

# Law Review 13047

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## Other Laws that Give Veterans an Advantage in Employment

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### 8.0—Veterans' preference

**Q: Other than the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Americans with Disabilities Act (ADA), are there other laws that require employers (federal, state, local, or private sector) to give preference to veterans (and especially disabled veterans) in employment?**

**A:** Yes. Section 4212 of title 38, United States Code, requires federal contractors and subcontractors to “take affirmative action to employ and advance in employment qualified covered veterans.” The federal Veterans’ Preference Act of 1944 (VPA) gives wartime veterans five “veterans preference” points in federal employment, and ten points for disabled veterans. More than 40 states have similar “veterans’ preference” laws at the state level, governing employment by the state and its political subdivisions (counties, cities, school districts, etc.). I will discuss these three laws separately.

### Affirmative action for veterans by federal contractors

Section 4212 provides as follows:

“(a)

(1) Any contract in the amount of \$100,000 or more entered into by any department or agency of the United States for the procurement of personal property and nonpersonal services (including construction) for the United States, shall contain a provision requiring that the party contracting with the United States take affirmative action to employ and advance in employment qualified covered veterans. This section applies to any subcontract in the amount of \$100,000 or more entered into by a prime contractor in carrying out any such contract.

(2) In addition to requiring affirmative action to employ such qualified covered veterans under such contracts and subcontracts and in order to promote the implementation of such requirement, the Secretary of Labor shall prescribe regulations requiring that—

(A) each such contractor for each such contract shall immediately list all of its employment openings with the appropriate employment service delivery system (as defined in section 4101(7) of this title), and may also list such openings with one-stop career centers under the Workforce Investment Act of 1998, other appropriate service delivery points, or America’s Job Bank (or any additional or subsequent national electronic job bank established by the Department of Labor), except that the contractor may exclude openings for executive and senior management positions and positions which are to be filled from within the contractor’s organization and positions lasting three days or less;

(B) each such employment service delivery system shall give such qualified covered veterans priority in referral to such employment openings; and

(C) each such employment service delivery system shall provide a list of such employment openings to States, political subdivisions of States, or any private entities or organizations under contract to carry out employment, training, and placement services under chapter 41 of this title.

(3) In this section:

(A) The term “covered veteran” means any of the following veterans:

(i) Disabled veterans.

(ii) Veterans who served on active duty in the Armed Forces during a war or in a campaign or expedition for which a campaign badge has been authorized.

(iii) Veterans who, while serving on active duty in the Armed Forces, participated in a United States military operation for which an Armed Forces service medal was awarded pursuant to Executive Order No. 12985 (61 Fed. Reg. 1209).

(iv) Recently separated veterans.

(B) The term “qualified”, with respect to an employment position, means having the ability to perform the essential functions of the position with or without reasonable accommodation for an individual with a disability.

(b) If any veteran covered by the first sentence of subsection (a) believes any contractor of the United States has failed to comply or refuses to comply with the provisions of the contractor’s contract relating to the employment of veterans, the veteran may file a complaint with the Secretary of Labor, who shall promptly investigate such complaint and take appropriate action in accordance with the terms of the contract and applicable laws and regulations.

(c) The Secretary of Labor shall include as part of the annual report required by section 4107(c) of this title the number of complaints filed pursuant to subsection (b) of this section, the actions taken thereon and the resolutions thereof. Such report shall also include the number of contractors listing employment openings, the nature, types, and number of positions listed and the number of veterans receiving priority pursuant to subsection (a)(2)(B).

(d)

(1) Each contractor to whom subsection (a) applies shall, in accordance with regulations which the Secretary of Labor shall prescribe, report at least annually to the Secretary of Labor on—

(A) the number of employees in the workforce of such contractor, by job category and hiring location, and the number of such employees, by job category and hiring location, who are qualified covered veterans;

(B) the total number of new employees hired by the contractor during the period covered by the report and the number of such employees who are qualified covered veterans; and

(C) the maximum number and the minimum number of employees of such contractor during the period covered by the report.

(2) The Secretary of Labor shall ensure that the administration of the reporting requirement under paragraph (1) is coordinated with respect to any requirement for the contractor to make any other report to the Secretary of Labor.

(3) The Secretary of Labor shall establish and maintain an Internet website on which the Secretary of Labor shall publicly disclose the information reported to the Secretary of Labor by contractors under paragraph (1).

**38 U.S.C. 4212.**

Enforcement of section 4212 is by the Office of Federal Contract Compliance Programs (OFCCP) of the United States Department of Labor (DOL). It has been held that section 4212 does not provide for a private right of action. That means that if you sue a federal contractor in federal court, alleging non-compliance with section 4212, your suit will be dismissed on the pleadings, without consideration of the merits, because Congress provided for exclusive enforcement through OFCCP.

OFCCP is also responsible for enforcing the affirmative action obligations of federal contractors, with respect to race and sex. Historically, OFCCP has given much higher priority to race and sex affirmative action.

### **Veterans' preference in federal civilian employment**

Under the VPA, a veteran of wartime<sup>[1]</sup> military service qualifies for a five-point veterans' preference, and a disabled veteran qualifies for ten points. The VPA is based on a model of federal employment that no longer exists. When Congress enacted the VPA in 1944, the usual way of getting a federal job was by taking a written examination, with a numerical score, to which five points or ten points could be easily added. Today, such examinations are no longer utilized, and federal agencies routinely flout the VPA and usually get away with it.

If you believe that a federal agency has violated your VPA rights, with respect to initial hiring or a promotion opportunity, you must file a written complaint within 60 days with the Veterans' Employment and Training Service of the United States Department of Labor (DOL-VETS). That agency is required to investigate your complaint. If DOL-VETS finds your complaint to have merit, it is required to make "reasonable efforts" (whatever that means) to get the federal agency to comply. But the DOL-VETS determination is not binding on the agency. Federal agencies can and usually do tell DOL-VETS to "pound sand."

After DOL-VETS has failed to resolve your VPA complaint, you must then bring your own action in the Merit Systems Protection Board (MSPB). The DOL-VETS determination in your favor is not binding and not even admissible. You must prove your case, without reference to the DOL-VETS findings. Yes, this is a screwy enforcement mechanism, but this is what Congress has enacted.

### **State veterans' preference laws**

The federal VPA does not apply to the states and their political subdivisions, but more than 40 states have veterans' preference laws at the state level, governing employment by state and local governments. You must look to the specific state law to find the enforcement mechanism (if any) in that state.

Some of the state veterans' preference laws are more generous than the federal VPA. For example, Massachusetts gives a veteran who meets the minimum standard of qualification an absolute preference. For example, let us assume that Smith, a veteran, scored 70 on the test, and 70 is the minimum passing score. Jones, a non-veteran, scored 100. Smith gets the job under Massachusetts' veterans' preference, although Jones outscored him by 30 points.

The United States Supreme Court has upheld the constitutionality of the Massachusetts veterans' preference law, despite evidence that at the time more than 98% of Massachusetts' veterans were male. See *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 257 (1979).<sup>[2]</sup>

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<sup>[1]</sup> For purposes of the VPA, we as a nation have been considered to be in "wartime" since August 2, 1990, when President George H.W. Bush declared a national emergency, based on the Iraqi invasion and occupation of Kuwait. That national emergency has not been terminated by any subsequent President, but it will be terminated

someday. When our nation is at “peace” a veteran must serve in a campaign or expedition to qualify for the five point veterans’ preference.

[2] I invite the reader’s attention to Law Review 801 (January 2008) for a detailed discussion of *Feeney*. Please go to [www.servicemembers-lawcenter.org](http://www.servicemembers-lawcenter.org). You will find 869 articles about laws that are especially pertinent to those who serve our country in uniform, along with a detailed Subject Index and a search function, to facilitate finding articles about very specific topics. I initiated this column in 1997, and we add new articles each week. We added 122 new articles in 2012.