LABOR AND EMPLOYMENT LAW UPDATE

IS IT UNLAWFUL TO SHUN UNEMPLOYED JOB-SEEKERS IN RECRUITING AND HIRING?

According to the Bureau of Labor Statistics, the U.S. unemployment rate in April 2011 was 9%, but the rates were significantly higher for certain groups:

* African Americans – 16.1%
* Disabled persons – 14.5%
* Hispanics – 11.8%
* Women with families – 11.7%

Given these statistics, it is not surprising that the U.S. Equal Employment Opportunity Commission ("EEOC") has been on the lookout for potentially discriminatory recruiting and hiring practices by employers. In the past several months, this focus has included employers which shun unemployed job-seekers in favor of employed job-seekers. Amongst the employer practices being scrutinized are (1) ads, job postings and recruiter searches which seek to discourage or bar inquiries from the jobless, and (2) the use of unemployment status as a negative criterion in hiring decisions.

So what does this attention mean for employers who prefer or restrict recruitment and hiring to candidates employed elsewhere? Under appropriate circumstances, it could mean potential liability under discrimination laws enforced by the EEOC.

HOW PREVALENT ARE THESE RECRUITING AND HIRING PRACTICES? There are no statistics which address this question, but the EEOC held a public meeting on February 11, 2011 to discuss "the emerging practice of excluding unemployed persons from applicant pools." Although testimony from invited panelists conflicted regarding the extent of these practices, some panelists described the practices as "fairly common" and cited specific examples:

* A posting on a recruiting website which said "No Unemployed Candidates Will be Considered at All."

* A posting on a recruiting website which stated the company would "not consider/review anyone NOT currently employed regardless of the reason."

WHAT PROTECTED GROUPS MAY HAVE POTENTIAL CLAIMS? At the February 11th meeting, the EEOC heard from panelists regarding four protected groups which may be affected by recruiting and hiring practices which snub the jobless:

* Racial and ethnic minorities, including Hispanics, African Americans, Native Americans and college-educated Asian Americans, protected by Title VII of the Civil Rights Act of 1964 ("Title VII") and the Civil Rights Act of 1866;

* Women protected by Title VII;

* Disabled individuals protected by the Americans with Disabilities Act and the Rehabilitation Act of 1973; and

* Persons over the age of 40 protected by the Age Discrimination in Employment Act.

HOW CAN A RECRUITING PRACTICE WHICH BARS OR DISCOURAGES INQUIRIES FROM UN-EMPLOYED APPLICANTS BE UNLAWFUL? A recruiting practice which does not openly bar or discourage applicants from a protected group may be unlawfully discriminatory under at least two theories:

"CHILLING": A practice may be unlawful if it is shown to be used:

* to intentionally prevent inquiries from persons of a protected group, or

* despite the knowledge that the practice has the affect of barring or discouraging inquiries from persons of a protected group.

SKEWED APPLICANT POOL: A practice may be unlawful – even without proof of discriminatory intent – if it is proven to result in an applicant pool in which a protected group is disproportionately and significantly under-represented and either:

* the employer fails to show that the practice is "job related for the position in question and consistent with business necessity", or
* it is proven that the employer refused to adopt an available alternative recruiting practice that has less disparate impact and serves the employer's legitimate needs.

HOW CAN THE USE OF UNEMPLOYMENT STATUS AS A NEGATIVE HIRING CRITERION BE UNLAWFUL? A criterion which does not, on its face, discriminate against a legally protected group may be discriminatory under at least three theories:

PRETEXT: A hiring criterion can be unlawful if it is proven to be a pretext to mask intentional hiring discrimination against persons from a protected group.

MIXED MOTIVE: A criterion can be unlawful even if it is motivated by a legitimate nondiscriminatory reason if it is shown that an additional reason for the criterion is to limit or exclude hiring persons from a protected group.

DISPARATE IMPACT: A criterion may be unlawful – even without proof of discriminatory intent – if it is proven to have the effect of disproportionately and significantly excluding persons of a protected group and either:

* the employer fails to show that the practice is "job related for the position in question and consistent with business necessity", or
* it is proven that the employer refused to adopt an available alternative hiring criterion that has less disparate impact and serves the employer's legitimate needs.

IS THERE A CORRELATION BETWEEN JOBLESSNESS AND JOB QUALIFICATION? None of the panelists who testified at the February 11th meeting defended the examined recruiting and hiring practices as being job related or consistent with business necessity. Indeed, the legitimate reasons for not recruiting or hiring an unemployed candidate seemingly relate to individual candidates rather jobless candidates as a whole.

WHAT IS THE LIKELIHOOD THE EEOC WILL BRING LITIGATION AGAINST EMPLOYERS WHICH SNUB UNEMPLOYED JOB-SEEKERS? The burden of proving that a recruiting or hiring practice discriminates against persons of a protected group is a formidable one. The EEOC, however, has already filed discrimination suits against employers which use poor credit history and criminal background as hiring criteria. The agency is likely reviewing charges of discrimination for the proof required to bring a suit against an employer which exclusively recruits and hires candidates employed elsewhere.

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