

LAW REVIEW 14014
January 2014

**National Guard Member Works in another State-
Is her Job Protected when she Is on State Active Duty?**

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

1.1.3.3—USERRA applies to National Guard service

Q: I am a Sergeant in the Texas Army National Guard. I live in El Paso, but my civilian job is just over the state line in New Mexico, where I am a server for a small restaurant. As a National Guard member, I perform inactive duty training (drills) and annual training under orders that cite title 32 of the United States Code, and I have twice been called to active duty (once for Iraq and once for Afghanistan) under title 10 of the United States Code. I understand that the Uniformed Services Employment and Reemployment Rights Act (USERRA) protects my civilian job for all of this training duty and for voluntary or involuntary active duty under title 10.

My concern is about state active duty. Several times I have been called to state active duty by the Governor of Texas for state emergencies in Texas. My civilian employer (the old man who owns the restaurant) has expressed a lot of irritation with me about the time that I am away from work for military training or service. If I am called to state active duty by the Governor of Texas, is my New Mexico employer required to reemploy me after I complete that state active duty?

I researched this issue on the Internet, and I found your Law Review 45¹ (June 2002) about the Washington National Guard member who worked for a store in Oregon and who lost his civilian job after performing state active duty in Washington. Has that issue been resolved?

A: That issue has been resolved in Oregon, but it has not been resolved in New Mexico and most other states.

First, you are correct that the federal statute (USERRA) protects your civilian job (federal, state, local, or private sector) when you are away from work for training or service under title 10 or title 32 of the United States Code. USERRA does not protect your job when you are on state active duty.

¹ We invite the reader's attention to www.servicemembers-lawcenter.org. You will find 1,005 articles about USERRA and other laws that are especially pertinent to those who serve our country in uniform, along with 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 169 new articles in 2013.

The Texas Government Code provides as follows: “A private employer may not terminate the employment of a permanent employee who is a member of the state military forces *of this state or any other state* because the employee is ordered to authorized training or duty by proper authority. The employee is entitled to return to the same employment held when ordered to training or duty and may not be subjected to loss of time, efficiency rating, vacation time, or any benefit of employment during or because of the absence. The employee, as soon as practicable after release from duty, must give written or actual notice of intent to return to employment.” Texas Government Code, section 431.006(a) (emphasis supplied). But of course a law enacted by the Texas Legislature does not apply to a restaurant in New Mexico.

Let us take Joe Smith, a member of the New Mexico Army National Guard who works in Texas. Joe was called to state active duty by the Governor of New Mexico. Section 431.006(a) protects Joe’s civilian job in Texas. Now, we need New Mexico to return Texas’ favor, to protect the civilian jobs of folks like you—those who are members of the Texas Army or Air National Guard and who work in New Mexico. This will require legislative action in Santa Fe.

Because of legislative action in Baton Rouge, Louisiana protects the civilian jobs of members of the Texas National Guard, and the National Guard of other states, who work in Louisiana. But Texas’ other three neighbors (Arkansas, New Mexico, and Oklahoma) have not enacted such laws. We are working this issue, and I have brought this matter to the attention of Brigadier General Andrew Salas, ANG, the Adjutant General of New Mexico and a life member of ROA.