

## LAW REVIEW<sup>1</sup> 22026

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### Four Distinct Statuses for National Guard Members

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1.1.1.8—USERRA applies to the Federal Government

1.1.3.3—USERRA applies to National Guard service

1.8—Relationship between USERRA and other laws/policies

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<sup>1</sup>I invite the reader's attention to [www.roa.org/lawcenter](http://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.

<sup>2</sup>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>.

<sup>3</sup>In February 2022, Lauren graduated cum laude from Baylor Law School and took the Texas bar exam. She is a Second Lieutenant in the Marine Corps not presently on active duty. Upon receiving the results from the Texas bar exam, she will go on active duty in the Marine Corps.

\*Military title used for identification only. The views expressed in this article are the views of the author, and not necessarily the views of the Marine Corps, the Department of the Navy, the Department of Defense, or the U.S. Government.

**Q: I am a Second Lieutenant in the Texas Army National Guard and a member of the Reserve Organization of America (ROA).<sup>4</sup> I have read with great interest several of your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Servicemembers Civil Relief Act (SCRA), and other laws that are especially pertinent to those who serve our country in uniform.**

**I heard a Texas Army National Guard judge advocate talk in detail about “Federal status” and “State status.” What is the difference between Federal status and State status? Please help me understand this legal gobbledegook.**

**Answer, bottom line up front:**

Unfortunately, this stuff is complicated. There are four separate statuses. You will likely be in all four statuses at different times during your career in the Army National Guard.<sup>5</sup> The four statuses are:

- a. Title 10 status
- b. Title 32 status
- c. State active duty
- d. Days when you do not perform any Federal or State military duty.

Your status for one legal purpose, like USERRA protection for your civilian job, is not necessarily the same as your status for another legal purpose, like applicability of the SCRA, the Uniform Code of Military Justice (UCMJ), or the Posse Comitatus Act (PCA).

### **Explanation**

When an individual (like Joe Smith) enlisted in the Army National Guard, he joined two overlapping but legally distinct entities.<sup>6</sup> He joined the Army National Guard of the United States (ARNGUS), 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.

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<sup>4</sup>At the 2018 national convention, members of the Reserve Officers Association amended the ROA Constitution to expand membership eligibility to include anyone who is serving or has served our country in any one of the eight uniformed services, including enlisted personnel as well as officers. ROA also adopted a new “doing business as” (DBA) name, the Reserve Organization of America, to emphasize that the organization represents and seeks to recruit as members all Reserve Component personnel, from E-10 through O-10.

<sup>5</sup>Like the Army National Guard, the Air National Guard is a hybrid Federal-State entity, and Air National Guard members similarly have these four statuses at different times.

<sup>6</sup>“The term ‘Army National Guard’ means that part of the organized militia of the several States and Territories, Puerto Rico, and the District of Columbia, active and inactive, that—(A) is a land force; (B) is trained, and has its officers appointed, under the sixteenth clause of section 8, article I, of the Constitution; (C) is organized, armed, and equipped wholly or partly at Federal expense; and (D) is federally recognized.” 10 U.S.C. § 101(c)(2).

In his ARNGUS (title 10) status, Joe can serve on active duty voluntarily or he can be called involuntarily under title 10 of the United States Code.<sup>7</sup> While in his ARNGUS status, USERRA would protect his civilian job, just like it would a member of the Army Reserve or other Reserve Component. While Joe is in “title 32” status he is performing inactive duty training (drills), active-duty training (annual training), or “full-time National Guard duty.”<sup>8</sup> At all other times, Joe is in “State status.” State status includes the days when Joe performs no military duty and the days when he is called “State active duty” (SAD).<sup>9</sup>

### **Title 10 status**

When Joe is in title 10 status, he is fully a member of the United States Army, just like a Regular Army soldier on full-time regular active duty. He is directed by the President and has been activated for Federal active-duty military service.<sup>10</sup>

### **Title 32 status**

When Joe is in a title 32 status, he is paid by the Federal Government, but he is under State control.<sup>11</sup> The primary purpose of Title 32 duty is to prepare Joe for the contingency of his being called to Title 10 duty. Title 32 duty includes active duty for training (annual training), inactive duty training (drills), and “full-time National Guard duty.”<sup>12</sup>

### **State active duty**

In his traditional role as a member of the latter-day Texas Militia, Joe can be called to state active duty by the Governor, for State emergencies like hurricanes, riots, etc.<sup>13</sup> In this situation, Joe is called by the Governor, under State authority, and paid with State funds.<sup>14</sup>

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<sup>7</sup>Title 10 status refers to title 10 of the United States Code, which governs the armed forces of the United States. The United States Code has 52 titles, or broad subject areas. Sections are numbered consecutively within a title.

<sup>8</sup>Title 32 status refers to title 32 of the United States Code, which governs the National Guard.

<sup>9</sup>“The term “State active duty” means training or other duty, other than inactive duty [drills], 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 service to the Governor of a State; (C) for which the member is not entitled to pay from the Federal Government.” 38 U.S.C. § 4303(14).

<sup>10</sup>See 10 U.S.C. §§ 13201(d), 12302, 12304, 331, 332, 333, 12406.

<sup>11</sup>See 32 U.S.C. §§ 502(f), 901, 902.

<sup>12</sup>“The term ‘full-time National Guard duty’ means training or other duty, other than inactive duty [drills], performed by a member of the Army National Guard of the United States or the Air National Guard of the United States in the member’s status as a member of the National Guard of a State or territory, the Commonwealth of Puerto Rico, or the District of Columbia under section 316, 502, 503, 504, or 505 of title 32 for which the member is entitled to pay from the United States or for which the member has waived pay from the United States.” 10 U.S.C. § 101(d)(5).

<sup>13</sup>*NGAUS Fact Sheet, Understanding the Guard’s Duty Status*, NATIONAL GUARD ASSOCIATION OF THE UNITED STATES, <http://giveanhour.org/wp-content/uploads/Guard-Status-9.27.18.pdf> (last visited Mar. 20, 2022).

<sup>14</sup>*Id.*

**The five questions:**

Joe Smith will be on title 10 duty, title 32 duty, and State active duty at various times throughout his military career. But, on most days, he is not performing Federal or State military duty. For the following five questions, the answer is yes when Joe is on title 10 duty. Therefore, we will answer the following questions as it pertains to title 32 duty or State active duty.

**1. Does Joe Smith receive Federal military pay?**

Title 32 status – Yes.<sup>15</sup>

State active duty – No.

**2. Is Joe Smith's absence from his civilian job protected by USERRA?**

Title 32 status – Yes.<sup>16</sup>

State active duty – Yes, under most circumstances.<sup>17</sup>

**3. Is Joe Smith protected by the Servicemembers Civil Relief Act?**

Title 32 status – Yes, but only under limited circumstances.<sup>18</sup>

State active duty – No.<sup>19</sup>

**4. Does the Posse Comitatus Act (PCA) apply to Joe Smith?**

Title 32 status – No.<sup>20</sup>

State active duty – No.<sup>21</sup>

The Posse Comitatus Act consists of one sentence:

Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years.<sup>22</sup>

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<sup>15</sup>See 32 U.S.C. § 902.

<sup>16</sup>38 U.S.C. § 4303(13).

<sup>17</sup>*Id.*

<sup>18</sup>50 U.S.C. § 3911.

<sup>19</sup>*Id.*

<sup>20</sup>18 U.S.C. § 1385.

<sup>21</sup>*Id.*

<sup>22</sup>*Id.*

What this sentence means, in practice, is that members of the military who are subject to the law may not participate in civilian law enforcement unless doing so is expressly authorized by the Constitution or by statute. The only members of the military that are covered by the Posse Comitatus Act are Federal military personnel. While the statute only states “the Army and the Air Force” the Act has been extended to the Navy and Marine Corps as well.<sup>23</sup> The Coast Guard, even though part of the Federal armed forces, is not bound by the Posse Comitatus Act due to express statutory authority. Members of the National Guard are rarely covered by the Posse Comitatus Act because they often report to their State or territory governors. However, there are instances when National Guard personnel are called into federal service. When Guard personnel are, they are bound by the Posse Comitatus Act until they return to State control.

While there are no constitutional exceptions to the Posse Comitatus Act, there are statutory exceptions, like the exception for the Coast Guard. Congress has also enacted an array of extensive particularized statutes, like those permitting the president to call the armed forces in times of insurrection and domestic violence, as well as general statutes authorizing the armed forces to share information and equipment with civilian law enforcement agencies.<sup>24</sup>

## **5. Does the Uniform Code of Military Justice (UCMJ) apply to Joe Smith?**

Title 32 status – No.<sup>25</sup>

State active duty – No.<sup>26</sup>

But many States have State military codes for this situation.

### **Please join or support ROA**

This article is one of 2,300-plus “Law Review” articles available at [www.roa.org/lawcenter](http://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.

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<sup>23</sup>10 U.S.C. § 275,

<sup>24</sup>*Id.* §§ 251—255, 271—284.

<sup>25</sup>*Id.* § 802, art. 2(a)(3)(A)(ii).

<sup>26</sup>*Id.*

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 eight<sup>27</sup> 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](http://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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<sup>27</sup> Congress recently established the United States Space Force as the 8<sup>th</sup> uniformed service.