

Unemployment Discrimination

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On September 12, 2011, President Obama submitted to Congress the American Jobs Act (AJA) of 2011, SB 1549, which in essence contains many of the elements found in SB 1471 and HR 2501 already before the Senate and House respectively as the Fair Employment Opportunity Act of 2011.

The AJA proposes coverage similar to other previous Title VII employment legislation extending protections to the unemployed. “Unemployed” is defined as a job applicant who does not have a job, is available for work and is searching for work. Employers include most public and private public safety agencies except those federal agencies normally excluded from Title VII requirements. Those federal agencies are included under Section 302 of the Government Employee Rights Act of 1991 unless they have already adopted Title VII compliance as an internal agency policy. Such policies often have the same effect on interviewers, investigators and polygraph examiners as legal requirements but vary greatly among the various federal intelligence and law enforcement employers.

If enacted, “Unemployed Status” would have the same restrictions as those proposed on the use of credit and criminal history information. In short, while it may not be illegal to discover an applicant is unemployed (or has a poor credit or criminal record), applicants with such backgrounds, if non-selected, would be provided a mechanism to challenge such decisions and force employers to give precise, work related reasons for their decision not to hire the applicant.

Since most behavioral interviewers and examiners use opinions of truthfulness to develop substantiating admissions that in turn sometime lead to negative consequences in screening situations, the AJA should not create new problems but rather expand the menu of possible challenges and litigation.

All interviewers and examiners are encouraged to begin considering protocols and procedures for handling allegations of unemployment discrimination should the AJA become law.