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LABOR & EMPLOYMENT ALERT

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New York City Council Passes Law Prohibiting Discrimination Against Unemployed, Overriding Mayor's Veto

By Scott J. Wenner, Rebecca Lacher and Allison R. Brown

On March 13, 2013, the New York City Council voted to override Mayor Michael Bloomberg's veto of Bill Number 814-A, which prohibits employers from discriminating against job applicants on the basis of employment status. Although other jurisdictions, including New Jersey, Oregon and Washington D.C., have enacted similar legislation, New York City's new law, which permits an applicant to sue an employer directly for damages, is the most far-reaching of this kind of legislation enacted to date.

Background

In the wake of the most severe economic downturn since the Great Depression and news of persistently high unemployment, reports of widespread bias on the part of employers and recruitment agencies against hiring the unemployed have garnered national attention. Researchers at the UCLA Anderson School of Management documented the phenomenon in a recent study entitled "The Stigma of Unemployment: When Joblessness Leads to Being Jobless."[1] In July of 2011, the National Employment Law Project (NELP) also reported on the prevalence of job postings that expressly limit consideration to the "currently employed."[2] These practices have been widely criticized by opponents for deepening the hardships faced by those struggling to return to the workforce and exacerbating the crisis levels of long-term unemployment that Americans across the county continue to face.

According to the New York City Council, New York City residents, in particular, are struggling to find work. According to the New York State Department of Labor, in 2012 the unemployment rate in New York City was 9.4 percent, exceeding both the national average (8.1 percent in 2012) and the New York State average (8.5 percent in 2012). Many of New York City's unemployed have found themselves without employment for prolonged periods of time. The Fiscal Policy Institute reported that in 2012 more than half (51 percent) of unemployed New York City residents had been seeking work actively for more than six months (compared to 39 percent nationally and 44.5 percent in New York State). Although long-term unemployment has taken a toll on all City residents, women and minorities, middle-aged workers and the least-educated are seen as the most severely impacted.

Bill Number 814-A seeks to remove the disadvantage of unemployment for New York City's job-seeking unemployed by prohibiting employers from considering unemployment status when making employment decisions. Originally passed by New York's City Council in January, the bill was vetoed by Mayor

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1. Ho, Geoffrey C.; Shih, Margaret; Walters, Daniel J.; and Pittinsky, Todd L. (2011). "The Stigma of Unemployment: When Joblessness Leads to Being Jobless." UC Los Angeles: The Institute for Research on Labor and Employment. Retrieved from: http://www.escholarship.org/uc/item/7nh039h1.

2. National Employment Law Project, "Hiring Discrimination Against the Unemployed," July 12, 2011, http://unemployedworkers.org/page/-/UI/2011/unemployed.discrimination.7.12.2011.pdf?nocdn=1. NELP is an advocacy group supporting the interests of employees.

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Michael Bloomberg who, characterizing the bill as "misguided," predicted it would create more lawsuits than jobs.

Coverage

Bill Number 814-A will apply to employers and/or employment agencies in New York City with at least four employees.

Prohibitions

The law, which becomes effective on June 11, 2013, amends New York City's Human Rights Law, N.Y. Admin. § 8-102 to include provisions that make it unlawful to exclude the unemployed who are "available for work and seeking employment" from consideration for employment. Specifically, Bill Number 814-A expressly prohibits employers from:

- basing an employment decision related to hiring, compensation, or the terms, conditions or privileges of employment, on an applicant's unemployment status; and
- publishing an advertisement for any job vacancy that lists current employment as a requirement and/or qualification for the job, or that unemployed individuals will not be considered for employment.

Exceptions

Despite the sweeping nature of the law, it does contain certain important exceptions. Among these are a right to consider an applicant's unemployment status (i) when there is a "substantially job-related reason for doing so," or (ii) when it is necessary to inquire into the "circumstances surrounding an applicant's separation from prior employment." Further, nothing in the law is to be interpreted as prohibiting an employer from considering any "substantially job-related qualifications," when making employment decisions with regard to hiring, compensation, or the terms, conditions or privileges of employment. These substantially job-related qualifications include: "current and valid professional or occupational licenses; 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 new law also permits an employer to limit the applicant pool to its own current employees and to determine compensation based on actual level of experience.

Right of Action/Civil Penalties/Damages

Significantly, Bill Number 814-A permits a person who believes that he or she has been discriminated against because of unemployment status to bring an action in court for damages, injunctive relief and other appropriate remedies, or to make a complaint to the New York City Commission on Human Rights (Commission). Upon finding that an employer has unlawfully discriminated against an applicant because of unemployment, the Commission may order the employer to "cease and desist" from its discriminatory practices. The Commission also could require that the employer hire a prospective employee; award back pay and front pay; and/or pay compensatory damages.

In addition to damages, the Commission also may impose a civil penalty of $125,000 on an employer found to have engaged in an unlawful discriminatory practice. If it finds that the unlawful practice resulted from the employer's "willful, wanton or malicious act," the Commission may impose a civil penalty in an amount up to $250,000.

Failure to comply with an order of the Commission may result in a further civil penalty of $50,000 and imposition of additional penalties of no more than $100 per day. Further, any person found to have willfully violated an order of the Commission may be found guilty of a misdemeanor, punishable by imprisonment for up to one year and/or a fine of not more than $10,000.

Comparison to Similar Laws

New York City is only the fourth jurisdiction to have enacted legislation limiting consideration of unemployed status in the hiring process. However, New York's law appears to be the most sweeping and potentially consequential of the group.

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New Jersey and Oregon Laws

New Jersey and Oregon were the first to enact legislation on the subject, in June 2011 and March 2012, respectively. Unlike the New York City law, both of these earlier laws were limited to regulating the content of job advertisements. The New Jersey law, NJSA 34:8B-1, declared it unlawful for a job vacancy advertisement to include current employment as a qualification for the position, or state that a currently unemployed applicant would not be considered or that only employed applicants would be considered. An employer that violates the law is subject to a civil penalty of $1,000 for a first violation, $5,000 for a second violation, and $10,000 for each subsequent violation. However, penalties are to be collected by the Commissioner of Labor and Workforce Development, and not by an affected employee. Further, the statute expressly declares it is not to be construed as creating a private cause of action against an employer. The Oregon law, ORS Ch. 659A, contains similar prohibitions and likewise is enforced strictly by an agency, the Commissioner of the Bureau of Labor and Industries, which assesses civil penalties for violations that are limited to $1,000 for each violation.

The District of Columbia Law

The District of Columbia enacted the "Unemployed Anti-Discrimination Act of 2012," which became effective on May 31, 2012. Like the New Jersey and Oregon laws, the D.C. Act also bans job advertisements that identify unemployment as a disqualifying factor for a job candidate. Unlike the laws of New Jersey and Oregon, the D.C. Act prohibits employers from failing or refusing to consider or hire an applicant because he is unemployed — which is defined as one who "does not have a job, is available for work, and is seeking employment." However D.C.'s law contains an important limiting sentence: it is *not* intended "to preclude an employer or employer agency from examining the reasons underlying an individual's status as unemployed, in assessing an individual's ability to perform a job or in otherwise making employment decisions about that individual." The law also makes unlawful retaliation against those who oppose an unlawful practice under its provisions.

Like New Jersey and Oregon, the D.C. law created no private right of action. Complaints of violation are filed with and investigated by the Office of Human Rights, which also has authority to assess penalties where it finds violations. Penalties per claimant are set at $1,000 and $5,000 for first and second violations and $10,000 per claimant for a third violation, but are capped at $20,000 irrespective of the number of claimants affected by a violation. Unlike the two earlier laws discussed above, penalties collected by the Office of Human Rights are distributed to the affected claimants.

Implications of the New York Law

New York's new law banning discrimination against the unemployed is the most consequential of the legislative enactments on the subject to date. It stands alone among them in offering unsuccessful candidates both the right to sue in court and the opportunity to collect damages.

It also raises questions that for now are unanswered. The law broadly forbids basing employment decisions regarding hiring, compensation, or the terms, conditions or privileges of employment, on the unemployment status of an applicant. Will this injunction preclude employers from considering periods of unemployment when considering a person's level of experience in deciding how much to compensate a new hire or current employee? Will an employer be forbidden from viewing an applicant with recent volunteer experience, but no employment, more favorably than an unemployed candidate who has nothing on his/her resume for the same period preceding the application? Will these circumstances qualify as "substantially job-related reason[s]" for considering the applicant's or employee's periods of current or past unemployment in making decisions on whether to hire, or on compensation or other terms and conditions?

On a more practical plane, will the law, its manner of enforcement or its application by the courts effectively penalize employers for their knowledge of the unemployed status of applicants? It is inevitable that employers who are aware of an applicant's unem-

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ployed status will be at some greater risk of a finding that they considered it as a factor in rejecting that applicant for employment. However, until the Commission begins making findings and the courts have construed the law, it is difficult to predict the degree of risk that employers will assume by their knowledge of an applicant's unemployment, much less by the background checking and other activities in which they engaged that uncovered the information about the applicant's unemployment.

It would be imprudent for employers in New York City, in the absence of a record of draconian enforcement and/or interpretation of the new law, to take any drastic measures in response (such as discontinuing or limiting reasonable background check practices or ignoring gaps in resumes and applications). However, in the period that precedes its mid-June effective date employers have an opportunity to eliminate recruitment and hiring practices and documents that would create an unnecessary risk of liability even under a reasonable interpretation of the law. Among the actions that New York City employers should consider taking before June are:

- Examining all current and scheduled job advertisements to ensure no requirement of current employment is stated.
- Review recruitment and hiring procedures, instructions, scripts and policies to ensure that no reference to a requirement or qualification of current employment is made as a condition for hire.
- Instruct (preferably in writing) recruiters and all those involved in the hiring process in New York City to avoid discussion or comment during interviews on the unemployment status of any applicant unless deemed job-related in advance by Human Resources, preferably with advice of counsel.
- Review internally and with counsel practices, such as background and reference checking, that likely would disclose current employment status and
  - confirm that the practice can be justified;
  - consider if and how information on unemployment status can be withheld from hiring decision-makers; and
  - identify in advance, where possible, instances where substantial job related reasons will exist for discussing unemployment status with applicant.

Now is the best time to consider whether and how changes are needed to current practice and/or procedure in order to comply. Consult your regular Schnader lawyer to prepare your company's compliance with this new law. ◆

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