Insight

IN-DEPTH DISCUSSION

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NYC Commission Issues Guidance on the Citywide Bill Restricting Employers from Using Credit Information in Employment Decisions

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As previously reported, on May 6, 2015, New York City Mayor Bill de Blasio signed the "Stop Credit Discrimination in Employment Act" (Act), which makes it unlawful for most employers to use an applicant's or employee's credit history for employment purposes, except in certain circumstances.[1] The New York City Council intended it to "be the strongest bill of its type in the country prohibiting discriminatory employment credit checks," and joined the growing list of states and cities that have enacted similar laws, such as California, Chicago, Colorado, Connecticut, Hawaii, Illinois, Maryland, Nevada, Oregon, Vermont and Washington.[2]

Three days before the Act went into effect on September 6, 2015, the New York City Commission on Human Rights (NYCCHR), which is responsible for enforcing the Act, issued its "Legal Enforcement Guidance on the Stop Credit Discrimination in Employment Act" (the Guidance). According to the Guidance, the Act "reflects the City's 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" (emphasis added). In light of the NYCCHR's narrow view of the exemptions, New York City employers should carefully review their practices to ensure they do not run afoul of the Act.

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1 *See* Jennifer L. Mora, David S. Warner and Rod M. Fliegel, *New York City Council Passes the First Citywide Bill Restricting Employers from Using Credit Information in Employment Decisions,* Littler Insight (Apr. 21, 2015).

2 *See*, e.g., Rod Fliegel and Jennifer Mora, *California Joins States Restricting Use of Credit Reports for Employment Purposes,* Littler Insight (Oct. 10, 2011); Rod Fliegel, Philip Gordon, and Jennifer Mora, *Colorado is the Latest and Ninth State to Enact Legislation Restricting the Use of Credit Reports for Employment Purposes,* Littler Insight (Apr. 26, 2013); Rod Fliegel and William Simmons, *Use of Credit Reports by Employers Will Soon Be Restricted in Connecticut,* Littler Insight (July 22, 2011); Philip Gordon and Jeffrey Kauffman, *New Illinois Law Puts Credit Reports and Credit History Off Limits for Most Employers and Most Positions,* Littler Insight (Aug. 24, 2010); Rod Fliegel, Steven Kaplan, and Emily Tyler, *Legislation Roundup: Maryland Law Restricts Use of Applicant's or Employee's Credit Report or Credit History,* Littler Insight (Apr. 20, 2011); Rod M. Fliegel, Bruce Young and Jennifer L. Mora, *Nevada is the Latest State to Restrict the Use of Credit Reports for Employment Purposes,* Littler Insight (May 30, 2013); Howard Rubin and Jennifer Nelson, *New Oregon Law Prohibits Credit Checks*, Littler Insight (Apr. 2, 2010); Rod Fliegel and Jennifer Mora, *Vermont Becomes the Eighth State to Restrict the Use of Credit Reports for Employment Purposes*, Littler Insight (June 18, 2012).

What the Act Requires

By way of background, the Act makes it generally unlawful for an employer of four or more employees to request or use an applicant's or employee's "consumer credit history" for employment purposes. This includes hiring, compensation and other decisions concerning the terms or conditions of employment. The Act defines "consumer credit history" as "an individual's credit worthiness, credit standing, credit capacity, or payment history, as indicated by: (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." The term also includes "any written or other communication of any information by a consumer reporting agency that bears on a consumer's creditworthiness, credit standing, credit capacity or credit history."

The Guidance Confirms the Wide Breadth of the Act

According to the Guidance, impermissible requests for, or use of, an applicant's or employee's "consumer credit history" for employment purposes will be considered unlawful even if they did not lead to an adverse employment action.

In addition, the Guidance confirms that the limited exemptions in the Act should be construed narrowly and that the employer bears the burden of proving an exemption applies. Moreover, exemptions will not be applied to "an entire employer or industry. Exemptions apply to positions or roles, not individual applicants or employees."

Limited Exemptions

When required by federal or state law or self-regulatory securities organizations

The law allows consideration of one's credit history for employment decisions when required by state law, federal law, regulations, a national securities exchange, registered securities association, registered clearing agency, or other "self-regulatory organization" (as defined in section 3(a)(26) of the Securities Exchange Act of 1934). The Guidance adds that members of the Financial Industry Regulatory Authority (FINRA) may consider one's credit history when making employment decisions if the individual is required to register with FINRA. For all other positions, including those requiring the employee to "perform functions that are supportive of, or ancillary or advisory to, 'covered functions' or engage solely in clerical or ministerial activities," the Act's prohibitions will apply. While the Guidance does not address any specific federal laws requiring consideration of one's credit history for employment purposes, it notes "the only New York law requiring the evaluation of a current or potential employee's consumer credit history applies to licensed mortgage loan originators."

For non-clerical roles with "regular access to trade secrets," intelligence information[3] or national security information[4]

The new law defines the term "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." In the Guidance, the NYCCHR clarified that "trade secrets" do not include "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." It likewise excludes employee handbooks, policies, and other general information that may be proprietary.

In terms of positions with access to "intelligence information," the Guidance states that this exemption shall be "narrowly construed to include those law enforcement roles that must routinely utilize intelligence information." With respect to "national security information," the Guidance

3 "Intelligence information" means "records and data compiled for the purpose of criminal investigation or counterterrorism, including records and data relating to the order or security of a correctional facility, reports of informants, investigators or other persons, or from any type of surveillance associated with an identifiable individual, or investigation or analysis of potential terrorist threats."

4 "National security information" means "any knowledge relating to the national defense or foreign relations of the United States, regardless of its physical form or characteristics, that is owned by, produced by or for, or is under the control of the United States government and is defined as such by the United States government and its agencies and departments."

advises that this exemption will apply only to "those government or government contractor roles that require high-level security clearances." The Guidance states that both exemptions "encompass those few occupations not already subject to exemptions for police and peace officers or where credit checks are required by law."

Jobs entailing signatory authority over third-party funds or assets valued at $10,000 or more, or involve "a fiduciary responsibility to the employer with the authority to enter financial agreements valued at $10,000 or more on behalf of the employer"

According to the Guidance, this exemption includes only executive-level positions with financial control over a company, including, but not limited to, chief financial officers and chief operations officers. It does not encompass all of the staff in a finance department.

Jobs in which the 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 databases"

According to the Guidance, this exemption applies only to positions at the executive level, such as a chief technology officer or a senior information technology executive who controls access to all parts of a company's computer system. It "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."

Police officers or peace officers, or those in a position with a law enforcement or investigative function at the "department of investigation"

The Guidance explains that only positions for police or peace officers, which are defined by New York law, are exempt, and reinforces the Act's application to civilian positions.

Those subject to background investigation by the "department of investigation for certain public trust positions"

According to the Guidance, for those positions within the City of New York in which the Department of Investigation (DOI) checks the applicant's consumer credit history, the City agency interviewing or hiring the job applicant may not request or use that credit history in making employment decisions unless the position is (1) appointed, and (2) requires a high degree of public trust.

Those for which the employee must be bonded under city, state or federal law

The Guidance contains no clarification of this exemption.

Those for which federal or state law requires security clearance

According to the Guidance, this exemption applies only when "the review of consumer credit history will be done by the federal or state government as part of evaluating a person for security clearance, and that security clearance is legally required for the person to fulfill the job duties." "Security clearance" is defined to mean "the ability to access classified information." It does not include "any other vetting process utilized by a government agency."

Recording-Keeping and Notice Requirements

Although the Act does not contain any notice or record-keeping requirements, the Guidance suggests that employers (i) inform their applicants or employees of the applicable exemption when requesting or using their credit history for employment purposes, and (ii) maintain related records for a period of five years, specifically an "exemption log," which should state the following:

- The claimed exemption;
- Why the claimed exemption covers the exempted position;
- The name and contact information of all applicants or employees considered for the exempt position;
- The job duties of the exempt position;

- The qualifications necessary to perform the exempt position;
- A copy of the applicant's or employee's credit history obtained by the employer;
- How the credit history information was obtained; and
- How the credit history led to the employment action.

Next Steps for Employers

In light of the NYCCHR's emphasis on the breadth of the Act's prohibitions, employers in New York City that still use credit information for employment purposes should consult immediately with an experienced employment attorney. The New York City law is currently the most restrictive law on employers' use of credit information in the nation and its penalties are steep. Multi-state employers also may want to revisit their practices to help ensure compliance with the varied laws in all 12 jurisdictions that regulate employers' use of information related to one's credit history.

Employers should also monitor efforts in Congress to regulate the use of credit history information, as well as advisory guidance from, and litigation initiated by, the U.S. Equal Employment Opportunity Commission in this area.[5] In addition, employers should evaluate the sufficiency of the paperwork they use with their screening procedures (e.g., consent forms, disclosure forms, and adverse action notices), and otherwise ensure they are following the requirements of the federal Fair Credit Reporting Act and any state and local counterparts. This includes obtaining advance, written consent for credit checks and providing specific notices before and when an adverse employment decision is based, in whole or in part, on information concerning an individual's credit history.[6]

5 *See* Barry A. Hartstein, Rod M. Fliegel, Jennifer Mora and Carly Zuba, *Update on Criminal Background Checks: Impact of EEOC v. Freeman and Ongoing Challenges in a Continuously Changing Legal Environment,* Littler Insight (Feb. 23, 2015).

6 See Rod Fliegel, Jennifer Mora and William Simmons, *The Swelling Tide of Fair Credit Reporting Act (FCRA) Class Actions: Practical Risk-Mitigating Measures for Employers,* Littler Report (Aug. 1, 2014).