

HOUSE BILL NO. 8

Special Session

Introduced: 12/12/83

Referred to Committee on Judiciary: 12/12/83

Hearing 12/12/83

Report: 12/14/83, Do Pass, As Amended

2nd Reading: 12/14/83

3rd Reading: 12/14/83

Transmitted to Senate: 12/14/83

Referred to Committee on Judiciary: 12/14/83

1 HOUSE BILL NO. 8
2 INTRODUCED BY PAVLOVICH

3
4 A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING PREFERENCE IN
5 PUBLIC EMPLOYMENT FOR CERTAIN MILITARY VETERANS AND
6 HANDICAPPED PERSONS AND THEIR ELIGIBLE SPOUSES; AMENDING
7 SECTIONS 10-2-402, 49-3-103, AND 49-3-201, MCA; REPEALING
8 SECTIONS 10-2-201 THROUGH 10-2-206, MCA; AND PROVIDING AN
9 IMMEDIATE EFFECTIVE DATE AND AN APPLICABILITY DATE."

10
11 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

12 NEW SECTION. Section 1. Short title. [Sections 1
13 through 10] may be cited as the "Montana Veterans and
14 Handicapped Persons Employment Preference Act".

15 NEW SECTION. Section 2. Purposes. The purposes of
16 [sections 1 through 10] are to reward veterans for service
17 to their country, recognize past employment discrimination
18 against handicapped persons, and facilitate the
19 habilitation, rehabilitation, and readjustment of veterans
20 and handicapped persons.

21 NEW SECTION. Section 3. Definitions. For the purposes
22 of [sections 1 through 10], the following definitions apply:

23 (1) "Active duty" means full-time duty other than for
24 training in the regular components of the United States
25 army, air force, navy, marine corps, or coast guard with

1 full pay and allowances. The term does not include monthly
2 drills, summer encampments, initial training, or other
3 inactive or active duty for training in the national guard
4 or reserves.

5 (2) "Disabled veteran" means an individual who:

6 (a) served on active duty;

7 (b) has been separated from service under honorable
8 conditions; and

9 (c) suffers a service-connected disability determined
10 by the United States veterans administration to be 30% or
11 more disabling.

12 (3) "Eligible spouse" means:

13 (a) the unmarried surviving spouse of a veteran who
14 died while on active duty or whose death resulted from a
15 service-connected disability; or

16 (b) the spouse of:

17 (i) a veteran determined by the United States veterans
18 administration to have a 100% service-connected disability
19 who is unable to use his employment preference because of
20 his disability;

21 (ii) a person on active duty determined by the United
22 States government to be missing in action or a prisoner of
23 war; or

24 (iii) a handicapped person determined by the department
25 of social and rehabilitation services to have a 100%

1 disability who is unable to use his employment preference
2 because of his disability.

3 (4) "Handicapped person" means an individual certified
4 by the department of social and rehabilitation services to
5 have a physical impairment that substantially limits one or
6 more major life activities, such as writing, seeing,
7 hearing, speaking, or mobility, and which limits the
8 individual's ability to obtain, retain, or advance in
9 employment.

10 (5) (a) "Initial hiring" means a personnel action for
11 which applications are solicited from outside the ranks of
12 the current employees of:

13 (i) a department, as defined in 2-15-102, for a
14 position within the executive branch;

15 (ii) a legislative agency, such as the consumer
16 counsel, environmental quality council, office of the
17 legislative auditor, legislative council, or office of the
18 legislative fiscal analyst, for a position within the
19 legislative branch;

20 (iii) a judicial agency, such as the office of supreme
21 court administrator, office of supreme court clerk, state
22 law library, or similar office in a state district court for
23 a position within the judicial branch;

24 (iv) a unit, as defined in 20-25-201, for a position
25 within the Montana university system;

1 (v) the office of commissioner of higher education for
2 a position within that office;

3 (vi) a college for a position within that college;

4 (vii) a center or program for a position within the
5 postsecondary vocational-technical education system;

6 (viii) a city or town for a municipal position,
7 including a city or municipal court position; and

8 (ix) a county for a county position, including a
9 justice's court position.

10 (b) A personnel action limited to current employees of
11 a specific public entity identified in subsections (a)(i)
12 through (a)(ix) of this subsection (5), current employees in
13 a reduction-in-force pool who have been laid off from a
14 specific public entity identified in subsections (a)(i)
15 through (a)(ix) of this subsection (5), or current
16 participants in a federally authorized employment program is
17 not an initial hiring.

18 (6) "Position" means a permanent or seasonal position
19 as defined in 2-18-101 for a state position or a similar
20 permanent or seasonal position with a public employer other
21 than the state. However, the term does not include:

22 (a) a temporary position as defined in 2-18-101 for a
23 state position or similar temporary position with a public
24 employer other than the state;

25 (b) a state or local elected official;

1 (c) employment as an elected official's immediate
2 secretary, legal advisor, or administrative, legislative, or
3 other immediate or first-line aide;

4 (d) appointment by an elected official to a body such
5 as a board, commission, committee, or council;

6 (e) appointment by an elected official to a public
7 office if the appointment is provided for by law;

8 (f) a department head appointment by the governor or
9 an executive department head appointment by a mayor, city
10 manager, county commissioner, or other chief administrative
11 or executive officer of a local government; or

12 (g) engagement as an independent contractor or
13 employment by an independent contractor.

14 (7) (a) "Public employer" means:

15 (i) any department, office, board, bureau, commission,
16 agency, college, including a community college,
17 postsecondary vocational-technical center or program,
18 university, or other instrumentality of the executive,
19 judicial, or legislative branch of the government of the
20 state of Montana; and

21 (ii) any county, city, or town.

22 (b) The term does not include a school district, a
23 special purpose district, an authority, or any political
24 subdivision of the state other than a county, city, or town.

25 (d) "Substantially equal qualifications" means the

1 qualifications of two or more persons among whom the public
2 employer cannot make a reasonable determination that the
3 qualifications held by one person are significantly better
4 suited for the position than the qualifications held by the
5 other persons.

6 (9) "Under honorable conditions" means a discharge or
7 separation from active duty characterized as under honorable
8 conditions. The term includes honorable discharges and
9 general discharges but does not include dishonorable
10 discharges or other administrative discharges characterized
11 as other than honorable.

12 (10) (a) "Veteran" means a person who:

13 (i) served on active duty during time of war or
14 declared national emergency or in a campaign or expedition
15 for which a campaign badge was authorized by the United
16 States congress or the United States department of defense;
17 and

18 (ii) has been separated from service under honorable
19 conditions.

20 (b) The term does not include a person receiving
21 retirement pay from the United States based on length of
22 military service.

23 (11) "War or declared national emergency" means:

24 (a) World War I, beginning on April 6, 1917, and
25 ending on November 11, 1918, both dates inclusive;

1 (b) World War II, beginning on December 7, 1941, and
2 ending on December 31, 1946, both dates inclusive;

3 (c) the Korean conflict, military expedition, or
4 police action, beginning on June 27, 1950, and ending on
5 January 31, 1955, both dates inclusive; and

6 (d) the Vietnam conflict, beginning on August 5, 1964,
7 and ending on May 7, 1975, both dates inclusive.

8 NEW SECTION. Section 4. Employment preference in
9 initial hiring. (1) (a) Except as provided in 10-2-402, in
10 an initial hiring for a position, if a job applicant who is
11 a veteran, disabled veteran, handicapped person, or eligible
12 spouse meets the eligibility requirements contained in
13 [section 5] and claims a preference as required by [section
14 8], a public employer shall hire the applicant over any
15 other applicant with substantially equal qualifications who
16 is not a preference eligible applicant.

17 (b) In an initial hiring, a public employer shall hire
18 a disabled veteran over any other preference eligible
19 applicant with substantially equal qualifications.

20 (2) The employment preference provided for in
21 subsection (1) does not apply to a personnel action
22 described in subsection (5)(b) of [section 3] or to any
23 other personnel action that is not an initial hiring.

24 NEW SECTION. Section 5. Eligibility requirements. No
25 veteran, disabled veteran, eligible spouse, or handicapped

1 person is entitled to receive employment preference as
2 provided in [section 4] unless:

3 (1) he is a United States citizen;

4 (2) he has resided continuously in the state for at
5 least 1 year immediately before applying for employment;

6 (3) if applying for municipal or county employment, he
7 has resided for at least 30 days immediately before applying
8 for employment in the city, town, or county in which
9 employment is sought; and

10 (4) he meets those requirements considered necessary
11 by a public employer to successfully perform the essential
12 duties of the position for which he is applying.

13 NEW SECTION. Section 6. Certification of handicapped
14 persons. The department of social and rehabilitation
15 services shall certify persons as handicapped for the
16 purpose of employment preference as provided in [sections 1
17 through 10].

18 NEW SECTION. Section 7. Duration of employment
19 preference. Subject to [section 5]:

20 (1) a handicapped person, the spouse of a handicapped
21 person as described in subsection (3)(b)(iii) of [section
22 3], a disabled veteran, or the spouse of a disabled veteran
23 as described in subsection (3)(b)(i) of [section 3]
24 qualifies for employment preference as long as the disabling
25 condition exists;

1 (2) a veteran, as defined in [section 3], who is not a
2 disabled veteran, as defined in [section 3], qualifies for
3 employment preference for life. However, once he has
4 obtained a position because of the application of the
5 employment preference, he may not use the preference again.

6 (3) the surviving spouse of a veteran as described in
7 subsection (3)(a) of [section 3] qualifies for employment
8 preference for as long as the spouse remains unmarried; and

9 (4) the spouse of a person described in subsection
10 (3)(b)(ii) of [section 3] qualifies for employment
11 preference for as long as the person is missing in action or
12 a prisoner of war.

13 ~~NEW SECTION.~~ Section 8. Enforcement of preference.

14 (1) A public employer shall, by posting and on the
15 application form, give notice of the preferences that
16 [sections 1 through 10] provide in public employment.

17 (2) A job applicant who believes he has an employment
18 preference shall claim the preference in writing before the
19 time for filing applications for the position involved has
20 passed. Failure to make a timely employment preference claim
21 is a complete defense to an action under subsection (4).

22 (3) If an applicant for a position makes a timely
23 written employment preference claim, the public employer
24 shall give written notice of its hiring decision to each
25 applicant claiming preference.

1 (4) (a) An applicant who believes he has not been
2 accorded his rights under [sections 1 through 10] may,
3 within 30 days of receipt of the notice of the hiring
4 decision, submit to the public employer a written request
5 for an explanation of the public employer's hiring decision.
6 Within 15 days of receipt of the request, the public
7 employer shall give the applicant a written explanation.

8 (b) The applicant may, within 90 days after receipt of
9 notice of the hiring decision, file a petition in the
10 district court in the county in which his application was
11 received by the public employer. The petition must state
12 facts which on their face entitle the applicant to an
13 employment preference.

14 (c) (i) Upon filing of the petition, the court shall
15 order the public employer to appear in court at a specified
16 time not less than 10 or more than 30 days after the day the
17 petition was filed and show cause why the applicant was not
18 hired for the position. The public employer has the burden
19 of making a clear showing that the applicant was not
20 substantially equally qualified with the person hired.

21 (ii) The time to appear provided in subsection
22 (4)(c)(i) may be waived by stipulation of the parties. If a
23 time to appear has been specified pursuant to subsection
24 (4)(c)(i), the court may, on motion of one of the parties or
25 on stipulation of all of the parties, grant a continuance.

(iii) If the public employer does not carry its burden of proof under subsection (4)(c)(i), the court shall order the public employer to reopen the selection process for the position involved and shall grant the applicant reasonable attorney fees and court costs. The remedy provided by this section is the only remedy for a violation of [sections 1 through 10], and a court may not grant any other relief in an action for violation of [sections 1 through 10].

(d) Failure of an applicant to file a petition under subsection (4)(b) within 90 days bars the filing of a petition. If a public employer fails to provide an explanation under subsection (4)(a) within 15 days and a petition is filed under subsection (4)(b), the court shall order the public employer to reopen the selection process.

(e) The Montana Rules of Civil Procedure apply to a proceeding under this subsection (4) to the extent that they do not conflict with this subsection (4).

NEW SECTION. Section 9. Adoption of rules. The department of administration shall adopt rules implementing [sections 1 through 10] and shall consult with the department of social and rehabilitation services in adopting rules governing certification of handicapped persons for purposes of [sections 1 through 10]. The department of administration's rules apply to all public employers, local as well as state.

NEW SECTION. Section 10. Conflicts with federal law. [Sections 1 through 10] do not apply to work or positions subject to federal laws or regulations if application of the employment preference conflicts with those laws or regulations.

Section 11. Section 10-2-402, MCA, is amended to read:
 "10-2-402. Superintendent to be given veteran's preference. In the selection of the superintendent of the Montana veterans' home, the department of institutions shall ~~give preference to veterans as defined in 10-2-202~~ apply the preference granted to veterans and disabled veterans, but not the preference granted to other persons, by [sections 1 through 10]."

Section 12. Section 49-3-103, MCA, is amended to read:
 "49-3-103. Permitted distinctions. Nothing in this chapter shall prohibit any public or private employer:

(1) from enforcing a differentiation based on marital status, age, or physical or mental handicap;

(a) when based on the preference provided in [sections 1 through 10];

(b) when based on a bona fide occupational qualification reasonably necessary to the normal operation of the particular business; or

(c) where the differentiation is based on reasonable factors other than age;

1 (2) from observing the terms of a bona fide seniority
2 system or any bona fide employee benefit plan, such as a
3 retirement, pension, or insurance plan, which is not a
4 subterfuge to evade the purposes of this chapter, except
5 that no such employee benefit plan shall excuse the failure
6 to hire any individual; or

7 (3) from discharging or otherwise disciplining an
8 individual for good cause."

9 Section 13. Section 49-3-201, MCA, is amended to read:

10 "49-3-201. Employment of state and local government
11 personnel. (1) State Except as provided in [sections 1
12 through 10], state and local government officials and
13 supervisory personnel shall recruit, appoint, assign, train,
14 evaluate, and promote personnel on the basis of merit and
15 qualifications without regard to race, color, religion,
16 creed, political ideas, sex, age, marital status, physical
17 or mental handicap, or national origin.

18 (2) All state and local governmental agencies shall:

19 (a) promulgate written directives to carry out this
20 policy and to guarantee equal employment opportunities at
21 all levels of state and local government;

22 (b) regularly review their personnel practices to
23 assure compliance; and

24 (c) conduct continuing orientation and training
25 programs with emphasis on human relations and fair

1 employment practices.

2 (3) The department of administration shall insure that
3 the entire examination process, including appraisal of
4 qualifications, is free from bias.

5 (4) Appointing authorities shall exercise care to
6 insure utilization of minority group persons."

7 ~~NEW SECTION.~~ Section 14. Repealer. Subject to section
8 16(3)(a) of this act, sections 10-2-201 through 10-2-206,
9 MCA, are repealed.

10 ~~NEW SECTION.~~ Section 15. Severability. If a part of
11 this act is invalid, all valid parts that are severable from
12 the invalid part remain in effect. If a part of this act is
13 invalid in one or more of its applications, the part remains
14 in effect in all valid applications that are severable from
15 the invalid applications.

16 ~~NEW SECTION.~~ Section 16. Effective date --
17 applicability -- saving clause. (1) This act is effective on
18 passage and approval.

19 (2) Except as provided in subsection (3)(b), this act
20 applies only to positions that are filled after the
21 effective date of this act.

22 (3) (a) Subject to the applicable statute of
23 limitations and to subsection (3)(c), a claim for violation
24 of 10-2-201 through 10-2-206, whether or not it is pending
25 in court on the effective date of this act, may be pursued

1 under and must be governed by 10-2-201 through 10-2-206.

2 (b) However, the only relief that may be granted on a
3 claim described in subsection (3)(a) is that provided in
4 section 8(4)(c)(iii) of this act, and the court may grant no
5 other relief, including that provided in 10-2-206 or any
6 judicial construction of 10-2-206.

7 (c) A claim under 10-2-201 through 10-2-206 must be
8 filed within 60 days after the effective date of this act.

-End-

1 STATEMENT OF INTENT

2 HOUSE BILL 8

3

4 A statement of intent is provided to address the nature
5 of the employment preference granted in the bill. The
6 legislature intends that public employers seek and hire the
7 most qualified persons for positions in public employment.
8 It is also the intent of the legislature that the nature of
9 the preference is a relative one in that it is to be applied
10 as a "tie breaker" among two or more applicants for a
11 position who have substantially equal qualifications.
12 Substantially equal qualifications does not mean a situation
13 in which two or more applicants are exactly equally
14 qualified. It means a range within which two applicants must
15 be considered to be substantially equal in view of the
16 qualifications set for the job. Qualifications should
17 include job-related knowledge, skills, and abilities. The
18 legislature recognizes that public employers use a variety
19 of scored and unscored selection procedures such as
20 conventional written examinations, training and experience
21 requirements, performance tests, structured oral interviews,
22 or combinations of these. The legislature does not intend to
23 specify the type of selection procedure to be used by a
24 public employer.

25 A statement of intent is also required for this bill

1 because section 9 requires the department of administration
2 to adopt rules implementing sections 1 through 10 and to
3 consult with the department of social and rehabilitation
4 services in formulating rules for the certification of
5 handicapped persons.

6 The legislature intends the rules to adequately provide
7 for the administration of the employment preference law, but
8 to include only those rules that are reasonably necessary to
9 implement sections 1 through 10.

10 It is the desire of the legislature that the department
11 take all necessary steps in formulating, proposing, and
12 adopting rules to ensure that the public, particularly those
13 persons and organizations that have shown past interest in
14 the employment preference law, is afforded sufficient time
15 and opportunity to participate in the rulemaking procedure.
16 The department should give such notice and hold such
17 hearings as will ensure adequate public participation.

18 Rules adopted by the department apply to all initial
19 hirings to positions by all public employers. In formulating
20 its rules the department should take this into consideration
21 and adopt rules that can be used and applied by the broad
22 spectrum of state and local public employers subject to
23 sections 1 through 10.

24 It is the intent of the legislature that the department
25 formulate and adopt rules relating, but not limited, to the

1 following matters and take into account the following
2 considerations.

3 (1) Claiming preference -- documentation and
4 verification. Rules relating to the job application process
5 should include the manner in which a preference should be
6 claimed when a job is applied for. They should prescribe the
7 means by which the applicant must document and submit
8 evidence of such things as the applicant's status as a
9 veteran, disabled veteran, handicapped person, or eligible
10 spouse. It is the intent of the legislature that rules for
11 claiming and documenting a preference do not place
12 unreasonable burdens upon applicants.

13 (2) Handicapped persons -- certification. The rules
14 should provide that a person will not be denied handicapped
15 status and certification merely because of his current or
16 former employment, should address the matter of what
17 constitutes a physical or mental impairment that
18 substantially limits one or more major life activities, and
19 outline in what instances a physical or mental impairment
20 limits a person's ability to obtain, retain, or advance in
21 employment. The department may wish to do this by a
22 combination of a statement of general principles and
23 specific examples.

24 Rules should provide for a certification process that
25 allows, when appropriate, permanent certification of those

1 impairments considered to be permanent in nature. A
2 procedure for extension or loss of certification should be
3 provided for those instances in which a handicap is or may
4 be temporary.

5 (3) Military conflicts. The legislature intends the
6 rules to apply federal law to determine what constitutes a
7 campaign or expedition for which a campaign badge is
8 authorized by the Congress of the United States or
9 department of defense.

10 (4) Honorable discharges. The legislature intends the
11 rules to apply federal law in defining honorable discharges.

12 (5) Hiring decision notices and explanations. The
13 legislature intends the rules to provide for the form and
14 content of written notices of hiring decisions, including
15 whether the position was obtained as the result of
16 application of the preference by the public employer,
17 written requests for explanations of hiring decisions, and
18 written explanations of hiring decisions.

19 (6) Reopening of selection process. The legislature
20 intends the rules to provide for a method of reopening the
21 selection process for a job should a court order the
22 selection process reopened, and include a method of giving
23 notice to those who applied for the job informing them of
24 the reopening and the reason therefor.

25 (7) Jobs subject to federal law. The legislature

1 intends the rules to identify or provide a method of
2 identifying work or positions to which the employment
3 preference does not apply by virtue of section 10.

1 HOUSE BILL NO. 8
2 INTRODUCED BY PAVLOVICH, JONES, FARRIS, D. BROWN,
3 PECK, SCHYE, WILLIAMS, ADDY, BARDANOUVE, HAND, MCCORNICK
4 YARDLEY, SHONTZ
5
6 A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING PREFERENCE IN
7 PUBLIC EMPLOYMENT FOR CERTAIN MILITARY VETERANS AND
8 HANDICAPPED PERSONS AND THEIR ELIGIBLE SPOUSES; RECONCILING
9 THE PREFERENCE STATUTES WITH THE HUMAN RIGHTS STATUTES;
10 AMENDING SECTIONS SECTION 10-2-402, 49-3-103, AND 49-3-201,
11 MCA; REPEALING SECTIONS 10-2-201 THROUGH 10-2-206, MCA; AND
12 PROVIDING AN IMMEDIATE EFFECTIVE DATE AND AN APPLICABILITY
13 DATE."
14
15 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:
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17 through 10] may be cited as the "Montana Veterans and
18 Handicapped Persons Employment Preference Act".
19 NEW SECTION. Section 2. Purposes. The purposes of
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21 to their country, recognize past employment discrimination
22 against handicapped persons, and facilitate the
23 habilitation, rehabilitation, and readjustment of veterans
24 and handicapped persons.
25 NEW SECTION. Section 3. Definitions. For the purposes

1 of [sections 1 through 10], the following definitions apply:
2 (1) "Active duty" means full-time duty other than for
3 training in the regular components of the United States
4 army, air force, navy, marine corps, or coast guard with
5 full pay and allowances. The term does not include monthly
6 drills, summer encampments, initial training, or other
7 inactive or active duty for training in the national guard
8 or reserves.
9 (2) "Disabled veteran" means an individual who:
10 (a) served on active duty;
11 (b) has been separated from service under honorable
12 conditions BY HONORABLE DISCHARGE; and
13 (c) suffers a service-connected disability determined
14 by the United States veterans administration to be 30% or
15 more disabling.
16 (3) "Eligible spouse" means:
17 (a) the unmarried surviving spouse of a veteran who
18 died while on active duty or whose death resulted from a
19 service-connected disability; or
20 (b) the spouse of:
21 (i) a veteran determined by the United States veterans
22 administration to have a 100% service-connected disability
23 who is unable to use his employment preference because of
24 his disability;
25 (ii) a person on active duty determined by the United

1 States government to be missing in action or a prisoner of
2 war; or

3 (iii) a handicapped person determined by the department
4 of social and rehabilitation services to have a 100%
5 disability who is unable to use his employment preference
6 because of his disability.

7 (4) "Handicapped person" means an individual certified
8 by the department of social and rehabilitation services to
9 have a physical OR MENTAL impairment that substantially
10 limits one or more major life activities, such as writing,
11 seeing, hearing, speaking, or mobility, and which limits the
12 individual's ability to obtain, retain, or advance in
13 employment.

14 (5) (a) "Initial hiring" means a personnel action for
15 which applications are solicited from outside the ranks of
16 the current employees of:

17 (i) a department, as defined in 2-15-102, for a
18 position within the executive branch;

19 (ii) a legislative agency, such as the consumer
20 counsel, environmental quality council, office of the
21 legislative auditor, legislative council, or office of the
22 legislative fiscal analyst, for a position within the
23 legislative branch;

24 (iii) a judicial agency, such as the office of supreme
25 court administrator, office of supreme court clerk, state

1 law library, or similar office in a state district court for
2 a position within the judicial branch;

3 (iv) a unit, as defined in 20-25-201, for a position
4 within the Montana university system;

5 (v) the office of commissioner of higher education for
6 a position within that office;

7 (vi) a college for a position within that college;

8 ~~(vii) a center or program for a position within the~~
9 ~~postsecondary-vocational-technical-education-system~~

10 ~~(viii) a city or town for a municipal position,~~
11 including a city or municipal court position; and

12 ~~(ix) a county for a county position, including a~~
13 justice's court position.

14 (b) A personnel action limited to current employees of
15 a specific public entity identified in subsections (a)(i)
16 through (a)~~(ix)~~(viii) of this subsection (5), current
17 employees in a reduction-in-force pool who have been laid
18 off from a specific public entity identified in subsections
19 (a)(i) through (a)~~(ix)~~(viii) of this subsection (5), or
20 current participants in a federally authorized employment
21 program is not an initial hiring.

22 (6) "Position" means a permanent or seasonal position
23 as defined in 2-18-101 for a state position or a similar
24 permanent or seasonal position with a public employer other
25 than the state. However, the term does not include:

1 (a) a temporary position as defined in 2-18-101 for a
 2 state position or similar temporary position with a public
 3 employer other than the state;

4 (b) a state or local elected official;

5 (c) employment as an elected official's immediate
 6 secretary, legal advisor, or administrative, legislative, or
 7 other immediate or first-line aide;

8 (d) appointment by an elected official to a body such
 9 as a board, commission, committee, or council;

10 (e) appointment by an elected official to a public
 11 office if the appointment is provided for by law;

12 (f) a department head appointment by the governor or
 13 an executive department head appointment by a mayor, city
 14 manager, county commissioner, or other chief administrative
 15 or executive officer of a local government; or

16 (g) engagement as an independent contractor or
 17 employment by an independent contractor.

18 (7) (a) "Public employer" means:

19 (i) any department, office, board, bureau, commission,
 20 agency, college, including a community college,
 21 ~~postsecondary-vocational-technical-center-or-program~~
 22 university, or other instrumentality of the executive,
 23 judicial, or legislative branch of the government of the
 24 state of Montana; and

25 (ii) any county, city, or town.

1 (b) The term does not include a school district, a
 2 special purpose district, an authority, or any political
 3 subdivision of the state other than a county, city, or town.

4 (d) "Substantially equal qualifications" means the
 5 qualifications of two or more persons among whom the public
 6 employer cannot make a reasonable determination that the
 7 qualifications held by one person are significantly better
 8 suited for the position than the qualifications held by the
 9 other persons.

10 ~~††† "Under-honorable-conditions" means a discharge or~~
 11 ~~separation from active duty characterized as under-honorable~~
 12 ~~conditions. The term includes honorable discharges and~~
 13 ~~general discharges but does not include dishonorable~~
 14 ~~discharges or other administrative discharges characterized~~
 15 ~~as other than honorable.~~

16 †††(9) (a) "Veteran" means a person who:

17 (i) served on active duty during time of war or
 18 declared national emergency or in a campaign or expedition
 19 for which a campaign badge was authorized by the United
 20 States congress or the United States department of defense;
 21 and

22 (ii) has been separated from service under honorable
 23 conditions BY HONORABLE DISCHARGE.

24 (b) The term does not include a person receiving
 25 retirement pay from the United States based on length of

1 ~~military--service~~ RETIRED MEMBER OF THE UNITED STATES ARMED
 2 FORCES WHO IS ELIGIBLE FOR OR RECEIVING A MILITARY
 3 RETIREMENT ALLOWANCE OTHER THAN A MEDICAL RETIREMENT
 4 ALLOWANCE AND DOES NOT INCLUDE ANY OTHER RETIRED MEMBER OF A
 5 PUBLIC RETIREMENT SYSTEM, EXCEPT SOCIAL SECURITY, THAT IS
 6 SUPPORTED IN WHOLE OR IN PART BY TAX REVENUES.

7 ~~†††1101~~ "War or declared national emergency" means:
 8 (a) World War I, beginning on April 6, 1917, and
 9 ending on November 11, 1918, both dates inclusive;
 10 (b) World War II, beginning on December 7, 1941, and
 11 ending on December 31, 1946, both dates inclusive;
 12 (c) the Korean conflict, military expedition, or
 13 police action, beginning on June 27, 1950, and ending on
 14 January 31, 1955, both dates inclusive; and
 15 (d) the Vietnam conflict, beginning on August 5, 1964,
 16 and ending on May 7, 1975, both dates inclusive.

17 NEW SECTION. Section 4. Employment preference in
 18 initial hiring. (1) (a) Except as provided in 10-2-402, in
 19 an initial hiring for a position, if a job applicant who is
 20 a veteran, disabled veteran, handicapped person, or eligible
 21 spouse meets the eligibility requirements contained in
 22 [section 5] and claims a preference as required by [section
 23 8], a public employer shall hire the applicant over any
 24 other applicant with substantially equal qualifications who
 25 is not a preference eligible applicant.

1 (b) In an initial hiring, a public employer shall hire
 2 a disabled veteran over any other preference eligible
 3 applicant with substantially equal qualifications.

4 (2) The employment preference provided for in
 5 subsection (1) does not apply to a personnel action
 6 described in subsection (5)(b) of [section 3] or to any
 7 other personnel action that is not an initial hiring.

8 NEW SECTION. Section 5. Eligibility requirements. No
 9 veteran, disabled veteran, eligible spouse, or handicapped
 10 person is entitled to receive employment preference as
 11 provided in [section 4] unless*

- 12 ~~(1)--he-is-a-United-States-citizen†~~
- 13 ~~(2)--he-has-resided-continuously-in-the-state-for-at-~~
 14 ~~least-1-year-immediately-before-applying-for-employment†~~
- 15 ~~(3)--if-applying-for-municipal-or-county-employment,he~~
 16 ~~has-resided-for-at-least-30-days-immediately-before-applying~~
 17 ~~for-employment--in--the--city--town--or--county--in--which~~
 18 ~~employment-is-sought;and~~

19 ~~(4) he meets those requirements considered necessary~~
 20 ~~by a public employer to successfully perform the essential~~
 21 ~~duties of the position for which he is applying.~~

22 NEW SECTION. Section 6. Certification of handicapped
 23 persons. The department of social and rehabilitation
 24 services shall certify persons as handicapped for the
 25 purpose of employment preference as provided in [sections 1

1 through 10].

2 ~~NEW SECTION.~~ Section 7. Duration of employment
3 preference. Subject to [section 5]:

4 (1) a handicapped person, the spouse of a handicapped
5 person as described in subsection (3)(b)(iii) of [section
6 3], a disabled veteran, or the spouse of a disabled veteran
7 as described in subsection (3)(b)(i) of [section 3]
8 qualifies for employment preference as long as the disabling
9 condition exists;

10 (2) a veteran, as defined in [section 3], who is not a
11 disabled veteran, as defined in [section 3], qualifies for
12 employment preference for life. However, once he has
13 obtained a PERMANENT position because of the application of
14 the employment preference, he may not use the preference
15 again.

16 (3) the surviving spouse of a veteran as described in
17 subsection (3)(a) of [section 3] qualifies for employment
18 preference for as long as the spouse remains unmarried; and

19 (4) the spouse of a person described in subsection
20 (3)(b)(ii) of [section 3] qualifies for employment
21 preference for as long as the person is missing in action or
22 a prisoner of war.

23 ~~NEW SECTION.~~ Section 8. Enforcement of preference.

24 (1) A public employer shall, by posting and on the
25 application form, give notice of the preferences that

1 [sections 1 through 10] provide in public employment.

2 (2) A job applicant who believes he has an employment
3 preference shall claim the preference in writing before the
4 time for filing applications for the position involved has
5 passed. Failure to make a timely employment preference claim
6 FOR_A_POSITION is a complete defense to an action IN REGARD
7 TO_THAT_POSITION under subsection (4).

8 (3) If an applicant for a position makes a timely
9 written employment preference claim, the public employer
10 shall give written notice of its hiring decision to each
11 applicant claiming preference.

12 (4) (a) An applicant who believes he has not been
13 accorded his rights under [sections 1 through 10] may,
14 within 30 days of receipt of the notice of the hiring
15 decision, submit to the public employer a written request
16 for an explanation of the public employer's hiring decision.
17 Within 15 days of receipt of the request, the public
18 employer shall give the applicant a written explanation.

19 (b) The applicant may, within 90 days after receipt of
20 notice of the hiring decision, file a petition in the
21 district court in the county in which his application was
22 received by the public employer. The petition must state
23 facts which on their face entitle the applicant to an
24 employment preference.

25 (c) (i) Upon filing of the petition, the court shall

1 order the public employer to appear in court at a specified
 2 time not less than 10 or more than 30 days after the day the
 3 petition was filed and show cause why the applicant was not
 4 hired for the position. The public employer has the burden
 5 of ~~making a clear showing that the applicant was not~~
 6 ~~substantially equally qualified with the person hired~~
 7 PROVING BY A PREPONDERANCE OF THE EVIDENCE THAT THE EMPLOYER
 8 MADE A REASONABLE DETERMINATION PURSUANT TO SUBSECTION (B)
 9 OF [SECTION 3].

10 (ii) The time to appear provided in subsection
 11 (4)(c)(i) may be waived by stipulation of the parties. If a
 12 time to appear has been specified pursuant to subsection
 13 (4)(c)(i), the court may, on motion of one of the parties or
 14 on stipulation of all of the parties, grant a continuance.

15 (iii) If the public employer does not carry its burden
 16 of proof under subsection (4)(c)(i), the court shall order
 17 the public employer to reopen the selection process for the
 18 position involved and shall grant the applicant reasonable
 19 attorney fees and court costs. The remedy provided by this
 20 section is the only remedy for a violation of [sections 1
 21 through 10], and a court may not grant any other relief in
 22 an action for violation of [sections 1 through 10].

23 (d) Failure of an applicant to file a petition under
 24 subsection (4)(b) within 90 days bars the filing of a
 25 petition. If a public employer fails to provide an

1 explanation under subsection (4)(a) within 15 days and a
 2 petition is filed under subsection (4)(b), the court shall
 3 order the public employer to reopen the selection process.

4 (e) The Montana Rules of Civil Procedure apply to a
 5 proceeding under this subsection (4) to the extent that they
 6 do not conflict with this subsection (4).

7 NEW SECTION. Section 9. Adoption of rules. The
 8 department of administration shall adopt rules implementing
 9 [sections 1 through 10] and shall consult with the
 10 department of social and rehabilitation services in adopting
 11 rules governing certification of handicapped persons for
 12 purposes of [sections 1 through 10]. The department of
 13 administration's rules apply to all public employers, local
 14 as well as state.

15 NEW SECTION. Section 10. Conflicts with federal law.
 16 [Sections 1 through 10] do not apply to work or positions
 17 subject to federal laws or regulations if application of the
 18 employment preference conflicts with those laws or
 19 regulations.

20 Section 11. Section 10-2-402, MCA, is amended to read:
 21 "10-2-402. Superintendent to be given veteran's
 22 preference. In the selection of the superintendent of the
 23 Montana veterans' home, the department of institutions shall
 24 ~~give preference to veterans as defined in 10-2-202~~ apply the
 25 preference granted to veterans and disabled veterans, but

1 not the preference granted to other persons by [sections 1
2 through 12]."

3 Section 12, Section 49-3-103, MEA, is amended to read
4 "49-3-103--Permitted distinctions--Nothing in this
5 chapter shall prohibit any public or private employer

6 (1) from enforcing a differentiation based on marital
7 status, age, or physical or mental handicap;

8 (a) when based on the preference provided in sections
9 1 through 10;

10 (b) when based on a bona fide occupational
11 qualification reasonably necessary to the normal operation
12 of the particular business; or

13 (c) where the differentiation is based on reasonable
14 factors other than age;

15 (2) from observing the terms of a bona fide seniority
16 system or any bona fide employee benefit plan, such as a
17 retirement, pension, or insurance plan, which is not a
18 subterfuge to evade the purposes of this chapter, except
19 that no such employee benefit plan shall excuse the failure
20 to hire any individual; or

21 (3) from discharging or otherwise disciplining an
22 individual for good cause."

23 Section 13, Section 49-3-201, MEA, is amended to read
24 "49-3-201--Employment of state and local government
25 personnel--(1) State ~~Except as provided in sections 1~~

1 through 10] state and local government officials and
2 supervisory personnel shall recruit, appoint, assign, train,
3 evaluate, and promote personnel on the basis of merit and
4 qualifications without regard to race, color, religion,
5 creed, political ideas, sex, age, marital status, physical
6 or mental handicap, or national origin.

7 (2) All state and local governmental agencies shall
8 (a) promulgate written directives to carry out this
9 policy and to guarantee equal employment opportunities at
10 all levels of state and local government;

11 (b) regularly review their personnel practices to
12 assure compliance; and

13 (c) conduct continuing orientation and training
14 programs with emphasis on human relations and fair
15 employment practices.

16 (3) The department of administration shall insure that
17 the entire examination process, including appraisal of
18 qualifications, is free from bias.

19 (4) Appointing authorities shall exercise care to
20 insure utilization of minority group persons."

21 NEW SECTION. SECTION 12. EMPLOYMENT PREFERENCE. THE
22 APPLICATION OF AN EMPLOYMENT PREFERENCE AS PROVIDED FOR IN
23 [SECTIONS 1 THROUGH 10] AND 10-2-402 BY A PUBLIC EMPLOYER AS
24 DEFINED IN [SECTION 3] MAY NOT BE CONSTRUED TO CONSTITUTE A
25 VIOLATION OF THIS CHAPTER.

1 NEW SECTION. SECTION 13. EMPLOYMENT PREFERENCE. THE
 2 APPLICATION OF AN EMPLOYMENT PREFERENCE AS PROVIDED FOR IN
 3 [SECTIONS 1 THROUGH 10] AND 10-2-402 BY A PUBLIC EMPLOYER AS
 4 DEFINED IN [SECTION 3] MAY NOT BE CONSIDERED TO CONSTITUTE A
 5 VIOLATION OF THIS CHAPTER.

6 NEW SECTION. Section 14. Repealer. Subject to section
 7 16(3)(a) of this act, sections 10-2-201 through 10-2-206,
 8 if they are repeated, SECTIONS 10-2-201 THROUGH 10-2-206, MCA,
 9 ARE REPEALED. THIS REPEAL APPLIES RETROACTIVELY TO BAR ANY
 10 CLAIM OF VIOLATION OR APPLICATION OF 10-2-201 THROUGH
 11 10-2-206 THAT HAS NOT BEEN REDUCED TO JUDGMENT, WHETHER OR
 12 NOT THE JUDGMENT IS FINAL, ON [THE EFFECTIVE DATE OF THIS
 13 ACT], CLAIMS UNDER 10-2-201 THROUGH 10-2-206 THAT HAVE BEEN
 14 REDUCED TO JUDGMENT, WHETHER OR NOT THE JUDGMENT IS FINAL,
 15 ON [THE EFFECTIVE DATE OF THIS ACT] ARE ENFORCEABLE. NO
 16 CLAIM FOR A VIOLATION OF 10-2-201 THROUGH 10-2-206 MAY BE
 17 MADE UNDER SECTION 8 OF THIS ACT.

18 NEW SECTION. Section 15. Severability. If a part of
 19 this act is invalid, all valid parts that are severable from
 20 the invalid part remain in effect. If a part of this act is
 21 invalid in one or more of its applications, the part remains
 22 in effect in all valid applications that are severable from
 23 the invalid applications.

24 NEW SECTION. Section 16. Effective date --
 25 applicability -- saving clause. (1) This act is effective on

1 passage and approval.

2 (2) Except as provided in subsection (3)(b) SECTION
 3 14, this act applies only to positions that are filled after
 4 the effective date of this act.

5 (3)(a) Subject to the applicable statute of
 6 limitations and to subsection (3)(c), a claim for violation
 7 of 10-2-201 through 10-2-206, whether or not it is pending
 8 in court on the effective date of this act, may be pursued
 9 under and must be governed by 10-2-201 through 10-2-206.

10 (b) However, the only relief that may be granted on a
 11 claim described in subsection (3)(a) is that provided in
 12 section 8(4)(c)(iii) of this act, and the court may grant no
 13 other relief, including that provided in 10-2-206 or any
 14 judicial construction of 10-2-206.

15 (c) A claim under 10-2-201 through 10-2-206 must be
 16 filed within 60 days after the effective date of this act.

17 NEW SECTION. SECTION 17. CODIFICATION. INSTRUCTION.
 18 (1) SECTION 12 IS INTENDED TO BE CODIFIED AS AN INTEGRAL
 19 PART OF TITLE 49, CHAPTER 2, AND THE PROVISIONS OF TITLE 49,
 20 CHAPTER 2, APPLY TO SECTION 12.

21 (2) SECTION 13 IS INTENDED TO BE CODIFIED AS AN
 22 INTEGRAL PART OF TITLE 49, CHAPTER 3, AND THE PROVISIONS OF
 23 TITLE 49, CHAPTER 3, APPLY TO SECTION 13.

-End-

1 STATEMENT OF INTENT

2 HOUSE BILL 8

3
 4 A statement of intent is provided to address the nature
 5 of the employment preference granted in the bill. The
 6 legislature intends that public employers seek and hire the
 7 most qualified persons for positions in public employment.
 8 It is also the intent of the legislature that the nature of
 9 the preference is a relative one in that it is to be applied
 10 as a "tie breaker" among two or more applicants for a
 11 position who have substantially equal qualifications.
 12 Substantially equal qualifications does not mean a situation
 13 in which two or more applicants are exactly equally
 14 qualified. It means a range within which two applicants must
 15 be considered to be substantially equal in view of the
 16 qualifications set for the job. WHERE APPLICABLE ON SCORED
 17 EXAMS OR STRUCTURED INTERVIEWS, THE RANGE FOR SUBSTANTIALLY
 18 EQUAL WILL BE WITHIN 5 PERCENTAGE POINTS. Qualifications
 19 should include job-related knowledge, skill, and abilities.
 20 The legislature recognizes that public employers use a
 21 variety of scored and unscored selection procedures such as
 22 conventional written examinations, training and experience
 23 requirements, performance tests, structured oral interviews,
 24 or combinations of these. The legislature does not intend to
 25 specify the type of selection procedure to be used by a

1 public employer.

2 A statement of intent is also required for this bill
 3 because section 9 requires the department of administration
 4 to adopt rules implementing sections 1 through 10 and to
 5 consult with the department of social and rehabilitation
 6 services in formulating rules for the certification of
 7 handicapped persons.

8 The legislature intends the rules to adequately provide
 9 for the administration of the employment preference law, but
 10 to include only those rules that are reasonably necessary to
 11 implement sections 1 through 10.

12 It is the desire of the legislature that the department
 13 take all necessary steps in formulating, proposing, and
 14 adopting rules to ensure that the public, particularly those
 15 persons and organizations that have shown past interest in
 16 the employment preference law, is afforded sufficient time
 17 and opportunity to participate in the rulemaking procedure.
 18 The department should give such notice and hold such
 19 hearings as will ensure adequate public participation.

20 Rules adopted by the department apply to all initial
 21 hirings to positions by all public employers. In formulating
 22 its rules the department should take this into consideration
 23 and adopt rules that can be used and applied by the broad
 24 spectrum of state and local public employers subject to
 25 sections 1 through 10.

1 It is the intent of the legislature that the department
2 formulate and adopt rules relating, but not limited, to the
3 following matters and take into account the following
4 considerations.

5 (1) Claiming preference -- documentation and
6 verification. Rules relating to the job application process
7 should include the manner in which a preference should be
8 claimed when a job is applied for. They should prescribe the
9 means by which the applicant must document and submit
10 evidence of such things as the applicant's status as a
11 veteran, disabled veteran, handicapped person, or eligible
12 spouse. It is the intent of the legislature that rules for
13 claiming and documenting a preference do not place
14 unreasonable burdens upon applicants.

15 (2) Handicapped persons -- certification. The rules
16 should provide that a person will not be denied handicapped
17 status and certification merely because of his current or
18 former employment, should address the matter of what
19 constitutes a physical or mental impairment that
20 substantially limits one or more major life activities, and
21 outline in what instances a physical or mental impairment
22 limits a person's ability to obtain, retain, or advance in
23 employment. The department may wish to do this by a
24 combination of a statement of general principles and
25 specific examples.

1 Rules should provide for a certification process that
2 allows, when appropriate, permanent certification of those
3 impairments considered to be permanent in nature. A
4 procedure for extension or loss of certification should be
5 provided for those instances in which a handicap is or may
6 be temporary.

7 (3) Military conflicts. The legislature intends the
8 rules to apply federal law to determine what constitutes a
9 campaign or expedition for which a campaign badge is
10 authorized by the Congress of the United States or
11 department of defense.

12 (4) Honorable discharges. The legislature intends the
13 rules to apply federal law in defining honorable discharges.

14 (5) Hiring decision notices and explanations. The
15 legislature intends the rules to provide for the form and
16 content of written notices of hiring decisions, including
17 whether the position was obtained as the result of
18 application of the preference by the public employer,
19 written requests for explanations of hiring decisions, and
20 written explanations of hiring decisions.

21 (6) Reopening of selection process. The legislature
22 intends the rules to provide for a method of reopening the
23 selection process for a job should a court order the
24 selection process reopened, and include a method of giving
25 notice to those who applied for the job informing them of

1 the reopening and the reason therefor.

2 (7) Jobs subject to federal law. The legislature
3 intends the rules to identify or provide a method of
4 identifying work or positions to which the employment
5 preference does not apply by virtue of section 10.

1 HOUSE BILL NO. 8
2 INTRODUCED BY PAVLOVICH, JONES, FARRIS, D. BRONN,
3 PECK, SCHYE, WILLIAMS, ADDY, BARDANOUVE, HAND, MCCORMICK
4 YARDLEY, SHONTZ
5
6 A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING PREFERENCE IN
7 PUBLIC EMPLOYMENT FOR CERTAIN MILITARY VETERANS AND
8 HANDICAPPED PERSONS AND THEIR ELIGIBLE SPOUSES; RECONCILING
9 THE PREFERENCE STATUTES WITH THE HUMAN RIGHTS STATUTES;
10 AMENDING SECTIONS SECTION 10-2-402, ~~49-3-103~~ AND ~~49-3-201~~
11 MCA; REPEALING SECTIONS 10-2-201 THROUGH 10-2-206, MCA; AND
12 PROVIDING AN IMMEDIATE EFFECTIVE DATE AND AN APPLICABILITY
13 DATE."
14
15 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:
16 NEW SECTION. Section 1. Short title. [Sections 1
17 through ~~10 11~~] may be cited as the "Montana Veterans and
18 Handicapped Persons Employment Preference Act".
19 NEW SECTION. Section 2. Purposes. The purposes of
20 [sections 1 through ~~10 11~~] are to reward veterans for
21 service to their country, recognize past employment
22 discrimination against handicapped persons, and facilitate
23 the habilitation, rehabilitation, and readjustment of
24 veterans and handicapped persons.
25 NEW SECTION. Section 3. Definitions. For the purposes

1 of [sections 1 through ~~10 11~~], the following definitions
2 apply:
3 (1) "Active duty" means full-time duty other than for
4 training in the regular components of the United States
5 army, air force, navy, marine corps, or coast guard with
6 full pay and allowances. The term does not include monthly
7 drills, summer encampments, initial training, or other
8 inactive or active duty for training in the national guard
9 or reserves.
10 (2) "Disabled veteran" means an individual who:
11 (a) served on active duty;
12 (b) has been separated from service under ~~honorab~~
13 conditions BY HONORABLE DISCHARGE; and
14 (c) suffers a service-connected disability determined
15 by the United States veterans administration ~~to be 30% or~~
16 more disabling.
17 (3) "Eligible spouse" means:
18 (a) the unremarried surviving spouse of a veteran who
19 died while on active duty or whose death resulted from a
20 service-connected disability; or
21 (b) the spouse of:
22 (i) a veteran determined by the United States veterans
23 administration to have a 100% service-connected disability
24 who is unable to use his employment preference because of
25 his disability;

1 (ii) a person on active duty determined by the United
2 States government to be missing in action or a prisoner of
3 war; or

4 (iii) a handicapped person determined by the department
5 of social and rehabilitation services to have a 100%
6 disability who is unable to use his employment preference
7 because of his disability.

8 (4) "Handicapped person" means an individual certified
9 by the department of social and rehabilitation services to
10 have a physical OR MENTAL impairment that substantially
11 limits one or more major life activities, such as writing,
12 seeing, hearing, speaking, or mobility, and which limits the
13 individual's ability to obtain, retain, or advance in
14 employment.

15 (5) (a) "Initial hiring" means a personnel action for
16 which applications are solicited from outside the ranks of
17 the current employees of:

18 (i) a department, as defined in 2-15-102, for a
19 position within the executive branch;

20 (ii) a legislative agency, such as the consumer
21 counsel, environmental quality council, office of the
22 legislative auditor, legislative council, or office of the
23 legislative fiscal analyst, for a position within the
24 legislative branch;

25 (iii) a judicial agency, such as the office of supreme

1 court administrator, office of supreme court clerk, state
2 law library, or similar office in a state district court for
3 a position within the judicial branch;

4 (iv) a unit, as defined in 20-25-201, for a position
5 within the Montana university system;

6 (v) the office of commissioner of higher education for
7 a position within that office;

8 (vi) a college for a position within that college;

9 ~~(vii) a center or program for a position within the~~
10 ~~postsecondary vocational technical education system~~

11 ~~(viii)~~ (viii) a city or town for a municipal position,
12 including a city or municipal court position; and

13 ~~(ix)~~ (ix) a county for a county position, including a
14 justice's court position.

15 (b) A personnel action limited to current employees of
16 a specific public entity identified in subsections (a)(i)
17 through (a)~~(ix)~~(viii) of this subsection (5), current
18 employees in a reduction-in-force pool who have been laid
19 off from a specific public entity identified in subsections
20 (a)(i) through (a)~~(ix)~~(viii) of this subsection (5), or
21 current participants in a federally authorized employment
22 program is not an initial hiring.

23 (6) "Position" means a permanent or seasonal position
24 as defined in 2-18-101 for a state position or a similar
25 permanent or seasonal position with a public employer other

1 than the state. However, the term does not include:

2 (a) a temporary position as defined in 2-18-101 for a

3 state position or similar temporary position with a public

4 employer other than the state;

5 (b) a state or local elected official;

6 (c) employment as an elected official's immediate

7 secretary, legal advisor, or administrative, legislative, or

8 other immediate or first-line aide;

9 (d) appointment by an elected official to a body such

10 as a board, commission, committee, or council;

11 (e) appointment by an elected official to a public

12 office if the appointment is provided for by law;

13 (f) a department head appointment by the governor or

14 an executive department head appointment by a mayor, city

15 manager, county commissioner, or other chief administrative

16 or executive officer of a local government; or

17 (g) engagement as an independent contractor or

18 employment by an independent contractor.

19 (7) (a) "Public employer" means:

20 (i) any department, office, board, bureau, commission,

21 agency, college, including a community college,

22 ~~postsecondary--vocational-technical--center--or--program~~

23 university, or other instrumentality of the executive,

24 judicial, or legislative branch of the government of the

25 state of Montana; and

1 (ii) any county, city, or town.

2 (b) The term does not include a school district, a

3 special purpose district, an authority, or any political

4 subdivision of the state other than a county, city, or town.

5 (8) "Substantially equal qualifications" means the

6 qualifications of two or more persons among whom the public

7 employer cannot make a reasonable determination that the

8 qualifications held by one person are significantly better

9 suited for the position than the qualifications held by the

10 other persons. IN A SCORED SELECTION PROCEDURE THE RANGE

11 FOR SUBSTANTIALLY EQUAL WILL BE WITHIN 5 PERCENTAGE POINTS.

12 ~~(9) "Under-honorable-conditions" means a discharge or~~

13 ~~separation from active duty characterized as under-honorable~~

14 ~~conditions--the term includes honorable discharges and~~

15 ~~general discharges but does not include dishonorable~~

16 ~~discharges or other administrative discharges characterized~~

17 ~~as other than honorable.~~

18 (10)(9) (a) "Veteran" means a person who:

19 (i) served on active duty during time of war or

20 declared national emergency or in a campaign or expedition

21 for which a campaign badge was authorized by the United

22 States congress or the United States department of defense;

23 and

24 (ii) has been separated from service ~~under-honorable~~

25 conditions BY HONORABLE DISCHARGE.

(b) The term does not include a person--receiving retirement pay from the United States based on length of military service RETIRED MEMBER OF A REGULAR COMPONENT OF THE UNITED STATES ARMED FORCES WHO IS ELIGIBLE FOR OR RECEIVING A MILITARY RETIREMENT ALLOWANCE OTHER THAN A MEDICAL RETIREMENT ALLOWANCE AND DOES NOT INCLUDE ANY OTHER RETIRED MEMBER OF A PUBLIC RETIREMENT SYSTEM, EXCEPT SOCIAL SECURITY, THAT IS SUPPORTED IN WHOLE OR IN PART BY TAX REVENUES.

~~(ii)~~(10) "War or declared national emergency" means:

(a) World War I, beginning on April 6, 1917, and ending on November 11, 1918, both dates inclusive;

(b) World War II, beginning on December 7, 1941, and ending on December 31, 1946, both dates inclusive;

(c) the Korean Conflict, military expedition, or police action, beginning on June 27, 1950, and ending on January 31, 1955, both dates inclusive; and

(d) the Vietnam conflict, beginning on August 5, 1964, and ending on May 7, 1975, both dates inclusive.

NEW SECTION. Section 4. Employment preference in initial hiring. (1) (a) Except as provided in SUBSECTION (1)(B) OF THIS SECTION AND 10-2-402, in an initial hiring for a position, if a job applicant who is a veteran, disabled veteran, handicapped person, or eligible spouse meets the eligibility requirements contained in [section 5]

and claims a preference as required by [section 8], a public employer shall hire the applicant over any other applicant with substantially equal qualifications who is not a preference eligible applicant.

~~(b)~~--in an initial hiring, a public employer AND shall hire a disabled veteran over any other preference eligible applicant with substantially equal qualifications.

(B) (I) WRITTEN OR ORAL EXAMINATIONS OR A STRUCTURED INTERVIEW SHALL BE GIVEN FOR INITIAL HIRING BY A DEPARTMENT, OFFICE, BOARD, BUREAU, AGENCY, OR OTHER INSTRUMENTALITY OF THE EXECUTIVE, JUDICIAL, OR LEGISLATIVE BRANCH OF THE GOVERNMENT OF THE STATE OF MONTANA, AND A VETERAN, DISABLED VETERAN, HANDICAPPED PERSON, OR ELIGIBLE SPOUSE SHALL HAVE ADDED TO HIS EXAMINATION AND INTERVIEW RATINGS A CREDIT OF THE FOLLOWING PERCENTAGE OF TOTAL POSSIBLE POINTS:

(A) VETERANS -- 5%;

(B) DISABLED VETERANS AND HANDICAPPED PERSONS -- 10%;

(C) ELIGIBLE SPOUSES -- 10%.

(II) THE FACT THAT AN APPLICANT HAS CLAIMED A CREDIT UNDER THIS SUBSECTION (1)(B) MAY NOT BE MADE KNOWN TO THE SCORERS OF A WRITTEN OR ORAL EXAMINATION OR STRUCTURED INTERVIEW UNTIL RATINGS OF ALL APPLICANTS HAVE BEEN RECORDED, AFTER WHICH SUCH CREDITS SHALL BE ADDED TO THE EXAMINATION OR INTERVIEW RATING AND THE RECORDS SHALL SHOW THE RATING AND CREDIT.

1 IIII A. PREFERENCE MAY NOT BE GRANTED UNDER SUBSECTION
2 (1)(A) IF A PREFERENCE HAS BEEN GRANTED UNDER THIS
3 SUBSECTION (1)(B).

4 (2) The employment preference provided for in
5 subsection (1) does not apply to a personnel action
6 described in subsection (5)(b) of [section 3] or to any
7 other personnel action that is not an initial hiring.

8 NEW SECTION. Section 5. Eligibility requirements. No
9 veteran, disabled veteran, eligible spouse, or handicapped
10 person is entitled to receive employment preference as
11 provided in [section 4] unless:

- 12 ~~(1) he is a United States citizen;~~
- 13 ~~(2) he has resided continuously in the state for at~~
14 ~~least 1 year immediately before applying for employment;~~
- 15 ~~(3) if applying for municipal or county employment, he~~
16 ~~has resided for at least 30 days immediately before applying~~
17 ~~for employment in the city, town, or county in which~~
18 ~~employment is sought; and~~

19 ~~(4) he ENTERED THE SERVICE WHILE RESIDING WITHIN THE~~
20 ~~STATE OF MONTANA AND HE~~ meets those requirements considered
21 necessary by a public employer to successfully perform the
22 essential duties of the position for which he is applying.

23 NEW SECTION. Section 6. Certification of handicapped
24 persons. The department of social and rehabilitation
25 services shall certify persons as handicapped for the

1 purpose of employment preference as provided in [sections 1
2 through 10 11].

3 NEW SECTION. Section 7. Duration of employment
4 preference. Subject to [section 5]:

5 (1) a handicapped person, the spouse of a handicapped
6 person as described in subsection (3)(b)(iii) of [section
7 3], a disabled veteran, or the spouse of a disabled veteran
8 as described in subsection (3)(b)(i) of [section 3]
9 qualifies for employment preference as long as the disabling
10 condition exists;

11 (2) a veteran, as defined in [section 3], who is not a
12 disabled veteran, as defined in [section 3], qualifies for
13 employment preference for ~~life~~ However, once he has
14 obtained a PERMANENT position because of the application of
15 the employment preference, he may not use the preference
16 again NO LONGER THAN 10 YEARS FOLLOWING SEPARATION FROM
17 SERVICE OR FOR NO LONGER THAN 10 YEARS FOLLOWING [THE
18 EFFECTIVE DATE OF THIS ACT], WHICHEVER IS LATER, AND WITH AN
19 UNLIMITED NUMBER OF USES.

20 (3) the surviving spouse of a veteran as described in
21 subsection (3)(a) of [section 3] qualifies for employment
22 preference for as long as the spouse remains unmarried; and

23 (4) the spouse of a person described in subsection
24 (3)(b)(iii) of [section 3] qualifies for employment
25 preference for as long as the person is missing in action or

1 a prisoner of war.

2 NEW SECTION. Section 8. Enforcement of preference.

3 (1) A public employer shall, by posting and on the
4 application form, give notice of the preferences that
5 [sections 1 through ~~to~~ 11] provide in public employment.

6 (2) A job applicant who believes he has an employment
7 preference shall claim the preference in writing before the
8 time for filing applications for the position involved has
9 passed. Failure to make a timely employment preference claim
10 FOR A POSITION is a complete defense to an action IN REGARD
11 TO THAT POSITION under subsection (4).

12 (3) If an applicant for a position makes a timely
13 written employment preference claim, the public employer
14 shall give written notice of its hiring decision to each
15 applicant claiming preference.

16 (4) (a) An applicant who believes he has not been
17 accorded his rights under [sections 1 through ~~to~~ 11] may,
18 within 30 days of receipt of the notice of the hiring
19 decision, submit to the public employer a written request
20 for an explanation of the public employer's hiring decision.
21 within 15 days of receipt of the request, the public
22 employer shall give the applicant a written explanation.

23 (b) The applicant may, within 90 days after receipt of
24 notice of the hiring decision, file a petition in the
25 district court in the county in which his application was

1 received by the public employer. The petition must state
2 facts which on their face entitle the applicant to an
3 employment preference.

4 (c) (i) Upon filing of the petition, the court shall
5 order the public employer to appear in court at a specified
6 time not less than 10 or more than 30 days after the day the
7 petition was filed and show cause why the applicant was not
8 hired for the position. THE AT THE HEARING, THE public
9 employer has the burden of ~~making a clear showing that the~~
10 ~~applicant was not substantively equitably qualified with the~~
11 ~~person hired~~ PROVING BY A PREPONDERANCE OF THE EVIDENCE THAT
12 THE EMPLOYER MADE A REASONABLE DETERMINATION PURSUANT TO
13 SUBSECTION (1) OF [SECTION 3]; AND THE APPLICANT HAS THE
14 BURDEN OF PROVING BY A PREPONDERANCE OF THE EVIDENCE THAT HE
15 IS A PREFERENCE ELIGIBLE APPLICANT OF PROVING BY A
16 PREPONDERANCE OF THE EVIDENCE:

17 (A) IF THE PREFERENCE IS CLAIMED UNDER SUBSECTION
18 (1)(A) OF [SECTION 4], THAT THE EMPLOYER MADE A REASONABLE
19 DETERMINATION PURSUANT TO SUBSECTION (1) OF [SECTION 3]; AND

20 (B) IF THE PREFERENCE WAS CLAIMED UNDER SUBSECTION
21 (1)(B) OF [SECTION 4], THAT THE APPLICANT WAS NOT ENTITLED
22 TO BE HIRED FOR THE POSITION.

23 (ii) The time to appear provided in subsection
24 (4)(c)(i) may be waived by stipulation of the parties. If a
25 time to appear has been specified pursuant to subsection

1 (4)(c)(i), the court may, on motion of one of the parties or
2 on stipulation of all of the parties, grant a continuance.

3 (iii) If the public employer does not carry its burden
4 of proof under subsection (4)(c)(i) AND THE COURT HAS FOUND
5 THAT THE APPLICANT IS A PREFERENCE ELIGIBLE APPLICANT, the
6 court shall order the public employer to reopen the
7 selection process for the position involved and shall grant
8 the applicant reasonable attorney fees and court costs. The
9 remedy provided by this section is the only remedy for a
10 violation of [sections 1 through ~~10~~ 11], and a court may not
11 grant any other relief in an action for violation of
12 [sections 1 through ~~10~~ 11].

13 (d) Failure of an applicant to file a petition under
14 subsection (4)(b) within 90 days bars the filing of a
15 petition. If a public employer fails to provide an
16 explanation under subsection (4)(a) within 15 days and a
17 petition is filed under subsection (4)(b), the court shall
18 order the public employer to reopen the selection process.

19 (e) The Montana Rules of Civil Procedure apply to a
20 proceeding under this subsection (4) to the extent that they
21 do not conflict with this subsection (4).

22 NEW SECTION. SECTION 9. DEPARTMENT TO DEVELOP JOB
23 CLASSIFICATION PLAN. (1) (A) THE DEPARTMENT OF
24 ADMINISTRATION SHALL DEVELOP A COMPREHENSIVE PLAN FOR THE
25 CLASSIFICATION OF ALL POSITIONS IN THE INSTRUMENTALITIES

1 REFERRED TO IN SUBSECTION (1)(B)(I) OF [SECTION 4]. THE
2 CLASSIFICATION PLAN SHALL INCLUDE:

3 (I) THE USE OF WRITTEN OR ORAL EXAMINATIONS AND
4 STRUCTURED INTERVIEWS FOR INITIAL HIRING, AS DEFINED IN
5 [SECTION 3], INTO EACH CLASS OF POSITION;

6 (II) THE RATING OF EACH INDIVIDUAL BY A NUMERICAL
7 SCORE, TAKING INTO ACCOUNT THE RESULTS OF ALL WRITTEN OR
8 ORAL EXAMINATIONS, STRUCTURED INTERVIEWS, AND ANY POINTS
9 ADDED AS A RESULT OF THE APPLICATION OF THE PREFERENCE
10 PROVIDED FOR IN SUBSECTION (1)(B)(I) OF [SECTION 4]. EACH
11 INDIVIDUAL MUST BE LISTED ON A REGISTER ACCORDING TO THE
12 CLASS OF POSITION FOR WHICH HE IS ELIGIBLE AND HIS NUMERICAL
13 SCORE.

14 (B) THE PLAN MUST CONTAIN THOSE STATUTES AND RULES
15 PROPOSED FOR ADOPTION, AMENDMENT, OR REPEAL AS THE
16 DEPARTMENT CONSIDERS NECESSARY IN ORDER TO ENSURE THE
17 WORKABILITY AND APPLICATION OF THE PLAN TO ALL POSITIONS IN
18 THE INSTRUMENTALITIES REFERRED TO IN SUBSECTION (1)(B)(I) OF
19 [SECTION 4].

20 (C) THE DEPARTMENT SHALL MAKE COPIES OF THE PLAN
21 AVAILABLE TO ALL INTERESTED PERSONS, HOLD PUBLIC HEARINGS ON
22 THE PLAN IN ORDER TO OBTAIN ACCURATE AND COMPREHENSIVE VIEWS
23 ON THE PLAN BY THE PUBLIC AND PUBLIC EMPLOYERS, AND SHALL
24 ESTABLISH A PERIOD DURING WHICH WRITTEN COMMENTS WILL BE
25 ACCEPTED FOR THE SAME PURPOSE. THE DEPARTMENT SHALL CONSIDER

1 ALL WRITTEN AND ORAL COMMENTS IN DEVELOPMENT OF A JOB
2 CLASSIFICATION PLAN, AND ADOPT THAT PLAN BY RULE PRIOR TO
3 JULY 1, 1984.

4 (2) THE DEPARTMENT SHALL DEVELOP AND ADOPT AN INTERIM
5 JOB CLASSIFICATION PLAN THAT INCLUDES THE ITEMS REFERRED TO
6 IN SUBSECTIONS (1)(A) AND (1)(B) OF THIS SECTION. THE
7 DEPARTMENT SHALL PROVIDE THAT THE INTERIM PLAN BECOMES
8 EFFECTIVE [30 DAYS FOLLOWING THE EFFECTIVE DATE OF THIS ACT]
9 AND THAT THE INTERIM PLAN REMAINS IN EFFECT UNTIL THE PLAN
10 REQUIRED BY SUBSECTION (1)(C) BECOMES EFFECTIVE. THE
11 DEVELOPMENT AND ADOPTION OF THE INTERIM PLAN IS NOT SUBJECT
12 TO THE PROVISIONS OF TITLE 2, CHAPTER 4, MCA.

13 NEW SECTION. Section 10. Adoption of rules. The
14 department of administration shall adopt rules implementing
15 [sections 1 through 10 11] and shall consult with the
16 department of social and rehabilitation services in adopting
17 rules governing certification of handicapped persons for
18 purposes of [sections 1 through 10 11]. The department of
19 administration's rules apply to all public employers, local
20 as well as state.

21 NEW SECTION. Section 11. Conflicts with federal law.
22 [Sections 1 through 10 11] do not apply to work or positions
23 subject to federal laws or regulations if application of the
24 employment preference conflicts with those laws or
25 regulations.

1 Section 12. Section 10-2-402, MCA, is amended to read:
2 "10-2-402. Superintendent to be given veteran's
3 preference. In the selection of the superintendent of the
4 Montana veterans' home, the department of institutions shall
5 ~~give preference to veterans as defined in 10-2-202 apply the~~
6 ~~preference granted to veterans and disabled veterans BY~~
7 ~~SUBSECTION (1)(B) OF [SECTION 4], but not the preference~~
8 ~~granted to other persons, by [sections 1 through 10 (11)]."~~

9 ~~Section 12. Section 49-3-103, MCA, is amended to read:~~

10 ~~"49-3-103. Permitted distinctions. Nothing in this~~
11 ~~chapter shall prohibit any public or private employer~~

12 ~~(1) from enforcing a differentiation based on marital~~
13 ~~status, age, or physical or mental handicap~~

14 ~~(2) when based on the preference provided in [sections~~
15 ~~1 through 10]~~

16 ~~(3) when based on a bona fide occupational~~
17 ~~qualification reasonably necessary to the normal operation~~
18 ~~of the particular business; or~~

19 ~~(4) where the differentiation is based on reasonable~~
20 ~~factors other than age;~~

21 ~~(5) from observing the terms of a bona fide seniority~~
22 ~~system or any bona fide employee benefit plan, such as a~~
23 ~~retirement, pension, or insurance plan, which is not a~~
24 ~~subterfuge to evade the purposes of this chapter, except~~
25 ~~that no such employee benefit plan shall excuse the failure~~

1 to hire any individual or
 2 (3) from discharging or otherwise disciplining an
 3 individual for good cause.
 4 Section 13. Section 49-3-201, MCA, is amended to read
 5 "49-3-201. Employment of state and local government
 6 personnel--(1) State except as provided in sections 1
 7 through 10. State and local government officials and
 8 supervisory personnel shall recruit, appoint, assign, train,
 9 evaluate and promote personnel on the basis of merit and
 10 qualifications without regard to race, color, religion,
 11 creed, political ideas, sex, age, marital status, physical
 12 or mental handicap or national origin.
 13 (2) All state and local governmental agencies shall
 14 (a) promulgate written directives to carry out this
 15 policy and to guarantee equal employment opportunities at
 16 all levels of state and local government;
 17 (b) regularly review their personnel practices to
 18 assure compliance and
 19 (c) conduct continuing orientation and training
 20 programs with emphasis on human relations and fair
 21 employment practices.
 22 (3) The department of administration shall insure that
 23 the entire examination process, including appraisal of
 24 qualifications, is free from bias.
 25 (4) Appointing authorities shall exercise care to

1 insure utilization of minority group persons."
 2 NEW SECTION. SECTION 13. EMPLOYMENT PREFERENCE. THE
 3 APPLICATION OF AN EMPLOYMENT PREFERENCE AS PROVIDED FOR IN
 4 [SECTIONS 1 THROUGH 10] AND 10-2-402 BY A PUBLIC EMPLOYER
 5 AS DEFINED IN [SECTION 3] MAY NOT BE CONSTRUED TO CONSTITUTE
 6 A VIOLATION OF THIS CHAPTER.
 7 NEW SECTION. SECTION 14. EMPLOYMENT PREFERENCE. THE
 8 APPLICATION OF AN EMPLOYMENT PREFERENCE AS PROVIDED FOR IN
 9 [SECTIONS 1 THROUGH 10] AND 10-2-402 BY A PUBLIC EMPLOYER
 10 AS DEFINED IN [SECTION 3] MAY NOT BE CONSTRUED TO CONSTITUTE
 11 A VIOLATION OF THIS CHAPTER.
 12 NEW SECTION. Section 15. Repealer. Subject to section
 13 16(3)(e) of this act, sections 10-2-201 through 10-2-206
 14 MCA are repealed. SECTIONS 10-2-201 THROUGH 10-2-206, MCA,
 15 ARE REPEALED. THIS REPEAL APPLIES RETROACTIVELY TO BAR ANY
 16 CLAIM OF VIOLATION OR APPLICATION OF 10-2-201 THROUGH
 17 10-2-206 THAT HAS NOT BEEN REDUCED TO JUDGMENT, WHETHER OR
 18 NOT THE JUDGMENT IS FINAL, ON [THE EFFECTIVE DATE OF THIS
 19 ACT]. CLAIMS UNDER 10-2-201 THROUGH 10-2-206 THAT HAVE BEEN
 20 REDUCED TO JUDGMENT, WHETHER OR NOT THE JUDGMENT IS FINAL,
 21 ON [THE EFFECTIVE DATE OF THIS ACT] ARE ENFORCEABLE. NO
 22 CLAIM FOR A VIOLATION OF 10-2-201 THROUGH 10-2-206 MAY BE
 23 MADE UNDER SECTION 8 OF THIS ACT.
 24 NEW SECTION. Section 16. Severability. If a part of
 25 this act is invalid, all valid parts that are severable from

1 the invalid part remain in effect. If a part of this act is
 2 invalid in one or more of its applications, the part remains
 3 in effect in all valid applications that are severable from
 4 the invalid applications.

5 NEW SECTION. Section 17. Effective date --
 6 applicability -- saving clause. (1) This act is effective on
 7 passage and approval.

8 (2) Except as provided in ~~subsection (3)(b)~~ SECTION 14
 9 15 AND SUBSECTION (3) OF THIS SECTION, this act applies only
 10 to positions that are filled after the effective date of
 11 this act.

12 ~~(3)(a) Subject to the applicable statute of~~
 13 ~~limitations and to subsection (3)(c), a claim for violation~~
 14 ~~of 10-2-201 through 10-2-206, whether or not it is pending~~
 15 ~~in court on the effective date of this act, may be pursued~~
 16 ~~under and must be governed by 10-2-201 through 10-2-206.~~

17 ~~(b) However, the only relief that may be granted on a~~
 18 ~~claim described in subsection (3)(a) is that provided in~~
 19 ~~section 8(4)(c)(iii) of this act, and the court may grant no~~
 20 ~~other relief, including that provided in 10-2-206 or any~~
 21 ~~judicial construction of 10-2-206.~~

22 ~~(c) A claim under 10-2-201 through 10-2-206 must be~~
 23 ~~filed within 60 days after the effective date of this act.~~

24 (3) SUBSECTION (1)(B) OF [SECTION 4] APPLIES ONLY TO
 25 POSITIONS REFERRED TO IN THAT SUBSECTION THAT ARE FILLED

1 AFTER [30 DAYS FOLLOWING THE EFFECTIVE DATE OF THIS ACT],
 2 UNTIL THAT DATE 10-2-201 THROUGH 10-2-206 APPLY TO THOSE
 3 POSITIONS.

4 NEW SECTION. SECTION 18. CODIFICATION INSTRUCTION.
 5 (1) SECTION 12 13 IS INTENDED TO BE CODIFIED AS AN INTEGRAL
 6 PART OF TITLE 49, CHAPTER 2, AND THE PROVISIONS OF TITLE 49,
 7 CHAPTER 2, APPLY TO SECTION 12 13.

8 (2) SECTION 13 14 IS INTENDED TO BE CODIFIED AS AN
 9 INTEGRAL PART OF TITLE 49, CHAPTER 3, AND THE PROVISIONS OF
 10 TITLE 49, CHAPTER 3, APPLY TO SECTION 13 14.

-End-