

LAW REVIEW¹ 20025

March 2020

Reemployment Rights after State Active Duty

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

[About Sam Wright](#)

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 Army National Guard and a member of Reserve Organization of America (ROA).³ I have read with great interest many of your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA).

¹ I invite the reader’s attention to www.roa.org/lawcenter. You will find more than 1900 “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, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997. I am the author of more than 1700 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.

³ At its September 2018 annual convention, the Reserve Officers Association amended its Constitution to make all service members (E-1 through O-10) eligible for membership and adopted a new “doing business as” (DBA) name: Reserve Organization of America. The full name of the organization is now the Reserve Officers Association DBA the Reserve Organization of America. The point of the name change is to emphasize that our organization represents the interests of all Reserve Component members, from the most junior enlisted personnel to the most senior officers. Our nation has seven Reserve Components. In ascending 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

On the civilian side, I am a paralegal for a major law firm in New York City—let's call it Dewey, Cheatham & Howe or DCH. As a National Guard member, I have performed voluntary and involuntary active duty under title 10 of the United States Code as well as training duty under title 32 of the United States Code. As a member of the New Jersey Army National Guard, I am also subject to being called by the Governor of New Jersey for state active duty, for state emergencies like Hurricane Sandy, riots, floods, etc.

If I am called to state active duty by the Governor of New Jersey, is my civilian job at the law firm in New York City protected by USERRA? Is my job protected by New Jersey law? By New York law?

A: In this situation, you have no legally enforceable right to your job back at DCH, the New York City law firm. USERRA protects your right to reinstatement in your civilian job when you are away from that job for military service or training under title 10 or title 32 of the United States Code. USERRA does not apply to *state active duty*—called by the Governor, under state authority, paid with state funds, for state emergencies. If National Guard members are to have the right to reinstatement in their civilian jobs after state active duty, it must be by state law.

Like every other state, New Jersey has enacted a law that protects the civilian job rights of National Guard members on state active duty. The problem is that a law enacted by the legislature in Trenton does not apply across the Hudson River in New York.

Like every other state, New York has enacted a law that protects the civilian jobs of National Guard members. Unfortunately, the New York law only protects National Guard members when they perform *New York* state active duty. New York's Military Law defines the term “military service” as follows:

The term “military service” means duty performed by a person, male or female, in the active military service of the United States as defined in section one of this chapter *and active duty in the military service of the state pursuant to an order of the governor issued pursuant to section six or seven of this chapter.*⁴

Reserve, and the Army National Guard. The number of service members in these seven components is almost equal to the number of personnel in the Active Components of the armed forces, so Reserve Component personnel make up almost half of our nation's pool of trained and available military personnel. Our nation is more dependent than ever before on the Reserve Components for national defense readiness. Almost a million Reserve Component personnel have been called to the colors since the terrorist attacks of 9/11/2001.

⁴ New York Military Law, section 301(1) (emphasis supplied).

It is clear from the context that “the state” refers to the State of New York, and “the governor” refers to the Governor of New York. The New York law does not protect your civilian job in New York City when you are on *New Jersey* state active duty.

Q: My friend Mary Jones lives in New York and is a member of the New York Army National Guard, but her civilian job is in Newark, New Jersey. If she is called to state active duty by the Governor of New York, does she have a legally enforceable right to reinstatement to her New Jersey job?

A: Fortunately, yes, because of a very recent (1/9/2020) amendment of New Jersey law.

Section 38:23C-20(a) of New Jersey Statutes Annotated (NJS) accords reemployment rights to a person who leaves a civilian job in New Jersey “to perform military service.”⁵ Subsection (c) of that same section provides:

The benefits, rights and privileges granted to persons in the military service by this section shall be extended to and be applicable to a member of the organized militia or of a reserve component of the Armed Forces of the United States and who, because of such membership is discharged by his employer or whose employment is suspended by his employer because of such membership and who, being qualified to perform the duties of such position, makes application for reemployment or termination of the period of his suspension within 10 days after such discharge or suspension.

For the purposes of this section, “organized militia” means the Army and Air National Guard of New Jersey or any other state, and “military service” includes National Guard active duty ordered by a Governor of a state.⁶

Q: How do other states treat state active duty performed by National Guard members who have civilian jobs in the state but who are members of the National Guard of some other state?

A: I addressed this issue (coverage for the National Guard member of State A who has a civilian job in State B) in Law Review 45 (January 2002) and in Law Review 14014 (January 2014). In our “State Leave Laws” section of our website, you will find an article for each state about this issue.⁷

⁵ NJS section 38:23C-20(a).

⁶ NJS section 38:23C-20(c) (emphasis supplied). The italicized paragraph was added by 2020 Chapter 286, section 2, effective January 9, 2020.

⁷ I want to thank three law students who are now lawyers for their most helpful work in researching and writing these articles. They are Austin Geisel and Kyle Helmick of Georgetown University Law School and Nathan Richardson of George Washington University Law School.

In the Department of Defense (DOD), there is an organization called the Defense State Liaison Office (DSLO), which has been described as follows:

Purpose. Since many issues surrounding quality of life and family well-being can only be addressed by states, the Department of Defense (DoD) started the USA4 Military Families initiative, worked through the DoD-State Liaison Office (DSLO), to engage state policymakers, not-for-profit associations, concerned business interests, and other state leaders about the needs of military members and their families. By developing state/military partnerships, the DoD seeks to work with states to remove unnecessary barriers and significantly improve the quality of life for military families.

What we do. The DSLO has 10 Liaisons across the country working with the many state leaders who are concerned for the welfare of the Active Duty, Guard, and Reserve Service members and their families living within their borders. We broadly educate state leaders on the 10 key issues, and as this education process proceeds, build relationships with interested state leaders. If one of these leaders (normally members of the legislature) wants to tackle an issue, we can provide assistance in the form of identifying 'best practice' legislation from other states and providing testimony as it is requested.⁸

In 2014, I persuaded DSLO to add this issue to its priority list, and largely through the efforts of DSLO 31 states fixed this problem by amending the coverage of "a member of the National Guard of this state" to "a member of the National Guard of this state or any other state" or words to that effect. Those 31 states are Alabama, Alaska, Arizona, California, Connecticut, Florida, Georgia, Illinois, Indiana, Kansas, Kentucky, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Jersey (very recently), New Mexico, North Carolina, North Dakota, Ohio, Rhode Island, South Carolina, South Dakota, Virginia, West Virginia, Wisconsin, and Wyoming.

When DSLO began this reform effort in 2014, there were 12 states that had already fixed this problem: Arkansas, Delaware, Hawaii, Idaho, Louisiana, Maine, Oklahoma, Oregon, Texas, Utah, Vermont, and Washington.

There are seven states where this reform is still needed: Colorado, Iowa, Maryland, New Hampshire, New York, Pennsylvania, and Tennessee. Readers in those states: Please contact your state legislators.

⁸ See <https://www.ncsl.org/documents/environ/DSLO-mission2013.pdf>.

Please join or support ROA

This article is one of 1900-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:

Reserve Officers Association
1 Constitution Ave. NE
Washington, DC 20002