

New York City Bans Employment Discrimination Based on Applicant's Unemployment Status

The New York City Council recently amended the New York City Human Rights Law to include the unemployed among the categories of persons protected from employment discrimination.

The amendment, which passed last week over Mayor Bloomberg's veto, and which becomes effective on June 11, 2013, prohibits employers in New York City with four or more employees from basing any decisions regarding "hiring, compensation, or the terms, conditions or privileges of employment" on an applicant's unemployment. N.Y.C. Admin. Code § 8-107(21).

The law further prohibits employers from publishing an advertisement for a job vacancy that indicates that current employment is a qualification for the job, or that the employer will not consider individuals for the job based on their unemployment.

The amendment also empowers private plaintiffs or the New York City Human Rights Commission to bring claims for so-called "disparate impact" discrimination, if they can demonstrate that a policy or practice of the employer results in a disparate impact on unemployed persons.

Under the amendment, employers may continue to consider substantially job-related qualifications such as current professional licenses, or minimum levels of education, training or experience (and to publish advertisements for job vacancies setting forth such qualifications). Employers also are permitted to give priority, or exclusive consideration, to persons who are already employed by that employer, and to continue to base compensation or other terms or conditions of employment on the person's actual experience.

The amendment carves out an exception permitting an employer to consider an applicant's unemployment when there is a "substantially job-related reason" for doing so. However, the scope of this exception is unclear, as it is not immediately apparent under what circumstances a person's employment status would be "substantially job-related" for any given position.

Notably, the amendment permits an employer to inquire into the circumstances surrounding an applicant's separation from prior employment. Needless to say, in light of the right of action created by the amendment, such inquiries of a job applicant could form the basis of a claim under this amendment by an unsuccessful job applicant against the inquiring employer. At the very least, with very limited exceptions, employers should refrain from asking applicants if they are currently employed.

New York City employers with four or more employees should ensure that human resources personnel and others involved in the hiring process are informed of these new requirements.