

New York City Council Overrides Mayor's Veto To Prohibit Discrimination Based on Unemployment Status

March 14, 2013

On January 23, 2013, the New York City Council passed Int. #0814-2012 (the "new Local Law"), which amends the New York City Human Rights Law ("NYCHRL") to prohibit discrimination against job applicants based on their unemployment status and provide expansive whistleblower/retaliation protections to employees. Mayor Michael Bloomberg vetoed the new Local Law on February 22, 2013, but the Council overrode the veto on March 13, 2013.

The new Local Law joins a growing number of laws and proposed laws to prohibit or limit discrimination against the unemployed. Indeed, New Jersey, Oregon and Chicago all have outlawed advertisements that state the unemployed need not apply. And, in addition to an advertisement ban, the District of Columbia has more broadly forbid (with exception) the *consideration* of an applicant's unemployment status in adverse hiring decisions. Over the last couple of years, bills containing some form of ban on "unemployment discrimination" also have been proposed in the U.S. Congress and a number of state legislatures, including the New York State Assembly and Senate.

Unlike the laws already in effect (and many of the proposals presently pending), the new Local Law allows applicants and employees to bring a *private right of action* and recover *generous remedies*. To assist employers in understanding this landmark law, which **takes effect June 11, 2013**, this alert discusses the scope of its coverage, as well as the unlawful practices, enforcement mechanisms and remedial schemes set forth therein.

Coverage

The coverage of the new Local Law is expansive. By amending the NYCHRL, the new Local Law covers "employers" employing at least four persons (including independent contractors), as well as "employment agencies" seeking to procure employees or opportunities to work. The new Local Law also defines "unemployment status" to mean "not having a job, being available for work, and seeking employment."

The new Local Law does *not* apply to certain actions taken or appointments made by various public officials or entities (including the New York City Department of Citywide Administrative Services and the Office of the Mayor), as well as the exercise of any right of an employer or employee pursuant to a collective bargaining agreement.

Unlawful Practices

Discrimination

The new Local Law prohibits, with exception, an employer, employment agency, or agent thereof, from making an employment decision – with regard to hiring, compensation or the terms, conditions or privileges of employment – based on an applicant's unemployment status.

Unless otherwise permitted by state or federal law, the new Local Law also prohibits an employer, employment agency, or agent thereof, from publishing, in print or on the Internet, an advertisement for any job vacancy in New York City that contains:

- any provision stating or indicating that being currently employed is a requirement or qualification for the job; and/or
- any provision stating or indicating that such entity will not consider individuals for employment based on current unemployment status.

In addition to claims for disparate treatment, the new Local Law recognizes claims for *disparate impact* as well.

Exceptions

The new Local Law permits an employer, employment agency, or agent thereof, to:

- (a) consider an applicant's unemployment, where there is a substantially job-related [\[1\]](#) reason; and (b) inquire into the circumstances surrounding an applicant's

separation from prior employment;

- consider any "substantially job-related qualifications" when making employment decisions with regard to hiring, compensation, or the terms, conditions or privileges of employment;
- publish, in print or in any other medium, an advertisement for any job vacancy in New York City that contains any provision setting forth any "substantially job-related qualifications"; and/or
- only consider or give priority to applicants currently employed by the employer.

In addition, the new Local Law expressly states that nothing is to prevent an employer from setting compensation or other terms or conditions of employment based on experience.

Retaliation

By amending the NYCHRL, the new Local Law also includes retaliation/whistleblowing protections for employees who:

- oppose any practice made unlawful by the new Local Law;
- file a complaint, testified, or assisted in any proceeding under the new Local Law;
- commence a civil action under the new Local Law;
- assist the New York City Human Rights Commission ("Commission") or the corporation counsel in an investigation commenced pursuant to the new Local Law; or
- provide any information to the Commission under the terms of a conciliation agreement made pursuant to the new Local Law.

Enforcement and Remedy

The new Local Law, by amending the NYCHRL, allows two avenues of recourse for a person alleging an unlawful discriminatory practice:

- file a complaint with the Commission within one year of the alleged unlawful discriminatory practice, *or*
- initiate a civil action (which the Commission also may initiate on the aggrieved person's behalf) in a court of competent jurisdiction within three years of the alleged unlawful discriminatory practice.

If an aggrieved person brings a complaint with the Commission, it may award remedies including but not limited to a "cease and desist order"; hiring, reinstatement or upgrading of employees; front and back pay; and compensatory damages. In addition, the Commission may impose a civil penalty of no more than one hundred and twenty-five thousand dollars, unless the unlawful discriminatory practice was the result of a "willful, wanton or malicious act," in which case the penalty may amount to no more than two hundred and fifty thousand dollars. Any civil penalties recovered are paid into the general fund of New York City. The Commission also has the power to initiate an investigation and enforce the new Local Law.

Moreover, the Commission has been tasked with developing courses of instruction and conducting ongoing public education efforts as necessary to inform employers, employment agencies, and job applicants about their rights and responsibilities under the new Local Law.

If an aggrieved person (and/or the Commission) chooses to file suit in court, the new Local Law also affords a host of legal and equitable remedies, including front and back pay, compensatory and punitive damages, attorney's fees and costs, and hiring/reinstatement. Civil penalties also may be assessed in an amount no more than two hundred and fifty thousand dollars in an action brought by the Commission (and, where levied, paid into the general fund).

Furthermore, individual employees found to have violated the new Local Law may be held individually liable under the NYCHRL's aider and abettor provision.

Takeaway

With the passage of the new Local Law, the specter of frivolous lawsuits looms large, with unemployed applicants having the right to sue not only for being denied hire, but for ostensibly no more than a discriminatory advertisement (should a court find that standing exists). While we have seen nothing to indicate that our clients or other employers are using current employment status as a basis to screen out candidates, employers in New York City should take the necessary measures to comply with the new Local Law. Employers may consider putting a statement on their applications where there are questions about prior work history that states "unemployment is not a bar to employment."

Given recent trends, employers *across the country* also should brace for continued legislative efforts to curtail "unemployment discrimination." Moreover, in addition to the growing patchwork of laws, the Equal Employment Opportunity Commission ("EEOC") purportedly is 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 new guidance from the EEOC that would limit the scope of background checks, including certain inquiries into an applicant's credit and criminal background history and use of social media.

If you have any questions or concerns regarding the new Local Law or related developments, please contact your Proskauer lawyer or any co-chair of the Employment Law Counseling & Training Group.

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[\[1\]](#) The new Local Law defines a "substantially job-related qualification" to include (but is not limited to) 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.