

## New York City Commission on Human Rights

### Notice of Adoption

NOTICE IS HEREBY GIVEN, pursuant to the authority vested in the Commission on Human Rights by section 905(e)(9) of the New York City Charter and in accordance with the requirements of Section 1043 of the Charter, that the New York City Commission on Human Rights (“the Commission”) has amended its rules to establish certain definitions and procedures applying Local Law No. 37 of 2015, the Stop Credit Discrimination in Employment Act (“the SCDEA”), which amended the Human Rights Law’s provisions regarding credit discrimination in employment and applications for licenses and permits.

The required public hearing was held on August 17, 2017.

### Statement of Basis and Purpose of Rule

The New York City Commission on Human Rights (“the Commission”) has amended its rules to establish certain definitions and procedures with respect to Local Law No. 37 of 2015, the Stop Credit Discrimination in Employment Act (“SCDEA”), which added provisions to title 8 of the Administrative Code prohibiting credit discrimination in employment and applications for licenses and permits. The SCDEA was enacted to ensure that applicants for employment, licenses, or permits are not arbitrarily denied opportunities based on poor credit.

The amended rules will:

- Amend title 47 of the Rules of the City of New York to establish definitions for “consumer credit history,” “consumer credit report,” “consumer reporting agency,” “high degree of public trust,” “intelligence information,” “national security information,” and “trade secrets” as those terms are used in the SCDEA.
- Establish and define *per se* violations of the SCDEA.
- Clarify that employers are prohibited from requesting or requiring waivers authorizing credit checks or using consumer credit history for the purpose of evaluating applicants for employment or in making determinations regarding the terms and conditions of employment.
- Clarify the positions that are exempt from the anti-discrimination provisions of the SCDEA.
- Define a limited number of positions as involving a “high degree of public trust” as that term is used in the SCDEA.
- Provide notice that an Early Resolution option may be available for respondents who have been charged with certain *per se* violations of the SCDEA.
- Clarify that exemptions to coverage under the SCDEA are to be construed narrowly.

The Commission's authority for these rules is found in sections 905 and 1043 of the New York City Charter.

New material is underlined.

[Deleted material is in brackets.]

“Shall” and “must” denote mandatory requirements and may be used interchangeably in the rules of the Commission, unless otherwise specified or unless the context clearly indicates otherwise.

Section 1. Section 2-01 of title 47 of the Official Compilation of the Rules of the City of New York is amended to read as follows:

### **§ 2-01 Definitions.**

*Adverse employment action.* “Adverse employment action” refers to any action that negatively affects the terms and conditions of employment.

*Applicant.* “Applicant” refers to persons seeking initial employment, and current employees who are seeking or being considered for promotions or transfers.

*Article 23-A analysis.* “Article 23-A analysis” refers to the process required under subdivisions 9, 10, 11, and 11-a of section 8-107 of the Administrative Code to comply with Article 23-A of the New York Correction Law.

*Article 23-A factors.* “Article 23-A factors” refers to the factors that employers must consider concerning applicants' and employees' conviction histories under section 753 of Article 23-A of the New York Correction Law.

*Business day.* “Business day” means any day except for Saturdays, Sundays, and all legal holidays of the City of New York.

*Commission.* “Commission” means the New York City Commission on Human Rights.

*Conditional offer of employment.* “Conditional offer of employment,” as used in section 8-107(11-a) of the Administrative Code and section 2-04 of this title for purposes of establishing when an applicant's criminal history can be considered by an employer, refers to an offer of employment, promotion or transfer. A conditional offer of employment can only be revoked based on one of the following:

1. The results of a criminal background check, and only after the “Fair Chance Process,” as defined in this section, has been followed.
2. The results of a medical exam as permitted by the Americans with Disabilities Act of 1990, as amended, 42 U.S.C. §12101 *et seq.*

3. Other information the employer could not have reasonably known before making the conditional offer if, based on the information, the employer would not have made the offer and the employer can show the information is material.

For temporary help firms, a conditional offer is the offer to place an applicant in the firm's labor pool, which is the group of individuals from which the firm selects candidates to send for job opportunities.

Consumer credit history. "Consumer credit history" is an individual's credit worthiness, credit standing, credit capacity, or payment history, as indicated by (i) a consumer credit report, which 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; (ii) a consumer's credit score; or (iii) information an employer obtains directly from the individual regarding (a) details about credit accounts, including the individual's number of credit accounts, late or missed payments, charged-off debts, debt collection lawsuits, nonpayment lawsuits, items in collections, credit limit, prior credit report inquiries, or (b) bankruptcies, judgments, or liens.

Consumer reporting agency. "Consumer reporting agency" is a person or entity that provides reports containing information about an individual's credit worthiness, credit standing, credit capacity, or payment history. A consumer reporting agency includes any person or entity that, for monetary fees, dues, or on a cooperative nonprofit basis, engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information about consumers for the purpose of furnishing consumer reports or investigative consumer reports to third parties. A person or entity need not regularly engage in assembling and evaluating consumer credit history to be considered a consumer reporting agency.

Conviction history. "Conviction history" refers to records of an individual's conviction of a felony, misdemeanor, or unsealed violation as defined by New York law or federal law, or the law of the state in which the individual was convicted.

Criminal background check. "Criminal background check" refers to when an employer, employment agency or agent thereof orally or in writing:

1. Asks a person whether or not they have a criminal record; or
2. Searches for publicly available records, including through a third party, such as a consumer reporting agency, the Internet, or private databases, for a person's criminal history.

Criminal history. "Criminal history" refers to records of an individual's convictions, unsealed violations, non-convictions, and/or currently pending criminal case(s).

Direct relationship. "Direct relationship" refers to a finding that the nature of the criminal conduct underlying a conviction has a direct bearing on the fitness or ability of an applicant or employee to perform one or more of the duties or responsibilities necessarily related to the

license, registration, permit, employment opportunity, or terms and conditions of employment in question.

*Domestic partners.* “Domestic partners” means persons who have a registered domestic partnership, which shall include any partnership registered pursuant to chapter 2 of title 3 of the Administrative Code, any partnership registered in accordance with executive order number 123, dated August 7, 1989, and any partnership registered in accordance with executive order number 48, dated January 7, 1993, and persons who are members of a marriage that is not recognized by the state of New York, a domestic partnership, or a civil union, lawfully entered into in another jurisdiction.

*Employer.* “Employer” refers to an employer as defined by section 8-102(5) of the Administrative Code.

*Fair Chance Process.* “Fair Chance Process” refers to the post-conditional offer process mandated by section 8-107(11-a) of the Administrative Code when employers elect to withdraw a conditional offer of employment or deny a promotion or transfer based on an applicant’s conviction history.

*High degree of public trust.* “High degree of public trust” as used in section 2-05 of this title refers only to the following City agency positions: (i) agency heads and directors; (ii) Commissioner titles, including Assistant, Associate, and Deputy Commissioners; (iii) Counsel titles, including General Counsel, Special Counsel, Deputy General Counsel, and Assistant General Counsel, that involve high-level decision-making authority; (iv) Chief Information Officer and Chief Technology Officer titles; and (v) any position reporting directly to the head of an agency.

*Human Rights Law.* “Human Rights Law” refers to Title 8 of the Administrative Code.

*Intelligence information.* “Intelligence information” means records and data compiled for the purpose of criminal investigation or counterterrorism, including records and data relating to the order or security of a correctional facility, reports of informants, investigators or other persons, or from any type of surveillance associated with an identifiable individual, or investigation or analysis of potential terrorist threats.

*Inquiry.* “Inquiry,” when used in connection with criminal history, refers to any oral or written question asked for the purpose of obtaining a person’s criminal history, including without limitation, questions in a job interview about an applicant’s criminal history, and any search for a person’s criminal history, including through the services of a third party, such as a consumer reporting agency.

*Licensing agency.* “Licensing agency” refers to any agency or employee thereof that is authorized to issue any certificate, license, registration, permit or grant of permission required by the law of this state, its political subdivisions or instrumentalities as a condition for the lawful practice of any occupation, employment, trade, vocation, business or profession.

*Members.* “Members” means individuals belonging to any class of membership offered by the institution, club, or place of accommodation, including, but not limited to, full membership, resident membership, nonresident membership, temporary membership, family membership, honorary membership, associate membership, membership limited to use of dining or athletic facilities, and membership of members' minor children or spouses or domestic partners.

*National security information.* “National security information” means any knowledge relating to the national defense or foreign relations of the United States, regardless of its physical form or characteristics, that is owned by, produced by or for, or is under the control of the United States government and is defined as such by the United States government and its agencies and departments.

*Non-conviction.* “Non-conviction” means any arrest or criminal accusation, not currently pending, that was concluded in one of the following ways:

1. Termination in favor of the individual, as defined by New York Criminal Procedure Law (“CPL”) section 160.50, even if not sealed;
2. Adjudication as a youthful offender, as defined by CPL section 720.35, even if not sealed;
3. Conviction of a non-criminal offense that has been sealed under CPL section 160.55; or
4. Convictions that have been sealed under CPL section 160.58.

“Non-conviction” includes a disposition of a criminal matter under federal law or the law of another state that results in a status comparable to a “non-conviction” under New York law as defined in this section.

*Payment directly from a nonmember.* “Payment directly from a nonmember” means payment made to an institution, club or place of accommodation by a nonmember for expenses incurred by a member or nonmember for dues, fees, use of space, facilities, services, meals or beverages.

*Payment for the furtherance of trade or business.* “Payment for the furtherance of trade or business” means payment made by or on behalf of a trade or business organization, payment made by an individual from an account which the individual uses primarily for trade or business purposes, payment made by an individual who is reimbursed for the payment by the individual's employer or by a trade or business organization, or other payment made in connection with an individual's trade or business, including entertaining clients or business associates, holding meetings or other business- related events.

*Payment indirectly from a nonmember.* “Payment indirectly from a nonmember” means payment made to a member or nonmember by another nonmember as reimbursement for payment made to an institution, club or place of accommodation for expenses incurred for dues, fees, use of space, facilities, meals or beverages.

*Payment on behalf of a nonmember.* “Payment on behalf of a nonmember” means payment by a member or nonmember for expenses incurred for dues, fees, use of space, facilities, services, meals or beverages by or for a nonmember.

*Per se violation.* “Per se violation” refers to an action or inaction that, standing alone, without reference to additional facts, constitutes a violation of title 8 of the Administrative Code, regardless of whether any adverse employment action was taken or any actual injury was incurred.

*Regular meal service.* “Regular meal service” means the provision, either directly or under a contract with another person, of breakfast, lunch, or dinner on three or more days per week during two or more weeks per month during six or more months per year.

*Regularly receives payment.* An institution, club or place of accommodation “regularly receives payment for dues, fees, use of space, facilities, services, meals or beverages directly or indirectly from or on behalf of nonmembers for the furtherance of trade or business” if it receives as many such payments during the course of a year as the number of weeks any part of which the institution, club or place of accommodation is available for use by members or non-members per year.

*Statement.* “Statement,” when used in connection with criminal history, refers to any communications made, orally or in writing, to a person for the purpose of obtaining criminal history, including, without limitation, stating that a background check is required for a position.

*Stop Credit Discrimination in Employment Act.* “Stop Credit Discrimination in Employment Act” refers to Local Law No. 37 of 2015, codified in sections 8-102(29) and 8-107(9)(d), (24) of the administrative code of the city of New York.

*Temporary help firms.* “Temporary help firms” are businesses that recruit, hire, and assign their own employees to perform work or services for other organizations, to support or supplement the other organization’s workforce, or to provide assistance in special work situations such as, without limitation, employee absences, skill shortages, seasonal workloads, or special assignments or projects.

*Terms and conditions.* “Terms and conditions” means conditions of employment, including but not limited to hiring, termination, transfers, promotions, privileges, compensation, benefits, professional development and training opportunities, and job duties.

*Trade secret.* “Trade secret” means information that: (i) derives significant independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use; (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy, both within the workplace and in the public; and (iii) can reasonably be said to be the end product of significant innovation. The term “trade secret” does not include general proprietary company information such as the information contained in handbooks and policies.

The term “regular access to trade secrets” does not include access to or the use of client, customer, or mailing lists or other information regularly collected in the course of business. In considering whether information constitutes a trade secret for the purposes of an exemption under section 8-107(24)(b)(2)(E) of the administrative code, the Commission will consider various factors, including: (1) efforts made by the employer to protect and develop such information for the purpose of increasing competitive advantage; (2) whether the information was regularly shared with entry level and non-salaried employees and supervisors or managers of such employees; (3) what efforts would be required to replicate such information by someone knowledgeable within the field; (4) the value of the information to competitors; and (5) the amount of money and effort expended by the employer to develop the information.

§ 2. Chapter 2 of title 47 of the Official Compilation of the Rules of the City of New York is amended by adding a new section 2-05 to read as follows:

**§ 2-05. Prohibitions on Discrimination Based on Credit by Employers, Labor Organizations, Employment Agencies, and Agencies Authorized To Issue Licenses, Registrations, or Permits.**

(a) *Per Se Violations.* The following are *per se* violations of sections 8-107(9)(d) and 8-107(24) of the Administrative Code (regardless of whether any adverse employment or licensing action is taken against an individual applicant, licensee, or permittee), except where an exemption applies pursuant to subdivision (c) of this section:

- (1) Requesting consumer credit history from an applicant, licensee, or permittee.
- (2) Requesting consumer credit history regarding applicants, licensees, or permittees from a consumer reporting agency.
- (3) Using consumer credit history for employment, licensing, or permitting purposes.
- (4) Requesting or requiring applicants for employment, licenses, or permits to consent to the disclosure of their consumer credit history to the employer.

(b) *Presumptive Violations.* It shall be a rebuttable presumption that posting or circulating any solicitation indicating that the employer, labor organization, employment agency, or licensing agency will use consumer credit history for employment, licensing, or permitting purposes constitutes a violation of sections 8-107(9)(d) and 8-107(24) of the administrative code of the city of New York, except where an exemption applies pursuant to subdivision (c) of this section.

(c) *Exemptions Under the Stop Credit Discrimination in Employment Act.*

- (1) Employers may require or use for employment purposes an applicant’s or employee’s consumer credit history when required to do so for specific positions or titles under state or federal law or regulations, or rules or regulations promulgated by self-regulatory organizations as defined in section 3(a)(26) of the Securities Exchange Act of 1934. This

exemption includes positions in which applicants or employees are not required to be registered with a self-regulatory organization but where the applicant or employee nevertheless either chooses to become registered while in the position or elects to maintain their prior registration.

(2) Agencies may request and use an applicant's, licensee's, or permittee's consumer credit history for licensing or permitting purposes when required to do so under state or federal law or regulations.

(3) The following positions are exempt from the Stop Credit Discrimination in Employment Act:

(i) Police officers or peace officers, as those terms are defined in subdivisions thirty-three and thirty-four of section 1.20 of the criminal procedure law, respectively.

(ii) Positions with a law enforcement or investigative function at the Department of Investigation.

(iii) Positions subject to background investigation by the Department of Investigation, provided however that the appointing agency may not use consumer credit history obtained by the Department of Investigation for employment purposes unless the position is an appointed position and a high degree of public trust, as defined in section 2-01 of this title, has been reposed in the position.

(iv) Positions requiring bonding under city, state, or federal law or regulation. An exemption will not apply where bonding is simply permitted, but not required, by city, state, or federal law or regulation. Only positions where bonding is required by law are exempt.

(v) Positions requiring security clearance under federal or state law. This exemption is applicable only when such security clearance is legally required for the person to fulfill the duties of the position in question.

(vi) Non-clerical positions having regular access to trade secrets, intelligence information, or national security information as defined in section 2-01 of this title.

(vii) Positions in which the individual regularly has: (A) signatory authority over third-party funds or third-party assets that are valued at \$10,000 or more; or (B) fiduciary responsibility to an employer who has granted the employee signatory authority to enter into financial agreements valued at \$10,000 or more on behalf of the employer. Signatory authority shall mean final authority, not subject to approval, delegated by an employer or third party to commit the employer or third party to a binding agreement. This exemption does not apply to positions for which the \$10,000 threshold can be met only by aggregating the value for multiple assets or agreements over which the position holds signatory authority or fiduciary responsibility.



(viii) Positions with regular duties that allow the employee to modify digital security systems established to prevent the unauthorized use of the employer's or client's networks. For purposes of this provision, a digital security system refers to an organization's security program that is designed to ensure information, assets, and technologies are not accessible by unauthorized parties outside of the employer or its clients.

(4) Evaluation of exemptions and burdens of proof.

- (i) All exemptions to the prohibitions on credit discrimination must be construed narrowly.
- (ii) It shall be an affirmative defense that any action taken by an employer or agent thereof is permissible pursuant to this subdivision, and the burden shall be on the employer, labor organization, employment agency, or licensing agency to prove the exemption's applicability by a preponderance of the evidence.
- (iii) Exemptions apply only to individual positions.

(d) Early Resolution for Commission-initiated complaints regarding certain per se violations.

- (1) Early Resolution is an expedited settlement option that is available to respondents in certain circumstances that allows them to immediately admit liability and accept a penalty in lieu of litigating the matter.
- (2) Except as provided in paragraph (3) below, the Law Enforcement Bureau will offer Early Resolution for Commission-initiated complaints of *per se* violations under the following circumstances:
  - (i) The respondent has committed a *per se* violation pursuant to subdivision (a) of this section;
  - (ii) There are no other pending or current allegations against the respondent concerning violations of title 8 of the Administrative Code;
  - (iii) The respondent has 50 or fewer employees at the time of the alleged violation; and
  - (iv) The respondent has been held liable for no more than one violation of title 8 of the Administrative Code in the 3 years preceding the filing of the complaint. For purposes of this provision, a violation of any provision of title 8 of the Administrative Code that resulted in an admission pursuant to Early Resolution, conciliation, or other settlement agreement, or a finding of liability issued after a hearing or trial pursuant to a complaint filed with or by the Commission, shall be considered a past violation.
- (3) Notwithstanding any other provision of this section, the Commission retains discretion to proceed with a full investigation and a referral to the Office of Administrative Trials and

Hearings when the Law Enforcement Bureau determines that an offer of Early Resolution will not serve the public interest. Factors that indicate that an Early Resolution is not in the public interest include, without limitation:

- (i) The respondent has had prior contact with the Commission, including without limitation, formal and informal complaints, investigations, and trainings, and workshops conducted by the Commission, from which an inference may be made that the alleged violation was willful.
- (ii) The respondent works with vulnerable communities.
- (iii) The Commission has reason to believe discrimination is significant in respondent's industry.

(4) Early Resolution Notice.

- (i) A respondent will be served with a copy of the Early Resolution Notice simultaneously with service of the complaint.
- (ii) The Early Resolution Notice will state that the respondent has 90 days to answer a complaint in which the respondent has been offered the option of Early Resolution, and that there will be no extensions of time granted.
- (iii) The Early Resolution Notice will inform the respondent of its right to either: (A) admit liability and agree to the proposed affirmative relief and penalty, or (B) file an answer to the complaint in compliance with section 1-14 of this title, except that the time to respond will be 90 days instead of 30 days.

(5) Early Resolution Penalties.

- (i) An Early Resolution penalty includes: (A) a mandatory and free training provided by the Commission; (B) a requirement that the respondent post a notice of rights under title 8 of the Administrative Code; and (C) a monetary fine as determined by the penalty schedule outlined in subparagraph (ii) of this paragraph. The Early Resolution Notice will inform the respondent that a private individual aggrieved by the same violation may also file an independent complaint with the Commission or may bring a court action.
- (ii) Early Resolution fines will be assessed according to the following penalty schedule:

<u>Employer Size (at the time of the violation)</u>	<u>1<sup>st</sup> Violation</u>	<u>2<sup>nd</sup> Violation (within 3 years of the resolution date of the first violation)</u>
<u>4-9</u>	<u>\$500.00</u>	<u>\$1,000.00</u>

<u>10-20</u>	<u>\$1,000.00</u>	<u>\$5,000.00</u>
<u>21-50</u>	<u>\$3,500.00</u>	<u>\$10,000.00</u>

\*\* Distinct and contemporaneous violations will be counted separately for the purpose of calculating a monetary penalty. For example, an employer who has 4-9 employees who requests consumer credit history from an applicant orally in violation of section 2-05(a)(1) and requires that same applicant to sign a waiver authorizing a credit check in violation of section 2-05(a)(4) will be charged with two separate violations of \$500.00 each. However, multiple violations of one section, for example, posting a discriminatory advertisement on three different websites, will be counted as one violation for the purpose of assessing a penalty under this section.

- (iii) If the employer believes that the employer size used to assess the imposed penalty is incorrect, the employer may call the number listed on the Early Resolution Notice.
  
- (6) Admission of Liability in an Early Resolution Case. An admission of liability must be returned to the Commission in the manner prescribed in the Early Resolution Notice. Once the admission is received, the Law Enforcement Bureau will promptly forward it to the Chair. The signature of the Chair with the notation "SO ORDERED" constitutes the final order of the Commission. A copy of such order will be served upon the respondent.
  
- (7) Contesting Liability and Filing an Answer in an Early Resolution Case. Notwithstanding any provision of sections 1-61 or 1-62 of this title, if a respondent elects to deny liability and contest the allegations in the complaint, the respondent shall file an answer and, upon receipt of the answer, the Law Enforcement Bureau will refer the case to the Office of Administrative Trials and Hearings for a hearing pursuant to section 1-71 of this title. The hearing will be conducted in accordance with subchapter C of Chapter 2 of Title 48 of the Rules of the City of New York.
  
- (8) Failure to Respond in an Early Resolution Case.
  - (i) If a respondent fails to respond to a complaint accompanied by an Early Resolution Notice within 90 days, all allegations in the complaint will be deemed admitted unless good cause to the contrary is shown, pursuant to section 8-111(c) of the Administrative Code.
  
  - (ii) If a respondent fails to respond to a complaint accompanied by an Early Resolution Notice within 90 days, the Law Enforcement Bureau may refer the case to the Office of Administrative Trials and Hearings pursuant to section 1-71 of this title and, in a written motion pursuant to section 1-50 of title 48 of the Rules of the City of New York, seek an expedited trial and issuance of a report and recommendation that finds respondent in default and recommends the affirmative relief and penalties requested by the Law Enforcement Bureau. The motion papers will include all supporting evidence, a copy of the complaint, the Early Resolution Notice, and proof of service.

(9) Relief From Default in an Early Resolution Case. At any time prior to the issuance of a decision and order, the respondent may move for relief from default.