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Recall Reservist Tackles Health Flexible Savings Arrangement

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9.0 – Miscellaneous

Q: At my civilian job, I have what is known as a “health flexible savings arrangement” (HFSA). I set aside money, from pre-tax dollars, into this special account. If I have medical-care expenses during the calendar year, I use money from that account to pay for those expenses. If I don’t spend all the money by Dec. 31, the remainder reverts to the federal government.

I am in the Army Reserve. It is likely but by no means certain that I will be called to active duty in early 2009. I inquired of my employer’s personnel director what would happen to my 2009 HFSA if I were called to active duty early in the year. If I have medical expenses while on active duty, the Army will cover those expenses. Thus, if I am called to active duty, I will want to get a refund of my contributions to the arrangement for 2009.

¹I invite the reader’s attention to www.roa.org/lawcenter. You will find more than 2000 “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Servicemembers Civil Relief Act (SCRA), the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), the Uniformed Services Former Spouse Protection Act (USFSPA), and other laws that are especially pertinent to those who serve our country in uniform. You will also find a detailed Subject Index, to facilitate finding articles about very specific topics. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997.

²BA 1973 Northwestern University, JD (law degree) 1976 University of Houston, LLM (advanced law degree) 1980 Georgetown University. I served in the Navy and Navy Reserve as a Judge Advocate General’s Corps officer and retired in 2007. I am a life member of ROA. For 43 years, I have worked with volunteers around the country to reform absentee voting laws and procedures to facilitate the enfranchisement of the brave young men and women who serve our country in uniform. I have also dealt with the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Veterans’ Reemployment Rights Act (VRRA—the 1940 version of the federal reemployment statute) for 36 years. I developed the interest and expertise in this law during the decade (1982-92) that I worked for the United States Department of Labor (DOL) as an attorney. Together with one other DOL attorney (Susan M. Webman), I largely drafted the proposed VRRA rewrite that President George H.W. Bush presented to Congress, as his proposal, in February 1991. On 10/13/1994, President Bill Clinton signed into law USERRA, Public Law 103-353, 108 Stat. 3162. The version of USERRA that President Clinton signed in 1994 was 85% the same as the Webman-Wright draft. USERRA is codified in title 38 of the United States Code at sections 4301 through 4335 (38 U.S.C. 4301-35). I have also dealt with the VRRA and USERRA as a judge advocate in the Navy and Navy Reserve, as an attorney for the Department of Defense (DOD) organization called Employer Support of the Guard and Reserve (ESGR), as an attorney for the United States Office of Special Counsel (OSC), as an attorney in private practice, and as the Director of the Service Members Law Center (SMLC), as a full-time employee of ROA, for six years (2009-15). Please see Law Review 15052 (June 2015), concerning the accomplishments of the SMLC. My paid employment with ROA ended 5/31/2015, but I have continued the work of the SMLC as a volunteer. You can reach me by e-mail at SWright@roa.org.

The personnel director told me that no such refund could be made. She said that if the employer paid such a refund, it would endanger the “tax qualification” of the whole plan and mess it up for everybody. Is that correct?

A: What the personnel director told you was correct until quite recently, but this has changed. On June 17, 2008, President Bush signed into law the Heroes Earnings Assistance and Relief Tax Act (HEART Act), Public Law 110- 245. Section 114 of this new law allows for a tax-free distribution of unused benefits in an HFSA to any member of a Reserve Component who is called to active duty for more than 179 days.

This is a new exception to the general rule that money in an HFSA that is not spent in a calendar year reverts to the federal government. Under the new rule, you are exempted from this adverse consequence if you are called to active duty during the calendar year. In that situation, under this new law, you can withdraw funds from your HFSA upon being called to active duty.

The HEART Act contains many other great provisions for military personnel and their families. For the complete text of this important new law, as well as the Congressional Research Service summary, I invite the reader’s attention to <https://www.loc.gov/>. This is the website for the Library of Congress.