

NEW YORK CITY ISSUES GUIDELINES ON CREDIT RESTRICTION REGULATION

New York City issues interpretative guidelines on their credit restriction law “Stop Credit Discrimination Employment Act”. New York City employers should review these guidelines:

NOTE: *Portions of this guide will be subject to future rulemaking pursuant to the City Administrative Procedure Act, N.Y. City Charter § 1041 et seq.*

The New York City Human Rights Law (hereinafter the “NYCHRL”) prohibits discrimination in employment, public accommodations, and housing. It also prohibits discriminatory harassment and bias-based policing by law enforcement.

The NYCHRL, pursuant to the 2005 Civil Rights Restoration Act, must be construed “independently from similar or identical provisions of New York state or federal statutes,” such that “similarly worded provisions of federal and state civil rights laws [are] a floor below which the City’s Human Rights law cannot fall, rather than a ceiling above which the local law cannot rise.”¹

The New York City Commission on Human Rights (the “Commission”) is the City agency charged with enforcing the NYCHRL. Individuals interested in vindicating their rights under the NYCHRL can choose to file a complaint with the Commission’s Law Enforcement Bureau within one (1) year of the discriminatory act or file a complaint at New York State Supreme Court within three (3) years of the discriminatory act.

The Stop Credit Discrimination in Employment Act (“SCDEA”), which goes into effect on September 3, 2015, amends the NYCHRL by making it an unlawful discriminatory practice for employers, labor organizations, and employment agencies to request or use the consumer credit history of an applicant or employee for the purpose of making any employment decisions, including hiring, compensation, and other terms and conditions of employment. N.Y.C. Admin. Code §§ 8-102(29), 8-107(24).

The SCDEA also makes it an unlawful discriminatory practice for a City agency to request or use, for licensing or permitting purposes, information contained in the consumer credit history of an applicant, licensee or permittee. *Id.* at § 8-107(9)(d)(1).

As of September 3, 2015, this document serves as the Commission’s interpretative enforcement guidance of the SCDEA’s protections.²

I. Legislative Intent

The SCDEA reflects the City’s view that consumer credit history is rarely relevant to employment decisions, and consumer reports should not be requested for individuals seeking most positions in New York City. In enacting the SCDEA, the City Council intended for it to “be the strongest bill of its type in the country prohibiting discriminatory employment credit checks.”³

The SCDEA is intended to stop employers from using consumer credit history when making employment decisions—a practice that has a disproportionately negative effect on unemployed people, low income communities, communities of color, women, domestic violence survivors, families with children, divorced individuals, and those with student loans and/or medical bills.

The City Council noted that multiple studies have failed to demonstrate any correlation between individuals’ credit history and their job performance.⁴

II. Definitions

The SCDEA defines “consumer credit history” to mean an individual’s “credit worthiness, credit standing, credit capacity, or payment history, as indicated by:

1. a consumer credit report;
2. credit score; or
3. information 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
- bankruptcies, judgments or liens." N.Y.C. Admin. Code § 8-102(29).

Under the SCDEA, a consumer credit report includes "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."

Companies that provide reports containing information about people's payment history to creditors, the amount of people's credit and credit consumption, and information from debt buyers and collectors are considered consumer reporting agencies for purposes of the SCDEA, though the definition of a "consumer reporting agency" is not confined to such companies. "Consumer reporting agency" includes any person or entity that, for monetary fees, dues, or on a cooperative nonprofit basis, engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports or investigative consumer reports to third parties. Note that, unlike the definition of a "consumer reporting agency" under the New York State Fair Credit Reporting Act ("FCRA"), a person need not regularly engage in assembling or evaluating consumer credit history in order to be a "consumer reporting agency" under the SCDEA.

III. Violations of the SCDEA

After September 2, 2015, the following acts will be separate chargeable violations of the NYCHRL:

1. Requesting consumer credit history from job applicants or potential or current employees, either orally or in writing;
2. Requesting or obtaining consumer credit history of a job applicant or potential or current employee from a consumer reporting agency; and
3. Using consumer credit history in an employment decision or when considering an employment action.

All of the above are unlawful discriminatory practices, even if such practices do not lead to an adverse employment action. Whether or not an adverse employment action occurred as a result of considering credit history can be considered when determining damages or penalties, but is not relevant for finding liability.

The SCDEA does not prevent employers from researching potential employees' background and experience, evaluating their résumés and references, and conducting online searches (e.g., Google and LinkedIn).

IV. Positions Exempted from the SCDEA's Anti-Discrimination Provisions

Consistent with the broad scope of the NYCHRL, all exemptions to coverage under the SCDEA's anti-discrimination provisions are to be construed narrowly. Employers may claim an exemption to defend against liability, and they have the burden of proving the exemption by a preponderance of the evidence. No exemption applies to an entire employer or industry. Exemptions apply to positions or roles, not individual applicants or employees.

A. 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.

FINRA members are exempt from the SCDEA when making employment decisions about people who are required to register with FINRA.⁵ FINRA members must comply with the SCDEA, however, when making employment decisions regarding people who are not required to register with FINRA. These individuals perform functions that are supportive of, or ancillary or advisory to, "covered functions"⁶ or engage solely in clerical or ministerial activities.⁷

As of the date of this interpretive guidance, the only New York law requiring the evaluation of a current or potential employee's consumer credit history applies to licensed mortgage loan originators. N.Y. Bank. L. § 559-d(9). This law was enacted to comply with the requirements of the federal SAFE Mortgage Licensing Act of 2008. 12 U.S.C. § 5104(a)(2)(A).

B. Police officers, peace officers, or positions with a law enforcement or investigative function at the Department of Investigation (“DOI”).

Police and peace officers are limited to their definitions in New York Criminal Procedure Law §§ 1.20(34) and 2.10, respectively. The SCDEA’s anti-discrimination provisions still apply when making employment decisions about civilian positions; only positions for police or peace officers are exempt from the SCDEA.

The DOI has several positions that do not serve investigative functions. Certain operations and communications positions are examples of positions to which the SCDEA’s anti-discrimination provisions still apply.

C. Positions subject to a DOI background investigation.

For certain positions with the City of New York, the DOI conducts background checks that involve collecting consumer credit history from the job applicant. The DOI may provide some of the information collected from the background check to the City agency interviewing or hiring the job applicant. Under the SCDEA, City agencies may not request or use consumer credit history collected by the DOI in making employment decisions unless:

1. The position is appointed; and
2. The position requires a high degree of public trust.

The Commission currently defines only the following positions as involving a high degree of public trust:

- Commissioner titles, including Assistant, Associate, and Deputy Commissioners;
- Counsel titles, including General Counsel, Special Counsel, Deputy General Counsel, and Assistant General Counsel, that involve high-level decision-making authority;
- Chief Information Officer and Chief Technology Officer titles; and
- Any position reporting to directly to an agency head.

D. Positions requiring bonding under federal, state, or City law or regulation.

In order for this exemption to apply, the specific position must be required to be bonded under City, state, or federal law, and bonding must be legally required, not simply permitted, by statute. For example, the following positions must be bonded:

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.

E. Positions requiring security clearance under federal or state law.

This exception only applies when the review of consumer credit history will be done by the federal or state government as part of evaluating a person for security clearance, and that security clearance is legally required for the person to fulfill the job duties. Having “security clearance” means the ability to access classified information, and does not include any other vetting process utilized by a government agency.

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

The SCDEA 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 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.”

The SCDEA limits the trade secret definition to exclude “general proprietary company information such as handbooks and policies” and “access to or the use of client, customer, or mailing lists.”

Consistent with this definition and the broad scope of the NYCHRL, “trade secrets” do not include information such as 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.

The SCDEA 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.” Positions having regular access to intelligence information shall be narrowly construed to include those law enforcement roles that must routinely utilize intelligence information.

The SCDEA 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.” Positions having regular access to national security information shall be narrowly construed to include those government or government contractor roles that require high-level security clearances.

The intelligence and national security exemptions encompass those few occupations not already subject to exemptions for police and peace officers or where credit checks are required by law.

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

In general, this exemption includes only executive-level positions with financial control over a company, including, but not limited to, Chief Financial Officers and Chief Operations Officers. This exemption does not include all staff in a finance department.

H. Positions involving digital security systems.

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 exemption does not include any person who may access a computer system or network available to employees, nor does it include all staff in an information technology department.

V. Employers' Record of Exemption Use

An employer claiming an exemption must show that the position or role falls under one of the eight (8) exemptions in Part IV above. Employers availing themselves of exemptions to the SCDEA's anti-discrimination provisions should inform applicants or employees of the claimed exemption. Employers should also keep a record of their use of such exemptions for a period of five (5) years from the date an exemption is used. Keeping an exemption log will help the employer respond to Commission requests for information.

The exemption log should include the following:

1. The claimed exemption;
2. Why the claimed exemption covers the exempted position;
3. The name and contact information of all applicants or employees considered for the exempted position;
4. The job duties of the exempted position;
5. The qualifications necessary to perform the exempted position;
6. A copy of the applicant's or employee's credit history that was obtained pursuant to the claimed exemption;
7. How the credit history was obtained; and
8. How the credit history led to the employment action.

Employers may be required to share their exemption log with the Commission upon request. Prompt responses to Commission requests may help avoid a Commission-initiated investigation into employment practices.

VI. Penalties for administrative actions

The Commission takes seriously the SCDEA's prohibitions against asking about or using consumer credit history for employment purposes and will impose civil penalties up to \$125,000 for violations, and up to \$250,000 for violations that are the result of willful, wanton or malicious conduct. The amount of a civil penalty will be guided by the following factors, among others:

- The severity of the violation;
- The existence of subsequent violations;
- The employer's size, considering both the total number of employees and its revenue; and
- The employer's actual or constructive knowledge of the SCDEA.

These penalties are in addition to the other remedies available to people who successfully resolve or prevail on claims under the NYCHRL, including, but not limited to, back and front pay, along with compensatory and punitive damages.

It is recommended that employers in NYC review their policy on ordering credit reports and determine if their positions fall within the exclusions as listed in the guidance and make applicable changes to their existing policies. It is encouraged that employers to review their background screening and drug testing policies regularly at least once a year.

1 Local Law No. 85 (2005); see also N.Y.C. Admin. Code § 8-130 ("The provisions of this title shall be construed liberally for the accomplishment of the uniquely broad and remedial purposes thereof, regardless of whether federal or New York State civil and human rights laws, including those laws with provisions comparably-worded to provisions of this title have been so construed.").

2 The Commission does not have jurisdiction to enforce federal and state fair credit reporting laws, which require employers to give applicants notice and get their permission before obtaining a consumer report about them. 15 U.S.C. § 1681d; N.Y. Gen. Bus. L. § 380-b(b).

3 Council Member Brad S. Lander, Hearing Transcript of the New York City Council Stated Meeting, 63 (Apr. 16, 2015), available at <http://legistar.council.nyc.gov/Legislation.aspx> (last accessed Aug. 12, 2015).

4 Report of the Governmental Affairs Division, Committee on Civil Rights, 4 (April 14, 2015) (available through <http://legistar.council.nyc.gov/Legislation.aspx>, last accessed Aug. 28, 2015).

5 FINRA, Rule 1230 and 3110(e).

6 FINRA, Rule 1230(b)(6)(B).

7 FINRA, Rule 1230.06; FINRA Regulatory Notice 11-33.

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<http://blog.aurico.com/2015/09/new-york-city-issues-guidelines-on.html>