

July 2014

## New York State Bans Discrimination Against Interns

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New York State amended its antidiscrimination law to prohibit discrimination against unpaid interns. Signed into law on July 22 and effective immediately, the amendment adds Section 296-c to the New York Executive Law, also referred to as the New York State Human Rights Law. The newly adopted provision makes it unlawful for an employer to do the following:

- Refuse to hire, bar, or discharge an individual from an internship because of that individual's age, race, creed, color, national origin, sexual orientation, military status, sex, disability, predisposing genetic characteristics, marital status, or domestic violence victim status
- Discriminate against an intern by "receiving, classifying, disposing, or otherwise acting upon" applications for internships because of age, race, creed, color, national origin, sexual orientation, military status, sex, disability, predisposing genetic characteristics, marital status, or domestic violence victim status
- Sexually or otherwise harass an intern or create an offensive or hostile environment based on age, race, creed, color, national origin, sexual orientation, military status, sex, disability, predisposing genetic characteristics, marital status, or domestic violence victim status
- Compel an intern who is pregnant to take a leave of absence *unless* the pregnancy prevents the intern from performing the duties of the position in a reasonable manner
- Advertise or use any application that classifies or limits internship opportunities on the basis of age, race, creed, color, national origin, sexual orientation, military status, sex, disability, predisposing genetic characteristics, marital status, or domestic violence victim status *unless* based on a bona fide occupational qualification
- Discharge, expel, or otherwise discriminate against any person who opposed unlawful practices, filed a complaint, or testified or assisted in a proceeding brought under the section

Section 296-c refers to interns in traditional unpaid programs, such as high school or college internship programs. The term "intern" is defined as an individual who performs work where the employer is not obligated to hire the person performing the work at the end of the training period, the person does not receive wages for the work performed, and the work performed provides supplemental training for the individual, provides experience benefiting the person performing the work, does not displace regular employees, and is performed under close supervision of existing staff. Because a key to the definition of intern includes a requirement that the person performing the work "is not entitled to wages," only unpaid internships are affected by the amendment. (It should be noted, however, that paid interns remain

covered under the New York Human Rights Law, as they likely meet the definition of “employee.”)

Section 296-c contains some language that could create significant issues for entities operating unpaid internship programs. For example, the provision purporting to prohibit advertisements or applications that include a limitation or classification based on age, race, creed, color, national origin, sexual orientation, military status, sex, disability, predisposing genetic characteristics, marital status, or domestic violence victim status *expressly permits* such advertising or use when “*based upon a bona fide occupational qualification.*” The antidiscrimination provisions of Section 296-c themselves, however, do not include a comparable provision. That is, Section 296-c does not permit discrimination on these bases, even when based on a bona fide occupational qualification, although the advertisement or application may do so. Furthermore, in the employer-employee context, prior to the adoption of Section 296-c, many believed that classification or discrimination on certain prohibited bases could never be justified as a bona fide occupational qualification (for example, race).

This confusion leaves open a significant question for many entities: Does Section 296-c make unlawful internship programs expressly designed to increase opportunities for underrepresented and disadvantaged demographic groups? Given the language of Section 296-c, some may question whether entities can continue to take the gender, race, ethnic, or veteran status of intern-applicants into account, even when the purpose of those programs is to expand the pool of qualified applicants for regular employment.

While time may clear up this confusion, entities operating internship programs may wish to consider the impact of Section 296-c on a going-forward basis.

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**Please contact one of the lawyers in the firm’s [Labor, Employment, Benefits + Immigration Group](#) with questions regarding the issues raised in this update:**

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