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Discrimination Against the Unemployed Now Prohibited in New York City

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New York City employers beware: The New York City Council has once again acted to expand the nation's broadest anti-discrimination law — this time to prohibit discrimination against New York City's unemployed. The law will go into effect on June 11, 2013. While several other jurisdictions (such as New Jersey, Oregon and Washington D.C.) have recently passed similar laws, the New York City measure goes one (major) step further: unemployed individuals who believe they have been discriminated against on the basis of their employment status will have the right to sue in court and recover compensatory and punitive damages, as well as attorneys' fees.

We strongly recommend that employers take steps now to position themselves to comply with the law when it goes into effect in June.

What's in the Law

In a nutshell, this new anti-discrimination measure prohibits employers, employment agencies and their agents generally, from:

1. Basing an employment decision with regard to hiring, compensation or the terms, conditions or privileges of employment on an applicant's unemployment status; and
2. Publishing, in print or any other medium, an advertisement for any job vacancy that states or indicates that (i) current employment is a requirement or qualification for the job; or (ii) they will not consider an individual for employment based on his or her unemployment.

The law includes certain exceptions and examples of situations that would *not* be considered violations. For example, employers, employment agencies, and their agents may lawfully:

1. Consider an individual's unemployment where there is a "substantially job-related reason for doing so," and may consider the "circumstances surrounding an applicant's separation from prior employment." In other words, an employer would be allowed to consider whether an applicant was unemployed because of misconduct or poor performance, rather than through no fault of his or her own.
2. Base decisions on, or post advertisements identifying, "substantially job-related qualifications," including "a current and valid professional or occupational 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."
3. Limit the applicant pool to only those currently working for that employer; and
4. Set compensation or terms and conditions of employment based on the person's actual amount of experience.

The law defines "unemployment" as individuals "not having a job, being available for work, and seeking employment." It does not appear, then, that the law covers those individuals who are currently working but who were previously unemployed or who have a history of unemployment. Despite this limitation, the law currently protects a population of about 400,000 individuals who, on average, have been out of work for more than 10 months.

As mentioned earlier, an individual may file a lawsuit in court, but they may also opt to lodge a complaint with the City Commission on Human Rights. If just 1% (or roughly 4,000) of the current eligible population

lodges a complaint with the already under-funded City Commission, its annual caseload would increase by more than two-thirds. Courts, as the Bloomberg administration has argued, will also experience "significant feasibility and operational challenges" in processing this many new claims. Of course, the impact of the new measure will be felt most by employers — already subject to strict liability under the human rights law — in that they will be forced to incur additional defense costs, especially those costs related to nuisance suits advanced by applicants rejected for otherwise valid reasons.

Perhaps Mayor Bloomberg's Deputy Counselor, Bill Heinzen, put it best when he testified before the New York City Council in June 2012, when the measure was first considered:

> **[A]dding this category blurs the line between irrational discrimination, which the Human Rights Law is supposed to address, and more complicated employment decision-making processes that can legitimately rely on multiple factors. Unlike other bases for discrimination prohibited by the Human Rights Law, such as race, religion, or sex — which should never be relevant to hiring and employment decisions — a person's unemployment status may, in certain situations, be relevant to employers when selecting qualified employees.**

Mayor Bloomberg put it even more succinctly: "I can't think of any rational employer who wouldn't want to know what you've been doing for a period of time." The New York City Council did not see it the same way when it voted overwhelmingly to override Mayor Bloomberg's veto of the new measure.

Reducing Employer Exposure

Employers should reduce their exposure by taking the following steps:

- **Train staff members involved in the recruiting and hiring processes about this newly protected category.** An October 2011 report by SmartRecruiters found that of those surveyed, "82% of recruiters, hiring managers, and human resource professionals, report the existence of discrimination against the unemployed" and that "55% of recruiters and HR managers surveyed have "personally experienced resistance when presenting qualified yet unemployed candidates to clients/colleagues." Thus, employers should train relevant staff members that an applicant's unemployment status — like other protected categories — has no place in the decision-making process.
- **Train staff members tasked with interviewing applicants.** Employers should identify prohibited questions and instruct interviewers how to frame certain questions properly. For example, rather than asking applicants how long they have been out of work, or the reason for a prolonged absence from the workplace, the interviewer should focus on why their previous employment ended, or whether they possess the requisite level of experience or training to properly perform the job duties associated with the vacancy. Interviewers should be taught to keep the conversation focused on job-related skills and qualifications, even if an applicant tries to explain his or her difficulties in finding a job. Employers should also train staff members how to properly complete applicant evaluations and document hiring decisions in order to comply with the law's requirements.
- **Consult with recruiters or other employment agencies acting on their behalf.** It is no secret that some recruiting firms favor currently-employed applicants over unemployed applicants when helping a company fill a vacancy. Employers should inform these firms and any other employment agencies they work with that the applicant pool should not be limited to currently-employed applicants.
- **Review employment advertisements and applications.** Clearly, employers should no longer post advertisements stating that only the currently-employed need apply. But employers should also analyze whether any other part of their existing applicant intake processes would violate the new law. This may be as simple, for example, as revising poorly-worded job postings that use phrases such as "recent experience necessary" rather than stating the level of experience necessary to perform the job. Or it may require the employer to ensure that its electronic screening software does not filter out applicants who fail to enter current employment information on electronic application forms.

We will continue to keep you posted on any developments related to New York City's new unemployment discrimination law, as well any other proposed employment laws currently being advanced by the City Council (and/or State Legislature), such as the one that seeks to prohibit discrimination based on an individual's credit history. In the meantime, we encourage employers to seek the advice of employment counsel to help comply with this new law, and, of course, attorneys from Mintz Levin's New York Labor, Employment & Benefits Practice are standing by to provide assistance.

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