

Yes, USERRA Applies to 12304b Duty

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1.1.3.1—USERRA applies to voluntary service

1.1.3.3—USERRA applies to National Guard service

1.3.1.2—Character and duration of service

1.8—Relationship between USERRA and other laws/policies

Q: I am a Captain in the Tennessee Army National Guard and a member of the Reserve Officers Association (ROA). I am currently on active duty on “12304b duty” but I don’t know what that means. A National Guard judge advocate told me that the Uniformed Services Employment and Reemployment Rights Act (USERRA) does not apply to 12304b duty and that when I complete this active duty period I will not have a legally enforceable right to return to my civilian job under USERRA. What do you say about that?

¹ I invite the reader’s attention to www.roa.org/lawcenter. 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, 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 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.

A: The National Guard judge advocate is wrong and should know better. As I have explained in Law Review 15116 (December 2015) and many other articles, any person who meets five simple conditions will have the right to reemployment under USERRA:

- a. Left a civilian job (federal, state, local, or private sector) to perform voluntary or involuntary uniformed service, as defined by USERRA.
- b. Gave the employer prior oral or written notice.
- c. Has not exceeded the cumulative five-year limit on the duration of the period or periods of service, relating to the employer relationship for which the person seeks reemployment.
- d. Was released from the period of service without having received a disqualifying bad discharge from the military.
- e. Made a timely application for reemployment, after release from the period of service.

USERRA defines the term “service in the uniformed services” 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 32.³

Nothing in this definition excludes duty performed under section 12304b of title 10 of the United States Code. If you meet the five USERRA conditions, you will have the right to reemployment.

Section 12304b provides:

Selected Reserve: order to active duty for preplanned missions in support of the combatant commands

- **(a)** Authority. When the Secretary of a military department determines that it is necessary to augment the active forces for a preplanned mission in support of a

³ 38 U.S.C. 4303(13) (emphasis supplied).

combatant command, the Secretary may, subject to subsection (b), order any unit of the Selected Reserve (as defined in section 10143(a) of this title), *without the consent of the members*, to active duty for not more than 365 consecutive days.

- (b) Limitations.
 - (1) Units may be ordered to active duty under this section only if--
 - (A) the manpower and associated costs of such active duty are specifically included and identified in the defense budget materials for the fiscal year or years in which such units are anticipated to be ordered to active duty; and
 - (B) the budget information on such costs includes a description of the mission for which such units are anticipated to be ordered to active duty and the anticipated length of time of the order of such units to active duty on an involuntary basis.
 - (2) Not more than 60,000 members of the reserve components of the armed forces may be on active duty under this section at any one time.
- (c) Exclusion from strength limitations. Members ordered to active duty under this section shall not be counted in computing authorized strength in members on active duty or total number of members in grade under this title or any other law.
- (d) Notice to Congress. Whenever the Secretary of a military department orders any unit of the Selected Reserve to active duty under subsection (a), such Secretary shall submit to Congress a report, in writing, setting forth the circumstances necessitating the action taken under this section and describing the anticipated use of such unit.
- (e) Termination of duty. Whenever any unit of the Selected Reserve is ordered to active duty under subsection (a), the service of all units so ordered to active duty may be terminated--
 - (1) by order of the Secretary of the military department concerned; or
 - (2) by law.
- (f) Relationship to War Powers Resolution. Nothing contained in this section shall be construed as amending or limiting the application of the provisions of the War Powers Resolution.
- (g) Considerations for involuntary order to active duty. In determining which units of the Selected Reserve will be ordered to duty without their consent under this section, appropriate consideration shall be given to--
 - (1) the length and nature of previous service, to assure such sharing of exposure to hazards as national security and military requirements will reasonably allow;
 - (2) the frequency of assignments during service career;
 - (3) family responsibilities; and
 - (4) employment necessary to maintain the national health, safety, or interest.

- (h) Policies and procedures. The Secretaries of the military departments shall prescribe policies and procedures to carry out this section, including on determinations with respect to orders to active duty under subsection (g). Such policies and procedures shall not go into effect until approved by the Secretary of Defense.
- (i) Defense budget materials defined. In this section, the term "defense budget materials" has the meaning given that term in section 231(f)(2) of this title.⁴

Congress enacted section 12304b in 2011, as a new provision for the *involuntary* call-up of National Guard and Reserve personnel. Coverage of section 12304b duty was never a problem. The problem was that when Congress enacted this new provision for involuntary call-up it failed to amend USERRA by adding section 12304b to the list of title 10 sections *that are exempt from USERRA's five-year limit*. Congress fixed that glitch in 2015.

Section 4312(c) of USERRA sets forth the five-year limit and the nine exemptions to that limit, as follows:

Subsection (a) [the right to reemployment] shall apply to a person who is absent from a position of employment by reason of service in the uniformed services if such person's cumulative period of service in the uniformed services, with respect to the employer relationship for which a person seeks reemployment, does not exceed five years, *except that any such period of service shall not include any service--*

- (1) that is required, beyond five years, to complete an initial period of obligated service;
- (2) during which such person was unable to obtain orders releasing such person from a period of service in the uniformed services before the expiration of such five-year period and such inability was through no fault of such person;
- (3) performed as required pursuant to section 10147 of title 10, under section 502(a) or 503 of title 32, or to fulfill additional training requirements determined and certified in writing by the Secretary concerned, to be necessary for professional development, or for completion of skill training or retraining; or
- (4) performed by a member of a uniformed service who is--
 - (A) ordered to or retained on active duty under section 688, 12301(a), 12301(g), 12302, 12304, 12304a, 12304b, or 12305 of title 10 or under section 331, 332, 359, 360, 367, or 712 of title 14;
 - (B) ordered to or retained on active duty (other than for training) under any provision of law because of a war or national emergency declared by the President or the Congress, as determined by the Secretary concerned;

⁴ 10 U.S.C. 12304b (emphasis supplied)

- **(C)** ordered to active duty (other than for training) in support, as determined by the Secretary concerned, of an operational mission for which personnel have been ordered to active duty under section 12304 of title 10;
- **(D)** ordered to active duty in support, as determined by the Secretary concerned, of a critical mission or requirement of the uniformed services;
- **(E)** called into Federal service as a member of the National Guard under chapter 15 of title 10 or under section 12406 of title 10; or
- **(F)** ordered to full-time National Guard duty (other than for training) under section 502(f)(2)(A) of title 32 when authorized by the President or the Secretary of Defense for the purpose of responding to a national emergency declared by the President and supported by Federal funds, as determined by the Secretary concerned.⁵

At the end of your current year of 12304b duty, you will have the right to reemployment at your civilian job, and this year of involuntary active duty does not count toward your five-year limit.

⁵ 38 U.S.C. 4312(c) (emphasis supplied).