

Reemployment Rights Of National Guard Members In South Carolina

By Austin M. Giesel¹

Today's National Guard traces its origins to 1636, when the Massachusetts Bay Colony established the Massachusetts militia to defend the colony against attacks by the Pequot Indians. Other colonies and states later established similar state militias. Early in the 20th Century, Congress established the National Guard as a hybrid federal-state organization. National Guard members are subject to call by the President or they can volunteer for national emergencies, and they train periodically for that contingency. National Guard members are also subject to state call-ups, by the Governor.

Like every other state legislature, the South Carolina Legislature has enacted provisions to protect members of the South Carolina Army National Guard and Air National Guard when they are on state active duty, called by the Governor of South Carolina for state emergencies like hurricanes, fires, floods, riots, etc.

Under certain circumstances, members of National Guard can be called up for state active duty by the Governor of South Carolina or by another state governor. South Carolina law gives a member of the South Carolina Army or Air National Guard the right to reinstatement in his or her civilian job after state active duty. South Carolina Code section 25-1-2310 states: "Any member of the *South Carolina National Guard* who, at the direction of the Governor, enters state duty is entitled, upon honorable release from such duty, to all the reemployment rights provided for in this article." (Emphasis supplied.)

South Carolina Code section 25-1-2320 provides:

Upon release from state duty, the employee shall make written application to his previous employer for reemployment within five days of his release from duty or from hospitalization continuing after release. If the employee is still qualified for his previous employment, he shall be restored to his previous position or to a position of like seniority, status and salary, unless the employer's circumstances now make the restoration unreasonable. If the employee is no longer qualified for his previous employment, he shall be placed in another position, for which he is qualified, and which will give him appropriate seniority, status and salary, unless the employer's circumstances now make the placement unreasonable.

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South Carolina Code section 25-1-2330 provides an enforcement mechanism for a National Guard member who claims that his or her rights under this section have been violated:

Any employee may file a motion, petition, or other appropriate pleading in the circuit court of the county in which the employer's place of business is located requiring the employer to comply with the provisions of this article to compensate such employee for any loss of wages or benefits.

These sections, in combination, provide protections to members of the South Carolina National Guard who are called to state active duty and are forced to leave their jobs as a result, and these protections are similar to the protections afforded by a federal law called the Uniformed Services Employment and Reemployment Rights Act (USERRA).² These South Carolina protections apply to both public and private employers in the state. South Carolina Code section 25-1-2330 applies to "any employee." Unfortunately, the South Carolina law only protects members of the South Carolina Army or Air National Guard on state active duty.

For example, Rocky's Rock & Roll Restaurant in Rock Hill, South Carolina employs two members of the National Guard. Staff Sergeant Michael Haley lives in South Carolina and is a member of the South Carolina Army National Guard. Sergeant Andy Taylor lives a few miles north in North Carolina and serves in the North Carolina Army National Guard. The Catawba River floods and the governors of North Carolina and South Carolina call up National Guard units to state active duty, and both Haley and Taylor are called up. Gomer Pyle, the owner of the restaurant, is annoyed by the short-notice call-up and fires both Taylor and Haley.

As a member of the South Carolina National Guard, Staff Sergeant Haley has enforceable reemployment rights under South Carolina Code section 25-1-2310. Unfortunately, Sergeant Taylor has no right to reemployment under this statute, as South Carolina Code section 25-1-2310 expressly limits the statute's protections to "any member of the South Carolina National Guard."

Update—May 2015

On April 23, 2015, South Carolina Governor Nikki R. Haley signed into law H. 357, which adds a new section 25-1-2350 of the Code of Laws of South Carolina, as follows:

"Section 25-1-2350. The provisions of this article granting reemployment rights to members of the South Carolina National Guard and to members of the South Carolina State Guard who, at the discretion of the Governor or by his authority, enter state duty and are honorably released from that duty shall apply also to a person who is employed in South Carolina but is a member

² USERRA is codified in title 38, United States Code, sections 4301-4335. USERRA protects National Guard members when they are away from their civilian jobs for military training or service under title 32 or title 10 of the United States Code, but USERRA does not apply to National Guard members when they are on state active duty.

of another state's national or state guard who, at the discretion of the other state's Governor or by his authority, enters into state duty and is honorably released from that duty."

SECTION 2. This act takes effect upon approval by the Governor. [April 23, 2015]

The purpose and effect of this new section is to expand South Carolina's protection of the civilian jobs of National Guard members who have civilian jobs in South Carolina. Prior to this amendment, the protection was limited to members of the South Carolina National Guard or State Guard. Now, the protection applies also to a member of the National Guard or State Guard of another state who has a civilian job in South Carolina and who is called to state active duty by the Governor of that other state.

For example, let us consider the hypothetical situation discussed above. The Catawba River overflows its banks, and both the Governor of South Carolina and the Governor of North Carolina call up National Guard units for state active duty. Sergeant Andy Taylor, a member of the North Carolina Army National Guard, is called to state active duty by the Governor of North Carolina, but his civilian job is at Rocky's Rock & Roll Restaurant in Rock Hill, South Carolina. Prior to the enactment of this new section, Taylor did not have enforceable reemployment rights in his South Carolina job, after North Carolina state active duty. This new law protects a person like Taylor, after April 23, 2015.

New section 25-1-2350 took effect on April 23, 2015, when Governor Haley signed this new law. This new law is not retroactive. It applies to situations that arise after April 23, 2015.