

# Management Alert



## New York City Council Overrides Mayoral Veto And Bans “Unemployment” Discrimination

Holding true to its promise, the New York City Council voted to override the Mayor’s veto of a bill prohibiting “unemployment” discrimination, making New York City the first jurisdiction in the country to allow unsuccessful job applicants to sue over claims that they were rejected for a position because of their unemployment status.

### Changes To The City’s Anti-Discrimination Law

The law will go into effect in June 2013 and amend New York City’s already broad anti-discrimination law to include “unemployment” as a protected characteristic. This would cover all applicants who do not have a job, are available for work, and are seeking employment.

The law will prohibit employers with four or more employees (including independent contractors), employment agencies, and their agents from basing employment decisions regarding hiring, compensation, or the terms, conditions, or privileges of employment, on the unemployment status of an applicant. The law will also prohibit all employers and employment agencies (regardless of size) from publishing an advertisement for any job vacancy in New York City that states or implies that current employment is a requirement or qualification for a position.

Additional details regarding the specifics of the law can also be found in our [prior alert](#) covering this issue.

### Exceptions

The law contains a few notable exceptions. Covered employers will be able to consider an applicant’s unemployment status in evaluating candidates, but only if there is a substantially job-related reason for doing so. Employers will also be able to ask about the circumstances surrounding an applicant’s separation from his or her prior employment.

Employers can require that an applicant have a current and valid professional or occupational license (or other similar credential), a minimum level of education or training, or a minimum level of professional, occupational, or field experience, without running afoul of the law. Employers can also give their own employees priority when hiring for open positions.

### Claims & Penalties

An individual who believes that he or she was discriminated against on the basis of his or her unemployment could either file a complaint with the New York City Commission on Human Rights, or bring a private action in court. If the Commission on Human Rights finds that an employer engaged in an unlawful discriminatory practice, the Commission could require the employer to hire the prospective employee, award back pay, front pay, and issue fines of up to \$250,000 based on the severity of the conduct. If an action is brought in court, the individual could sue for damages (including punitive damages),

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injunctive relief, and request attorneys' fees and costs.

### What To Expect

Employers' concerns should go beyond the immediate anxiety about more lawsuits and increased potential liability. This is because the law expressly allows for disparate impact claims. This type of claim allows an unsuccessful applicant to claim that a prospective employer's policy or practice works to prevent the hiring of unemployed applicants.

Under a disparate impact theory, the unsuccessful applicant would not have to show that the prospective employer intended to discriminate against unemployed applicants. Rather, the unsuccessful applicant could rely on statistical evidence to demonstrate discrimination likely occurred. The employer would then be required to prove that the policy or practice either has a substantially job-related qualification or did not contribute to the disparate impact. This could lead to costly and protracted litigation if employers are not proactive about this type of claim.

### What To Do Now

New York City employers have three months to prepare before the law goes into effect. During this time, affected employers should consider the following possible changes to their recruiting practices:

- Review job advertisements to ensure that they do not require applicants to be currently employed.
- Review hiring procedures to avoid the appearance that a practice or policy could be viewed as a way to "screen out" unemployed applicants.
- Train recruiters and interviewers to avoid comment on an applicant's unemployment status at any point during the application process.
- If unemployment status must be discussed during an interview, ensure that there is a substantially job-related reason for doing so.

New York City employers should also take this time to evaluate their potential exposure to disparate impact claims. Taking proactive measures now before the law goes into effect may pay dividends in the months and years to come by potentially avoiding costly and protracted litigation.

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