

The SCRA and the Active Duty Service Member— Full-Time National Guard Duty is Not Active Duty

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

1.1.3.3—USERRA applies to National Guard service

4.0—SCRA generally

4.5—SCRA protection from state/local tax authorities

6.0—Military service and tax laws

7.2—Service member or military spouse voting and domicile

Q: I am a Major in the Army National Guard of a midwestern state. I was a traditional Guard member for many years until January 2015, when I was given the opportunity to go on active duty for three years in the national capital area. I have been on full-time active duty under title 10 of the United States Code since January 2015. In a few days, I will complete my three-year active duty period and leave active duty.

¹I invite the reader's attention to www.roa.org/lawcenter. You will find more than 2000 "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, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997.

²BA 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 43 years, I have worked with volunteers around the country to reform absentee voting laws and procedures to facilitate the enfranchisement of the brave young men and women who serve our country in uniform. I have also 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 36 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.

For the last three years, while I have been on active duty, I have lived in an apartment in Arlington, Virginia—very close to my military duty station. My lease on that apartment expires 12/31/2017, and I will be vacating the apartment at that time.

Recently, a friend provided me a copy of your Law Review 17061 (June 2017). I wish that I had been able to read your article months ago, because I am afraid that my legal and financial affairs are hosed up because of decisions that I made and actions that I took without fully understanding the legal implications. Now that I have read your article, I better understand the legal implications, but I cannot turn back the hands of time and undo things that I have done. I now understand that my domicile (legal residence) did not change when I physically moved from the midwestern state to Arlington, Virginia, to be near my active duty military assignment.

Since I was living in Northern Virginia in 2017, I got interested in Virginia's 2017 elections for Governor, Lieutenant Governor, Attorney General, and members of the House of Delegates (the lower house of the state legislature). I registered to vote in Virginia in September 2017, and I voted on Election Day (November 7, 2017).

Having read your Law Review 17061 just recently, I now understand that registering to vote and voting in Virginia, while on active duty, may have been a mistake. I now understand that I cannot have it both ways. By registering to vote and voting in Virginia in 2017, I may have given up my right to claim to be domiciled in the midwestern state, rather than Virginia, in 2017.

While on active duty in the national capital area over the last three years, I have continued paying state income tax to the midwestern state. That state income tax has been withheld from my military salary, just as federal income tax has been withheld.

As 2017 turns to 2018, and as I leave title 10 active duty at the end of 2017, I am concerned about my state income tax liability for 2017. Do I file a return and pay state income tax to Virginia for all of 2017, or just the last four months after I registered to vote there? What about the midwestern state? Will I be able to get that state to return the state income tax that I paid, through withholding, for all of 2017, or at least the last four months?

A: Yes, your affairs are in a mess, and you need to retain competent legal counsel to get this matter sorted out. Good luck with that.

Under federal law, an *active duty* servicemember³ is entitled to maintain his or her domicile of origin at the address where he or she lived and was domiciled just before entering active duty.

³The SCRA defines and uses the word “servicemember”—all one word, rather than “service member.” While “servicemember” may not be grammatically correct, Congress is not required to follow the rules of grammar when it enacts statutes.

The servicemember can maintain that domicile of origin until he or she establishes a new domicile elsewhere or until he or she leaves active duty, whichever comes first.

Every human being, including every servicemember, has one and only one domicile (legal residence). Under a federal law called the Servicemembers Civil Relief Act (SCRA),⁴ an *active duty* servicemember⁵ is treated differently from civilians in the determination of the individual's domicile and in the liability to pay state income tax and personal property tax to the state and local tax authorities of the place where the service member has a physical residence (the place where he or she usually sleeps) if that place is not the service member's domicile.

For a civilian (a person not presently on active duty in one of the uniformed services),⁶ the person's domicile is the place where he or she usually sleeps, unless it is for a temporary purpose, measured in weeks or months and with a definite intent to return to the place of domicile.⁷ For example, Alice Adams, a civilian, quits her job in Boston and takes a new job in Los Angeles. She vacates her Boston apartment and rents a new apartment in Los Angeles. On day one in the Los Angeles apartment, she becomes a domiciliary of California and ceases to be a domiciliary of Massachusetts. She must begin paying California state income tax on that first day, and her obligation to pay Massachusetts state income tax ends on the first day in the California apartment.⁸

If Alice has brought her vehicle with her to California, she must register the vehicle in California and get California license tags and a California driver's license. On that first day in California, she loses the right to vote in Massachusetts, and she is eligible to register and then vote in California. By moving to California, Alice has become a Californian by operation of law, without regard to her preference.

Every human being has one and only one domicile. Daddy Warbucks can afford to purchase and furnish 365 houses and to spend one night of the year in each house. Nonetheless, he has only one domicile and he can vote only once.

Under the SCRA, *active duty* servicemembers are exempted from the rule that moving to a new state necessarily means becoming a domiciliary of that state and losing one's domicile in the

⁴The SCRA is codified in title 50 of the United States Code, at sections 3901 through 4043 (50 U.S.C. 3901-4043). Congress enacted the SCRA in 2003, as a long-overdue rewrite of the Soldiers' and Sailors' Civil Relief Act (SSCRA), which was originally enacted in 1917, when our country entered World War I.

⁵50 U.S.C. 3911(2)(A)(i).

⁶The uniformed services are the Army, Navy, Marine Corps, Air Force, and Coast Guard, as well as the commissioned corps of the Public Health Service and the commissioned corps of the National Oceanic and Atmospheric Administration. 10 U.S.C. 101(a)(5) and 50 U.S.C. 3911(2)(A).

⁷For example, Bob Jones, a civilian, lives in Boston and works for a major corporation. Bob's employer sends him from its headquarters in Boston to its branch office in Los Angeles for a three-month assignment. Bob fully intends to return to his home in Boston at the end of the assignment. Under these circumstances, Bob does not lose his domicile in Boston and gain a domicile in Los Angeles.

⁸Unless she moves on the first of January, she will need to pay partial-year income tax to Massachusetts and partial-year income tax to California for the year of the move.

former state.⁹ If soldier Alexander Williams is transferred by the Army from State A to State B, he does not automatically lose his domicile in State A or become a domiciliary of State B. Of course, Alexander will need to make living arrangements in State B, within a reasonable commuting distance of his new military assignment there. Making such living arrangements in State B, while on active duty, does not make him a domiciliary of State B. If Alexander has a physical residence in State B but is not domiciled there, State B is precluded by federal law (the SCRA) from taxing Alexander's military income or his personal (moveable) property.

The idea is that active duty servicemembers must be protected from double taxation—by the “home” state and the state where the servicemember is currently stationed. Moreover, unlike civilians, active duty servicemembers do not choose where to live. When the Army transfers Alexander from State A to State B, he has a legal obligation to report to his new duty station as ordered. If he fails to go to his new appointed place of duty, he is guilty of the military criminal offense called “unauthorized absence.”

The SCRA provides:

§ 4001. Residence for tax purposes

- Residence or domicile.
 - o **(1)** In general. *A servicemember shall neither lose nor acquire a residence or domicile for purposes of taxation with respect to the person, personal property, or income of the servicemember by reason of being absent or present in any tax jurisdiction of the United States solely in compliance with military orders.*
 - o **(2)** Spouses. A spouse of a servicemember shall neither lose nor acquire a residence or domicile for purposes of taxation with respect to the person, personal property, or income of the spouse by reason of being absent or present in any tax jurisdiction of the United States solely to be with the servicemember in compliance with the servicemember's military orders if the residence or domicile, as the case may be, is the same for the servicemember and the spouse.
- **(b)** Military service compensation. *Compensation of a servicemember for military service shall not be deemed to be income for services performed or from sources within a tax jurisdiction of the United States if the servicemember is not a resident or domiciliary of the jurisdiction in which the servicemember is serving in compliance with military orders.*
- **(c)** Income of a military spouse. Income for services performed by the spouse of a servicemember shall not be deemed to be income for services performed or from sources within a tax jurisdiction of the United States if the spouse is not a resident or domiciliary of the jurisdiction in which the income is earned because the spouse is in the

⁹Under the SCRA, a reservist or National Guard member is not considered a “servicemember” except when he or she is on active duty.

jurisdiction solely to be with the servicemember serving in compliance with military orders.

- **(d) Personal property.**
 - o **(1)** Relief from personal property taxes. *The personal property of a servicemember or the spouse of a servicemember shall not be deemed to be located or present in, or to have a situs for taxation in, the tax jurisdiction in which the servicemember is serving in compliance with military orders.*
 - o **(2)** Exception for property within member's domicile or residence. This subsection applies to personal property or its use within any tax jurisdiction other than the servicemember's or the spouse's domicile or residence.
 - o **(3)** Exception for property used in trade or business. This section does not prevent taxation by a tax jurisdiction with respect to personal property used in or arising from a trade or business, if it has jurisdiction.
 - o **(4)** Relationship to law of state of domicile. Eligibility for relief from personal property taxes under this subsection is not contingent on whether or not such taxes are paid to the State of domicile.
- **(e) Increase of tax liability.** A tax jurisdiction may not use the military compensation of a nonresident servicemember to increase the tax liability imposed on other income earned by the nonresident servicemember or spouse subject to tax by the jurisdiction.
- **(f) Federal Indian reservations.** An Indian servicemember whose legal residence or domicile is a Federal Indian reservation shall be taxed by the laws applicable to Federal Indian reservations and not the State where the reservation is located.
- **(g) Definitions.** For purposes of this section:
 - o **(1)** Personal property. The term "personal property" means intangible and tangible property (including motor vehicles).
 - o **(2)** Taxation. The term "taxation" includes licenses, fees, or excises imposed with respect to motor vehicles and their use, if the license, fee, or excise is paid by the servicemember in the servicemember's State of domicile or residence.
 - o **(3)** Tax jurisdiction. The term "tax jurisdiction" means a State or a political subdivision of a State.¹⁰

Brenda Barnes, a civilian, works for a major corporation with operations in many states. Her employer transfers her from State A to State B, and she buys a house or rents an apartment in State B to go to her new job assignment. Brenda is not protected by the SCRA. She loses her domicile in State A and becomes a domiciliary of State B as soon as she moves into the new apartment in State B. Brenda must register to vote in State B, if she wants to vote, and she is no longer eligible to vote in State A. Brenda must pay state income tax and personal property tax to State B after she moves into the state.

¹⁰50 U.S.C. 4001 (emphasis supplied).

Why is Alexander treated better than Brenda? The difference is that if Brenda does not want to move she can quit her job. Alexander cannot quit the Army, at least not until the end of his enlistment or the period of active service to which he obligated himself.

You cannot have it both ways. You have one and only one domicile, for all legal purposes. You cannot simultaneously be a domiciliary of Virginia for voting purposes and a domiciliary of the midwestern state for state income tax purposes. When you registered to vote and voted in Virginia, you thereby became a Virginian for all legal purposes, and you were then required to pay Virginia state income tax and personal property tax and you have other legal obligations as a Virginian (jury service, etc.). Maryland's high court has held: "Evidence that a person registered or voted is admissible and ordinarily persuasive when the question of domicile is at issue."¹¹

Q: I have been offered the opportunity to return to full-time military service almost immediately after I leave title 10 active duty in a few days. This new period of full-time military service will be under title 32 of the United States Code and will be called "full-time National Guard duty." The new duty period will be at the Office of the Adjutant General (TAG) of the midwestern state that I left three years ago to go on full-time title 10 active duty. If I decide to take this opportunity, I will need to move back to the state capital of the midwestern state. I will need to get a house or apartment in the state capital, within a reasonable commuting distance of the TAG headquarters.

Having changed my domicile from the midwestern state to Virginia, I want to maintain my Virginia domicile while serving on this upcoming period of "full-time National Guard duty" over the next three years, starting in January 2018. Will that be possible?

A: No, because *full-time National Guard duty does not qualify as "military service" or "active duty" for SCRA purposes.*

Rights under the SCRA accrue to a "servicemember" who is presently performing "military service." The SCRA defines the term "servicemember" and the term "military service." When a statute defines a term, the statutory definition controls for purposes of that statute. The statutory definition may be different from the definition found in other statutes or in a dictionary.

The SCRA defines the term "servicemember" as follows: "The term 'servicemember' means a member of the uniformed services as that term is defined in section 101(a)(5) of title 10, United States Code."¹² Section 101(a)(5) of title 10 defines the "uniformed services" as the "armed forces" (Army, Navy, Marine Corps, Air Force, and Coast Guard), plus the commissioned corps

¹¹*Comptroller of the Treasury v. Lenderking*, 268 Md. 613, 619, 303 A.2d 402, 405 (Maryland Court of Appeals 1971). See also *Suglove v. Oklahoma Tax Commission*, 1979 OK 168, 605 P.2d 1315 (Oklahoma Supreme Court 1979). For other articles about the relationship between voting and state income tax liability for active duty service members, please see Law Review 17008 (February 2017) and Law Review 16076 (August 2016).

¹²50 U.S.C. 3911(1).

of the Public Health Service (PHS) and the commissioned corps of the National Oceanic and Atmospheric Administration (NOAA).¹³

The SCRA defines the term “military service” as follows:

(2) Military service. The term "military service" means--

- in the case of a servicemember who is a member of the Army, Navy, Air Force, Marine Corps, or Coast Guard—
 - **(i)** *active duty, as defined in section 101(d)(1) of title 10, United States Code, and*
 - **(ii)** in the case of a member of the National Guard, includes service under a call to active service authorized by the President or the Secretary of Defense for a period of more than 30 consecutive days under section 502(f) of title 32, United States Code, for purposes of responding to a national emergency declared by the President and supported by Federal funds ...¹⁴

Section 101(d)(1) of title 10 defines the term “active duty” as follows:

The term "active duty" means full-time duty in the active 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.*¹⁵

Section 101(d)(5) 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.¹⁶

When you move from Arlington, Virginia to the capital of the midwestern state to perform full-time National Guard duty, you are not protected by the SCRA, including the provision that gives you the right to maintain your domicile in the state you left to enter active duty. For SCRA

¹³Service in the commissioned corps of PHS gives rise to rights under the Uniformed Services Employment and Reemployment Rights Act (USERRA), but service in the commissioned corps of NOAA does not. Please see Law Review 15002 (January 2015).

¹⁴50 U.S.C. 3911(2)(A) (emphasis supplied).

¹⁵10 U.S.C. 101(d)(1) (emphasis supplied).

¹⁶10 U.S.C. 101(d)(5) (emphasis supplied).

purposes, moving to a new state to perform full-time National Guard duty is like moving to a new state to take a new civilian job. The SCRA simply does not apply in this situation.

Q: Does a National Guard member who leaves a civilian job to perform full-time National Guard duty have the right to reinstatement in the civilian job at the end of the period of full-time National Guard duty?

A: Yes, if he or she meets the five conditions for reemployment under the Uniformed Services Employment and Reemployment Rights Act (USERRA). Like the SCRA, USERRA has definitions, but the USERRA definitions are different from the SCRA definitions.

USERRA defines the term “uniformed services” as follows:

The term "uniformed services" means the Armed Forces, the Army National Guard and the Air National Guard when engaged in active duty for training, inactive duty training, *or full-time National Guard duty*, the commissioned corps of the Public Health Service, System members of the National Urban Search and Rescue Response System during a period of appointment into Federal service under section 327 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, and any other category of persons designated by the President in time of war or national emergency.¹⁷

USERRA and the SCRA are equally important statutes for those who serve our country in uniform, but these statutes were enacted at different times and they protect different kinds of rights. Do not conflate USERRA coverage with SCRA coverage.

Please join or support ROA

This article is one of 1800-plus “Law Review” articles available at <https://www.roa.org/page/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.

¹⁷38 U.S.C. 4303(16) (emphasis supplied).

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 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:

Reserve Officers Association
1 Constitution Ave. NE
Washington, DC 20002