

NY-2015-NG

The New York Laws That Protect National Guard Members On State Active Duty

By Mathew B. Tully, Esq.,¹ and
David Fallon, Esq.²

The Uniformed Services Employment and Reemployment Rights Act (USERRA) is a comprehensive statute that affords numerous protections for National Guard members who are called to federal service.³ However, USERRA applies only to military service under Title 10 or Title 32 of the United States Code and, as such, does not provide protection to Guard members on State active duty.⁴ Luckily, New York, like all other states, has laws on its books to protect Guard members when they are performing State Active Duty, such as quelling a riot or responding to a natural disaster. As these New York State benefits and protections do not always mirror the benefits and protections contained in USERRA, it is important that Guard members have a basic understanding of their rights when they are serving on State Active Duty.

New York's protections for its service members are contained in the New York Military Law. One of the most robust protections for Guard Members called to State Active Duty is the right to be reemployed in the private sector after a period of qualifying "military service," which includes State Active Duty.⁵ A Guard member will generally be entitled to reemployment so long as he or she has left a permanent position with an employer in order to perform military service and "a) 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*

¹ Mathew B. Tully is Founding Partner of [Tully Rinckey PLLC](#), and a retired Lieutenant Colonel in the New York Army National Guard. He concentrates his practice on representing military personnel and federal government employees.

² David Fallon is an associate attorney at [Tully Rinckey PLLC](#). He concentrates his practice on public and private sector employment litigation.

³ See 38 U.S.C. § 4301, *et. seq.*

⁴ See 20 CFR § 1002.57 ("National Guard members may perform service under either Federal or State authority, but only Federal National Guard service is covered by USERRA.").

⁵ Section 301 of the Military Law defines "military service" as "duty by a person, male or female, in the active military service of the United States as defined in section one of this chapter and *active duty in the military service of the state pursuant to an order of the governor issued pursuant to section six or seven of this chapter.*" (emphasis supplied). N.Y. Mil. Law § 301(1). Section 6 of the Military Law, titled "Ordering organized militia into active state service", provides: "1. The governor shall have power, in case of invasion, disaster, insurrection, riot, breach of the peace, or imminent danger thereof, to order into the active service of the state for such period, to such extent and in such manner as he may deem necessary all or any part of the organized militia. Such power shall include the power to order the organized militia or any part thereof to function under the operational control of the United States army, navy or air force commander in charge of the defense of any area within the state which is invaded or attacked or is or may be threatened with invasion or attack. 2. Upon the request of the sheriff of a county, or in the county of Nassau the county executive or the mayor of a city, whenever it shall be made to appear to the governor that there is a breach of the peace, riot, resistance to process of this state or disaster or imminent danger thereof, the governor may order into the active service of the state, for such period, to such extent and in such manner as he may deem necessary all or any part of the organized militia. . . ." N.Y. Mil. Law §6.

applicable force of the organized militia b) is still qualified to perform the duties of such position; and c) makes application for reemployment within ninety days after he is relieved from such service[.]”⁶ Such a person is then entitled 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.”⁷ Accordingly, Guard members called to State Active Duty will generally be protected from losing their job, so long as they timely seek reemployment upon their return.

One limitation in the New York Military Law is that its protections do not appear to extend to Guard members of neighboring states who are performing State Active Duty service.⁸⁹ This could conceivably create problems in cities like Manhattan, where workers commonly commute from neighboring states, such as New Jersey and Connecticut. For example, imagine Alan Adams and Barry Bautista both work for a venture capital firm at its headquarters in lower Manhattan. Adams lives in New York and is a Sergeant in the New York Army National Guard while Bautista lives across the Hudson River in Weehawken, New Jersey and is a Sergeant in the New Jersey Army National Guard. After a hurricane causes major devastation in both New York and New Jersey, both individuals are called to perform State Active Duty service. While Adams is called to State Active Duty service by the Governor of New York, Bautista is called up by the Governor of New Jersey. Both individuals are then summarily terminated by their common employer upon their return from State Active Duty service. While Adams is protected under New York Military Law Section 317, Bautista will not be afforded the same protections as Adams. Accordingly, while the protections of Section 317 are robust, they could be strengthened to avoid seemingly inequitable results such as this.

While the New York Military Law provides robust protections for private sector employees, public sector employees on State Active Duty service are afforded even greater protection by the Military Law. Specifically, public sector employees are entitled to return to work upon the completion of their State service without “any loss or diminution of time service, increment, vacation or holiday privileges, or any other right or privilege.”¹⁰ Accordingly, Guard members are entitled to have their benefits and privileges continue to accrue without interruption. Public sector employees are also entitled to up to thirty days of pay by their civilian employers during periods of State Active Duty service.¹¹

⁶ N.Y. Military Law § 317 (emphasis supplied).

⁷ N.Y. Military Law § 317 .

⁸ See N.Y. Mil. Law § 301(1); N.Y. Mil. Law §6.

⁹ Under New York State Executive Law Section 29-G, a National Guardsman in another state called into service under a mutual aid compact would be covered the same as a New York Guardsman. New York State has used ‘compact’ forces (normally from New Jersey and Massachusetts) on a somewhat regular basis since 9-11 to respond to various situations.

¹⁰ N.Y. Military Law § 242(4).

¹¹ N.Y. Military Law § 242(5) (“Every public officer or employee shall be paid his salary or other compensation as such public officer or employee for any and all periods of absence while engaged in the performance of ordered military duty, and while going to and returning from such duty, not exceeding a total of thirty days or twenty-two working days, whichever is greater, in any one calendar year and not exceeding thirty days or twenty-two working days, whichever is greater, in any one continuous period of such absence.”).

In addition to receiving protection in reemployment upon the completion of State Active Duty service, the New York Military Law also protects Guard members in a variety of ways *during* any such period of service. Specifically, the New York State Soldiers' and Sailors' Civil Relief Act (NYSSCRA), contained in Article 13 of the Military Law, provides a variety of protections to Guard Members while they are on State Active Duty.¹² While a comprehensive treatment of all of the benefits contained in the NYSSCRA would be impossible within the confines of this article, there are some particularly notable benefits that Guard members should be aware of.

Under the NYSSCRA a Guard member is generally entitled to have a pending legal proceeding stayed during his or her period of service so long as the court or administrative agency does not determine that the Guard member's ability to represent his or her interest is "not materially affected by reason of his military service."¹³ Accordingly, a Guard member will usually be able to have any lawsuit or proceeding he or she is involved in "placed on hold" during their period of service. The NYSSCRA also provides protections against evictions for a Guard member, his spouse, or dependents, so long as the court does not determine that the Guard member's ability to pay any outstanding rent is "not materially affected by reason of his military service."¹⁴ Another similar benefit is that the statute of limitations for any civil actions will be "tolled" during any period of service.¹⁵ For example, if a Guard member has only one day remaining to bring a lawsuit but is ordered to State Active Duty before he is able to commence suit, the Guard member will not have his period of State Active Duty counted towards any applicable limitations period and will be able to file suit upon his return, even though his claim otherwise likely would have been time-barred.¹⁶

New York's Military Law also provides Guard members with protection from liability for their acts performed in connection with State Active Duty. Specifically, the law provides that "Members of the militia ordered into the active service . . . shall not be liable civilly or criminally, for any acts done by them in the performance of their duty."¹⁷ In the event that a Guard member is sued for acts performed in connection with the performance of his duty, the person suing the Guard member can be required to post a bond for treble (meaning triple) the costs of defending against the lawsuit, which then can be awarded to the Guard member at the conclusion of the case.¹⁸

Finally, individuals who willfully attempt to deprive Guard members of their employment or interfere with a Guard member's trade, business, or employment because of their membership in the Guard, can be guilty of a misdemeanor.¹⁹ Accordingly, an employer

¹² N.Y. Mil. Law §§ 300 – 328.

¹³ N.Y. Mil. Law § 304.

¹⁴ N.Y. Mil. Law § 309.

¹⁵ N.Y. Mil. Law §308.

¹⁶ *Id.*

¹⁷ N.Y. Mil. Law § 235.

¹⁸ N.Y. Mil. Law § 235; *Shea v. Rotnour*, 135 N.Y.S.2d 694, 694-696 (N.Y. Sup. Ct., Onondaga Cty., 1954).

¹⁹ N.Y. Mil. Law § 251.

may not condition a job offer on an individual's promise to resign from the Guard or abstain from joining the Guard.²⁰ While perhaps unlikely that charges will be brought under this provision given the relatively limited resources of many district attorneys' offices in the State of New York, it is nonetheless possible that such a prosecution could be brought in the case of egregious conduct by an employer or third-party.

In sum, New York Laws provide a variety of protections for Guard Members on State Active Duty. The above examples are some of the more robust protections contained in the New York Military Law, but they are not an exhaustive list of protections and benefits. If a Guard member feels that his or her rights may have been violated either during, or upon return from, a period of State Active Duty service, he or she should promptly consult with an attorney to determine his or her rights.

²⁰ See 1975 NY Ops Atty Gen July 21.