

LAW REVIEW¹ 19074

August 2019

State Laws Protecting the Civilian Jobs of National Guard Members on State Active Duty—Do they Apply to Federal Employees?

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[Update on Sam Wright](#)

1.1.1.8—USERRA applies to the Federal Government

1.1.3.3—USERRA applies to National Guard service

1.3.1.1—Left job for service and gave prior notice

1.8—Relationship between USERRA and other laws/policies

2.0—Paid military leave for government employees

Q: I am a Sergeant Major (E-9) in the Illinois Army National Guard. On the civilian side, I am a GS-7 employee of the United States Department of Labor (DOL) at the DOL regional office in Chicago. I have read with great interest several of your “Law Review” articles about the

¹ I invite the reader's attention to www.roa.org/lawcenter. You will find more than 1800 "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 1600 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 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.

Uniformed Services Employment and Reemployment Rights Act (USERRA) and other laws that are especially pertinent to those of us who serve in the National Guard or Reserve.

As a member of the Illinois Army National Guard, I perform three kinds of military duty and training:

- a. **Voluntary or involuntary duty under title 10 of the United States Code.**
- b. **Voluntary or involuntary training or duty under title 32 of the United States Code.**
- c. **State active duty—called by the Governor, under state authority, paid with state funds, for state emergencies like riots, floods, tornadoes, etc.**

It is my understanding that USERRA protects my civilian job when I am away from that job for voluntary or involuntary duty or training under title 10 or title 32, but USERRA does not apply to state active duty. Is my understanding correct?

A: Yes, USERRA applies to both title 10 duty and title 32 duty, but not to state active duty. USERRA applies to the Federal Government, as a civilian employer, and to state and local governments and private employers.

Q: Why does USERRA not apply to state active duty?

A: To have the right to reemployment under USERRA, you must meet five simple conditions. The first condition is that you left your civilian job *to perform service in the uniformed services as defined by USERRA*. USERRA's definition of "service in the uniformed services" is broad, but it does not include state active duty.³

Q: I have read with great interest the article (by Kyle Helmick) titled "Illinois Law Protecting National Guard Members Performing State Active Duty" in the Illinois portion of your "state leave laws" section. In that article, Mr. Helmick quotes 20 Illinois Consolidated Statutes section 1805/30.15 and says that the civilian jobs of National Guard members are protected when they perform state active duty. Does that section of state law apply to federal employees like me?

A: No. This state law and other state laws protecting National Guard members on state active duty do not apply to the Federal Government. Section 1805/30.15 applies to the State of Illinois and its political subdivisions (counties, cities, school districts, etc.) and to private employers in Illinois. A state law that purported to regulate the relationship between the Federal Government and its employees would probably be unconstitutional.⁴

³ 38 U.S.C. 4303(13).

⁴ See *McCulloch v. Maryland*, 17 U.S. 316 (1819).

Q: Does that mean that I will lose my federal civilian job if I respond to the call of the Governor of Illinois to perform state active duty?

A: Probably not. Under section 6323(b) of title 5 of the United States Code, you have the right to 22 days of military leave, as a National Guard member, for state active duty in support of civil authorities. Here is the text of section 6323:

Military leave; Reserves and National Guardsmen

(a)

(1) Subject to paragraph (2) of this subsection, an employee as defined by section 2105 of this title or an individual employed by the government of the District of Columbia, permanent or temporary indefinite, is entitled to leave without loss in pay, time, or performance or efficiency rating *for active duty, inactive-duty training (as defined in section 101 of title 37), funeral honors duty (as described in section 12503 of title 10 and section 115 of title 32), or engaging in field or coast defense training under sections 502-505 of title 32 as a Reserve of the armed forces or member of the National Guard.* Leave under this subsection accrues for an employee or individual at the rate of 15 days per fiscal year and, to the extent that it is not used in a fiscal year, accumulates for use in the succeeding fiscal year until it totals 15 days at the beginning of a fiscal year.

(2) In the case of an employee or individual employed on a part-time career employment basis (as defined in section 3401(2) of this title), the rate at which leave accrues under this subsection shall be a percentage of the rate prescribed under paragraph (1) which is determined by dividing 40 into the number of hours in the regularly scheduled workweek of that employee or individual during that fiscal year.

(3) The minimum charge for leave under this subsection is one hour, and additional charges are in multiples thereof.

(b) Except as provided by section 5519 of this title, an employee as defined by section 2105 of this title or an individual employed by the government of the District of Columbia, permanent or temporary indefinite, who--

(1) is a member of a Reserve component of the Armed Forces, as described in section 10101 of title 10, or the National Guard, as described in section 101 of title 32; and
(2)(A) *performs, for the purpose of providing military aid to enforce the law or for the purpose of providing assistance to civil authorities in the protection or saving of life or property or the prevention of injury--*

- **(i)** Federal service under section 331, 332, 333, or 12406 of title 10, or other provision of law, as applicable, or
- **(ii)** *full-time military service for his State, the District of Columbia, the Commonwealth of Puerto Rico, or a territory of the United States; or*
- **(B)** *performs full-time military service as a result of a call or order to active duty in support of a contingency operation as defined in section 101(a)(13) of title 10; is entitled, during and because of such service, to leave without loss of, or reduction in,*

pay, leave to which he otherwise is entitled, credit for time or service, or performance or efficiency rating. *Leave granted by this subsection shall not exceed 22 workdays in a calendar year.* Upon the request of an employee, the period for which an employee is absent to perform service described in paragraph (2) may be charged to the employee's accrued annual leave or to compensatory time available to the employee instead of being charged as leave to which the employee is entitled under this subsection. The period of absence may not be charged to sick leave.

(c) An employee as defined by section 2105 of this title or an individual employed by the government of the District of Columbia, who is a member of the National Guard of the District of Columbia, is entitled to leave without loss in pay or time for each day of a parade or encampment ordered or authorized under title 39, District of Columbia Code. This subsection covers each day of service the National Guard, or a portion thereof, is ordered to perform by the commanding general.

(d)

(1) A military reserve technician described in section 8401(30) is entitled at such person's request to leave without loss of, or reduction in, pay, leave to which such person is otherwise entitled, credit for time or service, or performance or efficiency rating for each day, not to exceed 44 workdays in a calendar year, in which such person is on active duty without pay, as authorized pursuant to section 12315 of title 10, under section 12301(b) or 12301(d) of title 10 for participation in operations outside the United States, its territories and possessions.

(2) An employee who requests annual leave or compensatory time to which the employee is otherwise entitled, for a period during which the employee would have been entitled upon request to leave under this subsection, may be granted such annual leave or compensatory time without regard to this section or section 5519.⁵

When you use your basic 15 days of *paid* military leave under 5 U.S.C. 6323(a), you receive your full federal salary without regard to whether it is more than, less than, or equal to your military pay on active duty. But when you use the additional 22 days under section 6323(b) you only receive the difference (if any) between your regular federal civilian salary and your military pay on active duty (including state active duty).⁶

Q: My military pay on active duty (as an E-9) is greater than my regular federal salary as a GS-7. Does that mean that I don't get paid military leave for support of civil authorities under section 6323(b) of title 5?

A: You don't get differential pay because there is not differential to make up, but you still get the 22 days of military leave under section 6323(b).

⁵ 5 U.S.C.6323 (emphasis supplied).

⁶ 5 U.S.C. 5519. Please see Law Review 19073, the immediately preceding article in this series.

Q: I did not perform any state active duty during Calendar Year 2018. Does that mean that I carried over 22 days of this special military leave to Calendar Year 2019? Can I use that carried over military leave in 2019?

A: No. Section 6323(a) provides for a limited carry over from one fiscal year to the next of the 15 basic days.⁷ Section 6323(b) does not provide for carry over. The section 6323(b) military leave that you did not use in calendar year 2018 was lost at midnight on 12/31/2018.

Q: During Fiscal Year 2019, so far, I have used only ten days of my 15-day entitlement to paid military leave under section 6323(a). Can I use the extra five days for state active duty?

A: No. You can use your 15 days of paid military leave under section 6323(a) for active duty, inactive duty training [drills], funeral honors duty, or engaging in field or coast defense training. You cannot use your paid military leave under section 6323(a) for state active duty.

Q: As a DOL employee, I earn six hours of annual leave per pay period, and I almost never use annual leave. I have a large balance of annual leave in the bank. Can I use that annual leave to perform state active duty beyond the 22 days per calendar year?

A: Yes.⁸

Q: We have had devastating floods in Illinois this year. As a Sergeant Major in the Illinois Army National Guard, I have been leading a group of Illinois Army National Guard soldiers on active duty, helping communities to clean up and recover. The Governor and the Adjutant General of Illinois want me to remain on state active duty and to keep leading this group until the job is done, but I have used up my 22 days of military leave under section 6323(b) and I am getting close to using up my accrued annual leave in the bank. Is there anything that can be done to enable me to keep serving without losing my civilian job at DOL?

A: If the Governor were to send a nice letter to the United States Secretary of Labor, it is likely that the Secretary would find a way to make an accommodation. But you do not have the right to leave, even without pay, beyond the 22 days and your accrued annual leave.

⁷ For purposes of the basic 15 days of paid military leave, the fiscal year (October 1 through September 30) counts. The extra 22 days is based on the calendar year. Yes, this is confusing, but that is the way the law is written.

⁸ Section 6323(b) provides: "Upon the request of an employee, the period for which an employee is absent to perform service described in paragraph (2) [support of civil authorities] may be charged to the employee's accrued annual leave or to compensatory time available to the employee instead of being charged as leave to which the employee is entitled under this subsection. The period of absence may not be charged to sick leave." 5 U.S.C. 6323(b).

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

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:

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