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Kentucky Law Protects National Guard Members On State Active Duty

By Austin M. Giesel¹

Under certain circumstances, members of the Army or Air National Guard can be called up for state active duty by the Governor of Kentucky or by another state governor. Kentucky law prohibits employment discrimination against members of the Kentucky National Guard² or Kentucky active militia³ in Kentucky Revised Statutes (KRS) section 38.460 (1), which states:

- (1) No person shall, either by himself or with another, willfully deprive a member of the Kentucky National Guard or Kentucky active militia of his employment or prevent his being employed or in any way obstruct a member of the Kentucky National Guard or Kentucky active militia in the conduct of his trade, business, or profession or by threats of violence prevent any person from enlisting in the Kentucky National Guard or Kentucky active militia.

Emphasis supplied.

KRS section 38.238 provides further clarification of the employment rights by stating that:

An employee shall be granted a leave of absence by his employer for the period required to perform active duty or training in the National Guard. Upon the employee's release from a period of active duty or training, he shall be permitted to return to his former position of employment with the seniority, status, pay or any other rights or benefits he would have had if he had not been absent, except that no employer shall be required to grant an employee a leave of absence with pay.

This section provides for full reinstatement to a service member's former position, akin to the protections provided by the Uniformed Services Employment and Reemployment Rights Act (USERRA).⁴

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² The Kentucky National Guard consists of individuals who have an obligation to the state and are subject to call by the Governor of Kentucky for state emergencies and who are simultaneously members of the Army National Guard or Air National Guard of the United States, which are two of the seven Reserve Components of the United States armed forces.

³ The Kentucky active militia consists of individuals who have an obligation to the state to serve in state emergencies but who (unlike the National Guard) have no federal status and are not subject to federal call-up.

⁴ USERRA is the federal statute that is codified at sections 4301-4335 of title 38 of the United States Code (38 U.S.C. 4301-4335). Under USERRA, a person who leaves a civilian job (federal, state, local, or private sector) for voluntary or involuntary service in the uniformed services (as defined by USERRA) is entitled to reemployment in the civilian job after release from the period of service, provided he or she meets the five USERRA eligibility criteria. Under USERRA, National Guard members have the right to reemployment after voluntary or involuntary

For example, let us say that there is a restaurant in Louisville, Kentucky that employs 99 individuals, including two members of the National Guard. Sergeant Daniel Boone lives in Louisville and is a member of the Kentucky Army National Guard. Sergeant Dan Quayle lives just across the Ohio River in New Albany, Indiana and serves in the Indiana Army National Guard. The Ohio River suddenly overflows its banks and the governors of Indiana and Kentucky call up National Guard units for state active duty. Both Boone and Quayle are called up for two weeks each, and there is almost no prior notice because the flood had not been expected.

Mr. Quisling, the owner of the restaurant, did not appreciate having two of his employees take time off without providing him with significant warning and he decides to fire them both. When Boone and Quayle return from state active duty, Mr. Quisling orders them off the property and tells them that they have been fired. We must look to Kentucky law to determine the rights of both Boone and Quayle, because legislation enacted in Indianapolis cannot apply to Mr. Quisling, an employer in Kentucky.

As a member of the Kentucky National Guard, Sergeant Boone has enforceable rights under KRS section 38.460. If necessary, he can sue Mr. Quisling in state court and get injunctive relief requiring Mr. Quisling to reinstate him in his restaurant job. He can also recover back pay and perhaps punitive damages and attorney fees.

Unfortunately, Sergeant Quayle has no enforceable reemployment rights at the restaurant. The federal law (USERRA) does not apply to this situation, because it involves state active duty. The Indiana statute does not apply to Mr. Quisling, an employer in Kentucky. The Kentucky statute appears to apply only to members of the Kentucky Army and Air National Guard and the Kentucky active militia, although the language of the Kentucky statute is somewhat ambiguous on this point.

It should also be noted that KRS section 38.510 incorporates the protections of the Servicemembers Civil Relief Act (SCRA) and extends those rights to members of the Kentucky Army or Air National Guard on state active duty for 30 days or more. KRS section 38.470 provides USERRA-type protections to postsecondary students whose educational pursuits at Kentucky colleges and universities are interrupted by military service. KRS sections 61.394 and 61.396 give public employees (employees of the State of Kentucky and counties, cities and other political subdivisions) 21 days of *paid* military leave per year.

UPDATE—APRIL 2018

On 4/2/2018, Kentucky Governor Matthew G. Bevin signed legislation that amends three separate but related sections of Kentucky Revised Statutes (KRS). KRS section 38.238(1) was amended to read as follows:

training or service under title 10 or title 32 of the United States Code. USERRA does not give the National Guard member the right to reemployment after state active duty.

An employee shall be granted a leave of absence by his or her employer for the period required to perform active duty or training in the National Guard of this or any other state. Upon the employee's release from a period of active duty or training, the employee shall be permitted to return to his or her former position of employment with the seniority, status, pay or any other rights or benefits he or she would have had if he or she had not been absent, except that no employer shall be required to grant an employee a leave of absence with pay.

KRS section 38.460(1) was amended to read as follows:

No person shall, either as an individual or with another, willfully deprive a member of the National Guard or Kentucky active militia of employment, or prevent the employer being employed, or in any way obstruct a member of the National Guard or Kentucky active militia in the conduct of trade, business, or profession, or by threats of violence prevent any person from enlisting in the National Guard or Kentucky active militia. References to the National Guard in this statute include members of the National Guard of this or any other state.

No association or corporation constituted or organized for the purpose of promoting the success of the trade, employment, or business of the members thereof shall by any constitution, rule, bylaw, resolution, vote, or regulation discriminate against any member of the National Guard or Kentucky active militia because of membership eligibility for membership, or right to retain membership in such organization.

KRS section 61.394 was amended to read as follows:

All officers and employees of this state, or of any department or agency thereof who are members of the National Guard or of any Reserve Component of the Armed Forces of the United States, or of the reserve corps of the United States Public Health Service, shall be entitled to leave of absence from their respective duties, without loss of time, pay, regular leave, impairment of efficiency rating, or of any other rights or benefits to which they are entitled, while in the performance of duty or training in the service of a state or of the United States under competent authority as specified in this section. In any one (1) federal fiscal year, officers or employees, while on military leave, shall be paid their salaries or compensations for a period or periods not exceeding twenty-one (21) calendar days. Any unused military leave in a federal fiscal year shall be carried over to the next year. Any unused military leave shall expire two (2) years after it has accrued.

The purpose and effect of the 2018 amendments is to expand the protection of Kentucky law to protect the civilian jobs of other-state National Guard members who have civilian jobs in Kentucky. For example, Vidkun Quisling is the owner-operator of Quisling's Norwegian Seafood Restaurant in Louisville, Kentucky. Among his 99 employees, two are National Guard members. Daniel Boone lives in Kentucky and is a member of the Kentucky Army National Guard. Dan Quayle lives across the state line in Indiana and is a member of the Indiana Army National Guard.

A series of tornadoes cause major destruction in northern Kentucky and southern Indiana, and both Governors call up National Guard members to state active duty. Boone is called up by the Governor of Kentucky, and Quayle is called up by the Governor of Indiana. Giving prior notice to civilian employers was impossible because National Guard members were deployed to collapsed buildings to extricate injured persons from the rubble, and delaying the deployment for even an hour, to give National Guard members the opportunity to notify their civilian employers, would likely have resulted in additional fatalities.

Mr. Quisling, the restaurant owner, was annoyed that two employees were taken away from their jobs with no notice to him, and he refused to reinstate them to their jobs when their state active duty periods were over. Prior to the 2018 amendments, Boone had enforceable reinstatement rights at the restaurant, but Quayle did not, because he is not a member of the *Kentucky* National Guard. After the 2018 amendments, a person in Quayle's situation is protected by Kentucky law.