

LAW REVIEW 15091¹

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The National Guard Makes up more than Half of Reserve Component Strength

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1.1.3.3—USERRA applies to National Guard service

1.3.1.1—Left job for service and gave prior notice

1.8—Relationship between USERRA and other laws/policies

In our nation's armed forces, there are seven Reserve Components, and here they are in order of size: The Army National Guard (ARNG), with 342,000 members; the Army Reserve (USAR)-198,000; the Air National Guard (ANG)-105,500; the Air Force Reserve (USAFR)-69,200; the Navy Reserve (USNR)-57,300; the Marine Corps Reserve (USMCR)-38,900; and the Coast Guard Reserve (USCGR)-7,000.³

The ARNG and ANG together account for 447,500 of the total RC strength of 817,900, or almost 55% of the total. The civilian jobs of ARNG and ANG personnel are protected by the Uniformed Services Employment and Reemployment Rights Act (USERRA) when they engage in voluntary or involuntary training and service under title 10 or title 32 of the United States Code. ARNG and ANG members are also subject to call-up by the Governor for State Active Duty (SAD). SAD has been in the news a great deal recently, as National Guard members have been called up under state authority for fires in California, riots in Maryland, and floods in South Carolina. USERRA does not protect National Guard members on SAD. If ARNG and ANG members are to have the right to return to their civilian jobs after SAD, it must be by state law.

¹ We invite the reader's attention to www.servicemembers-lawcenter.org. You will find more than 1,400 "Law Review" articles about 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. The Reserve Officers Association (ROA) initiated this column in 1997.

² Captain Wright was the Director of ROA's Service Members Law Center (SMLC) for its entire six years of existence, from June 2009 through May 2015. Please go to Law Review 15052 (June 2015) for a detailed report on the SMLC's accomplishments. We invite the reader's attention to www.servicemembers-lawcenter.org. You will find more than 1400 "Law Review" articles about 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. ROA initiated this column in 1997. Captain Wright is the author of more than 1200 of the articles.

³ These figures come from the National Defense Authorization Act (NDAA) for Fiscal Year 2016. On October 7, 2015, the NDAA passed the Senate in the same form that had already passed the House. The bill is on the President's desk, and it is expected that he will veto it. There will then be negotiations about the specific provisions to which the President objects and a revised NDAA will likely be enacted late this year or early in 2016. The strength numbers for the seven RC will not likely change significantly.

Every state has a state law protecting the civilian jobs of ARNG and ANG members on SAD, but some of these laws are much better than others. We (ROA) have prepared 55 articles (50 states, the District of Columbia, Guam, Puerto Rico, Virgin Islands, and a summary article) about the state laws that protect National Guard members on SAD. Go to www.servicemembers-lawcenter.org and then to “state leave laws.”

We found a major flaw in 38 of the 50 states—the state law that protects ARNG and ANG members only protects Guard members *of that particular state*. A member of the National Guard of a neighboring state who has a civilian job in this particular state, and who is called to SAD by the Governor of the neighboring state, has no protection of his or her right to return to the civilian job.

For example, Frances Scott Key lives in Bethesda, Maryland and is a Sergeant in the Maryland ARNG. For her civilian job, she commutes across the Potomac River on the American Legion Bridge to McLean, Virginia, where she works for law firm Dewey Cheatham & Howe (DCH) as a paralegal. The Governor of Maryland calls up Key and deploys her to Baltimore, to deal with a civil disturbance. The Managing Partner of DCH is annoyed by the short notice call-up, so he replaces Key and refuses to reinstate her when she returns from her SAD in Baltimore.

Under current law, Key has no legally enforceable right to reinstatement at DCH. USERRA does not apply to SAD. The Maryland law does not apply across the state line in Virginia. The Virginia law, by its terms, is limited to Virginia Guard members. Key has fallen through the crack and is unemployed. The solution is to get Virginia to amend its law to protect National Guard members of other states in this scenario.

Working with the eight regional representatives of the Defense State Liaison Office (DSLO),⁴ we have persuaded six states (California, Illinois, Kansas, Montana, North Carolina, and South Carolina) to amend their laws, so far in 2015, to protect National Guard members of other states as well as Guard members of these six states. We are working on another 32 states for next year.

In reviewing these state laws, I have found another deficiency in several states. These state laws invariably require the ARNG or ANG member to provide *advance notice* to his or her civilian employer. Most of the states provide an exception to the advance notice requirement for circumstances wherein exigent circumstances preclude the providing of any advance notice to the civilian employer,⁵ but several states have not enacted such exceptions.

⁴ The Department of Defense (DOD) created DSLO a decade ago. It represents the interests of DOD, service members, and military families in communicating with governors and state legislators.

⁵ Section 4312(b) of USERRA provides: “No [prior] notice [to the civilian employer] is required under subsection (a)(1) if the giving of such notice is precluded by military necessity or, under all of the relevant circumstances, the

For example, let us assume that a major tornado has devastated Emerald City, Kansas. Dorothy, her little dog Toto, and many of her neighbors are trapped in collapsed buildings. Kansas Governor Wizard Oz has called up a nearby National Guard unit and dispatched it to Emerald City to rescue these people. Delaying the mobilization for even one hour, to give the National Guard members the opportunity to notify their civilian employers, will result in additional deaths.

National Guard officers, warrant officers, and noncommissioned officers are most definitely eligible for full membership in ROA, and we need to go after them. We cannot afford to write off more than half of our target audience. ROA is looking out for the interests of ARNG and ANG members, as well as members of the other five components.

giving of such notice is otherwise impossible or unreasonable. A determination of military necessity for the purposes of this subsection shall be made pursuant to regulations prescribed by the Secretary of Defense and shall not be subject to judicial review.” 38 U.S.C. 4312(b). But of course USERRA does not apply to SAD.