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Law Prohibiting Discrimination Based on Unemployment Status Signed by DC Mayor: Employers Beware – Similar Laws Likely to Follow

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On March 19, 2012, the Mayor of the District of Columbia signed the Unemployed Anti-Discrimination Act of 2012 (the "Act"), which prohibits employers and employment agencies from discriminating against job applicants based on their unemployment status. The Act is set to become the nation's first law to ban the *consideration* of an applicant's unemployment status in adverse hiring decisions. The Act will take effect following the statutorily mandated 30-day period of U.S. Congressional review, and publication in the District of Columbia Register.

Although the Act does not allow employees and applicants a private right of action, it is nevertheless significant in that it provides unemployed applicants and employee whistleblowers unprecedented protection from discrimination based on employment status. The only other similar law in effect is in New Jersey, but that law pertains to job advertisements alone, banning employers from advertising that the unemployed need not apply. Oregon's legislature passed a bill similar to New Jersey's law, but that bill has not yet been signed by Oregon's governor.

As unemployment discrimination legislation is gaining interest among legislators across the nation, we recommend that employers within *and outside* DC pay attention to the broad protections afforded under the Act, with the understanding that similar legislation may soon be enacted in your state. To assist employers in understanding the Act, this Alert discusses the scope of the Act's coverage, as well as the unlawful practices, enforcement mechanisms and remedial schemes set forth therein.

Coverage

The coverage of the Act is expansive. "Employer" is defined as any person who employs or seeks to employ for compensation one or more individuals for a position in DC (but not including the person's parent, spouse, child, or domestic servant engaged in work in and about the employer's household), as well as any person acting in the interest of the employer, directly or indirectly.

The Act also covers "employment agencies" – defined as any person regularly undertaking or attempting, with or without compensation, to procure employees for an employer (or to procure opportunities for employees to work for an employer), as well as an agent of such person.

Under the Act an "employee" is any individual employed by an employer, and a "potential employee" includes any individual who has applied to an employer for a vacant position to obtain employment.

Finally, the Act defines "status as unemployed" to mean any individual who, at the time of applying for employment, or, who at the time an act alleged to violate the Act occurs, does not have a job, is available for work, and is seeking employment.

Discrimination Defined

Under the Act, it is an unlawful practice for an employer or employment agency:

- to fail or refuse to consider for employment, or fail or refuse to hire, an individual as an employee because of his unemployed status;
- to publish in print, on the Internet, or in any other medium, an advertisement or announcement for any vacancy in a job for employment that includes
    - any provision stating or indicating that an individual's unemployed status disqualifies the individual for the job; or
    - any provision stating or indicating that an employer or employment agency will not consider or hire an individual for employment based on that individual's unemployed status.

Retaliation/Whistleblower Protections Defined

Under the Act, which contains broad retaliation and whistleblower protections found in other anti-discrimination laws, employers and employment agencies are prohibited from interfering with, restraining, or denying the exercise of any right specified therein. Further, the Act prohibits employers and employment agencies from failing or refusing to hire, or discharging, any employee or potential employee for:

- opposing any practice made unlawful by the Act;
- filing any charge, or instituting (or causing to be instituted) any proceeding relating to any right provided under the Act;
- giving (or about to give) any information in connection with any inquiry or proceeding relating to any right provided under the Act; or
- testifying (or about to testify) in any inquiry or proceeding relating to any right provided under the Act.

Exemptions

The Act contains three exemptions which allow employers and employment agencies to continue to engage in certain activities when filling job vacancies. Accordingly:

- Job advertisements may contain any other lawful job qualification including:
    - the holding of a current and valid professional or occupational license;
    - a certificate, registration, permit, or other credentials; or
    - a minimum level of education, training, or professional, occupational, or field experience;
- Employers and employment agencies may continue to examine the reasons underlying an individual's unemployed status in assessing an individual's ability to perform a job or in otherwise making employment decisions about that individual; and
- Employers may limit the applicant pool to their own current employees and any advertisement can specify that only applicants who are currently employed by the employer will be considered for employment.

Enforcement and Remedy

The District of Columbia Office of Human Rights ("DCOHR") will be responsible for handling all complaints alleging violations of the Act. Once a complaint has been filed, the DCOHR will have one month to investigate and determine whether an employer or employment agency violated the Act and assess a penalty.

Under the Act, DCOHR can access civil penalties of $1,000 per claimant for a first violation, $5,000 per claimant for a second violation, and $10,000 per claimant for each subsequent violation (but not to exceed a total of $20,000 per violation). DCOHR will distribute the funds among any employee or potential employee who filed a claim under the Act.

Takeaway

Along with New Jersey's law, the Act may be the harbinger of future legislation at the federal and state levels. In fact, there are currently four bills pending before the U.S. Congress that would prohibit employers from making most hiring decisions based on an applicant's unemployed status (which two of the federal bills define to include gaps in employment history). Unlike the Act, however, these bills would allow applicants and employees to bring a private right of action and to recover generous remedies from employers and employment agencies found to be violating the law. Furthermore, bills containing some form of ban on employment discrimination have been proposed in approximately half of state legislatures.

It is worth noting that this issue is also on the radar screen of the Equal Employment Opportunity Commission (EEOC). Last year the EEOC conducted a public hearing on the topic of unemployment discrimination, entertaining the prospect that the alleged practice disparately impacts minority groups protected under existent federal discrimination law and the agency is purportedly investigating a number of charges involving allegations of unemployment discrimination.

Overall, the hiring process has received a tremendous increase in legislative and judicial attention in recent years both at the federal and state levels. This scrutiny includes a headwind of laws and proposed laws and potential new guidance from the EEOC that would ban or limit inquiries into an applicant's credit and criminal background history and use of social media.

Best Practices

- To avoid potential scrutiny, employers should:
  - delete all reference to current employment status in job advertisements and/or their instructions to staffing agencies, and
  - carefully review hiring procedures, including those of their regularly-used outside employment agencies/recruiters, to avoid the appearance of "screening" based on unemployment status or otherwise eliminating applicants from consideration based solely on unemployed status;
- Those interviewing prospective candidates should be reminded that they should not comment orally, or in a post-interview written review as to a candidate's unemployment status as a rationale for any recommendations;
- Employers should be cognizant of the Act and New Jersey law and the expanding patchwork of legislation and proposed legislation intended to eliminate perceived barriers to hire, but may continue to:
  - consider an unemployed candidate's work history, including reason for unemployment -- so long as information is relevant to job performance; and
  - hire candidates with the most relevant and/or most recent appropriate work experience.

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If you have any questions or concerns regarding the Act, please contact your Proskauer lawyer or any member or co-Chairs of Proskauer's Employment Law Counseling Practice Group.

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