

Department of Legislative Services  
 Maryland General Assembly  
 2011 Session

FISCAL AND POLICY NOTE  
 Revised

Senate Bill 132

(Senator Pugh, *et al.*)

Finance

Economic Matters

Job Applicant Fairness Act

This bill prohibits an employer from using an individual’s credit report or credit history as a basis to deny employment to an applicant for hire, discharge an employee, or determine compensation or the terms of employment. The bill establishes certain exemptions whereby an employer may request and use the credit report or credit history of an applicant or employee when making employment decisions.

Fiscal Summary

**State Effect:** General fund expenditures by the Department of Labor, Licensing, and Regulation (DLLR) increase by at least \$183,700 in FY 2012 due to additional staffing needed to enforce the bill’s provisions. Expenditures are lower in FY 2014 and 2015 as fewer staff are needed due to increased compliance. Future year expenditures reflect annualization and inflation. Minimal increase in general fund revenues due to the civil penalties established by the bill.

(in dollars)	FY 2012	FY 2013	FY 2014	FY 2015	FY 2016
GF Revenue	-	-	-	-	-
GF Expenditure	\$183,700	\$214,100	\$183,200	\$116,500	\$122,600
Net Effect	(\$183,700)	(\$214,100)	(\$183,200)	(\$116,500)	(\$122,600)

*Note:() = decrease; GF = general funds; FF = federal funds; SF = special funds; - = indeterminate effect*

**Local Effect:** Any increase in the workload of the circuit courts is expected to be minimal and can be handled with existing resources.

**Small Business Effect:** Potential minimal.

## Analysis

**Bill Summary:** The bill's provisions do not apply to (1) an employer required by State or federal law to check the credit report or credit history of an applicant or employee; (2) a financial institution (or its subsidiary or affiliate) that accepts federally insured deposits; (3) a credit union share guaranty corporation that is approved by the Maryland Commissioner of Financial Regulation; or (4) an entity, or its affiliate, that is registered as an investment advisor with the U.S. Securities and Exchange Commission.

An employer may request or use the credit report of an applicant for hire or an employee if the individual has received an employment offer and the credit information will not be used for a purpose prohibited by the bill, or if the employer has a *bona fide*, substantially job-related reason for requesting the information.

The bill identifies certain positions or types of employment for which an employer has a *bona fide* purpose that is substantially job-related for requesting or using information in an individual's credit report or credit history. The bill defines such positions as those that involve (1) setting the direction or control of a business or a department, division, unit, or agency of a business in a managerial capacity; (2) access to specified personal information of a customer, employee, or employer – except for personal information customarily provided in retail transactions; (3) a fiduciary responsibility to the employer, including the authority to issue payments, collect debts, transfer money, or enter into contracts; (4) the use of an expense account or a corporate debit or credit card; or (5) access to trade secrets or confidential business information.

If an employer violates the bill's provisions, the aggrieved job applicant or employee may file a written complaint with the Commissioner of Labor and Industry, which the commissioner must investigate promptly. If the commissioner determines that the employer has committed a willful or negligent violation of the bill's provisions, the commissioner must try to resolve the matter informally. If the matter cannot be resolved informally, the commissioner may assess a fine against the employer of up to \$500 for a first offense or up to \$2,500 for any subsequent offenses. If a civil penalty is assessed, the commissioner may send an order to pay the civil penalty to the complainant and the employer.

Within 30 days of receiving the order to pay a civil penalty, the employer may request, and the commissioner must schedule, a *de novo* administrative hearing at the Office of Administrative Hearings. If a hearing is not requested within 30 days, the order to pay the civil penalty becomes a final order of the commissioner. If an employer fails to comply with a final order to pay a civil penalty, the commissioner or the complainant may bring an action to enforce the order in the circuit court for the county where either the employer or the complainant is located.

The bill may not be construed to prohibit an employer from performing an employment-related background investigation that (1) includes use of a consumer report or investigative consumer report; (2) is authorized under the federal Fair Credit Reporting Act (FCRA) of 1971; and (3) does not involve investigation of credit information.

**Current Law:** FCRA regulates the use of consumer credit reports as a part of employment-related background checks. Consumer reporting agencies may only provide credit history information to persons with a valid need, typically to consider an application with an employer, creditor, insurer, or landlord; FCRA specifies the instances that rise to the level of valid need. Consumer credit reporting agencies may not provide an employer with a credit report without the consent of the employee or applicant for hire. If an employer uses information contained in a credit report as a basis to deny an applicant for employment, or to take adverse action against an employee, the employer must give the individual a pre-adverse action disclosure that offers the individual an opportunity to review and correct information in the credit report. After taking an adverse action, the employer must inform the applicant or employee of the name, address, and phone number of the agency that provided the information.

FCRA only applies to background checks conducted by a consumer reporting agency. (The Act does not apply in situations where an employer conducts a background investigation.) There are many types of consumer reporting agencies, including credit bureaus and specialty agencies (such as agencies that sell information about check writing histories, medical records, and rental history records). Further, the Act does not apply to individuals holding or seeking jobs with an annual salary greater than \$75,000 per year. Employers who violate the Act's provisions may be liable for specified civil damages.

FCRA defines a consumer report as any communication of information by a consumer reporting agency with bearing on a consumer's creditworthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used to determine the consumer's standing for credit, employment, or other authorized purposes. FCRA defines an investigative consumer report as a consumer report in which personal information about an individual is collected through interviews with the individual's acquaintances.

If a credit report reveals that an applicant or employee has declared bankruptcy, the employer must comply with the federal Bankruptcy Act of 1978. Under the Bankruptcy Act, an employer may not discriminate against an applicant solely because a credit check reveals that an applicant has sought protection under the Act, been insolvent before seeking protection under the Act, and not paid a debt that is dischargeable under the Act.

**Background:** According to the National Conference of State Legislatures, 18 states and the District of Columbia introduced bills in 2010 relating to the use of credit information in employment. To date, four states have limited the use of credit information by employers: Hawaii, Illinois, Oregon, and Washington. As of January 2011, 11 states have pending legislation on this issue.

H.R. 312, pending legislation in the U.S. Congress, proposes to amend FCRA to expand consumer protections by prohibiting a current or prospective employer from using a consumer credit report for either employment purposes or for taking an adverse action, if the report contains information that bears upon the consumer's creditworthiness, credit standing, or credit capacity. H.R. 312 makes exceptions for employment (1) that requires a national security or Federal Deposit Insurance Corporation clearance; (2) with a state or local government agency that otherwise requires use of a consumer report; or (3) in a supervisory, managerial, professional, or executive position at a financial institution.

This bill does not specify that the State or units of government are subject to the bill's provisions. Thus, Legislative Services advises that the bill does not apply to employers that are units of government.

**State Fiscal Effect:** The bill requires the Commissioner of Labor and Industry to conduct investigations of potential violations of the bill, attempt to resolve complaints informally, and – when informal resolution fails – issue civil penalties against employers who violate the bill's provisions. Based on the wide application of the bill's provisions to employers in the State and the current volume of inquiries and complaints related to employment standards received by the Division of Labor and Industry, DLLR estimates that it may receive between 250 and 300 complaints related to the bill within the first full year of the bill becoming effective. DLLR advises that complaints will likely decrease gradually in future years as employers in the State comply with the bill's provisions; it is expected that the number of cases that must be investigated by DLLR stabilizes at around 90 cases per year within the next five years. DLLR cannot absorb the additional workload with existing resources. Thus, additional staffing is necessary.

The minimum staff needed to handle the responsibilities created by the bill include an experienced, full-time wage and hour investigator, one full-time office clerk, two full-time contractual wage and hour investigators, and one half-time contractual assistant Attorney General. These staff members will be responsible for developing DLLR's investigative program required by the bill and handling the initial volume of complaints and inquiries related to the use of credit reports by employers in the State. In addition to managing a caseload of investigations, the experienced investigator will monitor the workload created by the bill and oversee other investigators. The half-time assistant Attorney General will develop regulations, assist in the informal complaint resolution process as needed, prepare administrative orders in cases where civil penalties are assessed, and attend any administrative hearings that may arise. The office clerk will be

responsible for managing case files, responding to inquiries, facilitating outreach efforts, and providing general administrative support. If complaint volume is higher than anticipated, additional staff may be needed.

As a result of the additional staff and other operating expenses necessary for enforcement, general fund expenditures increase by at least \$183,738 in fiscal 2012, which accounts for the bill's October 1, 2011 effective date. This estimate includes salaries, fringe benefits, one-time start-up costs, and ongoing operating expenses. Future year expenditures decrease as the number of complaints decline in future years due to greater compliance; Legislative Services estimates that one contractual investigator position may be able to be eliminated beginning in fiscal 2014. The other contractual investigator and the half-time assistant Attorney General may be unnecessary beginning in fiscal 2015. However, if complaint volume is higher than anticipated, additional contractual support may be needed in fiscal 2012 and subsequent years.

Permanent Positions	2.0
Contractual Positions	2.5
Salaries and Fringe Benefits	\$147,958
One-time Start-up Costs	21,385
Ongoing Operating Expenses	<u>14,395</u>
<b>Total FY 2012 State Expenditures</b>	<b>\$183,738</b>

Future year expenditures for permanent staff reflect full salaries with 4.4% annual increases and 3% employee turnover as well as 1% annual increases in ongoing operating expenses. Future year expenditures for contractual staff reflect full salaries with 4.4% annual increases and 7.2% employee turnover as well as 1% annual increases in ongoing operating expenses.

Any additional workload for the Office of Administrative Hearings can be handled with existing resources.

General fund revenue due to imposition of civil penalties is expected to be minimal.

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### **Additional Information**

**Prior Introductions:** Similar bills, SB 312/HB 175 of 2010, received unfavorable reports from the Senate Finance Committee and House Economic Matters Committee, respectively.

**Cross File:** HB 87 (Delegate Reznik, *et al.*) - Economic Matters.

**Information Source(s):** National Conference of State Legislatures; Federal Trade Commission; Office of the Attorney General (Consumer Protection Division); Department of Budget and Management; Human Relations Commission; Judiciary (Administrative Office of the Courts); Department of Labor, Licensing, and Regulation; Department of Legislative Services

**Fiscal Note History:** First Reader - February 4, 2011  
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