

LAW REVIEW¹ 20037

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USERRA Coverage of National Guard Members

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[About Sam Wright](#)

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Q: I am a retired Army Reserve Colonel and a life member of the Reserve Organization of America (ROA).³ For many years, I have read with great interest your “Law Review” articles

¹I invite the reader’s attention to www.roa.org/lawcenter. You will find more than 2000 “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.

²BA 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.

³At 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 Reserve, and the Army National Guard. The number of service members in these seven components is almost equal to the number of

about the Uniformed Services Employment and Reemployment Rights Act (USERRA) and other laws that are especially pertinent to those who serve our country in uniform.

Recently, I have read that National Guard personnel in many states have deployed National Guard personnel as part of the national response to the COVID-19 emergency. Are the civilian jobs of those National Guard personnel protected by USERRA?

A: Sometimes. When an individual (let's call her Josephine Smith) enlisted in the Army National Guard, she joined two overlapping but legally distinct entities. She joined the Army National Guard of the United States (ARNGUS), which is one of the seven Reserve Components of the United States armed forces.⁴ She also joined the Army National Guard of her specific state—let's say New York. The Army National Guard of New York is the modern-day equivalent of the New York Militia.⁵

In her ARNGUS (federal) status, Josephine can volunteer for or can be involuntarily called to federal active duty under title 10 of the United States Code. In that situation, her civilian job is protected by USERRA (the federal law), just like a member of the Army Reserve or any other Reserve Component.

Josephine is in a “federal status” or “title 10 status” when she volunteers for or is called to federal active duty under title 10. The rest of the time, she is in a “state status” or “title 32 status.” This includes the days when she performs no military duty, the days when she performs state active duty, and the days when she performs training or other duty under title 32 of the United States Code. Although Josephine is in a state status when performing title 32 duty, *USERRA protects her civilian job at those times.*

Section 4303 of USERRA⁶ defines 16 terms used in this law. When a statute defines a term, that definition controls for purposes of that statute, not the definition used somewhere else in the United States Code or the dictionary definition.

Section 4303(16) of USERRA defines the term “uniformed services” as follows:

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 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. More than a million Reserve Component personnel have been called to the colors since the terrorist attacks of 9/11/2001.

⁴ In order of size, the seven components are ARNGUS, the Army Reserve, the Air National Guard of the United States (ANGUS), the Air Force Reserve, the Navy Reserve, the Marine Corps Reserve, and the Coast Guard Reserve. Like the ARNGUS, the ANGUS is a hybrid federal-state organization. The other five components are purely federal entities.

⁵ New York has another military organization, the New York Naval Militia (NYNM). The NYNM is a purely state entity. It does not receive federal funding, and its members are not subject to being called up by the Federal Government.

⁶ 38 U.S.C. 4303.

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.⁷

Section 4303(13) provides:

The term “service in the uniformed services” means the performance of duty on a voluntary or involuntary basis in a uniformed service under competent authority and includes active duty, active duty for training, initial active duty for training, inactive duty training, *full-time National Guard duty*, a period for which a person is absent from a position of employment for the purpose of an examination to determine the fitness of the person to perform any such duty, a period for which a System member of the National Urban Search and Rescue Response System is absent from a position of employment due to an appointment into Federal service under section 327 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, and a period for which a person is absent from employment for the purpose of performing funeral honors duty as authorized by section 12503 of title 10 or section 115 of title 32.⁸

USERRA protects the civilian jobs of National Guard personnel on title 32 duty, as well as title 10 duty. USERRA does not apply to *state active duty*—called by the Governor, under state authority, paid with state funds, for state emergencies. Every state has a state law that protects the civilian jobs of National Guard members on state active duty.⁹

New York and several other states have requested that the Federal Government use its authority under title 32 to call up National Guard troops and pay them for their service in the COVID-19 emergency. New York’s request was approved, and other requests are pending. When National Guard personnel are serving under title 32 of the United States Code, USERRA protects their civilian jobs.

Q: Can members of the Army Reserve, Air Force Reserve, Navy Reserve, and Marine Corps Reserve be called to active duty for domestic emergencies?

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

⁸ 38 U.S.C. 4303(13) (emphasis supplied).

⁹ Please see the “state leave 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 United States Virgin Islands) about these state and territorial laws. Some of the laws are much better than others.

A: Yes. On 12/31/2011, President Obama signed into law the National Defense Authorization Act (NDAA) for Fiscal Year 2012.¹⁰ That new law added a new section to title 10 of the United States Code, 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.¹¹

Q: If a federal reservist (Army, Navy, Air Force, or Marine Corps) is involuntarily called to active duty under 10 U.S.C. 12304a, is his or her civilian job protected by USERRA? Would that involuntary service time count toward the individual's five-year limit under USERRA?

A: USERRA has always applied to duty under section 12304a, as well as other sections of title 10. Initially, this involuntary duty was not excluded from the computation of the individual's cumulative five-year limit with that employer, because Congress failed to amend title 38 (USERRA) when it amended title 10 in 2011. This oversight was corrected in 2015.

On 11/25/2015, President Obama signed into law the National Defense Authorization Act (NDAA) for Fiscal Year 2016.¹² That law amended section 4312(c)(4)(A) of USERRA¹³ by adding sections 12304a and 12304b to the list of title 10 sections, duty under which is excluded from the computation of the individual's five-year limit. Section 4312(c) reads as follows:

- (c)** Subsection (a) [the right to reemployment] shall apply to a person who is absent from a position of employment by reason of service in the uniformed services if such person's cumulative period of service in the uniformed services, with respect to the employer

¹⁰ Public Law 112-81, 125 Stat. 1394.

¹¹ 10 U.S.C. 12304a (bold print in original, emphasis by italics supplied). I invite your attention to Law Review 18098 (October 2018) for a detailed discussion of this provision.

¹² Public Law 114-92, 129 Stat. 726.

¹³ 38 U.S.C. 4312(c)(4)(A). Please see Law Review 15108 (November 2015) for a detailed discussion of this change.

relationship for which a person seeks reemployment, does not exceed five years, except that any such period of service shall not include any service—

- (1) that is required, beyond five years, to complete an initial period of obligated service;
- (2) during which such person was unable to obtain orders releasing such person from a period of service in the uniformed services before the expiration of such five-year period and such inability was through no fault of such person;
- (3) performed as required pursuant to section 10147 of title 10, under section 502(a) or 503 of title 32, or to fulfill additional training requirements determined and certified in writing by the Secretary concerned, to be necessary for professional development, or for completion of skill training or retraining; or
- (4) performed by a member of a uniformed service who is—
 - (A) ordered to or retained on active duty under section 688, 12301(a), 12301(g), 12302, 12304, 12304a, 12304b, or 12305 of title 10 or under section 331, 332, 359, 360, 367, or 712 of title 14 [14 USCS § 2127, 2128, 2308, 2309, 2314, or 3713];
 - (B) ordered to or retained on active duty (other than for training) under any provision of law because of a war or national emergency declared by the President or the Congress, as determined by the Secretary concerned;
 - (C) ordered to active duty (other than for training) in support, as determined by the Secretary concerned, of an operational mission for which personnel have been ordered to active duty under section 12304 of title 10;
 - (D) ordered to active duty in support, as determined by the Secretary concerned, of a critical mission or requirement of the uniformed services;
 - (E) called into Federal service as a member of the National Guard under chapter 15 of title 10 or under section 12406 of title 10; or
 - (F) ordered to full-time National Guard duty (other than for training) under section 502(f)(2)(A) of title 32 when authorized by the President or the Secretary of Defense for the purpose of responding to a national emergency declared by the President and supported by Federal funds, as determined by the Secretary concerned.¹⁴

Q: What about the Servicemembers Civil Relief Act (SCRA)? Do National Guard members on title 32 duty enjoy the protections of the SCRA?

A: As Colonel Mark E. Sullivan explained in detail in Law Review 116 (March 2004), on 12/19/2003 President George W. Bush signed into law the SCRA, as a long-overdue update and

¹⁴ 38 U.S.C. 4312(c) (emphasis supplied). Please see Law Review 16043 (May 2016) for a detailed discussion of what counts and what does not count in exhausting an individual's five-year limit.

rewrite of the Soldiers' and Sailors' Civil Relief Act (SSCRA), which was originally enacted in 1917, shortly after our country entered World War I. The SCRA provides important protections for those who serve our country in uniform, including:

- a. Postponement of civil court and administrative proceedings when military duties prevent the service member from attending and presenting his or her side, and protection against default judgment if the service member is unaware of the proceeding or unable to file a timely answer because of service.
- b. For a service member entering active duty, reducing the interest rate on pre-service loans and obligations to 6%.
- c. Barring the eviction of the service member's family if the call to service prevents the service member from paying the full rent.
- d. Giving the service member entering active duty the right to terminate a residential or vehicle lease.
- e. Allowing a service member on active duty to retain his or her domicile at the time of entry on active duty and protecting the service member from state income taxation by the state where he or she physically resides but is not domiciled.

The SCRA ordinarily does not protect Army National Guard and Air National Guard service members on title 32 orders, but it does protect them under limited circumstances. The SCRA applies to a service member who is performing "military service," and that term is defined as follows:

(2) Military service. The term "military service" means—

(A) in the case of a servicemember who is a member of the Army, Navy, Air Force, Marine Corps, or Coast Guard—

(i) active duty, as defined in section 101(d)(1) of title 10, United States Code, and

(ii) in the case of a member of the National Guard, includes service under a call to active service authorized by the President or the Secretary of Defense for a period of more than 30 consecutive days under section 502(f) of title 32, United States Code, for purposes of responding to a national emergency declared by the President and supported by Federal funds.¹⁵

The italicized language (above) would apply to a member of the New York Army or Air National Guard on title 32 orders for the COVID-19 emergency.¹⁶ This provision was originally enacted for the National Guard soldiers and airmen who provided security services in civilian airports for many months in the aftermath of the terrorist attacks of 9/11/2001, while the Transportation

¹⁵ 50 U.S.C. 3911(2) (emphasis supplied).

¹⁶ It would also apply to National Guard members in other states, if their requests for title 32 authority and funding are granted.

Security Administration (TSA) was being established and its initial employees were recruited and trained.

Update – March 2022

Section 4303(13) provides:

The term “service in the uniform services” means the performance of duty on a voluntary or involuntary basis in a uniformed service under competent authority and includes active duty, active duty for training, initial active duty for training, inactive duty training, full-time National Guard duty, *State active duty for a period of 14 days or more, State active duty in response to a national emergency declared by the President under the National Emergencies Act (50 U.S.C. 1601 et seq.), State active duty in response to a major disaster declared by the President under section 401 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5170)*, a period for which a person is absent from a position of employment for the purpose of an examination to determine the fitness of the person to perform any such duty, a period for which a person absent from a position of employment for the purpose of an examination to determine the fitness of the person to perform any such duty, a period for which a System member of the National Urban Search and Rescue Response System is absent from a position of employment due to an appointment into Federal service under Section 327 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, and a period for which a person is absent from employment for the purpose of performing funeral honors duty as authorized by section 12503 of title 10 or section 115 of title 32.¹⁷

The change came on January 5, 2021, when President Trump signed into law the Johnny Isakson and David P. Roe, M.D. Veterans’ Health Care Benefits Improvement Act of 2020.¹⁸ Therefore, USERRA now applies to most State active duty.¹⁹

Please join or support ROA

This article is one of 2000-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

¹⁷50 U.S.C. § 4303(13).

¹⁸Samuel Wright, *State Active Duty Performed by National Guard Member after 1/5/2021 is Now Protected by USERRA, under most Circumstances*, ROA Law Review 21034 (June 2021) (provides a detailed discussion of the update to USERRA).

¹⁹Update by Second Lieutenant Lauren Walker, USMC.

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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