

IL-2015-NG
(Update Appended October 2015)

Illinois Law Protecting National Guard Members Performing State Active Duty

By Kyle E. Helmick¹

Illinois has enacted excellent provisions protecting National Guard members performing state active duty. Here is the text of the pertinent sections:

§ 30.15. National Guard; State Active Duty; reemployment rights.

(a) *Any member of the National Guard ("a member")* employed by a private employer in the State of Illinois *or by the State of Illinois or any political subdivision of the State* whose absence from a position of employment is necessitated by reason of being called to State Active Duty, whether or not voluntary, shall be entitled to reemployment rights and benefits and other employment benefits under this Article if:

(1) the member (or an appropriate officer of the National Guard in which the service is performed) has given advance written or oral notice of the service, if reasonably possible;

(2) the member reports to, or submits an application for reemployment to, the employer in accordance with the provisions of subsection (e); and

(3) the character of the member's service on State Active Duty was honorable, under honorable conditions, or otherwise characterized as satisfactory.

(b) No notice is required under subsection (a) if precluded by military necessity, or if the giving of the notice is not reasonably possible, under all relevant circumstances. A written determination of military necessity for the purposes of this subsection shall be made by the Adjutant General of Illinois and shall not be subject to judicial review.

(c) An employer is not required to reemploy a member under this Section if:

(1) the employer's circumstances have so changed as to make such reemployment impossible or unreasonable, or if reemployment would impose an undue hardship on the employer; or

(2) the employment from which the member leaves to serve in the National Guard on State Active Duty is for a brief, nonrecurrent period and there is no reasonable expectation that the employment will continue indefinitely or for a significant period.

(d) In any proceeding involving an issue of whether (i) any reemployment referred to in subsection (c) is impossible or unreasonable because of a change in an employer's circumstances; (ii) any accommodation, training, or effort referred to in subdivision

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(c)(1) would impose an undue hardship on the employer; or (iii) the employment referred to in subdivision (c)(2) is for a brief, nonrecurrent period and there is no reasonable expectation that the employment will continue indefinitely or for a significant period, the employer has the burden of proving the impossibility or unreasonableness, the undue hardship, or the brief or nonrecurrent nature of the employment without a reasonable expectation of continuing indefinitely or for a significant period.

(e) Subject to subsection (f), a member referred to in subsection (a) shall, upon completion of a period of State Active Duty, notify the employer referred to in subsection (a) of the member's intent to return to a position of employment with the employer as follows:

(1) In the case of a member whose period of State Active Duty was less than 31 days, by reporting to the employer:

(A) not later than the beginning of the first full regularly scheduled work period on the first full calendar day following completion of the period of State Active Duty and the expiration of 8 hours after a period allowing for safe transportation of the member from the place of that duty to the member's residence; or

(B) as soon as possible after the expiration of the 8-hour period referred to in paragraph (A), if reporting within that period is impossible or unreasonable through no fault of the member.

(2) In the case of a member whose period of State Active Duty was more than 30 days but less than 180 days, by submitting an application for reemployment with the employer not less than 14 days after completion of the period of State Active Duty, or if submitting the application within that period is impossible or unreasonable through no fault of the member, the next full calendar day when submission of the application becomes possible.

(3) In the case of a member whose period of State Active Duty was 180 days or more, by submitting an application for reemployment with the employer not later than 90 days after completion of the period of service.

(f) A member who is hospitalized for, or convalescing from, an illness or injury incurred in, or aggravated during, the performance of a period of State Active Duty shall, at the end of the period that is necessary for the member to recover from the illness or injury, report to the member's employer or submit an application for reemployment with the employer. The period of recovery shall not exceed 2 years, except that the 2-year period shall be extended by the minimum time required to accommodate the circumstances beyond the member's control which make reporting within the 2-year period impossible or unreasonable.

(g) A member who fails to report or apply for employment or reemployment within the appropriate period specified in this Section shall not automatically forfeit his or her rights and benefits under subsection (a), but shall be subject to the conduct rules, established policy, and general practices of the employer pertaining to explanations and

discipline with respect to absence from scheduled work.

(h) A member who submits an application for reemployment in accordance with this Article shall, upon the request of the employer, provide to the employer documentation to establish that:

(1) the member's application is timely; and

(2) the character of the member's service was honorable, under honorable conditions, or otherwise satisfactory.

The failure of a member to provide documentation as prescribed in this subsection may not be the basis for denying reemployment if the failure occurs because the documentation does not exist or is not readily available at the time of the employer's request. If, after reemployment, documentation becomes available that establishes that the member does not meet one or more of the requirements in paragraph (1) or (2), the employer may terminate the member's employment in accordance with the conduct rules, established policy, and general practices of the employer pertaining to explanation and discipline with respect to absence from scheduled work.

An employer may not delay or attempt to defeat a reemployment obligation by demanding documentation that does not exist or is not then readily available.

(i) Except as otherwise provided by this subsection, a member entitled to reemployment under this Article, upon completion of a period of State Active Duty, shall be promptly reemployed in the position of employment which he or she left with the same increases in status, seniority, and wages that were earned during his or her period of State Active Duty by employees in like positions who were on the job at the time the returning member entered State Active Duty, or to a position of like seniority, status, and pay, unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so.

If at the time of requesting reemployment, the member is no longer physically, mentally, or otherwise qualified or able to perform the duties of the position of employment which he or she left due to disability acquired incident to his or her service in State Active Duty, but is qualified and able to perform the duties of any other position in the employ of the employer, then the member shall be restored to that other position, the duties of which he or she is qualified and able to perform and that will provide him or her with like seniority, status, and pay, or the nearest approximation thereof consistent with the circumstances of the case.

If a member enters State Active Duty and the position of employment which he or she left is filled by one or more employees who are also members of the National Guard and who later enter State Active Duty, the members shall, upon release from State Active Duty, be given preference in the matter of reemployment in the order in which they entered State Active Duty, and the employer shall not be required to retain more than one of them in his or her employ.

(j) Except as otherwise provided in this Section, each member in the employ of a private employer or of the State of Illinois or a political subdivision of the State who, for the

purpose of entering State Active Duty, has left or leaves that employment but who has been rejected for State Active Duty for lack of proper qualifications, shall be restored by the employer (i) to the position of employment which the member left with the same seniority, status, and wage increases that an employee who was employed in that position at the time the member left to enter State Active Duty earned during the time the member was absent from employment because of his or her attempt to enter State Active Duty or (ii) to a position of like seniority, status, and pay, provided that at the time of the rejection for State Active Duty the member is qualified to perform the duties of the position of employment which he or she left and has made application for reemployment within the time period specified in subsection (e) after receiving official notice of the rejection for State Active Duty.

20 Illinois Consolidated Statutes section 1805/30.15 (emphasis supplied).

§ 30.20. Reemployment; benefits.

(a) *Any member of the National Guard* who is reemployed or seeks reemployment to a position of employment in accordance with the provisions of this Article, shall be considered as having been on furlough or leave of absence during his or her State Active Duty and shall be so reemployed without loss of seniority and 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 the member entered State Active Duty. The member shall not be discharged from the position without cause within one year after reemployment.

(b) If an employer provides health insurance, an exclusion or waiting period may not be imposed in connection with coverage of a health or physical condition of a member entitled to participate in that insurance under this Section, or a health or physical condition of any other person who is covered by the insurance by reason of the coverage of that member, if: (i) the condition arose before or during that member's period of State Active Duty; (ii) an exclusion or waiting period would not have been imposed for the condition during a period of coverage resulting from participation by that member in the insurance; and (iii) the condition of that member has not been determined to be service connected.

20 Illinois Consolidated Statutes section 1805/30.20 (emphasis supplied).

These protections explicitly apply to the State of Illinois and its political subdivisions (counties, cities, school districts, etc.), as well as private employers in Illinois. The language “any member of the National Guard” can be reasonably construed to apply to a member of the National Guard of another state (like Wisconsin or Indiana) who has a civilian job in Illinois.

ILLINOIS NATIONAL GUARD UPDATE

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By Captain Samuel F. Wright, JAGC, USN (Ret.)

On July 21, 2015, Illinois Governor Bruce Rauner signed into law Public Act 99-0088. This new law went into effect immediately upon the Governor's signature.

This new law amends 330 ILCS 60/3 by adding the following sentence: "The term 'military service' also includes any period of active duty pursuant to an order of the Governor of this State *or an order of the governor of another state.*" (Emphasis supplied.)

In our principal Illinois article we wrote: "The language 'any member of the National Guard' can be reasonably construed to apply to a member of the National Guard of another state (like Wisconsin or Indiana) who has a civilian job in Illinois." Up to now, we have carried Illinois in the "arguable" category on this issue. We believed that the state law in Illinois protected National Guard members of other states (typically but not necessarily neighboring states) who held civilian jobs in Illinois, but there was some ambiguity. What was arguable is now explicit. The Illinois law protects National Guard members of other states who have civilian jobs in Illinois and who are called to state active duty by the governors of other states.

For example, Larry Bird lives in Gary, Indiana and is a Sergeant in the Indiana Army National Guard. For his civilian job, Bird commutes across the state line to Oprah's Restaurant in Chicago, Illinois, where he works as a cook. Bird is called to state active duty by the Governor of Indiana for a state emergency in that state, and he missed several days of work at the restaurant.

Prior to July 29, Bird's right to reemployment at the Chicago restaurant was probably protected by Illinois law, but there was some ambiguity. The 2015 amendment has removed all the ambiguity.