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Yes, Reservists Can Be Called up for Domestic Emergencies

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[Update on Sam Wright](#)

1.3.1.2—Character and duration of service

1.8—Relationship between USERRA and other laws/policies

9.0--Miscellaneous

Q: I am a long-retired Air Force Reserve Colonel and a life member of the Reserve Officers Association (ROA). I read with great interest the “Reserve Voice” electronic newsletter that I receive from ROA twice per month, and I pay particular attention to your new “Law Review” articles near the bottom of each issue.

I also read with great interest the “Smart Brief” that I receive from ROA. The issue of 9/17/2018 reported that 140 Air Force Reservists of the 920th Rescue Wing deployed to Georgia recently for Hurricane Florence and that the same unit deployed to Texas a year ago for Hurricane Harvey.

¹ I invite the reader’s attention to www.roa.org/lawcenter. You will find more than 1700 “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 1500 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. For 42 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.

In my long Air Force Reserve career, I never heard of reservists (as opposed to National Guard members) being deployed for domestic emergencies. What has changed?

A: On 12/31/2011, President Barack Obama signed into law the National Defense Authorization Act (NDAA) for Fiscal Year 2012.³ Section 515(a)(1) of NDAA 2012 added a new provision for involuntary call-up of Air Force Reserve, Army Reserve, Navy Reserve, and Marine Corps Reserve members. That provision reads as follows:

- (a) Authority.** When a Governor requests Federal assistance in responding to a major disaster or emergency (as those terms are defined in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act ([42 U.S.C. 5122](#))), the Secretary of Defense may, *without the consent of the member affected*, order any unit, and any member not assigned to a unit organized to serve as a unit, of the Army Reserve, Navy Reserve, Marine Corps Reserve, and Air Force Reserve to active duty for a continuous period of not more than 120 days to respond to the Governor's request.
- (b) Exclusion from strength limitations.** Members ordered to active duty under this section shall not be counted in computing authorized strength of members on active duty or members in grade under this title or any other law.
- (c) Termination of duty.** Whenever any unit or member of the reserve components is ordered to active duty under this section, the service of all units or members so ordered to active duty may be terminated by order of the Secretary of Defense or law.⁴

The National Guard (Air and Army) is a hybrid federal-state organization. In their state status, National Guard members are subject to call by the Governor for state active duty (called by the Governor, under state authority, paid with state funds, for state emergencies like natural or man-made disasters). Disaster mitigation and recovery is the principal mission of the National Guard in its state status.

In recent years, there have been several major hurricanes that have swamped the capacity of the National Guard, even with interstate cooperation. Active duty soldiers, sailors, airmen, and Marines have been deployed to respond to major natural disasters,⁵ and Congress acted in 2011 to provide authority to call up reservists for such missions.

Q: If an Air Force Reservist is called up for a domestic emergency, under 10 U.S.C. 12304a, does he or she have the right to reemployment in his or her civilian job under the Uniformed Services Employment and Reemployment Rights Act (USERRA)?

³ Public Law 112-81, 125 Stat. 1394. The citation means that this was the 81st new Public Law enacted during the 112th Congress (2011-12). You can find this Public Law in Volume 125 of *Statutes at Large*, starting on page 1394.

⁴ 10 U.S.C. 12304a (emphasis supplied). Do not refer to this section as 12304(a)—that is subsection (a) of section 12304. Section 12304a is a separate section that comes after section 12304 and before section 12305.

⁵ Coast Guard personnel, active and reserve, have always responded to natural disasters of a maritime nature, and lifesaving is one of the principal missions of the Coast Guard.

A: Yes. Such duty clearly is within USERRA's definition of "service in the uniformed services."⁶ If the reservist meets the five USERRA conditions for reemployment, he or she will have the right to prompt reinstatement in the civilian job, just like a person returning from service in a foreign emergency.

Q: Does involuntary service under section 12304a count toward exhausting the individual's five-year cumulative limit under USERRA?

A: No.

One of the five conditions for reemployment is that the person's cumulative period or periods of uniformed service, with respect to the employer relationship for which he or she seeks reemployment, must not have exceeded five years. Under section 4312(c) of USERRA,⁷ there are nine exemptions from the five-year limit. That is, there are nine kinds of service that do not count toward exhausting the individual's five-year limit.

Under section 4312(c)(4)(A), *involuntary* service is exempted from the limit. That subsection lists the sections of title 10 and title 14 (Coast Guard) that provide for involuntary call-up, and duty under those sections is exempted from the computation of the individual's five-year limit.

When Congress enacted section 12304a in 2011, providing for the involuntary call-up of reservists for domestic emergencies, Congress should have simultaneously amended section 4312(c)(4)(A) by adding section 12304a to the list of title 10 sections duty under which does not count toward the five-year limit, but that was not done. That oversight was corrected four years later when Congress enacted NDAA 2016.⁸

⁶ 38 U.S.C. 4303(13).

⁷ 38 U.S.C. 4312(c).

⁸ Please see Law Review 15108 (November 2015). The 2015 amendment to section 4312(c)(4)(A) also added section 12304b, another new 2011 section that provides for involuntary call-up of Reserve Component personnel.