

## LAW REVIEW 17125<sup>1</sup>

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### **SCRA Coverage for National Guard Members on Title 32 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: In Law Review 17124 (December 2017), you wrote that National Guard personnel on “full-time National Guard duty” do not have rights under the Servicemembers Civil Relief Act (SCRA), although they do have rights under the Uniformed Services Employment and Reemployment Rights Act (USERRA). Are there any circumstances under which National Guard members on title 32 duty have SCRA rights?**

**A:** The SCRA applies to National Guard members on title 32 duty only under very limited and unusual circumstances.

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

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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 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.

<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 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](mailto:SWright@roa.org).

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

- **(A)** 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 ...<sup>3</sup>*

Section 502(f) of title 32 of the United States Code (U.S.C.) provides as follows:

- **(f)(1)** Under regulations to be prescribed by the Secretary of the Army or Secretary of the Air Force, as the case may be, a member of the National Guard may--
  - **(A)** without his consent, but with the pay and allowances provided by law; or
  - **(B)** with his consent, either with or without pay and allowances; be ordered to perform training *or other duty* in addition to that prescribed under subsection (a).
    - **(2)** The training or duty ordered to be performed under paragraph (1) may include the following:
      - (A)** *Support of operations or missions undertaken by the member's unit at the request of the President or Secretary of Defense.*
      - **(B)** Support of training operations and training missions assigned in whole or in part to the National Guard by the Secretary concerned, but only to the extent that such training missions and training operations--
        - **(i)** are performed in the United States or the Commonwealth of Puerto Rico or possessions of the United States; and
        - **(ii)** are only to instruct active duty military, foreign military (under the same authorities and restrictions applicable to active duty troops), Department of Defense contractor personnel, or Department of Defense civilian employees.

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<sup>3</sup> 50 U.S.C. 3911(2)(A) (emphasis supplied).

- **(3)** Duty without pay shall be considered for all purposes as if it were with pay.<sup>4</sup>

Under section 502(f)(2)(A), italicized above, Army National Guard soldiers and Air National Guard airmen can be ordered to active duty to support military operations or missions. This authority was utilized in the months following the terrorist attacks of 9/11/2001.

Before the terrorist attacks, airport security was provided under ad hoc arrangements that varied from airport to airport and that often relied on contractor employees. In response to the terrorist attacks, the President and Congress decided to establish the Transportation Security Administration (TSA), initially as part of the Department of Transportation and transferred to the Department of Homeland Security when it was established. It was necessary for the newly established TSA to recruit and train its initial staff, and that process took several months. In the interim, National Guard soldiers and airmen were called to active duty under section 502(f) to provide security at airports.

In December 2003, President George W. Bush signed into law the SCRA, as a long-overdue rewrite of the Soldiers' and Sailors' Civil Relief Act (SSCRA), which was originally enacted in 1917. Like the SCRA, the SSCRA did not apply to National Guard members on title 32 duty. Congress amended the SSCRA to provide civil relief protections to the National Guard soldiers and airmen performing months-long duty at civilian airports in the months following 9/11/2001. When Congress enacted the SCRA to replace the SSCRA, this provision was carried over unchanged. It is only in this limited and unusual circumstance that the SCRA applies to National Guard soldiers and airmen on title 32 duty.

**Q: What is the United States Code? What is title 10? What is title 32?**

**A:** Permanent federal statutes are codified in the United States Code, and that Code has 53 titles (broad subject areas). Sections are numbered consecutively within each title. Title 10 deals with the armed forces. Title 32 deals with the National Guard. Title 38 deals with veterans' affairs and includes USERRA. Title 50 deals with war and national defense and includes the SCRA.

If you were to enlist in the Texas Army National Guard, you would take two enlistment oaths and you would join two overlapping but legally distinct organizations.<sup>5</sup> The Army National Guard of the United States is one of the Reserve Components of the armed forces.<sup>6</sup> The Texas Army National Guard is the state defense force of Texas. As a member of the Army National

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<sup>4</sup> 32 U.S.C. 502(f) (emphasis supplied).

<sup>5</sup> When the Air Force split off from the Army and became a separate service in 1947, the Air National Guard was created as a similar hybrid federal-state organization.

<sup>6</sup> Our nation has seven Reserve Components. In order of size, 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 entities, while the other five components are purely federal.

Guard, you are subject to call by the President for national military emergencies, or you can volunteer for federal (title 10) active duty. At all other times, you are in a title 32 (state) status. While in the title 32 status, you engage in federally funded training duty, including drills and annual training.

USERRA protects your right to reinstatement in your civilian job after title 10 duty or title 32 duty, but the SCRA does not apply to title 32 duty, except in the limited circumstance discussed above. Many states have state laws that provide SCRA-type rights to National Guard soldiers and airmen while they are on title 32 duty.<sup>7</sup>

National Guard soldiers and airmen can be called to state active duty—called by the Governor, under state authority, paid with state funds, for state emergencies like hurricanes, floods, fires, riots, etc. USERRA does not apply to state active duty, but every state has a state law to protect the civilian jobs of National Guard members on state active duty.<sup>8</sup> When a state has a state equivalent of the SCRA, that law will generally apply to National Guard members on state active duty as well as title 32 duty.

#### **Update - March 2022<sup>9</sup>**

On January 5, 2021, President Trump signed into law the Johnny Isakson and David P. Roe, M.D. Veterans' Health Care Benefits Improvement Act of 2020.<sup>10</sup> The change provides protection to State active duty performed by National Guard Members under USERRA for most circumstances.<sup>11</sup> Therefore, both USERRA and the applicable state law protects the civilian jobs of Nation Guard members on State active duty.

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<sup>7</sup> Please see Law Review 17072 (July 2017).

<sup>8</sup> See *State Law Index*, RESERVE ORGANIZATION OF AMERICA; SERVICE MEMBERS LAW CENTER, <https://www.roa.org/page/StateLawIndex> (provides an article for each state about these state laws).

<sup>9</sup> Update by Second Lieutenant Lauren Walker, USCM.

<sup>10</sup> See 50 U.S.C. § 4303(13); 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).

<sup>11</sup> *Id.*