

State Active Duty Performed by National Guard Members after 1/5/2021 Is now Protected by USERRA, under most Circumstances

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[About Sam Wright](#)

1.1.3.3—National Guard service

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.³

¹ We invite the reader's attention to 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. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997.

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 44 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 (VRRRA—the 1940 version of the federal reemployment statute) for 38 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 VRRRA 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 VRRRA 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 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.

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 USERRA,⁴ 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” 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 32.⁵

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 2020.⁶ Section 7004 of that new law

⁴ 38 U.S.C. § 4303.

⁵ 38 U.S.C. § 4303(13).

⁶ Public Law 116-315.

amended section 4303(13) of USERRA⁷ 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).”

Section 7004 also added a new subsection (15) to section 4303 of USERRA,⁸ 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, I am most pleased with this expansion of USERRA coverage.

I am 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.⁹ A big problem is that a State lacks the constitutional power to regulate the relationship between a federal agency and federal civilian employees.¹⁰ 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.

The Veterans’ Employment and Training Service of the United States Department of Labor (DOL-VETS) recently published a “fact sheet” about the recent USERRA amendment to expand

⁷ 38 U.S.C. 4303(13).

⁸ 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).

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.

¹⁰ See *McCulloch v. Maryland*, 17 U.S. 316 (1819).

the definition of “service in the uniformed services” to include State active duty performed by National Guard members, under most circumstances. Here is a link to that DOL-VETS fact sheet:

https://esgr.mil/Portals/0/Volunteer%20Resources/Fact%20Sheets%20and%20Brochure/DOLVETS_USERRA-State-Active-Duty-Coverage-New_2021Jan.pdf?ver=eO3i58WHN4BGNoUwUx-BHg%3d%3d×tamp=1612055744659

There have been times (like during the “surge” in Iraq in the first decade of this century) when so many National Guard members have been called to federal active duty that there were not enough left at home to cover State missions, like responding to hurricanes, riots, and other disasters. To cover this scenario, some States have established “State Guard” organizations to supplement or substitute for the National Guard when needed. These “State Guard” organizations are purely State entities, not hybrid organizations like the National Guard. Even with the recent amendment, USERRA does not protect the civilian jobs of “State Guard” members.

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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.

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

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