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One Minute Memo®

New York City Close To Prohibiting "Unemployment" Discrimination

Employers in New York City with four or more employees or independent contractors may soon have to deal with a new characteristic protected under the City Human Rights Law: "unemployment." On January 23, 2013, the City Council passed a bill that would make it illegal to base a hiring decision on an applicant's "unemployment" status without a substantially job-related reason for doing so. The bill would also prohibit employers from placing advertisements that list current employment as a requirement or qualification for a job in the City.

Mayor Michael Bloomberg has stated his intention to veto the bill, but the City Council passed the bill by a sufficient margin (44-4) to override a veto if an unchanged revote were to take place.

Specifics of the Proposed Amendment

If enacted into law, City Council Bill 814-A would amend the New York City Human Rights Law to prohibit hiring decisions based on an individual's "unemployment," which is defined as "not having a job, being available for work, and seeking employment." The operative provisions of the bill prohibit covered employers, 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 bill contains two important exceptions. First, employers are not prohibited from considering an applicant's unemployment "where there is a substantially job-related reason for doing so." Second, employers can inquire into the circumstances surrounding an applicant's "separation from prior employment."

The bill would also prohibit employers and employment agencies from publishing (in print or any other medium such as the Internet) an advertisement for any job vacancy in New York City that states or indicates that current employment is a requirement or qualification. This prohibition also applies to any provision stating or indicating that an employer or employment agency will not consider hiring individuals "based on their unemployment."

The prohibitions in Bill 814-A do not prevent covered employers and employment agencies from requiring 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." The same employers and employment agencies can also list these types of job-related qualifications in published job advertisements. And employers can still give their own employees priority when hiring for open positions.

Claims and Penalties

If Bill 814-A is enacted, New York City will be the first jurisdiction in the country to allow a private right of action for failure to hire based on unemployment status. Similar legislation has been introduced or passed in several states and in Congress, but none included a private right of action. In addition to private lawsuits, the New York City Commission on Human Rights would have jurisdiction to enforce the law.

The law would expressly permit "disparate impact" claims. If a facially neutral policy or practice operates to the detriment of unemployed applicants, the Commission on Human Rights or aggrieved applicants could bring an action challenging the policy or practice. The employer would then be required to prove that the policy or practice is based on a "substantially job-related qualification" or did not contribute to the alleged disparate impact. Employers found to have violated the law could face substantial penalties in the form of fines, punitive damages, and attorneys' fees.

Best Practices

While the bill remains in limbo pending approval or veto by Mayor Bloomberg, employers in New York City should consider four possible changes to their recruiting practices in anticipation of the bill becoming law: (1) review of job advertisements to ensure that they do not require applicants to be currently employed; (2) review of hiring procedures to avoid the appearance that a practice or policy could be viewed as a way to "screen out" unemployed applicants; (3) training recruiters and interviewers to avoid comment on an applicant's unemployment status at any point during the application process; and (4) ensuring that, for any openings where unemployment status is considered, there is a "substantially job-related" reason for doing so.

We will continue to monitor the status of the bill and provide updates as warranted.

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