Reserve Organization of America

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As of 1/5/2021, the Uniformed Services Employment and Reemployment Rights Act (USERRA) Applies to National Guard Members Performing State Active Duty, in Most Cases.

By Captain Samuel F. Wright, JAGC, USN (Ret.)[1]

The Uniformed Services Employment and Reemployment Rights Act (USERRA) is a federal statute that was enacted in 1994, as a rewrite of the Veterans' Reemployment Rights Act (VRRA), which was originally enacted in 1940. USERRA is codified in title 38 of the United States Code, at sections 4301 through 4335.

When you have been away from your civilian job (federal, state, local, or private sector) for a short, intermediate, or long period of uniformed service, you (or any returning service member or veteran) will have the right to reemployment in your pre-service job only if you meet the five USERRA conditions:

[1] 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. I have dealt with USERRA and the Veterans' Reemployment Rights Act (VRRA—the 1940 version of the federal reemployment statute) for 44 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. As of 5/1/2026, I have come out of retirement and have affiliated with Maher Legal Services in an "of counsel" role. You can reach me by e-mail at SWright@roa.org.

a. You must have left the job to perform service in the uniformed services, **as defined by USERRA**.[2]
b. You must have given the employer prior oral or written notice of your impending absence to perform service.[3]
c. Your cumulative period or periods of uniformed service, related to the employer relationship for which you seek reemployment, must not have exceeded five years.[4]
d. You served honorably, and you were released from the period of service without having received a disqualifying bad discharge from the military.[5]
e. You made a timely application for reemployment with the pre-service employer after release from the period of service.[6]

USERRA defines the term "service in the uniformed services" 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,

[2] 38 U.S.C. § 4312(a).
[3] 38 U.S.C. § 4312(a)(1). No specific amount of advance notice is required, but of course the practical advice is to give the employer as much notice as possible. "No notice is required under subsection (a)(1) if the giving of such notice is precluded by military necessity or, under all of the relevant circumstances, the giving of such notice is otherwise impossible or unreasonable." 38 U.S.C. § 4312(b)(1).
[4] 38 U.S.C. § 4312(c). There are nine exemptions from the five-year limit. That is, there are nine kinds of service that do not count toward exhausting your five-year limit with respect to that employer relationship. The purpose of this article is to explain in detail what counts and what does not count in exhausting your five-year limit.
[5] 38 U.S.C. § 4304. Disqualifying bad discharges include punitive discharges, awarded by court martial for serious crimes, and other-than-honorable administrative discharges.
[6] After a period of service of 181 days or more, you have 90 days to apply for reemployment. 38 U.S.C. § 4312(e)(1)(D). Shorter deadlines apply after shorter periods of service.

> **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.), State active duty in response to a major disaster declared by the President under section 401 of the Robert T. Stafford Disaster Relief and Assistance Act** (**42 U.S.C. 5170**), 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 Assistance Act, a period for which a person is absent from a position of employment due to an appointment into service in the Federal Emergency Management Agency as intermittent personnel under section 306(b)(1) of the Robert T. Stafford Disaster Relief and Assistance Act (42 U.S.C. 5148(b)(1)), 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, the President 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 USERRA[9] by inserting the following after "full-time National Guard

[7] 38 U.S.C. § 4303(13) (emphasis supplied).
[8] Public Law 116-315, 134 Stat. 5058.
[9] 38 U.S.C. § 4303(13).

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)."[10]

Section 7004 also added a new subsection (15) to section 4303 of USERRA,[11] 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. 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.[12]

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[10] 38 U.S.C. § 4303(13) (emphasis supplied).

[11] 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).

[12] 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.

Memorandum for the Adjutant General of each State:

If you are calling an Army National Guard (ARNG) soldier or an Air National Guard (ANG) airman to State active duty and it is not for a national emergency or major disaster declared by the President, it is essential that you write the orders in increments of 14 days or more, so that the civilian job rights of the soldier or airman are protected.

Q: Where can I find a lawyer or law firm that fully understands laws like the Servicemembers Civil Relief Act (SCRA), the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Uniform Code of Military Justice (UCMJ), and other laws that are especially pertinent to those who serve our country in uniform?

A: As of 5/1/2026, I have come out of retirement and have joined Maher Legal Services in an "of counsel" role. This firm has a great team, headed by attorneys John Maher and Kevin Mikolashek, both of whom have served as Army judge advocates for many years. These attorneys and this firm have a great record, and I am proud to join their team.

Here is a link to the Maher Legal Services website:

https://www.lawyersdefendingwarriors.com/about.

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Our roots run deep. On October 2, 1922, veterans of the Great War gathered at Washington's historic Willard Hotel — at the invitation of General of the Armies John J. Pershing — to build something lasting. One of the junior officers in that room was Captain Harry S. Truman, who, as President, signed ROA's congressional charter in 1950. That charter gives us a clear mission: advocate for policies that ensure adequate national security. For more than a century, we've made the case that America's Reserve Components and National Guard are among the most cost-effective pillars of our national defense.

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If you are currently serving, or have ever served, in any of America's eight uniformed services, you are eligible to join ROA — and membership starts at just $20 for a full year, or $450 for life. Officers and enlisted personnel alike qualify, whether your service was in the Active Component, the National Guard, or the Reserve. ROA has also recently expanded eligibility to include ancestors and lineal descendants and spouses, widows, and widowers of past or present service members, so families can stand with those who serve. Join online at Reserve Organization of America - ROA or call 800-809-9448.

If you are not eligible for membership but believe in this mission, your financial contribution directly funds this resource and the advocacy work that protects those who serve. Donations may be mailed to:

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