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What Is the Federal Veterans' Preference Act?

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8.0—Veterans' preference

Q: What is the Veterans' Preference Act (VPA)?

A: The VPA is a federal statute that was enacted in 1944, when young Americans were fighting the forces of tyranny all over the world. The VPA is codified in scattered sections of title 5 of the United States Code (U.S.C.), including section 2108, which reads as follows:

For the purpose of this title--

- **(1)** "veteran" means an individual who--
(A) served on active duty in the armed forces during a war, in a campaign or expedition for which a campaign badge has been authorized, or during the period beginning April 28, 1952, and ending July 1, 1955;

¹ I invite the reader's attention to www.roa.org/lawcenter. You will find more than 1600 "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Servicemembers Civil Relief Act (SCRA), the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), the Uniformed Services Former Spouse Protection Act (USFSPA), and other laws that are especially pertinent to those who serve our country in uniform. You will also find a detailed Subject Index, to facilitate finding articles about very specific topics. The Reserve Officers Association (ROA) initiated this column in 1997. I am the author of more than 1400 of the articles.

² BA 1973 Northwestern University, JD (law degree) 1976 University of Houston, LLM (advanced law degree) 1980 Georgetown University. I served in the Navy and Navy Reserve as a Judge Advocate General's Corps officer and retired in 2007. I am a life member of ROA. I have dealt with USERRA and the Veterans' Reemployment Rights Act (VRRRA—the 1940 version of the federal reemployment statute) for 35 years. I developed the interest and expertise in this law during the decade (1982-92) that I worked for the United States Department of Labor (DOL) as an attorney. Together with one other DOL attorney (Susan M. Webman), I largely drafted the proposed VRRRA rewrite that President George H.W. Bush presented to Congress, as his proposal, in February 1991. On 10/13/1994, President Bill Clinton signed into law USERRA, Public Law 103-353, 108 Stat. 3162. The version of USERRA that President Clinton signed in 1994 was 85% the same as the Webman-Wright draft. USERRA is codified in title 38 of the United States Code at sections 4301 through 4335 (38 U.S.C. 4301-35). I have also dealt with the VRRRA and USERRA as a judge advocate in the Navy and Navy Reserve, as an attorney for the Department of Defense (DOD) organization called Employer Support of the Guard and Reserve (ESGR), as an attorney for the United States Office of Special Counsel (OSC), as an attorney in private practice, and as the Director of the Service Members Law Center (SMLC), as a full-time employee of ROA, for six years (2009-15). Please see Law Review 15052 (June 2015), concerning the accomplishments of the SMLC. My paid employment with ROA ended 5/31/2015, but I have continued the work of the SMLC as a volunteer. You can reach me by e-mail at SWright@roa.org.

(B) served on active duty as defined by section 101(21) of title 38 at any time in the armed forces *for a period of more than 180 consecutive days* any part of which occurred after January 31, 1955, and before the October 15, 1976, not including service under section 12103(d) of title 10 pursuant to an enlistment in the Army National Guard or the Air National Guard or as a Reserve for service in the Army Reserve, Navy Reserve, Air Force Reserve, Marine Corps Reserve, or Coast Guard Reserve;

(C) served on active duty as defined by section 101(21) of title 38 in the armed forces during the period beginning on August 2, 1990, and ending on January 2, 1992; or

(D) served on active duty as defined by section 101(21) of title 38 at any time in the armed forces *for a period of more than 180 consecutive days* any part of which occurred during the period *beginning on September 11, 2001, and ending on the date prescribed by Presidential proclamation or by law as the last date of Operation Iraqi Freedom*;³

and, except as provided under section 2108a, who has been discharged or released from active duty in the armed forces under honorable conditions;

(2) "disabled veteran" means an individual who has served on active duty in the armed forces, except as provided under section 2108a has been separated therefrom under honorable conditions, and had established the present existence of a service-connected disability or is receiving compensation, disability retirement benefits, or pension because of a public statute administered by the Department of Veterans Affairs or a military department;

(3) "preference eligible" means, except as provided in paragraph (4) of this section or section 2108a(c);--

(A) a veteran as defined by paragraph (1)(A) of this section;

(B) a veteran as defined by paragraph (1)(B), (C), or (D) of this section;

(C) a disabled veteran;

(D) the unmarried widow or widower of a veteran as defined by paragraph (1)(A) of this section;

(E) the wife or husband of a service-connected disabled veteran if the veteran has been unable to qualify for any appointment in the civil service or in the government of the District of Columbia;

(F) the parent of an individual who lost his or her life under honorable conditions while serving in the armed forces during a period named by paragraph (1)(A) of this section, if--

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(i) the spouse of that parent is totally and permanently disabled; or

- **(ii)** that parent, when preference is claimed, is unmarried or, if married, legally separated from his or her spouse;

(G) the parent of a service-connected permanently and totally disabled veteran, if--

(i) the spouse of that parent is totally and permanently disabled; or

- **(ii)** that parent, when preference is claimed, is unmarried or, if married, legally separated from his or her spouse; and

³ The national emergency period that began on September 11, 2001 has not ended. A person who enlists in any branch of the armed forces today and who serves on active duty for at least 181 consecutive days is eligible for veterans' preference in federal employment.

(H) a veteran who was discharged or released from a period of active duty by reason of a sole survivorship discharge (as that term is defined in section 1174(i) of title 10); but does not include applicants for, or members of, the Senior Executive Service, the Defense Intelligence Senior Executive Service, the Senior Cryptologic Executive Service, or the Federal Bureau of Investigation and Drug Enforcement Administration Senior Executive Service;

(4) except for the purposes of chapters 43 and 75 of this title, "preference eligible" does not include a retired member of the armed forces unless--

- (A) the individual is a disabled veteran; or
 - (B) the individual retired below the rank of major or its equivalent; and,
- (5) "retired member of the armed forces" means a member or former member of the armed forces who is entitled, under statute, to retired, retirement, or retainer pay on account of service as a member.⁴

A person who served on active duty in the armed forces and sustained a serious disability (30% or more) in that service is entitled to a ten-point preference. This provision applies without regard to the timing or duration of the person's service.

A person who served on active duty for at least 181 *consecutive* days during one of the designated "war" periods is entitled to a five-point preference. Periods of training duty in the Reserve or National Guard do not qualify a person for veterans' preference. A person who served on active duty outside the designated "war" periods is eligible for the five-point preference only if he or she served in a campaign or expedition for which a campaign badge has been authorized.

A person who is entitled to the five-point preference, based on active duty service during a "war" period or service in a campaign or expedition for which a campaign badge has been authorized, loses his or her preference upon retiring from the military (active or reserve) at or above the grade of O-4 (Major or Lieutenant Commander). A person who is entitled to the ten-point preference does not lose the preference based on retirement at or above that grade.

Q: I am entitled to the five-point preference. What is my score to which these five points are to be added?

A: In 1944, when Congress enacted the VPA, the most common way to gain federal employment was to take a written examination, with an objective numerical score. If there were 100 applicants for 20 positions, the individuals with the top 20 scores were hired. Thus, it was easy enough to add five or ten points to the eligible veteran's score and then determine which applicants were hired.

In recent decades, written application exams have become exceedingly rare in the federal civil service. Federal personnel departments frequently flout the VPA by assigning higher than

⁴ 5 U.S.C. 2108 (emphasis supplied).

warranted scores to non-veteran applicants, to the disadvantage of preference-eligible veterans.

Q: Does the federal VPA apply to hiring by state and local governments?

A: No. The VPA only applies to the Federal Government, but more than 40 states have veterans' preference laws at the state level. Those state laws require veterans' preference by the state government, and most of those laws also apply to employment by political subdivisions of the state (counties, cities, school districts, etc.).

Regarding state veterans' preference laws, I invite the reader's attention to Law Review 08001 (Massachusetts), Law Review 10037 (California), Law Review 12047 (Minnesota), Law Review 17052 (Washington), and Law Review 17111 (Florida). Readers who are attorneys are invited to write and submit an article about your state's veterans' preference law.

Q: What about employees of federal contractors. Do they have veterans' preference rights?

A: Yes, under section 4212 of title 38 of the United States Code. That section reads 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).⁵

Complaints must be filed with Office of Federal Contract Compliance Programs within 180 days of date of alleged violation unless time for filing is extended for good cause shown; date of filing is date complaint is first received in writing by office, and request for complaint form of verbal notice of intent to file complaint is not sufficient to establish filing date; filing or processing of grievance under collective bargaining agreement does not extend filing period; date of alleged violation is date complainant knew or reasonably should have known of alleged discriminatory act or violation.⁶

The exclusive means of enforcement of section 4212 is through the Office of Federal Contractor Compliance Programs (OFCCP) of the United States Department of Labor. Section 4212 does not create a private right of action allowing the veteran to sue the federal contractor.⁷

CORRECTION—NOVEMBER 2020

In this article, I correctly stated that a person who serves on active duty in the armed forces for at least 181 consecutive days is entitled to the five-point veterans' preference, even if he or she was safely ensconced in the Pentagon or some other place that is far from the sound of guns. In footnote 3, I incorrectly stated that the "war" period that began on 9/11/2001 had not ended.

In fact, that "war" period ended on 8/31/2010, when President Barack Obama proclaimed the end of Operation Iraqi Freedom. See The White House, Office of the Press Secretary, "Remarks by the President in Address to the Nation on the End of Combat Operations in Iraq," August 31, 2010, at <https://obamawhitehousearchives.gov/the-press-office/2010/08/31/remarks-president-address-nation-end-combat-operations-iraq>.

A person who served on active duty outside a "war" period is entitled to the five-point preference only if he or she served "In a campaign or expedition for which a campaign medal has been authorized. Any Armed Forces Expeditionary Medal or campaign badge, including El Salvador, Lebanon, Grenada, Panama, Southwest Asia, Somalia, and Haiti, qualifies for preference." See <https://www.opm.gov/policy-data-oversight/veterans-services/vet-guide-for-hr-professionals/>.

⁵ 38 U.S.C. 4212.

⁶ OFCCP Order No. 630a5, March 10, 1983.

⁷ See *Harris v. Adams*, 873 F.2d 929 (6th Cir. 1989); *Barron v. Nightingale Roofing, Inc.*, 842 F.2d 20 (1st Cir. 1988).