

LAW REVIEW¹ 20038

April 2020

Yes, Coast Guard Reservists Can Be Called to Active Duty Involuntarily for Domestic Emergencies

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

1.3.1.2—Character and duration of service

3.0—Reserve Retirement and Civilian Employment

Q: I am a recently retired Captain of the Coast Guard Reserve and a life member of the Reserve Organization of America (ROA).³ For many years, I have read with great interest your

¹I invite the reader's attention to <https://www.roa.org/page/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 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 personnel in the Active Components of the armed forces, so Reserve Component

“Law Review” articles 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.

In Law Review 20037 (April 2020), you wrote that members and units of the Army Reserve, Air Force Reserve, Navy Reserve, and Marine Corps Reserve can be involuntarily called to active duty for domestic emergencies, under legislation enacted in 2011.⁴ What about the Coast Guard Reserve?

On 4/20/2010, there was a massive explosion and fire on the “Deepwater Horizon” offshore oil platform, setting off a massive water pollution incident in the Gulf of Mexico. It took weeks to stanch the flow of oil, and there was an ecological and economic disaster. I know several Coast Guard Reservists who were involuntarily called to active duty to respond to that incident. Why did you not mention the Coast Guard Reserve in Law Review 20037?

A: Yes, Coast Guard Reservists can be and have been involuntarily called to active duty for domestic emergencies, but not under section 12304a of title 10 of the United States Code. Rather, those Coast Guard Reserve personnel were called up under section 3713 (formerly 712) of title 14, which deals specifically with the Coast Guard. That section was enacted in 1980, and in 2018 section 712 became 3713 as title 14 was renumbered. The pertinent subsection is as follows:

Notwithstanding another law, and for the emergency augmentation of the Regular Coast Guard forces during a, or to aid in prevention of an imminent, serious natural or manmade disaster, accident, catastrophe, act of terrorism (as defined in section 2 of the Homeland Security Act of 2002 (6 U.S.C. 101)), or transportation security incident as defined in section 70101 of title 46 [46 USCS § 70101], the Secretary may, without the consent of the member affected, order to active duty of not more than 120 days in any 2-year period an organized training unit of the Coast Guard Ready Reserve, a member thereof, or a member not assigned to a unit organized to serve as a unit.⁵

Q: When a Coast Guard Reservist is involuntarily called to active duty under section 3713(a), does he or she have the right to reemployment under USERRA? Does this period of involuntary active duty count toward the individual’s five-year cumulative limit under USERRA?

A: The Coast Guard is an “armed force” at all times, not just during those times (most recently in World War II) when the Coast Guard operated as a separate service within the Navy. Service

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.

⁴10 U.S.C. 12304a.

⁵14 U.S.C. 3713(a).

in the Coast Guard gives rise to reemployment rights under USERRA, just like service in the Navy or any other service.

Section 4303 of USERRA⁶ defines 16 terms used in this law, including the term “service in the uniformed services”⁷ and the term “uniformed services.”⁸ The definition of “uniformed services” includes: “The term ‘uniformed services’ means the Armed Forces.”⁹ The term “armed forces” is not defined in USERRA, but it is defined in the definitions section of title 10, and the definition includes the Army, Navy, Marine Corps, Air Force, *and Coast Guard*.¹⁰

Under USERRA, a person who meets five simple conditions¹¹ has the right to reemployment. Under section 4312(c),¹² there is a five-year cumulative limit on the duration of the person’s period or periods of uniformed service, relating to that employer. There are also nine exemptions—that is, there are nine kinds of service that do not count toward exhausting the individual’s five-year limit.¹³

Under section 4312(c)(4)(A),¹⁴ involuntary service under certain enumerated sections of title 10 and title 14 (Coast Guard) is exempted from the computation of the individual’s five-year limit. Section 712 of title 14 is one of the enumerated sections. Section 712 has been renumbered as section 3713. When a Coast Guard Reservist performs involuntary active duty under section 3713, that period of service does not count toward exhausting the individual’s five-year limit.

Q: In Law Review 16090 (September 2016), you explained that Congress amended the Reserve Component retirement law in 2008. Traditionally, a reservist or National Guard member with 20 “good years” for Reserve Component retirement purposes but not with 20 years of full-time active duty (to qualify for a regular military retirement) started receiving his or her Reserve Component retirement monthly checks at age 60. Under the 2008 amendment, a Reserve or National Guard retiree with “contingency service” after 1/28/2008 can start receiving the Reserve Component retirement monthly checks before his or her 60th birthday, based on the amount of “contingency service” after that 2008 date.

⁶38 U.S.C. 4303.

⁷38 U.S.C. 4303(13).

⁸38 U.S.C. 4303(16).

⁹*Id.*

¹⁰10 U.S.C. 101(a)(4).

¹¹The person must have left a civilian job (federal, state, local, or private sector) to perform service in the uniformed services and must have given the employer prior oral or written notice. The person must not have exceeded the five-year cumulative limit on the duration of the period or periods of uniformed service, relating to the employer relationship with that employer. The person must have been released from the period of service without having received a disqualifying bad discharge from the military. After release, the person must have made a timely application for reemployment with the pre-service employer. Please see Law Review 15116 (December 2015) for a detailed discussion of the USERRA eligibility conditions.

¹²38 U.S.C. 4312(c).

¹³Please see Law Review 16043 (May 2016) for a detailed discussion of what counts and what does not count in exhausting the five-year limit.

¹⁴38 U.S.C. 4312(c)(4)(A).

Does active duty service by a Coast Guard Reservist under section 712 (now 3713) of title 14 qualify as “contingency service” for purposes of early receipt (before age 60) of the Reserve Component retirement benefit?

A: Yes, but only for involuntary active duty under section 712 (now 3713) on or after 12/31/2011. Service in 2010 or 2011 for the Deepwater Horizon disaster does not qualify the reservist for early receipt of Reserve Component retirement pay.

On 1/2/2013, President Obama signed into law the National Defense Authorization Act (NDAA) for Fiscal Year 2013.¹⁵ Section 681 of that law amended the definition of “contingency service” for purposes of early receipt of Reserve Component retirement benefits¹⁶ by adding service under section 712 (now 3713) to the kinds of service that qualify a Reserve Component member for early receipt. This change is retroactive, but only to 12/31/2011. Thus, this change does not apply to involuntary service by a Coast Guard Reservist in 2010 or 2011 for the Deepwater Horizon disaster.

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

¹⁵Public Law 112-239, 126 Stat. 1632.

¹⁶10 U.S.C. 12731(f)(2)(A).

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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