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NDAA 2013 Promotes Fairness for Coast Guard Reserve

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2.0—Paid Leave for Government Employees Who Are Reserve Component Members

9.0--Miscellaneous

On January 2, 2013, President Obama signed the National Defense Authorization Act (NDAA) for Fiscal Year 2013. Section 681 of this new law makes two important changes in title 10 of the United States Code and one in title 38. These changes are particularly relevant to members of the Coast Guard Reserve.

Eligibility for differential pay for federal employees called to active duty as Reserve Component (RC) members

As I described in Law Review 1010[1] (January 2010), in March 2009 President Obama signed legislation that provides for federal civilian employees who leave their civilian jobs to receive differential pay from the Federal Government when they perform “contingency service” as members of Reserve Components (RC) of the armed forces and when their military pay, while performing such service, is less than their regular civilian pay.

The pertinent language is as follows:

“(a) An employee who is absent from a position of employment with the Federal Government in order to perform active duty in the uniformed services *pursuant to a call or order to active duty under a provision of law referred to in section 101(a)(13)(B) of title 10* shall be entitled, while serving on active duty, to receive, for each pay period described in subsection (b), an amount equal to the amount by which—

(1) the amount of basic pay which would otherwise have been payable to such employee for such pay period if such employee’s civilian employment with the Government had not been interrupted by that service, exceeds (if at all)

(2) the amount of pay and allowances which (as determined under subsection (d))—

(A) is payable to such employee for that service; and

(B) is allocable to such pay period.”

Title 5, United States Code, section 5538(a) [5 U.S.C. 5538(a)] (emphasis supplied)

Thus, a federal employee receives the differential pay when he or she is called to active duty for a “contingency operation” as defined by 10 U.S.C. 101(a)(13)(B). Until now, section 101(a)(13) has read as follows:

“(13) The term “contingency operation” means a military operation that—

(A) is designated by the Secretary of Defense as an operation in which members of the armed forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force; or

(B) results in the call or order to, or retention on, active duty of members of the uniformed services under section 688, 12301(a), 12302, 12304, 12304a, 12305, or 12406 of this title, chapter 15 of this title, or any other provision of law during a war or during a national emergency declared by the President or Congress.”

10 U.S.C. 101(a)(13).

Section 681 of NDAA 2013 amends section 101(a)(13) to read as follows:

“(13) The term “contingency operation” means a military operation that—

(A) is designated by the Secretary of Defense as an operation in which members of the armed forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force; or

(B) results in the call or order to, or retention on, active duty of members of the uniformed services under section 688, 12301(a), 12302, 12304, 12304a, 12305, or 12406 of this title, chapter 15 of this title, *section 712 of title 14*, or any other provision of law during a war or during a national emergency declared by the President or Congress.”

The italicized language above was added by section 681 of NDAA 2013.

As I explained in Law Review 1010, Coast Guard Reservists called to active duty under section 712 of title 14 have not, until now, qualified for this differential pay. The purpose and effect of this very recent amendment is to extend this important benefit to Coast Guard Reservists called up under section 712, which reads as follows:

“(a) Notwithstanding another law, and for the emergency augmentation of the Regular Coast Guard forces during a, or to aid in prevention of an imminent, serious natural or manmade disaster, accident, catastrophe, act of terrorism (as defined in section 2(16) of the Homeland Security Act of 2002 (6 U.S.C. 101(16))), or transportation security incident as defined in section 70101 of title 46, the Secretary [of Homeland Security] may, without the consent of the member affected, order to active duty of not more than 60 days in any 4-month period and not more than 120 days in any 2-year period an organized training unit of the Coast Guard Ready Reserve, a member thereof, or a member not assigned to a unit organized to serve as a unit.

(b) Under the circumstances of the domestic emergency involved, a reasonable time shall be allowed between the date when a Reserve member ordered to active duty under this section is alerted for that duty and the date when the member is required to enter upon that duty. Unless the Secretary determines that the nature of the domestic emergency does not allow it, this period shall be at least two days.

(c) Active duty served under this section—

(1) satisfies on a day-for-day basis all or a part of the annual active duty for training requirement of section 10147 of title 10;

(2) does not satisfy any part of the active duty obligation of a member whose statutory Reserve obligation is not already terminated; and

(3) entitles a member while engaged therein, or while engaged in authorized travel to or from that duty, to all rights and benefits, including pay and allowances and time creditable for pay and retirement purposes, to which the member would be entitled while performing other active duty.

(d) Reserve members ordered to active duty under this section shall not be counted in computing authorized strength of members on active duty or members in grade under this title or under any other law.

(e) For purposes of calculating the duration of active duty allowed pursuant to subsection (a), each period of active duty shall begin on the first day that a member reports to active duty, including for purposes of training.”

14 U.S.C. 712.

I have personally spoken to more than a dozen Coast Guard Reservists who were called to active duty under this section for the emergency created by the explosion and oil leak associated with the 2010 Deepwater Horizon disaster (massive oil leak in the Gulf of Mexico).

Non-forfeitability of military leave earned while on contingency orders

Under 10 U.S.C. 701, military personnel performing “contingency” service are exempted from some of the “use it or lose it” rules (pertaining to leave earned for active military service) that are applicable to military personnel generally. Adding section 712 duty to the definition of “contingency” will benefit Coast Guard Reservists with respect to the application of this rule

Eligibility to start receiving RC retirement pay before one's 60th birthday

As I explained in Law Review 1007 (February 2010), Congress amended the RC retirement law as part of the 2008 NDAA. RC personnel who perform contingency service after January 28, 2008 can qualify to start drawing their RC retirement pay some months prior to their 60th birthdays. Here is the pertinent statutory language:

“(f)

(1) Subject to paragraph (2), the eligibility age for purposes of subsection (a)(1) is 60 years of age.

(2)

(A) In the case of a person who as a member of the Ready Reserve serves on active duty or performs active service described in subparagraph (B) after January 28, 2008, the eligibility age for purposes of subsection (a)(1) shall be reduced below 60 years of age by three months for each aggregate of 90 days on which such person so performs in any fiscal year after such date, subject to subparagraph (C). A day of duty may be included in only one aggregate of 90 days for purposes of this subparagraph.

(B)

(i) Service on active duty described in this subparagraph is service on active duty pursuant to a call or order to active duty under a provision of law referred to in section 101(a)(13)(B) or under section 12301(d) of this title. Such service does not include service on active duty pursuant to a call or order to active duty under section 12310 of this title.

(ii) Active service described in this subparagraph is also service under a call to active service authorized by the President or the Secretary of Defense under section 502(f) of title 32 for purposes of responding to a national emergency declared by the President or supported by Federal funds.

(iii) If a member described in subparagraph (A) is wounded or otherwise injured or becomes ill while serving on active duty pursuant to a call or order to active duty under a provision of law referred to in the first sentence of clause (i) or in clause (ii), and the member is then ordered to active duty under section 12301(h)(1) of this title to receive medical care for the wound, injury, or illness, each day of active duty under that order for medical care shall be treated as a continuation of the original call or order to active duty for purposes of reducing the eligibility age of the member under this paragraph.

(C) The eligibility age for purposes of subsection (a)(1) may not be reduced below 50 years of age for any person under subparagraph (A)."

10 U.S.C. 12731(f).

Section 681 of NDAA 2013 adds a new subsection (iv) to section 12731(f)(2)(B), reading as follows: "(iv) Service on active duty as described in this subparagraph is also service on active duty pursuant to a call or order to active duty authorized by the Secretary of Homeland Security under section 712 of title 14 for purposes of emergency augmentation of the Regular Coast Guard forces."

Until now, Coast Guard Reservists have not been able to use their section 712 active duty for the purpose of qualifying to start receiving their RC retired pay prior to their 60th birthdays. The purpose and effect of this very recent amendment is to enable Coast Guard Reservists to use this duty for this purpose.

Post 9-11 educational assistance

Under section 3301 of title 38, United States Code, RC members who perform active duty have qualified, under certain circumstances, for additional educational assistance administered by the United States Department of Veterans Affairs. Until now, this benefit has been provided to RC members who perform these kinds of active duty:

"(B) In the case of members of the reserve components of the Armed Forces, service on active duty under a call or order to active duty under section 688, 12301(a), 12301(d), 12301(g), 12302, or 12304 of title 10."

38 U.S.C. 3301(1)(B).

Section 681 of NDAA 2013 amends section 3301(1)(B) to read as follows:

"(B) In the case of members of the reserve components of the Armed Forces, service on active duty under a call or order to active duty under section 688, 12301(a), 12301(d), 12301(g), 12302, or 12304 of title 10 *or section 712 of title 14.*"

The italicized language was added by this very recent amendment. The purpose and effect of this amendment is to enable Coast Guard Reservists to use section 712 duty to qualify for this educational assistance.

Retroactive effect

Subsection (d) of section 681 of NDAA 2013 provides as follows:

"(d) Retroactive Application of Amendments—

- (1) **INCLUSION OF PRIOR ORDERS**- The amendments made by this section shall apply to any call or order to active duty authorized under section 712 of title 14, United States Code, on or after December 31, 2011, by the Secretary of the executive department in which the Coast Guard is operating.
- (2) **CREDIT FOR PRIOR SERVICE**- The amendments made by this section shall be deemed to have been enacted on December 31, 2011, for purposes of applying the amendments to the following provisions of law:
 - (A) Section 5538 of title 5, United States Code, relating to nonreduction in pay.
 - (B) Section 701 of title 10, United States Code, relating to the accumulation and retention of leave.

(C) Section 12731 of title 10, United States Code, relating to age and service requirements for receipt of retired pay for non-regular service.”

Thus, Deepwater Horizon duty performed in 2010 or 2011 will not benefit the Coast Guard Reservist for these purposes, but all section 712 duty performed on or after December 31, 2011 will benefit the individual in these important ways.

[1] I invite the reader’s attention to www.servicemembers-lawcenter.org. You will find 830 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), and other laws that are especially pertinent to those who serve our country in uniform. You will also find 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 122 new articles in 2012.