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Will disqualifying job candidates based on their current unemployment soon be prohibited?

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On February 16, 2011, the U.S. Equal Employment Opportunity Commission ("EEOC") held a public meeting examining the impact of employers who only consider currently employed applicants when filling job vacancies. This recent trend among some employers, and complaints about the practice received by the EEOC, have caught the attention of the agency and caused it to begin investigating whether this practice causes a disproportionately negative impact on certain protected classes of job applicants.

The laws enforced by the EEOC prohibit an employer from using neutral employment policies and practices that disproportionately affect applicants of a particular race, color, religion, sex (including pregnancy), national origin, or an individual with a disability, if the policies or practices at issue are not job-related and necessary to the business operation.³ If, as a result of EEOC's investigation of this practice, the agency pursues claims of unemployed individuals who allege they were illegally discriminated against based on their status as unemployed, employers will face a new theory of illegal discrimination not encountered in previous cases.

A new trend addressing the same issue may also be starting at the state level, where states enact and enforce their own employment discrimination laws. For example, a recently proposed Illinois bill, if passed, would make it illegal to discriminate against a job applicant based on his or her unemployment status or based on a gap in employment history.⁴ The bill proposes that it be a civil rights violation for employers, employment agencies or labor organizations to inquire into, use or advertise a job based on a prospective employee's status as unemployed, or based on a gap in the applicant's employment history, or to use employment status or a gap in employment as a basis to refuse to hire. The bill would fine employers up to \$5,000 for their first violation, and \$10,000 for each subsequent violation.

Testimony at the Recent EEOC Public Meeting

At the EEOC public meeting the agency heard testimony from multiple witnesses from both sides of the debate. Several witnesses testified that employers using the employment status of an applicant as a criterion for applicant selection did disproportionately affect certain protected classes of job applicants. Other witnesses testifying on behalf of employers and employer groups testified, however, that they use current employment as a signal of quality job performance only, that using current employment as a factor in hiring decisions does not disproportionately impact applicants who are protected under the EEOC laws and regulations, and that the practice of using employment status in hiring decisions is not a widespread practice.

James S. Urban, a partner at Jones Day who represents many Fortune 500 companies, testified that most employers are looking to hire the best candidate for the position because of the amount of money that is invested when hiring a new employee, and therefore employers usually consider all qualified candidates, regardless of their employment status. He pointed out that it is in the best interest of the employer to hire the best candidate, and that it is his belief that there is not a widespread practice among employers to disqualify applicants on the basis of unemployment.

Christine L. Owens, Executive Director of the National Employment Law Project (“NELP”), testified that NELP regularly receives reports from unemployed workers who were told they would not be considered for employment because they are not currently working. She pointed to articles in The Huffington Post, CNNMoney.com, and USA Today, which pointed out the increasing number of job ads that automatically disqualify the long-term jobless by requiring candidates to be currently employed, or employed within the last six months. Owens further noted reports received by NELP that suggest some workers (particularly older workers) are being told they will be excluded if they are not currently employed, even for jobs that do not advertise such a requirement.

A press release by the EEOC followed the public meeting, pointing out the agency’s view of the individuals most impacted by employer requirements that applicants be currently employed.⁵ In that regard, Fatima Goss Graves, Vice President for Education and Employment of the National Women’s Law Center, noted that women, and particularly older women and those in non-traditional occupations, are disproportionately affected by the employer’s restriction. Algernon Austin, Director of the Program on Race, Ethnicity, and the Economy of the Economic Policy Institute, explained that unemployment rates for African-Americans, Hispanics, and Native Americans are higher than those of whites, and that restricting applications to those currently employed could place a heavier burden on people of color.

The use of employment status to screen job applicants could also seriously impact people with disabilities, according to Joyce Bender, an expert in the employment of people with disabilities. Individuals with disabilities are often denied interviews based on their lack of work experience, even if they are otherwise qualified, because hiring managers are seeking the “best qualified” candidates for their company. Bender testified that not all jobs require current work experience, and by disqualifying applicants with disabilities because they are unemployed, a very large talent pool is being excluded from the opportunity to work, causing a negative impact on persons with disabilities, including disabled veterans.

Fernan R. Cepero, testifying on behalf of the Society for Human Resource Management (“SHRM”) pointed out that employers who argue that current employment is an indicator of recent experience are not considering candidates who have held unpaid volunteer positions or internships directly in the candidates’ field. While candidates who have been out of the workforce for a time may have skills that are out of date or obsolete compared with a candidate who’s skills are fresh, refusing to consider applicants who are not currently employed eliminate applicants who have fresh skills acquired through internships or volunteer experience.

While there is disagreement over the number of employers requiring applicants to be currently employed in order to apply, and the issue of whether there is really a disproportionate impact on protected classes, employers should prepare themselves for the possibility that this practice may soon be challenged by EEOC as an improper factor in making employment decisions. In addition, because states have the power to expand on the laws enforced by the EEOC, employers should watch for and be prepared to respond to possible legislation in their states that may seek to classify the use of this employment criterion as improper, due to its alleged disparate impact on applicants who are already members of EEOC protected classes. Employers can protect themselves by advertising and recruiting all qualified applicants, not just

those currently employed. From there, employers can review and make decisions on job applicants based on the normal and customary criteria recognized as appropriate for making employment decisions. Until the EEOC clarifies the circumstances under which employment status is an appropriate or inappropriate criterion for job selection, employers should evaluate carefully whether to consider an applicant's status as unemployed in making such decisions. In the event an employer does decide to use employment status as a criterion, the employer should consider it in the context of evaluating the overall qualifications of the applicant and whether those qualifications have been lessened due to the applicant's unemployment. In addition, employers should be mindful that not all experience or qualifications come from current employment, and that some candidates may be better qualified based on their overall experience, or through skills obtained through sources other than traditional jobs, such as volunteer or internship experiences. ■

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3. Prohibited Employment Policies/Practices, Eeoc.gov, <<http://www.eeoc.gov/laws/practices/index.cfm>> (last visited March 11, 2011).

4. S.B. 2153, 97th Gen. Assemb., Reg. Sess. (Ill. 2011).

5. Press Release, Equal Emp't Opportunity Comm'n, Out of Work? Out of Luck (Feb. 16, 2011) (on file with author).