SUBJECT: Employer protection for disclosing employee job performance

COMMITTEE: Economic Development — favorable, with amendment

VOTE: 8 ayes — Oliveira, Greenberg, Keffer, Luna, Raymond, Seaman, Siebert, Van de Putte

0 nays

1 absent — Yarbrough

WITNESSES: For — Ronda Bauman, Texas Association of Business and Chambers of Commerce; Louis K. Obdyke, Texas Council for the Society for Human Resource Management; Chris Knepp, Texas Employment Law Council; Karn Wood, Baylor University; Robert Houden, National Federation of Independent Business; David Pinkus, Small Business United of Texas

Against — Rick Levy, Texas AFL-CIO; Mark Einfalt, Texas Trial Lawyers Association

On — Aaron Haecker, Texas Workforce Commission

DIGEST: HB 40, as amended, would allow employers to disclose information about a current or former employee's job performance to a prospective employer if requested by the employee or the prospective employer.

Job performance would mean the manner in which an employee performed the duties of the position, including attendance, job attitude, effort, knowledge, and skills as exemplified in evaluations, disciplinary actions, and other personnel actions.

An employer who disclosed information about a current or former employee would be immune from liability for defamation based upon that disclosure, unless a preponderance of the evidence proved the employer knew the information was false or made with reckless disregard of whether it was false or not. HB 40 would apply to managerial employees or other representatives of the employer authorized to provide this type of information.

Upon written request by applicants, prospective employers would have to furnish copies of all communications from current and former employers that may have affected their chances for employment with the prospective employer. An applicant would have to make this request within 30 days after the date of application. A prospective employer would be required to provide the applicant copies of the written correspondence with 10 days of the request.

HB 40 would take effect September 1, 1997, and would apply only to a cause of action accruing on or after that date.

SUPPORTERS SAY:

HB 40 would protect employers from defamation suits for giving information about a former or current employee. Many employers, fearful of being sued for libel, now just confirm prior employment, giving only "name, rank and serial number" when asked by a prospective employer for reference information about a former employee. Because background information from previous employment can fill in the gaps of an application and interview, employers should be encouraged to provide this information when asked by other prospective employers.

Current law forces employers into a position of withholding the truth about a former employee because it provides inadequate protection from libel suits. A recent survey of employers reported that 63 percent of personnel managers refuse to provide information about former employers. In addition, blacklisting statutes in the Labor Code only protect statements about the reason for an employee's discharge. HB 40 would give employers the protection they need to speak truthfully about an employee's job performance.

The protections provided in the bill would encourage employers to be candid and honest about an employee's job performance. This is especially important for individuals applying for jobs that affect public safety, such as airline pilots, doctors and truck drivers. Knowing a candidate's past job performance would help a prospective employer make an informed decision about the candidate.

Because workplace violence and harassment cost business more than $4 billion each year, it is important to allow employers to feel comfortable giving complete reference information. A reference from a past employer could help decrease workplace violence by weeding out employees with past job performances that include violence and harassment.

HB 40 would help employees as well. Because of fear of liability, a former employer may not divulge an ex-worker's history of on-the-job violence, thus endangering co-workers at the new job.

The language of HB 40 is consistent with laws in 24 other states that protect employers from civil liability based upon disclosure of an employee's job performance. Although courts may have upheld decisions protecting employers from libel actions, HB 40 would permanently safeguard employers by putting these protections into the Labor Code. HB 40 addresses the crux of the employment reference problem and would allow employers to provide truthful assessments of an employee's job performance. It is beyond the scope of this bill to address access problems to employee files.

OPPONENTS SAY:

HB 40 would place too much control in the hands of employers. Because Texas is an at-will employment state, an employer can fire someone for a good reason, a bad reason, or without reason. Personnel actions contained in personnel files are governed by this same standard and are not challenged to guarantee their accuracy. Moreover, the information contained in personnel files is controlled by the employer, and employees do not have access to its contents. HB 40 would even further undermine employee privacy by allowing employers to disclose information from a personnel file that has not been reviewed or challenged.

Employers who are fearful of providing reference information are reacting to a perceived rather than an actual problem. There are already adequate employer protections under current case law that have been upheld by many courts.

Current law adequately addresses the problems of retaliation by an employee for a bad reference. Sec. 52.031 of the Labor Code prohibits an employer from blacklisting an employee and permits employers to provide a written

truthful statement for the reason of the employee's discharge. It expressly provides that the statement may not be used as the cause for a civil or criminal action for libel against the person who furnished the statement.

OTHER OPPONENTS SAY:

HB 40 should also grant employees access to their personnel files with a chance to respond to their contents. Access would give employees a voice in the employment decisions that affect them.

The 10-day time limit to respond to an employee's request for written reference information would be a burden on employers. The bill should be amended to extend the response time to 30 days.

NOTES:

The committee amendment would replace references to “protection from civil liability” to “protection from defamation.” It would also require a standard of preponderance of the evidence, rather than clear and convincing evidence, to establish a cause of action, and add liability for information provided with reckless disregard as to its validity.

The companion bill, SB 990 by Nelson, has been referred to the Senate Jurisprudence Committee.