

109TH CONGRESS  
1ST SESSION

# H. R. 1058

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.

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## IN THE HOUSE OF REPRESENTATIVES

MARCH 2, 2005

Mrs. McCARTHY (for herself, Mr. ANDREWS, Ms. WOOLSEY, and Mr. KILDEE) 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.

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 2005”.

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 employee 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 Retire-  
8 ment 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 and voluntary. This practice violates the Employee Retirement Income Security Act of 1974.

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

15 **SEC. 3. ADDITIONAL STANDARDS RELATING TO MINIMUM  
16 PARTICIPATION REQUIREMENTS.**

17 (a) REQUIRED INCLUSION OF SERVICE.—Section  
18 202(a)(3) of the Employee Retirement Income Security  
19 Act of 1974 (29 U.S.C. 1052(a)(3)) is amended by adding  
20 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 such 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)(8), by striking the period at the end of sub-  
13       section (a)(9) and inserting “; or”, and by adding at  
14       the end the following new paragraph:

15               “(10) 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    urity 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, and fiduciaries (in-  
20 cluding administrators, officers, trustees, and custodians)  
21 to 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 shall be  
4 required to tender back any consideration given in ex-  
5 change for a waiver under subparagraph (A) before bring-  
6 ing such civil action. The retention of any consideration  
7 received in exchange for any waiver shall not constitute  
8 ratification of a waiver under subparagraph (A) or fore-  
9 close 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, 2006.

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, 2006” 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, 2007; or

11 or

12 (2) January 1, 2008.

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, 2007, if—

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.

