Employment

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New York City Largely Bans Employers from Considering Consumer Credit History

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On May 6, 2015, New York City Mayor Bill de Blasio signed into law a bill barring employers in New York City from discriminating against employees and applicants based on their consumer credit histories. The exceptions to this new law are much more limited than the exceptions found in similar laws in other states. New York City employers need to review their employment policies to ensure that their employment policies and decisions do not give employees or applicants potential claims of "consumer credit history" discrimination.

With Few Exceptions, New York City Employers Are Prohibited From Using Consumer Credit Histories for Employment Purposes.

The new law amends the New York City Human Rights Law ("NYCHRL") to bar New York City employers from requesting, or relying upon, the consumer credit history of an applicant or employee for employment purposes, including hiring and compensation decisions. Specifically, the law provides:

> [I]t shall be an unlawful discriminatory practice for an employer, labor organization, employment agency, or agent thereof to request or to use for employment purposes the consumer credit history of an applicant for employment or employee, or otherwise discriminate against an applicant or employee with regard to hiring, compensation, or the terms, conditions or privileges of employment based on the consumer credit history of the applicant or employee."[1]

Notably, this new law extends protections with regard to consumer credit history beyond the protections afforded most other statuses protected by the NYCHRL: not only are employers prohibited from relying upon consumer credit histories to discriminate against applicants or employees, it now also violates the NYCHRL for an employer even to "request" an applicant's or employee's consumer credit history, unless one of the enumerated exceptions applies.

[1] N.Y.C. Admin. Code § 8-107(24).

Most employers that include background checks as part of their application or post-offer hiring process for their operations outside of New York City must therefore now remove any consumer credit-related inquiries from their employment and hiring documentation and practices in New York City. Significantly, mere compliance with the Fair Credit Reporting Act notification and authorization requirements will not eliminate the need to follow the new requirements of the NYCHRL.

The definition of the term "consumer credit history" includes not only information obtained in a background check, but also information obtained directly from an applicant or employee:

> "[C]onsumer credit history" means 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. A consumer credit report shall include 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.

In a press release, the New York City Council explained the rationale for this new law:

> Employers often use consumer credit information to make hiring decisions, despite the fact that there is little evidence linking an employee's credit score or credit worthiness to job performance or trustworthiness. Credit checks may adversely affect those who have fallen behind on student loan payments, medical bills or have taken on other forms of consumer debt. Further, the use of credit checks for employment purposes has been shown to have a discriminatory impact on low-income communities and communities of color. They also have a disparate impact on women and victims of domestic violence.[2]

The law goes into effect on September 3, 2015, 120 days after enactment. The remedies for aggrieved applicants and employees are the same as those available to other discrimination plaintiffs under the New York City Human Rights Law: Aggrieved applicants and employees may either file a lawsuit for damages in court within three years of the alleged discrimination or file a complaint with the New York City Commission on Human Rights within one year of the alleged discrimination. Remedies available to aggrieved applicants and employees include compensatory damages, punitive damages and injunctive relief.

The Exceptions

Many employers have reason to be concerned by this new law. Despite the policy concerns outlined in the New York City Council's press release, there are many jobs for which a credit history check is a vital component of an employer's efforts to protect itself against employee embezzlement and similar problems. Fortunately for employers, the new law does include some limited exceptions. Specifically, New York City employers may continue to request, and use, credit histories when making employment decisions for the following positions:

- Positions for which state or federal law and regulations require the use of an employee's credit history;
- Law enforcement personnel;

[2] *See* http://council.nyc.gov/html/pr/041615stated.shtml.

- Positions that require a background investigation by the New York Department of Investigation;
- Positions in which an employee is required to be bonded under City, state or federal law;
- Positions requiring security clearances;
- Non-clerical positions that have regular access to trade secrets, intelligence information or national security information;
- Positions having signatory authority over third-party funds or assets valued at $10,000 or more;
- Positions involving a fiduciary responsibility to the employer with authority to enter financial agreements valued at $10,000 or more on behalf of the employer; and
- Positions with regular duties that allow the employee to modify digital security systems to prevent the unauthorized use of the employer's or a client's networks or databases.

The law includes no generally applicable exception for employees working for financial institutions or employees with signatory or contract authority for amounts under $10,000. Similarly, in the absence of such signatory or contract authority, none of the exceptions allow credit checks for employees or applicants working in finance or payroll departments, even though these positions necessarily involve access to information and payment systems that may make it easier for employees to engage in embezzlement without detection. The law does, however, provide that employers are not precluded from requesting or receiving consumer credit history information pursuant to a lawful subpoena, court order or law enforcement investigation.

New York City's Law Goes Further than Similar State Laws

A number of states have laws similarly limiting employers' ability to use applicants' and employees' credit histories in making employment decisions, including California, Colorado, Connecticut, Hawaii, Illinois, Maryland, Nevada, Oregon, Vermont, and Washington—but New York City's new law is the most restrictive yet enacted.

Maryland's statute is illustrative of the approach of most jurisdictions with such laws. While generally barring employers from considering applicants' and employees' credit histories, it includes an exception allowing employers to request and use credit histories when doing so is "substantially job-related" and "disclosed in writing to the employee or applicant."[3] The Maryland statute makes it clear that this exception applies, at a minimum, to managerial positions, positions with access to customers' and employees' personal information, positions involving fiduciary obligations to an employer, positions with an expense account or a corporate debit or credit card and positions that have access to trade secrets and other confidential information.[4] Many positions covered by this exception would not be covered by the far narrower New York City exceptions.

Next Steps for Employers

New York City employers that use credit history checks for employment purposes should promptly amend their policies to ensure compliance with this new law and should educate their hiring managers and human resources employees about these new restrictions. Further, employers should carefully review any positions for which they still intend to request or consider consumer credit history in order to confirm that

[3] Md. Code Lab & Empl. § 3-711(c)(1)(ii).

[4] See id. at § 3-711(c)(2).

those positions meet at least one of the enumerated exceptions to the law. Employers may also wish to modify job descriptions to fit within one of the narrow exceptions, if the employer views credit history information as vital to its personnel decisions for a particular position. For example, an employer could increase a position's signatory authority from $5,000 to $10,000 if the employer has used consumer credit histories in employment selection decisions for that position in the past and wants to continue doing so. Alternatively, an employer can consider eliminating a position's limited signatory authority to mitigate the risk of granting such authority without a credit history check.

The enactment of this new law in New York City also serves as a useful reminder to employers in other jurisdictions to review whether their policies and practices regarding use of credit check history comply with any applicable state and local laws. Further, all employers that conduct consumer credit history or other background checks using third-party providers should ensure that their practices meet the notice and disclosure requirements of the federal Fair Credit Reporting Act.

If you have any questions about the content of this alert, please contact the Pillsbury attorney with whom you regularly work, or the authors below.

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