

USERRA's Definition of "Uniformed Services"

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[\(Update on Sam Wright\)](#)

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As I have explained in Law Review 15116 (December 2015) and many other articles, a person who leaves a civilian job (federal, state, local, or private sector) to perform service in the uniformed services and who meets the five conditions for reemployment under the Uniformed Services Employment and Reemployment Rights Act (USERRA) is entitled to reemployment in the civilian job that he or she left. What are the uniformed services?

¹ I invite the reader's attention to www.roa.org/lawcenter. You will find more than 1600 "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 1400 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 (VRRRA—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 VRRRA 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 VRRRA 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.

Section 4303 of USERRA³ defines 16 terms used in this law and 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.*⁴

Coverage of the armed forces and National Guard

USERRA does not define the term “armed forces,” but the term is defined in the definitions section of title 10 of the United States Code, as the Army, Navy, Marine Corps, Air Force, and Coast Guard.⁵ These armed forces have 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 organizations, while the other five reserve components are purely federal.

The definitions section of title 10 defines the term “Army National Guard” as follows:

The term "Army National Guard" means that part of the organized militia of the several States and Territories, Puerto Rico, and the District of Columbia, active and inactive, that--

- (A)** is a land force;
- (B)** is trained, and has its officers appointed, under the sixteenth clause of section 8, article I, of the Constitution;
- (C)** is organized, armed, and equipped wholly or partly at Federal expense; and
- (D)** is federally recognized.⁶

³ 38 U.S.C. 4303.

⁴ 38 U.S.C. 4303(16) (emphasis supplied).

⁵ 10 U.S.C. 101(a)(4).

⁶ 10 U.S.C. 101(c)(2). Section 101(c)(4) defined the term “Air National Guard” identically, except that it refers to that component as “an air force.” The 16th clause of Article I, Section 8 of the Constitution gives Congress the authority “To provide for organizing, arming, and disciplining the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.” United States Constitution, Article I, Section 8, Clause 16. Yes, it is capitalized just that way, in the style of the late 18th Century.

Josephine Smith enlisted in the Virginia Army National Guard. She has both a state (Virginia) status and a federal status. She is in her state status all the time, except when she is in her federal status. She is in her federal status only when she goes on active duty voluntarily or involuntarily. In that situation, she is serving as a member of the United States Army, and she has the right to reemployment under USERRA if she meets the five USERRA conditions.⁷

While in her state status, Josephine performs active duty for training (annual training), inactive duty training (drills), and perhaps full-time National Guard duty. USERRA protects her right to reemployment when she is absent from her civilian job (federal, state, local, or private sector) to perform such duty voluntarily or involuntarily, because USERRA expressly so provides.⁸

While in her state status, Josephine is also subject to call by the Governor of Virginia for state active duty. That is service called by the Governor, under state authority, paid with state funds, for state emergencies like riots, hurricanes, floods, fires, etc. State active duty is not covered by USERRA. If Josephine is to have the right to reinstatement in her civilian job after state active duty, it must be by state law.⁹

PHS Corps is covered by USERRA

The PHS commissioned corps is a uniformed service in the United States Department of Health and Human Services. This organization is specifically mentioned in USERRA's definition of "uniformed services." A person who leaves a civilian job to serve in the PHS commissioned corps and who meets the five USERRA conditions has the right to reemployment in his or her pre-service civilian job.

NOAA Corps is not covered by USERRA

Our nation has five armed forces¹⁰ and seven uniformed services.¹¹ All armed forces are uniformed services, but not all uniformed services are armed forces. As defined in the definitions section of title 10, the PHS commissioned corps is a uniformed service in the United States Department of Health and Human Services and the National Oceanic & Atmospheric Administration (NOAA) commissioned corps is a uniformed service in the United States Department of Commerce.¹²

⁷ Please see Law Review 15116 (December 2015) for a detailed discussion of the conditions.

⁸ 38 U.S.C. 4303(16).

⁹ Every state has a law protecting the civilian job rights of National Guard members on state active duty, but some of those laws are better than others. Please see our "state laws" section of the Reserve Officers Association "Law Center" website (see footnote 1) for 54 articles (50 states, the District of Columbia, Guam, Puerto Rico, and the United States Virgin Islands) on the state laws that protect National Guard members on state active duty.

¹⁰ 10 U.S.C. 101(a)(4).

¹¹ 10 U.S.C. 101(a)(5).

¹² Id.

But USERRA has its own definition of “uniformed services” and that definition controls for USERRA purposes. USERRA’s definition includes the PHS commissioned corps but not the NOAA commissioned corps.¹³ A person who leaves a civilian job to perform service in the NOAA commissioned corps does not have the right to reemployment.

Coverage of Urban Search & Rescue (US&R) personnel

As I have described in detail in Law Review 17011 (February 2017), President Obama signed the National Urban Search and Rescue Act¹⁴ on 12/12/2016. That act amended USERRA by providing for coverage for individuals who leave jobs with state or local governments or private employers (but not federal agencies) to serve as urban search and rescue personnel, locating injured and deceased persons trapped in rubble following earthquakes, tornadoes, terrorist explosions, and other tragic incidents and extricating them from these perilous situations. The act covers training for these personnel, under the cognizance of the Federal Emergency Management Agency (FEMA), as well as deployment for actual emergencies.

NDMS personnel are covered under another law

As I have described in detail in Law Review 100 (December 2003), members of the National Disaster Medical System (NDMS) have the right to USERRA reemployment rights when they are away from their regular civilian jobs for NDMS service, including training for emergency service. That right is conferred by a provision in title 42 of the United States Code. That provision reads as follows:

(3) Employment and reemployment rights.

(A) In general. Service as an intermittent disaster-response appointee when the Secretary [of Health & Human Services] activates the National Disaster Medical System or when the individual participates in a training program authorized by the Assistant Secretary for Preparedness and Response or a comparable official of any Federal agency specified in subsection (a)(2)(B) shall be deemed "service in the uniformed services" for purposes of chapter 43 of title 38, United States Code pertaining to employment and reemployment rights of individuals who have performed service in the uniformed services (regardless of whether the individual receives compensation for such participation). All rights and obligations of such persons and procedures for assistance, enforcement, and investigation shall be as provided for in chapter 43 of title 38, United States Code.

(B) Notice of absence from position of employment. Preclusion of giving notice of service by necessity of Service as an intermittent disaster-response appointee when the

¹³ The exclusion of the NOAA Corps from USERRA coverage was intentional. Please see Law Review 15002 (January 2015).

¹⁴ Public Law 114-326, 130 Stat. 1968.

Secretary activates the National Disaster Medical System shall be deemed preclusion by "military necessity" for purposes of section 4312(b) of title 38, United States Code, pertaining to giving notice of absence from a position of employment. A determination of such necessity shall be made by the Secretary, in consultation with the Secretary of Defense, and shall not be subject to judicial review.¹⁵

Other categories designated by the President

USERRA's definition of "uniformed service" also includes "any other category of persons designated by the President in time of war or national emergency."¹⁶ This authority to designate other categories of persons as a "uniformed service" for USERRA purposes has not been utilized since USERRA was signed into law on 10/13/1994.

In the weeks following the Japanese attack on Pearl Harbor on 12/7/1941, civilian construction workers on Wake Island were pressed into service with the United States Marines trying to fend off Japanese attacks on the island. Under circumstances like that, it is conceivable that some future President could designate a category of persons to be a "uniformed service."

¹⁵ 42 U.S.C. 300hh-11(d)(3).

¹⁶ 38 U.S.C. 4303(16) (final clause).