

106TH CONGRESS  
2D SESSION

# S. 2946

To amend title I of 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 a miscategorization of their employee status.

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## IN THE SENATE OF THE UNITED STATES

JULY 27, 2000

Mr. KENNEDY (for himself, Mr. TORRICELLI, and Mr. HARKIN) introduced the following bill; which was read twice and referred to the Committee on Health, Education, Labor, and Pensions

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## A BILL

To amend title I of 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 a miscategorization of their employee 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 Eli-  
5       gibility Fairness Act of 2000”.

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 employees to improperly ex-  
8 clude them from employee benefit plans. Employees  
9 are wrongly denied benefits when they are mis-  
10 labeled as temporary employees, part-time employ-  
11 ees, leased employees, agency employees, staffing  
12 firm employees, and contractors. If their true em-  
13 ployment status were recognized, mislabeled employ-  
14 ees would be eligible to participate in employee ben-  
15 efit plans because such plans are offered to other  
16 employees performing the same or substantially the  
17 same work and working for the same employer.

18 (2) Mislabeled employees are often paid through  
19 staffing, temporary, employee leasing, or other simi-  
20 lar firms to give the appearance that the employees  
21 do not work for their worksite employer. Employ-  
22 ment contracts and reports to government agencies  
23 also are used to give the erroneous impression that  
24 mislabeled employees work for staffing, temporary,  
25 employee leasing, or other similar firms, when the  
26 facts of the work arrangement do not meet the com-

1 mon law standard for determining the employment  
2 relationship. Employees are also mislabeled as con-  
3 tractors and paid from non-payroll accounts to give  
4 the appearance that they are not employees of their  
5 worksite employer. These practices violate the Em-  
6 ployee Retirement Income Security Act of 1974.

7 (3) Employers are amending their benefit plans  
8 to add provisions that exclude mislabeled employees  
9 from participation in the plan even in the event that  
10 such employees are determined to be common law  
11 employees and otherwise eligible to participate in the  
12 plan. These plan provisions violate the Employee Re-  
13 tirement Income Security Act of 1974.

14 (4) As a condition of employment or continued  
15 employment, mislabeled employees are often required  
16 to sign documents that purport to waive their right  
17 to participate in employee benefit plans. Such docu-  
18 ments inaccurately claim to limit the authority of  
19 the courts and applicable Federal agencies to correct  
20 the mislabeling of employees and to enforce the  
21 terms of plans providing for their participation. This  
22 practice violates the Employee Retirement Income  
23 Security Act of 1974.

24 (b) PURPOSE.—The purpose of this Act is to clarify  
25 applicable provisions of the Employee Retirement Income

1 Security Act of 1974 to ensure that employees are not im-  
 2 properly excluded from participation in employee benefit  
 3 plans as a result of mislabeling of their employment sta-  
 4 tus.

5 **SEC. 3. ADDITIONAL STANDARDS RELATING TO MINIMUM**  
 6 **PARTICIPATION REQUIREMENTS.**

7 (a) **REQUIRED INCLUSION OF SERVICE.**—Section  
 8 202(a)(3) of the Employee Retirement Income Security  
 9 Act of 1974 (29 U.S.C. 1052(a)(3)) is amended by adding  
 10 at the end the following new subparagraph:

11 “(E) For purposes of this section, in determining  
 12 ‘years of service’ and ‘hours of service’, service shall in-  
 13 clude all service for the employer as an employee under  
 14 the common law, irrespective of whether the worker—

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

18 “(ii) is paid directly by the employer under an  
 19 arrangement purporting to characterize an employee  
 20 under the common law as other than an employee,  
 21 or

22 “(iii) is paid from an account not designated as  
 23 a payroll account.”

24 (b) **EXCLUSION PRECLUDED WHEN RELATED TO**  
 25 **CERTAIN PURPORTED CATEGORIZATIONS.**—Section 202

1 of such Act (29 U.S.C. 1052) is amended further by add-  
2 ing at the end the following new subsection:

3 “(c)(1) Subject to paragraph (2), a pension plan shall  
4 be treated as failing to meet the requirements of this sec-  
5 tion if any individual who—

6 “(A) is an employee under the common law,  
7 and

8 “(B) performs the same work (or substantially  
9 the same work) for the employer as other employees  
10 who generally are not excluded from participation in  
11 the plan,

12 is excluded from participation in the plan, irrespective of  
13 the placement of such employee in any category of workers  
14 (such as temporary employees, part-time employees, leased  
15 employees, agency employees, staffing firm employees,  
16 contractors, or any similar category) which may be speci-  
17 fied under the plan as ineligible for participation.

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

1 **SEC. 4. WAIVERS OF PARTICIPATION INEFFECTIVE IF RE-**  
 2 **LATED TO MISCATEGORIZATION OF EM-**  
 3 **PLOYEE.**

4 Section 202 of the Employee Retirement Income Se-  
 5 curity Act of 1974 (29 U.S.C. 1052) (as amended by sec-  
 6 tion 3) is amended further by adding at the end the fol-  
 7 lowing new subsection:

8 “(d) Any waiver or purported waiver by an employee  
 9 of participation in a pension plan or welfare plan shall  
 10 be ineffective if related, in whole or in part, to the  
 11 miscategorization of the employee in 1 or more ineligible  
 12 plan categories.”

13 **SEC. 5. OBJECTIVE ELIGIBILITY CRITERIA IN PLAN IN-**  
 14 **STRUMENTS.**

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

18 “(c)(1) The written instrument pursuant to which an  
 19 employee benefit plan is maintained shall set forth eligi-  
 20 bility criteria which—

21 “(A) include and exclude employees on a uni-  
 22 form basis;

23 “(B) are based on reasonable job classifications;  
 24 and

25 “(C) are based on objective criteria stated in  
 26 the instrument itself for the inclusion or exclusion

1 (other than the mere listing of an employee as in-  
2 cluded or excluded).

3 “(2) No plan instrument may permit an employer or  
4 plan sponsor to exclude an employee under the common  
5 law from participation irrespective of the placement of  
6 such employee in any category of workers (such as tem-  
7 porary employees, leased employees, agency employees,  
8 staffing firm employees, contractors, or any similar cat-  
9 egory) if the employee—

10 “(A) is an employee of the employer under the  
11 common law,

12 “(B) performs the same work (or substantially  
13 the same work) for the employer as other employees  
14 who generally are not excluded from participation in  
15 the plan, and

16 “(C) meets a minimum service period or min-  
17 imum age which is required under the terms of the  
18 plan.”

19 **SEC. 6. ENFORCEMENT.**

20 Section 502(a)(3)(B) of the Employee Retirement In-  
21 come Security Act of 1974 (29 U.S.C. 1132(a)(3)(B)) is  
22 amended—

23 (1) by striking “or” in clause (i) and inserting  
24 a comma,

1           (2) by striking the semicolon at the end of  
2           clause (ii) and inserting “, or”, and

3           (3) by adding at the end the following: “(iii) to  
4           provide relief to employees who have been  
5           miscategorized in violation of sections 202 and  
6           402;”.

7 **SEC. 7. EFFECTIVE DATE.**

8           The amendments made by this Act shall apply with  
9           respect to plan years beginning on or after the date of  
10          the enactment of this Act.

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