

**Written Testimony of the Honorable Carolyn N. Lerner, Special Counsel
U.S. Office of Special Counsel**

**Committee on Veterans' Affairs
United States Senate**

Hearing on Pending Legislation

June 29, 2016

Chairman Isakson, Ranking Member Blumenthal, and Members of the Committee:

The U.S. Office of Special Counsel (OSC) welcomes this opportunity to provide written testimony for the Committee's June 29, 2016 hearing on pending legislation. OSC is the federal sector prosecutor of claims under the Uniformed Services Employment and Reemployment Rights Act (USERRA). We provide comments on Ranking Member Blumenthal's legislation, which clarifies the scope of procedural rights of members of the uniformed services with respect to their employment and reemployment rights.

USERRA was enacted in 1994 to provide more robust mechanisms for service members to enforce their employment and reemployment rights, including through actions in the U.S. district courts (private employers), state courts (state employers), and the U.S. Merit Systems Protection Board (federal employers). In section 4302(b) of USERRA (38 U.S.C. 4302(b)), Congress attempted to ensure that these enforcement rights could not be curtailed, limited, or otherwise restricted:

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.

Congress specifically intended section 4302(b) to prevent employers from undermining USERRA's procedural protections through the use of arbitration and collective bargaining agreements. As the House Committee report notes:

Section 4302(b) would reaffirm a general preemption as to state and local laws and ordinances, as well as to employer practices and agreements, which provide fewer rights or otherwise limit rights provided under chapter 43 or put additional conditions on those rights.... Moreover, this section would reaffirm that additional resort to mechanisms such as grievance procedures or arbitration or similar administrative appeals is not required.... It is the Committee's intent that, even if a person protected under the Act resorts to arbitration, any arbitration decision shall not be binding as a matter of law.

H. Rept. No. 103-65 (April 28, 1993), USCCAN 2449, 2453.

Nevertheless, in *Garrett v. Circuit City Stores Inc.*, 449 F.3d 672 (5th Cir. 2006), the U.S. Court of Appeals for the Fifth Circuit ruled that section 4302(b) does not preclude the enforceability of binding arbitration agreements to resolve USERRA disputes. The court opined that section 4302(b) encompasses only “substantive,” not “procedural,” rights under USERRA, and that the right to have a USERRA claim independently adjudicated in court is not “substantive.” The only other circuit court to rule on the issue simply adopted the *Garrett* ruling. *See Landis v. Pinnacle Eye Care LLC*, 537 F.3d 559 (6th Cir. 2008).

Given Congress’s clear intent in enacting section 4302(b), OSC believes these rulings were erroneous and have impermissibly narrowed the scope of protections afforded to service members under USERRA. Section 1 of Ranking Member Blumenthal’s proposed bill would correct this misinterpretation by explicitly clarifying that USERRA’s procedural protections are part of the “rights and benefits” guaranteed by the statute. OSC supports this clarification and believes it advances the intent of this important law.

Thank you for the opportunity to comment on matters important to those who serve our nation in uniform.