

NYC Provides Guidance on Employer Credit Checks

The *Stop Credit Discrimination in Employment Act*, which generally prohibits most NYC employers from running credit checks or using an applicant's or employee's consumer credit history for employment purposes, took effect on September 3. The NYC Commission on Human Rights recently issued enforcement guidance clarifying available exemptions, recordkeeping requirements and penalties for noncompliance under that law. Employers will want to review their pre-employment screening practices and use of credit information to ensure compliance.

Background

The federal Fair Credit Reporting Act (FCRA) requires employers to follow certain notice and authorization procedures to secure an employee's or applicant's credit report. As long as those procedures are followed, the FCRA does not restrict an employer's ability to secure consumer credit histories or limit its ability to factor the contents of credit reports into hiring or other employment decisions.

On May 6, New York City Mayor Bill de Blasio signed the [Stop Credit Discrimination in Employment Act](#) (SCDEA) into law. When the new law took effect on September 3, NYC joined a growing number of jurisdictions that restrict — or are considering restricting — employers' use of an individual's personal credit history for employment purposes. (See our [May 12, 2015](#) *For Your Information*.)



NYC Restrictions on Credit Checks

The new law amends the NYC Human Rights Law (NYCHRL) to make it an unlawful discriminatory practice for an employer, labor organization, employment agency, or agent thereof to request or use an individual's "consumer credit history" in making employment decisions. The law's broad definition of "consumer credit history" — "an individual's credit worthiness, credit standing, credit capacity, or payment history" — includes, among other things,

consumer credit reports, credit scores, or information provided by the individual to the employer about his or her credit accounts, bankruptcies, judgments or liens.

Comment. Because the law covers employers and their agents, the limits on employment-related credit checks extend not only to employers but also to the background screening companies employers use to vet job candidates.

Exemptions

The new law contains limited exemptions from the general prohibition on an employer's use of an applicant's or employee's consumer credit history for employment purposes. Important exceptions exist for:

- Employers required by federal or state law or regulations or by self-regulatory organizations (such as FINRA) to consider an individual's credit history for employment purposes
- Police officers and other law enforcement personnel
- Certain positions with NYC subject to a Department of Investigation background check
- Positions requiring bonding under federal, state or local law
- Positions requiring security clearance under federal or state law
- Non-clerical positions having regular access to trade secrets, intelligence information or national security information
- Positions having signatory authority over third-party funds or assets valued at \$10,000 or more, or the authority to enter into financial agreements valued at \$10,000 or more on behalf of the employer
- Positions allowing the employee to modify digital security systems of the employer's or client's networks or databases

The law also provides carve-outs for an employer's request and receipt of consumer credit history pursuant to a subpoena, court order or law enforcement investigation, and for employees who have to disclose information on creditors or debts to the NYC Conflicts of Interest Board.

A Growing Trend

A number of states have enacted similar laws restricting employers' use of credit reports for employment purposes. Among them are California, Colorado, Connecticut, Hawaii, Illinois, Maryland, Nevada, Oregon, Vermont and Washington. Cities such as Chicago also have laws limiting the use of credit information in employment decisions.

Enforcement Guidance and Important Clarifications

On September 2, the NYCCHR released [enforcement guidance](#) confirming that only the exemptions above are available to employers, and providing other important clarifications. In [frequently asked questions](#) released along with the enforcement guidance, the NYCCHR clarified that the exemptions do not extend to "most entry-level, non-salaried employees" or to "bank tellers, cashiers, salespeople, clerical workers, administrative staff, restaurant and bar workers, and private security employees."

In addition, the guidance narrowly construes the exemption for "employers required by state or federal law or regulations, or by a self-regulatory organization as defined in Section 3(a)(26) of the Securities Exchange Act." According to the guidance, the exemption for FINRA members applies only to employment decisions regarding "people who are required to register with FINRA." Thus, FINRA members cannot rely on credit history when making

employment decisions regarding applicants or employees whose functions are “supportive of, or ancillary to, ‘covered functions,’ or engage solely in clerical or ministerial activities.”

The enforcement guidance also narrowly interprets the exemption for individuals in positions involving responsibility for funds or assets valued at \$10,000 or more. The guidance limits the availability of this exemption to individuals in “executive-level positions with financial control over a company, including, but not limited to, Chief Financial Officers and Chief Operations Officers.”

Similarly, the guidance limits the exemption for technology positions to “positions at the executive level, including, but not limited to Chief Technology Officer or a senior information technology executive who controls access to all parts of a company’s computer system.” Thus, employers cannot conduct credit checks on other individuals who have access to “a computer system or network available to employees, nor does the exemption include all staff in an information technology department.”

Although the law itself does not contain specific notice and recordkeeping requirements, the guidance says that employers should inform applicants or employees of any exemption claimed when asking for or using their credit history. In addition, the guidance says that employers should keep an exemption log that includes the claimed exemption, why it covers the exempted position, the name and contact information of all applicants or employees considered for the position, job duties and qualifications, copies of the credit history obtained, how it was obtained and how it led to the employment action. Records should be maintained for five years, and may have to be provided to the NYCCHR on request.

Violations and Penalties

The guidance makes clear that each of the following will be separate chargeable violations of the NYCHRL:

- Requesting consumer credit history from applicants or employees
- Requesting or obtaining an applicant’s or employee’s consumer credit history from a consumer reporting agency
- Using consumer credit history in considering or taking an employment action

All of these actions are unlawful discriminatory practices that can render an employer liable, regardless of whether they lead to an adverse employment action. Whether considering credit history resulted in an adverse action could, however, be considered for purposes of determining damages or penalties.

The guidance also confirms that the NYCCHR will impose civil penalties for violations of the new credit check law of up to \$125,000, and up to \$250,000 for violations that are the result of willful, wanton or malicious conduct. The penalties are in addition to the other remedies available to aggrieved applicants and employees under the NYCHRL, including back and front pay, punitive damages and attorneys’ fees.

In Closing

The new law alters the way in which employers may screen job applicants, and potential or current employees. Employers with employees who work in NYC will want to reevaluate their background check practices and procedures and make any needed changes to ensure compliance.

Authors

Nancy Vary, JD

Abe Dubin, JD

Produced by the Knowledge Resource Center of Buck Consultants at Xerox

The Knowledge Resource Center is responsible for national multi-practice compliance consulting, analysis and publications, government relations, research, surveys, training, and knowledge management. For more information, please contact your account executive or email fyi@xerox.com.

You are welcome to distribute *FYI*® publications in their entirety. To manage your subscriptions, or to sign up to receive our mailings, visit our [Subscription Center](#).

This publication is for information only and does not constitute legal advice; consult with legal, tax and other advisors before applying this information to your specific situation.