Patterson Belknap Webb & Tyler LLP

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New York City Passes Law Prohibiting Discrimination Against the Unemployed

Under a recent amendment to the New York City Administrative Code, it is now unlawful to discriminate against job applicants based on their unemployment status. N.Y.C. Admin. Code. §§ 8-107(21)(a)(1)-(2). The law takes effect on June 11, 2013. The law, passed by the New York City Council over Mayor Michael Bloomberg's veto, prohibits employers and employment agencies from discriminating against applicants who have previously been unemployed. Specifically, the law makes it illegal for employers to base employment decisions regarding "hiring, compensation or the terms, conditions or privileges of employment on an applicant's unemployment." N.Y.C. Admin. Code § 107(21)(a)(1)-(2). The law defines "unemployed" or "unemployment" as "not having a job, being available for work and seeking employment." N.Y.C. Admin. Code § 8-102(27).

Despite the broad language restricting what aspects of an applicant's work history cannot be considered, the law is clear about several considerations employers may still keep in mind while hiring:

- Employers are allowed to consider an individual's unemployment where there is a "substantially job related reason for doing so." Likewise, employers are not prohibited from asking about the "circumstances surrounding an applicant's separation from prior employment." N.Y.C. Admin. Code § 8-107(21)(b)(1).
- Employers remain free to consider whether applicants have a "substantially job-related qualification," including "a current and valid professional or occupational license; a certificate, registration permit or other credential; a minimum level of education or training; or a minimum level of professional occupational or field experience." N.Y.C. Admin. Code § 8-107(21)(b)(2).
- Employers can limit the pool of those who will be considered for a position to current employees. N.Y.C. Admin. Code § 8-107(21)(b)(4)(a).
- Employers can consider an individual's actual amount of experience in setting compensation, terms, or conditions of employment. *Id*.

In addition to regulating employment decisions, the law reaches employer advertising. It is unlawful to state or imply that current employment is a requirement or qualification for a position, or that the employer will not consider an individual based on his or her prior unemployment. N.Y.C. Admin. Code § 8-107(21)(a)(2). In spite of these prohibitions, employers may still include statements of "substantially job related" qualifications, including "a current and valid professional or occupational license; a certificate, registration permit or other credential; a minimum level of education or training; or a minimum level of professional occupational or field experience." N.Y.C. Admin. Code § 8-107(21)(b)(3). While the provision applying to employment decisions applies only to employers with more than four employees, the advertising provision applies to any and all employers regardless of the number of individuals under employment.

The law allows both the New York City Commission of Human Rights and individuals claiming discrimination to bring legal claims of alleged discrimination. If an individual goes through the Commission, they must first file a complaint.

If, based on this complaint, the Commission finds that an employer engaged in unlawful discrimination, it can issue a "cease and desist" order, require the employer to hire the applicant, impose fines up to $250,000, and award both back and front pay. Under the law, individuals are also able to bring private actions against employers. If a court finds a plaintiff has proven an employer engaged in unlawful discrimination, the law authorizes the award of damages, including punitive damages, injunctive relief, and attorney's fees.

The law specifically allows both the Commission and individual plaintiffs to challenge a policy or practice based on a disparate impact theory. To prevail under the disparate impact theory, the Commission or an individual plaintiff must either (1) demonstrate that an employer's policy or practice, or a group of policies or practices, results in a disparate impact on the "unemployed" as defined by the statute; or (2) produce substantial evidence that an alternative policy or practice with less disparate impact is available. N.Y.C. Admin. Code § 8-107(21)(e). If the Commission or plaintiff can establish either of these theories, the employer can plead and prove an affirmative defense that the policy or practice is based on a substantially job-related qualification or that it does not contribute to the disparate impact identified. If the Commission or plaintiff has produced substantial evidence about an alternative policy with less disparate impact, then the employer can affirmatively defend by pleading and proving that the proposed policy would not serve the employer "as well" as the policy already in place. *Id*.

In light of the new law, employers based in New York City should consider reviewing their hiring practices, policies, and procedures to be certain that they do not directly or indirectly discriminate against the unemployed. Specifically, employers should review employment advertising and applications to ensure that neither requires applicants to be currently employed. Likewise, all individuals involved in the hiring process—from recruiters to interviewers—should be educated about the new law and instructed to avoid asking questions that may appear to take into consideration an applicant's employment status.

This alert is for general informational purposes only and should not be construed as specific legal advice. If you would like more information about this alert, please contact one of the following attorneys or call your regular Patterson contact.

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