

LABOR & EMPLOYMENT

ALERT

NEW YORK CITY NOW PROHIBITS DISCRIMINATION BASED ON UNEMPLOYMENT STATUS OVER MAYOR'S VETO

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New York City continues to enact some of the nation's most stringent anti-discrimination laws. Most recently, the New York City Council overrode Mayor Bloomberg's veto and passed a law prohibiting employers from basing hiring and other employment decisions on an applicant's unemployment status. The law takes effect in June and the full text of the law [is available here](#).

New York City is the fourth jurisdiction in the country to pass a law making "employment status" a protected category. However, the New York City law goes a step farther than any other jurisdiction and is the only statute that allows applicants to file a private court action against an employer or file a complaint with the New York City Commission on Human Rights. If a private action is brought, an individual could potentially recover compensatory damages, punitive damages, injunctive relief and attorneys' fees. If the Commission finds a violation an employer could be required to hire the prospective employee, award back pay, front pay and issue fines of up to \$250,000. The law prohibits covered employers, employment agencies and their agents from making employment decisions regarding hiring, compensation, or the terms, conditions, or privileges of employment on the unemployment status of an applicant. The new law also prohibits employers and employment agencies

from publishing or placing any advertisement that states that current employment is a prerequisite for the job.

The law does contain several exceptions. First, employers may consider an applicant's employment status if there is a substantial job related reason for doing so. We believe that this "exception" will be narrowly construed because it is hard to imagine any scenario where current and active employment is an essential function of a prospective job.

A second exception contained in the law permits an employer to inquire into the circumstances surrounding an applicant's separation from a prior position. In other words, an employer is technically allowed to inquire as to whether an applicant was previously terminated for cause, misconduct, or poor performance. This "exception," however, is fraught with risk because such an inquiry, while strictly allowed, will provide a basis for an applicant to file a charge of discrimination or lawsuit claiming that the basis of the decision not to hire the applicant was based on the applicant's unemployment status, which remains prohibited.

A third exception allows employers to base hiring decisions on, and to post advertisements identifying, "substantially job-related qualifications," including "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.” In other words, employers are permitted to consider applicants’ substantive training and licensure in making hiring and other employment related decisions.

A fourth exception allows employers to limit the pool of prospective applicant to its own current employees.

A final exception allows employers to set compensation rates and terms of conditions based upon an applicant’s previous experience.

It goes without saying that New York City employers should immediately begin training all staff members involved in the recruiting process about this new legislation. Employment advertisements and applications must be reviewed to ensure that they do not require applicants to be currently employed. Interviewers should be instructed to ask questions designed to ascertain the

applicant’s level of experience or training, and should be advised not to question an applicant’s unemployment status. Employers should also train interviewers to avoid asking applicants concerning gaps in an applicant’s resume, or the reasons behind a prolonged absence from the workplace. If an absence from the workplace must be addressed those questions should be limited to ascertaining why previous employment ended. The interview questions should also be geared to determine whether the applicant possesses the skills needed to properly perform the job.

Please have your human resources personnel or managers immediately review all job applications and interview policies. If you require any assistance in training managers on the proper ways to conduct interviews please contact [Caroyn D. Richmond](mailto:Caroyn.D.Richmond@foxrothschild.com) at [Caroyn D. Richmond](mailto:Caroyn.D.Richmond@foxrothschild.com) or [Eli Z. Freedberg](mailto:Eli.Z.Freedberg@foxrothschild.com) at [Eli Z. Freedberg](mailto:Eli.Z.Freedberg@foxrothschild.com) or another member of the Fox Rothschild LLP’s New York [Labor & Employment Department](#).



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