House
Legislative
Analysis
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EMPLOYER REFERENCE IMMUNITY

House Bill 5137 (Substitute H-2)
First Analysis (10-25-95)

Sponsor: Rep. Gerald Law
Committee: Human Resources and Labor

THE APPARENT PROBLEM:

Although in general, Michigan case law recognizes that employers have a qualified privilege to disclose information regarding former employees to prospective employers, in practice, employers are increasingly reluctant to provide employee references to prospective employers for fear of being sued for defamation by the former employees. Reportedly, defamation lawsuits against employers by disgruntled former employees are increasingly common, and even the prospect of having to defend such expensive suits has the practical effect of discouraging employers from providing any information on former employees beyond employment dates, salary ranges, and, occasionally, job titles. In fact, some employers have resorted to settling out of court with former employees, which in many cases involves being forced to write glowing letters of (undeserved) recommendation.

Ironically, this reluctance to disclose information about former employees, while protecting employers from defamation lawsuits, apparently has exposed employers to lawsuits from another quarter. Third parties reportedly have begun suing employers for negligence in hiring or in keeping employees who are incompetent, vicious, or dangerous to others, even though prospective employers often are unable to determine if a prospective employee is incompetent or dangerous because they cannot obtain this information from the former employer.

THE CONTENT OF THE BILL:

The bill would create a new act that would give employers immunity from civil liability for disclosing, in good faith and on request, job performance information on the employee that was documented in the employee's personnel file. The information would have to be requested by either the employee or the prospective employer, and the employer would be presumed to be acting in good faith when disclosing the information unless a preponderance of the evidence established that the employer either knew that the information was false or misleading, or disclosed the information "with a reckless disregard for the truth," or if the disclosure was specifically prohibited by state or federal law.

FISCAL IMPLICATIONS:

According to the House Fiscal Agency, the bill has no fiscal implications. (10-24-95)

ARGUMENTS:

For:

Although no hard data on the actual number of defamation lawsuits by former employees appears to exist, employers (and employer organizations) are virtually unanimous that the safest policy is one of "don't ask and don't tell." As one newspaper article points out, even though employers' fears of defamation lawsuits are not necessarily grounded in reality, it is a fear that is driving almost two-thirds of human resource managers to divulge nothing about former employees, according to a recent survey by the Society for Human Resource Management. According to the article, even though lawyers say few suits involving reference-checking actually end up in court, 63 percent of the 1,131 respondents to the society's survey said that fear of litigation stopped them from providing any information about former employees, while at the same time 73 percent said that reference checking was more important than ever, both to hire the best workers and to avoid suits over employees with violent or criminal pasts. As it is, employers are in an impossible situation right now. They are afraid to give out information on former employees for fear of expensive defamation litigation, while they also are exposed to "negligent hiring" lawsuits if, because of this inability to obtain relevant information on prospective employees, they hire people who turn out to be dangerous.

This "don't ask, don't tell" policy, however, not only puts employers in an impossible situation. It also allows poor or dangerous employees to leave their job records behind, and, in some cases (and under the threat of expensive litigation) to extort otherwise undeserved glowing references from former employers.

Finally, it also penalizes good employees, who can't capitalize on their good job performance records.

Employers should be able to communicate accurate and fair information about their employees' job performance to prospective employers without fear of expensive lawsuits, and good employees should be able to use their good job performance to advance to better jobs. The bill would result in a "win-win" situation for employers and good employees alike. Prospective employers would have access to legitimate, documented job performance information about prospective employees, while good employees would be able to use their good employment histories to go on to better jobs.

Against:

The bill could go further to reduce employers' exposure to frivolous lawsuits by disgruntled employees. It could include language to permit employees to waive any claim for defamation through a voluntarily signed waiver of claims which would serve as an absolute bar to any civil action for defamation against any current or former employers, supervisors, or co-workers. It also could include language that required plaintiff-employees to demonstrate that defendant-employers failed to provide written corrections or retractions within a certain period of time (say, 14 days) after being informed in writing of the alleged defamatory statement.

POSITIONS:

The Michigan State Chamber of Commerce supports the bill. (10-25-95)

The Michigan Manufacturers Association supports the bill. (10-25-95)

The National Federation of Independent Businesses supports the bill. (10-25-95)

The Society for Human Resource Management supports the bill. (10-25-95)