

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Commerce and Tourism

BILL: CS/SB 324

INTRODUCER: Commerce and Tourism Committee and Senator Detert

SUBJECT: Employment Practices

DATE: December 10, 2013 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Siples	Hrdlicka	CM	Fav/CS
2.			JU	
3.			GO	
4.			RC	

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 324 prohibits the use of an applicant's credit report or credit history for employment purposes except as provided by law. The employer may request and consider an applicant's credit report or history if the employer has a bona fide purpose for requesting the information that is substantially related to the job, notifies the applicant of the employer's ability to request the information, and obtains permission from the applicant to request the information. The bill defines positions for which an employer has a bona fide purpose to request an applicant's credit history or report.

The provisions of the bill do not apply to those employers who are expressly permitted or required to perform credit history background checks by state or federal law, certain financial institutions, and certain investment advisors, brokers, or dealers.

The bill creates a private right of action for an aggrieved person to seek declaratory relief that a practice violates the provisions of the bill and enjoin such practice. The prevailing party may recover actual damages, plus court costs. The bill provides that, upon a motion by a defendant that an action is frivolous or without merit, a court may require a plaintiff to post a bond to indemnify the defendant for any damages it may incur.

II. Present Situation:

Employment Practices

Under current law, employers are prohibited from discriminating against applicants or employees on the basis of disabilities, race or color, gender, national origin, religion, age, or genetic information.¹ These prohibitions can be found in the Americans with Disabilities Act,² the Civil Rights Act of 1964,³ the Age Discrimination in Employment Act of 1967,⁴ and the Genetic Information Nondiscrimination Act of 2008.⁵

Employers may not ask job applicants about the existence, nature, or severity of a disability. Applicants may be asked about their ability to perform specific job functions. In some cases a job offer may be conditioned on the results of a medical examination, but only if the examination is required for all entering employees in similar jobs. Medical examinations of employees must be job related and consistent with the employer's business needs.

Employers are not specifically prohibited from asking an employee or applicant his or her age or date of birth, race, national origin, gender, or status of pregnancy. In fact, it can be necessary for employers to track information about race for affirmative action purposes or applicant flow; the U.S. Equal Employment Opportunity Commission (EEOC) suggests the use of separate forms to keep information about race separate from the application. However, in general, with regard to interview questions, requests for certain information will be closely scrutinized to ensure that the inquiry was made for a lawful purpose, rather than for a purpose prohibited by a federal law. If the information is used in the selection decision and members of particular groups are excluded from employment, the inquiries can constitute evidence of discrimination. For example, unless the information is for such a legitimate purpose, pre-employment questions about race can suggest that race will be used as a basis for making selection decisions.

Additionally, the federal bankruptcy law makes it illegal for an employer to discriminate against an individual based on bankruptcy.⁶

Fair Credit Reporting Act – Employment

Under the Fair Credit Reporting Act (FCRA), employers are permitted to obtain consumer reports for employment purposes.⁷ The uses may include employment, promotion, reassignment,

¹ More information is available on the U.S. Equal Employment Opportunity Commission website, "Discrimination by Type," available at: <http://www.eeoc.gov/laws/types/index.cfm> (last visited Dec. 2, 2013). Gender discrimination also includes issues related to pregnancy, childbirth, related medical conditions, sexual harassment, and equal pay.

² 42 U.S.C. s. 12101 et. seq.

³ 42 U.S.C. s. 2000e et. seq.

⁴ 29 U.S.C. s. 621 et. seq.

⁵ Pub. L. No. 110-233, 110th Cong. (May 21, 2008).

⁶ 11 U.S.C. s. 525.

⁷ A consumer report is any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is issued or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for credit or insurance, employment, or any other authorized purpose. 15 U.S.C. s. 1681a(d)(1). An employment purpose is defined as "a report used for the purpose of evaluating a consumer for employment, promotion, reassignment or retention as an employee." 15 U.S.C. s. 1681a(h).

or retention as an employee. The FCRA places a number of requirements on the employer regarding notification and disclosure about the use of the consumer reports and only applies to those reports obtained from a third party that are utilized to make an employment decision. Prior to obtaining a consumer report, the employer must inform the applicant or employee that a consumer report may be used to make employment-related decisions. The notice must be written and conspicuous and cannot be part of the employment application.⁸ The employer must also receive written consent from the applicant or employee authorizing the employer to obtain a consumer report. Prior to providing a consumer report to an employer, the employer must certify to the consumer-reporting agency⁹ that:

- The report will be used for the stated, permissible purpose under the FCRA and it will not be used for any other purpose;
- It has provided the initial notice and disclosure to the employee or applicant;
- It will provide a copy of the summary of consumer rights if adverse action is to be taken based on information contained in the consumer report; and
- It will not violate any federal or state equal employment opportunity laws.

Employment consumer reports differ from those provided to lenders and other entities because they provide less information. Employment credit reports do not include a credit score, account numbers (but does include the lender and type of credit), or the individual's age and year of birth.¹⁰ The employment inquiry is also not included in the calculation of the individual's credit score.¹¹

Prior to taking an adverse action¹² against the employee or applicant based on information obtained from the consumer report, the employer must provide the applicant or employee a copy of the consumer report and a copy of "A Summary of Your Rights Under the Fair Credit Reporting Act."

When the employer takes an adverse action against an applicant or employee that is based on information obtained from the consumer report, the employer must provide the individual with a notice of adverse action that includes:

- An explanation of the adverse action;
- The name, address, and telephone number of the consumer reporting agency that supplied the report;

⁸ If the applicant has applied by mail, telephone, computer or other similar means, the applicant must be advised by oral, written, or electronic means that a consumer report may be obtained for employment purposes and the applicant must consent orally, in writing, or electronically.

⁹ A consumer reporting agency is defined as "any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports." 15 U.S.C. s. 1681a(f).

¹⁰ LexisNexis, *White Paper: The Use of Credit Reports in Employment Background Screening, an Overview for Job Applicants* (2010), available at

[http://www.napbs.com/files/public/Consumer_Education/Credit_Reports_for_Background_Screening\(1\).pdf](http://www.napbs.com/files/public/Consumer_Education/Credit_Reports_for_Background_Screening(1).pdf) (last visited Dec. 3, 2013).

¹¹ *Id.* at 2. Employment credit reports are regarded as a special type of inquiry and may not be visible on a consumer report requested by other organizations.

¹² Adverse action is defined as "a denial of employment or any other decision for employment purposes that adversely affects any current or prospective employee." 15 U.S.C. s. 1681a(k)(1)(B)(ii).

- A statement that the consumer reporting agency is unable to provide the individual with specific reasons for the adverse action;
- A statement that the individual may request a free copy of the report from the consumer reporting agency within 60 days of receipt of the notice; and
- A statement that the individual has the right to dispute, with the consumer-reporting agency, the accuracy or completeness of the information provided in the report.

Other States

Eight states have enacted legislation limiting employers' use of credit report information and nineteen states have proposed legislation to restrict the use of credit reports in employment decisions.¹³ The laws of these states generally prohibit the use of credit reports in employment decisions unless such inquiry is required by state or federal law, is a bona fide occupational qualification, is for a managerial or supervisory position, is for a law enforcement position, or the position is located at a financial institution.

Society for Human Resource Management

The Society for Human Resource Management conducted research in 2012 regarding the use of credit background checks. Of those surveyed, it found that slightly less than half (47 percent) conducted credit checks as part of their employment practices. The number of organizations conducting credit checks on potential employees has declined due to employers' increased awareness of scrutiny of this practice by both state and federal governments.¹⁴

Of those surveyed, the top reason for conducting credit checks, was to decrease or prevent theft and embezzlement and to reduce legal liability for negligent hiring. The majority of credit checks are requested after an offer for employment has been extended (58 percent) or after the interview has been conducted (33 percent). Most employers allow the applicant to provide an explanation of items contained in the credit history prior to making a hiring decision.

Although many organizations obtain credit histories as a part of the hiring process, only 14 percent of those surveyed viewed it as an important factor in making a final hiring decision. The most important factors include such attributes as previous work experience, possession of specific skills or expertise, and being perceived as a good fit with the job and organization.

Equal Employment Opportunity Commission

In October 2010, the Equal Employment Opportunity Commission (EEOC) invited public testimony regarding the use of credit histories in employment decisions. Consumer advocates indicated that use of credit histories might have a disparate impact on people of color, women,

¹³ Washington enacted legislation in 2007, Hawaii enacted legislation in 2009, Illinois and Oregon enacted legislation in 2010. California, Connecticut and Maryland enacted legislation in 2011. Vermont enacted its legislation in 2012. Colorado and Nevada enacted legislation in 2013. See National Conference of State Legislatures "Use of Credit Information in Employment 2013 Legislation," last updated June 20, 2013, available at: <http://www.ncsl.org/research/financial-services-and-commerce/use-of-credit-info-in-employ-2013-legis.aspx> (last visited Dec. 3, 2013).

¹⁴ For full survey results, please see: <http://www.shrm.org/Research/SurveyFindings/Articles/Pages/CreditBackgroundChecks.aspx> (last visited Dec. 2, 2013).

and individuals with disabilities. There was also testimony that credit reports may obtain incomplete information or errors and are poor predictors of job performance.

Employers expressed that although a credit history may be used in the hiring process, it is only one element of the employee selection process.¹⁵ The credit report is not usually an automatic bar to employment but opens the door to discussion of issues discovered. Testimony also indicated that it is used as a way to collect additional information about a prospective employee that would be relevant to the position being sought.

The EEOC advises that, unless the information is essential to the job in question, inquiries regarding an employee or applicant's credit rating or economic status should generally be avoided due to the adverse effect it may have on females and minorities.¹⁶

III. Effect of Proposed Changes:

Section 1 prohibits an employer from using a credit history or credit report to deny employment or determine compensation or the terms, conditions, or privileges of employment. The bill also provides the circumstances under which an applicant's credit report or credit history may be used. The employer may request and consider an applicant's credit report or history if the employer has a bona fide purpose for requesting the information that is substantially related to the job, notifies the applicant of the ability to request the information, and obtains permission from the applicant to request the information.

The bill provides that a position, for which an employer has a bona fide purpose for requesting a credit report or credit history, include a position that:

- Is supervisory, defined as a position in which an individual has the authority to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees or has the responsibility to direct employees, adjust their grievances, or recommend action in a manner that requires use of independent judgment;
- Is managerial, defined as a position in which the employee formulates and implements management policies;
- Accesses personal information of customers, employees, and employers, except personal information customarily provided in a retail transaction;
- Has a fiduciary responsibility to the employer, including the authority to issue payments, collect debts, transfer money, or enter into contracts;
- Involves the use of an expense account or a corporate debit or credit card;
- Has access to non-public corporate information, including trade secrets or other information which is not generally known or ascertainable and from which other persons can obtain economic value; or
- Involves public safety, such as law enforcement or other positions involving enforcement of state or federal criminal laws.

¹⁵ See Meeting of October 20, 2010 – Employer Use of Credit History as a Screening Tool: <http://www.eeoc.gov/eeoc/meetings/10-20-10/index.cfm> (last visited Dec. 2, 2013).

¹⁶For more information, please see: http://www.eeoc.gov/laws/practices/inquiries_credit.cfm (last visited Dec. 2, 2013).

The bill does not apply to employers that are expressly permitted or required, by state or federal law, to perform an inquiry into a person's credit history, as well as to financial institutions and their affiliates or subsidiaries that accept federally insured deposits, credit unions or state-chartered banks registered with the Office of Financial Regulation, or entities that are registered with the U.S. Security and Exchange Commission, the Office of Financial Regulation, or the Financial Industry Regulatory Authority as investment advisors, brokers, dealers, or their affiliates.

The bill provides that an aggrieved individual may seek declaratory relief that an act or practice violates the protections provided in this bill and to enjoin the continuance of such practice. The bill also provides that a person who has suffered a loss under these provisions may recover actual damages and attorney fees and costs if the individual prevails in court. If the defendant alleges such suit is frivolous or without merit, the court may require the plaintiff to post a bond in an amount to indemnify the defendant for any damages incurred, upon finding a reasonable necessity. However, this provision does not apply to an enforcement agency.

The relief provided under the provisions of this bill is in addition to any other remedy provided by law.

Section 2 provides that the bill takes effect July 1, 2014.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Indeterminate.

C. Government Sector Impact:

Indeterminate.

VI. Technical Deficiencies:

None.

VII. Related Issues:

Employers may become subject to the provisions of the Fair Credit Reporting Act if they obtain credit history or credit reports under the provisions of this bill.

VIII. Statutes Affected:

This bill creates s. 448.071, F.S.

IX. Additional Information:**A. Committee Substitute – Statement of Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Commerce and Tourism on December 9, 2013:

The committee substitute provides that the provisions of the bill do not apply to an investment advisor, broker, or dealer that is registered with the U.S. Securities Exchange Commission, the Office of Financial Regulation, or the Financial Industry Regulatory Authority.

B. Amendments:

None.