

May 12, 2015

**New York City Commission on Human Rights
to Conduct Employment Discrimination
Investigations Using Undercover “Testers”**

On April 20, 2015, New York City Mayor Bill De Blasio signed a bill into law that requires the New York City Commission on Human Rights (the “Commission”) to investigate local employers for evidence of employment discrimination. Investigations will consist of “using matched pairs of testers who shall apply for, inquire about or express interest in the same job and who shall be assigned similar credentials but who shall differ in [a protected characteristic].” In other words, two undercover individuals selected by the Commission with similar credentials will apply for the same position, and the only meaningful difference between the two will be whether or not they have a particular protected characteristic. Protected characteristics include actual or perceived age, race, creed, color, national origin, gender, disability, marital status, partnership status, sexual orientation, alienage or citizenship status, or any other characteristic protected pursuant to the New York City Administrative Code. The Commission will then evaluate how the two testers fared during the hiring process to evaluate whether the tester with the protected characteristic was subjected to employment discrimination.

These investigations can result in tangible consequences: the law requires that any incident of actual or perceived discrimination that occurs during an investigation be referred to the Commission’s law enforcement bureau.

The law took effect immediately on April 20, 2015, and the first investigation must occur no later than October 1, 2015. The Commission is required to conduct at least five investigations within the next year,

*747 Third Avenue
New York, N. Y. 10017
Tel: 212-758-7600
www.cfk-law.com*

though the size and scope of each investigation is not clear, nor how the targets of the investigations will be selected.

In light of the new law, and as a matter of best practices, employers should examine their hiring practices to ensure they can withstand the scrutiny of a Commission investigation. It would be helpful, in response to a complaint from either the Commission or a disappointed applicant, to be able to show that all candidates were evaluated according to the same objective and relevant criteria, as opposed to subjective criteria or general impressions. Attention to these considerations may warrant updating applications and materials used during the hiring process and training employees on proper note taking and record keeping of interviews, as well as coordinating the questions asked of each candidate. A written record setting forth objective, specific reasons for employment decisions is often an employer's best defense against accusations of discriminatory hiring practices. However, the implementation of such safeguards should not discourage employers from considering a candidate's intangible qualities; it is often intangible factors that distinguish an acceptable candidate from a great one or foreshadow how well a candidate will adjust to the employer's particular work environment. Rather, employers must be prepared to identify and explain such intangible qualities in the context of hiring practices that simultaneously evaluate all candidates for a particular position based on the same objective criteria. Among other considerations, interviewers should make a practice of recording the observations they rely on when making these subjective judgments; commenting generically on "attitude," for example, will be unhelpful. Notes instead that reflect the applicant's actual behavior and presentation may be more helpful in explaining the reasons for the interviewer's recommendation or decision.

If you have any questions about the new law or your hiring practices, please contact Amanda M. Baker at (212) 758-7724, or any other attorney at the Firm.

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