

**LAW REVIEW 719**  
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**Reemployment and Regulars: USERRA supports recruitment of older individuals  
to meet higher Active Duty end-strength authorities**

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CATEGORY: USERRA Coverage

In January 2007, the Department of Defense (DoD) announced that the Army's Active Duty end-strength will increase from 512,400 to 547,000 and the Marine Corps' Active Component will increase from 180,000 to 202,000. These increases are on top of the 25,000-personnel increase in the Army and the 5,000 increase in the Marine Corps directed in the Fiscal Year 2007 National Defense Authorization Act.

How will the services recruit for these new higher numbers when they have struggled to meet the lower numbers in recent years? Part of the answer is that the services will have to expand their recruiting forces and expand the target audience from the traditional audience of high school seniors and recent high school graduates. Recruiters will have to go after people in their 20s and 30s—people who already are in the civilian workforce.

It is important to note that, contrary to popular mis\_impression, the Uniformed Services Employment and Reemployment Rights Act (USERRA) is not limited to the National Guard and Reserve. This law gives reemployment rights to anyone who meets five simple eligibility criteria:

1. The person must have left a civilian position of employment for the purpose of performing voluntary or involuntary "service in the uniformed services";
2. The person must have given the civilian employer prior notice, orally or in writing;
3. The person must not have exceeded the cumulative five-year limit on the duration of the period or periods of uniformed service, relating to that employer relationship;
4. The person must have been released from the period of service, without having received a punitive (by court martial) or other-than-honorable discharge;
5. Finally, the person must have made a timely application for reemployment after release from service.

A person who enlists in the armed forces and serves on active duty for up to five years has the right to reemployment in the pre-service job after leaving active duty. Moreover, USERRA entitles the person to be treated, for seniority and pension purposes, as if he or she had been continuously employed in the civilian job during the entire military-related absence.

In some circumstances, the person can be on active duty for more than five years and still have reemployment rights. Section 4312(c)(1) of USERRA [38 U.S.C. 4312(c)(1)] exempts from the

five-year limit any service that is required, beyond five years, to meet the individual's initial active service obligation. If the person's active duty period is extended beyond five years because of a national emergency and a stop-loss order, the additional period would be exempted from the computation of the five-year limit under section 4312(c)(2) or 4312(c)(4)(A). See Law Review 201 at [www.roa.org](http://www.roa.org) for a summary of the five-year limit.

It should also be noted that USERRA's definition of "service in the uniformed services" in section 4303(13) expressly 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."

For example, let us take 35-year-old Joe Smith, who has visited an Army recruiter and wants to join the Army. The recruiter has scheduled Mr. Smith for an appointment at the nearest Military Examination and Processing Station (MEPS) for a Thursday (the MEPS is not open on weekends). The nearest MEPS is several hundred miles away, so the examination will require Mr. Smith to miss a full day of work at his civilian job, and maybe two days. Mr. Smith gives his employer notice, but the employer does not want to give him the time off for this purpose. Upon completion of the examination, regardless of the outcome, Mr. Smith is entitled to reemployment in his civilian job. Please see Law Review 50.