Testimony of Kevin Ziober
Before the U.S. Senate Committee on Veterans' Affairs
June 29, 2016

Chairman Johnny Isakson (GA), Ranking Member Richard Blumenthal (CT) and other distinguished Members of the Committee, thank you for affording me the opportunity to testify in support of the Justice for Servicemembers Act of 2016 (S. 3042 / H.R. 5426). This legislation that Senator Blumenthal recently introduced would clarify longstanding protections under the federal Uniformed Services Employment and Reemployment Rights Act (USERRA) that have existed since the 1950s, by stating that service members and veterans cannot waive their substantive or procedural rights under USERRA.

I also appreciate the opportunity to tell my own personal story – about how on my last day of work before a one-year deployment to Afghanistan, my employer threw an office-wide party to celebrate my military service, and then fired me minutes before my deployment began. Furthermore, when I tried to enforce my rights upon returning home from military duty, I was told that I had to arbitrate my USERRA claims, even though Congress has expressly stated that service members and veterans are not required to arbitrate their USERRA claims.[1]

USERRA is the latest in an unbroken line of federal laws that since the 1940s have guaranteed that service members can return to their civilian jobs after serving in the military, be free of discrimination based on their military service or status, and will not be disadvantaged by their service. This law is not just a vital protection for Reservists like me who take leave from our civilian jobs to serve in the Armed Forces. It is also vital to maintaining a vibrant Guard and Reserve force, and ensuring that the United States has the strongest military in the world.

As a private citizen, a combat veteran, and Reservist, I stand with twelve Veterans Service Organizations – including the Military Officers Association of America, the Reserve Officers Association, and the National Guard Association of the United States – in support of the Justice for Servicemembers Act of 2016.

In 1994, when Congress enacted USERRA, it stated explicitly that veterans and service members cannot waive *any* of their rights under USERRA, that they have a right to enforce their rights in federal court, and that they cannot be required to arbitrate their USERRA claims. While some courts like the Federal Circuit have followed Congress' explicit intent, two federal courts of appeals have erroneously concluded that the text of USERRA is not clear enough to protect the procedural rights of service members from waiver. By clarifying that *all* USERRA rights are protected against waiver, the Justice for Servicemembers Act will ensure, once and for all, that no service member is forced to choose between his USERRA rights and a job that puts food on the table and a roof over his head.

[1] Today, I am sharing my own views as a private citizen about the importance of USERRA, and I am not speaking on behalf of any other person or institution. I accepted this invitation to speak and am testifying in my personal capacity. The views expressed in my remarks are my own and do not necessarily reflect the official positions of the U.S. Government, the U.S. Navy, U.S. Special Operations Command or Naval Special Warfare Command. I am speaking on my own behalf and have no affiliation with public or private entities. Nor do I seek any financial or political gain by participating in this hearing.

I am heartened to see bipartisan support for the Justice for Servicemembers Act. I also appreciate how both parties have come together in the past to strengthen USERRA including, when necessary, clarifying provisions of the law when courts have ignored the intent of Congress in enacting USERRA.

My USERRA Story: Fired the Day Before I Began a Deployment to Afghanistan and Forced to Arbitrate My Claims Under USERRA

I am here today to share my own story about losing a job that I loved because I chose to serve my country in the Armed Forces. Sadly my story is not unique. It happens every day across America, because employers either are not aware of USERRA or they disregard the law when they find our military service to be inconvenient.

In July 2010, I was hired as a manager by BLB Resources, Inc. ("BLB"), a federal contractor headquartered in Irvine, California. From 2010 to 2012, I helped BLB to grow from a staff of 18 employees to a workforce of over 90.

Six months into my tenure at BLB, the company asked me and other employees to sign an arbitration agreement in order to remain employed. The agreement was presented to us on a take it or leave it basis. Like other employees who needed their jobs to support themselves and their families, I felt that I had to sign the arbitration agreement.

In November 2012, I received active duty orders to deploy to Afghanistan for 12 months. On my last day of work on November 30, 2012, I was greeted by my colleagues with a standing round of applause. My office was decorated with camouflage netting and balloons. Cards and gifts were stacked on my desk. At noon, BLB held a surprise party in my honor, where 40 of my co-workers gathered to wish me well on my deployment. There was even a large cake with an American flag decorated in red, white, and blue, with the inscription "Best Wishes Kevin." Right after the party, I felt amazing. I even called my family to tell them about how moved I was that my colleagues had honored me and my military service.

Around 4:45 that same afternoon, I was summoned into a meeting with BLB's Human Resources department where I was summarily fired and told that my position would not be available upon my return from active duty. The shock of learning that I was being terminated from my job – on the eve of my deployment to a combat zone – created an unimaginable amount of concern and anxiety about how I would support myself when I returned home. No service member who is asked to fight for his country should ever need to worry about fighting for his job when he returns from war. That was the primary reason why Congress enacted USERRA and its predecessor statutes.

When my deployment ended in the spring of 2014, I was further surprised when I tried to enforce my USERRA rights. I was surprised, because the arbitration agreement did not mention USERRA and because I understood that when Congress enacted USERRA in 1994, it explicitly stated that service members cannot be required to arbitrate their USERRA claims. Upon filing a USERRA action in a federal district court in southern California, BLB filed a motion to compel

arbitration. Soon thereafter, the judge granted BLB's motion, dismissing my USERRA case and sending my case to arbitration.

Thankfully, my story did not end there. I found legal advocates – including a former Marine and a former Senate counsel who advised members of this Committee and the HELP Committee on bipartisan USERRA legislation – who agreed to take my case to the U.S. Court of Appeals and, if necessary, to the U.S. Supreme Court. As much as I would like to take my case to the U.S. Supreme Court and win this issue for the benefit of all service members and veterans, it should not be necessary for America's highest court to decide whether service members can be forced to waive their procedural rights, including the right to enforce their USERRA protections in court. By passing the Justice for Servicemembers Act, Congress can ensure that no service member will ever have to give up any USERRA rights to make ends meet.

Background on USERRA's Strong Protections and Congress' Intent to Allow Service Members to Choose Where They Enforce Their USERRA Rights

In 1994, Congress enacted USERRA to clarify, simplify, and strengthen federal employment and reemployment rights that have existed since the 1940s. Congress enacted USERRA and its predecessor statutes so that honorable Americans can serve in the Armed Forces without jeopardizing their civilian jobs when they return from deployment, and so that all who have served can be free of discrimination related to their military service. Without USERRA's strong substantive and procedural protections, it would be impossible for millions of Americans to serve in the National Guard and Reserves to protect our homeland and advance America's national interests abroad.

USERRA is one of the strongest employment laws that Congress has ever enacted. One of the primary reasons why USERRA is such a strong and effective law is that Congress provided service members and veterans with a number of powerful enforcement tools that are rarely found in other federal employment laws. For example:

1. *USERRA allows a service member or veteran to file a USERRA action in any district where the employer maintains a place of business*. 38 U.S.C. § 4323(c)(2). This is very important for service members, who are often called to duty far away from home for extended periods of time.

2. *USERRA has no statute of limitations period, as Congress clarified in an amendment that was enacted unanimously and signed by President Bush in 2008*. 38 U.S.C. § 4327(b).

3. USERRA does not require service members or veterans to file an administrative claim with a federal agency – like the Equal Employment Opportunity Commission (EEOC) – before enforcing their rights in court. 38 U.S.C. § 4323(a)(3).

4. Under USERRA, service members and veterans cannot be charged any filing fees or other court fees, and cannot be required to pay an employer's fees or costs. 38 U.S.C. § 4323(h)(2).

Most, if not all, of these strong enforcement rights do not exist under other federal employment laws. For example, claims under Title VII of the Civil Rights Act of 1964 generally must be filed in the district where the employee worked; an employee must file a charge with the EEOC before filing an action in court; an action must be filed in court within 90 days of the end of the EEOC proceeding; and employees must pay filing fees in court and can be required to pay the attorneys' fees and costs of a prevailing employer. 42 U.S.C. § 2000e-5(e)(1), (f)(1), (3), (k),

USERRA's strong enforcement rights are routinely undermined by arbitration agreements that are designed to cover federal laws like Title VII that are not as protective as USERRA. Arbitration agreements do not just take away a service member's right to file a USERRA action in federal court; they commonly require the service member to arbitrate in one county or city, even if he or she is deployed across the country; they often impose very short statute of limitations periods, such as six months, even though USERRA has no statute of limitations period; they frequently impose arbitration filing fees and costs on service members and permit service members to pay an employer's fees and costs, even though such fees and costs are barred by USERRA; and they often require multi-step procedures to be exhausted before a service member can obtain a hearing before an arbitrator, even though USERRA was designed to allow service members to enforce their rights without delay.

Simply put, USERRA's strong enforcement protections are incompatible with arbitration. Arbitration does not adequately protect the rights of our service members and veterans under USERRA. Furthermore, Congress, the U.S. Supreme Court, and the U.S. Department of Labor have made clear that service members and veterans cannot be required to arbitrate their reemployment and reemployment claims.

In 1946, the U.S. Supreme Court declared that private agreements cannot "cut down" or waive the substantive rights of servicemembers – like the right to be reemployed after serving in the Armed Forces. *See Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946). In 1958, the Supreme Court extended that non-waiver principle to procedural rights by declaring that service members have a right to enforce their reemployment rights in court and that they cannot be required to arbitrate their reemployment rights. *See McKinney v. Missouri-Kan.-Tex. R.R. Co.*, 357 U.S. 265, 268-69 (1958). As the Supreme Court explained in *McKinney*, service members cannot be required to grieve or arbitrate their reemployment claims before enforcing their rights in court, because they are "asserting special rights bestowed upon him in furtherance of a federal policy to protect those who have served in the Armed Forces." *Id.*

In 1994, when Congress enacted USERRA it consciously decided to continue to the non-waiver principles of *Fishgold* and *McKinney* so that service members cannot be required to waive any of their rights and cannot be required to arbitrate their reemployment or employment claims under USERRA.

Although USERRA's predecessor statute had not included statutory language on the waiver of rights, in 1994 Congress added a very broad, express provision against waiver of USERRA rights. In USERRA § 4302(b), Congress stated that:

> This chapter supersedes any State law . . . 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.

38 U.S.C. § 4302(b). When Congress explained what this provision meant, it described its intent to continue the longstanding tradition of protecting the substantive and procedural rights of service members and veterans, and in particular its view that service members and veterans cannot be required by arbitrate their USERRA claims. The relevant House Report stated that:

> [T]his section would reaffirm that additional resort to mechanisms such as grievance procedures or arbitration or similar administrative appeals is not required. *See McKinney v. Missouri-K-T R.Co.*, 357 U.S. 265, 270 (1958) . . . . It is the Committee's intent that, even if a person protected under [USERRA] resorts to arbitration, any arbitration decision shall not be binding as a matter of law.

H.R. Rep. No. 103-65, at 20 (1993) (emphasis added).

In 2005, under the leadership of Labor Secretary Elaine Chao, the Department of Labor issued regulations recognizing that service members and veterans cannot be required to arbitrate their USERRA claims. 70 Fed. Reg. 75246, 75257 (Dec. 19, 2005). The Department of Labor understands the importance of strong USERRA protections, because each year DOL's Veterans Employment and Training Service (DOL VETS) assists more than 1,100 service members who ask DOL VETS to investigate their USERRA claims.[2] In addition, in enacting USERRA, Congress delegated DOL authority to interpret and implement USERRA. 38 U.S.C. § 4331(a).

Some Federal Courts Have Ignored the Intent of Congress to Protect Servicemembers and Veterans Against the Waiver of Their USERRA Rights

Despite the broad anti-waiver language in USERRA § 4302(b), and the explicit legislative history stating that service members cannot be required to arbitrate their USERRA claims, the federal courts are deeply divided over whether USERRA protects procedural rights from waiver and thus bars forced arbitration of USERRA disputes.

In 2008, the U.S. Court of Appeals for the Federal Circuit held that USERRA protects both procedural and substantive rights from waiver, and held that federal workers cannot be required to arbitrate their USERRA claims. *Russell v. MSPB*, 324 F. App'x 872, 874-75 (Fed. Cir. 2008) (per curiam). Unfortunately, the Fifth and Sixth Circuits ignored the clear intent of

[2] U.S. Department of Labor, Uniformed Services & Reemployment Rights Act, FY 2014 – Annual Report to Congress at 10 (July 2015), https://www.dol.gov/vets/media/USERRA_Report_to_Congress_July_2015.pdf

Congress in holding that that USERRA protects only substantive rights, not procedural rights, from waiver, and that arbitration of USERRA claims may be required. *See Garrett v. Circuit City Stores, Inc*., 449 F.3d 672, 674-75 (5th Cir. 2006); *Landis v. Pinnacle Eye Care*, LLC, 537 F.3d 559, 561-63 (6th. Cir. 2008). Notably, one of the Sixth Circuit Judges in *Landis* wrote a special concurring opinion to point out that he believed it was clear that Congress intended for arbitration to not apply to USERRA claims, but that he did not believe the text of the law was clear enough for him to hold that USERRA would override an arbitration agreement. *Landis*, 537 F.3d at 564 (Cole, J., concurring).

The Justice for Servicemembers Act of 2016 Will Eliminate the Uncertainty That Service Members and Veterans Now Face When They Enforce Their USERRA Rights

Because federal courts have sharply disagreed over whether USERRA protects procedural rights from waiver, right now service members and veterans do not know what to expect when they try to enforce their rights. That uncertainty makes it harder for service members to leave their civilian jobs to serve in the Armed Forces and feel confident they can exercise and enforce their USERRA rights. In addition, because the Federal Circuit's decision applies to the federal sector workplace, today federal workers cannot be required to arbitrate their USERRA claims. But the opposite rule applies to private sector workers in many parts of the country. As a result, federal workers currently have the procedural protections that service members have enjoyed since the 1950s, while millions of private sector workers are left with inferior rights under USERRA.

By clarifying USERRA to say that procedural rights – as well as substantive ones – are protected from waiver, Congress can ensure that the USERRA rights of all service members and veterans will be fully protected in the future. That is what the Justice for Servicemembers Act will do. It does not create any new rights, but instead ensures that the clear intent of Congress in enacting USERRA in 1994 will be followed by the federal courts when service members seek to vindicate their rights under USERRA.

I hope Congress will enact the Justice for Servicemembers Act this year, so that no service member or veteran will have to experience what happened to me. Regardless of what one thinks of arbitration generally, I hope we can all agree that service members and veterans should not have to give up their USERRA rights to get a job or keep a job. When our USERRA protections are strong, our military is stronger, our business community is stronger, and America is stronger.

I am pleased to see that members of Congress from all across America and from both parties are supporting the Justice for Servicemembers Act, and have supported similar legislation in the past. Service members and veterans appreciate that USERRA's history is a bipartisan one. USERRA was approved by this Committee by unanimous consent, and the law was passed by the House and Senate by voice votes without the need for a roll call vote. In addition, in recent history, this Committee and Congress have unanimously enacted amendments to clarify USERRA where there was disagreement within the federal courts over how to interpret USERRA, including amendments to clarify that USERRA has no statute of limitations period and that it is illegal to pay a person lower wages due to his or her military status or service.

It Has Never Been More Important to Have Strong Protections for Guard and Reserve Members

USERRA and its predecessor laws have always been critical to encouraging and enabling Americans to serve in the Guard and Reserve. But today, because of the increasing reliance on the Guard and Reserve to support the global activities of our Armed Forces, it is more important than ever to ensure that we have strong USERRA protections so that Guard and Reserve members can transition between their civilian and military positions. In fiscal year 2015, there were approximately 810,000 Reservists and National Guard personnel comprising roughly 38 percent of total U.S. uniformed manpower.[3] Since 2001, over 780,000 Reserve and Guard members were called up to provide critical combat forces, mission support, and logistics to the global war on terror campaigns in Iraq and Afghanistan.[4]

These men and women willingly set aside their civilian lives and careers, put on a uniform, and answered our nation's call when they were asked to serve – without hesitation or reservation. Unfortunately, thousands of men and women just like me returned from overseas only to learn that their civilian were not waiting for them, or that they had to take a demotion to return to their jobs. By keeping USERRA strong and enacting the Justice for Servicemembers Act, Congress can send a powerful bipartisan message to all of those who have served – and those who are thinking about serving in the future – that it understand the challenges we face and supports us.

Conclusion

I sincerely appreciate that the Committee is considering this important issue and legislation, as well as other ways to improve the lives of America's veterans. Thank you very much for your time and consideration of my views.

[3] U.S. Department of Defense, Office of the Assistant Secretary of Defense for Readiness and Force Management, Total Force Planning and Requirements Directorate, Defense Manpower Requirements Report, Fiscal Year 2015, June 2014, p. 2, Table 1–1, http://prhome.defense.gov/Portals/52/Documents/RFM/TFPRQ/docs/F15%20DMRR.pdf

[4] Leo Shane III, *The National Guard is coming to a dangerous crossroads, incoming chief warns*, Military Times (June 25, 2016), http://www.militarytimes.com/story/military/guard-reserve/2016/06/25/joseph-lengyel-national-guard-confirmation/86294538/.