

Reemployment Rights Of National Guard Members In North Carolina Following State Active Duty

By Austin M. Giesel¹

Under certain circumstances, members of National Guard can be called up for state active duty by the Governor of North Carolina or by another state governor. North Carolina law gives members of the North Carolina National Guard the right to reemployment after state active duty, in North Carolina General Statutes Annotated (N.C.G.S.A.) § 127A-201, which states:

Any member of the *North Carolina* National Guard who, at the direction of the Governor, enters State duty, is entitled, upon honorable release from State duty, to all the reemployment rights provided for in the Article.

Emphasis supplied.

N.C.G.S.A. § 127A-202 provides these rights as:

Upon release from State duty, the employee shall make written application to the employee's previous employer for reemployment within five days of the employee's release from duty or from hospitalization continuing after release. If the employee is still qualified for the employee's previous employment, the employee shall be restored to his previous position or to a position of like seniority, status and salary, unless the employer's circumstances now make the restoration unreasonable. If the employee is no longer qualified for the employee's previous employment, the employee shall be placed in another position, for which the employee is qualified, and which will give the employee appropriate seniority, status and salary, unless the employer's circumstances now make the placement unreasonable.

N.C.G.S.A. § 127A-203 provides the penalties against the non-complying employer, public or private, as follows:

If any employer, public or private, fails or refuses to comply with G.S. 127A-202, the superior court for the district of the employer's place of business may, upon the filing of a motion, petition, or other appropriate pleading by the employee, require the employer to comply with G.S. 127A-202 and to compensate the

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employee for any loss of wages or benefits suffered by reason of the employer's unlawful failure or refusal.

These statutes, in combination, provide protections to members of the North Carolina National Guard who are called to state active duty and must leave their civilian jobs to perform this service to the state. These protections are very similar to the protections afforded by the Uniformed Services Employment and Reemployment Rights Act (USERRA).² These protections clearly apply to public employers (state agencies, counties, school districts, etc.) as well as private employers in North Carolina.

For example, the Pigs R Us Barbecue Restaurant in Charlotte, North Carolina employs two members of the National Guard. Sergeant Lynne Blount is a member of the North Carolina National Guard, and Sergeant Anthony Gaillard lives in Rock Hill, South Carolina (just across the state line) and serves in the South Carolina National Guard. An unanticipated but catastrophic flood of the Catawba River causes the governors of North Carolina and South Carolina to call up their respective National Guard units to state active duty. Mr. Patrick, the owner of the restaurant, is annoyed by the inconvenience that the call-up of Blount and Gaillard causes him, and he decides to fire both employees. When Sergeant Blount and Sergeant Gaillard return from these state active duty periods, Mr. Patrick tells both that they have been fired and replaced. Blount and Gaillard must look to North Carolina law to protect their civilian job rights.

As a member of the North Carolina National Guard, Sergeant Blount meets the requirements of N.C.G.S.A. § 127A-201 in that she is both a member of the North Carolina National Guard and she served on state active duty. Assuming that Sergeant Blount received an honorable release from State duty and made a timely application for reemployment, she has a clear right to reemployment under N.C.G.S.A. § 127A-202. Unless Mr. Patrick can prove that Sergeant Blount is no longer qualified for the position or that Mr. Patrick's circumstances make reemployment unreasonable, Mr. Patrick must return Sergeant Blount to her previous position, or one of like seniority, status and salary. If Sergeant Blount is found to no longer be qualified for her previous position³, Mr. Patrick must place her in another position for which she is qualified, that offers

² USERRA is codified at 38 U.S.C. 4301-4335. Under USERRA, a person who leaves a civilian job (federal, state, local, or private sector) to perform "service in the uniformed services" as defined by USERRA is entitled to reemployment, upon release from the period of service, in the pre-service civilian employment, provided he or she meets the five USERRA conditions. USERRA protects National Guard members when they perform training or duty under title 10 or title 32 of the United States Code, but USERRA does not protect the National Guard member on state active duty. If National Guard members are to have reemployment rights after state active duty, it must be by state law.

³ For example, she could have suffered a serious injury in the course of the state active duty and could be disabled, at least temporarily.

appropriate seniority, status and salary. If Mr. Patrick refuses to reemploy Sergeant Blount, Blount can sue Patrick in state court and obtain injunctive relief (reinstatement) and back pay.

As a member of the South Carolina National Guard, Sergeant Gaillard, unfortunately, has no right to reemployment under this statute, as N.C.G.S.A. § 127A-201 expressly limits the statute's protections to "any member of the North Carolina National Guard."