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Nebraska's Reemployment Protections For National Guard Members

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The Good News: Nebraska Law Protects National Guard Members Returning from State Active Service

The Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA")⁴ creates a comprehensive set of legal protections for members of America's reserve components⁵ (including the Army and Air National Guard) who are called to or volunteer for active service (including training). Members of the Army and Air National Guard have reemployment rights under USERRA when they are away from their civilian jobs (federal, state, local, or private sector) for military training or service under title 10 or title 32 of the United States Code.

Members of the Army and Air National Guard are subject to being called and are frequently called to state active duty by Governors, for state emergencies like hurricanes, tornadoes, floods, fires, riots, etc. These state call-ups are under state authority and with state funding. USERRA does not give a National Guard member the right to reemployment in his or her civilian job after state active duty. If the individual is to have the right to reemployment in this scenario, it must be by state law. Every state has a statute giving National Guard members the right to reemployment after state active duty, but there are major differences among the states as to what is protected and how these rights are to be enforced.

Section 55-161 of the Revised Nebraska Statutes applies most of USERRA to the state's employees, and fills the "state active service" gap not covered by USERRA as enacted by the federal legislature:

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⁴ USERRA is codified in title 38 of the United States Code, sections 4301-4335 (38 U.S.C. 4301-4335).

⁵ There are seven reserve components: the Army National Guard, the Army Reserve, the Air National Guard, 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 a hybrid federal-state status, while the other five reserve components are purely federal entities.

- (1) The parts of the federal Uniformed Services Employment and Reemployment Rights Act of 1994, 38 U.S.C. Chapter 43, listed in subdivisions (a) through (j) of this subsection or any other parts referred to by such parts, in existence and effective as of January 1, 2001, are adopted as Nebraska law. This section shall be applicable to all persons employed in the State of Nebraska and shall include all officers and permanent employees, including teachers employed on a one-year contract basis and elected officials, of the state or of any of its agencies or political subdivisions...
- (2) This section applies to all members performing duty in *active service of the state*.

Emphasis supplied.

The Bad News: Guard Members of Other States Are Not Covered

By adopting USERRA as a state law and applying the Act's provisions to state active service, the Nebraska Legislature has provided Nebraska National Guard members with a very strong set of reemployment protections. However, there is a gap in coverage that could apply to some Nebraskans or citizens of other states who have civilian jobs in Nebraska but are members of National Guard units of other states. The protections of section 55-161 do not apply to members of National Guard units of *other* states, even if they reside and/or are employed in the state of Nebraska. Section 55-104 defines several key terms used throughout Chapter 55, the portion of the Nebraska statutes that applies to the state militia. Section 55-104 defines the legislature's meaning of the term "state active service" as applicable only to active service to Nebraska:

The words active service of the state shall mean service on behalf of *this state*...whenever called upon in aid of civil authorities, at encampments whether ordered by state or federal authority, at periods of drill and any other training or service required under state or federal law, regulations or orders, or upon any other duty requiring the entire time of the organization or person; *Provided*, that in no event will active service of the state include in the service of the United States, as defined in this section."

Emphasis supplied.

This definition makes it clear that Section 55-161 only applies to members of the *Nebraska* National Guard. For example, Air National Guard Major John Pershing flies C-17 cargo aircraft for the *Iowa* Air National Guard. He also is a command pilot in the Boeing 737 for BlackJack Airlines, based in Omaha, Nebraska, and Nebraska law governs his employment relationship with the airline. When an epidemic of mad cow disease strikes in Iowa, the Iowa Governor calls many members of his state's National Guard into action. Major Pershing's squadron performs emergency evacuation of cattle from the state's numerous dairy farms, delivering them to special quarantine farms where they are processed and tested. Because of his active service to the State of Iowa, Major Pershing is away from his home station in Omaha and unavailable to work for BlackJack Airlines for many days. When the epidemic is brought under control and he

returns to Omaha, BlackJack Airlines has no legal obligation to reemploy him. Nebraska's statutory protections in section 55-161 only apply to members of the *Nebraska* National Guard.

Additionally, the statute does not apply to members of the Nebraska National Guard employed in *other* states. This is a simple byproduct of our federal system of government. The Nebraska legislature has no sovereign authority to tell employers in other states how to treat their employees.

Enforcement

Section 55-161, paragraph (4) makes the Nebraska Commissioner of Labor responsible for enforcing the section's provisions. Section 55-166 makes it a misdemeanor to discriminate against any member of the National Guard:

Any person, firm, or organization, who discharges an employee because of his membership in the National Guard of this state or his fulfillment of military duty in the active service of the state or of the United States, shall be guilty of a Class IV misdemeanor, and, in addition thereto, shall restore the employee to a position of like seniority, status, and pay.

These protections could be stronger. We advocate adoption of legislation that enables a National Guard member who has experienced discrimination at the hands of an employer to file suit against that employer in civil court. This would provide a stronger incentive to employers to avoid violating the employment and reemployment rights guaranteed by USERRA and Nebraska law. The Commissioner of Labor could simply be too busy to attend to every violation of reemployment rights of Guard members. A Class IV misdemeanor carries a maximum penalty of \$500 and a minimum penalty of \$100. In Nebraska, violating a National Guard member's reemployment rights carries same penalty as a "violation of provisions relating to weed control", "engaging in business as a potato shipper without a license," or "unlawful feeding of garbage to animals." Providing National Guard members with a cause of action against discriminating employers would strengthen Nebraska's already-robust reemployment protections.

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On March 9, 2016 Nebraska Governor Pete Ricketts signed into law Legislative Bill 753. This new law expands Nebraska's protections of National Guard members to include "any person employed in Nebraska who is a member of the National Guard of another state and who is called into active service by the Governor of that state."

For example, Josephine Smith lives in Iowa and is a Sergeant in the Iowa Army National Guard and is called to state active duty by the Governor of Iowa, to assist in clean-up operations after a tornado. Smith's civilian job is just across the state line in Nebraska. Prior to this amendment,

Smith had no enforceable right to reemployment in her Nebraska job. Now, Nebraska law protects the civilian job of a person in this situation.