

Michigan Law Protecting The Civilian Jobs Of Michigan National Guard Members On State Active Duty

By Captain Samuel F. Wright, JAGC, USN (Ret).¹
And Kyle E. Helmick²

Today's National Guard traces its origins to 1636, when the Massachusetts Bay Colony established the Massachusetts militia to defend the colony against attacks by the Pequot Indians. Other colonies and states established similar state militias, and those state militias were called to federal duty for the Revolutionary War, the War of 1812, the Mexican-American War, the Civil War, and the Spanish-American War.

Under federal legislation enacted very early in the 20th 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.³ After World War II, when the Air Force 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.

Anthony Wayne V is a Staff Sergeant (SSG) in the Michigan Army National Guard. When he enlisted, he took two enlistment oaths, one to the State of Michigan and one to the United States of America. He joined two overlapping but legally distinct organizations. The *Michigan* Army National Guard is the present-day equivalent of the Michigan 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, Wayne performs monthly periods of inactive duty training (drills), usually on weekends, and annual training periods of about two weeks, usually in the summer.⁴ The federal

¹ Captain Wright is the Director of the Service Members Law Center at the Reserve Officers Association. He can be reached by telephone at 800-809-9448, ext. 730. His e-mail is SWright@roa.org.

² 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 throughout his first year of law school.

³ 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 Guard and Air National Guard have this hybrid state-federal status, while the other five Reserve Components are purely federal entities.

⁴ 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

law called the Uniformed Services Employment and Reemployment Rights Act (USERRA)⁵ protects Wayne from discrimination with respect to his civilian employment⁶ 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 well as voluntary or involuntary federal active duty.

USERRA protects National Guard members when they are away from their civilian jobs for military training or service under title 10 or title 32 of the United States Code. USERRA does not protect National Guard members when they are on state active duty, called by the Governor for state emergencies. If National Guard members are to have the right to reemployment after state active duty, it must be by state law.

The Michigan Legislature has enacted a provision to protect members of the Michigan Army National Guard and the Michigan Air National Guard when they are on state active duty, called by the Governor of Michigan for state emergencies like fires, floods, riots, etc. Here is the entire text of that section:

Sec. 3. (1) An employee who gives advance notice for a period of leave from his or her employment shall not be denied a leave of absence by his or her employer for the purpose of being inducted into or entering into active service, *active state service*, or the service of the United States, for the purpose of determining his or her physical fitness to enter the service, or for performing service as an officer or enlisted member of the *military or naval forces of this state* or of the United States in *active state service* or under title 10 or title 32 of the United States code. If the employee reports to work or applies to the employer within 45 days or, if the service was for more than 180 days, within 90 days following release from service, release from duty, or rejection, the employer shall reemploy the employee in the following order of priority:

- (a) Following service of 1 to 90 days, in the position of employment in which the person would have been employed if the continuous employment of the person with the employer had not been interrupted by service, the duties of which the person is qualified to perform.
- (b) Following service of 1 to 90 days, in the position of employment in which the person was employed on the date of the commencement of service, only if the person is not qualified to perform the duties of the position referred to in subdivision (a) and after

reserve available only for World War III to an operational reserve routinely federalized for intermediate military operations like Iraq and Afghanistan.

⁵ 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. At that website, you will also find a detailed Subject Index and a search function, to facilitate finding articles about very specific topics.

⁶ Shaw works as a cook at one of Detroit's finest restaurants.

reasonable efforts by the employer to qualify the person have been made.

(c) Following service of 91 or more days, a position described under subdivision (a) or (b) or in a position that is the nearest approximation in status and pay to a position described in subdivision (a) or (b) that the person is qualified to perform, only if the person is not qualified and cannot become qualified with reasonable efforts by the employer to be employed as described in subdivision (b).

(2) A person who is reemployed under this section is entitled to the seniority and other rights and benefits that are determined by seniority that the person had on the date of the commencement of service plus the additional seniority and rights and benefits that the person would have attained if the person had been continually employed.

(3) In addition to the seniority, rights, and benefits under subsection (2), a person who is reemployed under this section is entitled to rights and benefits, not determined by seniority, that are generally provided by the employer to employees who have similar seniority, status, and pay who are on furlough or leave of absence under a contract, agreement, policy, practice, or plan in effect at the commencement of service or established while the person performs service.

(4) The employee is not entitled to reemployment under this section if the employee who is absent by reason of active service, active state service, or the service of the United States has an uninterrupted period of service in the uniformed services, with respect to the employer relationship for which a person seeks reemployment, that exceeds 5 years, except that for purposes of this subsection, a period of service shall not include any of the following:

(a) Any service that is required, beyond 5 years, to complete an initial period of obligated service.

(b) Any service during which the person was unable to obtain orders releasing him or her from a period of service in the uniformed services before the expiration of the 5-year period and the inability was through no fault of the person.

(c) Any service performed as required pursuant to 10 USC 10147, under 32 USC 502(a) or 503, or to fulfill additional training requirements determined and certified in writing by the appropriate service secretary to be necessary for professional development or for completion of skill training or retraining.

(d) Any service performed by a member in active service, *active state service*, or the service of the United States if any of the following occur:

(i) The member is ordered to or retained on active duty, active service, or active state service under 10 USC 688, 12301(a), 12301(g), 12302, 12304, or 12305, or under 14 USC

331, 332, 359, 360, 367, or 712.

(ii) The member is ordered to or retained on active duty, active service, or active state service, other than for training, under any provision of law because of a war or national emergency declared by the president, the congress, *or the governor*.

(iii) The member is ordered to active duty, other than for training, in support, as determined by the appropriate service secretary, of an operational mission for which personnel have been ordered to active duty under 10 USC 12304.

(iv) The member is ordered to active duty in support, as determined by the appropriate service secretary, of a critical mission or requirement of the uniformed services.

(v) The member is called into federal service as a member of the national guard under 10 USC 331 to 335 or under 10 USC 12406.

(5) An employee is not entitled to the benefits under this section if the service of the employee in any of the uniformed services is terminated under any of the following circumstances:

(a) A separation of the person from the uniformed service or national guard with a dishonorable or bad conduct discharge.

(b) A separation of the person from the uniformed service or national guard under other than honorable conditions, as characterized pursuant to regulations prescribed by the appropriate service secretary.

(c) A dismissal of the person under 10 USC 1161(a).

(d) A dropping from the rolls pursuant to 10 USC 1161(b).

(6) An employee who meets the requirements of this section and is denied reemployment after reporting to work or applying to the employer may bring an action against the employer in the circuit court for the employee's county of residence and shall be awarded reinstatement and reasonable attorney fees.

(7) As used in this section:

(a) "Active service" means service, including active state service or special duty required by law, regulation, or pursuant to order of the governor. Active service includes continuing service of an active member of the national guard and the defense force in fulfilling that active member's commission, appointment, or enlistment.

(b) "Active state service", as applied to the national guard and the defense force, means military service in support of civil authorities, at the request of local authorities, including, but not limited to, support in the enforcement of laws prohibiting the

importation, sale, delivery, possession, or use of a controlled substance, if ordered by the governor or as otherwise provided in this act. As used in this subdivision, “controlled substance” means that term as defined in section 7104 of the public health code, 1978 PA 368, MCL 333.7104.

(c) “Service” means active service, active state service, or in the service of the United States.

(d) “Service secretary” means the secretary concerned as defined in 10 USC 101(a)(9).

(e) “Uniformed service” means the armed forces, the reserve component, the national guard in active service or active state service, the commissioned corps of the public health service, and any other category of persons designated by the president or governor in time of war or national emergency.

Michigan Compiled Laws Annotated section 32.273 (West) (emphasis supplied).

Sec. 1. No person shall discriminate against any officer or enlisted man of the military or naval forces *of the state* or of the United States because of his membership therein.

Michigan Compiled Laws Annotated section 32.271 (West) (emphasis supplied).

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

In his state status, Wayne is subject to being called to state active duty by the Governor of Michigan for state emergencies. He has been called to state active duty several times for major snowstorms, a fire, and a prison riot. USERRA does not protect Wayne’s civilian job when he is away from the job for this sort of state-funded state active duty.

Like every other state, Michigan has enacted a state law (copied above) that protects the civilian jobs of Army National Guard and Air National Guard members on state active duty. In December 2014, a major blizzard causes devastation in northern Michigan. Governor Rick Snyder calls up SSG Wayne and his Army National Guard unit and deploys them to northern Michigan to protect life and property. Benedict Arnold III, owner of the restaurant where Wayne works as a cook, is annoyed by this short-notice call-up and refuses to reinstate Wayne to his job when he returns from a week of state active duty.

Arnold’s refusal to reinstate Wayne is a violation of Michigan Compiled Laws Annotated section 32.273. But the state law in Michigan is unclear as to what Wayne can do about this violation of his right to reemployment. We ask the Michigan Legislature to enact a provision giving

Wayne or a person like Wayne an explicit private right of action—allowing such a person to sue the employer in state court for injunctive relief, back pay, and double damages for a willful violation. And the law should also provide for the court to order the defendant employer to pay attorney fees, if the plaintiff employee proceeds with private counsel and prevails.

Henrietta Ford is a Second Lieutenant in the Indiana Army National Guard. She lives in La Porte, Indiana, but her civilian job is just across the state line in Michigan. Indiana Governor Mike Pence calls her to state active duty because of a state emergency in Indiana. After a week of Indiana state active duty, Ford tries to return to her civilian job in Michigan, but the employer refuses to reinstate her.

Does the Michigan law protect Ford's right to return to her civilian job in this situation? No. The Michigan law explicitly refers to "an officer or enlisted member of the military or naval forces of this state" (Michigan). We urge the Michigan Legislature to amend its law and to provide protection for a National Guard member of "this state or any other state" on state active duty. We are urging all the states to make this change so that folks like Henrietta Ford will not fall through the crack and lose their civilian jobs when called to state active duty.

UPDATE TO MI-2015-NG

June 2016

On June 12, 2016, Michigan Governor Rick Snyder signed into law Public Act 172 of 2016. This new Public Act amends sections 32.272 and 32.273 of Michigan Consolidated Laws (MCL). These sections are reprinted in full in our Michigan article, above. Here are the pertinent amendments:

Section 2:

An employer or agent of any corporation, company, or firm, or other person shall not discharge any person from employment because of being or performing his or her duty as an officer or enlisted member of the military or naval forces of this state *or any other state* ... (Emphasis supplied.)

Section 3(1):

An employee who gives advance notice for a period of leave from his or her employment shall not be denied a leave of absence by his or her employer for the purpose of being inducted into or entering active service, *active state service*, or the service of the United States, for the purpose of determining his or her physical fitness to enter the service, or for performing service as an officer or enlisted member of the

military or naval services of this state, *any other state*, or the United States in *active state service* or under title 10 or title 32 of the United States Code. (Emphasis supplied.)

Section 7(a):

“Active service” means service, *including active state service* or special duty required by law, regulation, or pursuant to the order of the governor of this state *or any other state*. (Emphasis supplied.)

In our article, above, we offered the hypothetical but realistic example of Henrietta Ford, who lives in LaPorte, Indiana and is a Second Lieutenant in the Indiana Army National Guard. Her civilian job is just across the state line in Michigan.

Henrietta is called to state active duty by the Governor of Indiana. Prior to the 2016 amendment, Henrietta had no enforceable right to reemployment in her Michigan job, after her state active duty as called by the Governor of Indiana. The federal statute (the Uniformed Services Employment and Reemployment Rights Act or USERRA) does not apply to state active duty. The Indiana law does not apply across the state line in Michigan. The Michigan law, prior to the 2016 amendment, only applied to members of the Michigan Army or Air National Guard, when called to state active duty by the Governor of Michigan.

The 2016 amendment clearly and explicitly expands the protection of the Michigan law to cover a person in Henrietta Ford’s situation. Henrietta no longer falls through the crack. The Michigan law now gives her an enforceable right to insist that her Michigan employer reinstate her in her civilian job at the end of this period of Indiana state active duty. Problem solved.