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# Wisconsin Legislative Council

## STUDY COMMITTEE MEMO

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**Memo No. 1**

**TO:** MEMBERS OF THE STUDY COMMITTEE ON WISCONSIN NATIONAL GUARD SEXUAL MISCONDUCT PROCEDURES

**FROM:** David Moore, Senior Staff Attorney, and Tom Koss, Staff Attorney

**RE:** Information in Response to Committee Discussion at August 9, 2022 Meeting

**DATE:** September 7, 2022

This memo provides general background information related to two topics the committee discussed during its August 9, 2022 meeting. First, the memo outlines a recent change to the Uniform Code of Military Justice (UCMJ) that codifies sexual harassment as a punitive article. Next, the memo provides information about legislation various other states have enacted in recent years to address sexual assault and sexual harassment in state National Guards.

### **SEXUAL HARASSMENT UNDER THE UCMJ**

The National Defense Authorization Act (NDAA) for fiscal year 2022 required the President to establish sexual harassment as an offense that is punishable under the UCMJ. The NDAA specifies that a person commits sexual harassment if all of the following apply:

- The person knowingly made sexual advances, demands, or requests for sexual favors or knowingly engaged in other conduct of a sexual nature.
- The person's conduct was unwelcome.
- Either of the following apply:
  - Under the circumstances: (1) the conduct would cause a reasonable person to believe that submission to that conduct would be made a term or condition of that person's job, pay, career, benefits, or entitlements or would be used as a basis for decisions affecting that person's job, pay, career, benefits, or entitlements; and (2) the person to whom the conduct was directed did believe submission to that conduct would be used in such a manner.
  - Under the circumstances, the conduct was so severe, repetitive, or pervasive that: (1) a reasonable person would perceive an intimidating, hostile, or offensive work environment; and (2) the person to whom the conduct was directed perceived the conduct in that manner.
- Under the circumstances, the accused's conduct was prejudicial to the good order and discipline of the military or brought discredit upon the military, or both.

[[Pub. L. 117-81](#), div. A, title V, s. 539D, Dec. 27, 2021, 135 Stat. 1699.] President Biden implemented that change, by executive order, on January 26, 2022.

## STATE RESPONSES TO SEXUAL MISCONDUCT IN NATIONAL GUARDS

Federal law sets minimum requirements related to reporting and investigating allegations of sexual assault and harassment that every state National Guard must follow. Department of Defense and Chief, National Guard Bureau Instructions, for example, require that each state Guard implement a Sexual Assault Prevention and Response (SAPR) program to provide certain services to victims, such as the assistance of a sexual assault response coordinator.

Beyond, and in connection with, those federal requirements, a number of states have enacted legislation in recent years to provide additional victim services or address sexual misconduct within their state National Guards. As is described in more detail below, among other topics, state legislation has required National Guards to regularly report various information related to sexual assault and harassment, codified sexual harassment as a military offense, and codified requirements related to reporting and investigating sexual assault.

### California

In 2021, California enacted [legislation](#) codifying sexual harassment as a military offense and requiring the California Military Department to annually report various information related to sexual assault and sexual harassment to various state and federal officers and state entities.

Under the California law, any member of the California National Guard serving in a state duty status or under Title 32 who commits sexual harassment may be punished under the state's military code of justice. For these purposes, the law defines sexual harassment as conduct that involves an unwelcome sexual advance, a request for sexual favors, or deliberate or repeated offensive comments or gestures of a sexual nature towards, from, or in the presence of another person, if any of the following apply:

- Submission to the conduct was explicitly or implicitly made a condition of a person's job, pay, or career.
- Submission to or rejection of the conduct was used, or threatened to be used, as a basis for career or employment decisions affecting that person.
- The conduct had the purpose or effect of unreasonably interfering with any person's work performance, or created an intimidating, hostile, or offensive working environment, and was so severe or pervasive that a reasonable person or a reasonable victim would have perceived the work environment to be hostile or offensive.

The law also requires the California Military Department to annually report certain information to the Governor, the Legislature, the California Attorney General, and the U.S. Attorney for each district in California. Among other information, the report must include matrices for restricted and unrestricted reports of the number of sexual assaults and sexual harassment cases involving Guard members and plans for preventing and responding to sexual assault and harassment.

[See 2021 California Senate Bill 352/ss. 58, 392, and 475, California Military and Veterans Code.]

### Illinois

In 2022, Illinois enacted [legislation](#) that allows Illinois National Guard members who have been the victim of nonconsensual sexual conduct to obtain certain types of restraining orders from a state court. Specifically, the act provides that a service member of the Illinois National Guard or any reserve military component serving within the state who is a victim of non-consensual sexual conduct and has

also received a Military Protective Order (MPO)<sup>1</sup> may file certain restraining orders under state civilian law. The act also requires the Guard to file a certified copy of any MPO with the clerk of court applicable to the petitioner's residence and provides that the clerk must treat an MPO in the same manner as a judgment of the circuit court for any county in the state.

The act also amended a provision of law that prohibits an employer from discriminating against an individual because the individual attended, participated in, prepared for, or requested leave to attend, participate in, or prepare for a criminal or civil court proceeding relating to an incident of domestic violence, sexual violence, or gender violence in which the individual or a family member was a victim. The act extended these employment protections so that they also prohibit engaging in employment discrimination against an individual because the individual attended, participated in, or prepared for a court-martial or nonjudicial punishment proceeding in which the person or a family member was a victim. [Illinois Public Act 102-0890.]

## Iowa

In 2013, Iowa modified its state code of military justice to provide that civilian courts have exclusive jurisdiction over the crimes of murder, manslaughter, sexual abuse, robbery, arson, extortion, assault, and burglary. This legislation, 2013 Senate File 2321, also requires a commander who is made aware of an allegation that one of these offenses, or any other civilian criminal offense, has been committed by a member of the state military forces against another member of the state military forces while both are subject to the code to notify the law enforcement agency with primary jurisdiction over the alleged offense without delay. This obligation does not apply to an allegation that is a restricted report, as defined by federal military regulations. Also with respect to an allegation of sexual abuse, Senate File 2321 requires a commander to notify the person making the allegation that he or she may also independently notify local civilian law enforcement.

Senate File 2321 further provides that any person subject to the state military code may be punished under the code if he or she interferes with or reprises against any member of the state military forces who has indicated an intent to make, or who has made, a report to civilian law enforcement.

Finally, Senate File 2321 requires the Adjutant General to submit an annual report to the Governor and Legislature about the number of offenses reported to civilian law enforcement authorities. [[2013 Senate File 2321.](#)]

## Maine

In 2022, Maine enacted [legislation](#) directing the Attorney General to review a variety of topics related to the investigation, prosecution, and adjudication of sexual assault by members of the Maine National Guard. By February 2023, the Attorney General must submit that review to the Legislature along with recommendations for improving the process by which law enforcement agencies and prosecutors investigate and prosecute allegations of sexual assault and harassment within the Maine National Guard.

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<sup>1</sup> An MPO, referred to in federal law as a Military Protective Order or Military Protection Order, is an order issued by a commanding officer that prohibits a service member from contacting or communicating with a protected person or members of a protected person's family. An MPO against a service member is in effect at all times, unless the military commander terminates the order or issues a replacement order, but is generally only enforceable by the military. [See [32 C.F.R. s. 635.19](#); [DD Form 2873](#), Feb. 2020; Congressional Research Service, Military Sexual Assault: A Framework for Congressional Oversight, [CRS Report](#), February 26, 2021.]

That legislation, LD 2029, also requires the Adjutant General to submit an annual report to the Legislature regarding sexual assault and harassment in the Maine National Guard. The report must provide information such as data regarding reported incidents of sexual assault and sexual harassment, a description of the current practices and procedures for preventing and investigating sexual assault and sexual harassment, and a description of the sexual assault and sexual harassment prevention training provided to Guard members.

LD 2029 also creates a crime of harassment specific to members of the National Guard. The act defines harassment, for this purpose, as engaging in a course of conduct with the intent to harass, torment, or threaten another person without reasonable cause and after being notified, while a member of the National Guard, not to engage in such conduct by a commanding officer.

Additionally, LD 2029 requires the Adjutant General to provide post-discharge travel funds to service members and former service members to attend sexual assault or sexual harassment proceedings and provides the Maine National Guard with a seat on Maine's Commission on Domestic and Sexual Abuse. [Maine LD 2029.]

Also in 2022, the Governor of Maine established an Advisory Council on Military and Sexual Trauma. That council is intended to ensure that victims of sexual assault in the military are connected to available resources, designate a point of contact for victims to report any problems from the investigative process, and improve the National Guard's response to sexual assault and harassment. Its duties include identifying best practices in reporting and preventing sexual trauma in the Guard, identifying barriers to reporting trauma, and identifying resources available to support members of the Guard who have been victims of sexual assault or harassment. [[Maine Executive Order 1 FY21/22.](#)]

## **Minnesota**

Minnesota enacted [legislation](#) in 2021 that requires that allegations of sexual assault among members of the Minnesota National Guard be referred to the state Bureau of Criminal Apprehension's Force Investigations Unit. The Force Investigations Unit is an independent investigatory unit that is charged with conducting various investigations involving peace officers, including criminal sexual conduct cases involving peace officers. The legislation requires the Force Investigations Unit to also investigate all criminal sexual conduct cases where both the victim and accused are members of the Minnesota National Guard and the incident occurred in Minnesota. That unit must also assist in investigations of incidents that occur in a jurisdiction outside of Minnesota if the investigating agency requests assistance from the unit. [Minn. Stat. [299C.80](#) and [609.3459 \(a\)](#) (2021).]

## **Nevada**

In 2021, Nevada codified sexual harassment as a punitive article under the Nevada Code of Military Justice. Specifically, Nevada law provides that sexual harassment is committed by any person subject to the Nevada Code of Military Justice who: (1) engages in or attempts to engage in influencing, offering to influence, or threatening the career, pay, or job of another person for sexual favors; or (2) makes deliberate or repeated offensive comments or gestures of a sexual nature to or in the presence of another person. That legislation also amended the Nevada Code of Military Justice's definition of sexual assault to match the definition found in the UCMJ, and amended the definitions of "consent" and "sexual contact." [[2021 Nevada Senate Bill 28.](#)]

## Texas

Texas enacted [legislation](#) in 2021 that makes several changes to the response and investigation of sexual assault within the Texas National Guard. Among other provisions, that legislation:

- Requires the Texas Military Department to establish a state Sexual Offense Prevention and Response Office and employ a sexual offense response coordinator, to the extent funds are available, with both the office and coordinator operating independently from the chain of command within the Military Department. The coordinator's duties include accepting reports of sexual assault, notifying victims of their eligibility for crime victims' compensation, and allowing victims to file an unrestricted or restricted report.
- Requires the sexual offense response coordinator to refer all unrestricted reports of sexual assault and aggravated sexual assault to a division of the Texas Department of Public Safety for investigation, and to refer all unrestricted reports of indecent assault to the appropriate local law enforcement agency.
- Requires the Adjutant General or sexual offense response coordinator to file an annual report with the Legislature, Governor, and Lieutenant Governor that includes information such as the policies and procedures implemented in response to incidents of sexual assault and indecent assault and statistics related to investigations and administrative actions.
- Allows the sexual offense response coordinator to file an application for a Military Protective Order on behalf of the victim, provided the victim consents.

[2021 Texas Senate Bill 623.]

## Vermont

Since 2013, Vermont has required the National Guard to submit an annual report to the Legislature regarding complaints of sexual assault and harassment. Vermont statute requires the Vermont National Guard to provide a report to the General Assembly on or before January 15 of each year that includes specified information, such as the number of restricted and unrestricted reports of sexual assault; the number of reports of sexual harassment and discrimination; a summary of the resolution in each report; and a summary of the current policies, procedures, and processes regarding the incidence of sexual assault, sexual harassment, and discrimination, and any changes made by the Guard in the past year. [[20 V.S.A. s. 427.](#)]

In 2020, Vermont codified the Office of Provost Marshal in state statute. Under Vermont law, the Adjutant and Inspector General may appoint to serve as a provost marshal an officer who holds the rank of major (O-4) or below and is certified as a level III law enforcement officer by the Vermont Criminal Justice Council. The Adjutant and Inspector General may also appoint to serve as an assistant provost marshal a noncommissioned officer who holds the rank of first sergeant (E-8) or below and is certified as a level III law enforcement officer by the Vermont Criminal Justice Council. Among other duties, Vermont law provides that the provost marshal shall serve as the primary liaison between the Vermont National Guard and law enforcement agencies. In addition, the provost marshal is specifically tasked with responding to allegations of sexual assault within the Guard, including by reporting and documenting allegations and coordinating and communicating with the Vermont National Guard Sexual Assault Response Coordinator, law enforcement, and prosecutors. [[20 V.S.A. s. 428.](#)]

## Wyoming

In 2022, Wyoming enacted three laws to address sexual assault and harassment in the Wyoming National Guard.

[Senate File 45](#) requires the Adjutant General to submit an annual report to the Governor and Legislature that includes information such as the details of and actions taken in response to incidents of sexual assault, sexual harassment, and discrimination, and changes in options for employees and Guard members to report incidents.

[House Bill 53](#) changes the investigation and processes for reporting employment law claims made by Wyoming National Guard members. It requires Wyoming's Department of Workforce Services and Adjutant General to enter into agreements and work together to investigate and determine employment law claims made by members of the Guard and employees of the Military Department and promulgate rules to create such a system for investigating and reporting. It also creates a redress provision that allows National Guard members to complain to superior commissioned officers.<sup>2</sup>

[Senate File 40](#) authorizes the release of criminal history information about Guard members to the Military Department.

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<sup>2</sup> This redress provision is similar to Article 138 in the Wisconsin Code of Military Justice. [s. 322.138, Stats.]