

Now We Know How NYC's Credit Check Ban Will Be Interpreted

Law360, New York (September 4, 2015, 2:43 PM ET) -- On Sept. 2, the New York City Commission on Human Rights released enforcement guidance on the Stop Credit Discrimination in Employment Act, which took effect on Sept. 3.[1] The SCDEA prohibits New York City employers from requesting or using the credit history of applicants and employees when making employment decisions. The commission's enforcement guidance makes clear that the commission plans on interpreting the SCDEA's restrictions broadly and its exemptions narrowly.

In the guidance, the commission explains 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." According to the commission, an employer will be in violation of the SCDEA for: "(1) requesting consumer credit history from job applicants or potential or current employees, either orally or in writing"; or "(2) requesting or obtaining consumer credit history from job applicants or potential or current employees from a consumer reporting agency"; or "(3) using consumer credit history in an employment decision or when considering an employment action." Accordingly, simply requesting consumer credit history will be considered a violation of the SCDEA, even if the employer does not use the information it receives or the employer's use of the information it receives does not result in adverse employment action.

As we detailed in our prior *Alert*,^[2] the SCDEA includes exemptions for certain positions, including positions with control of funds or assets worth \$10,000 or more, nonclerical positions with regular access to trade secrets, positions with control over digital security systems and positions for which credit checks are required by law or self-regulatory organization. The commission's guidance provides insight as to how the commission plans on interpreting these exemptions:

- The exemption for positions involving responsibility for funds or assets worth \$10,000 or more "only" applies to "executive-level positions with financial control over a company, including, but not limited to, Chief Financial Officers and Chief Operations Officers." This exemption "does not include all staff in a finance department."
- Financial Industry Regulatory Authority members are exempt from the SCDEA only when making decisions about people who are required to register with FINRA. FINRA members must comply with the SCDEA when making employment decisions about individuals who are not required to register with FINRA.
- 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 nonsalaried employees and supervisors or managers of such employees."

- The exemption for positions with control over digital security systems includes “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.” This exemption “does not include any person who may access a computer system or network available to employees, nor does it include all staff in an information technology department.”

The commission explains that employers “have the burden of showing that an exemption applies.” According to the commission, the exemptions “are to be construed narrowly.”

The commission outlines steps that an employer should take if it believes a position is exempt. Employers should “inform applicants or employees of the claimed exemption.” The commission does not, however, require that applicants or employees be so informed in any particular manner. Additionally, the commission suggests in the guidance that employers keep an “exemption log” detailing instances when exemptions are used to perform credit checks. The commission instructs that the exemption log should be maintained for a period of five years from the date an exemption is used and should include the following information:

1. the claimed exemption;
2. why the claimed exemption covered the exempted position;
3. the name and contact information of all applicants or employees considered for the exempted position;
4. the job duties of the exempted position;
5. the qualifications necessary to perform the exempted position;
6. a copy of the applicant’s or employee’s credit history that was obtained pursuant to the claimed exemption;
7. how the credit history was obtained; and
8. how the credit history led to the employment action.

Employers may be required to share their exemption logs with the commission “upon request,” and “promptly” doing so may “help avoid a Commission-initiated investigation into employment practices.”

As with other violations of the New York City Human Rights Law, employers found in violation of the SCDEA may be liable for compensatory damages (including front pay and back pay), punitive damages and attorneys’ fees and costs, as well as a civil penalty of up to \$250,000 for violations that “are the result of willful, wanton or malicious conduct.”

New York City employers should carefully review the commission’s enforcement guidance before requesting credit history of applicants or employees. Additionally, any decision to apply one of the SCDEA’s exemptions should be made on a case-by-case basis, after carefully reviewing the SCDEA and the commission’s accompanying enforcement guidance.

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[1] The enforcement guidance and other materials issued by the commission are available on the commission's website.

[2] "New York City to Restrict Employers' Use of Credit History in Employment Decisions." (available at www.srz.com/New_York_City_to_Restrict_Employers_Use_of_Credit_History_in_Employment_Decisions)

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