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## District of Columbia First in Nation to Ban Discrimination Based on (Un)Employment Status

By Nancy Delogu and Jennifer Thomas

The District of Columbia City Council and Mayor Vincent Gray have enacted a first-of-its-kind law protecting jobless individuals from discrimination in the hiring process. The new law prohibits employers and employment agencies from discriminating against potential employees based on their status as unemployed, and it is the first in the United States to both prohibit employers from considering the employment status of potential employees and provide whistleblower protections for current employees who report employer violations. Although the law does not give aggrieved individuals a private right of action to enforce the law, civil penalties are available and may be assessed against noncompliant employers by the D.C. Office of Human Rights. The Unemployed Anti-Discrimination Act of 2012 ("the Act") was signed by Mayor Vincent Gray on March 19, 2012, and has been in effect since May 31, 2012. Regulations implementing the Act are anticipated as well.

### Scope of the Act

The Act defines "employer" broadly to include any employer with at least one employee, other than a family member or a domestic household servant, within the District of Columbia. The definition includes any person acting in the interest of the employer, directly or indirectly. The Act's prohibitions also apply to "employment agencies," defined as any person regularly undertaking, with or without compensation, to procure employees for an employer. "Potential employees" covered by the Act are those individuals who have applied to an open position of employment located within the District of Columbia. Finally, the term "status as unemployed" refers any person who, at the time of application for employment, does not have a job and is available and looking for work.

### Prohibited Actions and Whistleblower Protections

The Act makes it an unlawful employment practice for an employer or employment agency to refuse to hire or consider for hire a potential employee based on his or her status as unemployed. The Act also specifically prohibits employers and employment agencies from publishing, in any medium, an advertisement for a job opening that states that an applicant's status as unemployed disqualifies the applicant from employment or from consideration for an available position.

Unlike similar statutes in effect in New Jersey and Oregon, the Act recognizes the unemployed as a protected class and contains broad protections for whistleblowers similar to those found in other anti-discrimination statutes. The whistleblower protections specifically state that employers may not restrain or deny current employees' exercise of rights conferred by the Act and further may not retaliate against employees who: (1) oppose employer practices that violate the Act; (2) file charges against their employer for violations; (3) provide, or are about to provide, information in connection with any inquiry or proceeding relating to a right conferred by the Act; or (4) testify, or are about to testify, in any inquiry or proceeding related to rights conferred by the Act.

## Excepted Activities

The new law provides three important exceptions to the general rule prohibiting consideration of an applicant's employment status in connection with hiring decisions. The first exception permits employers to consider the *reasons* underlying a potential employee's status as unemployed in assessing the applicant's ability to perform a job or "in otherwise making employment decisions" about the applicant. The second exception permits employers to include in advertisements for job openings a list of necessary qualifications for the position, including requirements that applicants hold a current and valid professional or occupational license; hold a certificate, registration, permit or other credential; or possess a minimum level of education, training or professional, occupational or field experience. The final exception allows employers to indicate in published (presumably internal) advertisements that only the employer's current employees will be considered.

## Enforcement and Civil Penalties

As noted above, the Act does not create a private cause of action to enforce its protections. Instead, aggrieved employees and potential hires may file claims with the District of Columbia's Office of Human Rights (the "Agency"). The Act requires the Agency to investigate all claims and to provide a response to the aggrieved party within one month of the date of filing.

The Agency must assess civil penalties against employers and employment agencies determined to have violated the Act. Employers will be assessed a civil penalty of \$1,000 per claimant for an initial violation, \$5,000 per claimant for a second violation, and \$10,000 per claimant for each subsequent violation, not to exceed a total of \$20,000 per violation. The Agency is charged with collecting civil penalties from employers and then distributing them to the employees or potential employees who filed the claim.

## Unemployment Protections a Trend?

While the District of Columbia is not the only jurisdiction to create legislative protections for the unemployed, the Act offers the most expansive protections for them. New Jersey and Oregon also have enacted laws that prohibit employers from discriminating against unemployed applicants. Both states' statutes prohibit employers from stating in job vacancy advertisements that unemployed individuals need not apply, and neither statute creates a private cause of action for aggrieved employees or potential employees against employers that violate those laws' protections. Unlike the District of Columbia, New Jersey and Oregon do not designate unemployed status as a protected class, and neither state provides whistleblower protections for current employees.

In the last year, several other states, including California, Connecticut, Missouri, and Maryland have considered legislation prohibiting unemployment discrimination. As long as unemployment remains high, state legislatures are likely to continue to visit this issue. And, although there are no federal statutes or regulations specifically prohibiting discrimination on the basis of one's employment status, Congress did recently consider legislation providing those protections as part of President Barack Obama's American Jobs Act. Also, the U.S. Equal Employment Opportunity Commission held hearings last year to help the agency evaluate the effects of unemployment discrimination on racial and ethnic minorities, as well as women and individuals with disabilities.

## Employer Compliance

To ensure compliance with the Act, covered employers and employment agencies within the District of Columbia are advised to review all current job advertisements and job advertising templates, and delete any references to employment status. Covered employers and employment agencies also should discontinue screening methods that disqualify applicants on the basis of their employment status and should communicate the changes to those making hiring decisions. Employers also should thoroughly review their hiring policies and eliminate any

provisions relating to a preference for applicants that are currently employed. Finally, it is recommended that employers counsel employees who will conduct interviews to avoid making reference to a potential employee's unemployed status either verbally or in written interview evaluations, unless such reference is directly related to the applicant's ability to perform the available position.

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