

Following the Lead of the U.S. House of Representatives, the U.S. Senate Proposes to Prohibit Discrimination Based on Unemployment Status

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On August 2, 2011, the U.S. Senate proposed S. 1471 to complement the recently proposed bill in the U.S. House of Representatives, H.R. 2501 (collectively, “the proposed Acts”). Otherwise known as the Fair Employment Opportunity Act of 2011, the proposed Acts are nearly identical in providing 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 Acts, as well as the unlawful practices, enforcement mechanisms and remedial schemes detailed therein.

Coverage

The coverage of the proposed Acts is quite expansive, as covered employers are defined as anyone engaging in commerce (or any industry or activity affecting commerce) with 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year. An employer can be (1) any person who acts, directly or indirectly, on behalf of the employer in the hiring process, and (2) any successor in interest of the employer. Unlike H.R. 2501, S. 1471 expressly defines public agencies, as well as the Government Printing Office and Library of Congress, as covered employers.

Also covered under the proposed Acts are employment agencies, which are defined as any person who regularly procures employees for an employer or procures opportunities for individuals to work (as employees under S. 1471) 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 under S. 1471).

As shown above, the coverage of the proposed Acts differs in one significant respect. Unlike H.R. 2501, S. 1471 includes the term “employees,” which, for non-federal employees, embraces the definition under Section 3 of the Fair Labor Standards Act, with exception. S. 1471 also defines the term as it applies to federal employees (which are covered by a separate title).

Accordingly, the meaning of “affected individuals” under the proposed Acts (who are entitled to bring a private action for relief) differs slightly, in that S. 1471 is limited to any person who was refused consideration for employment or was not hired, *as an employee*, by an employer because of the person’s employment status, or any person who was not considered, screened, or referred for employment opportunities, *as an employee*, by an employment agency because of the person’s employment status. The term otherwise has the same meaning under the proposed Acts.

Discrimination Defined

Under Sections 4(a) and (b) of the proposed Acts, it is an unlawful practice for

- an employer or employment agency to refuse to offer or consider for employment an individual simply because of his unemployed status (which includes present and *past* unemployment regardless of the length of time such individual was unemployed);
- an employment agency to limit, segregate, or classify individuals in any manner that may limit their access to information about jobs or referral for consideration of jobs because of their unemployed status;
- 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 a job;
 - any provision stating or indicating that an employer will not consider an applicant for employment based on that individual’s unemployed status; and
 - (for employers only) a direction or request that an unemployment agency take an individual’s status as unemployed into account in screening or referring applicants for employment.

As referenced earlier, unlike H.R. 2501, under S. 1471 these unlawful practices only apply to applicants seeking the position of employee. Notwithstanding this distinction and slight linguistic variation (as merged above), Sections 4(a) and (b) of H.R. 2501, when compared to their S. 1471 counterparts, are otherwise identical.

The proposed Acts also provide a limited exception that permits the employer or employment agency to consider an applicant's unemployed status if there is a bona fide occupational qualification that the applicant be employed in a similar or related job for a reasonable period of time before hiring.

Retaliation/Whistleblowing Protections Defined

Not only do the proposed Acts prohibit employers from interfering with, restraining, or denying the exercise of (or the attempt to exercise) any right provided therein, but Section 4(c) provides whistleblowing protections to individuals, where the employer or employment agency refused to hire, discharged, or in any other manner discriminated against the individual for

- opposing any practice made unlawful by the proposed Act;
- 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 provide 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

An affected individual (which the proposed Acts limit to mean *currently* unemployed applicants), as well as others similarly situated,^[1] may file suit to recover damages or equitable relief for violations of Sections 4(a) and (b) against any employer or employment agency in any court of competent jurisdiction. The Secretary of Labor may also receive, investigate, and attempt to resolve complaints of Section 4 violations, and bring an action in any court of competent jurisdiction to enforce the law.

Under the proposed Acts, an affected individual may bring a private action no later than 2 years (3 years for “willful” violations) after the date of the last event of the alleged violation, unless the limitations period is tolled while the Secretary considers the complaint. Furthermore, the right to bring a private action ceases when the Secretary brings an action (1) for an injunction to restrain violations of Section 4, or (2) to recover damages available under Sections 4(a) and (b), with exception.

Any employer or employment agency that violates Sections 4(a) and (b) shall be liable to any affected individual for

- actual damages equal to either the amount of
 - any wages, salary, employment benefits, or other compensation denied or lost to such individual resulting from the violation; or
 - in a case in which wages, salary, employment benefits or other compensation have not been denied or lost to the individual, any actual monetary losses sustained by the individual as a direct result of the violation, or a civil penalty of \$1,000 per violation per day, whichever is greater;
- the interest on the above-described amount (calculated at the prevailing rate);
- an additional amount as liquidated damages equal to the sum of the above-described amount and interest (and punitive damages under S. 1471), except that if an employer or employment agency proves that it violated Section 4 in good faith and that the employer or employment agency had reasonable grounds for believing that it did not violate the section, a court may use its discretion to reduce the amount and interest owed; and
- for such equitable relief as may be appropriate, including employment (and compensatory and punitive damages under H.R. 2501).

In addition to the above-provided remedies, a court shall allow for reasonable attorney fees, reasonable expert witness fees, and other costs of the action.

As noted earlier, the Secretary may bring an action in any court of competent jurisdiction to enjoin violations and seek other relief to prevent future violations. The Secretary also may recover damages for violations of Sections 4(a) and (b), a civil penalty of not less than \$250 per violation of Section 4(c), or such other equitable relief the court deems appropriate. Any sums recovered by the Secretary on behalf of the affected individual shall be held in a special deposit account and shall be paid, on order of the Secretary, directly to each affected individual.

Take-away

Employers should pay careful attention to the rights and remedies afforded to applicants and employees under the proposed Acts. Although S. 1471 is slightly narrower in its coverage than H.R. 2501, the proposed Acts both afford broad protections against discrimination based on unemployment status, as well as rights for employees who blow the whistle on such discrimination. Employers also should be cognizant that the proposed Acts add 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, including the recent flurry of laws and proposed laws to ban or limit credit and criminal background checks. Furthermore, the proposed Acts continue a troubling trend of expansive whistleblower protections recently provided in landmark federal legislation.

The proposed Acts also have intensified the efforts already underway at the state level to limit discrimination based on unemployment, which include the recently enacted law in New Jersey, as well as proposals in states such as New York, Michigan, and Illinois. Although New Jersey's law and other states' proposed laws all vary in content, the proposed Acts are, by and large, more "unemployed-friendly" than their state counterparts. Accordingly, to brace for the prospect of new lawsuits and steep penalties under both federal and state law, employers should review carefully their hiring procedures, including those of their regularly-used outside employment agencies/recruiters.

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If you have any questions or concerns regarding the New Jersey law or federal proposal, please contact the lawyers at Proskauer Rose.

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[\[1\]](#) Employers should note that “similarly situated” is a vague term which courts may interpret to include currently employed applicants who were unemployed in the *past* – a protected class under the proposed Acts. This alert in no way endorses this expansive interpretation of the term.