

Reemployment Rights Of National Guard Members In South Dakota
(Updated April 2018)

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.

A federal statute called the Uniformed Services Employment and Reemployment Rights Act (USERRA)² accords the right to reemployment to a person who leaves a civilian job (federal, state, local, or private sector) for voluntary or involuntary service in the uniformed services (as defined by USERRA) and who meets the USERRA eligibility criteria.³ USERRA protects the civilian jobs of National Guard members (as well as members of the Army Reserve, Air Force Reserve, Navy Reserve, Marine Corps Reserve, and Coast Guard Reserve) after military training or service under title 10 or title 32 of the United States Code, but USERRA does not apply to state active duty. If National Guard members are to have reemployment rights after state active duty, it must be by state law.

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

South Dakota law extends to these National Guard members USERRA protections and Servicemembers Civil Relief Act (SCRA) protections⁴ when they are called to state active duty. South Dakota Consolidated Laws (SDCL) section 33A-2-9 states:

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² USERRA is codified in title 38, United States Code, sections 4301-4335.

³ The person must have left the civilian job for the purpose of performing uniformed service and must have given the employer prior oral or written notice. The person's cumulative period or periods of uniformed service, relating to the employer relationship with that employer, must not have exceeded five years, but certain kinds of service are exempt from the computation of the person's five-year limit. The person must have been released from the period of service without having received a disqualifying bad discharge from the military and after release the person must have made a timely application for reemployment.

⁴ The SCRA extends many important protections to service members on active duty, including the right to a continuance and protection against a default judgment in a civil proceeding.

If any member of the *South Dakota* National Guard is ordered to active duty service by the Governor of the State of South Dakota or the President of the United States, the member has all protections afforded to persons serving on federal active duty by the Servicemembers Civil Relief Act of 2003, 54 Stat. 1178, 50 App. U.S.C.A. 501-548 and 560-591, as amended to January 1, 2007, and by the Uniformed Services Employment and Reemployment Rights Act, 108 Stat. 3149, 38 U.S.C.A. 4301 to 4333, as amended to January 1, 2007.

Emphasis supplied.

This statute protects the civilian job of a South Dakota National Guard member who is called to state active duty by the Governor of South Dakota, but it does not help a member of the National Guard of another state (e.g., North Dakota) who happens to have a civilian job in South Dakota and who is called to state active duty by the Governor of another state.

For example, Paul Bunyan owns the Blue Ox Restaurant in the northern part of South Dakota, near the North Dakota line. Among his employees, two are National Guard members. Sergeant George McGovern is a member of the South Dakota Army National Guard, and Sergeant Bill Cody is a member of the North Dakota Army National Guard.

A major tornado causes devastation in the northern part of South Dakota and the southern part of North Dakota. The South Dakota Governor and the North Dakota Governor both call up National Guard units to assist in the aftermath of the storm, and both McGovern and Cody are called to state active duty. Bunyan is annoyed by the short notice recall, and he fires both McGovern and Cody. When they return from their state active duty periods, Bunyan informs them that they have been fired and replaced and orders them off his property.

As a member of the South Dakota National Guard, Sergeant McGovern meets the requirements of SDCL section 33A-2-9 and has enforceable reemployment rights at the Blue Ox Restaurant. As a member of the North Dakota National Guard, Sergeant Cody, unfortunately, has no right to reemployment under this statute, as SDCL section 33A-2-9 expressly limits the statute's protections to "any member of the South Dakota National Guard."

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

In February 2018, South Dakota Governor Bill Haslam signed House Bill 1010 into law. This new law amends section 33A-2-9 of South Dakota Consolidated Laws to read as follows:

Any *resident of this state* who is a member of *any state's National Guard* who is ordered to active duty by the Governor of that state or the President of the United States has all the protections afforded to persons serving on federal active duty by the Servicemembers Civil Relief Act of 2003, 54 Stat. 1178, 50 App. U.S.C.A. 501-548 and 560 591, as amended to January 1, 2007, and by the Uniformed Services Employment and Reemployment Rights Act, 108 Stat. 3149, 38 U.S.C.A. 4301 to 4333, as amended to January 1, 2007.

Emphasis supplied.

It is most unfortunate that the 2018 amendment introduced the requirement that the person claiming reemployment rights must be a *resident of South Dakota*. Most of the individuals who *have civilian jobs in South Dakota* but are members of the National Guard of other states are *not residents of South Dakota*.

For example, Paul Bunyan is the owner-operator of the Blue Ox Restaurant in the northern part of South Dakota, near the state line with North Dakota. The restaurant has 100 employees, and four of them are National Guard members.

George McGovern lives in South Dakota, near the restaurant, and is a member of the South Dakota Army National Guard. McGovern is called to state active duty by the Governor of South Dakota, after a series of destructive tornadoes struck both Dakotas. Under section 33A-2-9, McGovern has a legally enforceable right to reemployment at the restaurant, both before and after the 2018 amendment.

Richard Nixon also lives in South Dakota, but he is a member of the North Dakota National Guard. Nixon is called to state active duty by the Governor of North Dakota after the same series of destructive tornadoes. After the 2018 amendment, Nixon has a legally enforceable right to reemployment at the restaurant. Before the 2018 amendment, a person in this situation did not have a legally enforceable right to reemployment.

Barry Goldwater is a member of the South Dakota National Guard, but he lives across the state line in North Dakota. Goldwater is called to state active duty by the Governor of South Dakota. Before the 2018 amendment, Goldwater had a legally enforceable right to reemployment at the restaurant. After the 2018 amendment, Goldwater does not have enforceable reemployment rights because he is not a resident of South Dakota.

Lyndon Johnson lives in North Dakota and is a member of the North Dakota National Guard. For his civilian job, he commutes southward in the morning to his job at the Blue Ox Restaurant in South Dakota and northward in the evening to his home in North Dakota. Johnson is called to state active duty by the Governor of North Dakota. He does

not have the enforceable right to reemployment at the South Dakota restaurant because he is not a resident of South Dakota.

I am also concerned that the incorporations by reference of the federal Servicemembers Civil Relief Act (SCRA) and Uniformed Services Employment and Reemployment Rights Act (USERRA) only include amendments enacted by Congress through January 1, 2007. This should be amended to include all amendments that have been enacted or that will be enacted. The statutory citations to USERRA and the SCRA are also incorrect and should be corrected.

Most importantly, I am concerned that the South Dakota statute does not provide for judicial enforcement of the statutory right to reemployment after state active duty for South Dakota or any other state, either against the State of South Dakota and its political subdivisions (counties, cities, school districts, etc.) or against private employers in South Dakota, like the Blue Ox Restaurant.

Finally, it should be noted that the *Employee Handbook*⁵ published and promulgated by the South Dakota Bureau of Human Resources facially flouts the federal USERRA statute.⁶

⁵ See <https://bhr.sd.gov/forms/policies/Handbook.pdf>.

⁶ Please see the June 2017 update and supplement to SD-2010-LV.