

## **Section 12736 Overrides State “No Double Dipping” Laws**

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Update on Sam Wright

### **3.0—Reserve retirement and civilian employment**

**Q: I am the Coast Guard Reservist who has asked the questions in the last several “Law Review” articles. I was on active duty in the Regular Coast Guard for exactly ten years, from September 2005 to September 2015. After I left active duty, I affiliated with the Coast Guard Reserve (USCGR). I plan to participate in the USCGR for at least ten years, in order to qualify for the Reserve Component (RC) retirement benefit at age 60.**

**After I left active duty, I searched for a civilian job, and I was hired in January 2016 by our state government. Our state has a law that permits new state employees to purchase up to five years of “military credit” for the state employee retirement system, based on active military service performed before the start of the individual’s career as a state employee. Right after I began my state job, I completed and submitted the form to request to purchase state employee retirement credit for five years of active Coast Guard service prior to the start of my state career, and I tendered a check for the required deposit.**

**The personnel office returned my check and rejected my application. The personnel director told me that, under state law, I am ineligible to purchase state retirement credit for the active duty period because I am using that same active duty period to qualify for the RC retirement benefit. The personnel director told me that if I use the same active duty period for federal military retirement purposes and for state employee retirement purposes, this amounts to “double dipping” and that the state law forbids such double dipping.**

**Is my state’s “no double dipping” rule consistent with federal law?**

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<sup>1</sup> Please see [www.servicemembers-lawcenter.org](http://www.servicemembers-lawcenter.org). You will find more than 1500 “Law Review” articles about 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. The Reserve Officers Association (ROA) initiated this column in 1997. I am the author of more than 1300 of the articles.

<sup>2</sup> BA 1973 Northwestern University, JD 1976 University of Houston Law School, LLM 1980 Georgetown University Law Center. 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, and for six years (2009-15) I served as the Director of the Service Members Law Center (SMLC), as a full-time employee of ROA. Please see Law Review 15052 (June 2015) concerning the accomplishments of the SMLC. Although I am no longer employed by ROA, I have continued the work of the SMLC on a part-time voluntary basis. You can reach me through ROA at (800) 809-9448, extension 730, or. [SWright@roa.org](mailto:SWright@roa.org).

**A:** No. Your state’s “no double dipping” rule directly conflicts with section 12736 of title 10 of the United States Code. That section provides:

No period of service included wholly or partly in determining a person’s right to, or the amount of, retired pay *under this chapter* may be excluded in determining his eligibility for any annuity, pension, or old-age benefit *under any other law*, on account of civilian employment by the United States *or otherwise*, or in determining the amount payable under that law, if that service is otherwise properly credited under it.<sup>3</sup>

Under Article VI, Clause 2 of the United States Constitution (commonly called the “Supremacy Clause”), a federal statute trumps a state statute or even a state constitution. Any state statute or local ordinance that violates section 12736 is invalid under our Constitution. The United States Court of Appeals for the 9<sup>th</sup> Circuit<sup>4</sup> held that section 12736 means what it says and that it invalidates any state law that purports to deny an employee the opportunity to purchase or otherwise obtain credit for state retirement purposes for a period of military service on the ground that the person is also receiving RC retirement for that same period of service.<sup>5</sup>

At the headquarters of the Reserve Officers Association (ROA), we have displayed the pen that President Harry S. Truman<sup>6</sup> used to sign the 1948 law that created the RC retirement system. The language of section 12736 has been in this law since 1948. The purpose of the RC retirement system is to give veterans of active military service an incentive to affiliate with one of the Reserve Components after leaving active duty and to remain active in the RC for 20 years or more. Events quickly proved the worth of the RC retirement system. In June 1950, North Korea invaded South Korea and set off the Korean War. Tens of thousands of combat-experienced World War II veterans were available and were called to the colors to defend freedom on the Korean Peninsula. The RC retirement system was and is one of the pillars of the “Total Force Policy” under which our country depends more than ever on National Guard and Reserve personnel for essential national defense readiness.<sup>7</sup>

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<sup>3</sup> 10 U.S.C. 12736 (emphasis supplied). “This chapter” refers to sections 12731 through 12741 of title 10 of the United States Code. If the individual has received regular military retirement credit for the period of service, based on active military service for 20 years or more, denying the person credit for the same period of active duty under a state retirement system does not violate federal law.

<sup>4</sup> The 9<sup>th</sup> Circuit is the federal appellate court that sits in San Francisco and hears appeals from district courts in California and several other western states.

<sup>5</sup> *Cantwell v. County of San Mateo*, 631 F.2d 631 (9<sup>th</sup> Cir.), *cert. denied*, 450 U.S. 998 (1980). *See also Almeida v. Retirement Board of the Rhode Island Employees Retirement System*, 116 F. Supp. 2d 269 (D.R.I. 2000); *Dailey v. Public School Retirement System*, 707 F. Supp. 1087 (E.D. Mo. 1989); *Arrington v. Florida*, 1985 U.S. Dist. LEXIS 14131 (N.D. Fla. Nov. 5, 1985).

<sup>6</sup> Captain Harry S. Truman, a veteran of the “Great War” (as World War I was then known), was one of the founders of ROA in 1922. As President, in 1950, he signed our congressional charter.

<sup>7</sup> Almost one million RC personnel have been called to the colors since the terrorist attacks of 9/11/2001, the “date which will live in infamy” for our time.

The point of section 12736 is that no federal agency, no state or local government, and no private employer should be permitted to undo the incentive that Congress has created through the RC retirement system. If a civilian employer is permitted to deny an employee or potential employee a valuable benefit based on the employee's choice to affiliate with a Reserve Component after leaving active duty, the incentive effect of the RC retirement system is thereby negated. The purpose and effect of section 12736 are essential, now more than ever.