

Reservists Called to Active Duty under 10 U.S.C. 12304b Are Not Eligible for Differential Pay as Federal Civilian Employees

By Captain Samuel F. Wright, JAGC, USN (Ret.)²

2.0—Paid leave for government employees who are Reserve Component members

Q: I am a Sergeant (E-5) in the Army Reserve (USAR) and a GS-11 employee of a federal agency. In my USAR capacity, I am being involuntarily recalled to active duty (with my USAR unit) under section 12304b of title 10 of the United States Code (10 U.S.C. 12304b). I will likely be on active duty, and away from my GS-11 job, for almost a year.

My E-5 pay on active duty is substantially less than my GS-11 pay. I have heard that federal civilian employees who are involuntarily called to active duty are entitled to differential pay from their federal agency employers, when their active duty pay is less than their federal civilian pay. I inquired of my agency's personnel office about receiving differential pay during this upcoming involuntary active duty period. The agency's personnel director told me that I am not eligible for differential pay because my activation orders cite section 12304b of title 10. Is the personnel director correct?

A: Yes. Unfortunately, under current law Reserve Component members called to active duty under section 12304b are not entitled to differential pay. A statutory amendment is necessary to make them eligible. I have brought this issue to the attention of Lieutenant Colonel Susan Lukas, ROA's Legislative Director. ROA will work with other military associations to get Congress to enact such an amendment during the upcoming 115th Congress.

¹ We invite the reader's attention to www.servicemembers-lawcenter.org. You will find more than 1500 "Law Review" articles about military voting rights, reemployment rights, and other military-legal topics, 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. Captain Wright is the author of more than 1300 of the articles.

² Samuel F. Wright received his BA in 1973 from Northwestern University, his JD (law degree) in 1976 from the University of Houston, and his LLM (advanced law degree) in 1980 from Georgetown University. He served on active duty and in the Navy Reserve as a Judge Advocate General's Corps officer and retired in 2007. He is a life member of ROA. For six years (June 2009 through May 2015), he was the Director of ROA's 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. Captain Wright has continued the work of the SMLC on a part-time basis, as a volunteer and ROA member. You can reach him at (800) 809-9448, ext. 730, or SWright@roa.org.

Section 5538(a) of title 5 of the United States Code requires federal agencies to pay differential pay to certain federal employees who leave their federal civilian jobs for military service:

An employee [of the Federal Government] who is absent from a position of employment in order to perform active duty in the uniformed services pursuant to an order or call to active duty under a provision of law referred to in section 101(a)(13)(B) of title 10 [shall receive differential pay].³

Section 101(a)(13)(B) of title 10 is part of the definition of “contingency operation” as follows:

The term “contingency operation” means a military operation that-- ... (B) results in the call or order to, or retention on, active duty of members of uniformed services under section 688, 12301(a), 12302, 12304, 12304a, 12305, or 12406 of this title [title 10], chapter 15 of this title, section 712 of title 14 [pertaining to the Coast Guard], or any other provision of law during a war or during a national emergency declared by the President or Congress.⁴

On December 31, 2011, President Obama signed into law the National Defense Authorization Act (NDAA) for Fiscal Year 2012.⁵ This new law made many changes to title 10 (the part of the United States Code that deals with the armed forces), including adding two new title 10 sections that provide for *involuntary* call-up of Reserve Component (RC) personnel. These two sections are numbered 12304a and 12304b.⁶

The pertinent subsection of section 12304a is as follows:

When a Governor requests Federal assistance in responding to a major disaster or emergency ..., the Secretary of Defense may, *without the consent of the member affected*, order any unit, and any member not assigned to a unit, of the Army Reserve, Navy Reserve, Marine Corps Reserve, and Air Force Reserve to active duty for a continuous period of not more than 120 days to respond to the Governor’s request.⁷

³ 5 U.S.C. 5538(a).

⁴ 10 U.S.C. 101(a)(13)(B) (emphasis supplied).

⁵ Public Law 112-81, 125 Stat. 1394-95.

⁶ In title 10, like many titles, there is a “crowding” effect as Congress has added hundreds of new sections over the decades. Sections 12304a and 12304b are separate sections that come after section 12304 and before section 12305. Section 12304a should not be confused with section 12304(a), which is subsection (a) of section 12304.

⁷ 10 U.S.C. 12304a(a) (emphasis supplied). Members of the Army National Guard and Air National Guard have a dual federal-state status. In their state status, they can be and frequently are called to state active duty by the Governor for disasters and emergencies. Congress enacted section 12304a because it anticipated that there could be a huge disaster or emergency that overwhelms the resources of the National Guard, even with interstate cooperation. In that contingency, the Secretary of Defense can call members of the purely federal Reserve Components and deploy them to respond.

The pertinent subsection of section 12304b is as follows:

When the Secretary of a military department determines that it is necessary to augment the active forces *for a preplanned mission* in support of a combatant command, the Secretary may, subject to subsection (b), order any unit of the Selected Reserve ..., *without the consent of the members*, to active duty for not more than 365 days.⁸

We believe that RC members who are called to active duty involuntarily, and who are federal civilian employees, should receive differential pay under section 5538(a) of title 5, and this should include members called under section 12304b, like you. Unfortunately, Congress made a conscious choice to include section 12304a call-ups in the definition of “contingency operation” but to exclude section 12304b call-ups.⁹

Unfortunately, under current law you are not entitled to differential pay during your upcoming call to the colors. ROA will work with other military associations to try to persuade Congress to correct this inequity in the 115th Congress. It is most unlikely that Congress will amend the law in time for your upcoming service, and when Congress enacts a new law or amends a law it normally makes the changes prospective, not retroactive.

Thank you for your service to our country in the Army Reserve.

⁸ 10 U.S.C. 12304b(a) (emphasis supplied).

⁹ The apparent rationale for the distinction is that section 12304b is for preplanned missions, not unanticipated emergencies.