

HR 1397 IH

108th CONGRESS  
1st Session  
**H. R. 1397**

To amend the Employee Retirement Income Security Act of 1974 to ensure that employees are not improperly disqualified from benefits under pension plans and welfare plans based on the misclassification or reclassification of their status.

**IN THE HOUSE OF REPRESENTATIVES**

**March 20, 2003**

Mrs. MCCARTHY of New York (for herself and Mr. ANDREWS) introduced the following bill; which was referred to the Committee on Education and the Workforce

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**A BILL**

To amend the Employee Retirement Income Security Act of 1974 to ensure that employees are not improperly disqualified from benefits under pension plans and welfare plans based on the misclassification or reclassification of their status.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

**SECTION 1. SHORT TITLE.**

This Act may be cited as the 'Employee Benefits Protection Act of 2003'.

**SEC. 2. FINDINGS AND PURPOSE.**

(a) FINDINGS- Congress makes the following findings:

(1) The intent of the Employee Retirement Income Security Act of 1974 to protect the pension and welfare benefits of workers is frustrated by the practice of mislabeling or relabeling employees to improperly exclude them from employee benefit plans. Employees are wrongly denied benefits when they are misclassified or reclassified as temporary employees, part-time employees, leased employees, agency employees, staffing firm employees, and independent contractors. If their true employment status were recognized, these misclassified and reclassified employees would be eligible to participate in employee pension and welfare benefit plans because such plans are offered to other employees performing the same or substantially the same work and working for the same employer.

(2) Mislabeled employees are often paid through staffing, temporary, employee leasing, or other similar firms to give the appearance that the employees do not

work for their employer. Employment contracts and reports to government agencies also are used to give the erroneous impression that mislabeled employees work for staffing, temporary, employee leasing, or other similar firms, when the facts of the work arrangement do not meet the common law standard for determining the employment relationship. Employees are also mislabeled as contractors and paid from non-payroll accounts to give the appearance that they are not employees of their employer. These practices violate the Employee Retirement Income Security Act of 1974.

(3) Employers are amending their employee benefit plans to add provisions that exclude mislabeled employees from participation in the plan even in the event that such employees are determined to be common law employees and otherwise eligible to participate in the plan. These plan provisions violate the Employee Retirement Income Security Act of 1974.

(4) As a condition of employment or continued service, employees are often required to sign documents that purport to waive their right to participate in employee benefit plans. Such documents inaccurately claim to limit the authority of the courts and applicable Federal agencies to correct the mislabeling and relabeling of employees and to enforce the terms of plans providing for their participation. This practice violates the Employee Retirement Income Security Act of 1974.

(5) As a condition of continued employment or service, employees are often required to sign documents that purport to waive their right to bring a lawsuit under the Employee Retirement Income Security Act of 1974. Such documents inaccurately claim to limit the ability of the courts and applicable Federal agencies to obtain any payments or benefits in the event that the waiver is found not to be knowing and voluntary. This practice violates the Employee Retirement Income Security Act of 1974.

(b) PURPOSE- The purpose of this Act is to clarify applicable provisions of the Employee Retirement Income Security Act of 1974 to ensure that employees are not improperly excluded from participation in employee benefit plans as a result of mislabeling or reclassifying their employment status.

### **SEC. 3. ADDITIONAL STANDARDS RELATING TO MINIMUM PARTICIPATION REQUIREMENTS.**

(a) REQUIRED INCLUSION OF SERVICE- Section 202(a)(3) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1052(a)(3)) is amended by adding at the end the following new subparagraph:

“(E) For purposes of this section, in determining years of service and hours of service--

“(i) service shall include all service for the employer as an employee under the common law, irrespective of whether the individual--

“(I) is paid through a staffing firm, temporary help firm, payroll agency, employment agency, or other such similar arrangement,

“(II) is paid directly by the employer under an arrangement purporting to characterize an employee under the common law as other than an employee, or

`(III) is paid from an account not designated as a payroll account, and  
`(ii) in any case in which an employer, plan sponsor, or fiduciary (including any administrator, officer, trustee, or custodian) changes the job classification of any person from employee to leased employee, agency employee, staffing firm employee, independent contractor, or any similar category, in determining years of service and hours of service, service shall include all service for the employer that the person performs subsequent to such reclassification.'

(b) EXCLUSION PRECLUDED WHEN RELATED TO CERTAIN PURPORTED CATEGORIZATIONS- Section 202 of such Act (29 U.S.C. 1052) is amended further by adding at the end the following new subsection:

`(c)(1) Subject to paragraph (2), a pension plan shall be treated as failing to meet the requirements of this section if the plan excludes from participation any person who performs the same work (or substantially the same work) for the employer as other employees who generally are not excluded from participation in the plan, irrespective of the placement of such person in any category of workers (such as temporary employees, part-time employees, leased employees, agency employees, staffing firm employees, independent contractors, or any similar category) which may be specified under the plan as ineligible for participation.

`(2) Nothing in paragraph (1) shall be construed to preclude the exclusion from participation in a pension plan of individuals who in fact do not meet a minimum service period or minimum age which is required under the terms of the plan and which is otherwise in conformity with the requirements of this section.'

#### **SEC. 4. OBJECTIVE ELIGIBILITY CRITERIA IN PLAN INSTRUMENTS.**

Section 402 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1102) is amended by adding at the end the following new subsection:

`(d)(1) The written instrument pursuant to which an employee benefit plan is maintained shall set forth eligibility criteria which--

`(A) include and exclude employees on a uniform basis;

`(B) are based on reasonable job classifications other than the mere labeling of a job position as something other than an employee; and

`(C) are based on objective criteria stated in the instrument itself for the inclusion or exclusion (other than the mere listing of an employee as included or excluded).

`(2) No employee benefit plan may permit an employer or plan sponsor to exclude any person from participation irrespective of the placement of such employee in any category of workers (such as temporary employees, leased employees, agency employees, staffing firm employees, contractors, or any similar category), if the employee--

`(A) is an employee of the employer under the common law;

`(B) performs the same work (or substantially the same work) for the employer as other employees who generally are not excluded from participation in the plan; and

`(C) meets a minimum service period or minimum age which is required under the terms of the plan.

`(3) In any case in which the employer of an individual who is a participant in an employee benefit plan, the plan sponsor of such plan, or a fiduciary of such plan requires

such individual to convert to the status of a temporary employee, leased employee, agency employee, staffing firm employee, contractor, or any similar category as a condition of continuing in the service of the employer, such individual shall not cease to be treated under such plan or this title as a participant in such plan by reason of such conversion.'

## **SEC. 5. ENFORCEMENT.**

Section 502 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1132) is amended--

(1) in paragraphs (3)(B) and (5)(B) of subsection (a), by striking 'other appropriate equitable relief' and inserting 'other appropriate relief, including such additional relief as a court of equity might have awarded in a case involving the enforcement or administration of a trust, other equitable relief, compensatory relief, or remedial relief';

(2) in subsection (a)(3)(B), by striking 'or' at the end of clause (i) and inserting a comma, by striking the semicolon at the end of clause (ii) and inserting ', or', and by adding at the end the following: '(iii) to provide restitution and other appropriate relief to employees who have been excluded from participation or have been misclassified or reclassified in violation of section 202 or 402';

(3) by striking 'or' at the end of subsection (a)(8), by striking the period at the end of subsection (a)(9) and inserting '; or', and by adding at the end the following new paragraph:

'(10) by a participant or beneficiary to obtain a judicial declaration concerning whether a waiver of rights arising under this title or a plan, including a waiver of participation in a plan, was knowing and voluntary under the totality of the circumstances.';

(4) in subsection (g)(1), by inserting ', reasonable expert fees,' before 'and costs' and by inserting before the period at the end the following: ', except that the court shall award such fees and costs to a prevailing party in the case of an action brought to enforce section 510, unless the court determines that it would be unjust to do so under the circumstances'; and

(5) by adding at the end of section 502 the following new subsection:

'(n) In an action under this section, if the court finds that any participant or beneficiary has been discharged, fined, suspended, expelled, disciplined, or discriminated against in violation of section 510, relief under this section may include enjoining such unlawful conduct and ordering such affirmative action as may be appropriate. Such action may include, but is not limited to, reinstatement or hiring and an award of back pay and lost benefits.'

## **SEC. 6. WAIVERS.**

Section 502 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1132) (as amended by section 5) is amended further by adding at the end the following new subsection:

`(o)(1) The rights under this title (including the right to maintain a civil action) may not be waived, deferred, or lost pursuant to any agreement not authorized under this title with specific reference to this paragraph.

`(2)(A) Subject to subparagraph (B), paragraph (1) shall not apply to an agreement providing for arbitration or participation in any other non-judicial procedure to resolve a dispute if the agreement is entered into knowingly

and voluntarily by the parties involved after the dispute has arisen or is pursuant to the terms of a collective bargaining agreement.

`(B)(i) No waiver under subparagraph (A) of participation in an employee benefit plan may be considered knowing and voluntary if related, in whole or in part, to the misclassification or reclassification of an individual in one or more categories ineligible for participation in the plan.

`(ii) The party asserting the validity of a waiver under subparagraph (A) shall have the burden of proving that the waiver was knowing and voluntary.

`(iii) A waiver under subparagraph (A) shall not impose any limitation, including any condition precedent or penalty, adversely affecting the right of an individual to challenge the waiver by bringing a civil action in a court of competent jurisdiction. Any provision requiring an individual to tender back consideration received and any provision allowing employers, plan sponsors, and fiduciaries (including administrators, officers, trustees, and custodians) to recover attorney's fees or damages because of the filing of a civil action shall be treated as limitations referred to in the preceding sentence. Nothing in this clause shall be construed as precluding recovery of a reasonable attorney's fee or costs of action that may be authorized under subsection (g)(1).

`(iv) No individual who brings a civil action shall be required to tender back any consideration given in exchange for a waiver under subparagraph (A) before bringing such civil action. The retention of any consideration received in exchange for any waiver shall not constitute ratification of a waiver under subparagraph (A) or foreclose a challenge thereto.

`(v) No waiver otherwise permitted under subparagraph (A) may affect the Secretary's rights and responsibilities to enforce this title. No waiver may be used to justify interfering with the protected right of any person to participate in an investigation or proceeding conducted by the Secretary.'

## **SEC. 7. GENERAL PROVISIONS.**

(a) IN GENERAL- Except as otherwise provided in this Act, the amendments made by this Act shall apply with respect to plan years beginning on or after January 1, 2004.

(b) SPECIAL RULE FOR COLLECTIVELY BARGAINED PLANS- In the case of a plan maintained pursuant to one or more collective bargaining agreements between employee representatives and one or more employers ratified on or before the date of the enactment of this Act, subsection (a) shall be applied to benefits pursuant to, and individuals covered by, any such agreement by substituting for 'January 1, 2004' the date of the commencement of the first plan year beginning on or after the earlier of--

(1) the later of--

- (A) January 1, 2005; or
- (B) the date on which the last of such collective bargaining agreements terminates (determined without regard to any extension thereof after the date of the enactment of this Act); or

(2) January 1, 2006.

(c) PLAN AMENDMENTS- If any amendment made by this Act requires an amendment to any plan, such plan amendment shall not be required to be made before the first plan year beginning on or after January 1, 2005, if--

(1) during the period after such amendment made by this Act takes effect and before such first plan year, the plan is operated in good faith compliance with the requirements of such amendment made by this Act; and

(2) such plan amendment applies retroactively to the period after such amendment made by this Act takes effect and before such first plan year.

*END*