

# Realty Advisory Board on Labor Relations, Incorporated

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*Realty Advisory Board on Labor Relations, Inc.*

# BULLETIN

July 28, 2015

No. 140 (General)

TO: Representatives of Memberships in the Realty Advisory Board on Labor Relations, Inc.

SUBJ: 1. New Credit Check Law  
2. New Criminal Background Check Law  
3. New York City Commission on Human Rights to Test Application Processes  
4. Inquiry regarding Amendment/Addendum to Resident Managers' SRSP Contributions

Dear Member:

## 1. Consumer Credit Checks Prohibited in Most Employment Situations

The New York City Council enacted an amendment to the New York City Human Rights Law (N.Y. City Admin. Code Sec. 8-101, *et seq.*) that prohibits the use of consumer credit history with regard to virtually all applicants to positions and present employees for any employment purpose. This new law is scheduled to become effective as of September 3, 2015. The amendment to the City Human Rights Law is one of the broadest prohibitions on credit check usage in employment in the United States, and effectively precludes any research into an employee's or applicant's credit history except in very limited occupations and circumstances. All members within the City of New York are likely to be impacted by the amendment.

Where, previously, employers were generally free to use consumer credit information in employment decisions, subject to the notice provisions of federal and other applicable laws, this is no longer the case. Employers in New York City may no longer use or request from *either* a credit reporting agency *or the employee/applicant* any consumer credit information defined in the law, as the amendment makes the use or request of this information for any employment purposes an unlawful discriminatory act under the City Human Rights Law (N.Y. City Admin. Code Sec. 8-107(24)). The prohibited consumer credit information is, further, broadly defined as:

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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. A consumer credit report shall include 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.

Consequently, employers are foreclosed from looking into virtually any credit or financial histories in any of their applicants' or employees' pasts without risking liability under New York City law.

The only exceptions from the amendment's strict prohibitions are limited to: (a) employers who must use consumer credit history in employment in the securities and finance industry under applicable laws and regulations; (b) police or peace officers; (c) employees in a position of high public trust where otherwise subject to background check by the Department of Investigation; (d) employees in a position which is required to be bonded by federal, state, or local law; (e) employees in a position where a security clearance is required by law; (f) employees in a position with signatory authority or fiduciary responsibility over the assets or funds of a third party in excess of \$10,000; or (g) in a position enforcing network and/or data security.

## 2. New York City "Bans the Box"

On June 11, 2015, New York City adopted a position taken by a number of other states and municipalities and banned questions regarding criminal background from employment applications. Effective October 9, 2015, virtually all employers within New York City are prohibited from making any inquiry into an applicant's criminal background until after an applicant receives a conditional offer of employment. Only employers who are otherwise obligated by federal, state, local laws and regulations, and a very limited number of law enforcement and other specified employers generally are permitted to continue to make pre-employment criminal record inquiries. In fact, the new amendment makes requests for criminal arrest and conviction records prior to a conditional offer of employment a violation of the City Human Rights Law and subject to that statute's remedies and penalties.

Prior to the enactment of this amendment, employers were free to request information about criminal convictions, but could only base an employment action (*i.e.*, refuse to hire) on an applicant's prior criminal conviction after engaging in the analysis required under New York Correction Law. That analysis ensured that persons convicted of crimes were not simply excluded from employment by requiring a strong nexus between the prior criminal conviction and the reason for taking an adverse action.

Under the new law, employers may only inquire about criminal convictions after extending a conditional offer of employment. In other words, only after stating to an applicant that they have been selected for the position subject to a criminal background review. If employers choose to make a post-conditional offer request for criminal conviction information, they must: (1) provide the applicant with a written copy of the background inquiry (the form of which will be defined by the New York City Commission on Human Rights); (2) make and document an analysis of the relation between any prior conviction and the position to which the conditional offer was extended as required under New York Correction Law; and (3) provide three days to the applicant to respond to an adverse decision taken based on the prior conviction and hold open the position during this time.

### 3. NYC Commission on Human Rights Directed to Use Test Applicants

Another recent law, adopted by New York City, directs the New York City Commission on Human Rights to commence investigations of discrimination in employment using at least five pairs of "test" applicants. The law directs the Commission to assign pairs of applicants with similar credentials, but who differ from each other by their inclusion in at least one protected category, to apply, inquire or express interest in the same open position with one employer. If the Commission determines, based upon the employer's response to the test applicants, that there were actual or perceived incidents of discrimination, the Commission is directed by the law to refer the case to its law enforcement bureau. Employers should, therefore, make certain that they are utilizing appropriate application, hiring, and employment policies and procedures to avoid unnecessary liability under the New York City Human Rights law.

### 4. Addendum/Amendment to Resident Managers' SRSP Contributions

If you have been, or you are aware of other Members who have been, approached by a Resident Manager/Superintendent regarding an agreement that increases or otherwise alters your SRSP contribution for a Resident Manager or Superintendent, please contact the RAB at your earliest convenience to discuss the implications of these agreements.

## CONCLUSION

Members should review their application and employment processes and procedures and consult with the RAB or their other legal representatives to ensure that they are in compliance with the new amendments to the New York City Human Rights Law as soon as possible to avoid potential violations and unnecessary litigation.

If you have any questions about the implications of these important amendments to New York City law, please contact the RAB.