

LEGAL REVIEW NOTE

Bill No.: SB 560

LC#: LC 2086, To Legal Review Copy, as
of March 17, 2023

Short Title: Establish the Defend Montana
Guard Act

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CONFORMITY WITH STATE AND FEDERAL CONSTITUTIONS

As required pursuant to section 5-11-112(1)(c), MCA, it is the Legislative Services Division's statutory responsibility to conduct "legal review of draft bills". The comments noted below regarding conformity with state and federal constitutions are provided to assist the Legislature in making its own determination as to the constitutionality of the bill. The comments are based on an analysis of jurisdictionally relevant state and federal constitutional law as applied to the bill. The comments are not written for the purpose of influencing whether the bill should become law but are written to provide information relevant to the Legislature's consideration of this bill. The comments are not a formal legal opinion and are not a substitute for the judgment of the judiciary, which has the authority to determine the constitutionality of a law in the context of a specific case.

This review is intended to inform the bill draft requestor of potential constitutional conformity issues that may be raised by the bill as drafted. This review IS NOT dispositive of the issue of constitutional conformity and the general rule as repeatedly stated by the Montana Supreme Court is that an enactment of the Legislature is presumed to be constitutional unless it is proven beyond a reasonable doubt that the enactment is unconstitutional. See Alexander v. Bozeman Motors, Inc., 356 Mont. 439, 234 P.3d 880 (2010); Eklund v. Wheatland County, 351 Mont. 370, 212 P.3d 297 (2009); St. v. Pyette, 337 Mont. 265, 159 P.3d 232 (2007); and Elliott v. Dept. of Revenue, 334 Mont. 195, 146 P.3d 741 (2006).

Legal Reviewer Comments:

The Supremacy Clause establishes that federal law “shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” U.S. Const., Art. VI, cl. 2. Where state and federal law “directly conflict,” state law must give way. Wyeth v. Levine, 555 U.S. 555, 583, 129 S. Ct. 1187 (2009) (Thomas, J., concurring in judgment); see also Crosby v. National Foreign Trade Council, 530 U.S. 363, 372, 120 S. Ct.

2288 (2000) (“[S]tate law is naturally preempted to the extent of any conflict with a federal statute”), and PLIVA, Inc. v. Mensing, 564 U.S. 604, 617-18, 131 S. Ct. 2567, 2577 (2011).

Federal law, 10 U.S.C. § 12406, provides as follows:

Whenever—

- (1) the United States, or any of the Commonwealths or possessions, is invaded or is in danger of invasion by a foreign nation;
 - (2) there is a rebellion or danger of a rebellion against the authority of the Government of the United States; or
 - (3) the President is unable with the regular forces to execute the laws of the United States;
- the President may call into Federal service members and units of the National Guard of any State in such numbers as he considers necessary to repel the invasion, suppress the rebellion, or execute those laws. Orders for these purposes shall be issued through the governors of the States or, in the case of the District of Columbia, through the commanding general of the National Guard of the District of Columbia. (Emphasis added.)

SB 560 is entitled the " Establish the Defend Montana Guard Act." Section 3 of SB 560 provides:

[T]he Montana national guard and any member of the Montana national guard may not be released from the state into active-duty combat unless the United States congress has:

- (a) passed an official declaration of war; or
- (b) taken an official action pursuant to Article I, section 8, clause 15, of the United States constitution to explicitly call forth the Montana national guard and any member of the Montana national guard [. . .].

Section 3 of SB 560 restricts the President from calling up the National Guard, which is allowed under federal law. Therefore, SB 560 may raise a potential constitutional conformity question as to whether this legislation conflicts with the Supremacy Clause of the U.S. Constitution.

In addition, LC 2068 may also conflict with the National Guard Mobilization act of 1933 and 10 U.S.C. sections 12301 and 12403. The National Guard Mobilization Act of 1933 made the National Guard a reserve component of the Armed Forces of the United States. Members of the National Guard hold commissions in both the federal military and the state militia. Therefore, when National Guard members are mobilized for overseas duty it is done under 10 U.S.C. section 12301 and not 10 U.S.C. section 12406, which only applies in the United States.

Under the National Guard Mobilization Act of 1933, a Governor and individual soldiers cannot prohibit a deployment. Therefore, SB 560 may raise a potential constitutional conformity question as to whether this legislation conflicts with the Supremacy Clause of the U.S. Constitution.

Requester Comments: