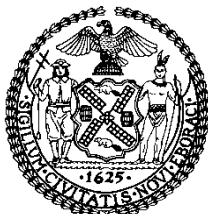


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## **THE COUNCIL**

### **REPORT OF THE GOVERNMENTAL AFFAIRS DIVISION**

Matthew Gewolb, Legislative Director  
Rachel Cordero, Deputy Director

**COMMITTEE ON CIVIL RIGHTS**  
Council Member Darlene Mealy, Chair

**April 14, 2015**

**Int. No. 261-A:**

By Council Members Lander, Rose, Arroyo, Chin, Dickens, Dromm, Ferreras, Garodnick, King, Koslowitz, Levin, Mendez, Richards, Van Bramer, Williams, Wills, Gentile, Gibson, Constantinides, Levine, Miller, Reynoso, Rosenthal, Torres, Menchaca, Kallos, Cornegy, Cumbo, Crowley, Johnson, Eugene, Treyger, Rodriguez, Cabrera, Espinal, Barron, Mealy, Vallone, Koo, Deutsch, Maisel, Cohen, and Public Advocate James

**Title:**

A Local Law to amend the administrative code of the city of New York, in relation to prohibiting discrimination based on one's consumer credit history.

## **I. Introduction**

On April 14, 2015, the Committee on Civil Rights (“the Committee”), chaired by Council Member Darlene Mealy, will hold a hearing to vote on Proposed Introductory Bill Number 261-A (“Int. No. 261-A”), a local law to amend the administrative code of the city of New York, in relation to prohibiting discrimination based on one’s consumer credit history. The Committee held a hearing on Introductory Bill Number 261 on September 12, 2014.

## **II. Background**

Studies demonstrate that many employers use consumer credit history when making employment decisions regarding current employees and applicants for employment. This practice has had an adverse impact on many individuals seeking employment opportunities and financial growth. A study conducted by Demos in 2013 on the use of employment credit checks found that “one in seven of all respondents who have poor credit say they’ve been told they would not be hired for a job because of the information in their credit report.”<sup>1</sup> Similarly, a survey conducted by the Society for Human Resource Management in 2012 found that approximately 47 percent of employers use credit checks to make hiring decisions.<sup>2</sup> Of this total, 13 percent of respondents conducted credit checks on all prospective employees while 34 percent of respondents conducted the checks on candidates for certain positions, such as those with financial responsibilities. Demos’ report found that a potential employer requested to

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<sup>1</sup> Traub, A., Discredited - How Employment Credit Checks Keep Qualified Workers Out of a Job, Demos, 1, Feb. 2013. Available at <http://www.demos.org/sites/default/files/publications/Discredited-Demos.pdf> (last visited April 14, 2015).

<sup>2</sup> Society for Human Resource Management, SHRM Survey Findings: Background Checking – The Use of Credit Background Checks in Hiring Decisions, Jul. 19, 2012. Available at <http://www.shrm.org/research/surveyfindings/articles/pages/creditbackgroundchecks.aspx> (last visited April 10, 2015).

check the credit score of one in four survey respondents as part of a job application.<sup>3</sup> Demos also found that credit checks were prevalent for filling positions that did not traditionally involve financial decision making on behalf of an employer, such as “jobs as diverse as doing maintenance work, offering telephone tech support, assisting in an office, working as a delivery driver, selling insurance, laboring as a home care aide, supervising a stockroom, and serving frozen yogurt.”<sup>4</sup>

### **III. Credit Reports**

Despite the now common use of credit history by employers, credit reports were originally developed as a tool for lenders to determine whether they should offer a loan to a potential borrower. Credit reports, which track a person’s “financial history including credit use, late payments, and credit inquiries as well as public information related to finances, such as bankruptcies,” can help lenders predict the risk of default associated with a prospective borrower.<sup>5</sup>

While there is no law that prohibits employers from using credit reports or making employment decisions based on credit reports, employers have certain obligations if they use credit reports. For instance, the federal Fair Credit Reporting Act (“FCRA”) requires a prospective employer to certify that it has disclosed to a potential employee that a credit report may be ordered for employment purposes and that the credit report will not be used in violation of any federal or state equal employment opportunity laws.<sup>6</sup> Additionally, if an employer takes an adverse action against an applicant or employee on the basis of his or her credit report, the employer must give that employee

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<sup>3</sup> Id., at 1.

<sup>4</sup> Id., at 1.

<sup>5</sup> Smith, G., “Bridging the Gap: Credit Scores and Economic Opportunity in Illinois Communities of Color,” Woodstock Institute, September 2010.

<sup>6</sup> 15 U.S.C. §1681(b).

notice of his or her rights under FCRA<sup>7</sup>. In an effort to protect consumers from employer misuse at the state level, New York's Fair Credit Reporting Act ("the Act") has similar requirements for prospective employers.<sup>8</sup> Nevertheless, pursuant to the Act, job applicants who refuse to authorize a credit report may be excluded from consideration for an employment position.<sup>9</sup>

Proponents for the use of credit reports in making employment decisions suggest that credit reports are an indicator of job performance and/or one's likelihood of engaging in counter-productive work behavior- such as theft or fraud- because credit reports illustrate an individual's ability to manage finances.<sup>10</sup> However, the value that credit reports offer employers is unclear. Research shows there is no correlation between an individual's credit history and job performance.<sup>11</sup> Significantly, credit reporting agencies have not been successful in proving that any such connection exists. Eric Rosenberg, Director of State Government Relations for TransUnion (one of the three primary for-profit credit reporting agencies in the country), testified before the Oregon State legislature in 2011: "at this point we don't have any research to show any statistical correlation between what's in somebody's credit report and their job performance or their likelihood to commit fraud."<sup>12</sup>

The use of credit reports to determine the performance or integrity of a potential employee or applicant is particularly problematic since credit reports are often inaccurate.

A Federal Trade Commission ("FTC") study done in 2013 found that 21 percent of

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<sup>7</sup> Id.

<sup>8</sup> N.Y. GBL § 380-b.

<sup>9</sup> Id.

<sup>10</sup> Testimony of Eric Ellman on behalf of the Consumer Data Industry Association, *Hearing on Introductory Bill Number 261*, September 12, 2014, Committee on Civil Rights, at 80.

<sup>11</sup> Laura Koppes Bryan and Jerry K. Palmer, "Do Job Applicant Credit Histories Predict Performance Appraisal Ratings or Termination Decisions?" *The Psychologist-Manager Journal*, 2012.

<sup>12</sup> See <http://www.nytimes.com/2011/05/30/opinion/30mon3.html> (Last visited April 13, 2015).

Americans had an error on at least one of the credit reports produced by the top three credit reporting agencies,<sup>13</sup> and that for 13 percent of consumers, the mistakes were significant enough to alter their credit score.<sup>14</sup> While consumers have the ability to dispute errors on their reports, the errors often persist, resulting in prolonged inaccuracy.<sup>15</sup> The FTC found that 26 percent of respondents identified at least one potentially material error on at least one of their three credit reports and for almost 70 percent of participants for which there was FTC follow up, respondents contended that at least one piece of previously disputed information in their report was inaccurate over two years later.<sup>16</sup>

Further, studies demonstrate that using an individual's credit report as an indicator of the person's ability to responsibly manage finances may be inaccurate since poor credit is often linked to unemployment, lack of healthcare coverage, and medical debt.<sup>17</sup> Demos' 2013 study found a cyclical relationship between unemployment and poor credit history: 31 percent of households where one member had been out of work for two months or longer reported a decline in their credit score during the period of unemployment.<sup>18</sup> Demos also found that households with a person lacking health coverage are "more than twice as likely to report that their credit score has declined in the past three years."<sup>19</sup> Additionally, Federal Reserve Board researchers found that 52

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<sup>13</sup> The three main credit reporting agencies in the United States are Equifax, Experian and TransUnion. See <http://www.usa.gov/topics/money/credit/credit-reports/bureaus-scoring.shtml> (Last visited April 13, 2015).

<sup>14</sup> Supra note 2, at 10.

<sup>15</sup> Federal Trade Commission. Available at <http://www.ftc.gov/system/files/documents/reports/section-319-fair-accurate-credit-transactions-act-2003-sixth-interim-final-report-federal-trade/150121factareport.pdf> (Last visited April 13, 2015).

<sup>16</sup> Id.

<sup>17</sup> Id., at 1.

<sup>18</sup> Id., at 1.

<sup>19</sup> Id., at 1.

percent of all accounts reported by collection agencies consisted of medical debt.<sup>20</sup> For 15 million Americans, medical debt is the only debt they have in collections in their credit report.<sup>21</sup> According to a study by Harvard Medical School, medical costs are the reason for 62 percent of bankruptcy filings.<sup>22</sup>

Studies also demonstrate that the use of credit reports in the hiring process has a potentially disproportionate impact on communities of color, who, as a demographic group, have historically had lower credit ratings.<sup>23</sup> A 2006 Brookings Institution study on credit trends in the United States found that counties with a higher concentration of communities of color tended to have lower credit scores.<sup>24</sup> Though the report was careful to note that credit calculation formulas do not include any racial data, and though it avoided suggesting a bias in credit calculations or a causal relationship between race and credit scores, it acknowledged “the numerous, historical disparities between races in the access to and availability of high quality education, well-paying jobs, and access to loans, among other factors.”<sup>25</sup> The findings of Demos’ 2013 survey largely mirrored this demographic trend: among white respondents, 65 percent reported having good or excellent credit scores, while over half of African-American respondents reported having fair or bad credit.<sup>26</sup>

The use of credit reports in the hiring process can also have a disparate effect on women who are victims of domestic violence. A study by the University of Pennsylvania

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<sup>20</sup> Robert Avery, Paul Calem, Glenn Canner & Raphael Bostic, “An Overview of Consumer Data and Credit Reporting,” Federal Reserve Bulletin, 2003.

<sup>21</sup> See <http://www.washingtonpost.com/news/get-there/wp/2014/12/11/medical-debt-is-ruining-the-credit-score-of-millions-of-americans/> (Last visited April 13, 2015).

<sup>22</sup> See [http://www.pnhp.org/new\\_bankruptcy\\_study/Bankruptcy-2009.pdf](http://www.pnhp.org/new_bankruptcy_study/Bankruptcy-2009.pdf) (Last visited April 13, 2015).

<sup>23</sup> Fellows, M., “Credit scores, Reports, and Getting Ahead in America,” The Brookings Institution, at 9.

<sup>24</sup> Fellows, M., “Credit scores, Reports, and Getting Ahead in America,” The Brookings Institution, at 9.

<sup>25</sup> *Id.* at 10.

<sup>26</sup> *Id.* at 1.

found that domestic violence victims often incur “coerced debt,” which occurs when an “abuser in a violent relationship obtains credit in the victim’s name via fraud or coercion.”<sup>27</sup> The study found that abusers use different tactics, “including secretly taking out credit cards in victims’ names, coercing victims into signing loan documents, and tricking victims into relinquishing their rights to the family home.” Furthermore, the study found that victims likely do not discover the debt that has been taken out in their name until they attempt to leave their abuser, at which point “much of the debt is delinquent or in danger of becoming so.”<sup>28</sup>

Finally, beyond the inaccuracies contained within credit reports, the lack of any real link between credit history and work behavior, and the discriminatory nature of credit checks, studies demonstrate that many job applicants whose credit reports negatively impact their candidacy are not given the opportunity to explain their credit history.<sup>29</sup> According to the 2012 survey conducted by the Society for Human Resource Management, eight percent of prospective employers did not give applicants an opportunity to explain their negative credit report, and 28 percent only allowed applicants to offer an explanation after the hiring decision was made.<sup>30</sup> Of the 64 percent of employers that allowed applicants to explain their credit histories, it is unclear what percent of employers dismissed medical or educational debt.<sup>31</sup>

#### **IV. Efforts to Limit Employers’ Use of Credit Reports**

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<sup>27</sup> Litwin, Angela. “Escaping Battered Credit: A Proposal For Repairing Credit Reports Damaged By Domestic Violence.” University of Pennsylvania Law Review. 2013.

<sup>28</sup> Id.

<sup>29</sup> Id., at 2.

<sup>30</sup> Id., at 2.

<sup>31</sup> Id., at 2.

Legislation restricting employers' use of credit checks has been passed in California, Connecticut, Hawaii, Illinois, Maryland, Oregon, Vermont, and Washington.<sup>32</sup> Though no such legislation has been passed in New York State, various pieces of legislation have been introduced in the legislature to address this issue.<sup>33</sup> For example, the "Credit Privacy in Employment Act," A.2372/S.1545-A, the first version of which was introduced in January 2013, would prohibit an employer from making employment decisions on the basis of one's credit history unless required to do so by state or federal law, and would require employers who take adverse action based on a credit report to give the candidate an opportunity to explain any negative information contained in the report.<sup>34</sup> While the New York State Assembly passed this bill in its last session, it was not passed by the New York State Senate.<sup>35</sup> There has not been a vote on this bill during this legislative session.<sup>36</sup>

At the federal level, the "Equal Employment for All Act," H.R. 645/S.1837, was introduced in the 113<sup>th</sup> Congress, but has not been reintroduced in the 114<sup>th</sup> Congress.<sup>37</sup> The "Equal Employment for All Act" would have amended FCRA to prohibit current and prospective employers from using consumer credit reports for the purposes of making employment decisions.<sup>38</sup> The bill would have also granted certain exceptions to the prohibition, including for positions which require a national security or Federal Deposit

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<sup>32</sup> Supra note 2, at 13.

<sup>33</sup> See New York State Assembly, Bill Number A.2372/S.1545-A. Available at [http://assembly.state.ny.us/leg/?default\\_fld=&bn=A02372&term=2015&Summary=Y&Actions=Y&Votes=Y&Memo=Y&Text=Y](http://assembly.state.ny.us/leg/?default_fld=&bn=A02372&term=2015&Summary=Y&Actions=Y&Votes=Y&Memo=Y&Text=Y) (Last visited April 13, 2015).

<sup>34</sup> Id.

<sup>35</sup> See New York State Assembly, Bill Number A-2372. Available at [http://assembly.state.ny.us/leg/?default\\_fld=&bn=A02372&term=2015&Summary=Y&Actions=Y&Votes=Y&Memo=Y&Text=Y](http://assembly.state.ny.us/leg/?default_fld=&bn=A02372&term=2015&Summary=Y&Actions=Y&Votes=Y&Memo=Y&Text=Y) (Last visited April 13, 2015).

<sup>36</sup> Id.

<sup>37</sup> See United States Congress, Bill Number H.R. 645/S.1837. Available at <https://www.congress.gov/bill/113th-congress/house-bill/645> (Last visited April 13, 2015).

<sup>38</sup> Id.



Insurance Corporation clearance, positions in state or local government agencies that require credit background checks, and senior-level positions at financial institutions.<sup>39</sup>

**V. Summary of Int. No. 261-A**

a. Prohibitions

Int. No. 261-A has been proposed in an effort to further the City’s goal of discouraging discrimination in employment through the use of consumer credit history. Int. No. 261-A would amend the City’s Human Rights Law by making it an unlawful discriminatory practice for any employer, labor organization, or employment agency to request or use the consumer credit history of an employee or an applicant for employment for the purpose of making any employment decisions. Int. No. 261-A would prohibit such discrimination in hiring, compensation, and other terms of employment.

Int. No. 261-A would define “consumer credit history” to include an individual’s credit worthiness, credit standing, credit capacity, and payment history as indicated by: (i) a consumer credit report; (ii) credit score; or (iii) information an employer obtains directly from an individual regarding details about credit accounts, including number of credit accounts, late or missed payments, charged-off debts, items in collections, credit limit, prior credit report inquiries, and bankruptcies, judgments or liens. Further, Int. No. 261-A would define “consumer credit report” as 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. Notably, Int. No. 261-A does not prohibit employers from using consumer credit history for employment purposes where using such information is required by federal or state law or regulation, or by a self-regulatory organization as defined by the Securities Exchange Act of 1934.

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<sup>39</sup> Id.

Further, Int. No. 261-A does not preclude an employer from requesting or receiving consumer credit history information pursuant to a lawful subpoena, court order or law enforcement investigation. And, Int. No. 261-A does not prohibit employers from obtaining publically accessible information such as public information related to bankruptcies, judgments or liens. The bill targets the use of credit reports, credit scores and information obtained directly from a job applicant or employee, such as through inquiries contained in a job application or questions asked during a job interview.

b. Exceptions

Due to the sensitive nature of various employment positions that require additional layers of security, Int. No. 261-A would exclude a number of positions from the credit check prohibition. Such positions would include:

- Police and peace officers, as defined in the Criminal Procedure Law;
- Department of Investigation (“DOI”) positions in law enforcement or where investigative functions are involved;
- Appointed positions subject to a DOI background investigation that are deemed to carry a high degree of public trust, as determined by the Commission on Human Rights through rulemaking;
- Employees who are required to be bonded under City, state, or federal law—this exception applies only where the employee is personally required to be bonded;
- Employees required to possess security clearance under federal law or any state law;

- Non-clerical positions that have regular access to trade secrets, intelligence information or national security information;
- Positions with signatory authority over third-party funds or assets valued at \$10,000 or more;
- Positions with a legal fiduciary responsibility<sup>40</sup> to the employer and the authority to enter financial agreements on behalf of the employer valued at \$10,000 or more per agreement;
- Positions that regularly allow an employee to modify digital security systems established to prevent the unauthorized use of the employer's or the employer's client's networks or databases; and
- Employees obligated by section 12-110 of the New York City Administrative Code or by Mayoral Executive Order to disclose information to the Conflicts of Interest Board regarding creditors or debts.

c. Licensing

Int. No. 261-A would also prohibit agencies from requesting or using consumer credit history for licensing and permitting purposes. However, Int. No. 261-A would not prohibit agencies from using an individual's consumer credit history for licensing and permitting when such use is required by state or federal law or regulations. Further, Int. No. 261-A would not prohibit an agency from considering failure to pay any tax, fine, penalty, or fee for which liability has been admitted by the person liable, or for which

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<sup>40</sup> Black's Law Dictionary defines "fiduciary duty" as a duty of utmost good faith, trust, confidence, and candor owed by a fiduciary (such as an agent or a trustee) to the beneficiary (such as the agent's principal or the beneficiaries of the trust); a duty of utmost good faith, trust, confidence, and candor owed by a fiduciary (such as a lawyer or corporate officer) to the beneficiary (such as a lawyer's client or a shareholder); a duty to act with the highest degree of honesty and loyalty toward another person and in the best interests of the other person (such as the duty that one partner owes to another). See Black's Law Dictionary (10<sup>th</sup> ed. 2014).

judgment has been entered by a court or administrative tribunal of competent jurisdiction. Additionally, Int. No. 261-A would not prohibit an agency from considering any tax for which a government agency has issued a warrant or a lien or levy on property. Finally, as with employers, Int. No. 261-A would not prohibit licensing agencies from requesting, receiving, or using consumer credit history information obtained pursuant to a lawful subpoena, court order or law enforcement investigation.

d. Reporting Requirement

Int. No. 261-A would require the Commission on Human Rights to request information from City and non-governmental employers regarding their use of the exemptions in the bill for purposes of hiring and employment. Int. No. 261-A would also require the Commission to submit a report to the Council, which the Council would review, regarding the results of its requests and any relevant feedback from agencies and employers.

The bill would take effect one hundred twenty days after enactment.