



MEMORANDUM

TO: Members of the Senate Labor Committee
FROM: Alida Kass, Chief Counsel
SUBJECT: NJCJI's Opposition to Senate Bills 1130 and 524
DATE: June 5, 2015

The New Jersey Civil Justice Institute is a statewide, bipartisan coalition of the state's leading employers, trade associations, and medical organizations dedicated to improving New Jersey's civil justice system and fostering economic growth.

We appreciate the sponsors' concern for ensuring a fair evaluation of prospective employees, recognizing that a bad credit report can result from a variety of circumstances beyond an employee's control. Indeed, the evaluation of credit history is just one data point in prospective employee evaluation, depending on its relevance to the job in question and on the reasons for the credit difficulties.

Our concern is that these bills would take credit history out of consideration entirely for most employment scenarios. While there is a carve-out for some positions where credit history is most evidently relevant, there are nevertheless several significant difficulties with the bill as currently structured.

First, the carve-out is under-inclusive and does not encompass full range of positions for which a poor credit history is potentially relevant. It expressly does not include the sort of retail positions that involve unsupervised access to cash; nor does it cover positions where employees would have access to high value inventory, such as narcotic pharmaceuticals.

Compounding that difficulty, the carve-out is also necessarily vague and subject to interpretation. That uncertainty of interpretation becomes a problem primarily because the enforcement mechanism is litigation, incentivized with fee-shifting that provides plaintiffs with attorney's fees and court costs.

Finally, in addition to the express private right of action provided in the bills, prohibiting the consideration of credit history would also facilitate the type of disparate impact litigation that has been brought by the EEOC at the federal level.

Regulating the use of credit history in the employment context is a challenge, as was demonstrated by the recent case of *EEOC v. Kaplan Higher Education Corp.* (2014), in which

the EEOC sued the defendants for using the same type of background check that the EEOC itself uses. And as the Court noted, the EEOC's own personnel handbook recites that "overdue just debts increase temptation to commit illegal or unethical acts as a means of gaining funds to meet financial obligations."

In short, this is a complicated area that calls for a delicate balancing of risks and interests. To the extent there is to be additional state regulation, it should be done with care. A broader carve-out that protects the full range of positions for which a credit history is potentially relevant, coupled with language clarifying that an alleged violation of this law shall not be the basis for a private cause of action under this or any other legislation, would help ensure that employers retain flexibility and are not unduly deterred by the threat of litigation when making appropriate employment decisions.

Barring such amendments, we would respectfully encourage the committee to hold the bills.