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Management Alert

THE FAIR CHANCE ACT AND STOP CREDIT DISCRIMINATION IN EMPLOYMENT ACT--NEW INTERPRETATIONS FROM THE NYCCHR

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Earlier this year, the New York City Council passed two laws which place limitations on an employer's ability to use background checks including credit checks (otherwise known as consumer reports) in employment decisions: the *Fair Chance Act ("FCA")* and the *Stop Credit Discrimination in Employment Act ("SCDEA")*. (For more information on either of these laws, please see our previous blogs *here*, *here*, *here* and *here*.)

On September 28, 2015, the New York City Commission on Human Rights' ("NYCCHR") staff attorney, Paul Keefe, held a question and answer forum for management counsel and employers to inquire about how the NYCCHR will interpret and apply the FCA and SCDEA.

Below is a summary of the NYCCHR's additional guidance and commentary.

Compliance with the Stop Credit Discrimination in Employment Act

By way of background, effective, **September 3, 2015**, it is unlawful for a New York City employer to request or use an applicant's credit history in making employment decisions. Only limited exemptions apply, namely:

1. positions where employers are required by state or federal law or regulations, or by a self-regulatory organization (such as FINRA) to use an individual's consumer credit history for employment purposes;

2. police officers, peace officers, or those in a position with law enforcement or investigative function at the City of New York Department of Investigation ("DOI") (or in certain positions subject to background investigation by the DOI);

3. certain positions working for the City of New York subject to a background investigation by the DOI;

4. positions requiring the employee to be bonded by City, state or federal law;

5. positions requiring the employee to possess a security clearance under federal or state law;

6. non-clerical positions having regular access to trade secrets, intelligence information or national security information;

7. positions having signatory authority over third party funds or assets valued at $10,000 or more, or positions that involve a fiduciary responsibility to the employer with authority to enter financial agreements on behalf of the employer for $10,000 or more; and

8. positions that allow the employee to modify digital security systems protecting the employer or client's networks or databases.

Shortly following the law's passage, the NYCCHR issued enforcement *guidance* detailing its interpretations of these exemptions, which led to many additional questions by management.

At its presentation, the NYCCHR clarified the following interpretive positions:

- The "FINRA Exception," detailed in the NYCCHR's guidance is broader than indicated by the guidance. The guidance states that individuals required to register with FINRA are exempt from the SCDEA, referencing by footnote FINRA Rule 1230. However, FINRA Rule 1230 does not encompass all employees required to register with FINRA. The NYCCHR clarified that the intent is to exempt *all* positions required to register with FINRA, and further, to cover individuals required to register with similar self-regulatory organizations, such as the National Futures Association.

- Likewise, the exception for "positions that allow the employee to modify digital security systems protecting the employer or client's networks or databases" is broader than previously suggested. For instance, the guidance suggests that this exemption is narrow and will only cover "Chief Technology Officers" or "senior information technology executives." However, larger employers with additional positions that do not have a CTO or executive title but are able to modify the digital security systems would likewise be able to conduct credit checks on those employees.

- Should an exemption apply, employers are required to maintain an exemption log for five years, detailing (1) the claimed exemption; (2) why the claimed exemption covers the exempted position; (3) the name and contact information of all applicants considered for the position; (4) the job duties of the exempted position; (5) the qualifications necessary to perform the exempted position; (6) a copy of the applicants' credit history that was obtained; (7) how the credit history was obtained; and (8) how the credit history led to the employment decision. It will be the employer's burden to prove the exemption was properly applied through this documentation.

- Finally, and perhaps most significantly, the NYCCHR clarified that the "intent of the law" is to avoid reference to credit checks at any point in the application process, and even after a conditional offer is provided, unless an exemption is met. Consequently, the NYCCHR will take a strict interpretation of the statute, and clarified that it would likely view FCRA Disclosure and/or Acknowledgment forms referencing credit history as noncompliant with the law, even if the employer does not ultimately obtain the applicant's consumer credit report. This is not referenced anywhere in the statute or the guidance.

- The NYCCHR expects to answer additional questions related to financial employers through Frequently Asked Questions on its website. For instance, we expect the NYCCHR to weigh in on how to reconcile the SCDEA with financial institutions' obligations under the SEC to monitor and ensure compliance with its insider trading policies. Likewise, the NYCCHR will weigh in on whether the "signatory exception" might apply to positions holding company credit cards with a limit in excess of $10,000.

Compliance with the Fair Chance Act

Under the Fair Chance Act, effective **October 27, 2015**, New York City employers are prohibited from inquiring about an applicant's criminal background until after a conditional offer of employment is issued. The NYCCHR clarified that the FCA prohibits reference to criminal history anywhere in a job advertisement, application, or at any other stage in the hiring process prior to a conditional offer of employment.

Once a conditional employment offer is given to the applicant, the employer may secure the applicant's authorization to obtain a consumer report, and, should it be warranted by the individualized analysis under New York Corrections Law, Article 23-A, take adverse action based on the information obtained. If an employer chooses to take adverse action (e.g. rescind a job offer), the employer is obligated to provide the applicant with: (1) a copy of the New York Corrections Law, Article 23-A; (2) a copy of the consumer report obtained; and (3) a copy of the employer's determination and the analysis conducted to make this determination, which would include its consideration of the factors listed in Article 23-A and its determination as to whether the criminal history is directly related to the position sought, or otherwise poses an unreasonable risk. (The NYCCHR intends to issue a sample form shortly.) The employer must then hold the job opportunity open for three business days, so

that the applicant can respond with additional or mitigating information.

The NYCCHR further clarified that:

- The three business day time frame will run from the date the applicant *receives* his or her consumer report and the employer's analysis.

- The Commission will consider it to be a violation of the law should a job advertisement or application reference, even generally, that a criminal background check will be conducted -- even if the advertisement or application refrains from stating any blanket prohibitions such as "no felonies." However, advertisements that state "reference checks will be conducted" would be considered lawful.

- It is still permissible to use reference checks and public resources, as long the intent of the check is ***not*** to discover an applicant's credit score or criminal background. Thus, simply searching an "applicant's name" in Google or LinkedIn would be permissible, however, searching "[Applicant's Name] criminal background" would be impermissible.

- Should an applicant inquire about a criminal background check during the interview process, the proper response to the applicant is simply that the Company will decide whether to conduct a background check after a conditional offer.

- The employer does not lose its right to take adverse action against an applicant who misrepresents his or her criminal history, so long as it does not ask the applicant about criminal history until after a conditional offer of employment is given.

- Temporary staffing agencies need not conduct the Article 23-A analysis for each temporary position -- only when making the initial decision to place the applicant in its pool of available temporary employees. However, staffing agencies are not permitted to accommodate client requests for "no felons," or other preferences with respect to criminal background, unless that limitation is required by state or federal law, and doing so may result in aiding and abetting liability under the statute.

What Employers Should Know

The NYCCHR will be offering free training for small businesses on how to comply with the SCDEA and FCA, so employers who qualify for this should take advantage of it. In early 2016, the rulemaking and notice and comment period will begin for both laws, allowing employers the opportunity to weigh in on the practical impact of these restrictions.

Employers are encouraged to monitor for upcoming proposed rules, additional guidance on the FCA (including the sample individualized assessment form to be issued), and keep an eye out for updates on the Frequently Asked Questions section of the NYCCHR's website.

These new interpretations likely will require employers to consider revising their processes and forms for applicants/residents in New York City to comply with these laws.

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