



## Ohio National Guard Federal Employee Benefits Bulletin

<b>Bulletin Number:</b> OH-10	<b>Date:</b> 10 June 2021
<b>Applicability:</b> National Guard (NG) Technicians (T5 and T32)	<b>Subject:</b> USERRA Rights for State Active Duty (SAD) orders

**Background:** On January 5, 2021, Section 4303 of the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) was amended to extend employment and reemployment rights to members of the National Guard performing certain types of duty under state authority. State Active Duty means National Guard training or other duty, other than inactive duty, performed under the authority of the Governor of a State. It does not include duty performed under federal authority (such as Title 10 or Title 32), nor duty for which the National Guard member is entitled to pay from the Federal Government.

**USERRA Protection:** National Guard duty performed as State Active Duty historically has not been covered under USERRA. However, pursuant to a recent statutory change which became effective on **January 5, 2021**, members of the National Guard serving on State Active Duty: **a)** for 14 days or more, **b)** in support of a national emergency declared by the President under the National Emergencies Act, or **c)** in support of a major disaster declared by the President under Section 401 of the Stafford Act, are now covered under USERRA.

**Impact:** If an employee enters into SAD status for over 14 days then the employee now has job protection under USERRA and would be eligible for placement in an Absent-US status in the personnel and pay systems. Significant changes under USERRA now include SAD service for discrimination, reemployment, employment, and benefits provisions.

**Military Leave:** Military Leave (15 day) is for military duty specifically listed in 5 USC 6323. State Active Duty is not listed and therefore, even though SAD orders are protected under USERRA, you are still not authorized to use the Military Leave.

**Military Deposits:** Military deposits are covered by 5 USC Chapters 83 and 84. The definition of military service did not change to include SAD. 38 USC 4318 states that only Employee Pension Benefit plans covered by Employee Retirement Income Security Act (ERISA) are subject to the requirements of USERRA. FERS and TSP are not covered by ERISA. Therefore, no change was made for retirement purposes.

For any other questions or concerns regarding any of the information listed above or on any Technician Benefits, please refer to the USERRA FAQ sheet attached from the Department of Labor, or contact the Benefits email distro at: [ng.oh.oharnng.list.j1-hro-benefits@mail.mil](mailto:ng.oh.oharnng.list.j1-hro-benefits@mail.mil)



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## *New Coverage for Certain State Active Duty under the Uniformed Services Employment and Reemployment Rights*

On January 5, 2021, Section 4303 of the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) was amended to extend employment and reemployment rights to members of the National Guard performing certain types of duty under state authority. Members of the National Guard continue to answer the call to duty to protect the health and well-being of all Americans. We owe a duty to them to ensure full compliance with the employment and reemployment rights under USERRA. The Veterans' Employment and Training Service (VETS) interprets and provides guidance on USERRA and investigates complaints filed under this law. VETS offers the following frequently asked questions and answers:

Does this factsheet create new USERRA rights and obligations in light of the recent change to USERRA?

- No. The statute and regulations still govern USERRA rights and obligations. This factsheet addresses some scenarios that might arise from the application of the recent change to USERRA in the context of current events.

What is State Active Duty for the purposes of USERRA?

- State Active Duty means National Guard training or other duty, other than inactive duty, performed under the authority of the Governor of a State. It does not include duty performed under federal authority (such as Title 10 or Title 32), nor duty for which the National Guard member is entitled to pay from the Federal Government.

Does a member of the National Guard who is called to State Active Duty have employment and reemployment protections under USERRA?

- Historically, no. National Guard duty performed as State Active Duty has not been covered under USERRA. However, pursuant to a recent statutory change which became effective on January 5, 2021, members of the National Guard serving on State Active Duty: a) for 14 days or more, b) in support of a national emergency declared by the President under the National Emergencies Act, or c) in support of a major disaster declared by the President under Section 401 of the Stafford Act, are now covered under USERRA.
- Members of the National Guard otherwise serving on State Active Duty may have similar employment protections under state law and should contact the appropriate state office for assistance.

- Note that the authority under which orders are issued can change, even in the course of a service member's performance of service.

Does a member of the National Guard or Reserves who is called to active duty in response to a national emergency have employment and reemployment protections under USERRA?

- Yes, if called to duty under federal authority. National Guard or Reserve duty under federal authority (such as Title 10 or Title 32) is covered by USERRA.
- Yes, if a National Guard member serving on State Active Duty on or after January 5, 2021, for 14 days or more, or in support of a national emergency declared by the President under the National Emergencies Act, pursuant to the recent statutory change.

Does a member of the National Guard or Reserves who is called to active duty in response to an emergency, rather than a major disaster, declared under Stafford Act have employment and reemployment protections under USERRA?

- Yes, if called to duty under federal authority. National Guard or Reserve duty under federal authority (such as Title 10 or Title 32) is covered by USERRA.
- Yes, if a National Guard member serving on State Active Duty on or after January 5, 2021, for 14 days or more.
- No, if a National Guard member serving on State Active Duty for 13 days or less. The recent statutory change which became effective on January 5, 2021, only authorizes USERRA protections for members of the National Guard serving on State Active Duty: a) for 14 days or more, b) in support of a national emergency declared by the President under the National Emergencies Act, or c) in support of a major disaster declared by the President under Section 401 of the Stafford Act. On January 11, 2021, the President declared an emergency under Section 501 of the Stafford Act for the District of Columbia (DC) 59th Presidential Inauguration between January 11, 2021, and January 24, 2021. A National Guard member serving on State Active Duty for 13 days or less, or in support of an emergency declared by the President under Section 501 of the Stafford Act, such as the DC 59th Presidential Inauguration, is still not covered under USERRA.
- Keep in mind that members of the National Guard otherwise serving on State Active Duty may have similar employment protections under state law and should contact the appropriate state office for assistance.

Where to Obtain Additional Information:

Important USERRA-related resources and compliance assistance materials for employees and employers are available through the Veterans' Employment and Training Service website at [www.dol.gov/agencies/vets/programs/userra](http://www.dol.gov/agencies/vets/programs/userra), which contains a USERRA elaws Advisor, FAQs, fact sheets, and links to the statute and implementing regulations. Our toll-free information and helpline, available 8:00 a.m. – 8:00 p.m. Eastern Time, is 1-866-4-USA-DOL (1-866-487- 2365). The Department of Defense's Employer Support of the Guard and Reserve also provides resources available at [www.esgr.mil](http://www.esgr.mil).

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