notifying claimant of the determination. In the case of referrals, investigators prepare a memorandum of referral with supporting documentation. | Investigators or attorneys are to investigate and attempt to resolve claims, prepare a summary of investigation with supporting documentation, and provide a detailed letter to the claimant (and for claims with merit, to the agency) containing the factual and legal basis for its conclusions. |

| Characteristic | DOL | OSC |
|----------------|---|---|
| Oversight | <p>There is no required internal review of investigative findings and closure letters prior to closure letters being sent to the claimant.</p> <p>VETS senior investigators are to review claims taking longer than 90 days and a random sample of 25 percent of all closed claims and 10 percent of all open claims at the regional level.</p> | <p>The USERRA Unit Chief provides ongoing guidance, reviews all work products in a case, and reviews and approves the letter notifying the claimant of OSC's determination and, in a case with merit, the letter to the agency, prior to sending the letters.</p> |

Source: GAO.

Note: VBIA did not change VETS's formal investigative process or the referral phase under the demonstration project.

Communication Concerning USERRA Claims Has Increased since the Demonstration Project Began

Under the demonstration project, both OSC and VETS officials said that cooperation and communication concerning USERRA claims has increased between them. Increased communication has in turn, according to these officials, raised the awareness among these two agencies of the issues related to servicemembers who are federal employees. For example, OSC and DOL officials mentioned working together to decide how to process certain types of frequently occurring cases concerning leave issues affecting some servicemembers.²¹ OSC also has been meeting monthly with VETS and Office of the Solicitor officials, and OSC participates in the Office of the Solicitor's monthly telephone conference calls to discuss selected claims they are working on, offer legal advice, and discuss what is happening during each agency's investigative process. Officials from the Office of the Solicitor and OSC said that these meetings and telephone conferences have been very useful and that during them they discuss issues related to federal employees and how the demonstration project is being handled by DOL and OSC.

Technological Enhancements Have Improved USERRA Claims' Processing since the Demonstration Project Began

Following a recommendation in our October 2005 report,²² VETS implemented an enhancement to its database in October 2006 to enable the four USERRA coordinating agencies—DOL, OSC, and the Departments of Defense and Justice—to electronically transfer case information between agencies. Officials from each of the USERRA coordinating agencies are also able to see such claim information as whether a case is open or closed, which agency is currently addressing it, and how long it

²¹These include claims resulting from the Federal Circuit Court of Appeals decision in *Butterbaugh v. Department of Justice*.

²²GAO-06-60.

took to resolve. As such, the database enhancement grants OSC limited access to demonstration project data in VETS's database, including the ability to view summary data for federal employer cases opened by VETS during the demonstration project period (e.g., case numbers, employer, open and closed dates, and issues concerning a case) and allows OSC to enter case data for demonstration project cases OSC has opened since October 1, 2006.²³ According to OSC's USERRA Unit Chief, to the extent consistent with the consent provided by claimants, he has been entering information on demonstration project claims into VETS's database. Officials from each coordinating agency are able to produce a report containing aggregate data on the claims over which they have jurisdiction. For investigations opened by VETS, only VETS has visibility over a claim's history, from its submission to VETS until it is resolved. The other coordinating agencies have visibility over only those claims that were opened by or referred to them. According to VETS officials, when the enhancement was being developed, the Office of the Solicitor determined that because of the sensitive nature of the information that the enhanced VETS's database may contain, except for VETS, full access to all data fields for a claim would be limited to those cases within each agency's jurisdiction.

Another technological enhancement by VETS is the implementation of electronic filing.²⁴ A VETS official told us that from July 18, 2005, the date on which electronic filing of USERRA claims at VETS became available, through September 30, 2006, about 39 percent of USERRA claims from servicemembers employed by federal executive branch agencies were filed with VETS electronically. As we said earlier, electronic filing of claims directly enters the information into VETS's E-filing database first and then into VETS's database, records the date the claim was received, and sends an automatic response to the claimant. This eliminates the need for initial data entry by staff and avoids the introduction of error when staff manually enter data. Also, when a claimant files electronically, VETS's database sends an automatic message to OSC to determine whether any prohibited personnel practice cases have been filed by the claimant.

²³All information related to OSC demonstration project claims is to be stored in a separate database throughout the entire life cycle of all demonstration project claims.

²⁴OSC is awaiting the outcome of the demonstration project before implementing electronic filing of USERRA claims.

In addition, according to OSC, although VBIA did not require that OSC modify its existing system, OSC enhanced its case tracking system to maintain demonstration project data that would be useful in tracking USERRA claims. For example, on October 1, 2006, OSC began tracking a claimant's status as veteran, disabled veteran, reservist, guardsman, or other and the claimant's allegation, such as veteran discrimination, disabled veteran discrimination, reservist reemployment, and reprisal. According to OSC, maintaining this information will enable OSC to prepare reports showing the number and the types of allegations filed by various claimant groups.

Conclusion

At a time when the nation's attention is focused on those who serve our country, it is important that policymakers have reliable information about the extent to which employment and reemployment rights are protected for applicants to and employees of the federal government who leave their employment to perform military or other uniformed service. While we did not assess the quality of the claims investigations or the correctness of outcomes, we believe that DOL's controls and oversight of the claims process need to be improved. DOL does not consistently notify servicemembers of their right to have their claims referred to OSC or to file directly with MSPB if DOL is not successful in resolving their claims, which may have prevented some servicemembers from seeking further review of their claims. Moreover, VETS's database does not contain sufficiently reliable data for purposes of our review on the number of cases, outcomes, and the time to investigate claims. Additionally, DOL has a lengthy two-phase review process that has servicemembers waiting months before the referral of their claims takes place.

We note that VETS uses the same process, including the same procedures, practices, investigators, and database, for federal and nonfederal USERRA claims. The same kinds of problems that we found in our review of federal USERRA claims may be occurring for nonfederal claims.

Citing our preliminary findings, in December 2006, VETS officials took action to rectify some of the identified shortcomings. While we view these actions as positive and a step in the right direction toward clarifying steps that VETS investigators are to take, VETS still lacks uniform policies and quality controls to help ensure that servicemember employment rights are protected and that Congress receives accurate information.

Recommendations for Executive Action

We recommend that the Secretary of Labor direct the Assistant Secretary for Veterans' Employment and Training to implement the following four actions:

- Incorporate into the formal update to VETS's *USERRA Operations Manual* the guidance from a VETS regional office December 2006 memorandum on the procedures that investigators should follow concerning the notification of a claimant's right to referral and the appropriate closed date in VETS's database.
- Require all VETS investigators to undergo mandatory training on the procedures to be followed concerning notification of a claimant's right to referral to help ensure that servicemembers know their rights under USERRA.
- Develop and implement an internal review mechanism for all unresolved claims before claimants are notified of determinations and claims are closed to help ensure adherence to all procedures and standards.
- Establish a plan of intended actions with target dates for implementing internal controls to ensure that VETS's database accurately reflects: the number of unique USERRA claims filed annually against federal executive branch agencies, the dates those claims were closed, and the outcomes of those claims, to ensure that accurate information on USERRA claims' processing is available to DOL and to Congress.

Agency Comments and Our Evaluation

We provided a draft of this report to the Secretary of Labor and the Special Counsel for their review and comment. In written comments, which are included in appendix II, the Assistant Secretary for Veterans' Employment and Training agreed with our recommendations and discussed actions that DOL is taking to address the recommendations.

In written comments, which are included in appendix III, the Special Counsel disagreed with our statement that OSC's corrective action data element, which OSC uses to describe the results or outcomes of USERRA claims, was not reliable. He also notes that the report does not address the differences between the results and time taken to get results by OSC versus DOL. As stated in our report, during our review, OSC and DOL provided us with data on USERRA claims processed, but because the data element for outcomes was not sufficiently reliable in either agency's database, we do not report on outcomes. Also in his written comments, the Special Counsel references a December 2006 letter to us in which he

expressed disagreement with a methodology used in calculating the time an investigative file is with DOL's Office of the Solicitor. The December letter refers not to the methodology in this report but rather to a preliminary methodology used in another GAO engagement.²⁵ Our methodology for this engagement, which includes a discussion of the time an investigative file is with DOL's Office of the Solicitor, is discussed in this letter and in more detail in appendix I.

In addition, both the Assistant Secretary for Veterans' Employment and Training and the Special Counsel provided their views on the demonstration project and their respective agency's role in processing USERRA claims.

We will send copies of this report to the Secretary of Labor, the Special Counsel, and other interested parties. Copies will be made available to others upon request. This report will also be available at no charge on GAO's Web site at <http://www.gao.gov>.

If you have questions about this report, please contact me on (202) 512-9490 or at stalcup@gao.gov. Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this report. Staff who made major contributions are listed in appendix IV.



George H. Stalcup
Director, Strategic Issues

²⁵See [GAO-07-259](#). However, the methodology referenced by the Special Counsel was revised and not used in the issued report.

List of Congressional Committees

The Honorable Daniel K. Akaka
Chairman
The Honorable Larry E. Craig
Ranking Member
Committee on Veterans' Affairs
U.S. Senate

The Honorable Joseph I. Lieberman
Chairman
The Honorable Susan M. Collins
Ranking Member
Committee on Homeland Security and Governmental Affairs
U.S. Senate

The Honorable Daniel K. Akaka
Chairman
The Honorable George V. Voinovich
Ranking Member
Subcommittee on Oversight of Government
Management, the Federal Workforce, and the District of Columbia
Committee on Homeland Security and Governmental Affairs
U.S. Senate

The Honorable Bob Filner
Chairman
The Honorable Steve Buyer
Ranking Member
Committee on Veterans' Affairs
House of Representatives

The Honorable Henry A. Waxman
Chairman
The Honorable Tom Davis
Ranking Member
Committee on Oversight and Government Reform
House of Representatives

The Honorable Stephanie Herseth Sandlin
Chairman
The Honorable John Boozman
Ranking Member
Subcommittee on Economic Opportunity
Committee on Veterans' Affairs
House of Representatives

The Honorable Danny K. Davis
Chairman
The Honorable Kenny Marchant
Ranking Member
Subcommittee on Federal Workforce,
Postal Service, and the District of Columbia
Committee on Oversight and Government Reform
House of Representatives

Appendix I: Objectives, Scope, and Methodology

Our objectives were to (1) describe the Department of Labor's (DOL) and Office of Special Counsel's (OSC) policies and procedures for processing federal employees' Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) claims under the demonstration project; (2) identify the number of federal employees' USERRA claims that DOL and OSC received and the outcomes of these claims, including average processing times; and (3) identify changes to federal employees' USERRA claims' processing since the demonstration project began.

Objective 1: Describe DOL's and OSC's Policies and Procedures for Processing Federal Employees' USERRA Claims under the Demonstration Project

To describe DOL's and OSC's policies and procedures for processing federal employees' USERRA claims under the demonstration project, we reviewed applicable laws, including USERRA and the Veterans Benefit Improvement Act of 2004, and regulations; agency policies, memorandums of understanding, and correspondence between DOL and OSC; DOL and OSC USERRA claims' processing manuals; other internal guidance and program information; and DOL's annual USERRA reports to Congress. We also interviewed knowledgeable DOL and OSC officials. At DOL, we interviewed officials from its Veterans' Employment and Training Service (VETS) National Office, VETS's Atlanta Regional Office, and DOL's Office of the Solicitor. At OSC, we interviewed the USERRA Unit Chief.

Objective 2: Identify the Number of Federal Employees' USERRA Claims that DOL and OSC Received and the Outcomes of These Claims, Including Average Processing Times

To identify the number of federal employees' USERRA claims that DOL and OSC received and the outcomes of these claims, including average processing times, we obtained information on all the USERRA claims filed against federal executive branch agencies that DOL and OSC received from February 8, 2005—the beginning of the demonstration project—through September 30, 2006. We excluded claims from our analysis identified by DOL and OSC as being brought by Transportation Security Administration security screeners and supervisory security screeners because they are not covered by USERRA,¹ specifically 7 claims at DOL and 10 claims at OSC.

Data Reliability

DOL

We also assessed the reliability of data on federal employee claims from VETS's database, the USERRA Information Management System, and OSC's case tracking system, OSC 2000, by tracing a statistically random sample of data to case files. Concerning the reliability of VETS's data, for selected data elements including open date, closed date, closed code, agency name, regional office action date, and Office of the Solicitor action date, we compared the electronic data in VETS's database to the source case files for 54 randomly selected cases received between February 8, 2005, and July 21, 2006. We assessed reliability by the amount of agreement between the data in VETS's database and the source case files. In addition, for each selected data element, we excluded claims if information was missing from the case file, thus preventing a comparison between data in VETS's database and the case file. We did not evaluate the accuracy of the source case files for the data elements reviewed. For data elements pertaining to time (i.e., open date and closed date), we considered the date a match if the date in VETS's database was the same or within 1 day of the date reflected in the case file.

¹Transportation Security Administration security screeners and supervisory security screeners are not covered by USERRA. See, *Spain v. Department of Homeland Security*, 99 M.S.P.R. 529 (2005), citing to *Conyers v. M.S.P.B.*, 388 F.3d. 1380 (Fed. Cir. 2004). The Transportation Security Administration, however, voluntarily permits DOL and OSC to investigate USERRA claims.

We determined that data contained in the closed date and closed code fields were not reliable for purposes of this study. Specifically, we found that the closed dates in VETS's database did not match a closed date indicated in the case files in 22 of 52 claims.² We considered the closed date a match if the date in VETS's database was the same as either the date of the closure letter, the date indicated in the closure letter by which a claimant had to respond to a request for information, or the date stated in the closure letter indicating when the investigation was closed. Thus, we are 95 percent confident that between 31 and 53 percent of the closed dates in VETS's database would not match between the VETS's database and the source case files. Regarding the closed code, which VETS uses to describe the outcomes of USERRA claims (i.e., claim granted, claim settled, no merit, withdrawn) we are 95 percent confident that as many as 16 percent of the outcomes would not match between the VETS's database and the source case files. While our analysis of VETS's database showed that about one-fifth of claimants received partial or full relief, we found that this data element was not sufficiently reliable for reporting specific outcomes of claims. We determined that the other data elements—open date, agency name, regional office action date, and Office of the Solicitor action date—necessary to answer our objectives were sufficiently reliable for purposes of this review.

OSC

Concerning the reliability of OSC's data, in an earlier report we assessed the reliability of selected data elements in OSC's case tracking system for USERRA claims by comparing them to the source case files.³ We reviewed the selected data elements for a statistically random sample of USERRA claims and determined the corrective action code, which OSC uses to describe the outcomes of USERRA claims, was not sufficiently reliable. Specifically, we are 95 percent confident that as many as 24 percent of the outcomes would not match between the case tracking system and the source case files. While our analysis of OSC's data showed that about a quarter of claimants received full relief, this data element is not sufficiently reliable for reporting outcomes of claims. We determined that the other data elements—date received, date closed, agency name, case type, case subtype, and action office—were sufficiently reliable for purposes of this review.

²As we said earlier, we excluded claims from the original sample size of 54 when information was missing from the case file, which accounts for any difference from 54.

³GAO, *Office of Special Counsel Did Not Follow Structured Life Cycle Management Practices for Its Case Tracking System*, [GAO-07-318R](#) (Washington, D.C.: Feb. 16, 2007).

Determining the Number of Claims Received

DOL

We reviewed data from VETS's database from February 8, 2005, through September 30, 2006, to determine the number of claims processed by DOL during the demonstration project. In doing so, we found that VETS's database records as separate claims (1) duplicate filings by the same claimant, (2) reopened claims for the same claimant, and (3) claims transferred to OSC. To determine the number of unique claims opened by VETS, we

- removed claims opened prior to the demonstration project;
- removed claims transferred to OSC after being opened in VETS's database (i.e., those with odd social security numbers and allegations of related prohibited personnel practices);
- removed duplicate filings (i.e., those opened within 3 days of another claim brought by the same claimant and subsequently closed, while the original claim remained open);
- removed one veterans' preference claim identified by VETS as being inadvertently opened as a USERRA claim; and
- combined and counted as one claim original and reopened claims where both were opened during the demonstration project.

Because the number of claims shown in VETS's database exceeded the number of unique claims VETS investigated, we concluded that the data in VETS's database were not sufficiently reliable for determining the number of claims. As a result of the steps we took to identify the number of unique claims DOL received, the number of claims received went from 202 shown in VETS's database from February 8, 2005, through September 30, 2006, to 166—the number we used for purposes of this review.

Because of our concerns over the reliability of the number of claims in VETS's database for the demonstration project, we also analyzed the number of claims in VETS's database for fiscal year 2005 and compared it to the number of claims filed against federal executive branch agencies that DOL reported in its fiscal year 2005 *USERRA Annual Report to Congress*. To determine the number of unique claims processed by VETS in fiscal year 2005 that were filed against federal executive branch

agencies, we used a methodology similar to the one used to determine the number of unique claims during the demonstration project.⁴ We again found that DOL had not removed duplicate, reopened, transferred, and erroneously opened federal USERRA claims. Specifically, DOL reported that it opened 146 claims involving federal employers for fiscal year 2005, reflecting the number of claims involving federal employers in VETS's database for fiscal year 2005. Our analysis, however, showed that of the reported 146 claims, 117 unique claims were investigated by VETS in fiscal year 2005.

OSC

To determine the number of claims processed by OSC during the demonstration project, we analyzed data from OSC's case tracking system for claims alleging only violations of USERRA and claims alleging both violations of USERRA and related prohibited personnel practices.

Determining Average Processing Time for DOL

Because the closed dates entered in VETS's database were not sufficiently reliable, we could not use the average of the time VETS spent on investigations reflected in its database to accurately determine DOL's average processing time. Instead, to determine average processing time, we used the correct closed dates from the case files in our random sample and (1) estimated average processing time for VETS investigations from the start of the demonstration project through July 21, 2006—the period of our sample—and (2) calculated the actual total DOL average processing time for those claims referred to OSC.⁵

VETS Investigations

To determine VETS's average processing time, we used the data from the sample of cases because the closed dates for all claims in VETS's database were not sufficiently reliable for our purposes. Where the closed date in VETS's database did not match the date in the closure letter, we used the correct dates obtained from our review of the hard copy case files and generated estimates from the sample of cases, which were opened and closed from February 8, 2005, through July 21, 2006—the period of our sample. Based on the random sample, we are 95 percent confident that VETS's average processing time for conducting investigations was

⁴Transportation Security Administration screeners and supervisory screeners were not excluded from this analysis because they could not be identified in VETS's database.

⁵Although we found the open date field to be sufficiently reliable for our purposes, as we were using the correct closed dates from the case files for our calculations, we used the correct open dates from case files to be as accurate as possible.

between 53 and 86 days. Because our sample contained only one case that received the two additional reviews at DOL after the VETS investigation was closed, (i.e., by a VETS's regional office and the Office of the Solicitor) before being referred to OSC, we could not reliably use this same process to estimate the average processing time for all of DOL's USERRA claims' processing.

DOL's Referrals to OSC

We separately reviewed those claims that VETS investigated but could not resolve and for which claimants requested referral of their claims to OSC. From February 8, 2005, through September 30, 2006, for 16 claims in the VETS's database, claimants asked VETS for referral to OSC. Of those 16 claims, 5 were reopened (i.e., claims brought by the same claimant), which we combined with their original claims, and 5 were still being reviewed at DOL. The other 6 claims had not been reopened. Thus, 11 unique claims were to be referred to OSC. Of the 11 unique claims, 6 had been reviewed by both a VETS regional office and the Office of the Solicitor as of September 30, 2006 (3 of the reopened claims and 3 of the others). To calculate the average processing time for DOL to process claims that were referred through DOL to OSC using actual dates, we used the average processing time of these 6 claims. We based this average on the number of days that it took DOL to process a claim from the date that VETS opened the investigation through the date that the Office of the Solicitor completed its review and made a recommendation to OSC. Because we found the closed dates of VETS investigations entered in VETS's database were not sufficiently reliable for our purposes, we could not determine how long it took the VETS regional office and the Office of the Solicitor to process referrals following VETS investigations.

For each of the three claims that were reopened, there were two open dates. Because we determined that the closed dates in VETS's database were unreliable, we could not accurately account for the time these claims had been closed before they were reopened. To compensate for this, we calculated the processing time for these three reopened claims in two ways: (1) using the open date of the first claim and (2) using the open date of the reopened, or second claim, in VETS's database. We then calculated two averages using each of the processing time calculations for the three claims. For the remaining three claims that were referred but not closed and reopened, there was only one open date to use in calculating processing time, which was used in both calculations of average processing time for the six referrals. The difference in the average processing time between these two calculations was about 31 days. For purposes of this report, we use the approximate midpoint obtained from each of the calculations—about 247 days or 8 months.

Determining Average Processing Time for OSC

To determine the average processing time for all OSC claims, USERRA only, and mixed claims, using the data in OSC's database, we calculated the number of days from and including the date that the claim was opened through the date that the claim was closed.

Notification of Rights

During our review of a sample of VETS's case files, for claims that were not successfully resolved, we reviewed the extent to which VETS notified claimants in closure letters of their right to have their claims referred to OSC or to bring them directly to MSPB using a private attorney. We defined "not successfully resolved" as those claims that did not have a closed code in VETS's database of "claim granted" or "claim settled." As a result, we excluded from our analysis of the 54 claims in the sample those claims with a closed code in VETS's database of claim granted or claim settled. We also excluded those claims that we were able to identify (1) as subject to the Defense Finance and Accounting Service administrative procedure to resolve their *Butterbaugh* claims,⁶ (2) a veterans' preference claim that was inadvertently opened as a USERRA claim, (3) a file of a duplicate claim, or (4) those withdrawn by the claimant. In total, we included 28 closure letters from our random sample of 54 claims in our review.

Objective 3: Identify Changes to Federal Employees' USERRA Claims' Processing since the Demonstration Project Began

To identify changes to federal employees' USERRA claims' processing since the demonstration project began, we reviewed applicable law, regulations, and legislative histories. We also reviewed relevant documentation about claims' processing prior to the demonstration project and compared that to relevant documentation from DOL and OSC regarding claims' processing during the demonstration project. We also interviewed knowledgeable DOL and OSC officials and representatives from veterans' service organizations, including The American Legion, Military Officers Association of America, National Guard Association of the United States, Paralyzed Veterans of America, Reserve Enlisted Association, Reserve Officers Association, Veterans of Foreign Wars of the United States, and Vietnam Veterans of America.

⁶*Butterbaugh v. Department of Justice*, 336 F.3d. 1332 (Fed. Cir. 2003) holds that federal agencies had improperly charged reserve component members military leave for nonworkdays.

**Appendix I: Objectives, Scope, and
Methodology**

We conducted our work from May 2006 to May 2007 in accordance with generally accepted government auditing standards.

Appendix II: Comments from the Department of Labor

U.S. Department of Labor

Assistant Secretary for
Veteran's Employment and Training
Washington, D.C. 20210



JUL - 5 2007

Mr. George H. Stalcup
Director, Strategic Issues
U.S. Government Accountability Office
Washington, DC 20548

Dear Mr. Stalcup:

Thank you for the opportunity to comment on the draft report GAO-07-907, which evaluates the demonstration project conducted by the U.S. Department of Labor Veterans' Employment and Training Service (VETS) and the Office of the Special Counsel (OSC) for addressing complaints under the Uniformed Services Employment and Reemployment Rights Act (USERRA). Under this multi-year demonstration project, mandated by Section 214 of the Veterans Benefits Improvement Act and ending in September 2007, certain claims against federal agencies under USERRA are referred to OSC for investigation, enforcement and resolution.

In the report, GAO recommends that VETS implement four specific actions to continue improvement in its handling of service members' employment rights claims. In summary, GAO recommends that VETS:

- Update its USERRA Operations Manual procedures for notifying claimants of their referral rights and for entry of case closure dates into the VETS database.
- Require all VETS USERRA investigators to undergo mandatory training on the procedures for notifying a claimant of their right to referral.
- Ensure adherence to procedures and standards by developing and implementing an internal mechanism for reviewing unresolved claims before they are closed and before claimants are notified of determinations.
- Establish a plan and milestones for implementing internal controls to ensure that VETS' database provides more accurate information.

We agree with the recommendations and, as noted in the report, VETS is addressing practices that GAO's preliminary report indicated could be improved. For example, all our USERRA investigators received new instructions on notifying claimants of their right to referral and on recording the appropriate closure date for a claim. Furthermore, the USERRA Operations Manual is being revised to institute systemic procedures to be followed in notifying claimants in writing of their right to referral and entering closure dates into the VETS database.

VETS is also implementing a new Quality Assurance Review process for all USERRA cases, federal and nonfederal, that will require a higher-level review before a claimant is notified of the determinations and before cases are closed. This review process will ensure that 100% of the cases investigated adhere to systemic procedures and standards, and that data entered into the VETS database accurately reflects our USERRA claims processing. The Quality Assurance

**Appendix II: Comments from the Department
of Labor**

Review mechanism is being tested in six states beginning this month, and we plan to expand it to all states in the future.

The draft report also draws a contrast between OSC's centralized process for investigating USERRA claims and VETS' nationwide, one-stop, comprehensive approach to addressing a wide range of work-related matters of importance to service members. VETS emphasizes pre-filing technical assistance that is immediately responsive and provides guidance to help resolve USERRA concerns in informal, non-adversarial ways that preserve on-going working relationships. This assistance, together with electronic tools such as the USERRA claws Advisor, helps resolve most reemployment rights problems before USERRA claims are ever filed.

VETS' network of veteran-focused employment specialists conducts outreach and provides technical assistance to employers, service members, veterans, and veterans' organizations on employment and reemployment issues at the national, state and local levels, including locations where service members are demobilized. In cases where a formal USERRA complaint is filed, VETS has made the filing easier and faster through electronic filing, and VETS draws on its many years of experience with USERRA and predecessor laws in investigating and resolving those complaints.

VETS is constantly seeking ways to better achieve the USERRA goal of minimizing disruption to service members and their employers by protecting against discrimination and securing prompt reemployment after military service. (*See* 38 U.S.C. § 4301.) Our immediate responses to concerns expressed by GAO in its preliminary report, and to the lessons learned during the demonstration project, have already produced tangible benefits for our country's service members. We are gratified that GAO's report recognizes these efforts. The Department of Labor is in a better position than ever before to serve the needs of all veterans. Therefore, we strongly believe that all federal and nonfederal sector USERRA cases should be investigated by VETS.

Thank you again for working with the Department of Labor to help improve the delivery of services under USERRA and for the opportunity to comment on this report. You can be assured that VETS will continue to work with the Office of Special Counsel to identify ways in which our two agencies can improve service to service members.

Sincerely,


Charles S. Ciccolella

Appendix III: Comments from the Office of Special Counsel



U.S. OFFICE OF SPECIAL COUNSEL
1730 M Street, N.W., Suite 300
Washington, D.C. 20036-4505

www.osc.gov

The Special Counsel

July 6, 2007

Ms. Belva Martin
Assistant Director
U.S. Government Accountability Office
441 G St., NW
Washington, DC 20548

By electronic transmission to: martinb@gao.gov

Re: Response to GAO-07-907

Dear Ms. Martin:

On behalf of the U.S. Office of Special Counsel (OSC), I thank you for the opportunity to respond to the draft version of the U.S. Government Accountability Office (GAO) report entitled *MILITARY PERSONNEL: Improved Quality Controls Needed over Servicemembers' Employment Rights Claims at DOL* (GAO-07-907). For the reasons set forth below, I concur with GAO's recommendations for executive action but respectfully disagree with its conclusion that OSC's corrective action data element was not reliable.

We attach a copy of our letter of December 11, 2006, in which OSC identifies the shortcomings of the methodology you use in calculating the delays occurring when an investigative file is with the DOL Solicitor's offices around the country (attached as Exhibit "A"). More importantly, the report does not address the differences between the results, and time taken to get results, by OSC versus the Department of Labor, Veterans' Employment and Training Service (VETS). OSC's USERRA unit achieves a 25% corrective action rate for service members in about half the time necessary for VETS to complete an investigation. OSC's timeliness is all the more noteworthy because the added leg of prosecution which VETS lacks the power to do can create delay unattributable to anything in OSC's power.

The charts used in your report are accurate insofar as they show that a service member enters the process and exits it at a certain point, but they do not accurately reflect the level of complexity a service member encounters when going through a VETS investigation. Thus the contrast between OSC's one-stop shopping simplicity and the relative complexity and delay of a VETS investigation that may bounce around between regional offices and the Solicitor's office is lost. This is a key aspect of the Demonstration Project to show which office is better suited to help the service member, and to do so in a timely manner. The chart we created and shared with GAO to explain this problem is Exhibit C to the December 19, 2006 letter (attached as Exhibit "A").

The Special Counsel

Page 2

Further, because the GAO report did not assess the quality of the claims, investigations or the correctness of the outcomes, I believe it is imperative for the congressional addressees to be aware of OSC's unique experience and expertise in investigating, analyzing, and resolving federal sector claims arising under the Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. § 4301, *et seq.* OSC's unmatched experience and expertise has directly benefited servicemembers during the demonstration project. In light of that success, this letter also addresses the reasons why Congress should permanently grant OSC the authority to receive and investigate all federal sector USERRA claims.

A. OSC's Role in Enforcing USERRA

1. Background

For the benefit of those congressional addressees who may not have a complete understanding of my office and its important mission, I offer a brief overview of OSC and its role in enforcing USERRA:

OSC is an independent federal investigative and prosecutorial agency established pursuant to 5 U.S.C. § 1211. Its primary mission is to safeguard the federal merit system by protecting the employment rights of federal employees and applicants for federal employment. OSC employs personnel specialists, investigators, and attorneys who accomplish that mission by receiving, investigating, analyzing, resolving, and prosecuting prohibited personnel practices and other violations of civil service law. We are the only federal agency authorized to seek corrective action on behalf of aggrieved claimants and disciplinary action against federal managers for committing prohibited personnel practices and related offenses. OSC prosecutes such claims before the U.S. Merit Systems Protection Board (MSPB). OSC has a proud history of serving the federal workforce and the public through its tenacious defense of the merit system principles that safeguard the integrity of the executive branch agencies of the United States.

2. USERRA

With the passage of USERRA in October of 1994, Congress expanded OSC's role as protector of the federal merit system and federal workplace rights, however, it is a 2 step process. Under USERRA's 1994 statutory scheme, VETS, first receives all federal and non-federal sector USERRA claims, conducts investigations, and endeavors to resolve claims with the involved employer. If VETS is unable to resolve claims filed against federal employers, the matter is then referred to OSC at the servicemember's request since VETS has no prosecutorial authority.¹

¹ Prior to the demonstration project, claims were not being referred to OSC from VETS for sometimes up to 2 years because of VETS referral process outlined in GAO's draft Report. Moreover, during the demonstration project, GAO found that "DOL has not been consistently notifying claimants concerning the right to have their claims referred to OSC for further investigation or to bring their claims directly to the Merit System Protection Board if DOL did not resolve their claims." p. 18.

The Special Counsel

Page 3

When a federal sector USERRA claim is referred, OSC objectively reviews the facts and laws applicable to each complaint. Where a VETS investigation is deficient, OSC obtains additional information from the involved agency. In the cases where OSC is satisfied that claimant is entitled to relief, then OSC may exercise prosecutorial authority and represent the claimant before the MSPB and, if required, the U.S. Court of Appeals for the Federal Circuit. As prosecutor, OSC seeks to obtain full corrective action on behalf of claimants either by settlements with the involved federal employer or litigation before the MSPB. Moreover, as protector of the merit system, OSC seeks “systemic” corrective action to prevent future violations whenever the USERRA Unit uncovers violations of USERRA within a federal agency that affect servicemembers beyond the individual claimant. For example, OSC will assist an agency in modifying its leave policy so that it does not violate USERRA.

Because allegations of federal sector USERRA violations are equivalent to prohibited personnel practices, the responsibility for receiving and investigating USERRA claims under the demonstration project merge seamlessly into OSC’s day-to-day operations. In short, OSC’s role in enforcing USERRA complements its role in protecting the federal employees and applicants from prohibited personnel practice in the federal workplace.

3. USERRA Demonstration Project and OSC’s USERRA Unit

In February 2005, OSC’s role in enforcing USERRA and protecting the federal employment rights of servicemembers expanded. Specifically, pursuant to a demonstration project established by section 204 of the Veterans Benefits Improvement Act of 2004 (VBIA), P.L. 108-454, Congress gave OSC the exclusive authority to investigate federal sector USERRA claims brought by servicemembers whose social security number ends in an odd-numbered digit. Additionally, under the project, OSC investigates all federal sector USERRA claims containing a related prohibited personnel practice allegation over which OSC has jurisdiction regardless of the servicemember’s social security number (so-called “mixed claims”).²

With the new, additional investigative responsibilities Congress assigned to OSC under demonstration project and my personal desire to revitalize OSC’s enforcement of USERRA during my term as Special Counsel, I established the USERRA Unit as part of my January 6, 2005, directive reorganizing the agency. The USERRA Unit is the in-take, investigative, and prosecutorial unit for all matters pertaining to USERRA and servicemember-related employment issues. The Unit is responsible for investigating USERRA claims and prosecuting meritorious cases.

The USERRA Unit is staffed with attorney and investigators who possess expert knowledge of federal personnel law and years of experience investigating, analyzing, and resolving allegations of violations federal employment rights. The Unit’s chief is a national expert in USERRA and has taught advanced USERRA classes at numerous conferences such as

² During the VBIA demonstration project, VETS’s investigative authority over federal sector USERRA claims was restricted to claims filed by servicemember whose social security number ends in an odd-numbered digit and claims that did not allege a prohibited personnel practice.

The Special Counsel

Page 4

the prestigious Federal Dispute Resolution Conference and the Judge Advocate General's Legal Center and School in Charlottesville, Virginia.³ The unit as a whole participates in OSC's USERRA outreach program and maintains a telephonic and web-based "hotlines" for answering USERRA-related questions from the public and private sectors.

The demonstration project has highlighted the benefits to servicemembers in eliminating the inefficiencies associated with the inter-agency bifurcation of the investigation and prosecution aspects of USERRA claims. OSC's involvement with a USERRA claim at the moment the claim is filed has streamlined the processing of claims as illustrated by the charts accompanying this letter. Chart A "DOL Case Processing" shows the manner in which the Department of Labor processes USERRA cases, while Chart B "OSC Case Processing" depicts the efficiency of having OSC's USERRA Unit receive and investigate federal sector USERRA claims.⁴ As discussed below, it has also led to beneficial resolutions for servicemembers "at a time when the nation's attention is focused on those who serve our country." (GAO draft Report, p. 29).

B. Specific Comments to GAO Report

1. Investigative Quality and Correctness of Legal Determinations

According to the report, GAO did not assess the quality of the claims investigations. Nor did it assess the correctness of outcomes. I assure the congressional addressees that the OSC's USERRA Unit's investigations and legal determination are of the highest professional quality.

The demonstration project enables certain servicemembers to have their USERRA allegations investigated by the USERRA Unit's experienced attorneys and investigators. For OSC, it is a reasonable extension of what OSC's was established to do: protect the employment rights of federal employees and applicants. Three press releases are attached as Exhibit "B". These releases provide a small sampling of the USERRA Unit's ability to investigate adeptly and analyze correctly federal sector USERRA claims. Indeed, the 6/27/06 release is an example of where the USERRA Unit obtained relief for a servicemember after DOL failed to analyze the case correctly.

Therefore, notwithstanding that GAO did not assess the quality of investigations or the correctness of legal analyses, Congress can be confident in the USERRA Unit's ability to handle competently and zealously federal sector USERRA claims.

³ GAO points out the fact that the Unit's chief reviews all claims when they first come into OSC and is responsible for "over-sight" of all claims. This is an important point because this assures consistency in how OSC analyzes and resolves all federal sector USERRA claims. As GAO points out, "VETS" has no internal process to routinely review investigators' determinations before claimants are notified of them ... there is no requirement that a supervisor review investigator's determinations before notifying the claimant of the determination." p. 16. Moreover, these claims are spread out all over the country, and even if a supervisor reviewed the claims, it would merely 1 of the 7 VETS 'Senior Investigator' Supervisor, a non-lawyer.

⁴ GAO-07-907 Figure 1 "USERRA Claims Processing under the Demonstration Project" does not endeavor to reflect the level of detail as Chart A.

The Special Counsel

Page 5

2. GAO's Assessment of OSC's Data Reliability

GAO found OSC's information management data to be reliable except for one exception: OSC's "corrective action" code was not sufficiently reliable.⁵ I respectfully disagree with GAO's assessment.

OSC's information management system uses codes both for closing individual allegations within a case as well as for the case as a whole. Thus, a case could be closed with a favorable corrective action even though not all of the servicemembers allegations were substantiated. A "corrective action" code is a type of closure code. I believe that GAO may have not completely understood that unique characteristic of OSC's information management system.

Notwithstanding data entry codes, OSC provided GAO with data evidencing the USERRA Unit's impressive corrective action rate of over 25%. **That is to say that over one in four the claims investigated and closed resulted in full corrective action to the servicemember.** Those results were obtained via thorough investigations, creative legal analysis, and dedication to the mission of protecting servicemembers' employment and reemployment rights.

I commend the hard, honest effort made by GAO to understand OSC's information management system and its the data entry code for corrective actions. At the end of the day, however, it is fundamental that the congressional addressees understand that real life "outcomes" are far more important than computer "output." Thus, Exhibit "C" to this letter identifies each of the corrective actions obtained during the February 8, 2005, through September 30, 2006 (the period over which the GAO report is based). Exhibit B shows that OSC obtained meaningful results for real problems encountered by federal sector servicemembers.

C. Comments Regarding GAO's Recommendations for Executive Action

Recommendation #1: GAO recommends that the Secretary of Labor direct the Assistant Secretary for Veterans' Employment and Training incorporate into the formal update to *VETS USERRA Operations Manual* the guidance from a VETS's regional office December 2006 memorandum on the procedures that investigators should follow concerning the notification of a claimant's right to referral and the appropriate closed date in VETS's database.

OSC concurs. Servicemembers must be informed that OSC, as prosecutor of federal sector USERRA cases and protector of the federal merit system, is ready willing and able to enforce zealously their USERRA and related employment rights.

Recommendation #2: GAO recommends that the Secretary of Labor direct the Assistant Secretary for Veterans' Employment and Training Require all VETS's investigators to undergo mandatory training on the procedures to be followed concerning notification of a claimant's right to referral to help ensure that servicemembers know their rights under USERRA.

⁵ See page 36 of the draft report.

The Special Counsel

Page 6

OSC concurs. Such training will strengthen the enforcement of USERRA, and OSC is willing to assist in training VETS personnel on the important role OSC plays in enforcing servicemembers' USERRA and related employment rights.

Recommendation #3: GAO recommends that the Secretary of Labor direct the Assistant Secretary for Veterans' Employment and Training develop and implement an internal review mechanism for all unresolved claims before claimants are notified of determinations and claims are closed to help ensure adherence to all procedures and standards.

OSC concurs. OSC's USERRA Unit relies on an internal review mechanism for ensuring that claims are thoroughly investigated and correctly analyzed and that servicemember are fully informed of their appeal rights. The success of such model is evidenced in the timeliness and correctness of its case resolutions.

Recommendation #4: GAO recommends that the Secretary of Labor direct the Assistant Secretary for Veterans' Employment and Training establish a plan of intended actions with target dates for implementing internal controls to ensure that VETS's database accurately reflects: the number of unique USERRA claims filed annually against federal executive branch agencies, the dates those claims were closed, and the outcomes of those claims to ensure that accurate information on USERRA claims' processing is available to DOL and to Congress.

OSC concurs. OSC has provided accurate information to DOL on the USERRA cases OSC receives, investigates, analyzes and resolves. It will continue to work with DOL to ensure that Congress receives accurate information about USERRA on an annual basis.

D. Congressional Action

The USERRA Unit's timely resolution of cases, the correctness of its legal determinations, and the beneficial results it obtained for servicemembers prove that OSC is well-suited for investigating all federal sector USERRA claims, which comprise only about 10% of the total number of USERRA claims that DOL receives each fiscal year. Indeed, should OSC be given investigative responsibility for all federal sector claims, I firmly believe DOL will be able to redirect its full investigative capabilities and resources to its non-federal sector claims. With the resulting slightly narrower investigative realm from the shift of 10% of the USERRA claims to OSC, VETS should be able to hone their non-federal sector investigative and analytical skills and claims processing. The shift will give VETS the opportunity to become the "expert" in the non-federal sector claims and allow it to provide the same quality of investigative and analytical expertise that OSC provides to servicemembers in the federal sector.

In short, there is ample reason for Congress to depart from the "old way" of processing federal sector USERRA claims and to establish a better way of protecting employment and reemployment rights. Certainly, our brave servicemembers deserve the best legal protection available in light of the tremendous personal sacrifices they make. Most importantly, our servicemembers deserve speedy and efficient resolution of their claims – not 2 years of being

The Special Counsel

Page 7

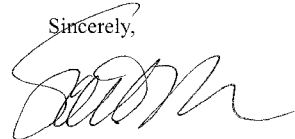
unemployed, waiting to see if he/she is going to be employees again in the federal sector, after being deployed and returning to find that his/her job has been eliminated.

E. Concluding Remarks

In summary, I thank you and your colleagues for the time and effort expended in reviewing OSC's receipt, investigation, analysis, and resolution of federal sector USERRA claims during the demonstration project. The report, coupled with this response, should provide Congress with a solid understanding of the benefits that will flow to servicemembers should OSC be given the authority to receive and investigate all federal sector USERRA claims.

Thank you for providing me the opportunity to respond to the draft report.

Sincerely,



Scott J. Bloch
Special Counsel

Appendix IV: GAO Contact and Staff Acknowledgments

GAO Contact

George H. Stalcup on (202) 512-9490 or at stalcupg@gao.gov

Acknowledgments

In addition to the individual named above, Belva Martin, Assistant Director; James Ashley; Karin Fangman; Tamara F. Stenzel; Kiki Theodoropoulos; Jason Vassilicos; Michael R. Volpe; and Gregory H. Wilmoth made key contributions to this report.

GAO's Mission

The Government Accountability Office, the audit, evaluation and investigative arm of Congress, exists to support Congress in meeting its constitutional responsibilities and to help improve the performance and accountability of the federal government for the American people. GAO examines the use of public funds; evaluates federal programs and policies; and provides analyses, recommendations, and other assistance to help Congress make informed oversight, policy, and funding decisions. GAO's commitment to good government is reflected in its core values of accountability, integrity, and reliability.

Obtaining Copies of GAO Reports and Testimony

The fastest and easiest way to obtain copies of GAO documents at no cost is through GAO's Web site (www.gao.gov). Each weekday, GAO posts newly released reports, testimony, and correspondence on its Web site. To have GAO e-mail you a list of newly posted products every afternoon, go to www.gao.gov and select "Subscribe to Updates."

Order by Mail or Phone

The first copy of each printed report is free. Additional copies are \$2 each. A check or money order should be made out to the Superintendent of Documents. GAO also accepts VISA and Mastercard. Orders for 100 or more copies mailed to a single address are discounted 25 percent. Orders should be sent to:

U.S. Government Accountability Office
441 G Street NW, Room LM
Washington, D.C. 20548

To order by Phone: Voice: (202) 512-6000
TDD: (202) 512-2537
Fax: (202) 512-6061

To Report Fraud, Waste, and Abuse in Federal Programs

Contact:

Web site: www.gao.gov/fraudnet/fraudnet.htm

E-mail: fraudnet@gao.gov

Automated answering system: (800) 424-5454 or (202) 512-7470

Congressional Relations

Gloria Jarmon, Managing Director, JarmonG@gao.gov (202) 512-4400
U.S. Government Accountability Office, 441 G Street NW, Room 7125
Washington, D.C. 20548

Public Affairs

Paul Anderson, Managing Director, AndersonP1@gao.gov (202) 512-4800
U.S. Government Accountability Office, 441 G Street NW, Room 7149
Washington, D.C. 20548