A Message to NYC Employers: Update Your Hiring Practices

In recent years, New York City and New York state have enacted legislation outlawing employment practices previously deemed acceptable. Many of these changes affect the first step in the employment relationship, hiring, which employers often overlook. Without appropriate preventative policies in place to account for recent developments, employers risk costly claims from a motivated pool of rejected applicants.

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When considering best practices in employee relations, employers often overlook their significant legal obligations during the hiring process. Perhaps this lack of focus is not surprising, since a relatively small percentage of employment-related claims arise out of the recruiting stage. By way of example, among charges filed with the Equal Employment Opportunity Commission, just 1 out of every 40 arises from the hiring process. See ***Bases by Issue (Charges Filed with EEOC) FY 2010-FY2018***, EEOC. But, particularly for employers in New York City, the failure to implement best practices in recruiting can be a costly oversight due to requirements from several recently-enacted laws. Below, we discuss these relatively recent requirements, and how employers can best structure their hiring practices to comply with their obligations and avoid potential complaints, investigations and litigation.

Salary History

It has long been customary to ask applicants for their current salaries, on a job application, during the interview process, or both. However, in an effort to

avoid perpetuating pay inequity, a growing number of jurisdictions across the country have enacted prohibitions on asking applicants about their current salaries. Following this trend, New York City and New York state have both recently passed laws prohibiting employers from asking about an applicant's salary history or retaliating against an applicant who refuses to provide salary history information. An employer may only consider the applicant's salary history, and verify such information, if the applicant volunteers it without prompting. See ***Salary History Law: Frequently Asked Questions***, New York City Commission on Human Rights.

Employers are also not permitted to conduct online searches, or use other means, to determine an applicant's salary history. While employers can research general information about industry compensation standards, they may not search for specific information about individual salary history. Id.

Update Employment Applications. To ensure compliance, employers should first review their employment applications, and remove any requests for this information. Importantly, employers who use job applications across multiple jurisdictions cannot comply with the New York City law by including such salary history questions but directing applicants in New York City not to answer them. Id.

Employers are not permitted to ask previous employers or references about the applicant's salary history. This prohibition has implications for employers who provide references: an employer can be held liable for violating the salary history ban if it intentionally aids and abets a violation of the law. Id.

Train Hiring Staff. Employers should train all individuals who have contact with applicants that it is unlawful to ask about the applicant's salary history. Any interview scripts should be reviewed and updated accordingly. This

training is particularly important for experienced interviewers who may be in the practice of asking about salary history.

Internal Promotions/Transfers for Current Employees. Effective Jan. 6, 2020, it is additionally illegal for employers in New York state to inquire about salary history for any applicant, or existing employee who applies for an internal promotion or transfer. However, employers may consider salary history information already in their possession for existing employees seeking promotion or transfer, as long as they do not ask existing employees for this information. ***Salary History Ban—What You Need To Know***, New York State.

Unemployment Status

Much like inquiries regarding salary history, questions on applications and during interviews about periods of unemployment have long been fairly standard. However, many employers in general, and interviewers in particular, are unaware that New York City prohibits employers from making a decision with regard to hiring, compensation, or the terms and conditions of employment based on an applicant's unemployment status. N.Y.C. Admin. Code §8-107(21)(a)(1)(b). Nothing in this provision, however, prohibits employers from considering substantially job-related qualifications, such as valid professional or occupational licenses, minimum levels of education and training, professional, occupational, or field experience. N.Y.C. Admin. Code §8-107(21)(b)(2). Employers may also inquire into the circumstances surrounding an applicant's separation from prior employment. N.Y.C. Admin. Code § 8-107(21)(b)(1).

New York City provides a private right of action for applicants who allege that they were discriminated against based on unemployment status, opening the

door to recovery for compensatory damages, punitive damages, and attorney fees. Therefore, exposure to a legitimate claim of unemployment status discrimination can quickly become costly.

Employers should make sure that employment applications do not ask about unemployment status or any gaps in employment, while simultaneously training interviewers that questions about employment gaps are inappropriate and should be avoided.

Hairstyle

Race discrimination on the basis of hair has been a persistent problem for Black applicants and employees. For example, as recently as 2014, the nation's largest employer—the U.S. Department of Defense—had a general ban on Black hairstyles, including afros, cornrows, and braids. ***Legal Enforcement Guidance on Race Discrimination on the Basis of Hair***, NYC Commission on Human Rights. In New York City, these hairstyles are considered protected racial characteristics because they are an "inherent part of Black identity." Id.

Protected Characteristics. In 2019, the New York City Commission on Human Rights issued guidelines stating that grooming or appearance policies that "ban, limit, or otherwise restrict natural hair or hairstyles associated with Black people generally violate the law." Id. This prohibition includes the right to maintain natural hair, treated or untreated hairstyles, such as cornrows, braids, Bantu knots, fades, Afros, and the right to keep hair in an uncut or untrimmed state. Id. Employers may impose a ban or restriction on hairstyle only where they have a legitimate health and safety concern, and only after considering alternative methods to address that concern. Id.

Employers should review their hiring and grooming policies and practices to make sure that they do not inquire about or make decisions based on hairstyle (unless they satisfy the narrow exception noted above). Perhaps as importantly, employers should train interviewers to avoid commenting on, or inquiring about, an applicant's hairstyle. Such comments and questions, even when not related directly to the hiring decision, can lead to discrimination claims.

Arrests and Convictions

In the United States, approximately 70 million adults have criminal records. ***NYC Commission on Human Rights Legal Enforcement Guidance on the Fair Chance Act, Local Law No. 63 (2015) Revised 5/24/2019***, New York City Commission on Human Rights (Local Law No. 63). For context, approximately the same number of Americans have four-year college degrees. ***Just Facts: As Many Americans Have Criminal Records as College Diplomas***, Brennan Center for Justice. Many employers previously requested information about convictions on employment applications, which New York City outlawed with the Fair Chance Act (except for certain government employers).

Under the Fair Chance Act, employers cannot inquire about an applicant's criminal history during the interview process, or attempt to obtain such information through other means. Only after an employer has extended a conditional offer of employment may the employer ask about an applicant's criminal history or run a background check. However, an employer may never ask about a non-conviction. Local Law No. 63, supra.

In order to revoke a conditional offer of employment based on a conviction, an employer must demonstrate that it can:

(1) draw a direct relationship between the applicant's conviction history and the prospective job; or

(2) show that employing the applicant "would involve an unreasonable risk to property or to the safety or welfare of specific individuals to the general public" based on the factors listed in Article 23-A of the New York State Correction Law. Id. There is no presumption that a previous conviction has a direct relationship to the prospective job, or poses an unreasonable risk; in each case, employers bear the burden of demonstrating that the exception exists. If the employer can demonstrate a direct relationship or unreasonable risk, it must disclose to the applicant a written copy of any inquiry it conducted into the applicant's criminal history, share with the applicant its Article 23-A analysis (also referred to as the "Fair Chance Notice"), and allow the applicant three business days from receipt of the inquiry and analysis to respond to the concerns raised. Id. Only after completing the process may the employer revoke a conditional offer of employment based on an applicant's criminal conviction.

Credit History

Under the Stop Credit Discrimination in Employment Act (SCDEA), it is illegal for the vast majority of employers in New York City—excluding certain government agencies—to request or use the consumer credit history of an applicant or employee for the purpose of making any employment decision, including hiring. ***Stop Credit Discrimination in Employment Act: Legal Enforcement Guidance***, New York City Commission on Human Rights. Employers may not request consumer credit history from applicants, either orally or in writing, or request or obtain an applicant's consumer credit history from a consumer reporting agency. The act of requesting this information is

itself unlawful, regardless of whether it leads to an adverse employment action. Id.

While claims for violating the SCDEA are rare, penalties can be severe. The New York City Commission on Human Rights can impose penalties up to $125,000 for inadvertent violations of the law, and up to $250,000 for violations resulting from willful, wanton or malicious conduct.

Implement Preventative Policies

Employers in New York City should promptly correct any issues they identify in their current hiring processes. By its nature, a claim arising from the hiring process typically involves an applicant who has been rejected for a job, is motivated by that negative experience, and has little to lose vis-à-vis their relationship with the employer by engaging in a protracted investigation and/or litigation. The confluence of those factors can create a particularly problematic scenario, and employers should accordingly take action to prevent claims before they ever arise.

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