

## Reemployment Rights Of National Guard Members In Rhode Island

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 Rhode Island 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.

Rhode Island law provides for reemployment rights in this situation:

- (a) Any person who is a duly qualified member of the *Rhode Island* national guard who, in order to perform any military service he or she may be called upon to perform by proper authority, leaves a position, other than a temporary position, in the employ of an employer<sup>2</sup>, who shall give evidence of the satisfactory completion of that training, and who is still qualified to perform the duties of that position, shall be entitled to be restored to his or her previous or a similar position in the same status, pay, and seniority, and this period of absence for military training shall be construed as an absence with leave and without pay.
- (b) In addition to the provisions provided in this section, all National Guard members on *state active duty* shall be entitled to the rights, protections, privileges, and immunities offered under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), Title 38 U.S. Code, Chapter 43, Sections 4301-4333, Public Law 103-353 [38 U.S.C. § 4301 et seq.].

Rhode Island General Laws 1956, section 30-11-3 (emphasis supplied).

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<sup>2</sup> This provision appears to apply to the State of Rhode Island and its political subdivisions (cities, towns, etc.) and also to private employers in Rhode Island.

Subsection (a) limits these protections to members of the Rhode Island National Guard. For example, Roady's Road House Restaurant in Rhode Island employs two members of the National Guard. Sergeant Greene is a member of the Rhode Island National Guard, and Sergeant Bancroft lives in Massachusetts and serves in the Massachusetts National Guard. The Blackstone River floods and the governors of Rhode Island and Massachusetts call up their respective National Guard units to state active duty. Mr. Mendon, the owner of the restaurant, is annoyed by the short-notice call-up and decides to fire them both.

Under this statute, Sergeant Bancroft has no legal right to reemployment, as he is not a member of the Rhode Island National Guard, and is thus not covered by section 30-11-3. Sergeant Greene, as a member of the Rhode Island National Guard, is covered by this statute and is eligible to "be restored to his or her previous or a similar position in the same status, pay, and seniority, and this period of absence for military training shall be construed as an absence with leave and without pay." Section 30-11-3(a).

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## **RHODE ISLAND LAW PROTECTS NATIONAL GUARD MEMBERS ON STATE ACTIVE DUTY AUGUST 2016 UPDATE**

By Captain Samuel F. Wright, JAGC, USN (Ret.)

In 2016, Rhode Island Governor Gina Raimondo signed into law 2016 H 8037, Substitute A. This new law amends Section 30-11-3 of the Rhode Island General Laws by substituting "the National Guard of this state or any other state" for "the Rhode Island national guard."

In the article, we discussed the hypothetical Sergeant Bancroft, who works for Roady's Road House Restaurant of Rhode Island but who lives in Massachusetts and is a member of the Massachusetts Army National Guard. Sergeant Bancroft was called to state active duty by the Governor of Massachusetts. Prior to the 2016 amendment, a person in this situation had no enforceable reinstatement rights in the Rhode Island job, because he or she was not a member of the Rhode Island National Guard. After the 2016 amendment, a person in this situation has enforceable reinstatement rights.

This 2016 amendment is effective as of the date of enactment. It is not retroactive. If Bancroft lost his job in 2015 when called to state active duty by the Governor of Massachusetts, the 2016 amendment does not require Roady's Road House Restaurant of Rhode Island to reinstate him.