LAW REVIEW 17069[1]
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ROA Testifies in Favor of Bill To Preclude Binding Arbitration of USERRA Disputes

By Captain Samuel F. Wright, JAGC, USN (Ret.)[2]
Update on Sam Wright

1.4—USERRA enforcement
1.5—USERRA arbitration
1.8—Relationship between USERRA and other laws/policies

On June 29, 2017, Major General Jeffrey Phillips, USAR (Ret.), the Executive Director of the Reserve Officers Association (ROA), testified before the Veterans' Affairs Committee of the United States House of Representatives, in favor of H.R. 2631, a bill that would protect the employment and reemployment rights of Reserve Component service members by precluding the enforcement of unfair binding arbitration agreements extracted from such service members as a condition of hiring. You can see video and hear audio of the hearing at https://veterans.house.gov/calendar/eventsingle.aspx?EventID=1797. The ROA testimony starts at 1:19:33.

In his testimony, General Phillips said:

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[1] I invite the reader's attention to www.roa.org/lawcenter. You will find more than 1500 "Law Review" articles about military voting rights, reemployment rights, and other military-legal topics, along with a detailed Subject Index, to facilitate finding articles about very specific topics. The Reserve Officers Association (ROA) initiated this column in 1997. I am the author of more than 1300 of the articles.

[2] BA 1973 Northwestern University, JD (law degree) 1976 University of Houston, LLM (advanced law degree) 1980 Georgetown University. I served in the Navy and Navy Reserve as a Judge Advocate General's Corps officer and retired in 2007. I am a life member of ROA. I have dealt with the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Veterans' Reemployment Rights Act (VRRA—the 1940 version of the federal reemployment statute) for 35 years. I developed the interest and expertise in this law during the decade (1982-92) that I worked for the United States Department of Labor (DOL) as an attorney. Together with one other DOL attorney (Susan M. Webman), I largely drafted the proposed VRRA rewrite that President George H.W. Bush presented to Congress, as his proposal, in February 1991. On 10/13/1994, President Bill Clinton signed into law USERRA, Public Law 103-353, 108 Stat. 3162. The version of USERRA that President Clinton signed in 1994 was 85% the same as the Webman-Wright draft. USERRA is codified in title 38 of the United States Code at sections 4301 through 4335 (38 U.S.C. 4301-35). I have also dealt with the VRRA and USERRA as a judge advocate in the Navy and Navy Reserve, as an attorney for the Department of Defense (DOD) organization called Employer Support of the Guard and Reserve (ESGR), as an attorney for the United States Office of Special Counsel (OSC), as an attorney in private practice, and as the Director of the Service Members Law Center (SMLC), as a full-time employee of ROA, for six years (2009-15). Please see Law Review 15052 (June 2015), concerning the accomplishments of the SMLC. My paid employment with ROA ended 5/31/2015, but I have continued the work of the SMLC as a volunteer. You can reach me by e-mail at SWright@roa.org or by telephone at 800-809-9448, ext. 730. I will provide up to one hour of information without charge. If you need more than that, I will charge a very reasonable hourly rate. If you need a lawyer, I can suggest several well-qualified USERRA lawyers.

> This bill [H.R. 2631] amends the Uniformed Services Employment and Reemployment Rights Act of 1994 [USERRA] to (1) consider procedural protections or provisions under such Act concerning employment and reemployment rights of members of the uniformed services to be a right or benefit subject to the protection of such Act, and (2) make any agreement to arbitrate a claim under such provisions unenforceable unless all parties knowingly and voluntarily consent to arbitration after a complaint on the specific claim has been filed in court or with the Merit Systems Protection Board [which adjudicates claims that federal executive agencies have violated USERRA] and all parties knowingly and voluntarily consent to have that particular claim subjected to arbitration.
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> Currently, the courts have interpreted that employed uniformed members are not afforded procedural right protections under USERRA with respect to binding arbitration clauses. Specifically, the courts' decisions in separate federal circuits indicate that legislative intent as determined from the committee reports cannot establish procedural right protections in the area of employment and reemployment under USERRA. The courts' past decisions demonstrate that only substantive right protections can be interpreted through the language of the Act.
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> However, the original intent of Congress was to provide both substantive and procedural right protections under USERRA. Vague language contained in the Act caused courts to deprive uniformed members of the procedural right protections that Congress intended to grant. Section 4302 [of USERRA] makes it clear that USERRA is a floor and not a ceiling on the rights of service members as persons who are serving or have served.
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> It is hard to accept that consent is voluntary when a person agrees to binding arbitration upon employment. Most people take jobs because they need to pay the rent and put food on the table. It is perhaps unsurprising that they may overlook the "future risk" of arbitration for the "present need" of income. Binding arbitration holds hostage the ability to provide food and housing for individuals and their families.

I strongly endorse General Phillips' testimony.

In Law Review 17054 (May 2017), I discussed in detail the relationship between USERRA (enacted in 1994) and the Federal Arbitration Act, which was enacted 69 years earlier in 1925, and the USERRA case law holding (wrongly in my opinion) that section 4302 of USERRA does not preclude enforcement of an agreement signed at hiring to submit future USERRA disputes to binding arbitration. In that article, I wrote:

> I think that arbitration is not an appropriate and just way to adjudicate employment and consumer disputes. For the employer or other company, these disputes are an everyday occurrence. For the individual employee or consumer, such a dispute is a once-in-a-lifetime occurrence. The arbitrator has an enormous financial incentive to rule against the individual and for the company, so that the company will select the same arbitrator again for the next dispute.
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> It is true that the arbitrator is supposedly required to apply the text and legislative history of the relevant statute (like USERRA) and the case law under that statute, just as a federal district court judge would. The problem is that there is no remedy if the arbitrator misapplies or even flouts the substantive law he or she is supposedly applying.[3]

Readers: Please contact your United States Representative and your two United States Senators and ask them to support the enactment of H.R. 2631.

[3] Please see Law Review 12033 (March 2012).