

Date of Hearing: April 12, 2016

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

Kansen Chu, Chair

AB 1687 (Calderon) – As Introduced January 20, 2016

SUBJECT: Customer records: age information: commercial online entertainment employment service providers.

SUMMARY: Prohibits a commercial online entertainment employment service provider, as defined, that enters into an agreement to provide certain employment services from publishing or sharing information about the subscriber's age as specified, and would require the provider to remove any information regarding the subscriber's age from any Internet website under the provider's control if requested by the subscriber.

Specifically, **this bill:**

- 1) Declares that the purpose of this section is to ensure that information obtained on an Internet website regarding a person's age will not be used in furtherance of employment or age discrimination.
- 2) Provides that a commercial online entertainment employment service provider that enters into a contractual agreement to provide employment services to an individual for a subscription payment shall not, upon request by the subscriber, do either of the following:
 - a) Publish or make public the subscriber's date of birth or age information.
 - b) Share the subscriber's date of birth or age information with any Internet websites for the purpose of publication.
- 3) Further provides that a commercial online entertainment employment service provider subject to item 2 above shall remove the subscriber's date of birth and age information from public view on all Internet websites under its control upon specific request by the subscriber naming the Internet websites.
- 4) States that for purposes of this section, the following definitions apply:
 - 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 a fee in exchange for advertisements, or any other form of compensation or benefit.

- c) "Provide employment services" means post resumes, photographs, or other information about a job applicant when one of the purposes is to provide individually identifiable information to a prospective employer.

5) Makes related findings and declarations.

EXISTING LAW:

- 1) 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.

Applies the above stated prohibitions to 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. (Government 12900 et seq.)

- 2) 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).]

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."

The Screen Actors Guild/American Federation of Television and Radio Artists (SAG-AFTRA) are the sponsors of this legislation and have written the committee to say, "Under California's FEHA, an employer is generally prohibited from asking the age of a job applicant until a bone fide offer of employment is made. However, since the advent of the internet and social media, employment referral websites designed for the use of casting professionals and others have provided access online to birthdate information which would be illegal for employers to seek in hard copy. Once having this information, they may discriminate against the job seeker on the basis of age without it being traced."

Additionally, the author point out that clarification of the law is needed due to the "complicating factor in the fight against age discrimination in Hollywood which 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."

SAG-AFTRA adds, "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.)

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 employment 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.

- 3) *Long arm jurisdiction of California: Purposeful availment and sufficient minimum contacts.* This measure is targeted at commercial online employment services, some of which are located outside of California. 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.

4) *Prior and related legislation.*

- a) AB 2068 (Holden), Legislation of 2016, would require talent services that post information about artists under contract via online services, online applications, and mobile applications, to remove photographs and other artist information from those locations upon an artist's request within 10 days. This measure is currently pending before the committee.
- b) AB 984 (Calderon) of 2015, would have prohibited employers from using age and birthdate information found online, as specified, to discriminate against job applicants. Status: Held in the Assembly Appropriations Committee.

5) *Double-referral*: Should this bill pass out of this committee, it will be re-referred to the Assembly Committee on Privacy and Consumer Protection.

REGISTERED SUPPORT / OPPOSITION:

Support

SAG-AFTRA (sponsor)

California Labor Federation

Opposition

There is no opposition on file

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