

Reemployment Rights of Texas National Guard Members on Duty for Hurricane Harvey

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

Update on Sam Wright

1.1.1.2—USERRA applies to small employers

1.1.3.3—USERRA applies to National Guard service

1.8—Relationship between USERRA and other laws/policies

Q: I am a Sergeant Major (E-9) in the Texas Army National Guard and a member of the Reserve Officers Association (ROA). Like almost every member of the Texas National Guard, I am currently on state active duty, called by the Governor of Texas, for rescue and recovery operations in the wake of Hurricane Harvey. I have read with great interest many of your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA).

We have a junior enlisted member of our unit—let’s call him PFC Joe Smith. Smith works for a very small diner, let’s call it Bob & Edward’s Diner. The diner generally has between nine and twelve employees and has never had more than 15. Like me and almost every other member

¹ I invite the reader’s attention to www.roa.org/lawcenter. You will find more than 1500 “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. 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. 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 35 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 e-mail at SWright@roa.org or by telephone at 800-809-9448, ext. 730. I will provide up to one hour of information without charge. If you need more than that, I will charge a very reasonable hourly rate. If you need a lawyer, I can suggest several well-qualified USERRA lawyers.

of the Texas National Guard, Smith is currently on state active duty. Bob Jones, the owner of the diner, said that Smith will not be rehired at the end of his current active duty and that the diner is exempt from USERRA because it has fewer than 15 employees.

In your Law Review 0857 (November 2008), you wrote that USERRA applies to very small as well as very large employers, and that a person or entity only needs one employee to be an employer for purposes of USERRA. Is Mr. Jones right that Smith has no legally enforceable right to reemployment at the end of his current period of state active duty?

A: Unfortunately, Mr. Jones is correct, with respect to state active duty.

USERRA protects National Guard members when they are away from their civilian jobs for training or duty under title 32 or title 10 of the United States Code. USERRA does not protect National Guard members when they are on state active duty—called by the Governor, under state authority, paid with state funds, for state emergencies like hurricanes, fires, riots, etc. If National Guard members are to have the right to return to their civilian jobs after state active duty, it must be by state law.

Like every other state, Texas has a state law that protects National Guard members on state active duty. The Texas law governing state active duty only applies to an employer that had 15 or more employees in 20 weeks in the current or preceding calendar year.³ Thus, Bob & Edward's Diner is exempt from this law.

Like the Veterans' Reemployment Rights Act (VRRA), USERRA applies to any employer with one or more employees.⁴ But USERRA does not apply, because this is state active duty. Perhaps the Governor or the state's Adjutant General can shame Bob Jones into reinstating Joe Smith in his job at the diner.

Our nation has seven Reserve Components. They are the Coast Guard Reserve, the Marine Corps Reserve, the Navy Reserve, the Air Force Reserve, the Air National Guard, the Army Reserve, and the Army National Guard. The Army National Guard and Air National Guard are hybrid federal-state organizations, subject to call by the President for federal duty and call by the Governor for state duty. The other five Reserve Components are purely federal entities, subject to call only by the President.

Hurricane Harvey is so massive that it has overwhelmed the capacity of the National Guard of Texas and Louisiana, the two states most affected. As a result, some members of the Coast Guard Reserve, Marine Corps Reserve, Navy Reserve, Air Force Reserve, and Army Reserve have

³ VTCA Labor Code section 21.002(8)(A).

⁴ *Cole v. Swint*, 961 F.2d 58, 60 (5th Cir. 1992).

been called to duty. Although their service is a result of a natural disaster, it is federal service, and they are protected by USERRA, even when they work for very small employers.

Under the Emergency Management Assistance Compact, some National Guard members of other states have been deployed to Texas and Louisiana for service related to Hurricane Harvey. They are on state active duty for their own states, and their reemployment rights are governed by the laws of the states where they have civilian jobs.

In the “state laws” section of our website (www.roa.org/lawcenter), you will find an article for each state about the state laws that protect the civilian jobs of National Guard members on state active duty.