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Article 18

# Ives-Quinn Act--The Law Against Discrimination

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# CURRENT LEGISLATION

IVES-QUINN ACT—THE LAW AGAINST DISCRIMINATION.—On March 12, 1945 the New York Legislature, on the recommendation of the New York State Temporary Commission Against Discrimination,[1] amended the Executive Law.[2] There was created in the executive department a commission vested with power "to eliminate and prevent discrimination because of race, creed, color or national origin either by employers, labor organizations, employment agencies or other persons."

This law is an inevitable outgrowth of precursory legislation. Man has constantly been seeking, through government and law, freedom, equality, security. In our country, from the Declaration of Independence through the Constitution of the United States and constitutions of the several states, has run the thread of man's search for the affirmation of these principles. He has continually projected into the field of social relationships the sanctions of legislation. This is evidenced by a study of the New York laws proscribing discrimination in various situations.[3]

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[1] See *Report of the N. Y. State Temporary Commission Against Discrimination,* LEGIS. DOC. No. 6 (1945). The New York State War Council was created in 1942 and since it would function, as its name implied, during the war only, and since its work in combating discrimination against various minorities in their efforts to find work and contribute to the national defense had been highly successful, the New York State Temporary Commission Against Discrimination was created in 1944 to draft legislation of a permanent nature. Its recommendation of the "Law Against Discrimination" was approved this year in its entirety with but one exception, and it becomes law effective July 1, 1945.

[2] Chapter 23 of the Laws of 1909 entitled "An act in relation to executive officers constituting c. 12 of the consolidated laws" was amended by inserting therein, a new article, to be Article 12, entitled "State Commission Against Discrimination." Former Article 12 is renumbered 12a.

[3] By the Consolidated Laws of 1909, discrimination because of race, creed or color in jury service, in the right to practice law, in admission to the public schools, or in places of public accommodation, resort or amusement was forbidden. (N. Y. CIV. RIGHTS LAW §§ 13, 40, 41; N. Y. JUDIC. LAW § 467; N. Y. EDUC. LAW § 920.) From 1913 to 1938, the following were proscribed: discrimination in insurance rates and benefits as between white and colored persons (N. Y. PEN. LAW [1913] § 1191); discrimination because of race, color or creed in any public employment, or in any accommodation by innkeepers, common carriers or operators of amusement places, or by teachers or officers of public institutions of learning, or by cemetery associations (N. Y. PEN. LAW [1918] § 514); inquiry concerning religion or religious affiliation of any person seeking employment or official position in public schools (N. Y. CIV. RIGHTS LAW [1932] § 40-a); discrimination by utility companies in employment on account of race, color or religion (N. Y. CIV. RIGHTS LAW [1933] § 42); public contracts which did not contain a clause against discrimination in employment because of race or color (N. Y. LABOR LAW [1935] § 220-e); tax exemption to any education corporation or association which held itself out as non-sectarian but denied its facilities to any person because of race, color or religion (N. Y. TAX LAW [1935] § 4, subd. 6). From 1938 to the present, the tempo in such legislation quickened. In 1938, with not a single state constitu-

The general purpose of the new law is the elimination and prevention of discrimination in employment,[4] and the opportunity for employment without discrimination is declared to be a civil right.[5] The terms "employer" and "employee" have been strictly defined in the law [6] for, in the opinion of those who drafted the law, to have

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tion containing any provision seeking to prohibit discrimination on the part of individuals, firms or corporations upon social or religious grounds, a constitutional provision against discrimination was added to the bill of rights, as follows: "Equal protection of laws; discrimination in civil rights prohibited. § 11. . . . No person shall because of race, color, creed or religion be subjected to any discrimination in his civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state" (N. Y. CONST. [1938] Art. I, § 11). The debates in the state constitutional convention show that uppermost in its conception of "civil rights" was the right to justice in the field of employment. In 1939, the state forbade discrimination because of race, creed, color or religion under the public housing law (N. Y. PUB. HOUSING LAW § 223). In 1940, labor organizations were forbidden to deny membership or equal treatment because of race, color or creed; deprivation of public relief or work because of any such discrimination was also forbidden (N. Y. CIV. RIGHTS LAW § 43; PEN. LAW § 172a). In 1941, the state forbade any offense against Section 11 of the Bill of Rights and made it a misdemeanor (PEN. LAW §§ 700, 701); that same year, industries involved in defense contracts were forbidden to discriminate in employment because of race, color, creed or national origin (N. Y. CIV. RIGHTS LAW § 44; N. Y. PEN. LAW § 514). In 1942, the Industrial Commissioner was empowered to "enforce" the provisions of Sections 42, 43 and 44 of the Civil Rights Law, but the Act gives no means of enforcement other than the power of investigation, subpoena, and hearing as vested in him by the Labor Law (N. Y. CIV. RIGHTS LAW § 45). In 1943, discrimination in the sale or delivery of alcoholic beverages was proscribed (N. Y. ALCO. BEV. CONT. LAW § 65).

[4] Sec. 125: ". . . and the legislature finds and declares that practices of discrimination against any of its inhabitants because of race, creed, color or national origin are a matter of state concern, that such discrimination threatens not only the rights and proper privileges of its inhabitants but menaces the institutions and foundations of a free democratic state."

[5] Bouvier says that "civil rights . . . may be reduced to three principal or primary articles: the right of personal security, which consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and reputation; the right of personal liberty, which consists in the power of locomotion, of changing situation or removing one's person to whatsoever place one's inclination may direct without any restraint unless by due course of law; the right of property, which consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution save only by the laws of the land. . . ." BOUVIER, LAW DICT., "Right", p. 929.

In the case of *Carroll v. Local 269*, 133 N. J. Eq. 144, 146, 31 A. (2d) 223 (1943), the court said, "the right to earn a livelihood is a property right which is guaranteed in our country by the fifth and fourteenth amendments of the federal constitution and by the state constitution. Denial or curtailment of the right to work by reason of race, creed, color or national origin deprives minorities of their constitutional right to earn a livelihood."

[6] Sec. 127. The term "employer" does not include a club exclusively social, or a fraternal, charitable, educational or religious association or corporation, if such club, association or corporation is not organized for private profit, nor does it include any employer with fewer than six persons in his employ. The term "employee" does not include any individual employed by his parents, spouse, or child or in the domestic service of any person.

attempted fuller inclusion was to have aroused resentment, risked constitutional inhibitions and to have been most unwise in this, the initial, stage. In any event the door is left open to further legislation, in the light of experience and future developments, by the power given the permanent state agency to make recommendations to the legislature. Of course, future legislatures may not desire to go further. The results of the administration of this law will have much to do with shaping future policy.

The law provides for the creation of a state commission, consisting of five commissioners appointed to a five-year term of office, at a salary to each of $10,000 a year. There is provision for removal by the governor upon grounds stated in writing. The commissioners are not required to devote their full time to their duties, a departure from the recommendation of the Temporary State Commission. This departure is to be regretted. The powers and duties given to this administrative body illustrate the broad scope of the job. To meet it by calling for a part-time devotion to duty is unwise, impractical. An analysis of the commission's powers will show how important it is that its personnel realize the full impact of this social, economic and legal program.

The commission is given broad powers to formulate policies for the state in the field of discrimination, subject to the legislature's approval.[7] It is, more specifically, to receive, investigate and pass upon complaints alleging discrimination in employment because of race, creed, color or national origin. One of the most sweeping powers, and, incidentally, one on which most people are in accord, is that given the commission to create advisory agencies and conciliation councils, local, regional or state-wide, as in its judgment will aid in effectuating the purposes of this law. The commission may empower them to study the problems of discrimination in all or specific fields of human relationships or in specific instances of discrimination, and to foster, through community effort or otherwise, goodwill, cooperation and conciliation among the groups and elements of the population of the state, and make recommendations to the commission for the development of policies and procedures and for programs of formal and informal education. These bodies are to be composed of citizens serving without pay. Insofar as it is recognized that harmonious social relationships cannot be imposed by legislative fiat, the soundness of this provision is immeasurable. In essence, it calls for community effort with an enlightened guidance from various responsible civic leaders and groups. This is a challenge to the people of this state upon whom, ultimately, must rest the responsibility for

[7] It is given power to hold hearings, subpoena witnesses and records, and no person shall be excused from attending and testifying or from producing records or other evidence on the ground that he may be incriminating himself. However, immunity from prosecution is extended because of such testimony, although the immunity is confined to the natural persons so compelled to testify. § 130.

the success or failure of this legislative program.

The law defines unlawful employment practices,[8] outlines the broad administrative procedure to be followed by the commission, provides for judicial review and enforcement, and contains penal provisions. Any person who is instrumental in the doing of any of the acts forbidden is guilty of an unlawful employment practice and thereby comes within the purview of the statute.

The procedure itself is rather simple. Any aggrieved person may by himself or by his attorney make, sign and file with the commission a verified complaint in writing, stating the name and address of the person alleged to have committed the unlawful employment practice, setting forth the particulars thereof and such other information as the commission may require. The industrial commissioner or attorney general may in like manner make, sign and file such complaint. An employer may also file a complaint where his employee or employees refuse to cooperate with this law. After the filing of a complaint, the chairman of the commission is to designate a member thereof to make an investigation. If the commissioner finds that probable cause exists for crediting the allegations of the complaint, he is to try to eliminate the unlawful employment practice by conference, conciliation and perusasion. This is important because success here means sound administrative practice. It is hoped that most of the conflicts will here be resolved, and that the opposing parties will be left on amicable terms, with better understanding of, and respect for, each other's rights.

If this fails, a hearing is had in accordance with the procedure set forth in the law.[9] If the commission finds the existence of an unlawful employment practice, it shall state its finding of fact and issue an order on the respondent to cease and desist from such practice. It shall, furthermore, be able to take such affirmative action as hiring, reinstatement or upgrading of employees with or without back

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[8] Sec. 131. An employer who refuses to hire or employ or who bars or discharges from employment or who discriminates in compensation or in terms, conditions or privileges of employment because of race, creed, color or national origin is guilty of an unlawful employment practice. It is unlawful for a labor organization to exclude or expel from its membership any individual for such reasons and it may not discriminate in any way against any of its members or against any employer. It is unlawful for an employment agency to print or circulate or cause to be printed or circulated any statement, advertisement or publication, or to use any form of application for employment or to make any inquiry in connection with prospective employment which expresses directly or indirectly any limitation, specification, or discrimination as to race, creed, color or national origin unless based upon a *bona fide* occupational qualification.

[9] The commissioner shall cause to be issued in the name of the commission a written notice to be served with a copy of the complaint requiring the person named therein, referred to as "respondent", to answer the charges at a hearing before three members of the commission sitting as the commission at a time and place to be specified in the notice. The investigating commissioner is not to participate in the hearing except as a witness, nor may he participate in the deliberation of the commission in such case. The strict rules of evidence are not to apply.

pay, restoring to membership in the labor union. By giving the commission this real power, the state has put "teeth" into the law. If no unlawful employment practice is found to exist, an order dismissing the complaint shall be issued.

A short statute of limitations as to the filing of a complaint has been set at ninety days. This is sound in view of the affirmative power to order the payment of back pay. Any party claiming to be aggrieved by an order of the commission may obtain judicial review,[10] and the commission in turn may obtain an order of court for its enforcement. Proceedings of this nature shall take precedence over other cases pending in the court, and the spirit of the legislation warrants speedy action and quick relief.[11] There is a provision that the law is to be liberally construed and that it is not intended to repeal any provisions of the New York Civil Rights Law or of other laws. While a proceeding is pending as to any unlawful employment practice, it shall be exclusive and a final determination therein shall exclude any other action, civil or criminal, based on the same grievance. If an action is instituted without resorting to the procedure of this law, resort to this procedure may not subsequently be had.

The law has been criticized on the grounds that it is too procedural and that it will prove too much of an administrative expense. The first argument may be met by pointing out that the goal set is that of re-educating our citizens to the meaning of democracy. The problem is not a simple one, and legislation alone is not the solution. It is hoped that only in isolated cases, where the offense is flagrant, will there be the need of going through the entire procedure. The emphasis should not be on the penal aspect, though there is provision for it, but rather on "persuasion, conference, conciliation".

As far as the expense involved, it has been urged that the administration of the law could have been assigned to an already existing agency,[12] such as the New York State Department of Labor, at a

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[10] Such proceeding shall be brought in the Supreme Court of the state, and an appeal may be taken to the Appellate Division and the Court of Appeals. An objection that has not been urged before the commission cannot be considered by the court except under extraordinary circumstances. The findings of the commission as to facts shall be conclusive if supported by sufficient evidence on the record considered as a whole.

[11] A proceeding for judicial review must be instituted within thirty days after the service of the commission's order by the party aggrieved. Anyone who wilfully resists or interferes with the commission in the performance of duty or who wilfully violates an order of the commission shall be guilty of a misdemeanor. The penalty provided is a prison term in the penitentiary or county jail for not more than one year or a fine of not more than $500 or both. However, the procedure for review of order is not to be deemed wilful conduct. § 132.

[12] It is interesting to note that the fair employment practices bill passed by the New Jersey legislature and sent to the governor for signature, where it still is at the time this is written, places the enforcement of the anti-discrimination provisions with a state agency—the Education Department. This bill bans bias by employers of six or more persons and by labor unions, but it requires indictment by a grand jury before a violator can be convicted of discrimina-

saving to the state. There is merit in this criticism in view of the fact that the commissioners appointed to administer the law are not required to devote their full time to the job. It was felt, however, that the problem warranted the creation of a separate, independent agency, for the problem is not merely that of labor, capital, or of any specific minority. It is uniquely common to all who envisage a workable democracy. The commission is charged with the duty of acting in furtherance of the general welfare. It was also for this reason that membership on the commission was not apportioned among the various economic or other groups. It is also the hope that those attracted to the administration of this law will be people willing to devote to it their full time and energy.

A further objection was that the law should have required the posting of a bond by complainants which, it was argued, would have eliminated nuisance suits. The exclusion of such a requirement is commendable for it would have served to frighten away the poor and timorous, those whom the law seeks to protect. If any complaints are in the nature of nuisances, it is up to the commission to ferret them out, and dismiss them rapidly.

The constitutional questions involved, in this writer's opinion, appear fairly to be resolved in favor of the law's validity.[13] As stated in the law itself, it is an exercise of the state's police power for the protection of the public welfare, health and peace of the people of this state. The peace and economic prosperity of its people are of state concern and do not strain the concept of police power. That the state has power to classify as it has done, that is, extend its protective aegis over specified types of employment situations, cannot be gainsaid at this stage in our history. Classification which is reasonable is constitutional.[14] There is here, furthermore, no abhorrent invasion of the right to employ and to contract. Freedom of contract is not absolute. The Supreme Court of the United States has held that "the constitution does not guarantee the unrestricted privilege to engage in a business or to conduct it as one pleases." [15] And in another case the United States Supreme Court, through Chief Justice Hughes, said, "what is this freedom of contract? The Constitution does not speak of freedom of contract. It speaks of liberty and pro-

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tion. This last provision indicates the weakness of the bill, since indictment and trial consume far too much time. Moreover, the New Jersey State Board of Education, several hours before the legislature passed the bill, passed a resolution stating the plan would interfere with educational administration in the state. In short, it did not want the job. Incidentally, eight states have had legislation in some respects similar to the New York Ives-Quinn Act proposed in their legislature. They are: N. J., Mass., Conn., Pa., Ill., Calif., Ind., and Ohio.

[13] Sec. 136 provides that if any part of the law is declared unconstitutional, it shall not invalidate the rest of the law—the usual separability clause.

[14] Radice v. New York, 264 U. S. 292, 44 Sup. Ct. 325 (1924).

[15] Nebbia v. People of the State of New York, 291 U. S. 502, 527, 54 Sup. Ct. 505 (1934).

hibits the deprivation of liberty without due process of law. In prohibiting that deprivation the Constitution does not recognize an absolute and uncontrollable liberty. Liberty in each of its phases has its history and connotation. But the liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals and welfare of the people. Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process. This essential limitation of liberty in general governs freedom of contract in particular." [16]

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VOLUNTARY ADOPTION BY THOSE IN MILITARY SERVICE.—The legislature of the State of New York has demonstrated a definite policy of aiding those away from home on active duty in the armed forces, by enacting laws facilitating procedure relative to their legal status.[1] In keeping with this general policy, the legislature has recently amended the Domestic Relations Law dealing with voluntary adoptions, facilitating thereby adoptions by those persons on active duty in the armed forces of the United States.[2]

Although the concept of adoption is rooted essentially in the concept of charity, it was known as a legal status only to some of the continental systems of law, and primarily in the French and Spanish law, but it was unknown to the English common law.[3] As a result, therefore, the whole modern concept in our law is purely one of statutory regulation.[4] Since it is a legislative creature, the legislature retains the power to create, destroy, and to limit the privilege of adoption.[5] Having the power to regulate the privilege, the legislature has been reluctant, in the past, to treat adopted children in the same manner as natural children. In the first general enactment of the subject of adoption into New York law,[6] the adopted child was permitted to assume all the relationships of a natural child, but the law expressly excluded the right of inheritance.[7] In 1887, however,

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[16] West Coast Hotel Co. v. Parrish, 300 U. S. 379, 391, 57 Sup. Ct. 578 (1937).

[1] SOLDIERS AND SAILORS CIV. REL. ACT OF 1940, N. Y. Laws 1941, c. 686; Survival of Power of Attorney After Death of Donor, N. Y. MILIT. LAW § 317a.

[2] N. Y. DOM. REL. LAW § 112, pars. 1 and 5 as amended by L. 1945, c. 98.

[3] United States Trust Co. v. Hoyt, 150 App. Div. 621, 135 N. Y. Supp. 849 (1st Dep't 1912).

[4] Carpenter v. Buffalo General Electric Co., 213 N. Y. 101, 106 N. E. 1026 (1914).

[5] *In re* Pierro, 173 Misc. 123, 17 N. Y. S. (2d) 233 (1940).

[6] L. 1873, c. 830, § 10.

[7] *Ibid.*