



NEW YORK
CITY BAR

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REPORT ON LEGISLATION BY THE CIVIL RIGHTS COMMITTEE

Int. No. 0814-2012 (A Version)

A Local Law to amend the administrative code of the city of New York, in relation to prohibiting discrimination based on an individual's unemployment.

THIS BILL IS OPPOSED

The New York City Bar Association urges the Council to let stand Mayor Bloomberg's veto of Int. 814-A of 2012, relating to unemployment discrimination. The Association, which includes as members more than 24,000 attorneys, is dedicated to promoting sound legal and social policy and often comments on City Council legislation.

The Association shares the Council's concerns for the plight of job seekers who are unemployed, and supports a key component of the bill that would help to address that plight: a ban on job advertisements stating that current employment is a requirement for a job or that unemployed applicants will not be considered for a job.

However, we are concerned that other provisions of the bill might worsen, rather than alleviate, the difficulties experienced by the unemployed. In particular, we believe that the bill does not provide sufficiently clear guidance to those who would be required to comply with, rely on, enforce, and adjudicate the law, thus increasing uncertainty and compliance costs without necessarily enhancing employment opportunities for the intended beneficiaries.

First, we anticipate substantial uncertainty to surround the definition of "unemployed" or "unemployment" in proposed Sec. 8-102(27), which includes "not having a job." Would the self-employed—including, for example, free-lance or contract workers, or those working in a series of very short term positions—qualify as "unemployed" under this definition? If so, would the self-employed be covered only so long as they were not working on an assignment on the day the employer made its decision? Similarly, would those on strike or lockout qualify as "unemployed" for purposes of the law? (Strikers in New York may collect unemployment compensation after a waiting period.)

Second, we are concerned that the bill as drafted does not fully address the ways in which unemployment may differ from other prohibited bases currently included in the City Human Rights Law. For example, proposed Sec. 8-107(21)(a)(1) states that "an employer shall not base an employment decision with regard to hiring, compensation or the terms, conditions or privileges of employment on an applicant's unemployment." Under current law, discrimination on a prohibited basis may not play "any role" in a decision, meaning that an employer with

“mixed motives”—including both lawful and unlawful ones—has violated the law, even if it would have made the same decision in the absence of any unlawful motives. Given this rule, the inclusion of unemployment as a prohibited basis may have unintentional consequences, as some differences in treatment related to unemployment may be appropriate, particularly in the setting of “the terms, conditions or privileges of employment.” An employer that offers enhanced compensation to lure a currently employed individual, for example, may be liable for discrimination if such an enhancement is not offered to otherwise similar, but currently unemployed, applicants.

Third, Sec. 8-107(21)(b)(1)(b) would permit a prospective employer to “inquir[e] into the circumstances surrounding an applicant’s separation from prior employment.” Without some explicit limitation to inquiries not otherwise prohibited by law, this provision may invite disability-related inquiries, such as reasonable accommodation issues.

Those who are unemployed deserve protections, but the uncertainties listed above should be addressed more fully before the City Human Rights Law is amended to include unemployment as a prohibited basis. We would welcome the opportunity to work further with the Council to address these concerns.

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