

Management Alert



New York City Offers Guidance for Employers on the Use of Credit History in Employment Decisions

By Cameron Smith and Sam Sverdlov

As we blogged about *previously*, Mayor Bill De Blasio signed into law the *Stop Credit Discrimination in Employment Act* (“SCDEA”) in May. The SCDEA went into effect on September 3, 2015 and it prohibits employers from using an individual’s consumer credit history when making employment decisions about applicants or current employees. The New York City Commission on Human Rights (NYCCHR) recently issued *enforcement guidance* on the SCDEA and its already limited exemptions. The enforcement guidance reflects the NYCCHR’s intent to adopt an expansive view of the SCDEA and to construe its exemptions narrowly. The NYCCHR has also begun an education campaign regarding the SCDEA, which may prompt increased inquiries by employees and applicants regarding the law.

According to the text of the SCDEA, employers may conduct credit checks on the following positions:

1. where employers are required by state or federal law or regulations, or by a self-regulatory organization (such as FINRA) to use an individual’s consumer credit history for employment purposes;
2. police officers, peace officers, or those in a position with law enforcement or investigative function at the City of New York Department of Investigation (“DOI”) (or in certain positions subject to background investigation by the DOI);
3. certain positions working for the City of New York subject to a background investigation by the DOI;
4. positions requiring the employee to be bonded by City, state or federal law;
5. positions requiring the employee to possess a security clearance under federal or state law;
6. non-clerical positions having regular access to trade secrets, intelligence information or national security information;
7. positions having signatory authority over third party funds or assets valued at \$10,000 or more, or positions that involve a fiduciary responsibility to the employer with authority to enter financial agreements on behalf of the employer for \$10,000 or more; and
8. positions that allow the employee to modify digital security systems protecting the employer or client’s networks or databases.

The NYCCHR's enforcement guidance states that employers claiming an exemption must show that the position or role falls under one of the eight exemptions in the SCDEA and that employers should inform applicants or employees of the claimed exemption. In addition, employers should keep a detailed record of the claimed exemption under which the credit check is performed, the name and contact information of all applicants or employees considered for the exempted position, the duties and qualifications for the position, a copy of the applicant or employee's credit history that was obtained pursuant to the claimed exemption, and a record of how the credit history was obtained. Employers are encouraged to maintain a record of the checks performed pursuant to an exemption along with the information outlined above for 5 years, and they may be required to furnish this information to the NYCCHR upon request.

The enforcement guidance calls for a narrow construction of the SCDEA's exemptions, and outlines several nuances not apparent from the text of the law. For instance, the enforcement guidance states that "FINRA members are exempt from the SCDEA when making employment decisions about people who are required to register with FINRA," under the exemption for "employers required by state or federal law or regulations, or by a self-regulatory organization as defined in Section 3(a) (26) of the Securities Exchange Act." However, the guidance goes on to explain that this exemption only covers employment decisions regarding "people who are required to register with FINRA." FINRA members must comply with the SCDEA and cannot rely on information about an applicant or employee's credit history when making employment decisions regarding individuals whose functions are "supportive of, or ancillary to, 'covered functions,' or engage solely in clerical or ministerial activities."

The enforcement guidance also clarifies the narrow interpretation of the SCDEA's exemption for individuals in "positions having signatory authority over third party funds or assets valued at \$10,000 or more, or positions that involve a fiduciary responsibility to the employer with authority to enter financial agreements on behalf of the employer for \$10,000 or more." While the text of the law can be read to exempt these individuals broadly, the NYCCHR's enforcement guidance states that this exemption only applies to individuals in "executive-level positions with financial control over a company, including, but not limited to, Chief Financial Officers and Chief Operations Officers" and not to all staff in a finance department whose signatory authority over third party funds is greater than \$10,000.

Similarly, while the text of the law seemingly exempts "positions that allow the employee to modify digital security systems protecting the employer or client's networks or databases," the enforcement guidance explains that this exemption only applies to "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." As such, employers cannot rely on this exemption to conduct credit checks on individuals who merely have access to "a computer system or network available to employees, nor does the exemption include all staff in an information technology department."

Employers should exercise extra caution when relying on the SCDEA's exemptions as the NYCCHR can impose civil penalties for violations of the SCDEA of up to \$125,000, and of up to \$250,000 for violations that are the result of willful, wanton, or malicious conduct. These penalties are in addition to other remedies available to private litigants who claim that the employer's use of their credit history violates the New York City Human Rights Law. Remedies under the New York City Human Rights Law may include, but are not limited to, back and front pay, along with compensatory and punitive damages and attorney's fees.

As always, we are available to answer any questions employers may have regarding the SCDEA. Employers should evaluate and reassess their practices and procedures with respect to employment-related credit checks in light of this new law and enforcement guidance.

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