

## **NYC Commission on Human Rights Issues Enforcement Guidance for Newly Effective Credit Check Law**

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On September 3, 2015, the [amendment](#) to the New York City Human Rights Law (“NYCHRL”) prohibiting the use of credit checks in employment (“Credit Check Law”) became effective. On the same day, the New York City Commission on Human Rights (“NYCCHR”), the government agency responsible for enforcing the NYCHRL, issued [enforcement guidance on the Credit Check Law](#) (“Enforcement Guidance”), [“Frequently Asked Questions,”](#) [“Information for Employees and Job Seekers,”](#) and [“Information for Employers.”](#)

These administrative materials from the NYCCHR expand upon and clarify certain provisions of the Credit Check Law and confirm that certain activities do not violate the Credit Check Law (e.g., performing Google and LinkedIn searches on applicants). Most significantly, the Enforcement Guidance addresses the Credit Check Law’s exemptions for certain positions, including those where a credit check is required by law and high-level positions involving trade secrets, financial authority, and information technology.

The Enforcement Guidance also addresses recordkeeping practices, penalties, and the application of the Credit Check Law to workers in non-traditional roles (e.g., independent contractors).

### **Exemptions**

As an initial matter, the Enforcement Guidance clarifies that the exemptions from the Credit Check Law apply to positions or roles, not individual applicants or employees. The Enforcement Guidance confirms that no exemption applies to an entire employer or industry.

With respect to specific exemptions, the Enforcement Guidance provides much-awaited guidance for the following:

- **Employers required by state or federal law or regulation or by the Financial Industry Regulatory Authority (“FINRA”) to use an individual’s consumer credit history for employment purposes.**

The Enforcement Guidance explains that the exemption for FINRA members extends *only* to registered representatives. These FINRA members may not rely upon the exemption for other employees within the same company. In particular, the exemption does not apply to “individuals [who] perform functions that are supportive of, or ancillary to or advisory to, ‘covered functions,’ or engage solely in clerical or ministerial activities.”

In regard to the exemption for credit checks required by state law, the Enforcement Guidance notes that the only New York State law currently requiring an employer to consider an applicant or employee’s consumer credit history applies to licensed mortgage loan originators pursuant to N.Y. Bank L. §559-d(9).

- **Positions involving responsibility for funds or assets worth \$10,000 or more.**

This exemption is limited to *only* executive-level positions with financial control over a company. The NYCCHR identifies such positions as Chief Financial Officer and Chief Operations Officer as representative examples. Importantly, the exemption does *not* include other staff members in a finance department, even if they would otherwise meet the exemption (i.e., by having responsibility for funds or assets worth \$10,000 or more).

- **Non-clerical positions having regular access to trade secrets, intelligence information, or national security information.**

The definition of “trade secrets” does *not* include the following: recipes, formulas, customer lists, processes, and other information regularly collected in the course of business or regularly used by entry-level and non-salaried employees and supervisors or managers of such employees.

- **Positions involving digital security systems.**

Again, this exemption is limited to *only* positions at the executive level. The NYCCHR identifies such positions as a Chief Technology Officer or a senior information technology executive.

- **Positions requiring bonding under federal, state, or New York City law or regulation.**

The following laws are examples of those that indicate positions that are required to be bonded by federal, state, or New York City law: Bonded Carriers for U.S. Customs, 19 C.F.R. § 112.23; Harbor Pilot, N.Y. Nav. L. § 93; Pawnbrokers, N.Y. Gen. Bus. L. § 41; Ticket Sellers & Resellers, N.Y. Arts & Cult. Aff. L. §§ 25.15, 25.07; Auctioneers, N.Y. City Admin. Code § 20-279; and Tow Truck Drivers, § 20-499.

- **Positions requiring security clearance under federal or state law.**

“Security clearance” is defined as the ability to access classified information and does not include any other vetting process utilized by a government agency. The exemption applies only where the review is done by the federal or state government.

## **Recordkeeping**

The “Information for Employers” document recommends that employers keep an “exemption log” to assist them in responding to information requests by the NYCCHR. The exemption log should include the following information:

- which exemption is claimed;
- how the applicant/employee fits into the exemption;
- the qualifications of the applicant/employee for the position/promotion;
- the name and contact information of the applicant/employee;
- the nature of the credit history information considered and a copy of such information;
- how the credit history information was obtained; and
- how the credit history impacted any employment action.

## **Penalties**

The Enforcement Guidance clarifies that violations of the Credit Check Law may subject an employer to a penalty of up to \$125,000 for violations, and 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 in cases brought by individuals for violations of the NYCHRL, such as back pay and front pay and compensatory and punitive damages.

## Scope of the Credit Check Law

The “Frequently Asked Questions” document provides that part-time workers, undocumented workers, interns, many independent contractors,<sup>1</sup> and probationary workers are all covered by the Credit Check Law.

## What Employers Should Do Now

- Review job descriptions and organizational charts to determine whether any positions fit within one of the exemptions.
- Instruct recruiters and those who perform background checks to confer with legal counsel on whether consumer credit history may be used in connection with hiring or other employment-related decisions at all or for certain positions.
- Confirm that employment, placement, and temporary agencies, as well as background check providers, have revised their forms and procedures in compliance with the Credit Check Law for New York City applicants and employees.

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<sup>1</sup> The “Frequently Asked Questions” document does not define to which independent contractors this law would apply. The NYCHRL, however, covers “natural persons employed as independent contractors to carry out work in furtherance of an employer's business enterprise who are not themselves employers shall be counted as persons in the employ of such employer.”

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