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MAYOR DE BLASIO MANDATES INCREASED INVESTIGATIONS INTO EMPLOYMENT DISCRIMINATION THROUGH THE INCREASED USE OF SECRET TESTERS

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Recently, New York City Mayor Bill de Blasio signed into law a bill requiring the New York City Commission on Human Rights (Commission) to enact a program to test for discrimination in employment practices among employers, labor unions, employment agencies, and employees or agents thereof. Under the program, the Commission will send out teams of discrimination “testers” to apply for, or inquire about, jobs. While “testers” have long been used by a variety of fair employment agencies, this is the first time a tester program is being mandated by law in New York.

In effectuating the program, the Commission will utilize “matched pair testing.” Under this process, the Commission will send two individuals to an employer to apply for, or inquire about, a job. These two individuals will have similar credentials, but one individual will be a member of one or more of the classes protected by the New York City Human Rights Law while the other will not. Characteristics currently protected under the New York City Human Rights Law include, but are not limited to, race, color, religion, creed, age, national origin, disability, gender, sexual orientation, transgender status, marital status, military or veteran status, partnership status, alienage, citizenship, unemployment status and criminal history.

To illustrate how the process works, the Commission would, in response to a job posting for a server, send a Caucasian woman and a Black man, with identical qualifications, to apply for the position. In the event that only the Caucasian woman was interviewed, the Commission would likely make the determination that the employer discriminated against the Black male applicant based upon his race and gender.

The Commission is required to perform no less than five of these tests each year. However, there is no limitation on the number of tests that the Commission can perform. As Mayor de Blasio is requesting a 25 percent budget increase for the Commission, which will result in the hiring of 34 additional employees, it is expected that the Commission will perform well in excess of the five mandated tests each year.

All tests that uncover incidents of actual, or perceived, discrimination that occur on the basis of an applicant’s membership in a protected class will be referred to the Commission’s law enforcement bureau, which would likely file a charge of discrimination against the offending employer. Testing must commence on or before October 1, 2015.

As a result of the Commission’s newly mandated investigatory process, employers should review their

job applications and hiring policies. In doing so, employers should, among other measures, train (or re-train) managers and hosts, who often are the individuals who receive job applications, on proper interviewing and hiring practices. Employers should also review their job postings to ensure that they do not show a preference for one category of employee over another based upon protected characteristics.

For example, charges of discrimination have been filed against some employers because their job postings sought “waitresses” or “busboys” implying that they were only seeking applicants of a specific gender. While testers will certainly focus on the interview process, it is essential to review job postings carefully. Other potentially discriminatory hiring practices/phrases to avoid are as follows:

Job Titles

Inadvisable	Advisable
Maid	Housekeeper/Room Attendant
Waiter/Waitress	Server
Salesman/Saleswomen	Salesperson/Sales
Maintenance Man	Maintenance Worker

Job Advertisements: Appropriate Language

Inadvisable	Advisable
Married, single	No substitutes
Man, woman, girl, boy	Person, applicant, trainee, staff
Clean cut, pretty, attractive, cute	Professional appearance, employer has dress code
Non-smokers only	Non-smoking environment
Recent grad, college student	College Degree required, internship
Young, energetic	Entry level, intern, trainee position
Must own car	Must arrive at work on time
Junior	Entry level
Senior	Mature attitude
Must have – years of experience	Successful/proven record, considerable experience

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