

Date of Hearing: April 28, 2015

ASSEMBLY COMMITTEE ON ARTS, ENTERTAINMENT, SPORTS, TOURISM, AND
INTERNET MEDIA

Ian Charles Calderon, Chair

AB 984 (Calderon) – As Amended March 26, 2015

SUBJECT: Use of age information in employment.

SUMMARY: Prohibits employers from using information found online, as specified, to discriminate against job applicants. Specifically, **this bill:**

- 1) Clarifies that an employer shall not use information obtained on an Internet Website regarding a person's age to discriminate against that person for employment, whether an applicant for employment or an employee.
- 2) States that a commercial online entertainment employment service provider that knowingly accepts payment from persons in California to post their resumes and photos online is subject to the antidiscrimination laws of this state.
- 3) Provides the following definitions:
 - a) "Commercial online entertainment employment service provider" means a person or business that owns, licenses, or otherwise possesses computerized data that includes personal information of people employed in the entertainment industry, including television, films, and video games, and that makes the personal information available to the public or potential employers.
 - b) "Payment" means for a fee in exchange for advertisements, or any other form of compensation or benefit.
- 4) Makes related findings and declarations.

EXISTING LAW:

- 1) States that all persons within the jurisdiction of this state are free and equal and no matter what their sex, race, color, religion, ancestry, national origin, disability, or medical condition and are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever. [Civil Code Section 51(b).]
- 2) Prohibits employment discrimination covering employers, labor organizations, employment agencies, apprenticeship programs and any person or entity who aids, abets, incites, compels, or coerces the doing of a discriminatory act. It prohibits employment discrimination based on race or color; religion; national origin or ancestry, physical disability; mental disability or medical condition; marital status; sex or sexual orientation; age, with respect to persons over the age of 40; and pregnancy, childbirth, or related medical conditions. (Government 12900 et seq.)

FISCAL EFFECT: Unknown

COMMENTS:

- 1) *Author & sponsor's statement of need for legislation: Existing laws against age discrimination need shoring up in the online employment environment.* According to the author, "Age discrimination in employment is against both federal and state law. In California the relevant statutes are the California Fair Employment and Housing Act (FEHA) and the Unruh Civil Rights Act. Sadly, despite these laws age discrimination continues to exist and is facilitated through public distribution of potential job applicant's birth and age information via commercial online employment service providers.

"Even the fear of age discrimination is troubling in the entertainment industry, where one woman sued Internet Movie Database (IMDb), an online cast and crew referral site used by the entertainment community, for revealing her age. In her complaint, the plaintiff pointed out that, "one is perceived to be 'over-the-hill,' when approaching 40" in Hollywood. She further alleges that age is such a powerful employment screening factor, "it is nearly impossible for an up-and-coming actress, such as the Plaintiff, to get work as she is thought to have less of an 'upside' therefore casting directors, producers, directors, agents/managers, etc. do not give her the same opportunities, regardless of her appearance and talent." Currently, birthdate and age are prominently displayed on the IMDb public page.

Additionally, the author points out, "one complicating factor in the fight against age discrimination in Hollywood is the notion that artistic freedom provides a haven from antidiscrimination laws. Indeed the law recognizes a defense against charges of discrimination for a bona fide occupational qualification (BFOQ) which would allow for a man to be cast in the role of a husband, or a child to be cast in the role of a school girl." However, the author contends that, "anyone who has ever seen Glee or 21 Jump Street knows we are not looking at high school aged actors, and famously Olivia Newton-John was 29 when she starred as high school cheerleader Sandy in the movie Grease. Therefore, the true question posed under the age discrimination BFOQ is what age can an actor play – not what year are they born."

The Screen Actors Guild/American Federation of Television and Radio Artists are the sponsors of this legislation and have written the committee to say, "In the case of actors, an employer casting a part may make a decision based on how young or old the actor looks but may not exclude the actor from trying out for the part simply because of his or her biological age. In other words, an actor's biological age cannot be a bar to applying for the part. We all know that frequently actors play the role of persons that are different from their true biological age. After all, the essence of acting is creating an illusion."

- 2) *Age discrimination remains a stubborn problem.* According to studies, the recent economic downturn now known as the Great Recession led to large increases in unemployment rates and unemployment durations for workers of all ages, but duration of unemployment rose far more for older workers than for younger workers. Statistics from the U.S. Equal Employment Opportunity Commission show that from 2006-2013, age discrimination claims rose 38%. The AARP reports that, "Age discrimination claims have been on the rise since 1997, when 15,785 reports were filed, according to the Equal Employment Opportunity Commission. Last year, 21,396 claims were recorded. Not every lawsuit is valid, experts say. Many are settled without assigning blame. Companies are sometimes hamstrung by the law from giving their side of the story in age discrimination cases. On the other hand, consumer

advocates and lawyers say recorded claims represent only a slice of the total number of workers who get pushed out of a job because they are older. One possible reason for the trend: an aging population. More than 20 % of workers in the United States, some 33 million, are age 55 and up, according to the Bureau of Labor Statistics." (*Forced Out, Older Workers Are Fighting Back*, by Carole Fleck, AARP Bulletin, May 2014, <http://www.aarp.org/work/on-the-job/info-2014/workplace-age-discrimination-infographic.html>, accessed April 22, 2015.)

- 3) *Long arm jurisdiction of California: Purposeful availment and sufficient minimum contacts.* This bill contains two major provisions, the first clarifies that an employer shall not use information obtained on an Internet Website regarding a person's age to discriminate against that person for employment. The second states that a commercial online entertainment employment service provider that knowingly accepts payment from persons in California to post their resumes and photos online is subject to the antidiscrimination laws of this state.

In order for one state to assert jurisdiction over a business located in another state, the law requires that there be sufficient minimum contacts, (e.g. contracts, directed advertisements or customers) for the assertion of jurisdiction to be found reasonable. The United States Supreme Court has decided a number of cases that have established and refined the principle that it is unfair for a court to assert jurisdiction over a party unless that party's contacts with the state in which that court sits are such that the party "could reasonably expect to be hauled into court" in that state. This jurisdiction must "not offend traditional notions of fair play and substantial justice". *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

A non-resident defendant has minimum contacts with the forum state if they 1) have direct contact with the state; 2) have a contract with a resident of the state; 3) have placed their product into the stream of commerce such that it reaches the forum state, 4) seek to serve residents of the forum state; 5) have satisfied the Calder effects test; or 6) have a non-passive website viewed within the forum state. (Citations omitted.)

The test for whether websites may provide minimum contacts is outlined in the *Zippo* decision, where the court found that commercial websites which do a substantial volume of business over the Internet, and through which customers in any location can immediately engage in business with the website owner, provides a basis for jurisdiction. *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997).

In this case, the proposed legislation is targeted to commercial Internet sites which knowingly do business with California residents through exchanging payment for the service of posting resumes and photographs on their site. Thus, the bill appears to comply with the constitutional requirements for California to assert jurisdiction.

REGISTERED SUPPORT / OPPOSITION:

Support

California Labor Federation, AFL-CIO
California Teamsters Public Affairs Council
Screen Actors Guild-American Federation of Television and Radio Artists

Opposition

There is no opposition on file.

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