

## **LAW REVIEW 14058**

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### **Calling up Army Reserve, Navy Reserve, Marine Corps Reserve, and Air Force Reserve Members and Units for Domestic Emergencies— How Does this Affect USERRA Rights?**

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

**1.1.3.1—USERRA applies to voluntary service**

**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**

#### **Provision for federal call-up of reserve units for domestic emergencies**

There are seven Reserve Components of the armed forces: The Army National Guard, the Army Reserve, the Air National Guard, the Air Force Reserve, the Navy Reserve, the Marine Corps Reserve, and the Coast Guard Reserve.<sup>1</sup> Unlike the other five Reserve Components, the Army National Guard and Air National Guard have a hybrid state-federal status. The Army National Guard and Air National Guard are the modern-day state militia, subject to call by the Governor for state emergencies, including riots, fires, floods, hurricanes, etc.

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<sup>1</sup> The Coast Guard is an armed force as defined by 10 U.S.C. 101(a)(4), but the Coast Guard is part of the Department of Homeland Security (DHS), not the Department of Defense (DOD). The Coast Guard has many important missions and goals, including maritime safety and maritime law enforcement. Under long-standing legal authority, Coast Guard Reservists can be and sometimes are called to involuntary active duty for domestic emergencies. Hundreds of Coast Guard Reservists were involuntarily called to active duty in 2010 and 2011, to deal with the consequences of the “Deepwater Horizon” disaster in the Gulf of Mexico. The Coast Guard Reserve will not be further mentioned in this article.

If you were to join the Virginia Army National Guard, you would take two enlistment oaths, and you would join two overlapping but legally distinct organizations—the *Virginia Army National Guard* and the *Army National Guard of the United States*. As a member of the Virginia Army National Guard, you are subject to call by the Governor for state emergencies. As a member of the Army National Guard of the United States, you are subject to call by the President for national emergencies like OPERATION ENDURING FREEDOM.

Members of the Army National Guard (and to a lesser but still significant extent the Air National Guard) are routinely called to state active duty by their Governors for state emergencies. Under interstate agreements, National Guard members in Virginia (or any specific state) can be called to Virginia duty and deployed to Maryland or some other state where they are needed. Occasionally, there are truly devastating events (like Hurricane Katrina in 2005) that overwhelm the capacity of the National Guard, even with interstate cooperation, and there is a need for additional assistance from federal military units, Active Component and Reserve Component.

Until very recently, there was no way to mobilize Army Reserve, Navy Reserve, Marine Corps Reserve, and Air Force Reserve units for even the most devastating domestic emergencies. On December 31, 2011, as part of the National Defense Authorization Act (NDAA) for Fiscal Year 2012, Congress enacted a new section of title 10 of the United States Code providing for *involuntary* call-up of Army Reserve, Navy Reserve, Marine Corps Reserve, and Air Force Reserve personnel and units after “a Governor requests Federal assistance in responding to a major disaster or emergency.” That new section provides as follows:

§ 12304a. Army Reserve, Navy Reserve, Marine Corps Reserve, and Air Force Reserve: order to active duty to provide assistance in response to a major disaster or emergency

(a) Authority. When a Governor requests Federal assistance in responding to a major disaster or emergency (as those terms are defined in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act ([42 U.S.C. 5122](#))), the Secretary of Defense may, *without the consent of the member affected*, order any unit, and any member not assigned to a unit organized to serve as a unit, of the Army Reserve, Navy Reserve, Marine Corps Reserve, and Air Force Reserve to active duty for a continuous period of not more than 120 days to respond to the Governor's request.

(b) Exclusion from strength limitations. Members ordered to active duty under this section shall not be counted in computing authorized strength of members on active duty or members in grade under this title or any other law.

(c) Termination of duty. Whenever any unit or member of the reserve components is ordered to active duty under this section, the service of all units or members so ordered to active duty may be terminated by order of the Secretary of Defense or law.

10 U.S.C. 12304a (emphasis supplied).

### 🚩History:

(Added Dec. 31, 2011, [P.L. 112-81](#), Div A, Title V, Subtitle B, § 515(a)(1), [125 Stat. 1394](#).)

### **How do these domestic emergency call-ups affect USERRA rights?**

Joe Smith is a Lieutenant Colonel in the Army Reserve and the commanding officer of an Army Reserve unit. He is not currently on

active duty, but he has been on active duty repeatedly since the terrorist attacks of September 11, 2001. Some of his active duty periods have been voluntary and some have been involuntary. Some of his active duty periods have been exempt from the computation of his five-year limit under the Uniformed Services Employment and Reemployment Rights Act (USERRA) and some of the periods have counted toward his limit.

Joe has worked for the XYZ Corporation since February 1990. Joe has been carefully tracking his usage of the five-year limit, and at this point he has used four years and ten months of the five-year limit. Joe understands that he cannot volunteer for any more active duty that counts toward his five-year limit with respect to his employer relationship with XYZ, because he is very close to the five-year limit.<sup>2</sup>

As I explained in Law Review 1281 and other articles, an individual must meet five conditions to have the right to reemployment after a period of voluntary or involuntary service in the uniformed services:

- a. Must have left a civilian position of employment (federal, state, local, or private sector) for the purpose of performing uniformed service.
- b. Must have given the employer prior oral or written notice, unless giving prior notice is precluded by military necessity or otherwise impossible or unreasonable.
- c. Must not have exceeded the cumulative five-year limit with respect to the period or periods of uniformed service related to

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<sup>2</sup> Please see Law Review 201 (August 2005) for a detailed discussion of what counts and what does not count toward exhausting the five-year limit. I invite the reader's attention to [www.servicemembers-lawcenter.org](http://www.servicemembers-lawcenter.org). You will find 1,049 articles about USERRA and other laws that are especially pertinent to those who serve our country in uniform, along with a detailed Subject Index and a search function, to facilitate finding articles about very specific topics. I initiated this column in 1997, and we add new articles each week. We added 169 new articles in 2013.

the employer relationship for which he or she seeks reemployment.

- d. Must have been released from the period of service without having received a disqualifying bad discharge from the military.
- e. After release from the period of service, has been timely in reporting back to work or applying for reemployment.<sup>3</sup>

Joe has met these five conditions for each of the times when he has been away from his XYZ Corporation job for voluntary or involuntary uniformed service. In September 2015, a truly historic hurricane (along the lines of Katrina 2005) causes absolutely devastating damage and loss of life in several Atlantic states. Five Governors have requested emergency federal assistance. Along with the Army Reserve unit he commands, Joe is called to active duty for 90 days under 10 U.S.C. 12304a.

At the end of his 90-day call-up, does Joe have the right to reemployment at XYZ Corporation? That depends. At the time he was called to active duty in 2015, Joe was within 60 days of exceeding his five-year limit on the cumulative duration of his periods of uniformed service related to his employer relationship with XYZ Corporation. If this 90-day period counts toward his five-year limit, Joe is beyond the five-year limit and does not have the right to reemployment.

Section 4312(c) of USERRA sets forth the five-year limit and the exemptions to the limit, as follows:

“(c) Subsection (a) [the right to reemployment] shall apply to a person who is absent from a position of employment by reason of service in the uniformed services if such person's cumulative period of service in the uniformed services, with respect to the employer relationship for

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<sup>3</sup> After a period of service of 181 days or more, the individual has 90 days to apply for reemployment. 38 U.S.C. 4312(e)(1)(D). Shorter deadlines apply after shorter periods of service.

which a person seeks reemployment, does not exceed five years, except that any such period of service shall not include any service--

(1) that is required, beyond five years, to complete an initial period of obligated service;

(2) during which such person was unable to obtain orders releasing such person from a period of service in the uniformed services before the expiration of such five-year period and such inability was through no fault of such person;

(3) performed as required pursuant to section 10147 of title 10, under section 502(a) or 503 of title 32, or to fulfill additional training requirements determined and certified in writing by the Secretary concerned, to be necessary for professional development, or for completion of skill training or retraining; or

(4) performed by a member of a uniformed service who is--

(A) **ordered to or retained on active duty under section 688, 12301(a), 12301(g), 12302, 12304, or 12305 of title 10** or under section 331, 332, 359, 360, 367, or 712 of title 14;

(B) ordered to or retained on active duty (other than for training) under any provision of law because of a war or national emergency declared by the President or the Congress, as determined by the Secretary concerned;

(C) ordered to active duty (other than for training) in support, as determined by the Secretary concerned, of an operational mission for which personnel have been ordered to active duty under section 12304 of title 10;

(D) ordered to active duty in support, as determined by the Secretary concerned, of a critical mission or requirement of the uniformed services;

(E) called into Federal service as a member of the National Guard under chapter 15 of title 10 or under section 12406 of title 10; or

(F) ordered to full-time National Guard duty (other than for training) under section 502(f)(2)(A) of title 32 when authorized by the President or the Secretary of Defense for the purpose of responding to a national

emergency declared by the President and supported by Federal funds, as determined by the Secretary concerned.

38 U.S.C. 4312(c) (emphasis supplied).

Under section 4312(c)(4)(A) of USERRA, *involuntary* call-ups to and extensions of active duty under several enumerated title 10 sections are explicitly exempted from the computation of an individual's five-year limit. Section 12304 is one of the listed sections, but section 12304a is not listed. We need an amendment to section 4312(c)(4)(A), adding section 12304a to the list of sections that are exempt from the five-year limit.<sup>4</sup>

**Q: Section 12304 is specifically mentioned in section 4312(c)(4)(A). Isn't section 12304a a part of section 12304?**

**A:** No. Section 12304(a) is subsection (a) of section 12304. Section 12304a is a *separate section* of title 10 that immediately follows section 12304. Yes, the placement of parentheses is absolutely critical. Here is the text of section 12304:

"§ 12304. Selected Reserve and certain Individual Ready Reserve members; order to active duty other than during war or national emergency

(a) Authority. Notwithstanding the provisions of section 12302(a) [[10 USCS § 12302\(a\)](#)] or any other provision of law, when the President determines that it is necessary to augment the active forces for any named operational mission or that it is necessary to provide assistance referred to in subsection (b), he may authorize the Secretary of Defense and the Secretary of Homeland Security with respect to the Coast

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<sup>4</sup> As I explained in Law Review 14057, the immediately preceding article in this series, Congress also recently added a new section 12304b to title 10, and that section also provides for *involuntary* calls to active duty in certain circumstances. We also need to add section 12304b to 38 U.S.C. 4312(c)(4)(A).

Guard when it is not operating as a service in the Navy, without the consent of the members concerned, to order any unit, and any member not assigned to a unit organized to serve as a unit, of the Selected Reserve (as defined in section 10143(a) of this [title \[10 USCS § 10143\(a\)\]](#)), or any member in the Individual Ready Reserve mobilization category and designated as essential under regulations prescribed by the Secretary concerned, under their respective jurisdictions, to active duty for not more than 365 consecutive days.

(b) Support for responses to certain emergencies. The authority under subsection (a) includes authority to order a unit or member to active duty to provide assistance in responding to an emergency involving--

- (1) a use or threatened use of a weapon of mass destruction; or
- (2) a terrorist attack or threatened terrorist attack in the United States that results, or could result, in significant loss of life or property.

(c) Limitations.

(1) No unit or member of a reserve component may be ordered to active duty under this section to perform any of the functions authorized by chapter 15 or section 12406 of this [title \[10 USCS §§ 331 et seq. or 12406\]](#) or, except as provided in subsection (b), to provide assistance to either the Federal Government or a State in time of a serious natural or manmade disaster, accident, or catastrophe.

(2) Not more than 200,000 members of the Selected Reserve and the Individual Ready Reserve may be on active duty under this section at any one time, of whom not more than 30,000 may be members of the Individual Ready Reserve.

(3) No unit or member of a reserve component may be ordered to active duty under this section to provide assistance referred to in subsection (b) unless the President determines that the requirements for responding to an emergency referred to in that subsection have exceeded, or will exceed, the response capabilities of local, State, and Federal civilian agencies.

(d) Exclusion from strength limitations. Members ordered to active duty under this section shall not be counted in computing authorized strength in members on active duty or members in grade under this title or any other law.

(e) Policies and procedures. The Secretary of Defense and the Secretary of Homeland Security shall prescribe such policies and procedures for the armed forces under their respective jurisdictions as they consider necessary to carry out this section.

(f) Notification of Congress. Whenever the President authorizes the Secretary of Defense or the Secretary of Homeland Security to order any unit or member of the Selected Reserve or Individual Ready Reserve to active duty, under the authority of subsection (a), he shall, within 24 hours after exercising such authority, submit to Congress a report, in writing, setting forth the circumstances necessitating the action taken under this section and describing the anticipated use of these units or members.

(g) Termination of duty. Whenever any unit of the Selected Reserve or any member of the Selected Reserve not assigned to a unit organized to serve as a unit, or any member of the Individual Ready Reserve, is ordered to active duty under authority of subsection (a), the service of all units or members so ordered to active duty may be terminated by--

- (1) order of the President, or
- (2) law.

(h) Relationship to War Powers Resolution. Nothing contained in this section shall be construed as amending or limiting the application of the provisions of the War Powers Resolution ([50 U.S.C. 1541](#) et seq.).

(i) Considerations for involuntary order to active duty.

(1) In determining which members of the Selected Reserve and Individual Ready Reserve will be ordered to duty without their consent under this section, appropriate consideration shall be given to--

(A) the length and nature of previous service, to assure such sharing of exposure to hazards as the national security and military requirements will reasonably allow;

(B) the frequency of assignments during service career;

(C) family responsibilities; and

(D) employment necessary to maintain the national health, safety, or interest.

(2) The Secretary of Defense shall prescribe such policies and procedures as the Secretary considers necessary to carry out this subsection.

(j) Definitions. In this section:

(1) The term "Individual Ready Reserve mobilization category" means, in the case of any reserve component, the category of the Individual Ready Reserve described in section 10144(b) of this [title \[10 USCS § 10144\(b\)\]](#).

(2) The term "weapon of mass destruction" has the meaning given that term in section 1403 of the Defense Against Weapons of Mass Destruction Act of 1996 ([50 U.S.C. 2302\(1\)](#))."

10 U.S.C. 12304.

As you can see, section 12304a is an entirely separate section and is not part of section 12304.

**Q: How is it possible for Congress to amend title 10 of the United States Code, adding a new provision for involuntary call-up of Reserve Component personnel, and not make a corresponding clerical amendment to USERRA in title 38?**

**A:** In the House of Representatives and also in the Senate, the various committees have jurisdiction over specific titles of the United States Code.<sup>5</sup> The House Armed Services Committee (HASC) and the Senate Armed Services Committee (SASC) have jurisdiction over title 10 (armed forces). Each year, the HASC and the SASC make amendments to title 10, as part of the NDAA.

The House Veterans Affairs Committee (HVAC) and the Senate Veterans Affairs Committee (SVAC) have jurisdiction over title 38 (veterans' affairs). The HASC and SASC cannot amend title 38 through the NDAA without the approval and cooperation of the HVAC and the SVAC. Other than ROA, nobody here in Washington is paying close attention to the relationship between title 10 and title 38. It frankly never occurred to anyone that the addition of a new title 10 section with new involuntary call-up authority would necessitate an amendment to title 38.

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<sup>5</sup> There are 49 titles (broad subject areas) in the United States Code.