

Forging a New Breed: The Emergence of Veterans' Preference Statutes Within the Private Sector*

I. INTRODUCTION

In the wake of numerous wars over the past century, the United States has struggled to reintegrate veterans within the civilian sector. To address this concern, the federal government and all fifty states enacted legislation mandating that veterans receive privileged treatment in certain employment decisions.¹

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1. See COLO. CONST. art. XII, § 15 (West, Westlaw through Nov. 2013 amendments); 5 U.S.C. § 2108 (2012); ALA. CODE § 36-26-15 (2014); ALASKA STAT. ANN. § 39.25.159 (West 2013); ARIZ. REV. STAT. ANN. § 38-492 (2014); ARK. CODE ANN. § 21-3-302 (Supp. 2013); CAL. GOV'T CODE § 18973 (West 2013), *amended by* CAL. GOV'T CODE § 18973.1 (West 2013); CONN. GEN. STAT. ANN. § 5-224 (West 2013); DEL. CODE ANN. tit. 29, § 5935 (West 2013); FLA. STAT. ANN. § 295.08 (West 2013); GA. CODE ANN. § 43-1-9 (West 2013); HAW. REV. STAT. § 76-103 (West 2013); IDAHO CODE ANN. § 65-503 (West 2013); 15 ILL. COMP. STAT. ANN. § 310 / 10b.7 (West 2013); IND. CODE ANN. § 5-9-3-1 (West 2013); IOWA CODE ANN. § 35C.1 (West 2013); KAN. STAT. ANN. § 75-2955 (West 2013); KY. REV. STAT. ANN. § 18A.150 (West 2013); LA. REV. STAT. ANN. § 33:2416(B) (West 2013); ME. REV. STAT. ANN. tit. 5, § 7054 (West 2013); MD. CODE ANN., STATE GOV'T § 1-204 (West 2014); MASS. GEN. LAWS ANN. ch. 31, § 3 (West 2013); MICH. COMP. LAWS ANN. § 38.413 (West 2013); MINN. STAT. ANN. § 43A.11 (West 2013); MISS. CODE ANN. § 71-5-121 (West 2013); MO. ANN. STAT. § 36-220 (West 2013); MONT. CODE ANN. § 39-29-101 (West 2013); NEB. REV. STAT. ANN. § 48-227 (West 2013); NEV. REV. STAT. ANN. § 284.260 (West 2013); N.H. REV. STAT. ANN. § 283:4 (2014); N.J. STAT. ANN. § 11A:5-4 (West 2013); N.M. STAT. ANN. § 10-9-13.2 (West 2013); N.Y. CIV. SERV. LAW § 85 (McKinney 2013); N.C. GEN. STAT. ANN. § 128-15 (West 2013); N.D. CENT. CODE ANN. § 37-19.1-02 (West 2013); OHIO REV. CODE ANN. § 124.23 (West 2013); OKLA. STAT. ANN. tit. 74, § 840-4.14 (West 2013); OR. REV. STAT. ANN. § 408.230 (West 2014); 51 PA. CONS. STAT. ANN. § 7103 (West 2014); R.I. GEN. LAWS ANN. § 36-4-19 (West 2013); S.C. CODE ANN. § 1-1-550 (2014); S.D. CODIFIED LAWS § 3-3-1 (2014); TENN. CODE ANN. § 8-30-306 (West 2014); TEX. GOV'T CODE ANN. § 657.003(c) (West 2013); UTAH CODE ANN. § 71-10-2 (West 2014); VT. STAT. ANN. tit. 20, § 1543 (West 2013); VA. CODE ANN. § 2-2-2903 (West 2013); WASH. REV. CODE ANN. § 41.04.010 (West 2014); W. VA. CODE ANN. § 6-13-1 (West 2014); WIS. STAT. ANN. § 66.0509 (West 2013); WYO. STAT. ANN. § 19-14-102 (West 2014).

These provisions manifested themselves in numerous forms, yet their influence primarily extended only to the *public* sector.

After a decade of military engagements and a large-scale force reduction, the veteran community finds itself, yet again, racked with displacement and unemployment troubles. In response, four states have forged a new breed of legislation that encourages the adoption of veterans' preference policies within the *private* sector.² In April 2013, Arkansas became the third state to authorize such preferences with the enactment of the Voluntary Veterans' Preference Employment Policy Act.³ As these statutes have only recently developed, they remain relatively untested. Their public-sector counterparts, however, have endured decades of controversy.⁴

The enactment of veterans' preference statutes, specifically those oriented toward the private sector, represents an attempt to remedy unemployment and reintegration difficulties within the veteran community.⁵ Although pro-veteran policies have existed in a variety of forms, such as in statutes⁶ and through special organizations,⁷ this comment addresses the role of preference

2. See ARK. CODE ANN. §§ 11-15-101 to -105 (Supp. 2013); MINN. STAT. ANN. § 197.4551 (West 2014); N.D. CENT. CODE ANN. § 37-19.1-05 (West 2013); WASH. REV. CODE ANN. § 73.16.110 (West 2014).

3. See Act 598, 2013 Ark. Acts 2270 (codified at ARK. CODE ANN. §§ 11-15-101 to -105 (Supp. 2013)). In 2011, Washington became the first state to adopt a private-sector veterans' preference statute. See WASH. REV. CODE ANN. § 73.16.110 (West 2014). Minnesota was the second, enacting its veterans' preference statute in 2012. See MINN. STAT. ANN. § 197.4551 (West 2014).

4. See, e.g., *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 281 (1979) (holding Massachusetts veterans' preference statute did not deprive women of equal protection); *Koelfgen v. Jackson*, 355 F. Supp. 243, 252 (D. Minn. 1972) (holding the Minnesota Veterans' Preference Law did not violate equal protection in a class-action lawsuit challenging its constitutionality).

5. A significant number of veterans have acknowledged difficulties in locating jobs, overcoming cultural barriers, and translating military skills to civilian jobs. PRUDENTIAL FIN. INC., *VETERANS' EMPLOYMENT CHALLENGES: PERCEPTIONS AND EXPERIENCES OF TRANSITIONING FROM MILITARY TO CIVILIAN LIFE* 3 (2012), available at <http://www.prudential.com/documents/public/VeteransEmploymentChallenges.pdf>.

Veterans have cited health problems and competition against individuals with more civilian work experience as challenges to the transition into the civilian workforce. See *id.*

6. See, e.g., Uniformed Services Employment and Reemployment Rights Act of 1994, Pub. L. No. 103-353 (codified as amended at 5 U.S.C. § 8432b and in scattered sections of 38 U.S.C.).

7. For example, the Veterans' Employment and Training Service (VETS) is a division of the United States Department of Labor that offers employment and training services to eligible veterans through grant programs. *VETS Employment Services Fact Sheet 1*, U.S. DEPARTMENT LAB.,

statutes, both public and private, and specifically discusses Arkansas's recently codified private-sector preference statute. Part II begins with a broad overview of veterans' preference policies, leading off with a discussion of their development, role, and objectives. Part III explores the various features of different preference statutes, both public and private, and examines the strengths and weaknesses of each. Finally, Part IV analyzes Arkansas's private-sector statute and culminates with recommended changes designed to protect and improve the law.

II. REVEILLE: THE RISE OF VETERANS' PREFERENCE STATUTES

A. Historical Development

The United States enjoys a rich tradition of supporting veterans throughout the employment process. Preferences have existed in one form or another since the very founding of the country. As early as the Revolutionary War, the federal government provided employment preferences to veterans.⁸ State-law preferences emerged in the wake of the Civil War and offered similar benefits.⁹ These endeavors culminated with the first comprehensive veterans' preference statute codified by the federal government in 1944.¹⁰ Despite this expansion, controversy lurked close behind.

Initially, public-sector veterans' preference statutes survived constitutional challenges alleging violations of equal protection and due process rights.¹¹ In the seminal case of *Personnel*

http://www.dol.gov/vets/programs/emp serv/employment_services_fs.htm (last visited Oct. 16, 2014).

8. *Vet Guide*, U.S. OFF. PERSONNEL MGMT., <https://www.opm.gov/policy-data-oversight/veterans-services/vet-guide/#content> (last visited Oct. 16, 2014).

9. *See, e.g., Feeney*, 442 U.S. at 265-66 ("The Massachusetts law dates back to 1884, when the State, as part of its first civil service legislation, gave a statutory preference to civil service applicants who were Civil War veterans . . .").

10. *See* Veterans' Preference Act of 1944, Pub. L. No. 78-359, 58 Stat. 387 (codified as amended in scattered sections of 5 U.S.C.); *see also Feeney*, 442 U.S. at 261 n.6 (recognizing enactment).

11. *See* *Branch v. Du Bois*, 418 F. Supp. 1128, 1130 (N.D. Ill. 1976) (upholding validity of a preference statute following allegations that it "create[d] an arbitrary and irrational classification" that obstructed equal protection rights); *State ex rel. Higgins v. Civil Serv. Comm'n of City of Bridgeport*, 90 A.2d 862, 864-65 (Conn. 1952) (rejecting an argument that preference statute violated equal protection); *Ballou v. State Dept. of Civil Serv.*, 382 A.2d 1118, 1120-21 (N.J. 1978) (rejecting plaintiff's due process claim challenging the legislature's adoption of an absolute preference).

Administrator of Massachusetts v. Feeney,¹² the United States Supreme Court upheld a public-sector veterans' preference statute that allegedly discriminated on the basis of gender.¹³ The Court noted:

Veteran status is not uniquely male. Although few women benefit from the preference, the nonveteran class is not substantially all female. To the contrary, significant numbers of nonveterans are men, and all nonveterans—male as well as female—are placed at a disadvantage. . . . The distinction made by the Massachusetts statute is, as it seems to be, quite simply between veterans and nonveterans, not between men and women.¹⁴

The Court's holding in *Feeney* established the parameters for the constitutionality of veterans' preference statutes. Although men continue to comprise a majority of the uniformed services, a similar case today would encounter fewer gender-based concerns, as the female population within the military has increased significantly since the *Feeney* decision.¹⁵

In addition, veterans' preference statutes have historically endured challenges under Title VII of the Civil Rights Act of 1964¹⁶ because they allegedly created a disparate impact on women.¹⁷ The drafters of Title VII incorporated a special exception, however, providing that “[n]othing contained in [Title VII] shall be construed to repeal or modify any Federal, State, territorial, or local law creating special rights or statutory

12. 442 U.S. 256 (1979).

13. *Id.* at 281.

14. *Id.* at 275. The plaintiff unsuccessfully countered by arguing that the impact was “too inevitable to have been unintended.” *Id.* at 276.

15. As of 2012, females comprised roughly 14.6% of the active-duty military and 16.1% of the active-duty officers. U.S. DEP'T OF DEF., 2012 DEMOGRAPHICS REPORT: PROFILE OF THE MILITARY COMMUNITY 19 (2012), available at http://www.militaryonesource.mil/12038/MOS/Reports/2012_Demographics_Report.pdf. In 1980, one year after the Court's holding in *Feeney*, females comprised only 8.4% of the military. RUTGERS INST. FOR WOMEN'S LEADERSHIP, WOMEN'S LEADERSHIP FACT SHEET: WOMEN IN THE U.S. MILITARY SERVICES 1, 3 (2010), available at <http://iwl.rutgers.edu/documents/njwomencount/Women%20in%20Military%202009%20Final.pdf>.

16. See 42 U.S.C. §§ 2000e to 2000e-17 (2012); see also *Skillern v. Bolger*, 725 F.2d 1121, 1122-23 (7th Cir. 1984) (plaintiff unsuccessfully argued that veterans' preference law violated Title VII by discriminating against an individual's disability).

17. See, e.g., *Branch v. Du Bois*, 418 F. Supp. 1128, 1130 (N.D. Ill. 1976) (addressing such a claim).

preference for veterans.”¹⁸ Pursuant to this provision, statutorily authorized preferences typically survive challenges raised under Title VII.¹⁹ Despite such varied legal challenges, veterans’ preference statutes have flourished.

In 2011, Washington became the first state to implement a private-sector veterans’ preference statute.²⁰ Three additional states followed suit thereafter.²¹ With the enactment of the Voluntary Veterans’ Preference Employment Policy Act, private employers in Arkansas now have the ability to legally implement preference policies.²² As a result, the private and public sectors have further aligned on the issue of providing employment preferences to qualifying veterans. Although the future is uncertain, the expansion in the scope of veterans’ preferences has the potential to dramatically impact the workplace environment and the veteran community as a whole.

B. Objectives and Roles of Veterans’ Preference Statutes

Veterans’ preferences exist for a number of reasons. Usually, such preferences reflect society’s desire to recognize service-oriented sacrifices and to ease a veteran’s transition back into the civilian world.²³ In addition, veterans’ preferences compliment other service-related economic incentives, such as the G.I. Bill and the veterans’ health care system, and further encourage military service. In *Koelfgen v. Jackson*,²⁴ a federal court identified three justifications that support veterans’ preferences, including:

- (1) The State owes a debt of gratitude to those veterans who served the nation in time of peril.
- (2) A veteran is likely to possess courage, constancy, habits of obedience and fidelity,

18. 42 U.S.C. § 2000e-11 (2012).

19. See EEOC Comp. Man. (BNA) at N:915.003 (May 2000) (“[E]ven though a veterans’ preference may, for example, disproportionately exclude women, it does not violate Title VII if it is a legislatively enacted preference.”).

20. See WASH. REV. CODE ANN. § 73.16.110 (West 2014).

21. ARK. CODE ANN. §§ 11-15-101 to -105 (Supp. 2013); MINN. STAT. ANN. § 197.4551 (West 2014); N.D. CENT. CODE ANN. § 37-19.1-05 (West 2013).

22. See Act 598, 2013 Ark. Acts 2270 (codified at ARK. CODE ANN. §§ 11-15-101 to -105(Supp. 2013)).

23. See *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 265 (1979) (providing that veteran benefits are “justified as a measure designed to reward veterans for the sacrifice of military service, to ease the transition from military to civilian life, to encourage patriotic service, and to attract loyal and well-disciplined people to civil service occupations”).

24. 355 F. Supp. 243 (D. Minn. 1972).

which are valuable qualifications for any public office holder. (3) Veterans should be aided in rehabilitation and relocation because military service has disrupted their normal life and employment.²⁵

Furthermore, these provisions reflect a pervading spirit of public appreciation for veterans and their service.²⁶ Although many preference statutes, both public and private, explicitly articulate the policy reasons to justify their existence, the Arkansas General Assembly has declined to do so.²⁷ Regardless, veterans' preference statutes provide a clear indication of a state's public policy supporting veterans and tangibly sanction the implementation of such preferences.

Beyond policy considerations, preference statutes carry the potential to play a major role in remedying high unemployment rates among veterans. An estimated 21.2 million individuals living in the United States qualified as veterans in 2012.²⁸ In March 2013, the United States Bureau of Labor Statistics announced that the 2012 unemployment rate of Gulf War-era II veterans²⁹ sat roughly at ten percent.³⁰ Recent studies also revealed a disturbing trend among veterans between the ages of eighteen and twenty-four, who experience unemployment at rates

25. *Id.* at 251 (citations omitted).

26. For example, Wal-Mart recently pledged to hire 100,000 veterans over a five-year period. James Dao, *Wal-Mart to Announce a Five-Year Commitment to Hire 100,000 Veterans*, N.Y. TIMES, Jan. 15, 2013, at A13. Other companies have committed to similar efforts. See Tiffany Hsu, *Starbucks to Hire 10,000 Veterans and Military Spouses in Five Years*, L.A. TIMES (Nov. 6, 2013), <http://articles.latimes.com/2013/nov/06/business/la-fi-mo-starbucks-veterans-20131106>; *Junior Military Officers: Meet our Veterans*, PEPSICO, http://www.pepsico.com/Careers/Junior_Military_Officers (last visited Oct. 16, 2014) ("We believe in providing opportunity for military hires, not just in the name of service, but because they help our business succeed.").

27. Compare N.C. GEN. STAT. ANN. § 128-15(a) (West 2014) ("It shall be the policy of the State of North Carolina that, in appreciation for their service to this State and this country during a period of war, and in recognition of the time and advantage lost toward the pursuit of a civilian career, veterans shall be granted preference in employment with every State department, agency, and institution."), with ARK. CODE ANN. §§ 11-15-101 to -105 (Supp. 2013) (containing no such codified statement).

28. Valerie Strauss, *America's Veterans: Who They Are*, WASH. POST (Nov. 11, 2013), <http://washingtonpost.com/blogs/answer-sheet/wp/2013/11/11/americas-veterans-who-they-are>.

29. Gulf War-era II veterans include those who have served in the armed forces since September 2001. News Release, Bureau of Labor Statistics, U.S. Dep't of Labor, *Employment Situation of Veterans—2012* (Mar. 20, 2013), available at http://www.bls.gov/news.release/archives/vet_03202013.pdf.

30. *Id.* The Department of Labor also placed the unemployment rate for all veterans at seven percent. *Id.*

approaching twenty percent.³¹ Unsurprisingly, these unemployment figures often demonstrate that veterans experience higher rates of unemployment than their non-veteran counterparts.³² Veterans' preferences seek to remedy the broad disparity between veteran and non-veteran unemployment rates.

Preference statutes represent one of many legislative attempts to assist veterans within the civilian employment sphere. Congress alone has enacted numerous pieces of legislation seeking to assist veterans, including the Vietnam Era Veterans' Readjustment Assistance Act of 1972,³³ the Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA"),³⁴ and the Servicemembers Civil Relief Act.³⁵

Veterans' preference statutes are unique in that they provide an offensive measure of support in seeking to give veterans an advantage over non-veterans rather than merely endeavoring to prohibit discrimination. For example, USERRA bars discrimination against service members based on their military status or service-related obligations.³⁶ This benefit is defensive in nature—it seeks to protect jobs and benefits already enjoyed by military personnel.³⁷ Conversely, preferences provide veterans with an advantage over non-veterans by assisting them in finding

31. *Id.*

32. *See id.*

33. Vietnam Era Veterans' Readjustment Assistance Act of 1972, Pub. L. No. 92-540 (codified as amended in scattered sections of 38 U.S.C.) (requiring employers with certain government contracts or subcontracts to provide equal opportunity and affirmative action benefits to qualifying veterans).

34. Uniformed Services Employment and Reemployment Rights Act of 1994, Pub. L. No. 103-353 (codified as amended at 5 U.S.C. § 8432b and in scattered sections of 38 U.S.C.).

35. *See* Servicemembers Civil Relief Act, 50 U.S.C. app. §§ 501–597b (2012) (protecting members of the military from being sued while on active duty or for one year following active duty, among other things).

36. *See* 38 U.S.C. § 4311(a) (2012). Many of the above-listed provisions may provide an offensive cause of action, but their primary function is to guarantee benefits and protect positions already secured. For example, USERRA entitles service members to the same or similar benefits that they would have received in the absence of a service-related interference. *See* 38 U.S.C. § 4312(a) (2012). In contrast, veterans' preference laws may entitle veterans to certain advantages and positions that they would not have otherwise enjoyed.

37. USERRA prevents an employer from refusing to initially hire a service member on the basis of his or her military status or service-related obligations, but this protection falls short of providing a distinct advantage over non-veterans. *See* 38 U.S.C. § 4311(a) (2012).

and securing employment itself.³⁸ Similar distinctions exist between preferences and other pro-veteran legislation.³⁹ Although veterans' preference statutes assist in filling the gaps created by other pro-veteran legislation, the manner in which they assist veterans varies greatly across jurisdictions.

III. OUT OF UNIFORM: ATTRIBUTES OF VETERANS' PREFERENCE STATUTES

Veterans' preference statutes take on numerous forms. The broadest division among these statutes focuses on whether the policy applies to public or private entities. Beyond the public-private dichotomy, preference policies fit into three primary sub-categories determined by the point at which the preference applies during the employment process: (1) hiring; (2) promotion; and/or (3) retention.⁴⁰ Furthermore, some policies extend preference only to certain types of individuals.⁴¹ In addition, most preferences are mandatory,⁴² but others are entirely voluntary.⁴³ Additional sub-categories focus on the nature of the preference's application, either being an absolute preference for qualifying veterans over non-veterans,⁴⁴ or those which merely provide

38. 67 C.J.S., *Oaths and Affirmations to Officers and Public Employees* § 48 (2002).

39. For example, the Servicemembers Civil Relief Act stays certain civil proceedings and protects members of the military against default judgments but does not create an affirmative employment benefit. *See* 50 U.S.C. app. §§ 502, 521 (2012). The designers of the Servicemembers Civil Relief Act intended for the legislation "to be used as a shield rather than as a sword." JOHN S. ODOM, JR., *A JUDGE'S BENCHBOOK FOR THE SERVICEMEMBERS CIVIL RELIEF ACT* 75 (2011).

40. *Compare* ARK. CODE ANN. § 11-15-103(a)(2)(B) (Supp. 2013) (allowing an employer to use a preference policy to make hiring, promotion, and retention decisions), *with* DEL. CODE ANN. tit. 29, § 5935(1) (West 2014) (confining the preference to hiring decisions).

41. *See, e.g.*, ARK. CODE ANN. § 21-3-302(c)(1)(C) (Supp. 2013) (extending preference to the surviving spouse of a deceased veteran); N.J. STAT. ANN. § 11A:5-12 (West 2014) (extending preference to recipients of certain service medals).

42. *See, e.g.*, WASH. REV. CODE ANN. § 73.16.010 (West 2014) (stating preference "shall" be given to qualifying veterans).

43. *See, e.g.*, ARK. CODE ANN. § 11-15-103(a)(1) (Supp. 2013) (providing that a private employer "may" adopt a veterans' preference policy).

44. *See, e.g.*, N.J. STAT. ANN. § 11A:5-4 (West 2014) (requiring disabled veterans to be placed at the top of the employment list as soon as they pass a competitive examination); 51 PA. CONS. STAT. ANN. § 7104 (West 2014) (providing that a veteran who possesses the requisite qualifications is entitled to preference even if he or she "does not stand highest on the eligible or promotional list").

additional points within a scored system.⁴⁵ Finally, some statutes incorporate special provisions that assist veterans in locating jobs⁴⁶ or supply remedies where preference rights are denied.⁴⁷

A. Public-Sector Versus Private-Sector Statutes

Historically, veterans' preference statutes applied exclusively to public employers. Only recently have the benefits of such provisions extended to the private sector.⁴⁸ For the purposes of this comment, the "public sector" refers to those employers which are controlled by the government,⁴⁹ while the "private sector" includes those employers which are not subject to direct governmental control.⁵⁰ Private-sector statutes usually take one of two forms, either extending benefits as a stand-alone provision⁵¹ or merely expanding an existing preference to the private sector.⁵²

B. Application

1. Application to Persons

As one might expect, veterans' preference laws apply primarily to veterans. Although some variance exists, both public-sector and private-sector statutes usually define "veteran" using similar language that requires some form of active-duty

45. See, e.g., ARK. CODE ANN. § 21-3-302(d)(1)(A) (Supp. 2013) (providing qualifying veterans with additional points on a civil-service examination); FLA. STAT. ANN. § 295.07(2) (West 2014) (same).

46. See, e.g., ARK. CODE ANN. § 11-15-104 (Supp. 2013) (directing the Department of Workforce Services to maintain a registry of all employers, both public and private, with veterans' preference policies).

47. See, e.g., IDAHO CODE ANN. § 65-506 (West 2014) (imposing civil liability on public employers who fail to comply with the state's preference laws); WASH. REV. CODE ANN. § 73.16.015 (West 2014) (providing a civil right of action to enforce rights).

48. In 2011, Washington became the first state to enact a private-sector veterans' preference policy. See WASH. REV. CODE ANN. § 73.16.110 (West 2014). Three other states have since passed similar laws. See ARK. CODE ANN. §§ 11-15-101 to -105 (Supp. 2013); MINN. STAT. ANN. § 197.4551 (West 2014); N.D. CENT. CODE ANN. § 37-19.1-05 (West 2013).

49. *Black's Law Dictionary* defines "public sector" as "[t]he part of the economy or an industry that is controlled by the government." BLACK'S LAW DICTIONARY 1352 (9th ed. 2009).

50. *Black's* defines "private sector" as "[t]he part of the economy or an industry that is free from direct governmental control." *Id.* at 1316.

51. See, e.g., ARK. CODE ANN. §§ 11-15-101 to -105 (Supp. 2013).

52. See, e.g., MINN. STAT. ANN. § 197.4551 (West 2014); N.D. CENT. CODE ANN. § 37-19.1-05 (West 2013); WASH. REV. CODE ANN. § 73.16.110 (West 2014).

service within the armed forces.⁵³ Such definitions are rarely, if ever, clear—they often define the word by using a variety of different service-related characteristics.⁵⁴ Although the majority of statutes strive to make preference benefits more accessible, many impose additional requirements. Under these laws, mere participation within the armed forces is ordinarily insufficient.

Public-sector preference laws generally incorporate time-in-service requirements, specifying either a minimum length of service⁵⁵ or certain periods during which a veteran must have served.⁵⁶ However, some other statutes employ only vague terminology.⁵⁷ Additional restrictions may include residency requirements,⁵⁸ requirements of honorable discharge,⁵⁹ and even disability status.⁶⁰

Many public-sector statutes also extend preference to spouses of certain types of veterans, such as spouses of disabled

53. See 5 U.S.C. § 2108(1) (2012) (requiring “active duty” service); NEB. REV. STAT. ANN. § 48-225(1) (West 2014) (requiring “full-time” service); OR. REV. STAT. ANN. § 408.225(1)(f)(A) (West 2014) (requiring “active duty” service).

54. For example, the federal government has used four distinct types of service to define “veteran.” See 5 U.S.C. § 2108(1) (2012).

55. See, e.g., 5 U.S.C. § 2108(1)(D) (requiring 180 days of consecutive active-duty service for individuals who served between September 11, 2001 and the end of Operation Iraqi Freedom); IDAHO CODE ANN. § 65-502(17) (West 2014) (requiring 180 days of consecutive active-duty service); NEB. REV. STAT. ANN. § 48-225 (West 2014) (requiring service during wartime or for 180 consecutive days); TEX. GOV’T CODE ANN. § 657.002(a) (West 2013) (requiring 90 consecutive days of service); VA. CODE ANN. § 2.2-2903(E) (West 2014) (requiring 180 consecutive days of full-time, active-duty service).

56. See, e.g., 5 U.S.C. § 2108(1)(A)–(D) (2012) (requiring service during periods of the Korean, Vietnam, or Gulf Wars); FLA. STAT. ANN. § 295.07(1)(c) (West 2014) (requiring service of at least one day during a wartime period for non-disabled veterans); 15 ILL. COMP. STAT. ANN. § 310/10b.7(d) (West 2014) (requiring that a non-disabled veteran must “ha[ve] served during a time of hostilities with a foreign country”); KAN. STAT. ANN. § 75-2955(a)(1) (West 2014) (requiring service during certain enumerated armed conflicts); N.Y. CIV. SERV. LAW § 85(1)(a) (McKinney 2014) (requiring service “in time of war”); N.C. GEN. STAT. ANN. § 128-15(b)(3)(a) (West 2014) (requiring service “during a period of war”).

57. See, e.g., ARK. CODE ANN. § 21-3-302(b)(1) (Supp. 2013) (requiring honorable discharge “from a tour of active duty”).

58. See, e.g., N.Y. CIV. SERV. LAW § 85(1)(a) (McKinney 2014); N.D. CENT. CODE ANN. § 37-19.1-01(8) (West 2013); WYO. STAT. ANN. § 19-14-102(c) (West 2014). Statutes requiring residence at the time of enlistment have been held unconstitutional. See *Att’y Gen. of N.Y. v. Soto-Lopez*, 476 U.S. 898, 911 (1986).

59. See, e.g., 5 U.S.C. § 2108(1) (2012); ARK. CODE ANN. § 21-3-302(b)(1) (Supp. 2013); GA. CODE ANN. § 43-1-13 (West 2014); IDAHO CODE ANN. § 65-502(17) (West 2014).

60. See, e.g., CAL. GOV’T CODE § 18973 (West 2014) (requiring total disability for the purpose of certain preferences).

veterans,⁶¹ surviving spouses of deceased veterans,⁶² and spouses of veterans who are missing in action or have been captured.⁶³ In scenarios where preferences may be awarded to the surviving spouse of a qualifying deceased veteran, some provisions include a restriction that the spouse be unmarried.⁶⁴ Occasionally, provisions also provide preference to orphans of deceased veterans who would have otherwise qualified for a preference.⁶⁵ A few jurisdictions take a broader approach by extending preferences to members of certain service-related entities, such as nursing associations and other organizations connected with the armed forces.⁶⁶ Similarly, some statutes explicitly provide preferences to members of the National Guard and reserve components of the United States Armed Forces who may not otherwise qualify as “veterans.”⁶⁷

In addition to satisfying the general requirement of “veteran” status, many public-sector provisions also require a veteran applicant to meet the minimum qualifications for the job,⁶⁸ while others require that the veteran be equally qualified with other applicants.⁶⁹ Courts have incorporated a requirement of minimum or equal qualification as a means of avoiding constitutional challenges to preference laws.⁷⁰ Where a provision

61. *See, e.g.*, FLA. STAT. ANN. § 295.07(1)(b) (West 2014); IDAHO CODE ANN. § 65-503(3) (West 2014).

62. *See, e.g.*, ARK. CODE ANN. § 21-3-302(c)(1)(C) (Supp. 2013).

63. *See, e.g.*, ARIZ. REV. STAT. ANN. § 38-492(D)(2) (2014).

64. *See, e.g.*, ARK. CODE ANN. § 21-3-302(c)(1)(C) (Supp. 2013); DEL. CODE ANN. tit. 29, § 5935(6)(a) (West 2014); IDAHO CODE ANN. § 65-503(2) (West 2014); TENN. CODE ANN. § 8-30-307(c)(2)(B) (West 2014).

65. *See, e.g.*, TEX. GOV'T CODE ANN. § 657.002(b) (West 2013).

66. *See, e.g.*, 51 PA. CONS. STAT. ANN. § 7101 (West 2014).

67. *See, e.g.*, ALASKA STAT. ANN. § 39.25.159(c) (West 2014); GA. CODE ANN. § 43-1-9 (West 2014); NEV. REV. STAT. ANN. § 284.260(1)(b) (West 2014). Such provisions may be redundant as members of the National Guard or reserve forces may be called to active duty for the period required by the majority of preference statutes.

68. *See, e.g.*, DEL. CODE ANN. tit. 29, § 5935(4) (West 2014); OR. REV. STAT. ANN. § 408.230(1)(b) (West 2014).

69. *See, e.g.*, ARK. CODE ANN. § 21-3-302(c)(3) (Supp. 2013) (requiring a veteran to “[m]eet[] substantially equal qualifications of other applicants”); IOWA CODE ANN. § 35C.1(1) (West 2014) (providing that qualifying veterans “are entitled to preference . . . over other applicants of no greater qualifications”).

70. *See State ex rel. Kangas v. McDonald*, 246 N.W. 900, 901 (Minn. 1933) (upholding a preference statute where it required that the veteran be capable of performing the required duties “in a reasonably efficient manner”); *see also Commonwealth ex rel. Graham v. Schmid*, 3 A.2d 701, 704 (Pa. 1938) (noting that preference laws may violate constitutional principles when they lack a requirement that a veteran satisfy the minimum

does not explicitly require the veteran to meet the minimum requirements for the job, courts have interpreted preference statutes as implying such restrictions in an effort to avoid constitutional invalidation.⁷¹

In many respects, private-sector statutes mirror their public-sector counterparts. Only Arkansas has crafted a definition of “veteran” in its private-sector law that varies from its respective public-sector statute.⁷² The state’s private-sector law imposes additional requirements, such as active-duty service for a certain period of time, a bar against those discharged dishonorably, and states that the veteran must be as equally qualified as competing applicants in order to receive preferential treatment.⁷³ Other private-sector statutes fail to define “veteran” and thus derive a definition from their corresponding public-sector laws.⁷⁴ Like many public-sector statutes, both Arkansas’s and Minnesota’s private-sector laws expressly extend preference benefits to certain qualifying spouses,⁷⁵ while North Dakota does so through its public-sector statute.⁷⁶ Washington, however, does not extend preference benefits to spouses at all.⁷⁷

2. Application to the Employment Process

There is substantial variance among policies, both public and private, as to their applicability to certain decisions made during

qualifications of a job because “there must be some reasonable relation between the basis of preference and the object to be obtained”).

71. See *State ex rel. Meehan v. Empie*, 204 N.W. 572, 573 (Minn. 1925) (holding that a court must construe a preference statute sensibly to require that the veteran “be capable of performing the duties of the position in a reasonably efficient manner”).

72. Arkansas’s private-sector statute provides for three means of qualifying as a veteran: (1) serve 180 days of active duty service with an other-than-dishonorable discharge; (2) receive a discharge as a result of a service-related disability; or (3) serve as a reservist with an other-than-dishonorable discharge. ARK. CODE ANN. § 11-15-102(6) (Supp. 2013). Arkansas’s public-sector statute, however, applies to two types of “veterans”: (1) those honorably discharged from a tour of active duty and (2) reservists or national guardsmen who served for a period of at least six years. ARK. CODE ANN. § 21-3-302(b) (Supp. 2013).

73. See ARK. CODE ANN. § 11-15-102(6)–(7) (Supp. 2013).

74. See MINN. STAT. ANN. § 197.4551 (West 2014); N.D. CENT. CODE ANN. § 37-19.1-05 (West 2013). Washington’s statute explicitly states that “veteran” has the “same meanings” as defined in the public-sector statutes. See WASH. REV. CODE ANN. § 73.16.110(3) (West 2014).

75. See ARK. CODE ANN. § 11-15-102(5) (Supp. 2013); MINN. STAT. ANN. § 197.4551(2) (West 2014).

76. See N.D. CENT. CODE ANN. § 37-19.1-03 (West 2013).

77. See WASH. REV. CODE ANN. §§ 41.04.005, .007 (West 2014) (public-sector statutes); WASH. REV. CODE ANN. § 73.16.110(3) (West 2014) (private-sector statute).

the employment process. Many statutes apply throughout the entire process, such as during hiring, promotion, and retention,⁷⁸ but several others provide for a narrower application that covers only certain employment decisions.⁷⁹ With respect to this issue, there is ultimately no bright-line distinction between public-sector and private-sector statutes.

The majority of public-sector statutes create preferences that apply, at a minimum, during the initial hiring process. Several courts have held that preferences related to promotions are unreasonable and therefore unconstitutional.⁸⁰ Other courts, however, have rejected this line of reasoning.⁸¹ Drawing from this jurisdictional split, provisions will occasionally specify whether they apply during promotion decisions.⁸² It is not uncommon for public-sector provisions to extend preferences to retention decisions, such as requiring that an employer terminate non-veterans prior to veterans when downsizing the workforce.⁸³ In some instances, preference policies even limit the grounds for terminating qualifying veterans.⁸⁴

Private-sector statutes, in effect, directly mirror their public-sector counterparts regarding the preference's applicability

78. See, e.g., ARK. CODE ANN. § 21-3-302(c), (e) (Supp. 2013); FLA. STAT. ANN. § 110.2135(1) (West 2014).

79. See DEL. CODE ANN. tit. 29, § 5935(1) (West 2013) (confining preference to initial entrance); 15 ILL. COMP. STAT. ANN. 310 / 10b.7 (West 2014) (providing a preference only for entrance examinations).

80. See *Parrack v. Ford*, 203 P.2d 872, 874 (Ariz. 1949) (“[T]he statute should have been interpreted to mean that the veteran employee is not entitled to any preference grading on promotional examinations.”); *Hoffman v. Twp. of Whitehall*, 677 A.2d 1200, 1203 (Pa. 1996) (“[T]he Veterans’ Preference Act [is], in the context of veterans seeking promotions in public employment, unconstitutional.”); *Commonwealth ex rel. Maurer v. O’Neill*, 83 A.2d 382, 383 (Pa. 1951) (“When we apply that test to the facts of this case, we can come only to the conclusion that, because of the difference between an original appointment and a promotion, the award of the ten percentage point preference to veterans in examinations for promotions is unreasonable and therefore unconstitutional.”).

81. See *Koelfgen v. Jackson*, 355 F. Supp. 243, 253-54 (D. Minn. 1972) (upholding a preference statute applicable to promotion decisions); *State ex rel. Higgins v. Civil Serv. Comm’n of City of Bridgeport*, 90 A.2d 862, 866-67 (Conn. 1952) (same).

82. See, e.g., COLO. CONST. art. XII, § 15(5) (West, Westlaw through Nov. 2013 amendments).

83. See COLO. CONST. art. XII, § 15(3)(a); ALA. CODE § 36-26-15(b) (2014); ARK. CODE ANN. § 21-3-304(c)(2) (Supp. 2013); 51 PA. CONS. STAT. ANN. § 7107 (West 2014).

84. See MINN. STAT. ANN. § 197.46 (West 2014). Minnesota courts have recognized additional common-law restrictions, such as “[t]he incompetency or misconduct must be related to the employee’s job performance, and the employer must be found to have acted reasonably in discharging the employee.” See *Pawelk v. Camden Twp.*, 415 N.W.2d 47, 49-50 (Minn. Ct. App. 1987) (internal citation omitted).

within the various aspects of the employment relationship. North Dakota and Washington merely derive the applicability of the preference in the private sector from the pre-existing public-sector statute, as their private-sector statutes omit any mention of its scope.⁸⁵ Minnesota's private-sector statute specifies that it is applicable to initial hiring and promotion decisions, and the public-sector statute speaks only in vague terms, suggesting a similar range.⁸⁶ Arkansas's private-sector law, although allowing a private employer to design its own policy, exists independent of the state's public-sector statute and requires an employer to apply its specific preferences throughout the entire employment relationship and in the same manner as provided by the public-sector statute.⁸⁷ The distinction arises in that private employers have a choice in whether or not to adopt a preference policy, whereas public organizations do not.⁸⁸ Once a private employer institutes a preference policy, however, the policy must be applied uniformly.⁸⁹

C. Mandatory Versus Voluntary

An additional distinction exists between preference statutes that mandate an employer to provide a preference and those which allow employers to voluntarily develop and apply a preference. Where a preference is drafted using affirmative language, thus evidencing a mandatory preference, most jurisdictions require an employer to select a veteran over other applicants, provided the veteran is equally qualified with competing applicants.⁹⁰ Implicit within each statute, however, is some measure of discretion for an employer to determine whether an applicant is "qualified."⁹¹

85. See N.D. CENT. CODE ANN. § 37-19.1-05 (West 2013); WASH. REV. CODE ANN. § 73.16.110 (West 2014).

86. Compare MINN. STAT. ANN. § 197.4551 (West 2014) ("A private, nonpublic employer may grant preference to a veteran in hiring and promotion."), with MINN. STAT. ANN. § 197.455 (West 2014) (lacking similar language).

87. ARK. CODE ANN. § 11-15-103(a)(2)(B) (Supp. 2013).

88. Compare ARK. CODE ANN. § 11-15-103(a)(1) (Supp. 2013) (voluntary), with ARK. CODE ANN. § 21-3-302(c), (e) (Supp. 2013) (mandatory).

89. ARK. CODE ANN. § 11-15-103(a)(2)(B) (Supp. 2013).

90. See, e.g., N.D. CENT. CODE ANN. § 37-19.1-02 (West 2013) ("If the veteran is found to possess the qualifications required for the position applied for, . . . the [public employer] shall employ the veteran.").

91. See *State ex rel. Slusher v. City of Leavenworth*, 172 P.3d 1154, 1161 (Kan. 2007) (noting an employer retained the discretion to determine whether a veteran was "competent").

Those statutes which do not speak in affirmative language allow for a voluntary preference, providing an employer with broad discretion as to whether they should implement or apply a preference at all.⁹²

The majority of public-sector preference statutes are explicitly mandatory in nature,⁹³ while private-sector preference statutes are exclusively voluntary.⁹⁴ It is worth noting, however, that a private employer in Arkansas may voluntarily implement a preference policy but, once adopted, must apply it uniformly.⁹⁵ Employers throughout the country may, in theory, voluntarily adopt a preference in the absence of a statute authorizing preferences within the private sector.⁹⁶

D. Absolute Versus Point System

A finer distinction exists between statutes that create absolute preferences, those which provide additional points within a scored system, and those that allow “preferences” but fail to outline the manner of their application. Absolute preferences create an automatic advantage, propelling a veteran with the necessary minimum skills to the top of an employment list, regardless of the competition’s qualifications.⁹⁷ In some instances, courts have invalidated arguably “absolute” preferences because they eliminate discretion entirely.⁹⁸

92. *See, e.g.*, ARK. CODE ANN. § 11-15-103(a)(1) (Supp. 2013); MINN. STAT. ANN. § 197.4551 (West 2014); N.D. CENT. CODE ANN. § 37-19.1-05 (West 2013); WASH. REV. CODE ANN. § 73.16.110 (West 2014).

93. *See, e.g.*, COLO. CONST. art. XII, § 15 (West, Westlaw through Nov. 2013 amendments); ALA. CODE § 36-26-15(b) (2014); ARK. CODE ANN. § 21-3-302(c) (Supp. 2013); KY. REV. STAT. ANN. § 18A.150 (West 2014); OR. REV. STAT. ANN. § 408.230(1) (West 2014).

94. ARK. CODE ANN. § 11-15-103(a)(1) (Supp. 2013); MINN. STAT. ANN. § 197.4551 (West 2014); N.D. CENT. CODE ANN. § 37-19.1-05 (West 2013); WASH. REV. CODE ANN. § 73.16.110(2) (West 2014).

95. ARK. CODE ANN. § 11-15-103(a) (Supp. 2013).

96. Historically, preference provisions have been created by statute because voluntarily adopted preferences are not exempt from Title VII liability unless created by law. *See* 42 U.S.C. § 2000e-11 (2012) (exempting preferences created by law from Title VII liability); *see also* *Krenzer v. Ford*, 429 F. Supp. 499, 502-03 (D.D.C. 1977) (holding an administrative policy not founded on any statute created a disparate impact on women in violation of Title VII).

97. *See, e.g.*, N.J. STAT. ANN. § 11A:5-4 (West 2014) (“The names of disabled veterans who receive passing scores on open competitive examinations shall be placed at the top of the employment list in the order of their respective final scores.”).

98. *See* *Hutcheson v. Dir. of Civil Serv.*, 281 N.E.2d 53, 57-59 (Mass. 1972) (holding a provision granting disabled veterans an “absolute” preference over all other applicants

Furthermore, several jurisdictions have invalidated absolute preferences that dispense or reduce examination requirements because they disregard a veteran's actual qualifications.⁹⁹

Conversely, point-based preferences offer a more measurable advantage, as certain categories of veterans are entitled to specific, predetermined point values to supplement their base score.¹⁰⁰ There are different methods an employer may use in applying the points. For example, some apply automatically,¹⁰¹ while others only come into play once a veteran satisfies the minimum requirements for a job, usually by passing a test.¹⁰² States generally accept that points cannot be awarded to assist a veteran in meeting the minimum job requirements of the examination; thus, preference points are applied only after a veteran attains a passing score.¹⁰³

The vast majority of public-sector preference statutes award veterans additional points within a scored system.¹⁰⁴ Several, however, continue to provide an absolute preference.¹⁰⁵ Private-sector statutes, yet again, mirror their respective public-sector

violated the state constitution); *see also* *Brown v. Russell*, 43 N.E. 1005, 1010 (Mass. 1896) (invalidating a veterans' preference statute purporting to give absolute "and exclusive privileges, distinct from those of the community").

99. *See* Commonwealth *ex rel. Graham v. Schmid*, 3 A.2d 701, 706 (Pa. 1939) (holding the absolute preference under review was "unconstitutional as not providing a reasonable relation between the value of military training and its appraisal in public employment"); *see also* *Brown*, 43 N.E. at 1010 (holding an employer was not authorized to place a veteran applicant at the top of the list for a law enforcement position without taking an examination).

100. *See* COLO. CONST. art. XII, § 15 (West, Westlaw through Nov. 2013 amendments); ARIZ. REV. STAT. ANN. § 38-492 (2014); ARK. CODE ANN. § 21-3-302(d)(1)(A) (Supp. 2013); FLA. STAT. ANN. § 295.08 (West 2014); IDAHO CODE ANN. § 65-504(2) (West 2014); 15 ILL. COMP. STAT. 310 / 10b.7 (West 2014); IND. CODE ANN. § 5-9-3-2(a)-(b) (West 2014); KY. REV. STAT. ANN. § 18A.150 (West 2014).

101. *See, e.g.*, COLO. CONST. art. XII, § 15 (West, Westlaw through Nov. 2013 amendments).

102. *See* ARIZ. REV. STAT. ANN. § 38-492(A) (2014) ("The preference shall be added to the grade earned by the veteran, but only if the veteran earns a passing grade without preference.").

103. If a preference interferes with an examination's initial determination of competency and qualification, it may be subject to constitutional challenges and Title VII claims. *See Schmid*, 3 A.2d at 706 ("[A] credit to veterans of a specific number of points aiding them in passing an examination . . . will be held unconstitutional . . .").

104. *See, e.g.*, COLO. CONST. art. XII, § 15 (West, Westlaw through Nov. 2013 amendments); ARIZ. REV. STAT. ANN. § 38-492 (2014); ARK. CODE ANN. § 21-3-302(d) (Supp. 2013); FLA. STAT. ANN. § 295.08 (West 2014); IDAHO CODE ANN. § 65-504(2) (West 2014); 15 ILL. COMP. STAT. ANN. 310 / 10b.7 (West 2014); IND. CODE ANN. § 5-9-3-2(a)-(b) (West 2014); KY. REV. STAT. ANN. § 18A.150 (West 2014).

105. *See, e.g.*, N.J. STAT. ANN. § 11A:5-4 (West 2014).

counterparts when it comes to awards of additional points. Minnesota, North Dakota, and Washington merely extend the preference authorized by the public-sector statute to the private sector without providing any additional guidance as to the preference's application.¹⁰⁶ Arkansas's private-sector statute effectively allows an employer to craft its own preferences.¹⁰⁷ Thus, in theory, an employer could create a new type of preference different from the traditional point-based system.

E. Preferences Among Different Types of Veterans

Many veterans' preference statutes create categories of veterans within the larger veteran population and favor one category over another. Even within a scored system, state law may award a base level of points to certain types of veterans, while other classifications, such as disabled veterans and former prisoners of war, receive additional points.¹⁰⁸ Such provisions usually favor disabled veterans or former prisoners of war as a means of recognizing their "larger sacrifice."¹⁰⁹

F. Remedies

In an effort to enforce the application of veterans' preferences, many provisions expressly create enforcement mechanisms. Public-sector statutes indisputably outperform private-sector statutes here by expressly providing mechanisms a veteran may use to seek redress. For example, several public-sector statutes authorize a direct cause of action against an

106. See MINN. STAT. ANN. § 197.4551 (West 2014); N.D. CENT. CODE ANN. § 37-19.1-05 (West 2013); WASH. REV. CODE ANN. § 73.16.110 (West 2014).

107. Arkansas's private-sector statute states that private employers *may* model a preference after the public-sector statute, which leaves the door open to alternatives. See ARK. CODE ANN. § 11-15-103(a)(2)(C) (Supp. 2013). The public-sector statute, however, provides for a point-based preference while simultaneously allowing a non-objective preference that seems to fall short of an absolute advantage. See ARK. CODE ANN. § 21-3-302(d) (Supp. 2013).

108. See, e.g., COLO. CONST. art. XII, § 15(1)(c) (West, Westlaw through Nov. 2013 amendments) (awarding additional points to disabled veterans); ALA. CODE § 36-26-15(b) (2014) (awarding additional points to disabled veterans); ALASKA STAT. ANN. § 39.25.159(a)(1) (West 2014) (awarding additional points to disabled veterans and former prisoners of war); IDAHO CODE ANN. § 65-504(2) (West 2014) (awarding additional points to disabled veterans); MICH. COMP. LAWS ANN. § 38.413 (West 2014) (awarding additional points to "war veterans" and disabled veterans).

109. See IDAHO CODE ANN. § 65-501 (West 2014).

employer who fails to apply a required preference.¹¹⁰ Similarly, many public-sector laws even require employers to provide a written explanation of their choice to hire a non-veteran over a preference-eligible veteran.¹¹¹ Statutes may also mandate notices of termination,¹¹² hearings,¹¹³ and even authorize courts to employ writs of mandamus in an effort to enforce preference rights.¹¹⁴ Though relatively rare, at least two public-sector statutes allow prosecutors to bring criminal charges against employers who fail to comply with preference laws.¹¹⁵ No private-sector statute sanctions any remedies independent of those provided by their respective public-sector counterparts.¹¹⁶

G. Special Provisions

Several public- and private-sector statutes provide more than a preference by incorporating special provisions which assist veterans in securing employment. For example, a preference statute may entitle certain veterans to an automatic interview.¹¹⁷ Likewise, a provision may provide employment credit for relevant military training or experience.¹¹⁸ Within the private sector, one statute even mandates that the state create and maintain a registry of employers who have implemented veterans' preference policies in an effort to connect veterans with military-

110. *See, e.g.*, IDAHO CODE ANN. § 65-506 (West 2014); MONT. CODE ANN. § 39-29-104 (West 2013); WASH. REV. CODE ANN. § 73.16.015 (West 2014).

111. *See, e.g.*, ARK. CODE ANN. § 21-3-303(a) (Supp. 2013); N.D. CENT. CODE ANN. § 37-19.1-04 (West 2013); OR. REV. STAT. ANN. § 408.230(5) (West 2014).

112. *See, e.g.*, MINN. STAT. ANN. § 197.46 (West 2014).

113. *See, e.g.*, MINN. STAT. ANN. § 197.46; N.D. CENT. CODE ANN. § 37-19.1-04(1) (West 2013).

114. *See, e.g.*, MINN. STAT. ANN. § 197.46 (West 2014).

115. *See* ARIZ. REV. STAT. ANN. § 38-494 (2014); N.Y. CIV. SERV. LAW § 85(8) (McKinney 2014).

116. *See* ARK. CODE ANN. §§ 11-15-101 to -105 (Supp. 2013); MINN. STAT. ANN. § 197.4551 (West 2014); N.D. CENT. CODE ANN. § 37-19.1-05 (West 2013); WASH. REV. CODE ANN. § 73.16.110 (West 2014).

117. *See, e.g.*, OKLA. STAT. ANN. tit. 74, § 840-4.14(D) (West 2014) (requiring employers to interview all qualified veterans).

118. *See, e.g.*, MO. ANN. STAT. § 36.220(2) (West 2014) (providing credit for training and experience gained with some relationship to the job's duties). In 2013, the Texas Legislature passed the "Chris Kyle Bill," named after the most lethal sniper in United States military history and a noted veterans' advocate, which provides a number of benefits to qualifying veterans, including occupational license credits for relevant military service, training, and education. *See* TEX. OCC. CODE ANN. §§ 55.001-55.007 (West 2013).

friendly employers.¹¹⁹ Certain jobs in some states, however, are expressly exempted from preference.¹²⁰

IV. COMING HOME: ARKANSAS'S PRIVATE-SECTOR VETERANS' PREFERENCE STATUTE

A. Characteristics

1. *Private*

Although Arkansas originally enacted a veterans' preference law in 1947, the preference extended only to public-sector employment.¹²¹ In April 2013, the Arkansas General Assembly passed the Voluntary Veterans' Preference Employment Policy Act, which statutorily authorized private employers to implement veterans' preferences.¹²² In theory, private employers in other states may implement their own policies without express statutory authorization, but such practices might lack protection against Title VII claims.¹²³

2. *Application to Persons*

Arkansas's private-sector statute focuses primarily on extending preferences to qualifying "veterans."¹²⁴ The Arkansas statute defines a "veteran" as a person who:

(A) Served on active duty for a period of more than one hundred eighty (180) days and was discharged or released from active duty with other than a dishonorable discharge;

119. See ARK. CODE ANN. § 11-15-104 (Supp. 2013).

120. See, e.g., ARK. CODE ANN. 21-3-302(h) (Supp. 2013) (exempting certain political positions and appointments); FLA. STAT. ANN. § 295.07(4) (West 2014) (exempting political positions, political appointments, temporary positions, and most jobs requiring professional licensure).

121. See ARK. CODE ANN. § 21-3-302 (Supp. 2013).

122. Act 598, 2013 Ark. Acts 2270 (codified at ARK. CODE ANN. §§ 11-15-101 to -105 (Supp. 2013)).

123. See 42 U.S.C. § 2000e-11 (2012) (exempting preferences created by statute from Title VII liability); see also *Krenzer v. Ford*, 429 F. Supp. 499, 502-03 (D.D.C. 1977) (holding an administrative policy not founded on any statute created a disparate impact on women in violation of Title VII). An individual may still bring a claim against an employer, but he or she must satisfy the *Feeney* test by demonstrating a disparate impact and discriminatory intent. See *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 275 (1979). Liability may also stand where a veterans' preference merely serves as a pretext for discrimination. See *Woody v. City of W. Miami*, 477 F. Supp. 1073, 1078-79 (S.D. Fla. 1979).

124. ARK. CODE ANN. § 11-15-103 (Supp. 2013).

(B) Was discharged or released from active duty because of a service-connected disability; or (C) As a member of a reserve component under an order to active duty, not to include training, was discharged or released from duty with other than a dishonorable discharge¹²⁵

Arkansas also allows private employers to provide preferential treatment to surviving spouses of deceased veterans and spouses of permanently disabled veterans.¹²⁶ With respect to qualifying spouses, the law incorporates an additional requirement of United States citizenship.¹²⁷ Furthermore, a surviving spouse must be unmarried at the time he or she pursues the preference.¹²⁸ Also, the law only authorizes preferences to a qualifying veteran or spouse who is “equally qualified” with other applicants.¹²⁹

3. *Other Characteristics*

Arkansas’s private-sector law features several of the characteristics discussed in Part III. The new law permits preferences with respect “to employment decisions regarding the hiring, promotion, or retention during a reduction in force.”¹³⁰ Accordingly, it applies throughout the employment relationship. In addition, the statute permits the voluntary adoption of a veterans’ preference policy allowing private employers to choose whether to adopt a preference policy at all.¹³¹ The statute does, however, mandate uniform application of the policy once it has been adopted.¹³² This seems to indicate that, although an employer enjoys broad discretion as to whether it will adopt a policy, consistent application becomes mandatory once a preference has been adopted.

The Arkansas law fails to create any express remedies for veterans to pursue should an issue arise. It does, however, provide for the maintenance of a registry by the Department of Workforce Services that lists “private employers and local

125. ARK. CODE ANN. § 11-15-102(6) (Supp. 2013).

126. ARK. CODE ANN. § 11-15-103(b) (Supp. 2013).

127. ARK. CODE ANN. § 11-15-102(4)–(5) (Supp. 2013).

128. ARK. CODE ANN. § 11-15-102(5)(A).

129. ARK. CODE ANN. § 11-15-102(7).

130. ARK. CODE ANN. § 11-15-103(a)(2)(B) (Supp. 2013).

131. ARK. CODE ANN. § 11-15-103(a)(1).

132. ARK. CODE ANN. § 11-15-103(a)(2)(B).

government employers in Arkansas that have a voluntary veterans' preference employment policy."¹³³ Moreover, the law requires the Department of Veterans' Affairs and Department of Workforce Services to assist private employers with the determination of whether an individual qualifies for benefits under the law.¹³⁴

B. Build Your Own Preference Policy

After examining Arkansas's private-sector law, one might question whether the preference is absolute in nature or, rather, whether it is based on a point system. The law fails to provide a clear answer to this question. It does, however, state that the preference policy "[s]hall be in writing" and "[s]hall be applied uniformly" throughout the employment relationship.¹³⁵ The only indicia of a preference structure can be seen in the language that states an employer's preference policy may be modeled after Arkansas's public-sector provisions.¹³⁶ This seems to indicate that an employer may design its policy after the public-sector laws, but it is not required to do so. As a result, it appears that private employers enjoy the ability to build their own preference employment policies.¹³⁷

Employers who elect to model their preference policy after the public-sector statute have the option to copy the two provisions cited by the private-sector statute. Under the first, an employer may award additional points to preference-eligible veterans after they pass a scored examination.¹³⁸ This provision also permits a more abstract preference where the employer utilizes a non-numeric scoring system, but requires that employers in such instances must be able to demonstrate how they

133. ARK. CODE ANN. § 11-15-104 (Supp. 2013).

134. ARK. CODE ANN. § 11-15-105 (Supp. 2013).

135. ARK. CODE ANN. § 11-15-103(a)(2) (Supp. 2013).

136. ARK. CODE ANN. § 11-15-103(a)(2)(C).

137. Although the private-sector statute fails to set boundaries for employer-designed preferences, such policies will almost certainly be subject to the same constitutional limitations. *See, e.g.*, *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 274 (1979) (establishing a two-prong test for determining whether a preference law violates equal protection principles); *Commonwealth ex rel. Graham v. Schmid*, 3 A.2d 701, 706 (Pa. 1938) ("[A] credit to veterans of a specific number of points aiding them in passing an examination, is in parity with exemption from examination; these provisions will be held unconstitutional . . .").

138. ARK. CODE ANN. § 21-3-302(d) (Supp. 2013).

applied the preference.¹³⁹ The second provision cited by the private-sector statute requires an employer to supply a veteran with a written explanation detailing why it did not select or interview the preference-eligible applicant.¹⁴⁰

The flexibility of the Arkansas private-sector law allows an employer to design a preference that fits its needs. Although some preference policies undoubtedly have room for improvement, the law recognizes a vital need for customization.¹⁴¹ This feature is truly unique and stands to alter the very concept of veterans' preference laws across the country, as it is the only law authorizing a customizable, rather than a one-size-fits-all, preference policy.

C. Recommendations

In order to improve Arkansas's private-sector statute, the Arkansas General Assembly should focus on two primary goals: (1) improving the effectiveness of the provision and (2) striking a balance that encourages employers to pursue veterans. This comment proposes modest reform by suggesting an amendment to Arkansas's Voluntary Veterans' Employment Preference Policy Act.¹⁴² The remainder of this Part focuses primarily on methods of improving the effectiveness of Arkansas's private-sector veterans' preference law by enforcing and publicizing its existing provisions. The law already provides employers with broad discretion in designing and implementing preferences of their own choosing, subject only to constitutional limitations. As a result, it is difficult to improve the actual preference provided when an employer alone shapes and defines its nature and scope. In recognition of the practical benefits garnered by the flexibility of current law, this comment does not propose a rigid structure.

139. ARK. CODE ANN. § 21-3-302(d)(2)(B).

140. ARK. CODE ANN. § 21-3-303(a) (Supp. 2013).

141. Wal-Mart's voluntary commitment to hiring 100,000 veterans by 2018, although praiseworthy, only assists a small portion of the veteran community. See Dao, *supra* note 26. Those who were discharged from service for administrative or punitive reasons, or left the armed forces more than twelve months before their application, will not be eligible for preferential treatment under Wal-Mart's plan. *Id.*

142. Sample legislation is attached as Appendix A.

1. *Additional and Alternative Remedies*

Perhaps the best method of improving a preference statute's effectiveness is to ensure enforcement of the benefits it already provides. Voluntary preferences, by their very nature, depend upon the goodwill of employers. In the absence of a statutory mandate ordering a preference, as is the case under every private-sector statute, private employers exercise free choice as to whether they will give preferential treatment to veterans.¹⁴³ Drawing from this reality, legislators must be mindful to appropriately balance the benefits and protections provided. If a preference statute grants veterans substantially greater protection than is available to non-veterans, employers may be hesitant to hire veterans, let alone to voluntarily implement a policy mandating preferential treatment. At the same time, however, preference statutes must have sufficient strength to adequately enforce and protect the preferences they provide. A statute must strike an appropriate balance by carefully weighing a veteran's interest in enjoying an unobstructed preference and an employer's interest in hiring a worker without the burden of excessive legal obligations.

Several public-sector statutes incorporate a straightforward approach by providing eligible veterans a direct cause of action against noncompliant employers.¹⁴⁴ Although such remedies unquestionably encourage employers to toe the line, a damages-based system only appears practical where the statute orders employers to provide preferences, as is the case under nearly every public-sector statute. As legislatures mandated that preferences apply to public-sector employment decisions, public employers never had the option to do otherwise. In the private sector, however, employers enjoy the freedom to make their own decisions. As a result, veterans armed with causes of action could prove too daunting as damages-based remedies run the risk of alienating veterans as a class, thus discouraging employers and defeating the very purpose of preference statutes.

143. The private-sector laws provide that an employer "may" award a preference, thus permitting free choice. *See* ARK. CODE ANN. § 11-15-103(a)(1) (Supp. 2013); MINN. STAT. ANN. § 197.4551 (West 2014); N.D. CENT. CODE ANN. § 37-19.1-05 (West 2013); WASH. REV. CODE ANN. § 73.16.110(2) (West 2014).

144. *See, e.g.*, IDAHO CODE ANN. § 65-506 (West 2014); WASH. REV. CODE ANN. § 73.16.015 (West 2014).

A promising middle ground could be reached through administrative remedies, such as hearings before state boards or commissions. Several jurisdictions already utilize similar approaches to resolve public-sector disputes.¹⁴⁵ These systems provide a cost-effective means of resolving state-law preference issues, which is particularly appealing when one considers that a veteran may lack sufficient resources to independently pursue his or her claim in court.¹⁴⁶ Agencies already providing assistance to veterans in securing government benefits and employment rights could work with the administrative process to safeguard private-sector preferences. Both the public- and private-sector laws in Arkansas fail to explicitly provide any remedy when an employer deprives a veteran of his or her preference rights.¹⁴⁷ As a result, a statutory right to an administrative hearing could significantly expand the protections given to Arkansas veterans.

If a jurisdiction seeks to implement administrative remedies, several other preliminary matters are of particular relevance. Legislators must consider which state entity to vest with jurisdiction over preference issues and what should be the scope of the entity's authority. Although Arkansas has a diverse array of options, administrative authority would best fit with an agency dealing with a related subject matter, such as the Arkansas Department of Veterans' Affairs. Furthermore, such procedures should be modeled on the systems adopted by similar administrative entities, such as the Equal Employment Opportunity Commission (EEOC)¹⁴⁸ or the Office of Personnel

145. See, e.g., MINN. STAT. ANN. § 197.46 (West 2014); N.D. CENT. CODE ANN. § 37-19.1-04 (West 2013).

146. Even with the protections offered by USERRA, requirements that a veteran demonstrate his or her military status as a motivating factor in the employer's conduct may be a difficult hurdle to surmount. The veteran applicant may lack sufficient resources to pursue a claim or may not feel that it is worthwhile to challenge employers over jobs that may not be particularly lucrative. As a result, a distinct danger exists that employers may arbitrarily refuse to extend preferences while still reaping the public-relations benefits derived from promulgating preference policies.

147. The Arkansas public-sector law does, however, require a written explanation of an employer's decision to hire a non-veteran over a preference-eligible veteran. See ARK. CODE ANN. § 21-3-303(a) (Supp. 2013). Ultimately, however, a written explanation offers little solace to an unemployed veteran.

148. See, e.g., *Understanding Your Employment Rights Under the Americans with Disabilities Act (ADA): A Guide for Veterans*, EQUAL EMP. OPPORTUNITY COMMISSION, http://www.eeoc.gov/eeoc/publications/ada_veterans.cfm (last visited Oct. 16, 2014).

Management (OPM).¹⁴⁹ For example, the OPM exercises jurisdiction when an employer has allegedly violated a veteran's preference rights pursuant to a federal public-sector statute.¹⁵⁰ This process begins after the aggrieved veteran files a complaint with the United States Department of Labor's VETS office, which begins the investigative process.¹⁵¹ VETS then attempts to resolve the issues with the employer but may permit the complainant to seek redress with a higher authority, usually the Merits Systems Protection Board.¹⁵² An Arkansas agency could adopt a similar process, perhaps permitting appeal to a traditional court or another agency which would not be burdened with establishing a record and resolving preliminary matters.

As an alternative to administrative jurisdiction, the Arkansas General Assembly could establish a designated review commission. For example, the Minnesota public-sector statute provides that civil service commissions within a public entity exercise jurisdiction over preference benefits in certain situations.¹⁵³ The statute also provides for the appointment of a temporary committee where such commissions do not already exist.¹⁵⁴ The temporary commission allows for greater flexibility that could facilitate the needs of private employers who lack established review boards. Furthermore, temporary commissions could draw representatives from independent government agencies and other entities familiar with veterans' benefits, rather than a private employer's limited pool of potentially biased employees. This would better facilitate a just resolution because the commission could act independent of an employer's influence.

If extending enforcement powers to an agency, a statute must vest the agency with sufficient authority to stipulate effective remedies in order to secure enforcement of preference rights.

149. The OPM exercises jurisdiction pursuant to the Veterans Employment Opportunities Act over matters surrounding veterans' preferences, including enforcement and interpretation of related laws. U.S. DEP'T OF LABOR, VETERANS' PREFERENCE 2 (2010), *available at* <http://www.dol.gov/vets/Education%20and%20Outreach/Program%20Brochures/PREFERENCE.pdf>.

150. *See id.*

151. *Id.*

152. *Id.*

153. *See* MINN. STAT. ANN. § 197.46 (West 2014).

154. MINN. STAT. ANN. § 197.46.

Although there are many options, legislators must strike a balance in order to avoid discouraging employers from hiring veterans by providing too potent an arsenal of remedies. Based on these concerns, administrative hearings could offer such remedies as injunctive relief and even position placement.¹⁵⁵ Furthermore, fines, and perhaps even back pay, would be appropriate in instances of gross violations.¹⁵⁶ Although a general award of damages could prove effective, such penalties would run the risk of discouraging employers from hiring veterans because they seem too similar to traditional court actions.

The entity designated to review veterans' preference claims should receive a statutory grant of specific jurisdiction to exercise substantive review over preference policies. This authority should extend to those individuals and organizations that claim to provide a veterans' employment preference. Furthermore, the public benefits by knowing that preference policies are legitimate since employers often garner social and economic benefits by appearing to be "military-friendly." Veterans derive little, if any, benefit from provisions that profess to assist them but actually amount to little more than a hollow public-relations endeavor. Where preferences are promised, they ought to be given, and administrative oversight could ensure proper application.

2. Promoting Awareness

Awareness by both veterans and employers is essential to the proper functioning of veterans' preference laws and policies. What good does a preference do if a veteran is unaware of his or her entitlement to such a benefit? How will an employer ever implement a preference policy if it is ignorant of its ability to do so? Both veterans and employers must be aware of a preference law's existence so that the preference can accomplish its goal of promoting veteran employment. To make Arkansas's private-sector preference law more effective, the state must actively promote the benefits offered under the law's provisions.

155. The EEOC offers similar remedies. See *The ADA: Questions and Answers*, EQUAL EMP. OPPORTUNITY COMMISSION, <http://www.eeoc.gov/eeoc/publications/adaqa1.cfm> (last visited Oct. 16, 2014).

156. The EEOC also provides these remedies. See *id.* In cases where "an employer act[ed] with malice or reckless indifference," the EEOC is vested with the power to award punitive damages to the injured party. *Id.*

Although far from perfect, Arkansas has implemented several noteworthy measures to reduce unemployment among veterans. The Arkansas Department of Workforce Services has appointed several officials, known as local veterans' employment representatives, who interact with employers to advocate for veteran employment opportunities and to assist veterans with finding work after military service.¹⁵⁷ Arkansas's private-sector law also directs the Department of Workforce Services to maintain a registry that lists all private employers who have adopted a veterans' preference policy.¹⁵⁸ Although these initiatives are laudable, they do little good if veterans are unaware that they exist or if they are too difficult to access. As of publication, the author has been unable to locate the registry, making it unclear whether one exists at all.

Many other organizations far outperform the State of Arkansas by assisting veterans in locating employment opportunities and in determining their eligibility for preferential treatment. For example, VETS maintains an interactive website that walks veterans through a step-by-step process to determine whether they are eligible for federal employment preferences.¹⁵⁹ VETS also provides an operations manual for employers that outlines relevant provisions and procedures related to veterans' preferences.¹⁶⁰ Arkansas could provide informative pamphlets to private employers that provide similar guidance on veterans' preferences and their limits. Similarly, many websites provide invaluable resources that connect veterans with local employers.¹⁶¹ Arkansas could simply direct veterans to these existing resources in order to shape its policy initiatives after such successful models.

157. *Veteran Services*, ARK. DEPARTMENT WORKFORCE SERVICES, <http://www.state.ar.us/esd/Programs/Veterans/index.htm> (last visited Oct. 16, 2014).

158. ARK. CODE ANN. § 11-15-104 (Supp. 2013).

159. *Veterans' Preference Advisor*, U.S. DEPARTMENT LAB., <http://www.dol.gov/elaws/vetspref.htm> (last visited Oct. 16, 2014).

160. See generally U.S. DEP'T OF LABOR, VETERANS' PREFERENCE OPERATIONS MANUAL (2010), available at http://www.dol.gov/vets/vms/Volume%20XII/vp_ops_manual.pdf.

161. See, e.g., *Monster: Veteran Employment Center*, MILITARY.COM, <http://www.military.com/veteran-jobs> (last visited Oct. 16, 2014); *SHOW YOUR STRIPES* (2013), <http://www.showyourstripes.org/veterans/> (last visited Oct. 16, 2014).

V. CONCLUSION

Arkansas's Voluntary Veterans' Preference Employment Policy Act stands as a trailblazing model for alleviating veteran employment troubles. Despite this laudable standing, the law leaves room for improvement. Unemployment continues to threaten and disrupt the lives of veterans, with little end in sight. Each and every day, veterans return home after sacrificing much of themselves for their country, and the transition itself is one often fraught with hardship. In recognition of such courage and sacrifice, we cannot, and must not, abandon them now.

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APPENDIX A

Arkansas's Right to Lawful Occupation Act is amended in the following manner:

§ 11-15-106. Administrative remedies for enforcement of preference rights

(a) [DESIGNATED AGENCY] is hereinafter vested with specific jurisdiction to adjudicate claims arising under this chapter, for the denial or abrogation of rights guaranteed therein.

(b) A preference-eligible party who believe that he or she has been denied a right or benefit under this chapter may file a complaint with [DESIGNATED AGENCY] no later than sixty (60) calendar days after the preference-eligible party knows or reasonably should know of the offense.

(c) [DESIGNATED AGENCY] shall, pursuant to this provision, exercise authority to:

(1) conduct hearings over claims arising under this chapter in order to determine the merits of the asserted claim;

(2) require an employer to submit evidence of a veteran preference's application within employment determinations, including but not limited to employment records;

(3) order an employer to provide periodic reports evidencing compliance with previous administrative orders.

(4) issue injunctions mandating the termination of a policy violating this chapter;

(5) issue orders requiring that the aggrieved preference-eligible party be placed within the position pursued; or

(6) issue reasonable fines appropriate to the nature of the performed offense.

(d) Upon finding a violation of a preference right, [DESIGNATED AGENCY] shall take reasonable steps to resolve a dispute prior to issuing any order pursuant to subsection (c)(5). Should such reasonable steps fail, [DESIGNATED AGENCY] shall issue such orders as it believes reasonably necessary to secure compliance with applicable law.