Looking For Work While Unemployed? Here's What You Should Know About Unemployment Discrimination

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"It's a cruel catch-22: the longer you're unemployed, the more unemployable you may seem," said President Obama in 2014 to a group of leaders from the nation's largest companies. In general, it has become cliché that it's easier to find a job when you already have one. If you've been denied a job opportunity simply because you are unemployed, what are your options? Is this even legal? In the past few years, legislators from a handful of cities and states across the country have attempted to combat the stigma of unemployment by prohibiting companies from engaging in unemployment discrimination when making hiring decisions.

This wave of proposed legislation regarding unemployment discrimination came in the wake of the Great Recession, as individuals who had been laid off and faced long-term unemployment found it increasingly difficult to return to work. In 2011, President Obama advocated the swift passage of the American Jobs Act, which, among other measures, would have prohibited discrimination against the unemployed under federal law. The bill stalled in Congress and was ultimately unsuccessful; Obama followed up with a 2014 Presidential Memorandum directing federal agencies not to discriminate against the long-term unemployed in making hiring decisions.

In 2014, the California Assembly also passed a bill that would have prohibited employers from asking an applicant to disclose his or her employment status before determining that the employee met minimum qualifications. The California measure also barred employers publishing job postings indicating that current employment is a requirement for the job. California Governor Jerry Brown vetoed the bill, stating that while he supported the intent of the bill, "it could impede the state's efforts to connect unemployed workers to prospective employers as currently drafted."

Some states and municipalities have been successful in passing legislation against unemployment discrimination. In 2011, New Jersey became the first state to pass a law addressing unemployment discrimination. New York City, Washington D.C., Chicago, Madison, Wisconsin, and the State of Oregon have since followed suit. Below we provide a brief overview of some of these provisions, along with examples of situations in which employers could violate these laws:

New York City

The New York City Law, passed in 2013 as an amendment to the New York City Human Rights Law, prohibits employers and employment agencies from:

- Representing that an available job is unavailable because of a person's unemployment;

- Basing an employment decision regarding hiring, compensation or the terms, conditions or privileges of employment on an applicant's unemployment.
- Unless otherwise permitted by city, state or federal law, publishing an advertisement for a job vacancy that states or indicates that:
  - Current employment is a requirement or qualification for the job; or
  - An employer will not consider individuals for employment because of their unemployment.

The bill does, however, contain some exceptions allowing unemployment discrimination by employers. Specifically, the law allows employers to consider "substantially job-related qualifications, including, but 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." Further, employers are permitted to advertise for such job-related qualifications, as well as to publish job postings specifying that only employees currently employed by that specific employer will be considered. N.Y.C. Admin. Code § 8-107(21).

Under the New York City law, the following conduct may serve as examples of unlawful unemployment discrimination:

- Statements made by an employer during an interview that they are concerned an applicant won't be able to "keep up" because he or she has been "out of work for too long."
- Publishing an advertisement that requires all applicants to submit "proof of continuous employment within the past year."
- Statements by a recruiter that they will not be able to work with or place an unemployed applicant because he or she is not currently working.

The New York City law is thought to contain the most expansive protections for unemployed job-seekers, as the law is the only one in the country to give individuals who have been subjected to unemployment discrimination a private right of action to file a lawsuit and bring their own claims against an employer in court. The law also permits employees to file a complaint with the New York City Commission on Human Rights, which has the authority to impose civil penalties of up to $125,000 for violators and $250,000 for willful violations, as well as grant injunctive remedies.

New Jersey

New Jersey's anti-discrimination law pertains only to advertisements and job postings, and prohibits employers from publishing:

- Any provision stating that the qualifications for a job include current employment;
- Any provision stating that the employer or employer's agent, representative, or designee will not consider or review an application for employment submitted by any job applicant currently unemployed; or
- Any provision stating that the employer or employer's agent, representative, or designee will only consider or review applications for employment submitted by job applicants who are currently employed.

Employers are, however, permitted to publish advertisements which specify that all applicants must have

a certain level of educational or field experience, or stating that only applicants currently employed by the employer itself will be considered.

The New Jersey Law prohibiting unemployment discrimination does not create a private right of action (that is, people cannot sue employers themselves based on the law). Rather, the Director of the Division of Wage and Hour Compliance may impose administrative penalties ($1,000 for the first violation, $5,000 for the second, and $10,000 for each subsequent violation) if he or she finds that an employer has violated the law. N.J. Stat. Ann. § 34:8B-1 (West).

Washington, D.C.

Likewise, D.C. amended their municipal code in 2012 to prohibit discrimination based on an individual's employment status. The new provision makes it unlawful for employers and employment agencies to:

- Fail or refuse to consider for employment, or fail or refuse to hire, an individual as an employee because of the individual's status as unemployed; or
- Publish, in print, on the Internet, or in any other medium, an advertisement or announcement for any vacancy in a job for employment that includes:
  - Any provision stating or indicating that an individual's status as unemployed disqualifies the individual for the job; or
  - Any provision stating or indicating that an employment agency will not consider or hire an individual for employment based on that individual's status as unemployed.

While the law prohibits discrimination on the basis of unemployment status, employers are permitted to require professional licenses and educational or professional experience; examine the reasons underlying an individual's unemployment; and publish advertisements stating that only current employees of that employer will be considered for employment.

Unlike the New York law, however, the D.C. Code does not provide for a private right of action. Rather, the D.C. Commission on Human Rights may impose civil penalties ($1,000 for the first violation, $5,000 for the second, and $10,000 for each subsequent violation) if it finds that an employer has violated the law. D.C. Code §32-1362 (7).

Have you been unfairly discriminated against due to unemployment? Contact Lawrence M. Pearson of Wigdor LLP at (212) 257-6800.

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