

DOJ Proposes SCRA Amendments

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On September 20, 2011, Assistant Attorney General for Legislative Affairs Ronald Weich sent identical letters to Speaker of the House John A. Boehner and Vice President (President of the Senate) Joseph R. Biden, Jr. These letters propose amendments to the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), the Uniformed Services Employment and Reemployment Rights Act (USERRA), and the Servicemembers Civil Relief Act (SCRA). I endorse these proposals. In this article, I will discuss the proposed SCRA amendments.

¹I invite the reader's attention to 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.

²BA 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.

Background

Congress enacted the SCRA in 2003, as a long-overdue rewrite of the Soldiers' and Sailors' Civil Relief Act (SSCRA), which goes back to 1917. The SCRA is codified in title 50 Appendix of the United States Code, sections 501 through 597b (50 U.S.C. App. 501-597b).

The SCRA suspends certain legal obligations for members of the uniformed services (Army, Navy, Marine Corps, Air Force, Coast Guard, commissioned corps of the Public Health Service, and commissioned corps of the National Oceanic and Atmospheric Administration) on active duty. This includes but is not limited to members of the National Guard or Reserve who have been called to active duty involuntarily or who have voluntarily gone on active duty. The SCRA also applies to regulars who have been on active duty for many years.

The point of the SCRA is to enable those who are serving our country in uniform to devote their full attention to their military duties, without adverse consequences for themselves and their families. This is a safety consideration, for the individual service member, and for his or her colleagues in arms. If I am in the foxhole next to Josephine Smith, I should not have to worry that she is not paying full attention to her sector of the perimeter, because she cannot put out of her mind her concern about the possibility that she is a defendant in a civil suit back home, and that she is not there to defend her interests.

The SCRA protects the service member in civil proceedings in federal and state courts and administrative agencies. The member has the right to one or more continuances and is protected against a default judgment if the member's service prevented that person from filing a timely answer to a lawsuit or appearing for a hearing or trial. Statutes of limitations, for or against the member, are tolled during the member's active service. The SCRA also offers many other important protections, including the right to interest rate reduction on debts incurred before entering active duty, the right to terminate certain leases and contracts, and protection against eviction of the member's family from rental housing, if the member's entry on active duty has materially affected his or her ability to pay the rent.

Clarification of affidavit required to obtain a default judgment

Let us say that Bob Jones has filed a civil lawsuit against Josephine Smith. The time required for Smith to file her answer has passed, and Smith has not been heard from. Jones can apply to the court for a default judgment for the full amount that he sought in the lawsuit. By failing to respond within the time allowed, Smith has waived her right to put on a defense.

But first, Jones must file an affidavit stating under oath that Smith is not a member of the uniformed services on active duty. 50 U.S.C. 521(b)(1)(A). If Smith is on active duty, or if her military status cannot be determined, there are several steps that the court (federal or state) must take to ensure that Smith has the opportunity to answer the lawsuit and to put on her defense. This requirement is essential to protect service members from losing out through the entry of default judgments in suits of which they may not even be aware.

You have no doubt heard of the “robo-signing” scandal in home foreclosures. “Paralegals” at “foreclosure mill” law firms sign affidavits averring facts of which they have no knowledge, just for the purpose of moving along the civil proceeding. Some of the fraudulently signed affidavits relate to the affidavit to the effect that the defendant, against whom a default judgment is proposed, is not a member of the uniformed services on active duty. Some default judgments have been awarded based on fraudulent affidavits to the effect that the defendant is not on active duty, when the defendant in fact was on active duty.

The Department of Defense (DOD) offers a free service whereby anyone can determine (in a matter of seconds) that a named person (with a provided Social Security Number) is or is not on active duty. But these foreclosure mill law firms are not utilizing the free DOD service. Bob Jones’ lawyer often does not really want to know that Josephine Smith is on active duty, because that fact greatly complicates the process of obtaining a judgment against her.

Section 101 of the DOJ proposal would clarify and strengthen the affidavit requirement by adding the following language to section 521(b): “Prior to filing the affidavit, the plaintiff shall conduct a diligent and reasonable investigation to determine whether or not the defendant is in military service, including but not limited to a search of available Department of Defense records and any other information available to the plaintiff. The affidavit shall set forth all steps taken to determine the defendant’s military status.”

I strongly support this proposed amendment.

Clarification of the domicile of the military family member for voting purposes

Section 705 of the SCRA (50 U.S.C. App. 595) protects the service member from losing or gaining a domicile by virtue of having moved from one place to another in compliance with military orders, and without regard to the service member’s intent about where to live after leaving active military service, perhaps many years in the future.

As amended by Congress in 2009, section 705 also protects the military family member (usually, but not always, the spouse). But this protection only applies to the military family member who is “*accompanying* the person’s spouse who is absent from *that same State* in compliance with military or naval orders.” 50 U.S.C. App. 595(b) (emphasis supplied). Section 102 of the DOJ proposal would eliminate the “accompanying” requirement and the “same State” requirement. Here is a likely scenario.

Joe Smith is on active duty in the United States Army and is stationed at Fort Bragg, North Carolina. Joe physically resides in an apartment near Fort Bragg. However, he is domiciled in Florida, a great state for a service member as it has no state income tax. Joe votes in Florida by absentee ballot.

Mary Smith, Joe’s wife, lives with him in that apartment near Fort Bragg. She has never lived in Florida, and marrying a Floridian does not make her a Floridian. Mary was living in California

when she married Joe five years ago, which was five years into his Army career. When Joe was transferred to Fort Bragg, she accompanied him to North Carolina.

Although Joe is domiciled in Florida, Mary is domiciled in North Carolina. She has registered to vote in North Carolina, and she considers that place her home. Mary works outside the home and pays North Carolina state income tax on her earnings. Under section 511 of the SCRA (50 U.S.C. App. 571), North Carolina is precluded from taxing Joe's military income, so long as he is not domiciled in the state and physically resides in the state pursuant to his military orders.

Joe is deploying to Afghanistan for a year or more. Instead of staying in the apartment near Fort Bragg, Mary takes the two small children and returns to California, where she and the children move in with her parents. Mary fully intends to return to North Carolina when Joe completes his Afghanistan deployment. During the year that she and her children are residing in California, she still plans to vote in North Carolina by absentee ballot.

Under the SCRA as currently written, Mary does not have a federal right to maintain her domicile and to vote in North Carolina, while living with her parents during her husband's deployment. Under the DOJ proposal, Mary would have that right.

But please note that the DOJ proposal does not include a change to section 511, dealing with domicile for state income tax purposes. If Mary works and has an income during that year that she lives in California, there is nothing in federal law to prevent California from taxing her income.

I am concerned about the potential for double taxation in this realistic scenario. North Carolina says, "You claimed to be a North Carolinian, and you voted by absentee ballot in our election. You are estopped to deny that you are a North Carolinian for state income tax purposes." But California says, "You earned the money here, and we have already made your employer withhold California state income tax from your salary. We don't care what you may have paid to North Carolina. You owe us state income tax on your salary earned here in California, and we will not refund what you have already paid through withholding." Mary ends up paying state income tax twice on the same income.

I suggest that section 102 of the DOJ proposal requires further research and better drafting. I am available to assist.

Increase in civil penalties for SCRA violations

Section 801(b)(3) of the SCRA [50 U.S.C. App. 597(b)(3)] provides that the court may impose a civil penalty of up to \$55,000 for an initial SCRA violation and \$110,000 for subsequent violations. Section 103 of the DOJ proposal would increase these civil penalties to \$110,000 for a first violation and \$220,000 for subsequent violations. I say, "Right on."

Issuance of civil investigative demands

Section 104 of the DOJ proposal would amend section 801 of the SCRA (50 U.S.C. App. 597) by adding a new subsection (d). This new subsection would enable the Attorney General (DOJ) to issue and enforce civil investigative demands in investigations of alleged SCRA violations. I believe that this new authority would be most useful, and I support this proposal.

Make the SCRA private right of action retroactive

Section 802(a) of the Veterans' Benefits Act of 2010 (VBA-2010), Public Law 111-275, amended the Servicemembers Civil Relief Act (SCRA) and created an *explicit* private right of action, authorizing the service member aggrieved by an SCRA violation to file suit in federal court, in his or her own name and with his or her own lawyer, and to obtain injunctive relief, compensatory damages, attorney fees, and other relief. President Obama signed VBA-2010 on October 13, 2010. Does this new provision apply to lawsuits arising from incidents that occurred prior to the date of enactment? Yes, according to the United States Court of Appeals for the 4th Circuit. *Gordon v. Pete's Auto Service of Denbigh, Inc.*, 637 F.3d 454 (4th Cir. 2011).

Section 105 of the DOJ proposal would amend section 802 of the SCRA (50 U.S.C. App. 597a) to make the authorization of the private right of action explicitly retroactive—to make it apply to SCRA violations that occurred before October 13, 2010. I support this proposal.

Update – March 2022³

The location of the SCRA within the United States code changed in late 2015. Previously codified at 50 U.S.C App. §§ 501-597(b), there was an editorial reclassification of the SCR by the Office of the Law Revision Counsel to the United States House of Representatives that became effective on December 1, 2015.⁴ The SCRA is now codified at 50 U.S.C. §§ 3901-4043. The changes in codification have not changed the substance or application of the sections. Therefore, the application of the SCRA throughout this article applies the same today as it did when it was written.

The relevant sections cited throughout the article can be found as followed:

50 U.S.C. App. § 521 discussing protection of servicemembers against default judgments can be found at 50 U.S.C. § 3931. Section 101 of the DOJ's proposed amendment has not been incorporated into at 50 U.S.C. § 3931 yet.

³Update by Second Lieutenant Lauren Walker, USMC.

⁴*The Servicemembers Civil Relief Act (SCRA)*, THE UNITED STATES DEPARTMENT OF JUSTICE, <https://www.justice.gov/servicemembers/servicemembers-civil-relief-act-skra> (last visited Mar. 10, 2022).

50 U.S.C. App. § 595 discussing the guarantee of residency for military personnel and spouse of military personnel can be found at 50 U.S.C. § 4025. Section 511 of the DOJ's proposed amendment has not been incorporated into 50 U.S.C. § 4025 yet.

But, on December 21, 2018, President Trump signed into law the Veterans Benefit and Transition Act of 2018.⁵ Section 302(a) of the Act adds to the SCRA to allow spouses of a servicemember to use the same residence for purposes of taxation as the servicemember regardless of when they were married.⁶ The provision is codified in 50 U.S.C. § 4001(a)(2)(B) as follows:

For any taxable year of the marriage, the spouse of a servicemember may elect to use the same residence for purposes of taxation as the servicemember regardless of the date on which the marriage of the spouse and the servicemember occurred.

Let us reconsider the hypothetical of Mary Smith. Mary may change her domicile to Florida, where her husband is domiciled, even though Mary has never lived in Florida. It would likely be beneficial for Mary to change her domicile to match her husband's because Florida does not have state income tax, while California has a very high state income tax. If Mary does decide to change her domicile to Florida, she will also need to register to vote and vote in Florida as well. She cannot be a California domiciliary for voting purposes and a Florida domiciliary for tax purposes.

But, Mary cannot keep her North Carolina domiciliary while she is living in California because she is not accompanying her husband to California in compliance with military or naval orders. Mary must choose California or Florida to be her domicile.

50 U.S.C. App. § 597 discussing enforcement by the Attorney General can be found at 50 U.S.C. § 4041. Sections 103 and 108 of the DOJ's proposed amendments have not been incorporated into 50 U.S.C. § 4041 yet.

50 U.S.C. App. § 597a discussing private right of action can be found at 50 U.S.C. § 4042. Section 505 of the DOJ's proposed amendment has not been incorporated into 50 U.S.C. § 4042 yet.

For a complete conversion chart for the SCRA please see *The Servicemembers Civil Relief Act Has Moved*.⁷

Please join or support ROA

⁵Veterans Benefits and Transition Act of 2018, Pub. L. NO. 115-407. 132 Stat. 5367. See also *The Veterans Benefits and Transition Act*, MILITARY BENEFITS, <https://militarybenefits.info/veterans-benefits-transition-act/> (last visited Mar. 18, 2022).

⁶Veterans Benefits and Transition Act § 302(a).

⁷Samuel F. Wright, *The Servicemembers Civil Relief Act Has Moved*, Law Review 15115 (Dec. 2015).

This article is one of 2,300-plus “Law Review” articles available at 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 on 10/1/1922 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 almost a century, we have argued that the Reserve Components, including the National Guard, are a cost-effective way to meet our nation’s defense needs.

Through these articles, and by other means, including amicus curiae (“friend of the court”) briefs that we file in the Supreme Court and other courts, we educate service members, military spouses, attorneys, judges, employers, DOL investigators, ESGR volunteers, congressional and state legislative staffers, and others about the legal rights of service members and about how to exercise and enforce those rights. We provide information to service members, without regard to whether they are members of ROA, 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 eight⁸ uniformed services, you are eligible for membership in ROA, and a one-year membership only costs \$20 or \$450 for a life membership. 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 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:

Reserve Organization of America
1 Constitution Ave. NE

⁸Congress recently established the United States Space Force as the 8th uniformed service.