

SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2021-2022 Regular Session

SB 665 (Umberg)
Version: February 19, 2021
Hearing Date: April 6, 2021
Fiscal: Yes
Urgency: No
MEC

SUBJECT

Employment policy: voluntary veterans' preference

DIGEST

This bill enacts the Voluntary Veterans' Preference Employment Policy Act and authorizes a private employer to establish a veterans' preference employment policy.

EXECUTIVE SUMMARY

Various statutes, such as the Fair Employment and Housing Act (FEHA) and the Unruh Civil Rights Act, prohibit discrimination in employment, housing, public accommodation and services provided by business establishments on the basis of specified personal characteristics such as sex, race, color, national origin, religion, and disability. Over time, these statutes have been amended to include other characteristics such as medical conditions, marital status, and sexual orientation. Also over time, other statutes were amended to reflect the state's public policy against discrimination in all forms.

The Federal Uniformed Services Employment and Reemployment Rights Act (USERRA) provides employment discrimination protection for a person who is in active military duty or a veteran and has an obligation to perform service in a uniformed service (United States Armed Forces, United States Armed Forces Reserve, the United States National Guard). (38 U.S.C. § 4311.) The California Military and Veterans Code incorporates this discrimination protection, and further extends it to members or veterans of the California National Guard. (Mil. & Vet. Code § 394.) AB 556 (Salas, Ch. 691, Stats. 2013) incorporated protection from discrimination and retaliation for military employees and veterans into FEHA.

This bill seeks to establish the Voluntary Veterans' Preference Employment Policy Act to allow private employers to give veterans preference in employment decisions. If this

bill passes this Committee, it will then be heard by the Senate Military and Veterans Affairs Committee.

PROPOSED CHANGES TO THE LAW

Existing federal law:

- 1) USERRA prohibits discrimination and retaliation against active duty military and veterans on the basis of the person's military membership, application for membership, performance of service, application for service, or obligation. (38 U.S.C. § 4311.)
- 2) Prohibits an employer's use of the employee's military membership, performance of service, application for service, or obligation as a motivating factor as cause for an adverse employment decision against the employee. (38 U.S.C. § 4311.)
- 3) USERRA provides that any person whose absence from a position of employment is necessitated by reason of service in the uniformed services shall be entitled to specified reemployment rights and benefits and other employment benefits of this chapter. (38 U.S.C. § 4312.)

Existing state law:

- 1) Prohibits discrimination by a person, public entity, or official against any officer, warrant officer, or enlisted member of the military or naval forces of the state or of the United States because of that membership, and prohibits prejudice or injury by any person, employer, or officer or agent of any corporation, company, or firm with respect to that member's employment, position or status, or be denied or disqualified for employment by virtue of the membership. (Mil. & Vet. Code § 394(a) & (b).)
- 2) Prohibits an employer or officer or agent of any corporation, company, or firm, or other person, from: (1) discharging any person from employment because of the performance of any ordered military duty or training or by reason of being an officer, warrant officer, or enlisted member of the military or naval forces of this state or of the federal reserve components of the Armed Forces of the United States; (2) hindering or preventing that person from performing any military service or from attending any military encampment or place of drill or instruction they may be called upon to perform or attend by proper authority; (3) using prejudice or harm against an employee in any manner in their terms, conditions, or privileges of employment, position, or status by reason of the employee's performance of military service or duty or attendance at military encampments or places of drill or instruction; or (4) dissuading, preventing, or

stopping any person from enlistment or accepting a warrant or commission in the California National Guard, State Guard, or Naval Militia of the federal reserve components of the Armed Forces of the United States by threat or injury to the employee in respect to their terms, conditions, or privileges of employment, position, status, trade, or business because of enlistment or acceptance of a warrant or commission. (Mil. & Vet. Code § 394(d).)

- 3) Prohibits a private employer or officer or agent of any corporation, company, or firm, or other person, from restricting or terminating any collateral benefit for employees by reason of an employee's temporary incapacitation (any period of incapacitation of 52 weeks or less) incident to duty in the National Guard, State Guard, or Naval Militia or the federal reserve components of the Armed Forces of the United States. (Mil. & Vet. Code § 394(e).)
- 4) Provides that a violation of the above state employment protections is a misdemeanor, and that any person violating any of these provisions is liable for actual damages and reasonable attorney's fees incurred by the injured party. (Mil. & Vet. Code § 394(g).)
- 5) Provides that a covered employee has an absolute right to be restored to the former office or position and status formerly had by them in the same locality and in the same office, board, commission, agency, or institution of the public agency upon the termination of temporary military duty. If the office or position has been eliminated during the employee's absence, the employee must be reinstated to a position of like seniority, status, and pay if a position exists, or if no position exists, the employee will have the same rights and privileges that he or she would have had if they had occupied the position when it ceased to exist and had not taken temporary military leave of absence. (Mil. & Vet. Code § 395(c).)
- 6) The Fair Employment and Housing Act (FEHA), prohibits discrimination in housing and employment on the basis of various characteristics, including military and veteran status, as defined. (Gov. Code § 12920 et seq.)
- 7) Allows the Legislature to provide civil service hiring preferences for veterans and their surviving spouses. (Cal. Const., art. VII, § 6(a).)
- 8) Provides that gender discrimination protection under FEHA does not affect the right of an employer to use veteran status as a factor in employee selection or to give special consideration to Vietnam-era veterans. (Gov. Code § 12940(a)(4).)

This bill:

- 1) Instead provides that nothing in FEHA relating to discrimination shall affect the right of an employer to use veteran status as a factor in hiring decisions if the employer maintains a veterans' preference employment policy established in accordance with the Voluntary Veteran's Preference Employment Policy Act.
- 2) Makes clear that a veterans' preference employment policy shall not be established or applied for the purpose of discriminating against an employment applicant on the basis of any FEHA protected classification.
- 3) Enacts the Voluntary Veterans' Preference Employment Policy Act and authorizes a private employer to establish and maintain a written veterans' preference employment policy, which shall be applied uniformly to hiring decisions.
- 4) Authorizes that employer to require that a veteran submit a DD 214 form to be eligible for the preference. (A DD 214 is a Certificate of Release or Discharge from Active Duty issued by the United States Department of Defense upon a military service member's retirement, separation, or discharge from active military duty.)
- 5) Specifies that the granting of a veterans' preference, in and of itself, shall be deemed not to violate any local or state equal employment opportunity law or regulation, including, but not limited to, FEHA.
- 6) Require the Department of Veterans Affairs to assist any private employer in determining if an applicant is a veteran, to the extent permitted by law.
- 7) Provides that nothing in the Voluntary Veteran's Preference Employment Policy Act shall be construed to authorize the establishment or use of a veterans' preference employment policy for the purpose of discriminating against an employment applicant on the basis of any protected classification under FEHA.
- 8) Provides that the Voluntary Veteran's Preference Employment Policy Act shall not become operative until the prohibition against transgender individuals from serving in the United States Armed Forces, as outlined in the United States Department of Defense Directive-type Memorandum-19-004, is rescinded and provided that individuals in any protected classification in subdivision (a) of Government Code Section 12940 are allowed to serve.
- 9) Provides that the Department of Veterans affairs shall post notice on the homepage of its internet website when United States Department of Defense Directive-type Memorandum-19-004 has been rescinded and individuals in any

protected classification in subdivision (a) of Government Code Section 12940 are allowed to serve.

10) Makes technical and conforming changes.

11) Provides the following definitions:

- “DD 214” means United States Department of Defense Form 214 or a similarly effective form issued by that department relating to separation from military service;
- “private employer” means a business entity in the private sector of this state with one or more employees;
- “veteran” means a person who served full time in the Armed Forces in time of national emergency or state military emergency or during any expedition of the Armed Forces and who has been discharged or released under conditions other than dishonorable; and
- “veterans’ preference employment policy” means a private employer’s voluntary preference for hiring or retaining a veteran over another qualified applicant or employee.

COMMENTS

1. Stated need for the bill

The author writes:

Despite the current national politicization, one area of overwhelming bipartisan support is for the members of our Armed Services, and seemingly all Americans look for ways to “thank our Armed Service members for their service.” One popular way to thank them for their service is assist them in serving again after their military career ends, this time working for a public or private employer. Towards that end, many public and private employers nationwide have considered so-called hiring preferences for veterans to advance the laudable goal of assisting our returning heroes to gainful employment.

Unfortunately, however, these good intentions have occasionally run into some challenges – particularly during periods of sizable troop reductions (such as what may occur as the United States draws down in Afghanistan), often resulting in higher unemployment rates for our discharged veterans.

The first of these is practical, as while these veterans have undoubtedly gained invaluable experience, this experience on paper may not immediately translate when compared against the standard expectations for a particular position. For example, a hiring manager tasked with selecting an applicant may not readily appreciate that the military-specific skills – whether leading a regiment or

overseeing logistics for a division – renders this person at least as qualified as someone who perhaps took a more traditional career path through public/private sector employment.

The second is a legal concern as employers worry their well-intentioned efforts to provide a preference to discharged veterans may subject them to litigation under federal or state laws prohibiting discrimination. Fortunately, federal law provides that a veterans preference enacted under federal, state or local law will preclude discrimination suits if the employer hires a veteran in accordance with applicable law. Accordingly, over 40 states have enacted “veterans preferences”, many of these very recently and almost all on an overwhelmingly bipartisan (and often unanimous) basis.

Indeed, California authorizes “veteran’s preferences” in both the public and private sector. However, while its public sector preference provisions are quite robust, the private sector preference contained in Government Code section 12940(a)(4) has not been recently updated and so currently applies only to Vietnam War-era veterans and only safeguards against gender discrimination claims.

This bill is intended to thank our members for their service by modernizing California’s current veterans hiring preference to extend it to the millions of members who have served since the Vietnam War and to recognize the increased diversity of our Armed Services. Entitled the Voluntary Veterans’ Preference Employment Policy Act, this bill will allow public and private employers who wish to do so to provide a hiring preference to discharged veterans, thus assisting them to serve their country again via their next employer.

In support of the bill, the Department of Defense (DOD) highlights that veterans “gained important attributes, such as integrity, service before self, tenacity, loyalty and focus, in addition to many gaining technical skills.” The DOD further notes that states are “making great strides to improve veteran employability...[h]owever, employment ultimately depends on employers providing workforce opportunities.” The DOD explains that forty states and the District of Columbia have a veterans preference for persons who are being considered for hire in public positions, and unlike government employers, who have been incorporating veterans’ hiring preferences since 1944, private employers do not have statutory protection to establish comparable business hiring policies.

2. Veterans’ preference in California

Existing law provides that sex discrimination protections provided under the FEHA do not affect the right of an employer to use veteran status as a factor in employee selection or to give special consideration to Vietnam-era veterans. (Gov. Code § 12940(a)(4).) This bill would provide that all of the discrimination protections provided under FEHA

would not affect a private employer's right to select a veteran over another applicant. This bill would also expand an employer's right to give special consideration to all veterans and authorize the employer to use veteran status as a factor in hiring decisions if the employer maintains a veterans' preference employment policy, as specified. The FEHA provisions allowing special consideration for Vietnam-era veterans were established in 1981 and the statute has not been updated since then. Additionally, the California Constitution allows the Legislature to provide civil service hiring preferences for veterans and their surviving spouses (Cal. Const., art. VII, § 6(a).) There is also veterans' preference for some state jobs.¹

This bill would require the private employer, who opts to provide veteran preference in hiring decisions, to establish and maintain a written veterans' preference employment policy. In this way, other applicants or employees would be made aware of the employer's hiring policy. In the absence of such written policy, the employer may be liable for discrimination against another employee or applicant. Moreover, seeking to address concern that veteran's preference policy created under this bill could be used by an employer in order to purposefully discriminate against the other protected classes under FEHA, the bill contains provisions that establish that:

- a veterans' preference policy shall not be established or applied for the purpose of discriminating against an employment applicant on the basis of any protected classification;
- nothing in the bill shall be construed to authorize the establishment or use of a veterans' preference employment policy for the purpose of discriminating against an employment applicant on the basis of any protected classification; and
- the veteran's preference program shall be applied uniformly to hiring decisions.

Veterans benefits have several purposes, including honoring and recognizing the sacrifice of veterans, incentivizing individuals to join the military, and recognizing that the transition from service to civilian life is often difficult. Indeed, there is a suicide and homelessness crisis among veterans. The author notes that the military can and often does exacerbate mental health issues, which contributes to suicide and homelessness. In 2014, 20 Veterans died by suicide daily and veterans accounted for 18% of all deaths by suicide among U.S. Adults while veterans were only 8.5% of the U.S. adult population.² According to the National Council for Homeless Veterans, Veterans account for about 11% of the adult homeless population.³ Veterans are at a higher risk of homelessness

¹ See <https://www.calvet.ca.gov/VetServices/Pages/State-Employment.aspx> (as of March 28, 2021).

² Suicide Among Veterans and Other Americans 2001-2014, Washington DC, US Department of Veterans Affairs, Office of Suicide Prevention, 2016 at <https://www.sprc.org/sites/default/files/resource-program/2016suicidedatareport.pdf> (as of April 2, 2021).

³ See https://nchv.org/index.php/news/media/background_and_statistics/ (as of April 2, 2021).

than non-veterans⁴ and employment is a key element in preventing veterans from suffering homeless.⁵

3. Opposition

The ACLU of California highlights the impact this bill would have on women⁶ and LGBTQ people.⁷ They explain in their letter of opposition to SB 665 that it has been “well established for many decades that discrimination against a protected class is unlawful if it is either motivated by intentional bias or results from policies that have a disparate impact against a protected class, unless the policy that causes the adverse impact has a demonstrable relationship to the requirements of the job in question.” The ACLU notes that “SB 665 would inadvertently eliminate disparate impact protection by permitting employers to justify hiring decisions under a veterans’ preference policy even if the policy is implemented in a way that has a discriminatory impact on other protected groups.” The ACLU notes that “the bill now makes clear that purposeful discrimination is still prohibited” and requests an amendment to the bill that would “also make clear that disparate impact discrimination is likewise still prohibited.” The proposed amendment would change Section 2 to read, “[. . .] A veterans’ preference employment policy shall not be established or applied for the purpose *or with the effect* of *unlawfully* discriminating against an employment applicant on the basis of any protected classification in this subdivision.” The ACLU further suggests “that an employer’s veterans’ preference policy be submitted to the Department of Fair Employment and Housing, so that the department can assess how many employers use such a preference policy and the impact these policies have on veterans and other protected groups.”

The author notes that no veteran who has responsibility for the wrongful discriminatory policies that led to the exclusion of LGBTQ people from military service will benefit from this bill. The author further notes that LGBTQ exclusion has ceased in the military and the demographics of the military have shifted to be more racially and

⁴ See <https://www.research.va.gov/topics/homelessness.cfm#research1> (as of April 2, 2021).

⁵ <https://www.va.gov/HOMELESS/nchav/resources/employment/index.asp> (as of April 2, 2021).

⁶ According to the United States Government Accountability Office, the percentage of female active-duty service members was 16.5% in 2018. <https://www.gao.gov/assets/gao-20-61.pdf> (as of April 2, 2021).

⁷ LGBTQ persons have historically been excluded from military service. “Don’t Ask, Don’t Tell” was repealed in September of 2011. See <https://obamawhitehouse.archives.gov/the-press-office/2012/09/20/statement-president-one-year-anniversary-repeal-dont-ask-dont-tell> (as of April 2, 2021). President Trump’s ban on service by transgender people was enacted early in his presidency. The transgender ban was in effect for over three years and was repealed on January 25, 2021 by President Joe Biden. See Executive Order on Enabling All Qualified Americans to Serve Their Country in Uniform, available at <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/25/executive-order-on-enabling-all-qualified-americans-to-serve-their-country-in-uniform/> (as of April 2, 2021).

ethnically diverse.⁸ “As the country has become more racially and ethnically diverse, so has the U.S. military.”⁹ “Racial and ethnic minority groups made up 40% of Defense Department active-duty military in 2015, up from 25% in 1990.”¹⁰ In 2015, African Americans made up 17% of the DOD active-duty military, a higher percentage than their percentage of the U.S. population ages 18 to 44.¹¹ Three times as many Latinos were active-duty personnel in 2015 than were active duty personnel in 1980.¹²

4. Support for the bill

The bill enjoys support from a variety of military and veterans associations, business associations, the Department of Defense, human resource management associations, and the Orange County Black Chamber. The Society for Human Resource Management, a sponsor of the bill, writes:

HR professionals are keenly aware of the difficulty some veterans face when searching for employment [. . .] We believe that allowing an employer to exercise a voluntary hiring preference exception to all veterans is one small way we can thank them for their service to our country.

Additionally, the bill explicitly states that an employer’s use of the veterans’ preference policy will not violate any current state or local employment opportunity law or regulation, and that it must be applied uniformly to hiring decisions. SHRM generally opposes any form of government mandate on employee benefits or hiring requirements. However, we believe that SB 665’s establishment of a *voluntary* preference policy for employers should they wish to exercise this preference is a fair and meaningful approach to assisting veterans in obtaining gainful employment.

Veterans Legal Institute, an organization that provides pro bono legal services to homeless, disabled, low-income and at-risk current and former US service members explains, in support of the bill, that SB 665 “would help address the important public policy issue of helping our veterans serve again via new employment which is critical to preventing veteran homelessness.”

A coalition of military and veterans groups, which include the American Legion-Department of California, California Association of County Veterans Service Officers,

⁸ See <https://www.cna.org/pop-rep/2018/summary/summary.pdf> (as of April 2, 2021); <https://www.pewresearch.org/fact-tank/2017/04/13/6-facts-about-the-u-s-military-and-its-changing-demographics/> (as of April 2, 2021).

⁹ <https://www.pewresearch.org/fact-tank/2017/04/13/6-facts-about-the-u-s-military-and-its-changing-demographics/> (as of April 2, 2021).

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

California State Commanders Veterans Council, Military Officers Association of America-California Council of Chapters, and the Vietnam Veterans of America-California State Council, write the following in support of the bill:

Many businesses want to do their part to assist the young men and women who have served our country and want to enter the civilian workforce to begin building a career. Young veterans committed their early adult years to defending our nation's freedoms, however by doing so, they are at a competitive disadvantage when seeking a career after enlistment. Many employers know this and want to help.

A coalition of human resources organizations who are affiliated with the California State Council of the Society for Human Resource Management and the Society for Human Resource Management explain the following in support of the bill:

While all states (including California) grant some form of employment preference to veterans in the public sector, some private employers have been hesitant to favor veterans because of provisions in the Civil Rights Act of 1964, which prohibits discrimination in hiring. An exception to the law, however, allows veterans preferences if authorized under federal, state or local law.

Accordingly, since 2011, nearly 40 states have enacted legislation allowing private employers to give hiring preferences to honorably discharged veterans [. . .]

However [. . .] some employers and Human Resource professionals have expressed concern that exercising such a preference might inadvertently create litigation under California anti-discrimination laws. Accordingly, this bill would clarify that exercising such a preference would not violate state or local anti-discrimination laws.

Notably, California presently allows public sector employers to afford a broad preference to veterans in employment decisions.

SUPPORT

Society for Human Resource Management (sponsor)

California Council for the Society for Human Resource Management (sponsor)

Bay Area HR Executives Council

California State Council of SHRM

American Legion-Department of California

California Association of County Veterans Service Officers

California State Commanders Veterans Council

Central California SHRM

Central Coast HR Association
Central Valley HR Management Association
Department of Defense
Golden Gate Business Association
HR Association of Central California
Inland Empire Society for HR Association Management
Kern County Society for Human Resource Management
Military Officers Association of America-California Council of Chapters
Northstate SHRM
Orange County Black Chamber
Orange County Veterans and Military Families Collaborative
Professionals in Human Resources Association
Sacramento Area HR Association
San Diego Military Advisory Council
San Diego Society of Human Resource Management
San Joaquin Human Resource Association
Santa Barbara HR Association
SHRM of Tulare/Kings County
SHRM Northern California
Sierra Human Resources Association
Southern California Wine Country SHRM
Veterans Legal Institute
Vietnam Veterans of America-California State Council

OPPOSITION

ACLU California

RELATED LEGISLATION

Pending Legislation: None known.

Prior Legislation:

AB 160 (Voepel, 2019) was substantially similar to this bill and failed passage in the Senate Judiciary Committee.

AB 353 (Voepel, 2017) was substantially similar to this bill and failed passage in the Senate Judiciary Committee.

AB 1383 (Jones, 2016) was substantially similar to this bill and failed passage in the Senate Judiciary Committee.

AB 556 (Salas, Ch. 691, Stats. 2013) *See* Executive Summary.

SB 36 (Baca, Ch. 201, Stats. 1999) requires any city, county, or city and county, general law or chartered, when it has established a civil service system, to implement a veterans' preference system, or adopt a resolution identifying reasons that the local agency does not do so.

SB 1150 (Fletcher and Burns, Ch. 123, Stats. 1945) requires military veterans' preference on civil service employment lists.
