ALERTS

Unemployed Persons: A New Protected Class in NYC

April 4, 2013

The New York City Council enacted, over Mayor Michael Bloomberg's veto, legislation that will amend the New York City Human Rights Law (the "NYCHRL"), N.Y.C. Admin. Code §§ 8-101 to -703, to include unemployed persons as a protected class for employment purposes. This law takes effect June 11, 2013.

The new law defines unemployment as "not having a job, being available for work, and seeking employment," and it prohibits covered New York City employers — those with four or more employees (including independent contractors who further the business enterprise of the employer and are not employers themselves) — from using an individual's unemployment status as a basis for decisions about hiring, compensation and employment terms, conditions or privileges. Unless otherwise permitted under federal, state or city law, all employers (including those with fewer than four employees) may not publish any job advertisement indicating that current employment is required or a qualification for a job in New York City, or that unemployed persons will not be considered for the job. The law's prohibition on retaliation against persons who sue, testify, assist the City Commission on Human Rights (the "Commission") or oppose discriminatory practices will also apply to the NYCHRL's latest protected classification.

The statute establishes several important limitations to the new law that protect employers' rights. Employers may lawfully take a job applicant's unemployment into account when "a substantially job-related reason for doing so" exists. The statute explicitly allows employers to ask about the

circumstances regarding separation from prior employment. Employers may consider qualifications that are substantially related to the job and publish them in advertisements. These qualifications include valid professional or occupational licenses, credentials (such as certificates, registrations or permits), minimum levels of education and training, and minimum levels of professional, occupational or field experience. Employers may limit employment opportunities to their own current employees or give their own employees priority in hiring, compensation or employment terms, conditions and privileges. Employers may base compensation, terms or conditions of employment on an employee's actual amount of experience. Employers may exercise any rights they have under collective bargaining agreements.

Employers that violate this new law are subject to penalties under the NYCHRL. Individuals may bring lawsuits against employers for civil damages (including punitive damages), injunctions and other remedies. Prevailing plaintiffs are entitled to costs and attorney fees. The statute of limitations for such litigation is three years. Alternatively, individuals may file complaints with the Commission within one year of the discriminatory act. The Commission is empowered to order employers to hire the individuals as employees, to cease and desist the discriminatory practices, and to pay aggrieved parties damages, back pay and front pay. Additionally, the Commission may fine an employer up to $125,000 for any violation or up to $250,000 for a willful violation.

Several details of the new law's impact on employers remain unclear. For example, an earlier version of the bill defined "unemployment status" as "an individual's current or recent unemployment." The City Council, however, deleted this language after the Bloomberg Administration noted that the term "recent unemployment" was vague and unnecessary. The City Council did not accept the Administration's recommendation that the statutory language explicitly limit the law's application either only to currently unemployed persons or to individuals unemployed within a certain timeframe. Some of the legislative history suggests that the law covers past unemployment even though the statutory language of "not having a job, being available for work, and seeking employment" could be read to suggest only the present tense. Therefore, whether the law applies only to individuals who are currently unemployed or to persons who have had periods of unemployment in the past remains unresolved. The line between unlawful discrimination and permissible "substantially job-related" inquiries into a job applicant's unemployment is also

ambiguous. During a City Council hearing on the previous version of the bill, advocates offered conflicting interpretations of the law's effect on employers. Mayor Bloomberg described the "substantially job-related" standard in his veto message as too nebulous to offer employers any help.

To protect themselves from liability, employers should review their existing policies and update them as appropriate or develop and implement policies to comply with the new law. For example, covered employers should consider adding "unemployed persons" to any list of protected classes. All employers who advertise jobs in New York City are advised to ensure that their job advertisements contain no explicit or implicit statements that currently unemployed persons are ineligible for the job. In particular, employers that use external advertising professionals or companies should communicate clearly to these third parties that statements about current employment status are not permitted. Employers should also consider adding affirmative statements to their advertisements indicating that unemployed status will not be used as a basis to deny employment.

New York City employers, furthermore, should ensure that all individuals involved in their employment decisions refrain from impermissibly taking into account any prospective or current employee's current or past unemployment, particularly because the NYCHRL holds employers strictly liable for the discriminatory actions of their managers and supervisors.[1] For example, employees involved in the hiring process should understand that while they may ask candidates about their previous jobs, including how and why their previous jobs ended, they must avoid questions about unemployment, including inquiries regarding whether the candidate is currently employed, reasons for current or past unemployment, and length of unemployment periods. By implementing appropriate safeguards, New York City employers will be well-positioned to avoid litigation under the new law and to lessen their risks of liability.

Authored by Mark E. Brossman, Ronald E. Richman, Holly H. Weiss and Scott A. Gold.

If you have any questions concerning this *Alert*, please contact your attorney at Schulte Roth & Zabel or one of the authors.

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[1] *See* SRZ's June 11, 2010 *Alert* , "New York City Employers Are Subject to Strict Liability for Supervisors' Unlawful Discriminatory Conduct, Court

Rules."

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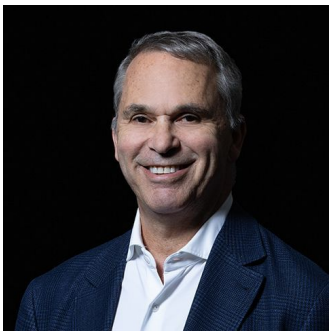

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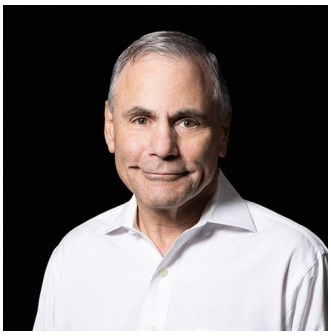

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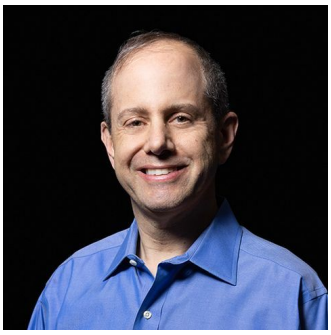

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