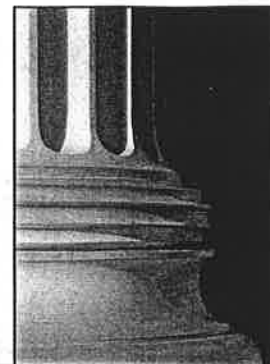


# Compensation Quarterly

Volume 24 • Number 3  
Fall 2014



**THE WORKERS' COMPENSATION UPDATE**

## Recourse for National Guard Members for Injuries Sustained in the Course of Service

*by Nicholas C. Varunes, Esq.  
and*

*2LT Taylor Hanson, ARNG, UCONN Law, Class of 2016*

Due to the atrocities occurring across the country involving shootings, annual wildfires, storms and, most recently, the rioting and looting in Missouri, our National Guard units are being called upon with increasing frequency to assist with emergency response and support. National Guard members are, therefore, being called away from their civilian jobs, exposing them to dangerous situations and potential injuries. The question of what recourse is available to them in case of injury sustained while on active duty is, therefore, one of immediate concern. Depending on the nature of the service, National Guard members may be eligible for federal or state compensation benefits. This article discusses the benefits available to National Guard members and when those benefits might be triggered.

Title 10 of the United States Code allows the President to “federalize” the National Guard forces by ordering them to active duty as a reserve component to the standing army and military. While serving on active military duty for the federal government under Title 10, Guard members are covered under federal statutes and are provided benefits through federal programs should they be injured. When a soldier in the National Guard is injured while activated under federal control, and the soldier is determined to be physically disabled, the member receives benefits for medical care and “incap” (incapacity) pay. If a member of the National Guard becomes incapacitated due to injury, illness or disease in the line of duty that prevents the performance of military duty, or prevents the member from returning to the civilian occupation in which he was employed at the time of the injury, illness or disease, he is entitled to benefits. (37 USCA §204) The program is two-tiered and allows for full military pay and allowances for members who are unfit to perform military duty as a result of an injury, and for lost wages in the civilian sector for members who are determined fit to perform their military duties by a military medical physician but are unable to perform their civilian jobs and can demonstrate loss of civilian earned income. The members who are entitled

continued on page 4

**IN THIS UPDATE**

- 1..... *Recourse for National Guard Members for Injuries Sustained in the Course of Service*
- 2..... *Legends of the Fall – The Workers’ Compensation Section Approaching the Autumnal Equinox: The Chair*
- 3..... *Interview: CQ Welcomes Commissioner Thomas Mullins*
- 8..... *16th Annual Verrilli-Belkin Workers’ Compensation Charity Golf Event*
- 11..... *Save the Date! Workers’ Compensation Exotic Seminar: May 16-19, 2015*
- 12..... *Case Comments*

## Recourse for National Guard Members for Injuries Sustained...

---

to "incap" pay are entitled to full pay and allowances, special pay and medical and dental care, not to exceed full military pay and allowances. (Army National Guard, G1 Personnel Gateway)

When not deployed federally, however, Guard members may still be called into active service by the governor of the state under Title 32 of the United States Code. Specifically, the governor can call National Guard members to active duty in response to natural or man-made disasters, Homeland defense missions, and to assist the police during times of civil unrest. (32 USCA §328) State active duty is based on state statute and policy and is funded by the state pursuant to Chapter 504 of the Connecticut General Statutes. The National Guard may also be called to full-time non-active National Guard duty for training activities that are performed by members of the National Guard, such as ceremonial and civic functions. The various situations in which the state may utilize the National Guard are enumerated in the following statutes.

Connecticut General Statutes Section 27-17 states that in cases "of riot or civil commotion in any place in this state, any official whose duty it is to enforce civil authority at such place may, if he considers that the force at his disposal is not sufficient, inform the Governor, who may order out such portion of the armed forces of the state as he thinks advisable and may direct the commanding officer of the force selected to communicate with the person making application to assist such person in preserving the peace and to use such portion of his force as may be necessary therefor." Connecticut General Statutes Section 27-18 allows the civil authority mentioned in Section 27-17 to request assistance in writing directly to an officer of the State Guard if the civil authority cannot communicate directly with the governor i.e. alien attack. Under both statutes, the Guard will be called out to help control civil unrest and perform as a "peace officer".

The third enumerated statute, Connecticut General Statutes Section 27-61, is the omnibus statute to cover all other circumstances in which a soldier in the National Guard called up to state active duty is considered a state employee under the jurisdiction of the commission. Specifically, subsection (2) of the statute states: "Military duty" means the performance of military service by a member of the armed forces of the State pursuant to competent State military orders, whether paid or unpaid for such military service, including training, performance of emergency response missions and traveling directly to or returning directly from the location of such military service."

The recent events in Missouri provide a factual scenario with which to begin the analysis of recourse should an injury occur to a member of the National Guard. The shooting death of an unarmed man by police touched off protests and looting which turned violent. There were reported incidents of shots being fired by people in the crowds and at aircraft. There were also incidents of Molotov cocktails being thrown at police and other civil authorities. As a result, the Governor of Missouri called out the National Guard to assist the local and state police in an effort to keep the peace.

Similarly, the Connecticut statutes encompass circumstances where the Guard may be called up to act or assist as police officers and as firefighters, such as to respond to events such as the Newtown shooting, to fight wildfires, or to assist in emergencies akin to Hurricane Sandy. (504 CGA §27-2a) If an injury occurred while performing these roles under State authority, would the Guard member be considered a state employee?

According to Connecticut General Statutes Section 27-67, when a member of the National Guard suffers injury or as a result of being called up for state active duty, the member's injury or illness falls within the jurisdiction of Chapter 568 of Connecticut General Statutes. Specifically, section 27-67 states:

- (a) A member of the armed forces of the State performing military duty in accordance with section 27-17, 27-18 or 27-61 shall be construed to be an employee of the State for the specific purposes of liability, immunity and being subject to the jurisdiction of the Workers' Compensation Commission and shall be compensated in accordance with the provisions of Chapter 568 for death, disability or injury incurred while performing such military duty. A member of the armed forces of the State performing such military duty shall not be considered an employee of the State for other purposes.

## Recourse for National Guard Members for Injuries Sustained...

---

(b) Any member of the armed forces of the State who is injured while performing military duty in accordance with section 27-17, 27-18 or 27-61 may collect benefits under the provisions of Chapter 568 based on the salary of the member's employment or the average production wage in the State, as determined by the Labor Commissioner under the provisions of Section 31-309, whichever is greater. The provisions of this subsection shall apply only if the member of the armed forces of the State is unable to perform the member's regular employment duties.

(c) For the purpose of this section, there shall be no prorating of compensation benefits because of other employment by a member of the armed forces of the state.

Public Act 13-25, which took effect in 2013, is worth noting as it completely repealed the prior statute and replaced it with language that seems to put all administration in the State forum. The new statute specifies the statutory authority allowing National Guard members to be called to state duty and then specifically states that, if injured while in the line of duty, the member will be considered a state employee for purposes of jurisdiction under the Workers' Compensation Commission, thereby removing jurisdiction from the adjutant general, the state's senior military officer. Public Act 13-25 also amended Connecticut General Statutes Section 31-275(9)(A)(vii) so the definition of employee conforms with the changes to Connecticut General Statutes Section 27-67. Consequently, as of October 1, 2013, a member of the Connecticut National Guard called up for state duty is considered an employee of the state and subject to the jurisdiction of the Connecticut Workers' Compensation Commission.

Considered an employee of the State of Connecticut for certain specific purposes, the current law provides National Guard members with the same benefits that employees of the State of Connecticut may obtain if they were injured out of and in the course of their employment. This includes any and all physical injuries. Additionally, if Guard members who are injured while called out to perform policing duties pursuant to Connecticut General Statutes Sections 27-17 or 27-18 they may be entitled to benefits pursuant to Connecticut General Statutes Section 31-275(16)(B)(ii), which allows for mental or emotional impairments to be considered injuries under Chapter 568 if it arises from such officer's use of deadly force or subjection to deadly force or a member called up as a firefighter who witnesses the death of another firefighter while engaged in the line of duty.

In conclusion, it is important to understand that benefits to which a National Guard member may be entitled if injured while on active duty depends on the nature of that call to duty. If acting in under the auspices of the federal government, the member should seek recourse through the applicable federal statutes and process any claim through the judge adjutant general. If, however, a member of the National Guard is injured while serving at the request of the governor, the Connecticut Workers' Compensation Act is the appropriate avenue for requesting and receiving benefits.

Editor's note: Nicholas Varunes is a partner at Varunes & Associates.