

Look to State Law for Protection of Civilian Jobs of National Guard Members on State Active Duty

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

1.1.3.3—USERRA applies to National Guard service

1.8—Relationship between USERRA and other laws/policies

Q: I am a Captain in the New Jersey (NJ) Army National Guard (NJARNG) and a member of the Reserve Officers Association. I have read with great interest many of your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA) and related laws.

I live in NJ, but my civilian job is across the Hudson River in New York City. As a member of the NJARNG, I routinely perform active duty for training and inactive duty training (drills) to maintain my readiness for the possibility of being called to federal active duty, and I have

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 (VRRRA—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 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.

been called to duty involuntarily once already and may be again. I can also volunteer for federal active duty. I am also subject to call by the Governor of NJ for state active duty in state emergencies like hurricanes, tornadoes, riots, etc.

It is my understanding that USERRA protects my right to reinstatement in my civilian job if I leave that job for voluntary or involuntary military duty or training under title 10 or title 32 of the United States Code, but USERRA does not apply to state active duty. Is my understanding correct? What law (if any) protects my right to reinstatement in my New York City job if I am called to state active duty by the Governor of NJ?

A: You are correct that USERRA gives you the right to reemployment in your civilian job (including being treated as if you had been continuously employed, for seniority and pension purposes) if you leave the job for “service in the uniformed services” and if you meet the five USERRA conditions.³ USERRA’s definition of “service in the uniformed services” includes active duty, active duty for training, inactive duty training, full-time National Guard duty, and funeral honors duty under title 10 or title 32 of the United States Code, but it does not include state active duty.⁴ If National Guard members are to have reemployment rights after state active duty, it must be by state law.⁵

Every state has a state law that protects the civilian jobs of National Guard members on state active duty, but some of those laws are better than others. Please see the “state laws” section of our website, www.roa.org/lawcenter. You will find 54 articles (50 states, the District of Columbia, Guam, Puerto Rico, and the Virgin Islands) about these state laws.

NJ has a law that gives members of the NJ Army or Air National Guard the right to reinstatement in their civilian jobs after state active duty,⁶ but of course NJ law does not apply across the state line in the State of New York (NY). NY has a law protecting the civilian jobs of members of the NY ARNG or ANG who are called to state active duty by the Governor of NY.⁷

³ You must have left a civilian job (federal, state, local, or private sector) to perform voluntary or involuntary uniformed service, and you must have given your employer prior oral or written notice. Your cumulative period or periods of uniformed service, with respect to the employer relationship for which you seek reemployment, must not have exceeded five years. All involuntary service and some voluntary service is exempted from the computation of your five-year limit. Please see Law Review 16043 (May 2016). You must have been released from the period of service without having received a disqualifying bad discharge from the military. After release from the period of service, you must have been timely in reporting back to work or applying for reemployment. Please see Law Review 15116 (December 2015) for a detailed discussion of USERRA’s eligibility criteria.

⁴ 38 U.S.C. 4303(13).

⁵ State active duty is duty that is called by the Governor, under state authority, paid with state funds, for state emergencies like hurricanes, riots, etc.

⁶ N.J. Stat. Ann. Section 38A:1-2(a).

⁷ NY law gives employees in NY the right to reemployment after a qualifying period of “military service.” The definition of “military service” includes “active duty in the military service *of the state* pursuant to an order *of the governor* issued pursuant to section 6 or 7 of this chapter.” NY Military Law Section 301(1) (emphasis supplied). It

If you must leave your NY civilian job for state active duty as called by the Governor of NJ, no federal or state law requires your NY employer to reinstate you in your civilian job upon completion of the period of state active duty. This is a loophole that needs to be closed.

Q: My friend Mary Jones lives in NY and is a Sergeant in the NY ARNG, but her civilian job is in Newark, NJ. If she is called to state active duty by the Governor of NY, does she fall into the same loophole?

A: Yes. NJ law protects the civilian jobs of members of the “militia,” and that term is defined as “all the military forces *of this state*.”⁸

Q: Alexander Adams is a member of my NJARNG unit. He lives in Camden, NJ. His civilian job is across the Delaware River in Philadelphia, Pennsylvania (PA). Does he have the same problem?

A: Yes. The PA law protects only National Guard members of PA.⁹

Q: Brenda Barnes lives in southern NJ and is a member of the NJARNG. Her civilian job is across the state line in Delaware (DE). If she is called to state active duty by the Governor of NJ, does she have a legally enforceable right to reinstatement in her DE job?

A: Yes. The DE law protects the civilian jobs of National Guard members on state active duty and is not limited to DE National Guard members but also includes National Guard members of other states.¹⁰

Efforts to close this loophole

In 2004, the Department of Defense (DOD) created the Defense State Liaison Office (DSLO), and that agency has ten regional representatives who represent the interests of DOD, service members, and military families in presentations to Governors and state legislators. The Reserve Officers Association (ROA) has been working with DSLO on this National Guard issue since 2014. When this effort began, only 12 states had laws that protected the civilian jobs of National Guard members *of other states* who had civilian jobs in the state. Due to the efforts of DSLO, that number is now up to 40, but several major states remain in the “to do” category. The states that still need to close this loophole are Colorado, Iowa, Maryland, New Hampshire, New

is clear from the text that “the governor” is the Governor of NY and that “the state” is the State of NY. Thus, this section provides no protection to a member of the National Guard of NJ or some other state.

⁸ N.J. Stat. Ann. Section 38A:1-2(a). “This state” clearly means NJ, not NY or some other state.

⁹ Pennsylvania Consolidated Statutes Annotated Section 7309.

¹⁰ Delaware Code Annotated Title 20, Section 905.

Jersey, New York, North Dakota, Pennsylvania, South Dakota, and Tennessee. Readers: Please contact your state legislators to bring this issue to their attention, especially if you live in one of these 10 states.

As I have explained in detail in Law Review 16103 (October 2016), we are judging the quality of each state's law based on four questions:

- a. Does the state law protect a private sector employee who is on state active duty?
- b. Does the state law protect a public sector (state or local government) employee who is on state active duty?
- c. Does the state law have an adequate enforcement mechanism for the employee who has lost his or her civilian job because of having been on state active duty?
- d. Does the state law protect a member of the National Guard *of another state* who has a civilian job in this state and who is called to state active duty by the Governor of the other state?

For questions a and b, the answer is YES for every state. Here is our chart for questions c and d:

Alabama

- c. No
- d. Yes

Alaska

- c. Yes
- d. Yes

Arizona

- c. Yes
- d. Yes

Arkansas

- c. Yes
- d. Yes

California

- c. Yes
- d. Yes

Colorado

- c. Yes
- d. No

Connecticut

c. Yes

d. Yes

Delaware

c. Yes

d. Yes

Florida

c. Yes

d. Yes

Georgia

c. Yes

d. Yes

Hawaii

c. Yes

d. Yes

Idaho

c. Yes

d. Yes

Illinois

c. Yes

d. Yes

Indiana

c. No

d. Yes

Iowa

c. Yes

d. No

Kansas

c. Yes

d. Yes

Kentucky

c. Yes

d. Yes

Louisiana

c. Yes

d. Yes

Maine

c. Yes

d. Yes

Maryland

c. Yes

d. No

Massachusetts

c. Yes

d. Yes

Michigan

c. No

d. Yes

Minnesota

c. No

d. Yes

Mississippi

c. Yes

d. Yes

Missouri

c. Yes

d. Yes

Montana

c. Yes

d. Yes

Nebraska

c. Yes

d. Yes

Nevada

c. Yes

d. Yes

New Hampshire

- c. Yes
- d. No

New Jersey

- c. Yes
- d. No

New Mexico

- c. Yes
- d. Yes

New York

- c. Yes
- d. No

North Carolina

- c. Yes
- d. Yes

North Dakota

- c. Yes
- d. No

Ohio

- c. Yes
- d. Yes

Oklahoma

- c. Yes
- d. Yes

Oregon

- c. Yes
- d. Yes

Pennsylvania

- c. Yes
- d. No

Rhode Island

- c. Yes
- d. Yes

South Carolina

c. Yes

d. Yes

South Dakota

c. No

d. No

Tennessee

c. Yes

d. No

Texas

c. Yes

d. Yes

Utah

c. Yes

d. Yes

Vermont

c. Yes

d. Yes

Virginia

c. Yes

d. Yes

Washington

c. Yes

d. Yes

West Virginia

c. Yes

d. Yes

Wisconsin

c. Yes

d. Yes

Wyoming

c. Yes

d. Yes

Guam

- c. Yes
- d. No

Puerto Rico

- c. Yes
- d. No

Virgin Islands

- c. Yes
- d. No

District of Columbia

The District of Columbia National Guard has no state status. The Mayor of DC has no authority to mobilize the DC National Guard. If the Mayor needs soldiers or airmen for a local emergency, she would need to ask the President to mobilize them. In that case, they would be on federal active duty, and USERRA would protect their civilian jobs. DC law does not protect the civilian job of a member of the National Guard of Virginia, Maryland, or some other state who has a civilian job in DC.