



New State Law Further Regulates Hiring

Insights

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Billed as a means to protect out-of-work Oregonians from discrimination, the Oregon legislature passed a new law that prohibits overt unemployment discrimination in job advertisements. Oregon has become only the second state in the country joining New Jersey to prohibit this practice.

The New Oregon Law

Unemployment discrimination occurs when an employer only considers currently employed applicants for a position. This may take the form of job advertisements noting that the "unemployed need not apply," or simply flow from a decision maker's informal policy of only considering employed applicants for a position.

Fortunately, the new law is rather limited in scope. It simply prohibits employers from publishing job advertisements that include language indicating that unemployed individuals should not apply for the job or that they will not be considered for the position. An employer whose job advertisements feature language such as "unemployed applicants not considered" or "all applicants must currently be employed" would violate the law. But the new law does NOT bar employers from considering an applicant's employment status during the course of the hiring process.

The limited available remedies also weaken the effect of the law. Disgruntled applicants may not sue you directly. Instead, only the Commissioner of the Bureau of Labor and Industries (BOLI) can pursue a violation. The law also caps any penalties the BOLI commissioner may assess at \$1,000 per violation, with such penalties going to the government rather than individual applicant.

The law took effect upon Gov. Kitzhaber's signing, which occurred on March 27, 2012.

Liability Risks

On the other hand, that sigh of relief shouldn't be too great as there are other, more significant risks stemming from unemployment discrimination. "Employment status" is not yet a protected class, and an employer can generally treat applicants differently because of their lack of employment without violating the law. But employers who favor employed applicants during the hiring process may still be liable under various state and federal anti-discrimination laws (such as Title VII) *if* the practice has the effect of disproportionately hurting members of a protected class (such as people of a certain race or ethnicity).

This is known as a disparate impact and can occur when a company rule or practice that appears to treat all employees the same actually falls more harshly on one group than another. Employers often adopt these blanket policies with the best intentions and without the goal of harming a particular group. Unfortunately, the lack of discriminatory intent does not protect employers from liability; courts look to the effect of the policy rather than the intent behind it. Therefore, innocent inquiries and policies can have significant legal ramifications for unwitting employers.

A company policy that technically abides by Oregon's new law but nonetheless takes an applicant's employment status into account could violate both Oregon and federal law if it has the effect of discriminating against a protected class. The U.S. Equal Employment Opportunity Commission (EEOC) has questioned the use of "current employment as a sign of quality performance" and, moreover, suggests that the practice of screening out the unemployed may have an unlawful negative effect on women, certain racial and ethnic minorities, and people with disabilities.

The Future: Broader Laws?

Oregon is once again at the forefront of what may become a national trend. Several other states are considering comparable legislation. And, on the federal level, the American Jobs Act, a proposed package of policies designed to lower the national unemployment rate, includes a provision addressing unemployment discrimination. The proposed law not only prohibits job postings with "unemployed need not apply" language, it goes further and creates a new protected class in the unemployed, by making it illegal to refuse to hire an applicant because he or she is unemployed.

Although the law has been stalled in Congress since late 2011 and is highly unlikely to pass in its current form, it still signifies a growing trend towards providing the unemployed with additional legal protections. Fisher Phillips will monitor this developing area of law and will continue to provide updates throughout the year.

For more information about any of the laws discussed in this Legal Alert, contact any attorney in the Portland office of Fisher Phillips at (503) 242-4262.

This Legal Alert presents information about a specific new law. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.