

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

Prepared By: Commerce and Consumer Services Committee

BILL: SB 1424

INTRODUCER: Senator Klein

SUBJECT: Civil Actions

DATE: March 15, 2006

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Gordon	Cooper	CM	Favorable
2.	_____	_____	JU	_____
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

This bill requires employers to show that they have performed all, rather than only one, of the specified actions that constitute a background investigation in order to qualify for a presumption against negligent hiring in civil actions.

This bill amends the following sections of the Florida Statutes: s. 768.096.

II. Present Situation:

In 1999, the Florida Legislature passed the Tort Reform Act (HB 775) which made several modifications to the procedural and substantive aspects of the civil litigation system in Florida. That legislation created s. 768.096, F.S.,¹ concerning negligent hiring. Negligent hiring is a subtopic of vicarious liability, the legal doctrine that imposes liability on one person for the conduct of another, based solely on a relationship between those individuals.² Negligent hiring occurs when an employer knew or should have known of the employee's unfitness prior to the time the employee was hired and a third party has been harmed by the actions of that employee.³ In order to prevail in a civil action based on negligent hiring, the plaintiff must prove:

- (a) The employer was required to make an appropriate investigation of the employee and failed to do so;
- (b) An appropriate investigation would have revealed the unsuitability of the employee for the particular duty to be performed or for employment in general; and

¹ Section 16, ch. 99-225, L.O.F.

² Black's Law Dictionary, 6th Ed.

³ See, *Garcia v. Duffy*, 492 So.2d 435, 438 (Fla. 2d DCA 1986).

- (c) It was unreasonable for the employer to hire the employee in light of the information he knew or should have known.⁴

The 1999 legislation created some protection for employers by establishing a presumption that an employer was not negligent in hiring an employee if, before hiring the employee, the employer conducted a background investigation and the investigation did not reveal any information that demonstrated the unsuitability of the individual for employment. Section 768.096, F.S., codifies this presumption against negligent hiring in actions for the death of, or injury or damage to, a third person caused by the intentional tort of an employee. In order to qualify for the presumption, an employer must show that, before hiring the employee, the employer conducted a background investigation of that employee and “the investigation did not reveal any information that reasonably demonstrated the unsuitability of the prospective employee for the particular work to be performed or for the employment in general.”⁵ Under that section of law, a background investigation must include:

- (a) Obtaining a criminal background investigation on the prospective employee under subsection (2);
- (b) Making a reasonable effort to contact references and former employers of the prospective employee concerning the suitability of the prospective employee for employment;
- (c) Requiring the prospective employee to complete a job application form that includes questions concerning whether he or she has ever been convicted of a crime, including details concerning the type of crime, the date of conviction and the penalty imposed, and whether the prospective employee has ever been a defendant in a civil action for intentional tort, including the nature of the intentional tort and the disposition of the action;
- (d) Obtaining, with written authorization from the prospective employee, a check of the driver’s license record of the prospective employee if such a check is relevant to the work the employee will be performing and if the record can reasonably be obtained; **or**
- (e) Interviewing the prospective employee.

Section 768.096(2) provides that in order “[t]o satisfy the criminal-background investigation requirement of this section, an employer must request and obtain from the Department of Law Enforcement a check of information as reported in the Florida Crime Information Center system as of the date of the request.” According to a 2005 Fact Sheet published by FDLE, the Florida Crime Information Center contains data related to Florida specific criminal arrest records, arrest warrants and domestic violence injunctions.⁶ According to FDLE, the request to which this section refers is a public records check which may be obtained via (1) the FDLE website (www.fdle.state.fl.us); (2) a written request to the FDLE criminal history division; or (3) through

⁴ See, *Malicki v. Doe*, 814 So.2d 347, 362 (Fla. 2002)(noting the Court first recognized a common law cause of action for negligent supervision of an employee over forty-five years ago; the doctrine has since evolved to encompass both negligent hiring and negligent supervision), *relying on*, *Garcia v. Duffy*, at 440 (Fla. 2d DCA 1986).

⁵ Section 768.096, F.S.

⁶ FDLE, *Criminal History Record Checks/Background Checks, Fact Sheet*, p.1, September 1, 2005.

an account set up with FDLE, known as a “Modem Account” (for those who customarily run multiple background checks).⁷ The cost is \$23.00 per background check.

As the statute makes clear, such criminal background checks are not required to meet the requirements of the presumption.⁸ Under current law, an employer would be deemed to have met the requirements for the presumption by meeting one of the specified actions.

III. Effect of Proposed Changes:

Section 1 of the bill changes the word “or” in s. 786.096, F.S., to “and” in order to require that *all* of the specified actions, not just one, be undertaken by employers before they may be granted the presumption against negligent hiring.

Section 2 provides this bill will take effect upon becoming a law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

⁷ According to the FDLE document referenced in note 6, certain state agencies (such as school districts) are statutorily required to conduct criminal background checks. The document also states, “Private citizens, companies and governmental entities are also authorized under Florida’s public records law to request state only criminal history checks. Examples of these entities include grocery stores, taxi drivers, summer camp employees, etc. Additionally provisions of the National Child Protection Act [42 U.S.C. § 5119a (1993)], implemented through Florida’s Volunteer and Employee Criminal History System (VECHS) authorize checks of employees and volunteers of certain qualified entities that provide care to children, elderly, or disabled persons.” *Id.*

⁸ It should be noted, however, that criminal background checks must now be conducted by school districts for all “noninstructional school district employees or contractual personnel who are permitted access on school grounds when students are present, who have direct contact with students or who have access to or control of school funds.” *See*, s. 1012.465, F.S. (s. 21, 2005-28, L.O.F., the Jessica Lunsford Act).

B. Private Sector Impact:

The requirement that employers now conduct *all* of the actions that constitute an adequate background investigation will increase costs for employers who do not use all methods presently.

C. Government Sector Impact:

The requirement that employers now conduct *all* of the actions that constitute an adequate background investigation may increase costs for employers who do not use all methods presently.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

VIII. Summary of Amendments:

None.

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