

**STATEMENT**  
**of**  
**the Military Officers Association of America**  
**on**  
**Uniformed Services Employment and Reemployment Rights Act**  
**(USERRA) and Servicemembers Civil Relief Act (SCRA)**  
**Improvements**  
**before the**  
**House Committee on Veterans' Affairs**

**June 23, 2004**

**Presented by**

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**Deputy Director, Government Relations**

**Biography of Robert F. Norton, COL, USA (Ret.)  
Deputy Director, Government Relations, MOAA  
Co-Chair, Veterans' Committee, The Military Coalition**

A native New Yorker, Bob Norton was born in Brooklyn and raised on Long Island. Following graduation from college in 1966, he enlisted in the U.S. Army as a private, completed officer candidate school, and was commissioned a second lieutenant of infantry in August 1967. He served a tour in South Vietnam (1968-1969) as a civil affairs platoon leader supporting the 196th Infantry Brigade in I Corps. He transferred to the U.S. Army Reserve in 1969 and pursued a teaching career at the secondary school level. He joined the 356th Civil Affairs Brigade (USAR), Bronx, NY and served in various staff positions from 1972-1978.

Colonel Norton volunteered for active duty in 1978 and was among the first group of USAR officers to affiliate with the "active Guard and Reserve" (AGR) program on full-time active duty. He specialized in manpower, personnel, and quality-of-life programs for the Army's reserve forces. Assignments included the Office of the Deputy Chief of Staff for Personnel, Army Staff; advisor to the Asst. Secretary of the Army (Manpower & Reserve Affairs); and personnel policy and plans officer for the Chief, Army Reserve.

Colonel Norton served two tours in the Office of the Secretary of Defense (OSD). He was responsible for implementing the Reserve Montgomery GI Bill as a staff officer in Reserve Affairs, OSD. From 1989 –1994, he was the senior military assistant to the Assistant Secretary of Defense for Reserve Affairs, where he was responsible for advising the Asst. Secretary and coordinating a staff of over 90 military and civilian personnel. During this tour, Reserve Affairs oversaw the call-up of more than 250,000 National Guard and Reserve component troops for the Persian Gulf War. Colonel Norton completed his career as special assistant to the Principal Deputy Asst. Secretary of Defense, Special Operations / Low Intensity Conflict and retired in 1995.

In 1995, Colonel Norton joined Analytic Services, Inc. (ANSER), Arlington, VA as a senior operational planner supporting various clients including United Nations humanitarian organizations and the U.S. Air Force's counterproliferation office. He joined MOAA's national headquarters as Deputy Director of Government Relations in March 1997.

Colonel Norton holds a B.A. in philosophy from Niagara University (1966) and a Master of Science (Education) from Canisius College, Buffalo (1971). He is a graduate of the U.S. Army Command and General Staff College, the U.S. Army War College, and Harvard University's Senior Officials in National Security course at the Kennedy School of Government.

Colonel Norton's military awards include the Legion of Merit, Defense Superior Service Medal, Bronze Star, Vietnam Service Medal, Armed Forces Reserve Medal, Army Staff Identification Badge and Office of the Secretary of Defense Identification Badge.

Colonel Norton is married to the former Colleen Krebs. The Nortons have two grown children and reside in Derwood, Maryland.

MISTER CHAIRMAN AND DISTINGUISHED MEMBERS OF THE COMMITTEE, on behalf of the Military Officers Association of America (MOAA), I am grateful for this opportunity to express our views on needed improvements to the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Servicemembers Civil Relief Act (SCRA).

MOAA does not receive any grants or contracts from the federal government.

### **Importance of USERRA and SCRA**

Our nation is undergoing the largest protracted mobilization of National Guard and Reserve forces since World War II. Since September 11, 2001, more than 350,000 members of the National Guard and Reserve forces have been mobilized on federal orders to support ongoing military operations in the nation's war on terror at home and abroad.

168,316 Guard and Reserve servicemembers are on active duty today according to the Defense Department. Approximately 40,000 reserve component servicemembers are serving on active duty tours of 24 months or longer.

Given the size, length and unknown conclusion of these mobilizations, the laws governing the reemployment, legal, and economic rights of our nation's citizen-soldiers are extremely important to their morale and families.

### **H.R. \_\_\_\_ , the "USERRA Health Coverage Extension Act of 2004".**

MOAA strongly supports the provisions of the draft legislation under consideration at today's hearing. The draft bill would increase from 18 months to 24 months the maximum period of employer-provided health plan coverage that an employee covered by USERRA may elect to continue, beginning with the date the absence from the position of employment begins. The effective date of the extended coverage period would be the date of enactment.

For the past few years, MOAA has actively sought Congressional support for legislation to provide what we call "continuity of health care" options for members of the National Guard and Reserve forces. The draft bill is consistent with this principle.

A top MOAA legislative objective this year is final passage of a Senate-passed bi-partisan amendment to the FY 2005 National Defense Authorization Act on Reserve health insurance coverage. The Amendment would permit reservists to have the government share some of the cost of their health insurance coverage. Reservists could elect to participate in TRICARE, the military health care plan, on an annual 28 / 72 percent cost-share basis with DoD or elect to have the government share used to pay annual premiums on employer-based or private health plans during periods of active duty. Reservists who are employees of federal agencies are already eligible for the government to offset family premiums under the Federal Employees Health Benefit Program (FEHBP) during extended active duty periods.

In a similar manner, the draft USERRA bill before the Committee would permit reservist-employees to retain their employment-based health plan coverage for up to two years while on active duty. There are about 40,000 members of the National Guard and Reserve forces serving today on active duty tours of 24 months or more. The proposed change to USERRA

will contribute to the goal of “continuity of health care” coverage for Guard and Reserve families, help to reduce the enormous stress on worried families during these difficult times, and demonstrate the unflinching support of their elected representatives in Congress.

MOAA believes the proposed bill also will have a beneficial impact on recruitment and retention in the Guard and Reserve. Senior National Guard and Reserve military leaders have testified before Congress this year on their growing concerns over looming recruitment and retention problems in their commands.

Earlier this year, DoD announced a new policy under which it plans to activate reservists every five or six years for lengthy active duty tours of one year or more. This sea change in the “total force” policy has no precedent in our history as a citizen-soldier nation. Unless the nation is prepared to extend and improve benefits for the reserve forces to match the new realities of their service, it will be enormously difficult to attract and retain high-quality young men and women to serve in the reserve forces.

Favorable Committee action on the USERRA health extension legislation will be seen as an important signal of Congressional support for the men and women who proudly serve in our nation’s National Guard and Reserve.

***MOAA is pleased to endorse the draft “USERRA Health Coverage Extension Act of 2004” and we pledge our full support towards its final enactment.***

**Reinstatement of Reporting Requirements under USERRA.**

The draft USERRA bill also reinstates a requirement under Section 4332 of Title 38 USC for the Secretary of Labor (DoL) in consultation with the Attorney General and the Special Counsel (referred to in section 4324(a)(1) of Title 38) to report to Congress on USERRA cases reviewed or referred by the federal offices responsible for them.

MOAA, on behalf of The Military Coalition, recommended this change in testimony before the Subcommittee on Veterans Benefits’ hearing of July 24, 2003.

With the reinstatement of a reporting requirement, the DoL would be required to report the “nature and status of each [USERRA] case reported on” by DoL, the Attorney General, and the Office of Special Counsel (section 4332(3)).

Veterans’ Employment and Training Service (VETS) / DoL data show a substantial 47% increase in new USERRA cases opened between 2001 and 2003:

**USERRA Cases Opened (VETS)**

<b>DATA CATEGORY</b>	<b>FY 2000</b>	<b>FY 2001</b>	<b>FY 2002</b>	<b>FY 2003</b>
USERRA cases opened*	929	895	1,195	1,315

MOAA is particularly interested in the outcome of cases referred by VETS to the Attorney General’s office and the Office of the Special Counsel. In 2003, for example, seventy-nine (79) cases were referred to the Attorney General or Office of Special Counsel. At this point in the process, VETS apparently considers these cases “closed”, even if the Attorney General

declines to take legal action. Yet the fact that these cases were not successfully resolved in the VETS process, or that they were based on contested legal issues under the USERRA suggests that the referral process should have a clear government backed outcome or conclusion. A reporting requirement could at least identify the disposition of cases left unresolved in the VETS referral process.

MOAA fully endorses the goal of resolving USERRA cases amicably. In most cases America's employers have gone the extra mile to support their mobilized employees during these stressful times. Because DoD plans to activate Guard and Reserve servicemembers every five or six years for the foreseeable future, we believe that additional resources must be made available to the VETS (DoL) and Employer Support of the Guard and Reserve offices (DoD) so that they may adequately accomplish their missions.

At the same time, we believe the Committee and the stakeholder community – reservist-veterans, employers, and advocates – need to have a clearer understanding of the actions and accomplishments of the Attorney General's office and Office of Special Counsel in prosecuting clear violations of the USERRA.

***MOAA supports the reinstatement of reporting requirements under the USERRA.***

**H.R. 4477, Patriotic Employer Act of 2004.**

H.R. 4477 would further amend the USERRA by requiring employers to post in the workplace for persons entitled to USERRA protections a notice of the rights, benefits, and obligations of National Guard and Reserve employees and their employers under the statute. The bill sponsor is Rep. James P. McGovern (D-MA).

***MOAA believes H.R.4477 would advance the outreach requirement established in Section 4333 of the USERRA and, accordingly, we support its enactment.***

At the same time, MOAA believes that this action alone would not educate employers and reservists on how to interpret the law's provisions in the myriad circumstances involving employment and reemployment situations covered under the statute.

For this reason, ***MOAA continues to recommend amending the USERRA to require, rather than permit, the DoL to develop and promulgate implementing regulations in the Code of Federal Regulations (CFR) for the Act. DoL should also be required to publish a handbook illustrating the types of cases that come up under the USERRA and how they were resolved.***

**Other USERRA Issues.**

- Escalator Principle and Merit Raise Problem. The escalator principle of the USERRA requires that each returning servicemember actually step back into the seniority escalator at the point the person would have occupied if the person had remained continuously employed. The application of the principle to merit pay increases that are based on annual evaluations is less certain. For example, an employer tells a reservist returning to the workplace that the company will not award a pay increase

because it is based on a performance evaluation of actual work performed. The theory in such cases is that since the mobilized reservist performed no work for the employer during the activation, an evaluation would not have been performed, and therefore a merit pay increase would not be awarded when the reservist returned to the workplace.

***MOAA recommends clarifying the escalator principle to ensure that reemployed servicemembers are not denied merit pay increases based on the lack of a scheduled performance evaluation during military absence. We recommend, for example, that an average of two or three previous merit increases, if awarded, be used to set a reemployment pay increase.***

- State Employees. [38 USC Sec. 4323]. In 1998, Congress amended the USERRA to permit the DoL to refer a complaint from a State employee covered by the Act to the Attorney General. In practice, however, unless the Attorney General agrees to take on such cases, reservists returning from active duty to State employment have no legal recourse under the law.

The United States Supreme Court has ruled in a number of cases interpreting the Eleventh Amendment of the Constitution that individual employees have no right to sue their State employers, unless the State waives its sovereign immunity under various federal laws. As a result, although USERRA specifically provides that a person may initiate an action for relief against a State for its violation of the USERRA, persons harmed by State violations of the statute lack important remedies to vindicate the rights and benefits that are available to all other persons covered by the law. Unless a State chooses to waive sovereign immunity, or the Attorney General brings an action on their behalf, persons affected by State violations of USERRA may have no adequate Federal remedy for such violations. A failure to provide a private right of action by persons affected by State violations of USERRA would leave vindication of their rights and benefits under that Act solely to Federal agencies, which may fail to take necessary and appropriate action because of administrative overburden or other reasons.

MOAA is working with a number of stakeholders to identify cases that would demonstrate the potential need to further amend the USERRA in order to protect the reemployment rights of State employees returning from active military service. We will provide such information to the Committee as it becomes available.

- Non-functioning role of the Office of Special Counsel. [38 USC Section 4324] Section 4324 provides for the enforcement of rights for Federal Executive Agencies. The statute authorizes the Secretary of Labor to refer a complaint for litigation under the USERRA before the Merit Systems Protection Board (MSPB). If the Special Counsel is satisfied that the servicemember's rights under the USERRA have been violated, the Special Counsel is authorized to represent the servicemember before the Merit Systems Protection Board.

All well and good, but the Office of Special Counsel has never represented a member of the Guard or Reserve before the MSPB, and it apparently has neither the intention nor the resources to do so. Consequently, returning servicemembers who wish to file a claim under USERRA against a Federal Executive Agency employer must hire counsel or represent themselves directly before the MSPB. It is our understanding that the MSPB has ruled on at least 100 cases brought before it by Guard and Reserve federal employees. But that record does not justify the indifference of the Office of Special Counsel, especially in cases where employees may not have the resources to pay for counsel or adequately represent themselves.

***MOAA recommends strengthening the right to counsel for National Guard and Reserve servicemembers who wish to pursue a complaint against a Federal Executive Agency employer.***

- Inclusion of NOAA Corps Officers in USERRA.

MOAA recommends inclusion of the Commissioned Corps of the National Oceanic and Atmospheric Administration (NOAA Corps) in Section 4303, Definitions, of the USERRA. NOAA Corps officers serve on active duty, as defined in Title 10 and Title 37, and receive pay and benefits commensurate with their status as members of the uniformed services, including the U.S. Public Health Service. Like USPHS officers, NOAA Corps officers may be transferred to the Army, Navy or Air Force in time of war or national emergency.

The NOAA Corps is included in the basic definition of “uniformed services” as set forth in Section 101(a)(5) of Title 10, USC. Accordingly, the NOAA Corps was improperly excluded from the comprehensive revision of employment and reemployment rights laws enacted in 1994 after the first Gulf War.

***MOAA recommends including the NOAA Corps in the USERRA.***

#### **H.R.\_\_\_\_, Servicemembers Legal Protection Act of 2004.**

This draft legislation would amend the Servicemembers Civil Relief Act by clarifying and extending certain legal and economic protections for servicemembers on active duty.

MOAA deeply appreciates the leadership of the Committee and the hard work of the Committee staff in crafting needed improvements to the Soldiers’ and Sailors’ Civil Relief Act, enacted last year as the Servicemembers Civil Relief Act (SCRA), P.L. 108-189.

The draft legislation before the Committee today makes additional improvements to the statute that recognizes the changed circumstances of military service in our volunteer forces today.

MOAA notes in particular that the draft bill would clarify that dependents as well as servicemembers are covered by SCRA’s residential and motor vehicle lease provisions on joint leases. The change recognizes that servicemembers often are deployed into harms way on short notice leaving their dependents to make economic decisions back home. The change provides additional flexibility for military families and MOAA fully supports it.

The draft bill also would amend the lease termination provision to apply when the servicemember has permanent change of station orders from a State outside the continental United States to any location outside that State; for example, from Hawaii or Alaska to the 48 contiguous States or a foreign duty station.

In addition, the lease termination provisions would be amended to clarify that the term "military orders" as used in the SCRA would mean "official military orders, or any notification, certification, or verification from the servicemember's commanding officer, with respect the servicemember's current or future military duty status." This change is important in today's high personnel and operational tempo environment in which members of the National Guard and Reserve are called to active duty on short or no notice and their "military orders" can and do take many forms.

The draft SCRA bill would include a provision to prevent double taxation of servicemembers when the laws of a tax jurisdiction do not provide a credit against use, excise or similar taxes the servicemember previously paid to another tax jurisdiction.

***MOAA strongly supports enactment of the draft "Servicemembers' Legal Protection Act of 2004."***

**H.R. 3779, the "Safeguarding Schoolchildren of Deployed Soldiers Act of 2004."**

H.R. 3779 would amend the SCRA to help the school age children to be treated as residents when the military service of parents causes a change of residence. The bill would treat a child who changes residence based on the military service of a parent and at the parent's request, as if the child held the residence before the change of residence took place, for the purposes of enrollment in elementary or secondary school.

A case in New York State was brought to our attention on this issue. MOAA worked with our colleagues in the National Military Family Association (NMFA) and we are pleased to see that Rep. Louise Slaughter (D-NY) has introduced H.R. 3779, the "Safeguarding Schoolchildren of Deployed Soldiers Act of 2004," to address the issue. Residency changes arising from military service should not cause unintended enrollment and economic problems in military families with schoolchildren.

***MOAA fully supports H.R. 3779 and recommends the Committee favorably report the bill.***

The Military Officers Association of America appreciates this opportunity to appear before the House Committee on Veterans Affairs on the issue of improving the Uniformed Services Employment and Reemployment Rights Act and the Servicemembers Civil Relief Act. Your work on behalf of our nation's servicemembers and veterans is very important to them and their families and we appreciate your leadership in defending their legitimate reemployment and economic needs as they put themselves in harms way to defend the nation.