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New York City Council and Bloomberg Administration Clash over Proposal to Prohibit Employment Discrimination Based on Credit History

April 15, 2013

On May 15, 2012, the New York City Council proposed Int. #0857-2012 (the Proposal), which would amend the New York City Human Rights Law (NYCHRL) to prohibit discrimination against job applicants and employeesbased on their credit history, and provide expansive whistleblower/retaliation protections to employees.

At a hearing-turned-debate before the Council on April 11, 2013, an attorney for Mayor Michael Bloomberg's administration expressed serious reservations with preventing employers from considering the credit histories of their applicants and employees. This legislative-executive rift is yet another example of the Bloomberg administration's recent opposition to employment measures advanced by the Council. Indeed, only a month ago, the Council overrode the Mayor's veto to prohibit discrimination based on unemployment status. The Mayor also recently expressed his intention to veto a bill that would mandate paid sick leave for most employees.

If the Proposal becomes law, it would join a growing number of laws and proposed laws to limit employment discrimination on the basis of credit history. Indeed, eight states have greatly restricted employer consideration of applicant and employee credit history, including California, Maryland, Connecticut, Hawaii, Illinois, Washington, Oregon and Vermont, as well as at least one locality, the City of Chicago. Moreover, bills containing some form of ban on the use of credit history in employment decisions also have been proposed in the U.S. Congress and a number of state legislatures, including New York State's.

Unlike the vast majority of laws in effect and in legislation pending across the nation, however, the Proposal does not explicitly enumerate exceptions for managerial positions, or positions with access to bank or credit card information, Social Security numbers, significant amounts of cash, or confidential or proprietary information. Although the Proposal exempts employers required by law to run credit checks on their applicants and employees, its silence as to these other standard exceptions should give New York City employers particular pause should the Proposal become law.

To assist employers in understanding the Proposal, which would take effect immediately if enacted, this alert discusses the scope of its coverage, as well as the unlawful practices, enforcement mechanisms and remedial schemes set forth therein.

Coverage

The coverage of the Proposal is expansive. By amending the NYCHRL, the Proposal would cover "employers" employing at least four persons (including independent contractors), as well as employment and licensing agencies and labor organizations. As noted above, the Proposal would not apply to employers required by state or federal law to use an individual's consumer credit history for employment purposes.

The Proposal also defines "consumer credit history" to mean any information bearing on an individual's creditworthiness, credit standing, or credit capacity, including but not limited to an individual's credit score, credit account and other consumer account balances, and payment history.

Unlawful Practices

To the extent consistent with federal and state law, the Proposal would make it an unlawful discriminatory practice for an employer, labor organization, or employment or licensing agency to:

- request or use for employment purposes information contained in the consumer credit history of an applicant, or
- retaliate or otherwise discriminate against an applicant or employee with regard to hiring, termination, promotion, demotion, discipline, compensation, or the terms, conditions or privileges of employment, based on information in his or her credit history.

Specifically, by amending the NYCHRL, the Proposal would afford retaliation/whistleblowing protections to employees who:

- oppose any practice made unlawful by the Proposal;
- file a complaint, testified, or assisted in any proceeding under the Proposal;
- commence a civil action under the Proposal;
- assist the New York City Human Rights Commission (Commission) or the Corporation Counsel in an investigation commenced pursuant to the Proposal; or
- provide any information to the Commission under the terms of a conciliation agreement made pursuant to the Proposal.

Enforcement and Remedy

The Proposal, by amending the NYCHRL, would allow two avenues of recourse for a person alleging an unlawful discriminatory practice:

- file a complaint with the Commission within one year of the alleged unlawful discriminatory practice, *or*
- initiate a civil action (which the Commission also may initiate on the aggrieved person's behalf) in a court of competent jurisdiction within three years of the alleged unlawful discriminatory practice.

If an aggrieved person were to bring a complaint with the Commission, the Proposal would allow a range of remedies, including but not limited to a "cease and desist order"; hiring, reinstatement or upgrading of employees; front and back pay; and compensatory damages. In addition, the Proposal would empower the Commission to impose a civil penalty of no more than one hundred and twenty-five thousand dollars, unless the unlawful discriminatory practice was the result of a "willful, wanton or malicious act," in which case the penalty may amount to no more than two hundred and fifty thousand dollars. Any civil penalties recovered would be paid into the general fund of New York City. The Commission also would have the ability to initiate an investigation and enforce the Proposal.

If an aggrieved person (and/or the Commission) were to file suit in court, the Proposal also would afford a host of legal and equitable remedies, including front and back pay, compensatory and punitive damages, attorney's fees and costs, and hiring/reinstatement. In addition, civil penalties could be assessed in an amount no more than two hundred and fifty thousand dollars in an action brought by the Commission (and, where levied, paid into the general fund).

Furthermore, individual employees found to have violated the Proposal could be held individually liable under the NYCHRL's aider and abettor provision.

Takeaway

Given recent trends, employers *across the country* should brace for continued legislative efforts to curtail employer consideration of credit history in their hiring and personnel decisions. Indeed, in addition to the growing patchwork of laws, the Equal Employment Opportunity Commission (EEOC) announced last year that it was considering issuing guidance on employer use of credit checks to screen applicants, taking the position that such checks can run afoul of Title VII of the Civil Rights Act of 1964 if conducted in a discriminatory manner, or if they have a disparate impact on a protected class and are not otherwise job-related and consistent with business necessity.

Overall, the hiring process has received a tremendous increase in legislative and judicial attention in recent years both at the federal, state, and local levels. This scrutiny includes a gust of laws and proposed laws and new guidance from the EEOC that would limit the scope of background checks, including certain inquiries into an applicant's criminal background history, employment status, and use of social media.

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If you have any questions or concerns regarding the Proposal or related developments, please contact your Proskauer lawyer or any co-chair of the Employment Law Counseling & Training Group.

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