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Risk Management in a New Era

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Oversight Risk

- Board fiduciary responsibilities
- NY Not-For-Profit Revitalization Act
- By-laws/governance
- Conflict of interest (reputational risk)
- Whistleblower
- Negligence standard
  - “On notice”
  - e.g. security
- Best practices
Contractual Risks

- Authority and process
- Understand terms/financial implications before entering into contracts
  - *e.g.*
    - Indemnification
    - liability caps
    - automatic renewals
    - term/termination
    - subcontracting/assignment
    - leases
- Enrollment contracts
Employment Practice Risk

- Background checks
- Misclassification/overtime/FLSA
- NYC laws
- Risks of termination
- Intermediate sanctions/executive comp.
- Housing
- Employee handbook/offer letters
- Hiring practices
  - e.g. I-9
- Consultant contracts
- Protected speech under NLRA
- Training (conduct with students)
Financial Risk

- NYPMIFA
- Investment Committee policies/endowment
- Internal controls
- Whistleblowers
- Role of audit committee
- Internal financial reporting: Board information?
- Government filings
- ERISA/defined compensation plans
General Organizational Risk

- Insurance
- Cybersecurity risks
- Intellectual property
  - Name
  - Logo
- Privacy compliance
Program Specific Risks

- Trips (including 3rd party)
  - Hotchkiss $41.75 million
- Mandated reporting
- Sexual abuse
- Bullying
  - Dignity for All Students Act
- Record retention
- Student disabilities/accommodations
- Divorce
- Immunization
- Social media/internet
- Enrollment of foreign students
- Transgender students
- Student discipline
- Parent issues
- Immigration
- Political activity/lobbying
Alert

New York City to Ban Employer Inquiries and Reliance on Salary History

April 7, 2017

On April 5, 2017, by a 47-3 vote, the New York City Council passed a bill that bans New York City employers from inquiring about an applicant’s “salary history” or relying on a job applicant’s “salary history” in determining the applicant’s salary, benefits or other compensation. New York City Mayor Bill de Blasio is expected to sign the bill, and the new law will go into effect 180 days after he signs it.

The new law, which applies to New York City employers with four or more employees, is intended to help eliminate pay inequality and amends the New York City Human Rights Law to make it “an unlawful discriminatory practice” for an employer to inquire about an applicant’s salary history or conduct any public search to determine the applicant’s salary history. In addition, the new law makes it “an unlawful discriminatory practice” for an employer to rely on an applicant’s “salary history” in determining the salary or benefits of an applicant during the hiring process. “Salary history” means an “applicant’s current or prior wage, benefits or other compensation.”

Although the bill restricts employers from inquiring about or relying on salary history, employers are permitted to, “without inquiring about salary history,” discuss with the applicant his or her expectations with respect to salary or benefits, “including but not limited to unvested equity or deferred compensation that an applicant would forfeit or have cancelled by virtue of the applicant’s resignation from their current employer.” Further, an employer may lawfully rely on salary history in determining salary and benefits if an applicant “voluntarily and without prompting discloses salary history.”

The law does not bar employers from verifying an applicant’s background information, but if an employer inadvertently learns salary history information during the verification process, the employer cannot rely on the information. If an applicant has voluntarily disclosed salary history information, the employer is permitted to verify the information provided.

As with other violations of the New York City Human Rights Law, employers found in violation of the new law may be liable for compensatory damages (including front pay and back pay), punitive damages, and attorneys’ fees and costs, as well as a civil penalty of up to $250,000 for violations that “are the result of willful, wanton or malicious conduct.”

Employers should carefully review their interview and hiring processes as a result of the new law. For example, employment applications should not ask for salary information. Employers should revise their neutral reference policies to not provide salary history information unless specifically requested by an employee. Employers should take steps to ensure that any discussions about salary or benefits are
limited to applicants’ expectations, and not to compensation the applicant has received from a prior employer. Further, to ensure an employer does not inadvertently obtain salary history information, employers should ensure that any background checks specifically exclude salary history information.


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Alert

New York City to Restrict Employers’ Use of Credit History in Employment Decisions

April 30, 2015

On April 16, 2015, by a 47-3 margin, the New York City Council passed a bill restricting employers from requesting or using the credit history of applicants and employees when making employment decisions. New York City Mayor Bill de Blasio is expected to sign the bill, which will go into effect 120 days after he signs it.

The bill amends the New York City Human Rights Law to prohibit employers from requesting or using “for employment purposes the consumer credit history of an applicant for employment or an employee” and from otherwise discriminating “with regard to hiring, compensation, or the terms, conditions or privileges of employment based on the consumer credit history of the applicant or employee.” “Consumer credit history” is defined as “an individual’s credit worthiness, credit standing, credit capacity, or payment history, as indicated by: (a) a consumer credit report; (b) credit score; or (c) information an employer obtains directly from the individual regarding (1) 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 (2) bankruptcies, judgments or liens.”

The bill includes several limited exceptions. The ban on the use of “consumer credit history” does not apply if an employer is required by law or by a self-regulatory organization as defined in Section 3(a)(26) of the Securities Exchange Act of 1934 (such as FINRA) to use an individual’s consumer credit history for employment purposes. Credit checks are also permitted for individuals applying for, or employed in, the following positions:

- A “non-clerical position having regular access to trade secrets, intelligence information or national security clearance.” The bill 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 bill, however, specifically excludes “general proprietary company information such as handbooks and policies” from the definition of “trade secrets” and specifies that having “access to or use of client, customer or mailing lists” does not constitute having “regular access to trade secrets.”
• A position in which the employee will have “signatory authority over third party funds or assets valued at $10,000 or more” or “that involves a fiduciary responsibility to the employer with the authority to enter financial agreements valued at $10,000 or more on behalf of the employer.”

• A position in which the employee’s regular duties “allow the employee to modify digital security systems established to prevent the unauthorized use of the employer’s or client’s networks or database.”

• A position in which the employee is required by law to be bonded.

Even in circumstances in which the new law will not apply, employers need to keep in mind the restrictions imposed by Section 525(b) of U.S. Bankruptcy Code, which prohibits employment discrimination against an individual “solely because” of the individual’s status as a debtor in a bankruptcy proceeding. Also, while the new law will not prohibit employers from conducting other types of background checks, such as reference checks or criminal background checks, employers need to comply with federal and state laws regarding conducting such checks and using information obtained from them when making employment decisions.¹

Employers should carefully review their hiring and background check practices as a result of the anticipated new law. In certain circumstances, it may be necessary for employers to make decisions about whether a credit check is permitted on a case-by-case basis rather than requiring them for all employees or job applicants.

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If you have any questions concerning this Alert, please contact your attorney at Schulte Roth & Zabel or one of the authors.

¹ For a more detailed overview of these requirements, see the SRZ Alert titled, “EEOC Issues New Guidance Regarding Applicants and Employees with Criminal Records.”

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Now We Know How NYC's Credit Check Ban Will Be Interpreted

Law360, New York (September 4, 2015, 2:43 PM ET) -- On Sept. 2, the New York City Commission on Human Rights released enforcement guidance on the Stop Credit Discrimination in Employment Act, which took effect on Sept. 3. [1] The SCDEA prohibits New York City employers from requesting or using the credit history of applicants and employees when making employment decisions. The commission’s enforcement guidance makes clear that the commission plans on interpreting the SCDEA’s restrictions broadly and its exemptions narrowly.

In the guidance, the commission explains 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.” According to the commission, an employer will be in violation of the SCDEA for: “(1) requesting consumer credit history from job applicants or potential or current employees, either orally or in writing”; or “(2) requesting or obtaining consumer credit history from job applicants or potential or current employees from a consumer reporting agency”; or “(3) using consumer credit history in an employment decision or when considering an employment action.” Accordingly, simply requesting consumer credit history will be considered a violation of the SCDEA, even if the employer does not use the information it receives or the employer’s use of the information it receives does not result in adverse employment action.

As we detailed in our prior Alert,[2] the SCDEA includes exemptions for certain positions, including positions with control of funds or assets worth $10,000 or more, nonclerical positions with regular access to trade secrets, positions with control over digital security systems and positions for which credit checks are required by law or self-regulatory organization. The commission’s guidance provides insight as to how the commission plans on interpreting these exemptions:

- The exemption for positions involving responsibility for funds or assets worth $10,000 or more “only” applies to “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.”

- Financial Industry Regulatory Authority members are exempt from the SCDEA only when making decisions about people who are required to register with FINRA. FINRA members must comply with the SCDEA when making employment decisions about individuals who are not required to register with FINRA.

- 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 nonsalaried employees and supervisors or managers of such employees.”
The exemption for positions with control over digital security systems 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.” This 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.”

The commission explains that employers “have the burden of showing that an exemption applies.” According to the commission, the exemptions “are to be construed narrowly.”

The commission outlines steps that an employer should take if it believes a position is exempt. Employers should “inform applicants or employees of the claimed exemption.” The commission does not, however, require that applicants or employees be so informed in any particular manner. Additionally, the commission suggests in the guidance that employers keep an “exemption log” detailing instances when exemptions are used to perform credit checks. The commission instructs that the exemption log should be maintained for a period of five years from the date an exemption is used and should include the following information:

1. the claimed exemption;
2. why the claimed exemption covered 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 logs with the commission “upon request,” and “promptly” doing so may “help avoid a Commission-initiated investigation into employment practices.”

As with other violations of the New York City Human Rights Law, employers found in violation of the SCDEA may be liable for compensatory damages (including front pay and back pay), punitive damages and attorneys’ fees and costs, as well as a civil penalty of up to $250,000 for violations that “are the result of willful, wanton or malicious conduct.”

New York City employers should carefully review the commission’s enforcement guidance before requesting credit history of applicants or employees. Additionally, any decision to apply one of the SCDEA’s exemptions should be made on a case-by-case basis, after carefully reviewing the SCDEA and the commission’s accompanying enforcement guidance.

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[1] The enforcement guidance and other materials issued by the commission are available on the commission’s website.


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