

Yet Another Piece In The Quilt Of U.S. Labor Laws?

The Editor interviews Lawrence Z. Lorber, Partner and Daniel L. Saperstein, Associate, Proskauer Rose LLP. Lawrence Lorber is a Partner in the Labor & Employment Department of the Washington, D.C. office at Proskauer. Dan Saperstein is an Associate in the Labor & Employment Law Department, resident in the Newark office.

Editor: What is the purpose of the President's proposed Fair Employment Opportunity Act of 2011, which is a portion of the American Jobs Act of 2011?

Lorber: The purpose of the President's bill is to try to ensure that the unemployed are not hindered in their job search because of their unemployed status.

Editor: What conditions prevailed with respect to hiring at the time the measures were introduced in first the House of Representatives and subsequently the Senate?

Saperstein: Prior to the President's bill, two near-identical standalone bills to ban unemployment discrimination, H.R. 2501 and S. 1471, were introduced in the U.S. Congress. Efforts at the state level predated these federal proposals, however. Indeed, some states had either passed or proposed laws targeting unemployment discrimination. New Jersey is the first and only state to ban the practice of employers posting job advertisements stating, in essence, that currently unemployed job applicants need not apply. But its law is more limited in scope than the federal proposals. It does not provide for a private right of action, and it only targets the practice of posting ads limiting a job pool to those currently employed.

Lorber: The EEOC held a hearing on this issue in July. Various organizations such as the Chamber of Commerce, Human Resource Management, and others, performed studies to see if, in fact, this was a real problem. Frankly it hasn't been shown that the types of practices that these bills would prohibit, i.e., excluding the unemployed from seeking jobs, are actually being employed.

Editor: What is the portion of the U.S. population that the bill reaches? What categories of employees are exempt?

Saperstein: The President's bill, as well as the two standalone bills, is quite expansive, applying to employers with 15 or more employees. I would also note that the President's bill and the standalone Senate bill apply to applicants seeking employment as an employee, so they're a little more limited in coverage than one of the earlier House proposals, which applied to any job applicant whether or not he was applying for the position of employee. All of the federal proposals cover employment agencies as well.

Editor: What questions may an employer ask of a prospective employee who has been unemployed without violating an individual's protection under the Act?

Saperstein: Under the President's bill there is actually a specific provision which allows a covered employer to still



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ask questions regarding the applicant's employment history as well as to examine the reasons underlying that individual's unemployment status. This was in response to expressions of concern with some of the earlier standalone bills that an employer could not delve at all into the underlying reasons for a person's unemployment. Under those bills, an employer would be hard put to explore a person's background. As a practical matter, this may also be the case under the President's bill, for despite the express provision that I had just noted, an employer should still be wary of potential liability for asking questions regarding the underlying reason for an applicant's unemployment status.

Lorber: This gray area is really one of the main concerns. There are a lot of protections now in existing law, such as in the case of the Fair Credit Reporting Act. If an employer conducts a background or credit check, there is a separate law protecting the applicant — reports have to be made, notice given to the applicant if there are negative findings, etc. Under this proposed law, we're faced with a very undefined protected class — one of the main problems!

Editor: What remedies is an individual entitled to who is found to have been discriminated against under the Jobs Act?

Saperstein: Under the President's proposal there is a two-fold division with respect to damages. First, if an employer or an employment agency posts an unlawful job advertisement, then there are four courses for redress: (1) seeking an order that prevents the employer from engaging in this practice; (2) requesting reimbursement of costs as a result of pursuing this unlawful practice; (3) seeking liquidated damages that cannot exceed \$1,000 per day for each day of the violation; and (4) recouping reasonable attorneys' fees. This provision is particularly problematic for employers because an individual or a person acting on behalf of an individual has a private right of action to pursue these damages. Since the unlawful employment practice is merely posting a job advertisement, the question becomes whether and when there is sufficient harm for an individual to have standing to pursue these remedies in a court of law. If this bill is passed, what would be a sufficient trigger to allow an unemployed applicant to bring legal action? Can he merely call on the employer to create the harm? Does merely spotting an advertisement enable that individual to seek these damages? This is a problematic section of the bill that might be found invalid if passed into law.

Second, by and large, the President's bill incorporates the remedies available under Title VII when an employer or employment agency violates any other

practice made unlawful by the bill. There is an exception under the President's bill when wages, salary, employment benefits, or other compensation have not been denied or lost to the individual, in which case damages may not be awarded in an amount exceeding \$5,000. This exception will primarily affect whistleblowers.

Lorber: The point relating to attorneys' fees is worthy of note since the money damages add up very quickly and might be an incentive to bring these types of claims.

Editor: What measures can an employer take to counter these penalties?

Saperstein: In New Jersey, as I mentioned earlier, the law is quite limited. Nevertheless, we counsel New Jersey employers to carefully review their postings for job applicants. If any of the federal proposals were to become law, employers would potentially have to revolutionize their hiring practices to avoid liability.

Editor: What are the whistleblowing protections afforded individuals who are discharged or otherwise discriminated against under the Act?

Saperstein: The whistleblowing provisions in the President's and other bills are actually very similar to some of the whistleblowing provisions that have recently become law in the Healthcare Act and the Dodd-Frank Act, part of a trend likely to continue in the future. One can be a whistleblower for opposing any practice that is made unlawful by the President's bill or any of the other bills proposed in Congress, such as testifying, filing a charge, or even providing information in connection with an inquiry regarding their violation.

Lorber: The trend in whistleblowing has been vastly expanded under current law, e.g., Sarbanes-Oxley and Dodd-Frank, so that you are looking at a whole new body of really quasi-employment law where those whistleblowers are receiving back pay and are reinstated in their jobs.

Editor: Have any of the whistleblower laws been tested in the courts?

Lorber: There are cases now challenging the expansion of coverage under Sarbanes-Oxley that contains a whistleblower provision relating to the reporting of any material financial wrongdoing. The Labor Department has recently expanded the definition of material financial wrongdoing to the point that it is almost a general whistleblower statute. Whereas the courts were originally somewhat restrictive in interpreting Sarbanes-Oxley, that is beginning to change as well. Interestingly enough, the Supreme Court, which has otherwise been accused of being fairly restrictive on employment laws, has been very expansive on retaliation.

Editor: What agencies are authorized to enforce penalties under the Act? What are the various damages that can be levied?

Saperstein: Under the President's act the agency that primarily would enforce the law would be the Equal Employment Opportunity Commission. In the cases of the two standalone bills proposed in the House and the Senate, the Department of Labor is the primary enforcement agency. Since the President's Act is more in line with the anti-discrimination statute, as it is primarily policed by the EEOC, in effect it amends Title VII by adopting the procedures and the remedies provided therein.

Editor: What are the major criticisms of the bill? Do you think it would stand up to a constitutional challenge?

Saperstein: Certainly the provision with respect to unlawful job advertisements presents a real concern as to validity. It's interesting that there is an express severability clause within the President's bill indicating that the bill's drafters were concerned about overreaching. One of the major criticisms of this bill is the potential to create more and more protected classes under federal law, which has formerly been relatively narrow as to the classes accorded protection.

Editor: How does this federal bill compare with the recent law enacted in New Jersey as well as some proposals being floated in the states of New York, Michigan and Illinois? How does it affect your practice?

Saperstein: The federal proposals are more "unemployed friendly" than the state counterparts. The other bills in New York, Michigan and Illinois do contain some broader protections than the more limited New Jersey law. With respect to our practice, all of these bills have the potential to redefine the hiring process. We need to review with our clients the many questions that may have been asked in the past of a job applicant that may likely no longer be allowed. Given the bad economic times, a larger national trend is well underway that may dramatically alter the hiring process. For instance, there are recent laws or proposed laws that ban or severely limit credit checks as well as certain criminal background inquiries. There is currently a case that has been petitioned for cert at the U.S. Supreme Court regarding whether an employer can look into a job applicant's bankruptcy history. One can certainly see all aspects of the hiring process receiving further scrutiny in the months to come, and employers will have to potentially adjust their employment practices accordingly.

Editor: What is the likelihood of passage of any of the bills?

Lorber: On the part of Republicans there is a reluctance to start adding additional employment laws, especially in view of the fact that much is covered by the Fair Credit Reporting Act, which has restrictions and guidelines as to what type of credit checks can be performed, including checks on a potential employee's employment history. The short answer is passage is probably not imminent, but these are bills that Congress can pass on the basis it is doing something for the unemployed.

Please email the interviewees at llorber@proskauer.com or dsaperstein@proskauer.com with questions about this interview.