

Reinstatement Rights as a Title 32 AGR after Title 10 Statutory Tour

By Captain Samuel F. Wright, JAGC, USN (Ret.)²

Update on Sam Wright

1.1.3.3—USERRA applies to National Guard service

1.8—Relationship between USERRA and other laws/policies

Q: I am a Major in the Air National Guard (ANG) and a member of the Reserve Officers Association (ROA). From November 2008 until November 2013, I was on Title 32 Active Guard & Reserve (AGR) duty with the California ANG. In November 2013, I was selected for a three-year Title 10 statutory tour at the National Guard Bureau (NGB) in Washington, DC. My three-year statutory tour will expire soon (November 2016), and it is unlikely that it will be extended.

I have read with great interest many of your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA). When I complete my three-year statutory tour in DC and return home to California in November, will USERRA give me the right to reinstatement to my prior status on Title 32 AGR orders?

¹ I invite the reader’s attention to www.servicemembers-lawcenter.org. You will find more than 1500 “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. I am the author of more than 1300 of the articles.

² BA 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 six years (2009-15), I was the Director of the Service Members Law Center (SMLC), as a full-time employee of ROA. Please see Law Review 15052 (June 2015), concerning the accomplishments of the SMLC. I have been dealing with the Veterans’ Reemployment Rights Act (VRRRA) and the Uniformed Services Employment and Reemployment Rights Act (USERRA) for 34 years. Congress enacted the VRRRA in 1940, as part of the Selective Training and Service Act, the law that led to the drafting of more than ten million young men (including my late father) for World War II. Congress enacted USERRA (Public Law 103-353) in 1994, as a long-overdue rewrite of the VRRRA. 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 VRRRA rewrite that President George H.W. Bush presented to Congress, as his proposal, in February 1991. The version of USERRA that President Bill Clinton signed into law on 10/13/1994 was 85% the same as the Webman-Wright draft. I have also dealt with the VRRRA and USERRA as a judge advocate in the Navy and Navy Reserve, as an attorney for the Department of Defense 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 at Tully Rinckey PLLC (TR), and as SMLC Director. After ROA disestablished the SMLC last year, I returned to TR, this time in an “of counsel” role. To arrange for a consultation with me or another TR attorney, please call Ms. JoAnne Perniciaro (the firm’s Client Relations Director) at (518) 640-3538. Please mention Captain Wright when you call.

A: No. USERRA gives the right to reemployment to a person who leaves a *civilian job* (federal, state, local, or private sector) for voluntary or involuntary uniformed service, as defined by USERRA. USERRA does not apply to a person who leaves one form of uniformed service (like Title 32 AGR duty) for another form of uniformed service (like a Title 10 statutory tour).

Although USERRA does not apply, you likely have restoration rights under Air National Guard Instruction 36-101 of 3 June 2010.³ Section 2.8.3 of that Instruction provides, in pertinent part, as follows:

Beyond the USERRA rights outlined in law in paragraph 2.8, ANG policy allows restoration of AGR Airmen to their prior or a comparable position. AGR personnel who enter an ANG Title 10 Statutory Tour assigned to the NGB UMD (e.g., Title 10 United States Code Sections 10211, 10305, 12402, and 12310) have restoration rights not to exceed five years, to the State from which they entered their initial Statutory Tour.

Q: My friend Mary Jones was a National Guard Technician when she left that status to go on active duty three years ago. She will be leaving active duty soon, and she wants to return to her technician position. How does USERRA apply to her situation?

A: As a National Guard technician, Mary was a *civilian employee*, although she probably wore her military uniform and observed military courtesies (saluting, etc.) while at work, and although she was required to maintain her National Guard membership as a condition of employment. Like any person who left a civilian job for uniformed service, Mary has the right to reemployment if she meets the five USERRA conditions. She must have left the civilian job for the purpose of performing uniformed service, and she must have given the employer prior oral or written notice. Her cumulative period or periods of uniformed service, relating to the employer relationship for which she seeks reemployment, must not have exceeded five years.⁴ She must have been released from the period of service without having received a disqualifying bad discharge from the military. After release, she must have made a timely application for reemployment.⁵

³ Go to <http://static.e-publishing.af.mil/production/1/publication/ang.36-101/angi36-101.pdf>. There is a similar instruction for the Army National Guard (ARNG). It is Army Regulation 135-18, available at <http://www.apd.army.mil/pdffiles/r135-18.pdf>.

⁴ There are nine exemptions—kinds of service that do not count toward exhausting her five-year limit. Please see Law Review 16043 (May 2016).

⁵ Please see Law Review 15116 (December 2015) for a detailed discussion of the five USERRA conditions.