

April 2013

New West Virginia Law Creates Tax Break for Some Service Members

By Captain Samuel F. Wright, JAGC, USN (Ret.)

6.0—Military service and tax laws.

9.0—Miscellaneous.

The West Virginia Legislature recently amended the state's tax code in a way that will help some service members who are domiciled in West Virginia and who are leaving active duty (by retirement or otherwise) after December 31, 2012. The new subsection reads as follows:

"For taxable years beginning after December 31, 2012, in addition to amounts authorized to be subtracted from federal adjusted gross income pursuant to subsection (c), section 12 of this article, active duty military pay received by a resident individual who is on active duty for 30 continuous days or more in the armed forces of the United States, the National Guard or armed forces reserve is an authorized modification reducing federal adjusted gross income for the taxable year in which the individual has separated from active military service, but only to the extent the active duty military pay is included in federal adjusted gross income for the taxable year in which it is received."

West Virginia Code, section 11-21-12e(b).

In West Virginia, as in many states that have state income taxes, the starting point for the state income tax is the "federal adjusted gross income" (FAGI). You must do your federal income tax return first, and that return gives you the FAGI—this is the amount upon which you pay federal income tax. You also pay West Virginia state income tax on that same figure, but first you make additional deductions as permitted by West Virginia law.

Section 11-21-12e(b) provides one more deduction that you can make. To understand how this new provision works, let us discuss six hypothetical but realistic West Virginia taxpayers.

1. Joe Smith

Joe graduated from South Charleston High School, in South Charleston, West Virginia in May 1983 and the next month reported to the United States Naval Academy (Annapolis, Maryland) for "plebe summer." In May 1987, Joe graduated and was commissioned an Ensign. He has remained on active duty ever since and has moved up the ranks to Captain. Joe has maintained his domicile (legal residence) in West Virginia throughout his Navy career. He has voted by absentee ballot (using the address where he lived with his parents when he graduated from high school in 1983) in most elections, and he has never voted or registered to vote in any other state. He has paid West Virginia state income tax each year that he has been on active duty.

Joe leaves active duty by retirement on September 30, 2013 and returns home to West Virginia.¹ Joe starts a civilian job in West Virginia on November 1, 2013. In early 2014, he is gathering his documents to prepare his federal and state income tax returns for 2013. Joe's active duty pay, for the first nine months of 2013, is taxable income that will be included in his FAGI—he will pay federal income tax on that amount.

¹ The apparent purpose of this new law is to encourage West Virginians leaving active duty to return home to West Virginia, but this provision would apply in exactly the same way if Joe chose to move to another state after retiring from the Navy.

But Joe can deduct that 2013 active duty Navy pay from the figure upon which his West Virginia state income tax is computed. Joe meets the conditions for this new subsection. He was on active duty for more than 30 days and left active duty during tax year 2013.

2. Mary Jones

Mary was Joe's classmate at South Charleston High School in 1983. Shortly after graduation, she reported to the United States Military Academy in West Point, New York. She graduated and was commissioned a Second Lieutenant in 1987. Like Joe, she remained on active duty for a career and maintained her domicile in South Charleston, West Virginia. She left active duty by retirement on September 30, 2012.

Mary does not benefit from this new provision because she did not leave active duty during a tax year that began after December 31, 2012.

3. Alexandra Adams

Alexandra Adams is a resident of West Virginia and a member of the West Virginia Army National Guard. She was called to active duty² for nine months, from February 1 to October 31, 2013, when she was released from active duty and returned to West Virginia. She spent this nine-month period at Fort Hood in Texas. When she prepares her federal and state income tax returns for 2013, in early 2014, she can deduct all of her Army active duty pay from her FAGI, on her West Virginia tax return. She must pay federal income tax on that Army pay, but not West Virginia state income tax.

4. David Davidson

David Davidson is a resident of West Virginia and an enlisted member of the Marine Corps Reserve. He is called to active duty and deployed to Afghanistan, from February 1 to October 31, 2013. Under federal law, his Marine Corps pay has already been deducted from his FAGI—because he was serving in an area where hazardous duty pay is awarded. The new West Virginia law does not apply, because this active duty pay has already been excluded.

5. Felix Frankel

Felix Frankel is a resident of West Virginia and a Lieutenant Commander in the Coast Guard Reserve. He is called to active duty for nine months, from July 1, 2013 to March 31, 2014, and he serves in Louisiana. The new West Virginia provision does not affect his 2013 state income tax liability, because he has not been released from active duty in 2013. When he files his 2014 income tax returns in early 2015, he will be able to shield his Coast Guard active duty pay for January-March 2014 from West Virginia state income tax.

6. Erica Evans

Erica Evans is a career officer in the United States Public Health Service (PHS) and is assigned to a PHS medical facility at a federal prison in West Virginia. Although she originally came to West Virginia for this assignment, she has become a West Virginia domiciliary. She has been voting in West Virginia and has been paying West Virginia state income tax on her PHS salary. She expects to retire from the PHS commissioned corps on September 30, 2013 and to remain in West Virginia.

This new provision does not benefit Erica because she is not serving in the *armed forces of the United States*. West Virginia law does not define "armed forces" so we must look to federal law. Section 101(a)(4) of title 10 of the United States Code defines the term "armed forces" and section 101(a)(5) defines "uniformed services." The

² The result would be the same if she had volunteered.

armed forces are the Army, Navy, Marine Corps, Air Force, and Coast Guard. The uniformed services are the five armed forces plus the commissioned corps of PHS and the commissioned corps of the National Oceanic and Atmospheric Administration (NOAA). The PHS commissioned corps is a uniformed service but not an armed force.

Some statutory benefits (federal and state) apply to all seven uniformed services, but a lot more benefits are limited to those who serve in the five armed forces. The West Virginia Legislature was under no federal legal imperative to include PHS and NOAA in this benefit.

ROA departments—please work on state issues.

Here at ROA headquarters, we have our hands full with the United States Congress and Executive Branch. We do not have the staff or resources to monitor (much less to affect) what is going on in 50 state capitals. Most of the laws that directly affect the uniformed services are federal laws, but there are certainly important issues addressed in the state legislatures that affect the rights and interests of those who serve our country in uniform. I invite the reader's attention to Law Review 16 (September 2000), titled "Department Involvement in State Issues."

We need ROA's state departments and local chapters to contact state legislators and urge them to keep in mind the interests of those who serve our country in uniform, whether Active, National Guard, or Reserve. If you have time to get involved in this effort, please call me at 800-809-9448, extension 730, or e-mail me at SWright@roa.org.

It has now been 40 years since Congress abolished the draft in 1973. With each passing year, a greater and greater percentage of state legislators (as well as members of the United States Senate and House of Representatives) have never served in the uniformed services. We need to educate these folks about the issues that affect those who serve in uniform.