

## LAW REVIEW<sup>1</sup> 045

June 2002

### USERRA and SSCRA Coverage for National Guard Members

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[About Sam Wright](#)

#### 4.1 Right to Interest Rate Reduction upon Mobilization

**Q: I am a first lieutenant in the Army National Guard and a member of ROA. I have been recalled to active duty, under state orders, and I am in charge of a detachment of recalled National Guard members providing security at a civilian airport. Most of the members of the detachment, myself included, left civilian jobs when we were called up for this service. One detachment member has been told by her employer that she will not have the right to return to her civilian job because her orders are state orders, not federal orders. Is the employer correct?**

A: No. If this unit member meets the eligibility criteria under the Uniformed Services Employment and Reemployment Rights Act (USERRA), she will have the right to re-employment in her pre-service civilian job (with the seniority that she would have accrued if she had been

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<sup>1</sup>I invite the reader's attention to [www.roa.org/lawcenter](http://www.roa.org/lawcenter). You will find more than 2000 "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Servicemembers Civil Relief Act (SCRA), the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), the Uniformed Services Former Spouse Protection Act (USFSPA), and other laws that are especially pertinent to those who serve our country in uniform. You will also find a detailed Subject Index, to facilitate finding articles about very specific topics. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997.

<sup>2</sup>BA 1973 Northwestern University, JD (law degree) 1976 University of Houston, LLM (advanced law degree) 1980 Georgetown University. I served in the Navy and Navy Reserve as a Judge Advocate General's Corps officer and retired in 2007. I am a life member of ROA. For 43 years, I have worked with volunteers around the country to reform absentee voting laws and procedures to facilitate the enfranchisement of the brave young men and women who serve our country in uniform. I have also dealt with the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Veterans' Reemployment Rights Act (VRRA—the 1940 version of the federal reemployment statute) for 36 years. I developed the interest and expertise in this law during the decade (1982-92) that I worked for the United States Department of Labor (DOL) as an attorney. Together with one other DOL attorney (Susan M. Webman), I largely drafted the proposed VRRA rewrite that President George H.W. Bush presented to Congress, as his proposal, in February 1991. On 10/13/1994, President Bill Clinton signed into law USERRA, Public Law 103-353, 108 Stat. 3162. The version of USERRA that President Clinton signed in 1994 was 85% the same as the Webman-Wright draft. USERRA is codified in title 38 of the United States Code at sections 4301 through 4335 (38 U.S.C. 4301-35). I have also dealt with the VRRA and USERRA as a judge advocate in the Navy and Navy Reserve, as an attorney for the Department of Defense (DOD) organization called Employer Support of the Guard and Reserve (ESGR), as an attorney for the United States Office of Special Counsel (OSC), as an attorney in private practice, and as the Director of the Service Members Law Center (SMLC), as a full-time employee of ROA, for six years (2009-15). Please see Law Review 15052 (June 2015), concerning the accomplishments of the SMLC. My paid employment with ROA ended 5/31/2015, but I have continued the work of the SMLC as a volunteer. You can reach me by e-mail at [SWright@roa.org](mailto:SWright@roa.org).

continuously employed). The USERRA eligibility criteria are set forth in detail in “Law Reviews 5–7.”

USERRA is codified in title 38, United States Code, sections 4301-4333 (38 U.S.C. 4301-4333). Section 4303 defines 16 terms used in USERRA, including the term “service in the uniformed services.” That term is defined as follows: “The term ‘service in the uniformed services’ means the performance of duty on a voluntary or involuntary basis in a uniformed service under competent authority and includes active duty, active duty for training, initial active duty for training, inactive duty training, full-time National Guard duty [emphasis added], a period for which a person is absent from a position of employment for the purpose of an examination to determine fitness of the person to perform any such duty, and a period for which a person is absent from a position of employment for the purpose of performing funeral honors duty as authorized by section 12503 of title 10 or section 115 of title 32.” [38 U.S.C. 4303(13)]

The term “full-time National Guard duty” is not defined in USERRA, but it is defined in 10 U.S.C. 101(d)(5), as follows: “The term ‘full-time National Guard duty’ means training or other duty, other than inactive duty, performed by a member of the Army National Guard of the United States or the Air National Guard of the United States in the member’s status as a member of the National Guard of a State or territory, the Commonwealth of Puerto Rico, or the District of Columbia under section 316, 502, 504, or 505 of title 32 for which the member is entitled to pay from the United States or for which the member has waived pay from the United States.”

It is my understanding that the National Guard members who are performing airport security duty have received orders that cite 32 U.S.C. 502(f). (Please confirm this by reviewing your own orders and the orders received by members of your detachment.) Because your orders cite one of the

enumerated title 32 sections, your current service qualifies as “full-time National Guard duty” and thus as “service in the uniformed services.” You and the members of your detachment have re-employment rights under USERRA.

**Q: Last summer, the governor of our state of Washington called several of us to state active duty to fight forest fires. Do we have USERRA rights for that period of service?**

A: No. Your orders for that forest fire duty did not cite one of the enumerated title 32 sections. That duty did not meet the 10 U.S.C. 101(d)(5) definition of “full-time National Guard duty” or the USERRA definition of “service in the uniformed services.” Fortunately, the state of Washington has an excellent state law protecting National Guard members under these circumstances.

**Q: One of the members of my airport detachment is still complaining about what happened to him last summer. When the governor of Washington called him up to fight forest fires, he left his civilian job at a small convenience store just across the border, in Oregon. When he was released from that period of state duty, the convenience store owner refused to re-**

**instate him in his civilian job. The storeowner insists that he is under no obligation to take this young man back because his duty was state, not federal. This young man was still unemployed when he was called up for the current period of airport security duty.**

A: It is most unfortunate that your detachment member has “fallen through the cracks.” He has no protection under federal law (USERRA) because the forest fire duty was state duty and did not meet the statutory definition of “full-time National Guard duty.” The Washington state law does not protect him because your state’s law cannot be applied across the state line in Oregon. The Oregon law does not protect him because that law, by its own terms, only applies to “a member of the National Guard of this state.”

The Washington law applies to “a member of the National Guard of this or any other state.” We need to get Oregon to return the favor, and we need to get all the states to emulate Washington’s law. Until that happens, your detachment member and others similarly situated are out of luck.

**Q: Another detachment member is in very serious financial difficulty. Even before he was recalled to active duty for the airport security task, he was barely making his monthly payments on large credit card debts. When he was recalled to active duty, as an E-2, his pay was cut in half, as compared to what he had been making at his civilian job. His financial situation has gone from bad to worse.**

I arranged for a National Guard judge advocate to help this detachment member. The judge advocate helped him out a great deal by drafting letters to the eight credit card companies requesting that the interest rate be reduced to 6 percent, in accordance with the Soldiers’ and Sailors’ Civil Relief Act (SSCRA). Seven of the eight companies acceded to the request, but the other company has refused. That company insists that it is under no obligation to reduce this member’s interest rate because the SSCRA does not apply to state duty. Is the company correct?

A: Unfortunately, yes. Although USERRA applies to some (but not all) state duty, the SSCRA does not apply to state duty under any circumstances. After 11 September, an effort was made in Congress to amend the SSCRA to make it apply to state duty performed by National Guard members. That effort has not yet succeeded. ROA is continuing its effort to broaden the SSCRA in this and other important ways. ROA

#### **UPDATE<sup>11</sup> March 2021**

Section 4303(13) provides:

The term “service in the uniform services” means the performance of duty on a voluntary or involuntary basis in a uniformed service under competent authority and includes active duty, active duty for training, initial active duty for training,

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<sup>11</sup>Update by Second Lieutenant Lauren Walker, USMC.

inactive duty training, full-time National Guard duty, *State active duty for a period of 14 days or more, State active duty in response to a national emergency declared by the President under the National Emergencies Act (50 U.S.C. 1601 et seq.), State active duty in response to a major disaster declared by the President under section 401 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42U.S.C. 5170)*, a period for which a person is absent from a position of employment for the purpose of an examination to determine the fitness of the person to perform any such duty, a period for which a person absent from a position of employment for the purpose of an examination to determine the fitness of the person to perform any such duty, a period for which a System member of the National Urban Search and Rescue Response System is absent from a position of employment due to an appointment into Federal service under Section 327 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, and a period for which a person is absent from employment for the purpose of performing funeral honors duty as authorized by section 12503 of title 10 or section 115 of title 32.<sup>12</sup>

The change came on January 5, 2021, when President Trump signed into law the Johnny Isakson and David P. Roe, M.D. Veterans' Health Care Benefits Improvement Act of 2020.<sup>13</sup> Therefore, when Dole would have a legally enforceable right to reemployment in the Missouri job under USERRA because USERRA does apply to state active duty.

### **Please join or support ROA**

This article is one of 2000-plus "Law Review" articles available at [www.roa.org/lawcenter](http://www.roa.org/lawcenter). The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997. New articles are added each month. ROA is almost a century old—it was established in 1922 by a group of veterans of "The Great War," as World War I was then known. One of those veterans was Captain Harry S. Truman. As President, in 1950, he signed our congressional charter. Under that charter, our mission is to advocate for the implementation of policies that provide for adequate national security. For many decades, we have argued that the Reserve Components, including the National Guard, are a cost-effective way to meet our nation's defense needs. Indeed, ROA is the *only* national military organization that exclusively supports America's Reserve and National Guard.

Through these articles, and by other means, we have sought to educate service members, their spouses, and their attorneys about their legal rights and about how to exercise and

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<sup>12</sup>50 U.S.C. § 4303(13) (emphasis added).

<sup>13</sup>See Samuel Wright, *State Active Duty Performed by National Guard Member after 1/5/2021 is Now Protected by USERRA, under most Circumstances*, ROA Law Review 21034 (June 2021) (provides a detailed discussion of the update to USERRA).

enforce those rights. We provide information to service members, without regard to whether they are members of ROA or eligible to join, but please understand that ROA members, through their dues and contributions, pay the costs of providing this service and all the other great services that ROA provides.

If you are now serving or have ever served in any one of our nation's seven uniformed services, you are eligible for membership in ROA, and a one-year membership only costs \$20. Enlisted personnel as well as officers are eligible for full membership, and eligibility applies to those who are serving or have served in the Active Component, the National Guard, or the Reserve. If you are eligible for ROA membership, please join. You can join on-line at [www.roa.org](http://www.roa.org) or call ROA at 800-809-9448. If you are not eligible to join, please contribute financially, to help us keep up and expand this effort on behalf of those who serve. Please mail us a contribution to:

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