

## MD-2015-NG

### Maryland Law Protects National Guard Members On State Active Duty

By Captain Samuel F. Wright, JAGC, USN (Ret.)<sup>1</sup>  
And Kyle E. Helmick<sup>2</sup>

Maryland law provides as follows concerning legal protections for members of the Maryland Army National Guard or Air National Guard and members of the Maryland Defense Force:

#### Scope of section

(a) The rights granted to *members of the National Guard and Maryland Defense Force* by this section shall be in addition to the rights granted to them by federal law, including the Servicemembers Civil Relief Act<sup>1</sup> and the Uniformed Services Employment and Reemployment Rights Act.<sup>2</sup>

#### Protections

(b) The following provisions of federal law shall be adopted as State law and applied to members of *the National Guard and Maryland Defense Force*:

(1) the Servicemembers Civil Relief Act applies only when members of the National Guard or Maryland Defense Force are ordered to military duty under this title or Title 10 or Title 32 of the United States Code for a period of 14 consecutive days or longer; and

(2) the Uniformed Services Employment and Reemployment Rights Act applies when members of the National Guard or Maryland Defense Force are ordered to military duty under this title or Title 10 or Title 32 of the United States Code for any period of time.

Maryland Public Safety Code section 13-704 (emphasis supplied).

Under federal legislation enacted very early in the 20<sup>th</sup> Century, state militia forces have been given major federal assistance in pay, training, and equipment and have been given federal status as part of the Army National Guard of the United States, one of the seven Reserve Components of the United States Armed Forces.<sup>3</sup> After World War II, when the Air Force

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<sup>1</sup> Captain Wright is the Director of the Service Members Law Center. He can be reached by telephone at 800-809-9448, ext. 730. His e-mail is [SWright@roa.org](mailto:SWright@roa.org).

<sup>2</sup> Kyle E. Helmick has completed his first year of law school at Georgetown University in Washington, DC. He has provided most valuable volunteer legal research assistance to the Service Members Law Center throughout his first year of law school.

<sup>3</sup> The other six Reserve Components are the Army Reserve, the Air National Guard of the United States, the Air Force Reserve, the Navy Reserve, the Marine Corps Reserve, and the Coast Guard Reserve. The Army National

became a separate service rather than part of the Army, Congress created the Air National Guard of the United States as a similar hybrid state-federal military service.

The Maryland Defense Force (MDF) is a purely state entity and has no federal status. There are times when most of the Maryland Army National Guard and Maryland Air National Guard are deployed elsewhere in a federal status. If a state emergency arises at such a time, the MDF can step in to fill the gap.

Francis Scott Key V is a Staff Sergeant (SSG) in the Maryland Army National Guard. When he enlisted, he took two enlistment oaths, one to the State of Maryland and one to the United States of America. He joined two overlapping but legally distinct organizations. The *Maryland* Army National Guard is the present-day equivalent of the Maryland State Militia. The Army National Guard *of the United States* is one of the seven Reserve Components of the United States armed forces.

In his state status, Key performs monthly periods of inactive duty training (drills), usually on weekends, and annual training periods of about two weeks, usually in the summer.<sup>4</sup> The federal law called the Uniformed Services Employment and Reemployment Rights Act (USERRA)<sup>5</sup> protects Key from discrimination with respect to his civilian employment<sup>6</sup> and gives him the job-protected right to time off (without pay) from his civilian job to participate in this federally funded training duty.

As a Private First Class (PFC), in 2006, Key was called to federal active duty and deployed to Iraq for a year. In 2011, as a Sergeant (SGT), Key was again called to federal active duty and deployed outside the United States, this time to Afghanistan. USERRA protects Key's civilian job when he is called to this federal active duty, or if he volunteers for federal active duty.

In his state status, Key is subject to being called to state active duty by the Governor of Maryland for state emergencies. He has been called to state active duty several times for major

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Guard of the United States and the Air National Guard of the United States have this hybrid state-federal status. The other five Reserve Components are purely federal.

<sup>4</sup> In the 13 years since the terrorist attacks of September 11, 2001, annual training tours and inactive duty training periods have become longer and more frequent, as the Army National Guard has transitioned from a strategic reserve available only for World War III to an operational reserve routinely federalized for intermediate military operations like Iraq and Afghanistan.

<sup>5</sup> USERRA is codified in title 38, United States Code, sections 4301-4335 (38 U.S.C. 4301-4335). For more than 800 articles about USERRA, we invite the reader's attention to [www.servicemembers-lawcenter.org](http://www.servicemembers-lawcenter.org). At that website, you will also find a detailed Subject Index and a search function, to facilitate finding articles about very specific topics.

<sup>6</sup> Key works as a cook at one of Baltimore's finest restaurants.

snowstorms, a fire, and a prison riot. USERRA does not protect Key's civilian job when he is away from the job for this sort of state-funded state active duty.

Like every other state, Maryland has enacted a state law (Maryland Public Safety Code section 13-704) that protects the civilian jobs of Army National Guard and Air National Guard members on state active duty. In September 2014, a major hurricane causes devastation on Maryland's Eastern Shore. Governor Martin O'Malley calls up SSG Key and his Army National Guard unit and deploys them to the Eastern Shore to protect life and property. Earl Weaver III, owner of the restaurant where Key works as a cook, is annoyed by this short-notice call-up and refuses to reinstate Key to his job when he returns from a week of state active duty.

Weaver's refusal to reinstate Key is a violation of Maryland Public Safety Code section 13-704, but what exactly can be done about that violation? We suggest that the Maryland Legislature strengthen this law by adding an explicit private right of action (giving a person in Key's situation the right to sue the employer in state court) and giving Key or a person in his situation the right to collect attorney fees if he or she files the suit through private counsel and prevails.

Wilhelmina McLean lives in McLean, Virginia and is a Second Lieutenant in the Virginia Army National Guard. When not on military duty, she commutes across the Potomac River, on the American Legion Bridge, to her civilian job in Bethesda, Maryland. The same major hurricane that devastated Maryland's Eastern Shore also devastated Virginia's portion of the Delmarva Peninsula, just to the south. Virginia Governor Terry McAuliffe calls McLean and her Virginia Army National Guard unit to state active duty and deploys them to assist in the consequence management operation.

Does Maryland Public Safety Code section 13-704 protect McLean's right to return to her civilian job in Maryland after her period of Virginia state active duty? No. Section 13-101 of the Maryland Public Safety Code contains definitions of terms used in this code. The term "National Guard" is defined as follows: "'National Guard' means the *Maryland* Army National Guard and *Maryland* Air National Guard." Maryland Public Safety Code, section 13-101(d) (emphasis supplied).

When a statute or statutory code defines a term, that definition must be utilized in construing the meaning of any provision of that statute or code. Thus, it is clear that the protections of section 13-704 of the Maryland Public Safety Code only apply to members of the *Maryland* Army or Air National Guard.

A person in McLean's situation falls through the proverbial crack. She is not protected by the federal law (USERRA) because that federal law does not apply to state active duty. She is not protected by the Virginia law because laws enacted in Richmond do not apply across the

Potomac River in Maryland. She is not protected by the Maryland law because that law, through its definitions section, is limited to *Maryland* National Guard members. The legislature in Annapolis could amend its law to protect individuals like McLean, but under the law as currently written a person in this situation has no enforceable right to reinstatement in the civilian job after non-Maryland state active duty.

We urge the Maryland Legislature to amend section 13-704 to make explicit that the protections of this section apply to National Guard members of other states, as well as Maryland, when they are called away from Maryland jobs for state active duty in Maryland or any other state. We are urging all states to enact laws of this kind, so that folks like Wilhelmina McLean will not fall through the cracks and lose their civilian jobs when called to state active duty.