

## Iowa's Reemployment Protections For Members Of The National Guard

By Nathan M. Richardson<sup>1</sup>

The State of Iowa has enacted two statutory provisions that affect the reemployment rights of National Guard members. Like many other states, Iowa has enacted separate statutes for state and local government employees and private sector employees. In both sections, the Iowa Code provides some reemployment protections for employees who are members of the National Guard. Neither statute explicitly references the *Iowa* National Guard. However, the Iowa Code, in section 29A.1 provides a clear definition:

“ ‘National guard’ means the *Iowa* units, detachments and organizations of the army national guard of the United States, the air national guard of the United States, the army national guard, and the air national guard as those forces are defined in 10 U.S.C. [section] 101.”

Because the Code limits its application to members of the Iowa National Guard, a potential coverage gap exists for individuals who pursue careers within Iowa's borders while serving in the Army National Guard or Air National Guard of a neighboring state.

Take the hypothetical case of Dr. William Cody as an example. Dr. Cody practices surgery as an employee of a hospital in Des Moines. He is also a trauma surgeon in the Nebraska Air National Guard. A devastating tornado strikes the Omaha area and the Governor of Nebraska calls Cody's unit to state active duty to aid in the recovery. When Dr. Cody takes leave from his job to participate in his Nebraska state active duty, Iowa law does not provide him with the reemployment protections that it would if he were called to state active duty as a member of the Iowa National Guard.<sup>2</sup> The provision, by definition, only applies to members of the *Iowa* Army National Guard and Air National Guard.

### CIVIL EMPLOYEES

Section 29A.28 of the Iowa Code addresses military leave and reemployment protections for civil employees, defined as “all officers and employees of the state, a subdivision thereof, or a municipality other than employees employed temporarily for six months or less.” 29A.28.1.a entitles civil employees “who are members of the [Iowa]

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<sup>1</sup> Nathan M. Richardson has completed his first year of law school and George Washington University in Washington, DC and is a summer associate, providing very valuable legal research assistance to the Service Members Law Center.

<sup>2</sup> If the federal government mobilized Dr. Cody's Nebraska National Guard Unit, Dr. Cody would fall under the reemployment protections of USERRA. In this particular example Dr. Cody is not covered because USERRA does not apply to *state* active duty. Please see Law Review 14071.

national guard” to a paid leave of absence “for the first thirty days of such leave of absence.” 29A.28.3 mandates:

“Upon returning from a leave of absence under this section, an employee shall be entitled to return to the same position and classification held by the employee at the time of entry into state active duty, national guard duty, federal active duty, or civil air patrol duty, or to the position and classification that the employee would have been entitled to if the continuous civil service of the employee had not been interrupted by state active duty...”

This provision mirrors the Uniformed Services Employment and Reemployment Rights Act (USERRA), which also entitles employees to the position they would have attained if continuously employed, rather than just the position they had prior to taking a military leave of absence after being called to federal active duty.

For example, Marshall DeMoyne is a public high school administrator and a helicopter pilot in the Iowa National Guard. Marshall’s school district offers fixed promotions to its employees every twenty-four months. Marshall is one month away from obtaining his next promotion. Iowa’s governor calls Marshall’s brigade to active state service for a period of sixty days. When Marshall returns from his leave of absence, he is entitled to (incidentally, along with pay for the first thirty days of his military leave) reinstatement at the level he would have been promoted to had he never left his job. If the *Federal* Government mobilized his unit for a 9-month deployment to Afghanistan, the outcome would be the same under USERRA.

## **PRIVATE EMPLOYEES**

Section 29A.43 of the Iowa Code addresses private employees who are also members of the Iowa National Guard.

“A member of the [Iowa] national guard...ordered to temporary duty or service, as defined in section 29A.1, subsection 3, 8, or 12<sup>3</sup>...for any purpose is entitled to a leave of absence for the period of the duty or service, from the member’s private employment unless the employment is of a temporary nature. Upon completion of the duty or service, the employer shall restore the person to the position held prior to the leave of absence or employ the person in a position of like seniority, status, and pay. However, the person shall give evidence to the employer of satisfactory completion of the duty or service, and that person is still qualified to perform the duties of the position.”

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<sup>3</sup> Federal active duty, Title 32 National Guard service, and state active duty authorized by the Governor of Iowa, respectively.

The key difference between 29A.43 (private employees) and 29A.28 (civil employees) is the status available when the employee returns from the leave of absence.

In the previous example, Marshall DeMoyné was a public high school administrator and National Guard helicopter pilot, with a fixed 24-month promotion plan. Now imagine the same scenario, except now Marshall works at a *private* high school. When he returns from his sixty-day state active duty, Marshall is not entitled to the promotion. Why is there a different result? Because the statute only requires his employer to “restore the [employee] to the position held prior to the leave or employ that person in a position of like seniority, status, or pay.” Marshall’s school is not required to reinstate him in the position he *would* have earned had he not taken military leave. In contrast, if Marshall’s unit were mobilized by the *Federal* Government, USERRA would require his employer to reinstate him with the promotion he would have earned had he not been mobilized.

Section 29A.43.3 provides the enforcement mechanism for civil employers who violate the reemployment rights of their National Guard employees, stating, “a person violating a provision of this section is guilty of a simple misdemeanor. Violations of this section shall be prosecuted by the attorney general or the county attorney of the county in which the violation occurs.”

Because Iowa’s enforcement mechanism is purely criminal, employees lack the ability to sue their employers in civil court for damages or equitable relief. Instead they must rely upon the zeal of their local prosecutor and a misdemeanor offense as sufficient deterrents to employers who would otherwise violate Iowa’s reemployment protections. This enforcement mechanism is of dubious value. If Iowa enacted legislation enabling civil suits against employers who violate the protections of Iowa Code 29A.43, members of the National Guard in Iowa would find themselves much better protected from employers who might otherwise lack an incentive to uphold the service members’ reemployment rights.