

President's Job Plan Includes Anti-Discrimination Provision

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"The Fair Employment Opportunity Act of 2011" is part of President Obama's American Jobs Act unveiled last week. The Act is intended to make it easier for unemployed Americans to get a new job.

The Act would make it illegal to refuse consideration for employment or refuse to hire an applicant because of that person's current unemployment status. The law includes an anti-retaliation claim disallowing any interference with the exercise of any right under the law and any adverse action against anyone who has opposed any unlawful practice under the law or participated in any proceeding or inquiry under the law. However, if an individual's employment in a similar or related job for a period of time reasonably proximate to the hiring of that individual is a bona fide occupational qualification reasonably necessary for successful employment, then an employer can differentiate applicants on that basis.

"Employer," as defined by the bill, would include any person engaged in commerce or any industry or activity affecting commerce with 15 or more employees for each working day in 20 or more calendar weeks in the current or preceding calendar year. This is equivalent to the applicable Title VII standard. However, the Act also states that "employer" includes "any person who acts, directly or indirectly, in the interest of an employer with respect to employing individuals to work for the employer." This same language provides for individual liability under the Fair Labor Standards Act and thus would likely result in individual liability under the Act, as well.

Employers and employment agencies would also be not allowed to publish in any medium a job announcement that includes any discussion as to whether the employer will or will not consider an applicant based on that applicant's unemployment status nor can employers talk about in any medium about an individual's employment status. Further, employment agencies cannot refuse to consider or refer an individual based on their unemployed status, nor can they block or limit their access to information on jobs based on their unemployment status.

Available damages include: (1) actual damages for the amount of compensation and benefits lost or, if none, any actual monetary losses sustained or a civil penalty of \$1,000 per violation per day, whichever is greater; (2) interest on actual damages; and (3) liquidated damages, which will equal the sum of actual damages and interest, unless the defendant can show that it acted in good faith. Moreover, prevailing plaintiffs are entitled to their fees and costs. The statute of limitations for a claim is two (2) years, unless

the violation is willful, in which case it is three (3) years. Importantly, there is no requirement that a claimant first exhaust administrative remedies before filing a lawsuit.

Employers certainly need to monitor the evolving situation in Washington. If this anti-discrimination provision of the bill remains in the final product, employers may need to revise their job advertisements and hiring policies, amend their employee handbooks, and train staff on the new law.

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