

## Reemployment Rights Of National Guard Members In Pennsylvania

By Austin M. Giesel<sup>1</sup>

The National Guard is a hybrid state-federal entity, created by federal legislation enacted very early in the 20<sup>th</sup> 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 Pennsylvania 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.

Pennsylvania law provides the following right of reinstatement to former employment for members of a uniformed service in title 51, Pennsylvania Consolidated Statutes Annotated (Pa. C.S.A.) section 7309:

- (a) General rule.**--It is unlawful for the Commonwealth or any of its departments, boards, commissions, agencies or any political subdivision, or for any private employer, to refuse to hire or employ any individual not on extended active duty because of his membership in the National Guard or any one of the other reserve components of the armed forces of the United States, or because he is called or ordered to active State duty or special State duty by *the Governor* during an emergency or as otherwise authorized by law, or because he is called or ordered to active duty by the Federal Government under provisions of 10 U.S.C. (relating to armed forces) or 32 U.S.C. (relating to National Guard), or to discharge from employment such individual, or to otherwise discriminate against such individual with respect to compensation, hire, tenure, terms, conditions or privileges of employment because of such membership, or because he is called or ordered to active State duty by the Governor during an emergency or because he is called or ordered to other military duty authorized by law.
- (b) Reemployment following emergency or other military duty.**--Upon the completion of such emergency or other military duty any such member of the *Pennsylvania* National Guard or any other reserve component of the armed forces of the United States shall be restored by such public or private employer or his successor in interest to such position

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or to a position of like seniority, status and pay which such member held prior to such emergency or other military duty, but if any such member is not qualified to perform the duties of such position by reason of disability sustained during such emergency or other military duty but qualified to perform the duties of any other position in the employ of such private employer or his successor in interest, such member shall be restored to such other position, the duties of which he is qualified to perform, as will provide him like seniority, status and pay, or the nearest approximation thereof consistent with the circumstances of the case, unless such public or private employer's or his successor in interests, circumstances have so changed as to make it impossible or unreasonable to do so.

Emphasis supplied.

Subsection (a) of this statute makes clear the Pennsylvania Legislature's intent to provide protections to those members of the Pennsylvania National Guard who are called to state active duty by the Governor of Pennsylvania, with no distinction between public and private employment. The statute only refers to "the National Guard" and "the Governor," providing no protections for members of non-Pennsylvania National Guard units called up by the governors of other states. This statute also extends these protections to both public and private sector employees within Pennsylvania, and provides a stipulation that "successor(s) in interest" must abide by the same reemployment rules as the initial corporation of employment. The service member will have the right to reemployment in the previously held position, or, if the service member is no longer qualified, he or she must be given a similar position in terms of status, seniority and pay. The employer can gain an exemption from this statute if it can prove that circumstances render reemployment impossible or unreasonable.

For example, the Benjamin Franklin Optical Shop in Sayre, Pennsylvania employs two members of the National Guard. Sergeant Smedley lives in Sayre and is a member of the Pennsylvania National Guard, and Sergeant Fillmore lives in Waverly, New York and serves in the New York National Guard. When the Susquehanna and Chemung Rivers flood, the Governors of New York and Pennsylvania call up their respective National Guard units to state active duty. Mr. Franklin, the owner of the shop, is annoyed by the short-notice call-up and decides to fire both Smedley and Fillmore.

This statute only protects for members of the *Pennsylvania* National Guard who are called to state active duty. As a member of the New York National Guard, Sergeant Fillmore has no legal rights under this statute and cannot force Mr. Franklin to reemploy him. Sergeant Smedley will receive all of the rights under this statute and regain his previous employment, or, if he is no longer qualified, an equal position unless Mr. Franklin can prove that reemployment of Sergeant Smedley is unreasonable under the circumstances.