Recently Enacted New York City Law Bars Discrimination Against the Unemployed

The New York City Council recently enacted a law, over Mayor Bloomberg's veto, that prohibits discrimination against the unemployed in New York City. Other jurisdictions - such as the District of Columbia, New Jersey and Oregon - also have laws prohibiting employers from discriminating against the unemployed. However, when compared with many of these other laws, New York City's law, which applies to employers with four or more employees, is broader and carries significantly higher penalties.

The law, which takes effect June 11, 2013, amends the New York City Human Rights Law by making unemployment status similar to other protected classifications, such as race, gender, age, national origin and disability. The law defines "unemployed" or "unemployment" as "not having a job, being available for work, and seeking employment." Under the law, employers are prohibited from basing an employment decision "with regard to hiring, compensation or the terms, conditions or privileges of employment on an applicant's unemployment." Employers are also prohibited from publishing job vacancy advertisements indicating that being currently employed is a requirement for a job or stating that an employer will not consider individuals for employment based on their unemployment.

The law not only prohibits intentional discrimination against the unemployed, but it also makes it unlawful for an employer to maintain a facially neutral policy or practice that disparately impacts unemployed persons. One notable aspect of the new law, which is troubling to employers and was the basis of Mayor Bloomberg's (overridden) veto, is that a plaintiff (or a class of plaintiffs) may sustain a claim against an employer by demonstrating that an employer's group of hiring practices or policies, as a whole, result in a disparate impact, *without being required to demonstrate which specific policy or practice results in such disparate impact*. In such event, to avoid liability, an employer must then "plead and prove as an affirmative defense that each such policy or practice has as its basis a substantially job-related qualification or does not contribute to the disparate impact." However, even if an employer makes such a showing, a plaintiff will still prevail if he or she "produces substantial evidence that an alternative policy or practice with less disparate impact is available to such entity and such entity fails to prove that such alternative policy or practice would not serve such entity as well."

The law includes certain express exceptions. An employer may consider an applicant's unemployment "where there is a substantially job-related reason for doing so." An employer may inquire "into the circumstances surrounding an applicant's separation from prior employment." An employer may decide that only applicants who are its current employees will be considered for employment or given priority for employment or with respect to compensation, terms, conditions or privileges of employment. An employer may publish an advertisement for a job vacancy that requires, or may take into consideration when making employment decisions, certain job-related qualifications, such as a current and valid professional or occupational license, a certificate or other credential, a minimum level of education or training, or a minimum level of occupational or field experience. Further, the law does not apply to collective bargaining agreements.

As with individuals asserting other claims of discrimination under the New York City Human Rights Law, individuals asserting unemployment discrimination claims may file a discrimination charge with the New York City Commission on Human Rights or file suit in court. Remedies available to a prevailing plaintiff include injunctive relief, compensatory

and punitive damages, attorneys' costs and fees, and civil penalties ranging from $125,000 to $250,000 per violation.

New York City's new law has the potential to become a heavily litigated area, especially because its contours may not be as clear as those involving more traditional protected classifications. For example, while prohibited interview questions are generally recognizable and avoidable when they relate to characteristics such as race or religion, they may be harder to recognize and avoid when they relate to unemployment, especially when the law allows an employer to make related inquiries concerning the circumstances that led to the loss of a job or an employee's qualifications.

Similarly, until the law is further developed, it may be unclear what factors employers may or may not consider. Traditionally, when determining what compensation to offer a prospective employee, some employers have considered how much the prospective employee is making at his or her current job. However, under the new law, courts may hold such a consideration will disparately impact the wages offered to unemployed persons, who are without current compensation.

Notwithstanding such open questions, employers can and should take steps to comply with the law and minimize the risk of litigation, including the following:

- Employers should review for compliance their recruiting policies and procedures before the law takes effect in June.
- Personnel involved in interviewing and hiring should be trained to understand what types of questions are and are not permitted in an interview and on an application form.
- Questions should focus on an employee's qualifications, not current employment status. For example, an employer may wish to ask an unemployed applicant what he or she has been doing to keep current since becoming unemployed.
- Employers should review their job advertisements and recruiting-oriented web pages and remove therefrom language that may give the impression of favoring employed over unemployed applicants.
- Employers should also revise their discrimination policies to include this new protected class.

For more information about this law or other employment-related matters, please contact Mark Goldberg or any other member of Loeb & Loeb's Employment and Labor Department.

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