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From: Jonathan Lee
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Subject: Waiver of Fees for Armed Forces Members
Legal Opinion 10-05

Question

What is the effect of the reauthorization of the federal Higher Education Opportunity Act on tuition rates for members of the armed forces on active duty, their spouses, and dependent children?

Background

On August 14, 2008, the federal government enacted the federal Higher Education Opportunity Act which reauthorized the Higher Education Act of 1965.

The federal Higher Education Opportunity Act (20 U.S.C. § 1001 et seq.; hereinafter “the Act”) has broadened the applicable situations in which a member of the armed forces and his or her dependents may receive the benefit of state resident status for purpose of college fees and tuition. The Act is intended to ensure that members of the armed forces do not lose any educational opportunity when called to active duty.

This federal law must be applied in concert with preexisting state law providing an exemption from nonresident fees and tuition for members of the armed forces and dependents. The benefit under both state and federal law depends on a determination that a member of the armed forces or a dependent is entitled to “resident classification.” This is sometimes referred to as a “military waiver,” but that term will not be used in this memorandum because it does not appear anywhere in the law. The questions examined below represent only a small sample of the questions that may arise from potential ambiguities between the Act and California law.

The relevant section of federal law is as follows:

“§ 1015d. In-State tuition rates for members of the armed forces on active duty, spouses, and dependent children

(a) Requirement

In the case of a member of the armed forces who is on active duty for a period of more than 30 days and whose domicile or permanent duty station is in a State that receives assistance under this chapter, such State shall not charge such member (or the spouse or dependent child of such member) tuition for attendance at a public institution of higher education in the State at a rate that is greater than the rate charged for residents of the State.

(b) Continuation

If a member of the armed forces (or the spouse or dependent child of a member) pays tuition at a public institution of higher education in a State at a rate determined by subsection (a), the provisions of subsection (a) shall continue to apply to such member, spouse, or dependent while continuously enrolled at that institution, notwithstanding a subsequent change in the permanent duty station of the member to a location outside the State.

(c) Effective date

This section shall take effect at each public institution of higher education in a State that receives assistance under this chapter for the first period of enrollment at such institution that begins after July 1, 2009.

(d) Definitions

In this section, the terms “armed forces” and “active duty for a period of more than 30 days” have the meanings given those terms in section 101 of Title 10.” (20 U.S.C. § 1015d.)

Several sections of the California Education Code also provide resident classification fees and tuition to active members of the armed forces and their dependents. Section 68074 deals with the dependents of members of the armed forces.

“(a) (1) An undergraduate student who is a natural or adopted child, stepchild, or spouse who is a dependent of a member of the armed forces of the United States stationed in this state on active duty shall be entitled to resident classification only for the purpose of determining the amount of tuition and fees.

(2) A student seeking a graduate degree who is a natural or adopted child, stepchild, or spouse who is a dependent of a member of the armed forces of the United States stationed in this state on active duty shall be entitled to resident classification only for the purpose of determining the amount of tuition and fees for no more than one academic year, and shall thereafter be subject to Article 5 (commencing with Section 68060).

(b) If that member of the armed forces of the United States, whose dependent natural or adopted child, stepchild, or spouse is in attendance at an institution, (1) is thereafter transferred on military orders to a place outside this state where the member continues to serve in the armed forces of the United States, or (2) is thereafter retired as an active

member of the armed forces of the United States, the student dependent shall not lose his or her resident classification until he or she has resided in the state the minimum time necessary to become a resident.”

Section 68075 specifically addresses members of the armed forces themselves.

“(a) An undergraduate student who is a member of the Armed Forces of the United States stationed in this state on active duty, except a member of the Armed Forces assigned for educational purposes to a state-supported institution of higher education, is entitled to resident classification only for the purpose of determining the amount of tuition and fees.

(b) A student seeking a graduate degree who is a member of the Armed Forces of the United States stationed in this state on active duty, except a member of the Armed Forces assigned for educational purposes to a state-supported institution of higher education, shall be entitled to resident classification only for the purpose of determining the amount of tuition and fees for no more than two academic years, and shall thereafter be subject to Article 5 (commencing with Section 68060).”

Section 68075.5 addresses resident classification following discharge.

“A student who was a member of the armed forces of the United States stationed in this state on active duty for more than one year immediately prior to being discharged from the armed forces is entitled to resident classification for the length of time he or she lives in this state after being discharged up to the minimum time necessary to become a resident.”

Analysis

In areas where state law and federal law conflict, the federal law supersedes the state law. If the federal law is silent on an issue, then state law applies. Below is a list of questions and answers to various questions related to the Act and its interaction with state law.

1. Under federal law, the benefit is not in effect unless a member of the armed forces has been on active duty for a period of more than 30 days while state law is silent on the matter. Are colleges required to verify that the active duty assignment will be for more than 30 days?

Generally, the answer to this question is no. California law allows for members of the armed forces and their dependents to receive resident classification regardless of the time period that member is on active duty. In this case, because there is no conflict between California state law and the federal law, the federal law acts as a “floor” by which state government can provide greater protection than federal law. Thus, in California, eligibility for the resident classification begins immediately upon being called into active duty.

Conceivably, a situation could arise where a member of the armed forces does not qualify for resident classification under state law and would under federal law. In that specific situation, a

college would need verification that the active duty assignment is for a period of more than 30 days.

2. Federal law provides that resident classification rates apply to members of the armed forces whose domicile or permanent duty station is in that state. Does this change the law for California community colleges?

Yes, this broadens the exemption because prior to the enactment of the Act, California law provided resident classification to active members of the military who are physically present in California under military orders along with their physically present dependents. The Act, however, eliminates this requirement. Resident classification can now also be established based on domicile or duty station.

Domicile is defined as a location where an individual has the intention of permanent or indefinite residence. A member of the armed forces who chooses to live in California, without any intention of moving to another state or returning to their previous domicile, would be considered to be domiciled in California. Simply stating that California is a domicile is not enough to establish domicile, however. In addition to other objective manifestations of intent as determined necessary by the district, a member of the armed forces would need to provide some evidence to demonstrate that they have established a legal, permanent home in California, such as owning a home or renting/leasing an apartment in California. Title 5 of the California Code of Regulations, section 54024(e) outlines some of the “objective manifestations” a member of the armed forces can show to demonstrate domicile within the state.

Permanent duty station is defined as the post of duty or official station to which a member of the armed forces is assigned or attached. A member of the armed forces assigned to a military base or installation in California would meet the requirements of having a permanent duty station in California.

The federal law would apply where a member of the armed forces has a permanent duty station in another state, but has retained domicile in California. That member of the armed forces and dependents (for purposes of this memorandum, dependents refers to both spouse and dependent children) would still retain the rights to resident classification, regardless of where they are physically residing. The California law requiring physical presence would not be controlling.

It should be noted that the benefit under federal law is extended to the member’s spouse and dependents. If a member of the armed forces has a domicile or permanent duty station in California, then the military member’s dependents would also qualify for the waiver, regardless of whether they are physically present in California.

3. Student “A” was born and raised in California before moving out of state with her spouse, where they have lived for the past several years. Student A’s spouse is on active duty out of state while Student A is no longer on active duty, but was before leaving the state. Student A and her spouse have a home on record in California and she has retained her California driver’s license. Student A is now taking online courses from out of state. Does she qualify for resident classification?

Yes. Student A and her spouse may be eligible for resident classification on two independent grounds under federal law. First, Student A can claim that the family still has domicile in California. Ownership of a home and retaining a California driver's license can be indicative, but not necessarily conclusive evidence of her intention of returning to California and retaining her domicile here. More facts would be needed to resolve the issue of Student A's domicile, which is usually determined at the local level.

Student A and her spouse may also qualify via title 20 United States Code section 1015d(b) of the Act. Section 1015d(b) states that a spouse who is continuously enrolled at an institution retains the benefit notwithstanding a subsequent change in permanent duty station to a location outside the state. Thus if, Student A has continuously been taking online courses at the community college since the move to another state, she still would retain her resident classification, and Student A's spouse would also retain resident classification. Furthermore, Student A's spouse would also be eligible if the spouse was continuously taking classes.

4. Student "B" has never lived in California. Her spouse will be stationed here later in the year. Prior to being stationed in California, both will be moving to California. She wants residency to be granted now so that she can enroll for the upcoming term, but has not arrived yet. Does she qualify for resident classification?

No. Neither the state nor the federal laws cover a future move by a member of the armed forces or dependents. Title 20 United States Code section 1015d(a) of the federal law requires that the member of the armed forces must have established domicile or permanent duty station in the State before the benefits of the federal law apply. As such, Student B does not currently qualify for resident classification under federal law. As there is no current physical presence in the state, Student B does not qualify for resident classification a under state law either.

5. Student "C" is a member of the armed forces assigned to California on active duty, and is later reassigned to a different state? Can Student C continue to enjoy the California residency exception if he continues his studies via distance education?

Yes, title 20 United States Code section 1015d(b) of the Act states that a member of the armed forces does not lose resident classification with a state if that member is continuously enrolled at that institution, regardless of a subsequent change in the location of the duty station. If Student C continuously enrolls in distance education classes at a California community college or other California higher education institution, and continues to do so after moving to another state due to a military transfer, then Student C retains resident classification in California.

6. Student "D" is a member of the armed forces stationed in California, but her family resides in another state or out of the country. Can dependents benefit from resident classification if they enroll in distance education courses from one of our colleges?

Yes, title 20 United State Code section 1015d(a) of the Act only requires that the member of the armed forces have a domicile or permanent duty station in the state. There is no parallel requirement for the dependents. In this case, the Act would allow for the dependents to claim

California resident classification if they were enroll in distance education courses from one of our colleges.

7. Student "E" is a member of the armed forces who originally obtained his military waiver from being stationed in California. Student E is reassigned to active duty in a neighboring state, but retains his domicile in California. Does Student E retain his resident classification?

Yes, Student E can retain resident classification if she remains continuously enrolled at a California college. Title 20 United States Code section 1015d(b) of the Act only requires the member of the armed forces to have paid tuition at the lowered rate prior to moving. In this situation, Student E had attained resident classification, then moved to a neighboring state. Continual enrollment is the only factor which will determine whether or not Student E and her dependents can retain the resident classification.

8. Student "F" is a dependent of a member of the armed forces who was transferred out of California more than one year ago. Is Student F entitled to resident classification?

Yes, Student F would be entitled to the resident classification. California law requires that a dependent of a member of the armed forces be provided a limited one-year resident classification once the member of the armed forces leaves the state. However, the federal law provides broader protection. Once a member of the armed forces is on active duty for more than 30 days and a domicile or permanent duty station exists within the state of California, that member, as well as his dependents, is entitled to resident classification for as long as a beneficiary remains continuously enrolled. As long as the Student F maintains continuous enrollment with the college, Student F would be entitled to resident classification.

9. Student "G" is a member of the armed forces assigned for educational purposes to a state's public supported institutions of higher education by the armed forces. Is Student G eligible for resident classification?

Yes, while state law would not provide resident classification under these circumstances, the purpose of the education is not relevant under federal law. The Act simply requires that the military member be on active duty for more than 30 days with a domicile or permanent duty station within the state of California. If these requirements are met, then a military member who is assigned here for educational purposes would still receive the resident classification despite California's law more limited coverage.

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