Insight

IN-DEPTH DISCUSSION

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Ninth Circuit Rules that Arbitration of USERRA Claims is Permissible

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In *Ziober v. BLB Resources, Inc.,* 2016 U.S. App. LEXIS 18516 (9th Cir., Oct. 14, 2016), the United States Court of Appeals for the Ninth Circuit joined three other circuit courts in holding that the Uniformed Services Employment and Reemployment Rights Act (USERRA) does not prohibit the compelled arbitration of claims under the Act. The Ninth Circuit's ruling helps solidify the right of employers to compel arbitration of USERRA claims under a valid arbitration agreement, particularly in light of this Circuit's perceived hostility towards arbitration of employment-related claims. Ziober provides further support for the view that a properly drafted arbitration agreement provides employers with the ability to arbitrate USERRA claims and avoid litigation.

The issue in Ziober was whether Congress intended USERRA to override the liberal federal policy favoring arbitration of claims subject to the Federal Arbitration Act (FAA). Noting that the FAA requires courts to "rigorously" enforce arbitration agreements, the Ninth Circuit was required to decide whether USERRA's language and legislative history "reveal that Congress intended to preclude arbitration of claims arising under its provisions." Joining the Fifth, Sixth, and Eleventh Circuits, the Ninth Circuit held that neither the text nor the legislative history of USERRA evinces the intent to preclude arbitration of claims under the Act.

The court began its analysis by focusing on the historical context of USERRA's adoption in 1994 in light of the federal policy favoring arbitration under the FAA. The court noted that when Congress adopted USERRA, the FAA had been in effect for almost 70 years; it also reasoned, based on existing case law, that overriding the liberal policy favoring arbitration of claims requires a "contrary congressional command." Examining USERRA's language, the court found no such command.

Specifically, the court examined the section of USERRA (38 U.S.C. § 4302(b)) that places limits on State laws and private contracts if they attempt to limit a person's rights under USERRA:

> 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.

Combining this language with the private right of action USERRA permits to enforce an individual's substantive rights, the appellant argued that USERRA creates "a procedural right to sue in federal court that precludes a contractual agreement to arbitrate."

The Ninth Circuit, however, disagreed. It first noted the well-established rule that, by agreeing to arbitrate claims, a party gives up no substantive rights. It also held that the United States Supreme Court's decision in *CompuCredit Corp. v. Greenwood*, 565 U.S. 95 (2012), "forecloses the argument that USERRA includes a non-waivable procedural right to a judicial forum." The statute involved in *CompuCredit*, the Credit Repair Organizations Act, prohibits waiver of any "right of a consumer" under that Act. The Supreme Court, however, held that this waiver, and the mere formation of a federal cause of action under the CROA, did not establish the required "contrary congressional command" necessary to override the liberal arbitration policy under the FAA. Like the CROA, nothing in the plain text of USERRA "mentions mandatory arbitration or the FAA."

The Ninth Circuit also distinguished an arbitration agreement from a contract that establishes "additional prerequisites" for vindication of substantive rights. Thus, union contracts that require additional steps prior to seeking enforcement of an employee's substantive rights under USERRA are barred, whereas arbitration agreements that simply require arbitration (as opposed to litigation) are not.

Finally, the Ninth Circuit considered USERRA's legislative history and concluded that, even if the plain language of the statute were ambiguous, the limited legislative history surrounding USERRA fails to satisfy the burden of showing that Congress intended to preclude arbitration of USERRA claims.

Although not a novel ruling, the Ninth Circuit's decision to follow other circuits in upholding the ability to arbitrate private USERRA claims is significant in that it adds to the ledger a circuit that has, in the past, been perceived as being hostile towards the arbitration of employment-related statutory claims. The Ninth Circuit's decision is likely to be viewed as a positive development for employers with respect to arbitration of USERRA claims, which can involve significant sympathies towards plaintiffs who serve, or have served, in the military.

Significant to the Ninth Circuit's ruling, however, is the limit Section 4302(b) places on agreements that require additional procedural steps prior to seeking arbitration. Thus, an arbitration agreement that includes the requirement of mediation prior to arbitration (or other steps that precede a right to arbitration) could be deemed inconsistent with Section 4302(b). Practically speaking, therefore, employers will wish to assure that, with respect to the arbitration of claims under USERRA, their arbitration agreements permit an immediate request for arbitration in order to avoid the preclusive effect of Section 4302(b).

Additionally, as with all employment-related statutory claims subject to arbitration agreements, employers may want to review their arbitration agreements to ensure they meet the relevant standards for permitting arbitration of statutory claims, as *Ziober* considered the ability of an employer to require arbitration of claims under USERRA—not whether the arbitration agreement itself was appropriately drafted. Relevant standards for enforceable arbitration agreement include, but are not necessarily limited to, provisions that provide for discovery and appropriate relief and remedies, and have the employer cover the costs of arbitration that would otherwise not be borne by an individual in court.