

**LAW REVIEW 17036<sup>1</sup>**

**April 2017**

**USERRA and SCRA Coverage for National Guard Members Serving on  
“Full Time National Guard Duty”**

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[About Sam Wright](#)

1.1.3.3—USERRA applies to National Guard service

1.8—Relationship between USERRA and other laws/policies

4.0—SCRA generally

**Q: I am a Sergeant Major (E-9) in the Army National Guard (ARNG) of a specific state, and I am currently serving a three-year tour (October 2016 to September 2019) as the Command Sergeant Major of the National Guard of my state. I am the senior enlisted advisor to the Adjutant General of our state, who heads the ARNG and Air National Guard (ANG) of our state. I am in a full-time position, and my military orders refer to my status as “full-time National Guard duty.” When I complete my tour in September 2019 I will leave this full-time National Guard duty and retire from the ARNG.**

**I have read with great interest several of your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Servicemembers Civil**

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<sup>1</sup> I invite the reader’s attention to [www.roa.org/lawcenter](http://www.roa.org/lawcenter). You will find more than 1700 “Law Review” articles about military voting rights, reemployment rights, and other military-legal topics, along with a detailed Subject Index, to facilitate finding articles about very specific topics. The Reserve Officers Association (ROA) initiated this column in 1997.

<sup>2</sup> 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. I have dealt with the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Veterans’ Reemployment Rights Act (VRRA—the 1940 version of the federal reemployment statute) for more than 34 years. 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 VRRA rewrite that President George H.W. Bush presented to Congress, as his proposal, in February 1991. On 10/13/1994, President Bill Clinton signed into law USERRA, Public Law 103-353, 108 Stat. 3162. The version of USERRA that President Clinton signed in 1994 was 85% the same as the Webman-Wright draft. USERRA is codified in title 38 of the United States Code at sections 4301 through 4335 (38 U.S.C. 4301-35). I have also dealt with the VRRA and USERRA as a judge advocate in the Navy and Navy Reserve, as an attorney for the Department of Defense (DOD) 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, and as the Director of the Service Members Law Center (SMLC), as a full-time employee of ROA, for six years (2009-15). Please see Law Review 15052 (June 2015), concerning the accomplishments of the SMLC. My paid employment with ROA ended 5/31/2015, but I have continued the work of the SMLC as a volunteer. You can reach me by telephone at (202) 210-4194 (my cell phone) or by e-mail at [samwright50@yahoo.com](mailto:samwright50@yahoo.com). I will provide the first hour of information for free, and after that I will charge you a very reasonable fee, which we can discuss.

**Relief Act (SCRA). Do these laws protect National Guard members on “full-time National Guard duty?”**

**Answer, bottom line up front:**

USERRA protects National Guard members when they are away from their civilian jobs for full-time National Guard duty as well as other forms of “service in the uniformed services” as defined by USERRA, but the SCRA does not apply to a member of the ARNG or ANG on full-time National Guard duty.

**Explanation USERRA:**

Under USERRA, a person who leaves a civilian job (federal, state, local, or private sector) for “service in the uniformed services” has the legally enforceable right to reemployment in the pre-service position of employment if he or she meets the five USERRA conditions.<sup>3</sup> Section 4303 of USERRA<sup>4</sup> defines 16 terms used in this law, including the term “service in the uniformed services” which is defined 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 for training, inactive duty training, *full-time National Guard duty*, a period for which a person is absent from a position of employment for the purpose of an examination to determine the fitness of the person to perform any such duty, a period for which a System member of the National Urban Search and Rescue Response System is absent from a position of employment due to an appointment into Federal service under section 327 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 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.<sup>5</sup>

USERRA’s definition of “service in the uniformed services” expressly includes full-time National Guard duty, so a person who leaves a civilian job for this sort of duty has the right to reemployment under USERRA.

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<sup>3</sup> The person must have left a civilian position of employment to perform uniformed service and must have given the employer prior oral or written notice. The person must not have exceeded the cumulative five-year limit on the duration of the period or periods of uniformed service, related to the employer relationship with that specific employer. There are nine exemptions—kinds of service that do not count toward exhausting the individual’s five-year limit. Please see Law Review 16043 (May 2016) for a detailed discussion of the five-year limit. The person must have been released from the period of service without having received a disqualifying bad discharge from the military. After release, the person must have made a timely application for reemployment. Please see Law Review 15116 (December 2015) for a detailed discussion of these five conditions.

<sup>4</sup> 38 U.S.C. 4303.

<sup>5</sup> 38 U.S.C. 4303(13) (emphasis supplied).

### **Explanation SCRA:**

The important protections of the SCRA apply to a “servicemember” on “active duty” in one of the seven uniformed services.<sup>6</sup> The SCRA defines “active duty”<sup>7</sup> by referring to the definition of that term in section 101(d)(5) of title 10. That definition is as follows:

The term “active duty” means full-time duty in the military service of the United States. Such term includes full-time training duty, annual training duty, and attendance, while in the active military service, at a school designated as a service school by law or by the Secretary of the military department concerned. *Such term does not include full-time National Guard duty.*<sup>8</sup>

Because the definition of “active duty” specifically excludes full-time National Guard duty, persons performing full-time National Guard duty are not protected by the SCRA. Providing such protections to those persons would require a statutory amendment to the SCRA.

Section 101 of title 10 defines the term “full-time National Guard duty” as follows:

The term "full-time National Guard duty" means training or other duty, other than inactive duty, performed by a member of the Army National Guard of the United States or the Air National Guard of the United States in the member's status as a member of the National Guard of a State or territory, the Commonwealth of Puerto Rico, or the District of Columbia under section 316, 502, 503, 504, or 505 of title 32 for which the member is entitled to pay from the United States or for which the member has waived pay from the United States.<sup>9</sup>

**Q: Soldiers of the ARNG and airmen of the ANG in my state are sometimes called to “state active duty” by the Governor for state emergencies, like fires, floods, tornadoes, riots, etc. Do these soldiers and airmen have the protection of USERRA or the SCRA while on state active duty?**

**A:** No. But every state has state laws that protect the civilian jobs of National Guard members on state active duty. Please see Law Review 16103 (October 2016) for a detailed discussion of those laws. I also invite your attention to our “state laws” section at [www.roa.org/lawcenter](http://www.roa.org/lawcenter).

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<sup>6</sup> The uniformed services are the Army, Navy, Marine Corps, Air Force, and Coast Guard, as well as the commissioned corps of the Public Health Service (PHS) and the commissioned corps of the National Oceanic and Atmospheric Administration (NOAA). 10 U.S.C. 101(a)(5) and 3911(2)(A). PHS officers and NOAA officers are fully protected by the SCRA while in active service. USERRA applies to PHS officers *but not to NOAA officers*. Please see Law Review 15002 (January 2015).

<sup>7</sup> 50 U.S.C. 3911(2)(A)(i).

<sup>8</sup> 10 U.S.C. 101(d)(1) (emphasis supplied).

<sup>9</sup> 10 U.S.C. 101(d)(5).

For each state, you will find an article about the state law that protects the civilian jobs of National Guard members on state active duty.

We have identified a serious deficiency in many of these state laws—that the state law only protects a member of the National Guard *of that specific state* who is performing state active duty. ROA has been working with the Defense State Liaison Office (DSLO)<sup>10</sup> on getting the state legislatures to amend these laws to protect National Guard members of other states (typically but not necessarily neighboring states) who happen to have civilian jobs in the state.

For example, Bob Dole lives in Kansas City, Kansas and is a Sergeant in the Kansas ARNG. His civilian job is just across the state line in Kansas City, Missouri. Dole is called to state active duty by the Governor of Kansas after a major tornado destroys Emerald City, Kansas. Dole is away from his Missouri job for 20 days of Kansas state active duty. After he is released from that duty, he has no legally enforceable right to reemployment in the Missouri job. USERRA does not apply to state active duty. The Kansas law does not apply across the state line in Missouri. The Missouri law, by its terms, only applies to *Missouri* National Guard members.

Now let us put the shoe on the other foot. Harry Truman lives in Kansas City, Missouri and is a Sergeant in the Missouri ARNG. Truman's civilian job is just across the state line in Kansas City, Kansas. Truman is called to state active duty by the Governor of Missouri and is away from his Kansas job for 20 days.

Truman has a legally enforceable right to reemployment in the Kansas job because the Kansas law was recently amended (thanks to DSLO) to apply to “a member of the National Guard of this state *or any other state*.”

I would appreciate it if you would take the time to check into the status of your state's law on this issue and then bring this issue to the attention of the Adjutant General of your state.

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<sup>10</sup> DSLO is a Department of Defense (DOD) organization created about a decade ago. Its mission is to represent DOD and service members in communicating with governors and state legislators.

## CLARIFICATION

July 2017

National Guard members on “full-time National Guard duty” do not have rights under the federal Servicemembers Civil Relief Act (SCRA), but at least in Louisiana, and probably in several other states, such members have SCRA-type rights under state law. Please see Law Review 17072 (July 2017).

## UPDATE<sup>11</sup>

March 2021

Section 4303(13) provides:

The term “service in the uniform 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 for training, inactive duty training, full-time National Guard duty, *State active duty for a period of 14 days or more, State active duty in response to a national emergency declared by the President under the National Emergencies Act (50 U.S.C. 1601 et seq.), State active duty in response to a major disaster declared by the President under section 401 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5170)*, a period for which a person is absent from a position of employment for the purpose of an examination to determine the fitness of the person to perform any such duty, a period for which a person absent from a position of employment for the purpose of an examination to determine the fitness of the person to perform any such duty, a period for which a System member of the National Urban Search and Rescue Response System is absent from a position of employment due to an appointment into Federal service under Section 327 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 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.<sup>12</sup>

The change came on January 5, 2021, when President Trump signed into law the Johnny Isakson and David P. Roe, M.D. Veterans’ Health Care Benefits Improvement Act of 2020.<sup>13</sup> Therefore, when Dole would have a legally enforceable right to reemployment in the Missouri job under USERRA because USERRA does apply to state active duty.

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<sup>11</sup>Update by Second Lieutenant Lauren Walker, USMC.

<sup>12</sup>50 U.S.C. § 4303(13) (emphasis added).

<sup>13</sup>See Samuel Wright, *State Active Duty Performed by National Guard Member after 1/5/2021 is Now Protected by USERRA, under most Circumstances*, ROA Law Review 21034 (June 2021) (provides a detailed discussion of the update to USERRA).

## **Please join or support ROA**

This article is one of 2000-plus “Law Review” articles available at [www.roa.org/lawcenter](http://www.roa.org/lawcenter). The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997. New articles are added each month. ROA is almost a century old—it was established in 1922 by a group of veterans of “The Great War,” as World War I was then known. One of those veterans was Captain Harry S. Truman. As President, in 1950, he signed our congressional charter. Under that charter, our mission is to advocate for the implementation of policies that provide for adequate national security. For many decades, we have argued that the Reserve Components, including the National Guard, are a cost-effective way to meet our nation’s defense needs. Indeed, ROA is the *only* national military organization that exclusively supports America’s Reserve and National Guard.

Through these articles, and by other means, we have sought to educate service members, their spouses, and their attorneys about their legal rights and about how to exercise and enforce those rights. We provide information to service members, without regard to whether they are members of ROA or eligible to join, but please understand that ROA members, through their dues and contributions, pay the costs of providing this service and all the other great services that ROA provides.

If you are now serving or have ever served in any one of our nation’s seven uniformed services, you are eligible for membership in ROA, and a one-year membership only costs \$20. Enlisted personnel as well as officers are eligible for full membership, and eligibility applies to those who are serving or have served in the Active Component, the National Guard, or the Reserve. If you are eligible for ROA membership, please join. You can join on-line at [www.roa.org](http://www.roa.org) or call ROA at 800-809-9448. If you are not eligible to join, please contribute financially, to help us keep up and expand this effort on behalf of those who serve. Please mail us a contribution to:

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