

AMENDED IN ASSEMBLY MAY 27, 2016

AMENDED IN ASSEMBLY APRIL 7, 2016

AMENDED IN ASSEMBLY APRIL 5, 2016

CALIFORNIA LEGISLATURE—2015–16 REGULAR SESSION

ASSEMBLY BILL

No. 2879

Introduced by Assembly Member Mark Stone
(Coauthors: Assembly Members ~~Chiu and Chiu~~, Thurmond, and
Ting)

February 25, 2016

An act to amend Section 394 of the Military and Veterans Code, relating to service members.

LEGISLATIVE COUNSEL'S DIGEST

AB 2879, as amended, Mark Stone. Service Member Employment Protection Act.

Existing law prohibits a person from discriminating against a member of the military forces because of his or her membership or service, as prescribed. Existing law makes a violation of those provisions a crime. Existing law also provides civil remedies for violations of those provisions.

This bill would prohibit a person from requiring a waiver of the protections afforded under those provisions as a condition of employment, including the right to file and pursue a civil action or complaint, as specified. The bill would prohibit a person from retaliating against a person who refuses to waive his or her rights under those provisions, as prescribed. The bill would require any waiver of the protections afforded under those provisions to be knowing and voluntary, in writing, and expressly not made as a condition of employment, as

specified. The bill would require a person seeking to enforce ~~such a~~ *that* waiver to have the burden of proving that the waiver was knowing and voluntary and not made as a condition of employment. The bill would apply its provisions to any *waiver* agreement entered into on or after January 1, 2017, including an agreement that requires private arbitration. A violation of these provisions would not constitute a crime. The bill would include a severability clause.

Vote: majority. Appropriation: no. Fiscal committee: no.
State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. The Legislature finds and declares all of the
2 following:

3 (a) Existing federal law and state law recognizes the need to
4 protect military service members from discrimination in
5 employment. Under the federal Uniformed Services Employment
6 and Reemployment Rights Act (USERRA), an employer may not
7 deny initial employment, reemployment, retention in employment,
8 promotion, or any employment benefits based on an employee's
9 military service. *Section 394 of the Military and Veterans Code*
10 *(Section 394), which enacts in state law employment protections*
11 *that are very similar to USERRA, also prohibits discrimination*
12 *against service members because of their membership or service*
13 *in the military. Furthermore, Section 394 prohibits an employer*
14 *from terminating or prejudicing in any manner a person's*
15 *employment because of his or her duties or attendance at military*
16 *places of drill or instruction for the California National Guard.*

17 ~~(b) In California, key protections in the Military and Veterans~~
18 ~~Code and the Fair Employment and Housing Act strictly prohibit~~
19 ~~discrimination on the basis of military and veteran status, and~~
20 ~~further prohibit any non-job-related inquiry of an employee or~~
21 ~~applicant's military and veteran status except that employers may~~
22 ~~identify members of the military or veterans for the purpose of~~
23 ~~awarding a veteran's preference as permitted by law.~~

24 (b) *It is the policy of the State of California, through key*
25 *protections in Section 394 and the California Fair Employment*
26 *and Housing Act (Part 2.8 (commencing with Section 12900) of*
27 *Division 3 of Title 2 of the Government Code), that employers*
28 *shall not discriminate against an employee or job applicant on*

1 *the basis of military and veteran status, and furthermore, that*
2 *employers are prohibited from making any non-job-related inquiry*
3 *of an employee's or applicant's military and veteran status, except*
4 *in order to identify members of the military or veterans for the*
5 *purpose of awarding a veteran's preference as permitted by law.*

6 (c) Because of the importance of these employment protections
7 for the well-being of service members, it is *also* the policy of the
8 State of California to ensure that all service members have the full
9 benefit of the rights, penalties, remedies, forums, and procedures
10 established to protect service members from discrimination in
11 employment and that service members not be deprived of those
12 rights, penalties, remedies, forums, or procedures through the use
13 of involuntary or coerced waivers.

14 (d) *Nevertheless, service members and reserve members in*
15 *California have experienced wrongful termination or*
16 *discrimination in the workplace, in violation of protections under*
17 *USERRA and Section 394, such as termination when they informed*
18 *their employers of their need to take time off from work in order*
19 *to carry out their military reserve duties. Some of these service*
20 *members have been required to waive their procedural rights*
21 *under USERRA and Section 394 as a condition of employment.*

22 ~~(d)~~

23 (e) Therefore, it is the purpose of this act to ensure that a contract
24 to waive any of the rights, penalties, remedies, forums, or
25 procedures under Section 394 of the Military and Veterans Code,
26 including any provision that has the effect of limiting the full
27 application or enforcement of any right, penalty, remedy, forum,
28 or procedure available under this section, is a matter of voluntary
29 consent, not coercion.

30 ~~(e)~~

31 (f) This act shall be known, and may be cited, as the Service
32 Member Employment Protection Act.

33 SEC. 2. Section 394 of the Military and Veterans Code is
34 amended to read:

35 394. (a) No person shall discriminate against any officer,
36 warrant officer, or enlisted member of the military or naval forces
37 of the state or of the United States because of that membership.
38 No member of the military forces shall be prejudiced or injured
39 by any person, employer, or officer or agent of any corporation,
40 company, or firm with respect to that member's employment,

1 position, or status or be denied or disqualified for employment by
2 virtue of membership or service in the military forces of this state
3 or of the United States.

4 (b) No officer or employee of the state, or of any county, city
5 and county, municipal corporation, or district shall discriminate
6 against any officer, warrant officer, or enlisted member of the
7 military or naval forces of the state or of the United States because
8 of that membership. No member of the military forces shall be
9 prejudiced or injured by any officer or employee of the state, or
10 of any county, city and county, municipal corporation, or district
11 with respect to that member's employment, appointment, position,
12 or status or be denied or disqualified for or discharged from that
13 employment or position by virtue of membership or service in the
14 military forces of this state or of the United States.

15 (c) No person shall prohibit or refuse entrance to any officer or
16 enlisted member of the Army or Navy of the United States or of
17 the military or naval forces of this state into any public
18 entertainment or place of amusement or into any of the places
19 described in Sections 51 and 52 of the Civil Code because that
20 member wears the uniform of the organization to which he or she
21 belongs.

22 (d) No employer or officer or agent of any corporation,
23 company, or firm, or other person, shall discharge any person from
24 employment because of the performance of any ordered military
25 duty or training or by reason of being an officer, warrant officer,
26 or enlisted member of the military or naval forces of this state, or
27 hinder or prevent that person from performing any military service
28 or from attending any military encampment or place of drill or
29 instruction he or she may be called upon to perform or attend by
30 proper authority; prejudice or harm him or her in any manner in
31 his or her employment, position, or status by reason of performance
32 of military service or duty or attendance at military encampments
33 or places of drill or instruction; or dissuade, prevent, or stop any
34 person from enlistment or accepting a warrant or commission in
35 the California National Guard or Naval Militia by threat or injury
36 to him or her in respect to his or her employment, position, status,
37 trade, or business because of enlistment or acceptance of a warrant
38 or commission.

39 (e) (1) No private employer or officer or agent of any
40 corporation, company, or firm, or other person, shall restrict or

1 terminate any collateral benefit for employees by reason of an
2 employee's temporary incapacitation incident to duty in the
3 *California* National Guard or Naval Militia. As used in this
4 subdivision, "temporary incapacitation" means any period of
5 incapacitation of 52 weeks or less.

6 (2) As used in this subdivision, "benefit" includes, but is not
7 limited to, health care which may be continued at the employee's
8 expense, life insurance, disability insurance, and seniority status.

9 (f) No person who provides lending or financing shall
10 discriminate against any person with respect to the terms of a loan
11 or financing, including, but not limited to, the finance charge,
12 based on that person's membership in the military or naval forces
13 of this state or of the United States. With respect to any loan or
14 credit transaction covered by Section 670 of Public Law 109-364
15 and Section 232 of Title 32 of the Code of Federal Regulations,
16 as published on August 31, 2007, in Volume 72 of the Federal
17 Register, a person that does not market or extend those transactions
18 to covered borrowers shall not be in violation of this section. For
19 purposes of this section, a covered borrower has the same meaning
20 as provided for in Section 232 of Title 32 of the Code of Federal
21 Regulations, as published on August 31, 2007, in Volume 72 of
22 the Federal Register.

23 (g) (1) A person shall not require another person to waive any
24 legal right, penalty, remedy, forum, or procedure for a violation
25 of this section, as a condition of employment, including the right
26 to file and pursue a civil action or complaint with, or otherwise
27 notify, the Labor Commissioner, state agency, other public
28 prosecutor, law enforcement agency, or any court or other
29 governmental entity.

30 (2) A person shall not threaten, retaliate, or discriminate against
31 another person on the basis that the other person refuses to waive
32 any legal right, penalty, remedy, forum, or procedure for a violation
33 of this section, including the right to file and pursue a civil action
34 or complaint with, or otherwise notify, the Labor Commissioner,
35 state agency, other public prosecutor, law enforcement agency, or
36 any court or other governmental entity.

37 (3) Except for any legal right, penalty, forum, or procedure that
38 state or federal law prohibits from being waived, any waiver of
39 any legal right, penalty, remedy, forum, or procedure for a violation
40 of this section, including the right to file and pursue a civil action

1 or complaint with, or otherwise notify, the Labor Commissioner,
2 state agency, other public prosecutor, law enforcement agency, or
3 any court or other governmental entity shall be knowing and
4 voluntary, and in writing, and expressly not made as a condition
5 of employment.

6 (4) Any waiver of any legal right, penalty, remedy, forum, or
7 procedure for a violation of this section that is required as a
8 condition of employment shall be deemed involuntary,
9 unconscionable, against public policy, and unenforceable. Nothing
10 in this subdivision shall affect the enforceability or validity of any
11 other provision of the contract.

12 (5) Any person who seeks to enforce a waiver of any legal right,
13 penalty, remedy, forum, or procedure for a violation of this section
14 shall have the burden of proving that the waiver was knowing and
15 voluntary and not made as a condition of employment.

16 (6) This section shall apply to any agreement to waive any legal
17 right, penalty, remedy, forum, or procedure for a violation of this
18 ~~code, section~~, including an agreement to accept private arbitration,
19 entered into, altered, modified, renewed, or extended on or after
20 January 1, 2017.

21 (h) Any person violating subdivision (a), (b), (c), (d), (e), or (f)
22 of this section is guilty of a misdemeanor. In addition to injunctive
23 relief and any other available remedies, any person violating any
24 of the provisions of this section shall be liable for actual damages
25 and reasonable attorney's fees incurred by the injured party.

26 (i) The remedies provided for in this section are not intended
27 to be exclusive but are in addition to the remedies provided for in
28 other laws, including Sections 51 and 52 of the Civil Code.

29 (j) The provisions of this section are severable. If any provision
30 of this section or its application is held invalid, that invalidity shall
31 not affect other provisions or applications that can be given effect
32 without the invalid provision or application.