

ALERT

## It's Now Illegal to Discriminate Against the Unemployed in New York City

By Bennett Pine

Imposing yet another burden on employers, and further expanding the rights of workers, the New York City Council, overriding the veto of Mayor Bloomberg, amended the New York City Human Rights Law on March 13, 2013, to prohibit discrimination against the unemployed. New York City joins (and exceeds) three other jurisdictions — New Jersey, Oregon and the District of Columbia — in extending existing employment discrimination protections and broad remedies to job applicants because they are not currently employed.

### Who Is Covered

The law applies to all employers with at least four employees (including independent contractors) and employment agencies.

### Who Is Protected

The law is designed to protect the “unemployed,” which is defined as “individuals not having a job, being available for work and seeking employment.”

### What It Does

The new law protects the unemployed in several ways:

- It prohibits employers, employment agencies and their agents from basing employment decisions with regard to “hiring, compensation or term conditions or privileges of employment” on an applicant’s unemployment status.
- All employers, regardless of size, are prohibited from publishing, in print or any other medium, an advertisement for any job vacancy that states or indicates that (i) current employment is a requirement or qualification for the job, or (ii) they will not consider an individual for employment based on his or her unemployment.

### What Is Permitted

Employers may still inquire about the *circumstances* of an applicant’s separation from prior employment and may consider an applicant’s unemployed status where there exists a “substantially job-related reason for doing so.”

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## who's who

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In addition, employers may (i) base decisions and post advertisements identifying "substantially job-related qualifications," including a current and valid professional or occupational license or minimum level of education, training or experience; (ii) limit the applicant pool or give preference to only those currently working for *that* employer; and (iii) base compensation or terms and conditions of employment on a person's actual amount of experience.

### Remedies Available

This is where New York City expands the prohibitions enacted in other jurisdictions: An individual who believes they have been discriminated against because of unemployment status law may file a private action in court for damages, injunctive relief and other appropriate remedies or make a complaint to the New York City Commission on Human Rights.

If it finds prohibited discrimination, the commission may impose a "cease and desist" order against the employer and could require the employer to hire the prospective employee, provide back pay and front pay, or pay compensatory damages. Failure to comply with an order could result in a civil penalty of up to \$50,000 and additional civil penalties of up to \$100 per day. If the commission finds that an employer engaged in an unlawful discriminatory practice, it can impose civil penalties of up to \$125,000 — or up to \$250,000 for "willful, wanton or malicious violations."

Finally, any person who violates a Commission on Human Rights order can be found guilty of a misdemeanor punishable by up to one year in prison or by a fine of up to \$10,000, or both.

### What Should Employers Do

Clearly it would be prudent for employers to review all job advertisements and related materials and remove any language that states or suggests in effect that only currently employed individuals may apply or will be considered.

Individuals who conduct job interviews should be made aware of the new law and be advised to eliminate job interview questions that focus on the fact of an applicant's present unemployed status, such as how long they have been unemployed, and the gap since last employment. However, it certainly appears permissible to inquire about the reasons why the applicant left their last employment. Of course, it is always advisable, as with all other employment discrimi-

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nation protections, to focus the job interview and the hiring process on the applicant's experience, training, education, skills and qualifications to perform the duties of the job, rather than any questions encroaching on an individual's protected classification.

### **When Effective**

The new law was passed on March 13, 2013. It will go into effect 90 days later, on June 11, 2013.

### **Conclusion**

New York City continues to enact pro-employee legislation. Other bills, which would (i) prohibit discrimination on account of an individual's credit history and (ii) require an employer to provide paid sick leave, are pending.

Given the fact that the unemployment rate in New York City is approaching 10 percent, it

is reasonable to assume that a large number of unsuccessful job applicants will avail themselves of this new right afforded by the New York City Human Rights Law. Filing such an administrative complaint — even a completely meritless one — with the New York City Commission on Human Rights is free of charge and does not require the assistance of an attorney. Job applicants unemployed for a long period, who presumably are already disgruntled, have nothing to lose by asserting a claim that their rejection for employment was based on unemployment status.

As a result, employers with New York City operations should make every effort to focus the job application process, and base hiring decisions, on the individual's education level, skills, experience and other qualifications for the job, not on the basis of protected classifications or characteristics, now extended to unemployment status. ▲

