

Vermont Legislative Council

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MEMORANDUM

To: The Vermont General Assembly  
From: Susan Senning, Erik FitzPatrick  
Date: January 24, 2011  
Subject: Report; impacts on hiring practices for employment-related immunity

**I. Background and Charge**

In May 2010, the Vermont General Assembly enacted Act No. 157 (S.292), *An act relating to term probation, the right to bail, medical care of inmates, and a reduction in the number of nonviolent prisoners, probationers, and detainees*. When a prospective employee applies for a job, Sec. 18 of Act 157 requires the prospective employer to request, and a previous employer to disclose, “all factual information that would lead a reasonable person to conclude that the prospective employee engaged in conduct jeopardizing the safety of a minor or vulnerable adult” while working for the previous employer.

During committee testimony and discussion, an amendment was proposed to grant immunity from civil liability to former employers who made the disclosures required by the new statute to prospective future employers. Ultimately, the committee decided to remove the immunity issue from the bill and instead study its potential impact on employers’ hiring practices, and to delay the effective date of the substantive reporting requirements until after the study could be completed and reviewed by the legislature.

The immunity study provision is contained in Sec. 19 of Act 157, which provides as follows:

Sec. 19. REPORT; CIVIL IMMUNITY

Legislative counsel shall review the potential impacts on hiring practices in Vermont if the state were to grant civil immunity for prospective, current, and former employers in connection with the disclosure of information concerning conduct jeopardizing the safety of a minor or vulnerable adult contained in a prospective employee’s personnel file from the previous ten years, including the manner in which these matters are addressed in other jurisdictions. On or before January 15, 2011, the legislative counsel shall submit a report regarding the review to the general assembly.

**II. Effect of Immunity on Hiring Practices**

Currently, there do not appear to be any studies, research, polls, or reports discussing the issue of potential impacts on hiring practices if civil immunity were granted to

employers in connection with their disclosure of information contained in a prospective employee's personnel file concerning conduct jeopardizing the safety of a minor or vulnerable adult. Legislative counsel conducted a thorough search of periodicals, law journals, secondary sources, and case law which located no information at all on the issue of potential impacts to hiring practices if immunity from liability were granted. There does not appear to be any research conducted or published on the subject.

In addition, professionals in the field, interested parties involved in the hearings held on the legislation last year, national policy professionals, legislative counsel from other states, and the National Conference on State Legislatures ("NCSL") were consulted. None of these parties was aware of any information bearing on the subject of potential impacts on hiring practices if civil liability were granted for disclosures of information concerning conduct jeopardizing the safety of minors or vulnerable adults. In fact, according to its Program Director, Jeanne Mejeur, NCSL did not know of and has not performed any analysis of how hiring practices among employers may have been affected by immunity or other tort provisions.

One factor possibly causing the absence of data on this subject is that no other state has passed a law requiring disclosure of employee conduct that may have jeopardized the safety of a minor or vulnerable adult.<sup>1</sup> Vermont's provision, which takes effect on April 1, 2011, mandates that this information be disclosed to prospective employers. The fact that no other state laws are directly on point may help explain the lack of information available.

### III. Job Reference Immunity Statutes

While no other states appear to require previous employers to disclose employee conduct information to prospective employers, a majority of states do provide immunity from liability when such disclosures are made.<sup>2</sup> These laws, which are known as "job

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<sup>1</sup> Some states define teacher disciplinary records as public records, which permits access to them through public records statutes, but this does not require disclosure of the records to prospective employers or anyone else. See Phillip D. McCarthy, Carolyn Russo, and Darlene Shores Lynch, *A Study of Laws in Other States that Permit the Dissemination of Confidential Information Pertaining to Teacher Certification*, Office of Policy and Legal Analysis, Maine State Legislature (October 27, 2008). (Categorizing state laws into three groups depending on how accessible teacher disciplinary records are to the public; the 12 "full access" state laws deem most of these records public but do not require their disclosure.)

<sup>2</sup> Several recent legal articles analyze the various types of immunity that arise in employment reference situations in other jurisdictions. An article from a national human resources group, The Society for Human Resource Management (SHRM), entitled "Implications of the Job Reference Immunity Statutes" (January 25, 2009) is particularly helpful to this review. The article is attached in Appendix B and is also available at: [http://www.shrm.org/hrdisciplines/staffingmanagement/Articles/Pages/CMS\\_000985.aspx](http://www.shrm.org/hrdisciplines/staffingmanagement/Articles/Pages/CMS_000985.aspx). See also, Matthew L. MacKelly, *Employer Liability for Employment References*, Wisconsin Lawyer (April, 2008) (highlighting the legal issues underlying employment references and other information given by employers about former employees); Kristin Berger Parker and Ellen G. Sampson, *Defamation in Employment Investigations: Bahr v. Boise Cascade Corp. and O'Donnell v. City of Buffalo*, William Mitchell Journal of Law & Practice (September 12, 2010) (examining the kinds of statements that can be considered defamatory, the chilling effect that the tort of defamation has on the communication of important information, the similarities and distinctions between public and private defamation; discusses the privilege

reference immunity statutes,” have been enacted in at least 34 states. They typically provide immunity from liability to past or present employers who make good faith disclosures to prospective employers about an employee’s job performance.<sup>3</sup> Information about a job performance is frequently defined to include such matters as duties, skills, evaluations, disciplinary actions, and illegal or wrongful acts.<sup>4</sup>

Maine’s job reference immunity statute, for example, provides that “[a]n employer who discloses information about a former employee’s job performance or work record to a prospective employer is presumed to be acting in good faith and, unless lack of good faith is shown by clear and convincing evidence, is immune from civil liability for such disclosure or its consequences.”<sup>5</sup> The statute has been in effect since 1995, but the Office of Policy and Legal Analysis with the Maine State Legislature confirms that there is no information known or available about the law’s impact on hiring practices. Even without such data, consideration of the job reference immunity statutes may be useful as the committee considers the related issues of mandatory disclosure and civil liability.

#### IV. Varying Perspectives

As discussed above, no analysis or verifiable data appear to exist on the issue of potential impacts on hiring practices if civil liability were granted for disclosures of information concerning conduct jeopardizing the safety of minors or vulnerable adults. In an effort to research the perspectives of potentially affected parties, several groups with an interest in the subject were solicited for comment or submitted unsolicited comments.<sup>6</sup> A summary of the survey responses is attached to this report as Appendix A, while memoranda and e-mail submissions from the groups are attached to this report as Appendix B.

In general, several themes are evident in the responses from interested parties. Groups who supported the mandatory disclosure requirement in Sec. 18 of Act 157 also tended to support immunity for the employers making the disclosures. However, all of these groups indicated that fairness required adopting a good faith standard for disclosures receiving immunity.<sup>7</sup> Other respondents were opposed to the mandatory disclosure

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defenses that courts have developed to alleviate the chilling effect of the tort, both in the public and private contexts; and considers how defamation and the privileges operate in the employment context). *See also*, Matthew W. Finkin and Kenneth G. Dau-Schmidt, *Solving the Employee Reference Problem: Lessons from the German Experience*, *American Journal of Comparative Law* (Spring 2009).

<sup>3</sup> *Id.* (SHRM article), pg. 3.

<sup>4</sup> *Id.*

<sup>5</sup> Maine Revised Statutes Title 26 § 598 (employment reference immunity; 1995), attached as Appendix C.

<sup>6</sup> These groups are: the Chittenden County Supervisory Union, the Vermont School Board Association, the Washington County Supervisory Union, the Vermont-National Education Association, the Chittenden South Supervisory Union, the Vermont Association for Justice, and Working Vermont. In addition, the Vermont Department of Human Resources was solicited for comment but had not responded by the time this report was submitted to the General Assembly. If the department does submit comment, it will be submitted to the committees of jurisdiction and the General Assembly as an addendum to this report.

<sup>7</sup> *See supra* (SHRM article), pg. 1, stating, “As a general rule, even without a specific state statute an employer is immune from liability for providing inaccurate job reference information if the employer disclosed the information in good faith – i.e., without “malice.”

requirements, believing that they were unfair to employees and would result in increased litigation. However, these same respondents were open to a discussion about whether Vermont should pass a job reference immunity statute if immunity were well-defined, limited, and included a good faith standard. These organizations appear to take the position that a limited job reference immunity statute would be much more preferable to the broad disclosure requirement scheduled to go into effect on April 1, 2011.

## **V. Conclusion**

Despite extensive research, no information was located or appears to exist about the impact on hiring practices of providing immunity to employers for disclosing information about employee misconduct, including conduct jeopardizing the safety of a minor or vulnerable adult. A majority of states do have job reference immunity statutes, which give employers immunity for making good faith disclosures about an employee's job performance to prospective employers. No research could be found concerning the impact of job reference immunity statutes on hiring practices, but analysis of such laws may be useful as the legislature considers whether to include an immunity provision in the mandatory disclosure requirements of Act 157 which are scheduled to go into effect on April 1, 2011.

**APPENDIX A**

**Summary of Responses from Interested Parties**

In order to provide a review on the issue of potential impacts on hiring practices if civil liability were granted for disclosures of information concerning conduct jeopardizing the safety of minors or vulnerable adults, several interest groups were solicited for comment or submitted unsolicited comments. The interested parties who submitted comments are the following eight groups:

Deb Robbins, Chittenden County Supervisory Union  
John Nelson, Vermont School Board Association  
Patty Blondin, HR Coordinator, Washington County Supervisory Union  
Joel Cook, Executive Director, Vermont-National Education Association  
Cindy Koenemann-Warren, Director of HR, Chittenden South Supervisory Union  
Eileen Blackwood, Vermont Association for Justice  
Michael Sirotkin, on behalf of Working Vermont  
Valerie Rickert, Acting Commissioner, Vermont Department of Labor

As these submissions demonstrate, the respondents agreed on some points and disagreed on others.<sup>8</sup> The following summary of their positions also includes comments pertaining to the broader employment disclosure requirements contained in Secs. 17 and 18 of Act No. 157. The summary begins with the positions with which most groups agreed, followed by positions with fewer groups' support.

Four of the eight groups, or 50 percent, responded to the precise issue of the potential impacts on hiring practices in Vermont were limited immunity granted.<sup>9</sup> All four groups stated that any impacts on hiring practices would be speculative, at best. They could not say what the impacts would be, or what changes to expect if immunity were granted. One respondent stated that it would be preferable to share information without fear of a lawsuit, as many employers are hesitant to share information from a personnel file due to fear of possible personal liability for any negative or misstatements. Another stated that she would expect more information sharing were immunity granted. Another stated that she would need to review the language with in-house counsel before any changes were made, and that she would not want to be the test case for such immunity.

Four of the eight groups, or 50 percent, suggested that if immunity were granted, it would be essential to include a definition of the phrase "conduct jeopardizing the safety."<sup>10</sup> Several of these four groups stated that if this phrase were not defined in statute, then there would be no change in their hiring practices even if immunity were granted. One group commented that this definition must also specify who would be responsible for determining whether such conduct "jeopardized the safety" of the protected groups. Another group commented that this term is so broad that it would probably include unintended conduct such as unintentional accidents.

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<sup>8</sup> The complete e-mail submissions and memoranda from interested parties can be found in Appendix B of this report.

<sup>9</sup> The four groups are: Washington County Supervisory Union (WCSU), Vermont-National Education Association (VT-NEA), Chittenden South Supervisory Union (CSSU), and Vermont Department of Labor (DOL).

<sup>10</sup> The four groups are: WCSU, CSSU, Vermont Association for Justice, and Working Vermont (WV).

Four of the eight groups, or 50 percent, suggested that providing immunity without including a requirement that information be disclosed in good faith would be unfair and potentially prejudicial to employees.<sup>11</sup> Some employers might, for example, make disclosures on the basis of unproven rumors if they know they would be immune from liability.

Four of the eight groups, or 50 percent, expressed the view that the previous ten years is too lengthy a time period for which to require disclosure.<sup>12</sup> Typically, schools only keep records for six years. Two groups were concerned that employers would most likely feel an increased burden if they were required to maintain personnel files and report information from the previous ten years.

Four of the eight groups, or 50 percent, were concerned that unintended consequences might arise from requiring employers to report while simultaneously granting them immunity.<sup>13</sup> Concerns ranged from the burden on employers of newly required recordkeeping, to the increase such provisions could cause in workplace disputes over trivial disciplinary matters. One group mentioned the risk of over-broad reporting that could result, while another was concerned that the provisions could have the opposite effect of leading current employers to include less information in a personnel file. Several of these respondents were concerned that over-broad reporting could damage an employee's job prospects because negative or qualified references from former employers often eliminate applicants from consideration for employment completely.

Three of the eight groups, or 37.5 percent, suggested that the legislature consider expanding the information to be disclosed beyond that contained in the employee's personnel file.<sup>14</sup> Schools do not keep information from criminal record and abuse checks in an employee's personnel file; this information is kept separate for confidentiality purposes. There was uncertainty about how to proceed if information subject to disclosure by the statute was known but not contained in the personnel file.

Three of the eight groups, or 37.5 percent, supported repealing the reporting requirements of Act No. 157 altogether and replacing them with a limited, reasonable job reference immunity statute similar to those passed by other states. Some groups were concerned that the reporting requirements would result in unsubstantiated charges in an employee's personnel file being prematurely disclosed.<sup>15</sup> If employers are required to disclose information about employees and held immune from liability for doing so, those groups felt there would be no legal protection for employees who are wrongly accused of misconduct.<sup>16</sup>

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<sup>11</sup> The four groups are: VT-NEA, CCSU, WCSU, and Vermont School Board Association (SBA).

<sup>12</sup> The four groups are: WV, WCSU, VT-NEA, and Vermont Association for Justice.

<sup>13</sup> The four groups are: VT-NEA, WCSU, CSSU, and Vermont Association for Justice.

<sup>14</sup> The three groups are: CSSU, WCSU, and VT-NEA.

<sup>15</sup> The three groups are: WCSU, WV, and Vermont Association for Justice.

<sup>16</sup> The two groups are: WV and Vermont Association for Justice.

Finally, other views should be noted. The acting commissioner for the Vermont Department of Labor stated that the disclosure requirement is too broad in scope and impossible to enforce. The Vermont School Board Association expressed the view that disclosure provisions should cover all employers instead of being limited to schools.

**APPENDIX B**

**Memoranda and E-mail Submissions from Interested Parties**

## Susan Senning - RE: Information request

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**From:** "McCarthy, Phillip" <Phillip.McCarthy@legislature.maine.gov>  
**To:** SSenning@leg.state.vt.us  
**Date:** 12/3/2010 3:39 PM  
**Subject:** RE: Information request

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Susan:

Regarding your request for how Maine addresses the civil immunity question, here's a few things for you to mull over:

1. I posed your question to Peggy Reinsch who staffs the Legislature's Judiciary Committee in Maine. Please see her e-mail response below (in blue text). FYI, here's the text of the Maine employment law statutes that she referenced in her response.

### **TITLE 26 §598. EMPLOYMENT REFERENCE IMMUNITY**

An employer who discloses information about a former employee's job performance or work record to a prospective employer is presumed to be acting in good faith and, unless lack of good faith is shown by clear and convincing evidence, is immune from civil liability for such disclosure or its consequences. Clear and convincing evidence of lack of good faith means evidence that clearly shows the knowing disclosure, with malicious intent, of false or deliberately misleading information. This section is supplemental to and not in derogation of any claims available to the former employee that exist under state law and any protections that are already afforded employers under state law. [1995, c. 335, §1 (NEW) .]

2. Another OPLA colleague, Carolyn Russo, and I prepared a staff study report a few years ago that appears to be somewhat similar to the focus of your study. The report titled -- "**OPLA Staff Report on A Study of Laws in Other States that Permit the Dissemination of Confidential Information Pertaining to Teacher Certification**" -- can be found at our website using this link: <http://www.maine.gov/legis/opla/teacherconfreport.pdf>.

Perhaps a quick review of parts of this report can familiarize you with the licensing and statutory requirements in Maine. After your review, perhaps we could schedule a conference call to discuss questions you may have.

3. I am not familiar with any Maine research or data on potential impacts on hiring practices. From my role as staff to the Education Committee for 14 years, there have been a number of anecdotal reports regarding the gaps in the Maine state-local scheme (i.e., between the authority of the Maine DOE under state-level licensure/certification requirements, the provisions pertaining to the authority of local school boards, and the rights and privileges of school employees).

Then again, Maine has recently enacted legislation permitting the Maine DOE to report otherwise confidential information ...

### **Title 20-A §13004. List of persons certified; records confidential**

**2-A. Confidentiality.** The provisions of this subsection govern confidentiality. For the purposes

of this subsection, the term "certification" means certification, authorization or approval under this chapter and chapter 502.

- A. Complaints and responses pursuant to section 13020 and any other information or materials that may result in an action to deny, revoke or suspend certification are confidential, except when submitted in court proceedings to revoke or suspend certification.
- B. Except for information designated confidential under section 6101 or section 6103, information designated confidential under paragraph A may be released or used by the department as necessary to:
- (1) Complete its own investigations;
  - (2) Provide information to a national association of state directors of teacher education and certification to which the State belongs;
  - (3) Assist other public authorities to investigate the same teacher's certification in another jurisdiction;
  - (4) Report or prevent criminal misconduct or assist law enforcement agencies in their investigations; or
  - (5) Report child abuse or neglect under Title 22, section 4011-A.
- C. The department may publish and release as public information statistical summaries of complaints and dispositions as long as the release of such information does not jeopardize the confidentiality of individually identifiable information.
- D. Notwithstanding paragraph A, the following information concerning final written decisions relating to disciplinary action taken by the commissioner against a person holding certification is a public record:
- (1) The name of the person;
  - (2) The type of action taken, consisting of denial, revocation, suspension, surrender or reinstatement;
  - (3) The grounds for the action taken;
  - (4) The relevant dates of the action;
  - (5) The type of certification and endorsements held, including relevant dates;
  - (6) The schools where the person was or is employed; and
  - (7) The dates of employment.

I hope this is helpful. Please review these materials and perhaps we can chat next week.

Best regards,

:{o  
Phil

**Phillip D. McCarthy, Ed.D.**, Legislative Analyst  
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URL: <http://www.state.me.us/legis/opla>

*Goodness in the hearts of people brings beauty to the soul of the world.*

~ Charles Thorsen

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Hi, Phil -

I don't have any background in this issue. Title 26 section 598 provides immunity for a former employer's actions taken in good faith concerning employment references. It is actually broader than the Vermont law because it applies to all employers/employees. It does seem to save whatever existing claims there may be for actions taken in anything other than good faith. It looks like it has been on the books since 1995. No case law.

<http://www.mainelegislature.org/legis/statutes/26/title26sec598.html>

Hope this is helpful. Happy to talk to you or the Vermont folks.

Peggy

Margaret J. Reinsch, Esq., Legislative Analyst  
Joint Standing Committee on Judiciary  
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**From:** Susan Senning [mailto:SSenning@leg.state.vt.us]  
**Sent:** Tuesday, November 30, 2010 11:42 AM  
**To:** McCarthy, Phillip  
**Subject:** Information request

Hello Phillip,

I received your name from Donna Russo-Savage, my colleague at Vermont's Legislative Council. I currently serve as law clerk to the judiciary committees and was assigned the duty of researching the issue emboldened below.

The general assembly passed Act 157 last session, which deals with disclosure of information to prospective employees. The committees decided to extend the effective date for purposes of looking into the issue presented in Section 19 (below), namely granting immunity from civil liability for employers who disclose this information about former employees. Specifically, I am wondering if you have any data or research findings from Maine about potential impacts on hiring practices that have resulted from your law. If you know anything that might help with our report, or can re-direct me, I would very much appreciate your help.

You can email me at this address or call me directly at 802-828-2277. Thanks so much, and I look forward to hearing from you at your earliest convenience,  
Susan Senning  
Law Clerk, Vermont Legislative Council

Sec. 18. 21 V.S.A. § 307 is added to read:  
§ 307. DISCLOSURE OF INFORMATION; WAIVER



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**Department of Labor**  
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December 27, 2010

Susan Senning  
Vermont Legislative Council  
115 State Street  
Montpelier, VT 05633-5301

Re: Report Mandated by Act 157 of the 2010 General Assembly

Dear Susan:

I am writing to provide formal comment on the provisions of Section 18 of Act 157, in furtherance of the review and report required by Section 19 of the same act. As the acting commissioner of labor, my department would have the duty of enforcing this rule.

I take no position on the relative merits of the liability waiver or the mandatory solicitation of information from past employers. Rather, my concern is with the scope of employment covered by this legislation. In particular, I reference the following sentence describing the type of employee subject to the background inquiry:

Each prospective employee whose duties may place that person in a position of power, authority, or supervision over *or permit unsupervised contact with* a minor or vulnerable adult shall sign a waiver prior to employment . . .

21 V.S.A. § 397(a). My concern is with the italicized language. Broadly construed, any employee who is working alone and unsupervised, in a business that is open to the public, would be subject to this definition. This would include literally thousands of small retail businesses and convenience stores. I do not believe it was the intent of the Legislature to cover this sort of employer. With that in mind, I would recommend either striking the phrase "or permit unsupervised contact with" entirely, or rewrite it in such a way as to narrow its scope considerably.

Thank you for considering my recommendation. I look forward to seeing the final report.

Sincerely,

A handwritten signature in black ink that reads "Valerie Rickert".

Valerie Rickert  
Acting Commissioner

VR:lc



>>> Cindy Koenemann-Warren <[ckwarren@cssu.org](mailto:ckwarren@cssu.org)> 1/3/2011 2:07 PM >>>

Hi Susan

I absolutely agree that any change in practice would be speculative at best. I know I would not want to be nor would I want any of my superintendent, principals or other supervisors be the test case for the new protections. Any changes we made to our current practices would be based on my own review and the review and discussion with our attorney. The bigger issue for us would be separation agreements that actually prevent the disclosure and whether the new law would trump the agreement or not and if not, would we be able to get a signed separation agreement that allowed us to disclose such information. A big issue is the ability to terminate and the steps we have to go through once someone is an employee. Even if the law intends to grant protection in this limited circumstance (

jeopardizing the safety) without clear definitions of what that means and who makes that determination I suspect not much would change. For example, if we had a teacher who failed to appropriately supervise (our opinion) on a field trip, who would determine if thsi jeoporadized safety or not. I would need to know a lot more detail before anything would change in our supervisory union. What would be interesting is if such disclosure was not protected but mandated. Then things would get really interesting.

Hope this helps but let me know if you need more. Would it be possible to get a copy of the report or will it be public?

Thanks

~Cindy

Cindy Koenemann-Warren  
Director of Human Resources  
Chittenden South Supervisory Union  
5420 Shelburne RD  
Shelburne VT 05482  
802-383-1233 (phone)  
802-383-1242 (fax)

"Set your sights high, the higher the better. Expect the most wonderful things to happen, not in the future but right now." -Eileen Caddy



January 5, 2011

Susan Senning, Legislative Council  
State House  
Montpelier, Vermont

Re: Act 157 and potential immunity

Dear Susan:

Thanks for the opportunity and the reminder(s) of the opportunity to comment on your pending assignment.

It is no secret we believe the specific provisions of this act relating to employer obligations (Sections 17 and 18) are unwieldy, unnecessarily intrusive, and simply unwise. While your assignment does not include making recommendations about the underlying law, we think the best policy approach is for the state to take two or more steps back from the provisions enacted last year and consider if it isn't immunity itself that should be the focus of legislation this year. In short, enact a law conferring good faith immunity for disclosure of job-performance relevant information about a prospective/former employee and dispense with – repeal – the complex provisions of Act 157 requiring employers to come up with information up to a decade old for purposes of mandatory disclosure to any prospective employers, with obligations flowing in several directions. It was a "hard case" that led to this law, and it seems to us well in the public interest not to implement it in its current form.

With or without immunity, it will require significant recordkeeping and likely lead to increased workplace disputes over trivial disciplinary matters as well as the disclosure of more information than is necessary or proper. It may also lead "current" employers to include less information in personnel files. We really do not know what impacts to expect on hiring practices *per se*.

The majority of states have statutes conferring somewhat limited immunity from liability. I'm certain you've done the research and won't attempt to summarize or cite any of them here. We have not found any law comparable to Act 157's employment provisions. Suffice it to say that Vermont-NEA does not object to a law codifying principles of good faith associated with relevant information sharing between employers about an employee, and we support ensuring the employee is provided the information as well. We believe doing so should be accompanied by a simple repeal of Sections 17 and 18 of Act 157.

I'm aware this may appear inconsistent with our testimony on S.292 last May 3. Then, our focus was on an initial draft that simply required the free flow of information, without regard to its accuracy. We said, then, "We do not support a proposal that insulates employers from liability for all but *deliberately* false or misleading statements. We oppose a proposal that purports, at

least by omission, to deny employees the right to dispute the accuracy of allegations made against them." Our immediate concerns then were the term "deliberately" and the probably lack of knowledge by the employee of the information being shared. We believe a grant of immunity should be balanced by a standard of care that extends beyond deliberate misstatements. The current law did not include immunity (apart from your review) and did include assurance the employee has access to the information being shared.

In summary, we believe the best policy approach, including but going beyond the immunity issue, would be one that acknowledges the overreaching and impractical aspects of Sections 17 and 18 and, therefore, repeals those sections and replaces them with a civil immunity provision with the following components, which include several of the provisions in Section 18:

- Insulates from civil liability prospective and current/prior employers who, acting in good faith, share certain information about a job applicant/employee;
- Extends to jobs where the duties may place the employee in a position of power, authority, or supervision over or permit unsupervised contact with a minor or "vulnerable" adult;
- Limits the information to be shared to matters relevant to job performance and related to conduct jeopardizing the safety of a minor or vulnerable adult;
- Ensures prior notice to the job applicant/employee about that information and provides him or her an opportunity to review and respond to it; and
- Requires the current/prior employer to include the job applicant/employee's response with the information.

We also suggest defining "vulnerable" adult. There are other secondary issues that would also need to be addressed, but these are our current views about the basics.

We will be pleased to participate in consideration of the best approach to this issue. Thanks once again, Susan, for the reminder(s).

Sincerely,



Joel D. Cook, Esq.  
Executive Director

**Susan Senning - FW: FW: Susan Senning Request via Jeff Francis**

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**From:** Patty Blondin <pblondin@u32.org>  
**To:** "ssenning@leg.state.vt.us" <ssenning@leg.state.vt.us>  
**Date:** 1/6/2011 11:32 AM  
**Subject:** FW: FW: Susan Senning Request via Jeff Francis  
**CC:** Robbe Brook <rbrook@u32.org>, Lori Bibeau <lbibeau@u32.org>, jeff franci...

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Hi Susan. I have revised my comments on this subject as follows. It is difficult to comment when I do not have specific language on the potential legislation. I think you can just use my comments as is since I have not had a chance to poll Superintendent Brook for her input to put it on official letterhead. Hope my comments are useful. Good luck and thanks, Patty Blondin

This is in response to your request for information from employers regarding potential legislation regarding immunity from civil legal action.

I don't have any specific situations I can think of in the 10 years I have been in this position where we had any legal action taken against us as a result of a negative reference check we received that resulted in not hiring someone. I do think schools and supervisory unions already share information confidentially if there is something serious in a potential employee's background. It would be a good thing to me to be able to share information if it involves the safety of children and staff and not worry about a civil suit against us or an individual within WCSU.

This would also be a good thing because I think many employers are hesitant to give out information because of the personal liability. I know when we check at least 3 references on potential employees and subs, 99.9% of the time they are references provided to us who will be of a positive nature. Why would anyone provide a reference that would be negative? It would be nice to be able to go a little further and contact recent employers, as sometimes they are not the ones listed as references and one wonders why.

The potential impacts might be getting bad information from only one source. Employers would really have to pole more than one employer and do more research before hiring or terminating someone. For instance, one employer may consider an incident as "jeopardizing safety of a minor or adult" when another one may not. Case in point...it can take months to appeal an abuse substantiation charge whether legitimate or not. To share that information with another employer prematurely would not be fair. We have had a case where it was reversed upon appeal.

I think they would first have to also look at the impact on the confidentiality laws for sharing criminal background checks and abuse checks also. Schools can share criminal background convictions, but just school to school, not to other employers. Even schools are not allowed to receive specific information on FBI out of state records without written consent from the person with the charge.

This might grant "civil" immunity, but what about bargaining agreement grievances? What about the fact that we do not keep employee files more than 6 years? And, it seems they are saying you can only share what is in the personnel file. Criminal record and abuse checks could not then be shared as they must be kept separate from the personnel file for confidentiality reasons.

All in all, it would be a good idea to honestly share information on why you terminated an employee

(or encouraged an employee to resign) so they don't just move them on to another unsuspecting employer to get rid of them and avoid any potential litigation. I assume this is why the legislation is being considered as it has happened more than once in Vermont.

*Patty Blondin- Human Resources*

**Washington Central Supervisory Union**

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**From:** Lori Bibeau  
**Sent:** Wednesday, January 05, 2011 12:55 PM  
**To:** Patty Blondin; Robbe Brook  
**Subject:** FW: FW: Susan Senning Request via Jeff Francis

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**From:** Susan Senning [mailto:SSenning@leg.state.vt.us]  
**Sent:** Wednesday, January 05, 2011 12:33 PM  
**To:** Lori Bibeau; 'jfrancis@vtvsa.org'  
**Subject:** Re: FW: Susan Senning Request via Jeff Francis

Hi Lori,

I wanted to follow up on the information you've provided below. I mentioned that I will be summarizing the position of your HR coordinator in my report due to the general assembly, but we've received a couple of memoranda from other groups that I will attach to the report.

I will still summarize the position below for incorporation into the report, but if you'd like to essentially cut and paste the below onto letterhead and make it more formal so I can attach it to the report, feel free. The decision is completely up to you, and it is not necessary. Just thought I'd give you a heads up!

## Memorandum

To: Susan Senning, Legislative Counsel  
From: Vermont Association for Justice  
Re: Act 157 Employer reference immunity study (S. 292)

The Vermont Association for Justice (VTAJ) is concerned with the effect that any blanket immunity for employers would have on the ability of employees to obtain future employment, particularly given the language in S. 292 (2010). A negative, or even a qualified, reference from a former employer often eliminates an applicant for consideration for new employment. Yet, an employee who fits terribly in one workplace may thrive in another. In most situations involving lawyers, obtaining a reference that focuses on the employee's positive qualities, or at best remains neutral, is key, and most employees in those situations go on to have successful careers at another place. Providing immunity for references therefore raises a number of concerns for employees and is likely to lead to increased employment litigation.

In particular, the following concerns stand out:

- I. S. 292 refers to “the disclosure of information concerning conduct jeopardizing the safety of a minor or vulnerable adult contained in a prospective employee’s personnel file.”
  - A. The phrase is not defined and thus will lead to significant litigation. The language “conduct jeopardizing the safety” is so broad it could include a much broader array of conduct than that with which the legislature is concerned. It could cover unintentional accidents—for example, dropping a glass and breaking it in a vulnerable adult’s nursing home room. It could include a situation with minor risks from which no injury actually resulted—for example, a young camp counselor who let a camper swing on a rope swing but forgot to check the strength of the rope first.
  - B. Since there is to some extent a risk of harm in almost any situation, reasonable people can disagree about whether specific conduct puts a vulnerable person or a minor in jeopardy or whether the risk is sufficiently low that it is acceptable. Yet, the statute provides no guidance on how to decide whether conduct falls within its definition. Thus, there is a risk that reporting will be overbroad, thus harming an employee’s chance to obtain new employment.
  - C. The phrase apparently includes a minor’s or vulnerable adult’s emotional or psychological safety, as well as physical safety, yet there may be significant differences between individuals, particularly those of different cultural and economic backgrounds, about what constitutes emotionally safe conduct. Without more specific definition, application of the provision could have discriminatory effects.
  - D. There is no protection for an employee who is wrongly accused of conduct. If an employer has immunity, it does not have much motivation to investigate or determine the truth of an allegation.

E. Information “concerning” conduct jeopardizing safety could include conduct that has not actually jeopardized anyone, but that an employer fears could, even though it is perfectly appropriate in the context in which it occurred. Blanket immunity would take away any imperative to have a factual basis for an accusation and would encourage stereotypical and prejudicial conclusions.

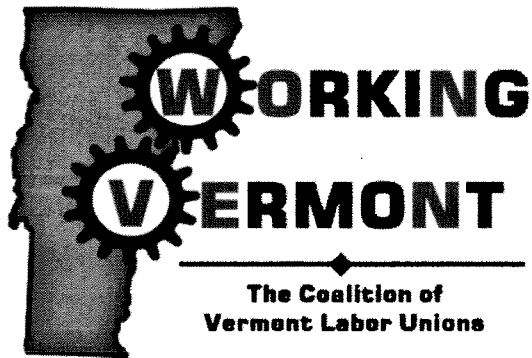
II. Blanket immunity may prevent an employee from challenging an employer’s unfair or inappropriate action. If an employer is acting in bad faith toward an employee—for discriminatory reasons or just out of personal animosity—the employee has no way to challenge that action. Even if a provision requiring good faith were included in an immunity provision, the reality is that few low-wage employees would be able to afford an attorney or the cost of litigating an immunity challenge.

III. Employers, understandably, give the benefit of the doubt toward protecting a minor or vulnerable adult. In many situations there is no clear way to determine the truth of whether something occurred or did not, or whether a particular employee was responsible for a situation, even if the employer acts in good faith. Additionally, often an employer’s own policies or lack of resources may have contributed to the incident, yet only the employee’s conduct is put at issue. If the employer has immunity, particularly combined with a requirement to report the conduct, the employee could be haunted for years by conduct that s/he did not even do or did not control. To prevent that unjust result, the employee will have to challenge any employer decision that might impact his/her future employment, resulting in increased employment litigation.

IV. Nothing in the general idea of immunity requires an employer to correct the record or cease passing on information if it is later proven to be false.

V. As written, the immunity provision really cannot be divorced from the rest of the Act, which requires an employer to report information for 10 years. That period is incredibly long, particularly for a young person who has made a mistake but corrects it. It assumes that people cannot change or learn from their mistakes. Essentially, this will mean that any person accused of conduct that could fall within this definition will have to litigate the issue, if s/he can afford to do so, or change professions.

Proposal: The required reporting provision of S. 292 is a huge part of the problem. If reporting were not required, then an immunity provision similar to that adopted in a number of other states might be a reasonable balance of the various interests. Many states provide immunity, or qualified immunity, for truthful references that are provided in good faith, are not reckless or malicious, and are not intentionally misleading. While removal of the required reporting provision would still allow an employer and employee to negotiate an agreement in which information was not shared, if an employer has the good faith immunity described above, it will be far less likely to agree to keep information confidential in those situations where the employee’s behavior was truly injurious to minors or vulnerable adults. After all, it will want other employers to provide it with that information about its hires. In the inconclusive cases, the employer may be more likely not to report, and those are the cases in which the most harm can be done to an innocent employee.



Susan Senning  
Legislative Council  
Statehouse  
Montpelier, VT 05602

January 10, 2011

RE: S.292 Immunity Study

Dear Susan,

On behalf of the Vermont Building Trades and the Working Vermont coalition of labor unions, please accept the following brief comments on the employer reference sections on S.292. We have just been retained, so these comments should be viewed as very preliminary and general, and we look forward to supplying additional information as this review progresses.

As many have commented, the immunity study called for in sec 19 of S.272 is difficult to address without looking closely at the underlying provisions of sec.18. It is quite obvious to any employer or union representative, who is knowledgeable on employment reference issues, that the breath and vagueness of many of the new law's underlying terms, such as those highlighted below, call out for greater clarity and definition.

Sec. 18. 21 V.S.A. § 307 is added to read: § 307. DISCLOSURE OF INFORMATION;  
WAIVER

(a) Each prospective employee whose duties may place that person in a *position of power*, authority, or supervision over or permit *unsupervised contact* with a minor or vulnerable adult shall sign a waiver prior to employment authorizing:

(1) the prospective employer to request information about the prospective employee from current employers and former employers who employed the person within the previous ten years regarding conduct *jeopardizing the safety* of a minor or vulnerable adult; and (2) the current and former employers to disclose the requested information as provided in subsection (c) of this section. (b) The prospective employer of a prospective employee described in subsection (a) of this section shall request in writing that the current and former employers disclose all factual information that would *lead a reasonable person* to conclude that the prospective employee engaged in conduct jeopardizing the safety of a minor or vulnerable

adult.

Without significant clarifying and limiting amendments to these terms it is almost a given that frequent litigation will ensue. It is also fairly certain that employers will feel the burden of the unprecedented requirement of reviewing files of up to 10 years. As a result, there may be an incentive to destroy records prematurely; to not review the records with reasonable scrutiny; or to keep fewer records to begin with. Disputes within existing employment over minor conduct and other personnel matters will take on far greater importance and increase. Responsible employers will likely feel the crush of numerous instances of unnecessary, improper and burdensome reporting.

Many of the above problems inherent in Sec.18 could easily be exacerbated by the granting of immunity and under the broadest of readings, the number of jobs and professions and lives impacted in our state could be startling. New challenges and lack of any meaningful redress, especially for workers inappropriately reported on, would also surface.

While the goal of protecting minors and other vulnerable Vermonters is obviously crucial, it is equally important not to overreach and ruin many working Vermonters careers for minor, disputed or erroneous reports of questionable conduct or conduct or conditions unrelated to the protection sought.

Moreover, broad immunity would leave many working Vermonters without recourse to remedy any injustice in this context. Inappropriate, inaccurate and/or irrelevant personnel records would be unaffordable and next to impossible to correct.

Again, while these comments are only meant to be preliminary, we are aware of no law of any state that is as broad and ill defined as Vermont's. Adding immunity will only create worse problems for innocent Vermonters and create new ones for employers, including reducing access to qualified and inappropriately accused workers.

Obviously, we all need to collaborate to find a better way to protect against the situation that gave rise to sections 17 and 18 of S. 292. The solution thus far, and any addition of immunity, cast far too wide a net. One that could adversely impact the hiring of thousands of Vermonters, who most of us would agree are not deserving of such a result

Thank you.

Sincerely,

Michael Sirotkin, Esq.  
Sirotkin & Necrason, PLC  
33 Court St.  
Montpelier, VT 05602



**APPENDIX C**

**Maine Revised Statutes Title 26 § 598  
(Employment Reference Immunity; 1995)**

## **TITLE 26 §598. EMPLOYMENT REFERENCE IMMUNITY**

An employer who discloses information about a former employee's job performance or work record to a prospective employer is presumed to be acting in good faith and, unless lack of good faith is shown by clear and convincing evidence, is immune from civil liability for such disclosure or its consequences. Clear and convincing evidence of lack of good faith means evidence that clearly shows the knowing disclosure, with malicious intent, of false or deliberately misleading information. This section is supplemental to and not in derogation of any claims available to the former employee that exist under state law and any protections that are already afforded employers under state law. [1995, c. 335, §1 (NEW).]