SUBJECT: Providing civil immunity to employers who offer job references

COMMITTEE: Business and Industry — committee substitute recommended

VOTE: 7 ayes — Brimer, Corte, George, Ritter, Siebert, Solomons, Woolley

0 nays

1 present, not voting — Giddings

1 absent — Dukes

WITNESSES: For —Eric Criss, National Federation of Independent Business, Texas; Kathy Dupree, Austin Human Resource Management Association; Les Findeisen, Texas Motor Transportation Association; Christopher A. Knepp, Texas Employment Law Council; Louis Obdyke, Human Resource Managers' Association; David Pinkus, Small Business United of Texas; Mike Pollard, Texas Association of Life and Health Insurers; Heather Vasek, Texas Association for Home Care; Lt. Howard E. Williams, Texas Police Chiefs' Association

Against —Walter Hinojosa, Texas AFL-CIO

On —Wanda Douglas, Texas Nurses Association; Chris Elliot, Texas Trial Lawyers Association

DIGEST: CSHB 341 would add Chapter 103 to Title 3 of the Labor Code, which would grant immunity from civil liability to an employer who disclosed information about a current or former employee's job performance when asked to give a job reference by a prospective employer. Immunity also would apply to damages proximately caused by the disclosure. Immunity would apply to an employer, a managerial employee, or a person authorized by the employer to provide information about current or former employees.

Immunity would not apply when it was proven by a preponderance of the evidence that information was known to be false when disclosed. "Known" would be defined as actual knowledge based on information relating to the employee in a file maintained by the employer, including transcriptions of

any verbal information conveyed from the employer to the employee.

The bill would authorize an employer to disclose to a prospective employer, upon request, information about a current or former employee's job performance.

"Job performance" would be defined as the manner in which an employee performed work, including an analysis of attendance, attitudes, effort, knowledge, behaviors, and skills. "Prospective employer" would mean an individual to whom the employee had made a verbal or written application, or sent a resume or other correspondence expressing interest in a job.

CSHB 341 would not require an employer to provide an employment reference.

CSHB 341 would take effect on September 1, 1999, and would only apply to a cause of action that accrues on or after the effective date.

SUPPORTERS SAY:

By providing civil immunity for truthful job references, CSHB 341 would make former, current, and prospective employers feel more comfortable about exchanging information on workers seeking employment. It also would help workers who want employers to feel free to give out detailed information about their job performance.

Currently, lawyers advise managers to provide only limited information about a current or former employee, or merely to confirm the employment occurred. Managers are reluctant to be forthright because they fear civil lawsuits, most commonly on the grounds of defamation. Such suits may be brought by employees who are convinced that the former employer unfairly characterized their job performance or neglected to disclose enough beneficial information.

The current situation hurts good employees, who may lose jobs to less qualified applicants because some employers have become reluctant to provide even positive references. By giving good references to some employees and not others, managers run the risk of being accused of acting in a discriminatory manner.

Good managers will document their interactions with their workers. Under

CSHB 341, they would be protected from suits because they would keep pertinent information on file.

The public also would benefit from greater exchange of information among managers. For example, under the current situation, a prospective boss at a trucking company might not learn in time that an applicant had problems with alcohol or drugs that could endanger public safety. The truck driver's former company might fear revealing them.

The reason few employer defamation lawsuits have been filed in recent years is so many employers have been reluctant to give references. Providing employers statutory protection for providing truthful references would help curb frivolous lawsuits while freeing employers to speak truthfully about employee performance.

OPPONENTS SAY:

CSHB 341 is an unnecessary and unfair extension of rights already granted to employers. Common law already provides an employer immunity when making a good-faith effort to provide a truthful reference. Truth is an absolute defense to claims of defamation under tort law, so this bill is not needed.

The bill would grant employers very broad immunity, putting the burden of proof on the employee to show that the employer knew the information to be false. It is extremely difficult to prove what someone knows or does not know.

Under the bill, proof of whether information was "known" to be false when disclosed would be determined by information contained in files kept by the employer. When a lawsuit is brought, it would not be difficult for the employer to change the files after the fact to the detriment of the employee who had no access to them.

When it comes to verbal information, the definition of "known" to be false would apply only to a transcript of any information conveyed "by the employer to the employee." That, by definition, would be one-sided. If an employee was terminated, reprimanded, or otherwise disciplined, such a transcript might not include the employee's verbal defense. Even if the employer knew the employee's verbal defense to be accurate, the employer would not be required to put it in the file.

Some of the most egregious cases of employer defamation have not involved statements known to be false, but rather statements made with reckless or malicious disregard for whether they were true. CSHB 341 could be used to protect an employer who passed along gossip that potentially could tarnish a worker's reputation, unless an employee proved by a preponderance of the evidence that the employer knew the information to be false at the time. As long as an employer did not have actual knowledge, based on information on an employee actually found in the files, that a statement was false, the employer would be protected.

The law is not needed because the number of lawsuits filed against employers for providing false references is very small. The Legislature does not need to act to provide protections against something that is not happening.

Employers already reluctant to provide references might not be encouraged to do so by CSHB 341. The bill would not prevent a worker from filing a defamation lawsuit, but merely make it more difficult to win. Even if the employee lost the suit, the individual still would have the option of filing a claim of negligence against the employer for revealing undesirable information or not revealing desirable information.

CSHB 341 could burden small businesses. Large companies with human resources departments are likely be aware of the need to maintain files on all communication about job performance, while smaller employers may not be.

NOTES:

The committee substitute eliminated from the original bill's definition of "job performance" reference to evaluations, awards, demotions, promotions, and disciplinary actions.

The substitute deleted a requirement in the original bill that a prospective employer, within 30 days of receiving a written request, provide to a prospective employee copies of written communication from the applicant's former or current employer. The substitute also added the definition of "known" for information known to be false when disclosed by the employers.

The companion bill, SB 90 by Nelson, has been referred to the Senate Economic Development Subcommittee on Technology and Business Growth.

A similar bill filed during the 1997 legislative session, HB 40 by McCall,

Junell, and Stiles, passed the House but died in the Senate.