

**GAO**

Testimony  
Before the Committee on Veterans'  
Affairs, U.S. Senate

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**MILITARY PERSONNEL**

**Considerations Related to  
Extending Demonstration  
Project on Servicemembers'  
Employment Rights Claims**

Statement of George H. Stalcup, Director  
Strategic Issues





Highlights of [GAO-08-229T](#), a testimony before the Committee on Veterans' Affairs, U.S. Senate

## 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 or other uniformed service.

Under a demonstration project from February 8, 2005, through September 30, 2007, and subsequently extended through November 16, 2007, the Department of Labor (DOL) and the Office of Special Counsel (OSC) share responsibility for receiving and investigating USERRA claims and seeking corrective action for federal employees.

In July 2007, GAO reported on its review of the operation of the demonstration project through September 2006. This testimony describes the findings of our work and actions taken to address our recommendations. In response to your request, we also present GAO's views on (1) factors to consider in deciding whether to extend the demonstration project and the merits of conducting a follow-up review and (2) options available if the demonstration is not extended.

In preparing this statement, GAO interviewed officials from DOL and OSC to update actions taken on recommendations from our July 2007 report and developments since we conducted that review.

To view the full product, including the scope and methodology, click on [GAO-08-229T](#). For more information, contact George H. Stalcup at (202) 512-9490 or [stalcupg@gao.gov](mailto:stalcupg@gao.gov).

## MILITARY PERSONNEL

### Considerations Related to Extending Demonstration Project on Servicemembers' Employment Rights Claims

#### What GAO Found

Under the demonstration project, OSC receives and investigates claims for federal employees whose social security numbers end in odd numbers; DOL investigates claims for individuals whose social security numbers end in even numbers. Among GAO's findings were the following:

- DOL and OSC use two different models to investigate federal USERRA claims, with DOL using a nationwide network and OSC using a centralized approach, mainly within its headquarters.
- Since the demonstration project began, both DOL and OSC officials have said that cooperation and communication increased between the two agencies concerning USERRA claims, raising awareness of the issues related to servicemembers who are federal employees.
- 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 if DOL did not resolve their claims.
- DOL had no internal process to routinely review investigators' determinations before claimants were notified of them.
- Data limitations at both agencies made claim outcome data unreliable.

DOL officials agreed with GAO's findings and recommendations and are taking actions to address the recommendations. In July 2007, DOL issued guidance concerning case closing procedures, including standard language to ensure that claimants (federal and nonfederal) are apprised of their rights, and began conducting mandatory training on the guidance in August 2007. In addition, according to DOL officials, beginning in January 2008, all claims are to be reviewed before the closure letter is sent to the claimant. These are positive steps and it will be important for DOL to follow through with these and other actions.

If the demonstration project were to be extended, it would be important that clear objectives be set. Legislation creating the current demonstration project was not specific in terms of the objectives to be achieved. Clear project objectives would also facilitate a follow-on evaluation. In this regard, GAO's July 2007 report provides baseline data that could inform this evaluation. Given adequate time and resources, an evaluation of the extended demonstration project could be designed and tailored to provide information to inform congressional decision making. GAO also presents potential benefits and limitations associated with options available if the demonstration project is not extended.

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Chairman Akaka, Senator Burr, and Members of the Committee:

I am pleased to be here today to discuss the results from our review of a demonstration project established by the Veterans Benefits Improvement Act of 2004 (VBIA),<sup>1</sup> related to servicemember rights under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA),<sup>2</sup> which protects the employment and reemployment rights of federal and nonfederal employees who leave their employment to perform military or other uniformed service. 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. USERRA applies to a wide range of employers, including federal, state, and local governments as well as private sector firms. The demonstration project authorized the Office of Special Counsel (OSC) along with the Department of Labor (DOL) to receive and investigate certain federal employee USERRA claims. DOL's Veterans' Employment and Training Service (VETS) investigates and attempts to resolve USERRA claims. In July, we issued a report responding to a mandate in VBIA on our evaluations of the demonstration project.<sup>3</sup> Our report focused on agency (1) processes, (2) outcomes, and (3) major changes during the demonstration project.

For today's hearing, I will discuss

- USERRA claims processing under the demonstration project for servicemembers of federal executive branch agencies,<sup>4</sup>

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<sup>1</sup>See section 204 of Pub. L. No. 108-454, 118 Stat. 3598, 3606-3608, 38 U.S.C. § 4301 note.

<sup>2</sup>Pub. L. No. 103-353, 108 Stat. 3149, 38 U.S.C. §§ 4301-4334.

<sup>3</sup>GAO, *Military Personnel: Improved Quality Controls Needed over Servicemembers' Employment Rights Claims at DOL*, [GAO-07-907](#) (Washington, D.C.: July 20, 2007).

<sup>4</sup>USERRA rights extend to servicemembers who are federal employees, prior employees of, and applicants to federal executive branch agencies. Servicemembers include members of the National Guard and Reserves. For purposes of this testimony, we are using the term servicemember, although 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.

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- the findings of our work and actions taken to address our recommendations, and
  - considerations related to extending the demonstration project.

For our July 2007 report, we reviewed relevant documentation and interviewed knowledgeable DOL and OSC officials on their policies and procedures for processing federal employees' USERRA claims under the demonstration project. We also reviewed and analyzed data from VETS's database, the USERRA Information Management System,<sup>5</sup> and OSC's case tracking system, OSC 2000,<sup>6</sup> 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 source case files.<sup>7</sup> We did not assess the quality of the claims' investigations or the quality of the outcomes of those investigations. Considerations related to extending the demonstration are based on our knowledge of the demonstration project and requirements for effective program evaluation. We conducted our work for this statement in October 2007 in accordance with generally accepted government auditing standards.

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## USERRA Claims Processing under the Demonstration Project

Under a demonstration project established by VBIA, from February 8, 2005, through September 30, 2007, and subsequently extended through November 16, 2007,<sup>8</sup> OSC and DOL share responsibility for receiving and investigating USERRA claims and seeking corrective action for federal employees. While the legislation did not establish specific goals for the demonstration project, the language mandating that GAO conduct a

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<sup>5</sup>The 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.

<sup>6</sup>OSC 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.

<sup>7</sup>The period of the sample was from the start of the demonstration project on February 8, 2005, through July 21, 2006. Unless otherwise stated, the data were sufficiently reliable for the purposes of our review.

<sup>8</sup>See section 130 of Pub. L. No. 110-92 (Sept. 29, 2007).

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review suggested that duplication of effort and delays in processing cases were of concern to Congress.<sup>9</sup>

The demonstration project gave OSC, an independent investigative and prosecutorial agency, authority to receive and investigate claims for federal employees whose social security numbers end in odd numbers. VETS investigated claims for individuals whose social security numbers end in even numbers. Under the demonstration project, OSC conducts an investigation of claims assigned to determine whether the evidence 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).<sup>10</sup> For claims assigned to DOL, VETS conducts an investigation, and if it cannot resolve a claim, DOL is to inform claimants that they may request to have their claims referred to OSC.<sup>11</sup>

OSC's responsibility under USERRA for conducting independent reviews of referred claims after they are investigated but not resolved by VETS remained unchanged during the demonstration project. Before sending the referred claim to OSC, two additional levels of review take place within DOL. After OSC receives the referred claim from DOL, it 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 referred 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.

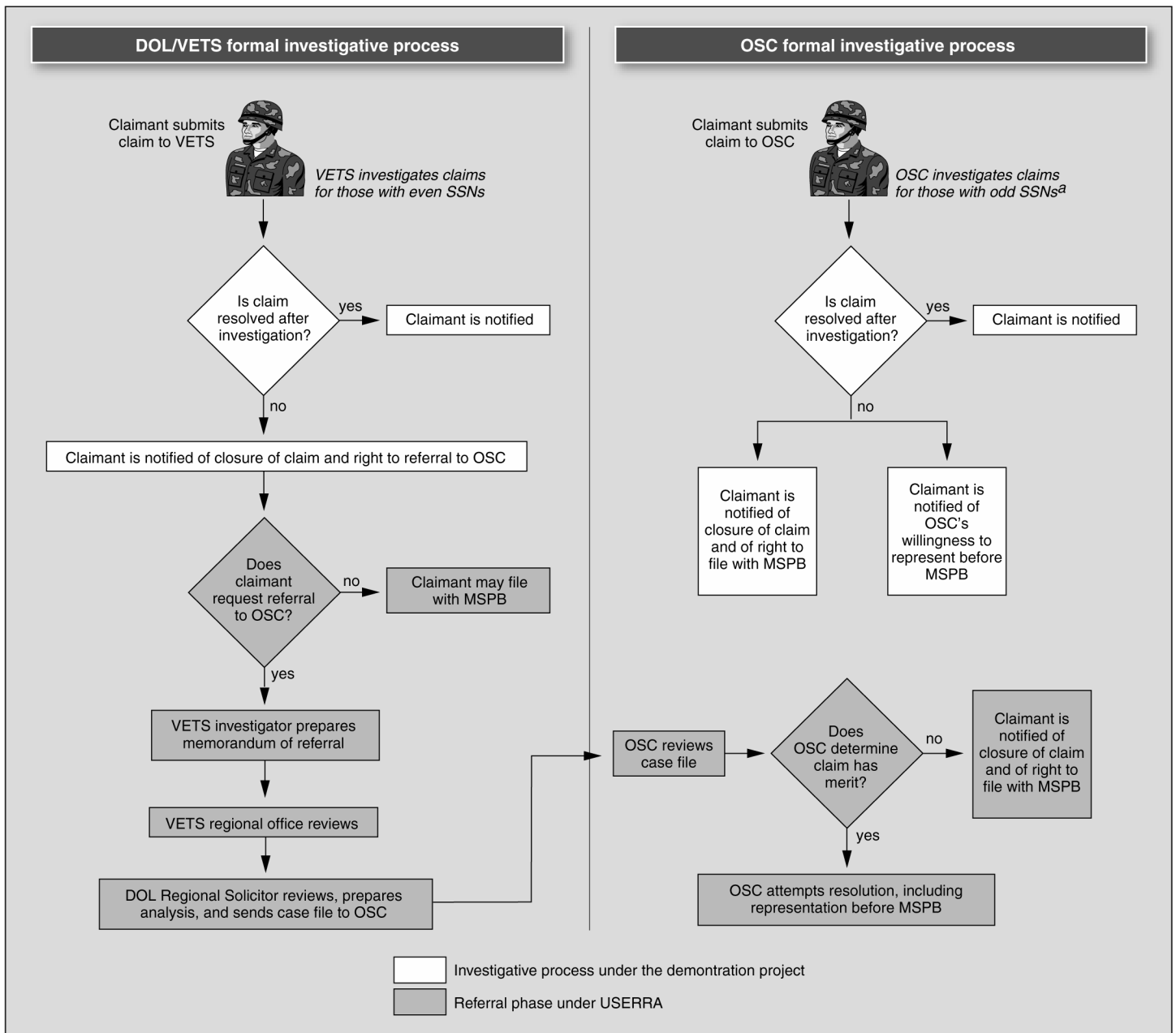
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<sup>9</sup>See section 204 of Pub. L. No. 108-454, 118 Stat. 3598, 3606-3608, 38 U.S.C. § 4301 note.

<sup>10</sup>An independent, quasi-judicial agency in the executive branch, MSPB serves as the guardian of federal merit principles.

<sup>11</sup>DOL is also to inform claimants that they may file a complaint directly with the MSPB. If DOL/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.

**Figure 1: USERRA Claims Processing under the Demonstration Project**



Source: GAO (data), PhotoDisc (images).

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

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<sup>a</sup>OSC 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.

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## Key Findings on the Demonstration Project and Actions Taken to Address Recommendations

Under the demonstration project, VETS and OSC used two different models to investigate federal employee USERRA claims. Both DOL and OSC officials have said that cooperation and communication increased between the two agencies concerning USERRA claims, raising awareness of the issues related to servicemembers who are federal employees. In addition, technological enhancements have occurred, primarily on the part of VETS since the demonstration project. For example, at VETS, an enhancement to its database enables the electronic transfer of information between agencies and the electronic filing of USERRA claims. However, we 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. We also found data limitations at both agencies that made claim outcome data unreliable. DOL agreed with our findings and recommendations and has begun to take corrective action.

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## Agencies Used Two Models for Processing USERRA Claims

Since the start of the demonstration project on February 8, 2005, both DOL/VETS and OSC had policies and procedures for receiving, investigating, and resolving USERRA claims against federal executive branch employers. Table 1 describes the two models we reported DOL and OSC using to process USERRA claims.

**Table 1: Characteristics of DOL’s and OSC’s USERRA Claims’ Processing Models**

Characteristic	DOL	OSC
Structure of office	Nationwide network with over 100 investigators working together on fact-finding at VETS’s offices in each state, six regional offices, and one national office.	Centralized USERRA Unit within OSC headquarters with the Unit Chief, three investigators, and three attorneys working together on fact-finding and legal analysis at the time of our review. <sup>a</sup>
Responsibilities of staff	Investigators process both federal and nonfederal USERRA and veteran’s preference claims, <sup>b</sup> provide outreach and education to servicemembers (at mobilizations and demobilizations) and employers (federal and nonfederal), and respond to informal requests for information.	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. For referrals, investigators prepare a memorandum of referral with supporting documentation. Attorneys from the Office of the Solicitor are available for consultations during an investigation if an investigator has a question or needs legal assistance, but attorneys are not assigned to every case. <sup>c</sup>	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 each claimant (and for a claim with merit, to the agency) containing the factual and legal basis for its conclusions.
Oversight	There is no required internal review of investigative findings and closure letters prior to closure letters being sent to the claimant.  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.	At the time of our review, the USERRA Unit Chief provided ongoing guidance, reviewed all work products in a case, and reviewed and approved 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.

Source: GAO.

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

<sup>a</sup>Since our report was issued, OSC now has seven attorneys and two investigators.

<sup>b</sup>Under 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.

<sup>c</sup>An official from DOL’s Office of the Solicitor said that attorneys from the office 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.



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## VETS Is Taking Action to Help Ensure That It Consistently Notifies Claimants of the Right to Referral

Once a VETS investigator completes an investigation and arrives at a determination on a 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. 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. Our review of a random sample of claims showed that for claims VETS was not successful in resolving (i.e., claims not granted or settled), VETS (1) failed to notify half the claimants in writing, (2) correctly notified some claimants, (3) notified others of only some of their options, and (4) incorrectly advised some claimants 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. In addition, we found that the *VETS USERRA Operations Manual* failed to provide clear guidance to VETS investigators on when to notify servicemembers of their rights and the content of the notifications. VETS had no internal process to routinely review investigators' determinations before claimants are notified of them. According to a VETS official, there was no requirement that a supervisor review investigators' determinations before notifying the claimant of the determination. In addition, legal reviews by a DOL regional Office of the Solicitor occurred only when a claimant requested to have his or her claim referred to OSC. A VETS official estimated that about 7 percent of claimants ask for their claims to be referred to OSC or, for nonfederal servicemembers, to the Department of Justice.

During our review, citing our preliminary findings, DOL officials required each region to revise its guidance concerning the notification of rights. Since that time, DOL has taken the following additional actions:

- reviewed and updated policy changes to incorporate into the revised *Operations Manual* and prepared the first draft of the revised *Manual*;
- issued a memo in July 2007 from the Assistant Secretary for Veteran's Employment and Training to regional administrators, senior investigators, and directors requiring case closing procedure changes, including the use of standard language to help ensure that claimants (federal and nonfederal) are apprised of their rights; and
- began conducting mandatory training on the requirements contained in the memo in August 2007.

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In addition, according to DOL officials, beginning in January 2008, all claims are to be reviewed before the closure letter is sent to the claimant. These are positive steps. It is important for DOL to follow through with its plans to complete revisions to its *USERRA Operations Manual*, which according to DOL officials is expected in January 2008, to ensure that clear and uniform guidance is available to all involved in processing USERRA claims.

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### Number of Claims and Average Processing Time under the Demonstration Project

Our review of data from VETS's database showed that from the start of the demonstration project on February 8, 2005, through September 30, 2006, VETS investigated a total of 166 unique claims. We reviewed a random sample of case files to assess the reliability of VETS's data and found that the closed dates in VETS's database were not sufficiently reliable. Therefore, 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. During the same period, 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.

In his July 2007 memo discussed above, the Assistant Secretary for Veteran's Employment and Training also instructed regional administrators, senior investigators, and directors that investigators are to ensure that the closed date of each USERRA case entered in VETS's database matches the date on the closing letter sent to the claimant.

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### Data Limitations at Both Agencies

We found data limitations at both agencies that affected our ability to determine outcomes of the demonstration project and could adversely affect Congress's ability to assess how well federal USERRA claims are processed and whether changes are needed. At VETS, we found an overstatement in the number of claims and unreliable data in the VETS's database. From February 8, 2005, through September 30, 2006, VETS received a total of 166 unique claims, although 202 claims were recorded

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as opened in VETS's database. Duplicate, reopened, and transferred claims accounted for most of this difference. Also, in our review of a random sample of case files,<sup>12</sup> we found

- the dates recorded for case closure in VETS's database did not reflect the dates on the closure letters in 22 of 52 claims reviewed, so using the correct dates from the sample, we statistically estimated average processing time, and
- 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.

At OSC, we assessed the reliability of selected data elements in OSC's case tracking system in an earlier report and found that the corrective action data element, which would be used for identifying the outcomes of USERRA claims, was not sufficiently reliable.<sup>13</sup>

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## DOL Has a Lengthy Two-Phase Review Process before Claims Are Referred 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. For these claims, two sequential DOL reviews take place: a VETS regional office prepares a report of the investigation, including a recommendation on the merits and a regional Office of the Solicitor conducts a separate legal analysis and makes an independent 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.<sup>14</sup> For those 6 claims, from initial VETS investigation through the VETS regional office and regional Office of the Solicitor reviews, it took an average of 247 days or about 8 months before the Office of the Solicitor sent the claims to OSC.<sup>15</sup> Of the 6 referred claims that OSC received from DOL during the demonstration project, as of

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<sup>12</sup>The period of the random sample covered February 8, 2005, through July 21, 2006.

<sup>13</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>14</sup>The remaining five claims were still at DOL as of September 30, 2006.

<sup>15</sup>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.

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September 30, 2006, OSC declined to represent the claimant in 5 claims and was still reviewing 1 of them, taking an average of 61 days to independently review the claims and determine if the claims had merit and whether to represent the claimants.

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## Considerations Related to Extending the Demonstration Project

You asked us about factors that could be considered in deciding whether to extend the demonstration project and to conduct a follow-up review. If the demonstration project were to be extended, it would be important to have clear objectives. Legislation creating the current demonstration project was not specific in terms of the objectives to be achieved. Having clear objectives would be important for the effective implementation of the extended demonstration project and would facilitate a follow-on evaluation. In this regard, our report provides baseline data that could inform this evaluation. Given adequate time and resources, an evaluation of the extended demonstration project could be designed and tailored to provide information to inform congressional decision making.

Congress also may want to consider some potential benefits and limitations associated with options available if the demonstration is not extended. Table 2 presents two potential actions that could be taken and examples of potential benefits and limitations of each. The table does not include steps, such as enabling legislation that might be associated with implementing a particular course of action.

**Table 2: Examples of Potential Actions and Potential Benefits and Limitations with Respect to Processing Federal USERRA Claims**

Potential action	Potential benefit	Potential limitation
Return to pre-demonstration status (i.e., DOL receives and investigates all claims)	DOL has an infrastructure in place. All USERRA claims, federal and nonfederal, would be processed by the same agency.	DOL is taking a number of actions to correct deficiencies in notifying servicemembers of their rights and to implement controls to help improve the quality of the data on the number of cases, outcomes, and the time to investigate claims. The effectiveness of these actions has not been determined.
Give OSC authority to receive and investigate all federal claims	OSC has institutional experience from enforcement of statutes to protect federal employees from prohibited personnel practices, which according to OSC, are similar to USERRA claims.  This eliminates two extra reviews at DOL under current system for referrals of federal claims.	OSC would need to “stand up” a more robust infrastructure to handle all USERRA cases, which may include hiring and training additional staff as well as additional operating expenses.  A significant increase in the number of claims to be processed may also necessitate a change to the oversight structure that OSC used during our review of the demonstration project, which relied heavily on the actions of one individual.

Source: GAO analysis.

At a time when the nation’s attention is focused on those who serve our country, it is important that employment and reemployment rights are protected for federal servicemembers who leave their employment to perform military or other uniformed service. Addressing the deficiencies that we identified during our review, including correcting inaccurate and unreliable data, is a key step to ensuring that servicemembers’ rights under USERRA are protected. While DOL is taking positive actions in this regard, it is important that these efforts are carried through to completion.

Chairman Akaka, Senator Burr, and Members of the Committee, this concludes my prepared statement. I would be pleased to respond to any questions that you may have.

For further information regarding this statement, please contact George Stalcup, Director, Strategic Issues, at (202) 512-9490 or [stalcupg@gao.gov](mailto:stalcupg@gao.gov). Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this testimony. Individuals making key contributions to this statement included Belva Martin, Assistant Director; Karin Fangman; Tamara F. Stenzel; Kiki Theodoropoulos; and Greg Wilmoth.

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