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Proposed New York City Law Would Be First in Nation to Provide a Private Right of Action for Discrimination Against the Unemployed

By Barbara Hoey and Jennie Woltz

The New York City Council recently passed a proposed law (Bill 814-A) that would prohibit employers in the city from discriminating against unemployed individuals. Although Mayor Bloomberg has promised to veto the bill, the City Council appears to have enough support to override a veto. If it passes, New York City will become the first jurisdiction in the nation to provide a private right of action against employers that discriminate against individuals based on their current or past unemployed status. The proposed law prohibits employers and employment agencies in New York City from basing any hiring or other employment-related decision on an applicant's employment status or stating in job advertisements that the unemployed need not apply.

Covered Employers

If passed, the proposed law will apply to any "employer," which is defined as any entity employing four or more persons (including independent contractors). In other words, both large and small employers are covered. It also applies to any "employment agency" and any "agent" of an employer or employment agency. Interestingly, the proposed law will not apply to certain public agencies or entities, including the mayor's office.

Prohibited Conduct

Bill 814-A, if enacted, will make it unlawful to base an employment decision with regard to hiring, compensation, or the terms, conditions or privileges of employment "on an applicant's employment status."

It will also prohibit employers, employment agencies, and their agents, from publishing an advertisement for any job vacancy in New York City that states that being currently employed is a requirement or qualification for the job, or that indicates that individuals will not be considered for employment based on their unemployment. The proposed law deems such actions "unlawful discriminatory practice[s] based on disparate impact," unless it can be shown that such a policy or practice has as its basis a substantially job-related qualification or does not contribute to the disparate impact. While it would seem to apply most readily to hiring decisions, the proposed law also prohibits unemployment discrimination related to internal promotions, pay, and potentially other employment-related policies and practices.

Whistleblowers

The proposed law also triggers the existing enforcement provisions of the New York City Human Rights Law, which prohibits retaliation against whistleblowers. It will therefore protect anyone that opposes an employer's unlawful discrimination based on employment status, or files a complaint, commences a civil action, or otherwise assists the Commission on Human Rights in an investigation into such suspected conduct.

Exceptions

In an attempt to recognize that there are many legitimate reasons why an employer would want to consider an individual's present or past employment status when making a hiring decision, the proposed law will create four basic exceptions in which the "employment status" of an applicant may be lawfully considered:

1. An employer may consider the "circumstances surrounding an applicant's separation from prior employment." In other words, employers can ask whether the individual was terminated from previous employment and on what basis.
2. An employer may consider an applicant's employment status where there is a "substantially job-related reason for doing so," such as the applicant's maintaining a current and valid professional license, a certificate, registration, permit, or other credential, a minimum level of education or training, or a minimum level of professional, occupational, or field experience. Advertisements for job vacancies may similarly contain provisions that applicants maintain such job-related qualifications.
3. An employer may determine that only applicants currently employed by the employer may be considered or given priority for vacant jobs or promotions.
4. An employer may tether compensation or terms or conditions of employment to a person's "actual amount of experience."

Penalties

If enacted, the proposed law will be enforced using the existing enforcement mechanisms of the New York City Human Rights Law. This will permit anyone aggrieved to file a claim with the Commission on Human Rights or file a civil suit.

If a violation is found, an employer could be liable for damages, including back pay, front pay, a civil penalty of up to $250,000, and/or injunctive relief, such as a "cease and desist" or reinstatement order, among other remedies. In a private civil action, the court may, in its discretion, award the prevailing party costs and reasonable attorneys' fees. There are also statutory fines that may be imposed.

What New York City Employers Should Be Doing to Comply

Because Bill 814-A may soon become law, New York City employers should consider compliance. Companies that hire or employ workers in New York City should review their current employment policies, employment applications, and upcoming job postings.

- **Review/Revise Advertisements and Postings** — Covered employers and agencies should review their job advertisements and postings and flag references to "employment status." If the bill becomes law, these references should be deleted. Note that plaintiffs and the New York State Division of Human Rights have been very aggressive about suing employers over ads that run afoul of state law, so it is expected that a similar response could be triggered at the city level.
- **Review/Revise Hiring Policies** — Covered employers and agencies also should review their hiring procedures and make sure that recruiters and hiring managers know that they cannot disqualify applicants on the basis of their employment status.
- **Train Recruiters, Managers, and Human Resources Professionals** — Training will become necessary to make sure that everyone involved in the hiring process understands the requirements of the new law and how to comply, if the proposed law if enacted. This is especially important because an employer may be subject to strict liability for violations by its employees. Those who interview or screen applicants must avoid making references to an applicant's "unemployed" status, unless the reference is directly related to the applicant's ability to perform the position. Managers and human resources professionals who routinely receive

and respond to workplace complaints and discipline employees will also need to be trained to avoid possible retaliation claims by whistleblowers opposing any suspected unlawful conduct.

- **Monitor Contractors and Agencies** — Covered employers that use outside contractors or agencies to obtain job candidates should consider monitoring their services with respect to compliance with the proposed law.
- **Review/Revise Employment Applications** — If the proposed law is enacted, covered employers should revise their employment applications to ensure that they make clear that the employer does not discriminate on the basis of employment status.

"Unique" New York City

New York City is not alone in seeking to protect the unemployed from discrimination. The District of Columbia,[1] New Jersey, and Oregon have already enacted laws that protect the unemployed from job discrimination. The New York City bill is unique, however, in that it provides for enforcement through either a private right of action by individuals or by the Commission on Human Rights, whereas the District of Columbia, New Jersey, and Oregon laws provide for enforcement only by state or district regulatory bodies.

Like the law passed in the District of Columbia, the proposed New York City law would designate unemployed status as a protected class and provide whistleblower protections for current employees opposing discrimination based on unemployment status, through existing protections in the New York City Administrative Code. In contrast, the laws in New Jersey and Oregon are limited to prohibiting advertisements for job vacancies that state current employment is required. These laws neither designate unemployment status as a protected class nor provide whistleblower protections for current employees.

There are currently no federal statutes or regulations prohibiting discrimination on the basis of unemployment status, although Congress has considered legislation providing these protections. Additionally, at least 18 other states are considering or have considered and rejected similar protections for the unemployed, including Arizona, California,[2] Colorado, Connecticut, Florida, Illinois, Indiana, Iowa, Maryland, Michigan, Minnesota, Nebraska, New York, Ohio, Pennsylvania, South Dakota, Tennessee, and Wisconsin.

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1 *See* Nancy Delogu and Jennifer Thomas, *District of Columbia First in Nation to Ban Discrimination Based on (Un)Employment Status*, Littler ASAP (June 28, 2012).

2 As previously discussed, California's legislature passed, but the governor vetoed, a bill banning unemployment discrimination in September 2012. *See* Christopher Cobey and Tomomi Glover, *What's New? California's Major 2012 Employment Laws Affecting Private Sector Employers*, Littler ASAP (Oct. 2, 2012).