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Unemployed - A New Protected Characteristic?

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The following does not depict an actual interview. Rather, it is a fictitious illustration (at least for now).

Interviewer: So tell me why you're interviewing for the position we've advertised.

Interviewee: That's an easy one. Because I'm unemployed and I need a job.

Interviewer: What happened with your last job?

Interviewee: I wasn't very good, and they needed to reduce headcount, and I was an easy place to start.

Interviewer: There appears to be gaps on your resume between all six of the jobs you've had. Six months here, two years there. What happened with your leaving those jobs?

Interviewee: Well, one was excessive absenteeism, another I got caught with my hand in the till if you know what I mean, and the others the same as the recent one – I was a well-deserved casualty of the need to reduce headcount.

Interviewer: Uhhhh.....

Interviewee: But here's the interesting part. Although I'm as litigious as they come, I never really had a shot at suing any of my former employers for my terminations. Couldn't be clearer that my so-called protected characteristics had nothing at all to do with my terminations. But now that I'm unemployed and applying for a job with you, I'll sue your ass under the Fair Employment Opportunity Act of 2011 for discriminating against me because of my status as unemployed if you fail to hire me.

Interviewer: HELP!!!!

The American Jobs Act recently proposed by President Obama in fact includes within it (at Subtitle D) "Prohibition of Discrimination in Employment on the Basis of an Individual's Status as Unemployed," cited as the "Fair Employment Opportunity Act of 2011". As written, the proposed statute would apply to employers with 15 or more employees, and include the same procedures as applicable to Title VII of the Civil Rights Act of 1964 ("Title VII"), including the U.S. Equal Employment Opportunity

Commission's ("EEOC") role with respect to administration and enforcement. (The EEOC's recent campaign against unemployment discrimination on the basis of an alleged disparate impact on minority, older and disabled workers provides an interesting backdrop to the proposed legislation.) Title VII's remedies would be available as well.

What exactly would the proposed statute prohibit employers from doing? For starters, employers would be precluded from including in any advertisement for a vacant position that it wouldn't consider unemployed individuals for the vacancy. So far, not so difficult to comply with. The proposed statute would also prohibit employers from directing a headhunter to screen out unemployed candidates. Again not so tough. But here's the kicker: if enacted, the statute would provide that it is an "unlawful employment practice for an employer to... fail or refuse to consider for employment, or fail or refuse to hire, an individual as an employee because of the individual's status as unemployed". HELP!

Consider the following:

Candidate A is currently employed in the same industry as Company, and is thriving in her role there, having recently survived a significant staff reduction. Company considers her a perfect candidate.

Candidate B has similar experience to Candidate A, with the same employer, but did not survive the reduction in force and is currently unemployed. Company might under other circumstances consider Candidate B, but prefers Candidate A and can't help but notice that their prior employer considered Candidate A the better worker.

Doesn't Company want to hire the best qualified candidate? But doesn't Company also want to avoid litigation?

While aimed, like the remainder of the American Jobs Act, at reducing the much too high unemployment rate plaguing this country, the proposed statute may well not achieve that objective given the disincentive on hiring it may impose on employers such as Company. What it certainly would do is increase the risk of litigation and place employers in the very difficult (and counterintuitive) position of not necessarily selecting the best qualified candidate.

Employers have long been prohibited (for good reason) from discriminating in hire decisions based on other protected characteristics such as sex, race, age, disability, etc., but these characteristics have nothing at all to do with an individual's (relative) capabilities with respect to a particular job opening. Of course there are many reasons an individual may be unemployed that have nothing to do with qualifications, but an individual's status as unemployed surely *may* have at least something to do with his qualifications for a particular vacancy. This is particularly true if the unemployment is for

a significant period of time during which perhaps significant changes in the industry have occurred. To suggest otherwise is not realistic.

All of which is bound to put employers in a difficult position if the law goes into effect. But some solace for employers may be found in (i) the proposed statute's definition of "affected individual" as a person subjected to an unlawful employment practice "solely" because of the person being unemployed; and (ii) the proposed statute's inclusion of language providing an employer "may" assess "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." Some, but not of whole lot of solace, given that the meaning courts attach to these provisions may take years to come into focus and, in any event, seem written to invite factual disputes.

Employers will need to be on the lookout for the status of the proposed Fair Employment Act of 2011.