

American Jobs Act Would Prohibit Discrimination Based on Unemployment Status

9/16/2011 By Steven Yarusinsky and Daniel L. Saperstein

President Barack Obama delivered the American Jobs Act of 2011 (AJA) to the U.S. Congress on Sept. 12, 2011, in the hope of stimulating economic growth and alleviating unemployment. The 155-page AJA contains a lesser known subtitle entitled the Fair Employment Opportunity Act of 2011, which would prohibit discrimination based on unemployment status. Part of the broader AJA, the proposed act contains similar provisions to the earlier stand-alone U.S. Senate proposal S. 1471 and its U.S. House of Representatives counterpart H.R. 2501, also known as the Fair Employment Opportunity Act of 2011. The proposed act would provide expansive rights and broad protections to the unemployed, including whistleblower/retaliation provisions and generous remedies.

Coverage

The coverage of the proposed act is quite expansive, as a covered employer is defined as a person engaged in an industry affecting commerce (as defined in Title VII of the Civil Rights Act of 1964) with 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, as well as any agent of such a person. Covered employees are defined in Title VII. Also covered under the proposed act are employment agencies.

The meaning of an "affected individual" under the proposed act (who is entitled to bring a private action for relief or on whose behalf relief may be brought) is any person who was subject to an unlawful employment practice solely because of that individual's status as unemployed. The term "status as unemployed" means that an individual, at the time of application for employment or at the time of action alleged to violate the proposed act, does not have a job, is available for work and is searching for work.

Discrimination Defined

It is an unlawful practice for an employer or employment agency to publish in print, on the Internet, or in any other medium, an advertisement or announcement for any job that includes any provision indicating that the employer or agency will not consider an individual for any employment opportunity based on that individual's unemployed status.

It is also an unlawful practice for an employer to:

- *Fail or refuse to consider for employment an employee simply because of his unemployed status.

- *Direct or request that an employment agency take an individual's status as unemployed into account to disqualify an applicant for consideration, screening or referral for employment as an employee.

It is unlawful for an employment agency to limit, segregate or classify individuals in any manner that would limit or tend to limit the individual's access to information about jobs, or consideration, screening or referral for jobs, as employees, solely because of an individual's unemployed status.

The proposed act notes that it does not preclude an employer or employment agency from considering an individual's employment history, or from examining the reasons underlying an individual's status as unemployed, in assessing an individual's ability to perform a job or in otherwise making employment decisions about that individual. Such consideration or examination may include an assessment of whether an individual's employment in a similar or related job for a period of time reasonably proximate to the consideration of such individual for employment is job-related or consistent with business necessity.

Retaliation/Whistle-Blowing Protections Defined

Not only does the proposed act prohibit employers or employment agencies from interfering with, restraining, or denying the exercise of (or the attempt to exercise) any right it provides, but it also provides whistle-blowing protections to individuals where the employer or employment agency refused to hire, discharged, or in any other manner discriminated

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against the individual, as an employee, for:

- *Opposing any practice made unlawful by the proposed act.

- *Asserting any right, filing any charge, or instituting (or causing to be instituted) any proceeding under or related to the proposed act.

- *Giving (or being about to give) any information in connection with any inquiry or proceeding relating to any right provided under the proposed act.

- *Testifying (or being about to testify) in any inquiry or proceeding relating to any right provided under the proposed act.

Enforcement and Remedy

For private employees, the act would be enforced by the Equal Employment Opportunity Commission (EEOC). The procedures applicable to a claim alleged by an individual for a violation of the proposed act include the procedures applicable for a violation of Title VII.

If any employer or employment agency violates Sections 374(a)(1) or (b)(1), which pertain to unlawful advertisements published by employers and employment agencies of the proposed act, an individual may be awarded, as appropriate:

- *An order enjoining the respondent from engaging in the unlawful employment practice.

- *Reimbursement of costs expended as a result of the unlawful employment practice.

- *An amount in liquidated damages not to exceed \$1,000 for each day of the violation.

- *Reasonable attorney's fees (including expert fees) and costs attributable to the pursuit of a claim under the proposed act.

Furthermore, in any claim alleging a violation of any other subsection of the proposed act, an individual may be awarded the remedies available for a violation of Title VII, except that in a case in which wages, salary, employment benefits, or other compensation have not been denied or lost to the individual, damages may be awarded in an amount not to exceed \$5,000.

Employers Should Review Hiring Practices Now

Employers should pay careful attention to the broad rights and remedies afforded to applicants and employees under the proposed act, which, in effect, amends Title VII.

The proposed act intensifies the efforts already underway at the federal and state levels to limit discrimination based on unemployment, which include the recently enacted law in New Jersey, as well as federal proposals in the U.S. House of Representatives and Senate and state proposals in New York, Michigan and Illinois. Accordingly, to brace for the prospect of new lawsuits and steep penalties under both federal and state law, employers should carefully review their hiring procedures, including those of their regularly used outside employment agencies/recruiters.

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