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## **Makeup Exam after Returning from Service**

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Q: I am employed as a heavy equipment operator for a construction company, and I am a member of the Army Reserve. I was called to active duty for more than a year. While I was gone, the employer established a testing program for heavy equipment operators. Those who did well on the test were promoted from "Heavy Equipment Operator 1" to "Heavy Equipment Operator 2" or maybe even "Heavy Equipment Operator 3." Those who were promoted received substantial pay raises.

When I returned from active duty, the employer reinstated me as a "Heavy Equipment Operator 1." If I had been given the opportunity to take the test, I think that I would have scored well and been promoted, but I missed the test because I was in Iraq at the time. This did not seem fair to me. I asked the employer to give me a makeup test, but he refused. He said that I must wait until the test is offered again, perhaps more than two years from now.

I have seen your Law Review articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA). What does USERRA say about my situation?

A: In Law Review 148 (November 2004), I explained that Section 4331(a) of USERRA gives the secretary of Labor rulemaking authority with respect to the application of USERRA to state and local governments and private employers. On September 20, 2004, the Department of Labor (DOL) published proposed USERRA regulations in the Federal Register. The 60-day notice and comment period expired on November 19. I am optimistic that DOL will publish the final regulations in the Code of Federal Regulations early in 2005.

Section 1002.193 of the proposed regulations contains some language that is very helpful to your argument: "If an opportunity for promotion, or eligibility for promotion, that you missed during service is based on a skills test or examination, then your employer should give you a reasonable amount of time to adjust to your employment position and then give you the skills test or examination. If you are successful on the makeup exam and, based on the results of that exam, there is a reasonable certainty that you would have been promoted, or made eligible for promotion, during the time that you served in the military, then your promotion or eligibility for promotion must be made effective as of the date it would have occurred had your employment not been interrupted by military service."

I could not have said it better myself! I hope that DOL will expedite the promulgation of the final regulations and that this language will be included.

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