TESTIMONY

HB31

HAWAI`I CIVIL RIGHTS COMMISSION
830 PUNCHBOWL STREET, ROOM 411 HONOLULU, HI 96813 ·PHONE: 586-8636 FAX: 586-8655 TDD: 568-8692

March 19, 2009
Rm. 224, 2:45 p.m.

TO: The Honorable Dwight Takamine, Chair
and Members of the Senate Committee on Labor

FROM: Coral Wong Pietsch, Chair
and Commissioners of the Hawai`i Civil Rights Commission

RE: H.B. 31

The Hawai`i Civil Rights Commission (HCRC) has enforcement jurisdiction over Hawai`i's laws prohibiting discrimination in employment, housing, public accommodations, and access to State and State-funded services. The HCRC carries out the Hawai`i constitutional mandate that no person shall be discriminated against in the exercise of their civil rights. Art. I, Sect. 5.

H.B. 31 amends the state employment discrimination law (H.R.S. § 378-2) to prohibit discrimination because of an individual's credit history or credit report unless the credit information directly relates to a bona fide occupational qualification (BFOQ).

While the HCRC understands the intent of this bill, it opposes the addition of this new protected basis under H.R.S. § 378-2 for two primary reasons: 1) credit history is different in character from the other protected bases; and, 2) without knowing how many employers use an applicant or employee's credit history to make workplace decisions, it is impossible to predict the number of persons who may file complaints of such discrimination or how these additional complaints will impact HCRC resources and operations.[1]

[1] If the legislature chooses to enact legislation establishing this protection, it should be noted that the BFOQ justification proposed in the bill establishes a very high standard of proof. Under this standard, an employer will be required to show a factual basis for believing that all or substantially all persons with a

The HCRC is sympathetic to the plight of workers who may be screened out from prospective employment opportunities on the basis of a credit history or report, particularly in the current difficult economic climate that has had devastating effect on individuals and families. However, as noted above, it is difficult to ascertain that impact of the practice in question without data.

The U.S. Equal Employment Opportunity Commission has explored the extent to which disqualification of job applicants on the basis of credit history checks has a disparate impact on racial minorities. See, Testimony of Adam T. Klein, Esq., EEOC Commission Meeting (May 17, 2007), http://www.eeoc.gov/abouteeoc/meetings/5-16-07/klein.html, (testifying that employer credit history checks violate Title VII as they have a disparate impact based on race and are not job-related and consistent with business necessity). Under current state law, if a complaint alleges that a facially neutral employer practice has a disparate impact on a protected basis (race, ancestry, sex, etc.), the HCRC would have jurisdiction to accept and investigate that complaint.

It is also noteworthy that several states are considering proposals similar to those found in H.B. No. 31. In 2007 Washington state enacted a law to prohibit employers from using credit reports for employment purposes unless the information is either substantially job related and the employer's reasons for the use of such information are disclosed to the applicant or employee, or if the credit report is required by law. That law, however, is found in Washington's fair credit reporting act, and not in that state's employment discrimination law. RCW 19.182.020 can be found at: http://www.leg.wa.gov/pub/billinfo/2007-08/Pdf/Bills/Senate%20Passed%20Legislature/5827-S.PL.pdf .

The HCRC opposes H.B. No. 31 because it proposes a broad protection that is different in kind from the other protected bases in the employment discrimination statute that we enforce, and the addition of this protected basis will tax our enforcement resources, negatively impacting the investigation of all complaints.

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certain credit history are unable to safely and efficiently perform the duties of the job involved and that the essence of the business would be undermined by hiring such persons.

The Twenty-Fifth Legislature
Regular Session of 2009

THE SENATE
Committee on Labor
Senator Dwight Y. Takamine, Chair
Senator Brian T. Taniguchi, Vice Chair

State Capitol, Conference Room 224
Thursday, March 19, 2009; 2:45 p.m.

STATEMENT OF THE ILWU LOCAL 142 ON H.B. 31
RELATING TO EMPLOYMENT PRACTICES

The ILWU Local 142 supports H.B. 31, which establishes the employer's use of an individual's credit history in hiring and termination decisions as an unlawful discrimiantory pracice.

An employee's credit history should be confidential from his employer. The employer is not loaning him money to buy a house or a car. The employer should only be concerned that the employee is able to perform his or her job satisfactorily. Whether or not the employee was late making loan or credit card payments or has too much debt, all of which could be reflected in the employee's credit history, is none of the employer's concern--unless the information in the credit history has a direct relation to the employee's job.

The ILWU urges passage of H.B. 31. Thank you for the opportunity to testify.

Chair, Senator Dwight Takamine
Vice-chair, Senator Brian Taniguchi
Committee: Labor
Society for Human Resource Management (SHRM) Hawaii
Testimony date: Thursday, March 19, 2009

Opposition to HB 31 Relating to Employment Practices.

SHRM Hawaii is the local chapter of a National professional organization of Human Resource professionals. Our 1,200+ Hawaii membership includes those from small and large companies, local, mainland or internationally owned - tasked with meeting the needs of employees and employers in a balanced manner, and ensuring compliance with laws affecting the workplace. We (HR Professionals) are the people that implement the legislation you pass, on a day-to-day front line level.

SHRM Hawaii strongly opposes House Bill 31 in its current form. We would like to see provisions made to this bill which would allow the use of credit report information in connection with legitimate job-related consideration.

SHRM Hawaii respectfully urges the committee to kill House Bill 31.

Thank you for the opportunity to testify. SHRM Hawaii offers the assistance of the Legislative Committee in discussing this matter further.

SHRM Hawaii Chapter PO Box 3175 Honolulu, HI 96801 (808) 447-1840

HAWAII TEAMSTERS AND ALLIED WORKERS, LOCAL 996
Affiliated with the International Brotherhood of Teamsters

1817 Hart Street
Honolulu, Hawaii 96819-3205

Telephone: (808) 847-6633
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Sen. Dwight Takamine, Chair
Sen. Brian Taniguchi, Vice-Chair
Committee on Labor

Glenn Ida
Representative
Thursday, Mar. 19, 2009, 2:45 PM,
Conference Room 224

Support of HB 31, Relating to Employment Practices.

The Hawaii Teamsters Local 996 opposes unlawful discrimination practices of any kind in the workplace.

The Hawaii Teamsters Local 996 strongly Supports HB 31.

Thank you for allowing me the opportunity to testify on this matter.

UNITE HERE!
LOCAL 5 HAWAII

Eric Gill, Financial Secretary-Treasurer Hernando Ramos Tan, President Godfrey Maeshiro, Senior Vice-President

Wednesday, March 18, 2009

Senator Dwight Takamine, Chair
Senator Brian Taniguchi, Vice Chair
Senate Committee on Labor

Testimony of UNITE HERE! Local 5
Regarding HB 31; *relating to employment practices.*

Chair Takamine, Vice Chair Taniguchi, members of the Senate Committee on Labor:

As an organization that is deeply committed to equality in hiring, we strongly support House Bill 31, which would restrict the use of credit reports in the hiring process. As the citizens of Hawaii and America face the worst economic crisis of our generation, now is precisely the time for us to ensure that job opportunity is based on equality, not credit history.

We feel that credit reports should be restricted from the hiring process for four main reasons.

First, the use of credit in hiring hurts those that are most vulnerable given our current economic crisis. Approximately one third of people earning less than $45,000 had bad credit *before the current economic downturn*, according to a Freddie Mac study. On top of this, those who have suffered from foreclosures have also seen their credit scores drop by up to 250 points, and may be denied unemployment for as long as the negative information remains on their credit reports, typically seven years.

Second, credit checks in hiring represent a form of economic segregation, in which job seekers are behind on their bills because they lost a job or their hours were cut, but are still unable to get a job or promotion because they're behind on their bills. Using credit reports in hiring creates a permanent barrier to better jobs for a growing population in our community who are affected by this unprecedented credit crisis.

Third, credit reports have an accuracy problem. The Consumer Data Industry Association acknowledged that 8% of credit reports obtained by consumers between 2004 and 2006 were inaccurate; however a 2007 survey by pollster Zogby cited in Smart Money Magazine put that figure at 37%, with half of those consumers surveyed saying they could not easily correct the mistakes.

Fourth, credit reports were designed by TransUnion and other companies to predict whether a consumer would pay their bills on time, not whether they would perform his/her job duties successfully. Not a single study suggests a positive correlation between credit history and job performance, and the definitive study on this issue, presented to the American Psychological Association Society in 2003, concludes that no correlation exists whatsoever. This makes sense intuitively: if your credit takes a dive because your son was in the hospital, are you less likely to be

1050 Queen Street, Suite 100 • Honolulu, Hawaii • 96814-4130 • Phone (808) 941-2141 • Fax (808) 941-2166 • www.unitehere5.org

a reliable technician? If you go through a divorce that wrecks your credit, will you not make a good cashier?

Now is not the time to put faith in the self-regulation of the credit reporting industry. **TransUnion**, one of the top three companies that sell credit reports, recently settled a class action lawsuit with the largest class in U.S. history, which alleged that the company sold private information to targeted marketing companies without a permissible purpose and thus **violated the federal Fair Credit Reporting Act**. TransUnion did not admit any violations of the law. Moreover, TransUnion's Chief Executive Officer Siddharth Mehta comes out of the subprime lending business that has triggered this economic crisis. When Mr. Mehta joined TransUnion as CEO in 2007, he had just recently resigned as Chairman and CEO of HSBC Finance (formerly known as Household Finance), after leading HSBC's foray into subprime lending and after its parent company wrote down $10.6 billion of loan losses. **HSBC is named in five class action lawsuits for alleged predatory lending practices while Mr. Mehta was CEO, including one of behalf of the NAACP.**

More Americans are now looking for work than at any time since 1982, and more of us are suffering foreclosures than at any time since the Great Depression. As this crisis engulfs our local families, it is more important than ever that job opportunity in our state be equal and not subject to hiring practices such as credit checks that promote economic segregation.

The Senate
The Twenty-Fifth Legislature
Regular Session of 2009

Committee on Labor
Senator Dwight Takamine, Chair
Senator Brian T. Taniguchi, Vice Chair

DATE: Thursday, March 19, 2009
TIME: 2:45 p.m.
PLACE: Conference Room 224

TESTIMONY OF THE UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO ON H.B. 31, RELATING TO EMPLOYMENT PRACTICES

HB 31 establishes that it is an unlawful discriminatory practice for an employer to use an individual's credit history in hiring or discharging, in compensation, in the terms, conditions, or privileges of employment. **The United Public Workers, Local 646, supports the intent and purpose of this measure.**

Only under limited circumstances should an employer know an employee's credit history. HB 31 strikes the proper balance between the needs of employers and protecting a worker's rights by providing an exception under section 378-3(2), which does not "Prohibit or prevent the establishment and maintenance of bona fide occupational qualifications reasonably necessary to the normal operation of a particular business or enterprise, and that have a substantial relationship to the functions and responsibilities of prospective or continued employment."

We urge the passage of this message. Thank you for the opportunity to testify.

CDIA
CONSUMER DATA INDUSTRY ASSOCIATION
Empowering Economic Opportunity
Writer's Direct Dial: 202-408-7407
Writer's Email: eellman@cdiaonline.org

March 18, 2009

Senator Dwight Takamine
Chair, Committee on Labor
Hawaii State Capitol, Room 204
415 S. Beretania Street
Honolulu, Hawaii 96813

Re: H.B. 31- Relating to Employment Practices
Hearing Date: Thursday, March 19, 2009 at 2:45 p.m.

Dear Chair Takamine and Members of the Committee on Labor:

I write on behalf of the Consumer Data Industry Association (CDIA) to request amendments to H.B. 31, concerning discrimination in employment based on a credit report.

By way of background, CDIA was founded in 1906 and is the international trade association that represents nearly over 200 consumer data companies. CDIA members represent the nation's leading institutions in credit reporting, mortgage reporting, check verification, fraud prevention, risk management, employment reporting, tenant screening and collection services.

House Bill 31 would make it a discriminatory practice for

> any employer to refuse to hire or employ or to bar or discharge from employment, or otherwise to discriminate against any individual in compensation or in the terms, conditions, or privileges of employment of any individual because of the individual's credit history or credit report, unless the information in the individual's credit history or credit report directly relates to a bona fide occupational qualification under section 378-3(2).

Some of CDIA's members are involved in doing research in producing reports that are used for many different purposes, including background checks. These members are concerned that H.B. 31, in its present form, would too severely limit the ability of employers to use background checks.

Employers work hard to create working environments that are safe and secure for themselves, their employees and their customers. Employees and customers expect and demand safety and security in places they work and visit. It is important to consider the bill in light of some key statistics. For example, employee theft accounts for more than $15 billion annually and the average employee embezzlement totals more than $125,000.

We understand that there may be a concern regarding an employer's potential misuse of credit reports. However, H.B. 31 may have the unintended consequence of discouraging employers from using a key tool that they might use to screen for possible fraud or other financial crimes.

We respectfully request that the Committee consider some proposed amendments to H.B. 31, which are attached to this testimony. We believe that these amendments would leave in place the protections that are part of the present bill, but would still enable the use of background checks in certain sensitive situations where it will be important for both employees and employers in a specific workplace to be sure that persons hired do not present a threat to the people in the workplace, as well as to the functions of certain businesses.

Thank you for the opportunity to submit testimony on this measure. Please do not hesitate to contact me with any questions or comments.

Sincerely,

Eric J. Ellman
Vice President, Public Policy and Legal Affairs

Attachment

DRAFT

Proposed Amendments to
Hawaii H.B. 31

Report Title:
Employment; Credit History Prohibited

Description:
Establishes employer's use of individual's credit history in hiring and termination decisions as an unlawful discriminatory practice.

HOUSE OF REPRESENTATIVES
TWENTY-FIFTH LEGISLATURE, 2009
STATE OF HAWAII

H.B. NO. [31]

A BILL FOR AN ACT

RELATING TO EMPLOYMENT PRACTICES.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

SECTION 1. Section 378-2, Hawaii Revised Statutes, is amended to read as follows:

"**§378-2 Discriminatory practices made unlawful; offenses defined.** It shall be an unlawful discriminatory practice:

(1) Because of race, sex, sexual orientation, age, religion, color, ancestry, disability, marital status, or arrest and court record:

(A) For any employer to refuse to hire or employ or to bar or discharge from employment, or otherwise to discriminate against any individual in compensation or in the terms, conditions, or privileges of employment;

(B) For any employment agency to fail or refuse to refer for employment, or to classify or otherwise to discriminate against, any individual;

(C) For any employer or employment agency to print, circulate, or cause to be printed or circulated any statement, advertisement, or publication or to use any form of application for employment or to make any inquiry in connection with prospective employment, which expresses, directly or indirectly, any limitation, specification, or discrimination;

(D) For any labor organization to exclude or expel from its membership any individual or to discriminate in any way against any of its members, employer, or employees; or

(E) For any employer or labor organization to refuse to enter into an apprenticeship agreement as defined in section 372-2; provided that no

apprentice shall be younger than sixteen years of age;

(2) For any employer, labor organization, or employment agency to discharge, expel, or otherwise discriminate against any individual because the individual has opposed any practice forbidden by this part or has filed a complaint, testified, or assisted in any proceeding respecting the discriminatory practices prohibited under this part;

(3) For any person whether an employer, employee, or not, to aid, abet, incite, compel, or coerce the doing of any of the discriminatory practices forbidden by this part, or to attempt to do so;

(4) For any employer to violate the provisions of section 121-43 relating to nonforfeiture for absence by members of the national guard;

(5) For any employer to refuse to hire or employ or to bar or discharge from employment, any individual because of assignment of income for the purpose of satisfying the individual's child support obligations as provided for under section 571-52;

(6) For any employer, labor organization, or employment agency to exclude or otherwise deny equal jobs or benefits to a qualified individual because of the

known disability of an individual with whom the qualified individual is known to have a relationship or association; [~~or~~]

(7) For any employer or labor organization to refuse to hire or employ[~~,~~] or to bar or discharge from employment, or withhold pay, demote, or penalize a lactating employee because an employee breastfeeds or expresses milk at the workplace. For purposes of this paragraph, the term "breastfeeds" means the feeding of a child directly from the breast[~~.~~]; or

(8) **Except as provided in this section** ~~F~~for any employer to refuse to hire or employ or to bar or discharge from employment, or otherwise to discriminate against any individual in compensation or in the terms, conditions, or privileges of employment of any individual because of the individual's credit history or credit report, unless the information in the individual's credit history or credit report ~~**directly**~~ relates to a bona fide occupational qualification under section 378-3(2). **An individual's credit history or credit report relates to a bona fide occupational qualification if:**

A. The position is highly compensated or one which requires the exercise of judgment,

control, or direction of the employer's business; or

B. The position is one in which there is access to customer or employee personal or financial information or one in which the employee has access to the employer's or customer's tangible or intangible assets, including but not limited to trade secrets, processes, formulas, or patentable subject matter; or

C. The employer is verifying the income or employment of a prospective or existing employee.

For purposes of this subsection, the plaintiff shall have the burden of proof that a credit history or credit report is not related to a bona fide occupational qualification."

SECTION 2. Statutory material to be repealed is bracketed and stricken. New statutory material is underscored.

SECTION 3. This Act shall take effect upon its approval.

INTRODUCED BY: _____

HBA

HAWAII BANKERS ASSOCIATION

1000 BISHOP ST., SUITE 301B • HONOLULU, HAWAII 96813-4203
PHONE: (808) 524-5161 • FAX: (808) 521-4120

Presentation to the House Committee on Labor
Thursday, March 19, 2009, at 8:30AM

Testimony for HB 31 Relating to Employment Practices

TO: The Honorable Senator Dwight Y. Takamine, Chair
The Honorable Brian T. Taniguchi, Vice Chair
Members of the House Committee on Labor

My name is Neal Okabayashi and I testify for the Hawaii Bankers Association who would support the bill if this bill is amended to provide for an exemption for financial institutions whose deposits are insured by the FDIC or the National Credit Union Association ("NCUA").

We propose that the amended section 378-2(8) be further amended by adding the capitalized and underlined words below so it reads as follows:

> For any employer, EXCEPT A FINANCIAL INSTITUTION IN WHICH DEPOSITS ARE INSURED BY THE FEDERAL DEPOSIT INSURANCE CORPORATION OR THE NATIONAL CREDIT UNION ADMINISTRATION, to refuse to hire or employ or to bar or discharge from employment, or otherwise to discriminate against any individual in compensation or in the terms, conditions, or privileges of employment of any individual because of the individual's credit history or credit report, unless the information in the individual's credit history or credit report directly relates to a bona fide occupational qualification under section 378-3(2) .

This exemption is necessary because of the obligations of federally insured depositories, banks and credit unions, under federal law and to its depositors. The State has already recognized the special role of banks and credit unions regarding employment actions which stems for our obligations under federal law. For example, section 378-2.5(d)(9) provides an exemption for federally insured depository institutions from the State's restrictions on consideration of a conviction record. See also section 378-3(9).

The foregoing exemption recognizes the banks' obligations under section 19 of the FDIC Act and the credit unions' obligations under sections 12 CFR sections 713.3 and 741.201 implementing the National Credit Union Administration Act. Section 19 restricts

insured banks (meaning banks whose deposits are insured by the FDIC) from hiring any individual who has been convicted of a crime of dishonesty, no matter how trivial, unless the federal regulator consents. The credit union regulations accomplish the same goal indirectly by requiring that credit unions obtain a fidelity bond protecting against fraud and dishonesty by its employees.

Because employees of financial institutions touch or impact other people's monies, the FDIC, by policy, has extended the definition of "employees" to include those who are independent contractors but because of their relationship with a financial institution are a position to influence the operations of the financial institution. For example, a systems operator who can alter financial positions might well be deemed to be an employee of a financial institution even though he may be paid by a third party. Similarly, while a credit union may use third party employees, the NCUA requires that the credit union still maintains control over the hiring and firing of such third party employees, and compensation of such employees. Banks also obtain a bond to cover its employees.

Similarly, financial institutions are sensitive to the financial condition of its employees and wish to have the option of using a credit report because signs of financial irresponsibility are red flags which serve as a cautionary warning that the person may not be well suited for employment in such a sensitive industry. That is not to say that an adverse credit report automatically leads to adverse action. It is a tool like other tools but certainly, financial institutions would like the option to use a credit report in its tool box.

One insurer who provides fidelity bond insurance coverage (CUNA Mutual Group) recommends an employee background check on employees and volunteers, including a credit check on all employees and volunteers.

Just last year, the United States Congress passed the Secure and Fair Enforcement for Mortgage Licensing Act of 2008, also known as the SAFE Act, which law provides a regulatory framework of mortgage brokers. In connection with licensing the individual broker, a background check must be completed on the applicant, which process includes authorizing the state to obtain an independent credit report. The SAFE Act further states that a minimum standard for licensing is demonstrated "financial responsibility, character, and general fitness such as to common the confidence of the community and to warrant a determination that the loan originator will operate honestly, fairly, and efficiently within the purposes of this title."

If Congress mandated the use of credit reports and a background check on the financial condition of a mortgage broker, shouldn't banks and credit unions be able to do the same for our employees?

Thus, HBA requests the amendment providing for an exemption for banks and credit unions whose deposits are insured by the FDIC or NCUA.

Thank you very much for this opportunity to testify. I am happy to answer any questions that you may have.

HAWAII CREDIT UNION LEAGUE
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Web Site: www.hcul.org
Telephone: (808) 941-0556
Fax: 808) 945-0019
Email: info@hcul.org

AMERICA'S CREDIT UNIONS™

Testimony to the Senate Committee on Labor
March 19, 2009 at 2:45 p.m.

Comments regarding HB 31, Relating to Employment Practices

To: The Honorable Dwight Takamine, Chair
The Honorable Brian Taniguchi, Vice-Chair
Members of the Committee on Labor

My name is Stefanie Sakamoto and I am testifying on behalf of the Hawaii Credit Union League, which represents approximately 810,000 credit union members across the state.

We understand the intent of this bill, but respectfully request that the following amendment in Section 378-2(8) be made:

> For any employer, EXCEPT A FINANCIAL INSTITUTION IN WHICH DEPOSITS ARE INSURED BY THE FEDERAL DEPOSIT INSURANCE CORPORATION OR THE NATIONAL CREDIT UNION ADMINISTRATION, to refuse to hire or employ or to bar or discharge from employment, or otherwise to discriminate against any individual in compensation or in the terms, conditions, or privileges of employment of any individual because of the individual's credit history or credit report, unless the information in the individual's credit history or credit report directly relates to a bona fide occupational qualification under section 378-3(2).

This exemption is necessary because federally insured depositories (banks and credit unions) are required under federal law to exercise care in selecting employees who do not have a history of committing acts that may threaten depositors' funds. Thus, credit unions are held to the strictest of standards in the hiring of employees.

Because the employees of credit unions are in direct contact with other people's monies, the trustworthiness and responsibility of a person must be taken into account when considering anyone for employment. While the use of a credit report in the evaluation of a potential employee of a credit union by no means leads to an immediate negative outcome, it could certainly be a warning sign that the potential employee may not be a suitable candidate for a credit union. Because they are dealing with the monies of credit union members, credit unions have a responsibility to ensure that their employees are credible and trustworthy.

Thank you for the opportunity to testify.

SENATE COMMITTEE ON
LABOR

March 19, 2009

House Bill 31 Relating to Employment Practices

Chair Takamine and members of the Senate Committee on Labor, I am Rick Tsujimura, representing Reed Elsevier, Inc.

Reed Elsevier the parent company of LexisNexis, which is recognized as a leading provider of authoritative legal, public records, and business information products to help customers make informed and accurate decisions. LexisNexis provides background check and credential verification information for employers. The LexisNexis information products protect employers from liability and ensure that newly hired employees do not pose a financial or other risk to the business. LexisNexis is opposed to House Bill 31, as currently drafted. The bill disallows the use of credit history or credit reports for the purpose of hiring or discharge, unless such information relates directly to a bona fide occupational qualification.

We believe there is a difference between a consumer credit report used to evaluate creditworthiness for the purpose of granting credit, versus the report a credit bureau provides to an employer for employment purposes. The employment report does not include FICO credit scores, account balances or account numbers.

The employment report is important, as it helps an employer evaluate an applicant's personal responsibility and organizational skills by their ability to pay their bills on time. It allows an employer to determine if an individual with a high debt ratio should be provided access to an employer's or a customer's assets. It may also help identify individuals who would be more vulnerable to fraud schemes.

The employment report helps employers determine the accuracy and completeness of a job application. Credit reports are used for employment checks to show former addresses, former employment, and the financial situation of a prospective employee.

Additionally, the use of employment reports is governed and expressly allowed under the federal Fair Credit Reporting Act (FCRA). Under the FCRA, an employer must give the consumer notice that a credit report may be used in the hiring process and require the consumer's written consent to access their credit report. Additionally, the FCRA provides important consumer protections, by requiring notice by the employer if an adverse action is taken.

If House Bill 31 were to move forward, we would seek amendments to the bill to allow the use of employment reports:

- for individuals who would be highly compensated;

- for positions which require the exercise of judgment, control or direction of the employer's business;

- where the employee would have access to customer or other personal or financial information of the company's employees;

- where the employee would have access to either the employer's or customer's assets, including trade secrets, processes, formulae, or patentable subject matter; or

- where an employer is verifying the current employment of a prospective employee or an existing employee.

These purposes are all legitimate uses of credit history or credit reports, since they relate to highly sensitive management decisions, or control or access to company or customer information or assets.

Employers must have the ability to access information which would allow the employer to determine whether the prospective, or current, employee can fulfill the requirements of the jobs mentioned above. We would request that these amendments be inserted into the current measure. We have prepared a proposed SD1 for your use.

Thank you for the opportunity to present this testimony.

DRAFT

Proposed Amendments to
Hawaii H.B. 31

Report Title:
Employment; Credit History Prohibited

Description:
Establishes employer's use of individual's credit history in hiring and termination decisions as an unlawful discriminatory practice.

HOUSE OF REPRESENTATIVES
TWENTY-FIFTH LEGISLATURE, 2009
STATE OF HAWAII

H.B. NO. 31

A BILL FOR AN ACT

RELATING TO EMPLOYMENT PRACTICES.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

SECTION 1. Section 378-2, Hawaii Revised Statutes, is amended to read as follows:

"**§378-2 Discriminatory practices made unlawful; offenses defined.** It shall be an unlawful discriminatory practice:

(1) Because of race, sex, sexual orientation, age, religion, color, ancestry, disability, marital status, or arrest and court record:

(A) For any employer to refuse to hire or employ or to bar or discharge from employment, or otherwise to discriminate against any individual in compensation or in the terms, conditions, or privileges of employment;

(B) For any employment agency to fail or refuse to refer for employment, or to classify or otherwise to discriminate against, any individual;

(C) For any employer or employment agency to print, circulate, or cause to be printed or circulated any statement, advertisement, or publication or to use any form of application for employment or to make any inquiry in connection with prospective employment, which expresses, directly or indirectly, any limitation, specification, or discrimination;

(D) For any labor organization to exclude or expel from its membership any individual or to discriminate in any way against any of its members, employer, or employees; or

(E) For any employer or labor organization to refuse to enter into an apprenticeship agreement as defined in section 372-2; provided that no

apprentice shall be younger than sixteen years of age;

(2) For any employer, labor organization, or employment agency to discharge, expel, or otherwise discriminate against any individual because the individual has opposed any practice forbidden by this part or has filed a complaint, testified, or assisted in any proceeding respecting the discriminatory practices prohibited under this part;

(3) For any person whether an employer, employee, or not, to aid, abet, incite, compel, or coerce the doing of any of the discriminatory practices forbidden by this part, or to attempt to do so;

(4) For any employer to violate the provisions of section 121-43 relating to nonforfeiture for absence by members of the national guard;

(5) For any employer to refuse to hire or employ or to bar or discharge from employment, any individual because of assignment of income for the purpose of satisfying the individual's child support obligations as provided for under section 571-52;

(6) For any employer, labor organization, or employment agency to exclude or otherwise deny equal jobs or benefits to a qualified individual because of the

known disability of an individual with whom the qualified individual is known to have a relationship or association; [~~or~~]

(7) For any employer or labor organization to refuse to hire or employ[~~,~~] or to bar or discharge from employment, or withhold pay, demote, or penalize a lactating employee because an employee breastfeeds or expresses milk at the workplace. For purposes of this paragraph, the term "breastfeeds" means the feeding of a child directly from the breast[~~.~~]; or

(8) **Except as provided in this section ~~F~~for any employer to refuse to hire or employ or to bar or discharge from employment, or otherwise to discriminate against any individual in compensation or in the terms, conditions, or privileges of employment of any individual because of the individual's credit history or credit report, unless the information in the individual's credit history or credit report ~~directly~~ relates to a bona fide occupational qualification under section 378-3(2). An individual's credit history or credit report relates to a bona fide occupational qualification if:**

A. The position is highly compensated or one which requires the exercise of judgment,

control, or direction of the employer's business; or

B. **The position is one in which there is access to customer or employee personal or financial information or one in which the employee has access to the employer's or customer's tangible or intangible assets, including but not limited to trade secrets, processes, formulas, or patentable subject matter; or**

C. **The employer is verifying the income or employment of a prospective or existing employee.**

For purposes of this subsection, the plaintiff shall have the burden of proof that a credit history or credit report is not related to a bona fide occupational qualification."

SECTION 2. Statutory material to be repealed is bracketed and stricken. New statutory material is underscored.

SECTION 3. This Act shall take effect upon its approval.

INTRODUCED BY: _____

Senator Dwight Takamine, Chair
Senator Brian Taniguchi, Vice Chair
Committee on Labor

HEARING Thursday, March 19, 2009
2:45 pm
Conference Room 224
State Capitol, Honolulu, Hawaii 96813

RE: HB31, Relating to Employment Practices

Chair Takamine, Vice Chair Taniguchi, and Members of the Committee:

Retail Merchants of Hawaii (RMH) is a not-for-profit trade organization representing 200 members and over 2,000 storefronts, and is committed to support the retail industry and business in general in Hawaii.

RMH opposes HB31, which establishes employer's use of individual credit history in hiring and termination decisions as an unlawful discriminatory practice.

The very nature of the retail industry is the exchange of goods for payment, whether cash, check or credit card, at the point of sale. Our sales associates / cashiers handle myriads of transactions daily. Knowledge of an employee's credit history, and the prudent decision based on that information, is vital to protecting the integrity of our businesses.

This capability becomes more important when we consider the potential for misuse and/or fraud involving our customers' credit cards, particularly with increasing incidences of identity theft. We must have the latitude to operate with utmost assurance to our customers that their personal information will not be compromised in any way.

We respectfully request that you hold HB31. Thank you for your consideration and for the opportunity to comment on this measure.

Carol Pregill, President

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The Chamber of Commerce of Hawaii
The Voice of Business in Hawaii

Testimony to the Senate Committee on Labor
Thursday, March 19, 2009
2:45 p.m.
Conference Room 224
State Capitol

RE: HOUSE BILL NO. 31 RELATING TO EMPLOYMENT PRACTICES

Chair Takamine, Vice Chair Taniguchi, and members of the committee:

My name is Jim Tollefson and I am the President and CEO of The Chamber of Commerce of Hawaii ("The Chamber"). The Chamber does not support House Bill No. 31, relating to Employment Practices in its current form.

The Chamber is the largest business organization in Hawaii, representing more than 1,100 businesses. Approximately 80% of our members are small businesses with less than 20 employees. As the "Voice of Business" in Hawaii, the organization works on behalf of its members, which employ more than 200,000 individuals, to improve the state's economic climate and to foster positive action on issues of common concern.

While well intentioned, we believe that this legislation would have significant unintended consequences which could harm the ability of Hawaii employers to properly and adequately screen potential employees, not only limiting their ability to hire the most appropriate employee, but also possibly leaving them vulnerable to potential litigation for failure to properly screen employees.

Generally, the Chamber believes that employers should be able to use a broad range of tools to assess potential employees, given the wide range of skills that are necessary in our diverse economy, as long as they do not utilize prohibited practices. This is particularly important in this context, because federal law has explicitly permitted the use of credit reports for employment purposes since the enactment of the Fair Credit Reporting Act (FCRA) in 1970.

However, it is important to note that while the use of a credit report is permitted, there is a wide-range of protections in place for potential employees, as well. For instance, if an employer denies employment or makes any other decision for employment purposes that adversely affects any current or prospective employee, an adverse action notice is triggered and sent to the prospective employee. This entitles the employee to a free copy of the consumer report upon which the information is based, and the employee has a right to dispute any potentially incorrect information in the report.

More specifically, the limitation on the use of a credit report in a hiring decision would effect a number of different considerations that employers try to take into account when making a hiring decision, including having a safe work environment and protecting against fraud.

Safe Work Environment:

Establishing a safe work environment for customers and other employees is a very important consideration for employers. H.B. 31 would remove a key tool for employers to use in assessing an employee. An employer is in the best position to determine what documentation and details they need to make a hiring decision.

Protecting Against Fraud:

Employee theft is a growing crime nationwide, accounting for more than $15 billion in losses annually, and the average employee embezzlement totals more than $125,000. Employers should have the ability to consider a prospective employee's personal financial management as part of the hiring decision.

In short, the Chamber believes that this well-intentioned legislation would unnecessarily tie the hands of businesses in making appropriate hiring decisions, and therefore we would urge the Senate to forgo additional consideration of this legislation.

Thank you for your time and the opportunity to submit testimony.