Senate Fiscal Agency
P. O. Box 30036
Lansing, Michigan 48909-7536

BILL ANALYSIS

Telephone: (517) 373-5383
Fax: (517) 373-1986

Senate Bill 353 (as enrolled)
Sponsor: Senator John Proos
Senate Committee: Commerce
House Committee: Commerce and Trade

Date Completed: 3-8-18

RATIONALE

Recently, San Francisco, Philadelphia, and a number of other cities have implemented or considered ordinances that prohibit an employer from asking for a prospective employee's wage history in an interview or job application. In Michigan, the Local Government Labor Regulatory Limitation Act prohibits local governments from adopting or enforcing an ordinance that regulates the information a prospective employer must request, require, or exclude on an application for employment. However, some have raised concerns that the Act might not apply to ordinances that seek to regulate the information provided during an interview. Accordingly, it has been suggested that the Act should specifically preempt such ordinances.

CONTENT

The bill would amend the Local Government Labor Regulatory Limitation Act to prohibit a local governmental body from regulating the information an employer would have to request, require, or exclude during a job interview.

The Act generally prohibits a local governmental body from adopting, enforcing, or administering an ordinance, local policy, or local resolution regulating the information an employer or potential employer must request or require on, or exclude from, an application for employment. Under the bill, a local governmental body also would be prohibited from regulating the information an employer or potential employer would have to request, require, or exclude during the interview process for an employee or potential employee.

(The Act defines "local governmental body" as any local government or its subdivisions, including a city, village, township, county, or educational institution (a school district, intermediate school district, public school academy, or community college); a local public authority, agency, board, commission, or other local governmental, quasi-governmental, or quasi-public body; or a public body that acts or purports to act in a commercial, business, economic development, or similar capacity for a local government or its subdivision. The term does not include an authority established by interlocal agreement under the Urban Cooperation Act to which the State is a party.)

The bill would take effect 90 days after its enactment.

MCL 123.1384

ARGUMENTS

(Please note: The arguments contained in this analysis originate from sources outside the Senate Fiscal Agency. The Senate Fiscal Agency neither supports nor opposes legislation.)

Supporting Argument

Local governments throughout the United States are using ordinances to regulate business hiring decisions. For example, in 2016, Philadelphia adopted an ordinance that prohibits employers from asking about a prospective employee's salary history. The ordinance makes it illegal for an employer to do the following: a) ask about a prospective employee's wage history, b) require disclosure of wage history, c) condition employment or consideration for an interview on disclosure of wage history, d) rely on wage history to determine the wage for a prospective employee unless he or she knowingly and willingly discloses his or her wage history, or e) retaliate against a prospective employee for failing to comply with a wage history inquiry. Advocates contend that the rationale for this measure, and others like it, is to address what they believe are discrepancies between the wages of male and female workers; however, these measures also block employers from considering wage history for legitimate purposes (i.e., to conduct market research or verify an individual's work performance).

Labor laws, including antidiscrimination measures, are the purview of the State and Federal governments, which collectively prohibit discrimination on the basis of age, national origin, citizenship, disability, height, weight, marital and familial status, race or color, religion, and sex. Also, at the Federal level, the Equal Pay Act prohibits employers from discriminating on the basis of sex in the payment of wages for equal work. Accordingly, an individual who has experienced sex-based discrimination in pay likely has claims under the Equal Pay Act as well as Title VII of the Civil Rights Act of 1964. These protections, along with State law protections, such as those provided under the Elliot-Larsen Civil Rights Act, should be sufficient to address claims of sex-based discrimination. If they are not, then efforts to eliminate sex-based discrimination (or other unfair labor practices) should be made by the State or Federal government.

According to testimony before the Senate Committee on Commerce, Michigan's local governments are not considering any ordinances similar to the Philadelphia ordinance. Nevertheless, too many times local units of government in Michigan have used "local control" as a justification to implement burdensome regulations on businesses. These measures disproportionately affect small businesses, which frequently do not have the sophistication or money to monitor and comply with overlapping State and Federal laws and regulations, as well as local ordinances. The bill would prevent local units of government from creating patchwork regulations on matters that are properly decided by the State or Federal government.

Opposing Argument

The bill would prevent the adoption of so-called fair chance policies, i.e., policies that regulate private employers as to when and to what extent they can consider an individual's criminal record in making a hiring decision. These policies are an effective strategy for eliminating the barriers that formerly incarcerated individuals face when obtaining employment. Many of these policies, such as "Ban the Box", are enacted as local ordinances that limit inquiries into an individual's criminal record on employment applications for positions within the local government. Some ordinances extend these restrictions to vendors, contractors, and even private sector employers within the jurisdiction. Absent these policies, a significant number of private employers exclude those with a criminal record outright, regardless of whether the conviction was related to the nature of the prospective employment or how much time has passed since the individual was convicted.

Such strict policies affect many people. According to the American Civil Liberties Union (ACLU), approximately 33% of the population has some sort of criminal record. However, these employment practices tend to have a disproportionate impact on minorities. It is believed that approximately 25% of African-Americans have a felony record. In Detroit, roughly 15% of the city's population (approximately 100,000 African-Americans) have a felony record, according to the ACLU. The potential inability of so many individuals to find jobs because of a felony record serves as a serious impediment to the city's recovery.

In addition to being discriminating, the automatic exclusion of individuals with criminal records from obtaining employment contributes to increased homelessness and crime. Local fair chance

policies reduce these socials problems and give formerly incarcerated individuals who are committed to changing their lives an opportunity to become productive members of society. Regulation is needed in order to ensure that these policies are implemented and given a chance to work. The absence of regulation at the State level has encouraged local governments to act. This bill would create a barrier for local governments to develop and implement fair chance employment requirements and would harm formerly incarcerated individuals who are committed to turning their lives around.

Response: The Elliott-Larsen Civil Rights Act prohibits Michigan employers from asking an applicant about a misdemeanor arrest that did not result in a conviction. An employer may ask about a misdemeanor arrest that resulted in conviction, or a felony charge before conviction or dismissal. Moreover, according to Equal Employment Opportunity Commission (EEOC) Enforcement Guidance, Title VII of the Civil Rights Act of 1964 prohibits employers from using policies or practices that screen individual based on criminal history information if they significantly disadvantage Title VII-protected individuals, and they do not help an employer accurately decide whether the person is likely to be a responsible, reliable, or safe employee. Other laws, however, prohibit hiring those with a criminal record for certain positions. Accordingly, the EEOC recommends certain best practices for employers considering criminal history information when making an employment decision. These include the elimination of blanket policies that exclude individuals from employment based on a criminal record, and the adoption of a narrowly tailored policy for screening individuals for criminal conduct.

Although not all employers are subject to Title VII, and it does not apply to states or political subdivisions, many businesses follow the EEOC best practices and hire formerly incarcerated individual if it is not illegal or unduly risky to do so. However, the decision to hire such a person entails certain risks, namely that the employee will reoffend and harm the business or its customers. Employers should be free to consider those risks and adopt appropriate policies without intrusive local regulations governing what they can and cannot do.

Legislative Analyst: Jeff Mann

FISCAL IMPACT

The bill would have no fiscal impact on State or local government.

Fiscal Analyst: Josh Sefton

SAS\A1718\s353en