

New York City Human Rights Law Amended to Prohibit Discrimination Based on Unemployment Status

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As we previously advised in the [April 2013 issue of Epstein Becker Green's Take 5 Newsletter](#), on June 11, 2013, over Mayor Michael Bloomberg's veto, [an amendment](#) to the New York City Human Rights Law ("NYCHRL") becomes effective, prohibiting discrimination based upon an individual's unemployment. The District of Columbia, New Jersey, and Oregon maintain similar laws prohibiting discrimination based on an individual's employment status. New York City's law, however, is broader than these other laws, in that it permits applicants to file private court actions against employers or file complaints with the New York City Commission on Human Rights ("Commission"), whereas existing laws in other jurisdictions do not provide for such remedies.

Coverage

The NYCHRL applies to employers, including employment agencies, with four or more employees (including independent contractors who are "natural persons" and not themselves employers).

Prohibited Actions

The amendment prohibits an employer from basing an employment decision, with regards to hiring, compensation, or the terms, conditions, or privileges of employment, on an applicant's "unemployment." The terms "unemployed" or "unemployment" are defined as "not having a job, being available for work, and seeking employment."

In addition, the amendment prohibits an employer from publishing, in print or in any other medium, an advertisement for any job vacancy in New York City that contains a provision stating or indicating that either: (1) being currently employed is a requirement or qualification for the job, or (2) an employer will not consider individuals for employment based on their unemployment status.

Finally, as with other protected classifications, covered employers must not retaliate against employees who have opposed employer actions based on unemployment status.

Exceptions

Although the amendment prohibits employers from basing an employment decision on an applicant's unemployment, employers may consider an applicant's unemployment when there is a "substantially job-related" reason or qualification, including, but not limited to, 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.

The law specifically permits inquiries into the circumstances surrounding an applicant's separation from prior employment. Furthermore, employers are permitted to consider only applicants who are currently employed by the employer—including both giving priority for employment and giving priority with respect to compensation or the terms, conditions, or privileges of employment. In addition, employers are permitted to base compensation and terms or conditions of employment on a person's actual amount of experience.

In addition, there are some exceptions for certain public employment and appointment scenarios. Finally, the legislation does not apply to the exercise of any right of an employer or employee pursuant to a collective bargaining agreement.

Disparate Impact

An unlawful discriminatory practice will be found where there is a disparate impact on the unemployed. Specifically, disparate impact will be found where an employer's policy or practice (or a group of policies or practices) has a disproportionate effect on the unemployed. Employers will be required to plead and prove as an affirmative defense that each such policy or practice has, as its basis, a substantially job-related qualification, or does not contribute to the disparate impact. As discussed above, a "substantially job-related" qualification includes, but is not limited to, 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.

Damages

If the Commission determines that an employer engaged in an unlawful discriminatory practice—in this case, the act of discriminating against an individual based on his or her unemployment status—it will require an employer to cease and desist from the unlawful discriminatory practice or take affirmative action, such as hiring the prospective employee, providing back pay and front pay, and/or paying compensatory damages. The Commission may also impose civil penalties of up to \$250,000 to "vindicate the public interest." The amount of civil penalties imposed depends on the severity of the employer's practice. If an applicant files a civil suit, a court may award damages, including punitive damages, injunctive relief, and attorneys' fees and costs.

What Employers Should Do Now

New York City employers should review their hiring procedures and practices to ensure compliance with the NYCHRL. This may include:

- revising advertisements to ensure that current employment is not a requirement for a position;
- reviewing employment applications to remove or modify questions that focus on gaps in employment;
- training staff regarding hiring and interviews, including instructing staff regarding questions that focus on gaps in employment;¹
- revising recruiting policies and procedures; and
- reviewing and, if needed, revising employee handbook or other policies or procedures pertaining to discrimination in hiring.

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¹ While asking these questions is not *per se* prohibited under the amendment, focusing on periods of unemployment during a job interview or in an employment application may make it more likely that an applicant will allege unemployment-related discrimination.

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