

The American Jobs Act Proposes to Prohibit Discrimination Based on Unemployment Status

September 14, 2011

On September 12, 2011, President Barack Obama delivered the American Jobs Act of 2011 ("AJA") to the U.S. Congress in the hope of stimulating economic growth and alleviating unemployment. Introduced in the U.S. Senate as S. 1549, the 155-page AJA contains a lesser known subtitle entitled the Fair Employment Opportunity Act of 2011 (hereinafter, "the proposed Act"), which would prohibit discrimination based on unemployment status. Part of the broader AJA, the proposed Act contains similar provisions to the earlier standalone 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. To understand the full scope of these expansive rights and protections, this alert discusses who is subject to and affected by the proposed Act, as well as the unlawful practices, enforcement mechanisms and remedial schemes detailed therein.

Coverage

The coverage of the proposed Act is equal to the broad coverage of Title VII of the Civil Rights Act of 1964 ("Title VII"), as a covered employer is defined as a person engaged in an industry affecting commerce (as defined in section 701(h) of Title VII) 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. This coverage does not include a bona fide private membership club that is exempt from taxation under Section 501(c) of the Internal Revenue Code of 1986. Covered employees are defined in section 701(f) of Title VII. Coverage also extends to employers and employees as defined in (i) section 302(a)(1) of the Government Employee Rights Act of 1991; (ii) section 101 of the Congressional Accountability Act of 1995 or section 411(c) of title 3 of the United States Code; and (iii) section 717(a) of Title VII.

Also covered under the proposed Act are employment agencies, which are defined as any person who regularly undertakes, with or without compensation, to procure employees for an employer or to procure opportunities for individuals to work as employees for an employer, as well as an agent of such a person and any person who maintains an Internet website that publishes advertisements or announcements of job openings for employees.

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 stating or indicating that an individual's unemployed status disqualifies the individual for an employment opportunity; or
 - any provision stating or indicating that an employer or employment agency will not consider or hire an individual for any employment opportunity based on that individual's unemployed status.
- an employer to fail or refuse to consider for employment, or fail or refuse to hire an individual as an employee (as well as an employment agency to screen, fail or refuse to consider, or fail or refuse to refer an individual for employment) simply because of his unemployed status;
- an employer to 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;
- 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/Whistleblowing 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 provided therein, but also provides whistleblowing protections to individuals, where the employer or employment agency refused to hire, discharged, or in any other manner discriminated 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 about to give) any information in connection with any inquiry or proceeding relating to any right provided under the proposed Act; or
- testifying (or about to testify) in any inquiry or proceeding relating to any right provided under the proposed Act.

Enforcement & Remedy

The proposed Act provides a myriad of enforcement mechanisms, including (1) the Equal Opportunity Employment Commission ("EEOC") in the case of an affected individual who would be covered by Title VII or section 302(a)(1) of the Government Employee Rights Act of 1991; (2) the Librarian of Congress in the case of an affected individual who would be covered by Title VII; (3) the Board as defined in section 101 of the Congressional Accountability Act in the case of an affected individual who would be covered by section 201(a)(1) of said Act; (4) the Attorney General in the case of an affected individual who would be covered by Title VII or section 302(a)(1) of the Government Employee Rights Act of 1991; and (5) the President, the EEOC, and the Merit Systems Protection Board in the case of an affected individual who would be covered by section 411 of title 3 of the United States Code. All of these listed individuals and institutions, as well as courts of the United States, possess the same powers to enforce the proposed Act in the aforementioned cases as they already possess to enforce the abovementioned titles and/or sections under the authority granted in their respective statutes.

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, section 302(a)(1) of the Government Employee Rights Act, section 201(a)(1) of the Congressional Accountability Act, and section 411 of title 3 of the United States Code, in the case of a claim alleged by such individual for their violations.

If an 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, or any person acting on behalf of the individual (as set forth above), 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; and
- reasonable attorney's fees (including expert fees) and costs attributable to the pursuit of a claim under the proposed Act, except that no person identified in Section 103(a) of the proposed Act shall be eligible to receive attorney's fees.

Furthermore, in any claim alleging a violation of any other subsection of the proposed Act, an individual, or any person acting on behalf of the individual as set forth above, may be awarded, as appropriate, the remedies available for a violation of Title VII, section 302(a)(1) of the Government Employee Rights Act, section 201(a)(1) of the Congressional Accountability Act, and section 411 of title 3 of the United States Code, 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.

Miscellaneous Provisions

- Federal and State Immunity:
 - States are *not* immune under the Eleventh Amendment to the Constitution from a suit brought in a Federal court of competent jurisdiction for a violation of the proposed Act.
 - An official of a state may be sued in his official capacity by an employee or applicant for employment who has complied with the applicable procedures of the proposed Act, for relief that is authorized under the proposed Act.
 - Notwithstanding any other provision of the proposed Act, in an action or administrative proceeding against the United States or a state for a violation of the proposed Act, remedies (including remedies at law and in equity) are available for the violation to the same extent as such remedies would be available against a non-governmental entity.
- Relationship to Other Laws: The proposed Act does not invalidate or limit the rights, remedies, or procedures available to an individual claiming discrimination prohibited under any other federal law or regulation or any law or regulation of a state or political subdivision of a state.
- Severability: If any provision of the proposed Act, or the application of the provision to any person or circumstance, is held to be invalid, the remainder of the proposed Act and the application of the provision to any other person or circumstances shall not be affected by the invalidity.
- Effective Date: If passed, the proposed Act will take effect on the date of enactment of the proposed Act.

Take-away

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. Employers should also be cognizant that the proposed Act adds to an ever-growing patchwork of legislation and proposed legislation intending to lower the unemployment rate in a sluggish economy. The hiring process, in particular, has received a tremendous increase in legislative attention in recent years both at the federal and state levels. This scrutiny includes the recent flurry of laws and proposed laws to ban or limit credit and criminal background checks, as well as recent federal circuit court decisions entertaining whether the Fair Labor Standards Act applies to prospective employees or whether an employer may consider an applicant's prior bankruptcy history. Furthermore, the proposed Act continues a troubling trend of expansive whistleblower protections recently provided in landmark federal legislation.

The proposed Act also has intensified 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 United States House of Representatives and Senate and state proposals in New York, Michigan, and Illinois. Earlier this year, the EEOC also conducted a public hearing on the topic of unemployment discrimination. Although New Jersey's law and other states' proposed laws all vary in content, the federal proposals are, by and large, more "unemployed-friendly" than their state counterparts. Accordingly, to brace for the prospect of new lawsuits and penalties under both federal and state law, employers should carefully review their hiring procedures, including those of their regularly-used outside employment agencies/recruiters.

* * *

If you have any questions or concerns regarding the proposed Act, please contact the attorneys at Proskauer.

Authors: Steven Yarusinsky and Daniel L. Saperstein