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Relationship between USERRA and other Federal, State, and Local Laws and Ordinances

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Update on Sam Wright

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Q: I am a Commander in the Coast Guard Reserve and a life member of the Reserve Officers Association (ROA). I have read with great interest many of your "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), and I have used those articles to help other Coast Guard Reservists who have had issues with their civilian employers concerning their Coast Guard Reserve training and service and absences from their civilian jobs necessitated by military training and service. What is the relationship between USERRA and other federal, state, and local laws, ordinances, and regulations?

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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 the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Servicemembers Civil Relief Act (SCRA), the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), the Uniformed Services Former Spouse Protection Act (USFSPA), and other laws that are especially pertinent to those who serve our country in uniform. You will also find 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 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.

A: USERRA is a floor and not a ceiling on the rights of the service member or veteran and his or her civilian employer, prospective employer, or former employer. Other federal, state, and local laws, ordinances, and regulations can give the service member or veteran *greater or additional rights.* State and local laws, ordinances, and regulations cannot take away USERRA rights and cannot impose additional prerequisites on the exercise of federal USERRA rights.

It is not correct to say that USERRA necessarily supersedes or overrides another *federal* law that seems or purports to limit USERRA rights. When there is a conflict between USERRA and another federal statute, that conflict must be resolved in accordance with the *rules of statutory construction*, as I explain in detail below.

Section 4302 of USERRA explains the relationship between USERRA and other laws, policies, contracts, and other matters, as follows:

- **(a)** Nothing in this chapter shall supersede, nullify or diminish any Federal or State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that establishes a right or benefit that is more beneficial to, or is in addition to, a right or benefit provided for such person in this chapter.
- **(b)** This chapter supersedes any State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by this chapter, including the establishment of additional prerequisites to the exercise of any such right or the receipt of any such benefit.[3]

Q: Coast Guard Reserve Petty Officer Joe Smith works for a state government agency in a southern state. His supervisor at his civilian job continuously gives him a hard time about work days that he misses because of Coast Guard training and service. Smith contacted the Department of Defense (DOD) organization called Employer Support of the Guard and Reserve (ESGR). An ESGR ombudsman contacted the personnel director of the state agency that employs Smith. The ombudsman explained to the personnel director the state agency's obligations under USERRA. The personnel director insisted that the USERRA obligations, as explained by the ESGR ombudsman, conflict directly with state law. What do you say about that?

A: The state law is irrelevant, because state law cannot supersede or override a federal statute like USERRA. The "Supremacy Clause" of the United States Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land, and the Judges in every State shall

[3] 38 U.S.C. 4302.

be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.[4]

State and local government officials in your part of the country sometimes need to be reminded that General Ulysses S. Grant did not surrender to General Robert E. Lee at Appomattox Courthouse.

Q: Coast Guard Reserve Lieutenant Mary Jones works for a large company—let's call it Daddy Warbucks Industries or DWI. When she was hired five years ago, she was required to sign, as a condition of hiring, an "agreement" to the effect that if she ever had a dispute with DWI relating to her employment she would submit the claim to binding arbitration, rather than suing in federal or state court.

Jones recently notified her DWI supervisor that she will likely be called to active duty at the end of this year, and four days later the company fired her. The proximity in time between her notice to the employer and the decision to fire her, plus her supervisor's frequent criticisms of her for her Coast Guard service, clearly show that the decision to fire her was motivated, at least in part, by her membership in the Coast Guard Reserve and her performance of uniformed service. Thus, firing her violated section 4311 of USERRA.[5]

Jones retained an attorney and sued DWI in federal court. The company responded with a motion to compel arbitration, based on the "agreement" that Jones was forced to sign as a condition of hiring. Will the court probably grant the motion to compel arbitration?

USERRA gives Jones valuable rights, including the right to sue in federal court, the right to a jury trial, and the right to court-ordered attorney fees if she prevails in the lawsuit. Section 4302(b) of USERRA provides that this federal law supersedes an agreement that limits USERRA rights. Doesn't that mean that USERRA overrides Jones' forced agreement to submit her USERRA claim to binding arbitration instead of a jury trial?

A: As I explained in detail a year ago in Law Review 16110 (October 2016), Colonel John S. Odom, Jr., USAFR (now retired) and I made exactly that argument in 2004-06 in the United States District Court for the Northern District of Texas and in the United States Court of Appeals

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4 United States Constitution, Article VI, Clause 2. Yes, it is capitalized just that way, in the style of the late 18th Century.

5 38 U.S.C. 4311.

for the 5th Circuit.[6] Our argument prevailed in district court.[7] Unfortunately, the defendant appealed and the 5th Circuit reversed and firmly rejected this argument.[8]

In the years since the 5th Circuit decided *Garrett,* the 6th Circuit,[9] the 11th Circuit,[10] and most recently the 9th Circuit[11] have followed *Garrett,* holding that section 4302(b) of USERRA does not mean that an agreement to submit future USERRA disputes to binding arbitration is invalid and unenforceable. The other circuits have not addressed this specific legal question. With four circuits on one side and none on the other on this important legal question, it is not surprising that the Supreme Court denied certiorari in *Ziober.*[12]

The problem is that the Federal Arbitration Act (FAA) provides, in pertinent part, as follows:

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.[13]

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[6] The 5th Circuit is the federal appellate court that sits in New Orleans and hears appeals from district courts in Louisiana, Mississippi, and Texas.

[7] *Garrett v. Circuit City Stores, Inc.,* 338 F. Supp. 2d 717 (N.D. Texas 2004).

[8] *Garrett v. Circuit City Stores, Inc.,* 449 F.3d 672 (5th Cir. 2006).

[9] *Landis v. Pinnacle Eye Care LLC,* 537 F.3d 559 (6th Cir. 2008). The 6th Circuit is the federal appellate court that sits in Cincinnati and hears appeals from district courts in Kentucky, Michigan, Ohio, and Tennessee.

[10] *Bodine v. Cook's Pest Control, Inc.,* 830 F.3d 320 (11th Cir. 2016). The 11th Circuit is the federal appellate court that sits in Atlanta and hears appeals from district courts in Alabama, Florida, and Georgia.

[11] *Ziober v. BLB Resources, Inc.,* 839 F.3d 814 (9th Cir. 2016), *cert. denied,* 137 S. Ct. 2274 (2017). The 9th Circuit is the federal appellate court that sits in San Francisco and hears appeals from district courts in Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, Nevada, Northern Mariana Islands, Oregon, and Washington.

[12] The Supreme Court denies certiorari (discretionary review) in more than 99% of the cases where it is sought. At least four of the nine Justices must vote for certiorari, at a conference to consider certiorari petitions, or certiorari is denied and the circuit court's decision becomes final. The best way to get the Supreme Court to grant certiorari is to show that there is a conflict among the circuits on an important issue of federal law. On this issue there is no conflict among the circuits. This issue cries out for a legislative solution. Please see Law Review 17069 (July 2017).

[13] 9 U.S.C. 3.

The 5th, 6th, 11th, and 9th Circuits have held that this FAA provision overrides section 4302(b) of USERRA. Congress can fix this problem by amending USERRA by adding specific language to the effect that USERRA lawsuits are not subject to the FAA.

Q: Congress enacted the FAA, including section 3, in 1925, 69 years before it enacted USERRA in 1994. How can a 1925 statute override a 1994 statute?

A: The law does not favor repeal by implication. The 5th Circuit held that if Congress had intended, in 1994, to exempt USERRA cases from the mandatory arbitration provisions of the FAA, it should have said so explicitly, mentioning the FAA, in the text of USERRA.[14] The Supreme Court has held:

> But even if petitioner were correct in concluding that section 2411(a) is to be regarded as the later enactment, it would not necessarily take precedence over section 3711(e), for it is familiar law that a specific statute controls over a general one "*without regard to priority of enactment." Townsend v. Little,* 109 U.S. 504, 512. *See, e.g., Ginsberg & Sons v. Popkin,* 285 U.S. 204, 208; *McEvoy Co. v. United States,* 322 U.S. 102, 107; *Fourco Glass Co. v. Transmirra Corp.,* 353 U.S. 222, 228-229.[15]

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[14] USERRA's legislative history seems to show that Congress envisioned that USERRA cases would be exempted from binding arbitration, but the 5th Circuit held that legislative history is insufficient to show the intent to exempt USERRA cases from the FAA.

[15] *Bulova Watch Co. v. United States,* 365 U.S. 753, 758 (1961) (emphasis supplied).