

ALERTS AND UPDATES

Discrimination Against the Unemployed Now Banned in New Jersey: Are More-Expansive Federal Protections Far Behind?

September 19, 2011

With unemployment continuing to skyrocket, the competition for jobs is stiff. There is an old adage that "you need a job to find another job." To the extent this adage is given credence by those making hiring decisions, it appears to reflect what may be viewed as a discriminatory animus against the unemployed, leaving the unemployed faced with an uphill climb in their efforts to reenter the workforce. The New Jersey Legislature recently enacted *N.J.S.A. 34:8B-1*, a new law designed to help eliminate this barrier in today's job market.

This new statute banning one form of discrimination against the unemployed became effective June 1, 2011. It prohibits employers and their agents or representatives from publishing (in print or on the Internet) any job listing stating that current employment is a requirement for job consideration. The law further precludes such advertisements from stating that either jobless applicants will not be considered for employment or that only the currently employed will be eligible for the position. One of the limited exceptions to this law involves the New Jersey Civil Service Commission employment system, where continuing employment in certain positions is a legal prerequisite for promotion to other state government jobs. The law similarly allows employers to specifically identify as part of an advertisement any necessary job qualifications other than current employment, such as mandated education and professional licensing; and nothing in the new law bans companies from advertising that only current employees will be considered for open, internal job positions.

While *N.J.S.A. 34:8B-1* does not allow job seekers to sue for its violation, employers nevertheless risk the imposition of significant fines, payable to the New Jersey Department of Labor and Workforce Development, for noncompliance. These fines include: up to \$1,000 payable for the first offense, up to \$5,000 for the second offense and up to \$10,000 for the third and all subsequent offenses. Given these penalties for noncompliance, it may be prudent for employers to take immediate steps to comply with the edicts of this new law.

One of the first questions that arises from an analysis of this recently effective law is whether employers can still consider an individual's employment status as part of their hiring

determination. The law does not provide a definitive answer on that issue. While refusing to hire someone because of his or her unemployed status would seemingly defeat the purpose of the law, the statute by its express terms contains no prohibitions that would interfere with an employer's continuing right to consider an applicant's employment status as part of the hiring decision. Instead, on its face, the new law merely precludes the use of specific advertisements indicating that unemployed applicants are not welcome. Therefore, employers in New Jersey should still be able to consider an applicant's employment status in making employment decisions, and can continue probing into the circumstances of why an applicant may be unemployed. The continuing ability to do so, however, could be discontinued if recently proposed federal legislation is passed—legislation that would go beyond the mere proscription of certain kinds of employment advertisements.

Unlike the New Jersey legislation that plainly falls short of imposing an absolute ban on consideration of an applicant's unemployed status, companion bills are now pending in Congress before both the House and the Senate that would enact even-broader anti-discrimination protections for the unemployed in the United States. Under these broader pending federal bills, collectively called the Fair Employment Opportunity Act of 2011, the current unemployment status of a job candidate could never be considered in the hiring process, unless current employment is a bona fide occupational qualification that is reasonably necessary to the performance of the advertised job position. Similarly, employers and employment agencies would likewise be subject to the same kinds of restrictions on the content of published and online job advertisements as those enacted under *N.J.S.A. 34:8B-1*. Another key difference between the pending federal bills and the New Jersey law is that, under the proposed federal measures, aggrieved individuals would have the right to maintain a private legal action where a panoply of potential remedies are available—including an award of lost wages, benefits, attorney's fees and legal costs incurred in filing any lawsuit. Moreover, liquidated damages (damages in addition to the losses incurred) would also be available, unless the prospective employer demonstrated that its violation of the law occurred in "good faith."

At present, these federal bills are at the committee stage of the legislative process in both the House and the Senate. We will continue to monitor the progress of these bills, and keep you posted on their status.

What Does This Mean for Employers?

In the meantime, for those companies doing business in New Jersey, or who are presently seeking employment candidates in the state, it is vital that all current and future job postings and advertisements are reviewed closely to ensure compliance with New Jersey's new protections for the unemployed.

For Further Information

If you have any questions regarding compliance with *N.J.S.A. 34:8B-1*, or any other areas of labor or employment law, please contact any member of the Employment, Labor, Benefits and Immigration Practice Group or the attorney at the firm with whom you are regularly in contact.

Disclaimer: This Alert has been prepared and published for informational purposes only and is not offered, or should be construed, as legal advice. For more information, please see the firm's full disclaimer.