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New York City Council Passes the First Citywide Bill Restricting Employers from Using Credit Information in Employment Decisions

By Jennifer L. Mora, David S. Warner and Rod M. Fliegel

On April 16, 2015, the New York City Council overwhelmingly passed a bill to make it unlawful for most employers to use an applicant's or employee's credit history for employment purposes, except in certain, specified circumstances. If the mayor signs the bill, as expected, New York City will join the growing list of jurisdictions that have enacted similar laws: California, Chicago, Colorado, Connecticut, Hawaii, Illinois, Maryland, Nevada, Oregon, Vermont, and Washington.[1]

As the United States continues to recover from the recession, and those hit by it slowly re-enter the workforce, this trend is not likely to abate anytime soon. Meanwhile, the Equal Employment Opportunity Commission (EEOC) continues to investigate the use of credit reports by some employers. Although the EEOC was expected to issue updated enforcement guidance regarding the use of credit reports for employment purposes more than two years ago, it has, to date, not done so.

What the Bill Will Require

New York City Bill Int-261-2014 A will amend the New York City Human Rights Law (NYCHRL) to make it an unlawful discriminatory practice for an employer generally to request or use an applicant's or employee's "consumer credit history" for employment purposes. It will further prohibit employers from basing any hiring, compensation or other decisions concerning the terms or conditions of employment based on the applicant's or employee's "consumer credit history."

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1 *See, e.g.*, Rod Fliegel and Jennifer Mora, *California Joins States Restricting Use of Credit Reports for Employment Purposes*, Littler ASAP (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 ASAP (Apr. 26, 2013); Rod Fliegel and William Simmons, *Use of Credit Reports by Employers Will Soon Be Restricted in Connecticut*, Littler ASAP (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 ASAP (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 ASAP (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 ASAP (May 30, 2013); Howard Rubin and Jennifer Nelson, *New Oregon Law Prohibits Credit Checks*, Littler ASAP (Apr. 2, 2010); and Rod Fliegel and Jennifer Mora, *Vermont Becomes the Eighth State to Restrict the Use of Credit Reports for Employment Purposes*, Littler ASAP (June 18, 2012).

The bill 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 extends to "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 bill provides a variety of exceptions in which employers may request or consider an individual's "consumer credit history" for employment purposes. For example, the bill will not apply to employers who are required by state or federal law or regulations, or by 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), to use an individual's "consumer credit history" for employment decisions. Moreover, the law will not apply to persons seeking or occupying the following positions:

- non-clerical roles with "regular access to trade secrets,"[2] intelligence information[3] or national security information;[4]
- jobs entailing signatory authority over third-party funds or assets valued at $10,000 or more, or that 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";
- 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";
- police officers or peace officers, or those in a position with a law enforcement or investigative function at the "department of investigation";
- those subject to background investigation by the "department of investigation for certain public trust positions";
- those for which the employee must be bonded under city, state or federal law; and
- those for which federal or state law requires that the employee have security clearance.

Coverage and Remedies

Because this bill will become a new part of the NYCHRL, it will extend to employers of four or more employees. It also will provide aggrieved persons with a private right of action to recover the full panoply of damages available under the NYCHRL, which includes back pay, front pay, emotional distress, attorney's fees, and punitive damages.

Employers will note the definitions in the new law are expansive, and as such, may overreach. Litigation challenging the law as unconstitutionally vague is possible.

Next Steps for Employers

The bill will become law 120 days after it is signed by the mayor. Employers in New York City that use credit reports or other credit information for employment purposes should consult with an experienced employment attorney to determine if this bill may prohibit them from continuing to do so. Multi-state employers also may want to revisit their practices to help ensure that they comply with both this bill and the laws of the 12 jurisdictions that now regulate employers' use of information related to one's credit history.

2 The bill defines the term "regular access to trade secrets" as excluding "access to or the use of client, customer or mailing lists." It also 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." This excludes employee handbooks, policies, and other general information that may be proprietary.

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."

All employers should continue to monitor efforts in Congress to regulate the use of credit history information, as well as advisory guidance from, and litigation initiated by, the EEOC in this area.[5] In addition, employers should evaluate the sufficiency of the paperwork they use with their screening procedures (*e.g.*, consent forms and adverse action notices), and otherwise ensure they are following the requirements of the federal Fair Credit Reporting Act and its 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]

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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).