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**Reserve Component Opportunities for Individuals Leaving
Active Duty Short of Retirement Eligibility**

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1.2—USERRA forbids discrimination

9.0--Miscellaneous

Q: I was commissioned a Second Lieutenant in 2005, when I graduated from college, through the Army Reserve Officers Training Corps (ROTC). I have been on active duty continuously ever since, and it has always been my intention to remain on active duty until at least 2025, to qualify for a full military retirement. Now, because of the budget cuts and the drawdown, I am told that remaining on active duty for a full career is not in the cards for me. I will be leaving active duty as a Captain in May 2014, almost exactly nine years after I was commissioned. I have been told that I can salvage some retirement credit for my nine years of active duty by affiliating with the Army Reserve or Army National Guard after I leave active duty. Please tell me how the Reserve retirement system works.

A: The Reserve retirement system is governed by Chapter 1223 of title 10 of the United States Code, 10 U.S.C. 12731-12741. Here at the headquarters of the Reserve Officers Association (ROA), in the treasured Minuteman Memorial Building, we have the pen that President Harry S. Truman used to sign Public Law 80-810 on June 29, 1948. This is the law that created the Reserve retirement system.

Under chapter 1223, you are eligible for Reserve retirement benefits at age 60 if you have at least 20 “good years” for retirement purposes, and a good year is a year in which you have earned at least 50 retirement points. 10 U.S.C. 12732(a)(2). You earn one point for each day of active duty or active duty for training. 10 U.S.C. 12732(a)(2)(A)(i). Accordingly, you already have nine of the required 20 good years, because in each of the years between May 2005 and May 2014 you earned 365 or 366 points.

After you leave active duty and affiliate with a Reserve Component, you will receive 15 “gratuitous” points per year for affiliating and maintaining your affiliation. 10 U.S.C. 12732(a)(2)(C). You will also receive one point for each “drill” that you perform as an RC member, including a member of the Army National Guard or Air National Guard. 10 U.S.C. 12732(a)(2)(B). A typical drill is four hours, and a typical drill weekend earns you four points, for training eight hours on Saturday and eight hours on Sunday. Some RC units are expected to train Friday evening as well and earn five points for a drill weekend.

In the “good old days” before the terrorist attacks of September 11, 2001, a typical year for an RC member was about 75 points—15 gratuitous points, plus 48 drills, plus 12 days of annual training. But in the dozen years since our generation’s “date which will live in infamy” the burden on the individual RC member has increased exponentially. Almost 900,000 RC members have been called to the colors since September 2001 and more than 330,000 of them have been called up more than once.

When you reach the threshold of 20 good years, your service will send you a Notice of Eligibility (NOE), informing you that you are eligible for retirement benefits at age 60. At that point, you can retire, secure in the knowledge that you will start drawing your RC retired pay on your 60th birthday. The NOE is binding on the service, unless there is clear evidence that you obtained the NOE by fraudulent means. 10 U.S.C. 12738.

Let us assume that you meet the threshold of 20 good years—what are you entitled to at age 60? The formula is set forth at 10 U.S.C. 12739. The formula includes your total number of points earned during your entire career, including the nine years of active duty (approximately 3285 points) that you have already earned. The formula also includes the base pay of your military grade (O-4, O-5, O-6, etc.) that you attain. The base pay will be computed as of your 60th birthday, so that gives you some inflation protection for the time after you stop participating and before you turn 60.

You are not required to retire when you receive your NOE. I received my NOE in May 1993, but I kept participating until my mandatory retirement date of April 1, 2007 (30 years of commissioned service and pay grade O-6). By remaining active after receiving my NOE, I added greatly to my monthly retirement check, because after May 1993 I earned an additional 1500 retirement points and I was promoted from O-5 to O-6.

With a base of 3285 retirement points, it makes sense for you to affiliate with the Army Reserve or Army National Guard *if* you realistically intend to stick it out to the 20 good year point or beyond. To stay to 20, you will need to be promoted to Major (O-4). With nine years of active duty behind you, you are probably very competitive for Major *unless* there is some serious deficiency in your military record, like a seriously bad Officer Efficiency Report.

With the Iraq war over and Afghanistan winding down, the next 12 years will likely not be as burdensome on RC members as the last 12 have been, but *only the dead have seen the end of war*. The “weekend warrior” days of RC service generally limited to one weekend per month and two weeks of annual “summer camp” are likely gone forever.

You need to consider carefully your military career so far and you need to discuss this matter in detail with your family. If you can realistically expect to participate in the RC and attain 20 good years or more, it makes sense for you to affiliate with the Army Reserve or Army National Guard after you leave active duty in May 2014. If sticking around to the 20-year point is not realistic in your case, for whatever reason, then perhaps it is time to “stop throwing good money after bad” as my late father used to say.

Q: I have heard that RC members who have performed “contingency service” after January 28, 2008 can qualify to start receiving their RC retirement monthly checks prior to age 60. During the 2008-12 time period, I was on active duty in combat, in Iraq and Afghanistan, for more than 30 months. Could that service qualify me to start receiving my RC retirement checks prior to my 60th birthday?

A: No. The provision you are referring to entitles an individual to early receipt of RC retirement pay based on contingency service “*as a member of the Ready Reserve.*” 10 U.S.C. 12731(f)(2)(A) (emphasis supplied). You performed 30 months of combat duty in 2008-12 as a member of the Active Component, not as a member of the Ready Reserve.

If you affiliate with the Army Reserve or Army National Guard after you leave active duty, you could conceivably have the opportunity to perform new contingency service, as a member of the Ready Reserve, and to qualify for early receipt of your RC retirement checks.

Q: What is the difference between the Army Reserve and the Army National Guard?

A: There are seven Reserve Components of the armed forces: the Army Reserve, Army National Guard, Air Force Reserve, Air National Guard, Navy Reserve, Marine Corps Reserve, and Coast Guard Reserve. If you affiliate with the Virginia Army National Guard, you will be joining two overlapping but legally distinct organizations, the *Virginia* Army National Guard and the Army National Guard *of the United States*.

As a member of the Virginia Army National Guard, you are subject to call-up by the Governor of Virginia for *state active duty* for state emergencies, like fires, floods, riots, etc. During periods of state active duty, you will be paid by the state and not by the Federal Government, and you will not receive RC retirement points for any state active duty that you perform.

The Army National Guard consists largely of combat units (infantry, armor, etc.), while the Army Reserve consists largely of combat support and combat service support. Depending on your military specialty during your nine years of active duty, you may have better opportunities in the Army Reserve or in the Army National Guard. It is also possible for you to go back and forth between the Army Reserve and Army National Guard, in order to improve your promotion opportunities or to find a drill site that is closer to your home.

Q: I want to affiliate with the Army Reserve or Army National Guard after I leave active duty, but I am concerned that my active RC participation will make it much more difficult for me to find a good full-time civilian job. What can you tell me about that?

A: It is entirely possible that civilian employers will be reluctant to hire you because they believe that it is likely that you will be called back to active duty. Such discrimination is unlawful under section 4311(a) of the Uniformed Services Employment and Reemployment Rights Act (USERRA), which provides as follows:

§ 4311. Discrimination against persons who serve in the uniformed services and acts of reprisal prohibited

(a) A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or *has an obligation to perform service* in a uniformed service shall not be denied *initial employment*, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation.

38 U.S.C. 4311(a) (emphasis supplied).

It would be unlawful for an employer to deny you initial employment based on your obligation to perform uniformed service, as an RC member, but such discrimination happens every day and can be difficult to prove, if the employer is clever and subtle. I invite your attention to www.servicemembers-lawcenter.org. You will find almost 1,000 “Law Review” articles about laws that are especially pertinent to those who serve our country in uniform. More than 750 articles are about USERRA. 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.