

## NYC Employers Should Check Themselves Before Employees

*Law360, New York (May 22, 2015, 12:22 PM ET)* -- On April 16, 2015, by a 47-3 margin, the New York City Council passed a bill restricting employers from requesting or using the credit history of applicants and employees when making employment decisions. New York City Mayor Bill de Blasio signed the bill on May 6, 2015. It will go into effect on Sept. 3, 2015.

The bill amends the New York City Human Rights Law to prohibit employers from requesting or using “for employment purposes the consumer credit history of an applicant for employment or an employee” and from otherwise discriminating “with regard to hiring, compensation, or the terms, conditions or privileges of employment based on the consumer credit history of the applicant or employee.”

“Consumer credit history” is defined as “an individual’s credit worthiness, credit standing, credit capacity, or payment history, as indicated by: (a) a consumer credit report; (b) credit score; or (c) information an employer obtains directly from the individual regarding (1) details about credit accounts, including the individual’s number of credit accounts, late or missed payments, charged-off debts, items in collections, credit limit, prior credit report inquiries, or (2) bankruptcies, judgments or liens.” Because the new law amends the New York City Human Rights Law, employers found in violation of the new law may be liable for compensatory damages (including front pay and back pay), punitive damages, and attorneys’ fees and costs.

Many other states and municipalities have passed similar legislation, most of which have included broad exceptions, such as exceptions for all financial institutions. City Councilman Brad Lander, the bill’s sponsor, has said the new law will “provide the strongest protections in the country.”[1] The initial version of the law only provided an exception for “employers that are required by state or federal law to use an individual’s consumer credit history for employment purposes.”

In February, the Partnership for New York City, a nonprofit organization which advocates on behalf of New York City’s business community, proposed that the bill include exceptions along the lines of the law currently in place in Connecticut. The Partnership for New York City specifically proposed exceptions for all financial institutions, as well as positions which, among other things, are managerial or involve setting the direction of the business, have access to expense accounts or corporate credit cards, have access to the employer’s nonfinancial assets of \$2,005 or more, and have access to personal or financial information of consumers/employees.[2]

While some of the Partnership for New York City’s suggestions were incorporated into the final version of the bill, the law’s exceptions are still very narrow. The ban on the use of “consumer credit history” does not apply if an employer is required by law or by a self-regulatory organization as defined in Section 3(a)(26) of the Securities Exchange Act of 1934 (such as Financial Industry Regulatory Authority)

to use an individual's consumer credit history for employment purposes. Credit checks are also permitted for individuals applying for, or employed in, the following positions:

- A "nonclerical position having regular access to trade secrets, intelligence information or national security clearance." The bill defines "trade secrets" as information that: "(a) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use; (b) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy; and (c) can reasonably be said to be the end product of significant innovation." The bill, however, specifically excludes "general proprietary company information such as handbooks and policies" from the definition of "trade secrets" and specifies that having "access to or use of client, customer or mailing lists" does not constitute having "regular access to trade secrets."
- A position in which the employee will have "signatory authority over third-party funds or assets valued at \$10,000 or more" or "that involves a fiduciary responsibility to the employer with the authority to enter financial agreements valued at \$10,000 or more on behalf of the employer."
- A position in which the employee's regular duties "allow the employee to modify digital security systems established to prevent the unauthorized use of the employer's or client's networks or database."
- A position in which the employee is required by law to be bonded.

Even in circumstances in which the new law will not apply, employers need to keep in mind the restrictions imposed by Section 525(b) of U.S. Bankruptcy Code, which prohibits employment discrimination against an individual "solely because" of the individual's status as a debtor in a bankruptcy proceeding. Also, while the new law will not prohibit employers from conducting other types of background checks, such as reference checks or criminal background checks, employers need to comply with federal and state laws regarding conducting such checks and using information obtained from them when making employment decisions.

### **What Employers Should Do**

Employers should carefully review their hiring and background check practices as a result of the new law. Employers should take care to ensure that they are conducting credit checks only on employees who are covered by one of the law's exceptions. In making decisions about which employees to conduct credit checks on, employers should analyze the job responsibilities for each employee to ensure that the employee's actual job responsibilities fall within one of the law's exceptions. Employers with offices inside and outside of New York City may wish to create separate hiring procedures for employees who will be working in New York City.

Additionally, when performing a credit check on an employee or job applicant, employers should document the applicable basis for an exception to the law's prohibition on performing credit checks. Employers should consider modifying their credit check authorization forms to provide the basis for the exception.

Finally, the New York City Commission on Human Rights may issue guidance on the law. Employers should review any guidance the commission provides.

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[1] <http://bradlander.com/news/updates/ending-discriminatory-employment-credit-checks-nyc-leads-the-way>

[2] [http://pfnyc.org/news\\_press/pfnyc-seeks-changes-to-credit-check-legislation/](http://pfnyc.org/news_press/pfnyc-seeks-changes-to-credit-check-legislation/)

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