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CONFIDENTIAL ATTORNEY CLIENT PRIVILEGED MEMORANDUM

DATE: September 9, 2015

TO: Hotel Association of New York City, Inc.
Labor Relations Members
General Managers, Human Resources Directors and Controllers

FROM: Kane Kessler, P.C.
Labor and Employment Law Department

RE: Credit Checks and Exemptions Under New York City Law

By Memorandum dated May 11, 2015, we informed Hotel Association Labor Relations members that pursuant to the newly enacted amendment to the New York City Administrative Code, entitled the Stop Credit Discrimination in Employment Act (“SCDEA”) effective September 4, 2015, employers could no longer request information contained in a consumer credit history of a job applicant or employee or use such information for employment purposes. We also notified our clients that the SCDEA provided an exemption, permitting employers to perform credit checks on candidates for top-level executive positions with fiduciary responsibilities over funds or assets worth \$10,000 or more, non-clerical positions with access to trade secrets, positions with control over digital security systems and positions for which credit checks are required by law or self-regulatory organizations.

On September 2, 2015, the New York City Commission on Human Rights issued an enforcement guidance on SCDEA. Among other things, the Commission stated that simply requesting a consumer credit history will be considered a violation of SCDEA even if the information does not result in an adverse employment action.

The Commission also stated that exemptions must be very narrowly construed. For example:

- The exemption for positions involving responsibility for funds or assets worth \$10,000 or more applies only to top-level positions with financial control over a company, including but not limited to Chief Financial Officers and Chief Operations Officers. It does not apply to all staff in a financial department.

- Financial Industry Regulatory Authority members are exempt from SCDEA only when making decisions about applicants or employees who are required to register with FINRA. However, FINRA members must comply with SCDEA when making employment decisions about individuals who are not required to register with FINRA.
- Trade secrets “do not include information such as 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 and managers of such employees.”
- The exemption for positions with control over digital security systems includes only positions at the executive level, including but not limited to Chief Technology Officer or Senior Information Technology Executive who controls access to all parts of a company’s computer system. It does not apply to any person who may have access to a computer system and does not include all staff in an information technology department.

The employer has the burden of proving that an exemption is applicable. The Commission’s enforcement guidance provides that employers should inform the applicant or employee of the exemption being claimed for his/her position. It also recommends that employers should prepare and maintain for five (5) years an “exemption log” detailing instances when the exemptions are used to perform credit checks. The log should contain the following information and be available for Commission inspection: (1) the claimed exemption; (2) why the claimed exemption covered the exempt position; (3) the name and contact information of all applicants and 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 the credit history led to the employment action.

Employers found to be in violation of SCDEA may be liable for compensatory damages (including front pay and back pay), punitive damages and attorney’s fees and costs, as well as a civil penalty of up to \$250,000 for violations that “are the result of willful, wanton or malicious conduct.”

New York City employers should carefully review the Commission’s enforcement guidance and seek legal advice before requesting a consumer credit history and/or using any information contained in a consumer credit history for making employment decisions.

If you have any questions, please do not hesitate to contact David R. Rothfeld, Judith A. Stoll, Robert L. Sacks, Lois M. Traub, Alexander Soric, Michael C. Lydakakis or Jaclyn Ruocco.

cc: Joseph E. Spinnato, Esq.
Vijay Dandapani, Chairman