

- SUBJECT:** Liability for negligent hiring by certain service companies
- COMMITTEE:** Civil Practices — committee substitute recommended
- VOTE:** 5 ayes — Nixon, Gattis, King, Rose, Woolley
1 nay — Y. Davis
3 absent — Capelo, Hartnett, Krusee
- WITNESSES:** For — David Mintz, Texas Apartment Association
Against — Larry Wright, Texas Trial Lawyers Association
On — Les Findeisen, Texas Motor Transportation Association
- BACKGROUND:** A rebuttable presumption is a presumption that can be overturned in court upon the showing of sufficient proof. For example, if a party demonstrates that a person performed work for another, a court presumes the fact that employment existed and that the employee was acting within the course and scope of that employment. Because the presumed employer has greater access to information about the possible employment, courts have held that the presumed employer has the burden of overcoming the presumption by showing a lack of employment.
- DIGEST:** CSHB 705 would require an in-home service company or a residential delivery company to obtain a criminal background check from the Department of Public Safety (DPS) on each officer, employee, or prospective employee whose job duties required or would require entry into residences.
- The bill would define an in-home service company as a person who employs someone to enter another person's home to repair an appliance, a heating, air conditioning, and ventilating system, or a plumbing or electrical system. It would define residential delivery company as a person who employs a person for a fee to deliver an item to another's residence and to enter the residence to place, assemble, or install the item.

The bill would create a rebuttable presumption, in an action for damages alleging negligent hiring, that an in-home service company or residential delivery company was not negligent for the criminal act or omission of an employee or officer during the course of duty if the company had obtained a criminal background check that showed that the employee had not been convicted of an offense against a person or family, an offense against property, or public indecency.

If a company sent two or more employees together into a residence, the company would be deemed to have complied with the background check requirement if:

- the company had obtained a background check on at least one of the employees;
- while they were in the residence, the employee that had been checked accompanied and directly supervised the employee who had not been checked; and
- the company maintained a record of the identity of all employees not checked for at least two years.

A person who contracted with a company to perform a service under this section would be rebuttably presumed not to have acted negligently if the company had complied with the bill's provisions or if the contractor had requested in writing that the company obtain a criminal background check on that employee and if the request was delivered to the company before the company sent the employee to perform the service. A copy of such a request would have to be maintained for two years.

An in-home service company or residential delivery company would be entitled to receive the criminal history record information from DPS upon request but could not release or disclose the information except on court order, on proper discovery request during litigation, or with the consent of the person who was the subject of the information. The company would have to destroy criminal history record information no sooner than two years after the subject of the information ceased being an officer or employee or after the company decided not to employ the person.

The bill would take effect September 1, 2003.

**SUPPORTERS
SAY:**

CSHB 705 would help protect the public by requiring in-home service companies and residential delivery companies to obtain criminal background checks on their employees and by creating a rebuttable presumption of no negligence for a company that had obtained the required checks. A person who hires a company to perform work within the home trusts that company to send a worker who will not harm the customer.

The bill would protect both consumers and service companies. Because companies would have to take prudent steps and to be knowledgeable about their employees' backgrounds, they would be less likely to hire people with criminal backgrounds who could put their customers at risk. The bill would enable these companies to make informed decisions about which employees to send out to homes. Some companies already perform regular background checks, but some choose not to because they want to avoid the liability associated with knowing that their employees may be criminals.

CSHB 705 would allow businesses that contracted with in-home service companies or residential delivery companies to share the rebuttable presumption of no negligence. Even if the business did not receive the employee's criminal history before sending the employee out to work, the bill would require the company to have requested that check.

The bill would not absolve these service companies of all liability. A rebuttable presumption can be overcome with the appropriate amount of contrary evidence. Even if a company complied with the bill, the presumption could be overcome by presentation of compelling evidence that the company knew or should have known of an employee's dangerous background. The bill would not protect companies for allowing an employee to enter a residence if a criminal background check showed that the employee had been convicted of violent crimes or of robbery, fraud, or computer crimes.

CSHB 705 would ensure companies' access to DPS records on criminal background checks. Although a company may ask its employees to obtain their own criminal histories and present them to the company, the employee may edit out an unfavorable portion of the history. Allowing companies to request these records directly from DPS would ensure that companies received accurate criminal history information.

The bill would allow companies to obtain this protection in an economically feasible manner. The cost of each background check would be about \$1, a minimal charge considering the presumption available. Although crimes committed in other states would not come up on a DPS check, it would be overly burdensome to require companies to obtain background checks from all 50 states. Not all states have their criminal databases online, and hiring an outside company to run a nationwide check could be very expensive.

CSHB 705 would not prevent people convicted of crimes from obtaining employment at these companies, though it would help ensure that companies would not send such employees out to customers' homes.

Companies should not have to tell their customers about the criminal backgrounds of their workers. Divulging this information would violate the employee's privacy rights.

**OPPONENTS
SAY:**

CSHB 705 would make it more difficult for victims of criminal acts to be able to recover against companies that had placed criminal actors in their homes. People place trust in a company when they hire it to send a repair person to their homes. Those companies should be held responsible for the actions of their employees while on the job. Although this bill would require companies to know whether their employees had criminal histories, it would not give residents that same knowledge.

The bill would allow companies to use the rebuttable presumption even if they knew an employee had committed crimes. If the owner of a company hired a family member who had told them that he had assaulted five women but never had been convicted, the company should not be able to have the benefit of the presumption just by making a background check on that person.

CSHB 705 would protect companies even if they hired people convicted of drug offenses and other crimes against public health, safety, and morals, such as unlawfully carrying a weapon, possessing the components of explosives, intoxication assault, and engaging in organized criminal activity. These types of criminals could pose serious danger to customers, and companies should not be given the benefit of the presumption for allowing them to enter customers' homes.

Companies could use the presumption even though they had sent people to residences who had been convicted of violent crimes in other states. If a person moved to Texas after serving time in Oklahoma for rape and child molestation convictions, those crimes would not show up in the Texas criminal history. The bill would not provide companies with a complete picture of an employee's criminal history, because it would require only a DPS check. The DPS database is only as thorough as the reports that local governments send to it. It does not include crimes committed in other states or federal crimes. If the purpose of this bill is to require companies to make informed decisions about their employees, the companies should be required to do a more thorough criminal history check.

Although CSHB 705 would require businesses contracting with companies to request a criminal history on employees, it would not require the business to have received the history. To obtain the benefit of the presumption, a business could fax the company a request five minutes before the company sent the employee out on the job.

**OTHER
OPPONENTS
SAY:**

CSHB 705 could make it more difficult for reformed prisoners to be incorporated back into society. Although companies are free to hire those with a criminal history, this bill would make them less likely to take the risk. The types of trades targeted by this bill, such as air conditioning repair, are taught in prison so that prisoners will have the skills necessary to obtain work upon release. It is already difficult for felons to obtain employment, and making it more difficult could increase recidivism.

NOTES:

The committee substitute would make the presumption rebuttable instead of irrebuttable. It would allow a company to send a group of employees to a home if at least one of those employees had a background check and directly supervised the nonchecked employee. The substitute would allow businesses to contract with companies and to receive the benefit of the presumption by meeting certain requirements. It also would allow disclosure of background check information during the discovery period of litigation.