

STATEMENT OF
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U.S. DEPARTMENT OF LABOR

BEFORE THE
COMMITTEE ON VETERANS' AFFAIRS
UNITED STATES SENATE

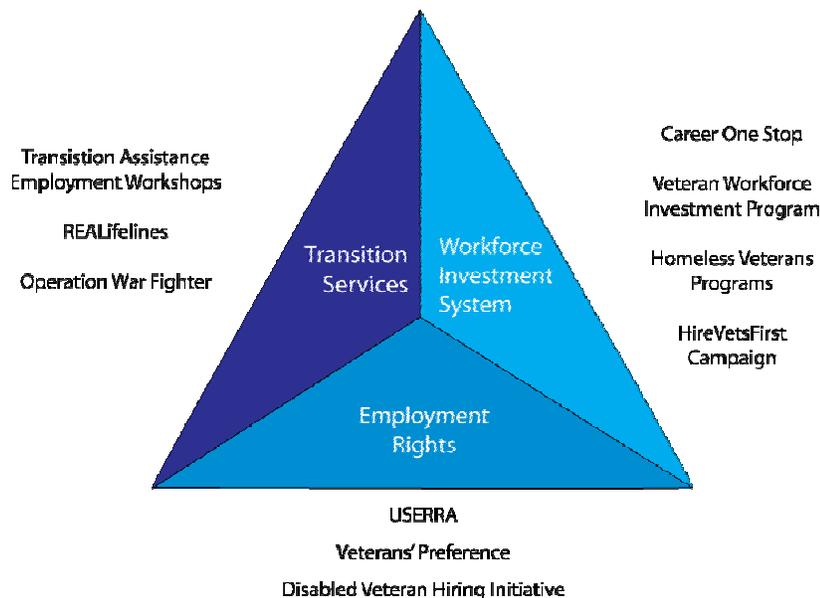
October 31, 2007

Chairman Akaka and Ranking Member Burr, and distinguished members of the Committee:

I am pleased to appear before you today to discuss issues relating to the Uniformed Services Employment and Reemployment Right Act (USERRA) program.

The principal programs and services of the Department of Labor's (DOL) Veterans' Employment and Training Service (VETS) focus on three areas:

- Providing employment services for veterans in America's publicly funded Workforce Investment System (One-Stop Career Services)
- Providing transition assistance for separating military members
- Protecting service members' employment rights



I will focus today on protecting service members' employment rights under USERRA.

The Uniformed Services Employment and Reemployment Rights Act

USERRA protects the public and private sector civilian job rights and benefits of veterans and members of the armed forces, including National Guard and Reserve members. USERRA also prohibits employer discrimination due to military obligations and provides reemployment rights to returning service members. VETS not only investigates complaints by service members and veterans, it also administers a comprehensive outreach, education, and technical assistance program here in the United States and around the world.

VETS works closely with the Department of Defense's (DoD) Office of the Assistant Secretary for Reserve Affairs and Employer Support of the Guard and Reserve (ESGR) to ensure that service members are briefed on their USERRA rights before and after they are mobilized. We conduct continuous USERRA outreach and education to inform service members and employers on their rights and responsibilities under the law. Since most complaints result from a misunderstanding of the USERRA obligations and rights, we took an important step in 2005 to make it easier to understand the law by promulgating clear, easy-to-understand regulations in question and answer format. VETS has provided USERRA assistance to over 480,000 service members, employers and others.

We have also made it easier for a service member to determine if he or she has a valid complaint and if so, to file a USERRA complaint online through our interactive USERRA elaws Advisor, which provides the user with information on eligibility and rights and responsibilities under the law. The Advisor is available 24 hours a day, seven days a week, at www.dol.gov/elaws/userra.htm.

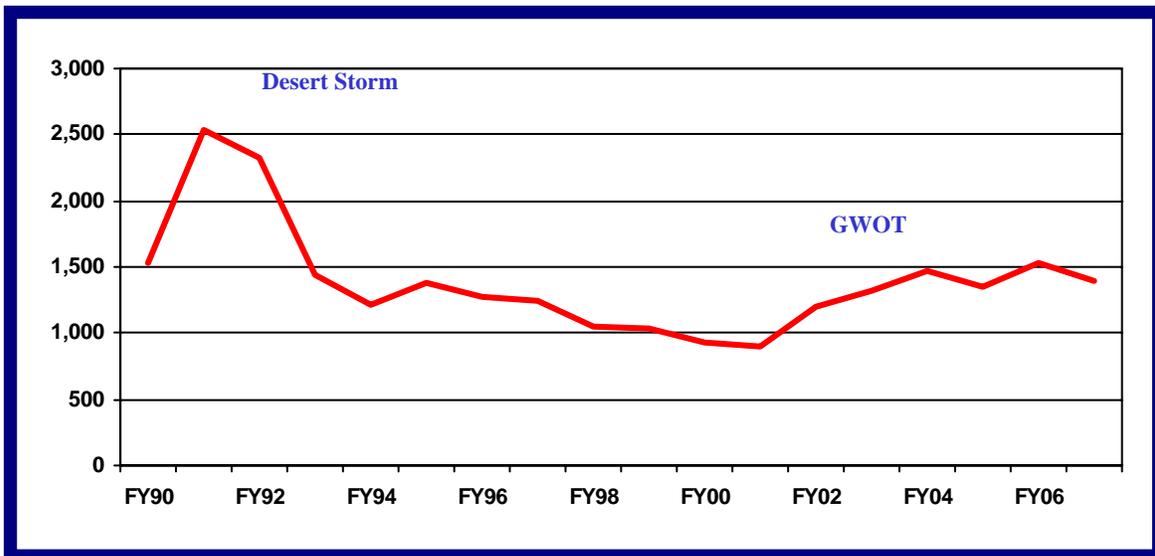
We vigorously investigate complaints, and when employers do not comply with the law, we make every effort to bring them into compliance. We do this through a network of over 100 highly trained investigators located throughout the nation who investigate claims of violations of USERRA and Veterans' Preference. These same individuals also conduct extensive compliance assistance outreach to employers and service members in their states.

VETS coordinates with ESGR, the Office of Special Counsel (OSC), and the Department of Justice (DOJ) to ensure the employment rights and benefits for returning service members are protected. As explained in their statement

provided for this hearing, ESGR engages in a number of efforts to ensure employer support for the Guard and Reserve is sustained. ESGR also reinforces the relationship between employers and employees through informal USERRA mediation. DOJ and the OSC help enforce USERRA by representing USERRA complainants when the Department of Labor is unable to resolve the complaint and/or when the service member or veteran requests their case be referred.

VETS has a decades-long history of protecting the rights and interests of American service men and women employed in both the public and private sectors by investigating complaints under USERRA and its predecessor laws. Complaints under USERRA peaked in 1991 following mobilizations for Operation Desert Storm, when claims topped 2,500. After 9/11, USERRA complaints rose again, from approximately 900 per year to approximately 1,500 in FY 2004 and FY 2006. Complaints in FY 2007 decreased to 1,400. As the chart below shows, complaints during the Global War on Terror have never approached their Desert Storm high. We attribute much of this result to VETS' comprehensive outreach to service members and employers and to the agency's user-friendly 2005 regulations.

USERRA CASES OPENED

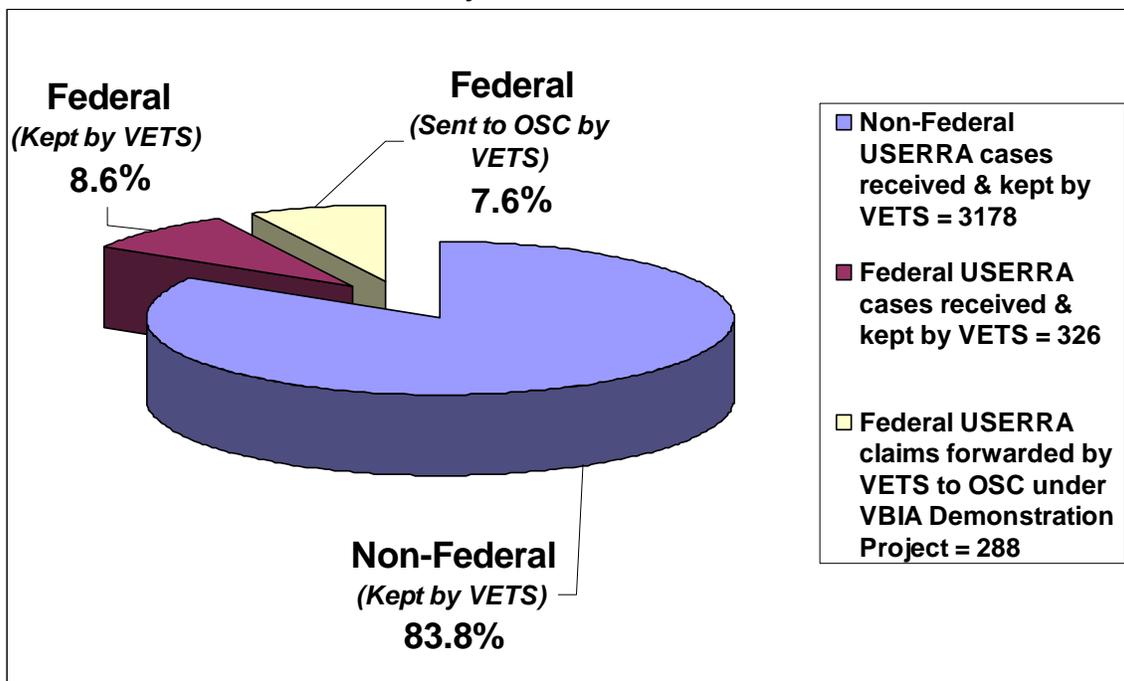


Demonstration Project with the Office of Special Counsel (OSC)

In 2004, Congress passed the Veterans Benefits Improvement Act (VBIA). Section 214 of that Act required the Secretary of Labor and the OSC to carry out a multi-year demonstration project under which USERRA claims made by federal government employees whose social security number ends in an odd-numbered digit are referred to OSC for investigation, resolution and enforcement. The Government Accountability Office (GAO) evaluated the demonstration project and published the report of its evaluation in July of this year. The demonstration project was to conclude at the end of September 2007, but the current Continuing Resolution extended the demonstration project through November 16, 2007.

Since inception of the pilot on February 8, 2005 through the end of fiscal year 2007, VETS received 3,792 USERRA complaints. Of those, 614 (16.2%) were federal cases that were subject to the demonstration. VETS transferred 288 of those federal cases to OSC under the demonstration.

All USERRA Claims Received by VETS 2/8/05 - 9/30/07



The demonstration project has produced several positive effects. VETS worked closely with OSC throughout the project to improve our investigators' ability to identify potential "mixed cases," which are USERRA cases that may also include related prohibited personnel practices under the federal civil service laws. VETS also spurred closer ties by convening monthly meetings in which DOL and OSC officials discuss and resolve USERRA issues. In addition, VETS is addressing

several data collection practices that GAO identified in its study of the demonstration project.

Recently, there has been discussion about whether to continue the demonstration project. We believe that the Department of Labor is better positioned than ever before to serve the needs of all veterans, including those who work in the federal sector. We also believe that splitting USERRA claims between the two agencies is not in the best interests of veterans.

First, VETS should continue to investigate all USERRA claims, federal or non-federal, because we are a veterans-focused agency whose sole mission is to serve the workplace needs of separating service members and veterans. We accomplish our mission through a nation-wide network of highly-skilled federal employees who are employment specialists. Almost all are veterans themselves. They are trained to meet the many workplace employment needs of today's service members.

VETS' federal employment specialists are located where veterans need them most – in all 50 states, the District of Columbia, and Puerto Rico. These specialists conduct outreach and provide technical assistance to employers, service members, veterans, and veterans' organizations on employment and reemployment issues at the national, state and local levels, including at locations where service members are demobilized. One frequently overlooked fact is that the vast majority of reemployment rights problems are resolved by VETS before a USERRA claim is ever filed. This is done at the local level through direct informal technical assistance that helps returning service members secure their employment and reemployment rights in accordance with the law.

Finally, the objectives of the demonstration project were to determine whether transferring USERRA cases involving federal employers to OSC would result in “improved services to service members and veterans” or “reduced or eliminated duplication of effort and unintended delays in resolving meritorious claims.” To our knowledge, neither result has been realized.

VETS is proud of its record in enforcing this statute since its enactment, including its continuous efforts to improve services. For example, over the past 10 ½ years:

- 91 percent of federal USERRA cases were resolved by VETS without need for referral to the Office of Special Counsel;
- 83 percent of “meritorious” federal USERRA cases resolved by VETS (claims granted or settled) reached resolution within 90 days.

I believe that the USERRA protections of service members and veterans are best served by VETS retaining the primary investigative authority for all USERRA cases, regardless of employer.

Recommendations of GAO's Report on DOL/OSC Demonstration Project

GAO's Report (GAO-07-907, July 2007) that evaluated the demonstration project recommended that VETS institute improved procedures to ensure claimants are notified of their right to have their case referred to OSC, if a federal case, or to the Department of Justice, if a nonfederal case, and that our investigators undergo mandatory training on those procedures. The report also recommended that VETS develop and implement an internal review mechanism for all unresolved claims before claimants are notified of determinations and cases are closed, to help ensure adherence to procedures and standards. Finally, GAO recommended that VETS implement internal controls to ensure that our investigations database accurately reflects the number of unique claims, the dates that these claims were closed and the outcomes of the claims.

VETS is actively addressing the issues raised in GAO's Report. VETS has taken positive steps to address each of these recommendations. For example:

- VETS investigative staff received new instructions on notifying claimants of their right to referral and on recording the appropriate closure date for a claim.
- These instructions have been incorporated into the revised USERRA Operations Manual, which will be field-tested in November and fully implemented in January 2008. The new manual will also clarify procedures for documenting case outcomes and recording them correctly in the VETS investigative data base.
- VETS investigators have all participated in mandatory conference calls reinforcing procedures for notifying claimants of their right to referral. In addition, regional investigator training is being conducted in each of the VETS regions and this training will also focus on these notification procedures.
- VETS is developing an on-line distance learning module for investigators that will include this instruction.
- VETS has already identified ways to correct previous reporting practices that resulted in duplicate cases being reported. We are working with GAO to ensure that issues identified by GAO surrounding duplicate cases are addressed.

In sum, the demonstration project has proved valuable to VETS. We have institutionalized a close working relationship with OSC that will continue to pay

dividends long after the project comes to an end. In addition, GAO's audit identified several areas in which our investigations and reporting could be improved and, as mentioned, we are now addressing those areas.

VETS is committed to continuous improvement of our USERRA investigative processes and our reporting to Congress on investigations. As a result of that commitment, we have made a number of investments to our USERRA program, and more are planned. An investment in VETS' USERRA program is an investment in protecting the employment rights of all service members and veterans covered under USERRA, regardless of whether their employer is the federal government, a state or local government, or a private entity.

For these reasons and others I have already highlighted, we believe all USERRA investigations should be conducted by VETS.

Protecting Jobs for Caretakers of Wounded Warriors

The Committee also asked me to address the issue of providing employment protections to family members of injured service members.

On March 6, 2007, President Bush issued an executive order establishing the President's Commission on Care for America's Returning Wounded Warriors "to provide a comprehensive review of the care provided to America's returning Global War on Terror service men and women from the time they leave the battlefield through their return to civilian life." Former Senator Bob Dole and former Secretary of Health and Human Services Donna Shalala co-chaired the Commission. On July 30, 2007, the Commission transmitted its report to the President, entitled *Serve, Support, Simplify: Report of the President's Commission on Care for America's Returning Wounded Warriors* (the Report).

The Report recommended amending the Family and Medical Leave Act (the FMLA) to allow up to six months of leave for a family member of a service member who has a combat-related injury. The Administration strongly supports the Commission's recommendation to provide leave and believes that it should be implemented promptly. However, some modification is necessary to address the mobile nature of military families.

First, in this situation, we believe that it is more helpful to utilize the FMLA as a starting point rather than amend the law because of practical difficulties that would make it difficult to achieve the necessary protections for military families. The statutory provisions on the duration of leave, the serious health conditions that entitle an employee to leave, and the procedures for certification of health conditions that are central to the FMLA may not provide the most appropriate structure for effectuating the Commission's recommendation.

We believe that it is more appropriate to create a new statute with a new leave concept based at least in part on the FMLA, but with several important adjustments. Second, although the Commission indicated that the leave should be available to employees who meet the FMLA's "other eligibility requirements," it does not appear that the Commission considered the unique hardship that the FMLA eligibility requirements would impose on families of service members.

For example, the FMLA limits eligibility for job-protected leave to employees who have been employed by their employer for at least 12 months and who have worked at least 1,250 hours for their employer in the preceding 12-month period. Congress gave careful consideration to establishing those eligibility requirements when it enacted the FMLA. But because military families, and more specifically the spouses and children of service members, often move from one city to another every few years as the service member receives new assignments, a significant number of family members of combat-wounded service members would not be eligible for leave under the FMLA under the statute's prior service requirements.

The Department does not believe that the Commission intended to exclude those individuals from the job-protected leave addressed in its recommendation.

With those concerns in mind, we believe that legislation implementing the Commission's recommendation should be guided by the following principles:

1. Spouses, parents, and children of a recovering service member should be able to take up to 26 weeks of unpaid, job-protected leave to care for the service member within the two years following injury.
2. Employees should be able to take the leave all at once or spread it out over time.
3. Employers should continue to maintain any health coverage for the employee during the period of leave.
4. Employees and employers should be able to substitute available paid leave for unpaid military caregiver leave.
5. At the end of the leave, the employee should be entitled to be reinstated to the same position or an equivalent position.
6. Caregivers should not have to be employed by an employer for 12 months or work 1,250 hours in the preceding year to be eligible for job-protected leave.

7. Taking military caregiver leave should not diminish an employee's right to take leave under the FMLA for other reasons, such as to care for a newborn baby or for an employee's own serious health condition, subject to reasonable limits on the extent to which military caregiver leave and FMLA leave may be combined to care for a recovering service member.

The Administration has submitted "America's Wounded Warrior Act" to the Congress in order to implement the recommendations of the Dole/Shalala Commission. Title III of this bill incorporates all of these principles and provides a new form of leave for family members to care for their wounded or injured service member with a combat-related serious injury, disability, or physical disability. I would urge the Congress to pass this legislation.

Our Nation owes an enormous debt of gratitude to our service members who are returning from their service in the Global War on Terror. The Department of Labor is committed to maximizing employment opportunities and protecting service members' jobs as they answer the nation's call to duty. We have a special obligation to those who are seriously wounded, ill, or injured, and to their families.

Thank you for the opportunity to be with you today. I am prepared to respond to your questions.