

MN-2015-NG

Minnesota Law Protecting 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 later established militias, and those militias have protected our country in both their state roles and federal roles. In Minnesota and other states, National Guard members perform state active duty, when called by the Governor for state emergencies, and this state active duty is not protected by the federal law called the Uniformed Services Employment and Reemployment Rights Act (USERRA). If National Guard members are to have the right to reinstatement in their civilian jobs after state active duty, it must be by state law.

The Minnesota Legislature has enacted provisions to protect members of the Army National Guard and the Air National Guard of Minnesota and other states when they are on state active duty, called by the Governor of Minnesota or any other governor for state emergencies like fires, floods, riots, etc. Here is the entire text of those sections:

(a) A person called or ordered to active service, as defined in section 190.05, subdivision 5a or 5b, has all the protections afforded to persons in the military service of the United States under:

(1) the Servicemembers Civil Relief Act, United States Code, Appendix 50, sections 501 to 548, and 560 to 591, as amended at any time; and

(2) the Uniformed Services Employment and Reemployment Rights Act, United States Code, title 38, sections 4301 to 4333, as amended at any time.

(b) The acts referenced in paragraph (a), clauses (1) and (2), may be cited as the "SCRA" and "USERRA," respectively.

Minnesota Statutes Annotated section 190.055 (West).

It shall be unlawful for any employer to discharge any person from employment because of membership in the military or naval forces of the United States, of this state, *or any*

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 very valuable volunteer legal research assistance to the Service Members Law Center throughout his first year of law school.

other state, or to hinder or prevent any person from performing any military service that person may be called upon to perform by proper authority, or to dissuade any person from enlistment in the military service by threat or injury, in case that person shall so enlist, in respect to that person's employment, trade or business. Any person violating any of the provisions of this section shall be deemed guilty of a gross misdemeanor.

Minnesota Statutes Annotated section 192.34 (West) (emphasis supplied).

An employer may not:

(1) discharge from employment or take adverse employment action against any employee because of the membership of that employee's spouse, parent, or child in the military forces of the United States, of this state, *or any other state*; or

(2) discharge from employment, take adverse employment action against, or otherwise hinder an employee from attending the following kinds of events relating to the military service of the employee's spouse, parent, or child and to which the employee is invited or otherwise called upon to attend by proper military authorities:

(i) departure or return ceremonies for deploying or returning military personnel or units;

(ii) family training or readiness events sponsored or conducted by the military; and

(iii) events held as part of official military reintegration programs.

The employee must provide reasonable notice to the employer when requesting time off, and the employer must provide a reasonable amount of nonpaid time off for the employee, for the purposes enumerated in items (i) to (iii), not to exceed two consecutive days or six days in a calendar year. The employer must not compel the employee to use accumulated but unused vacation for these events.

Minnesota Statutes Annotated section 192.325 (West) (emphasis supplied).

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.

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.

Paul Bunyan is a Staff Sergeant (SSG) in the Minnesota Army National Guard. When he enlisted, he took two enlistment oaths, one to the State of Minnesota and one to the United States of America. He joined two overlapping but legally distinct organizations. The *Minnesota* Army National Guard is the present-day equivalent of the Minnesota 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, Bunyan 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 law (USERRA)⁵ protects Bunyan 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 a Private First Class in 2006, Bunyan was called to federal active duty and deployed to Iraq for a year. In 2011, as a Sergeant, Bunyan was again called to federal active duty and deployed outside the United States, this time to Afghanistan. USERRA protects Bunyan's civilian job when he is called to this federal active duty or if he volunteers for federal active duty.

In his state status, Bunyan is subject to being called to state active duty by the Governor of Minnesota 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 Bunyan's civilian job when he is away from the job for this sort of state-funded state active duty.

Like every other state, Minnesota has enacted state laws (copied above) that protect 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 Minnesota. Governor Mark Dayton calls up SSG Bunyan and his Army National Guard unit and deploys them to northern Minnesota to protect life and property. Benedict Arnold III, owner of the restaurant where Bunyan works as a cook, is annoyed by this short-notice call-up and refuses to reinstate Bunyan to his job when he returns from a week of state active duty.

Arnold's refusal to reinstate Bunyan is a violation of the Minnesota laws copied above. But the state law in Minnesota is unclear as to what Bunyan can do about this violation of his right to reemployment. We ask the Minnesota Legislature to enact a provision giving Bunyan or a

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 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 Bunyan works as a cook at one of St. Paul's finest restaurants.

person like Bunyan 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.

The Minnesota law provides that violating the reemployment rights of a National Guard member is a “gross misdemeanor” punishable by fine and/or imprisonment. It seems unlikely that a local prosecutor would give a high priority to prosecuting cases of this kind, so Arnold may choose to take his chances, figuring that it is most unlikely that he will be prosecuted. Moreover, fining Arnold and putting him in jail does not get Bunyan his job back.

Roberta LaFollette lives in La Crosse, Wisconsin and is a Second Lieutenant in the Wisconsin Army National Guard. When not on military duty, she commutes across the state line to a civilian job in Minnesota. Wisconsin Governor Scott Walker calls LaFollette and her Army National Guard unit to state active duty for a state emergency in Wisconsin. Does the Minnesota law give LaFollette the right to reinstatement in her civilian job in Minnesota when she is released from this period of Wisconsin state active duty? Yes. Section 192.34 protects persons who leave civilian jobs for service in the military or naval forces of the United States, this state, *or any other state*.