

## LAW REVIEW<sup>1</sup> 21002

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### Congress Expands USERRA Coverage

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1.1.3.3—USERRA applies to National Guard service.

1.1.3.5—USERRA applies to NOAA service.

1.8—Relationship between USERRA and other laws/policies

Three new laws enacted at the end of the 116<sup>th</sup> Congress (2019-20) have expanded the coverage of the Uniformed Services Employment and Reemployment Rights Act (USERRA) as follows:

- a. USERRA now applies to service in the Space Force, our nation's newest armed force.
- b. USERRA now applies to service in the commissioned corps of the National Oceanic and Atmospheric Administration (NOAA), a uniformed service in the United States Department of Commerce.
- c. USERRA now protects the civilian jobs of National Guard members when they perform "State active duty."

In this article, we discuss these three expansions of USERRA coverage.

#### Coverage of the Space Force

Section 4303 of USERRA, 38 U.S.C. § 4303, defines terms used in this law. The term "uniformed services," as amended, is defined in Section 4303 as follows:

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<sup>1</sup> We invite the reader's attention to [www.roa.org/lawcenter](http://www.roa.org/lawcenter), where you will find more than 2,000 "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. You will also find a numerical (chronological) index and a subject index, to facilitate finding articles about specific topics. This is the second new article for 2021.

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*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, the commissioned officer corps of the National Oceanic and Atmospheric Administration, 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.<sup>4</sup>*

USERRA does not define the term “Armed Forces,” but that term is defined in Section 101(10) of title 38 of the United States Code. As amended, Section 101(10) now provides: “The term ‘Armed Forces’ means the United States Army, Navy, Marine Corps, Air Force, *Space Force*, and Coast Guard, including the reserve components thereof.”<sup>5</sup> Because USERRA does not define the term “Armed Forces,” it is necessary to look elsewhere in title 38 of the United States Code for the definition. By adding the Space Force to the list of Armed Forces, Congress expanded USERRA’s coverage to apply to service in the Space Force.<sup>6</sup>

USERRA’s coverage of service in the Space Force includes service in the Space Force Reserve. The “Armed Forces” definition quoted above includes “the reserve components” of each of the Armed Forces. Moreover, the new law added the “the Space Force Reserve” to the list of reserve components identified in the definition of “reserve component” at Section 101(27) of Title 38, United States Code. With addition of the Space Force Reserve, there are now eight reserve components of the United States Armed Forces.<sup>7</sup>

#### **Coverage of the commissioned corps of NOAA.**

The commissioned corps of the National Oceanic and Atmospheric Administration (NOAA) is a uniformed service in the United States Department of Commerce. The term “uniformed services” is defined in section 101(a)(5) of title 10<sup>8</sup>, and the NOAA Corps has been on that list for decades.

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<sup>4</sup> 38 U.S.C. § 4303(17) (formerly 38 U.S.C. § 4303(16)) (emphasis supplied).

<sup>5</sup> 38 U.S.C. § 101(10) (emphasis supplied). The William M. (Mac) Thornberry National Defense Authorization Act (NDAA) for Fiscal Year 2021, Public Law 116-283, added “Space Force” to the list of our nation’s armed forces. President Trump vetoed this bill, but Congress overrode the veto, and this new law was enacted and went into effect on 1/1/2021.

<sup>6</sup> On 12/10/2020, five men and two women completed basic training. They are the first seven individuals to enlist directly in the Space Force. <https://www.spaceforce.mil/News/Article/2443546/us-space-force-makes-history-at-basic-military-training/>.

<sup>7</sup> The reserve components are the Army Reserve, the Navy Reserve, the Marine Corps Reserve, the Air Force Reserve, the Space Force Reserve, the Coast Guard Reserve, the Army National Guard of the United States, and the Air National Guard of the United States.

<sup>8</sup> 10 U.S.C. 101(a)(5).

As Wright explained in Law Review 15002 (January 2015), USERRA has its own definition of the “uniformed services” to which USERRA applies, and until very recently the NOAA Corps was not on the list of “uniformed services” for USERRA purposes. On 12/23/2020, President Trump signed the NOAA Commissioned Officer Corps Amendments Act of 2020.<sup>9</sup> This new law broadened USERRA’s definition of the term “uniformed services”<sup>10</sup> by adding the NOAA commissioned officer corps to the definition’s list of uniformed services covered by USERRA.

A person who leaves a civilian job (federal, state, local, or private sector) to serve in the NOAA Corps after 12/23/2020 and who meets the five USERRA conditions for reemployment<sup>11</sup> is now entitled to reemployment, just like a person who served in the Army or any other uniformed service. Does USERRA apply to a person who left a civilian job for NOAA service before 12/23/2020 and who completed his or her NOAA service after that date and met the five USERRA conditions? That remains to be seen, but we would argue that USERRA does accord reemployment rights to such a person. However, USERRA does not apply to a person who completed his or her NOAA service and applied for reemployment before 12/23/2020.

### **Coverage of State active duty by National Guard members**

When an individual (let us 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 eight Reserve Components of the United States armed forces. She also joined the Army National Guard of her specific state—let us say New York. The Army National Guard of New York is the modern-day equivalent of the New York Militia.<sup>12</sup>

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

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<sup>9</sup> Public Law 116-259.

<sup>10</sup> We have quoted this subsection above.

<sup>11</sup> The person must have left a civilian job to perform uniformed service and must have given the employer prior oral or written notice. The person’s cumulative period or periods of uniformed service, relating to the employer relationship for which he or she seeks reemployment, must not have exceeded five years. There are nine exemptions from the five-year limit, meaning that there are nine kinds of service that do not count toward exhausting the individual’s limit. Please see Law Review 16043 (May 2016) for a detailed discussion of the five-year limit. The person must have been released from the period of service without having received a disqualifying bad discharge from the uniformed service. After release, the person 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 the five USERRA conditions.

<sup>12</sup> 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.

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 USERRA,<sup>13</sup> as amended, defines 17 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.

USERRA's definition of "uniformed services" (quoted above) includes "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."

Until very recently, Section 4303(13) of USERRA defined "service in the uniformed service" as follows:

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.<sup>14</sup>

On 1/5/2021, President Trump signed into law the Johnny Isakson and David P. Roe, M.D. Veterans Health Care and Benefits Improvement Act of 2020.<sup>15</sup> Section 7004 of that new law amended section 4303(13) of USERRA<sup>16</sup> by inserting the following after "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.), and 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)."

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<sup>13</sup> 38 U.S.C. § 4303.

<sup>14</sup> 38 U.S.C. § 4303(13) (emphasis supplied).

<sup>15</sup> Public Law 116-315.

<sup>16</sup> 38 U.S.C. 4303(13).

Section 7004 also added a new subsection (15) to section 4303 of USERRA,<sup>17</sup> as follows:

The term “State active duty” means training or other duty, other than inactive duty, performed by a member of the National Guard of a State—(A) not under section 502 of title 32 or under title 10; (B) in the service of the Governor of a State; and (C) for which the member is not entitled to pay from the Federal Government.

Previously, USERRA did not protect the civilian jobs of National Guard members on State active duty—called by the Governor, under State authority, paid with State funds, for State missions. Effective 1/5/2021, most State active duty is now protected by USERRA. While this recent amendment is not exactly a model of clear legislative drafting, we are most pleased with this expansion of USERRA coverage.

We are especially pleased for federal employees who are members of the Army National Guard or Air National Guard and who are subject to gubernatorial calls to State active duty, as well as to calls to duty under title 10 and title 32 of the United States Code. Every State has a State law protecting the civilian jobs of National Guard members on State active duty.<sup>18</sup> A big problem is that a State lacks the constitutional power to regulate the relationship between a federal agency and federal civilian employees.<sup>19</sup> With this recent amendment, the civilian jobs of federal employees who are National Guard members are now protected when they are on State active duty.

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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.

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<sup>17</sup> Section 7004 of the amending legislation redesignated former 38 U.S.C. § 4303(15) (defining the term “undue hardship) as 38 U.S.C. § 4303(16). Presumably, with this change the definition of “uniformed services” previously at 38 U.S.C. § 4303(16) is now located at 38 U.S.C. § 4303(17).

<sup>18</sup> Please see the “state leave laws” section of our website, [www.roa.org/lawcenter](http://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.

<sup>19</sup> See *McCulloch v. Maryland*, 17 U.S. 316 (1819).

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, but please understand that ROA members, through their dues and contributions, pay the cost 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 eight uniformed services, you are eligible for membership in ROA, and a one-year membership only costs \$20.00. 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](http://www.roa.org) or call ROA at 800-809-9448.

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