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The Nuts and Bolts of Oregon's Veterans' Preference Law

By Katie Kammer, CIS Pre-Loss Employment Associate Attorney

Most public employers know that they must comply with Oregon law by granting preference to eligible veterans when making certain employment decisions. They know that an eligible veteran is one who meets both the minimum and any special qualifications for a position—and they know that the preference is usually awarded in the form of points. But when it comes to the nuts and bolts of implementing this very technical (and sometimes confusing) law, employers have lots of questions.

CIS has created the following Q&A to answer those nitty-gritty questions and help member cities set up a recruitment process that complies with the law—while determining the best candidate for an open position.

Initial Qualification for the Preference

- *Does an Applicant have the Responsibility to Ask for Veterans' Preference?*

There's ambiguity surrounding this question because the statute doesn't explicitly state whether it's the applicant who must ask for the preference, or the employer that must offer it as an option. However, the statute makes one thing clear—the consequence of failing to properly award veterans' preference to an eligible veteran is a potentially costly administrative complaint or civil lawsuit in court. To avoid this, employers should make sure that applicants know that veterans' preference is available and how to request it if they believe they're qualified.

City websites and recruitment materials—including a job posting and application—should include a statement (much like an EEO statement) affirming the city complies with Oregon's veterans' preference law. Recruitment materials should include explicit instructions about what steps an applicant must take to seek the veterans' preference, what documents must be submitted as proof of eligibility, when they must be submitted, and who to contact within the city if the applicant has questions. Some cities even provide an applicant with a worksheet that allows him or her to select the qualifications that he or she believes create an entitlement to the preference. CIS members may request a sample veterans' preference qualification worksheet from CIS Pre-Loss. Finally, it's important to be extremely clear that the veterans' preference will not be awarded if the applicant doesn't request it, or fails to

provide the supporting documentation. The more explicit the application instructions, the easier it is for the applicant when applying—and for city staff when making the preference-eligibility assessment.

- *Can a Veteran Affirmatively Waive the Preference?*

Yes, there is nothing precluding a veteran from affirmatively waiving the preference. But if they choose to do so, the employer should make sure to get that waiver in writing. This may also be accomplished by having a yes/no statement on the application form.

- *Does Veterans' Preference Come into Play when Recruiting for Volunteers?*

Oregon's veterans' preference law only applies to a veteran applying for a paid position or seeking a promotion to a



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position with a higher maximum salary rate. It does not apply to volunteers.

- **What About a Contract Position?**

If the recruitment for the position involves a competitive process, the employer must comply with the veterans' preference law regardless of whether the individual filling the position will be employed at-will, represented by a union, or have an employment contract.

- **So, ALL Internal Promotional Processes Require Veterans' Preference to be Applied?**

If the promotion comes with a pay raise and the promotional decision is made based on the results of a merit-based, competitive process that evaluates employees based on

relative ability, knowledge, experience and other skills, then yes, the veterans' preference must be applied to eligible candidates.

Preparing for Recruitment

- **When Preparing a Job Posting, Can the City Use the Term "Mandatory" Instead of "Minimum" Qualifications?**

Because the Oregon veterans' preference statute uses the term "minimum qualifications," CIS attorneys suggest cities stick to that term.

Does CIS sound like a stickler? Well it's for good reason. In the past, one public employer used the term "preferred qualification" instead of "special qualification" in its job posting and was sued by a veteran applicant after the

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employer had determined that he wasn't eligible for the preference. The applicant argued that because the job posting didn't list any "special qualifications" (it only listed "preferred qualifications"), all he had to do was meet the minimum qualifications for the position.

Although the employer won the case on summary judgment, it still spent time and money to defend a claim that could have been easily avoided by simply using the statutorily-defined terms. If the city wants to use an alternative term, perhaps because of past practices, CIS suggests using both—for example "minimum/mandatory qualifications."

• *What's an Example of a "Special Qualification"?*

The Oregon Bureau of Labor and Industries (BOLI) defines special qualifications as "qualifications added to minimum qualifications necessary at the time of appointment based on specific duties of the position to be filled."

Crystal clear, right?

Luckily, BOLI goes on to give some examples such as bilingual skills, or licenses, permits and certifications required by law, or screenings permitted by law such as references, criminal background and credit checks, and physical fitness and drug tests. A common example might be a commercial driver's license for a public works employee.

Cities should review the job description for the position and think about skills and attributes that an ideal candidate for that position would have. Those qualifications should be added to the job posting as special qualifications.

Applying the Preference

• *Is it Correct that Preference-Eligible Veterans Must be Interviewed, Even if They Do Not Meet the Minimum or Special Qualifications?*

Trick question! Yes, preference-eligible veterans must be interviewed, but if an applicant doesn't meet the minimum and special qualifications for the position to which they're applying, they aren't preference-eligible.

• *For a Repeat Veteran Applicant that has Poor References, Must They Receive an Interview for Each and Every Opening?*

Each recruitment should be treated independently. Each time an applicant applies for a city position, staff must consider whether the applicant meets both the minimum and any special qualification for that particular position, regardless of what the city may have learned about the applicant in previous recruitments. If the applicant meets the minimum and any special qualifications for the position, he or she must be interviewed.

It can be frustrating to go through the steps required by the law when staff suspect that in the end, the references will disqualify the applicant. However, the law doesn't provide an exception for repeat unsuccessful candidates, and failure to follow the law could result in a claim.

As CIS attorneys can attest, there's nothing more frustrating than defending an employment lawsuit.

Consider this: some cities make passing a reference check a minimum qualification of employment, and so if applicants receive negative or unsatisfactory references, they no longer qualify for the veterans' preference. This process doesn't necessarily save staff the effort of going through the recruitment, since references are typically checked toward the end of the recruitment, but it could save the employer from having to establish a method for applying a preference to negative references.

- *If the City's Recruitment has a Third Stage with Two or More Finalists, Do We Add the Points?*

Yes, you must apply the preference at every stage, even the last one. (As an aside, the statute doesn't define what a "stage" is, so CIS recommends applying the preference at every point of the recruitment where one or more contenders is eliminated from consideration.) If city staff use a scored method for the final stage of the recruitment, that would involve applying the points to the scores for those finalists.

- *What About a Final Interview with Top Candidates that is Unscored? They are All Scored Up to this Stage. How Does Staff Apply the Preference at That Point?*

There's nothing that prevents a city from using a mix of scored and unscored evaluation techniques during a single recruitment. But if staff use an unscored method, they have to be able to show how they plan to devise a method to apply the veterans' preference.

As CIS learned in *Edwards v. Multnomah County Sheriff's Office*, cities should preferably have formulated the procedure for granting preference before a recruitment has even started—and trained all those involved with the recruitment on how the procedure will be implemented. A city's attorney or a CIS Pre-Loss attorney can advise whether an unscored evaluation method meets the statutory requirements.

- *What if the City Doesn't Like Any of the Applicants and Chooses Not to Hire?*

That's fine! The city just needs to make sure to keep a record of the legitimate, non-discriminatory reasons on why and how the decision was made. Remember, a veteran applicant has the right to ask for the reason(s) why he or she wasn't selected for the position in writing.

This Q&A doesn't answer every question that may arise when cities try to implement Oregon's veterans' preference law. City staff that have more questions about complying with this employment law should reach out to their attorney or, if they're members of CIS, should contact a CIS Pre-Loss attorney or the Hire-to-Retire team. Law enforcement employers that have questions about compliance for their current processes should contact CIS Human Resources Senior Consultant Kurt Chapman. ■