

Reemployment Rights Of National Guard Members In Wisconsin

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, 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, Wisconsin has enacted a statute to protect the civilian jobs of National Guard members on state active duty. Section 321.65 of Wisconsin Statutes Annotated (W.S.A.) provides as follows:

(a) "Active state service" means any of the following:

1. State active duty or active duty in the national guard under 32 USC 502(f).
2. Active service with the state laboratory of hygiene under s. 36.25(11)(em) for the purpose of assisting the department of health services under s. 250.042 during a state of emergency relating to public health declared by the governor

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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.

under s. 323.10.

3. Active duty in the national guard *of any state under an order of the governor of that state.*

(b) “Employer” means a person engaging in any activity, enterprise, or business in this state employing one or more persons on a permanent basis. “Employer” includes the state and any office, department, independent agency, authority, institution, association, society, or other body in state government created or authorized to be created by the constitution or any law, including the legislature and the courts. “Employer” also includes a successor-in-interest of a person employing an individual who has provided notice to that person under sub.

(3)(a).

(3) Reemployment rights. (a) *Prerequisites.* Subject to par. (d), any person who is *a resident of this state* and absent from a position of employment because of active state service is entitled to the reemployment rights and benefits specified in this section if all of the following apply:

1. Except as provided in par. (b), the person or an appropriate officer in the national guard of this or another state or the state defense force has given advanced notice of the active state service to the person's employer.
2. Except as provided in par. (c), the cumulative length of the absence from the position of employment and of all previous absences from a position of employment with the employer by reason of active state service or federal active duty does not exceed 5 years.
3. Except as provided in par. (f), the person reports to the employer or submits an application for reemployment to the employer as required under par. (e).
4. In the case of active state service in the national guard in this or another state or the state defense force, the active state service has not been terminated under other than honorable conditions.

(b) *Notice not required.* No notice is required under par. (a)1. if the giving of that notice is precluded by military necessity or is otherwise impossible or unreasonable. A determination of military necessity for purposes of this paragraph shall be made according to rules and regulations promulgated by the adjutant general or the federal secretary of defense and is not subject to judicial review.

(c) *Length of absence limit.* The periods of federal active duty described in 38 USC 4312(c)(1) to (4) and all of the following periods of active state service are not included in calculating the 5-year period specified in par. (a)2.:

1. Any period of active state service beyond that 5-year period that is required to complete an initial period of obligated active state service.
2. Any period of active state service for which the person, through no fault of the person's own, was unable to obtain orders releasing the person from a period of active state service before the expiration of the 5-year period.
3. Any period of active state service that was performed to fulfill any additional training requirements determined and certified in writing by the federal secretary of the army, the federal secretary of the air force, or the adjutant

general to be necessary for professional development or for completion of skill training or retraining.

4. Any period of active state service that was performed by a person who was ordered to, or retained in, active state service, other than for training, because of a state emergency declared by the governor, because of a war or national emergency declared by the president of the United States or Congress, because of insurrection, rebellion, riot, invasion, or resistance to the execution of the laws of this state or of the United States, or in support of an operational mission, a critical mission, or any other requirement of the U.S. armed forces.

(d) *Exceptions.* An employer is not required to reemploy a person under this section if the employer shows that any of the following applies:

1. The employer's circumstances have so changed as to make reemployment of the person impossible or unreasonable.
2. The position of employment that the person left to perform active state service was for a brief, nonrecurrent period and there was no reasonable expectation that the position of employment would continue indefinitely or for a significant period of time.
3. In the case of a person who is entitled to reemployment under sub. (4)(a)3. or 4., the accommodations, training, or effort required under sub. (4)(a)3. or 4. would pose an undue hardship on the employer.

(e) *Return procedures.* 1. Subject to subds. 4. and 5., if a person who has been absent from a position of employment because of active state service that lasted for less than 31 days, who has been absent from a position of employment for any period of time for the purpose of an examination to determine the person's fitness to perform active state service, or who has been absent from a position of employment because the person was hospitalized for or was convalescing from an illness or injury that was incurred in or aggravated during the performance of that active state service wishes to receive the reemployment rights and benefits specified in this section, the person must notify the person's employer of the person's intent to return to the position of employment by reporting to the employer by no later than the beginning of the first full regularly-scheduled work period on the first full calendar day following the completion of the active state service, examination, or period of hospitalization or convalescence, a period of time that allows for the safe transportation of the person from the place of active state service, examination, hospitalization, or convalescence to the person's residence, and a rest period of 8 hours following that transportation period or, if through no fault of the person's own reporting to the employer within that time is impossible or unreasonable, by reporting to the employer as soon as possible after that 8-hour rest period.

2. Subject to subds. 4. and 5., if a person who has been absent from a position of employment because of active state service that lasted for more than 30 days, but less than 181 days, or who has been absent from a position of employment because the person was hospitalized for or was convalescing from an illness or injury that was incurred in or aggravated during the performance of that active

state service wishes to receive the reemployment rights and benefits specified in this section, the person must notify the person's employer of the person's intent to return to the position of employment by submitting to the employer an application for reemployment by no later than 14 days after the completion of the active state service, hospitalization, or convalescence or, if through no fault of the person's own submitting the application within that time is impossible or unreasonable, by submitting to the employer an application for reemployment by no later than the first full calendar day on which submission of the application becomes possible.

3. Subject to subds. 4. and 5., if a person who has been absent from a position of employment because of active state service that lasted for more than 180 days or who has been absent from a position of employment because the person was hospitalized for or was convalescing from an illness or injury that was incurred in or aggravated during the performance of that active state service wishes to receive the reemployment rights and benefits specified in this section, the person must notify the person's employer of the person's intent to return to the position of employment by submitting to the employer an application for reemployment by no later than 90 days after the completion of the active state service, hospitalization, or convalescence or, if through no fault of the person's own submitting the application within that time is impossible or unreasonable, by submitting to the employer an application for reemployment by no later than the first full calendar day on which submission of the application becomes possible.

4. The period of hospitalization or convalescence specified in subds. 1., 2., and 3. may not exceed 2 years, except that if through no fault of the person's own it is impossible or unreasonable for the person to report to the employer within the time specified in subd. 1. or to apply for reemployment within the time specified in subd. 2. or 3., that 2-year period shall be extended by the minimum period of time required to accommodate the circumstances that made it impossible or unreasonable for the person to report or apply as so required.

5. A person who fails to report to the person's employer within the time specified in subd. 1. or who fails to apply for reemployment within the time specified in subd. 2. or 3. does not automatically forfeit the reemployment rights and benefits specified in this section. Instead, the person shall be subject to the rules, policies, and practices of the person's employer pertaining to discipline for unexcused absences from work.

(f) *Documentation.* 1. A person who submits an application for reemployment under par. (e)2. or 3. must, on the request of the person's employer, provide to the employer documentation to establish that the application was submitted within the time limits specified in par. (e)2. or 3., that the person's cumulative length of all absences from employment with the employer because of active state service and federal active duty does not, except as permitted under par. (c), exceed 5 years, and, in the case of active state service in the national guard in this or another state or the state defense force, that the person's service was

not terminated under other than honorable conditions.

2. An employer may not refuse to reemploy a person who fails to provide any of the documentation specified in subd. 1. because that documentation does not exist or is not readily available at the time the employer requests that documentation. If after the person is reemployed documentation becomes available that establishes that the person does not meet a requirement specified in subd. 1., the employer may terminate the person's employment and the provision of any rights and benefits afforded to the person under this section.

3. An employer may not delay or attempt to defeat a reemployment right that the employer is obligated to provide under this section by demanding documentation that does not exist or is not readily available at the time of the demand.

(g) *Veterans preferences.* The right of a person to reemployment under this subsection does not entitle the person to retention, preference, or displacement rights over any person who has a superior claim under s. 45.03(4), 62.13(4)(d), 63.08(1)(f), 63.37, 63.39(2m), 66.0509(1), 230.15(2m), 230.16(7) or (7m), 230.21(1m), 230.25, or 230.275.

(h) *Prohibited bases for denial of reemployment.* In determining a person's right to reemployment and other benefits under this section, an employer may not deny reemployment or any other benefits based on the timing, frequency, duration, or nature of the person's active state service or federal active duty so long as the requirements under par. (a) are met.

(4) Reemployment positions. (a) *Prompt reemployment required.* 1. Subject to subds. 3. and 4. and par. (b), an employer shall reemploy a person who is entitled to reemployment under sub. (3) and whose period of active state service was for less than 91 days promptly on completion of that period of active state service in the position of employment in which the person would have been employed if the continuous employment of the person with the employer had not been interrupted by that active state service so long as the person is qualified to perform the duties of that position or, if after reasonable efforts by the employer to qualify the person to perform those duties the person is not qualified to perform those duties, in the position of employment in which the person was employed on the date on which the person's period of active state service began.

2. Subject to subds. 3. and 4. and par. (b), an employer shall reemploy a person who is entitled to reemployment under sub. (3) and whose period of active state service was for more than 90 days promptly on completion of that period of active state service in the position of employment in which the person would have been employed if the continuous employment of the person with the employer had not been interrupted by that active state service or in a position of employment of like seniority, status, and pay so long as the person is qualified to perform the duties of that position or, if after reasonable efforts by the employer to qualify the person to perform those duties the person is not qualified to perform those duties, in the position of employment in which the person was

employed on the date on which the person's period of active state service began or in a position of employment of like seniority, status, and pay.

3. Subject to par. (b), in the case of a person who has a disability that was incurred in or aggravated during a period of active state service and who, after reasonable efforts by the employer to accommodate the disability, is not qualified due to the disability to perform the duties of the position of employment in which the person would have been employed if the continuous employment of the person with the employer had not been interrupted by the active state service, the employer shall reemploy the person promptly on completion of that period of active state service in any other position that is equivalent to that position in seniority, status, and pay, the duties of which the person is qualified to perform or would become qualified to perform with reasonable efforts by the employer, or, if there is no other position of employment available that is equivalent to that position in seniority, status, and pay, in a position that is the nearest approximation to that equivalent position in terms of seniority, status, and pay, consistent with the person's circumstances.

4. Subject to par. (b), in the case of a person who is not qualified to be employed in the position of employment in which the person would have been employed if the continuous employment of the person with the employer had not been interrupted by the person's active state service or in the position of employment in which the person was employed on the date on which the person's period of active state service began for any reason other than disability incurred in or aggravated during a period of active state service and who cannot become qualified to be so employed with reasonable efforts by the employer, the employer shall reemploy the person promptly on completion of that period of active state service in any other position that the person is qualified to perform and that is the nearest approximation to the position of employment in which the person would have been employed if the continuous employment of the person with the employer had not been interrupted by that active state service, with full seniority, or if no position of employment that is the nearest approximation to that position is available, in a position of employment that the person is qualified to perform and that is the nearest approximation to the position of employment in which the person was employed on the date on which the person's period of active state service began, with full seniority.

(b) Multiple returning employees. 1. If 2 or more persons who are entitled to reemployment under sub. (3) in the same position of employment have reported to the employer or applied for reemployment in that position, the person who left employment first shall have the prior right to reemployment in that position.

2. A person who is entitled to reemployment under sub. (3), but who is not reemployed because of subd. 1., shall be entitled to reemployment as provided in par. (a)1., 2., 3., or 4., whichever is applicable, in a position of employment that provides for similar status and pay as the position described in subd. 1., consistent with the person's circumstances, with full seniority.

(5) Rights, benefits, and obligations. (a) *Seniority.* A person who is reemployed

under this section is entitled to the seniority and other rights and benefits determined by seniority that the person had on the last day of employment before the person's active state service began, plus all seniority and other rights and benefits determined by seniority that the person would have had if the continuous employment of the person with the employer had not been interrupted by that active state service.

(b) *Continuation of benefits.* 1. Subject to subds. 2. to 5., a person who is absent from employment because of active state service is considered to be on furlough or leave of absence while performing the active state service and is entitled to receive all rights and benefits not determined by seniority that are generally provided by the employer to employees having similar seniority, status, and pay who are on furlough or leave of absence under a contract, agreement, policy, practice, or plan that is in effect on the day on which the active state service began or that is established while the person is performing the active state service.

2. If an employer shows that a person who is absent from a position of employment because of active state service has knowingly provided written notice of the person's intent not to return to a position of employment with the employer after that active state service and, in doing so, was aware of the specific rights and benefits under subd. 1. that the person would lose while absent from the position of employment, the person is not entitled to the rights and benefits specified in subd. 1. while absent from employment.

3. A person who is considered to be on furlough or leave of absence under subd. 1. while performing active state service is not entitled to any benefit to which the person would not otherwise be entitled if the person had remained continuously employed.

4. An employer may require a person who is considered to be on furlough or leave of absence under subd. 1. while performing active state service to pay the employee cost, if any, of any benefit that is continued under subd. 1. to the same extent that other employees who are on furlough or leave of absence are so required.

5. A person who is absent from a position of employment because of active state service is entitled to receive coverage under a health benefit plan during the absence and on reemployment as provided in sub. (6).

(c) *Protection from discharge.* An employer that reemploys under this section a person whose period of active state service lasted for more than 30 days, but less than 181 days, may not discharge the person within 180 days after the date of reemployment except for cause. An employer that reemploys under this section a person whose period of active state service lasted for more than 180 days may not discharge the person within one year after the date of reemployment except for cause.

(6) Continuation of health care coverage. (a) *Option to continue coverage.* Notwithstanding s. 632.897, if a person who has coverage under a health benefit plan in connection with the person's employment is absent from a position of

employment because of active state service, the insurer that issued the health benefit plan shall permit the person, and the person's dependents, to continue coverage under the health benefit plan until the first to occur of the following:

1. Eighteen months have elapsed since the person's absence from the position of employment began.

2. The day after the date on which the person is required under sub. (3)(e) to report to the employer or apply for reemployment.

(b) *Payment of premiums.* A person who elects to continue coverage under par.

(a) and who is absent from a position of employment for 30 days or less may not be required to pay more than the employee share, if any, of the cost of the coverage. A person who elects to continue coverage under par. (a) and who is absent from a position of employment for more than 30 days may be required to pay up to 102% of the full premium for that coverage for the period of continued coverage that exceeds 30 days.

(c) *Reinstatement on reemployment.* If a person's coverage under a health benefit plan in connection with his or her employment was terminated because of the person's active state service and if after returning from that active state service the person is reemployed under sub. (3), coverage under the health benefit plan shall be reinstated for the person and the person's dependents immediately upon reemployment. With respect to the reinstated coverage, no exclusion or waiting period may be imposed that would not have been imposed had the coverage not been terminated because of the active state service.

(7) Enforcement. (a) *Complaint.* Any person who believes that his or her employer has failed or refused, or is about to fail or refuse, to provide to the person any reemployment right or benefit to which the person is entitled under this section may file a complaint with the adjutant general, in such form as the adjutant general may prescribe by rule, summarizing the allegations that form the basis of the complaint. The adjutant general shall investigate the complaint and, if the adjutant general is reasonably satisfied that the person is entitled to the rights or benefits sought, the adjutant general shall endeavor to resolve the complaint by conference, conciliation, or persuasion. If the adjutant general is not reasonably satisfied that the person is entitled to the rights or benefits sought, the adjutant general may refuse to endeavor to resolve the complaint and shall notify the person who filed the complaint that the person may proceed under par. (b)2. to enforce the person's rights under this section. If the adjutant general is not able to resolve the complaint, the adjutant general shall notify the person who filed the complaint that the person may proceed under par. (b)1. or 2. to enforce the person's rights under this section.

(b) *Enforcement procedures.* 1. A person who receives notification under par. (a) that the adjutant general was unable to resolve the person's complaint may request the adjutant general to refer the complaint to counsel, which may include the attorney general, appointed by the governor on the recommendation of the adjutant general for the purpose of prosecuting complaints under this subdivision who shall file a complaint for appropriate relief

with the department of workforce development.

2. Subdivision 1. does not preclude a person who has chosen not to file a complaint with the adjutant general under par. (a), whose complaint the adjutant general has refused to endeavor to resolve under par. (a), or who has chosen not to request the adjutant general to refer his or her complaint to counsel under subd. 1. from filing a complaint for appropriate relief with the department of workforce development.

3. The department of workforce development shall process a complaint filed under subd. 1. or 2. in the same manner that employment discrimination complaints are processed under s. 111.39.

(c) *Retaliation prohibited.* An employer may not discharge or otherwise discriminate any person for filing a complaint or attempting to enforce a right provided under this section or for testifying or assisting in any action or proceeding to enforce a right provided under this section.

(d) *Remedies.* If the department of workforce development finds that an employer has failed or refused, or is about to fail or refuse, to provide any reemployment right or benefit to which a person is entitled under this section or has discharged or otherwise against any person in violation of par. (c), the department of workforce development may order the employer to do any one or more of the following:

1. Take such action as will fully vindicate the rights and benefits of the person under this section.

2. Compensate the person for any loss of wages, salary, or other benefits suffered because of the failure or refusal to provide reemployment rights or benefits under this section or the discharge or other discrimination.

3. Pay the person, as liquidated damages, an amount that is equal to the amount ordered under subd. 2. if the department of workforce development finds that the failure or refusal to provide reemployment rights or benefits under this section or the discharge or other discrimination was willful.

4. Pay the person costs and reasonable actual attorney fees, if the person is not represented by counsel appointed under par. (b)1.

W.S.A. 321.65 (emphasis supplied).

Section 321.65 provides comprehensive reemployment protections for National Guard members on state active duty and provides a comprehensive enforcement mechanism for persons claiming that their reemployment rights have been violated. The law and its enforcement mechanism explicitly applies to the State of Wisconsin and its political subdivisions (counties, cities, school districts, etc.), as well as private employers in Wisconsin.

Unlike similar provisions in most other states, section 321.65 explicitly applies to “Active duty in the national guard *of any state under an order of the governor of that state.*”

W.S.A. 321.65(a)(3). However, section 321.65(b)(3) requires, as a prerequisite to the

protections of this statute, that the individual claiming rights be “a resident of this state” (Wisconsin). This limitation presents a serious problem for some National Guard members.

For example, Bart Starr and Mike Ditka both work for the Cheeseheads Insurance Agency (C.I.A.) in Kenosha, Wisconsin, and both are noncommissioned officers in the *Illinois* Army National Guard. Starr lives in Kenosha and Ditka lives just across the state line in Illinois. The Governor of Illinois calls both Starr and Ditka to state active duty for an Illinois emergency, and both of them are away from their C.I.A. jobs for two weeks of Illinois state active duty.

Starr has enforceable reemployment rights at his C.I.A. job in Wisconsin, because he meets all of the qualifications of section 321.65, including being a resident of the State of Wisconsin. Ditka meets all of the qualifications under section 321.65 *except* Wisconsin residence—he resides in Illinois. Thus, Ditka does not have reemployment rights at his C.I.A. job in Kenosha under section 321.65 as currently written.

UPDATE MAY 2018

Wisconsin Governor Scott Walker recently signed into law Assembly Bill No. 943. This new law expands Wisconsin’s law that protects the civilian jobs of National Guard members on state active duty. The amendment expands the protection to include National Guard members of other states who have civilian jobs in Wisconsin but reside in other states and are members of the National Guard of other states.

For example, Mary Jones works for the Cheeseheads Insurance Agency (CIA) in Kenosha, Wisconsin. She resides just across the state line in Illinois, and she is a Specialist (E-4) in the Illinois Army National Guard. She is called to state active duty by the Governor of Illinois to assist in rescue and recovery efforts after a major tornado in Illinois. She is away from her civilian job in Wisconsin for several days.

Does Mary have the legally enforceable right to reemployment in the Wisconsin job? Until recently, the answer was no, because she was not a resident of Wisconsin. Now, the civilian job of a person in this situation is protected by Wisconsin law.

Assembly Bill No. 943 also makes several other most welcome changes to Wisconsin law. Here is a press release sent out by the Adjutant General of Wisconsin:

WI NATIONAL GUARD RELEASE
Gov. Walker signs bills to protect Guard members, families

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By Capt. Joe Trovato

MADISON, Wis. — Gov. Scott Walker today signed a bill into law that will protect Soldiers and Airmen in the Wisconsin National Guard as well as their families when they are mobilized to state active duty.

Walker signed Assembly Bill 943, which provides for reemployment rights, death benefits and continuation pay benefits for National Guard members on state active duty.

"Wisconsin continues to lead the nation in ensuring that our service members have the protections they need and deserve for serving our state and nation," Walker said. "This legislation is another way we are striving to help those who protect our freedom. I encourage other states to follow suit in ensuring individual states match or exceed the protections afforded to service members by the federal government."

Maj. Gen. Don Dunbar, Wisconsin's adjutant general, agreed and thanked Walker and the legislature for making a commitment to protect Wisconsin National Guard members serving on state active duty.

"I'm grateful to Gov. Walker and the state legislature for taking this much needed step to ensure our service members are afforded the same protections on state active duty as they are when mobilized into federal service," Maj. Gen. Don Dunbar, Wisconsin's adjutant general said. "These measures provide protection for the 10,000 Soldiers and Airmen of the Wisconsin National Guard and their families."

The bill requires the Wisconsin Department of Military Affairs to grant continuation pay to National Guard members injured while performing their duties while on state active duty. It also requires the department to pay a \$100,000 death gratuity to a beneficiary designated by the service member in the event of their death while serving on active duty. In addition, the bill extends eligibility for reemployment rights of Guardsmen returning from active state service to non-state residents serving in the Wisconsin National Guard whose active state service occurred in a U.S. state or territory.

The new law positions Wisconsin as a leader in efforts to create parity between federal protections for National Guard and Reserve service members and those provided by individual states. The federal government provides a \$100,000 death gratuity to beneficiaries when service members die while serving in their federal capacity, but states are under no obligation to do the same when National Guard members or other state defense forces die while serving in a state active duty status. Service members injured while serving in a federal capacity receive continuation pay, but there were previously no such protections for service members injured on state active duty.

Similarly, the Uniformed Services Employment and Reemployment Rights Act provides federal reemployment protections to service members called to federal service, and current Wisconsin law protects National Guard members from Wisconsin called to state active duty. But no provision previously existed for members of the Wisconsin National Guard who reside in other states.

Such protections are critical for National Guard members who fulfill a unique dual-role as both the state's first military responder in times of emergency and as the primary combat reserve for the Army and Air Force.

The bill passed both the Wisconsin State Assembly and the Wisconsin State Senate unanimously before Gov. Walker signed it into law Monday.

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