

110TH CONGRESS
1ST SESSION

H. R. 2657

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

JUNE 11, 2007

Mrs. MCCARTHY of New York (for herself, Ms. WOOLSEY, and Mr. KILDEE) introduced the following bill; which was referred to the Committee on Education and Labor

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.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Employee Benefits
5 Protection Act of 2007”.

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

2 (a) FINDINGS.—Congress makes the following find-
3 ings:

4 (1) The intent of the Employee Retirement In-
5 come Security Act of 1974 to protect the pension
6 and welfare benefits of workers is frustrated by the
7 practice of mislabeling or relabeling employees to im-
8 properly exclude them from employee benefit plans.
9 Employees are wrongly denied benefits when they
10 are misclassified or reclassified as temporary em-
11 ployees, part-time employees, leased employees,
12 agency employees, staffing firm employees, and inde-
13 pendent contractors. If their true employment status
14 were recognized, these misclassified and reclassified
15 employees would be eligible to participate in em-
16 ployee pension and welfare benefit plans because
17 such plans are offered to other employees per-
18 forming the same or substantially the same work
19 and working for the same employer.

20 (2) Mislabeled employees are often paid through
21 staffing, temporary, employee leasing, or other simi-
22 lar firms to give the appearance that the employees
23 do not work for their employer. Employment con-
24 tracts and reports to government agencies also are
25 used to give the erroneous impression that mis-
26 labeled employees work for staffing, temporary, em-

1 ployee leasing, or other similar firms, when the facts
2 of the work arrangement do not meet the common
3 law standard for determining the employment rela-
4 tionship. Employees are also mislabeled as contrac-
5 tors and paid from non-payroll accounts to give the
6 appearance that they are not employees of their em-
7 ployer. These practices violate the Employee Retirement
8 Income Security Act of 1974.

9 (3) Employers are amending their employee
10 benefit plans to add provisions that exclude mis-
11 labeled employees from participation in the plan
12 even in the event that such employees are deter-
13 mined to be common law employees and otherwise
14 eligible to participate in the plan. These plan provi-
15 sions violate the Employee Retirement Income Secu-
16 rity Act of 1974.

17 (4) As a condition of employment or continued
18 service, employees are often required to sign docu-
19 ments that purport to waive their right to partici-
20 pate in employee benefit plans. Such documents in-
21 accurately claim to limit the authority of the courts
22 and applicable Federal agencies to correct the
23 mislabeling and relabeling of employees and to en-
24 force the terms of plans providing for their partici-

1 pation. This practice violates the Employee Retirement
2 Income Security Act of 1974.

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

13 (b) PURPOSE.—The purpose of this Act is to clarify
14 applicable provisions of the Employee Retirement Income
15 Security Act of 1974 to ensure that employees are not im-
16 properly excluded from participation in employee benefit
17 plans as a result of mislabeling or reclassifying their em-
18 ployment status.

19 **SEC. 3. ADDITIONAL STANDARDS RELATING TO MINIMUM**
20 **PARTICIPATION REQUIREMENTS.**

21 (a) REQUIRED INCLUSION OF SERVICE.—Section
22 202(a)(3) of the Employee Retirement Income Security
23 Act of 1974 (29 U.S.C. 1052(a)(3)) is amended by adding
24 at the end the following new subparagraph:

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

3 “(i) service shall include all service for the em-
4 ployer as an employee under the common law, irre-
5 spective of whether the individual—

6 “(I) is paid through a staffing firm, tem-
7 porary help firm, payroll agency, employment
8 agency, or other similar arrangement,

9 “(II) is paid directly by the employer
10 under an arrangement purporting to charac-
11 terize an employee under the common law as
12 other than an employee, or

13 “(III) is paid from an account not des-
14 ignated as a payroll account, and

15 “(ii) in any case in which an employer, plan
16 sponsor, or fiduciary (including any administrator,
17 officer, trustee, or custodian) changes the job classi-
18 fication of any person from employee to leased em-
19 ployee, agency employee, staffing firm employee,
20 independent contractor, or any similar category, in
21 determining years of service and hours of service,
22 service shall include all service for the employer that
23 the person performs subsequent to such reclassifica-
24 tion.”.

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

5 “(c)(1) Subject to paragraph (2), a pension plan shall
6 be treated as failing to meet the requirements of this sec-
7 tion if the plan excludes from participation any person
8 who performs the same work (or substantially the same
9 work) for the employer as other employees who generally
10 are not excluded from participation in the plan, irrespec-
11 tive of the placement of such person in any category of
12 workers (such as temporary employees, part-time employ-
13 ees, leased employees, agency employees, staffing firm em-
14 ployees, independent contractors, or any similar category)
15 which may be specified under the plan as ineligible for
16 participation.

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

1 **SEC. 4. OBJECTIVE ELIGIBILITY CRITERIA IN PLAN IN-**
2 **STRUMENTS.**

3 Section 402 of the Employee Retirement Income Se-
4 curity Act of 1974 (29 U.S.C. 1102) is amended by adding
5 at the end the following new subsection:

6 “(d)(1) The written instrument pursuant to which an
7 employee benefit plan is maintained shall set forth eligi-
8 bility criteria which—

9 “(A) include and exclude employees on a uni-
10 form basis;

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

14 “(C) are based on objective criteria stated in
15 the instrument itself for the inclusion or exclusion
16 (other than the mere listing of an employee as in-
17 cluded or excluded).

18 “(2) No employee benefit plan may permit an em-
19 ployer or plan sponsor to exclude any person from partici-
20 pation irrespective of the placement of such employee in
21 any category of workers (such as temporary employees,
22 leased employees, agency employees, staffing firm employ-
23 ees, contractors, or any similar category), if the em-
24 ployee—

25 “(A) is an employee of the employer under the
26 common law;

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

5 “(C) meets a minimum service period or min-
6 imum age which is required under the terms of the
7 plan.

8 “(3) In any case in which the employer of an indi-
9 vidual who is a participant in an employee benefit plan,
10 the plan sponsor of such plan, or a fiduciary of such plan
11 requires such individual to convert to the status of a tem-
12 porary employee, leased employee, agency employee, staff-
13 ing firm employee, contractor, or any similar category as
14 a condition of continuing in the service of the employer,
15 such individual shall not cease to be treated under such
16 plan or this title as a participant in such plan by reason
17 of such conversion.”.

18 **SEC. 5. ENFORCEMENT.**

19 Section 502 of the Employee Retirement Income Se-
20 curity Act of 1974 (29 U.S.C. 1132) is amended—

21 (1) in paragraphs (3)(B) and (5)(B) of sub-
22 section (a), by striking “other appropriate equitable
23 relief” and inserting “other appropriate relief, in-
24 cluding such additional relief as a court of equity
25 might have awarded in a case involving the enforce-

1 ment or administration of a trust, other equitable
2 relief, compensatory relief, or remedial relief”;

3 (2) in subsection (a)(3)(B), by striking “or” at
4 the end of clause (i) and inserting a comma, by
5 striking the semicolon at the end of clause (ii) and
6 inserting “, or”, and by adding at the end the fol-
7 lowing: “(iii) to provide restitution and other appro-
8 priate relief to employees who have been excluded
9 from participation or have been misclassified or re-
10 classified in violation of section 202 or 402”;

11 (3) by striking “or” at the end of subsection
12 (a)(9), by striking the period at the end of sub-
13 section (a)(10) and inserting “; or”, and by adding
14 at the end the following new paragraph:

15 “(11) by a participant or beneficiary to obtain
16 a judicial declaration concerning whether a waiver of
17 rights arising under this title or a plan, including a
18 waiver of participation in a plan, was knowing and
19 voluntary under the totality of the circumstances.”;

20 (4) in subsection (g)(1), by inserting “, reason-
21 able expert fees,” before “and costs” and by insert-
22 ing before the period at the end the following: “, ex-
23 cept that the court shall award such fees and costs
24 to a prevailing party in the case of an action
25 brought to enforce section 510, unless the court de-

1 termines that it would be unjust to do so under the
2 circumstances”; and

3 (5) by adding at the end of section 502 the fol-
4 lowing new subsection:

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

13 **SEC. 6. WAIVERS.**

14 Section 502 of the Employee Retirement Income Se-
15 curity Act of 1974 (29 U.S.C. 1132) (as amended by sec-
16 tion 5) is amended further by adding at the end the fol-
17 lowing new subsection:

18 “(o)(1) The rights under this title (including the
19 right to maintain a civil action) may not be waived, de-
20 ferred, or lost pursuant to any agreement not authorized
21 under this title with specific reference to this paragraph.

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

1 and voluntarily by the parties involved after the dispute
2 has arisen or is pursuant to the terms of a collective bar-
3 gaining agreement.

4 “(B)(i) No waiver under subparagraph (A) of partici-
5 pation in an employee benefit plan may be considered
6 knowing and voluntary if related, in whole or in part, to
7 the misclassification or reclassification of an individual in
8 one or more categories ineligible for participation in the
9 plan.

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

13 “(iii) A waiver under subparagraph (A) shall not im-
14 pose any limitation, including any condition precedent or
15 penalty, adversely affecting the right of an individual to
16 challenge the waiver by bringing a civil action in a court
17 of competent jurisdiction. Any provision requiring an indi-
18 vidual to tender back consideration received and any provi-
19 sion allowing employers, plan sponsors, or fiduciaries (in-
20 cluding administrators, officers, trustees, or custodians) to
21 recover attorney’s fees or damages because of the filing
22 of a civil action shall be treated as limitations referred
23 to in the preceding sentence. Nothing in this clause shall
24 be construed as precluding recovery of a reasonable attor-

1 ney's fee or costs of action that may be authorized under
2 subsection (g)(1).

3 “(iv) No individual who brings a civil action under
4 this title shall be required to tender back any consider-
5 ation given in exchange for a waiver under subparagraph
6 (A) before bringing such civil action. The retention of any
7 consideration received in exchange for any waiver shall not
8 constitute ratification of a waiver under subparagraph (A)
9 or foreclose a challenge thereto.

10 “(v) No waiver otherwise permitted under subpara-
11 graph (A) may affect the Secretary's rights and respon-
12 sibilities to enforce this title. No waiver may be used to
13 justify interfering with the protected right of any person
14 to participate in an investigation or proceeding conducted
15 by the Secretary.”.

16 **SEC. 7. GENERAL PROVISIONS.**

17 (a) IN GENERAL.—Except as otherwise provided in
18 this Act, the amendments made by this Act shall apply
19 with respect to plan years beginning on or after January
20 1, 2008.

21 (b) SPECIAL RULE FOR COLLECTIVELY BARGAINED
22 PLANS.—In the case of a plan maintained pursuant to one
23 or more collective bargaining agreements between em-
24 ployee representatives and one or more employers ratified
25 on or before the date of the enactment of this Act, sub-

1 section (a) shall be applied to benefits pursuant to, and
2 individuals covered by, any such agreement by substituting
3 for “January 1, 2008” the date of the commencement of
4 the first plan year beginning on or after the earlier of—

5 (1) the later of—

6 (A) January 1, 2009; or

7 (B) the date on which the last of such col-
8 lective bargaining agreements terminates (de-
9 termined without regard to any extension there-
10 of after the date of the enactment of this Act);

11 or

12 (2) January 1, 2010.

13 (c) PLAN AMENDMENTS.—If any amendment made
14 by this Act requires an amendment to any plan, such plan
15 amendment shall not be required to be made before the
16 first plan year beginning on or after January 1, 2009, if—

17 (1) during the period after such amendment
18 made by this Act takes effect and before such first
19 plan year, the plan is operated in good faith compli-
20 ance with the requirements of such amendment
21 made by this Act; and

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

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