

LAW REVIEW 1034

National Guard: Yes, Title 32 duty is covered by USERRA

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1.1.3.3--National Guard Service

I continue to hear personnel officials, including federal agency personnel officials, and attorneys for employers say, "Title 32 duty by National Guard personnel is not covered by the Uniformed Services Employment and Reemployment Rights Act (USERRA). We are not required to grant an employee time off from work (even time off without pay) for Title 32 duty." This statement is clearly wrong.

The U.S. Code (U.S.C.) comprises all federal laws of permanent and general import. The U.S.C. is divided into 50 titles (general subjects), including Title 34, which was repealed in 1947 when Congress created the Department of Defense (DoD) by merging the Department of War (Army, including the Army Air Force) with the Department of the Navy (Navy and Marine Corps). Until 1947, Title 34 governed the Navy and Marine Corps, while Title 10 governed the Army. The Air Force became a separate service in 1947.

Before 1947, separate congressional committees addressed the Departments of War and the Navy. There were some glaring inconsistencies between the laws applicable to the Army and those applicable to the Navy and Marine Corps. For example, see Law Review 0802 (Jan. 2008), titled "Way Back Pay: Legislation addresses retroactive promotions for World War II Navy and Marine Corps POWs." More than 600 articles and a detailed Subject Index are available at www.roa.org/law_review.

During World War II, having two separate cabinet departments and inconsistent laws sometimes caused problems in promoting interservice cooperation and joint operations. This learned lesson was the impetus for the creation of DoD in 1947. As part of the consolidation process, Congress transferred the separate provisions in Title 34 to Title 10 and then repealed Title 34.

We need to be cognizant of all 49 current U.S.C. titles, but six of them are most pertinent to the armed forces: Title 10 (Armed Forces), 14 (Coast Guard), 32 (National Guard), 37 (Pay and Allowances of the Uniformed Services), 38 (Veterans' Benefits), and 50 (War and National Defense). USERRA is in title 38, and the Servicemembers Civil Relief Act (SCRA) is in title 50.

USERRA accords the right to reemployment (including accrued seniority and pension credit as if continuously employed) to a person who leaves a position of employment to perform "service in the uniformed services" and who gives prior oral or written notice to the civilian employer, is released from service without having exceeded the cumulative five-year limit and without having received a punitive or other-than-honorable discharge, and who makes a timely application for reemployment.

To understand the distinction between "Title 10 duty" and "Title 32 duty" and how USERRA applies to each, it is necessary to understand something of the history and structure of the National Guard. The National Guard is the modern iteration of the militia, which can be traced to 1636, when the Massachusetts Bay Colony established its militia to fight the Pequot Indians.

Until World War II, the permanent, established U.S. Army was tiny. A military operation of any size required the president to mobilize militia forces from the various states. This was the pattern followed for the War of 1812, the Mexican War, the Civil War, and the Spanish-American War. Mobilization problems for the Spanish-American War demonstrated the need for a better organized and trained militia.

As the 19th century turned to the 20th, Congress correctly anticipated that the new century would bring major new responsibilities to the United States as an emerging world power. One result was the enactment of the Militia Act of 1903, 32 Stat. 775, also known as the Dick Act. The law was named for Senator Charles W.F. Dick of Ohio, a major general in the Ohio Militia and chairman of the Senate Committee on the Militia.

The Dick Act gave federal status and federal aid to the organized militia forces of the various states. Federal funding of the militia during the first 13 years after the enactment of the Dick Act exceeded federal funding during the century preceding enactment. The Dick Act required National Guard members to attend 24 drills and five days of annual training per year, and for the first time provided for pay for annual training. National Guard units were subject to inspection by Regular Army officers and had to meet certain standards. When National Guard units were mobilized for World War I, they were much better prepared than the Spanish-American War cohort mobilized less than a generation earlier.

The Dick Act provided for the dual enlistment system utilized to this day. Let us discuss the hypothetical but realistic Joe Smith, who enlisted in the Virginia Army National Guard in 2009. Joe took two enlistment oaths, one to the Commonwealth of Virginia and one to the United States of America. Joe joined two overlapping but legally distinct entities: the Army National Guard and the Army National Guard of the United States. Joe performs inactive duty training, annual training, and full-time National Guard duty in his status as a member of the Army National Guard; that is Title 32 duty. When he is called to active duty, voluntarily or involuntarily, that is Title 10 duty.

Joe is in Title 32 status all the time, except when he is called to federal active duty and transformed to Title 10 status. While in Title 32 status, he performs inactive duty training (drills usually, but not always, on weekends) and annual training. He can also perform "full-time National Guard duty" while in his Title 32 status. If he leaves his civilian job to perform Title 10 duty or Title 32 duty (annual training duty, inactive duty training, or full-time National Guard duty), and if he meets the USERRA eligibility criteria, he has the right to reemployment under USERRA.

In addition to the kinds of duty that give rise to reemployment rights under USERRA, Joe is subject to be called to state active duty by the governor of Virginia, to restore order during a riot, to fill sandbags in anticipation of a flood, or for some other state emergency. USERRA does not protect Joe with respect to absences from his civilian job for such state active duty, but Virginia and every other state have state laws to provide such protection.

If your civilian employer tells you that USERRA does not protect your right to be away from work for inactive duty training, annual training, or full-time National Guard duty, respectfully tell the employer that he or she is incorrect, and provide a copy of this article. But don't get into a theoretical legal argument with the employer; such an argument serves no useful purpose. If you give the employer notice of an upcoming period of service, necessitating your absence from work, and if the employer tells you that your request for military leave is denied, call the National Committee for Employer Support of the Guard and Reserve (ESGR) at 800-336-4590. You can also visit the ESGR website, www.esgr.mil.

If you have questions, suggestions, or comments, please contact Captain Samuel F. Wright, JAGC, USN (Ret.) (Director of the Servicemembers' Law Center) at swright@roa.org or 800-809-9448, ext. 730.