

**Statutory Restrictions on Employers' Hiring Policies in
New York City**

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Employers' consideration of applicants' backgrounds in employment decisions – including credit, criminal and employment history – has been subject to significant scrutiny in recent years. Many states and local governments have passed, or are considering passing, legislation that restricts the degree to which employers may inquire about or use such histories in employment decisions. New York City has been particularly active in this area, and its laws are among the nation's most restrictive on employers' ability to inquire or use information about candidates' backgrounds. This paper examines three of the most relevant of these laws – the New York City Stop Credit Discrimination in Employment Act, the New York City Fair Chance Act, and amendments to the New York City Human Rights Law – that protect job applicants.

I. Ban on Use of Credit Checks in Employment Decisions

A. New York City Ban on Credit Checks

In April 2015, the New York City Council passed an amendment to the New York City Human Rights Law that made it an unlawful discriminatory

practice for most employers to request or use an individual's consumer credit history for employment purposes. Mayor Bill de Blasio signed the bill into law and it took effect on September 3, 2015. The prohibition does not apply to employers that are required by state or federal law or regulation or by the rules of a self-regulatory organization as defined by the Securities Exchange Act of 1934, such as FINRA, to use an individual's consumer credit history for employment purposes. In addition, employers are permitted to request and use the credit history of certain enumerated categories of employees, including those involved in maintaining their employers' digital security systems, those with signatory authority over third-party funds or assets valued at \$10,000 or more, or those with fiduciary responsibility to their employer in connection with authority to enter into financial agreements valued at \$10,000 or more. The City Council declined to exempt employees of the financial services industry generally, as some other municipalities have done.

The amendment to the New York City Human Rights Law was intended to respond to the perceived discriminatory impact of employers' use of consumer credit history when making employment decisions. With this law, New York City joins a number of other states and local governments that have passed legislation restricting the use of credit and/or criminal background history in employment decisions. Both federal law and New York state law, however, allow employers to use credit reports in employment decisions. Under the federal Fair Credit Reporting Act ("FCRA"), employers may use the information contained in consumer credit reports in employment decisions provided that before requesting an

applicant's or employee's consumer report, the employer informs the individual that it might use information in the consumer report for employment-related decisions. *See* 15 U.S.C. § 1681 b. And if the employer takes an adverse action against the employee on the basis of information in the report, the employer must give the applicant or employee a notice that includes a copy of the consumer report relied upon in the decision and a copy of a Federal Trade Commission publication, *A Summary of Your Rights Under the Fair Credit Reporting Act*. *Id.*; *see also* 15 U.S.C. § 1681m. New York state's Fair Credit Reporting Act has similar requirements. N.Y. GBL § 380-b.

Under the amendment, it is 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

The law defines “consumer credit history” as “an individual’s credit worthiness, credit standing, credit capacity or payment history,” which an employer obtains from (1) a consumer credit report; (2) a credit score; or (3) information provided directly by an applicant or employee, regarding (i) details about credit accounts, including the individual’s number of credit accounts, late or missed payments,

¹ N.Y.C. Council Bill Number 261-A § 2.

charged-off debts, items in collections, credit limit, prior credit report inquiries, or (ii) bankruptcies, judgments or liens.² A “consumer credit report” is “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.³

The law does not prohibit employers from using consumer credit history for employment purposes where such information is required by state or federal law or regulations, or by a self-regulatory organization as defined by the Securities Exchange Act of 1934.⁴ Thus, broker-dealer firms subject to FINRA’s regulatory authority may request credit check information from job applicants under FINRA Rule 3110(e), which becomes effective on July 1, 2015.⁵ Rule 3110(e) requires FINRA members to

² *Id.* at § 1.

³ *Id.*

⁴ *See* 15 U.S.C. § 78c(a)(26) (“The term ‘self-regulatory organization’ means any national securities exchange, registered securities association, or registered clearing agency, or (solely for purposes of sections 78s(b), 78s(c), and 78w(b) of this title) the Municipal Securities Rulemaking Board established by section 78o-4 of this title.”).

⁵ *See* Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment No. 1 Thereto, Relating to the Adoption of FINRA Rule 3110(e) (Responsibility of Member To Investigate Applicants for Registration) in the

conduct background investigations of applicants for FINRA registration and verify information provided on the applicant's Form U-4, such as disclosures about bankruptcies and outstanding judgments or liens.

In addition, the law identifies certain employment positions that are exempted from the credit check prohibitions, including:

- (a) positions having signatory authority over third-party funds or assets valued at \$10,000 or more;
- (b) positions involving "a fiduciary responsibility to the employer with the authority to enter financial agreements valued at \$10,000 or more on behalf of the employer";
- (c) positions with "regular duties that allow the employee to modify digital security systems established to prevent the unauthorized use of the employer's or client's networks or databases";
- (d) positions in which the employee is required to possess security clearance under federal law or the law of any state; and
- (e) non-clerical positions having "regular access to trade secrets, intelligence information or national security information." "Trade secrets" are defined under the law to exclude "general proprietary company information such as handbooks and

Consolidated FINRA Rulebook, 80 Fed. Reg. 546 (proposed Sept. 18, 2014) (to be codified at SR-FINRA-2014-038).

policies,” as well as “access to or the use of client, customer or mailing lists.” Trade secrets means 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.”⁶ The law also exempts various local government positions, including police officers.⁷ In addition, the law does not appear to prevent employers from obtaining publicly accessible

⁶ N.Y.C. Council Bill Number 261-A § 2. The statute also defines the term “intelligence information,” which means records and data compiled for the purpose of criminal investigation or counterterrorism. *Id.* Similarly, the term “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 and is defined as such by the federal government. *Id.*

⁷ *Id.* Also exempted are positions with a law enforcement or investigative function at the Department of Investigation (“DOI”); appointed positions subject to a DOI background investigation and deemed to carry “a high degree of public trust,” as defined by the Commission on Human Rights in rulemaking; employees required to be bonded under City, state or federal law; and City employees obligated by the New York City Administrative Code or by Mayoral Executive Order to disclose information to the Conflicts of Interest Board regarding creditors or debts. *Id.*

information concerning employees' credit history, such as information available in publicly filed bankruptcy actions, for example.

Because the law is an amendment to the New York City Human Rights Law, it provides employees with the procedural and substantive rights set forth therein. An employee asserting discriminatory treatment based on her or his credit history may file a complaint with the New York City Commission on Human Rights or bring suit in State Court. Should the employee succeed with a claim in State Court, the Human Rights Law provides for significant employer liability, including punitive damages and attorneys' fees.⁸

Employers may wish to review their policies for obtaining and using consumer credit history in light of the amendment and, in particular, assess whether certain positions may still be subject to the provision of satisfactory credit history reports.

As discussed above, neither the federal government nor New York state prohibits the use of consumer credit history in employment decisions. Accordingly, if employers wish to continue using credit checks where permitted, they should consider whether to implement separate policies for New York City employees. Employers nonetheless should remain cognizant of the notice and other requirements set forth in the federal and state consumer credit laws.

Further, the scope of the "trade secrets" exception remains unclear. The law allows

⁸ N.Y.C. Admin. Code § 8-502.

employers to continue to seek credit history information from employees whose jobs involve “regular access to trade secrets,” but excludes from the “trade secrets” definition “general proprietary company information” and “client, customer or mailing lists,” the latter of which historically have been treated by New York courts as potentially entitled to protection as trade secrets. Committee reports connected with the bill’s drafting do not provide further insight on the scope of this exception, and it is unclear how many positions would qualify.

B. New York City Commission on Human Rights Guidance

In November 2015, the Commission issued a Legal Enforcement Guidance on the Stop Credit Discrimination in Employment Act. Portions of the Guidance will be subject to future rulemaking pursuant to the City Administrative Procedure Act, N.Y. City Charter § 1041 *et seq.*

The Commission’s position is that a job application cannot reference a background check in any way – *i.e.*, an application should not advise a candidate that a background check may be conducted at some point down the line. The only exception is if the application is specifically intended for a position exempted under either law. The Guidance reads the exemptions very narrowly. For example, with respect to the exemption concerning positions involving digital security systems, the Guidance states: “This exemption 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.”

The Guidance also takes the position that an employee or job applicant must be informed of the specific exemption which applies to the position and that employers should keep a log of the exemption basis for each position they subject to a credit check.

II. Ban on Use of Criminal History in Employment Decisions

In June 2015, the New York City Council voted to amend the New York City Human Rights Law⁹ to prohibit employers from inquiring into the arrest or criminal conviction record of an applicant for employment prior to extending a conditional offer to the applicant. The law became effective on October 27, 2015.

The Fair Chance Act (“FCA”) permits employers to examine applicants’ criminal records after first making conditional offers of employment. An employer that rejects an applicant on the basis of a post-offer criminal record inquiry must provide a written explanation of the decision and allow the applicant at least three business days to respond to the explanation, while holding open the position sought by the applicant. The act exempts employers from compliance in situations where applicable federal, state, or local laws or regulations require consideration of applicants’ criminal background information in connection with hiring decisions. The FCA imposes requirements not established under

⁹ N.Y.C. Administrative Code §§ 8–101 *et seq.*

either federal or New York State law and thus exposes employers to potentially inconsistent obligations.

In passing the FCA, New York City joined a growing cohort of more than ten states and municipalities that have restricted private employers from inquiring into the criminal backgrounds of job applicants.¹⁰ Over 100 jurisdictions, including numerous states (including New York) have adopted similar prohibitions applicable only to public employers.¹¹ Advocates of such legislation base their arguments in favor of it on the perceived discriminatory impact, particularly on members of racial minorities, of employers' consideration of prior criminal convictions in making hiring decisions. Federal law, like New York State law, does not proscribe private employers' consideration of applicants' criminal records. However, guidance issued by the EEOC in 2012 identified as an employer best practice "[e]liminat[ing] policies or

¹⁰ See Michelle Natividad Rodriguez, Ban the Box: U.S. Cities, Counties, and States Adopt Fair Hiring Policies, NATIONAL EMPLOYMENT LAW PROJECT (May 26, 2015), <http://www.nelp.org/publication/ban-the-box-fair-chance-hiring-state-and-local-guide/>. These jurisdictions include Chicago, the District of Columbia, Hawaii, Illinois, Massachusetts, Minnesota, New Jersey, Philadelphia, Rhode Island, and San Francisco.

¹¹ See *id.* The eleven states that have adopted such restrictions are California, Colorado, Connecticut, Delaware, Georgia, Maryland, Nebraska, New Mexico, Ohio, Vermont, and Virginia.

practices that exclude people from employment based on any criminal record.”¹²

The FCA makes it “an unlawful discriminatory practice for any employer, employment agency or agent thereof to . . . [m]ake any inquiry or statement related to the pending arrest or criminal conviction record of any person who is in the process of applying for employment with such employer or agent thereof until after such employer or agent thereof has extended a conditional offer of employment to the applicant.” The term “inquiry” encompasses not only questions posed to an applicant, but also “searches of publicly available records or consumer reports” conducted “for the purpose of obtaining an applicant’s criminal background information.”

Under the law, an employer may look into a prospective employee’s criminal background after extending a conditional offer to the applicant. Before rejecting the applicant based on such an inquiry, however, the employer must (i) provide the applicant with a written explanation of the reasons for the employer’s anticipated decision, along with any supporting documents; (ii) allow the applicant at least three business days to respond to that explanation with countervailing information or argument; and (iii) hold the position open during the three-day period. The employer’s decision whether to proceed

¹² See U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ENFORCEMENT GUIDANCE NO. 915.002, CONSIDERATION OF ARREST AND CONVICTION RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, at 25 (Apr. 25, 2012).

with the employment of an applicant who has a criminal record will also be subject to the provisions of New York State law requiring that, before rejecting an applicant based on a criminal record, an employer must assess a variety of state-mandated factors, including the relationship between the relevant job duties and the applicant's prior offense, the length of time since the offense, the seriousness of the offense, and the like.¹³ These are often referred to as the "Article 23-A factors," after their source in New York Correction Law Article 23-A.

The FCA does not prohibit employers from considering applicants' criminal background information where such consideration is required by federal, state, or local law or by rule or regulation promulgated by a self-regulatory organization as defined by the Securities Exchange Act of 1934.¹⁴ Accordingly, the FCA does not conflict directly with federal regulations requiring certain employers to inquire into some applicants' criminal history. For example, Rule 17a-3 promulgated under the Securities Exchange Act mandates that broker-dealers question applicants for certain positions about their arrest and conviction records with respect to pertinent crimes, including felonies and misdemeanors relating to securities, commodities, fraud, and false statements.¹⁵ The FCA should not affect compliance programs maintained by covered employers in connection with such regulations. The law also exempts employers with respect to applicants for

¹³ See N.Y. Correction Law §§ 752–53.

¹⁴ See 15 U.S.C. § 78c(a)(26).

¹⁵ 17 C.F.R. § 240.17a-3.

certain civil service positions or positions involving law enforcement, care for vulnerable persons, or “susceptib[ility] to bribery or other corruption.”

As an amendment to the New York City Human Rights Law, the FCA incorporates the private rights of action set forth in that statute. Individuals claiming violations of the act by private employers may seek relief in New York State court or, alternatively, through administrative channels, by filing a complaint with the New York City Commission on Human Rights. Penalties under the Human Rights Law may include punitive damages and injunctive relief.¹⁶

Consistent with other provisions of the New York City Human Rights law, the FCA marks out a sphere of employee protection broader than that created by either federal or New York State law. Employers seeking to comply with the act must reconcile the potentially inconsistent obligations resulting from these differing standards.

Employers should consider assessing whether any positions for which they hire fall under the FCA’s exemptions, obviating the need for any alterations to hiring practices applicable to those positions. With respect to positions subject to the act’s prohibitions, if employers seek to continue to examine applicants’ criminal histories in jurisdictions permitting such inquiries, then they should consider creating separate employment application forms for use within New York City or adding language to existing forms instructing New York City applicants for positions

¹⁶ N.Y.C. Administrative Code § 8-502.

covered by the act not to answer questions concerning criminal history. Employers should also consider educating human resources staff and other relevant personnel on the act's requirements in order to prevent improper questions concerning applicants' criminal histories during interviews. In addition, in light of the act's broad definition of "inquiry" to include searches of public records, employers should consider amending any policies permitting or requiring public-source criminal background checks with respect to applicants for non-exempt positions in New York City, and consulting with any background check firms they may use to confirm those firms' compliance with the act.

Because the FCA prohibits inquiries into an applicant's criminal history only prior to issuance of a conditional offer of employment, employers may establish procedures for conducting post-offer inquiries into applicants' criminal records, along the lines set forth in the act. Such employers may wish to consider implementing policies mandating documentation of decisions not to hire applicants with prior convictions, in order to comply with the act's requirement that employers provide rejected applicants with written explanations of those determinations.

III. Ban on Discrimination Against the Unemployed

In 2013, the New York City Council amended the New York City Administrative Code to make it unlawful for an employer, employment agency, or agent thereof, with four or more employees to discriminate against job applicants on the basis of their unemployment status. *See* N.Y.C. Admin. Code

§§ 8-107(21)(a)(1)-(2). The amendment made it unlawful for an employer to: (i) base “an employment decision with regard to hiring, compensation or the terms, conditions or privileges of employment on an applicant’s unemployment”; and (ii) advertise for any job vacancy with a provision that “being currently employed is a requirement or qualification for the job,” or that the employer “will not consider individuals for employment based on their unemployment.” *Id.*

“Unemployed” and “unemployment” are defined as “not having a job, being available to work, and seeking employment.” *Id.* at § 8-102(27). The law protects an individual’s unemployment status under the New York City Administrative Code in a manner analogous to the protections offered on the basis of an individual’s sex, race, national origin, etc.

The amendment enumerates certain conditions and instances in which employers may take into account an applicant’s unemployment. Principally, an employer may consider an applicant’s unemployment “where there is a substantially job-related reason for doing so.” (*Id.* at § 8-107(21)(b).) And it is permissible for an employer to “inquir[e] into the circumstances surrounding an applicant’s separation from prior employment.” (*Id.*) An employer may also consider, when making employment decisions with regard to hiring, compensation, or the terms, conditions or privileges of employment, “any substantially job-related qualifications, including[,] but not limited to[,] a current and valid professional or occupational license; a certificate, registration, permit, or other credential; a minimum level of education or training; or a

minimum level of professional, occupational, or field experience,” and may state those same requirements when publishing an advertisement for a job vacancy. (*Id.*) And, finally, an employer may determine that “only applicants who are currently employed by the employer will be considered for employment or given priority for employment or with respect to compensation or terms, conditions or privileges of employment” and may set “compensation or terms or conditions of employment for a person based on that person’s actual amount of experience.” *Id.*

The law establishes a cause of action for disparate impact. Either the New York City Commission on Human Rights or an individual may bring an unlawful discriminatory practice claim based on a disparate impact theory. *Id.* at § 8-107(21)(e). The Commission or the individual must: “demonstrate[] that a policy or practice of an employer, employment agency, or agent thereof . . . results in a disparate impact to the detriment of” the unemployed; or “produce[] substantial evidence that an alternative policy or practice with less disparate impact is available” to the employer. As affirmative defenses, an employer may assert that the challenged policy or practice “has as its basis a substantially job-related qualification¹⁷ or does not contribute to the disparate impact”; or the employer may “prove that

¹⁷ Under the amendment, a “substantially job-related qualification” shall include, but not be limited to, “a current and valid professional or occupational license; a certificate, registration, permit, or other credential; a minimum level of education or training; or a minimum level of professional, occupational, or field experience.” *Id.*

[the asserted] alternative policy or practice would not serve [the employer] as well.”