

Alabama Law Protecting National Guard Members on State Active Duty
(Updated July 2017)

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Alabama law protects Alabama National Guard members who are called to active duty by the Alabama Governor, but only for periods of state active duty that last 30 days or more.

Whenever any active member of the Alabama National Guard, in time of war, armed conflict, or emergency proclaimed by the Governor or by the President of the United States, shall be called or ordered to state active duty for a period of 30 consecutive days or more or federally funded duty for other than training, the provisions of the SSCRA [Soldiers' and Sailors' Civil Relief Act]³ and the Uniformed Services Employment and Reemployment Rights Act shall apply.

Alabama Code section 31-12-2 (West).

This provision needs to be rewritten. State active duty periods (responding to floods, tornadoes, hurricanes, etc.) often are completed within 30 days. It is ironic that the State of Alabama might need to keep the individual National Guard member on state active duty longer than needed, just to ensure that he or she will not lose his or her civilian job.

The Uniformed Services Employment and Reemployment Rights Act (USERRA) is the federal law that protects service members and veterans from discrimination in employment and that gives them the right to reemployment after voluntary or involuntary "service in the uniformed services." USERRA is codified in title 38 of the United States Code, sections 4301-4335 (38 U.S.C. 4301-4335).

USERRA protects National Guard members when they perform military duty or training under title 10 or title 32 of the United States Code, but USERRA does not protect the civilian jobs of National Guard members when they perform state active duty (called by the Governor for state emergencies like floods, tornadoes, etc.). Alabama and every other state should have a state law to protect the civilian jobs of National Guard members performing state active duty, because this duty is not protected by federal law. The Alabama law quoted above is insufficient.

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³ In 2003, Congress substantially rewrote the Soldiers' and Sailors' Civil Relief Act (SSCRA), a law that was originally enacted in 1917. The new law is called the Servicemembers Civil Relief Act (SCRA).

It is unclear what is meant by the term that “USERRA shall apply.” The Alabama Legislature does not have the power to amend a federal law or to make that federal law apply to situations that are not covered by that federal law. The Alabama Legislature needs to enact a clear statute that gives National Guard members a specific right to return to their civilian jobs after state active duty and that provides a strong enforcement mechanism to deal with employers who flout this requirement.

It should also be noted that the Alabama law quoted above, by its terms, only applies to members of the Alabama National Guard. Some members of the National Guard of other states (especially neighboring states like Georgia and Mississippi) happen to have civilian jobs in Alabama. The Alabama statute should be amended to protect state active duty performed by members of the National Guard of other states.

UPDATE JULY 2017

Alabama Governor Kay Ivey has signed Senate Bill No. 97, and this new law has amended section 31-12-2 to read as follows:

- (a) Whenever any active member of the Alabama National Guard, *or a member of the national guard of another state who is employed in this state*, in time of war, armed conflict, or emergency proclaimed by the Governor or by the President of the United States, shall be called or ordered to state active duty [for a period of 30 consecutive days or more] or federally funded duty for other than training, the provisions of the [SSCRA] *federal Servicemembers Civil Relief Act (SCRA)* and the *uniformed Services Employment and Reemployment Rights Act* shall apply.
- (b) *Those active members as defined in subsection (a) called or ordered to active duty for a period of 30 consecutive days or more shall be eligible for military differential pay pursuant to Section 31-12-5 and restoration of annual or sick leave pursuant to Section 31-12-8.*

Code of Alabama, Section 31-12-2. The bracketed words have been deleted and the italicized words have been added.

This amendment expands the protection of Alabama law to apply to a member of the National Guard of another state (typically but not necessarily a neighboring state) who has a civilian job in Alabama and who is called to state active duty by the Governor of another state. For example, George Vernon Montgomery V lives in eastern Mississippi and is a Sergeant in the Mississippi Army National Guard, but his civilian job is just across the state line in western Alabama. Montgomery is called to state active duty by the Governor of Mississippi and is away from his Alabama job for several days. Until now, the right to return to the civilian job was not protected by law. The federal Uniformed Services Employment and Reemployment Rights Act (USERRA) does not apply to state active duty. The Mississippi law does not apply across the

state line in Alabama. The Alabama law, until now, only applied to members of the Alabama National Guard. Montgomery fell through the crack and was unemployed. With this amendment, the right to reinstatement in the Alabama civilian job is protected in this scenario.

This amendment also addresses the issue of the National Guard member who is called to state active duty for a period of fewer than 30 consecutive days, as will typically be the case. For example, George Corwin Wallace V lives and works in Alabama and is a Sergeant in the Alabama Army National Guard. After a major hurricane, Wallace is called to state active duty by the Governor of Alabama for rescue, recovery, and clean-up operations. Wallace remains on state active duty for 20 days.

Wallace serves honorably and reports back immediately to his civilian employer. The employer is annoyed with the short-notice call-up and has already filled Wallace's job by hiring a new employee. The employer denies Wallace's reinstatement request, saying that Alabama law only gives the right to reinstatement after a period of state active duty of 30 consecutive days or more. This amendment removes that potential employer argument.

I remain concerned about the sufficiency of the "USERRA will apply" language. If the National Guard member is denied reinstatement in his or her civilian job after a period of absence necessitated by state active duty, it is unclear if Alabama law provides for enforcement in court.