



**FEMINIST
MAJORITY**



April 28, 2021

The Honorable Thomas J. Umberg
California State Capitol, Room 5097
Sacramento, California 95814

**Re: SB 665 – as introduced
OPPOSE UNLESS AMENDED**

Dear Senator Umberg:

We regret that we must oppose your SB 665 unless it is amended to preserve longstanding principles of civil rights law prohibiting discrimination against women, people with disabilities, and others. We would be happy to work with you to advance employment opportunities for those veterans who face barriers to employment after discharge from the military – such as disabled veterans – rather than granting preferential treatment to all veterans, who as a group already have better employment statistics than non-veterans.¹

Our concern is that, as currently drafted, your bill permits discrimination that has long been unlawful against women, people with disabilities, LGBT applicants, and other protected classes that are underrepresented among veterans. Certainly our nation owes much to our veterans, but it does not honor them to practice discrimination in their name, nor does it serve the greater good to

¹ Perhaps owing to the value of their military training, the data indicates that among other measures veterans overall have better job attainment, higher median earnings, higher personal incomes, lower poverty rates and lower unemployment rates than non-veterans. See, e.g., U.S. Dept. of Veterans Affairs, Profile of Veterans, March 2019, https://www.va.gov/vetdata/docs/SpecialReports/Profile_of_Veterans_2017.pdf; U.S. Dept of Labor, Veterans' Employment & Training Service (noting that in March 2021, the veteran unemployment rate was 4.6%, compared to the non-veteran unemployment rate of 6.0%) available at <https://www.dol.gov/agencies/vets/latest-numbers>

inflict the economic harms² and psychological trauma³ of discrimination on other vulnerable groups, to say nothing of the destructive societal costs. Just as veterans should be protected against both intentional and disparate impact discrimination – as they already are – we should be equally concerned about the same types of discrimination against others.

It has been well established for many decades that discrimination against a protected class is unlawful if it is either motivated by intentional bias or results from policies that have a disparate impact against a protected class, unless the policy that causes the adverse impact has a demonstrable relationship to the requirements of the job in question. Despite the Trump Administration's recent effort to eliminate disparate impact discrimination under federal law, the theory of disparate impact discrimination has never been seriously questioned.⁴ This longstanding principle is important here because the class that would be afforded preferential treatment is far different than the labor pool. For example, many people with disabilities are categorically excluded from military service, and veterans are roughly 90% male.

Unfortunately, SB 665 would eliminate disparate impact protection by permitting employers to justify hiring decisions under a veterans' preference policy even if the policy is implemented in a way that has a discriminatory impact on other protected groups. Fortunately, the fix is simple. Where the bill now makes clear that purposeful discrimination is still prohibited, it should also make clear that disparate impact discrimination is likewise still prohibited.

Not every application of a veterans' preference policy would necessarily have an unlawful discriminatory impact – women are relatively well-represented in the health care fields of military service, for example, such that a veterans' preference policy in such jobs is unlikely to disproportionately disqualify women. In traditionally male-dominated fields, however, women may be adversely impacted. See, e.g. *Bailey v. Southeastern Area Joint Apprenticeship Committee*, 561 F. Supp. 895 (N.D. W.Va. 1983) (awarding points to applicants for boilermaker position on the basis of prior military service had a disparate impact on women, and the defendant did not meet its burden of showing a legitimate business necessity for the practice). Thus, the U.S. Equal Employment Opportunity Commission, which administers the comparable federal employment discrimination laws, notes that “based on recent national statistics, it is the Commission's position

² See, e.g., *The Costly Business of Discrimination: The Economic Costs of Discrimination and the Financial Benefits of Gay and Transgender Equality in the Workplace*, Center for American Progress, March 2012, https://cdn.americanprogress.org/wp-content/uploads/issues/2012/03/pdf/lgbt_biz_discrimination.pdf; *How discrimination harms the economy and business*, Chicago Booth Review, July 2020, <https://review.chicagobooth.edu/economics/2020/article/how-discrimination-harms-economy-and-business>; *The Price of Prejudice*, Morten Størbling Hedegaard, Jean-Robert Tyran, *American Economic Journal: Applied Economics*, Vol. 10, No. 1, January 2018, <https://www.aeaweb.org/articles?id=10.1257/app.20150241>

³ *Effects of discrimination in the workplace*, Neslie A. Etheridge, Feb. 2015, https://www.army.mil/article/142799/Effects_of_discrimination_in_the_workplace/; *Discrimination can be harmful to your mental health*, UCLA Newsroom, January 2016 <https://newsroom.ucla.edu/stories/discrimination-can-be-harmful-to-your-mental-health>; *Discrimination Linked to Increased Stress, Poorer Health*, American Psychological Association Survey Finds, American Psychological Association, March 2016, <https://www.apa.org/news/press/releases/2016/03/impact-of-discrimination>

⁴ See *Trump administration seeks to undo decades-long rules on discrimination*, Washington Post, Jan. 5, 2021, https://www.washingtonpost.com/education/civil-rights-act-disparate-impact-discrimination/2021/01/05/4f57001a-4fc1-11eb-bda4-615aaefd0555_story.html

that voluntarily adopted veterans' preferences have an adverse impact on women. Accordingly... the Commission will presume the existence of adverse impact. The presumption may be rebutted, however, where an employer shows that the preference does not adversely affect female applicants or employees based on either more narrowly drawn statistics (*e.g.*, regional or local statistics) or its own applicant flow data/workforce statistics.”⁵ Although this discussion focuses on gender discrimination, disparate impact is likely to be a problem for people with disabilities who have long been excluded from military service, as well as disparate impact on the basis of sexual orientation in light of the LGBTQ community’s long struggle with discrimination in the military, and potentially other protected classes.

You have said that one of the primary goals of the bill is to incentivize people to join the military, which seems like an attenuated rationale for a measure that would give employers a legal defense against discrimination. Nevertheless, we would be happy to work with you to advance employment opportunities for those veterans who face barriers to employment after discharge from the military, such as disabled veterans, and we remain hopeful that you will work with us to assist veterans without subjecting others to invidious discrimination by undermining important and longstanding protections.

Sincerely,

Kevin Baker

Kevin G. Baker
Director of Governmental Relations
ACLU California Action

Kolikea Seigle

Kolikea Seigle
President
National Organization for Women – CA

Kathy Spillar

Kathy Spillar
Executive Director
Feminist Majority

Claudia Center

Claudia Center
Legal Director
Disability Rights Education & Defense Fund

Eric M. Harris

Eric M. Harris
Director of Public Policy
Disability Rights California

cc: Members and Committee Staff, Senate Appropriations Committee

⁵ U.S. Equal Employment Opportunity Commission, Policy Guidance on Veterans' Preference Under Title VII, <https://www.eeoc.gov/laws/guidance/policy-guidance-veterans-preference-under-title-vii>