

USERRA and Waivers of Employees' Claims - - Confusion Abounds

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The Uniformed Services Employment and Reemployment Rights Act ("USERRA") is a broad federal statute that protects the employment rights of certain individuals who engage in military service. The ability of an employee and employer to enter into an enforceable agreement in settlement of an employee's alleged rights under USERRA was upheld by the Sixth Circuit in Wysocki v. IBM, 607 F.3d 1102 (6th Cir. 2010) and the Supreme Court has recently denied certiorari. However, application of the relevant statutory provisions is unclear in certain circumstances and this means that some waivers may not be enforceable according to their terms. Thus, an employer's expectations of finality may not be satisfied and an employee's expectation of a post-agreement ability to sue for USERRA violations may also be unsatisfied.

By way of background, employees and employers may enter into separation agreements when an employee terminates his/her employment. In those cases where an employee receives a cash payment, his/her employer will seek a written acknowledgment from the employee waiving any rights he may have under various statutes and common law. The written agreement will often list the specific statutes and types of employment claims that the employee is waiving.

In Wysocki the plaintiff worked as a data administrator and his employer refused to reinstate him when he returned from military service. Mr. Wysocki entered into a written agreement with IBM under which it paid him over \$6,000 and he agreed to waive his employment rights including his veterans rights. Subsequently, Mr. Wysocki sued IBM claiming that it had violated his rights under USERRA. IBM sought to have the litigation dismissed on the basis

that any right under USERRA had been waived by the plaintiff and the district court agreed. The case was appealed to the Sixth Circuit, it affirmed and the Supreme Court denied certiorari.

The issue before the courts was whether Wysocki could waive his USERRA claim. That statute has a specific provision dealing with its relationship to agreements:

- (a) Nothing in this chapter shall supersede, nullify or diminish any... contract, agreement, ... 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 ... contract, agreement, ... or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by this chapter, ...

38 U.S.C. §4302.

A fair reading of these two sub-sections is that contracts affecting covered veterans' benefits will be given effect if they provide greater rights or protections than those otherwise mandated by USERRA but contracts that provide rights or benefits inferior to those required by the statute will have no or limited effect. The Sixth Circuit in Wysocki decided as a matter of law that IBM's payment of approximately \$6,000 was deemed by Wysocki to be more beneficial than his rights under USERRA. The court therefore affirmed the district court's grant of summary judgment.

The courts' decisions are troubling because there was no evidentiary showing that the district court had analyzed, as required by §4302, whether IBM's payment was more valuable than Wysocki's rights under USERRA. There was an insufficient record before the court to make that determination. This issue is made even more difficult to resolve in most, if not all cases, where an employee waives rights arising under a multiplicity of state and federal statutes as well as the common law. In most cases employee waivers cover a range of laws and there is

no discussion in the waiver regarding how the amount of payment was arrived at nor is there an allocation of portions of the payment to specific potential causes of action. In such cases it will be difficult if not impossible for a court to determine that an employee has waived his USERRA rights.

As a consequence, the parties' expectations may be misplaced when they jointly execute a waiver. Employers believe that such waivers are binding and they will have a hard time establishing a defense to future USERRA claims, particularly where the waiver covers a multiplicity of potential causes of action and the agreement does not specify the portion attributable to USERRA claims. An employee's expectations may not be satisfied if other courts follow the Sixth Circuit's approach and assume that an employee's acceptance of a payment is, as a matter of law, proof that the payment is in excess of his statutory rights. Until courts provide greater clarification or until the statutory language is amended, there cannot be certainty that USERRA waivers are enforceable in accordance with the terms of the parties' written agreements.