

## LAW REVIEW 1198

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### USERRA Protection for National Guard Members

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**Q: I recently joined the Texas Army National Guard. Several of the officers have talked about “title 32 duty” and “title 10 duty.” This is very confusing. Please explain to me what this means.**

**A:** There are 49 titles (broad subject areas) of the United States Code (U.S.C.). Title 10 is about the armed forces, and title 32 is about the National Guard.

When you joined the Texas Army National Guard, you took two enlistment oaths, and you joined two separate but overlapping organizations. You joined the Army National Guard of the United States (ARNGUS), which is one of the seven reserve components of the United States Armed Forces.<sup>[1]</sup> You simultaneously joined the Texas Army National Guard, which is the state militia of Texas, subject to call by the Governor for state emergencies.

At different times in your career, you are considered to have a “state status” and a “federal status.” You are considered to be in a state status at all times, except when you go on federal active duty, voluntarily or involuntarily. Such federal active duty is called title 10 duty.

While in your state status, you are required to perform inactive duty training (“drills” that are usually, but not always, on weekends) and annual training. This sort of training duty is called title 32 duty. You are still in your state status, but the Federal Government is paying for this duty, which is intended to prepare you for the possibility of being called to federal active duty. Also in a state status, you may be called by the Governor for state duty, in which the state pays the cost of that duty.

**Q: I have heard the officers talking about something called “YOU SARAH.” What is that?**

**A:** The officers are almost certainly referring to the Uniformed Services Employment and Reemployment Rights Act (USERRA), a federal law that was enacted in 1994, as a long-overdue replacement of a law first enacted in 1940.

As I explained in [Law Review 0766](#) and other articles,<sup>[2]</sup> you must meet five conditions to have the right to reemployment under USERRA:

- a. You must have left a civilian job for the purpose of performing *service in the uniformed services*.
- b. You must have given the employer prior oral or written notice, before leaving the job for service.
- c. Your cumulative period or periods uniformed service, relating to your relationship with your current employer, must not have exceeded five years. When you start a new job with a new employer, you get a fresh five-year limit with

the new employer. Moreover, *all* involuntary service (like in a mobilization) and *some* voluntary service (including your periodic National Guard training duty) are exempted from counting toward your five-year limit with your current employer. Please see [Law Review 201](#) for a detailed discussion of what counts and what does not count.

- d. You must have been released from the period of service without having received a punitive (by court martial) or other-than-honorable discharge.
- e. You must have been timely in reporting back to work or applying for reemployment, with the employer you left in order to serve. The deadline for you to do this depends upon the length of the period of service from which you are returning.

USERRA also protects you from discrimination in employment, including initial hiring, based on your membership in the National Guard or other reserve component or any uniformed service, your application to join a service, your performance of uniformed service (including drill weekends and annual training), or your obligation to perform service in the future.

**Q: Does USERRA give me the right to get my civilian job back after title 10 duty? What about after title 32 duty?**

**A:** Yes to both questions.

USERRA is codified in title 38 of the United States Code, sections 4301 to 4335 (38 U.S.C. 4301-4335). Section 4303 of USERRA (38 U.S.C. 4303) defines 16 terms used in this law, and these definitions control with respect to this law. USERRA defines “service in the uniformed services” 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 training, inactive duty training, a period for which a person is absent from a position of employment for the purpose of an examination to determine fitness to perform any such duty, 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.”

38 U.S.C. 4303(13 ) (emphasis supplied).

USERRA defines “uniformed services” as follows:

“The term ‘uniformed services’ means the Armed Forces, *the Army National Guard and Air National Guard when engaged in active duty for training, inactive duty training, or full-time National Guard duty*, the commissioned corps of the Public Health Service, and any other category of persons designated by the President in time of war or national emergency.”

38 U.S.C. 4303 (16) (emphasis supplied).

Thus, it is clear beyond any question that you have the right to reinstatement in your civilian job after a period of title 10 duty or title 32 duty, provided you meet the USERRA condition—prior notice to the employer, not having gone over the 5-year limit, not having a bad discharge, and timely reporting back to work or application for reemployment, after release from the period of service.

**Q: Is there any kind of duty that I will be asked to perform as a member of the Texas Army National Guard that is not protected by USERRA?**

**A:** Yes. In your state capacity, you are subject to being called by the Governor of Texas for state service in a state emergency, like a fire, flood, or riot. USERRA does not protect such state service, but a Texas law protects you in this situation.<sup>[3]</sup>

**Q: To what kinds of employers does USERRA apply?**

**A:** USERRA applies to almost all employers in this country. There are only four very narrow exemptions from universal USERRA coverage of employers:

- a. Foreign embassies in the United States.
- b. International organizations (United Nations, World Bank, etc.) in the United States.
- c. Indian tribes
- d. Religious institutions (churches, synagogues, seminaries, etc.), with respect to ordained employees (priests, ministers, rabbis, etc.)

**Q: I work for a tiny diner, as a cook. An old man owns the diner, and there are only five employees, including myself. The owner said that he cannot afford to let me off for my drill weekends, because I am the only cook. He also said that he is exempt from all these federal laws so long as he employs fewer than 15 employees. Is the owner correct?**

**A:** No, the employer is wrong. Other federal employment laws (such as the Age Discrimination in Employment Act) have a threshold that only applies to employers with 15 or more employees. The reemployment statute has never had such a threshold. You only need one employee to be an employer that is subject to the federal reemployment statute. See *Cole v. Swint*, 961 F.2d 58, 60 (5<sup>th</sup> Cir. 1992).<sup>[4]</sup>

**Q: If the owner of the diner continues to give me a hard time about my National Guard duty, where do I go for help?**

**A:** I suggest that you contact Employer Support of the Guard and Reserve (ESGR), a Department of Defense organization that was established 40 years ago to gain and maintain the support of civilian employers for the men and women of the National Guard and Reserve. Call ESGR toll-free at 800-336-4590. I also invite your attention to the ESGR website, [www.esgr.mil](http://www.esgr.mil).

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<sup>[1]</sup> The other six reserve components are the Air National Guard of the United States, the Army Reserve, the Air Force Reserve, the Navy Reserve, the Marine Corps Reserve, and the Coast Guard Reserve.

<sup>[2]</sup> I invite your attention to [www.servicemembers-lawcenter.org](http://www.servicemembers-lawcenter.org). You will find more than 900 articles about USERRA and other laws that are particularly pertinent to those who serve our country in uniform, especially in the National Guard or Reserve. You will also find a detailed Subject Index and a search function, to facilitate finding articles about very specific topics.

<sup>[3]</sup> There could be a problem if your civilian employer is in another state, like Louisiana or New Mexico. Please see [Law Review 45](#).

[4] *Cole v. Swint* is a decision of the United States Court of Appeals for the 5<sup>th</sup> Circuit, the federal appellate court that sits in New Orleans and hears appeals from federal district courts in Louisiana, Mississippi, and Texas. USERRA's 1994 legislative history, showing the intent of Congress when it enacted this law, cites *Cole v. Swint* with approval and clearly states that USERRA is to apply without regard to the size of the employer or the number of employees. See House Rep. No. 103-65, 1994 *United States Code Congressional & Administrative News* 2449, 2454.