USERRA No Bar to Enforcing Employment Arbitration Agreement, Federal Appeals Court Rules

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The Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) does not prohibit compelling a former employee to arbitrate his USERRA claims under an arbitration agreement, the U.S. Court of Appeals for the Ninth Circuit, in San Francisco, has ruled. *Ziober v. BLB Resources, Inc.*, No. 14-56374 (9th Cir. Oct. 14, 2016).

Emphasizing the Federal Arbitration Act's pro-arbitration mandate and joining other circuits (the Fifth, Sixth, and Eleventh Circuits) to have considered the issue, the court panel found neither USERRA's text nor legislative history showed a Congressional intent to prevent an employer from compelling an employee to arbitrate claims under an arbitration agreement. Accordingly, the Court affirmed the lower court's order compelling arbitration and dismissing the complaint.

The Facts

The former employee, Kevin Ziober, was an operations director for a real estate marketing and management firm and served in the Navy Reserve. He had signed an agreement with his employer requiring arbitration of legal disputes. Subsequently, the Navy recalled him to active duty. On his last scheduled day of work, the company informed him that he would not have a job upon his return.

After returning from active duty, Ziober sued the company, alleging violations of USERRA's provisions protecting servicemembers against discrimination and establishing reemployment rights. His complaint also included state law claims.

The company moved to compel arbitration based on the arbitration agreement Ziober had signed. The district court granted the motion to compel arbitration, concluding USERRA did not invalidate or supersede the agreement.

Pro-Arbitration Mandate

Emphasizing the FAA's pro-arbitration mandate, the appellate court affirmed the lower court's order compelling arbitration and dismissing the complaint. The Court explained the FAA required courts to "rigorously enforce" arbitration agreements according to their terms, unless there is "a contrary congressional command."

Ziober argued that USERRA's text represented a contrary congressional command by creating a procedural right to sue in federal court that, he asserted, precludes a contractual agreement to arbitrate. The Court rejected his argument, pointing out that an individual agreeing to arbitrate his or her claims does not give up substantive rights. It noted the U.S. Supreme Court, in a consumer arbitration case, said that when Congress has issued a command precluding the arbitration of claims, it has done so in unmistakable terms. However, Congress made no such plain statement in USERRA's text, the Ninth Circuit concluded.

The closest USERRA's text comes to addressing the compelled arbitration of claims, the Ninth Circuit said, is a prohibition of "the establishment of additional prerequisites" to the vindication of substantive rights. However, as other circuits have recognized, the Court found, that language directly relates to "union contracts and collective bargaining agreements" that require an employee to take an additional step or exhaust certain remedies before filing suit. The Court explained, "[A]n individual arbitration agreement between an employer and an employee — operating like a forum selection clause — allows an employee to immediately seek to vindicate his or her rights in an arbitral forum, with no additional steps or exhaustion of other remedies required."

Ziober also argued that USERRA should be interpreted more liberally than other statutes given its focus on veterans. The Court said the principle of liberal construction, however, "is designed to ensure that veterans may take full advantage of the substantive rights and protections provided by a statute.... Yet,... arbitration

agreements like the one at issue in this case operate like forum selection clauses that do not require a party to give up any 'substantive rights afforded by the statute.'"

Finally, Ziober argued the legislative history of USERRA's prohibition on the creation of "additional prerequisites" for the vindication of substantive rights under the statute is "a contrary congressional command" that overrode the FAA's pro-arbitration mandate. The Court disagreed, finding the "limited legislative history" insufficiently supported Ziober's interpretation. Moreover, the Court said, the legislative history showed the concern was with union contracts that require an employee to take an additional step or exhaust certain remedies before filing suit, which is not the arbitration agreement in this case.

Judge Paul Watford concurred in the Court's opinion even though he thought reasonable arguments can be made on whether USERRA overrode the FAA's pro-arbitration mandate. However, he concluded it was not "prudent for [the Court] to create a circuit split by reversing the district court's ruling, particularly given the ease with which Congress can fix this problem."

While it seems generally recognized that USERRA claims are subject to arbitration agreements that do not alter USERRA's substantive rights, the required arbitration of USERRA claims remains somewhat controversial. Periodically, bills are introduced in Congress that would broaden USERRA claims and remedies. For example, a handful of Senators have sponsored the "Uniformed Services Employment and Reemployment Rights Improvement Act of 2016," S. 3445. S. 3445 provides for possible intervention by the Attorney General in private USERRA litigation, allows states to be sued for USERRA violations, and broadens the disability aspects of USERRA. Currently, S. 3445 does not contain proposed restrictions on the arbitration of USERRA claims, but comments by the sponsors regarding *Ziober* suggest that they may seek to incorporate such restrictions.

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Employers should review and consider updating their arbitration agreements periodically to ensure enforceability. Please contact Jackson Lewis with any questions about *Ziober*, arbitration, or USERRA.