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## *New York City to Limit Use of Credit Checks for Employment-Related Purposes*

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Last week, the New York City Council passed a bill to make it unlawful for a New York City employer to seek or use the consumer credit history of applicants or employees except under very limited circumstances. Bill 261-2014, expected to be signed into law by New York City Mayor Bill de Blasio, will bar employers from using an applicant's consumer credit history in making hiring decisions or discriminating against an applicant or employee with regard to hiring, compensation, or the terms, conditions or privileges of employment based on his or her consumer credit history. The bill will amend the New York City Human Rights Law ("NYCHRL") to make such inquiries about an applicant's or employee's consumer credit history an unlawful discriminatory practice. The amendment will be effective 120 days after Mayor de Blasio signs the bill.

A "consumer credit history" includes an individual's credit worthiness, credit standing, credit capacity, or payment history as indicated by a consumer credit report, credit score, or information an employer obtains directly from the individual. The amendment will not affect an employer's ability to conduct thorough background investigations that do not contain credit reports, as permitted under the Fair Credit Reporting Act ("FCRA") and applicable state law. For many employers, regardless of their state of incorporation or principal place of business, the new law will significantly curtail their ability to request credit histories for employees and job applicants in New York City.

Ten states—California, Colorado, Connecticut, Hawaii, Illinois, Maryland, Nevada, Oregon, Vermont, and Washington—and the City of Chicago have enacted similar laws limiting the use of credit checks for employment decisions. Many of these laws, however, contain broad exemptions for the financial services industry, for workers who are required to handle any amount of money, or for managerial positions. In Connecticut, for example, employers are permitted to run credit checks on employees with expense accounts, corporate credit cards, or access to computer networks protected by firewalls. The exceptions enumerated under Bill 261-2014 are far narrower, signaling sweeping reform in this area for New York City employers.

### **Exceptions to the Ban on the Use of Credit Checks in Hiring**

Employers will be permitted to check credit history and to use credit reports only under the following circumstances:

1. When required by any national securities exchange, registered securities association, or registered clearing agency.

2. For positions with signatory authority over third-party funds or assets worth \$10,000 or more, or positions involving a fiduciary responsibility to the employer with the authority to enter financial agreements of \$10,000 or more on the employer's behalf.
3. For non-clerical positions with regular access to trade secrets, intelligence information or national security information. For purposes of this exception, "trade secrets" does not include access to or the use of client, customer or mailing lists, or "general proprietary company information" such as handbooks or policies.
4. For jobs in which an employee is required to have security clearance under federal or state law.
5. For employment as a police or peace officer, or employment as a public official in an appointed position with a high degree of public trust.
6. For jobs in which an employee is required to be bonded under City, state, or federal law.
7. For positions with regular duties allowing the employee to modify digital security systems which are established to prevent the unauthorized use of the employer's or client's networks or databases.
8. When required by state or federal law or regulations.

If a position falls within one of these enumerated exceptions, prior to conducting a credit check on an applicant or employee, an employer must follow the procedures required by the New York State Fair Credit Reporting Act and the FCRA. The FCRA procedures, for example, include (a) providing notice to the employee/applicant that the employer will seek a credit report; (b) supplying a copy of "A Summary of Your Rights Under the Fair Credit Reporting Act"; and (c) obtaining written authorization/consent from the applicant/employee.

## **Impact on New York City's Financial Services Industry Employers**

As the bill was debated, some financial services groups called for broad carve-outs found in laws impacting other jurisdictions, as noted above. Advocates of the ban, however, called for virtually no exceptions to the prohibition on credit checks. Bill 261-2014 incorporates only some of the carve-outs advocated by financial services groups. One exception directly impacting employers in the financial services industry permits the use of consumer credit history if required by a national securities exchange, registered securities association, or registered clearing agency, such as registered representatives of broker-dealers regulated by the Financial Industry Regulatory Authority. Another exception applies to employees with signatory power over assets worth \$10,000 or more who have fiduciary responsibilities to their employers. While both of these exceptions directly apply to some jobs in the financial services industry, there is no broad-based carve-out for the financial services industry. Financial services employers therefore will need to pay close attention to the enumerated exceptions in the statute in order to determine which positions qualify.

## **Enforcement**

The new law amends the NYCHRL, which means the prohibition on credit checks will be enforced by the City Commission on Human Rights or by private civil action. Claimants may be awarded attorneys' fees and punitive damages under the law. Because the amendment bars discrimination against employees with regard to the terms, conditions or privileges of employment, it is noteworthy that the

NYCHRL could be read to apply a broader interpretation of “adverse action” than found under state or federal nondiscrimination laws.

## Next Steps for New York City Employers

If the bill is signed into law by Mayor De Blasio as expected, employers should consult with counsel to determine which positions, if any, fall within one of the enumerated exceptions. Employers should consider their use of credit checks and their reliance on credit histories not only during the application stage but during all phases of the employment relationship. If an employer currently uses a third party agent to perform credit checks, that employer should work with the agent to help ensure its compliance with the new law.

Notwithstanding the amendment, employers conducting credit checks should review their practices to ensure that they do not disparately affect employees and/or applicants on the basis of a protected status. Finally, employers should consider training on applicable laws for all individuals involved in the recruitment process.



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