

**LAW REVIEW 16103<sup>1</sup>**  
**October 2016**  
**(Updated September 2018)**

**Update on Protecting the Civilian Jobs of  
National Guard Members on State Active Duty**

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1.1.3.3—USERRA applies to National Guard service

1.8—Relationship between USERRA and other laws/policies

Today's Army National Guard (ARNG) traces its origin to 1636, when the Massachusetts Bay Colony established the Massachusetts Militia to protect the colony from the Pequot Indians. Other colonies and later states created similar militia forces, and those forces were available to governors for state emergencies, including riots, fires, floods, tornadoes, etc. State militia forces were called into federal service for the American Revolution, the War of 1812, the Mexican-American War, the Civil War, and the Spanish-American War.

As the 19<sup>th</sup> Century turned to the 20<sup>th</sup>, Congress was aware that there had been problems with the mobilization of state militia forces for the recently concluded Spanish-American War. The mobilized state militia forces varied considerably in their quality and state of readiness. Congress also correctly anticipated that the 20<sup>th</sup> Century would bring increased responsibility to our country on the world stage, as an emerging world power.

In 1902, Congress created the ARNG as a hybrid federal-state organization. In 1947, Congress created the Air Force as a separate service, apart from the Army, and the Air National Guard (ANG) as a similar hybrid federal-state organization. The National Guard of a specific state retained its "state militia" character and was subject to call-up by the Governor for state emergencies. The Army National Guard of the United States (ARNGUS) became an important

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<sup>1</sup> I invite the reader's attention to [www.servicemembers-lawcenter.org](http://www.servicemembers-lawcenter.org). You will find more than 1500 "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Servicemembers Civil Relief Act (SCRA), the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), the Uniformed Services Former Spouse Protection Act (USFSPA), 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. The Reserve Officers Association (ROA) initiated this column in 1997. I am the author of more than 1300 of the articles.

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Reserve Component of the United States Army, subject to call-up by the President for national emergencies. Starting in 1902, Congress provided major financial and logistical assistance to the states in recruiting, paying, training, and equipping the National Guard.

Today, there are seven Reserve Components. The ARNG is the largest, and the ANG the third largest. The other five Reserve Components (Army Reserve, Air Force Reserve, Navy Reserve, Marine Corps Reserve, and Coast Guard Reserve) are purely federal entities.

As I have explained in Law Review 15067 (August 2015) and other articles, Congress enacted the Uniformed Services Employment and Reemployment Rights Act (USERRA)<sup>3</sup> in 1994 as a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRA), which was originally enacted in 1940. USERRA protects the civilian jobs of National Guard members when they are on voluntary or involuntary duty or training under title 10 or title 32 of the United States Code.

USERRA does not apply to state active duty performed by National Guard members. State active duty is duty called for by the Governor, under state authority, paid with state funds, for state emergencies like fires, floods, tornadoes, hurricanes, riots, etc. If the National Guard member (Army or Air) is to have the right to reinstatement in his or her civilian job after a period of state active duty, it must be by state law.

Each state has a state law that protects the civilian jobs of National Guard members on state active duty, but some of these laws are better than others. I invite the reader's attention to the "State Leave Laws" section at [www.servicemembers-lawcenter.org](http://www.servicemembers-lawcenter.org). At that place, you will find an article for each state about the state's law protecting the civilian jobs of National Guard members on state active duty.

We are judging the quality of each state's law based on four questions:

- a. Does the state law protect a private sector employee who is on state active duty?
- b. Does the state law protect a public sector (state or local government)<sup>4</sup> employee who is on state active duty?
- c. Does the state law have an adequate enforcement mechanism for the employee who has lost his or her civilian job as a result of having been on state active duty?
- d. Does the state law protect a member of the National Guard of *another state* who has a civilian job in this specific state and who is called to state active duty by the Governor of the other state?

We have determined that all 50 states now have laws that protect the civilian jobs of National Guard members on state active duty, and those laws apply to private sector employers as well

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<sup>3</sup> USERRA is codified in title 38 of the United States Code at sections 4301 through 4335 (38 U.S.C. 4301-35).

<sup>4</sup> In our federal system of government, a state lacks the constitutional authority to impose obligations on a federal agency with respect to the agency's relationship with its federal employees.

as state and local governments. Accordingly, we have determined that each state has earned a “yes” on questions (a) and (b) in our summary below. We have determined that 40 states have adequate enforcement mechanisms.

The issue of coverage for other-state National Guard members is significant because we have determined that at least 5% of National Guard members have civilian jobs outside the states of their National Guard affiliations. This is particularly a problem in a metropolitan area that includes two or more states.

For example, Judy Garland lives in Kansas City, Kansas and is a Sergeant in the Kansas ARNG. Her civilian job is just across the state line in Kansas City, Missouri.

The Governor of Kansas calls Garland and other ARNG members to state active duty after a major tornado devastates Emerald City, Kansas. Garland is away from her Missouri job for several days for Kansas state active duty.

Does Garland have a legally enforceable right to reinstatement in her Missouri job after Kansas state active duty? Unfortunately, the answer is no, under current law. USERRA does not apply because this is state active duty. The Kansas law does not apply across the state line in Missouri. The Missouri law, by its terms, only applies to members of the Missouri ARNG or ANG. Garland has fallen through the crack and is unemployed.

Now let's put the shoe on the other foot. Joe Smith lives in Kansas City, Missouri and is a Sergeant in the Missouri ARNG. His civilian job is across the state line in Kansas City, Kansas. Smith is called to state active duty by the Governor of Missouri. Does Smith have a legally enforceable right to reinstatement in his Kansas job after Missouri state active duty? Yes, because Kansas recently amended its law to expand the protection to include National Guard members of other states who have civilian jobs in Kansas.

There has been a lot of progress in 2015 and 2016, through the efforts of the Defense State Liaison Office (DSLO), the Department of Defense (DOD) organization that represents the interests and concerns of DOD and military personnel and family members in communications with governors and state legislators. We expect more progress in 2017. I recently attended the DSLO annual meeting in Alexandria, Virginia. I can tell you that the DSLO regional representatives are very much on board with this issue and this will be a priority for DSLO in 2017.

Here is our state-by-state chart on the four questions:

#### **ALABAMA**

- a. Yes
- b. Yes
- c. No

d. Yes

**ALASKA**

- a. Yes
- b. Yes
- c. Yes
- d. Yes

**ARIZONA**

- a. Yes
- b. Yes
- c. Yes
- d. Yes

**ARKANSAS**

- a. Yes
- b. Yes
- c. Yes
- d. Yes

**CALIFORNIA**

- a. Yes
- b. Yes
- c. Yes
- d. Yes

**COLORADO**

- a. Yes
- b. Yes
- c. Yes
- d. No

**CONNECTICUT**

- a. Yes
- b. Yes
- c. No
- d. Yes

**DELAWARE**

- a. Yes
- b. Yes
- c. Yes
- d. Yes

**FLORIDA**

- a. Yes
- b. Yes

- c. Yes
- d. Yes

**GEORGIA**

- a. Yes
- b. Yes
- c. Yes
- d. Yes

**HAWAII**

- a. Yes
- b. Yes
- c. Yes
- d. Yes

**IDAHO**

- a. Yes
- b. Yes
- c. Yes
- d. Yes

**ILLINOIS**

- a. Yes
- b. Yes
- c. Yes
- d. Yes

**INDIANA**

- a. Yes
- b. Yes
- c. No
- d. Yes

**IOWA**

- a. Yes
- b. Yes
- c. Yes
- d. No

**KANSAS**

- a. Yes
- b. Yes
- c. Yes
- d. Yes

**KENTUCKY**

- a. Yes
- b. Yes

- c. Yes
- d. Yes

**LOUISIANA**

- a. Yes
- b. Yes
- c. Yes
- d. Yes

**MAINE**

- a. Yes
- b. Yes
- c. Yes
- d. Yes

**MARYLAND**

- a. Yes
- b. Yes
- c. Yes
- d. No\* (see explanation below)

**MASSACHUSETTS**

- a. Yes
- b. Yes
- c. No
- d. Yes

**MICHIGAN**

- a. Yes
- b. Yes
- c. No
- d. Yes

**MINNESOTA**

- a. Yes
- b. Yes
- c. No
- d. Yes

**MISSISSIPPI**

- a. Yes
- b. Yes
- c. No
- d. Yes

**MISSOURI**

- a. Yes

- b. Yes
- c. No
- d. No

**MONTANA**

- a. Yes
- b. Yes
- c. Yes
- d. Yes

**NEBRASKA**

- a. Yes
- b. Yes
- c. Yes
- d. Yes

**NEVADA**

- a. Yes
- b. Yes
- c. No
- d. No

**NEW HAMPSHIRE**

- a. Yes
- b. Yes
- c. Yes
- d. No

**NEW JERSEY**

- a. Yes
- b. Yes
- c. Yes
- d. No

**NEW MEXICO**

- a. Yes
- b. Yes
- c. Yes
- d. Yes

**NEW YORK**

- a. Yes
- b. Yes
- c. Yes
- d. No

**NORTH CAROLINA**

- a. Yes

- b. Yes
- c. Yes
- d. Yes

**NORTH DAKOTA**

- a. Yes
- b. Yes
- c. Yes
- d. No

**OHIO**

- a. Yes
- b. Yes
- c. Yes
- d. Yes

**OKLAHOMA**

- a. Yes
- b. Yes
- c. Yes
- d. Yes

**OREGON**

- a. Yes
- b. Yes
- c. Yes
- d. Yes

**PENNSYLVANIA**

- a. Yes
- b. Yes
- c. Yes
- d. No

**RHODE ISLAND**

- a. Yes
- b. Yes
- c. Yes
- d. Yes

**SOUTH CAROLINA**

- a. Yes
- b. Yes
- c. Yes
- d. Yes

**SOUTH DAKOTA**

- a. Yes
- b. Yes
- c. No
- d. Yes\* (see explanation below)

**TENNESSEE**

- a. Yes
- b. Yes
- c. Yes
- d. No

**TEXAS**

- a. Yes
- b. Yes
- c. Yes
- d. Yes

**UTAH**

- a. Yes
- b. Yes
- c. Yes
- d. Yes

**VERMONT**

- a. Yes
- b. Yes
- c. Yes
- d. Yes

**VIRGINIA**

- a. Yes
- b. Yes
- c. Yes
- d. Yes

**WASHINGTON**

- a. Yes
- b. Yes
- c. Yes
- d. Yes

**WEST VIRGINIA**

- a. Yes
- b. Yes
- c. Yes
- d. Yes

**WISCONSIN**

- a. Yes
- b. Yes
- c. Yes
- d. Yes

**WYOMING**

- a. Yes
- b. Yes
- c. Yes
- d. Yes

**DISTRICT OF COLUMBIA**

The District of Columbia National Guard has no state status. The Mayor of the District of Columbia has no authority to mobilize the DC National Guard. If the Mayor of DC needs National Guard soldiers and airmen for a local emergency, she would need to ask the President to call them up. In that case, they would be on federal active duty, and USERRA would protect their civilian jobs. DC law does not protect a member of the National Guard of Virginia, or Maryland, or some other state who has a civilian job in DC and who is called to state active duty by the Governor of another state.

**GUAM**

- a. Yes
- b. Yes
- c. Yes
- d. No

**PUERTO RICO**

- a. Yes
- b. Yes
- c. Yes
- d. No

**VIRGIN ISLANDS**

- a. Yes
- b. Yes
- c. Yes
- d. No

\*For Maryland, Virginia, and Wisconsin the protection for members of the National Guard of another state is of little value because in each of these states the state law only protects *residents* of the state. We are giving these states a “no” on question 4 because most of the people we are trying to protect are not residents of the states where they have civilian jobs.

For example, let us take the Cheeseheads Insurance Agency (CIA) of Kenosha, Wisconsin. Among CIA's 55 employees, three are National Guard members, and all work at the Kenosha facility of the company.

Scott Walker lives in Kenosha, Wisconsin and is a Sergeant in the Wisconsin ARNG. He is called to state active duty by the Governor of Wisconsin. His civilian job at CIA is protected because he lives and works in Wisconsin and is a member of the Wisconsin ARNG.

Tammy Baldwin lives in Kenosha, but she is a member of the Illinois ARNG. She is called to state active duty by the Governor of Illinois. Her civilian job is protected because she *resides* in Wisconsin.

Bruce Rauner lives in northern Illinois and commutes across the state line to his civilian job at CIA in Kenosha, Wisconsin. He is a member of the Illinois ARNG and is called to state active duty by the Governor of Illinois. His job is not protected because he does not reside in Wisconsin. We have exactly the same problem with Virginia and Maryland.

#### **UPDATE** **September 2018**

Question 4 in the chart above pertains to the situation wherein National Guard member Josephine Jones has a civilian job in State A but is a member of the National Guard of State B (typically but not necessarily a neighboring state). Jones is called to state active duty by the Governor of State B and is away from her civilian job in State A for several days or weeks. Does the law of State A give Jones a legally enforceable right to reinstatement in her job in State A after she completes the period of state active duty in State B?

The answer to this question is critical because the federal Uniformed Services Employment and Reemployment Rights Act (USERRA) does not apply to state active duty. Moreover, the law of State B does not apply across the state line in State A. If the law of State A does not apply to a person in this situation, Jones is likely to be without a job and without a remedy.

For 11 states, the former **NO** answer can now be changed to **YES** because of recent statutory amendments at the state level. Credit for this progress should go to the Defense State Liaison Office (DSLO), a Department of Defense office that is responsible for communicating to Governors and State Legislators the position of the Department of Defense with respect to state laws and policies that affect national defense and members of the armed forces.

The 11 states that have changed from **NO** to **YES** on Question 4 are Alabama, Alaska, Arizona, Connecticut, Kentucky, Mississippi, New Mexico, Ohio, South Dakota\*, Virginia, and Wisconsin. South Dakota has an asterisk in this list because the recent amendment in that state was poorly

drafted. In South Dakota, a member of the National Guard of another state is protected while on state active duty *only if he or she is a resident of South Dakota.*

The states that are still **NO** on Question 4 are Colorado, Iowa, Maryland, Missouri, Nevada, New Hampshire, New Jersey, New York, North Dakota, Pennsylvania, and Tennessee.

Please see the “state laws” section at [www.roa.org/lawcenter](http://www.roa.org/lawcenter). You will find for each state an article about the state laws that protect the civilian jobs of National Guard members on state active duty. We update those articles as we become aware of relevant statutory amendments.