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Unemployment: A Potential New Protected Class

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Last week, President Obama proposed the euphemistically-named, American Jobs Act ("AJA"). Employment attorneys and human resources professionals should take note of the proposed law's expansion of traditional notions of protected classifications. The AJA contains a provision that would create a new protected class of prospective employees who are unemployed.

Specifically, the President's proposal would prohibit employers from:

(1) publish[ing] in print, on the Internet, or in any other medium, an advertisement or announcement for an employee for any job that includes:

(A) any provision stating or indicating that an individual's status as unemployed disqualifies the individual for any employment opportunity; or

(B) any provision stating or indicating that an employer will not consider or hire an individual for any employment opportunity based on that individual's status as unemployed;

(2) fail[ing] or refuse[ing] to consider for employment, or fail or refuse to hire, an individual as an employee because of the individual's status as unemployed;

(3) direct[ing] or request[ing] 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.

Significantly, the second provision makes it illegal for an employer to refuse to hire an individual because they are unemployed. This provision gives a cause of action to any unemployed applicant who may suspect that their unemployed status correlates to your company's decision not to hire them.

The proposed legislation does contain some protection for employers:

Nothing in this Act is intended to 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.

However, this provision turns traditional analysis on its head by requiring that employers prove that their consideration of the applicant's length of service at a prior employer is "job-related and consistent with business necessity." So, for example, if the applicant had seven employers in the last seven months, then it would be the prospective employer's burden to prove that the applicant's inability to keep a job is somehow related to the company's specific job functions or operations of the business.

If the President's proposal survives the legislative process in its current form, employers can expect increased frivolous litigation from unsuccessful applicants.