

Unemployed Need Not Apply: EEOC Considers Discrimination Against Jobless

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Recently, the EEOC held an open meeting to “examine treatment of unemployed job seekers.” During the meeting, several witnesses presented testimony on what some view as a growing problem in the current economy – discrimination against the jobless. The impetus for the meeting started as early as May of 2010, when employment organizations first noticed job postings that explicitly discriminated against the unemployed. These postings ranged from requirements that the person have been employed in the last six months to specific announcements that “no unemployed candidates will be considered at all.”

While some witnesses disputed whether such postings were indicative of any trend, others presented actual postings of such explicit discrimination and testimony that the discrimination is more widespread on an implicit level. The concern with such blanket exclusions is that they have a disparate impact on certain protected groups that currently suffer from unemployment rates well above the national rate of 9%. For example, a representative from the National Employment Law Project presented data at the meeting that the unemployment rate for African Americans was 15.7% in January 2011. Hispanics also have an unemployment rate several percentage points higher than the national rate.

Another issue is the impact that such a practice may have on older workers. Information provided by the Pew Center indicates that younger workers are much more likely to experience shorter durations of unemployment than older workers. For example, 26.6% of unemployed individuals between the ages of 25-34 have been unemployed for longer than one year. Contrast this with 40.3% of those between the ages of 55-64 who have been unemployed for at least the same period. Thus, any postings that require an applicant to have been employed “in the last six months” (or some other fixed amount of time) could come under fire for having a disparate impact against older workers in violation of the ADEA.

With these statistics in mind, the EEOC will continue to examine how employers are treating unemployed applicants and it may not be long before we see the first case involving discrimination against the unemployed. Last fall, legislation was proposed in the New Jersey state assembly which would subject employers to penalties of up to \$10,000 for including specific language that bars unemployed applicants from applying for open positions. The law was passed by the legislature but conditionally vetoed by the governor and returned to the legislature to address specific concerns.

Employers would be wise to ensure that their job postings do not explicitly prohibit the unemployed from applying and avoid review processes that automatically disqualify unemployed candidates solely on that basis. While such requirements could conceivably be necessary where up-to-date skills and knowledge are required, such requirements must be based on reasonable factors other than someone’s age, race or gender. Creating and maintaining documentation as to the basis for hiring decisions will also be useful should a claim of unemployment discrimination be brought against an employer. Ensuring that each applicant is considered based on qualifications and not eliminated from consideration merely by virtue of

being unemployed (even when the requirement is unwritten) will assist employers to avoid liability down the road should the EEOC begin to prosecute such discrimination.