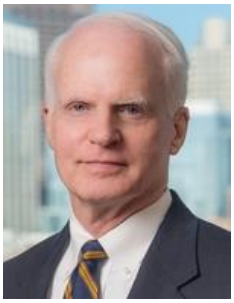
Portfolio Media. Inc. | 111 West 19th Street, 5th Floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Justice For Servicemembers Act: A Look At The Big Picture

Law360, New York (July 28, 2016, 11:50 AM ET) --



David C. Henderson

It now has been 22 years since Congress enacted the Uniformed Services Employment and Reemployment Rights Act (USERRA).[1] But even then, in 1994, special employment and reemployment rights had long been a part of the incentive package that Congress extended to military members.[2] And now, if recently introduced bills providing for a so-called Justice for Servicemembers Act are enacted into law, the decades-long evolution of service members' rights could take another significant, evolutionary step.[3] Whether that step would be advisable will be subject to debate.

The background of the new proposal is substantial. The trifold purposes of USERRA are apparent. The statute itself states that its objectives are to (1) encourage noncareer service in the uniformed services by eliminating or minimizing the disadvantages to civilian careers and employment that result from such service; (2) minimize the disruptions of military service by providing for prompt reemployment of persons who complete such service; and (3) prohibit discrimination against persons because of their service.[4]

Consistent with those statutory purposes, the U.S. Department of Labor generally has demonstrated enthusiasm for enforcing USERRA rights. Upon finalizing current USERRA regulations in 2005,[5] for example, the DOL emphasized that it intended to follow the expansive reading of the law taken by the courts, and that it generally would follow the maxim that USERRA and its predecessor laws were intended to be "liberally construed for the benefit of those who left private life to serve their country in its hour of great need."[6]

But case law, in the opinion of some, nevertheless took a more restrained, even undesirable, approach, at least in its interpretation of one key USERRA provision. And notably, DOL regulations do not address that provision at all.

The provision is 38 U.S.C. § 4302, where USERRA purports to sets forth its "relation to other law." And in setting forth this "relation," USERRA provides, in terms that might seem to be clear and categorical, that USERRA's "superseding" position is as follows:

> § 4302. Relation to other law
>
> (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.

Case law has shown, however, that § 4302 cannot be read in isolation. The seminal Fifth Circuit case taking a restricted view of § 4302(b) is Garrett v. Circuit City Stores.[7] And after 10 years, Garrett still stands for the proposition that, notwithstanding the seemingly clear phrasing of § 4302(b), USERRA does not supersede every "contract, agreement, policy, plan, practice or other matter" that seems to limit USERRA rights.[8]

The plaintiff in Garrett was a member of the Marine Reserves who alleged in a federal district court complaint that his civilian employer, Circuit City, discriminated against him in violation of USERRA. Specifically, he contended, in 2002 and 2003, as the American military began to prepare for combat in Iraq, he began to receive unjustified criticism and discipline that ultimately led to his being fired.

The plaintiff's employer, while generally denying doing anything unlawful, moved to compel arbitration of the plaintiff's USERRA claim, however, pointing out that the plaintiff had acknowledged in writing, and failed to opt out of, a company policy requiring that such claims be arbitrated.

The plaintiff opposed his employer's motion, countering that he could not be required to arbitrate his claim. Instead, he argued, his right to bring suit in a federal court was a "right or benefit provided by" USERRA that, according to § 4302(b), could not be "reduc[ed], limit[ed] or eliminate[d] in any manner" by any "contract, agreement, policy, plan, practice or other matter."

The district court thus denied the employer's motion to compel arbitration. But the Fifth Circuit reversed, holding in favor of the employer and explaining that "an exclusive judicial forum is not a right protected by Chapter 43 of USERRA, nor is it within the scope of § 4302(b)."[9]

And the court of appeals' explanation of its ruling is essential to a fair understanding of the Justice for Servicemembers Act now being opposed. The court reasoned as follows:

- The arbitration agreement between this employer and this employee explicitly provided that claims arising out of cessation of employment would be settled by final and binding arbitration, enforceable by and subject to the Federal Arbitration Act (FAA).

- As the U.S. Supreme Court already explained in Gilmer v. Interstate/Johnson Lane Corp.,[10] statutory discrimination claims may be the subject of an arbitration agreement, enforceable pursuant to the FAA.

- And as the Supreme Court also explained in Gilmer, arbitration does not require a party to forego substantive rights afforded by the particular statute; arbitration is not inconsistent with the important social policies being addressed by federal statutes; and limited discovery provisions associated with arbitration are nevertheless sufficient to allow a fair opportunity to present

discrimination claims.

- Moreover, in Gilmer, the Supreme Court discussed the difference between substantive rights conferred by Congress, such as the prohibition of age discrimination, which must be preserved, even in the arbitral forum, and procedural rights, which include choice of forum and may be waived without running afoul of the substantive intent of Congress."[11]

- And besides, USERRA itself defines "rights and benefits" in a limited way, indicating that they include only substantive rights relating to compensation and working conditions, not to affording a particular forum for dispute resolution." As a result, "an exclusive judicial forum is not a right ... within the scope of § 4302(b)."[12]

The sponsors of the Justice for Servicemembers Act quite obviously have an unfavorable opinion of Garrett, and they question the fairness and advisability of agreements requiring service members to arbitrate USERRA claims. The sponsors thus would amend USERRA by making two sets of changes.

First, they would add a subparagraph to the definitions section of USERRA to clarify that "rights and benefits" (as used, e.g., in § 4302) also includes any procedural protections or provisions set forth in USERRA.[13]

Second, they would amend § 4302 by adding the following two items as subsection (c):

> (1) Pursuant to this section and the procedural rights afforded by subchapter III of this chapter, any agreement to arbitrate a claim under this chapter is unenforceable, unless all parties consent to arbitration after a complaint on the specific claim has been filed in court or with the Merit Systems Protection Board and all parties knowingly and voluntarily consent to have that particular claim subjected to arbitration.
>
> (2) For purposes of this subsection, consent shall not be considered voluntary when a person is required to agree to arbitrate an action, complaint or claim alleging a violation of this chapter as a condition of future or continued employment, advancement in employment, or receipt of any right or benefit of employment.[14]

So who is right here? Was the analysis of the court of appeals in Garrett really so bad? Or is it overridden entirely by a greater need to support veterans?

Perhaps the biggest challenge associated with giving fair consideration to the so-called Justice for Servicemembers Act involves separating the emotional aspects of a legitimate need to support veterans, from an equally compelling need to engage in a broader, less emotional assessment of whether mandatory arbitration should be allowed for any type of employment discrimination claim.

After all, it may not be obvious to everyone why USERRA plaintiffs should be exempt from agreements with employers requiring arbitration of military discrimination claims if, e.g., Title VII, Americans with Disabilities Act, and Age Discrimination in Employment Act plaintiffs can be subject to such agreements when they bring claims based on their protected categories.

—By David C. Henderson, Nutter McClennen & Fish LLP

David Henderson is a partner in Nutter's litigation department, a member (and former co-chair) of the firm's labor, employment and benefits practice group, and a member of the business litigation practice group in Boston.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] USERRA is codified at 38 U.S.C. §§ 4301-4335.

[2] USERRA's immediate predecessor was the Vietnam Era Veterans' Readjustment Assistance Act of 1974. Part of the reason USERRA was enacted was to clarify reemployment rights first contained in the Selective Training and Service Act of 1940. 70 Fed. Reg. at 75246. See 70 Fed. Reg. 75246 (Dec. 19, 2005) (Department of Labor summary of prior legislation upon announcement of current USERRA regulations found at 20 C.F.R. part 1002).

[3] The two bills, H.R. 5426 and S. 3042, were introduced on June 9, 2016, and are co-sponsored by United States Representatives Joe Wilson, R-S.C., Walter Jones, R-N.C., Matt Cartwright, D-Pa., Tulsi Gabbard, D-Hawaii, and Jackie Walorski, R-Ind., and United States Senators Patrick Leahy, D-Vt., Al Franken, D-Minn., and Dick Durbin, D-Ill.

[4] 38 U.S.C. § 4301(a).

[5] USERRA regulations are at 20 C.F.R. Part 1002.

[6] See 70 Fed. Reg. at 75246, quoting Fishgold v. Sullivan Drydock and Repair Corp., 328 U.S. 275, 285 (1946), cited in Alabama Power Co. v. Davis, 431 U.S. 581, 584–85 (1977).

[7] 449 F.3d 672 (5th Cir. 2006).

[8] The Supreme Court has not addressed this issue. But one other United States Court of Appeals reached the same conclusion as the court of appeals in Garrett. See Landis v. Pinnacle Eye Care LLC, 537 F.3d 559, 563 (6th Cir. 2008) (explanation that Garrett is persuasive and that USERRA claims therefore are subject to mandatory arbitration agreements).

[9] Garrett, 449 F.3d at 677-78.

[10] 500 U.S. 20, 24 (1991).

[11] Garrett, 449 F.3d at 675.

[12] Garrett, 449 F.3d at 677-78.

[13] See, e.g., S. 3042.

[14] Id.