

CONTACT

LEGISLATIVE AFFAIRS DEPARTMENT

MARIA CILENTI

212.382.6655 | mcilenti@nycbar.org

ELIZABETH KOCIENDA

212.382.4788 | ekocienda@nycbar.org

**REPORT ON LEGISLATION BY THE
CONSUMER AFFAIRS COMMITTEE**

**A.1071
S.3795**

**M. of A. Braunstein
Sen. Sanders**

AN ACT to amend the general business law, in relation to the sale and use of employment information

THIS BILL IS SUPPORTED WITH RECOMMENDATIONS

These comments are with regard to A.1071/S.3795, which proposes to amend the General Business Law to ban the sale and use of employer data reports without consumer consent.

As the Legislature is aware, the credit reporting industry is rapidly expanding.¹ The three largest national consumer reporting agencies (“CRA”)—TransUnion, Equifax and Experian—maintain information on approximately 200 million consumers.² Creditors and other data furnishers submit financial, medical and other personal information about consumers to CRAs, which consolidate this information into reports they then sell to third parties for use in extending credit, employment and insurance.³ The reports generally include (1) identifying information, such as name, birthdate, social security number, and current and previous addresses; (2) credit account information including mortgages, car loans, credit cards, and installment payments; (3) information from public records like civil judgments, bankruptcies, foreclosures, and tax liens; (4) accounts that have been turned over to collection agencies, which may include medical bills; and (5) inquiries, or requests to access a consumer’s report.⁴

Increasingly, employers purchase consumer reports containing general credit information from CRAs for use in employment decisions, such as hiring, firing, and promotions.⁵ They may

¹ See TRANSUNION, THE IMPORTANT OF CREDIT SCORING FOR ECONOMIC GROWTH 3 (2007), available at <https://www.transunion.com/docs/interstitial/scoringWhitepaper.pdf> (last visited Feb. 6, 2015).

² FED. TRADE COMM’N, REPORT TO CONGRESS UNDER SECTION 319 OF THE FAIR AND ACCURATE CREDIT TRANSACTIONS ACT OF 2003 2 (2012) [hereinafter “FTC REPORT”].

³ *Id.* at 2-3.

⁴ *Id.* at 3.

⁵ See AMY TRAUB, DEMOS, DISCREDITED: HOW EMPLOYMENT CREDIT CHECKS KEEP QUALIFIED WORKERS OUT OF A JOB 3 (2013) [hereinafter “DEMOS REPORT”].

do so, however, only with the consumer's written consent.⁶ In addition to using consumer reports, employers, like creditors and collection agencies, also furnish data they routinely gather—such as human resources and payroll information—to CRAs. Currently, there are no limitations on this furnishing of employment information, and the consumer's consent is not required. In fact, many consumers are unaware that such personal information is being shared, let alone sold at a profit.⁷

Consumer reports are notoriously rife with errors.⁸ A recent report by the Federal Trade Commission identified errors in approximately 25% of the consumer reports studied.⁹ Yet the protections federal and state law currently offer are inadequate to protect consumers from inaccuracies in, as well as abusive and discriminatory use of, the information gathered and sold. For example, dispute procedures are difficult to navigate, and when triggered, the CRA's duty to investigate is minimal.¹⁰ In addition, the information, once gathered, can be distributed and sold to any entity with a permissible purpose, without further restriction. We applaud the Legislature's effort to strengthen consumer protections by promoting transparency when information is first furnished.

THE PROPOSED LEGISLATION

While CRAs may choose to require consumer consent before distributing employment information, they are not required to do so, and may provide this information to anyone with a permissible purpose.¹¹ The proposed legislation prohibits consumer reporting agencies from selling employment data reports to third parties, except when the consumer has consented in a stand-alone document.

The impetus for this proposed legislation is an NBC News report about the "Work Number," a company that performs outsourced payroll and human resource functions for employers. It maintains information on at least 30% of the U.S. working population, and was acquired by the credit reporting agency Equifax in 2007. The Work Number provides employment data reports containing private information, including detailed health insurance and payroll information, to Equifax, which then sells these reports to third parties, such as debt collectors and other financial services corporations. The report found that many employees are unaware of this flagrant invasion of their privacy for profit.¹²

⁶ See 15 U.S.C. § 1681b(b)(2).

⁷ See Ann Carrns, *Checking the Data Collected on Your Work and Pay*, N.Y. TIMES, Aug. 29, 2013; *EXCLUSIVE: Your employer may share your salary, and Equifax might sell that data*, NBC NEWS (Jan. 30, 2013), available at <http://redtape.nbcnews.com/news/2013/01/30/16762661-exclusive-your-employer-may-share-your-salary-and-equifax-might-sell-that-data?chromedomain=usnews> [hereinafter, "NBC NEWS"] (last visited Feb. 6, 2015).

⁸ See U.S. PIRG, *MISTAKES DO HAPPEN: A LOOK AT ERRORS IN CONSUMER CREDIT REPORTS* 11-13 (2004).

⁹ FTC REPORT 36-37.

¹⁰ See DEMOS REPORT 10-11; U.S. PIRG, *MISTAKES DO HAPPEN: A LOOK AT ERRORS IN CONSUMER CREDIT REPORTS* 8 (2004).

¹¹ See Carrns, *supra*.

¹² See generally NBC NEWS, *supra*.

REASONS FOR SUPPORT

We applaud the bill's sponsor for acting to protect New York workers from this increasingly prevalent invasion of privacy. New York leads the nation as the only state to propose legislation on this important issue. In light of the unreliability of the information contained in credit reports, it is extremely important to monitor the growth of this industry and ensure transparency in reporting.

In particular, we support the explicit inclusion of a private right of action in order to ensure that consumers have a real remedy for violations.

In addition, we note that this law, if passed, would not be preempted by the federal Fair Credit Reporting Act (FCRA) because the laws are consistent.¹³ The FCRA is silent as to the sale of employment data reports; it does not require that they be freely sold without consumer consent. Its provisions, therefore, would not be violated by compliance with the proposed legislation. Likewise, the activity targeted by the proposed legislation is not covered by the specific areas of preemption created by the Fair and Accurate Credit Transactions Act of 2003 and codified under 15 U.S.C. § 1681t. These areas are expressly limited to state laws that address the aging off of information contained in consumer reports, the responsibilities of furnishers, the actions a CRA must take regarding disputed inaccurate information, and requirements related to adverse actions against consumers.

We also note that the proposed legislation will be most effective if passed in tandem with the Credit Privacy in Employment Act (A.2372/S.1545-A) banning the use of credit checks in employment decisions, which passed the Assembly last year. Together, the bills protect workers from the unfair dissemination and use of their personal information. They also strengthen the American workforce by ensuring that qualified workers are not denied employment opportunities due to privacy concerns, as well as inaccurate and irrelevant credit reporting.

RECOMMENDATIONS

Notwithstanding our support for this bill, we urge that the bill be amended to remove the consent exception.¹⁴ Such an exception, even if required in a stand-alone document, creates a loophole that will eviscerate the intended benefits of the law. Presumably, this consent would be sought by employers of their current and prospective employees, as opposed to by the unknown

¹³ See 15 U.S.C. § 1681t(a).

¹⁴ Specifically, we recommend removing from subsection (A) the language, "without verifying that such sale, resale, or distribution was disclosed to the consumer to whom such employment information pertains without written consumer consent in a separate stand-alone document." We also note that this language appears to contain an inadvertent typographic error, introduced in the recent amendment to the bill. The proposed legislation reads, "No consumer reporting agency . . . shall sell or resell . . . or distribute employment information to any principal creditor . . . or other debt collector without verifying that such sale, resale, or distribution was disclosed to the consumer to whom such employment information pertains without written consumer consent in a separate stand-alone document." These comments are made under the assumption that current bill requires a CRA both to verify that its action was previously disclosed to the consumer and that the consumer's written consent was obtained.

third parties to whom the information would be sold. However, as has been documented in the context of employment credit checks, employers often require consent and will not consider candidates who decline.¹⁵ As a result, so-called consent does not reflect a decision freely made by the prospective or current employee. Accordingly, in order to realize the protections promised by this bill, there should be no consent exception.

Alternatively, if a consent exception is deemed necessary, we urge the Legislature to clarify that consumers cannot be fired, declined for hiring, or otherwise retaliated against due to their failure or refusal to provide the required consent. Although enforcing this protection will be difficult, it at least conveys the Legislature's intent that the consent be meaningful, and sets a best practices standard for scrupulous employers.

In addition, a private litigant should have the opportunity to seek actual damages on top of statutory damages. The current bill permits only the greater of actual damages or statutory damages of \$1,000. However, statutory damages serve a deterrent purpose that is entirely separate from the purpose of actual damages to wholly compensate successful plaintiffs for their losses. This deterrent effect should not be blunted as to those entities whose violations cause tangible loss. Instead, the Legislature should adopt a damages framework that is consistent with analogous consumer protection statutes, such as the Fair Debt Collection Practices Act, which permits up to \$1,000 in statutory damages in addition to actual damages, 15 U.S.C. § 1692k(a), or the FCRA, which permits punitive damages for willful violations, 15 U.S.C. § 1681n(a).

CONCLUSION

For the foregoing reasons, we support the proposed legislation while urging the Legislature to adopt our recommendations for strengthening its protections.

Reissued April 2015

¹⁵ See DEMOS REPORT 3.