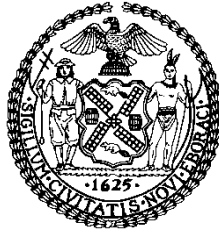


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## THE COUNCIL

### Committee Report of the Governmental Affairs Division

Robert Newman, Legislative Director  
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#### COMMITTEE ON CIVIL RIGHTS

Hon. Deborah Rose, Chair

**Wednesday, March 13, 2013**

**Int. No. 814-A:**

By Council Members Comrie, Gentile, the Speaker (Council Member Quinn), Barron, Cabrera, Chin, Dickens, Dromm, Eugene, Ferreras, Gonzalez, Jackson, James, Koo, Koppell, Lander, Levin, Palma, Reyna, Rose, Vann, Williams, Rodriguez, Foster, Arroyo, Van Bramer, Vacca, Mark-Viverito, Garodnick, Brewer, Wills, Koslowitz, King, Lappin, Gennaro, Ulrich and Mealy

**Title:**

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.

**M 1047:**

Communication from the Mayor – Mayors veto and disapproval message of Introductory Number 814-A, in relation to prohibiting discrimination based on an individual's unemployment.

## **I. Introduction**

On Wednesday, March 13, 2013, the Committee on Civil Rights, chaired by Council Member Deborah Rose, will meet to vote on Introductory Bill Number 814-A (“Int. No. 814-A”), 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, and to file the veto message of Mayor Michael Bloomberg, M 1047.

The Committee held a hearing on the original introduction, Introductory Bill Number 814 (“Int. No. 814”), a Local Law to amend the administrative code of the city of New York, in relation to prohibiting discrimination based on one’s unemployment status, on June 20, 2012. On January 22, 2013, the Committee passed a revised version of the bill, Proposed Introductory Bill No. 814-A (“Proposed Int. No. 814-A”), 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. The legislation was then passed by the Council on January 23, 2013 by a vote of 44 in the affirmative and four in the negative. On February 22, 2013, the Mayor issued a message of disapproval, vetoing the legislation. That veto message was formally accepted by the Council at its stated meeting held on February 27, 2013.

The question before the Committee is whether Int. No. 814-A should be re-passed notwithstanding the objections of the Mayor.

## **II. Background**

According to the New York State Department of Labor, the unemployment rate in New York City in November 2012 was 8.7 percent, the highest of any metropolitan area in the state.<sup>1</sup> Perhaps even more troubling, at 11.8 percent, the Bronx has the highest unemployment rate out

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<sup>1</sup> NYS Department of Labor, *Employed, Unemployed, and Rate of Unemployment by Place of Residence for New York State and Major Labor Areas*, <http://www.labor.ny.gov/stats/pressreleases/prtbur.pdf> (last visited January 17, 2013).

of any county in the state.<sup>2</sup> Unemployment rates among communities of color have historically been significantly higher. For example, a 2010 investigation by the New York City Comptroller found that, in the third quarter of 2010, the unemployment rate for blacks and Hispanics in the city was 15.3 and 13.3 percent, respectively, compared to 5.2 percent for Whites.<sup>3</sup>

Unfortunately, the unemployed are increasingly becoming victims of discrimination as companies screen out candidates on the basis of their unemployment status. In a 2011 examination of online job posting websites, the National Employment Law Project (“NELP”) found over 150 advertisements over a four-week period that included language that explicitly required that the candidates be currently employed.<sup>4</sup> According to NELP, excluding unemployed candidates from consideration allows employers to shrink the pool of prospective employees at a time when there are four times as many unemployed people as there are available positions.<sup>5</sup> NELP also reported that some employers exclude unemployed jobseekers from consideration based on the unfair assumption that those who are unemployed lack the work ethic needed for the job.<sup>6</sup> This discriminatory selection process can have a particularly debilitating effect on groups that already suffer from high rates of unemployment, such as communities of color and recent military veterans. While some of the businesses cited in the NELP report disavowed the language used in the advertisements, others defended the policy, stating that the preferred candidate is one that seeks new employment out of desire, not necessity.<sup>7</sup> Others justified the

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<sup>2</sup> NYS Department of Labor, *Counties Ranked by Unemployment Rate, November 2012*, [https://www.labor.ny.gov/stats/ur\\_rank.xls](https://www.labor.ny.gov/stats/ur_rank.xls) (last visited January 17, 2013).

<sup>3</sup> Press Release, Office of the NYC Comptroller, *Persistent Disparities in NYC Unemployment* (Oct. 28, 2010).

<sup>4</sup> National Employment Law Project, *Hiring Discrimination Against the Unemployed: Federal Bill Outlaws Excluding the Unemployed From Job Opportunities, as Discriminatory Ads Persist*, 2, <http://www.nelp.org/page/-/UI/2011/unemployed.discrimination.7.12.2011.pdf?nocdn=1> (last visited January 18, 2013) [hereinafter *NELP*].

<sup>5</sup> *Id.* at 5.

<sup>6</sup> *Id.*

<sup>7</sup> Tyler Kingkade, Jordan Howards, and Arthur Delaney, *Unemployment Discrimination: Who’s Afraid to Hire the Jobless?*, The Huffington Post, Aug. 8, 2011, <http://www.huffingtonpost.com/2011/08/11/unemployment->

policy based on the belief that the long-term unemployed lack “a stable job history and recent references.”<sup>8</sup>

Despite the fact that certain groups, such as blacks and Hispanics, are more dramatically impacted because of their unemployment status, the unemployed are not a protected class under federal law or under local laws in most parts of the country.<sup>9</sup> In an effort to address this gap in protections for workers, several jurisdictions have considered laws to protect the unemployed in the hiring process. New Jersey and Oregon have addressed this issue by passing laws that prohibit employers from using language in job advertisements that clearly excludes unemployed applicants.<sup>10</sup> The District of Columbia went further by not only barring discriminatory job advertisements, but also prohibiting employers from considering unemployment status when making employment decisions.<sup>11</sup> Additionally, under the District’s law, aggrieved individuals may make complaints with the District’s Office of Human Rights and they may receive damages.

Moreover, in July 2011, the United States Congress introduced the Fair Employment Opportunity Act of 2011, which prohibits employers from refusing to hire a person because he or she is unemployed and from including any exclusionary language in job advertisements.<sup>12</sup> Discrimination against the unemployed has also caught the attention of President Obama, who proposed similar protections for the unemployed when he announced his jobs bill in September

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[discrimination-slideshow\\_n\\_917641.html#s321678&title=Frankel\\_Staffing\\_Entry](#), (last visited January 18, 2013) [hereinafter *Afraid to Hire the Jobless*].

<sup>8</sup> Stephen Singer, *For long-unemployed, hiring bias rears its head*, USA Today, Mar. 26, 2012, <http://www.usatoday.com/money/economy/employment/story/2012-03-23/unemployment-discrimination/53783328/1> (last visited January 18, 2013).

<sup>9</sup> *Afraid to Hire the Jobless*, *supra* note 7.

<sup>10</sup> NELP, *supra* note 4, at 6.

<sup>11</sup> B.19-486, enacted Mar. 19, 2012, (on file with Committee Staff).

<sup>12</sup> NELP, *supra* note 4, at 6.

2011.<sup>13</sup> Some employers, however, resist efforts that would prohibit discrimination against the unemployed, expressing concern that such a law would risk exposing them to litigation in the hiring process.<sup>14</sup>

### **III. Testimony on Int. No. 814**

In order to address discrimination against the unemployed in New York City, Int. No. 814 was introduced into the City Council on March 28, 2012. Int. No. 814 amended the Human Rights Law to make it an unlawful discriminatory practice for employers to base employment decisions on the unemployment status of a current or prospective employee or to advertise a job vacancy that includes language that being currently employed is a job requirement or that unemployed applicants will not be considered. Int. No. 814 also included language explicitly permitting employers to request or use unemployment status information for an employment decision so long as it was substantially job related and the employer had a bona fide reason for doing so. Additionally, Int. No. 814 included language making it explicit that employers could inquire into the circumstances surrounding an individual's previous termination or demotion.

The Committee on Civil Rights held a hearing on Int. No. 814 on June 20, 2012, during which the Committee heard testimony in support of the Introduction from advocates and legal practitioners. For example, Mitchell Hirsch, an advocate for the unemployed from NELP, testified in support of the bill, saying it would “keep the doors of employment opportunity open to all qualified job-seekers regardless of their current employment status” and “send a strong message to employers, recruiters and staffing firms nationwide that it is time to stop all discriminatory practices

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<sup>13</sup> Robert Pear, *Obama Proposes Protecting Unemployed Against Hiring Bias*, NY Times, Sept. 26, 2011, [http://www.nytimes.com/2011/09/27/us/politics/obama-proposes-adding-unemployed-to-protected-status.html?\\_r=1](http://www.nytimes.com/2011/09/27/us/politics/obama-proposes-adding-unemployed-to-protected-status.html?_r=1) (last visited January 18, 2013).

<sup>14</sup> Jonathan Horn, *Unemployment discrimination bill clears another committee*, The San Diego Union-Tribune, Apr. 17, 2012, <http://www.utsandiego.com/news/2012/apr/17/unemployment-discrimination-bill-clears-another-co/> (last visited January 18, 2013).

that exclude unemployed workers.”<sup>15</sup> Karen Cacace, a Supervising Attorney in The Legal Aid Society’s Employment Law Unit, expressed support of the bill’s potential to protect job seekers from any unwarranted bias that employers may have against the currently or recently unemployed.<sup>16</sup> Advocates and legal practitioners noted the fact that the bill went beyond prohibiting discriminatory advertising, commenting that a prohibition on discriminatory job postings alone would be insufficient to address discriminatory actions by employers against the unemployed.<sup>17</sup> Specifically, they pointed out that recruiters are being told not to look at unemployed job applicants and companies are using screening software that contains keyword searches that ultimately eliminate the unemployed, both facts that make it essential to find a way to address the underlying problem.<sup>18</sup>

The Committee also received testimony from Bill Heinzen, Deputy Counselor to Mayor Bloomberg, who, on behalf of the Bloomberg Administration, supported the concept of prohibiting job postings and advertisements from indicating that the unemployed need not apply, with the caveat that employers needed to be free to “seek recent relevant work experience.”<sup>19</sup> Mr. Heinzen also expressed certain additional concerns about the proposed legislation.

#### **IV. Proposed Int. No. 814-A**

Following the June 20, 2012 hearing on Int. No. 814, several changes were made to address concerns raised by the Administration and to clarify any ambiguities about the rights and obligations of employers and job applicants under this bill. Changes to the bill are as follows:

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<sup>15</sup> Written Testimony of Mitchell Hirsch, National Employment Law Project, before the Committee on Civil Rights, 3 (June 20, 2012) (on file with Committee Staff).

<sup>16</sup> Written Testimony of Karen Cacace, Employment Law Unit, The Legal Aid Society, before the Committee on Civil Rights, 2 (June 20, 2012) (on file with Committee Staff).

<sup>17</sup> Int. No. 814, a Local Law to amend the administrative code of the city of New York, in relation to prohibiting discrimination based on one’s unemployment status, before the Committee on Civil Rights, 37, 40 (June 20, 2012) (testimony of Mitchell Hirsch, NELP, and Karen Cacace, The Legal Aid Society).

<sup>18</sup> *Id.* at 37 (testimony of Mitchell Hirsch, NELP).

<sup>19</sup> Written Testimony of Bill Heinzen, Deputy Counselor to the Mayor, Office of Mayor Bloomberg, 1 (June 20, 2012) (on file with Committee Staff).

- Int. No. 814 defined the term “unemployment status” as one’s “current or recent unemployment.” The Administration found the definition to be ambiguous, undefined, and an unnecessary expansion of the bill’s scope.<sup>20</sup> In order to address this concern and to make it clear who would be able to seek relief under these provisions of the Human Rights Law, the terms “unemployed” and “unemployment” are defined in Proposed Int. No. 814-A as “not having a job, being available for work, and seeking employment.”
- Int. No. 814 contained language prohibiting employers from basing employment decisions on an individual’s unemployment in the context of termination, promotion, demotion, and discipline. The prohibitions set forth in Proposed Int. No. 814-A are narrower, however, and would only apply to employment decisions related to hiring, compensation or the terms, conditions or privileges of employment.
- Int. No. 814 included an exemption for employers who consider unemployment status information where it is “substantially job related” and “where the employer has a bona fide reason for doing so.” In order to address any concerns that these are two different standards that provide inadequate guidance to employers,<sup>21</sup> this section has been changed. Proposed Int. No. 814-A only contains the “substantially job-related” standard.
- Recognizing that, unlike race, there might be valid reasons for an employer to consider an applicant’s unemployment, circumstances in which an employer would be permitted to consider an applicant's unemployment are set forth in Proposed Int. No. 814-A. Specifically, Proposed Int. No. 814-A would explicitly permit employers to consider, among other things, substantially job-related qualifications when making employment

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<sup>20</sup> *Id.* at 3.

<sup>21</sup> *Id.* at 4.

decisions; advertise job openings that include substantially job-related qualifications; give priority to applicants currently employed by the employer; and make employment decisions based on an applicant's actual experience.

- In order to harmonize the prohibition on unemployment discrimination with certain other laws, section three of Proposed Int. No. 814-A provides, among other things, that the provisions of the City Human Rights Law related to unemployment-based discrimination would not apply to certain employment actions taken by the City's Department of Citywide Administrative Services pursuant to the City's Charter or in administering the Civil Service Law and other applicable laws.
- Recognizing the fact that litigation, and its risk, are a more significant risk for smaller businesses, Proposed Int. No. 814-A would exempt businesses with fewer than four employees from being subject to private actions for unemployment based discrimination claims and disparate impact claims. These small businesses would, however, be subject to the prohibition against discriminatory advertising under Proposed Int. No. 814-A.
- Proposed Int. No. 814-A would give the Commission the authority to educate the public on their rights and obligations with regard to unemployment discrimination in order to ensure the adequate and appropriate dissemination of information.

#### **IV. Effective Date**

This local law would take effect 90 days after its enactment into law.

#### **V. Penalties**

Pursuant to Proposed Int. No. 814-A, an individual who believes that he or she has been unlawfully discriminated against on the basis of his or her unemployment may bring an action in



court for damages, injunctive relief and other appropriate remedies,<sup>22</sup> or make a complaint to the Commission on Human Rights.<sup>23</sup> Upon a finding that an employer has engaged in an unlawful discriminatory practice in violation of the City Human Rights Law, the Commission may issue an order to the employer to “cease and desist” the unlawful discriminatory practice.<sup>24</sup> In addition, the Commission could require the employer to hire a prospective employee; award back pay and front pay; or pay compensatory damages, among other things.<sup>25</sup> Failure to comply with such an order may result in a civil penalty of no more than \$50,000 and an additional civil penalty of no more than \$100 per day.<sup>26</sup> Should the Commission find that an employer engaged in an unlawful discriminatory practice, it may impose a civil penalty of \$125,000.<sup>27</sup> If the unlawful discriminatory practice resulted from the employer’s “willful, wanton or malicious act,” the Commission may impose a civil penalty of not more than \$250,000.<sup>28</sup> Should a person willfully violate an order of the Commission, he or she may be guilty of a misdemeanor that is punishable by imprisonment for not more than one year, or by a fine of not more than \$10,000, or by both.<sup>29</sup>

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<sup>22</sup> Admin. Code §8-502.

<sup>23</sup> Admin. Code §8-109.

<sup>24</sup> Admin. Code §8-120(a).

<sup>25</sup> *Id.*

<sup>26</sup> Admin. Code §8-124.

<sup>27</sup> Admin. Code §8-126(a).

<sup>28</sup> *Id.*

<sup>29</sup> Admin. Code §8-129.



Int. No. 814-A

By Council Members Comrie, Gentile, the Speaker (Council Member Quinn), Barron, Cabrera, Chin, Dickens, Dromm, Eugene, Ferreras, Gonzalez, Jackson, James, Koo, Koppell, Lander, Levin, Palma, Reyna, Rose, Vann, Williams, Rodriguez, Foster, Arroyo, Van Bramer, Vacca, Mark-Viverito, Garodnick, Brewer, Wills, Koslowitz, King, Lappin, Gennaro, Ulrich and Mealy

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.

Be it enacted by the Council as follows:

Section 1. Subdivision 5 of section 8-102 of chapter one of title eight of the administrative code of the city of New York, as amended by local law 39 of 1991, is amended to read as follows:

5. For purposes of subdivisions one, two, [and] three, subparagraph one of paragraph a of subdivision twenty-one, and paragraph e of subdivision twenty-one of section 8-107 of this chapter, the term "employer" does not include any employer with fewer than four persons in his or her employ. For purposes of this subdivision, natural persons employed as independent contractors to carry out work in furtherance of an employer's business enterprise who are not themselves employers shall be counted as persons in the employ of such employer.

§2. Section 8-102 of chapter one of title eight of the administrative code of the city of New York, as amended by local law number 36 for the year 2011, is amended by adding a new subdivision 27 to read as follows:

27. The terms "unemployed" or "unemployment" shall mean not having a job, being available for work, and seeking employment.

§3. Section 8-107 of chapter one of title eight of the administrative code of the city of New York, as amended by local law number 39 for the year 1991, is amended by adding a new subdivision 21 to read as follows:

21. Employment; an individual's unemployment. a. Prohibition of discrimination based on an individual's unemployment.

(1) Except as provided in paragraphs b and c of this subdivision, an employer, employment agency, or agent thereof shall not base an employment decision with regard to hiring, compensation or the terms, conditions or privileges of employment on an applicant's unemployment.

(2) Unless otherwise permitted by city, state or federal law, no employer, employment agency, or agent thereof shall publish, in print or in any other medium, an advertisement for any job vacancy in this city that contains one or more of the following:

(a) Any provision stating or indicating that being currently employed is a requirement or qualification for the job;

(b) Any provision stating or indicating that an employer, employment agency, or agent thereof will not consider individuals for employment based on their unemployment.

b. Effect of subdivision. (1) Paragraph a of this subdivision shall not be construed to prohibit an employer, employment agency, or agent thereof from (a) considering an applicant's unemployment, where there is a substantially job-related reason for doing so; or (b) inquiring into the circumstances surrounding an applicant's separation from prior employment.

(2) Nothing set forth in this subdivision shall be construed as prohibiting an employer, employment agency, or agent thereof, when making employment decisions with regard to hiring, compensation, or the terms, conditions or privileges of employment, from considering any substantially job-related qualifications, including but not limited to: a current and valid professional or occupational license; a certificate, registration, permit, or other credential; a

minimum level of education or training; or a minimum level of professional, occupational, or field experience.

(3) Nothing set forth in this subdivision shall be construed as prohibiting an employer, employment agency, or agent thereof from publishing, in print or in any other medium, an advertisement for any job vacancy in this city that contains any provision setting forth any substantially job-related qualifications, including but not limited to: a current and valid professional or occupational license; a certificate, registration, permit, or other credential; a minimum level of education or training; or a minimum level of professional, occupational, or field experience.

(4)(a) Nothing set forth in this subdivision shall be construed as prohibiting an employer, employment agency, or agent thereof, when making employment decisions with regard to hiring, compensation, or the terms, conditions or privileges of employment, from determining that only applicants who are currently employed by the employer will be considered for employment or given priority for employment or with respect to compensation or terms, conditions or privileges of employment. In addition, nothing set forth in this subdivision shall prevent an employer from setting compensation or terms or conditions of employment for a person based on that person's actual amount of experience.

(b) For the purposes of this subparagraph, all persons whose salary or wages are paid from the city treasury, and all persons who are employed by public agencies or entities headed by officers or boards including one or more individuals appointed or recommended by officials of the city of New York, shall be deemed to have the same employer.

c. Applicability of subdivision. (1) This subdivision shall not apply to: (a) actions taken by the New York city department of citywide administrative services in furtherance of its

responsibility for city personnel matters pursuant to chapter thirty-five of the charter or as a municipal civil service commission administering the civil service law and other applicable laws, or by the mayor in furtherance of the mayor's duties relating to city personnel matters pursuant to chapter thirty-five of the charter, including, but not limited to, the administration of competitive examinations, the establishment and administration of eligible lists, and the establishment and implementation of minimum qualifications for appointment to positions;

(b) actions taken by officers or employees of other public agencies or entities charged with performing functions comparable to those performed by the department of citywide administrative services or the mayor as described in paragraph one of this subdivision;

(c) agency appointments to competitive positions from eligible lists pursuant to subsection one of section sixty-one of the state civil service law; or

(d) the exercise of any right of an employer or employee pursuant to a collective bargaining agreement.

(2) This subdivision shall apply to individual hiring decisions made by an agency or entity with respect to positions for which appointments are not required to be made from an eligible list resulting from a competitive examination.

d. Public education campaign. The commission shall develop courses of instruction and conduct ongoing public education efforts as necessary to inform employers, employment agencies, and job applicants about their rights and responsibilities under this subdivision.

e. Disparate impact. An unlawful discriminatory practice based on disparate impact under this subdivision is established when: (1) the commission or a person who may bring an action under chapter four or five of this title demonstrates that a policy or practice of an employer, employment agency, or agent thereof, or a group of policies or practices of such an entity results

in a disparate impact to the detriment of any group protected by the provisions of this subdivision; and (2) such entity fails to plead and prove as an affirmative defense that each such policy or practice has as its basis a substantially job-related qualification or does not contribute to the disparate impact; provided, however, that if the commission or such person who may bring an action demonstrates that a group of policies or practices results in a disparate impact, the commission or such person shall not be required to demonstrate which specific policies or practices within the group results in such disparate impact; provided further, that a policy or practice or group of policies or practices demonstrated to result in a disparate impact shall be unlawful where the commission or such person who may bring an action produces substantial evidence that an alternative policy or practice with less disparate impact is available to such entity and such entity fails to prove that such alternative policy or practice would not serve such entity as well. A “substantially job-related qualification” shall include, but not be limited to, a current and valid professional or occupational license; a certificate, registration, permit, or other credential; a minimum level of education or training; or a minimum level of professional, occupational, or field experience.

§4. This local law shall take effect ninety days after it shall have been enacted into law.

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