

LAW REVIEW¹ 22015

March 2022

USERRA Was Recently Amended To Make it Apply to State Active Duty Performed by National Guard Members. How Does that Affect USERRA's Five-Year Limit?

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[About Sam Wright](#)

1.1.3.3—USERRA applies to National Guard service

1.3.1.2—Character and duration of service

1.8—Relationship between USERRA and other laws/policies

Q: I am a Colonel³ in the Army National Guard of Texas and a life member of the Reserve Organization of America (ROA).⁴ I have read with great interest many of your “Law Review”

¹ I invite the reader's attention to www.roa.org/lawcenter. You will find more than 2300 “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. I am the author of more than 90% of the articles, but we are always looking for “other than Sam” articles by other lawyers.

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 45 years, I have collaborated 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 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 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 <mailto:swright@roa.org>.

³ The factual set-up for this article is hypothetical but realistic.

⁴ At its 2018 annual convention, the Reserve Officers Association amended its Constitution to make all military personnel, from E-1 through O-10, eligible for full membership. The organization also adopted a new “doing

articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA) and other laws that are especially pertinent to those of us who serve in the National Guard or Reserve. I was particularly interested in Law Review 16043 (May 2016), about USERRA's five-year limit.

I have been employed by a large company (Let us call it Daddy Warbucks Industries or DWI.) since 2000, when I left active duty and affiliated with the Texas Army National Guard. During my 21-plus years at DWI, I have been away from work many times for drill weekends, annual training, involuntary mobilizations for Iraq and Afghanistan, voluntary periods of Active Duty for Special Work (ADSW), and State active duty (called by the Governor, under State authority, paid with State funds, for State emergencies), including for Hurricane Harvey in 2017.

I read and reread your Law Review 16043 and then I carefully reviewed all my military orders. Many of my military duty periods have been exempt from USERRA's five-year limit under various subsections of section 4312(c) of USERRA.⁵ I totaled up all the periods that are not exempt, and the total comes to four years, 11 months, and 20 days. In other words, if I perform just 12 days of non-exempt uniformed service, I will exceed the five-year limit and lose my right to reemployment.

In just two years, I will come to the point when I must retire from the Army National Guard. Going forward, I am being incredibly careful to ensure that any further military duty that I perform will be exempt from the five-year limit, but I am concerned that I could be called to involuntary State active duty, and that could put me over the limit and jeopardize my career with DWI, the major company where I have worked since 2000. Help!

Answer, bottom line up front:

Until 1/5/2021, USERRA did not protect State active duty under any circumstances. On that date, Congress amended USERRA, and now State active duty is protected by USERRA under most circumstances.⁶ Now State active duty, even if involuntary, will count toward your five-year limit with respect to your employer relationship with DWI.⁷

business as" name—the Reserve Organization of America. The point of the name change is to emphasize that the organization now represents and admits to membership all military personnel, from the most junior enlisted personnel to the most senior officers.

⁵ 38 U.S.C. § 4312(c).

⁶ See Law Review 21074 (November 2021).

⁷ Involuntary service should always be exempt from the computation of the five-year limit. An individual should not lose his or her civilian job because of service that he or she was required to perform. We (ROA) will work for a USERRA amendment exempting State active duty from the five-year limit.

If an involuntary call to State active duty puts you over the five-year limit, you will not have the right to reemployment *under USERRA*, but you will have the right to reemployment under Texas State law, the same law that protected all the State active duty that you performed before 1/5/2021.

Explanation

The recent USERRA amendment

When an individual (like Joe Smith) enlisted in the Army National Guard, he joined two overlapping but legally distinct entities. He joined the Army National Guard of the United States (ARNGUS), which is one of the eight Reserve Components of the United States armed forces. He also joined the Army National Guard of his specific State—let us say Texas. The Army National Guard of Texas is the modern-day equivalent of the Texas Militia.

In his ARNGUS (Federal) status, Joe can serve on active duty voluntarily or can be involuntarily under title 10 of the United States Code. In that situation, USERRA protects his civilian job, just like a member of the Army Reserve or any other Reserve Component.

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

Section 4303 of USERRA,⁸ as amended, defines seventeen 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

⁸ 38 U.S.C. § 4303.

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 32.⁹

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 2020.¹⁰ Section 7004 of that new law amended section 4303(13) of USERRA¹¹ 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,¹² 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, USERRA applies to State active duty if the continuous period of State active duty lasts for fourteen days or more or if the State active duty is for a national emergency or major disaster declared by the President.¹³

⁹ 38 U.S.C. § 4303(13).

¹⁰ Public Law 116-315, 134 Stat. 4932.

¹¹ 38 U.S.C. § 4303(13).

¹² 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). 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).

¹³ If the period of State active duty is for 14 continuous days or more, the State active duty is protected by USERRA even if it is not for a national emergency or major disaster declared by the President. If the State active duty is for a national emergency or major disaster declared by the President, the State active duty is protected by USERRA even if the continuous period of State active duty lasts for fewer than 14 days.

Q: How does this recent (2021) USERRA amendment affect the five-year limit under USERRA?

Under section 4312(c) of USERRA,¹⁴ there are nine exemptions from the five-year limit. That is, there are nine kinds of service that do not count toward exhausting an individual's limit with respect to a specific employer. Involuntary service is generally exempted from the five-year limit, but the 2021 amendment did not change section 4312(c). We need an amendment exempting State active duty from the five-year limit, but getting Congress to act is by no means an easy proposition. In the meantime, if you exceed the five-year limit, you will not have the right to reemployment under USERRA, but you will have the right to reemployment under Texas law.

Q: How does Texas law protect State active duty performed by National Guard members?

The pertinent section of Texas law is as follows:

- (a)** An employer may not terminate the employment of an employee who is a member of the state military forces of this state or any other state because the employee is ordered to authorized training or duty by a proper authority. The employee is entitled to return to the same employment held when ordered to training or duty and may not be subjected to loss of time, efficiency rating, vacation time, or any benefit of employment during or because of the absence. The employee, as soon as practicable after release from duty, must give written or actual notice of intent to return to employment.
- (b)** A violation of this section is an unlawful employment practice. A person injured by a violation of this section may file a complaint with the Texas Workforce Commission civil rights division under Subchapter I.¹⁵

This Texas law will protect your job at DWI even if the State active duty period causes you to exceed the five-year limit under USERRA.

Q: What is the relationship between USERRA and State laws?

A: USERRA is a floor and not a ceiling on the employment and reemployment rights of service members and veterans. A State or territorial or local law, ordinance, regulation, or policy can give service members and veterans *greater or additional rights, over and above USERRA*. These laws, ordinances, regulations, or policies cannot take away the rights and benefits that Congress conferred on service members and veterans when it enacted USERRA. The pertinent USERRA section is as follows:

¹⁴ 38 U.S.C. § 4312(c).

¹⁵ Tex Gov't Code § 437.204. I invite the reader's attention to the "State leave laws" section of our website, www.roa.org/lawcenter. You will find, for each of the 50 States, the District of Columbia, Puerto Rico, Guam, and the U.S. Virgin Islands an article about the State or territorial law that protects the civilian jobs of National Guard members on State or territorial active duty.

(a) Nothing in this chapter shall supersede, nullify or diminish any Federal or State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that establishes a right or benefit that is more beneficial to, or is in addition to, a right or benefit provided for such person in this chapter.

(b) This chapter supersedes any State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by this chapter, including the establishment of additional prerequisites to the exercise of any such right or the receipt of any such benefit.¹⁶

The pertinent section of the Department of Labor (DOL) USERRA Regulation is as follows:

How does USERRA relate to other laws, public and private contracts, and employer practices?

(a) USERRA establishes a floor, not a ceiling, for the employment and reemployment rights and benefits of those it protects. In other words, an employer may provide greater rights and benefits than USERRA requires, but no employer can refuse to provide any right or benefit guaranteed by USERRA.

(b) USERRA supersedes any State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by USERRA, including the establishment of additional prerequisites to the exercise of any USERRA right or the receipt of any USERRA benefit. For example, an employment contract that determines seniority based only on actual days of work in the place of employment would be superseded by USERRA, which requires that seniority credit be given for periods of absence from work due to service in the uniformed services.

(c) USERRA does not supersede, nullify or diminish any Federal or State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that establishes an employment right or benefit that is more beneficial than, or is in addition to, a right or benefit provided under the Act. For example, although USERRA does not require an employer to pay an employee for time away from work performing service, an employer policy, plan, or practice that provides such a benefit is permissible under USERRA.

(d) If an employer provides a benefit that exceeds USERRA's requirements in one area, it cannot reduce or limit other rights or benefits provided by USERRA. For example, even

¹⁶ 38 U.S.C. § 4302.

though USERRA does not require it, an employer may provide a fixed number of days of paid military leave per year to employees who are members of the National Guard or Reserve. The fact that it provides such a benefit, however, does not permit an employer to refuse to provide an unpaid leave of absence to an employee to perform service in the uniformed services in excess of the number of days of paid military leave.¹⁷

Because section 437.204 gives you additional rights, over and above USERRA, it is not superseded by USERRA.

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This article is one of 2,300-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 on 10/1/1922 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 almost a century, we have argued that the Reserve Components, including the National Guard, are a cost-effective way to meet our nation’s defense needs.

Through these articles, and by other means, including amicus curiae (“friend of the court”) briefs that we file in the Supreme Court and other courts, we educate service members, military spouses, attorneys, judges, employers, DOL investigators, ESGR volunteers, congressional and state legislative staffers, and others about the legal rights of service members 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 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 eight¹⁸ uniformed services, you are eligible for membership in ROA, and a one-year membership only costs \$20 or \$450 for a life membership. 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.

¹⁷ 20 C.F.R. § 1002.7 (bold question in original).

¹⁸ Congress recently established the United States Space Force as the 8th uniformed service.

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 Organization of America
1 Constitution Ave. NE
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