

Oregon Law On Reemployment Rights Of National Guard Members

By Austin M. Giesel¹

The National Guard is a hybrid state-federal entity, created by federal legislation enacted very early in the 20th Century. National Guard members are subject to federal call-up or they can volunteer for operations like Iraq and Afghanistan, and they engage in periodic training to maintain their readiness for such contingencies. Under certain circumstances, members of National Guard can be called up for state active duty by the Governor of Oregon or by another state governor. A federal law called the Uniformed Services Employment and Reemployment Rights Act (USERRA) protects members of the Army or Air National Guard (as well as members of the Army Reserve, Air Force Reserve, Navy Reserve, Marine Corps Reserve, and Coast Guard Reserve) when they are away from their civilian jobs for voluntary or involuntary training or service under title 10 or title 32 of the United States Code. USERRA does not protect National Guard members who are away from their jobs for state active duty. If National Guard members are to have reemployment rights after state active duty, it must be by state law.

Oregon law provides as follows concerning the right of reinstatement to former employment for members of a uniformed service in Oregon Revised Statutes (O.R.S.) § 659A.086:

- (1) An employee shall be granted a leave of absence by the employer of the employee to perform *active state service* if:
 - (a) The employee is a member of the organized militia of this state and is called into active service of the state under ORS 399.065 (1) or state active duty under ORS 399.075.
 - (b) The employee is a member of the organized militia² of *another state* and is called into active state service by the Governor of the respective state.
- (2) The employer shall grant the employee a leave of absence until release from active state service permits the employee to resume the duties of employment. The regular employment position of an employee on a leave of absence for active state service under this section is considered vacant only for the period of the leave of absence. The employee is not subject to removal or discharge from the position as a consequence of the leave of absence.
- (3) Upon the termination of the leave of absence for active state service, an

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² The term “organized militia” clearly includes the National Guard, which has both a state and federal status, as well as the “state guard” which is a purely state entity.

employee shall:

- (a) Resume the duties of employment within seven calendar days; and
- (b) Be restored to the employee's position or an equivalent position by the employer without loss of seniority, vacation credits, sick leave credits, service credits under a pension plan or any other employee benefit or right that had been earned at the time of the leave of absence.

Emphasis supplied.

This statute defines “employee” and “employer” as follows:

(8)

(a) “Employee” means any individual, other than a copartner of the employer or an independent contractor, who renders personal services in this state to an employer who pays or agrees to pay wages or other compensation to the individual for those services.

(c) “Employer” means any person who employs one or more employees in this state. The term includes the State of Oregon or any county, city, district, authority, public corporation or entity and any of their instrumentalities organized and existing under law or charter, but does not include the federal government.

O.R.S. § 659A.086(8)(a) and (c).

This statute applies to both public and private sector employers per the definitions provided in subsection (8). The Oregon Legislature provides these reemployment rights to service members called to state active duty, whether by the Governor of Oregon or another Governor.

For example, Porky’s Barbecue Restaurant in Portland, Oregon employs two members of the National Guard. Sergeant Autzen is a member of the Oregon National Guard, and Sergeant Brattain lives in Vancouver, Washington and serves in the Washington National Guard.

When the Columbia River floods, the Governors of Washington and Oregon call up their respective National Guard units to state active duty. Because the flood was not anticipated, there was almost no advance notice of the call-up. Mr. Metzger, the owner of the restaurant, was annoyed by the short notice and decided to fire them both. So long as both Autzen and Brattain attempt to return to employment within seven calendar days of the end of their state active duty periods, they will both have enforceable reemployment rights. This statute provides equal protection to both public and private employees and to members of the Oregon National Guard and National Guard members of other states who happen to hold civilian jobs in Oregon.