

## **LAW REVIEW<sup>1</sup> 24042**

**August 2024**

### **New York National Guard Soldiers Called to State Active Duty To Provide Security in the New York City Subways Are Protected by USERRA. By Captain Samuel F. Wright, JAGC, USN (Ret.)<sup>2</sup>**

**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.**

**Q: I serve as an enlisted soldier in the Army National Guard (ARNG) of New York<sup>3</sup> and I am a member of the Reserve Organization of America**

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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 2,000 "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 Spouses' 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 (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 <mailto:swright@roa.org>.

<sup>3</sup> The factual set-up for this article is hypothetical but realistic.

**(ROA).<sup>4</sup> I have read with great interest many of your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), and I have utilized your articles in understanding and exercising my legal rights. I have also shared your articles with my colleagues in the ARNG.**

**On the civilian side, I am a GS-7 for the United States Small Business Administration (SBA). Recently, I was called to State Active Duty and assigned to serve in the New York City subways to help provide security for the passengers and employees. When I was notified that I was being called for this service, I gave immediate notice to my SBA supervisor and the SBA personnel office by e-mail.**

**I need to return to my federal civilian job promptly when New York releases me from this period of State active duty. My SBA supervisor told me that USERRA (the federal reemployment statute) does not apply to State active duty and that the New York State law does not apply and cannot constitutionally be applied to the relationship between a federal agency and federal employees.**

**Is my SBA job protected by USERRA?**

**Answer, bottom line up front:**

**Yes.** Your civilian job is protected by USERRA when you are on State active duty under a USERRA amendment that was signed into law on 1/5/2021, *provided your State active duty orders are written in increments of 14 days or more.* I have written to Major General Ray Shields, the Adjutant General (TAG) of New York, and to Kevin Getnick, the Counsel of the New York Division of Military & Naval Affairs, to

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<sup>4</sup> The Reserve Officers Association was established in 1922 and chartered by Congress in 1950. In 2018, ROA members amended the ROA Constitution and made enlisted service members and veterans, as well as officers, eligible for full membership. ROA adopted the “doing business as” name of “Reserve Organization of America” to emphasize that we represent and seek to recruit as members service members and veterans of all ranks, from E-1 to O-10.

remind them that it is essential in this situation that State active duty orders be written in increments of at least 14 days at a time. Please see the copy of my letter reprinted at the end of this article.

## **Explanation**

Under USERRA, a person who leaves a civilian job (federal, state, local, or private sector) to perform “service in the uniformed services” as defined by USERRA and who meets the other USERRA conditions<sup>5</sup> is entitled to prompt reinstatement in the position that he or she would have attained if continuously employed with continuous seniority and pension credit in the civilian job.<sup>6</sup>

Section 4303 of USERRA,<sup>7</sup> 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.

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

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<sup>5</sup> The person must have given the civilian employer prior oral or written notice, must not have exceeded the five-year limit on the duration of the period or periods of uniformed service relating to the employer relationship with the current employer, must have been released from the period of uniformed service without having received a disqualifying bad discharge from the military, and must have been timely in reporting back to work or applying for reemployment. *See generally* Law Review 15116 (December 2015) for a detailed description of the USERRA conditions for reemployment.

<sup>6</sup> *See generally* Law Review 21058 (September 2021).

<sup>7</sup> 38 U.S.C. § 4303.

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>8</sup>

On 1/5/2021, the President signed into law the Johnny Isakson and David P. Roe, M.D. Veterans Health Care and Benefits Improvement Act of 2020.<sup>9</sup> Section 7004 of that new law amended section 4303(13) of USERRA<sup>10</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).*”<sup>11</sup>

Section 7004 also added a new subsection (15) to section 4303 of USERRA,<sup>12</sup> as follows:

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<sup>8</sup> 38 U.S.C. § 4303(13).

<sup>9</sup> Public Law 116-315, 134 Stat. 5058.

<sup>10</sup> 38 U.S.C. § 4303(13).

<sup>11</sup> 38 U.S.C. § 4303(13) (emphasis supplied).

<sup>12</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). 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).

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. 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.<sup>13</sup> *Because your State active duty to serve in the subway system is not for a national emergency or major disaster declared by the President, your State active duty orders need to be written in increments of 14 days or more.*

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

This article is one of 2,200-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. We add new articles each month.

ROA is the nation’s only national military organization that exclusively and solely supports the nation’s reserve components, including the Coast Guard Reserve (6,179 members), the Marine Corps Reserve (32,599 members), the Navy Reserve (55,224 members), the Air Force Reserve (68,048 members), the Air National Guard (104,984 members),

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<sup>13</sup> 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.

the Army Reserve (176,171 members), and the Army National Guard (329,705 members).<sup>14</sup>

ROA is more than a century old—on 10/2/1922 a group of veterans of “The Great War,” as World War I was then known, founded our organization at a meeting in Washington’s historic Willard Hotel. The meeting was called by General of the Armies John J. Pershing, who had commanded American troops in the recently concluded “Great War.” 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 more than 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 advocate for the rights and interests of service members and educate service members, military spouses, attorneys, judges, employers, Department of Labor (DOL) investigators, Employer Support of the Guard and Reserve (ESGR) volunteers, federal and state legislators and 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.

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<sup>14</sup> See <https://crsreports.congress.gov/product/pdf/IF/IF10540/>. These are the authorized figures as of 9/30/2022.

If you are now serving or have ever served in any one of our nation's eight<sup>15</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 <https://www.roa.org/page/memberoptions>. 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

Washington, DC 20002<sup>16</sup>

Here is the letter that I sent to the Adjutant General of New York and to his counsel:

**Samuel F. Wright**  
**Captain, JAGC, USN (Ret.)**  
[Samwright50@yahoo.com](mailto:Samwright50@yahoo.com)

March 8, 2024

Major General Ray Shields, ARNG  
Adjutant General of New York  
330 Old Niskayuna Road  
Latham, NY 12110-3514

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<sup>15</sup> Congress recently established the United States Space Force as the eighth uniformed service.

<sup>16</sup> You can also contribute on-line at [www.roa.org](http://www.roa.org).

Re: State active duty orders for National Guard members called for service in the subway system must be written in increments of 14 days or more to ensure that USERRA applies.

Dear General Shields:

Please ensure that the State active duty orders written for service in the subways are written in increments of 14 days or more. On 1/5/2021, Congress amended the Uniformed Services Employment and Reemployment Rights Act (USERRA). As of that date, USERRA protects the civilian jobs of National Guard soldiers and airmen on State active duty *if the period of State active duty service is for 14 days or more* or if the duty is for a national emergency or major disaster declared by the President. Because the New York City subway mission does not relate to a national emergency or major disaster declared by the President, the State active duty orders need to be written in increments of 14 days or longer for USERRA to apply.

You may ask: Aren't these National Guard soldiers protected by New York State law even if USERRA does not apply? Yes, *but not if they are federal civilian employees*. The New York State law does not apply and cannot constitutionally be applied to federal agencies as employers. See *McCulloch v. Maryland*, 17 U.S. 316 (1819).

It should also be noted that some of the soldiers being called up for the subway mission probably have civilian jobs in New Jersey or Connecticut. Of course, laws enacted in Albany do not apply in other States.

I invite your attention to our Law Review 24042, to be published in August 2024. I am enclosing a copy of that draft article. The article explains in considerable detail the 2021 USERRA amendment that extended USERRA protections to State active duty in most circumstances.

Please note that this article is a draft and is subject to further amendment. I would like to add a note saying that the Adjutant General of New York is very much aware of the need to ensure that State active duty orders are written in



increments of 14 days or more and that the orders are all being written in that way.

More broadly, I invite your attention to [www.roa.org/lawcenter](http://www.roa.org/lawcenter). You will find more than 2,200 “Law Review” articles about USERRA, the Servicemembers Civil Relief Act (SCRA), the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), the Uniformed Services Former Spouses’ 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, and we add new articles each month. The articles are available for free to everyone, not just ROA members. As a sample, I am enclosing copies of several articles.

Through these articles, and by other means, including amicus curiae (“friend of the court”) briefs that we file in the United States Supreme Court and other courts, ROA advocates for the rights and interests of service members, without regard to their membership status, or lack thereof, in our organization. Our articles provide vital information, not readily available elsewhere, about the legal rights of service members and how to exercise and enforce those rights. Our articles are read by service members, military spouses, attorneys, judges, employers, Employer Support of the Guard and Reserve (ESGR) volunteers, Department of Labor (DOL) investigators, federal and state legislators and staffers, and others.

I am the author of more than 90% of the “Law Review” articles that ROA has added to its website over the last 27 years, but I am 72 and will not be around forever to author and update these articles. Accordingly, over the last three years I have recruited three understudies who are young enough to be my granddaughters. Perhaps you know of judge advocates in the New York National Guard who would like to author articles for our website.

**We sure would love to have you as a member of ROA.** You can join on-line at <https://www.roa.org/page/memberoptions> or call ROA at 800-809-9448. The cost is only \$20 per year or \$450 for a life membership. Whether or not you choose to join, we hope that you will inform your soldiers and airmen about this research resource.

Very respectfully,

Samuel F. Wright

Enclosures

Copy to: Kevin Getnick, Esq.

Counsel, NYS Division of Military & Naval Affairs