

## New York City Expected to Ban the Use of Credit Checks in Employment

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On April 16, 2015, the New York City Council passed [an amendment](#) (“Amendment”) to the New York City Human Rights Law (“NYCHRL”) that, if signed into law, would make it an unlawful discriminatory practice for employers to use “consumer credit history” for employment purposes. The Amendment contains several exceptions, discussed below, but would affect how employers conduct background checks. The Amendment has been delivered to Mayor Bill de Blasio’s office. If he signs the bill, as is expected, the Amendment will become effective 120 days later.

### Prohibited and Permissible Inquiries and Actions

The Amendment prohibits employers from requesting or using consumer credit history to (i) make an employment decision pertaining to an applicant or an employee, or (ii) discriminate against an applicant or employee. The term “consumer credit history” is defined as an individual’s credit worthiness, credit standing, credit capacity, or payment history, as indicated by:

- a consumer credit report;<sup>1</sup>
- credit score; or
- information that an employer obtains directly from the individual regarding:
  - 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

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<sup>1</sup> A “consumer credit report” is defined as “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.”

- bankruptcies,<sup>2</sup> judgments, or liens.

The Amendment includes a carve-out permitting employers to request or receive consumer credit history pursuant to a lawful subpoena, court order, or law enforcement investigation.

The Amendment falls in line with credit check laws passed in recent years in [California](#), Colorado, Connecticut, Hawaii, Illinois, Maryland, Nevada, North Carolina, Oregon, Vermont, and Washington.

## **Exemptions**

Notably, the Amendment provides certain exemptions where requesting or using consumer credit history is, indeed, permissible.<sup>3</sup>

Employer Exemption. The Amendment does not apply to employers that are otherwise required to use an individual's consumer credit history for employment purposes by federal or state law or by a "self-regulatory organization," as defined by the Securities Exchange Act of 1934. Thus, the Amendment does not apply to employers subject to the rules of the Financial Industry Regulatory Authority ("FINRA").

Position Exemptions. The Amendment does not apply to persons applying for positions:

- as police officers or peace officers;
- subject to a background investigation by the New York City Department of Investigation;
- in which the employee is required to be bonded by federal, state, or city law;
- in which the employee is required to possess security clearance under federal or any state's law;
- as a non-clerical employee having regular access to trade secrets<sup>4</sup> (which excludes general proprietary company information, such as handbooks or policies), intelligence information,<sup>5</sup> or national security information;<sup>6</sup>

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<sup>2</sup> Employers should note that federal bankruptcy laws may limit the use of an employee's bankruptcy in employment decisions as well.

<sup>3</sup> In cases where employers request consumer credit history in accordance with these exceptions, employers must continue to comply with the notice, authorization and disclosure requirements of the state and federal Fair Credit Reporting Acts.

<sup>4</sup> The Amendment defines "trade secrets" as

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

- (i) where the employee would have signatory authority over third-party funds or assets valued at \$10,000 or more, or (ii) that involve a fiduciary responsibility to the employer with the authority to enter financial agreements valued at \$10,000 or more on behalf of the employer; and
- where the employee has regular duties that allow the employee to modify digital security systems established to prevent the unauthorized use of the employer's or clients' networks or databases.

## Covered Employers

The NYCHRL applies to employers, including employment agencies, with four or more employees (including independent contractors who are “natural persons” and not themselves employers).

## Enforcement

An employee alleging a violation of the Amendment may either bring a complaint with the New York City Commission on Human Rights or proceed directly to court.

## What Employers Should Do Now

While awaiting the mayor's signature, New York City employers should:

- review the *employer* exemption to the Amendment to determine whether it will apply to them generally;
- review the *position* exemptions to determine if they may request or use consumer credit history in connection with one or more particular positions;
- review (and get ready to revise) background check procedures, as applied;

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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.

According to the City Council, having regular access to trade secrets *does not* include access to, or the use of, client, customer, or mailing lists.

<sup>5</sup> The Amendment defines “intelligence information” as “records and data compiled for the purpose of criminal investigation or counterterrorism, including records and data relating to the order or security of a correctional facility, reports of informants, investigators or other persons, or from any type of surveillance associated with an identifiable individual, or investigation or analysis of potential terrorist threats.”

<sup>6</sup> The Amendment defines “national security information” as “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 government and is defined as such by the United States government and its agencies and departments.”

- prepare to train recruiters and human resources professionals who perform background checks on whether consumer credit history may be used at all or for certain positions; and
- confirm that employment, placement, and temporary agencies, as well as background check providers, are aware of the Amendment and are poised to revise their forms and procedures in compliance with the Amendment for New York City applicants and employees in companies and positions covered (and not exempted) by the Amendment.

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