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U.S. CHAMBER OF COMMERCE

Statement of U.S. Chamber Institute for Legal Reform and U.S. Chamber of Commerce

BY: Statement for the Record of the U.S. Chamber Institute for Legal Reform and U.S. Chamber of Commerce

ON: Justice for Servicemembers Act of 2017, H.R. 2631

TO: House Veterans' Affairs Subcommittee on Economic Opportunity

DATE: June 29, 2017

Chairman Arrington, Ranking Member O'Rourke and members of Subcommittee on Economic Opportunity of the House Veterans' Affairs Committee, the U.S. Chamber of Commerce ("Chamber") and the U.S. Chamber Institute for Legal Reform ("ILR") submit this statement for the record regarding H.R. 2631, the "Justice for Servicemembers Act of 2017," and appreciate the opportunity to offer it.

The U.S. Chamber of Commerce is the world's largest business federation representing the interests of more than three million companies of all sizes, sectors, and regions, as well as state and local chambers and industry associations, and is dedicated to promoting, protecting, and defending America's free enterprise system. ILR is an affiliate of the Chamber dedicated to making our nation's civil legal system simpler, faster, and fair for all participants.

The Chamber and ILR deeply value servicemembers and their contributions both at home and abroad. The Chamber and ILR also vigorously support the goal of the Uniformed Services Employment and Reemployment Rights Act ("USERRA")—to "encourage noncareer service in the uniformed services by eliminating or minimizing the disadvantages to civilian careers and employment which can result from such service."¹ Employers should never discriminate on the basis of membership in the uniformed services when making employment, reemployment, promotion, or benefits decisions; and those who leave civilian employment to serve our country properly should receive reemployment protections.² However, the Chamber and ILR oppose H.R. 2631 because the legislation would make it harder for servicemembers to obtain relief pursuant to USERRA by effectively eliminating arbitration as an available means of resolving USERRA disputes.

Servicemembers are entitled to a fair, accessible, and speedy means of vindicating the rights conferred by USERRA. Forcing them into our overcrowded court system—and requiring them to depend entirely on plaintiffs' lawyers—will not serve those goals.

¹ 38 U.S.C. § 4301(a)(1).

² *Id.* §§ 4311(a) & 4312(a).

First, the vast majority of employment-related claims are individualized and relatively small—in the USERRA context, for example, claims that an employer refused to rehire a particular servicemember or that a particular person was passed over for promotion after applying to join the uniformed services. But those are the precise category of cases for which it will be difficult for a servicemember to secure a lawyer, because most plaintiffs’ lawyers seek to handle either lucrative class actions or high-dollar contingency fee claims.³ Without a lawyer, the servicemember will be unable to vindicate his or her rights in court, because complex court rules, and the requirement that litigants representing themselves appear in person, effectively make a lawyer mandatory.

To interest a lawyer, moreover, a servicemember likely would be required to sign an agreement promising the plaintiffs’ lawyer a significant percentage of any settlement or damages award; even if the court awards attorneys’ fees under USERRA’s fee-shifting provision, the servicemember will be obligated to pay the lawyer an additional amount out of the servicemember’s recovery if that is necessary to reach the payment required under the contract. That is because the Supreme Court has held that a fee-shifting statute “controls what the losing defendant must pay, not what the prevailing plaintiff must pay his lawyer,” and that fee-shifting statutes “do[] not interfere with the enforceability of a contingent-fee contract.”⁴ More broadly, the “trend” is for courts to require a prevailing plaintiff to pay the difference between a fee award and a higher contingency fee set by agreement.⁵

³ Studies indicate that a claim must exceed \$60,000 in order to attract a contingent-fee lawyer. Elizabeth Hill, *Due Process at Low Cost: An Empirical Study of Employment Arbitration Under the Auspices of the American Arbitration Association*, 18 Ohio St. J. on Disp. Resol. 777, 783 (2003). In some markets, this threshold may be as high as \$200,000. Recommendations of the Minnesota Supreme Court Civil Justice Reform Task Force 11 (Dec. 23, 2011), <https://www.leg.state.mn.us/docs/2012/other/120214.pdf>.

⁴ *Venegas v. Mitchell*, 495 U.S. 82, 90 (1990) (interpreting 42 U.S.C. § 1988’s fee-shifting provision).

⁵ See 1 Robert L. Rossi, *Attorneys’ Fees* § 2:13 (3d ed. 2013) (explaining that “unless . . . the retainer agreement makes specific provision for” a fee-shifting award, “the trend is to calculate the contingency fee based on the amount of the judgment exclusive of the fee award, and then credit the fee award to the client as an offset against the contingency fee owed”).

Arbitration, by contrast, provides servicemembers with a simple, low-cost mechanism for dispute resolution—with procedures so simple that servicemembers can represent themselves if they wish:

- Studies reveal that individuals fare at least as well in arbitration as they would have in court, if not better.⁶
- Arbitration is inexpensive for servicemembers. The American Arbitration Association (“AAA”), for example, requires the business to bear most arbitration costs; many companies pay even the consumer’s share, which the AAA caps at \$200.⁷ A large percentage of servicemembers will pay no attorneys’ fees, either.⁸
- Courts invalidate arbitration agreements that include unfair procedural rules, or unfair processes for selecting arbitrators, under generally applicable unconscionability principles.⁹
- Arbitration is flexible and can be tailored to servicemembers’ needs. The AAA, for example, offers hearings by telephone, and participants can file documents and otherwise communicate with the AAA and arbitrator through email.¹⁰ Arbitration’s simplicity and flexibility mean that servicemembers can resolve their claims themselves if they wish—without a lawyer.
- Studies show that arbitration is much quicker than bringing a lawsuit in the overburdened federal and state court systems.¹¹

⁶ Compare Christopher R. Drahozal & Samantha Zyontz, *An Empirical Study of AAA Consumer Arbitrations*, 25 Ohio St. J. on Disp. Resol. 843, 897 (2010) (studying claims filed with the American Arbitration Association and concluding that consumers win relief 53.3% of the time), with Theodore Eisenberg et al., *Litigation Outcomes in State and Federal Courts: A Statistical Portrait*, 19 Seattle U. L. Rev. 433, 437 (1996) (observing that in 1991-92, plaintiffs won 51% of jury trials in state court and 56% of jury trials in federal court, while in 1979-1993 plaintiffs won 50% of jury trials).

⁷ AAA, *Employment Arbitration Rules and Mediation Procedures* 33, <https://www.adr.org/sites/default/files/Employment%20Rules.pdf> (“AAA Rules”).

⁸ Hill, *supra* note 3, at 802 (finding that lower-income employees “paid no forum fees” in 61% of the cases studied; employees also paid no attorney’s fees in 32% of the cases).

⁹ *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530, 533-534 (2012); see also, e.g., *Chavarria v. Ralphs Grocery Co.*, 733 F.3d 916, 923 (9th Cir. 2013) (provision requiring employee to pay an unrecoverable portion of the arbitrator’s fees “regardless of the merits of the claim”); *Alexander v. Anthony Int’l, L.P.*, 341 F.3d 256, 263 (3d Cir. 2003) (provision barring punitive damages).

¹⁰ AAA Rules, *supra* note 7, at 25.

¹¹ See Drahozal & Zyontz, *supra* note 6, at 845 (average time from filing to final award in consumer arbitrations studied was 6.9 months); *U.S. District Courts—National Judicial Caseload Profile* (2016), <http://www.uscourts.gov/file/19995/download> (average civil lawsuit in federal court took 26.7 months to reach trial).

The proponents of H.R. 2631 have not offered sufficient systemic evidence to conclude that servicemembers generally face difficulty pursuing their claims effectively and efficiently through arbitration. Rather, the evidence of consumer arbitration generally reveals that those who want to present their claims quickly—without our court system’s delays—are able to do so in arbitration.

The primary effect of eliminating arbitration would be to give plaintiffs’ lawyers a monopoly over litigating these claims and leave servicemembers’ ability to enforce their rights at the mercy of those lawyers. It therefore is not surprising that the chief proponents—and the principal beneficiaries—of prohibitions or restrictions on arbitration are the trial lawyers. One of the “[t]op lobbying goals” of the American Association for Justice (formerly the Association of Trial Lawyers of America or “ATLA”) has long been to “outlaw mandatory binding arbitration in consumer contracts.”¹²

Second, private class actions in court will not protect servicemembers.

To begin with, the vast majority of USERRA claims likely could not be brought as class actions because they are individualized—turning on specific facts relating to specific individuals and specific employers. Class certification would normally be denied in such cases.

Even in the event of a systemic problem that adversely affected a large number of our servicemembers in similar ways, class actions (and the huge fees they reap for plaintiffs’ attorneys) would not be needed. USERRA authorizes servicemembers to report suspected USERRA violations to the Department of Labor’s Veterans Employment and Training Service (“VETS”); VETS, in turn, is required to investigate these complaints and to “mak[e] reasonable efforts to ensure that the person or entity named in the complaint complies with” the law.¹³ This process allows for the resolution of most complaints without any need for further formal processes. The statute also provides that a servicemember whose complaint is not resolved by VETS can request that the complaint be referred to the Justice

¹² Sharon Theimer and Pete Yost, *THE INFLUENCE GAME: Lobbyists adapt to power shift*, USA Today, Nov. 14, 2008, http://usatoday30.usatoday.com/news/washington/2008-11-14-567071791_x.htm.

¹³ 38 U.S.C. § 4322(a), (d).

Department; the Justice Department can choose to sue on behalf of the servicemember and can obtain injunctive relief requiring the employer to comply with the law.¹⁴ And state attorneys general likewise have the ability to enforce employment nondiscrimination laws. In short, there are ample enforcement mechanisms for addressing systemic violations of USERRA—without the need for lawyer-driven class actions.

And those class actions provide little in the way of relief—for anyone other than lawyers. Members of a class typically receive pennies on the dollar—if they receive anything at all. Even a 2015 study of arbitration by the Consumer Financial Protection Bureau—which was clearly seeking to make a case *for* class actions and against arbitration—showed that only 13% of putative class actions studied were finally approved for classwide settlement, with absent class members in the remaining 87% of class actions receiving nothing.¹⁵

When a trial lawyer is negotiating a class action settlement—and virtually all private class actions that are not dismissed end up in a settlement, because class actions are almost never decided on the merits—there is an inherent conflict between the lawyer’s desire to maximize revenue for serving as class counsel and maximizing the recovery for the class. Although courts are supposed to police this conflict, the reality is that they are unable to do so when both sides are urging approval of the settlement and the court has no independent source of information. The interests of the class members all too often lose out.

That is why the data show that only a small percentage of class members are benefited by settlements. Very few bother to collect a payment, both because the settlement process is complex and the amounts available small, and because trial lawyers, eager to compromise with defendants in order to obtain their fee award, may agree to a form of notice calculated to produce little interest by class members. Although settlement distribution rates typically are not disclosed, they are very low. The CFPB study found a “weighted average claims rate” by class

¹⁴ *Id.* §§ 4323(a), (d)(1).

¹⁵ Consumer Fin. Protection Bureau, *Arbitration Study: Report to Congress, pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act § 1028(a)* at section 6, page 37 (Mar. 1, 2015) (“CFPB Study”).

members of just 4%.¹⁶ A declaration filed in court by a settlement administrator stated that in the absence of direct outreach to the class members, the *median* rate at which class members file claims in consumer cases is 0.023%.¹⁷

As a practical matter, therefore, counsel for plaintiffs (and for defendants) are frequently the only real beneficiaries of class actions. A study of insurance class actions by the RAND Corporation found that attorney's fees amounted to an average of 47% of total class-action payouts, taking into account benefits actually claimed and distributed, rather than theoretical benefits measured by the estimated size of the class. "In a quarter of these cases, the effective fee and cost percentages were 75 percent or higher and, in 14 percent (five cases), the effective percentages were over 90 percent."¹⁸ The CFPB's recent study similarly showed that attorneys' fees amounted to 41% of the average class action settlement—working out to more than \$1 million per case.¹⁹

Removing arbitration and forcing class actions on servicemembers' attempts to resolve USERRA appears intended to profit trial lawyers, rather than servicemembers. Claims brought as class actions rarely yield real benefits for class members. Most class actions are settled without any benefit to the class members, and even when class members are eligible to receive a settlement payment, they rarely bother to file a claim. Thus, the primary beneficiaries of class actions are not class members, but plaintiffs' lawyers—the group that has the most to gain by banning arbitration.²⁰

¹⁶ CFPB Study at section 8, page 30.

¹⁷ Declaration of Deborah McComb at ¶ 5, *Poertner v. The Gillette Company and The Proctor & Gamble Company*, No. 6:12-CV-00803-GAP-DAB (M.D. Fla., filed Apr. 22, 2014), ECF No. 156.

¹⁸ Nicholas M. Pace et al., *Insurance Class Actions in the United States*, Rand Inst. for Civil Just., xxiv (2007), <http://www.rand.org/pubs/monographs/MG587-1.html>. Another RAND study similarly found that in three of ten class actions, class counsel received more than the class. See also Deborah R. Hensler et al., *Class Action Dilemmas: Pursuing Public Goals for Private Gain* (Executive Summary), Rand Inst. for Civil Just., 21 (1999), http://www.rand.org/content/dam/rand/pubs/monograph_reports/2005/MR969.1.pdf.

¹⁹ CFPB Study at section 8, page 33.

²⁰ The benefits of arbitration compared to the judicial system are discussed in detail in the Chamber/ILR's comment filed in opposition to a proposal by the Consumer Financial Protection Bureau to promulgate a rule effectively banning arbitration in consumer contracts. That comment, incorporated by reference, is attached to this letter.

Third, the proponents of the bill will surely claim that it preserves arbitration by allowing parties to agree to arbitrate after a dispute arises. But that possibility is entirely illusory.

Employee-friendly arbitration programs are costly to businesses, which agree to pay or reimburse arbitration fees, filing fees, attorneys' fees, and other costs. They agree to do so because they gain certainty that they will not have to incur the transaction costs of defending class actions. Without that certainty, however, businesses will not subsidize arbitration, instead relegating all disputes to the court system—leaving servicemembers to fend for themselves except in rare cases when they can secure plaintiffs' lawyers.

Less rational factors also prevent parties from agreeing to post-dispute arbitration: “parties are loath[] to agree to anything post-dispute when relationships sour.”²¹ That is why the evidence demonstrates that opposing parties virtually never agree to arbitration after a particular dispute arises.²²

Accordingly, the Chamber and ILR urge the Subcommittee to reject H.R. 2631.

²¹ Amy J. Schmitz, *Building Bridges To Remedies For Consumers In International Econflicts*, 34 U. Ark. Little Rock L. Rev. 779, 785 (2012).

²² Theodore J. St. Antoine, *Mandatory Arbitration: Why It's Better than It Looks*, 41 U. Mich. J.L. Reform 783, 790 (2008) (addressing employment arbitration).