

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: SB 102

INTRODUCER: Senator Siplin

SUBJECT: Employment Practices

DATE: January 18, 2012

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Hrdlicka	Hrdlicka	CM	Pre-meeting
2.	_____	_____	BI	_____
3.	_____	_____	GO	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

SB 102 prohibits an employer from using a job applicant’s personal credit history as a criterion for hiring, except where required by law. If credit history is directly related to the position sought by the applicant, then the employer may request credit history as part of the application process but may not use the history as the determining factor in hiring the applicant.

This bill 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

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.

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.

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

Fair Credit Reporting Act

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.

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).

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
- 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

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

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).

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).

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

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.

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.

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

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).

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 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.

III. Effect of Proposed Changes:

SB 102 prohibits an employer from using a job applicant’s personal credit history as a criterion for hiring, except where required by law. If credit history is directly related to the position sought

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).

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).

by the applicant, then the employer may request credit history as part of the application process but may not use the history as the determining factor in hiring the applicant.

While the bill does not provide an enforcement mechanism for the provisions, Florida businesses that currently use consumer reports in their hiring practices may be subject to penalties and lawsuits under FCRA, which requires that employers comply with state laws when using consumer reports.

This bill takes effect July 1, 2012.

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:

The impact of this bill on current hiring practices for state agencies is unclear. The Department of Management Services (DMS) indicated that state agencies currently only employ the use of a

consumer report for hiring only for those positions to which such information is directly related.¹⁹

In its analysis of the bill, DMS drew attention to an apparent inconsistency with the language of the bill, making its application unclear:

[I]f an employer is allowed to request a credit history due to the nature of the position being filled, then it stands to reason that the results of the credit history will have a bearing on the final hiring decision. In those situations, using credit history as the deciding factor when all other things are equal between applicants who are under consideration for a position is appropriate and consistent with current law. Conversely, if the findings of the credit history cannot be used in the hiring decision, then the credit history has no value in the selection process. In fact, such information could be prejudicial to an applicant. Therefore, there is no reason for it to be obtained.

For example, the Department of Law Enforcement indicated that “law enforcement agencies routinely review credit histories related to candidates for employment to determine if there is 1) a lack of personal responsibility demonstrated in financial management and 2) a significant potential to be sought out by those seeking sensitive or non-public information by paying someone in financial straits for the information.”²⁰ This practice would likely be discontinued under the provisions of this bill.

VIII. Additional Information:

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

None.

B. **Amendments:**

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill’s introducer or the Florida Senate.

¹⁹ Department of Management Services, Bill Analysis 2012, October 19, 2011, on file with the Senate Commerce and Tourism Committee.

²⁰ Florida Department of Law Enforcement, Bill Analysis 2012, October 31, 2011, on file with the Senate Commerce and Tourism Committee.