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Virginia Is For Virginians: National Guard Reemployment Protections In The Old Dominion

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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 like Iraq and Afghanistan, 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 (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, title 14, 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, Virginia has enacted a statute to protect the civilian jobs of National Guard members on state active duty. Section 44-93.3 of Virginia Revised Statutes provides members of the Virginia National Guard returning from state active duty reemployment rights that are largely analogous to those offered by USERRA for periods of federal active duty:

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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.

Upon honorable release from *state active duty or* military duty pursuant to Title 32 of the United States Code, a member of the *Virginia* National Guard, Virginia Defense Force or naval militia shall make written application to his previous employer for reemployment within (i) *14 days* of his release from duty or from hospitalization following release if the length of the member's absence by reason of service in the uniformed services *does not exceed 180 days* or (ii) *90 days* of his release from duty or from hospitalization following release if the length of the member's absence by reason of service in the uniformed services *exceeds 180 days*. When released from such duty, they shall be restored to positions held by them when ordered to duty. If the office or position has been abolished or otherwise has ceased to exist during such leave of absence, they shall be reinstated in a position of like seniority, status and pay if the position exists, or to a comparable vacant position for which they are qualified, unless to do so would be unreasonable. This section shall not apply when the cumulative length of the absence and of all previous absences from a position of employment with that employer by reason of service in the uniformed services exceeds five years. (Emphasis supplied).

DEPARTURES FROM USERRA

A minor but key difference exists between the protections offered in Section 44-93.3 and USERRA. USERRA guarantees the service member returning from federal active duty that he or she will be reemployed in the position that he or she *would have had* if he or she had never left the civilian job to go on active duty. Section 44-93.3, unlike USERRA, does not take into account the service member's potential loss of a promotion or career step. In reality, the occurrence of a National Guard member failing to reach a promotion due to a state active duty period is probably less likely than losing a promotion due to a federal deployment, simply because federal deployments typically last much longer than a period of state active duty. Nevertheless, since 44-93.3 contemplates state active duty periods for atypically lengthy periods (greater than 180 days), the possibility of losing a promotion due to serving a period of state active duty exists, at least in theory.

A COVERAGE GAP FOR NON-VIRGINIA GUARD PERSONNEL

Virginia is also one of several states who have enacted a National Guard Mutual Assistance Compact into law. This law permits signatory states to temporarily assign their state National Guard units to the command of other signatory states in the event of an emergency. This, however, does not correct the primary issue at hand in 44-93.3: a coverage gap for members of the National Guard units of *other* states who are employed in Virginia.

For example, Robert Lee lives and works in Danville, Virginia. He is also a member of the North Carolina National Guard, and commutes to Greensboro (less than an hour away) to participate in drill weekends. When Hurricane Teach strikes the Outer Banks in North Carolina, the North Carolina Governor activates Lee's unit and sends him to the Outer Banks to participate in cleanup operations. After about 90 days, Lee returns to his Virginia workplace and applies for

reemployment within 14 days, as section 44-93.3 requires. His manager refuses to reinstate him into his former job. Unfortunately, the manager is within his legal rights to do so. Section 44-93.3 applies only to members of the *Virginia* National Guard.

ENFORCEMENT MECHANISMS

Like virtually every state, Virginia has a prohibition against discriminating against members of the National Guard, including refusing to reemploy members after state active duty. Section 44-93.4 provides:

- A. A member of the Virginia National Guard, Virginia Defense Force, or naval militia who performs, has performed, applies to perform, or has an obligation to perform state active duty or military duty pursuant to Title 32 of the United States Code shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation.
- B. A person shall be considered to have denied a member of the Virginia National Guard, Virginia Defense Force, or naval militia initial employment, reemployment, retention in employment, promotion, or a benefit of employment in violation of this section if the member's membership, application for membership, performance of service, application for service, or obligation for service is a motivating factor in that person's action, unless the person can prove by the greater weight of the evidence that the same unfavorable action would have taken place in the absence of the member's membership, application for membership, performance of service, application for service, or obligation for service.

Unlike a majority of states, Virginia enables members of its National Guard to sue employers in civil court. Section 44-93.5 provides:

If any employer fails or refuses to comply with the provisions of §§ 44-93, 44-93.2, 44-93.3 and 44-93.4, the circuit court having jurisdiction over the employer's place of business may, upon the filing of a motion, petition, or other appropriate pleading by the employee, require the employer to comply with §§ 44-93, 44-93.2, 44-93.3, and 44-93.4 and to compensate the employee for any loss of wages or benefits and reasonable attorney fees and costs incurred by reason of the employer's unlawful failure or refusal. Upon request of the affected employee, the Attorney General may represent personally or through one of his assistants, such employee denied the benefits of §§ 44-93, 44-93.2, 44-93.3 and 44-93.4 while in the performance of state active duty.

The ability to file suit in civil court is the best deterrent available to ensure that rogue employers do not violate the reemployment rights of Guard members. Once again, this will only apply in Virginia to members of the Virginia National Guard. If Robert Lee attempted to file a

complaint against his employer, he would lack any legal basis for doing so, because Virginia's reemployment statute applies only to members of the Virginia National Guard.

UPDATE—MARCH 2016

In March 2016, Virginia Governor Terry McAuliffe signed into law H. 111. This new law adds the following clause to sections 44-93.2, 44-93.3, and 44-93.4 of the Code of Virginia: "or a *resident of the Commonwealth* [Virginia] who is a member of the National Guard of another state." (Emphasis supplied.) This amendment fixes the cross-state loophole for some but not all of the National Guard members who fall through that crack.

For example, Mary Jones and Joe Smith both work for Spanky's Swanky Restaurant in Tysons Corner, Virginia and both are enlisted members of the Maryland Army National Guard. Maryland Governor Larry Hogan calls both of them to state active duty and sends them to Baltimore to quell a riot.

Jones lives near the restaurant, in McLean, Virginia. Virginia law now protects her civilian job, because she is a resident of Virginia. Smith lives across the Potomac River in Bethesda, Maryland. Virginia law does not protect his job because he is not a resident of Virginia.

UPDATE AND CORRECTION—MARCH 2018

Virginia's compilation of statutes is called the Code of Virginia, not Virginia Revised Statutes.

Three sections of the Code of Virginia are directly relevant, and those are sections 44-93.2, 44-93.3, and 44-93.4. Those sections were amended in 2016 and again in 2018. The 2018 amendments were made by House Bill 146, which was signed into law by Governor Northam on 3/9/2018. The 2018 amendments go into effect on 7/1/2018. Here are the three sections in the form that they will exist on and after 7/1/2018:

A member of the Virginia National Guard or Virginia Defense Force, or a person who is a member of the National Guard of another state and who is otherwise employed in the Commonwealth [Virginia], called to state active duty or military duty pursuant to Title 32 of the United States Code shall have the right to take leave without pay from his *nongovernmental employment*. No member of the National Guard or Virginia Defense Force, or person who is a member of the National Guard of another state, shall be forced to use or exhaust his vacation or other accrued leaves from his *nongovernmental employment* for a period of active service. The choice of leave shall be solely within the discretion of the member.

Code of Virginia, section 44-93.2 (emphasis supplied).

Upon honorable release from state active duty or military duty pursuant to Title 32 of the United States Code, a member of the Virginia National Guard or Virginia Defense Force, or a person who is a member of National Guard of another state and who was previously employed in the Commonwealth, shall make written application to his previous employer for reemployment within (i) 14 days of his release from duty or from hospitalization following release if the length of the member's absence by reason of service in the uniformed services does not exceed 180 days or (ii) 90 days of his release from duty or from hospitalization following release if the length of the member's absence by reason of service in the uniformed services exceeds 180 days. When released from such duty, they shall be restored to positions held by them when ordered to duty. If the office or position has been abolished or otherwise has ceased to exist during such leave of absence, they shall be reinstated in a position of like seniority, status, and pay if the position exists, or to a comparable vacant position for which they are qualified, unless to do so would be unreasonable. This section shall not apply when the cumulative length of absences and of all previous absences from a position of employment with that employer by reason of service in the uniformed services exceeds five years.

Code of Virginia, section 44-93.3.

- A. A member of the Virginia National Guard or Virginia Defense Force, or a person who is a member of the National Guard of another state, who performs, has performed, applies to perform, or has an obligation to perform state active duty or military duty under Title 32 of the United States Code shall not be denied initial employment, reemployment, retention in employment, promotion, or a benefit of employment by an employer within the Commonwealth on the basis of that membership, application for membership, performance of service, application for service, or obligation.
- B. A person shall be considered to have denied a member of the Virginia National Guard or Virginia Defense Force, or a person who is a member of the National Guard of another state, initial employment, reemployment, retention in employment, promotion, or a benefit of employment within the Commonwealth in violation of this section if the member's membership, application for membership, performance of service, application for service, or obligation for service is a motivating factor in that person's action, unless the person can prove by the greater weight of the evidence that the same unfavorable action would have taken place in the absence of the member's membership, application for membership, performance of service, application for service, or obligation for service.

Code of Virginia, section 44-93.4

Let us consider the hypothetical but realistic Spanky's Swanky Restaurant in Tyson's Corner, Virginia. The restaurant has 100 employees, and four of them are National Guard members.

Alexander Adams lives in nearby McLean, Virginia and is a member of the Virginia Army National Guard. Adams is called to state active duty by the Governor of Virginia and is away from his restaurant job for two weeks. Adams' right to reinstatement in his job at the restaurant has been protected by Virginia law for many years and is still protected.

Brenda Barnes is also a member of the Virginia National Guard, but she lives across the Potomac River in Bethesda, Maryland.⁵ Barnes and Adams are members of the same Virginia Army National Guard unit, and they are called to Virginia state active duty simultaneously. Barnes' job has been protected by Virginia law for many years and is still protected.

Connie Cox lives in nearby McLean, Virginia, but she is a member of the Maryland Army National Guard. Cox is called to state active duty by the Governor of Maryland. Under the 2016 amendment, Cox's right to reinstatement in the restaurant job is protected, because she is a resident of Virginia.

David Daniels lives in Bethesda, Maryland and is a member of the Maryland Army National Guard. Daniels is called to state active duty by the Governor of Maryland. Under the law that is in effect now (March 2018), Daniels' civilian job is not protected, because he is not a resident of Virginia (although he works in Virginia). On and after 7/1/2018, when the most recent amendment goes into effect, the civilian job of a person in this situation will be protected by Virginia law.

The right to time off from work for state active duty called by Virginia or another state, or for service in the uniformed services as defined by the Uniformed Services Employment and Reemployment Rights Act (USERRA), applies to the Commonwealth of Virginia and its political subdivisions, like counties and independent cities. However, enforcing these laws against the Commonwealth of Virginia, as employer, is most difficult because the Virginia Supreme Court has held that the Commonwealth of Virginia has sovereign immunity and cannot be sued.⁶

⁵ There is no requirement that a member of the National Guard of Virginia reside in Virginia. It is not unusual for a National Guard member to reside in State a but be a member of the National Guard of State B.

⁶ See *Clark v. Virginia Department of State Police*, 292 Va. 725, 793 S.E.2d 1 (2016), cert. denied, 138 S. Ct. 500 (2017). I discuss the *Clark* case in detail in Law Review 16124 (December 2016).