SULLIVAN & CROMWELL LLP

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New York City Council Passes Bill Banning Use of Credit Checks in Employment Decisions

Amendment to the New York City Human Rights Law Makes It an Unlawful Discriminatory Practice for Most Employers to Use Consumer Credit Histories in Employment Decisions

SUMMARY

On April 16, 2015, the New York City Council passed an amendment to the New York City Human Rights Law that will make it an unlawful discriminatory practice for most employers to request or use an individual's consumer credit history for employment purposes. The prohibition would 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 would be 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. Mayor Bill de Blasio is expected to sign the bill shortly, and the law will take effect 120 days thereafter.

BACKGROUND

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 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. § 1681b. 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.

PROHIBITION ON THE USE OF CREDIT CHECKS

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, 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]

EMPLOYER EXEMPTIONS AND EXCEPTIONS FOR CERTAIN POSITIONS

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 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:

- 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 the authority to enter financial agreements valued at $10,000 or more on behalf of the employer";
- 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";
- employees required to possess security clearance under federal law or the law of any state; and
- employees in 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 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]

REMEDIES AVAILABLE TO EMPLOYEES

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 his or her 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]

IMPLICATIONS

Employers may wish to consider whether certain positions are still subject to credit checks.

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. Moreover, the law does not appear to prevent employers from obtaining publicly accessible information concerning employees' credit history, such as information available in publicly filed bankruptcy actions, for example.

New York City employers with workplaces in other jurisdictions may be subject to inconsistent requirements.

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.

The scope of the "trade secrets" exception remains unclear.

The law allows 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.

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ENDNOTES

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

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

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*.

8 N.Y.C. Admin. Code § 8-502.

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