

## NH-2015-NG

### New Hampshire's Reemployment Protections For Members Of The National Guard

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Section 110-C:1 of the Revised Statutes Annotated of the State of New Hampshire extends the protections of the Uniformed Services Employment and Reemployment Rights Act (USERRA) protections to National Guard members called to *state* active service:

I. It is the intention of this section to eliminate the differences in benefits, rights, and protections in employment between individuals called to active duty by the federal government and those called to active duty by the state. Members of the national guard or state guard, when called to active service, state or federal, shall receive the same benefits, privileges, and protections in employment regardless of the activation authority or location of service.

II. Any person who shall be called by the governor to active duty, pursuant to RSA 110-B:6 or RSA 111:1, as a member of the national guard or as a member of the militia shall be afforded such employment and reemployment rights, privileges, benefits, and protections in employment as provided in the Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. 4301 et seq., as though that person had been called to active duty in the service of the United States; and shall not be denied hiring, retention in employment, promotion, or other incidents or advantages of employment because of any obligation as a member of the national guard or the militia.

As is explained in Law Review 14071<sup>3</sup> (June 2014) and other articles, USERRA protects the civilian jobs (federal, state, local, and private sector) of persons who leave those jobs for voluntary or involuntary "service in the uniformed services" as defined by USERRA. A person who leaves a civilian job for service is entitled to reemployment in the civilian job if he or she meets the five USERRA conditions:

- a. Must have left the job for the purpose of performing uniformed service.

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<sup>3</sup> We invite the reader's attention to [www.servicemembers-lawcenter.org](http://www.servicemembers-lawcenter.org). You will find more than 1,100 articles about USERRA and other laws that are especially pertinent to those who serve our country in uniform, along with a detailed Subject Index and a search function, to facilitate finding articles about very specific topics. ROA initiated this column in 1997 and adds new articles each week, including 169 new articles in 2013.

- b. Must have given the employer prior oral or written notice.
- c. Cumulative period or periods of uniformed service, relating to the employer relationship for which the person seeks reemployment, must not have exceeded five years.
- d. Must have been released from the period of service without having received a disqualifying bad discharge from the military.
- e. After release, must have made a timely application for reemployment.

As is explained in Law Review 14071, USERRA protects the National Guard member who is away from his or her civilian job for military training or service under title 10 or title 32 of the United States Code. USERRA does not protect the civilian job of the National Guard member who is away from his or her civilian job for *state active duty*—duty called by the Governor, under state authority, for state emergencies like tornadoes, fires, riots, etc. If the National Guard member is to be protected during these state active duty periods, it must be by state law.

Sections 110-B:13 and 110-B:14 limit the terms “National Guard” and “Air National Guard” to the “units which are part of the *New Hampshire* national guard [and air national guard].” Individuals who work in the state of New Hampshire who are members of the National Guard of *other states* will most likely find themselves unable to utilize Section 110-C:1’s statutory protections.

For example, Joshua Lawrence Chamberlain is a senior associate attorney at a law firm in Portsmouth, New Hampshire. He is also a Major in the Maine Army National Guard. The Maine Governor calls Major Chamberlain’s unit to state active duty for 60 days to deal with the terrible effects of a “perfect storm” that devastated Maine’s coastline. When Chamberlain returns from Maine, he has no statutory basis to force the New Hampshire law firm to reemploy him in his job. The statute simply does not address anyone in his particular circumstances and applies only to members of the New Hampshire National Guard.

## **ENFORCEMENT**

Section 110-C:1 continues with a detailed provision for enforcement of National Guard members’ reemployment rights:

- III. (a) Any member of national guard who believes his or her rights have been violated under this section must first attempt mediation through the Employer Support of the Guard and Reserve organization. If mediation is unsuccessful for any reason, including a refusal to participate by the employer, then the mediator shall certify the complaint to the New Hampshire department of labor.
- (b) The department of labor shall provide assistance to affected military members with respect to the enforcement of rights and benefits under this section. If the department, after notice and a hearing, determines that an employer has violated this section, the department shall order a remedy which corrects the violation and may further order the employer to take action which compensates the member for any adverse impact of the

violation. Any order to make the member whole shall be limited to pay, time credit, health benefits or other areas over which the employer has control.

(c) The department of labor shall adopt rules pursuant to RSA 541-A, to govern complaint and hearing procedures under this section.

(d) In the event the department of labor is unable to successfully resolve a complaint against an employer, the department of labor shall notify the affected military member and the military member may request that the complaint be referred to the attorney general. The attorney general may commence an action in the name of the state of New Hampshire for relief under this chapter for such person.

(e) If the attorney general declines to proceed in a given case, or if the person does not desire the assistance of the attorney general, the affected member may file a petition in superior court seeking relief against the employer for violation of this section. In any civil action to enforce the provisions of this section, the prevailing party may be allowed reasonable attorney's fees to be assessed by the court and collected as costs.

(f) The courts shall give proceedings under this chapter priority on the court calendar.

Although rigidly structured, this provision does ultimately permit National Guard members to bring civil suits against employers who violate their rights, providing an important incentive for employers to follow the relevant reemployment laws of New Hampshire. This provision adds teeth to New Hampshire's expansion of USERRA's protections to members of the New Hampshire National Guard on state active duty.