

LAW REVIEW 13122
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USERRA Protects National Guard Service, Even if SCRA Does Not

By Captain Samuel F. Wright, JAGC, USN (Ret.)

1.1.3.3—USERRA applies to National Guard service

Q: I am a Major in the Wisconsin Army National Guard and a regular reader of your “Law Review” column. I was greatly disconcerted when I read your Law Review 13121, stating that National Guard Soldiers on title 32 orders do not have rights under the Servicemembers Civil Relief Act (SCRA). In Law Review 1198¹ (November 2011), you wrote that title 32 duty performed by National Guard members is protected by the Uniformed Services Employment and Reemployment Rights Act (USERRA). What gives?

A: Law Review 13121 is about the SCRA, not about USERRA. The fact that a particular kind of military duty is protected by USERRA does not necessarily mean that it is protected by the SCRA. These are two entirely separate laws, although they share the same general purpose of taking off the service member’s mind (to the maximum extent feasible) civilian concerns back home, so that the service member can give his or her full time and attention to defending our country. These statutes were drafted by different people, at different times, and with different considerations in mind.

When you joined the Army National Guard, you joined two overlapping but legally distinct entities. You joined the *Wisconsin* National Guard, the modern-day equivalent of the state militia. In that capacity, you are subject to call-up by the Governor for state emergencies, like riots, floods, blizzards, tornadoes, etc. You simultaneously joined the Army National Guard of the *United States* (ARNGUS), which is one of the seven Reserve Components of the United States armed forces.²

In your federal status (ARNGUS), you are subject to call-up by the President for national military service, under title 10 of the United States Code. In order to prepare yourself for the possibility of a federal call-up, you are expected to participate in inactive duty training (drills), annual training, and “full-time National Guard duty” under title 32 of the United States Code.

¹ We invite the reader’s attention to www.servicemembers-lawcenter.org. You will find 944 articles about USERRA and other laws that are especially pertinent to those who serve our country in uniform. You will also find a detailed Subject Index and a search function, to facilitate finding articles about very specific topics. Captain Wright initiated this column in 1997, and we add new articles each week. We added 122 new articles in 2012 and another 122 so far in 2013.

² The other six components are the Air National Guard of the United States (ANGUS), the Army Reserve, the Air Force Reserve, the Navy Reserve, the Marine Corps Reserve, and the Coast Guard Reserve.

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 conditions—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: Am I protected by USERRA when I perform state active duty, called by the Governor of Wisconsin?

A: No, but Wisconsin and every other state has state laws protecting Army National Guard and Air National Guard personnel on state active duty.³

³ There could be a problem if your civilian employer is in another state, like Minnesota, Illinois, or Michigan. Please see Law Review 45.