

Legislation and Compliance Update



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New York City Issues Guidance on Credit Restrictions

The New York City Commission on Human Rights has issued legal enforcement guidance on the City's Stop Credit Discrimination in Employment Act that went into effect on September 3, 2015.

The Act amends the New York City Human Rights Law 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. It prohibits employers from requesting or using information about an individual's credit worthiness, credit standing, credit capacity, or payment history as indicated by a consumer credit report, credit score, or information an employer obtains directly from the individual regarding details about credit accounts or bankruptcies, judgments, or liens.

The City's enforcement guidance identifies the limitations that will be applied to the exemptions listed in the Act. The limited exemptions are:

1. Employers required by state or federal law or regulation or by the Financial Industry Regulatory Authority (FINRA). The guidance says that the only state law requiring a credit check applies to licensed mortgage loan originators and individuals who are required to register with FINRA.
2. Police officers, peace officers, or positions with a law enforcement or investigative function at the Department of Investigation. The Department of Investigation exemption does not apply to the many positions that do not serve investigative functions.
3. Positions subject to a Department of Investigation background investigation. The exemption applies only to individuals who are appointed to the position and the position requires a high degree of public trust. The guidance lists the specific positions.
4. Position requiring bonding under federal, state, or city law or regulation. For the exemption to apply to these positions, the bonding must be legally required, not simply permitted by statute.
5. Positions requiring security clearance under federal or state law. This exception only applies to 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 the security clearance is legally required for the person to fulfill the job duties. A security clearance means only the type of clearance that allows access to national security classified information.

6. Non-clerical positions having regular access to trade secrets, intelligence information, or national security information. “General proprietary company information such as handbooks and policies” and “access to or the use of client, customer, or mailing lists” do not qualify as trade secrets. “Trade secrets” do not include 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 those employees.

7. Positions involving responsibility for funds or assets worth \$10,000 or more. Generally, the exclusion includes only executive-level positions with financial control over a company. It does not include all staff in a finance department.

8. Positions involving digital security systems. This exemption applies to positions at the executive level. It does not apply to all staff in an information technology department.

The guidance recommends that, whenever an employer claims an exemption, it informs the applicant or employee of the claimed exemption. It also recommends that each employer should keep a record of its use of exemptions for a five-year period from the date an exemption is used. Employers will be required to share their exemption logs with the Commission upon request. The log should contain 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 credit history led to the employment action.

It is important to note that a violation of the Act occurs even if an employer’s practices do not lead to an adverse employment action. Based on the Act’s provisions and the limited exceptions, there are very few circumstances when an employer may lawfully access or use credit history information for employment purposes.

Penalties for violating the New York City Human Rights Laws are substantial. Employers may have to pay lost wages and other damages and may be subject to civil penalties of up to \$125,000. A willful violation may be subject to civil penalties of up to \$250,000.

The legal enforcement guidance is found on the New York City Commission on Human Rights website:<http://www.nyc.gov/html/cchr/html/coverage/credit-history-legalguidance.shtml>

You can view the New York City ordinance #261-A at <http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=1709692&GUID=61CC4810-E9ED-4F16-A765-FD1D190CEE6C&Options=&Search>

What This Means for You:

- **Determine whether you have positions in New York City for which you run credit checks.**
- **If so, determine whether one of the exemptions in the law applies to you.**
- **If not, either consider how to log the information needed to show compliance or contact your account manager to talk about setting up background screening packages without credit checks for New York City positions.**

e-Verifile.com, Inc. | [855.383.7434](tel:855.383.7434) | support@everifile.com | everifile.com