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New Recall Authority for Selected Reserve Units—What Effect on USERRA Rights?

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1.3.1.2—Character and duration of service
1.3.2.2—Continuous accumulation of seniority-escalator principle
1.3.2.3—Pension credit for service time
1.8—Relationship between USERRA and other laws/policies
2.0—Paid leave for government employees who are RC members

On September 11, 2001, the "date which will live in infamy" for our generation, 19 terrorists commandeered four airliners and crashed them into three buildings and a field, killing almost 3,000 of our fellow Americans and setting off a national defense emergency that continues to this day. According to the Department of Defense (DOD), almost 900,000 Reserve Component (RC)[1] members have been called to the colors since September 11, 2001, and almost 350,000 of them have been called up more than once. The transformation of the "strategic reserve" (available only for World War III) to the "operational reserve" (routinely called up for intermediate range military operations like Iraq and Afghanistan) has been completed in the 13 years since September 11, 2001.

The transformation began in August 1990, when Saddam Hussein's Iraq invaded and quickly occupied Kuwait and President George H.W. Bush drew "a line in the sand" to protect Saudi Arabia and liberate Kuwait,

[1] The seven Reserve Components are the Army National Guard, Army Reserve, Air National Guard, Air Force Reserve, Marine Corps Reserve, Navy Reserve, and Coast Guard Reserve.

and as part of his forceful military response he called up RC units in the first significant RC call-up since the Korean War.[2] In the 37 years between the end of the Korean War (July 1953) until the occupation of Kuwait (August 1990), RC members came to be known as "weekend warriors" in that their military participation was generally limited to one drill weekend per month and two weeks of annual training, usually in the summer.

United States military operations in Iraq are over, and major operations in Afghanistan will likely wind down by the end of this calendar year. Does that mean that the seven Reserve Components will return to the "weekend warrior" days? No. The burden on individual RC members and their families and civilian employers will lessen with the end of major U.S. military operations in Afghanistan, but we are never going back to the "weekend warrior" days.

Each year, Congress enacts and the President signs into law the "National Defense Authorization Act" (NDAA) for the upcoming fiscal year, authorizing the activities and expenditures of DOD and the national defense activities (nuclear weapons and naval reactors) of the Department of Energy. Each year, the NDAA also makes scores of changes to title 10 and other titles of the United States Code. NDAA 2012 enacted a new section (section 12304b[3]) for title 10, and NDAA 2013 amended that new section, which reads as follows:

§ 12304b. Selected Reserve: order to active duty for preplanned missions in support of the combatant commands

(a) Authority. When the Secretary of a military department determines that it is necessary to augment the active forces for a preplanned mission in support of a combatant command, the Secretary may,

[2] Only a handful of RC units were mobilized for the Vietnam War.

[3] Section 12304b is not the same thing as section 12304(b). Section 12304(b) is subsection (b) of section 12304. Section 12304b is a new section, coming after section 12304 and before section 12305.

subject to subsection (b), order any unit of the Selected Reserve (as defined in section 10143(a) of this title [10 USCS § 10143(a)]), without the consent of the members, to active duty for not more than 365 consecutive days.

(b) Limitations.

(1) Units may be ordered to active duty under this section only if--

(A) the manpower and associated costs of such active duty are specifically included and identified in the defense budget materials for the fiscal year or years in which such units are anticipated to be ordered to active duty; and

(B) the budget information on such costs includes a description of the mission for which such units are anticipated to be ordered to active duty and the anticipated length of time of the order of such units to active duty on an involuntary basis.

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(2) Not more than 60,000 members of the reserve components of the armed forces may be on active duty under this section at any one time.

(c) Exclusion from strength limitations. Members ordered to active duty under this section shall not be counted in computing authorized strength in members on active duty or total number of members in grade under this title or any other law.

(d) Notice to Congress. Whenever the Secretary of a military department orders any unit of the Selected Reserve to active duty under subsection (a), such Secretary shall submit to Congress a report, in writing, setting forth the circumstances necessitating the action taken under this section and describing the anticipated use of such unit.

(e) Termination of duty. Whenever any unit of the Selected Reserve is ordered to active duty under subsection (a), the service of all units so ordered to active duty may be terminated--

(1) by order of the Secretary of the military department concerned; or

(2) by law.

(f) Relationship to War Powers Resolution. Nothing contained in this section shall be construed as amending or limiting the application of the provisions of the War Powers Resolution (50 U.S.C. 1541 et seq.).

(g) Considerations for involuntary order to active duty. In determining which units of the Selected Reserve will be ordered to duty without their consent under this section, appropriate consideration shall be given to--

(1) the length and nature of previous service, to assure such sharing of exposure to hazards as national security and military requirements will reasonably allow;

(2) the frequency of assignments during service career;

(3) family responsibilities; and

(4) employment necessary to maintain the national health, safety, or interest.

(h) Policies and procedures. The Secretaries of the military departments shall prescribe policies and procedures to carry out this section, including on determinations with respect to orders to active duty under subsection (g). Such policies and procedures shall not go into effect until approved by the Secretary of Defense.

(i) Defense budget materials defined. In this section, the term "defense budget materials" has the meaning given that term in section 231(f)(2) of this title [10 USCS § 231(f)(2)].

10 U.S.C. 12304b.

History:

(Added Dec. 31, 2011, P.L. 112-81, Div A, Title V, Subtitle B, § 516(a)(1), 125 Stat. 1395; Jan. 2, 2013, P.L. 112-239, Div A, Title X, Subtitle C, § 1014(b), 126 Stat. 1908.)

Under this new authority, Selected Reserve units will be mobilized involuntarily, as needed, for pre-planned missions in support of the combatant commands.[4] For example, Army brigades deploy to Korea on a schedule that is mapped out years in advance. Under this new policy, some of those brigades will come from the Army Reserve and the Army National Guard.

On April 8, 2014, Joseph M. McDade, Jr. (the Principal Deputy General Counsel of the Department of the Air Force) wrote a four-page memorandum about "use of title 10 section 12304b mobilization authority" for the Assistant Secretary of the Air Force for Manpower & Reserve Affairs. I have attached a copy of the McDade Memorandum to the end of this article.

In paragraph 5 on page 3, the McDade Memorandum states: "Perhaps the most important distinction between active duty under section 12302 and section 12304b is that section 12302 duty may qualify for a reduction in the eligibility age for reserve retired pay under section 12731, whereas section 12304b duty will not."

For example, let us say that Army Reservist Joe Smith was on involuntary active duty for all of Fiscal Year 2012[5] (366 days). Under 10 U.S.C. 12731, as amended in 2008, this year of service means that Joe will start receiving his RC retirement money a year early, on his 59th

[4] The combatant commands include United States Central Command, United States Southern Command, United States Northern Command, United States European Command, United States Pacific Command, etc.
[5] Fiscal Year 2012 started on October 1, 2011 and ended on September 30, 2012.

birthday instead of his 60th birthday. This is a very valuable benefit to Joe.

Now let us assume further that Joe and his Army Reserve unit are on involuntary section 12304b duty for all of Fiscal Year 2016. Does that mean that Joe can start drawing his Army Reserve retirement money on his 58th birthday? The answer is no, at least according to the McDade Memorandum.

The McDade Memorandum does not address reemployment rights under the Uniformed Services Employment and Reemployment Rights Act (USERRA), and I have been asked to comment on that question. As I explained in Law Review 1281[6] and other articles, USERRA gives the right to reemployment to a person who meets the following simple conditions:

a. Left a civilian job (federal, state, local, or private sector) for voluntary or involuntary service in the uniformed services.
b. Gave the employer prior oral or written notice, unless giving prior notice was precluded by military necessity or otherwise impossible or unreasonable.
c. Has not exceeded the cumulative five-year limit on the duration of the period or periods of uniformed service relating to the employer relationship for which the individual seeks reemployment. As I explained in Law Review 201 and other articles, there are nine exemptions—kinds of service that do not count toward an individual's five-year limit.
d. Has been released from the period of service without having received a disqualifying bad discharge from the military.

[6] I invite the reader's attention to www.servicemembers-lawcenter.org. You will find 1,048 articles about USERRA and other laws that are especially pertinent to those who serve our country in uniform, along with a detailed Subject Index and a search function, to facilitate finding articles about very specific topics. I initiated this column in 1997, and we add new articles each week. We added 169 new articles in 2013.

e. After release from the period of service, has been timely in reporting back to work or applying for reemployment.[7]

A person who meets these five simple conditions is entitled, under USERRA, to reinstatement in the position of employment that he or she *would have attained if continuously employed*[8] or (at the employer's option) in another position for which the person is qualified that is of like seniority, status, and pay.[9] Upon reemployment, the person is entitled to the seniority and pension credit that he or she would have received if he or she had remained continuously employed in the civilian job.[10]

Let us assume that Joe Smith leaves his civilian job in late September 2015 and serves on active duty under 10 U.S.C. 12304b for all of Fiscal Year 2016, starting on October 1, 2015. Joe gives prior oral or written notice to his civilian employer and serves honorably. On September 30, 2016, he is released from active duty without a disqualifying bad discharge from the Army. Just one week later, and well within the 90 day window permitted, Joe applies for reemployment with the employer where he has worked since 2000.

Joe is entitled to reemployment *unless* this year of section 12304b active duty puts him over the five-year cumulative limit with respect to his employer relationship with his current employer. Section 4312(c) of USERRA sets forth the five-year limit and its exemptions as follows:

"(c) Subsection (a) [the right to reemployment] shall apply to a person who is absent from a position of employment by reason of service in the uniformed services if such person's cumulative period of service in

[7] After a period of service of 181 days or more, the individual has 90 days to apply for reemployment. 38 U.S.C. 4312(e)(1)(D). Shorter deadlines apply after shorter periods of service.
[8] The position that the person would have attained is usually but not always the position that the person left.
[9] 38 U.S.C. 4313(a)(2)(A).
[10] 38 U.S.C. 4316(a), 4318.

the uniformed services, with respect to the employer relationship for which a person seeks reemployment, does not exceed five years, except that any such period of service shall not include any service--

(1) that is required, beyond five years, to complete an initial period of obligated service;

(2) during which such person was unable to obtain orders releasing such person from a period of service in the uniformed services before the expiration of such five-year period and such inability was through no fault of such person;

(3) performed as required pursuant to section 10147 of title 10, under section 502(a) or 503 of title 32, or to fulfill additional training requirements determined and certified in writing by the Secretary concerned, to be necessary for professional development, or for completion of skill training or retraining; or

(4) performed by a member of a uniformed service who is--

(A) **ordered to or retained on active duty under section 688, 12301(a), 12301(g), 12302, 12304, or 12305 of title 10** or under section 331, 332, 359, 360, 367, or 712 of title 14;

(B) ordered to or retained on active duty (other than for training) under any provision of law because of a war or national emergency declared by the President or the Congress, as determined by the Secretary concerned;

(C) ordered to active duty (other than for training) in support, as determined by the Secretary concerned, of an operational mission for which personnel have been ordered to active duty under section 12304 of title 10;

(D) ordered to active duty in support, as determined by the Secretary concerned, of a critical mission or requirement of the uniformed services;

(E) called into Federal service as a member of the National Guard under chapter 15 of title 10 or under section 12406 of title 10; or

(F) ordered to full-time National Guard duty (other than for training) under section 502(f)(2)(A) of title 32 when authorized by the President

or the Secretary of Defense for the purpose of responding to a national emergency declared by the President and supported by Federal funds, as determined by the Secretary concerned.

38 U.S.C. 4312(c) (emphasis supplied).

Does Joe's year of involuntary active duty under section 12304b count toward his five-year limit? The answer is probably yes, because section 12304b is not one of the title 10 sections listed in section 4312(c)(4)(A).[11] We need an amendment to section 4312(c)(4)(A) to add section 12304b to the enumerated title 10 sections. Involuntary service should always be exempted from the computation of an individual's five-year limit, and an individual should never lose the right to reemployment because of an involuntary call to the colors. We will push for a statutory amendment.

[11] Section 12304 is listed, but section 12304 is not the same as section 12304b, a separate section after section 12304.