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**Under Current Law, not every Reservist Is a Veteran,
But that Should Change**

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More than 16 million men and women, including our late fathers, served on active duty in the armed forces⁴ during World War II, and the vast majority of them were honorably discharged after victory was achieved. President Harry S. Truman⁵ and congressional leaders recognized that World War II was not “the war to end all wars” and that some of the men and women who had served during the war might be needed again. On June 29, 1948, President Truman signed legislation⁶ that created the Reserve Retirement System, enabling a person serving in the Reserve Components (RC)⁷ to earn retirement benefits at age 60⁸ based on a combination of active duty and active duty for training (annual training) and inactive duty training (drills, usually on weekends). The RC retirement system and other incentives made it possible to build and maintain the seven Reserve Components and to persuade the members of those Components to engage in periodic training to maintain their readiness. Just two years later

¹ We invite the reader's attention to www.servicemembers-lawcenter.org. You will find more than 1,300 “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), and other laws that are especially pertinent to those who serve our country in uniform. You will also find 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, and we add new articles each week.

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⁴ There are five armed forces: the Army, Navy, Marine Corps, Air Force, and Coast Guard. 10 U.S.C. 101(a)(4). The Air Force as a separate service did not exist until 1947.

⁵ As an Officers Reserve Corps Captain in 1922, Harry S. Truman was one of the founders of ROA. As President, he signed our Congressional Charter (Public Law 81-595) on June 30, 1950, which was just five days after the start of the Korean War.

⁶ Public Law 80-810.

⁷ There are seven Reserve Components: the Army National Guard, the Army Reserve, the Air National Guard, the Air Force Reserve, the Navy Reserve, the Marine Corps Reserve, and the Coast Guard Reserve.

⁸ Under legislation signed into law on January 28, 2008, an RC member who has performed “contingency service” after that date can qualify for the RC retirement benefit some months prior to his or her 60th birthday. Please see Law Review 15008 (January 2015).

(June 25, 1950), North Korea invaded South Korea and set off the Korean War, and 857,877 RC members were called to the colors for that 1950-53 conflict.⁹

After the end of the Korean War, the RC came to be considered the “strategic reserve” that was available only for a major worldwide conflict akin to World War III, which thankfully never happened. Only 37,643 RC members were called up for the Vietnam War.¹⁰ The transformation from the Strategic Reserve (available only for World War III) to the Operational Reserve (routinely called up for intermediate military operations) began in August 1990, when Saddam Hussein’s Iraq invaded and occupied Kuwait and threatened Saudi Arabia, and President George H.W. Bush drew “a line in the sand” to protect Saudi Arabia and liberate Kuwait. As part of his forceful response to the tyrant’s aggression, he called up 238,729 RC members for Operation Desert Shield/Storm in 1990-91.¹¹

The transformation from strategic to operational status of the RC was completed after the terrorist attacks of September 11, 2001, the “date which will live in infamy” for our time. Since that fateful day, 906,587 RC members have supported Operation Noble Eagle, Operation Enduring Freedom, Operation Iraqi Freedom, and Operation New Dawn.¹²

The relevant provisions of Title 5 (Government Organization and Employees) and Title 38 (Veterans Benefits) of the United States Code were drafted and enacted during the Strategic Reserve era. Important benefits are limited to those who serve in “*active* military, naval, or air service” and these laws seem to draw a distinction between persons who serve in the *Active* Component (AC) and those who serve in the *Reserve* Component (RC), thereby creating a class distinction.

Persons who serve in the RC are often times treated as second-class citizens, based on the presumption that their service is limited to “one weekend per month and two weeks in the summer.” This presumption was never entirely accurate and fair, and it is certainly inaccurate and unfair in the U.S. military after September 11, 2001. It is time to reconsider the Title 5 and Title 38 provisions and for some of them to be rewritten so that the law fully recognizes the Reserve has become a part-time active force.

Qualifying as a veteran for title 38 purposes generally

Section 101 is the definitions section of Title 38. Section 101(2) defines “veteran” as follows: “The term ‘veteran’ means a person who served in the *active* military, naval, or air service, and

⁹ Lawrence Kapp, “Involuntary Reserve Activations for U.S. Military Operations since World War II,” CRS Report dated August 14, 2000 (hereinafter “Kapp Report”).

¹⁰ Kapp Report.

¹¹ Kapp Report.

¹² This figure comes from a weekly report prepared by the Defense Manpower Data Center, and this report is dated March 17, 2015.

who was discharged under conditions other than dishonorable.”¹³ Section 101(24) defines “active military, naval, or air service” as follows:

(24) The term "active military, naval, or air service" includes--

- (A) active duty;
- (B) any period of active duty for training *during which the individual concerned was disabled or died from a disease or injury incurred or aggravated in line of duty*; and
- (C) any period of inactive duty training *during which the individual concerned was disabled or died--*
 - (i) from an injury incurred or aggravated in line of duty; or
 - (ii) from an acute myocardial infarction, a cardiac arrest, or a cerebrovascular accident occurring during such training.¹⁴

Section 101(21) defines “active duty” as: “The term ‘active duty’ means—(A) full-time duty in the Armed Forces, *other than active duty for training*.”¹⁵ Section 101(22) defines the term “active duty for training” as follows:

(22) The term "active duty for training" means--

- (A) full-time duty in the Armed Forces performed by Reserves *for training purposes*;
- (B) full-time duty for training purposes performed as a commissioned officer of the Reserve Corps of the Public Health Service (i) on or after July 29, 1945, or (ii) before that date under circumstances affording entitlement to "full military benefits", or (iii) at any time, for the purposes of chapter 13 of this title;
- (C) in the case of members of the National Guard or Air National Guard of any State, full-time duty under section 316, 502, 503, 504, or 505 of title 32, or the prior corresponding provisions of law; and
- (D) duty performed by a member of a Senior Reserve Officers' Training Corps program when ordered to such duty for the purpose of training or a practice cruise under chapter 103 of title 10 for a period of not less than four weeks and which must be completed by the member before the member is commissioned; and
- (E) authorized travel to or from such duty.

The term does not include duty performed as a temporary member of the Coast Guard Reserve.¹⁶

Section 101(23) defines the term “inactive duty training” as follows:

(23) The term "inactive duty training" means--

- (A) duty (other than full-time duty) prescribed for Reserves (including commissioned officers of the Reserve Corps of the Public Health Service) by the Secretary concerned under section

¹³ 38 U.S.C. 101(2) (emphasis supplied).

¹⁴ 38 U.S.C. 101(24) (emphasis supplied).

¹⁵ 38 U.S.C. 101(21)(A) (emphasis supplied).

¹⁶ 38 U.S.C. 101(22) (emphasis supplied).

206 of title 37 or any other provision of law;

(B) special additional duties authorized for Reserves (including commissioned officers of the Reserve Corps of the Public Health Service) by an authority designated by the Secretary concerned and performed by them on a voluntary basis in connection with the prescribed training or maintenance activities of the units to which they are assigned; and

(C) training (other than active duty for training) by a member of, or applicant for membership (as defined in section 8140(g) of title 5) in, the Senior Reserve Officers' Training Corps prescribed under chapter 103 of title 10.

In the case of a member of the National Guard or Air National Guard of any State, such term means duty (other than full-time duty) under sections 316, 502, 503, 504, or 505 of title 32, or the prior corresponding provisions of law. Such term does not include (i) work or study performed in connection with correspondence courses, (ii) attendance at an educational institution in an inactive status, or (iii) duty performed as a temporary member of the Coast Guard Reserve.¹⁷

Under these provisions, a person must have performed *active duty* to qualify as a veteran. Service on active duty for training or inactive duty training qualifies a person for “veteran” status for purposes of benefits administered by the United States Department of Veterans Affairs (VA) only if the person suffered death or disability during such training duty.

ROA proposes that section 101(24) of title 38 be amended to read as follows:

(24) The term "active military, naval, or air service" includes--

(A) active duty;

(B) any period of active duty for training; and

(C) any period of inactive duty training *during which the individual concerned was disabled or died--*

(i) from an injury incurred or aggravated in line of duty; or

(ii) from an acute myocardial infarction, a cardiac arrest, or a cerebrovascular accident occurring during such training.¹⁸

This amendment would delete “*during which the individual concerned was disabled or died from a disease or injury incurred or aggravated in line of duty*” from section 101(24)(B), thus making active duty for training sufficient to qualify a person for “veteran” status without regard to whether the person suffered death or disability during such duty.

Qualifying as a veteran for purposes of affirmative action in employment by federal contractors

¹⁷ 38 U.S.C. 101(23).

¹⁸ 38 U.S.C. 101(24) (emphasis supplied).

Section 4212 of title 38 of the United States Code requires federal contractors and subcontractors to “take affirmative action to employ and advance in employment qualified covered veterans.” Here is the entire text of section 4212:

§ 4212. Veterans' employment emphasis under Federal contracts

(a)

(1) Any contract in the amount of \$ 100,000 or more entered into by any department or agency of the United States for the procurement of personal property and nonpersonal services (including construction) for the United States, shall contain a provision requiring that the party contracting with the United States take affirmative action to employ and advance in employment qualified covered veterans. This section applies to any subcontract in the amount of \$ 100,000 or more entered into by a prime contractor in carrying out any such contract.

(2) In addition to requiring affirmative action to employ such qualified covered veterans under such contracts and subcontracts and in order to promote the implementation of such requirement, the Secretary of Labor shall prescribe regulations requiring that--

(A) each such contractor for each such contract shall immediately list all of its employment openings with the appropriate employment service delivery system (as defined in section 4101(7) of this title), and may also list such openings with one-stop career centers under the Workforce Investment Act of 1998, other appropriate service delivery points, or America's Job Bank (or any additional or subsequent national electronic job bank established by the Department of Labor), except that the contractor may exclude openings for executive and senior management positions and positions which are to be filled from within the contractor's organization and positions lasting three days or less;

(B) each such employment service delivery system shall give such qualified covered veterans priority in referral to such employment openings; and

(C) each such employment service delivery system shall provide a list of such employment openings to States, political subdivisions of States, or any private entities or organizations under contract to carry out employment, training, and placement services under chapter 41 of this title.

(3) *In this section:*

(A) *The term "covered veteran" means any of the following veterans:*

(i) *Disabled veterans.*

(ii) *Veterans who served on active duty in the Armed Forces during a war or in a campaign or expedition for which a campaign badge has been authorized.*

(iii) *Veterans who, while serving on active duty in the Armed Forces, participated in a United States military operation for which an Armed Forces service medal was awarded pursuant to Executive Order No. 12985.*

(iv) *Recently separated veterans.*

(B) The term "qualified", with respect to an employment position, means having the ability to perform the essential functions of the position with or without reasonable accommodation for an individual with a disability.

(b) If any veteran covered by the first sentence of subsection (a) believes any contractor of the

United States has failed to comply or refuses to comply with the provisions of the contractor's contract relating to the employment of veterans, the veteran may file a complaint with the Secretary of Labor, who shall promptly investigate such complaint and take appropriate action in accordance with the terms of the contract and applicable laws and regulations.

(c) The Secretary of Labor shall include as part of the annual report required by section 4107(c) of this title the number of complaints filed pursuant to subsection (b) of this section, the actions taken thereon and the resolutions thereof. Such report shall also include the number of contractors listing employment openings, the nature, types, and number of positions listed and the number of veterans receiving priority pursuant to subsection (a)(2)(B).

(d)

(1) Each contractor to whom subsection (a) applies shall, in accordance with regulations which the Secretary of Labor shall prescribe, report at least annually to the Secretary of Labor on--

(A) the number of employees in the workforce of such contractor, by job category and hiring location, and the number of such employees, by job category and hiring location, who are qualified covered veterans;

(B) the total number of new employees hired by the contractor during the period covered by the report and the number of such employees who are qualified covered veterans; and

(C) the maximum number and the minimum number of employees of such contractor during the period covered by the report.

(2) The Secretary of Labor shall ensure that the administration of the reporting requirement under paragraph (1) is coordinated with respect to any requirement for the contractor to make any other report to the Secretary of Labor.

(3) The Secretary of Labor shall establish and maintain an Internet website on which the Secretary of Labor shall publicly disclose the information reported to the Secretary of Labor by contractors under paragraph (1).

38 U.S.C. 4212 (emphasis supplied).

Under section 4212 as currently written, only the following categories qualify as "covered veterans" who are entitled to affirmative action:

(i) Disabled veterans.

(ii) Veterans who served on active duty in the Armed Forces during a war or in a campaign or expedition for which a campaign badge has been authorized.

(iii) Veterans who, while serving on active duty in the Armed Forces, participated in a United States military operation for which an Armed Forces service medal was awarded pursuant to Executive Order No. 12985.

(iv) Recently separated veterans.

ROA proposes to amend section 4212(a)(3) by adding a new subsection (v) to read as follows:

“(v) Persons who are currently serving as members of Reserve Components of the armed forces.”

This change would add an additional category of persons who would be entitled to affirmative action in employment by federal contractors and subcontractors.

Under section 4311 of the Uniformed Services Employment and Reemployment Rights Act (USERRA), it is unlawful for any employer (federal, state, local, or private sector) to discriminate against any person in initial employment, retention in employment, or a promotion or benefit of employment on the basis of the person’s membership in a uniformed service (including a Reserve Component), application to join a uniformed service, performance of uniformed service, or application or obligation to perform service. For USERRA purposes, an employer’s status as a federal contractor is irrelevant—federal contractors do not have additional obligations under USERRA but neither are they exempted from USERRA’s requirements upon employers generally.

USERRA notwithstanding, many employers are tempted to discriminate against persons who currently serve in the Reserve Components. Employing a Reserve Component member means having to accommodate the inconvenience of the employee absenting himself or herself from the civilian job for inactive duty training, active duty for training, and occasional voluntary or involuntary active duty. Employers are tempted to avoid this inconvenience by discriminating against these persons in initial employment and by firing those who are already on the payroll.

The amendment that we propose would give the Reserve Component member another tool to prevent discrimination and to find suitable civilian employment. Reserve Component members are a great deal for the taxpayer, because they are paid only when they are on active duty or when they are training for the possibility of being recalled to active duty. Almost half of our nation’s military personnel, available for service in an emergency, are currently serving in the Reserve Components, rather than on full-time active duty. But if these people are to be available to serve in this way, they must be able to obtain and hold civilian jobs, to support themselves and their families during the time between military assignments, which is most of the time.

Qualifying for veterans’ preference in federal employment

Section 2108 of title 5 of the United States Code sets forth the qualifications that a person must meet to qualify for veterans’ preference in federal civilian employment. Here is the entire text of that section:

§ 2108. Veteran; disabled veteran; preference eligible

For the purpose of this title--

(1) "veteran" means an individual who--

(A) served on active duty in the armed forces during a war, in a campaign or expedition for which a campaign badge has been authorized, or during the period beginning April 28, 1952, and ending July 1, 1955;

(B) served on active duty as defined by section 101(21) of title 38 at any time in the armed forces for a period of more than 180 *consecutive* days any part of which occurred after January 31, 1955, and before the October 15, 1976, not including service under section 12103(d) of title 10 pursuant to an enlistment in the Army National Guard or the Air National Guard or as a Reserve for service in the Army Reserve, Navy Reserve, Air Force Reserve, Marine Corps Reserve, or Coast Guard Reserve;

(C) served on active duty as defined by section 101(21) of title 38 in the armed forces during the period beginning on August 2, 1990, and ending on January 2, 1992; or

(D) served on active duty as defined by section 101(21) of title 38 at any time in the armed forces for a period of more than 180 *consecutive* days any part of which occurred during the period beginning on September 11, 2001, and ending on the date prescribed by Presidential proclamation or by law as the last date of Operation Iraqi Freedom; and, except as provided under section 2108a, who has been discharged or released from active duty in the armed forces under honorable conditions;

(2) "disabled veteran" means an individual who has served on active duty in the armed forces, (except as provided under section 2108a, has been separated therefrom under honorable conditions, and had established the present existence of a service-connected disability or is receiving compensation, disability retirement benefits, or pension because of a public statute administered by the Department of Veterans Affairs or a military department;

(3) "preference eligible" means, except as provided in paragraph (4) of this section or section 2108a(c)--

(A) a veteran as defined by paragraph (1)(A) of this section;

(B) a veteran as defined by paragraph (1)(B), (C), or (D) of this section;

(C) a disabled veteran;

(D) the unmarried widow or widower of a veteran as defined by paragraph (1)(A) of this section;

(E) the wife or husband of a service-connected disabled veteran if the veteran has been unable to qualify for any appointment in the civil service or in the government of the District of Columbia;

(F) the mother of an individual who lost his life under honorable conditions while serving in the armed forces during a period named by paragraph (1)(A) of this section, if--

(i) her husband is totally and permanently disabled;

(ii) she is widowed, divorced, or separated from the father and has not remarried; or

(iii) she has remarried but is widowed, divorced, or legally separated from her husband

when preference is claimed;

(G) the mother of a service-connected permanently and totally disabled veteran, if--

(i) her husband is totally and permanently disabled;

(ii) she is widowed, divorced, or separated from the father and has not remarried; or

(iii) she has remarried but is widowed, divorced, or legally separated from her husband

when preference is claimed; and

(H) a veteran who was discharged or released from a period of active duty by reason of a sole survivorship discharge (as that term is defined in section 1174(i) of title 10);

but does not include applicants for, or members of, the Senior Executive Service, the Defense Intelligence Senior Executive Service, the Senior Cryptologic Executive Service, or the Federal Bureau of Investigation and Drug Enforcement Administration Senior Executive Service;

(4) except for the purposes of chapters 43 and 75 of this title, "preference eligible" does not include a retired member of the armed forces unless--

(A) the individual is a disabled veteran; or

(B) the individual retired below the rank of major or its equivalent; and,

(5) "retired member of the armed forces" means a member or former member of the armed forces who is entitled, under statute, to retired, retirement, or retainer pay on account of service as a member.¹⁹

Under section 2108 as currently written, a person must have served on active duty for more than 180 *consecutive* days, during one of the relevant time periods, to qualify for veterans' preference in federal civilian employment.

ROA proposes to amend 5 U.S.C. 2018, (1)(B) and (1)(D) to change "consecutive" to "cumulative" in each of the places where the word "consecutive" appears.

Some Reserve Component members (especially medical specialists) often serve many short tours of service, including service in combat zones like Iraq or Afghanistan. During the 1990-91 Persian Gulf War (Operation Desert Shield/Storm), some mobilized RC members were released from active duty after fewer than 180 days simply because the Iraqis surrendered in droves and the war was over much sooner than had been expected. Such a person should not lose out on a valuable benefit simply because no one period of service amounted to at least 181 days.

¹⁹ 5 U.S.C. 2108 (emphasis supplied).