

## Hawaii Law Protecting National Guard Members Performing State Active Duty

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Hawaii protects the employment rights of National Guard members called to state active duty. Here is the pertinent section:

- (a) Every *employee of a private employer* who is a member of the national guard shall be entitled to absent oneself from the employee's employment duties while engaged in the performance of ordered national guard service and while going to and returning from such service. Such person shall:
- (1) If still qualified to perform the person's employment duties, be restored by such employer or the employer's successor in interest to such position or to a position of like seniority, status, and pay; or
  - (2) If not qualified to perform the person's employment duties, by reason of disability sustained during ordered national guard service, but qualified to perform the duties of any other position in the employ of such employer or the employer's successor in interest, be offered employment and, if such person so requests, be employed by such employer or the employer's successor in interest in such other position the duties of which such person is qualified to perform as will provide such person like seniority, status, and pay, or the nearest approximation thereof consistent with the circumstances in such person's case, unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so.
- (b)(1) Any person who is restored to or employed in a position in accordance with the provisions of subsection (a) shall be considered as having been on furlough or leave of absence; shall be so restored or reemployed without loss of seniority; shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was ordered to national guard service; and shall not be discharged from such employment position without cause within one year after such restoration or reemployment.
- (2) Any person who is restored to or employed in a position in accordance with the provisions of subsection (a) should be so restored or reemployed in such manner as to

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give such person such status in the person's employment as the person would have enjoyed if such person had continued in such employment continuously from the time such person became engaged in the performance of ordered national guard service until the time of such person's restoration to such employment, or reemployment.

- (3) Any person who holds a position described in subsection (a) shall not be denied retention in employment or any promotion or other incident or advantage of employment because of any obligation as a member of the national guard.

Hawaii Revised Statutes section 121-43 (emphasis supplied).

Section 121-43 is limited to private employers in Hawaii. Two other statutory sections, in a different chapter, apply to employees of the State of Hawaii and the five counties<sup>3</sup>:

**§78-16.5: Pay of officers and employees on active military service.**

(a) All officers and employees of the State and the several counties who are appointed for at least six months of service shall be entitled, while on active duty or during periods of camps of instruction or field maneuvers as members of the Hawaii national guard or organized reserves, including the officers' reserve corps and the enlisted reserve corps, under call of the President of the United States *or the governor of the State*, to receive pay as provided by law. During the absence of the officer or employee, while in the performance of ordered military or naval duty as a member of the national guard, air national guard, naval militia, or organized reserves, including the officers' reserve corps and the enlisted reserve corps, the officer or employee shall receive the officer's or employee's salary or compensation as such officer or employee, but only for a period not exceeding fifteen working days in any calendar year.

(b) Notwithstanding subsection (a), if the officer or employee is called to active duty or otherwise required to report for camp training or field maneuvers by official military orders a second time within a calendar year, the officer or employee may elect to use the fifteen working days of the succeeding calendar year to which the officer or employee is entitled for such purposes within the current calendar year; provided that the officer's or employee's entitlement to fifteen working days under this section for the succeeding calendar year shall be canceled and the officer or employee shall so agree in writing. [L 2003, c 109, pt of §5]

Hawaii Revised Statutes section 78-16.5 (emphasis supplied).

**§78-16.6 Nonforfeiture for absence.** Every officer and employee of the State and the several counties who is a member of the Hawaii national guard or organized reserves, including the officers' reserve corps and the enlisted reserve corps, shall be entitled to be absent from the

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<sup>3</sup> The five counties re Hawaii County, Kalawao County, Kaua'i County, Maui County, and the City and County of Honolulu.

officer's or employee's duties or service while engaged in the performance of ordered military or naval duty and while going to and returning from such duty.

No officer or employee shall be subjected, directly or indirectly, by reason of the absence to any loss or diminution of vacation or holiday privileges or be prejudiced by reason of the absence with reference to promotion or continuance in office, employment, reappointment to office, or reemployment. [L 2003, c 109, pt of §5]

Hawaii Revised Statutes section 78-16.6.

Under section 78-16.5, an employee of the State of Hawaii or one of the counties is entitled to 15 work days per year of *paid* military leave for military training or duty as a member of a Reserve Component of the armed forces<sup>4</sup> and this expressly includes *state* active duty as a member of the *Hawaii* Army or Air National Guard. Under section 78-16.6, a Reserve Component member who works for the State of Hawaii or a county and who has exhausted his or her right to *paid* military leave is entitled also to *unpaid military leave* without limitation. Section 78-16.6 does not expressly mention state active duty, but it seems reasonable to infer that state active duty performed by a member of the Hawaii Army or Air National Guard is protected.

Section 121-43 appears to apply to members of the National Guard of other states, not just Hawaii. This issue is of lesser importance since it is unlikely that a member of the National Guard of another state would have a civilian job in Hawaii. The protection for public sector employees is clearly limited to members of the Hawaii National Guard. It would seem to be most unlikely that an employee of the State of Hawaii or a Hawaii county could be a member of the National Guard of a state other than Hawaii.

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<sup>4</sup> The seven Reserve Components are 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. The Army National Guard and Air National Guard have a hybrid state-federal status, while the other five components are purely federal.