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National Guard Reemployment Protections In North Dakota

By Nathan M. Richardson¹

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 similar state militias. Early in the 20th Century, Congress established the National Guard as a hybrid federal-state organization. National Guard members are subject to call by the President for national emergencies, and they train periodically for that contingency. National Guard members are also subject to state call-ups, by the Governor.

A federal statute called the Uniformed Services Employment and Reemployment Rights Act (USERRA)² accords the right to reemployment to a person who leaves a civilian job (federal, state, local, or private sector) for voluntary or involuntary service in the uniformed services (as defined by USERRA) and who meets the USERRA eligibility criteria.³ USERRA protects the civilian jobs of National Guard members after military training or service under title 10 or title 32 of the United States Code, but USERRA does not apply to state active duty. If National Guard members are to have reemployment rights after state active duty, it must be by state law.

PUBLIC EMPLOYEES:

In Section 37-01-25 of its state laws, North Dakota provides a strong set of reemployment protections, including paid leave, for public employees⁴ who are members of the National Guard. The statute provides as follows:

All officers and employees of this state or of a political subdivision thereof who:

1. Are members of the national guard;
2. Are members of the armed forces reserve of the United States of America;
3. Shall be subject to call in the federal service by the president of the United States; or
4. Shall volunteer for such service,

when ordered by proper authority to active noncivilian employment, are entitled to a leave of absence from such civil service for the period of such active service without loss of

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² USERRA is codified in title 38, United States Code, sections 4301-4335.

³ The person must have left the civilian job for the purpose of performing uniformed service and must have given the employer prior oral or written notice. The person's cumulative period or periods of uniformed service, relating to the employer relationship with that employer, must not have exceeded five years, but certain kinds of service are exempt from the computation of the person's five-year limit. The person must have been released from the period of service without having received a disqualifying bad discharge from the military and after release the person must have made a timely application for reemployment.

⁴ The term "public employees" refers to employees of the State of North Dakota and its political subdivisions—counties, cities, school districts, etc. A state has no authority to regulate the relationship between the Federal Government and its employees.

status or efficiency rating. If such persons have been in the continuous employ of the state or political subdivision for ninety days immediately preceding the leave of absence, they shall receive twenty workdays each calendar year without loss of pay. In addition, any leave of absence necessitated by a full or partial mobilization of the reserve and national guard forces of the United States of America, *or emergency state active duty*, must be without loss of pay for the first thirty days thereof less any other paid leave of absence which may have been granted during the calendar year pursuant to this section. However, if leave is required for weekend, daily, or hourly periods of drill for military training on a day in which a public officer or employee is scheduled to perform the work of the state or of a political subdivision, the officer or employee must be given the option of time off with a concurrent loss of pay for the period missed or must be given an opportunity to reschedule the work period so that the reserve or national guard weekend, daily, or hourly drill or period of training occurs during time off from work without loss of status or efficiency rating.

Emphasis supplied.

Public employees have the additional benefit of up to twenty days of paid time off to attend to their National Guard duties. The trade-off is their enforcement mechanism—instead of having a private cause of action, they are forced to rely upon the North Dakota department of veterans affairs. Section 37-01-25.1 provides:

Any person referred to in section 37-01-25 [public employees of North Dakota], who within ninety days after receiving a discharge other than dishonorable from such active noncivilian service, and who is not physically or otherwise incapacitated to perform the duties of the position formerly held by the person, applies for such position held by the person at the time of entering such active service, must be given such position or one of like seniority, status, and pay, and is immune to discharge from said position except for cause, as defined by the department of veterans' affairs, for a period of one year after entering upon the duties of the person's civilian position. Any such person not so reemployed or who is discharged within a period of one year without cause, has the right of appeal to the department of veterans' affairs under such rules and regulations as the administrative committee on veterans' affairs may promulgate. If the department of veterans' affairs finds that such person was not reemployed or was discharged within one year without cause, it may order any officer or other appointing power to comply with the provisions of this chapter...Any person violating any of the provisions of this section is guilty of an infraction.

The most effective enforcement mechanisms typically permit the wronged employee to sue his or her employer in civil court. It is foreseeable that relying on the assistance of a state agency could provide a less immediate deterrent to employers who would otherwise violate the reemployment rights of their National Guard employees. However, the deleterious effect of such an enforcement mechanism is minimized in North Dakota, because only public employees, presumably a fraction of the total National Guard population, fall under this enforcement mechanism. Private employees in North Dakota have a much stronger mechanism for enforcement, although they do not obtain the benefit of twenty days of paid military leave.

PRIVATE EMPLOYEES: “VOLUNTEER EMERGENCY RESPONDERS”

Members of the National Guard who are not public employees receive similar protections under Chapter 37-29 of the North Dakota Statutes. These statutes define the term “voluntary emergency responder” to mean an individual in good standing as . . . [a] volunteer member of the North Dakota army national guard or North Dakota air national guard...”

Section 37-29-02 generally prohibits any form of employment discrimination against “volunteer emergency responders,” including members of the North Dakota Air and Army National Guard:

An employer may not discriminate from hiring or otherwise deny employment to an individual who is a volunteer emergency responder, based on the fact the individual is a volunteer emergency responder. A volunteer emergency responder who is discriminated against or denied employment under this section may bring a civil action against the employer that violated this section, seeking reasonable reparations for damages caused due to the discrimination or denial of employment. A civil action under this section must be commenced within one year of the date of the violation.

Section 37-29-03 adds teeth to 37-29-02’s antidiscrimination law. This statute provides:

1. An employer may not terminate or demote an employee who is a volunteer emergency responder or in any other manner discriminate against that employee in the terms and conditions of employment based upon the employee being absent or tardy from employment due to serving as a volunteer emergency responder in responding to a disaster or emergency.
2. An employee who is terminated, demoted, or otherwise discriminated against in violation of this section may bring a civil action against the employer that violated this subsection. In the civil action, the employee may seek reinstatement to the employee's former position; payment of back wages; reinstatement of fringe benefits; and if seniority rights are granted, the employee may seek reinstatement of seniority rights. A civil action under this section must be commenced within one year of the date of the violation.
3. Except for an involuntarily activated North Dakota national guard member, subsection 1 does not apply if due to serving as a volunteer emergency responder, the employee is absent or tardy from the employee's place of employment for a period that exceeds twenty regular working days in a calendar year.
4. In order to receive the protections of subsection 1, an employee who will be absent or tardy from the employee's place of employment while serving as a volunteer emergency responder in the case of a disaster or emergency shall make reasonable efforts to notify the employer of that service.
5. An employer may request that an employee provide the employer with written verification of times and dates of instances during which the employee was absent or tardy from employment due to serving as a volunteer emergency responder in the case of a disaster or emergency. Verification under this subsection may include a statement from the department of emergency services, the adjutant general's office, the North Dakota wing of the civil air patrol, or other appropriate entity.

6. This section does not limit an employer from charging against an employee's regular pay the time the employee is absent or tardy from employment while serving as a volunteer emergency responder to a disaster or emergency.

DEPARTURES FROM USERRA

A minor but key difference exists between the protections offered in Section 37-01-25 and USERRA. USERRA guarantees the service member returning from federal active duty that he or she will be reemployed in the position that he or she *would have had* if he or she had never left the job to go on active duty. 37-01-25, unlike USERRA, does not take into account the service member's potential loss of a promotion or career step. In reality, the occurrence of a National Guard member failing to reach a promotion due to a state active duty period is probably less likely than losing a promotion due to a federal deployment, simply because federal deployments typically last much longer than a period of state active duty.

A COVERAGE GAP FOR NON-NORTH DAKOTA GUARD PERSONNEL

Although state law provides North Dakota National Guard members with excellent reemployment protections and supporting enforcement mechanisms, a coverage gap exists for any members of the National Guard units of *other* states who are employed in North Dakota.

Chapter 37 provides a strict definition of the term "National Guard:"

"National guard" means that part of the military forces of this state which is organized, equipped, and federally recognized under the provisions of the National Defense Act, as amended, of the United States as the "national guard, air national guard, of the United States and the state of North Dakota". The term includes also the term "national guard of the state of North Dakota"

Given this clear statutory definition, the protections provided to both public and private employees do not extend to members of the National Guard of neighboring states. For example, Quentin Burdick works in Grand Forks, North Dakota. He lives in Grand Forks, Minnesota, just across the state line. He is also a member of the Minnesota National Guard, and commutes to Crookston, Minnesota (less than thirty minutes away) to participate in drill weekends. When a series of winter storms referred to by national media sources as "Snowpocalypse 2015" devastates Minneapolis, the Minnesota governor activates Burdick's unit and sends him to Minneapolis to participate in cleanup operations. After about 90 days, Burdick returns to his North Dakota workplace and applies for reemployment. His manager refuses to reinstate him into his former job. Unfortunately, the manager is within his legal rights to do so. The statutory protections apply only to members of the *North Dakota* National Guard.

UPDATE—MAY 2019

On 4/24/2019, North Dakota Governor Doug Burgum signed into law House Bill 1095. This new enactment amends Chapter 37-29 of North Dakota Statutes protecting the civilian jobs of National

Guard members when they are away from their civilian jobs for *state active duty*—called by the Governor, under state authority, paid with state funds, for state emergencies like floods or riots.

Previously, the North Dakota law protected “a volunteer member of the North Dakota army national guard or air national guard.” As amended, this law protects “a volunteer member of the army national guard or air national guard of *this state or any other state*.” (Emphasis supplied.)

For example, Vidkun Quisling is the owner-operator of Quisling’s Norwegian Seafood Restaurant in Grand Forks, North Dakota. Among his employees there were two National Guard members. Audie Murphy lives in North Dakota and is a member of the North Dakota Army National Guard. Ira Hayes lives just across the Red River of the North in East Grand Forks, Minnesota. Hayes is a member of the Minnesota Army National Guard.

The Red River of the North overflows its banks, and the Governors of North Dakota and Minnesota call up National Guard units to fill sandbags, evacuate residents, and clean up the mess. Both Murphy and Hayes are among those called to state active duty. Quisling is annoyed by the short-notice call-up and fires both Murphy and Hayes.

Prior to the recent amendment, Murphy had enforceable reinstatement rights with respect to his job at the restaurant, but Hayes did not. As amended, North Dakota law protects both Murphy and Hayes.

The federal Uniformed Services Employment and Reemployment Rights Act (USERRA) protects the civilian jobs of National Guard members when they are away from their jobs for voluntary or involuntary duty (including training) under title 10 or title 32 of the United States Code.⁵ USERRA does not apply to state active duty. If National Guard members are to have the right to reemployment in their civilian jobs after periods of state active duty, it must be by state law.

⁵ See 38 U.S.C. 4303(16).