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New Jersey's Reemployment Protections For Members Of The National Guard

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OVERVIEW

Section 38:23C-20 of the New Jersey Statutes Annotated (West) provides a member of the New Jersey National Guard with a number of reemployment protections in the event he or she is required to leave a job for military service or is discharged from a position of employment for service-related reasons:

- a. In the case of any person who, in order to perform military service [³], has left or leaves a position, other than a temporary position, in the employ of any employer, and who:
 - (1) Receives a certificate of completion of military service duly executed by an officer of the applicable force of the Armed Forces of the United States or by an officer of the applicable force of the organized militia;
 - (2) Is still qualified to perform the duties of such position; and
 - (3) Makes application for reemployment *within 90 days* after he is relieved from such service, if such position was in the employ of a private employer, such employer shall restore such person to such position, or to a position of like seniority, status and pay, unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so.

If the circumstances of an employer have so changed...as to make it impossible or unreasonable to restore [such] person... such employer shall restore such person to any available position, if requested by such person, for which the person is able or qualified to perform the duties.

- b. The benefits, rights and privileges granted to persons in the military service by this section shall be extended to and be applicable to any person who, in order to participate in assemblies or annual training or in order to attend service schools conducted by the Armed Forces of the United States for a period or periods up to and including three months, *temporarily leaves or has left his position*, other than a temporary position, in the

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³ "Military Service" includes both federal and state active duty, according to section 38:23C-2.

employ of any employer and who, being qualified to perform the duties of such position, *makes application for reemployment within 10 days after completion of such temporary period of service*; provided that no such person shall be entitled to the said benefits, rights and privileges for such attendance at any service school or schools exceeding a total of three months during any four-year period.

- c. The benefits, rights and privileges granted to persons in the military service by this section shall be extended to and be applicable to any person who is or becomes a member of the *organized militia* or of a reserve component of the Armed Forces of the United States and who, *because of such membership is discharged by his employer* or whose employment is suspended by his employer because of such membership and who, being qualified to perform the duties of such position, makes application for reemployment or termination of the period of his suspension *within 10 days* after such discharge or suspension.
- d. Any person who is restored to a position ... [along with guarantees of standard benefits availability and leave] shall not be discharged from such position without cause, within one year after such restoration [Emphasis supplied].

NOT ALL MEMBERS OF THE NATIONAL GUARD ARE COVERED

At first glance, the term 'organized militia' does not appear to distinguish between members of the New Jersey National Guard and members of the National Guard of *other* states. However, New Jersey's definition of the term 'militia' in 38A:1-2 encompasses the 'organized militia,' and limits its application to New Jersey Guard units:

- (a) " 'Militia' means all the military forces of *this State*, whether organized, or active or inactive" [emphasis supplied].

Based on this definition, the reemployment protections for the National Guard found in section 38-23C-23(d) do not apply to persons who are employed in New Jersey but who are members of the National Guard in other states.

For example, William Franklin is an attorney living and working in Trenton, New Jersey. Before he moved to New Jersey to accept his position with his new firm (Tory, Benedict, Arnold, and Brant, LLC) he worked as an assistant district attorney in Philadelphia, and was an intelligence officer in the Pennsylvania National Guard. Franklin liked his Guard unit so much that he maintained his position in the Pennsylvania National Guard even after moving to New Jersey. He commutes to Pennsylvania for drill weekends and annual training. He even deployed to Iraq for a year with the Pennsylvania National Guard. Although his law firm initially did not want to reinstate Franklin upon his return from Iraq, Franklin cited USERRA's reemployment protections, and the firm grudgingly reinstated him.

Unfortunately for Franklin, his luck is about to change. After a major terrorist threat targeted Philadelphia, the Pennsylvania governor activated Franklin's unit to guard airports, train stations,

and other potential targets in and around Philadelphia for 90 days. After completing his duties in Philadelphia, Franklin returns to his firm and applies for reinstatement to his former position as a senior associate. The managing partner, George DeThird, refuses to reemploy Franklin, pointing out that USERRA does not apply to state active service, and that New Jersey statutes protect members of the *New Jersey* National Guard, not the National Guard of other states.

Unfortunately for Franklin, DeThird is correct: Franklin has no reemployment protection in New Jersey as a member of the Pennsylvania National Guard.

DISCHARGE OR DEPARTURE: A VITAL DIFFERENCE

The statute makes a key distinction between employees who have *left* a position and those who have *been discharged* by their employer because of their military service. A discharged employee has a much shorter window of opportunity in which to apply for reinstatement. The statute gives employees who voluntarily leave a position 90 days to apply for reinstatement, but only ten days to those who have been fired by their employers.

USERRA VERSUS NEW JERSEY

A small but substantial difference exists between New Jersey's reemployment protections and those offered by USERRA. Section 38:23C-20 only requires an employer to reinstate a returning member of the National Guard "to a position of like seniority, status and pay, unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so." USERRA requires an employer to return a reservist or a National Guardsman returning from federal active duty to the same position the member *would have held had he or she never left*.

For example, Dr. John Hart is a trauma surgeon and a Colonel in the New Jersey National Guard. He is also the deputy chief of surgery at a hospital in Trenton, New Jersey. The hospital provides fixed promotions and pay increases to its physicians every two years. Hart is three months from his next promotion when his unit is deployed to Afghanistan for a nine-month tour. When Hart returns, both USERRA and the New Jersey statute require the hospital to reinstate him. However, because his deployment consisted of *federal* active duty, USERRA applies, preempts the state law, and requires the hospital to reinstate Dr. Hart along with the promotion he would have earned if he had never left.

State active service would yield a different result. Suppose that, instead of a federal employment to Afghanistan, the governor of New Jersey calls Colonel Hart's unit to state active duty for four months after a massive explosion caused by methane accumulation in a landfill devastates the New Jersey countryside. After he is discharged, Hart returns to his position at the hospital. Because USERRA does not apply to members of the National Guard engaged in state active service, the state law applies, and the hospital is only required to reinstate Dr. Hart in the same position he had before, or a "position of like seniority, status, and pay."

ENFORCEMENT

Part (e) of section 38:23C-20 provides an enforcement mechanism against those employers who violate New Jersey's reemployment protections:

e. In case any private employer fails or refuses to comply with the provisions of this section the Superior Court shall have the power, upon the filing of a complaint, by the person entitled to the benefits of such provisions, to specifically require such employer to comply with such provisions, and may, as an incident thereto, compensate such person for any loss of wages or benefits suffered by reason of such employer's unlawful action. The court shall order a speedy hearing in any such case, and shall advance it on the calendar. Any person claiming to be entitled to the benefits of the provisions of this section may appear and be represented by counsel, or, upon application to the Attorney General of the State, may request that the Attorney General appear and act on his behalf. If the Attorney General is reasonably satisfied that the person so applying is entitled to such benefits, he shall appear and act as attorney for such person in the amicable adjustment of the claim, or in the filing of any complaint and the prosecution thereof. In the hearing and determination of such applications under this section, no fees or court costs shall be assessed against a person so applying for such benefits.

This section is crucial. It empowers members of the National Guard to sue their employers in civil court and simultaneously expedites their cases, giving teeth to New Jersey's reemployment laws and providing a key incentive to employers who might otherwise violate their employees' reemployment protections. As an added bonus, even in the event that the National Guard member loses the lawsuit, the statute prohibits the employer from recovering legal costs from the service member. Additionally, New Jersey makes discrimination against military members seeking reemployment a minor criminal offense in section 38A:14-4:

Any person who, either by himself or with another, willfully deprives a member of the organized militia of his employment or prevents his being employed by himself or another, or obstructs or annoys such member in his employ in respect to his trade, business or employment because he is a member of the organized militia or is performing or about to perform some duty in connection therewith or dissuades any person from enlistment therein by threat or injury to him in respect to his business, employment or trade, in case he shall enlist, shall be guilty of a misdemeanor.

Altogether, New Jersey provides substantial protections backed up by strong legal enforcement mechanisms in place to members of its own National Guard. Members of the National Guard in other states, however, are not as fortunate.

UPDATE—FEBRUARY 2020
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Section 38:23C-20(a) of New Jersey Statutes Annotated (NJS) accords reemployment rights to a person who leaves a civilian job in New Jersey "to perform military service."⁴ Subsection (c) of that same section provides:

⁴ NJS section 38:23C-20(a).

The benefits, rights and privileges granted to persons in the military service by this section shall be extended to and be applicable to a member of the organized militia or of a reserve component of the Armed Forces of the United States and who, because of such membership is discharged by his employer or whose employment is suspended by his employer because of such membership and who, being qualified to perform the duties of such position, makes application for reemployment or termination of the period of his suspension within 10 days after such discharge or suspension.

For the purposes of this section, “organized militia” means the Army and Air National Guard of New Jersey or any other state, and “military service” includes National Guard active duty ordered by a Governor of a state.⁵

Thus, New Jersey has solved the problem, effective 1/9/2020.⁶ For example, Alexander Hamilton lives in New York City and is a member of the New York Army National Guard, but his civilian job is in Newark, New Jersey. Hamilton is called to state active duty by the Governor of New York and is away from his New Jersey job for several days. If this situation arose on or after 1/9/2020, Hamilton has a legally enforceable right to reinstatement in his New Jersey job.

⁵ NJSA section 38:23C-20(c) (emphasis supplied). The italicized paragraph was added by 2020 Chapter 286, section 2, effective January 9, 2020.

⁶ The new provision is not retroactive.