
Is Homelessness the Next Protected Class?

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Would you hire a homeless person? It may surprise you to learn that discrimination against the homeless may be unlawful — regardless of whether your state or the federal government has expressly prohibited this practice. If this is the case, could common practices, such as requesting a job applicant's home address, be considered unlawful?

New Initiatives Promise Equal Employment Opportunity

There is a growing movement nationally for states and municipalities to enact a "Homeless Person's Bill of Rights." In 2012, Rhode Island became the first state to put this concept into law. Among other things, the law prohibits employment discrimination solely on the basis of an individual's status as homeless. Victims of such discrimination can sue for damages, including attorneys' fees. Other states have yet to follow suit. However, earlier this year, Connecticut enacted a Homeless Person's Bill of Rights that promises equal employment opportunity, but only offers protection through other statutes or regulations that may be enacted. Therefore, it has no force on its own. Will the legislature amend the law and give it some teeth? Only time will tell.

While several other states have considered similar legislation, Rhode Island and Connecticut are alone so far. As the economy remains sluggish, we may see homelessness become a protected status in several more states, just as several states recently banned discrimination against the unemployed.

Is Homelessness Already a *De Facto* Protected Class?

Is discrimination against the homeless already unlawful? Arguably so. There is no federal law explicitly prohibiting employment discrimination on the basis of homelessness, but it could be an extension of federal laws under a disparate impact theory.

Under the "disparate impact" theory of discrimination, a practice is unlawful if it disproportionately harms members of protected classes, unless the practice is "job related and consistent with business necessity." For example, a requirement that employees be at least 5'8" tall would have a disparate impact on women. However, if the height requirement is necessary because of the nature of the job, the requirement is lawful unless there is a less discriminatory way to meet the job's demands. Arguably, discrimination against the homeless is unlawful because of its disparate impact on certain protected classes.

On a national level, according to homeless advocacy groups, the homeless population is disproportionately African-American and/or Hispanic, so a homeless African-American job applicant could have a legal claim. Likewise, a disproportionate percentage of those with severe mental illness are homeless, so they, too, could have a legal claim. Such claims would be available under federal or state laws prohibiting discrimination on the basis of race, national origin, and disability. While veterans are disproportionately homeless, there is

controversy as to whether federal employment laws protecting them from discrimination recognize a disparate impact theory.

Some disparate impact theories would be cognizable only under state law and only if the state law recognized a disparate impact theory of employment discrimination. Many states protect veteran status. Also, domestic violence victims are also disproportionately homeless. Since status as a victim of domestic violence is a protected class in several states, these individuals may also have disparate impact claims. Similarly, several states have recently banned discrimination against the unemployed. Since the unemployed are disproportionately homeless, these individuals too could have disparate impact claims.

But remember, a disparate impact theory can only be invoked by those in the disproportionately affected group. This means that a homeless African-American could bring a claim for race discrimination under a disparate impact theory, but a homeless Caucasian would not.

Surprisingly, the Equal Employment Opportunity Commission (EEOC) has yet to issue guidance as to whether discrimination against the homeless is prohibited. In recent months, a number of facially neutral policies have come under the EEOC's microscope: credit checks (for their disparate impact on women and ethnic and racial minorities) and criminal background checks (for their disparate impact on ethnic and racial minorities). The EEOC does not contend that these practices are prohibited, but that they must be justified by a legitimate business need and that the final employment decision must be based on an individualized assessment and not the mere existence of a negative finding as a result of credit check or criminal background check. For example, before denying employment based on a criminal conviction, an employer generally must consider the nature of the offense, how recent it was, and how it relates to the job.

Homelessness could easily come up on the EEOC's agenda. The agency's strategic enforcement plan for 2013 through 2016 includes as its top three priorities: 1) Eliminating barriers in recruitment and hiring; 2) Protecting immigrant, migrant, and other vulnerable workers; and 3) Addressing emerging and developing issues.

An initiative targeting discrimination against homeless persons easily fits any and all of those three priorities. While the EEOC does not have the authority to make discrimination against the homeless illegal, it does have the authority to interpret the statutes it enforces as prohibiting such discrimination under a disparate impact theory. If adopted, such an interpretation could be challenged in court, but courts generally give weight to agency interpretations.

Strategies for Employers

To avoid becoming a test case, employers should review certain policies and procedures now to ensure they do not discriminate against the homeless. Employers in Rhode Island (and even Connecticut) should be particularly attentive to these issues, as there is no question an employer could be sued for violating the new law. Based on how courts and administrative agencies have viewed similar issues, employers should consider implementing the following measures.

1. Review and Update Policies

We suspect few employers maintain policies expressly stating employees must not be homeless, but to the extent any such policy exists, it should be removed unless there is a legitimate business need for one. Counsel can assist in revising policies if there is a reason the policy cannot be eliminated. Rhode Island employers should list homelessness as a protected status in any handbooks or other documents setting forth the company's non-discrimination policies.

2. Train Managers

Train your managers, especially those involved in hiring. Managers should be trained to understand that discriminating against the homeless may have legal and public relations consequences. For example, earlier this year, KFC endured public outcry when a franchisee rescinded a job offer after learning the applicant lived at a shelter. Even though no legal action was taken, the company suffered.

Hiring personnel may be concerned that a homeless applicant may have poor hygiene, use illegal drugs, or be unable to come to work on short notice. If these are key issues/problems for the company, the interviewer could ask questions about these issues directly, or maybe simply explain that the company requires all employees to maintain good hygiene, that the workplace is drug-free, and that employees are expected to be available to work when needed and on short notice. If these issues need to be addressed, they must be a regular part of the interview process for all applicants and should be documented in written interview protocols.

If an applicant discloses his or her status as homeless, managers should not assume their lives are "unstable," that they use illegal drugs, that they will be unavailable, or that they will have poor hygiene. Basing employment decisions on stereotypes is seldom a good idea. Particularly now, with educated professionals losing their homes to foreclosure, stereotypes about the homeless population may cause employers to miss out on great candidates. However, if problems manifest once the applicant is hired, management should handle it as they would with any other employee.

3. Review Job Applications and Interview Questions

Just as concerns about age discrimination have led employers not to ask for an applicant's birth date, employers may wish to reconsider how they ask for contact information on a job application. At the moment, we do not know if this is necessary, but one day it might be. One way to take this precaution is to ask the applicant how he or she wishes to be contacted and leave room for the applicant to give an e-mail address, a telephone number, or a mailing address at his or her option. An interviewer should not ask about the applicant's living arrangement. It is fine to ask whether the applicant lives a reasonable commuting distance from the workplace, but more detailed questions may lead to trouble.

After a provisional job offer or hire, employers should ask for the employee's mailing address, as it is needed for various administrative purposes, just as employers ask for birth dates after hire. The information should not be shared with employees who do not need it, as a P.O. Box or the address of a shelter could reveal that the employee is homeless.

4. Enforce Anti-Harassment Policies

Regardless of whether discrimination against homeless persons is or is not unlawful, employers should not tolerate harassment of homeless employees. Harassment and bullying are not appropriate in any work environment, whether or not based on a legally protected status. How we treat the weakest among us is a sign of our character. In addition, harassment and bullying can be a significant drain on employee morale and productivity. Finally, bullying can be an early sign of future workplace violence and should always be taken seriously.

5. Consider Favoring Homeless Applicants

It could be appropriate for a company to favor homeless applicants. It shows the company is a good corporate citizen and is working to solve social problems. In addition, employers who give opportunities to people who are down on their luck may be rewarded with exceptional loyalty and gratitude. Employers can work with job placement organizations and local shelters to find qualified applicants. Whether this applies to you is an individualized question for every business.

Conclusion

It is not clear whether homelessness will or will not become the next protected class outside of Rhode Island (and almost Connecticut). Nonetheless, employers should review these compliance strategies to avoid becoming a test case. A few changes now could prevent a big headache later.

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Illinois is Latest State to Make Homelessness a Protected Class

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Illinois has joined Connecticut and Rhode Island in passing a new law, The Bill of Rights for the Homeless Act, which designates the homeless as a protected class for purposes of employment discrimination. The new law, which is effective immediately, protects the homeless in the following ways:

- Prohibits employers from discriminating against employees and job applicants based on their *housing status*, which is defined as the status of having or not having a fixed regular residence, including the status of living on the streets, in a shelter or in a temporary residence.
- Specifies that an individual should not suffer or be subject to unfair discrimination based on his or her homeless status and attempts to "lessen the adverse effects and conditions caused by the lack of a residence or a home."
- Guarantees that homeless employees will not be discriminated against because they lack a permanent mailing address or because their mailing address is that of a shelter or social service provider.

In light of this new law, Illinois employers should take the following steps:

- Review and amend the nondiscrimination provisions in their workplace policies and practices to add protections for homeless employees and job applicants and to ensure that they receive equal employment opportunities.
- Train all supervisors and individuals with hiring and management responsibilities.
- Instead of asking applicants and employees for a home address, ask for a mailing address.
- Avoid negatively stereotyping homeless individuals to ensure that they are provided with resources that will help them maintain proper hygiene, medical care and assistance.

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