

October 2010

# SERVICEMEMBER REEMPLOYMENT

Agencies Are  
Generally Timely in  
Processing Redress  
Complaints, but  
Improvements Needed  
in Maintaining Data  
and Reporting



GAO

Accountability \* Integrity \* Reliability

## Why GAO Did This Study

The Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) protects the employment and reemployment rights of individuals who leave their employment to perform uniformed service. Concerned with the timeliness of USERRA complaint processing and data reliability of agency reports, Congress imposed timeliness requirements for the Department of Labor (DOL), Department of Justice (DOJ), and Office of Special Counsel (OSC) under the Veterans' Benefits Improvement Act of 2008 (VBIA 2008) and required agencies to submit quarterly reports to Congress on the extent of their compliance with the requirements. As required by VBIA, this report assesses whether the agencies (1) met VBIA timeliness requirements for USERRA complaint processing, and (2) submitted reliable and timely quarterly reports. GAO analyzed data in each agency's USERRA database, and the extent to which those data were consistent with the quarterly reports.

## What GAO Recommends

GAO recommends that the three agencies use consistent reporting criteria and that the Attorney General and Secretary of Labor improve maintenance of data. Congress should consider amending USERRA to apply VBIA 2008 deadlines to state cases and add reporting requirements. The agencies generally agreed with GAO's recommendations but expressed concern over some of the matters for congressional consideration.

View [GAO-11-55](#) or key components. For more information, contact Laurie E. Ekstrand at (202)512-6806 or [ekstrandl@gao.gov](mailto:ekstrandl@gao.gov).

# SERVICEMEMBER REEMPLOYMENT

## Agencies are Generally Timely in Processing Redress Complaints, but Improvements Needed in Maintaining Data and Reporting

### What GAO Found

DOL, DOJ, and OSC generally were timely in meeting VBIA 2008 deadlines to process complaints, but issues remain regarding notification of rights. Under VBIA 2008, DOL must complete its investigation within 90 days of receiving a complaint. If the complaint is not resolved and the servicemember requests to have the complaint referred, DOL must send the case to DOJ (if against a nonfederal employer) or OSC (if against a federal employer) within 60 days of receiving the request for referral. Within 60 days of receiving the case from DOL, DOJ, and OSC must make a decision on whether to represent the servicemember. Any of the three agencies may seek consent to extend the applicable deadline. GAO's analysis showed that DOL, DOJ, and OSC generally met the original or extended deadlines to process complaints. Although DOL does not maintain data in its USERRA database on notifying servicemembers of their USERRA complaint processing rights within 5 days of receiving the complaint, GAO estimated that in about 7 percent of the cases, DOL did not document notification of rights. Because VBIA 2008 does not require DOL to report on this requirement and DOL does not maintain and monitor such data, Congress and DOL cannot be assured that all servicemembers are adequately being informed of their USERRA process rights in accordance with VBIA 2008.

According to DOJ, the 60-day statutory deadline does not apply to state employer cases. GAO's analysis showed that 6 of 12 cases against state employers took more than 60 days to process. Comparatively, 23 of 189 cases against private or local government employers exceeded the 60-day deadline. Therefore, servicemembers who are employed by state governments may not be receiving the same treatment in terms of timeliness that other servicemembers are receiving under USERRA. In addition, GAO's analysis showed that in 6 of 13 cases where the servicemember was involved in settlement negotiations and DOJ declined representation, DOJ notified the servicemember of its decision but continued to aid the parties with facilitating a settlement. VBIA 2008 does not require agencies to report on their time spent after making a decision on representation.

For DOL, DOJ, and OSC, the data contained in the quarterly reports during the time of our review were generally consistent with our analysis. However, the three agencies did not use the same criteria for including the number of cases that exceeded or met the statutory deadline in their quarterly reports. DOL and DOJ were consistently late in submitting quarterly reports to Congress, by as much as 46 days for DOL and by as much as 40 days for DOJ. DOL does not always correct errors in its USERRA database after preparing its quarterly reports and therefore cannot ensure it has accurate, readily available data to monitor its performance in meeting USERRA requirements. DOJ does not have a standard, repeatable process to input USERRA data and produce its quarterly reports.

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United States Government Accountability Office  
Washington, DC 20548

October 22, 2010

The Honorable Daniel K. Akaka  
Chairman  
The Honorable Richard Burr  
Ranking Member  
Committee on Veterans' Affairs  
United States Senate

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

In the wake of the ongoing conflicts in Iraq and Afghanistan, thousands of current and former military servicemembers are undergoing a transition between their federal duties and their civilian employment. Congress enacted the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA)<sup>1</sup> to protect the employment and reemployment rights of federal and nonfederal employees when they leave their employment to perform military or other uniformed service.<sup>2</sup> Among other rights, servicemembers who meet the statutory requirements are entitled to reinstatement to the positions they would have held if they had never left their employment or to positions of like seniority, status, and pay. USERRA was enacted as a means to encourage noncareer service in the uniformed services by reducing the disruption that servicemembers often face when returning to the civilian workforce and to prohibit discrimination against individuals based upon their uniformed service.

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<sup>1</sup>Pub. L. No. 103-353, 108 Stat. 3149 (Oct. 13, 1994) (codified at 38 U.S.C. §§ 4301-4335). USERRA is the most recent in a series of laws protecting veterans' employment and reemployment rights going back to the Selective Training and Service Act of 1940. Pub. L. No. 783, 54 Stat. 885, 890 (Sept. 16, 1940).

<sup>2</sup>In addition to those serving in the Armed Forces and the Army and Air National Guards (when engaged in active duty for training, inactive duty training, or full-time National Guard duty), USERRA covers the commissioned corps of the Public Health Service and other persons designated by the President in time of war or national emergency.

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Under USERRA, an employee or applicant for employment who believes that his or her USERRA rights have been violated may file a complaint with the Department of Labor's (DOL) Veterans' Employment and Training Service (VETS), which is the entity that investigates and attempts to resolve the complaint. If DOL's VETS cannot resolve the complaint, DOL is to inform the complainant of the right to request to have his or her complaint referred to the Department of Justice (DOJ) or the Office of Special Counsel (OSC). A complaint is referred to DOJ if it involves state or private employers or to OSC if it involves a federal executive branch agency. If the servicemember elects to have the complaint referred, DOJ and OSC then determine whether to initiate legal action against the employer.<sup>3</sup>

We have previously reported on problems with the timeliness of agency complaint processing and the reliability of data contained in DOL's USERRA annual report to Congress.<sup>4</sup> To address concerns about timeliness and data reliability, Congress imposed timeliness requirements for DOL, DOJ, and OSC USERRA complaint processing as part of the Veterans' Benefits Improvement Act of 2008 (VBIA 2008).<sup>5</sup> Under VBIA 2008, within 5 days of receiving a complaint, DOL must notify the complainant of his or her USERRA process rights and, within 90 days of receiving a complaint, complete its investigation. If the complaint is not resolved and the servicemember requests to have the complaint referred, DOL must send the case to DOJ (if against a nonfederal employer) or OSC (if against a federal employer) within 60 days of receiving the request for referral. Within 60 days of receiving the case from DOL, DOJ and OSC

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<sup>3</sup>DOJ initiates legal action in federal district court and OSC initiates legal action before the Merit Systems Protection Board (MSPB). Servicemembers may also bring their claims directly to federal court or to the MSPB without using federal assistance.

<sup>4</sup>GAO, *Military Personnel: Improved Quality Controls Needed over Servicemembers' Employment Rights Claims at DOL*, [GAO-07-907](#) (Washington, D.C.: July 20, 2007); *Military Personnel: Additional Actions Needed to Improve Oversight of Reserve Employment Issues*, [GAO-07-259](#) (Washington, D.C.: Feb. 8, 2007); and *Military Personnel: Federal Management of Servicemember Employment Rights Can Be Further Improved*, [GAO-06-60](#) (Washington, D.C.: Oct. 19, 2005).

<sup>5</sup>VBIA 2008 also included a provision stating that if DOL, DOJ, or OSC are unable to meet a deadline related to investigating or resolving the case or offering representation and the complainant agrees to an extension of time, then the agencies shall complete the required action within the additional period of time agreed to by the complainant. In addition to the USERRA-related provisions, VBIA 2008 addresses a range of veterans' issues, including compensation, pensions, education, insurance, and housing. Pub. L. No. 110-389, 122 Stat. 4145 (Oct. 10, 2008).

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must make a decision on whether to represent the servicemember. Any of the three agencies may seek consent to extend the applicable deadline. The act also requires DOJ, DOL, and OSC to submit quarterly reports to Congress on the extent to which these agencies are meeting the timeliness requirements and directs us to assess, as of the time of our review, the extent to which DOJ, DOL, and OSC (1) have met the USERRA complaint processing timeliness requirements and (2) have submitted reliable and timely quarterly reports to Congress as required by VBIA 2008.

To address our first objective, we analyzed data from DOJ's, DOL's, and OSC's USERRA databases on complaints filed and referrals requested and received from October 10, 2008—the effective date of VBIA 2008—to December 31, 2009. In order to meet our mandated reporting deadline, we established a cutoff date of February 28, 2010, and analyzed each agency's data as of that date. We assessed the reliability of the agencies' USERRA databases by comparing a random sample of DOL and DOJ case files and all OSC case files during the period of our review against the data in the databases. We found the data from each agency's USERRA databases to be sufficiently reliable to use in this report. We then used each agency's data to determine the extent that each agency met the timeliness requirements and the average amount of time it took for each agency to meet the respective deadlines. We also interviewed relevant agency officials. To assess the reliability of the quarterly reports, we used each agency's data and attempted to recreate each agency's quarterly reports covering the periods of October 10, 2008, through December 31, 2009. We also interviewed relevant agency officials and reviewed each agency's policies and procedures for collecting, maintaining, and storing the data and for producing the reports. To determine the timeliness of each agency's submission of the quarterly reports to Congress, we reviewed the transmittal letters and other evidence of submission to determine whether the quarterly reports were submitted to Congress within 30 days after the end of the quarter as required by VBIA 2008 and interviewed agency officials concerning communication with Congress on their submissions.

We conducted this performance audit from January 2010 through October 2010 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

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## Background

USERRA applies to public and private employers in the United States, regardless of size, and includes federal, state, and local governments, as well as for-profit and not-for-profit private sector firms. In addition to the reemployment provisions, USERRA also prohibits discrimination in employment against individuals because of their service, obligation to perform service, or membership or application for membership in the uniformed services.<sup>6</sup> Generally, servicemembers who were absent from their civilian job by reason of their service are entitled to the reemployment rights and benefits provided by USERRA if they provided their employer with advance notice of their service requirement when possible, served fewer than 5 years of cumulative uniformed service with respect to that employer, left service under honorable conditions, and reported back to work or applied for reemployment in a timely manner.

Servicemembers who meet their USERRA requirements are entitled to

- prompt reinstatement to the positions they would have held if they had never left their employment or to positions of like seniority, status, and pay;
- continued health coverage for a designated period of time while absent from their employers and immediate reinstatement of health coverage upon return;
- training, as needed, to requalify for their jobs;
- periods of protection against discharge (without cause) based on the length of service; and
- nonseniority benefits that are available to other employees who are on leaves of absence.

If a servicemember believes that his or her USERRA rights have been violated, the servicemember may seek formal assistance from federal agencies in resolving the complaint.<sup>7</sup> Figure 1 below shows the formal USERRA complaint process using federal assistance and the deadlines imposed by VBIA 2008.

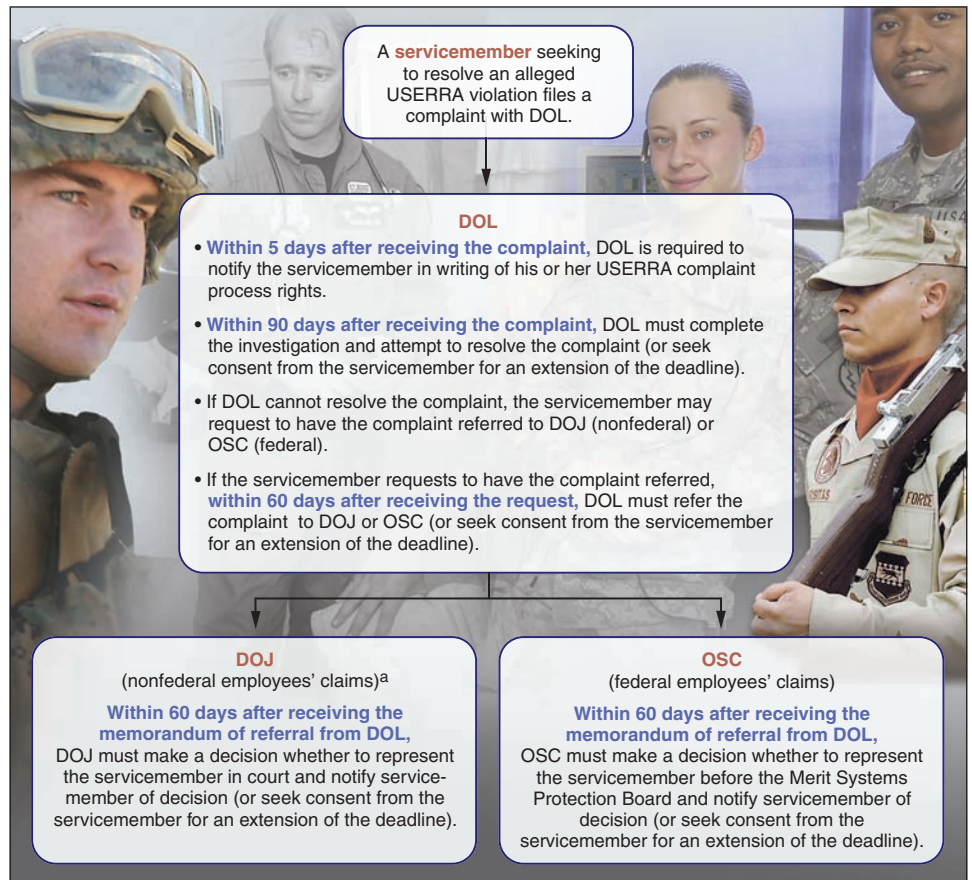
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<sup>6</sup>USERRA further prohibits employer retaliation against any individual who engages in protected activity under USERRA, regardless of whether the individual has performed service in the uniformed services.

<sup>7</sup>USERRA provides for both informal and formal assistance to servicemembers. Servicemembers can file informal complaints with the Department of Defense's Employer Support of the Guard and Reserve, which can serve as ombudsmen to informally mediate USERRA issues that arise between servicemembers and their employers.



**Figure 1: Formal USERRA Complaint Process Using Federal Assistance and VBIA 2008 Deadlines**



Sources: GAO analysis of VBIA 2008 (information); DOD (photos).

<sup>a</sup>According to DOJ, state employee complaints are not covered under the 60-day statutory deadline.

In addition, VBIA 2008 requires DOJ, DOL, and OSC to submit quarterly reports to Congress on their compliance with the deadlines.<sup>8</sup> The reports cover USERRA activities for the previous quarter and are due within 30 days of the end of that quarter.

To implement VBIA 2008 reporting requirements, each of the agencies updated their existing databases used to both maintain data on USERRA

<sup>8</sup>VBIA 2008 does not require DOL to report on the extent to which it notified servicemembers of their complaint processing rights.

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cases and produce the required reports. DOL produces its quarterly USERRA reports by extracting data contained in its USERRA Information Management System, a Web-based system managed by VETS that includes critical events in the history of the case, case resolution, complainant and employer names, and dates. DOJ's Employment Litigation Section of the Civil Rights Division, maintains data on the extent to which it meets VBIA 2008 deadlines in a WordPerfect log, which is an ancillary system to the Civil Rights Division's primary data system.<sup>9</sup> OSC uses OSC 2000, which was designed to capture and record data from the initial filing of a complaint until the closure and archiving of the case file and allows for queries that create a number of management and workload reports.

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## DOL, DOJ, and OSC Were Generally Timely in Meeting VBIA Deadlines, but Issues Remain Regarding Notification of Rights by DOL

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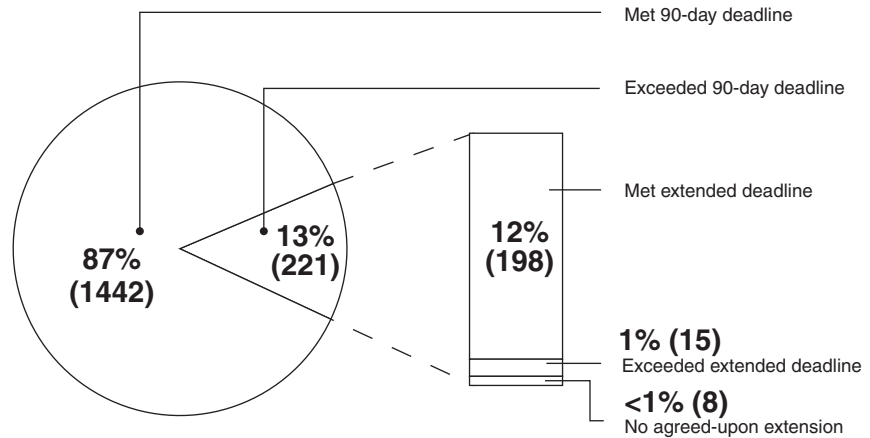
### DOL Has Generally Met VBIA and Extended Deadlines, but Some Servicemembers who Filed Hard Copy Complaints Were Not Notified of Rights

Our analysis showed that in the 1,663 investigations included in our review, DOL generally met the original deadline or a new deadline agreed to by the servicemember. For investigations, DOL met the original 90-day deadline or an extended deadline in about 99 percent of cases. During the period covered by our review, DOL took on average about 52 days to complete an investigation. Figure 2 shows the extent to which DOL met initial and extended investigation deadlines.

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<sup>9</sup>DOJ inputs initial case information, such as case number and date received, from the Civil Rights Division's primary database into its WordPerfect log.

**Figure 2: DOL's Compliance with the 90-Day Investigation Deadline for Complaints Received from October 10, 2008, to December 31, 2009**



Source: GAO analysis of DOL data.

Note: This figure represents investigations opened from October 10, 2008, to December 31, 2009, and closed as of February 28, 2010.

When DOL exceeded the deadline, it generally negotiated an extension with the servicemember to complete the investigation and met those extended deadlines. In the 213 cases where DOL asked for and received the complainant's consent for an extension, DOL met the last extended deadline in approximately 93 percent (198) of the investigations. For cases that exceeded the deadline, the average processing time was approximately 138 days. The longest investigation took nearly a year (357 days) to complete. According to DOL, this case, for which the Pension Benefit Guaranty Corporation (PBGC) was the trustee, involved a servicemember who returned to employment after his pension plan had been terminated and was affected by a change in PBGC rules under the Employee Retirement Income Security Act (ERISA) of 1974.<sup>10</sup>

As of February 28, 2010, 68 cases subject to our review remained open (i.e., their investigation had not yet been completed). For investigations that remained open, 32 of 68 cases had been open for more than 90 days.

<sup>10</sup>*USERRA Benefits Under Title IV of ERISA*, 74 Fed. Reg. 59093 (Nov. 17, 2009) (amending 29 C.F.R. pts. 4001 and 4022).

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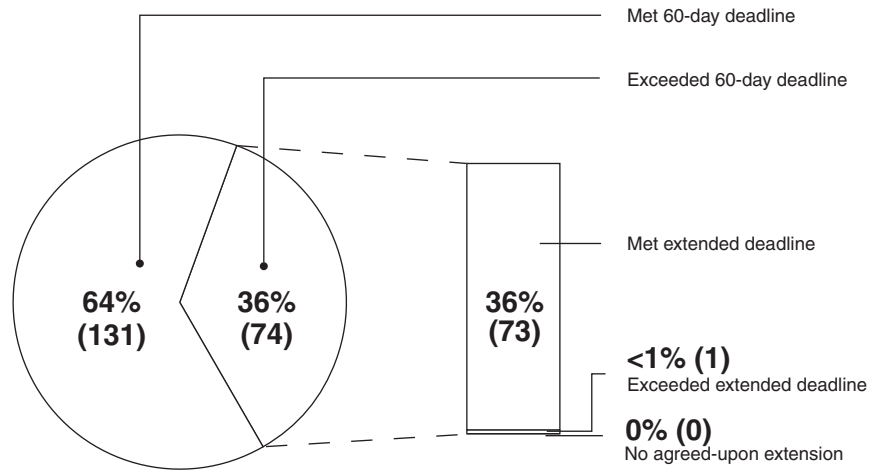
The average age of those still open was approximately 104 days.<sup>11</sup> As of February 28, 2010, the investigation that had been open the longest was 285 days. According to DOL, during the course of the 285 days, the investigation had been closed for 45 days due to the complainant's lack of response to the investigator's inquiries. After DOL reopened the investigation, the parties reached a settlement, but DOL kept the case open, in accordance with DOL policy, until all the terms of the settlement had been met. To assess the progress of investigations taking more than 90 days, VETS officials said that they produce a monthly management report, which helps them identify and eliminate any barriers to resolution. The report is also reviewed to identify any recurring issues that need to be resolved through revised procedures or enhanced training.

When servicemembers requested a referral, DOL met either the original 60-day deadline to send the case to DOJ or OSC or an extended deadline in more than 99 percent of the 205 referrals in our review. During the period covered by our review, DOL took, on average, about 67 days to send the memorandum of referral to DOJ or OSC. Figure 3 shows the extent to which DOL met initial and extended referral deadlines.

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<sup>11</sup>DOL sought an extension to complete the investigation in all 32 cases open for more than 90 days.

**Figure 3: DOL's Compliance with the 60-Day Deadline for Referrals Requested from October 10, 2008, to December 31, 2009**



Source: GAO analysis of DOL data.

Note: This figure represents those referrals requested from October 10, 2008, to December 31, 2009, and closed as of February 28, 2010.

When DOL exceeded the deadline on referral cases, it generally negotiated an extension with the servicemember in order to finish processing the referral and send it to DOJ or OSC. Where DOL asked for and received the complainant's consent for an extension of time, DOL met the last extended referral deadline in nearly all cases—73 of 74 cases. For the 74 cases that exceeded the deadline, the average processing time was about 113 days, with the longest referral taking 348 days to process. According to DOL, the complainant in this case had been injured in service and was not medically ready to return to work at the time of the referral. Once the complainant became medically stable, DOL could determine whether there was an appropriate reemployment position to which the complainant could return, and the case was ultimately resolved.

As of February 28, 2010, 34 referral cases subject to our review remained open and were still being processed by DOL. Of the referrals still open as of February 28, 2010, 13 of 34 cases had been open for more than 60 days.<sup>12</sup>

<sup>12</sup>In nearly all 13 referrals open for more than 60 days, DOL sought an extension to finish processing the referral.

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DOL Notified Servicemembers of Rights for all Electronically Filed Complaints but Did Not Notify Some That Filed in Hard Copy

The average age for those still open was 71 days. The referral open the longest had an age of 324 days. According to DOL, it was difficult to obtain the employer's compliance with the terms of the settlement agreement, and DOL kept the case open until the employer complied. To assess the progress of referral processing, DOL also produces a monthly management report on referrals to ensure that established procedures are being followed and that, if the referral process will exceed 60 days, DOL will negotiate for and document an extension of time.

To implement the VBIA 2008 requirement to notify servicemembers of their USERRA complaint process rights within 5 days of receiving a complaint, DOL created a standard notification letter that advises servicemembers of their right to request to have their case referred to DOJ or OSC for further review, or that the servicemember can file a complaint using private counsel. For complaints filed electronically, DOL updated its USERRA database to automatically generate the standard notification in an E-mail and send it directly to servicemembers. For complaints filed in hard copy, the assigned DOL employee is to send the servicemember a copy of the notification letter via E-mail or mail. To ensure that the notifications are sent to the servicemember, DOL requires the investigator to make a notation in the hard copy case file indicating that the notification was sent and on what date. However, DOL does not record this information in its USERRA database and does not track the extent to which it complies with the notification requirement. VBIA 2008 does not require DOL to report on the extent to which it complies with this notification requirement.

We have previously reported on the importance of ensuring that servicemembers are appropriately notified of their rights. In 2007, we reported that DOL did not consistently notify complainants of their rights at the end of the investigation and recommended that DOL update its operations manual and augment its training.<sup>13</sup> Since 2007, DOL has taken actions to improve its process for notifying servicemembers of their rights at the end of the investigation. However, because VBIA 2008 does not require DOL to report on the extent to which it meets the new requirement to notify servicemembers of their rights in writing within 5 days of receiving the complaint, and DOL does not maintain and monitor such data, Congress and DOL cannot be assured that servicemembers who file

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<sup>13</sup>GAO, *Military Personnel: Improved Quality Controls Needed over Servicemembers' Employment Rights Claims at DOL*, GAO-07-907 (Washington, D.C.: July 20, 2007).

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complaints are adequately being informed of their USERRA process rights in accordance with VBIA 2008.

Although DOL does not maintain data in its USERRA database on notifications of USERRA complaint process rights, we were able to estimate, based on our review of a random sample of case files, the extent to which DOL notified servicemembers of their USERRA complaint process rights within 5 days. Specifically, we estimated that in about 85 percent of cases, DOL notified complainants of their rights within 5 days. In about 9 percent of the cases, we estimated that DOL notified complainants late. Of the complaints in our sample where DOL exceeded the 5-day deadline, DOL notified complainants of their rights within 12 days. In about 7 percent of the cases, DOL did not have evidence of notification of rights.<sup>14</sup> In our sample, where we found no evidence of notification, servicemembers had filed their complaints in hard copy. About one-third of the cases in our sample were filed in hard copy. Moreover, where servicemembers filed complaints electronically, we found evidence in all cases that DOL notified the servicemembers of their complaint process rights.

DOL is planning to implement a new process for handling hard copy complaints, which, according to DOL, would help to ensure that all servicemembers are notified of their rights in a timely manner. According to DOL, all hard copy filed complaints will be submitted first to the USERRA Regional Lead Center. The Lead Center will enter the hard copy complaints into the electronic complaint system, and the complaint will then be treated in the same way as if it had been filed electronically. This includes immediately notifying the complainants that the complaint has been received, providing them with appropriate VETS contact information, notifying complainants of their rights, assigning the case to the appropriate VETS office, and keeping records of all those actions. This new procedure requires a change in the complaint form, which is pending approval from the Office of Management and Budget. DOL officials plan to implement the new process as soon as the new complaint form is approved, which DOL officials expect will occur in the fall of 2010.

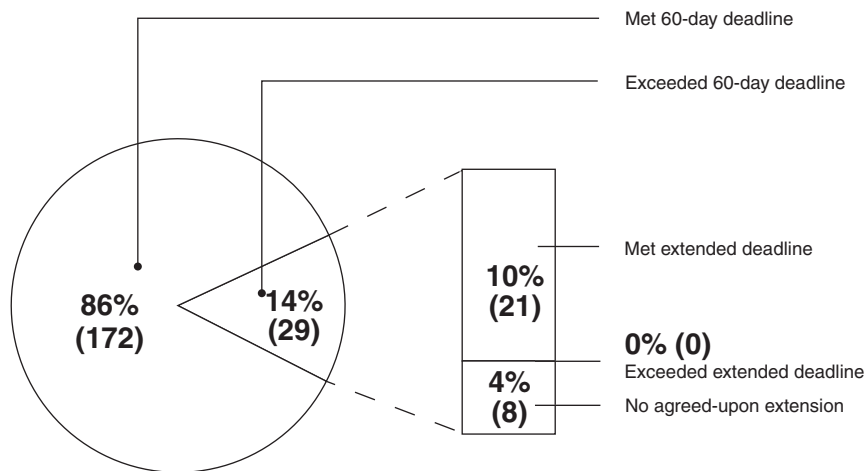
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<sup>14</sup>Each of these estimates has a margin of error at the 95 percent confidence level of plus or minus 11 percentage points or less.

**DOJ Generally Met VBIA and Extended Deadlines, but Does Not Apply VBIA Deadlines to State Employer Cases or Report Time Facilitating Settlement**

Our analysis shows that in the 201 cases included in our review, DOJ met the original deadline or an extended deadline in about 96 percent of all cases. According to DOJ, complaints against state employers are not covered under the 60-day deadline. However, because DOJ maintains data on the extent to which it met the 60-day deadline in state employer cases and reports on these cases in its quarterly reports, we have included these cases in our analysis. During the period covered by our review, DOJ took on average about 35 days to make a decision on representation (or initiation of legal action) and to notify the complainant of its decision. Figure 4 shows the extent to which DOJ met initial and extended referral deadlines.

**Figure 4: DOJ's Compliance with the 60-Day Deadline for Referrals Received from October 10, 2008, to December 31, 2009**



Source: GAO analysis of DOJ data.

Notes: This figure represents those referrals received from October 10, 2008, to December 31, 2009, and closed as of February 28, 2010. Six of the eight cases where there was no agreed-upon extension were against state employers. In these six cases, according to DOJ, the 60-day deadline does not apply, and it does not seek agreement from complainants for an extension of such a deadline. In the two cases against private employers where there was no agreed-upon extension, DOJ notified complainants of its decision on representation within 2 days after the 60-day deadline.

For the 29 cases that exceeded the 60-day deadline, the average processing time was 101 days. The longest case took 342 days to reach a decision on representation. According to DOJ, the servicemember in this case was deployed overseas, and because DOJ wanted to conduct an in-person interview with him prior to making a decision on representation, DOJ obtained an extension until his return. Three other cases exceeded the



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DOJ Does Not Apply Statutory  
Deadline Requirements to  
Cases against State Employers

deadline by 60 days or more. Of those cases, one involved a servicemember with an overseas deployment, another was delayed due to settlement negotiations, and the third required DOJ to collect additional information to make a decision on representation. Of those cases that exceeded the deadline, DOJ sought an extension in 21 of 29 cases. For cases where DOJ asked for and received the servicemember's consent for an extension of time, DOJ met the last negotiated deadline in all of the cases. As of February 28, 2010, four cases included in our review remained open and were still being processed by DOJ. Three of these cases had been open for more than 60 days, with the longest open for 89 days.<sup>15</sup>

Our analysis showed that 6 of 12 cases against state employers took more than 60 days to process. Comparatively, 23 of 189 cases against private or local government employers exceeded the 60-day deadline. Therefore, servicemembers who are employed by state governments may not be receiving the same treatment as other servicemembers in terms of the timeliness of USERRA complaint processing.

According to DOJ officials, the statutory deadline does not apply in cases against a state employer. Specifically, DOJ officials stated that the statutory deadline only applies where the Attorney General makes a decision whether to “appear on behalf of, and act as attorney for” the servicemember.<sup>16</sup> This provision only applies to cases against private employers because in those cases, DOJ represents the servicemember. For cases against state employers, however, DOJ must bring cases on behalf of the United States as the plaintiff.<sup>17</sup> Since in these instances DOJ “appears on behalf of and acts as attorney for” the United States—not the servicemember—the statutory deadline does not apply, according to DOJ. Nevertheless, DOJ maintains data on the extent to which it processes these cases within 60 days and includes information on these cases in the narrative section of its quarterly reports to Congress.

DOJ similarly states that the statutory requirement to seek consent for an extension of the 60-day deadline does not apply to situations involving

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<sup>15</sup>In all three referrals open for more than 60 days, DOJ sought an extension to finish processing the referral.

<sup>16</sup>38 U.S.C. § 4323(a)(2).

<sup>17</sup>Section 4323(a)(1) of title 38 of the United States Code provides that “[i]n case of such an action against a State (as an employer), the action shall be brought in the name of the United States as the plaintiff in the action.”

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state employers since DOJ does not represent the individual servicemember, but is instead representing the interests of the United States as the plaintiff, or real party in interest. DOJ officials said that to require DOJ to seek such consent from a servicemember in situations involving state employers would create the appearance that the servicemember is the real party in interest and that DOJ is not representing the U.S. government, but the servicemember. According to DOJ, this could foster Eleventh Amendment challenges by states who would argue that it is the servicemember, not the United States, that is the plaintiff or real party in interest and that such a suit runs afoul of the Eleventh Amendment in the same way that a private suit has when brought by a servicemember against a state employer.<sup>18</sup>

#### DOJ Did Not Report on Time Facilitating Settlement

Our analysis showed that in 6 of 13 private employer cases where the servicemember was involved in settlement negotiations and DOJ declined representation, DOJ notified the servicemember of its decision to decline representation but continued to aid the parties with facilitating a settlement.<sup>19</sup> According to DOJ officials, once it has declined representation, DOJ no longer counts the time it spends working on the case in measuring compliance with the statutory time frame. Consequently, DOJ does not report this time following the decision on representation. DOJ officials said that for some cases they made the decision not to offer representation, but continued to aid parties in facilitating settlement because they thought it was in the best interest of

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<sup>18</sup>USERRA used to permit private servicemember suits against their state employers in federal court, but this option was removed by Congress in 1998 as a result of successful legal challenges by states to such suits based on the Eleventh Amendment of the U.S. Constitution's guarantee of state sovereignty, which protects states from being sued without their consent. See, e.g., *Palmatier v. Michigan Dept. of State Police*, 981 F. Supp. 529 (W.D. Mich. 1997). Federal district courts, such as in *Palmatier*, applied the 1996 Supreme Court decision, *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, in dismissing USERRA cases brought by individual servicemembers against their state employers. In the *Seminole* case, which involved application of the Indian Gaming Regulatory Act, the Supreme Court ruled that Congress was precluded by the Eleventh Amendment from permitting individuals to sue states in federal court for violating federal statutes. One recognized exception to this principle of sovereign immunity involves suits against states by the United States. The 1998 amendment to USERRA provided for suits against state employers to be brought by the United States as plaintiff in federal court. Pub. L. No. 105-368, § 211, 112 Stat. 3315, 3329-3331 (Nov. 11, 1998). See, 38 U.S.C. § 4323(a)(1).

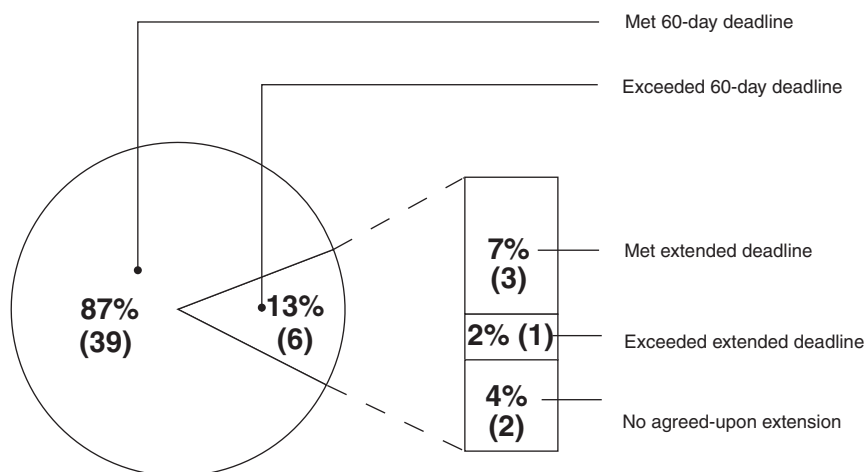
<sup>19</sup>VBIA 2008 does not require DOJ and OSC to report time working on a case after they have made a decision on representation.

the servicemember.<sup>20</sup> VBIA 2008 requirements were enacted in part due to congressional recognition of servicemember concerns over the length of time it takes for USERRA complaints to be resolved. Because VBIA 2008 does not require the agencies to report time they spend on a case after declining representation, Congress is not getting a full picture of the effort that DOJ makes on behalf of servicemembers.

## OSC Has Generally Met VBIA and Extended Deadlines

Our analysis showed that in the 45 cases included in our review, OSC generally met the original deadline or an extended deadline agreed to by the servicemember. OSC met the original 60-day deadline or an extended deadline in 42 of 45 cases. During the period covered by our review, OSC took, on average, about 61 days to make a decision on representation and to notify the servicemember of its decision. Figure 5 shows the extent to which OSC met initial and extended deadlines.

**Figure 5: OSC’s Compliance with the 60-Day Deadline for Referrals Received from October 10, 2008, to December 31, 2009**



Source: GAO analysis of OSC data.

Note: This figure represents those referrals received from October 10, 2008, to December 31, 2009, and closed as of February 28, 2010.

<sup>20</sup>Unlike DOJ, OSC officials said that they facilitate settlement in all cases before making a decision on representation to enhance the bargaining position of the servicemember. When the 60-day deadline approaches, OSC will seek an extension from the servicemember if necessary to facilitate settlement.

For cases where OSC asked for and received the complainant's consent for an extension of time to make a decision on representation, OSC met the last extended deadline in three of the four cases. The longest case, which was delayed because OSC discovered it needed to gather more information in the case, took 240 days to reach a decision on representation.<sup>21</sup>

## DOL's and DOJ's Quarterly Reports Have Timeliness and Data Quality Issues; the Three Agencies Lack Uniform Criteria in Reporting Cases

VBIA 2008 requires that DOL, DOJ, and OSC submit quarterly reports to Congress within 30 days of the end of each quarter. Based on our review of the transmittal letters for quarterly reports submitted between October 10, 2008, and December 31, 2009, DOL was late in submitting all five of its quarterly reports, ranging from 4 to 46 days late. DOJ was late in submitting its quarterly reports in four of five quarters of our review by a range of 11 to 40 days. During the period covered by our review, OSC consistently submitted its quarterly USERRA reports on time or before the statutory deadline, from 1 to 3 days early. Table 1 below shows the extent to which each agency was timely in submitting its quarterly report to Congress.

**Table 1: GAO Analysis of Timeliness of DOL, DOJ, and OSC Quarterly Reports of USERRA cases, October 10, 2008, through December 31, 2009**

Quarter	Deadline	Department of Labor		Department of Justice		Office of Special Counsel	
		Date filed	Days early or late (-)	Date filed	Days early or late (-)	Date filed	Days early or late (-)
First	01/30/09	02/17/09	-18	02/10/09	-11	01/27/09	3
Second	04/30/09	05/04/09	-4	04/29/09	1	04/30/09	0
Third	07/30/09	08/04/09	-5	08/11/09	-12	07/30/09	0
Fourth	10/30/09	12/15/09	-46	12/03/09	-34	10/29/09	1
First	01/30/10	03/15/10	-44	03/11/10	-40	01/29/10	1
<b>Agency average</b>			<b>-23.4</b>		<b>-19.2</b>		<b>1</b>

Source: GAO analysis of DOL, DOJ, and OSC quarterly report transmittal letters and other submission documentation.

DOL officials said that to ensure data accuracy and avoid having to regularly adjust previously-submitted quarterly reports in future reports, DOL reserves 2 weeks after the end of each quarter for staff to finalize database entries on all investigations and referral actions taken through

<sup>21</sup>As of February 28, 2010, there were no cases included in our review where a decision on representation had not been made.

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the last day of that quarter. The quarterly report is then drafted and reviewed by the responsible officials. Although recent reports have been late, DOL expects to improve its timeliness in submitting them as it gains more experience in preparing these reports. DOL officials said that it had not communicated with Congress in advance of late submissions.

Officials from DOJ's Civil Rights Division said they typically submit reports 1 to 2 weeks before the statutory deadline to their Office of Legislative Affairs (OLA), which has sole responsibility for communication with Congress. OLA officials said that it takes from 1 week to 1 month for a report to go through OLA's review process before it can be submitted to Congress. When a report is expected to miss a deadline, OLA officials said that they do not generally communicate with members of Congress or their staff.

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### Agencies' Reports Were Generally Accurate, but Lack Uniformity in Reporting Data; DOL and DOJ Have Data Quality Issues

For DOL, DOJ, and OSC, the data contained in the quarterly reports during the period covered by our review were generally consistent with our analysis.<sup>22</sup> However, the three agencies did not use the same criteria for including the number of cases that exceeded or met the statutory deadline in their quarterly reports. Specifically, DOL and OSC included cases where (1) the applicable statutory deadline occurred within the quarter, or (2) the deadline occurred in a later quarter but the agency met its statutory requirement within that quarter. However, DOJ reports the number of cases that met or exceeded the deadline only for cases where the deadline occurred within the quarter. VBIA 2008 requires that data contained in the reports be categorized in a uniform way. Because the three agencies are not using the same criteria to determine which cases to include in their quarterly reports, Congress may not be able to assess trends across the three agencies.

### DOL Data Presented in Quarterly Reports Were Generally Reliable, but DOL Does Not Always Correct Its Database after Preparing its Reports

Although the data contained in DOL's quarterly USERRA reports during the time of our review were generally consistent with our analysis of data from its USERRA database, DOL's process for identifying and correcting errors in its quarterly reports accounts for some of the differences we found.

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<sup>22</sup>For a more detailed discussion of the methods we used to assess each agency's quarterly reports, see appendix 1.

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To prepare its quarterly reports, DOL extracts data on the relevant cases from its USERRA database and generates two separate lists; one for investigations, which are subject to a 90-day deadline, and another for referral requests, which are subject to the 60-day deadline. After both lists have been sorted and analyzed to produce a draft report, the lists are reviewed by DOL officials who oversee investigations and referral processing. From those lists, DOL identifies cases that exceeded the deadline and then reviews documentation for these cases to determine if an extension had been recorded in the file but had not been entered in DOL's USERRA database. If it identifies such a record, it makes a notation as part of its analysis, but does not always make a correction in its system of record—the USERRA database. We identified four referrals where the USERRA database showed that DOL exceeded the 60-day referral deadline without an extension, but DOL made a written notation in its analysis used to produce its quarterly report reflecting consent to an extension. As of March 1, 2010, the date that DOL extracted the data for this review, DOL had not updated its database to reflect these extensions. After we notified DOL that its USERRA database had not been updated, DOL provided us documentation of consent for extensions in these four cases and updated its USERRA database to reflect the extensions.<sup>23</sup>

GAO's *Standards for Internal Control in the Federal Government* require that agencies establish a system to ensure the accuracy of data that it processes.<sup>24</sup> These standards state that such a system should employ a variety of control activities to ensure accuracy and completeness, such as using edit checks in controlling data entry and performing data validation and editing to identify erroneous data, among other activities. Because DOL does not consistently make corrections to the data in its USERRA database, DOL cannot ensure it has accurate and readily available data to monitor, track, and report on its performance in meeting VBIA 2008 requirements. A better system to correct its data could help DOL to ensure that it is accurately meeting congressional reporting requirements.

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<sup>23</sup>We incorporated these data into our analysis of the extent to which DOL met VBIA 2008 complaint processing timeliness requirements.

<sup>24</sup>GAO, *Standards for Internal Control in the Federal Government*, [GAO/AIMD-00-21.3.1](#) (Washington, D.C.: November 1999).

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## DOJ Reports Were Generally Accurate, but DOJ Does Not Have a Reliable Process for Producing Quarterly Reports

Although the data contained in DOJ's quarterly reports that we analyzed were generally consistent with our analysis of the data from its WordPerfect log, DOJ does not have a standard, repeatable process to input USERRA data and produce its quarterly reports. DOJ relies on one individual to enter the data and prepare its quarterly reports. A supervisory equal opportunity specialist in the Employment Litigation Section of the Civil Rights Division is responsible for inputting all the USERRA data necessary for reporting on timeliness into a WordPerfect log. DOJ does not have any written definition on each data element in the log. When this employee takes leave, the deputy section chief serves as the backup to collect the relevant documents, but does not enter data into the log; the supervisory equal opportunity specialist enters the data upon return from leave. DOJ officials said that no other DOJ employee is knowledgeable about operating the WordPerfect log. Moreover, there is no system to check and ensure that data are entered correctly. To prepare the reports, the supervisory equal opportunity specialist manually counts the number of reports to be included in each category of the report. Although DOJ said that it uses a WordPerfect formula to calculate when the 60-day deadline occurs, DOJ does not use standard formulas or queries to generate the numbers for the reports. Such an approach that requires manual counting may be susceptible to error. We have previously reported on the importance of standard, repeatable procedures for producing reports.<sup>25</sup> Moreover, GAO's *Standards for Internal Control in the Federal Government* require that agencies establish a system to ensure the accuracy of data contained in reports.<sup>26</sup> Implementing such a system could help DOJ improve the accuracy of its reports to Congress.

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## Conclusions

Servicemembers who leave their civilian employment to perform military or other uniformed service need to be assured that the agencies assigned to assist them when they believe that their USERRA rights have been violated are processing their complaints in a timely manner. We found that DOL, DOJ, and OSC generally met initial or extended complaint processing deadlines. While all three agencies' quarterly reports to Congress were generally accurate, the agencies did not use the same criteria for including cases in their quarterly reports. Moreover, DOL and DOJ were sometimes late in submitting quarterly reports to Congress and

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<sup>25</sup>GAO, *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).

<sup>26</sup>[GAO/AIMD-00-21.3.1](#).

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could improve maintenance of data and reporting on the extent to which they have met statutory deadlines. Specifically, DOL does not maintain data to monitor the extent to which it met the requirement to notify servicemembers of their complaint processing rights within 5 days. Additionally, when DOL identifies errors in its USERRA database when it prepares its quarterly reports to Congress, it does not always correct the database. DOJ does not have a standard, repeatable process to input USERRA data and process its quarterly reports and lacks data reliability checks. Addressing these data maintenance and reporting issues can help agencies ensure that future USERRA quarterly reports are timely, accurate, and clear.

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## Recommendations for Executive Action

We recommend that the Secretary of Labor, Attorney General, and Special Counsel

- establish consistent criteria for including cases in their quarterly USERRA reports to Congress.

We recommend that the Secretary of Labor direct the Assistant Secretary for the Veterans' Employment and Training Service to

- ensure that a system is in place to monitor compliance with notification of rights requirements similar to those used to assess compliance with other statutory deadlines, including maintaining data on such compliance;
- develop guidance and oversight mechanisms to ensure that changes are entered into the USERRA database as the quarterly reporting data are updated; and
- establish procedures to ensure that quarterly USERRA reports are submitted to Congress within 30 days of the end of each quarter, as required by VBIA 2008.

We recommend that the Attorney General

- establish a system of internal controls for collecting, maintaining, processing, and checking reliability of data for the quarterly reports to Congress; and
- establish procedures to ensure that quarterly USERRA reports are submitted to Congress within 30 days of the end of each quarter as required by VBIA 2008.



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## Matters for Congressional Consideration

- To help ensure that that servicemembers who file complaints are adequately being informed of their USERRA complaint process rights in accordance with VBIA 2008, Congress should consider amending USERRA to require DOL to report on the extent to which it is notifying complainants of their USERRA complaint process rights within 5 days of filing a complaint.
- To help ensure that DOJ handles state cases as expediently as private employer cases, Congress should consider amending USERRA to specifically require DOJ to adhere to the same 60-day deadline for state employer matters that they must adhere to for matters against private employers.
- To help ensure that servicemembers in state employer cases are kept apprised of the status of DOJ's decision making without potentially compromising DOJ's ability to successfully bring suit against state employers, Congress should consider amending USERRA to require DOJ to notify these servicemembers of the status of DOJ's efforts.
- To help ensure that Congress is fully apprised of efforts to resolve a case, Congress should consider amending USERRA to require DOJ and OSC to report on additional time taken to resolve a matter after they decline representation.

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## Agency Comments and Our Evaluation

We provided a draft of this report to DOL, DOJ, and OSC for review and comment. In written comments, which are included in appendix II, DOL agreed with our recommendations and provided additional comments on the matter for congressional consideration regarding reporting on notification of rights. Specifically, DOL stated that actions it plans to take to ensure that servicemembers are notified of their rights within 5 days will be sufficient and DOL will notify Congress and GAO of its progress in this regard. Therefore, DOL's view is that amending USERRA to require reporting on notification of rights is not necessary. While these steps are positive, we continue to believe that providing Congress this information on a regular basis is important for supporting Congress in its oversight role.

DOJ, in written comments, which are included in appendix III, agreed with our recommendations to establish consistent criteria for including cases in quarterly USERRA reports and to establish procedures to ensure that quarterly USERRA reports are submitted to Congress within 30 days of the end of each quarter. While DOJ agreed with our recommendation to improve its internal controls for producing its quarterly reports with

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respect to checking reliability of data, DOJ stated that its procedures for collecting, processing, and maintaining data for the quarterly reports are adequate. We continue to believe that DOJ's practice of having one person responsible for the collection and maintenance of the data and its process for manually counting claims to be included in the quarterly reports do not provide sufficient internal controls to ensure the continued accuracy of the data reported to Congress.

DOJ also expressed serious concern about our matter for congressional consideration to amend USERRA to require DOJ to notify state employee servicemembers of the status of their cases, stating that it is extremely important to maintain its independence in determining whether to file suit in the name of the United States against a state. We continue to believe that it is important that state employees be made aware of the status of their USERRA complaint and that an amendment requiring notification would help ensure that this occurs. The suggested amendment would not require DOJ to request approval from the servicemember to extend deadlines and is consistent with DOJ's current practice. In our view, this notification requirement would not compromise DOJ's independence and would reinforce the important distinction between state employee cases, where DOJ represents the interests of the United States, and private employee cases, where DOJ represents the individual servicemember. For cases involving state employees, DOJ would be required to notify servicemembers of the status of their cases, whereas in cases involving private employees, DOJ is required to request approval from the servicemember to extend the deadline for DOJ's review.

DOJ also said that it believed that it was unnecessary to amend USERRA to require reporting on time spent on USERRA referrals after representation has been declined because VBIA 2008 does not require DOJ to engage in conciliation or settlement discussions. However, because VBIA 2008 requirements were enacted in part due to concerns over the length of time it takes to resolve USERRA complaints, the proposed amendment is needed to provide Congress a full picture of the effort that DOJ makes on behalf of servicemembers.

OSC, in written comments, which are included in appendix IV, generally concurred with the conclusions and recommendations in our report. However, OSC noted that, regarding the recommendation on establishing consistent criteria for including cases in quarterly USERRA reports, DOJ should adopt the criteria already used by DOL and OSC. As we state in our report, VBIA 2008 called for the agencies to uniformly categorize the data

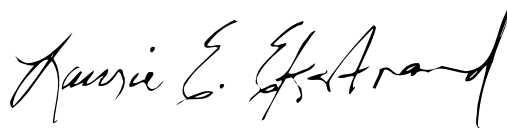
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contained in their reports. Whether one way provides greater benefit should be addressed by the agencies.

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We will send copies of this report to the Attorney General, the Secretary of Labor, the Associate Special Counsel, and other interested parties. 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 at (202) 512-6806 or at [ekstrandl@gao.gov](mailto:ekstrandl@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 to this report are listed in appendix V.



Laurie E. Ekstrand  
Director, Strategic Issues

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# Appendix I: Objectives, Scope, and Methodology

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Our objectives were to assess the extent to which the Department of Labor (DOL), Office of Special Counsel (OSC), and Department of Justice (DOJ) (1) met Veterans' Benefits Improvement Act of 2008's (VBIA 2008) complaint processing timeliness requirements between October 10, 2008, and December 31, 2009, and (2) submitted timely and reliable quarterly reports to Congress as required by VBIA 2008.

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## Objective 1: Assess the Extent to Which DOL, OSC, and DOJ Met VBIA's Complaint Processing Timeliness Requirements between October 10, 2008, and December 31, 2009

To assess the extent to which DOL, OSC, and DOJ met VBIA 2008's complaint processing timeliness requirements, we obtained information on all the USERRA complaints filed with and without referral requests received by DOL from October 10, 2008—the effective date of VBIA 2008—through December 31, 2009. We obtained data from DOL's USERRA Information Management System on March 1, 2010. We considered cases that were closed as of February 28, 2010, as completed cases, while cases that remained open as of this date were treated as pending cases in our analysis. We obtained 1,663 unique complaints and 205 referrals that met these criteria from DOL. In addition, there were 68 complaints and 34 referrals that remained open as of February 28, 2010. We also obtained data during that same time period on referrals received by OSC generated from its case tracking system, OSC 2000, and by DOJ from the WordPerfect log used by the Employment Litigation Section of its Civil Rights Division. For OSC, we obtained 45 referrals that met these criteria. For DOJ, we identified 201 referrals that met these criteria and four cases that remained open as of February 28, 2010.

We first assessed the reliability of the data from databases that each agency uses to maintain data for reporting to Congress under VBIA 2008. To assess the reliability of each of the databases, we compared data from the databases with data found in the official hard copy case files. For DOL and DOJ, we traced data from a random probability sample of cases to the case files. For DOL, our sample included a total of 60 unique cases where the servicemember did not request a referral and 52 cases where the servicemember requested a referral.<sup>1</sup> For DOJ, our sample included 55 cases from a universe of 201 cases. Because OSC received only 45 referrals between October 10, 2008, and December 31, 2009, we compared the data from all 45 cases to the official hard copy case files.

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<sup>1</sup>Of those cases we reviewed, 60 contained data only on investigations because the servicemember did not request a referral, 30 cases contained data related to both investigations and referrals, and 22 contained data related to referrals only. There were a total of 90 cases in the investigation sample.

For selected data elements related to reporting to Congress, we assessed the reliability of these data elements by attempting to match the data in the databases with the source case files.<sup>2</sup> In addition, for each selected data element, we excluded cases from our data reliability assessment if information was missing from the case file, thus preventing a comparison between data in the databases and the case file. We did not evaluate the accuracy of the source of the 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 the databases was the same or within 1 day of the date reflected in the case file.

To assess the reliability of the data elements pertaining to time, we assessed (1) the number of times that the electronic data did not match the hard copy, case file data, (2) the average number of days that the electronic date differed from the hard copy date, and (3) the change in the number of cases exceeding the deadline based on differences between the dates contained in the electronic data and the hard copy data. Based on the collective results of each of these tests, we consider each agency's data to be sufficiently reliable for the purposes of this report.

To determine the extent to which each agency met the complaint processing timeliness deadlines, we used the data from each agency's database and calculated the average processing time for complaints and referrals received from October 10, 2008, through December 31, 2009, and that closed by February 28, 2010.

Because DOL does not maintain data in its USERRA database on the extent to which it notified the claimant of his or her complaint processing rights, we estimated that percentage based on the data gathered from the random probability sample of case files. We reviewed the extent to which there was evidence that DOL notified the servicemember of his or her USERRA complaint processing rights within 5 days of receiving the complaint and the time it took to notify the servicemember. We used four different indicators as evidence of notification: (1) the pen and ink notation at the bottom of the complaint form, (2) an E-mail containing the text of the standard notification, (3) the presence of the enclosure for

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<sup>2</sup>For DOL, these data elements included case number, employer, date investigation was opened, date investigation was closed, extensions of deadline, date referral was requested, and date the referral was sent to DOJ or OSC. For DOJ and OSC, they included case number, date received from DOL, date of decision on representation, and extensions. For DOJ, we also assessed whether the data element indicated if the case was against a state.

“Your USERRA Complaint Process Rights,” or (4) a letter or E-mail containing language indicating that notification of rights was enclosed or attached. All percentage estimates presented in this report have a margin of error of plus or minus 11 percentage points or less at the 95 percent confidence level.

We also interviewed knowledgeable DOL, DOJ, 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 DOJ, we interviewed officials with the Employment Litigation Section of the Civil Rights Division. At OSC, we interviewed officials from the USERRA Unit and Information Technology Branch.

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## Objective 2: Assess the Extent to Which DOL, OSC, and DOJ Have Submitted Timely and Reliable Quarterly Reports to Congress as Required by VBIA 2008

**Timeliness of Submissions:** To determine the timeliness of each agency’s submission of the quarterly reports to Congress, we reviewed the transmittal letters and other documentation of submission to determine whether the quarterly reports were submitted to Congress within 30 days after the end of the quarter. To determine each agency’s policies and procedures for submitting the quarterly reports, we interviewed officials from DOL’s VETS, DOJ’s Office of Legislative Affairs, and OSC’s USERRA Unit.

**Reliability of Quarterly Reports:** To assess the reliability of the quarterly reports, we used data from each agency’s database covering the period of October 10, 2008, through December 31, 2009, and, based on criteria provided by each agency, attempted to recreate the quarterly reports. For each agency’s report, we assessed the accuracy of the tables identifying the number of cases that met the deadline and the number of cases that exceeded the applicable deadline, with and without consent. We did not assess the data contained in the narrative portion of each agency’s reports. We also reviewed each agency’s policies and procedures for collecting, maintaining, and storing the data and for producing the reports, and interviewed officials from VETS’s National Office and Atlanta Regional Office; DOJ’s Employment Litigation Section of its Civil Rights Division; and OSC’s USERRA Unit and Information Technology Branch.

DOL: We recreated five quarterly reports by applying DOL’s criteria and using data provided from its USERRA database. For each quarter, we included investigations where the 90-day deadline occurred within the quarter, or the 90-day due date occurred in a later quarter and the close date occurred within the quarter. For referrals, we included cases where

the 60-day deadline occurred within the quarter, or the 60-day deadline occurred in a later quarter and the last action on the referral occurred during the quarter.

We found some differences between our analysis and the data in the quarterly reports. However, we were generally able to account for the differences. For referrals, these differences were due to DOL's failure to correct its database to include extensions that DOL identified while reviewing the data extracts prior to submission of its quarterly reports. Specifically, when DOL identifies cases where the latest deadline has been exceeded, DOL reviews documentation for these cases to determine if an extension had been recorded in the file but had not been entered in DOL's USERRA database. If DOL identifies such a record, it makes a notation as part of its analysis, but it does not always make a correction in its system of record—the USERRA database. Specifically, we found four cases where DOL made a notation in its analysis used to produce its quarterly report, but the information did not appear in the data that we obtained from DOL's USERRA database.<sup>3</sup> For investigations, differences between our analysis and the data in the quarterly reports may have been due to changes in the status of a case being recorded in DOL's USERRA database following the end of the quarter in which the case was reported.

DOJ: We recreated four of five DOJ reports using criteria provided to us by DOJ and applying those criteria to the data from DOJ's WordPerfect log. We included cases where the 60-day deadline occurred within the quarter. In addition, we included state cases in our analyses through third quarter, fiscal year 2009—the same quarters that state cases were included by DOJ.<sup>4</sup> We could not recreate DOJ's quarterly report for first quarter, fiscal year 2009, because DOJ's WordPerfect log did not contain data on all cases contained in the report—specifically referrals that were received prior to October 10, 2008. Our analysis of the latter four reports showed that DOJ included one additional referral that exceeded the 60-day deadline with consent in second quarter, fiscal year 2009, and one case that exceeded the deadline without consent in third quarter, fiscal year 2009. This case exceeded the deadline by 2 days. Because of the small number of inaccuracies, we found DOJ's fiscal year 2009 second through fourth

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<sup>3</sup>DOL subsequently provided evidence of consent for an extension and such data were incorporated to our analysis on the extent to which DOL met the applicable deadline.

<sup>4</sup>DOJ reported on state cases in the narrative portion of its fourth quarter fiscal year 2009 and first quarter fiscal year 2010 quarterly reports.

quarter and fiscal year 2010 first quarter reports to be generally consistent with our analysis.

OSC: We recreated OSC's report by including cases where the 60-day deadline occurred within the quarter, or the 60-day deadline occurred in a later quarter but OSC completed processing the referral within the quarter. We did not find any discrepancies between our analysis and the data contained in OSC's quarterly reports.

We conducted this performance audit from January 2010 through September 2010 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.



# Appendix II: Comments from the Department of Labor

**U.S. Department of Labor**

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



September 30, 2010

Ms. Laurie Ekstrand  
Director, Strategic Issues  
U.S. Government Accountability Office  
441 G Street, NW  
Washington, DC 20548

Dear Ms. Ekstrand:

Thank you for the opportunity to review the Government Accountability Office (GAO) draft report entitled "Servicemember Reemployment: Agencies are Generally Timely in Processing Redress Complaints, but Improvements Needed in Maintaining Data and Reporting" (GAO-11-55). The Department of Labor (DOL) welcomes GAO's analysis and suggestions for improving its Uniformed Services Employment and Reemployment Rights Act (USERRA) program.

DOL is pleased that your audit found that 99% of the USERRA investigations conducted by the Veterans' Employment and Training Service (VETS), and 99% of the USERRA referrals processed by DOL, met the original statutory deadline or an extended deadline agreed to by the claimant. DOL also appreciates being given the opportunity to explain the circumstances of particular investigations and referrals that exceeded the average time for completion. As is illustrated by the explanations DOL provided for those "outliers," each USERRA case is unique, and some cases and referrals necessarily take longer to investigate and analyze than others.

For example, your audit found that one USERRA investigation took almost one year to complete. This case involved a pension plan that had been terminated and the Pension Benefit Guaranty Corporation (PBGC) had become the plan's statutory trustee. DOL and PBGC worked together to develop a regulatory amendment to resolve a tension between USERRA's requirements and the PBGC's rules under the Employee Retirement Income Security Act of 1974 ("ERISA"). On November 17, 2009, PBGC published a final rule (74 FR 59093) amending its benefit payments regulation. The new rule, effective December 17, 2009, gives credit, for PBGC guarantee purposes, for military service through plan termination even if the Service Member returns to employment after plan termination. Thus the new rule fully harmonizes PBGC's regulations with USERRA's requirement that upon reemployment by the previous employer the Service Member receives credit for pension plan benefits that would have accrued but for the employee's absence due to military service. At the time of publication, PBGC estimated that through the end of FY 2010, there would be approximately 1,800 participants in plans trusted by PBGC whose USERRA benefits would be guaranteed as a result of the final rule, and that

the present value of those benefits would be about \$4.5 million. PBGC expected to pay approximately \$85,000 in back payments to about 34 participants who went into pay status after plan termination but before the rule became effective. Many Veterans who never filed a USERRA complaint will benefit from this comprehensive government solution to a complex USERRA compliance issue.

The GAO report contains four recommendations for DOL. First, you recommend that the Secretary of Labor, the Attorney General and the Special Counsel establish consistent criteria for including cases in their quarterly USERRA reports to Congress. DOL concurs with this recommendation, and will work with these agencies to develop a consistent approach to quarterly reporting.

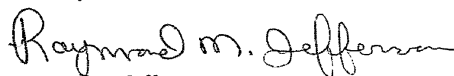
Secondly, GAO recommends that VETS implement a system to monitor compliance with the five-day notification of rights requirements, and maintain data on such compliance. As noted in the report, VETS is implementing a new process for centralized receipt of hard copy complaint forms. The GAO report found that all of the 15% of cases where claimants were not notified of their rights within five days of filing had been filed manually. The new process for manually-submitted forms will replicate the process already in place for electronically-submitted forms. DOL is confident that this new process for handling hard copy complaints will ensure that all claimants receive timely notification of rights. In addition, DOL will add a field to our USERRA database to more closely track compliance with the notification requirement.

The report further suggests that Congress consider amending USERRA to require DOL to report on the extent to which it is notifying complainants of their USERRA complaint process rights within 5 days of filing a complaint. DOL is confident that the procedures described above will ensure that claimants receive the required notification in a timely manner, and will be pleased to inform Congress and GAO on the effectiveness of the new process. Therefore, DOL does not believe it is necessary to amend the statute.

The third and fourth recommendations in the GAO report are that VETS develop procedures to ensure that changes are entered into the USERRA database as the quarterly reporting data are updated, and that procedures are established to ensure that quarterly USERRA reports are submitted to Congress on time. VETS concurs with both of these recommendations, and will take steps to implement them.

We appreciate your team's thorough analysis and their work with our staff in the course of developing this report. We are committed to continuous improvement of our USERRA program and will promptly implement these changes in light of your recommendations.

Sincerely,



Raymond M. Jefferson

# Appendix III: Comments from the Department of Justice



U.S. Department of Justice  
Civil Rights Division  
*Deputy Assistant Attorney General*

Washington, D.C. 20530

OCT 1 2010

Laurie Ekstrand  
Director, Strategic Issues  
U.S. Government Accountability Office  
441 G Street, N.W.  
Washington, D.C. 20548

Dear Ms. Ekstrand:

Thank you for the opportunity to review the final draft of the Government Accountability Office (GAO) report entitled "SERVICEMEMBER REEMPLOYMENT: Agencies are Generally Timely in Processing Complaints, but Improvements Needed in Maintaining Data and Reporting." This draft report was reviewed by the Department of Justice's component that participated in the review. This letter constitutes the Department's formal comments. I request that the GAO include this letter in the final report.

Recommendation that the Secretary of Labor, Attorney General, and Special Counsel Establish Consistent Criteria for Including Cases in their Quarterly Reports to Congress

The Department of Justice supports this recommendation. The Department of Justice and the other agencies already have collaborated regarding consistent reporting criteria, and further meetings between the agencies should ensure a consistent understanding of the agreed-upon reporting criteria.

Recommendation that the Attorney General Establish Internal Controls of Collecting, Maintaining, Processing, and Checking Reliability of Data for the Quarterly Report

The Department of Justice believes that its procedures for collecting, maintaining, and processing data for the quarterly report are adequate. With respect to checking reliability, however, the Department agrees that more internal controls would be helpful to protect against human error in the data input function.

2

Recommendation that the Attorney General Establish Procedures to Ensure that Quarterly Reports are Submitted to Congress within 30 Days of the End of Each Quarter as Required by the Veterans' Benefits and Improvement Act of 2008

The Department of Justice does not object to this recommendation, and has already taken steps to ensure timely submissions of its Quarterly Reports, as evidenced by its timely submission of the Third Quarterly Report for FY2010.

The Department of Justice notes that it has serious concerns regarding GAO's suggestion that Congress consider amending USERRA so that the Department must notify servicemembers regarding the status of the Department's review of their USERRA complaints when suit will be filed in the name of the United States. Based upon the Eleventh Amendment issues raised in the GAO's report, the Department believes it is extremely important to maintain its independence when exercising prosecutorial discretion regarding whether to file suit in the name of the United States against a State or State Agency.

The Department also has concerns regarding GAO's suggestion that the Department report time spent on a USERRA referral after the Department has decided not to extend an offer of representation to the servicemember. The purpose of the Veterans' Benefits and Improvement Act of 2008 ("VBIA") is to ensure that DOJ timely reviews USERRA referrals and notifies the claimant in writing, by imposed deadlines, as to whether he or she will be offered representation in a court action. As noted in the GAO's report, in some cases the Department continues to aid the parties in settlement discussions after the Department has definitively determined that it will not be offering representation to the servicemember and notified the servicemember of this decision in writing. Unlike the Department of Labor, the Department of Justice has no statutory obligation to engage in conciliation or settlement discussions with the parties. Thus, the Department's continued efforts to provide settlement assistance are solely to benefit the servicemember, and in no way designed to administratively meet the VBIA's deadlines while continuing to work on the case. Accordingly, the Department believes it is unnecessary to impose additional administrative reporting requirements upon the Department.

The extensive efforts that your staff has put into this report and the opportunity to work with them on this important issue are appreciated.

Sincerely,

  
Loretta King  
Deputy Assistant Attorney General

# Appendix IV: Comments from the Office of Special Counsel



U.S. OFFICE OF SPECIAL COUNSEL  
1730 M Street, N.W., Suite 218  
Washington, D.C. 20036-4505  
202-254-3600

September 29, 2010

Laurie E. Ekstrand  
Director, Strategic Issues  
U.S. Government Accountability Office  
441 G St., NW  
Washington, DC 20548

Re: Response to GAO Draft Report GAO-11-55

Dear Ms. Ekstrand:

Thank you for the opportunity to comment on Government Accountability Office (GAO) Draft Report (GAO-11-55), *SERVICEMEMBER REEMPLOYMENT: Agencies Are Generally Timely in Processing Redress Complaints, but Improvements Needed in Maintaining Data and Reporting*. The report addresses compliance by the Department of Labor (DOL), Department of Justice (DOJ), and Office of Special Counsel (OSC) with changes made by the Veterans Benefits Improvement Act of 2008 (VBIA) to the Uniformed Services Employment and Reemployment Rights Act (USERRA), which protects the civilian employment rights of military service members.

OSC generally concurs with the conclusions and recommendations contained in the report, with certain caveats. First, while we agree with Recommendation # 1, that DOL, DOJ, and OSC should use consistent criteria for inclusion of cases in their quarterly USERRA reports, we note that DOL and OSC use the same criteria, which we believe provide the most relevant, accurate, and transparent data consistent with the purposes and requirements of the VBIA. Therefore, OSC believes that such criteria should be adopted by DOJ, and that Recommendation # 1 should be modified accordingly.

Second, with regard to GAO's Matters for Congressional Consideration # 4, that Congress should consider amending USERRA to require DOJ and OSC to report on additional time taken to resolve a matter after they decline representation, we note that OSC's practice is to facilitate settlement *before* making a final decision on representation, which we believe enhances the service member's bargaining position and the likelihood of a favorable resolution. As noted in the report, OSC will seek an extension from a service member if necessary to continue its efforts to facilitate settlement. Thus, OSC's data and reports already reflect the additional time spent on such efforts. For these reasons, even if Congress amended USERRA in the manner described in the report, OSC would likely continue its current practice, which we believe is in the best interests of service members.

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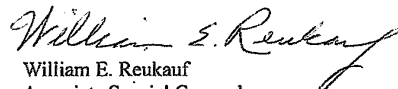
**Appendix IV: Comments from the Office of  
Special Counsel**

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In closing, we appreciate your efforts and thank you for the opportunity to comment on your report.

Sincerely,

  
William E. Reukauf  
Associate Special Counsel

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# Appendix V: GAO Contact and Staff Acknowledgments

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## GAO Contact

Laurie E. Ekstrand at (202) 512-6806 or [ekstrandl@gao.gov](mailto:ekstrandl@gao.gov).

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## Acknowledgments

In addition to the contact named above, individuals making key contributions to this report were Bill Reinsberg, Assistant Director; Jim Ashley; Gerard Burke; Karin Fangman; Donna Miller; Wesley Sholtes; Tamara Stenzel; Jessica Thomsen; and Greg Wilmoth.

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# Related GAO Products

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*Military Personnel: Improvements Needed to Increase Effectiveness of DOD's Programs to Promote Positive Working Relationships between Reservists and Their Employers.* [GAO-08-981R](#). Washington, D.C.: August 15, 2008.

*DOD Financial Management: Adjudication of Butterbaugh Claims for the Restoration of Annual Leave or Pay.* [GAO-08-948R](#). Washington, D.C.: July 28, 2008.

*Military Personnel: Federal Agencies Have Taken Actions to Address Servicemembers' Employment Rights, but a Single Entity Needs to Maintain Visibility to Improve Focus on Overall Program Results.* [GAO-08-254T](#). Washington, D.C.: November 8, 2007.

*Military Personnel: Considerations Related to Extending Demonstration Project on Servicemembers' Employment Rights Claims.* [GAO-08-229T](#). Washington, D.C.: October 31, 2007.

*Military Personnel: Improved Quality Controls Needed over Servicemembers Employment Rights Claims at DOL.* [GAO-07-907](#). Washington, D.C.: July 20, 2007.

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

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

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

*U.S. Office of Special Counsel's Role in Enforcing Law to Protect Reemployment Rights of Veterans and Reservists in Federal Employment.* [GAO-05-74R](#). Washington, D.C.: October 6, 2004.



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