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No Credit, No Problem: NYC's New Guidance Further Limits Employer Credit Checks

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As we previously reported, New York City recently passed a law prohibiting employers from requesting or using an individual's credit history in making employment decisions. On September 3, 2015—the same day that the new law went into effect—the New York City Commission on Human Rights (Commission) issued official guidance on the new law, now called the Stop Credit Discrimination in Employment Act (SCDEA).

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The SCDEA's Prohibitions

The SCDEA makes it an unlawful discriminatory practice for any employer:

- to request or use the consumer credit history of an applicant or employee for the purpose of making any employment decision or
- to otherwise discriminate with regard to hiring, compensation, or any other term of employment based on an applicant's or employee's consumer credit history.

The SCDEA defines "consumer credit history" to include an individual's credit worthiness, credit standing, credit capacity, and payment history as indicated by a consumer credit report, by a person's credit score, or by credit information an employer obtains directly from an individual.

The Commission's guidance makes it clear that the legislative intent of the SCDEA is to reflect the view that "consumer credit history is rarely relevant to employment decisions, and consumer reports should not be

requested for individuals seeking most positions in New York City." Indeed, the guidance emphasizes that the City Council intended the SCDEA to "be the strongest bill of its type in the country prohibiting discriminatory employment credit checks."

To comply with the law, affected employers should not:

- request an applicant's or employee's consumer credit history (either orally or in writing);
- request or obtain the consumer credit history of an applicant or employee from a credit reporting agency (which the SCDEA defines more broadly than the Fair Credit Reporting Act or state law do); or
- use an applicant's or employee's consumer credit history in making an employment decision or considering an employment action (e.g., hiring, firing, and promotions).

Importantly, the Commission considers all of these actions to be unlawful, even if they do not lead to an adverse employment action.

The Commission has also indicated that "employment forms requiring applicants to authorize a credit or background check are prohibited." Thus, affected employers should not require applicants or employees to complete any disclosure or authorization forms that discuss or authorize credit checks, even if a credit check is not run.

The SCDEA's Exemptions

The SCDEA includes various exemptions to these prohibitions. However, the Commission cautions that these exemptions are "to be construed narrowly" and that the employer has the burden of proof in establishing that an exemption should apply. The Commission's guidance states that the exemptions do not apply to an entire employer or industry; rather they apply to specific positions or roles.

The SCDEA exempts the following positions relevant for private employers from the law's requirements:

- Positions at the executive level only (per the Commission) (i) with "signatory authority over third-party funds or assets valued at $10,000 or more" or (ii) that involve fiduciary responsibility to the employer with the authority to enter financial agreements valued at $10,000 or more on the employer's behalf
  The Commission interprets this exemption as applying only to executive-level positions with financial control over a company (e.g., chief financial officers and chief operations officers). The guidance expressly states that this exemption does not apply to all staff in a finance department.
- Positions requiring credit checks for security clearance under federal or state law
  According to the Commission, this exemption pertains only to positions for which a review of an individual's credit history is done by the state or federal government (i.e., not an employer) as part of an evaluation for a security clearance that is required for a job.
- Non-clerical positions that have regular access to trade secrets, intelligence information, or national security information (all of which have been narrowly defined by the Commission)

Trade Secrets—The Commission has taken the position that trade secrets "do not include information such as recipes, formulas, customer lists, processes, and other information regularly collected in the course of business or regularly used by entry-level and non-salaried employees and supervisors or managers of such employees."

Intelligence Information—The exemption for intelligence information is limited to law enforcement positions that must routinely use intelligence information.

National Security Information—The exemption for national security information is limited to government or government contractor positions that require high-level security clearances.

- Positions that require, as a condition of employment, that an employee be personally bonded under local, state, or federal law

  According to the Commission, this exemption only applies to those positions that are legally required to be bonded, not those that are simply permitted to be bonded.
- Positions at the executive level only (per the Commission) that regularly allow an employee "to modify digital security systems established to prevent the unauthorized use of the employer's or client's networks or databases"

  This exemption applies only to executive-level positions (e.g., chief technology officers and senior information technology executives). It does not apply to all individuals in positions that can access a computer system or network available to employees, or all employees in the information technology department.
- Positions for which an employer (e.g., banks and certain financial institutions) "is required by state or federal law, or regulations or by a self-regulatory organization" (as defined in the Securities Exchange Act of 1934) to use an individual's consumer credit history for employment purposes

  The Commission interprets this exemption to apply only to positions for which credit checks are required. For instance, members of the Financial Industry Regulatory Authority (FINRA) are only exempt from the requirements of SCDEA with regard to FINRA-covered positions (i.e. positions for which FINRA requires a credit check).

  According to the Commission's FAQs, this exemption does not cover bank tellers, cashiers, clerical workers, etc.

In a development that goes beyond the plain language of the SCDEA, the Commission's guidance states that employers that claim an exemption under the ordinance should inform applicants or employees of the exemption.

Exemption Recordkeeping Obligations

Additionally, the Commission recommends that employers keep a log of all positions that are exempt from the SCDEA at their company for a period of five years. The Commission may require employers to share this log upon request. The log should include the following information:

the name of the claimed exemption;

an explanation of why the exemption covers the position in question;

the name and contact information of all applicants or employees considered for the exempted position;
the job duties of the exempted position;
the qualifications necessary to perform the exempted position;
a copy of the applicant's or employee's credit history obtained pursuant to the claimed exemption;
a description of how the individual's credit history was obtained; and
an explanation of how the individual's credit history led to the employment action.

Conclusion

Employers should note that the New York City law is one of the most strenuous credit discrimination laws in the country, insofar as it creates a private right of action for the applicant or employee. Under the New York City Human Rights Law, employers that improperly use employee consumer credit histories may be subject to compensatory damages (including back and front pay), uncapped punitive damages, attorneys' fees, and/or a civil penalty of up to $125,000 for standard violations and up to $250,000 for violations that are the result of willful, wanton, or malicious conduct. Therefore, New York City employers should carefully review their practices to ensure that they do not consider an applicant or employee's consumer credit histories in employment decisions unless the position falls within one of the new law's narrow exemptions.

The text of the ordinance can be found on The New York City Council's website, and the new guidance can be found on the website of the New York City Commission on Human Rights.

The New York City Stop Credit Discrimination in Employment Act and other "ban the box" laws, including all federal and state background check requirements, are summarized in the firm's *O-D Comply: Background Checks* and *O-D Comply: Employment Applications* subscription materials, which are updated and provided to *O-D Comply* subscribers as the law changes.

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