

OH-2015-NG
(Updated March 2017)

Ohio Laws that Protect National Guard Members on State Active Duty

By Michael McCarthy¹ And Sean McCarthy²

The right to call one's military forces to duty has long been recognized as one of the purviews of the leaders of sovereign states. In Ohio, this power is extended to the Governor by the state Constitution, where Article IX grants the Governor, "the power to call forth the militia, to execute the laws of the state, to suppress insurrection, to repel invasion, and to act in the event of a disaster within the state."

In Ohio, the state's military forces are broken into the "unorganized militia" and the "organized militia." The unorganized militia encompasses every able bodied man, age 17 to 67 not otherwise exempted by statute. The organized militia is broken into two parts: the National Guard (encompassing both the Army and Air Guard), and the State Defense Force (encompassing both the Ohio Naval Militia and the Ohio Military Reserve).³

The Governor's power to call the militia is further codified under O.R.C. 5923.21. When called to duty by the Governor through his own executive power alone, members of the National Guard are in a status known as State Active Duty. The Ohio Revised Code defines State Active Duty as "full-time duty in the active military service of the state under a proclamation of the governor issued pursuant to authority vested in the governor by law, and while going to and returning from such duty."⁴

While operating under State Active Duty orders, members of the National Guard are afforded protections similar, but not identical, to those they enjoy under federal status. The Ohio Legislature has enacted several laws that define these protections.

1. Pay and Allowances. ORC 5923.12 states that members of the National Guard on State Active Duty orders "shall receive the same pay and allowances for each day's service as is

¹ Michael McCarthy is the managing member of McCarthy Law Offices based in Columbus, Ohio. The firm handles cases involving USERRA and SCRA on behalf of servicemembers. He is currently serves as an infantry officer in the Marine Corps Reserve.

² Sean McCarthy is an Assistant Prosecutor in Franklin County, Ohio. His service as an Army Judge Advocate officer includes tours as a Staff Judge Advocate for two Brigades and Brigade Judge Advocate for an Infantry Brigade Combat Team with service in Afghanistan.

³ ORC 5923.01

⁴ ORC 5924.01

provided for commissioned officers, warrant officers, noncommissioned officers, and enlisted personnel of like grade and longevity in the armed forces of the United States, together with the necessary transportation, housing, and subsistence allowances as prescribed by the United States department of defense pay manual, or an amount not less than seventy-five dollars per day as base pay for each day's duty performed, whichever is greater."

Service members do not accrue "points" toward a Federal retirement while in a State Active Duty Status. Also, while in a State Active Duty status, Service members are considered employees of the State of Ohio and are covered by the State's workers' compensation program for injuries incurred while on duty.

2. Servicemembers Civil Relief Act. Though the federal Servicemembers Civil Relief Act does not protect Servicemembers in a State Active Duty status, ORC 5923.12 extends "the protections afforded to persons on federal active duty by 'The Servicemembers Civil Relief Act,' 117 Stat. 2835, 50 U.S.C.A. App. 501."

3. Privileges and Immunities. ORC 5923.27 states that no member of the organized militia called to State Active Duty shall be arrested on any warrant, except for treason or felony, while going to, performing, or returning from such duty. Additionally, a member of the organized militia called to State Active Duty to aid the civil authorities in executing the laws of the state, suppressing insurrection, repelling invasion, or promoting the health, safety, and welfare of the citizens of this state shall be considered a law enforcement officer (as defined by statute), and shall be entitled to legal defense by state attorneys and extends "good Samaritan" protections against civil liability that might otherwise attend to administering emergency care or treatment at the scene of an emergency (unless the care constitutes willful or wanton misconduct).

Finally, this code section extends to National Guard members (among others) immunity from civil damages for any injury to or death of persons or damage to property resulting during training periods, test periods, practice periods, or other emergency management operations, or false alerts, as well as during any hazard, actual or imminent, and subsequent to the same (again, except in cases of willful misconduct).

4. Reinstatement and Reemployment Rights. The Ohio Revised Code extends employment protections to "[a]ny person whose absence from a position of employment is necessitated by reason of service in the uniformed services or in the *Ohio* organized militia has the same reinstatement and reemployment rights in this state that a person has under the "Uniformed Services Employment and Reemployment Rights Act of 1994." (Emphasis supplied.)

Members may file their complaints in their county Court of Common Pleas, or if against the state of Ohio, in the Court of Claims.

5. Chain of Command. Anticipating the potential challenges military support in a State Active Duty status might cause when called to support civil authorities, the ORC codifies that when members of the organized militia are called to State Active Duty by the Governor, “the orders shall state in general terms the objectives to be accomplished and with which agencies of civil authority the accomplishment of these objectives shall be coordinated. The missions of a commander of any unit or units called to State Active Duty in aid to civil authority shall be as directed by the appropriate civil authorities.” However, “the mode and means of accomplishing those missions shall at all times remain with their commander... The command and control of units or members of the organized militia shall at all times remain with their commanding officers.”⁵

Examples:

The Cincinnati law firm of Dewey Cheatham & Howe (DCH) has 100 employees, two of whom are National Guard members. Robert Taft, an attorney employed by DCH as an associate, lives in Cincinnati and is a Captain in the Ohio Army National Guard. Daniel Boone (also a DCH associate) lives just across the Ohio River in northern Kentucky and is a Captain in the Kentucky Army National Guard. The Ohio River overflows its banks and the Governors of Ohio and Kentucky call up certain National Guard units for State Active Duty. Taft is called up by the Governor of Ohio and Boone by the Governor of Kentucky.

Benedict Arnold, the managing partner of DCH, is annoyed by the short-notice call-up and by the trouble and expense that the call-up causes for the law firm. Taft and Boone complete their two-week State Active Duty periods and report back to DCH early the next morning. Arnold informs them that they have been fired and replaced and orders them off the property.

Taft has enforceable reinstatement rights under Ohio law. If DCH refuses to comply, he can bring a civil action in the Court of Common Pleas and get the court to order the law firm to reinstate him and to pay him back pay for the delayed reinstatement.

Unfortunately, Boone falls through the proverbial crack. He has rights under the federal law (USERRA) when he is away from his civilian job for military training or service under title 32 or title 10 of the United States Code, but USERRA does not apply to State Active Duty. The Kentucky law does not apply to DCH, an Ohio employer. The Ohio provision protecting the right

⁵ ORC 5923.23

to reinstatement in this situation is limited to members of the *Ohio* organized militia, and Boone does not qualify. The Ohio Legislature could amend its law to expand the law's protections to apply to folks like Boone, but under the law as currently written an individual in Boone's situation has no protection.

UPDATE—MARCH 2017
By Captain Samuel F. Wright, JAGC, USN (Ret.)

On December 16, 2016, Ohio Governor John Kasich signed House Bill 471 into law. This new law made many changes to the Ohio Revised Code (ORC). The relevant amendment is to ORC 5903.02(B). House Bill 471 adds "or in the organized militia of another state" to the classes of persons who have reinstatement rights under Ohio law.

In the article, a hypothetical example was used, involving the law firm of Dewey Cheatham & Howe in Cincinnati, Ohio. Among the firm's employees are two National Guard members, Captain Robert Taft of the Ohio Army National Guard and Captain Daniel Boone of the Kentucky Army National Guard.

In the example, the Ohio River overflowed its banks in a major flood, and both the Governor of Ohio and the Governor of Kentucky called up National Guard members for the emergency—this was state active duty and was not protected by the federal law, the Uniformed Services Employment and Reemployment Rights Act (USERRA). Taft was called to state active duty by the Governor of Ohio, and Boone was called to state active duty by the Governor of Kentucky. Both Taft and Boone were absent from their law firm jobs for two weeks for this state active duty.

The article stated that Taft had enforceable reemployment rights under Ohio law but Boone did not. That statement was correct when Michael McCarthy and Sean McCarthy wrote the article, but the enactment of House Bill 471 has changed this result. Under ORC 5903.02(B) as recently amended, both Taft and Boone have enforceable reemployment rights at the Cincinnati law firm.

This amendment is effective December 16, 2016. It is not retroactive. If Boone lost his job because of a call to Kentucky state active duty prior to December 16, 2016, this new amendment does not help him. But going forward, persons in this situation have enforceable reemployment rights.

This recent amendment solves our problem with the Ohio statute.