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Montana Law Protects National Guard Members On State Active Duty

By Kyle Helmick¹

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 later states established similar state militias. Like every other state legislature, the Montana Legislature has enacted a provision to protect members of the Montana Army National Guard and Air National Guard when they are on state active duty, called by the Governor of Montana for state emergencies like fires, floods, riots, etc.

Montana law protects members of the National Guard from employment discrimination based on their National Guard status and gives them the right to reinstatement in their civilian jobs after voluntary or involuntary military training or service, including state active duty when called by the Governor of Montana.² An employer is required to give an employee unpaid leave for military training or service, including state active duty. It is unlawful for an employer to charge such leave to the employee's vacation or sick leave balance. The employee may opt out of or stay in the employer's healthcare plan during the time that he or she is away from work for training or service.

You must apply for reemployment within:

- safe travel time plus eight hours for active duty of under 30 days.
- fourteen days after termination for active duty between 30 and 180 days.
- 90 days after termination for active duty of more than 180 days.

An individual must file a complaint with the Montana Department of Military Affairs within 15 days after discovering discrimination.

Here are the pertinent provisions of Montana law:

An employer may not deny employment, reemployment, reinstatement, retention,

¹ Kyle Helmick has completed his first year of law school at Georgetown University in Washington, DC. He provided most valuable volunteer legal research assistance to the Service Members Law Center throughout his first year of law school.

² A federal law called the Uniformed Services Employment and Reemployment Rights Act (USERRA), codified at sections 4301-4335 of title 38 of the United States Code, accords reemployment rights to National Guard members when they are away from their civilian jobs (federal, state, local, or private sector) for voluntary or involuntary military training or service under title 32 or title 10 of the United States Code. USERRA does not protect National Guard members on state active duty, and we must look to state laws to find the protections for state active duty.

promotion, or any benefit of employment or obstruct, injure, discriminate against, or threaten negative consequences against a person with regard to employment because of the person's membership, application for membership, or potential application for membership in *the state organized militia*³ or because the person may exercise or has exercised a right or may claim or has claimed a benefit under this part.

Montana Code Annotated section 10-1-1005.

(1) A member ordered to state active duty is entitled to a leave of absence from the person's employment during the period of that state active duty.

(2) A leave of absence for state active duty may not be deducted from any sick leave, vacation leave, military leave, or other leave accrued by the member unless the member desires the deduction.

Montana Code Annotated section 10-1-1006.

(1) Subject to the provisions of this section, after a leave of absence for state active duty, a member is entitled to return to employment with the same seniority, status, pay, health insurance, pension, and other benefits as the member would have accrued if the member had not been absent for the state active duty.

(2)(a) If a member was a probationary employee when ordered to state active duty, the employer may require the member to resume the member's probationary period from the date when the member's leave of absence for state active duty began.

(b) An employer may decide whether or not to authorize the member to accrue sick leave, vacation leave, military leave, or other leave benefits during the member's leave of absence for state active duty. However, the member may not be provided with lesser leave accrual benefits than are provided to all other employees of the employer in a similar but nonmilitary leave status.

(c)(i) An employer's health plan must provide that:

³ Montana's "state organized militia" includes the Montana Army and Air National Guard, which have a hybrid state-federal status, and it also includes the "state guard," which is a purely state entity. The reference to the "state organized militia" seems to indicate that the protections of this section are limited to members of the *Montana* state organized militia and that National Guard members of neighboring states who happen to have civilian jobs in Montana are not protected.

(A) a member may elect to not remain covered under the employer's health plan while the member is on state active duty but that when the member returns, the member may resume coverage under the plan without the plan considering the employee to have incurred a break in service; and

(B) a member may elect to remain on the employer's health plan while the member is on state active duty without being required to pay more than the regular employee share of the premium, except as provided in subsection (2)(c)(ii).

(ii) If a member's state active duty qualifies the member for coverage under the state of Montana's health insurance plan as an employee of the department of military affairs, the employer's health plan may require the member to pay up to 102% of the full premium for continued coverage.

(iii) A health insurance plan covering an employee who is a member serving on state active duty is not required to cover any illness or injury caused or aggravated by state active duty.

(iv) If the member is a state employee prior to being ordered to state active duty, the member does not become qualified as an employee of the department of military affairs for the purposes of health plan coverage until the member's state active duty qualifies the member to be considered an employee of the department of military affairs pursuant to 2-18-701.

(d) An employer's pension plan must provide that when a member returns to employment from state active duty:

(i) the member's period of state active duty may constitute service with the employer or employers maintaining the plan for the purposes of determining the nonforfeitability of the member's accrued benefits and for the purposes of determining the accrual of benefits under the plan; and

(ii) if the member elects to receive credit and makes the contributions required to accrue the pension benefits that the member would have accrued if the member had not been absent for the state active duty, then the employer shall pay the amount of the employer contribution that would have been made for the member if the member had not been absent.

(e) An employer is not obligated to allow the member to return to employment after the

member's absence for state active duty if:

(i) the member is no longer qualified to perform the duties of the position, subject to the provisions of [49-2-303](#) prohibiting employment discrimination because of a physical or mental disability;

(ii) the member's position was temporary and the temporary employment period has expired;

(iii) the member's request to return to employment was not done in a timely manner;

(iv) the employer's circumstances have changed so significantly that the member's continued employment with the employer cannot reasonably be expected; or

(v) the member's return to employment would cause the employer an undue hardship.

(3)(a) For the purposes of this section and except as provided in subsection (3)(b), "timely manner" means:

(i) for state active duty of up to 30 days, the member returned to employment the next regular work shift following safe travel time plus 8 hours;

(ii) for state active duty of 30 days to 180 days, the member returned to employment within 14 days of termination of state active duty; and

(iii) for state active duty of more than 180 days, the member returned to employment within 90 days of termination of the state active duty.

(b) If there are extenuating circumstances that preclude the member from returning to employment within the time period provided in subsection (3)(a) through no fault of the member, then for the purposes of this section "timely manner" means within the time period specified by the adjutant general provided for in [2-15-1202](#).

(1) A person entitled to rights or benefits under this part and who claims that an employer has failed or is about to fail to comply with the provisions of this part may file a complaint with the department as provided in this section.

(2) A complaint under this section must be:

(a) filed within 15 days after the member discovered the actions or practice alleged to constitute an employer's failure or imminent failure to comply with the provisions of this part; and

(b) submitted in writing to the department in a manner prescribed by the department.

(3) The department shall, upon request, provide technical assistance to a person wishing to file a complaint pursuant to this section.

Montana Code Annotated section 10-1-1015.

(1) The department shall provide assistance to any person with respect to the employment rights and benefits to which the person is entitled pursuant to this part. The department may request the assistance of federal or state agencies engaged in similar or related activities and utilize the assistance of volunteers.

(2) The department shall investigate each complaint submitted pursuant to 10-1-1015. The department shall initiate the investigation within 30 days of receiving the complaint. Within 60 days of receiving the complaint, the department shall make a finding about whether a violation of rights or benefits provided in this part has occurred or is about to occur and shall notify the complainant and the employer in writing of the finding.

(3) If the department's investigation finds that a violation of this part has occurred or is about to occur, the department shall attempt to resolve the matter by making a reasonable effort, including conference, conciliation, and persuasion, to provide redress to the complainant and ensure that the employer named in the complaint complies with the provisions of this part.

(4) If the department fails to resolve the matter within 90 days of receiving the

complaint, the department shall notify the complainant of the complainant's right to request that the department refer the complaint to the state attorney general under the provisions of 10-1-1018.

Montana Code Annotated section 10-1-1016.

Example: Ben Cartwright owns and operates the massive Ponderosa Ranch in Glendive, Montana. Most of his employees live on or near the ranch, but George Armstrong Custer lives a few miles east in Dickinson, North Dakota. Custer is a Lieutenant Colonel in the North Dakota Army National Guard and is called to state active duty by the Governor of North Dakota, to fight fires in North Dakota. Cartwright fires Custer because he is annoyed by the short-notice recall. Does Custer have a legally enforceable right to reemployment at the Ponderosa Ranch? No. The Montana law only applies to members of the Montana National Guard on state active duty.

Update—May 2015:

On April 29, 2015, Governor Steve Bullock signed into law Senate Bill No. 195. This new law adds “and the National Guard members of other states who are employed in Montana” at all the relevant places in the Montana Code. It is clear that the purpose and effect of this amendment is to cover a situation like the hypothetical situation outlined above, involving Lieutenant Colonel George Armstrong Custer of the North Dakota Army National Guard. Going forward, the Montana law protects members of the National Guard of other states, when they have civilian jobs in Montana and when they are called to state active duty by the Governors of other states. This new law is not retroactive.