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# Chapter 691: Protecting Military Members and Veterans from Employment Discrimination

Lindsay Barnes

*Pacific McGeorge School of Law*

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### **Chapter 691: Protecting Military Members and Veterans from Employment Discrimination**

*Lindsay Barnes*

#### *Code Sections Affected*

Government Code §§ 12920, 12921, 12926, 12940 (amended).  
AB 556 (Salas); 2013 STAT. CH. 691.

#### I. INTRODUCTION

California currently has the largest veteran population in the country.<sup>1</sup> In 2013, the US Department of Veteran Affairs classified approximately 1.8 million California residents as veterans,<sup>2</sup> with the number increasing as service members return to California from recent conflicts in Afghanistan and Iraq.<sup>3</sup> Yet many veterans are returning from combat to find that they cannot obtain steady employment.<sup>4</sup> The Bureau of Labor Statistics reported in August 2012 that the unemployment rate for veterans who “served in Afghanistan, Iraq, or both” was 10.9 percent nationally.<sup>5</sup> It also reported that the unemployment rate in 2012 for veterans who served in the military after September 2001 was 9.9 percent nationally.<sup>6</sup> By comparison, the national unemployment rate was 8.1 percent in

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1. Niraj Chokshi, *MAPS: What Each State’s Veteran Population Looks Like*, WASH. POST (Nov. 11, 2013), <http://www.washingtonpost.com/blogs/govbeat/wp/2013/11/11/maps-what-each-states-veteran-population-looks-like> (on file with the *McGeorge Law Review*).

2. *Veteran Population*, U.S. DEP’T OF VETERANS AFFAIRS, NAT’L CTR FOR VETERANS ANALYSIS & STAT., [http://www.va.gov/vetdata/Veteran\\_Population.asp](http://www.va.gov/vetdata/Veteran_Population.asp) (last updated Sept. 30, 2013) (on file with the *McGeorge Law Review*) (listing California as having 1,795,455 total veterans).

3. Press Release, Assembly Member Rudy Salas, Salas Protects Military and Veterans from Discrimination (Apr. 9, 2013), <http://asmdc.org/members/a32/news-room/press-releases/salas-protects-military-and-veterans-from-discrimination> [hereinafter Salas Press Release] (on file with the *McGeorge Law Review*); see generally Joshua Norman, *After War, Vets Fight for Jobs at Home*, CBS NEWS, Sep. 4, 2012, [http://www.cbsnews.com/8301-201\\_162-57505057/after-war-vets-fight-for-jobs-at-home](http://www.cbsnews.com/8301-201_162-57505057/after-war-vets-fight-for-jobs-at-home) (on file with the *McGeorge Law Review*) (“The White House and others have estimated that as much as one million military members will enter the civilian workforce in the next 5 years as the wars in Iraq and Afghanistan wind down.”).

4. See Shaila Dewan, *As Wars End, Young Veterans Return to Scant Jobs*, N.Y. TIMES (Dec. 18, 2011), <http://www.nytimes.com/2011/12/18/business/for-youngest-veterans-the-bleakest-of-job-prospects.html> (on file with the *McGeorge Law Review*) (“Veterans who served in combat . . . have a harder time finding work than other people their age, a situation that officials say will grow worse as the United States completes its pullout of Iraq and as, by a White House estimate, a million new veterans join the work force over the next five years.”).

5. Press 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/pdf/vet.pdf> [hereinafter *Veterans Report*] (on file with the *McGeorge Law Review*).

6. See *id.* (defining veterans “as men and women who have previously served on active duty in the US

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August 2012.<sup>7</sup> Veteran and military advocates fear that hidden discrimination against military members and veterans factors into the disparate unemployment rates.<sup>8</sup>

California has several laws in place that protect residents from employment discrimination, but these protections often do not provide the same degree of coverage to veterans and military members.<sup>9</sup> Assemblymember Salas introduced Chapter 691 to add “military and veteran status” to the Fair Employment and Housing Act (FEHA) in order to provide employment discrimination protections for military members and veterans previously not available under California law.<sup>10</sup>

## II. LEGAL BACKGROUND

Existing California and federal law provide military service members and veterans various protections from employment discrimination.<sup>11</sup> While California and federal protections for military members and veterans overlap in some respects, they differ in others.<sup>12</sup> Additionally, both California and federal law allow employers to give preference to veterans when hiring.<sup>13</sup>

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Armed Forces and who were civilians at the time these data were collected”).

7. Press Release, Bureau of Labor Statistics, US Dep’t of Labor, The Employment Situation—August 2012, (Sept. 7, 2012), available at [http://www.bls.gov/news.release/archives/empisit\\_09072012.pdf](http://www.bls.gov/news.release/archives/empisit_09072012.pdf) [hereinafter Employment Report] (on file with the *McGeorge Law Review*).

8. Gregg Zoroya, *Recent War Vets Face Hiring Obstacle: PTSD Bias*, USA TODAY (Apr. 9, 2013), [www.usatoday.com/story/news/nation/2013/04/06/recent-war-vets-face-hiring-obstacle-ptsd-bias/2057857](http://www.usatoday.com/story/news/nation/2013/04/06/recent-war-vets-face-hiring-obstacle-ptsd-bias/2057857) (on file with the *McGeorge Law Review*).

9. CAL. DEP’T OF FAIR EMP’T & HOUS., CALIFORNIA LAW PROHIBITS WORKPLACE DISCRIMINATION AND HARRASSMENT POSTER (2012), available at <http://www.dfeh.ca.gov/res/docs/Publications/DFEH-162.pdf> (on file with the *McGeorge Law Review*).

10. See Salas Press Release, *supra* note 3 (“I am pleased to partner with California Veterans groups like the American Legion and AMVETS to protect Veterans from discrimination, especially when we have so many Veterans returning from Afghanistan and Iraq.”).

11. CAL. MIL. & VET. CODE § 394 (West 2010). The California Military and Veterans Code Section 394 is a state code providing current military members protections from employment discrimination; the term “military member” is not specifically defined. *Id.* § 18540.4 (West 2009) (defining “veteran” as “any person who has served full time in the armed forces in time of national emergency or state military emergency or during any expedition of the armed forces and who has been discharged or released under conditions other than dishonorable”). 38 U.S.C.A. §§ 4301–4335 (West 2002 & Supp. 2013). The Uniformed Services Employment and Redeployment Rights Act is a federal statute providing military members and veterans protections from employment discrimination. *Id.*

12. See MIL. & VET. § 394 (prohibiting discrimination against members of the armed forces in employment, admission to public places, and financing). *But cf.* 38 U.S.C.A. §§ 4301–4335 (prohibiting discrimination against members of the armed forces in employment, health benefits, and pension benefits).

13. CAL. GOV’T CODE §§ 18971–18978 (West 2009); 5 U.S.C.A. § 2108 (West 2007 & Supp. 2013); see *Pers. Adm’r of Mass. v. Feeney*, 99 S. Ct. 2282, 2287 (1979) (“The Federal Government and virtually all of the States grant some sort of hiring preference to veterans.”).

### A. *Fair Employment and Housing Act*

The California FEHA protects persons with certain statuses and characteristics from employment discrimination.<sup>14</sup> FEHA makes it unlawful for an employer to refuse to hire or employ an individual based on “race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, or sexual orientation.”<sup>15</sup> FEHA previously did not recognize military or veteran status as a protected class under its provisions.<sup>16</sup> FEHA’s antidiscrimination provisions apply to employers, labor organizations, and employment agencies with regard to employment, membership, or training-program selection within such an organization.<sup>17</sup> In order to make a claim of discrimination, FEHA requires protected individuals to proceed through an administrative process and obtain a “right-to-sue notice,” at which point they can choose to pursue civil litigation.<sup>18</sup>

### B. *Military and Veterans Code, Section 394*

Section 394 of California’s Military and Veterans Code protects members of the armed forces from employment discrimination, including actions such as refusal to hire and improper discharge.<sup>19</sup> It provides that “[n]o person shall discriminate against any officer, warrant officer or enlisted member of the military or naval forces of the state or of the United States because of that membership” and that an employer cannot prejudice or injure a military member based on such membership.<sup>20</sup> In addition, Section 394 provides that an employer cannot “discharge any person from employment because of the performance of any ordered military duty or training.”<sup>21</sup> While this law protects military members who are currently serving in the armed forces, it does not extend such protections to veterans.<sup>22</sup>

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14. Gov’t § 12940(a) (West 2011 & Supp. 2013).

15. *Id.*

16. *Id.*

17. *Id.* § 12940(a)–(d).

18. *Id.* § 12965; see *General Complaint Information*, CAL. DEP’T OF FAIR HOUS. & EMP’T, <http://www.dfeh.ca.gov/generalinformationcomplaints.htm> (last visited Aug. 29, 2013) (on file with the *McGeorge Law Review*) (explaining that for employment discrimination complaints under FEHA, “you are required to exhaust your administrative remedies with the Department [of Fair Employment and Housing] by securing your Notice of Right to Sue”).

19. CAL. MIL. & VET. § 394(a)–(d) (West 2010).

20. *Id.* § 394(a). *But see* Haligowski v. Superior Court, 200 Cal. App. 4th 983, 986, 134 Cal. Rptr. 3d 214, 215 (2d Dist. 2011) (holding that under Section 394 and FEHA, an individual supervisor cannot be held liable for discrimination against an employee based on military and veteran status).

21. *Id.* § 394(d).

22. *Id.* § 394(a).

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### C. *The Uniformed Services Employment and Redeployment Rights Act*

The Uniformed Services Employment and Redeployment Rights Act (USERRA) is a federal statute that protects military members and veterans from employment discrimination.<sup>23</sup> It was enacted to reduce the disadvantages experienced by service members joining the civilian workplace, “minimize the disruption of the lives of” services members and their employers, and “to prohibit discrimination against” members of the uniformed services based on that membership.<sup>24</sup>

Compared to California law, USERRA provides more comprehensive protections to a larger group of people.<sup>25</sup> USERRA protects military members, veterans, and prospective military members from discrimination by an employer.<sup>26</sup> An employer is defined as “any person, institution, organization, or other entity that pays salary or wages for work performed or that has control over employment opportunities,” regardless of the number of persons such an entity employs.<sup>27</sup> These protections apply when hiring or reemploying present, past or future military members, as well as when providing employment benefits to them.<sup>28</sup> USERRA does not supersede any state law providing additional or greater rights or benefits.<sup>29</sup> However, the statute does supersede any state law that reduces or limits any right or benefit under its provisions.<sup>30</sup>

### D. *Veterans’ Hiring Preference*

Most state and federal laws allow an employer to grant a “veterans’ preference” when hiring employees.<sup>31</sup> Generally, veterans’ preference laws give

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23. 38 U.S.C.A. § 4301(a)(3) (West 2002).

24. *Id.* § 4301(a)(1)–(3).

25. *See id.* § 4311(a) (“A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation.”); U.S. DEP’T OF LABOR, VETERANS’ EMP’T AND TRAINING SERV., A NON-TECHNICAL RESOURCE GUIDE TO THE UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT, 1–2 (2004), available at <http://www.dol.gov/vets/whatsnew/uguide.pdf> (on file with the *McGeorge Law Review*) (defining “uniform service” under USERRA as the “Army, Navy, Marine Corps, Air Force, or Coast Guard” and each of their reserve components, the “Army National Guard or Air National Guard, Commissioned Corps of the Public Health Service, [and] any other category of persons designated by the President in time of war or national emergency”).

26. 38 U.S.C.A. §§ 4301(a)(3), 4303(4)(A), 4311(a).

27. *Id.* § 4303(4)(A).

28. *Id.* § 4311(a).

29. *Id.* § 4302(a).

30. 38 U.S.C.A. § 4302(b).

31. *Pers. Adm’r of Mass. v. Feeney*, 99 S. Ct. 2282, 2287 (1979).

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preference to qualified veterans in hiring and retention over nonveterans.<sup>32</sup> Congress and state legislatures established veterans' preference laws to help veterans transition from military to civilian life, promote military service, and reward veterans for their sacrifice.<sup>33</sup> While critics of veterans' preference laws characterize them as discriminatory because they are more favorable to certain characteristics, such as sex,<sup>34</sup> the laws have been upheld as nondiscriminatory under Title VII of the Civil Rights Act of 1964.<sup>35</sup> It is important to note that veterans' preference laws do not guarantee employment.<sup>36</sup>

California law provides a veterans' preference by awarding additional points on civil service examinations based on various veteran statuses and giving eligible veterans favorable consideration in the hiring process.<sup>37</sup> California's veterans' preference is only applicable to state employment.<sup>38</sup>

## III. CHAPTER 691

Chapter 691 broadens FEHA by adding "military and veteran status" as a class protected from employment discrimination.<sup>39</sup> Chapter 691 defines "military and veteran status" as "a member or veteran of the United States Armed Forces, United States Armed Forces Reserve, the United States National Guard, and the California National Guard."<sup>40</sup>

Despite the expansion of FEHA, Chapter 691 does not affect state law allowing employers to consider military or veteran status for purposes of preferential hiring.<sup>41</sup>

32. See U.S. DEP'T OF LABOR, VETERANS' PREFERENCE BROCHURE 2 (2010) [hereinafter VETERANS' PREFERENCE BROCHURE] (on file with the *McGeorge Law Review*) (explaining that a federal veterans' preference provides "a uniform method by which special consideration is given to qualified Veterans").

33. Pers. Adm'r of Mass. v. Feeney, 99 S. Ct. 2282, 2289 (1979).

34. See *id.* at 2285–86 (regarding the plaintiffs' claim that a state veterans' preference law discriminated against them because they were female and veterans are predominantly male).

35. 42 U.S.C.A. § 2000e–11 (West 2012) ("Nothing contained in this subchapter shall be construed to repeal or modify any Federal, State, territorial, or local law creating special rights or preference for veterans.").

36. VETERANS' PREFERENCE BROCHURE, *supra* note 32, at 2.

37. CAL. GOV'T CODE §§ 18971–18978 (West 2009).

38. *Id.*; see also *Careers in California Government*, CA.GOV, <http://jobs.ca.gov/Job/VeteransInformation> (last visited Aug. 2, 2013) (on file with the *McGeorge Law Review*) (providing information regarding the application of veterans' preference points to State civil service examinations).

39. GOV'T §§ 12920, 12921, 12926, 12940 (amended by Chapter 691). It is important to note that Chapter 691 applies to several aspects of employment aside from initial employment, including harassment and termination of employment. *Id.* § 12940(a)(j). Chapter 691 incorporates other 2013 legislative changes to Section 12940 regarding sexual harassment, which is outside of the scope of this Article. See GOV'T CODE § 12940(j)(4)(C) (amended by Chapter 88) (adding "sexually harassing conduct need not be motivated by sexual desire").

40. *Id.* § 12926(k) (amended by Chapter 691).

41. *Id.* § 12940(p) (amended by Chapter 691) ("[P]rovides that nothing in this section shall be interpreted as preventing the ability of employers to identify members of the military or veterans for purposes of awarding a veteran's preference as permitted by law").

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#### IV. ANALYSIS

Veterans and military members often encounter unique barriers to employment not typically experienced by civilians that can lead to employment discrimination.<sup>42</sup> Adding military and veteran status to the classes protected by FEHA grants greater protections to military members and brings veterans within the scope of protections not previously available under California law.<sup>43</sup> However, it is uncertain whether the expansion of FEHA alone will remedy unfair employment practices against military members and veterans in California.<sup>44</sup>

##### A. Sources of the Employment Discrimination Faced by Veterans and Military Members

The Bureau of Labor Statistics reported in 2012 that the unemployment rate of post-9/11 veterans exceeded the unemployment rate of nonveterans.<sup>45</sup> Though unemployment rates have improved overall across the nation in the past year, the unemployment rate remains high for veterans.<sup>46</sup> Despite the widely positive support given to military service members and veterans throughout the country,<sup>47</sup> advocates for Chapter 691 feared that discriminatory employment practices based on misperceptions about the military community may be a contributing factor to their high unemployment rates.<sup>48</sup> Assemblymember Salas contends that veterans

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42. See ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF AB 556, at 4 (Apr. 9, 2013) (“[Veterans and members of the uniformed services] have traditionally been discriminated against in many aspects of life, including employment.”); see also Tom Tarantino, *The Ground Truth on Veterans’ Unemployment*, TIME (Mar. 22, 2013), <http://nation.time.com/2013/03/22/the-ground-truth-about-veterans-unemployment> (on file with the *McGeorge Law Review*) (“[There are] systematic challenges that cause higher rates of unemployment for our veterans”).

43. GOV’T §§ 12920, 12921, 12926, 12940 (amended by Chapter 691); ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF AB 556, at 1 (Apr. 9, 2013).

44. See Tamika L. Butler, *Employment and Reemployment Rights of Veterans*, L.A. LAWYER, Nov. 2012, at 21 (explaining that there is little case law on the application of California’s Military and Veterans Code 394 regarding employment discrimination among military service members); see also SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 556, at 4 (June 11, 2013) (“[I]ncluding ‘military and veteran status’ as a protected group in FEHA would provide a more clear and substantive framework for protecting Military and Veterans from discrimination and harassment”).

45. See Veterans Report, *supra* note 5 (describing that the unemployment rate for post-9/11 veterans was 9.9 percent in 2012); see also Employment Report, *supra* note 7 (describing the national unemployment rate was 8.1 percent in August 2012).

46. Tarantino, *supra* note 42.

47. See Jason Ukman, *The American Military and Civilians, Worlds Apart*, WASH. POST (Oct. 5, 2011), [http://www.washingtonpost.com/blogs/checkpoint-washington/post/the-american-military-and-civilians-worlds-apart/2011/10/04/gIQAhIDgLL\\_blog.html](http://www.washingtonpost.com/blogs/checkpoint-washington/post/the-american-military-and-civilians-worlds-apart/2011/10/04/gIQAhIDgLL_blog.html) (on file with the *McGeorge Law Review*) (discussing a 2011 study by the Pew Research Center that found “when it comes to the armed forces, most Americans in the post-9/11 era have feelings of pride, gratitude, and confidence”).

48. See Zoroya, *supra* note 8 (“Military members and veterans’ advocates worry about hidden hiring discrimination against Iraq and Afghanistan war vets by employers who see the veterans perhaps as emotionally

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are not sufficiently “protected from discriminatory hiring practices” due to these misconceptions.<sup>49</sup>

1. *The Great Divide Between the Military and Civilian World*

Modernly, there is a cultural gap between the military and civilian workplace.<sup>50</sup> Unlike previous generations,<sup>51</sup> many current employers have not served in the military and assume that veterans will not be productive in a civilian organization because they will be unable to translate their military skills to civilian equivalents.<sup>52</sup> Further, some employers have concerns that military members are “too non-traditional” and “have fallen behind their civilian counterparts,” making them incapable of assimilating into the civilian workforce.<sup>53</sup> Whether or not they are valid, these concerns may be contributing to discrimination against military members and veterans.<sup>54</sup>

2. *Increased Awareness of Military-Related Injuries*

Another factor significantly affecting the job prospects of service members is the increased awareness of military-related injuries,<sup>55</sup> specifically post-traumatic stress disorder (PTSD) and traumatic brain injury (TBI).<sup>56</sup> The increased

damaged.”). “A key fear is how [hidden hiring discrimination] could be contributing to stubbornly higher joblessness among the generation that volunteered to serve in the military after the 9/11 attacks.” *Id.*

49. SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF AB 556, at 5 (June 24, 2013).

50. Tarantino, *supra* note 42.

51. *Id.*

52. See generally Katie Drummond, *Veterans Make Valuable Employees, So Why Aren't More Getting Hired?*, FORBES (June 12, 2012), <http://www.forbes.com/sites/katiedrummond/2012/06/12/cnas-veterans-jobs> (on file with the *McGeorge Law Review*) (describing a report released by the Center for a New American Security in June 2012 indicating one barrier to hiring veterans is that “business leaders worry that veterans won’t be able to translate their skills to the civilian workplace”).

53. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 556, at 4 (June 11, 2013); see also David Zucchini, *Unemployment Is a Special Challenge for Veterans*, L.A. TIMES (Apr. 25, 2012), <http://articles.latimes.com/2012/apr/25/nation/la-na-vets-unemployed-20120426> (on file with the *McGeorge Law Review*) (describing how an Air Force veteran “has been told that he’s overqualified, too old, too ‘non-traditional,’ and that he’s fallen behind his civilian contemporaries”).

54. See generally SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 556, at 4 (June 11, 2013) (discussing concerns of employers and how “[t]his [b]ill would remedy these injustices and would allow veterans to attain or not attain employment based solely on their merit instead of prejudice and discrimination”).

55. Zucchini, *supra* note 53.

56. *What Is PTSD?*, U.S. DEP’T OF VETERANS AFFAIRS, NAT’L CTR FOR PTSD, <http://www.ptsd.va.gov/public/pages/what-is-ptsd.asp> (last updated July 26, 2013) (on file with the *McGeorge Law Review*) (explaining that after a traumatic event, PTSD occurs when symptoms such as “reliving the event, avoiding situations that remind you of the event, negative changes in beliefs and feelings, and feeling keyed up (also called hyperarousal)” continue to occur). *Traumatic Brain Injury and PTSD*, U.S. DEP’T OF VETERANS AFFAIRS, NAT’L CTR FOR PTSD, <http://www.ptsd.va.gov/professional/pages/traumatic-brain-injury-ptsd.asp> (last updated Dec. 20, 2011) (on file with the *McGeorge Law Review*) (explaining that TBIs, depending on the nature and severity of the injury, vary in symptoms, but can include “post-concussive symptoms” such as headache,

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awareness of these mental health problems among the military population creates the stigma that veterans and military members are emotional, hostile, or otherwise volatile.<sup>57</sup> According to the US Department of Veterans Affairs, eleven to twenty percent of veterans who have served since 9/11 suffer from PTSD.<sup>58</sup> Research conducted by the Center for New American Security in 2012 indicated that incorrect perceptions about PTSD can be a factor in deciding whether to hire a veteran.<sup>59</sup> That is, some employers fear that veterans may behave unpredictably in the workplace.<sup>60</sup> While the Americans with Disabilities Act and FEHA currently prohibit employment discrimination on the basis of a disability, including PTSD,<sup>61</sup> the concern is that incorrect stereotypes about PTSD may nevertheless contribute to hidden discrimination against veterans and military members.<sup>62</sup>

### B. Expanded Protection under FEHA

While the disparate unemployment rates among veterans cannot be completely attributed to employment discrimination,<sup>63</sup> Chapter 691 extends greater protections to service members and veterans to combat some of the bases of employment discrimination they have historically experienced.<sup>64</sup> By including military and veteran status among the classes protected by FEHA, both the provisions of FEHA and the case law applying those protections will now apply to veterans and active military members.<sup>65</sup>

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insomnia, memory loss, concentration difficulties, irritability, and anxiety, and in some cases, severe brain damage).

57. Zucchini, *supra* note 53.

58. See *How Common Is PTSD?*, U.S. DEP'T OF VETERANS AFFAIRS, NAT'L CTR FOR PTSD, <http://www.ptsd.va.gov/public/pages/how-common-is-ptsd.asp> (last updated Apr. 25, 2012) (on file with the *McGeorge Law Review*) (explaining that exposure to combat and sexual trauma experienced in the military are the most common situations leading to PTSD among veterans).

59. See Zoroya, *supra* note 8 (discussing research by the Center for New American Security where sixty-nine executives from leading corporations were interviewed and more than half acknowledged they had negative feelings about veterans because of the media's portrayal of PTSD).

60. *Id.*

61. 42 U.S.C.A. §12112(a) (West 2013); CAL. GOV'T CODE § 12940(a) (West Supp. 2013).

62. See Zoroya, *supra* note 8 (noting "a key fear" is that possible "hidden hiring discrimination against Iraq and Afghanistan war [veterans] by employers who see the veterans . . . as emotionally damaged . . . could be contributing to stubbornly higher joblessness" and that "[b]ecause employers are barred by law from asking job applicants about mental health conditions, many assume that any veteran can be afflicted with [PTSD]").

63. See Tarantino, *supra* note 42 (discussing other potential reasons for the high unemployment rate among veterans, including the argument that post-9/11 veterans are "a younger demographic, and young people tend to have more trouble finding a job across the board").

64. See SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 556, at 6 (June 11, 2013) ("Arguably, it is appropriate to provide such protections to these employees who otherwise may be denied employment based on incorrect assumptions that the employee has PTSD, would act inappropriately, or may not be able to adequately perform the tasks required by the job.").

65. ASSEMBLY COMMITTEE ON LABOR & EMPLOYMENT, COMMITTEE ANALYSIS OF AB 556, at 5 (Apr. 24, 2013).

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Prior to Chapter 691, USERRA barred discrimination based on military and veteran status, but only by employers.<sup>66</sup> Chapter 691 extends employment discrimination based on military and veteran status beyond employers, applying also to labor organizations, employment agencies, training programs for any employment, and labor union membership.<sup>67</sup> Despite the expansion, Chapter 691 is less protective than USERRA in one regard: “employer” under FEHA means “any person employing five or more persons,”<sup>68</sup> while USERRA prohibits employment discrimination by any employer regardless of how many people he or she employs.<sup>69</sup> With 4.2 million Californians employed by businesses of five or less employees, Chapter 691 fails to provide veterans protection from employment discrimination by these businesses.<sup>70</sup>

Additionally, FEHA prohibits unintentional discrimination, known as disparate impact discrimination, where an employer does not overtly discriminate against a protected class, but has hiring procedures in place disproportionately excluding a protected class from being hired.<sup>71</sup> Chapter 691 extends the prohibition of disparate impact discrimination to military members and veterans—a protection not available under USERRA.<sup>72</sup> Therefore, Chapter 691 broadens the employment discrimination claims available to military members or veterans.<sup>73</sup>

In addition to the extension of substantive protections, adding military and veteran status to the classes protected by FEHA offers these groups a different enforcement process for alleged violations.<sup>74</sup> A party alleging employment

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66. 38 U.S.C.A. § 4311(a) (West 2002); *see also id.* § 4303(4)(A) (defining “employer” as “any person, institution, organization, or other entity that pays salary or wages for work performed or that has control over employment opportunities”).

67. CAL. GOV’T CODE § 12940(b)–(d) (amended by Chapter 691).

68. GOV’T § 12926(d).

69. 38 U.S.C.A. § 4303(4)(A) (West 2002); *id.* § 4311(a).

70. *See What Is Micro Enterprise?*, CAL. ASS’N FOR MICRO ENTER. OPPORTUNITY, <http://www.microbiz.org/about-micro-business/what-is-micro-enterprise> (last visited Aug. 29, 2013) (on file with the *McGeorge Law Review*) (according to the most recent census, “4.2 million Californians [were] employed by micro-businesses in 2007”); CAL. MIL. & VET. CODE § 394 (West 2010) (providing employment discrimination protections to military members who are currently serving in the armed forces of California or the United States, not to veterans).

71. LEGAL AID SOC’Y-EMP’T LAW CTR, DISCRIMINATION AND HARASSMENT IN EMPLOYMENT: YOUR LEGAL RIGHTS FACT SHEET (2012), *available at* <http://www.las-elc.org/factsheets/discrimination.pdf> (on file with the *McGeorge Law Review*).

72. *See* Samuel F. Wright, *Law Review 1108-Merit Systems Protection Board Holds That Disparate Impact Discrimination Is Not a Cognizable Claim Under USERRA*, SERV. MEMBERS L. CTR., [http://www.servicemembers-lawcenter.org/LAW\\_REVIEW\\_1108.html](http://www.servicemembers-lawcenter.org/LAW_REVIEW_1108.html) (last visited July 20, 2013) (on file with *McGeorge Law Review*) (“MSPB held that section 4311 [of USERRA] outlaws only purposeful discrimination, where the employer or prospective employer had a ‘motive to discriminate.’”).

73. *See* ASSEMBLY COMMITTEE ON LABOR & EMPLOYMENT, COMMITTEE ANALYSIS OF AB 556, at 5 (Apr. 24, 2013) (describing how Chapter 691 “prohibit[s] employment practices that are *facially neutral* in their treatment of military personnel and veterans but that are in fact harsher on them, something that is not expressly covered under USERRA”).

74. *See General Complaint Information*, CAL. DEP’T OF FAIR HOUS. & EMP’T, <http://www.dfeh.ca.gov/>

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discrimination under FEHA must file a complaint with the Department of Fair Employment and Housing (DFEH) and proceed through an administrative process.<sup>75</sup> While some see this process as burdensome or inefficient, this administrative process can also be an easier avenue for alleging employment discrimination violations than formal litigation.<sup>76</sup> Additionally, filing an administrative complaint is typically less expensive and faster than civil litigation.<sup>77</sup> Although a service member alleging discrimination may bring an immediate civil action for employment discrimination under the Military and Veterans Code, it does not offer resolution through an administrative process as FEHA does.<sup>78</sup> Additionally, a veteran would be unable to bring an employment discrimination action under Section 394 of the Military and Veterans Code.<sup>79</sup>

Notwithstanding FEHA's antidiscriminatory provisions, Chapter 691 does not change state law allowing an employer to offer a veterans' preference.<sup>80</sup> Rather, Chapter 691 expressly allows it.<sup>81</sup> Although veterans' preference laws may seem contradictory to FEHA's antidiscrimination provisions, preferential treatment serves as another method to help protect veterans in their transition to civilian employment after honorably serving.<sup>82</sup> By allowing employers to embrace veteran preference policies in addition to the antidiscrimination

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generalinformationcomplaints.htm (last visited Aug. 29, 2013) (on file with the *McGeorge Law Review*) (explaining that for employment discrimination complaints under FEHA "you are required to exhaust your administrative remedies with the Department [of Fair Employment and Housing] by securing your Notice of Right to Sue"); see also CAL. MIL. & VET. CODE § 394 (West 2010) (establishing rights for military members, but failing to include an administrative enforcement process, as available under FEHA).

75. CAL. GOV'T CODE § 12965 (West 2005 & Supp. 2013); see *Right to Sue Notice*, CAL. DEP'T OF FAIR HOUS. & EMP'T, [http://www.dfeh.ca.gov/Complaints\\_RTSNotice.htm](http://www.dfeh.ca.gov/Complaints_RTSNotice.htm) (last visited Aug. 29, 2013) (on file with the *McGeorge Law Review*) (explaining that for employment discrimination complaints under FEHA, individuals are required to "exhaust their administrative remedies with the Department of Fair Employment and Housing by filing a complaint and obtaining a 'right-to-sue notice' from the Department before filing a lawsuit under FEHA").

76. See generally GARY BLASI & JOSEPH W. DOHERTY, CTR. FOR LAW & PUB. POLICY, CALIFORNIA EMPLOYMENT DISCRIMINATION LAW AND ITS ENFORCEMENT: THE FAIR EMPLOYMENT AND HOUSING ACT AT 50 13 (2010) (discussing the FEHA administrative enforcement process as requiring improvements in "effectiveness and efficiency," since "many complaints are unwarranted and responding to them is time consuming and expensive for employers").

77. See Dirk Stemerma, *Dirk Stemerma: How the California Department of Fair Employment and Housing Protects Workers*, MONTEREY COUNTY HERALD (Sept. 2, 2011), [http://www.montereyherald.com/dirkstemerma/ci\\_18811695#](http://www.montereyherald.com/dirkstemerma/ci_18811695#) (on file with the *McGeorge Law Review*) (stating that the hearing process under FEHA is "faster and less expensive than state court").

78. ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF AB 556, at 5 (Apr. 9, 2013).

79. See CAL. MIL. & VET. § 394(a) (West 2010) (failing to extend discrimination protections to veterans).

80. *Id.* at 6.

81. CAL. GOV'T CODE § 12940(p) (amended by Chapter 691).

82. See VETERANS' PREFERENCE BROCHURE, *supra* note 32 (regarding Federal veterans' preference laws, "Congress enacted laws to prevent Veterans seeking Federal employment from being penalized because of time spent in military service").

provisions available under FEHA, veterans will be able to obtain and maintain employment, possibly improving the veteran unemployment rate.<sup>83</sup>

### *C. Is Chapter 691 Both Necessary and Sufficient?*

Although it is uncertain whether Chapter 691's additional protections will prevent employment discrimination or improve the veteran unemployment rate, it seems especially necessary to incorporate veterans into California antidiscrimination law during a time when many veterans are returning from Iraq and Afghanistan.<sup>84</sup> While protecting military members and veterans from employment discrimination is not a new concept, California had no law protecting veterans from employment discrimination prior to Chapter 691.<sup>85</sup> Despite the various state and federal laws in place to prevent employment discrimination against veterans and military members, discriminatory practices continued to occur.<sup>86</sup> Thus, Chapter 691 seems to be a necessary measure to combat the discriminatory hiring practices suffered by California's military and veteran population.<sup>87</sup> Furthermore, business groups that have historically opposed adding new protected classes to FEHA did not oppose the addition of military and veteran status.<sup>88</sup> This may suggest, at the very least, that business groups appreciate the need for increased employment protections for veterans and service members.<sup>89</sup>

Chapter 691 does not change California law already offering certain protections to military members.<sup>90</sup> Chapter 691 simply broadens the protections available to active military members and provides protections to veterans previously not available under California law.<sup>91</sup> These increased protections aim to prevent hidden employment discrimination, potentially improving the overall

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83. See generally SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 556, at 4 (June 11, 2013) (addressing how AB 556 would "allow veterans to secure and maintain employment without discrimination from employers, and agents, or any other person").

84. See generally Norman, *supra* note 3 and accompanying text.

85. See MIL. & VET. § 394 (West 2010) (protecting only currently enlisted service members).

86. See ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF AB 556, at 5 (Apr. 9, 2013) (explaining that "although there are state and federal laws in place to discourage employment discrimination, such discrimination still persists").

87. See *id.* (explaining that such legislation would help veterans gain employment without "prejudice and discrimination").

88. ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF AB 556, at 6 (Apr. 9 2013) (noting the instances that business groups opposed adding other statuses to FEHA including: "domestic violence victims (AB 1740, V.M. Perez of 2012), family caregivers (AB 1999, Brownley of 2012), unemployed persons (AB 1450, Allen of 2012), familial status (AB 1001, Skinner of 2010), and lawful and qualified users of medical marijuana (AB 2279, Leno of 2008)").

89. See *id.* (noting business groups did not oppose AB 556, "[r]eflecting apparent broad comfort with this proposal").

90. CAL. GOV'T CODE §§ 12920, 12921, 12926, 12940 (amended by Chapter 691).

91. *Id.*

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unemployment rate among veterans in California.<sup>92</sup> However, the fact remains that several factors aside from discrimination contribute to the high veteran unemployment rate, so it is unlikely that Chapter 691 alone will significantly reduce this statistic.<sup>93</sup> Notwithstanding, the wide support for the legislation from the legislature and military advocates, as well as a complete lack of opposition, indicates Chapter 691 is perceived as a step in the right direction toward protecting veterans and service members from employment discrimination.<sup>94</sup>

## V. CONCLUSION

Assemblymember Salas introduced Chapter 691 to provide veterans and military members with greater protections from employment discrimination and to prevent unfair hiring practices, possibly reducing the high veteran unemployment rates.<sup>95</sup> Chapter 691 enables military members and veterans to be considered for employment based on the qualities they possess rather than incorrect assumptions associated with the military and veteran community.<sup>96</sup> These protections afforded under FEHA may alleviate the discriminatory practices military members and veterans face, thereby increasing employment opportunities for this valued segment of society.<sup>97</sup>

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92. *See generally* ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF AB 556, at 5 (Apr. 9, 2013) (“This Bill would remedy . . . injustices and would allow Veterans to attain or not attain employment based solely on their merit instead of prejudice and discrimination.”).

93. *See generally* *Young Vets Hard-Hit by Unemployment*, MILITARY.COM, <http://www.military.com/money/retirement/post-retirement-careers/young-veterans-and-unemployment.html> (last visited Aug. 2, 2013) (on file with the *McGeorge Law Review*) (“Employment experts cite several reasons for the increased unemployment rate among young veterans, including the uncertainty raised by multiple deployments, extended time away from a job market that has grown ferocious, and subtle worries that troops return home bearing psychological scars.”). “[M]any . . . full-time positions were swept away by the same recessionary wave that wiped out 8 million other jobs between 2007 and 2009” and veterans are having the same trouble most people are having finding a job in a weakened economy. *Id.*

94. *See generally* SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 556, at 7 (June 11, 2013) (indicating no registered opposition, support from many veteran and military organizations, and a prior vote within the legislature of only ayes for AB 556).

95. *See generally* SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 556, at 4 (June 11, 2013) (discussing how AB 556 would “remedy [the] injustices” faced by veterans as a result of incorrect assumptions, allowing them to “attain employment based solely on their merit instead of prejudice and discrimination”).

96. *Id.* at 6.

97. *See generally id.* (discussing how some of the employment barriers faced by military members and veterans “have turned into a justification by some employers to discriminate against military members and veterans, which in turn has contributed to high unemployment for these members and veterans”).