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Tennessee Law Protecting National Guard Members On State Active Duty

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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, 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)⁴ 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.⁵ 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.

Every state has a state law that protects the civilian jobs of National Guard members on state active duty, but some of those laws are better than others. Some states have strong enforcement mechanisms, while other states have only weak enforcement systems or no enforcement systems at all.

There are several pertinent sections in Tennessee Code Annotated (TCA), and here are those sections:

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⁴ USERRA is codified in title 38, United States Code, sections 4301-4335.

⁵ 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.

It is a Class E felony for any person, firm or corporation to refuse employment to any person for the sole reason that the person is a member of the *Tennessee* national guard or to terminate the employment of any such person for such reason or because of absence from place of employment while attending any prescribed drill, including annual field training.

TCA section 58-1-604 (emphasis supplied).

Any public employee⁶ who leaves a position or who left such position not earlier than June 27, 1950, whether voluntarily or involuntarily, in order to perform *military duty*, or who was performing military duty on June 27, 1950, and who is relieved or discharged from such duty under conditions other than dishonorable, and makes application for reemployment within ninety (90) days after such employee is relieved from military duty or from hospitalization continuing after discharge for a period of not more than one (1) year shall:

- (1) If still physically qualified to perform the duties of such position, be restored to such position if it exists and is not held by a person with greater seniority, otherwise to a position of like seniority, status and pay; or
- (2) If not qualified to perform the duties of such position by reason of disability sustained during such service, such public employee shall be placed in such other position, the duties of which such employee is qualified to perform as will provide the employee like seniority, status and pay, or the nearest approximation thereof consistent with the circumstances of the case.

TCA section 8-33-102 (emphasis supplied).

Note: We invite the reader's attention to *Tennessee Attorney General's Opinion No. 01-169*, dated November 27, 2001. In the Opinion, the Attorney General states that a member of the Tennessee Army or Air National Guard who performs state active duty, called by the Governor of Tennessee for a state emergency, is entitled to paid military leave under TCA section 8-33-109 (copied below) because such state active duty constitutes "military service" for purposes of section 8-33-109. We infer that such state active duty also constitutes "military duty" for purposes of section 8-33-102. Thus, an employee of the state or a political subdivision (county, city, school district, etc.) who is away from his or her civilian job for state active duty is entitled to reemployment under section 8-33-102 if he or she meets the conditions of that section.

Any person who is restored to a position in accordance with the provisions of §§ 8-33-101 -- 8-33-108 shall not be discharged from such position without cause within one (1) year after such restoration, and shall, without limiting such person's rights conferred by this or other sections, be considered as having been on furlough or leave of absence during the period of military duty. Such person shall be restored without loss of seniority (including, upon promotion or other advancement following completion of any period of employment required therefor, a seniority date in the advanced position which will place such person ahead of all persons previously

⁶ Public employees are employees of the State of Tennessee or its political subdivisions (counties, cities, etc.).

junior to such person who advanced to the position during the absence in armed forces). The employee shall also be entitled on reinstatement to participate in insurance (including retirement, pension plans, and medical insurance) and other benefits dependent on length of employment, including vacation privilege and severance pay. The employee shall be protected against reduction in seniority, status, or pay during employment, except as such reduction may be made for all employees whose employment situations are similar.

TCA section 8-33-104.

(a) The commissioner of human resources is authorized and directed to issue regulations for the enforcement of §§ 8-33-101 -- 8-33-108. The departments and agencies in the state government shall comply with such regulations and orders issued by the commissioner pursuant to such regulations.

(b) The commissioner is authorized and directed whenever the commissioner finds, upon appeal of the person concerned, that any state department or agency has failed or refuses to comply with the provisions of §§ 8-33-101 --8-33-108, or of regulations thereunder, to issue an order specifically requiring such department or agency to comply with such provisions and to compensate such person for any loss of salary or wages suffered by reason of failure to comply with such provisions, less any amount received through other employment, unemployment compensation or readjustment allowances; provided, that any such compensation ordered to be paid by the commissioner shall be in addition to and shall not be deemed to diminish any of the benefits of such provisions, and shall be paid by the head of the department or agency concerned out of the appropriations currently available for salaries and expenses of such department or agency, and such appropriations shall be available for such purpose.

TCA section 8-33-106.

The chancery courts for the various counties in the state of Tennessee are hereby authorized, and express jurisdiction is hereby conferred upon the chancery courts, to enforce the provisions of §§ 8-33-101 -- 8-33-108 in any case where a political subdivision of the state of Tennessee, county or municipality within the local jurisdiction of the chancery court has failed or refuses to comply with the provisions of those sections, and to issue an order specifically requiring such political subdivision, county or municipality, to comply with the provisions of those sections and to compensate such person for any loss of salary or wages suffered by reason of failure to comply with such provisions, less any amount received through other employment, unemployment compensation or readjustment allowances; provided, that any such compensation ordered to be paid by the chancery court shall be in addition to and shall not be deemed to diminish any of the benefits of such provisions and shall be paid from currently available funds of such political subdivision, county or municipality.

TCA section 8-33-107.

Any laws or parts of laws which are inconsistent with the provisions of §§ 8-33-101 -- 8-33-107, or which would serve to defeat the purposes thereof, shall to such extent be deemed

inapplicable to public employees and public employers in the exercise of the rights and privileges conferred by those sections.

TCA section 8-33-108.

All officers and employees of this state, or any department or agency thereof, or of any county, municipality, school district, or other political subdivision, and all other public employees of this state who are, or may become, members of any reserve component of the armed forces of the United States, *including members of the Tennessee army and air national guard*, shall be entitled to leave of absence from their respective duties, without loss of time, pay, regular leave or vacation, impairment of efficiency rating, or any other rights or benefits to which otherwise entitled, for all periods of military service during which they are engaged in the performance of duty or training *in the service of this state*, or of the United States, under competent orders; provided, that an officer or employee while on such leave shall be paid salary or compensation for a period, or periods, not exceeding twenty (20) working days in any one (1) calendar year, plus such additional days as may result from any call to active state duty pursuant to § 58-1-106. The military leave herein provided shall be unaffected by date of employment or length of service and shall have no effect on other leaves provided by law, regulation, policy or practice. After the twenty (20) working days of full compensation, any public employer may provide partial compensation to its employees while under competent orders. After the twenty (20) working days of full compensation, members of any reserve component of the armed forces of the United States, including members of the Tennessee army and air national guard, may use up to five (5) days of sick leave in lieu of annual leave for the purposes of not having to take leave without pay.

TCA section 8-33-109 (emphasis supplied).

In addition to the leave of absence provided in § 8-33-109, all officers and employees of this state, or any department or agency thereof, or of any county, municipality, school district, or other political subdivision, all other public employees of this state *and all private sector employees who are members of the Tennessee army and air national guard on active state duty*⁷ or the Tennessee state guard⁸ and civil air patrol shall be entitled to an unpaid leave of absence from their respective duties, without loss of time, pay not specifically related to leave of absence time, regular leave or vacation or impairment of efficiency rating for all periods of service during which under competent orders they are engaged in the performance of duty or training in the service of this state, including the performance of duties in an emergency.

TCA section 8-33-110 (emphasis supplied).

⁷ The language requiring private sector employers to grant unpaid leaves of absence to members of the Tennessee Army or Air National Guard for state active duty was added recently.

⁸ The Tennessee State Guard is a purely state military entity, subject to call by the Governor for state emergencies.

To see how these sections might apply in practice, let us consider a hypothetical but realistic scenario. Ms. Maureen Morris owns and operates Momo's Memphis Barbecue in Memphis, Tennessee. Among her 50 employees, two are National Guard members. David Crockett lives in Memphis and is a Sergeant in the Tennessee Army National Guard. Sam Houston lives a few miles west in West Memphis, Arkansas and is a Sergeant in the Arkansas Army National Guard.

A tornado causes serious damage in several counties in western Tennessee and eastern Arkansas, and the Governor of Tennessee and the Governor of Arkansas both mobilize several National Guard units for state active duty. Both Crockett and Houston are called to state active duty for several days.

Given the current state of meteorological science, forecasters do well to give 15 minutes of advance notice of a tornado, perhaps enough time to warn persons to seek shelter underground. In the aftermath of a tornado, it is necessary for National Guard personnel to deploy as soon as possible, to rescue persons trapped in destroyed buildings and to restore essential services. Thus, it is not possible to provide civilian employers any advance notice when it is necessary to mobilize National Guard members in a scenario of this kind.

Ms. Morris is annoyed by the lack of advance notice and by the inconvenience that the call-up causes her. When Crockett and Houston return from their state active duty periods, Ms. Morris informs them that they have been fired and replaced and orders them off the property.

Does firing Houston violate Tennessee law? Clearly not, because the quoted sections expressly apply only to members of the *Tennessee* National Guard, and Houston is a member of the National Guard of Arkansas.

The firing of Crockett (a member of the Tennessee Army National Guard) for having absented himself from his restaurant job for state active duty clearly violates Tennessee law, and the Tennessee courts have clear authority to remedy this violation by ordering Ms. Morris to reinstate Crockett and to pay him back pay. In addition, Ms. Morris could potentially be subject to criminal prosecution under TCA section 58-1-604.

Mary Jones lives in Memphis and works for the Public Works Department of the City of Memphis, and she is a Technical Sergeant in the Tennessee Air National Guard. She is called to state active duty by the Governor of Tennessee in the aftermath of the same tornado. The City of Memphis fires her for absence from her civilian job during the period of her state active duty. The firing of Jones clearly violates Tennessee law and there are adequate enforcement mechanisms in place to enforce Jones' rights.

Moreover, under TCA section 8-33-109 Technical Sergeant Jones is entitled to 20 work days of *paid* military leave per year. She can use that paid military leave for state active duty and also for her periodic National Guard training under title 32 of the United States Code.