

LAW REVIEW¹ 21074
November 2021
(Updated December 2021)

**Yes, USERRA Applies to National Guard Member on
State Active Duty To Drive School Buses.**

By Captain Samuel F. Wright, JAGC, USN (Ret.)²

[About Sam Wright](#)

1.1.1.2—USERRA applies to small employers

1.1.3.3—USERRA applies to National Guard service

1.8—Relationship between USERRA and other laws/policies

Q: I am the owner-operator of a restaurant. While doing Internet research, I found one of your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA).

¹ I invite the reader’s attention to www.roa.org/lawcenter. You will find more than 2200 “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 two thousand of the articles.

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 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 SWright@roa.org.

I have a long-time employee (Let us call him “Joe Smith.”) who is a member of the Army National Guard of our State. Over the years, I have accommodated his absences from his job for military training and duty, including weekend drills, annual training, year-long deployments to Iraq and Afghanistan, and State active duty for riots, floods, and other emergencies. Recently, Joe left his job for State active duty driving school buses.

This recent call-up annoys me. For years, I have operated the restaurant with twelve employees, but three of them resigned and I have been unable to find new people willing to work for what I can afford to pay, so I have been struggling to operate with just nine employees. Now that Joe has left for 90 days of “military” duty to drive school buses, I am really struggling to operate with just eight employees. Why should I have to pay the price for our local school district’s inability to hire and retain bus drivers?

I have read that USERRA does not apply to State active duty performed by National Guard members—called by the Governor, under State authority, paid with State funds, for State missions. Is that not the case?

Answer, bottom line up front

That statement is no longer true. On 1/5/2021, Congress amended USERRA. Now, USERRA applies to State active duty under most circumstances. If Joe meets the five conditions for reemployment under USERRA,³ you must promptly reinstate him at the restaurant.

Explanation

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

³ It appears that Joe left his civilian job to perform “service in the uniformed services” as defined by USERRA, and he gave you (the employer) prior oral or written notice. Joe must be released from this period of service without having exceeded the cumulative five-year limit on his periods of uniformed service related to his employment relationship with your restaurant, but there are nine exemptions to the five-year limit. That is, there are nine kinds of service that do not count toward exhausting his five-year limit. Joe’s drill weekends and annual training periods and his involuntary call-ups for service in Iraq and Afghanistan do not count toward exhausting his five-year limit, so he is not close to exhausting the limit. Please see Law Review 16043 (May 2016) for a detailed discussion of what counts and what does not count in exhausting the five-year limit. Joe must be released from the period of service without receiving a disqualifying bad discharge from the Army, and after he is released, he must make a timely application for reemployment. Please see Law Review 15116 (December 2015) for a detailed discussion of the five conditions for reemployment under USERRA.

also joined the Army National Guard of his specific State—let us say New York.⁴ The Army National Guard of New York is the modern-day equivalent of the New York Militia.⁵

In his ARNGUS (Federal) status, Joe can serve on active duty voluntarily or involuntarily volunteer for 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 her civilian job at those times.*

Section 4303 of USERRA,⁶ 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 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

⁴ Joe also has reinstatement rights under State law. Please see the “State leave laws” section at www.roa.org/lawcenter. You will find fifty-four articles about the State and territorial laws that protect the civilian jobs of National Guard members on State or territorial active duty.

⁵ 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.

⁶ 38 U.S.C. § 4303.

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 32.⁷

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 2020.⁸ Section 7004 of that new law amended section 4303(13) of USERRA⁹ 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,¹⁰ 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.¹¹

Q: My brother-in-law is a lawyer. I asked him about this situation, and he told me that the Federal employment laws only apply to employers with fifteen or more employees. I have never had more than twelve employees at the restaurant. Does USERRA apply to me?

⁷ 38 U.S.C. § 4303(13).

⁸ Public Law 116-315.

⁹ 38 U.S.C. § 4303(13).

¹⁰ 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).

¹¹ 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.

A: Yes, USERRA applies to you. Other Federal employment laws only apply to employers with fifteen or more employees, but USERRA and the predecessor Federal reemployment statute have never had such a threshold. You only need one employee to be an employer subject to USERRA.¹²

UPDATE—DECEMBER 2021

This article, published in the *Minnesota Star-Tribune* on 11/27/2021, details the additional burden on National Guard members, their families, and their civilian employers necessarily imposed by the Governor of Minnesota (State active duty call-ups) to respond to the COVID-19 pandemic and civil unrest, on top of federal mobilizations and recurring training requirements. These additional burdens make all the more important the recent (1/5/2021) amendment to the Uniformed Services Employment and Reemployment Rights Act (USERRA), expanding the coverage of that law to include State active duty performed by members of the Army National Guard and Air National Guard.

<https://www.startribune.com/for-minnesota-national-guard-past-two-years-have-been-relentless/600121401/>

Please join or support ROA

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

¹² See *Cole v. Swint*, 961 F.2d 58, 60 (5th Cir. 1992). *Cole* was decided two years before Congress enacted USERRA in 1994, but USERRA’s legislative history makes clear that Congress intended that USERRA, like the predecessor reemployment statute, would apply to exceedingly small as well as exceptionally large employers: “This chapter [USERRA] would apply, as does current law, to all employers regardless of the size of the enterprise or the number of employees. See *Cole v. Swint*, 961 F.2d 58, 60 (5th Cir. 1992).” House Committee Report [House Committee on Veterans’ Affairs], April 28, 1993, H.R. Rep. 103-65. This committee report is published, in its entirety, in Appendix D-1 of *The USERRA Manual*, by Kathryn Piscitelli and Edward Still. The quoted language can be found on page 803 of the 2021 edition of the *Manual*.

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, ROA educates service members, military spouses, attorneys, judges, employers, ESGR volunteers, DOL investigators, 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 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 or \$450 for 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.

If you are not eligible to join, please contribute financially to help us continue and increase our support of those who serve. You can mail us a contribution to:

Reserve Organization of America
1 Constitution Avenue NE
Washington, DC 20002