



**Senate Fiscal Agency**  
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**BILL ANALYSIS**



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House Bill 5137 (Substitute H-2 as reported without amendment)  
 Sponsor: Representative Gerald Law  
 House Committee: Human Resources and Labor  
 Senate Committee: Human Resources, Labor and Veterans Affairs

Date Completed: 2-6-96

**RATIONALE**

Some Michigan employers apparently are becoming increasingly reluctant to provide information about former employees to prospective employers for fear of being sued for defamation by the former employees. Reportedly, defamation lawsuits against employers by disgruntled former employees are increasingly common, and even the prospect of having to defend against these types of actions can have the practical effect of discouraging employers from providing any information beyond employment dates, salary ranges, and job titles. Some employers evidently have resorted to settling out of court with former employees, which might even involve having to write letters of recommendation that may actually be undeserved. This, in turn, could result in prospective employers' unwittingly hiring job candidates who may be poor employees or even dangerous in the workplace. To prevent this outcome and any civil liability that may come with it, and to ensure that employers are free to provide and obtain accurate information about a prospective job candidate, some people feel that employers should be granted immunity for providing information relating to an employee's job performance.

**CONTENT**

The bill would create a new act to provide that an "employer" could disclose to an "employee" or that person's "prospective employer" information relating to the employee's job performance that was documented in his or her personnel file, upon the request of the employee or his or her prospective employer. An employer who disclosed information under the bill in good faith would be immune from civil liability for that disclosure.

An employer would be presumed to be acting in good faith at the time of a disclosure unless a preponderance of the evidence established one or more of the following:

- The employer knew the information disclosed was false or misleading.
- The employer disclosed the information with a reckless disregard for the truth.
- The disclosure was specifically prohibited by a State or Federal statute.

"Employer" would mean a person who employed an individual for compensation or who supervised an individual providing volunteer labor; "employee" would mean an individual who, as a volunteer or for compensation, provided an employer with labor; and "prospective employer" would mean a person to whom an employee or former employee had submitted an application for employment.

**ARGUMENTS**

*(Please note: The arguments contained in this analysis originate from sources outside the Senate Fiscal Agency. The Senate Fiscal Agency neither supports nor opposes legislation.)*

**Supporting Argument**

With increasing frequency, employers (and employer organizations) apparently agree that the safest policy regarding information disclosure about past employees is one of "don't ask and don't tell". Fear of potential liability reportedly is driving many human resource managers to divulge nothing about former employees. Even though few suits involving reference checking evidently make it to court, reportedly 63% of the 1,131 respondents to a recent survey conducted by the

Society for Human Resource Management said that fear of litigation stopped them from providing any information about former employees, while 73% said that reference checking was more important than ever, both to hire the best workers and to avoid hiring employees with violent or criminal pasts. Employers feel that they are in an impossible situation right now: They are afraid to give out information on former employees for fear of defamation litigation, while they also fear being exposed to “negligent hiring” lawsuits if, because of this inability to obtain relevant information on prospective employees, they hire people who turn out to be dangerous.

This “don’t ask, don’t tell” practice not only puts employers in a difficult situation, but also allows inadequate or dangerous employees to leave their job records behind, and, in some cases, to extract from former employers otherwise undeserved positive references. This policy also may prevent good employees from benefitting from their positive work history, because their former employer chooses not to reveal job performance information.

Employers should be free to communicate accurate and fair information about their employees’ job performance to prospective employers without fear of expensive lawsuits, and good employees should be able to use their good job performance to advance to better jobs. The bill would result in a “win-win” situation for employers and good employees alike. Prospective employers would have access to legitimate, documented job performance information about prospective employees, while good employees would be able to use their employment histories to go on to better jobs.

**Response:** The bill could do even more to reduce employers’ exposure to potential liability for disclosure of information. It could specifically allow employees to waive any claim for defamation, thereby facilitating the release of their employment records to prospective employers. Also, the bill could specify that employers would have to include written corrections, retractions, or clarifications in an employee’s file within a certain period of time after being informed in writing of alleged falsehoods or incomplete statements in the file.

### **Opposing Argument**

By specifying that an employer would be presumed to be acting in good faith unless a preponderance of the evidence established that the employer disclosed information “with a reckless disregard for the truth”, the bill would eliminate an employer’s

duty to exercise ordinary care in maintaining and disclosing information in an employee’s employment records. The bill, in effect, would approve an employer’s negligent acts, short of acting with a reckless disregard for the truth. The standard to which an employer was held should be higher than “reckless disregard”; the exercise of “ordinary care” in removing false information from an employee’s file should be a condition of employer immunity for disclosure.

**Response:** Immunity would not be granted under the bill to an employer who knew that information disclosed was false or misleading.

Legislative Analyst: P. Affholter

### **FISCAL IMPACT**

The bill would have no fiscal impact on State or local government.

Fiscal Analyst: K. Lindquist

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.