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Promoting Fairness and Equity in Wisconsin's Civil Justice System

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TO: Members, Assembly on Workforce Development
 FROM: Andrew Cook, on behalf of the Wisconsin Civil Justice Council
 DATE: August 27, 2009
 RE: **OPPOSITION TO AB 367 – PROHIBITING THE USE OF CREDIT HISTORIES FOR EMPLOYMENT PURPOSES**

The Wisconsin Civil Justice Council, Inc. (WCJC) represents business interests on emerging civil litigation challenges before the Legislature. The WCJC's primary goal is to achieve fairness and equity, reduce costs, and enhance Wisconsin's image as a place to live and work.

Assembly Bill 367

Assembly Bill 367 would prohibit employment discrimination based on credit history. The bill provides a narrow exception where circumstances of an individual's credit history are "substantially related to the circumstances of a particular job or licensed activity" and where the employment "depends on the bondability of the individual and the individual may not be bondable due to his or her credit rating."

The WCJC opposes AB 367 because it would unnecessarily expose businesses to greater liability. As explained in greater detail below, the WCJC is particularly concerned that by amending Wisconsin's Fair Employment Law, AB 367 further exposes businesses to more lawsuits involving potentially significant punitive and compensatory damages. Moreover, the WCJC is concerned that AB 367 would impose another unnecessary limitation on Wisconsin businesses' ability to manage their workforce and compete in the current dismal economy.

AB 367 Would Unnecessarily Expose Businesses to Greater Civil Liability under Wisconsin's Fair Employment Law

The Legislature recently enacted into law Senate Bill 20 (2009 Wisconsin Act 20). For the first time Act 20 adds punitive and compensatory damages for violations of the Wisconsin Fair Employment Law (WFEL). (Prior to enactment of Act 20, the WFEL allowed an employee who was discriminated against to seek reinstatement, back pay, attorney fees, and costs, but did not allow an employee to sue for punitive and compensatory damages.)

The WFEL, as recently amended by Act 20, now exposes businesses employing 16 to 99 employees up to \$50,000 in punitive and compensatory damages, plus court costs and attorney fees. Businesses with 101 to 200 employees are subjected up to \$100,000 in punitive and compensatory damages, plus court costs and attorney fees. Businesses with 201 to 300 employees are now subjected up to \$200,000 in punitive damages, and businesses employing more than 300 employees are subjected to punitive and compensatory damages totaling up to \$300,000 (in addition to court costs, back pay, and attorney fees).

Assembly Bill 367 would prohibit employment discrimination based on credit history under Wisconsin's WFEL. Thus, if AB 367 is enacted, an employer would be subjected to significant punitive and compensatory damages by simply running a credit check on a potential employee. As currently drafted, AB 367 proposes a broad protection that is different in kind from the other protected bases in the employment discrimination statute. Therefore, since credit reports do not contain information pertaining to a consumer's race, gender, religion, creed, color, or national origin, it is not clear why credit history should be protected under the WFEL

Current Law Provides Significant Protection for the Use of Credit Reports

The federal Fair Credit Reporting Act (FCRA)¹ provides sufficient protections for job applicants in circumstances when a credit report is used for employment purposes. For example, if information from a credit report is used for employment purposes, the FCRA requires that the employer:

- Make a clear and conspicuous written disclosure to the applicant before the report is obtained, as specified, that a consumer report may be obtained;
- Obtain prior written authorization from the applicant;
- Certify to the credit reporting agency that the employer disclosed and obtained authorization to review the credit report and disclosed to the applicant that the information will not be used in violation of any federal or state equal-opportunity law or regulation, as specified; and
- Before taking an adverse action based on the credit report, provide the person with notice of the adverse decision and the name, address, and telephone number of the consumer reporting agency making the report.

In addition, the employer is required to give the employee a copy of the credit report, a summary of FCRA rights with information on how to dispute the contents of the report, and other documents as specified.

Legislation in Other States

It is worth noting that only two other states (Washington and Hawaii) have passed similar legislation. (The California Legislature passed a bill prohibiting consumer credit reports for employment purposes, but was vetoed by the Governor.)

Washington state recently amended its Fair Credit Reporting Act.² Unlike AB 367, the bill did not amend the state's employment discrimination act. Moreover, the Washington law does not expose the employer to significant punitive and compensatory damages. Instead, an employer that violates the law is subjected to actual damages, plus costs and reasonable attorney fees. Only if there is willful failure to comply with the law would an employer be subject to the same damages as above, plus a monetary penalty of up to \$1,000 (significantly less than the potential \$300,000 in punitive and compensatory damages under current Wisconsin law).³

Conclusion

In conclusion, the WCJC opposes AB 367 particularly because of the effect the bill will have on exposing already struggling Wisconsin businesses to greater civil liability. More exposure to civil litigation will drive up the cost of doing business making it that much more difficult for Wisconsin employers to compete during these extraordinarily trying economic times.

¹ 15 U.S.C. § 1681 (see <http://www.law.cornell.edu/uscode/15/1681.html>)

² Chapter 93, Laws of 2007.

³ Revised Code of Washington 19.182.150.