

LAW REVIEW¹ 132

Taxability of Employer Payments While You Are Mobilized

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6.0 – Military Service and Tax Law

Q: I am a captain in the Army Reserve, and I have been recalled to active duty. I am currently serving in Iraq. I make less money on active duty (even with the hazardous duty pay included) than I normally make at my civilian job, but my employer has most graciously agreed to make up the difference in pay. Now, under a new IRS policy as set forth in Revenue Ruling 69-136, I do not have to pay federal income tax on these differential payments from my civilian employer. This is a great deal. Please pass along this good news.

A: Like so much of what you read on the Internet, this one is too good to be true. In the first place, Revenue Ruling 69-136 is hardly new. It was promulgated in 1969, the year that I graduated from high school. But more importantly, you are reading far too much into that ancient Revenue Ruling.

¹I invite the reader's attention to www.roa.org/lawcenter. You will find more than 2300 "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 specific topics. The Reserve Officers Association, now doing business as the Reserve Organization of America (ROA), initiated this column in 1997. I am the author of more than 90% of the articles, but we are always looking for "other than Sam" articles by other lawyers.

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 45 years, I have collaborated 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 38 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 <mailto:swright@roa.org>.

Revenue Ruling 69-136 provides that such payments from the civilian employer do not constitute “salary” or “wages” as those terms are construed by the Internal Revenue Service (IRS). That means that your civilian employer is not required to *withhold* federal income tax, Social Security, and Medicare from the payments that the employer is making to you while you are on active duty. *These payments do constitute income to you.* You are required to report them to the IRS and to pay taxes on them.

Under the Internal Revenue Code, the concept of “taxable income” is very broad. It includes salary and wages, but it also includes many other things, including self- employment income, interest, etc. If you pay me \$500 to draft a will for you, that is not salary or wages, because you are not my employer. But I must report the \$500 and pay tax on it.

Sorry to be the bearer of bad news. There is an important lesson to be learned here. Please do not rely on scuttlebutt or advice from “sea lawyers” (as we call them in the Navy). Because you are on active duty, you are eligible for military legal assistance, from a real military lawyer. To find a legal assistance office nearby, go <https://legalassistance.law.af.mil/>. That Web site will refer you to the nearest military (not necessarily Air Force) legal assistance office. Because you are in Iraq, perhaps your spouse can visit a military legal assistance office. She (or he) is also eligible for military legal assistance while you are on active duty. Good luck, and you be careful out there.