

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 Commerce and Tourism Committee

BILL: CS/SB 102

INTRODUCER: Commerce and Tourism Committee and Senator Siplin

SUBJECT: Employment Practices

DATE: January 20, 2012 **REVISED:** _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Hrdlicka	Hrdlicka	CM	Fav/CS
2.	_____	_____	BI	_____
3.	_____	_____	GO	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

Please see Section VIII. for Additional Information:

A. COMMITTEE SUBSTITUTE..... Statement of Substantial Changes

B. AMENDMENTS..... Technical amendments were recommended

Amendments were recommended

Significant amendments were recommended

I. Summary:

CS/SB 102 prohibits use of individuals' credit reports or history for employment or insurance purposes.

An employer is prohibited from using a job applicant's credit report or credit history to deny employment or determine compensation or privileges of employment. However, an employer may request and use 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 CS defines positions for which an employer has a bona fide purpose to request an applicant's credit report or history, include positions that are managerial, involve access to personal information, and involve public safety, such as law enforcement officers.

The prohibition does not apply to employers expressly permitted to request credit reports or history under federal or state law, FDIC insured financial institutions, credit unions and state

chartered banks registered with the Florida Office of Financial Regulation, and entities registered with the U.S. Securities and Exchange Commission.

The CS provides for a private cause of action for individuals aggrieved by a violation of the prohibition, and permits for recovery of actual damages plus court costs. Additionally, any frivolous actions brought under the section will require the plaintiff to pay the defendant for any damages incurred plus attorneys' fees.

The CS also prohibits insurers from using credit history when making rate determinations.

This CS amends ss. 626.9541 and 626.9741, F.S.

This CS creates general law not contained in a designated section of the Florida Statutes.

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, the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, and the Genetic Information Nondiscrimination Act of 2008.

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 make sure 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.

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 1/16/2012). Gender discrimination also includes issues related to pregnancy, childbirth, related medical conditions, sexual harassment, and equal pay.

Additionally the federal bankruptcy law makes it illegal for an employer to discriminate against an individual based on bankruptcy.²

Fair Credit Reporting Act – Employment

The Fair Credit Reporting Act (FCRA) permits employers to obtain a consumer report for “employment purposes.” An employer may obtain a consumer report only for the limited purposes of evaluating a consumer for employment, promotion, or reassignment or retention as an employee.³

In order to obtain a report, the employer must disclose to the person that a consumer report may be obtained for employment purposes and the person has authorized in writing the employer to do so. The disclosure must be in a stand-alone document – it cannot be part of the employment application.⁴

The employer must certify to the consumer reporting agency that it has disclosed and obtained the written consent from the person, and that the employer will not use the information from the consumer report in violation of any applicable federal or state equal employment opportunity law or regulation. Additionally the consumer reporting agency must provide the employer with a summary of consumer’s rights under FCRA.⁵ The consumer reporting agency is responsible for taking reasonable measures to ensure that the report is being requested and used for permissible purposes under the law.

If the employer decides to take an adverse action because of the consumer report, then, before the employer takes such action, the employer must provide the person with a copy of the report and the Federal Trade Commission notice, “A Summary of Your Rights Under the Fair Credit Reporting Act,” which is a description of the rights of the consumer under FCRA.⁶ After the employer takes an adverse action, it must provide to the person:

- Notice of the action taken by the employer;
- Disclosure of the numerical credit score used in taking the adverse action and other related information;
- Notice of the contact information for the consumer reporting agency that the report was obtained from and a statement that the consumer reporting agency did not make the decision to take the adverse action and is unable to provide the person the specific reasons why the adverse action was taken; and

² 11 U.S.C. s. 525.

³ “Consumer report” is defined as “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 used or expected to be used or collected in whole or in part for the purpose of...credit or insurance...employment purposes; or...” any other authorized purpose. 15 U.S.C. 1681a(d). See also definition of “employment purposes” at 15 U.S.C. s. 1681a(h). See 15 U.S.C. s. 1681b(b) for permissible purposes of consumer reports.

⁴ If the person is applying by mail, telephone, computer, or other similar means, then the consent may be given orally, in writing, or electronically. 15 U.S.C. s. 1681b(b)(2)(B).

⁵ 15 U.S.C. s. 1681b(b)(1).

⁶ 15 U.S.C. s. 1681b(b)(2). An “adverse action” is “a denial of employment or any other decision for employment purposes that adversely affects any current or prospective employee.” 15 U.S.C. 1681a(k)(B)(ii).

- Notice that the person has the right to obtain a free copy of his or her consumer report and to dispute the accuracy or completeness of any information contained therein.⁷

FCRA also provides for penalties for employers who do not comply with the requirements of the law.⁸ FCRA also allows the Federal Trade Commission, other federal agencies, and states to sue employers who do not comply with the law. Additionally, consumers can sue employers in state or federal court for certain violations.⁹

For the past several years, bills have been filed in Congress to prohibit the use of consumer reports in hiring decisions. The bills generally provide exceptions for employment that requires national security or FDIC clearance, state or local employment that requires use of a consumer report, employment in management positions at financial institutions, and when otherwise required by law.¹⁰

Other States – Employment

Seven states limit employers' use of credit information in employment decisions.¹¹ While the statutes differ, generally states limit or ban the use of reports with exceptions for employment in certain fields, such as the financial industry. Additionally some federal and state laws expressly permit or require the use of consumer reports in employment decisions.¹²

Current Use of Consumer Reports for Employment

It is unclear whether the recent recession and high number of unemployed have influenced employers to begin to use or increase their use of consumer reports for hiring. Some news reports indicate increased use, while an annual survey from the Society for Human Resource Management shows consistent responses since 2006 of about 60 percent of employers using credit background checks.

⁷ 15 U.S.C. s. 1681m(a). If an investigation by the consumer reporting agency reveals that a correction is warranted, the agency must send an updated report to the employer if requested by the person.

⁸ For more information see also Federal Trade Commission, Bureau of Consumer Protection, Business Center, "Using Consumer Reports: What Employers Need to Know" (January 2012), available at <http://business.ftc.gov/documents/bus08-using-consumer-reports-what-employers-need-know> (last visited 1/12/12); and the Bureau's Facts for Consumers, "Employment Background Checks and Credit Reports" (May 2010), available at <http://www.ftc.gov/bcp/edu/pubs/consumer/credit/cre36.shtm> (last visited 1/12/12).

⁹ Federal Trade Commission, FTC Facts for Consumers, "Employment Background Checks and Credit Reports" (May 2010). See 15 U.S.C. ss. 1681n – 1681s, imposing civil and administrative penalties, including fines, punitive damages, and attorneys' fees.

¹⁰ See H.R. 321 (112th Congress).

¹¹ The states are: California, Connecticut, Hawaii, Illinois, Maryland, Oregon and Washington. Washington enacted legislation in 2007; Hawaii enacted legislation in 2009; Illinois and Oregon enacted legislation in 2010; and California, Connecticut, and Maryland enacted legislation in 2011. California's law was effective January 1, 2012. See National Conference of State Legislatures "Use of Credit Information in Employment 2011 Legislation," updated 12/19/2011, available at: <http://www.ncsl.org/default.aspx?tabid=22043> (last visited 1/11/2012).

¹² For example, law enforcement positions and employment related to industries required to be registered with the Securities and Exchange Commission.

Even many federal agencies require credit history as part of its employment processes.¹³

Survey by the Society for Human Resource Management

Credit reporting bureaus provide consumer reporting services to business for employment decisions.¹⁴ A survey by the Society for Human Resource Management in August 2010 found that 47 percent of employers conducted credit background checks on select job candidates and 13 percent conducted such checks on all job candidates; most employers stated that they conducted the tests after a contingent job offer or interview.¹⁵ Employers must pay for every credit report that they request.

Employers indicated that they conduct the credit background checks to reduce/prevent theft and embezzlement and to reduce liability for negligent hiring. Additionally, 87 percent of the employers surveyed stated that they allow job candidates to explain the results of the credit background check.

Most employers indicated other reasons as being primary influences in hiring decisions, such as the candidate being a “good fit” with the business and the candidate’s previous work experience and skills; only 9 percent of the employers surveyed indicated that favorable credit background check results were most influential in their hiring decisions.

Testimony Before the EEOC¹⁶

Consumer advocates oppose the practice because they say credit reports contain a high incidence of errors and the reports could be used in a way that is discriminatory.¹⁷ In testimony before the EEOC, several individuals stated that African Americans and Hispanics have lower credit scores and are disproportionately affected by predatory credit practices which damage their credit history. They stated that credit reports “do not reflect the circumstances surrounding debts or reasons for late payments...[and] often include errors.” For example, a bad credit report would not reflect identity theft or medical debt that arose due to circumstances outside of the individual’s control. The credit reports do not specify the type of debt. They were concerned that

¹³ See Presidential National Security Directive 63 (October 21, 1991), George Bush, Presidential Library and Museum, National Security Directives, available at <http://bushlibrary.tamu.edu/research/pdfs/nsd/nsd63.pdf> (last visited 1/16/2012); U.S. Department of Labor, Bureau of Labor Statistics, Career Guide to Industries 2010-11 Edition, Federal Government, available at <http://www.bls.gov/oco/cg/cgs041.htm> (last visited 1/16/2012); and Federal Deposit Insurance Corporation, FDIC: Conditions of Employment, available at <http://www.fdic.gov/about/jobs/e.html> (last visited 1/16/2012).

¹⁴ For example, Experian offers the “Employment Insight” services to business; while Equifax provides such services through TALX. See Experian website at <http://www.experian.com/consumer-information/employment-credit-checks.html> (last visited 1/12/2012) and Equifax website at <http://www.talx.com/Solutions/Compliance/Verifications/> (last visited 1/12/2012).

¹⁵ Across most industries and types of jobs, employers looked at up to 6 – 7 years of an applicant’s credit history. Society for Human Resource Management, “Background Checking: The Implications of Credit Background Checks on the Decision to Hire SHRM Poll” (September 2010), available at <http://www.shrm.org/Research/SurveyFindings/Articles/Pages/BackgroundCheckingImplications.aspx> (last visited 1/11/2012).

¹⁶ See EEOC Meeting of October 20, 2010, “Employer Use of Credit History as a Screening Tool,” testimony and information available at <http://www.eeoc.gov/eeoc/meetings/10-20-10/index.cfm> (last visited 1/16/2012).

¹⁷ See Yipp, Pamela, “You seem qualified, but how’s your credit?” Tampabay.com (October 2009), available at <http://www.tampabay.com/news/business/personalfinance/article1044644.ece> (last visited 1/12/2012).

the use of credit history would lead to violations of law prohibiting discriminatory employment practices.

On the other hand, employers use the information as a way to vet candidates and such background checks allow them to ensure that applicants are telling the truth.¹⁸ In testimony before the EEOC, several individuals stated that employers do not receive or use a credit score as part of a consumer report received from a consumer reporting agency (“...the number standing by itself is meaningless to employers.”). Employers were said to use the credit history for employees with direct access to company or client funds, sensitive information, social security numbers, banking information, trade secrets, confidential company property, or controlled substances. The individuals testified that employers use the credit histories to see if there was a pattern and history of debt, multiple sources of debt over a long period of time, and if the applicant attempted to repay or consolidate the debt.

Additionally, testimony was provided that credit histories can give employers information that they could not otherwise obtain. They cited concerns by employers in providing references about potential defamation or retaliation suits. Employers also fear negligent hiring suits. Further, the individuals testified to employers’ fears of getting fake references; “[w]ebsites such as BuyAJobReference.com and careerexcuse.com specifically market [that] they will sell fake references.”

On the other hand, testimony was provided that employers have stopped using credit reports because employers now have technology in place by which allow the employer to monitor employees and alert the employer of certain behaviors.

Fair Credit Reporting Act – Insurance

The Fair Credit Reporting Act (FCRA) permits insurers to obtain a consumer report to serve as a factor in establishing an individual’s eligibility for insurance to be used primarily for personal, family, or household purposes.¹⁹

If the insurer decides to take an adverse action because of the consumer report, then, before the insurer takes such action, the insurer must provide the person with a copy of the report and the Federal Trade Commission notice, “A Summary of Your Rights Under the Fair Credit Reporting Act,” which is a description of the rights of the consumer under FCRA.²⁰ An adverse action includes the denial or cancellation of, increase in any charge for, or a reduction or unfavorable change in terms of coverage or amount of, any insurance in connection with the underwriting of insurance.²¹

¹⁸ A 2009 article stated that a background check company found increased discrepancies in background checks, mostly involving falsehoods about previous employment, education, and criminal history. See Merritt, Athena D., “Know It All finds applicants are stretching the truth,” South Florida Business Journal (September 2009), available at <http://www.bizjournals.com/philadelphia/stories/2009/09/14/story7.html> (last visited 1/12/2012).

¹⁹ 15 U.S.C. s. 1681a(d). For more information see also Federal Trade Commission, Bureau of Consumer Protection, Business Center, “Consumer Reports: What Insurers Need to Know” (October 1998), available at <http://business.ftc.gov/documents/bus07-consumer-reports-what-insurers-need-know> (last visited 1/20/12).

²⁰ 15 U.S.C. s. 1681b(b)(2).

²¹ 15 U.S.C. s. 1681a(k).

FCRA also provides for penalties for employers who do not comply with the requirements of the law. FCRA also allows the Federal Trade Commission, other federal agencies, and states to sue employers who do not comply with the law. Additionally, consumers can sue employers in state or federal court for certain violations.²²

Current Use of Credit Reports for Insurance

For the last several years, insurance companies have been using credit information to determine a consumer's level of risk before selling or renewing auto, home, or renter insurance policies. Insurers believe that the use of credit reports, combined with traditional underwriting tools, can improve the insurers' ability to predict future losses and claims. The insurance companies believe that there is a direct correlation between a consumer's financial stability and risk of filing an insurance claim. Insurers may use a consumer's credit score as one factor in assigning premiums, deciding whether to accept or decline coverage or in the decision to place a consumer with a nonstandard (generally higher priced) insurer.

Several states regulate or limit insurers' use of credit information in rating decisions.²³

Regulation of Use of Credit Reports by Insurers in Florida²⁴

Section 626.9741, F.S., regulates and limits the use of credit reports and scores by insurers for underwriting and rating purposes. The regulations and limits only apply to personal lines motor vehicle insurance and personal lines residential insurance, which includes homeowners, mobile home owners' dwelling, tenants, condominium unit owners, cooperative unit owners, and similar types of insurance.

An insurer may use a credit report or score for underwriting or rating purposes under current law. The insurer must notify the individual that a credit report or score is being requested.

If the insurer makes an adverse decision the insurer must notify the individual and explain the four primary (or fewer) reasons for the adverse action and provide the individual with a copy of the credit report used or the contact information for the consumer reporting agency from which the report was obtained. Receiving a less favorable rate is not considered adverse action under the statute. However, the insurer may not make an adverse decision solely because of information contained in a credit report or score without consideration of any other underwriting or rating factor.

An insurer is also prohibited from making an adverse decision based on the following factors:

- The absence of, or an insufficient, credit history, under certain circumstances;
- Collection accounts with a medical industry code;

²² See 15 U.S.C. ss. 1681n – 1681s, imposing civil and administrative penalties, including fines, punitive damages, and attorneys' fees.

²³ See National Conference of State Legislatures "Use of Credit Information in Insurance 2011 Legislation," updated 12/20/2011, available at, <http://www.ncsl.org/issues-research/banking-insurance-financial-services/use-of-credit-information-in-insurance-2011-legisl.aspx#NV> (last visited 1/20/2012).

²⁴ See Senate Staff Analysis and Economic Impact Statement for SB 40-A (2003), available at <http://archive.flsenate.gov/data/session/2003A/Senate/bills/analysis/pdf/2003s0040A.bi.pdf> (lat visited 1/20/2012).

- Place of residence; or
- Any other special circumstances that the Financial Services Commission determines, by rule, lacks sufficient statistical correlation and actuarial justification as a predictor of insurance risk.

The insurer must provide a means of appeal for an individual whose credit report or credit score is unduly influenced by the death of a spouse, the dissolution of a marriage, or temporary loss of employment. An insurer must complete a review of an adverse decision upon request of an individual who supplies an insurer with reasonable documentation of a temporary loss of employment, dissolution of marriage, or death of a spouse. If an insurer determines that a credit report or credit score was unduly influenced by either of such factors, it shall either exclude the credit information or treat the credit information as neutral, whichever is more favorable to the individual.

Additionally, an insurer is required to establish procedures to review the credit history of an individual who was adversely affected by the use of the insured's credit history at the initial rating of the policy, or at a subsequent renewal thereof.

A rate filing that uses credit reports or credit scores must comply with the requirements of ss. 627.062 and 627.0651, F.S., to ensure that rates are not excessive, inadequate, or unfairly discriminatory.

III. **Effect of Proposed Changes:**

CS/SB 102 prohibits use of individuals' credit reports or history for employment purposes, and credit reports or scores for insurance purposes.

Section 1 prohibits an employer from using a job applicant's credit report or credit history to deny employment or determine compensation or privileges of employment.

However, an employer may request and use 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 CS defines positions for which an employer has a bona fide purpose to request an applicant's credit report or history, include positions that are managerial, involve access to personal information, and involve public safety, such as law enforcement officers.

The prohibition does not apply to employers expressly permitted to request credit reports or history under federal or state law, FDIC insured financial institutions, credit unions and state chartered banks registered with the Florida Office of Financial Regulation, and entities registered with the U.S. Securities and Exchange Commission.

The CS provides for a private cause of action for individuals aggrieved by a violation of the prohibition, and permits for recovery of actual damages plus court costs. Additionally, any

frivolous actions brought under the section will require the plaintiff to pay the defendant for any damages incurred plus attorneys' fees.

Section 2 amends s. 626.9541, F.S., to prohibit an insurer from using any rate, schedule, manual, or underwriting rule not contained in a rating manual and determined in whole or part on the basis of an insured's credit report or score. Further an insurer may not refuse to insure or continue to insure any individual solely on the basis of the insured's or applicant's credit report or score.

Section 3 amends s. 626.9741, F.S., to specifically prohibit an insurer from using credit reports or scores in making rate determinations.

Section 4 provides an effective date of July 1, 2012.

Other Potential Implications:

Florida businesses that currently use consumer reports in their hiring practices or in making rate determination may be subject to penalties and lawsuits under FCRA, which requires that employers and insurers comply with state laws when using consumer reports.

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:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

- A. **Committee Substitute – Statement of Substantial Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Commerce and Tourism on January 19, 2012:

The committee substitute made the following changes:

- Allows use of a credit report for certain jobs such as financial jobs, jobs where people have access to personal information, and law enforcement;
- Provides for damages for people who suffer a loss for violations of the statute by an employer; and
- Prohibits insurers from using credit history when making rate determinations.

- B. **Amendments:**

None.