

**Number 50, September 2002:
USERRA COVERAGE FOR EXAMINATION TO DETERMINE FITNESS**

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Q: In "Law Review Number 45" (The Officer, June 2002), you included the definition by the Uniformed Services Employment and Reemployment Rights Act (USERRA) of "service in the uniformed services." The definition includes "a period [of time] for which a person is absent from a position of employment for the purpose of an examination to determine fitness of the person to perform any such [military] duty" [38 U.S.C. 4303(13)].

I am the commanding officer of a Naval Reserve Recruiting Area. A continuing frustration for our recruiters is the difficulty in arranging for examinations for our potential recruits at the Military Examination and Processing Station (MEPS). Some of the recruits have to travel quite some distance to the MEPS, and the MEPS is generally open only on regular workdays (Monday–Friday). Most of our potential recruits have civilian jobs, and the examination sessions generally must take place during a regular workday. Does USERRA give an employee the right to take time off from work to take an examination to determine his or her fitness to join the military?

A: Yes. The time required to take such an examination clearly falls within USERRA's definition of "service in the uniformed services." Thus, an employee has the right to time off (without pay), just like any other kind of service (inactive duty training, active duty for training, active duty, etc.). This applies to active duty as well as Reserve recruiting. The outcome of the examination does not matter. There are at least four possibilities.

The person could be found fit for service and could depart immediately for such service. In that case, the person will have re-employment rights upon completion of the service, if he or she meets the USERRA eligibility criteria (set forth in "Law Reviews" 5–7).

The person could be found fit for service and be scheduled to begin such service at some future date. In that case, the person is entitled to immediate reinstatement in the civilian job until he or she must leave for service. Upon completion of that service, the person is entitled to re-employment, if he or she meets the eligibility criteria.

The examination results could be ambiguous, and the person may be directed to return to the MEPS at some future date for further testing. In that case, the person is entitled to immediate reinstatement in the civilian job, and he or she is entitled to more time off for the retesting.

The person could be found unfit for service. In that case, the person is entitled to immediate reinstatement as a "rejectee."

Either the person to be examined, or an "appropriate officer" of the uniformed service (or both) must give prior oral or written notice to the civilian employer. See 38 U.S.C. 4312(a)(1). As the CO, you are an "appropriate officer." You should develop a form letter that your recruiters can send out in your name to the employers of potential recruits. You should give the civilian employers as much advance notice as possible. I suggest that you send these letters by certified mail (as well as e-mail) and retain proof of receipt.

After completing the examination, regardless of the outcome, the individual must report to the employer "not later than the beginning of the first regularly scheduled work period on the first full calendar day following the completion of the period of service and the expiration of eight hours after a period allowing for the safe transportation of the person from the place of that service [examination] to the person's residence" [38 U.S.C. 4312(e)(1)(A)(i), 4312(e)(1)(B)]. If reporting at the first regularly scheduled work period is "impossible or unreasonable through no fault of such person" (like an automobile accident on the return trip), the person must report for work "as soon as possible after the expiration of the eight-hour period" [38 U.S.C. 4312(e)(1)(A)(ii)]. This is the same deadline that applies after Reserve component training of fewer than 31 days.

Upon reporting for work, as required, the person must be reinstated immediately, and he or she is entitled to be treated, for seniority purposes, as if his or her period of employment had not been interrupted by such service (examination). Returning from a fitness examination is just like returning from any other kind of uniformed service. ROA

* Military title used for purposes of identification only. The views expressed in these articles are the personal views of the author and are not necessarily the views of the Department of the Navy, the Department of Defense, the Department of Defense or the U.S. government.