

Senate Commerce Committee

Angela Leach 271-3077

SB 22, relative to employer immunity for disclosure of certain worker employment information.

Hearing Date: January 24, 2017

Time Opened: 1:32 p.m.

Time Closed: 2:34 p.m.

Members of the Committee Present: Senators Innis, French, Sanborn, Soucy and Lasky

Members of the Committee Absent : None

Bill Analysis: This bill provides immunity from civil liability to an employer who discloses employment information about a worker to a prospective or current employer.

Sponsors:

Sen. Bradley

Sen. Innis

Rep. Hunt

Rep. Biggie

Who supports the bill: Sponsors, Connie Roy Czyzowski, Andrea Chatfield, Jim Reidy, Gary Abbott, Associated General Contractors; Tina Sharby, Easter Seals NH; Bruce Berke, NFIB; Mike Somers, NH Lodging and Restaurant Association; Dave Juvet, BIA; Stuart Trachy, NH Grocers Association

Who opposes the bill: Marissa Chase, NH Association for Justice; Natalie Frendenthal, Vanacore Law Firm

Summary of testimony presented:

Senator Sanborn stated that with current ethics law, he may or may not have a conflict of this bill but will be participating.

Senator Bradley- PRIME- Last session we had a very limited form of this bill, it was protection from employers to disclose information, related to Exeter Hospital that dealt with health care and hospitals, and there was discussion it should be broader. It intends to create a liability protection for employers. An employer should have as much transparency as possible and should be able to tell the truth, not fear legal action if they reveal true but not flattering information. They have to provide the information in good faith, only in good faith, will they be immune from civil liability, if they disclose false information, liability protection in this bill would not apply to them. There is protection for employees because employers would be under the obligation to tell the truth or they would lose this protection.

Senator Sanborn- I put this amendment in last year, it is a very important bill.

Senator Soucy- How does this play against the whistleblower protection act, doesn't that

already have a burden for the employee, and isn't it doubling the burden on someone.

Senator Bradley- Both statues co-exist and work together, not part of the whistleblower act, which gives employees certain protection if they are revealing information. If an employee is not fulfilling their job requirements, they're late, whatever is the problem it ought to be something an employer can disclose to a prospective employee, without fear of legal action be taken against them. This is really about disclosing job performance.

Senator Soucy- What recourse is there for the employee for the employer, they will not know until they have been denied a job.

Senator Bradley- It would have to be alleged and proven the information that was disclosed was false and the employer would not have any of this protection.

Senator Innis- If I am the prospective employee and my former employer provides a negative review, how would I ever find out that is the case.

Senator Bradley- The employee could ask the future employer.

Senator Innis- - When you are speaking of life and death, I understand the genesis of that at Exeter Hospital, I also understand having everyone on the same playing field. In those cases, if you are talking about a housekeeper in a hotel, lives are not at risk. Trying to get my head around it.

Senator Bradley- An employee of a hotel steals a possession of a guest, which would be a crime, employer finds out, wouldn't that be something another inn keeper would want to know.

Senator Innis- Absolutely, presently there is code in references.

Senator Bradley- You could find any number of professions that could have public safety implications.

Senator Lasky- Struck by the language on line 13, provide information in good faith, seems squishy language, how do you know it was done in good faith, it is overly broad.

Senator Bradley- The proponents would be willing to work with you to tighten that language up, the street is one way now. If the employer can only speak in code that code may only be adequate in some instances. If I were an employer, I would want to be told the truth about a prospective employee and not have to speak in code. Maybe a compromise, would be some kind of penalty provision.

Senator French- Wouldn't we consider property of the employer if it was gathered while the employee was employed.

Senator Bradley-The content of the bill is not if the employer has sole right to that, and honestly describes the job performance of an employee elsewhere that is less than fully flattering. The first employer providing the job description reference runs the risk of having an action taken against him or her for telling the truth which was the situation we had in Exeter. The person that manipulated the blood samples had a history of this that couldn't be disclosed. We saw fit to give this protection to hospitals last years and I agree with Senator Sanborn, all employees should be able to tell the truth.

Senator Sanborn- This is about fairness, disclose information that a potential new employee may or may not know and the ability to share information. Balances both sides of the sword. And there is requirement that both be truthful.

Senator Bradley- the whole point, was to try to rectify the situation. The employee at Exeter Hospital had a very checkered past, was hired, and the problems that resulted were terrible. If the committee feels there should be stronger provisions to prevent false provisions, I am willing to work with them. An employer who has someone that isn't meeting the job criteria, should not be under the threat of legal action for telling the truth about an employee.

Senator Lasky- Was there any evidence in the Exeter case, that someone didn't come forward because they were afraid of liability.

Senator Bradley- My understanding was, the employee who committed the crime had a past history, so when references were made about this employees past behavior a lot of information

was not able to be provided because the other employer felt like they could not disclose because of fear of retribution. Something such as a substance abuse problem, shouldn't they be able to warn the next person in line.

Senator Innis- In cases where there is a particular labor shortage, an argument can be made for this type of disclosure because you are apt to make a quick hire. Do other states have similar laws in place.

Senator Bradley- Other people here can answer that question.

Connie Roy-Czyzowski – VP of HR at Northeast Delta Dental- As a human resource professional we hire employees we review their resume, interview individuals assess their skills and personality. Validating information about performance, dates of hire, reasons the employee left, salary, job duties but we are not able to get this information. Why does validating the information have to be so difficult, employers are protected if they provide documented facts and share in good faith and they are reluctant to do that. The average wage in NH is \$24 per hour and add 25% for benefits. Making a decision to hire someone on the average cost of \$62,500 per hire without the ability to check to determine whether the information provided on a resume is true. We have legislation that allows healthcare and other organizations immunity for providing accurate information. Many employers will only provide the date of hire and last day of a person's employment. We are asking that you support our efforts to facilitate sharing of documented facts in good faith so employers can make the right choices when they make hiring decisions.

Andrea Chatfield- Law offices of Cook, Little, Rosenblatt and Mason Have practiced in this area for over 25 years. The new law passed last year applies to healthcare provider facilities, licensed under RSA Chapter 151. These facilities include hospitals, long term care facilities, walk in clinics, surgical centers, labs, home health agencies, etc. The new law recognizes the importance of sharing information regarding misconduct and competency of healthcare workers that could indicate risks to the new employer's patients. The new law does not address the numerous other jobs that involve a high degree of risk and trust. This bill takes that much needed immunity and applies it to other employers. The new law does not apply to community healthcare centers which provides medical services to low income, the mentally challenged and patients struggling with addiction. There are 10 of these healthcare facilities in NH which employ hundreds of health care workers. Other occupations which involve enormous safety and health risks: daycares, school employees, school bus drivers, therapists and counselors, nonprofits that serve children, the disabled and other needy populations, companion aides to the elderly and disabled and pharmacy employees. There are other risks employees may have, those that handle sensitive medical information about patients but are not healthcare workers, such as insurance agencies, IT providers, and financial service industry jobs. Without being able to get substantive information from prior employers, hiring managers are left with trusting what the applicant says about their prior work experience. Resume fraud is a huge problem in the hiring and recruiting industry. A study by CareerBuilder indicated that 58% of hiring managers reported that they found misrepresentations on resumes. The most common involved embellishment of skill sets and responsibilities at prior jobs. NH should pass this bill and join a vast majority of other states that also have this law.

Senator French- this bill is to eliminate the liability of disclosure on an employer, is there any law for those that are not disclosing.

Andrea Chatfield- There can be, if you had a daycare center, checked the applicant's references and hired the person, and the person shoved the child, typically the parents of the child sue the daycare, the daycare may turn around and sue the previous employee saying you had a duty to warn us. This law allows transparency for disclosure of information. If you struggle with the words "In good faith" that was passed by this legislature last year in the healthcare bill. Provides the balance of employees rights and employers needs.

Senator Soucy- lines 11 through 13, what can be disclosed, comparing what was passed in 151 16:C, in this new bill we are adding “work history”.

Andrea Chatfield- Work history is, were they promoted or demoted? Gaps in their employment, chronic tardiness, and absence issues.

Senator Soucy- In regards to work history, there wouldn't be liability on the employee that disclosed a portion of it, an incomplete work history.

Andrea Chatfield- there is a difference between last year and this law, the bill last year made it mandatory to disclose information. This say an employer may provide this information, not mandatory.

Senator Lasky- This bill talks about a prospective employer, at what stage does that prospective employer, have they submitted a formal application, if they are inquiring.

Andrea Chatfield- Prospective employee is used a lot in the HR field and it is typically limited to an employers who is currently considering an applicant for a position. Are focused on when a employer is seriously considering hiring an employee.

Jim Reidy Attorney and Chair of Sheehan Phinney's Labor and Employment Group

– Many of the other state statutes have protection for employers, as many as 40 states. Many of the laws which were passed in the last 25 years, have been employee protections laws, now HR rep's spend a lot of time on compliance and risk avoidance, which is not being sued by current and former employees. There is a great risk for having a bad hire. Recently, there were bills which were introduced that restrict employers to check criminal history, and also restrict drug testing. In states such as Maine and Vermont you cannot fire an employee for a positive drug test. The pressure is on the employer to rely on the application, the resume and the good vibe during the interview. If checking references, they only know the date of hire. Disservice to the good employee, gag order to sing the praises of that employee. This bill does not shield employers from liability if they act in bad faith.

Tina Sharby- Chief HR for Easter Seals of NH- Statewide human service organization that serves more than 15,000 individuals with disabilities. This bill is incredibly important to Easter Seals to work to ensure individuals with disabilities or special needs are safe and well cared for. In 2016, Easter Seals NH made 781 new hires. To ensure the safety of the clients, they obtain employee background checks. Many of the clients are not able to communicate due to their disabilities. Many former employers provide minimum information such as date of hire, job title, or pay scale, which is not sufficient enough to ensure they are hiring people that have the character and skills to meet their needs.

Senator Soucy- Would it make sense to include your organization under the umbrella of 151-c.

Tina Sharby- Two of our departments are covered under that, Medical Rehab and Senior Services but our substance abuse services, child development centers, transportation centers, it goes on and on

Natalie Fredenthal Attorney at Vahacore Law Firm (Opposed)- This is not just a focus on an employer cannot share the truth, an employer can already share the truth, there are already protections. There is no requirement that it be documented in writing. When an employer shares the truth, they have a defense for liability of slander. This bill isn't that the employer must tell the truth but that the employee has the burden to prove what the employer has shared was actually false and that the employer knew that it was false. An employer can stand around the water cooler, and hear, “Alice” has been late a lot, the employer has no idea if that is true or false, therefore that is information that they can share. I can understand the concern with people who are disabilities or children that don't fall under the law that was already passed, but that is an argument for expanding the law that was already passed not creating an overly broad law for all employees. The previous law, 151-16:C, was in response to a specific problem, a safety issue, a relevant issue to be addressed by the law, maybe other broader situations in a career field. One of categories of what can be shared is misconduct,

doesn't say documented misconduct, verified misconduct or even that the employee should know if there was alleged misconduct. Sets up a process for retaliation. Employees are sometimes afraid to take advantage of the Whistleblowers Act, FMLA etc, because of fear of retaliation. The most common way we see retaliation is when that reference is asked from a prospective employer. With this bill, the employer can say anything about an employee unless they absolutely know it is false. There are other alternatives such as criminal background checks and probationary periods.

Future Action: Pending

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Date Hearing Report completed: January 26, 2017