

Reemployment Rights Of National Guard Members In Utah

By Captain Samuel F. Wright, JAGC, USN (Ret.)¹
And Austin M. Giesel²

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)³ 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.⁴ USERRA protects the civilian jobs of National Guard members 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 Utah 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, plagues of locusts, etc. Section 39-1-36 of Utah Code Annotated (U.C.A.) provides as follows:

(1) *Any member of a reserve component of the armed forces of the United States who pursuant to military orders enters active duty, active duty for training, inactive duty training, or state active duty shall upon request be granted a leave*

¹ Captain Wright is the Director of the Service Members Law Center (SMLC) at the Reserve Officers Association (ROA). He can be reached by e-mail at SWright@roa.org or by telephone at 800- 809-9448, ext. 730.

² Austin M. Giesel has completed his first year of law school at Georgetown University in Washington, DC. He is a summer associate at the SMLC for the summer of 2014.

³ USERRA is codified in title 38, United States Code, sections 4301-4335.

⁴ 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.

of absence from employment, but for no more than five years.

(2) Upon satisfactory release from the training or from hospitalization incidental to the training, the member shall be permitted to return to the prior employment with the seniority, status, pay, and vacation the member would have had as an employee if he had not been absent for military purposes.

Emphasis supplied.

While this section is not exactly a model of clarity, it can be reasonably argued that a member of the National Guard of a neighboring state (e.g., Wyoming) is “a member of a reserve component of the armed forces of the United States” and that if the individual happens to have a civilian job in Utah and is called to state active duty by the Governor of another state the person would have the right to reemployment in the Utah job following a period of state active duty.

For example, Louise Locust owns a seafood restaurant in Durant, Utah. There are two National Guard members among her 30 employees. Brigham Young lives in Durant and is a Sergeant in the Utah Army National Guard. Glenn Campbell lives a few miles away in Evanston, Wyoming and is a Sergeant in the Wyoming Army National Guard. A major tornado devastates several counties in Utah and Wyoming. The Governor of Utah and the Governor of Wyoming call up several National Guard units for state active duty, and both Young and Campbell are called up. Ms. Locust is annoyed by the short-notice call-up and fires both Young and Campbell. When they return from their state active duty periods, Ms. Locust informs them that they have been fired and replaced and orders them off the property.

Sergeant Young clearly has enforceable reemployment rights at the restaurant, and Sergeant Campbell has a reasonable claim that section 39-1-36 applies to his situation as well. In its first case construing the federal reemployment statute (precursor of USERRA), the United States Supreme Court held: “This legislation is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need.” *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946). It is to be hoped that the Utah Supreme Court would apply a similar liberal interpretation in construing section 39-1-36.