

What Employers Should Know About the National Guard and Reserves

CPT Stephen Yip

McLennan County Criminal District Attorney's Office

36th Infantry Division, Texas Army National Guard



Foot Stomp

1. Noun

The physical act of bringing one's foot down onto a surface with force

2. Noun, Slang (U.S. Military)

Emphasis during a block of instruction



So...what do you do?

“Are you in the Army or the National Guard?”

“Are you in the Guard Reserve?”

“Are you in the Army Guard or the Texas Guard?”

Structure of the U.S. Armed Forces

Army	Navy	Marine Corps	Air Force	Space Force	Coast Guard
------	------	--------------	-----------	-------------	-------------

Active Duty	Active Duty	Active Duty	Active Duty	Active Duty	Active Duty
-------------	-------------	-------------	-------------	-------------	-------------

Army Reserve	Navy Reserve	Marine Corps Reserve	Air Force Reserve		Coast Guard Reserve
--------------	--------------	----------------------	-------------------	--	---------------------

Army National Guard			Air National Guard		
---------------------	--	--	--------------------	--	--

“Reserve Components”

Structure of the U.S. Army



U.S. ARMY





Active Duty (Regular Army)

- Component 1
- Primary combat force of the U.S. Army
- Combat, combat support, & combat service support
- 452,823 Soldiers
- 12 combat divisions
- Professional Soldiers who engage in day-to-day military operations
- Garrison duty focuses on training
- Limited, if any, civilian employment with no federal employment protection



Army National Guard

- Component 2
- Primary combat reserve of the U.S. Army
- Combat & combat support
- 328,823 Soldiers
- 8 combat divisions
- Citizen-Soldiers who maintain civilian employment while also conducting regular military training and mobilizing for military operations as part of combat units
- Combat-driven units and training
- Can be called upon for domestic operations and Defense Support to Civil Authorities



Army National Guard

- Title 10: Federal funding, Federal operational control
 - OCONUS deployments
- Title 32: Federal funding, State operational control
 - IDT (drill) & Annual Training
 - Disaster response & long-term domestic operations
- State Active Duty (SAD): State funding, State operational control
 - Short-term civil support
 - State military operations, i.e. Operation Lone Star
- ARNG has two commanders-in-chief
 - President is CIC when in T10 status
 - Governor is CIC when in T32 and SAD status





Army Reserve

- Component 3
- Provides Soldiers to support Active Duty
- 170,601 Soldiers
- Combat support and combat service support
- Citizen-Soldiers who maintain civilian employment while also conducting regular military training and mobilizing to provide support to Active Duty
- Job-driven units and training



Army Reserve

- Always in Title 10 Status
 - Battle Assembly (drill) & Annual Training
 - Activations and deployments
- USAR always reports to the President

Federal Protection for Guardsmen & Reservists

- Uniformed Services Employment and Re-employment Rights Act (USERRA)
 - 38 U.S.C. §§ 4301–4335
 - Job protections for reserve component Service Members
- Servicemembers Civil Relief Act (SCRA)
 - 50 U.S.C. §§ 3901–4043
 - Other civil protections for all Service Members



USERRA

38 U.S.C. § 4301 – Purposes; sense of Congress

(a) *The purposes of this chapter—*

- (1) *to encourage service in the uniformed services by **eliminating or minimizing the disadvantages to civilian careers and employment** which can result from such service;*
- (2) *to **minimize the disruption to the lives of persons performing service in the uniformed services as well as to their employers, their fellow employees, and their communities**, by providing for the prompt reemployment of such persons upon their completion of such service; and*
- (3) *to **prohibit discrimination** against persons because of their service in the uniformed services.*

USERRA – Discrimination Prohibited

38 U.S.C. § 4311 – Discrimination against persons who serve in the uniformed services and acts of reprisal prohibited

- Employers may not deny initial employment, reemployment, retention, promotion, or any employment benefit on the basis of military membership, application for membership, performance of service, application for service, or obligation
- Employers may not take adverse employment action or retaliatory action against Service Members who assert protection under USERRA

USERRA – Reemployment

38 U.S.C. § 4312 – Reemployment rights of persons who serve in the uniformed services

Service Members absent due to “service in the uniformed services” shall be entitled to reemployment if:

- The employee has given advance written or verbal notice*;
- The cumulative length of the absence and all previous service-related absences with that employer does not exceed five years; and
- The employee reports to, or submits an application for reemployment to, their employer according to statutory requirements



USERRA – Notice

38 U.S.C. § 4312 – Reemployment rights of persons who serve in the uniformed services

Notice Requirement

- May be given by either the employee or an appropriate officer of the employee's uniformed service
- No notice is required if:
 - Giving notice is precluded by military necessity, or
 - Under all relevant circumstances, giving of such notice is otherwise impossible or unreasonable

USERRA – Reemployment <91 days

38 U.S.C. § 4313 – Reemployment positions

Upon return, the Service Member shall be promptly reemployed in:

- The position the Service Member would have if they had not left and been continuously employed; or
- The position of the Service Member had when they left
 - But only if the Service Member is not qualified for the position they would have had without the absence, and after the employer has made reasonable efforts to qualify the Service Member)

USERRA – Reemployment 91+ days

38 U.S.C. § 4313 – Reemployment positions

Upon return, the Service Member shall be promptly reemployed in:

- The position the Service Member would have if they had not left and been continuously employed **or a position of similar seniority, status, and pay**; or
- The position of the Service Member had when they left **or a position of similar seniority, status, and pay**
 - But only if the Service Member is not qualified for the position they would have if they had not left, and after the employer has made reasonable attempts to qualify the Service Member



USERRA – Service-Related Disability

38 U.S.C. § 4313 – Reemployment positions

If a service member has a disability incurred or aggravated as during the service-related absence, and this disqualifies them from the position they would have if continuously employed, they will be reemployed in

- A position of similar seniority, status, and pay that they are qualified to perform, or would be qualified to perform with reasonable efforts by the employer; or
- A position which is the nearest approximation in terms of seniority, status, and pay

USERRA – Multiple Military Employees

38 U.S.C. § 4313 – Reemployment positions

The Service Member who left first has priority to a reemployment position over a Service Member who left later

If a returning Service Member cannot be reemployed in a particular position because of another returning Service Member, they shall be reemployed in a position that provides a similar status and pay, with full seniority

USERRA – Rights and Benefits

38 U.S.C. § 4316 – Rights, benefits, and obligations of persons absent from employment for service in a uniformed service

- Upon reemployment, a Service Member is entitled to the seniority, and rights and benefits determined by seniority, they had when they left **PLUS** seniority, rights, and benefits they would have attained had they been continuously employed

38 U.S.C. § 4318 – Employee pension benefit plans

- Reemployed Service Members will be considered to not have a break in service with respect to an employee pension benefit plan
- Employers are obligated to make employer contributions during the absence in the same manner and to the same extent as they do for other employees

USERRA – Enforcement

38 U.S.C. § 4323 – Enforcement of rights with respect to a State or private employer

A Service Member whose employer has failed to comply with USERRA may ask the Secretary of Labor to refer the complaint to the U.S. Attorney General, who may represent the Service Member in the action in the U.S. District Court

The Service Member can also choose to pursue a federal action with their own attorney

No fees or court costs can be charged against a person claiming rights under USERRA

USERRA – Remedies

38 U.S.C. § 4323 – Enforcement of rights with respect to a State or private employer

If the Service Member is successful in their action, the District Court may award:

- Enforcement of USERRA rights
- Compensation for lost wages
- 3% per annum interest on lost wages
- \$50,000 in liquidated damages if the Court finds the employer knowingly failed to comply with USERRA
- Attorney fees, expert witness fees, and other litigation expenses



Additional Employee Benefits

USERRA sets the floor for employment and reemployment benefits, employers can always go above this level of protection

Common employment protections often address pay while a Service Member is on orders

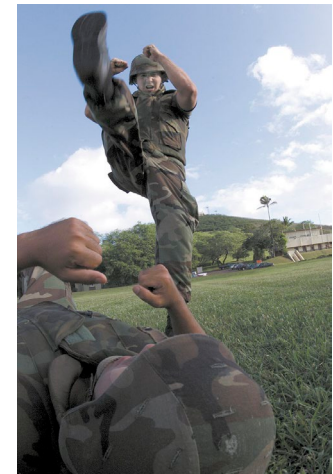
- Unlimited paid military leave
- Paid military leave days
- Differential pay

“Service in the uniformed service”

38 U.S.C. § 4303 – Definitions

“Performance of duty on a voluntary or involuntary basis in a uniformed service under competent authority”

- Active Duty
- Active Duty for Training
- Initial Active Duty for Training
- Inactive Duty Training (IDT)
- “Full-time National Guard duty”
- State Active Duty in response to a declared national emergency (National Emergencies Act)
- State Active Duty in response to a declared disaster (Stafford Act)



“Full-time National Guard Duty”

Active Guard Reserve (AGR)

- Full-time federal employment
- Service members with key positions in their National Guard units
- Must be uniformed
- Should not have civilian employment

National Guard Technicians

- Full-time federal employment
- Administrative and operation support for state military departments
- May be either uniformed (Title 32) or civilian (Title 5)
- Should not have civilian employment

Active Duty Operational Support (ADOS)

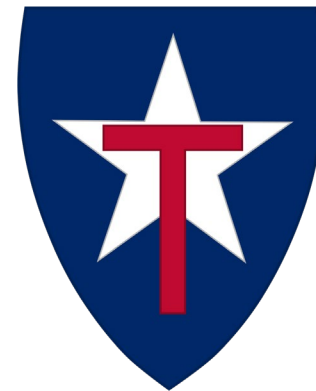
- Temporary military orders
- Provide operational support for specific operations
- Must be uniformed
- Could be on leave from civilian employer

Why does the National Guard have
special statuses?

The National Guard has dual authorities and missions

- Title 10: Federal funding, Federal operational control
 - OCONUS deployments
- Title 32: Federal funding, State operational control
 - IDT (drill) & Annual Training
 - Disaster response & long-term domestic operations
- State Active Duty (SAD): State funding, State operational control
 - Short-term civil support
 - State military operations, i.e. Operation Lone Star

Structure of the Texas Military Department





Texas State Guard

- Uniformed service that provides mission-ready forces to assist state and local authorities in times of state emergencies
- ~1800 Soldiers
- No weapons, tactical vehicles, or aircraft
- Unlike National Guard, not part of the U.S. Armed Forces and cannot be brought under Federal authority or sent outside Texas
- Conduct monthly drill, annual training, and can be activated on State Active Duty orders

State Protection for Guardsmen

Texas Govt. Code § 437.213: Certain Benefits and Protection for State Service

*A Service Member in the Texas Military Forces who is ordered to State Active Duty or state training and other duty by...proper authority...is entitled to **the same benefits and protections** provided to persons...*

(1) performing service in the uniformed services as provided by 38 U.S.C. sections 4301-4313 and 4316-4319; and

(2) in the military service of the United States as provided by 50 U.S.C. sections 3901-3959 and 4011-4026

Texas confers the same protections as USERRA and the SCRA to TMD Service Members on State Active Duty (SAD)



**Isn't State Active Duty already
covered by USERRA?**

SAD Not in Support of Presidential Declaration

USERRA only covers SAD for U.S. Service Members (not the Texas State Guard) and only when it is in support of the response to an emergency or disaster that is so declared by the President of the United States

- Hurricane Harvey (2017)
- COVID-19 response (2020)
- Kerr County floods (2025)

Until recently, there were no significant SAD activations outside of emergencies and disasters

Operation Lone Star



Civil Disturbance Operations





Stephen Yip
CPT, JA, TXARNG

McLennan County Criminal District Attorney's Office

stephen.yip@mcclennan.gov

36th Infantry Division, Texas Army National Guard

stephen.h.yip.mil@army.mil