

HOUSE OF REPRESENTATIVES  
COMMONWEALTH OF PENNSYLVANIA

\* \* \* \* \*

House Bill 1972

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House Judiciary Committee

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Room 60, East Wing  
Main Capitol Building  
Harrisburg, Pennsylvania

Tuesday, February 27, 1996 - 10:00 a.m.

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BEFORE:

Honorable Thomas Gannon, Majority Chairman  
Honorable Jerry Birmelin  
Honorable Timothy Hennessey  
Honorable Robert Reber  
Honorable Chris Wogan

Honorable Thomas Caltagirone, Minority Chairman  
Honorable Peter Daley  
Honorable Kathy Manderino

KEY REPORTERS  
1300 Garrison Drive, York, PA 17404  
(717) 764-7801 Fax (717) 764-6373

ORIGINAL

**ALSO PRESENT:**

**Judy Sedesse**  
Committee Administrative Assistant

**Brian Preski, Esquire**  
Chief Counsel for Committee

**Dan Fellin**  
Counsel for Committee

**Heather Ruth**  
Majority Research Analyst

**James Mann**  
Majority Research Analyst

**Steve Meehan**  
Majority Research Analyst

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1           CHAIRMAN GANNON: Good morning, ladies  
2 and gentlemen. Pursuant to a Notice of Public  
3 Hearing on House Bill 1972, I would like to call  
4 this Judiciary Committee meeting to order and  
5 invite our first witness, Susan Warner,  
6 President of the Human Resource Trouble  
7 Shooters.

8           Susan, begin. Good morning.

9           MS. WARNER: Good morning.

10          CHAIRMAN GANNON: Before we begin, I  
11 would like to have the members introduce  
12 themselves who are here with us this morning.  
13 Beginning with Representative Reber. Seated  
14 next to Representative Reber is Democrat  
15 Chairman Caltagirone and Chief Counsel Brian  
16 Preski and Representative Timothy Hennessey and  
17 next to him is Representative Jerry Birmelin and  
18 next to Representative Birmelin is  
19 Representative Peter Daley. Representative Al  
20 Masland just entered.

21          We forgot the prime sponsor. Finally,  
22 the man in the spotlight -- we were keeping you  
23 for last --

24          REP. WOGAN: I hope that is not a  
25 harbinger.

1           CHAIRMAN GANNON: Saving the prime  
2 sponsor till the last, Representative Chris  
3 Wogan.

4           Go ahead, Susan.

5           MS. WARNER: Thank you very much.

6           Good morning, Mr. Chairman and Members  
7 of the Committee. My name is Susan Warner. I  
8 am President of the Human Resource Trouble  
9 Shooters; I am also a former Vice President of  
10 Human Resource in Healthcare and I have more  
11 than 20 years of experience in the Human  
12 Resource profession. I also happen to be an  
13 employment lawyer and a member of SHRM, which is  
14 the Society for Human Resource Management which  
15 has over 70,000 members, HR professionals in the  
16 state in the country and 4,000 members in  
17 Pennsylvania. I serve as Chairperson of the  
18 Legislative Affairs Committee for the SHRM  
19 Pennsylvania State Council, which is a volunteer  
20 position.

21           Human Resource professionals are  
22 responsible for some very critical functions for  
23 employers like wage and salary benefits, or  
24 compensation as it is referred to, training and  
25 development, labor employment relationships.

1 But perhaps the most important is the employment  
2 function -- recruiting and selection -- because  
3 we need to help hire the most skilled and  
4 qualified workforce available, and because those  
5 hiring decisions are the direct impact on the  
6 day-to-day business of America with respect to  
7 their safety, their quality and their customer  
8 satisfaction.

9 Our existing local, state and federal  
10 laws do recognize that the best predictor of  
11 success on the job is an employee's past  
12 performance in similar positions. But the issue  
13 is that this legitimate and critical role of  
14 reference checking has been undermined by costly  
15 lawsuits that stem from the reference process  
16 and employers' attempts to avoid those lawsuits.  
17 So, today, I want to talk to you about the need  
18 for legislation that provides employers with  
19 immunity from lawsuits when they provide  
20 reference information in good faith.

21 You want to keep in mind that this  
22 legislation is not providing employers with  
23 anything that Pennsylvania common law does not  
24 already provide them.

25 This law, this bill, would essentially

1 codify the existing case law in Pennsylvania;  
2 and the codification over time -- though perhaps  
3 not overnight -- will free employers and  
4 encourage them to provide legitimate job-related  
5 information because it will clarify our existing  
6 case law.

7           Some background. For the last several  
8 years, lawsuits stemming from job reference  
9 processes have run the gamut -- from claims of  
10 invasion of privacy to defamation, from  
11 negligent hiring. So many companies have  
12 adopted very strict policies of what we call  
13 nondisclosure of job performance and job  
14 behavior information. The result: employers  
15 respond to inquiries in to job performance  
16 history with very limited information. We refer  
17 to that information as directory-only: what is  
18 your name, rank and serial number, i.e., your  
19 title, when we hire a manager, and that's all  
20 they'll tell; or, worse, a neutral policy: we  
21 will give you a neutral reference.

22           This nondisclosure affects business on  
23 a day-to-day basis, and it is not just  
24 businesses that suffer. Good employees are  
25 denied the right to have their previous job

1 performance considered in the hiring process.  
2 Bad employees are protected from any history of  
3 substandard performance and inappropriate and  
4 yes sometimes even illegal behavior. And this  
5 results in serious consequences: botched jobs;  
6 safety violations; and in the most serious  
7 cases, workplace violence or the costly claims  
8 of negligent hiring. It prevents the good  
9 employee from getting a good reference because  
10 of the employer's fear of litigation - and, even  
11 worse, it puts the good candidate on the same  
12 level playing ground as someone who may be a  
13 convicted felon, a sexual harasser or has  
14 committed violence in the workplace. The same  
15 level playing ground.

16 One emergent claim is negligent hiring  
17 and this can be brought against employers for  
18 hiring (or even for retaining) an employee when  
19 the employer knew -- or should have known,  
20 should have known -- that the employee was unfit  
21 for the job and might create a danger to third  
22 parties. Plaintiffs in negligent hiring actions  
23 claim that if the employer had properly examined  
24 an employee's background, the employee would not  
25 have been hired and the injury would not have



1 occurred. For example, Pennsylvania case law  
2 has abounded with negligent hiring cases  
3 stemming from the job reference process. It  
4 ranges from parents being sued (as employers)  
5 for negligently hiring baby sitters, paying the  
6 baby sitters, and found negligent because they  
7 should have known of the dangerous propensity of  
8 the baby sitter. I won't pretend that I have  
9 always checked every reference on every baby  
10 sitter I eventually used and paid. And it  
11 ranges through, in Pennsylvania, as far as  
12 holding an employer liable for not communicating  
13 to their customers the propensity for violence  
14 of a former employee who once had access to  
15 their homes. It is a real tough situation.

16 Prevention through a criminal  
17 background check is a Catch-22 for employers.  
18 It is cost-prohibitive for many employers. The  
19 EEOC guidelines suggest that an employer may  
20 have discriminated if an employment decision is  
21 based solely on the results of criminal  
22 background checks; and it has been my experience  
23 that even in situations involving potentially  
24 criminal activity on the job, like theft, sexual  
25 harassment, fist fighting, even fights involving

1 deadly weapons, most employers do not want to be  
2 involved in criminal prosecution of employees.  
3 If the internal employment records clearly  
4 reflect and accurately document the on-the-job  
5 behavior -- which is for the protection of  
6 potential employers and future co-workers --  
7 should, could and would be transmitted if  
8 employers have the protection of the proposed  
9 legislation.

10           Defamation is another one, much more  
11 common for employers, against employers. This  
12 is a claim where a former employer makes a  
13 statement to a third party which allegedly  
14 injures the employee's reputation and causes  
15 damage, or has the potential to cause damage to  
16 the employee. So even when the employer has a  
17 sound basis for communicating a legitimate  
18 job-related negative reference, they keep  
19 silent, they are gagged and they give  
20 directory-only information.

21           I have been in the position, on more  
22 than one occasion, when I have been required to  
23 reject an apparently well highly-qualified  
24 employee because I was unable to obtain a  
25 reference. Just got directory-only information

1 in favor of the less-qualified employee who had  
2 a neutral letter of reference. The reason the  
3 lesser employee had a neutral letter of  
4 reference was because the last employer just  
5 wanted to get rid of him. And so, they said,  
6 here, I will give the neutral letter of  
7 reference. You resign and we will give you a  
8 neutral letter of reference, go away. And  
9 that's what really happens. So, in practice, it  
10 has become almost suspect when an applicant does  
11 have a good letter of reference.

12 Pennsylvania employers do have a  
13 conditional privilege, but the theory does not  
14 provide statutory protection for us. The  
15 protection exists where an employee believes he  
16 or she has an interest or duty to provide  
17 reasonable information in good faith to another  
18 person who has corresponding interest or duty.  
19 Normally, under Pennsylvania case law, a former  
20 employer has the conditional privilege to  
21 communicate, right now, defamatory information  
22 when asked by a prospective employer to evaluate  
23 the employee's performance and this privilege  
24 applies to private communication among employers  
25 regarding discharge and discipline.

1           And besides that, Pennsylvania case law  
2 also protects the right of employers to express  
3 personal opinions as distinguished from the  
4 statements of fact about the employee. So, even  
5 though a statement about one's conduct or  
6 character would adversely affect his or her  
7 fitness to perform a certain job or duty and  
8 would be defamatory under other circumstances,  
9 Pennsylvania law holds that a mere expression of  
10 opinion is not defamatory.

11           And here, under our law, the plaintiff  
12 has the burden of pleading and proving abuse of  
13 this conditional privilege. And our courts look  
14 for things like spite, malice, animus, hostility  
15 (or improper purpose) to determine if the  
16 privilege was abused.

17           Nevertheless, litigation abounds in  
18 Pennsylvania, largely because, without express  
19 Statutory, clear Statutory and express written  
20 protection, employers are advised by their  
21 attorneys to gag themselves, that they either  
22 have to keep silent, give neutral references or  
23 directory-only information, or risk spending  
24 thousands of dollars to defend themselves in  
25 court, while plaintiffs continue to test the

1 common law. So we need Statutory protections to  
2 prevent further excessive litigation,  
3 unnecessary workplace accidents, and avoidable  
4 workplace violence.

5 Everyone has heard of the devastating  
6 situations that could have been avoided had the  
7 employer been able to obtain job-related  
8 performance information. You probably all  
9 heard, for example, of the major airline crash  
10 recently, where it is alleged by one victim's  
11 father that the pilot had been fired by a  
12 previous airline for incompetency as a pilot.

13 And what happens locally in  
14 Philadelphia? A healthcare institution, which I  
15 know, once hired a convicted rapist as a  
16 maintenance person in a student nursing home  
17 because it wasn't able to get anything but  
18 directory-only information on a maintenance  
19 person who had been fired from the former  
20 institution for sexual harassment and abuse on  
21 the job. Time and again, I have personally seen  
22 organizations, for whom I have worked, fire  
23 individuals with violent propensities. And  
24 examples of my personal experience have been:  
25 pulling a knife on someone else on the job,

1 sexual harassment, fistfighting, illegal use of  
2 drugs on the job, and theft, and then give  
3 directory-only or neutral references because  
4 they were afraid of a lawsuit. It is  
5 commonplace in Pennsylvania. Ask any Human  
6 Resource person and they will tell you.

7 And, now, another Catch-22 for  
8 employers ... because recently employers have  
9 become subject to suits called negligent  
10 referral. Flip side: this claim is brought  
11 against employers by other employers for failure  
12 to disclose certain information.

13 Our employers also face lawsuits for  
14 interference with contract if they do give  
15 negative job-related information, and this is  
16 when applicants claim that it interferes with  
17 the performance of a contract between them and  
18 the potential employer.

19 The need for employers to have access  
20 to relevant job information is also underscored  
21 by resume fraud. Employee fraud has resulted in  
22 hiring decisions that effect and directly impact  
23 a company's bottom line, their customer service.

24 In reviewing resumes each year when I  
25 am at Operation Native Talent in Philadelphia,

1 on several occasions, I have had individuals  
2 actually tell me that they have misrepresented  
3 past employment experiences because they know  
4 that their past employer will give  
5 directory-only information.

6 So who would oppose this legislation -  
7 and why? Well, it is possible that the ACLU and  
8 some well-meaning unions may oppose the proposed  
9 bill because they believe it diminishes the  
10 protection employees may have to counter claims  
11 of discrimination and defamation in reference  
12 checking. However, this bill is both an  
13 employer and employee bill. It would encourage  
14 employers to re-evaluate their nondisclosure  
15 policies and to provide their references in good  
16 faith. It can only benefit the good employee  
17 who, in the past, may not have been hired  
18 because no comment often means no good. And,  
19 the prospective employer would be better able to  
20 ensure the safety of the workplace. Unions are  
21 obligated to, as I understand it, to protect the  
22 interest of the majority of their members. Most  
23 employees are good employees. What union would  
24 really want to imply that the majority of their  
25 members would not get reasonable references

1 because they are less than satisfactory - or  
2 have a propensity for violence?

3 And, perhaps the ACLU should be just as  
4 concerned -- or even more concerned -- about the  
5 right to free speech. Because this is about  
6 free speech of the employer and protecting the  
7 employer's resources, especially because,  
8 without this protection, the potential  
9 employer's attempt to obtain reference  
10 information through less legitimate means:  
11 nonjob-related information, clandestine  
12 conversations like, I swear I will never tell  
13 you ... this is off the record, but ... It is  
14 in this fashion and through these clandestine  
15 means that applicants may get blacklisted, not  
16 through legitimate job-related information that  
17 is encouraged by the legislation we are asking  
18 you to pass.

19 There may be some trial lawyers -- and  
20 I, myself, am a trial lawyer and I have taken  
21 many plaintiff cases -- who fear that the bill  
22 may take away the rights of an individual. But  
23 since this bill actually codifies existing  
24 Pennsylvania case law, it should help attorneys,  
25 and their clients, to assess a case without



1     having to expend excessive time, money, energy  
2     in court, only to have their case dismissed in  
3     Summary Judgment or, worse, thrown out after  
4     they have been dragged through the courts  
5     because they are trying to test it. And this  
6     legislation still permits the good faith  
7     presumption to be rebutted. It doesn't change  
8     that.

9             So, at least 15 other states -- I can  
10     name them if you want -- have already all  
11     recognized the dilemma facing employers today,  
12     and they have created measures to thaw the chill  
13     that surrounds reference checking. They allow  
14     for the free exchange of information between  
15     employers, enabling them to make responsible  
16     hiring decisions.

17             The SHRM (that's the Society of Human  
18     Resource Management) Pennsylvania State Council  
19     and the Northeast Philadelphia Bux-Mont Chapter  
20     believe that employers and employees of  
21     Philadelphia and Pennsylvania would be  
22     well-served by the adoption of a statute similar  
23     to those in other states. HB 1972 is offered  
24     for the Pennsylvania Legislature's consideration  
25     as the solution to this troublesome problem.

1           We urge the Pennsylvania Legislature to  
2 recognize the unstable climate that has been  
3 created regarding employment references. This  
4 climate -- where the free flow of information is  
5 chilled -- is harmful to Pennsylvania employers  
6 and employees. To inhibit the growth of these  
7 counter-productive, nondisclosure policies and  
8 to address the inequitable results when  
9 employers are required to obtain information but  
10 fear responding to the legitimate reference  
11 requests, we urge the passage of HB 1972. The  
12 proposed legislation would really encourage  
13 employers to responsibly communicate job-related  
14 information, above board, to potential employers  
15 in accordance with our existing public policy  
16 and common law.

17           We all know that the longest journey  
18 begins with the first step and we urge you, the  
19 Members of the Judiciary Committee, to take this  
20 first step with us, to correct this inequitable  
21 and potentially dangerous situation, which is  
22 urgently in need of clarification, uniformity  
23 and protection.

24           And I thank you.

25           CHAIRMAN GANNON: Thank you very much,

1 Miss Warner. Would you give a copy of your  
2 remarks to our stenographer so it can be  
3 included as an exhibit?

4 MS. WARNER: That is actually a much  
5 more extensive one that you have; that gives you  
6 case law that some people have asked me for. I  
7 had to cut it back because I was limited to 17  
8 minutes, which I hope I didn't go over. And,  
9 so, this eliminates a lot of the legal  
10 background for you. And you are more than  
11 welcome to have that.

12 CHAIRMAN GANNON: What we will do is,  
13 your handout, we will attach that as an exhibit.

14 MS. WARNER: This is better  
15 (indicating). But that has things that I think  
16 you may want for references and backup. This is  
17 the real me (indicating), saying what really is  
18 happening out there. If you want this, too, you  
19 can have it.

20 CHAIRMAN GANNON: We are being joined  
21 by Representative Manderino at the far end of  
22 the table.

23 I guess some questions, perhaps.

24 Representative Manderino

25 REP. MANDERINO: Thank you, Mr.

1 Chairman. I was following along and also trying  
2 to kind of read in the legal cites because  
3 that's where a couple of my questions come from.  
4 But let me ask a few basic questions for my  
5 understanding.

6 Is there anything in Pennsylvania law  
7 right now that prevents an employer from doing a  
8 criminal background check on a potential  
9 employee?

10 MS. WARNER: There are some limits.  
11 Probably the most limiting factor is that it is  
12 so cost-prohibitive. And in addition to that,  
13 as I understand it, a lot of convicted felons  
14 know the ropes and so when they move, they move  
15 from one state to another and there is no  
16 across-the-country way for an employer to do a  
17 one-spot check and get all that. So what  
18 happens is, even if they were to implement it,  
19 like some jobs they do do it, because even  
20 though it is very expensive, it is a clear job  
21 duty problem, but most of them, because of the  
22 money. And the money is such a major problem  
23 because you can't do one check. You need to go  
24 from county to county and state to state and it  
25 is almost impossible, especially for the small-

1 to medium-sized employer.

2 REP. MANDERINO: But in Pennsylvania,  
3 if you wanted to do a criminal background check  
4 through the Pennsylvania State Police, you are  
5 not denied access to do that, is that correct,  
6 is that a correct understanding?

7 MS. WARNER: No? Yes?

8 MR. LARRY WARNER: You can do that.

9 MS. WARNER: You can do that.

10 REP. MANDERINO: Okay. Thank you.

11 The other point you made with regard to  
12 your experiences with resume fraud and I think  
13 part of the problem that we get into, and you  
14 cite that, right now, case law protects the  
15 rights of employers to express personal opinions  
16 as distinguished from statement of fact. But  
17 can you, indeed, check such things such as, did  
18 this person have this job title and his resume  
19 says that this was the description of the job  
20 title and is that an accurate description of  
21 what he did? Can you ask an employer that?

22 MS. WARNER: You can ask it, but you  
23 won't get an answer.

24 REP. MANDERINO: Well, is your  
25 experience, from having litigated these, is that

1 to give somebody answered yes or no to that --  
2 that meaning, yes, he did exactly what he wrote  
3 on his resume that he did; or, no, she didn't do  
4 exactly what she wrote on her resume that she  
5 did -- that you have seen cases where that has  
6 still been turned down?

7 MS. WARNER: I am not sure -- I think I  
8 understand your question.

9 REP. MANDERINO: Okay. What I am  
10 trying to say is that I can think of a lot of  
11 ways to ask questions, some of which could be  
12 objectionable and some of which could not. I  
13 could say, was this person the cream of the crop  
14 of all your employees that was so wonderful that  
15 you are going to tell me he was the best or she  
16 was the best employee in the ... any question  
17 posed like that is going to give me a subjective  
18 answer and, as employee, I may challenge what  
19 the employer did. But if somebody says to me  
20 was this person the Director of Human Resources  
21 and, in that capacity, did he supervise 75 other  
22 employees, do this, do that and do this that is  
23 listed on his resume and I answered yes, have  
24 you seen successfully litigated cases on the  
25 part of a plaintiff challenging and winning an

1 employer having given a yes answer to that  
2 question? That's the point that I am after.

3 MS. WARNER: I have to answer that in  
4 two parts. The first part is that most  
5 employers asked the very objective, apparently  
6 innocent, question the way you asked it. Most  
7 employers have a directory-only information  
8 policy.

9 REP. MANDERINO: Okay. But that is the  
10 employer policy --

11 MS. WARNER: And they never answer that  
12 second part.

13 REP. MANDERINO: Okay.

14 MS. WARNER: They just won't answer it.  
15 That's the issue.

16 REP. MANDERINO: Okay. But I guess  
17 what I am trying to get to is the difference  
18 between where the law is cutting and whether or  
19 not we make this law and you still won't want to  
20 give information because you are creating part  
21 of your own problem, employer to employer, and I  
22 am trying to cut to where the cutting edge  
23 difference is.

24 I could say to you, was Mrs. Jones a  
25 good employee, did she come to work every day?

1 And one employer could say yes about Mrs. Jones  
2 who had three absences in one year and a  
3 different employer could say no about Mrs. Jones  
4 who had three absences in one year. It would be  
5 better if I asked the question how many absences  
6 last year did Mrs. Jones have and you would tell  
7 me three and then I could subjectively interpret  
8 that.

9 MS. WARNER: You should not ask that  
10 now because of the FMLA.

11 REP. MANDERINO: Say that again.

12 MS. WARNER: You should not ask about  
13 absences because of the Family and Medical Leave  
14 Act. We have been told not to do that anymore,  
15 under the law. It could be highly  
16 discriminatory. You would have to frame that  
17 very differently. But I understand what you are  
18 saying. Let try to answer it --

19 REP. MANDERINO: I guess what I am  
20 trying to get to is the difference --

21 I have listened very carefully to the  
22 examples that you gave.

23 MS. WARNER: Yes.

24 REP. MANDERINO: And it seemed to me  
25 that a lot of the examples that you gave won't



1 be fixed by this. I don't see how this  
2 legislation changes that until we get to a  
3 wholesale immunity, which I am going to ask you  
4 about next.

5 MS. WARNER: We don't want a wholesale  
6 immunity. We don't want to see, HR people. I  
7 am saying that because I have been in the field  
8 for 20 years, but you can ask each one of them.

9 Remember, our job really is to balance.  
10 Our loyalty is to the employer, but our  
11 responsibility and our code of ethics is to  
12 balance and oversee that it follows the law,  
13 that we have ethical obligations. So, it is a  
14 very different, tough road for us. We would not  
15 want to see uniform unqualified. I don't know  
16 an HR person who would want to see that.

17 But I now understand what you are  
18 saying. The current law does not prevent us, in  
19 and of itself. What prevents the employers, and  
20 what I am asking you to do, is to clearly, will  
21 prevent, is fear. Perception is everything. So  
22 the lawyers -- and I am an HR person first and  
23 an attorney second -- the lawyers come along and  
24 say you cannot say anything, no matter what you  
25 know, because here is your liability, here is

1 your exposure.

2           What I am asking to you do is take what  
3 we have, tell the world this is the public  
4 policy, document, put it in writing and  
5 encourage employers not to be afraid.

6           And you are right, it is not going to  
7 change overnight. They need your encouragement.  
8 They need that. And employers would then begin  
9 to ask, well, can we legitimately say this?

10           Right now if you back up to the example  
11 you gave, and even you are saying a perfectly  
12 legitimate question, I don't know an employer  
13 who, on the record, who has a directory-only  
14 information -- and most employers I know -- who  
15 would answer that second, innocent part of your  
16 very innocent question. And that's what happens  
17 with the good employees. Because now here you  
18 have these good employees and they can't even  
19 squeeze that information out of the ex-employer.

20           REP. MANDERINO: Okay. Let me refocus  
21 to the language of the bill and it dovetails  
22 into this issue because part of what bothers me  
23 about the language of the bill is the rebuttable  
24 presumption, and since you have litigated, you  
25 understand the notion of a rebuttable

1 presumption and who the burden of that is on.

2 MS. WARNER: Representative, just  
3 because I am on -- I have not litigated. I have  
4 accepted plaintiff cases and every one has  
5 settled. I have never had to litigate so I am a  
6 little uncomfortable.

7 REP. MANDERINO: I am sorry.

8 MS. WARNER: Okay.

9 REP. MANDERINO: Thank you.

10 The legal notion of a rebuttable  
11 presumption and who the burden is on, I guess my  
12 concern is that the way the language of this  
13 immunity from liability bill is written, it  
14 would be on the burden of me as the allegedly  
15 aggrieved plaintiff to rebut, meaning the burden  
16 is on me to rebut what was in the mind of my  
17 former employer when he or she gave the  
18 reference that I am challenging because it says  
19 that there is a presumption of good faith in  
20 what you said ...

21 MS. WARNER: Um-hum (yes).

22 REP. MANDERINO: ... and that  
23 presumption is rebutted by showing knowingly  
24 false, we don't have to talk about it ...

25 MS. WARNER: Um-hum.

1           REP. MANDERINO: ... deliberately  
2 misleading or rendered with malicious purpose.  
3 And I think while it does not say purpose or  
4 intent, I suspect that that is very much how the  
5 courts will interpret it and there will be  
6 another angle of litigation right there.

7           How do you give me comfort that it is  
8 okay to place the burden on the plaintiff to  
9 rebut what is in your mind when you gave that  
10 reference?

11           MS. WARNER: The existing case law --  
12 this tracks the existing case law -- the burden  
13 is now on plaintiff to rebut the good faith of  
14 the employer. This is not changing, or it  
15 already exists and has existed for decades in  
16 Pennsylvania. We are not asking you to change  
17 that. We are asking you to codify it so that  
18 there is -- And I am not, we don't pretend to  
19 have memorized all the cases. I don't  
20 understand what you are saying and I am trying  
21 to think of examples and I would hope that it is  
22 not that wishy-washy and I am sure it is not.

23           There is so much case law that has  
24 already gone before this that really has carved  
25 out. That I can't say that, here, this is the

1 case, look at it, but I will check it for you,  
2 if you want.

3 REP. MANDERINO: Okay.

4 MS. WARNER: I don't think there would  
5 be a wishy-washy there in us. You know, well,  
6 what was in their minds. It is really clearcut.  
7 And even while the others speak, I have some  
8 stuff in the office. If you want, I will check  
9 and try to find something for you.

10 REP. MANDERINO: Okay. Just one last  
11 question then. I guess my understanding was  
12 that this was more than a codification of  
13 current practices, but assuming for the moment  
14 that it is a codification of current case law to  
15 the T, then my question is, what about this in  
16 your view will limit litigation that you are  
17 trying to limit or erase the fear and perception  
18 of employers?

19 MS. WARNER: Okay. Several things.  
20 One thing is that there already are  
21 encouragements. I know a person who -- or  
22 actually read -- if the bill passes, they are  
23 going to do it. And these are employees who  
24 have been totally hurt because of workplace  
25 violence because they got hurt by another

1 person. So there are a lot of employers who are  
2 ready to say, now that you have spoken, I will  
3 never let this happen to anyone else. And they  
4 feel a very major sense of guilt when that  
5 happens to you as an employer. Whether you get  
6 sued or not, it is a horrible thing.

7 So there are, you know, enough  
8 employers who are going to step forward right  
9 now and say, okay, we can do what's right, we  
10 have heard you and now we know you are  
11 encouraging us. That's one thing.

12 The other thing is, remember, it is  
13 happening in all the other states, too. And we  
14 are kind of -- I hate -- we are still in the  
15 first 15th, 16th so I would like to say it is  
16 really unique. Other things, or one of the  
17 things -- and I am not sure this is a direct  
18 answer, but I think it is something you want to  
19 know, but it concerns us tremendously on the HR  
20 side -- is this issue of good employees, most of  
21 the people are good employees, getting placed on  
22 the same -- Let me backtrack.

23 HR is a very volatile profession. We  
24 are very mobile. You are going to hear from HR  
25 people, not only who have been on the street

1 themselves for long periods of time, but also  
2 have gone into what we call out-placement,  
3 teaching other people in all areas of the  
4 fields, getting to get jobs. And you are going  
5 to hear the problems that they encounter. So  
6 these people, who are on the HR side, experience  
7 the devastation that not being able to give  
8 above board, legitimate, clearly documented,  
9 appropriate job-related information, does.

10 And they are the ones who are  
11 responsible for furthering, once you speak with  
12 us and take that step with us. And so, that  
13 they can hold it out and say, look, this one,  
14 first step, we have got to take the first step.  
15 We have been hurt. So it will be a slow  
16 process. I would not pretend that it is not.

17 But we are asking you to help to lead  
18 the way with the people who are the experts in  
19 this field and to help us to make this  
20 transition from what is clandestine. I mean,  
21 the wrong people get called. And, I mean, you  
22 have supervisors, they know downright well they  
23 have got a policy and they are not supposed to  
24 give any information, but they also know that  
25 nobody else is going to give the information on

1 you people anyway. And, if it is really  
2 serious, clandestinely, they get it. Well, we  
3 don't want them doing that. If there is  
4 something negatively said, we want them to know  
5 that there is a way, a proper way, it is above  
6 board, it is documented. Do you see what I  
7 mean? And that's what we are asking you to help  
8 us with.

9 REP. MANDERINO: Thank you, Miss  
10 Warner.

11 Mr. Chairman, thank you.

12 CHAIRMAN GANNON: Thank you,  
13 Representative Manderino. We have been joined  
14 by Representative Steve Maitland.

15 Do you have any questions,  
16 Representative Maitland?

17 REP. MAITLAND: None, Mr. Chairman.  
18 Thank you.

19 CHAIRMAN GANNON: Thank you.  
20 Representative Hennessey.

21 REP. HENNESSEY: Thank you, Mr.  
22 Chairman.

23 Miss Warner, I know we live in a  
24 litigious society, but did the person who sued  
25 the parent for negligently hiring the baby



1 sitter win?

2 MS. WARNER: I use that in every one of  
3 my workshops.

4 REP. HENNESSEY: That is just shocking.

5 MS. WARNER: The infant was 16 months  
6 old. And usually when I say, is accepted, you  
7 know, how many of you have ever hired, ever had  
8 a baby sitter? How many have children? How  
9 many of you have a baby sitter? Keep your hands  
10 up. Did you ever pay the baby sitter? Now, did  
11 you check their references? The answer is, it  
12 was, sometimes, this is how much you would pay.

13 What do you call it when an infant has  
14 a representative?

15 REP. HENNESSEY: Ad litum?

16 MS. WARNER: Yes, it was appointed and  
17 the estate of the infant received the monies.  
18 And I believe --

19 REP. HENNESSEY: It was actually a  
20 successful claim in this?

21 MS. WARNER: Successful claim in court.  
22 Ginofsky was the new baby sitter's name, brain  
23 damaged the kid, even though she admittedly did  
24 it, the court said the parents should have  
25 known, they should have more effectively checked

1 her references and they should have known of  
2 this lady's propensity for violence. A million  
3 dollars, or something, they ruled.

4 REP. HENNESSEY: Did the court rule on  
5 that?

6 MS. WARNER: Yes, they did.

7 REP. HENNESSEY: Or was there a  
8 settlement done?

9 MS. WARNER: They ruled on it.

10 REP. HENNESSEY: Is that right?

11 MS. WARNER: They ruled on it.

12 REP. HENNESSEY: I would like to get a  
13 copy of that citation, if I could.

14 MS. WARNER: I may or may not have it  
15 with me, but I have it in every one of my  
16 workshops so I will get it for you. Tia Marie  
17 was her name.

18 CHAIRMAN GANNON: I am sorry?

19 MS. WARNER: Tia Marie. It is a  
20 Pennsylvania case, punishing the child and  
21 bludgeoning it, an unbelievable case.

22 REP. WOGAN: Mrs. Warner, if I could  
23 suggest that you get that citation to me, I will  
24 make sure that every member of the committee  
25 gets a copy.

1 MS. WARNER: Great. I tried to get up  
2 this morning, but I had to get up at 5:30 and I  
3 just couldn't.

4 REP. HENNESSEY: I would like to ask  
5 another question; that is, in common law,  
6 generally, we can find situations that the  
7 common law covers which the statute would not  
8 necessarily cover. And on page 6, I think it is  
9 of your comments, you talk about it, a new claim  
10 that is being sort of ...

11 MS. WARNER: Relatively.

12 REP. HENNESSEY: ... a relatively new  
13 claim that is being brought for negligent  
14 referral, I guess a refusal to tell or to  
15 disclose information about an employee that,  
16 when asked, that you otherwise would be expected  
17 to cover, to tell.

18 MS. WARNER: That's right.

19 REP. HENNESSEY: Now, 1972 doesn't  
20 address that situation. So how would you  
21 analyze that?

22 MS. WARNER: Well, in 1972, that case  
23 that I have given you an example of, that case  
24 was brought under negligence.

25 Today, we have evolved, probably out of

1 that case and case law. In other words, it was  
2 brought under the existing cause of action of  
3 negligent hiring, or something of that nature.  
4 There was not a label of negligent referral.  
5 Today, there is now a label of negligent  
6 referral.

7 REP. HENNESSEY: Well, my point is, in  
8 House Bill 1972, it doesn't seem to address that  
9 at all.

10 MS. WARNER: Oh, I am sorry. I thought  
11 you were talking about the case I cited.

12 REP. HENNESSEY: And how do you analyze  
13 that? If we passed the 1972 as it is drafted  
14 now, that we eliminate the claim of negligent  
15 referral?

16 MS. WARNER: No, no.

17 REP. HENNESSEY: Or would that continue  
18 to exist in common law side by side with the  
19 statute?

20 MS. WARNER: No, no.

21 We are not asking you to eliminate --  
22 unless I am missing something -- any tort  
23 claims.

24 We are asking you to encourage and  
25 speak up and encourage employers to legitimately

1 communicate job-related information, whether it  
2 is negative or not, and make it clear so that  
3 attorneys do not go running all through testing  
4 case law or common law. I mean, why do we  
5 codify anything, if it already exists? Because  
6 statutes have more clarity, to begin with. So I  
7 am not asking you to eliminate it. What in it  
8 would --

9 REP. HENNESSEY: 1972 does not deal  
10 with negligent referral or the failure to  
11 disclose information. Are you suggesting that,  
12 in addition to what is already in 1972, that we  
13 should codify it further and say that there  
14 should be duty imposed on the prior employer to  
15 actually disclose what's --

16 MS. WARNER: I would love to see you do  
17 that.

18 REP. HENNESSEY: What's that?

19 MS. WARNER: Well, first, let me tell  
20 you that there really is, through common law, a  
21 duty.

22 REP. HENNESSEY: Okay.

23 MS. WARNER: And secondly let me say to  
24 you -- I could be wrong -- I believe in  
25 Pennsylvania, as well as other states, in the

1 Department of Transportation, in a couple of  
2 other departments, there is legislation that  
3 would do exactly that for specific industries.  
4 Like the transportation industry, and I think  
5 you all know why, because of a recent event.  
6 Well, the plane crash was one thing. So there  
7 is legislation pending either federally or in  
8 other states and maybe even Pennsylvania,  
9 somebody told me, but that is not what this is  
10 concerning.

11 REP. HENNESSEY: So passing 1972 won't  
12 eliminate the need to go back to the common law  
13 to find out what the state of the law is, we  
14 will just codify the specific area of immunity  
15 when you actually give the information that you  
16 are requested to give, not if you don't, when  
17 you fail to give information that you have  
18 requested?

19 MS. WARNER: Well, what you are talking  
20 about places a duty.

21 REP. HENNESSEY: Right.

22 MS. WARNER: The common law, this new  
23 stuff, places a duty. But if this -- This is  
24 just a new label. The common law, for years,  
25 has placed that duty on it.

1           REP. HENNESSEY: I guess what I am  
2 getting at is, you seem to be suggesting that we  
3 ought to pass 1972 because that will eliminate  
4 the confusion that is inherent in the research  
5 of, you know, you have to go through to the case  
6 law and develop the common law precedence; and  
7 yet it seems like what you are telling me is  
8 that passing it does not take you away from the  
9 common law, you just have to rely on this bill  
10 or this statute for the affirmative response you  
11 give. But if you fail to give a response that  
12 you should give, then you have to go back to  
13 common law.

14           MS. WARNER: Yes.

15           REP. HENNESSEY: And I guess what I am  
16 saying is, if we want to change it, maybe we  
17 ought to look at both sides of that coin and do  
18 it in the bill.

19           MS. WARNER: I would love to. The  
20 reason is that it will clarify and substantially  
21 reduce the exposure. You are absolutely right,  
22 it will not basically eliminate on that basis.  
23 But if you look at the last things, one step at  
24 a time, we would love to go a step further and  
25 yes.

1           REP. HENNESSEY: Okay. Mr. Chairman, I  
2 am going to leave -- I have to testify -- and  
3 then I will be back.

4           CHAIRMAN GANNON: Okay. Thank you,  
5 Representative Hennessey.

6           Representative Masland.

7           REP. MASLAND: Just briefly. I share  
8 some of the concerns that Representative  
9 Manderino and Representative Hennessey have  
10 said, in terms of why we need to codify this.  
11 And perhaps this is to cut back on billable  
12 hours for attorneys so they don't have to spend  
13 so much time reading the case law. Just be able  
14 to find this -- I am an attorney, I can say that  
15 -- they can just find it a little bit easier.

16           But the fact is, if we are to the  
17 extent that 1972 is simply codifying case law,  
18 how much more reassurance should any employer  
19 feel, simply because you have something codified  
20 that parallels what we have in the common law?

21           I mean, we can beat this to death all  
22 day long, and I don't think you are going to be  
23 able to answer my question right now and satisfy  
24 me, so if you just want to make a comment, go  
25 ahead. But we have already beaten this around a



1 little bit.

2 MS. WARNER: All right. I won't  
3 pretend to answer your question. You probably  
4 know, more than I, why legislature should codify  
5 things that have already existed: it does  
6 provide clarity.

7 And I will say one more thing, in terms  
8 of mutual personal skills and the training that  
9 we do: perception is everything. It is one more  
10 way of speaking out what our public policy is  
11 and reinforcing our public policy and how  
12 employers perceive.

13 What I am trying to do through this --  
14 and I know really will impact employers as it  
15 does everyone -- is change their perception that  
16 they are going to get dragged into court for  
17 everything. Remember what I said earlier, most  
18 employers never go to court, they just never say  
19 anything.

20 REP. MASLAND: They could still go to  
21 court with this statute. If it is only  
22 codifying case law, they are still just as  
23 liable to go to court with this. Now, you can  
24 send a news letter.

25 MS. WARNER: Maybe they are not that

1       liable.

2               REP. MASLAND:   Maybe you should just  
3       send a news letter to them saying this is what  
4       the case law says at this point in time.

5               MS. WARNER:   If you would send it, it  
6       would help.   If I would send it, it would not.  
7       We are asking the Legislature to speak.   That is  
8       the point.

9               REP. MASLAND:   Well, we have something  
10       called separation of powers, you know.

11              At this point, it appears to me, with  
12       not being an expert on case law, that the courts  
13       have spoken.

14              MS. WARNER:   Yes.   Does that mean that  
15       the Legislature does not speak?

16              REP. MASLAND:   Well, sometimes we speak  
17       too much and sometimes we speak when we  
18       shouldn't.

19              MS. WARNER:   I think we need you to  
20       speak this time.

21              REP. MASLAND:   Okay.

22              MS. WARNER:   We need you to speak.

23              CHAIRMAN GANNON:   Thank you,  
24       Representative Masland.

25              Representative Reber.

1           REP. REBER: Very briefly, Mr.  
2 Chairman. Thank you.

3           Miss Warner, in the statute on line 15,  
4 the evidentiary standards set forth in the  
5 legislation, the proposed legislation, is a  
6 clear and convincing evidentiary standard. The  
7 case law, as you have been referring to for the  
8 past 45 minutes or so, does that embody an  
9 evidentiary standard, also, clear and convincing  
10 as simply preponderance of the evidence, what  
11 comes forth, out of those different cases?

12           MS. WARNER: I am 99 percent certain  
13 that it is clear and convincing -- it may be  
14 made heavier -- because I took the language from  
15 the case law, the Rayman (phonetic) case law.  
16 However, again, I would be happy to double check  
17 that.

18           Actually, again, I think you have a  
19 couple of cites there. But there is an enormous  
20 amount of law that was reviewed.

21           REP. REBER: Yes, I looked at the  
22 citations that you gave in some of the language  
23 that was quoted and it talks about reasonable  
24 belief from an evidentiary standpoint. I was  
25 just curious. Because what we are doing is

1 going in the direction of a presumption and then  
2 that presumption can only be overcome by a  
3 higher level, if you will, of the civil  
4 evidentiary standard that needs to be clear and  
5 convincing which is normally an equity type  
6 standard; and, it seems to me to be a real  
7 double hurdle that we are talking about, because  
8 there is a rebuttable presumption that you must  
9 ascertain and must carry and it must be done then  
10 by this higher evidentiary standard, very close  
11 and beyond a reasonable doubt, if you will. So  
12 I was just curious if that was the case.

13 MS. WARNER: Yes, it is meant to  
14 detract the case law. I believe that it does.  
15 But I would be more than happy to double check  
16 that for you.

17 REP. REBER: Why don't you do this:  
18 just take a look at it and if, in your opinion,  
19 those particular citations that are set forth in  
20 your, I believe your testimony, is contrary to  
21 that, I would appreciate knowing otherwise.

22 MS. WARNER: Absolutely. And I will  
23 forward the current, existing --

24 REP. REBER: Otherwise --

25 MS. WARNER: I have it ready -- it is,

1 I just don't have the cites -- so I will just  
2 double check that for you. I would be more than  
3 happy.

4 REP. REBER: Thank you.

5 Thank you, Mr. Chairman.

6 CHAIRMAN GANNON: Thank you,

7 Representative Reber.

8 Representative Wogan.

9 REP. WOGAN: Thank you, Mr. Chairman.

10 Miss Warner, I can't answer the  
11 question either, the questions revolving around  
12 the codification of the common law and why there  
13 would be a difference. But after you came to me  
14 and explained the situation and personal  
15 resources, I was skeptical at first. And all of  
16 my investigating has led me to the conclusion,  
17 there really is a serious problem. And whether  
18 the perception is erroneous or not, employers do  
19 not share this information. And I did come  
20 across at least one major employer, in eastern  
21 Pennsylvania, which analyzed House Bill 1972 and  
22 analyzed it using your tools and ascertained that,  
23 yes, that employer does not share any  
24 information. But, were House Bill 1972 to pass,  
25 we should very strongly consider it changing its

1 policy because probably start sharing  
2 information.

3 MS. WARNER: Um-hum. I am really glad  
4 that you did that. And I have done the same  
5 thing with many, many, many employers.

6 REP. WOGAN: You mentioned, in your  
7 direct testimony then, you are aware of more  
8 than one situation with more than one employer.

9 MS. WARNER: Oh, many. The ones who  
10 are most likely to immediately respond and be  
11 open and above board and start communicating  
12 legitimate job-related information are the ones  
13 who have been, or whose employees have been,  
14 hurt, and the larger the organization, more  
15 likely that is to be. So there will be a large  
16 -- I mean, you people matter, it means something  
17 if you speak, it means something if you pass the  
18 statute. And to pretend that it doesn't, that  
19 is just not true, it is just not.

20 REP. WOGAN: Thank you, Miss Warner.

21 CHAIRMAN GANNON: Yes, Miss Warner,  
22 Representative Hennessey got into an issue.  
23 Would you have any difficulty with it including  
24 in the bill an affirmative requirement where the  
25 bill now reads that if a former employer

1 discloses information, that is presumed to be in  
2 good faith? What about affirmative duty, where  
3 if they fail to disclose information? In other  
4 words, not only they have a duty to disclose  
5 information as opposed to simply disclosing. Do  
6 you understand what I am getting at?

7 MS. WARNER: Yes. Actually, may I just  
8 turn around for a second?

9 Guys, we would love it?

10 AUDIENCE: Absolutely.

11 MS. WARNER: We would lie down and kiss  
12 your feet. But we don't want to ask you for  
13 more than -- We know that, right now, you may  
14 not all understand that this is both an employer  
15 and employee bill and we don't want to ask you  
16 to go --

17 I mean, we are willing to take one step  
18 at a time. We just want you with us and  
19 understanding and helping us to do what's right.  
20 So, yes, we would love to see it in there, if  
21 you think that it will pass.

22 CHAIRMAN GANNON: The other question  
23 that I have -- and I don't know if  
24 Representative Reber asked this or not, I was  
25 distracted for a moment -- is on this standard

1 of evidence, this standard of proof. Is this  
2 clear and convincing, is that current case law?

3 MS. WARNER: I believe so.

4 CHAIRMAN GANNON: As opposed to the  
5 concept --

6 MS. WARNER: I don't think so. I know  
7 that I am answering all of these so because  
8 unless I can literally picture in my mind and  
9 cite you the case, I would not say absolutely,  
10 yes.

11 I am saying, 90 have it. That I took  
12 it from the existing case law so I could easily  
13 answer you yes. But my tendency is that, I  
14 believe so, is to say, yes, I know it is, but I  
15 will double check it for you. I would just  
16 rather say that, here, here it is, and show it  
17 to you. But, yes, it is.

18 CHAIRMAN GANNON: Yes. Because I would  
19 like to see that. Because generally standard of  
20 proof is by a preponderance of the evidence in a  
21 civil matter and this goes beyond that.

22 MS. WARNER: Yes. I will tell you that  
23 this language is the same language in almost all  
24 of the 15 other states who have passed it, which  
25 is clear and convincing. And I can give you the



1 states. And so they were passing around this  
2 language to us and we were using it. However,  
3 most of those states or many of those states did  
4 not really have -- and that may be why they went  
5 first -- did not really have their state common  
6 law supporting them. So I guess, you know, they  
7 could have gone a step further.

8           Nevertheless, when I checked our case  
9 law, I found many of the cases were clear and  
10 convincing. What I did not do -- or don't  
11 remember doing because I started this two years  
12 ago -- is Shepardizing that on that language.  
13 And I will do that to make you more comfortable.  
14 But I will tell you that the other states have  
15 used it.

16           CHAIRMAN GANNON: And I think one of  
17 the difficulties that some of the members are  
18 having -- and I don't want to characterize it as  
19 a difficulty -- but some of the sense is that we  
20 are being asked to codify case law and once we  
21 do that, we lock in to place. This case law is  
22 evolving in this issue, workplace safety. I am  
23 on the editorial board of the workplace safety  
24 general site so I have a little understanding of  
25 what is going.

1           And this is a rapidly evolving area of  
2 the law and changes are taking place around the  
3 country on a very rapid basis. So you have to  
4 understand that when you put this in statute,  
5 you freeze the case law where it is right now  
6 and all the courts will do subsequent to that is  
7 interpret the statute as opposed to applying new  
8 or evolving principles of law. And I think some  
9 of the members wanted to make sure that you  
10 understood that and that that is what you wanted  
11 us to do.

12           MS. WARNER: Okay. And I may be  
13 missing something, but let me say to you that  
14 many HR people are directly responsible for  
15 safety and working conditions so you won't find  
16 a group of professionals who are more concerned  
17 about safety in the workplace. As a group of  
18 professionals, that is their responsibility in  
19 most cases.

20           But is what you are asking, are you  
21 saying that maybe we would be setting something  
22 in concrete that would limit our ability to keep  
23 the workplace safe in the future?

24           CHAIRMAN GANNON: No, no. What I am  
25 suggesting is that, number one, this is an

1 evolving area of the law, the workplace safety  
2 issues. You know, 20 years, 10 years ago, if  
3 someone was shot by a fellow employee, for  
4 example ...

5 MS. WARNER: Right.

6 CHAIRMAN GANNON: ... the question  
7 would be whether it was the altercation, whether  
8 it occurred at work. If it did occur at work,  
9 it was workers compensation, was all the  
10 employee received. Now you have somebody  
11 saying, well, wait a minute. This guy that got  
12 shot, how long has he been working here? Oh, he  
13 started about seven or eight months ago. Who  
14 did you work for before? And did he have  
15 violent propensities there? And all of a sudden  
16 you have got a lawsuit by the injured employee  
17 against a former employer of the person who  
18 committed the crime.

19 MS. WARNER: That's right, that's  
20 right.

21 CHAIRMAN GANNON: Now we are getting  
22 into other areas where an employer said I  
23 thought my liability was limited to workers  
24 compensation for an employee's injury. Now it  
25 is going beyond that. I think years ago, nobody

1 would have thought of that. Now that is  
2 becoming a rapid, particularly where a female  
3 employee is sexually assaulted by a fellow  
4 employee, immediately go back and say, look,  
5 let's get this work history and find out what he  
6 or she did before they came to work for us and  
7 then they file a lawsuit against the previous  
8 employer for not disclosing that information.

9 MS. WARNER: Right, that's that  
10 negligent referral claims now.

11 CHAIRMAN GANNON: But this is evolving.  
12 And I think the courts, as you pointed out, this  
13 is the current law, they are putting protections  
14 into place to free that line of communication  
15 between employers.

16 MS. WARNER: You are only scaring  
17 employers more.

18 CHAIRMAN GANNON: My one point is --  
19 and I guess it is not to diminish the employer's  
20 protection or the employee's protection, but  
21 simply saying that -- if we take existing case  
22 law and put it into statute, that's the end of  
23 the evolution of case law in that issue. Other  
24 than, now the case law shifts from evolving into  
25 one of interpretation of the statute. And that,

1 I just want to, I think that's some of the  
2 concern.

3 MS. WARNER: Yes. And I think that you  
4 need to start there in order to -- And it  
5 appears that they are stuck, they are stuck here  
6 and they are petrified and they won't move. And  
7 they must, they have to begin to communicate  
8 this law. And so that's why we want to do it.  
9 And if that first step, if setting in concrete  
10 for now does not work, then we will come back to  
11 you. That's what you are here for, right? But  
12 we have to do something.

13 CHAIRMAN GANNON: Thank you.

14 MS. WARNER: Thank you very much.

15 CHAIRMAN GANNON: Our next witness, who  
16 is Mr. Larry Frankel, Acting Executive Director  
17 of the Pennsylvania Chapter of the American  
18 Civil Liberties Union.

19 Thank you, Mr. Frankel.

20 Thank you very much, Miss Warner, for  
21 your testimony. I am sorry, I apologize for not  
22 ...

23 MR. FRANKEL: Good morning, Chairman  
24 Gannon, and other members of the House Judiciary  
25 Committee.

1           CHAIRMAN GANNON: Good morning.

2           MR. FRANKEL: I want to thank you for  
3 giving us the opportunity to testify here today.  
4 I am afraid some of you will be disappointed to  
5 learn that we do not oppose this bill  
6 completely. We have some problems with the  
7 language, but we are not diehard opponents. I  
8 don't know whether that means that  
9 Representative Wogan wants to withdraw the  
10 legislation.

11           REP. WOGAN: No, but I am temporarily  
12 in a state of shock, Mr. Frankel. It may take  
13 me a minute or two to recover.

14           MR. FRANKEL: Okay. As you have heard,  
15 this legislation provides the employer with  
16 qualified immunity if he or she is sued for  
17 defamation as a result of statements made when  
18 giving a reference about a former employee. The  
19 ACLU believes that this bill affects two  
20 important rights: an employer's right to free  
21 speech and an employee's right to not be denied  
22 a job because a former employer has made  
23 reckless and untrue statements. We think that  
24 these rights can be balanced when drafting a  
25 statute that provides immunity for employers who

1 provide job references.

2           There has already been discussion about  
3 whether this is a codification of law. And,  
4 traditionally, the courts have established the  
5 rule in this area of law rather than the  
6 legislature. In most states, including  
7 Pennsylvania, courts have found that employers  
8 have a qualified privilege to make negative  
9 statements about former employees as long as  
10 those statements are made without malice. In  
11 this context, malice is defined as either a  
12 desire to injure a former employee or making a  
13 damaging statement without having a reasonable  
14 basis for believing it to be true.

15           In 1977, the Federal District Court for  
16 the Eastern District of Pennsylvania stated that  
17 Pennsylvania law, quote, recognizes the defense  
18 of a conditional privilege whenever a prior  
19 employer evaluates a former employee at the  
20 request of prospective employer. And I have a  
21 citation listed in my testimony, that decision  
22 was affirmed by the 3rd. Circuit without any  
23 opinion being published. That decision has not  
24 been overturned and its statement regarding  
25 Pennsylvania law remains true, at least as far

1 as my research has indicated.

2 The ACLU believes there are sound  
3 public policy reasons to support this rule.  
4 Employers should be able to give honest  
5 references regarding former employees.  
6 References are a good way to find out if a  
7 prospective employee is right for a job.  
8 Important information can be obtained from  
9 reviewing an applicant's academic record and  
10 resume and through a personal interview. But if  
11 a potential employer wants to know how a  
12 candidate will perform in the future, there is  
13 no substitute for actually learning how that  
14 person has performed in the past.

15 We are aware of the fact that many  
16 employers will not discuss a former employee's  
17 performance with another employer. Nothing that  
18 was said by Miss Warner, in that regard, was  
19 surprising. Acting on advice of counsel,  
20 employers will only confirm the fact that  
21 someone used to work for them and the dates of  
22 employment. The important hiring decisions are  
23 being made in an information vacuum.

24 We think that such an approach harms  
25 both employers and employees. Hiring the wrong



1 person for a job hurts the employer. Money is  
2 spent on salaries and benefits with little  
3 return. Time is wasted on training. An  
4 important job goes undone or is done poorly.  
5 From an employee's perspective, being hired for  
6 an inappropriate job can be a nightmare the  
7 person will be dissatisfied and perform poorly.  
8 If she manages to hold onto her job, a marginal  
9 job performance will eliminate any chance of  
10 promotion.

11 We also think that the absence of  
12 candid employment references contributes to  
13 abuses in the hiring process. An employer who  
14 is unable to get reliable information may resort  
15 to invasive personality tests, urine tests,  
16 handwriting analysis, and other unfair and  
17 inaccurate methods which we find extremely  
18 troubling.

19 And there is no mystery as to why  
20 employers are not giving candid references.  
21 They are afraid of being sued and there is some  
22 basis for this fear. I would hope that some of  
23 the witnesses from Human Resources could provide  
24 numbers of cases that they know about. We do  
25 not get many calls about this particular issue,

1 but it would be interesting to know, actually,  
2 the numbers that are involved. And there have  
3 been cases where employers have been found  
4 liable for defamation because of something they  
5 have said in a reference check that caused a  
6 former employee to lose a potential job.

7 But we think that this risk is limited,  
8 and probably much less than most employers would  
9 legitimately fear. There have been very few  
10 reported cases in Pennsylvania. It doesn't  
11 include cases that were settled out of court and  
12 no court opinion was ever issued, but we do not  
13 believe that there is an avalanche of litigation  
14 in this area. There may be cases brought where  
15 defamation is one of the claims, along with some  
16 of the other claims noted, but we don't see an  
17 overwhelming number of them. The reality is  
18 that most employers have never been sued for  
19 defamation and probably never will be.

20 In doing some research to prepare for  
21 this testimony, I did come across one case that  
22 I wanted to at least talk about a little where  
23 the employer was held liable. The case of Geyer  
24 vs Steinbronn, the 1986 decision, the  
25 Pennsylvania Superior Court. It was an action

1 for defamation and potential interference with  
2 respective contractual relations. According to  
3 the Superior Court opinion, the employer made  
4 statements about the plaintiff having a drinking  
5 problem and it implicated the plaintiff in a  
6 forgery scheme. The jury decided, and the  
7 appellate court agreed, that there was  
8 sufficient evidence to find that the employer  
9 had not only made statements that were untrue or  
10 without a reasonable belief that they were  
11 untrue, but had even known that he was making  
12 false statements.

13 The ACLU believes that a plaintiff  
14 suffering such injuries should not be barred  
15 from bringing a lawsuit to redress the harm  
16 caused by this kind of behavior. And I want to  
17 be absolutely clear, we think that the kind of  
18 behavior described in the Geyer decision would  
19 not be immunized under this bill. I just bring  
20 it to your attention to relate that this kind of  
21 case has happened.

22 I would disagree with an assessment  
23 that this bill is a current codification of  
24 Pennsylvania law. I did not see that kind of  
25 language in the bill. I only have a couple of

1 the cases here today. The current state of law  
2 is a little closer to that, which I quoted from  
3 the Federal Court opinion, that the employer has  
4 a conditional privilege and that privilege can  
5 be abused if the employer makes statements  
6 motivated by malice.

7 We think that there is nothing  
8 seriously wrong with this current state of the  
9 law. Giving a reference is a serious matter and  
10 employers ought to think about what they say.  
11 But an employer who makes the statement that he  
12 honestly believes to be true and for which there  
13 is a reasonable basis should not be subject to  
14 Monday morning quarterbacking even if that  
15 statement ultimately turns out to be incorrect.  
16 Pennsylvania case law appears to meet this  
17 standard. Possibly in order to encourage job  
18 references to deal with some of the anxiety that  
19 some employers have, it would be helpful to  
20 enact legislation. We would propose that such  
21 legislation would provide that employers are  
22 liable for defamation only when there is clear  
23 and convincing evidence that the employer has  
24 made a false and damaging statement, with  
25 knowledge of its falsity or with reckless

1       disregard as to its truth or falsity.

2                   With respect to the clear and  
3       convincing evidence standard, we make that  
4       recommendation not based on the state of the law  
5       but that is what we would recommend with regard  
6       to defamation cases in general because we  
7       believe in the right to free speech and that  
8       should only be compromised if there is clear and  
9       convincing evidence and we would think that  
10      would be a better standard for all defamation  
11      cases.

12                   And while we support the notion which  
13      is the basis for House Bill 1972, we do not  
14      support it as written because the bill  
15      eliminates any objective standard of  
16      responsibility on the part of the employer.

17      Under the language of the legislation, as I  
18      understand it, an employer could not be found  
19      liable even if he had no reasonable basis for  
20      his damaging statement and acted with complete  
21      disregard as to the accuracy of those  
22      statements. False statements that are  
23      recklessly made, no matter how damaging and no  
24      matter how little basis there is for those  
25      statements, would be immune from liability.

1 They would have to prove that it was either  
2 deliberately false or deliberately misleading,  
3 as I recall the language of the bill. There is  
4 no standard that he or she had a reasonable  
5 belief in the truth of what they are saying. An  
6 employer could jeopardize someone's career by  
7 passing on what he reasonably should know to be  
8 be an unsubstantiated rumor could not be called  
9 to account.

10 We do not think that is a proper  
11 standard. Employers who tell deliberate lies  
12 should be held responsible and they would be.  
13 So should those who ruin lives with reckless  
14 charges without giving any thought to the truth  
15 should not be protected. Employers who make an  
16 honest attempt to tell the truth should be  
17 protected. Employers who act without a  
18 reasonable basis should not be granted immunity.

19 Once again, I want to thank you for  
20 allowing me to testify. And I would be happy to  
21 answer any questions. Or if you would want me  
22 to give any suggestions for further drafting, I  
23 would be happy to to be of what assistance I  
24 can.

25 CHAIRMAN GANNON: Thank you, Mr.

1 Frankel.

2 Representative Manderino.

3 REP. MANDERINO: Did you just assume I  
4 would have a question? He knows me too well.

5 Mr. Frankel, the Geyer versus  
6 Steinbronn case that you referenced in your  
7 testimony, do you recall -- it is not  
8 necessarily in quotes -- but when you talked  
9 about the jury's decision and the appellate  
10 court upholding of it, you used the term  
11 sufficient evidence to find the employer not  
12 only made statements that were untrue or without  
13 reasonable belief that they were untrue and I am  
14 focusing on the notion of sufficient evidence  
15 and without reasonable belief. Were those the  
16 words that were language from the holding in the  
17 case?

18 MR. FRANKEL: I will quote with regard  
19 to the sufficiency of the evidence and this is  
20 the Superior Court opinion. We agree with the  
21 trial court that the evidence was sufficient for  
22 the jury to conclude that, quote, Steinbronn  
23 communicated in at least a negligent manner  
24 several defamatory falsehoods concerning the  
25 plaintiff.

1           The trial court opinion on page 16, the  
2 Geyer opinion -- and that is with regard to  
3 sufficiency also used as negligence -- the Geyer  
4 opinion was the only opinion in the employer  
5 defamation area where even the term negligence  
6 was used. Most of them don't even use the term  
7 negligence and we think that is inappropriate.  
8 Even, you know, I mean, it is whether the  
9 employer has a reasonable basis and maybe it is  
10 negligence if they act without a reasonable  
11 basis. But that gets into a confusion with  
12 other notions that are more akin to negligence  
13 torts as opposed to defamation which is an  
14 intentional tort. If we can remember what we  
15 learned in law school?

16           I don't believe the word reasonable  
17 appear in the opinion. And this is why I think  
18 it may be helpful -- actually, I didn't want to  
19 go into this at first -- why it may be helpful  
20 to have a statute because the use of the word  
21 negligence in this one opinion may create some  
22 confusion.

23           The other opinions that I reviewed did  
24 not use the word negligence. And whether you  
25 want to let the case law evolve further or not,



1 that is certainly up to you, but it did create  
2 some difference there.

3 The reasonable belief standard does  
4 have some basis in case law. The Federal Court  
5 opinion that I referred to really relied on what  
6 was, at that time, the restatement of torts. I  
7 assume the restatement of torts has been revised  
8 since 1977. But there is some reference about a  
9 conditional privilege can be abused if the  
10 defendant -- and one of the ways it can be  
11 abused -- although believing in the truth of the  
12 statements, has no reasonable grounds for so  
13 believing. So there is some language in the  
14 case law with regard to reasonable belief.

15 The long answer to the short question,  
16 but I can't help it.

17 REP. MANDERINO: I guess my only other  
18 question is, in your testimony, you talked about  
19 defamation only as being an area that you think  
20 needs statutory protection. Maybe I am  
21 misunderstanding what you said. In what ways  
22 does 1972 go beyond defamation?

23 MR. FRANKEL: The way I read the bill,  
24 it is solely related to defamation ...

25 REP. MANDERINO: Okay.

1           MR. FRANKEL: ... because it would be  
2           an action based on information disclosed by a  
3           former. I mean, I didn't interpret it in any  
4           other manner.

5           REP. MANDERINO: I didn't either. I  
6           just must have misheard what you said then.

7           MR. FRANKEL: I confined my testimony  
8           to just the sense that it was about actions  
9           brought, sounding in defamation.

10          REP. MANDERINO: Thank you.

11          Thank you, Mr. Chairman.

12          CHAIRMAN GANNON: Thank you,  
13          Representative Manderino.

14          Representative Maitland.

15          REP. MAITLAND: No questions.

16          CHAIRMAN GANNON: Representative Reber.

17          REP. REBER: Just briefly.

18          Mr. Frankel, on the last two lines of  
19          the first page of the bill and on to the first  
20          three sentences of the second page. For  
21          purposes of rebutting the presumption, what  
22          elements in the cumulative must be shown, as  
23          this is written, in your opinion?

24          And what I mean by that, must the  
25          plaintiff show that the former employee was

1 knowingly false or deliberately misleading? And  
2 must he also show that it was done with malice?

3 I am having a hard time understanding  
4 what are the elements that have to be proven to  
5 overcome the presumption. Does one suffice?  
6 Does a combination suffice? If you show that it  
7 was rendered with malicious purpose or if you do  
8 not show that it was rendered with malicious  
9 purpose, do you rebut presumption and show that  
10 it violated any civil right of the former  
11 employee? I am not sure where the civil rights  
12 get the chance to see the law.

13 MR. FRANKEL: I would agree that it --

14 REP. REBER: And we will litigate this  
15 until hell freezes over, as to what those  
16 particular elements are that have to be, in  
17 essence, are proven in the course of rebutting  
18 the presumption if you are the plaintiff in the  
19 action.

20 MR. FRANKEL: Unless some additional  
21 punctuation is put in, which I am not going to  
22 suppose to put in to clarify, it is unclear to  
23 me whether there is supposed to be separate  
24 elements that have to each be proven, i.e.,  
25 whether you either, first of all, have to proof

1 the employer made knowingly false or  
2 deliberately misleading statements; then  
3 secondly, had to have malicious purpose or  
4 whether that is disjunctive. Either.

5 And it could be clarified by  
6 punctuation, with some colons and commas and  
7 things like that. But I would agree with you,  
8 Representative, that without that clarification,  
9 I would certainly believe that some court is  
10 going to have to make an interpretation which  
11 another court might disagree with and this would  
12 get litigated for quite a period of time.

13 REP. REBER: I guess my concern really  
14 rises to the height of the whole defamation  
15 issue of whether we are talking about public  
16 official/public figure concepts vis-a-vis the  
17 New York Times and the progeny and all of that,  
18 or whether we are just talking about two average  
19 individuals that do not fall into those  
20 trappings of actually having to show that malice  
21 situation before the defamatory action is  
22 recoverable, as we currently know it as relates  
23 to public officials, etc., etc.

24 So I guess that is, to some extent,  
25 what is causing me some concern here: are we now

1       statutorily rising certain people that otherwise  
2       are not public officials to a standard in  
3       rebutting the presumption that basically would  
4       attach only to public figures and the public  
5       officials? And I think that all goes to, as you  
6       say, the clarification of statutory  
7       construction.

8               MR. FRANKEL: My reading of the case  
9       law -- and I did not read every case that I  
10      could find -- but my reading of the case law  
11      would indicate to me that the employer/employee  
12      cases fall somewhere between the pure private  
13      citizen case and the public figure case. That  
14      you do have pretty consistently, I am saying  
15      there is a qualified or conditional privilege to  
16      make these statements and for a plaintiff to  
17      recover, they have to demonstrate an abuse of  
18      that privilege and the word malice is used just  
19      as it is used in the public figure cases, but I  
20      think your burden, as a plaintiff, is not as  
21      great but it is greater than in a nonemployment,  
22      nonpublic official defamation action.

23               REP. REBER: I thank you.

24               Thank you, Mr. Chairman.

25               CHAIRMAN GANNON: Thank you,

1 Representative Reber.

2 Representative Wogan.

3 REP. WOGAN: Thank you, Mr. Chairman.

4 And I want to thank you, Mr. Frankel,  
5 for your testimony today. I can't believe I am  
6 -- I guess I have been around here too long when  
7 I have come to thanking you for your testimony.  
8 But I sincerely believe your testimony was  
9 helpful today. And I do think it is important  
10 you helped elucidate that there is a problem in  
11 this area.

12 You may not entirely agree with House  
13 Bill 1972, but I wonder, would you characterize  
14 your main objection to the lack of some sort of  
15 a recklessness standard in the rebutting of the  
16 good faith presumption? Is that the main  
17 component that you believe would be missing from  
18 House Bill 1972?

19 MR. FRANKEL: That is a reasonably  
20 accurate clarification. It really creates too  
21 high a barrier for the plaintiff to overcome.

22 REP. WOGAN: Right, right.

23 MR. FRANKEL: And we think if you make  
24 it more akin to what we are talking about, one,  
25 it will be more in keeping with existing case

1 law. I think this has -- I don't think it  
2 reflects this in Pennsylvania case law. And,  
3 two, it will be more in keeping with our concern  
4 that employers at least have to have some  
5 reasonable belief and, therefore, I think their  
6 characterization is accurate.

7 REP. WOGAN: All right. Well, thank  
8 you, Mr. Frankel. Thank you very much.

9 MR. FRANKEL: Thank you,  
10 Representative, for your kind words.

11 CHAIRMAN GANNON: Thank you,  
12 Representative Wogan.

13 Mr. Preski, do you have a question?

14 MR. PRESKI: Yes, I do have a question.

15 Mr. Frankel, as a proposed compromise  
16 for the language that rebuts the presumption, I  
17 offer a standard that I think encompasses what  
18 you have placed in your testimony and at the  
19 same time protects the issues that are clear to  
20 the employers here. I would offer -- and I just  
21 ask for your brief comment -- for purposes of  
22 this section, the presumption of good faith is  
23 rebutted upon a showing of clear and convincing  
24 evidence that the information disclosed by the  
25 former employer was knowingly false and damaging

1 with knowledge of its falsity when disclosed or  
2 with the reckless disregard of the statement's  
3 truth or falsity. And I just ask for your  
4 comment on that.

5 REP. MANDERINO: Could you read it one  
6 more time, Brian?

7 MR. PRESKI: Sure.

8 REP. MANDERINO: You were starting on  
9 line 17, correct?

10 MR. PRESKI: I believe from line 17,  
11 all the way to the end. And insert: ... For  
12 purposes of this section, the presumption of  
13 good faith is rebutted upon a showing of clear  
14 and convincing evidence that the information  
15 disclosed by the former employer was knowingly  
16 false and damaging with knowledge of its falsity  
17 when disclosed or with a reckless disregard of  
18 the statement's truth or falsity.

19 And I say that knowing that you don't  
20 have it in front of you.

21 MR. FRANKEL: And knowing that I don't  
22 have it in front of me, the first comment that I  
23 have is, we already have clear and convincing  
24 evidence in lines 15 to 16 so I don't know if it  
25 necessarily needs to be repeated. That is one



1 thought that occurred to me.

2 It sounds like it is addressing our  
3 concerns. I just want to think more about the  
4 difference between reckless disregard and  
5 reasonable belief.

6 MR. PRESKI: Okay.

7 MR. FRANKEL: But it does represent a  
8 very good faith effort to meet the objection I  
9 raised in my testimony.

10 MR. PRESKI: Thank you.

11 CHAIRMAN GANNON: Thank you, Mr.  
12 Frankel, for your testimony today.

13 MR. FRANKEL: If I may? I do have one  
14 further remark, Chairman, which was in response  
15 to a question you asked ...

16 CHAIRMAN GANNON: Sure.

17 MR. FRANKEL: ... the previous witness  
18 about placing affirmative duty to disclose on an  
19 employer. I think you better ask a lot of  
20 employers because what happens if they fail to  
21 respond to a piece of paper, knowing that they  
22 have got thousands of pieces, you know?

23 I mean, I have some responsibilities as  
24 an employer now, at least temporarily, and I  
25 know how many pieces of paper come across my

1 desk and if you are going to impose an  
2 affirmative duty to disclose and somebody fails  
3 to do it, one, you really want to impose on the  
4 liability; two, regardless of that, you might  
5 want to find out how employers think about what  
6 cost that may impose on them; and the third is,  
7 I do know, at least in one jurisdiction, there  
8 was talk of a compromise between competing  
9 concerns which would have been that the employer  
10 and the employee at the time of termination  
11 would have an agreed upon statement that would  
12 be put in the file that would be what would be  
13 disclosed.

14 Now, I don't even know that I really  
15 support that because I don't think you want to  
16 be creating too many more duties than necessary,  
17 but I do have some concern about this  
18 affirmative duty to disclose and it is just  
19 another burden being placed on businesses.

20 CHAIRMAN GANNON: Could I? Just a  
21 quick question. Just so I am clear in my own  
22 mind. Would it be fair to say that you have  
23 some trouble with the language in the decision  
24 that you referred to, the federal decision,  
25 where they used the standard of negligence?

1           MR. FRANKEL: That was a state court  
2 decision.

3           CHAIRMAN GANNON: I am sorry. A state  
4 court decision.

5           MR. FRANKEL: I don't have as much  
6 trouble. My main source of trouble is that I  
7 think it has created potential confusion in the  
8 law. Having one case use the term negligence  
9 when none of the others have, that could end up  
10 being picked up and used over and over again to  
11 where the law does change quite a bit from what  
12 the other cases say. I haven't thought through,  
13 in terms of where we would like the law, if a  
14 statute was passed, what it would say, but I am  
15 troubled when a court kind of picks up a word  
16 and to me it was a little reckless in picking up  
17 a word that had not appeared in some of the  
18 other cases regarding employment defamation.

19           The term negligence appeared in other  
20 cases about purely private defamation and I  
21 think that's where it came from, but I think  
22 this is a different kind of action. And  
23 employment related defamation is different than  
24 if there is no employment relationship at all  
25 and somebody starts circulating a letter about

1 somebody. So that was why I raised it. It is  
2 there, it does create the potential for harm  
3 down the road, and it is up to you, as  
4 legislators, as to whether you want to leave  
5 that potential out there or not.

6 CHAIRMAN GANNON: Okay. Thank you.

7 REP. WOGAN: Thank you, Mr. Chairman.  
8 That leads me to another question.

9 Mr. Frankel, your criticism of the  
10 Steinbronn case almost makes it appear as if you  
11 support one of the enunciated aims of House Bill  
12 1972 of clarity, establishing clarity in this  
13 area of the law. Would that be an accurate  
14 characterization? Do you support?

15 MR. FRANKEL: I support clarity in the  
16 law. It certainly helps anybody. My criticism  
17 of Steinbronn is only in the use of the word  
18 negligence, not in the result.

19 REP. WOGAN: Right.

20 MR. FRANKEL: And there was no  
21 question. I mean, that's why the word  
22 negligence is even more trouble. I think the  
23 evidence, as reported in the opinion, shows that  
24 there was no negligence there. The employer  
25 deliberately lied.

1           But to go back to your question, to the  
2 extent there is confusion, clarity is certainly  
3 helpful, if there is an agreement on what that  
4 should be.

5           REP. WOGAN: Thank you again.

6           MR. FRANKEL: Thank you.

7           CHAIRMAN GANNON: Thank you. Would you  
8 hand a copy of your remarks to the stenographer  
9 to be added as an exhibit in the transcription.

10           Our next witness is Diane Dietrich,  
11 Human Resource Manager, Keystone Railway  
12 Equipment Company.

13           Welcome, Diane.

14           MS. DIETRICH: Thank you.

15           CHAIRMAN GANNON: Thank you.

16           MS. DIETRICH: Good morning, Mr.  
17 Chairman, Members of the Committee. I would  
18 like to thank you all for taking this  
19 opportunity and allowing us to present testimony  
20 as a part of this bill. My name is Diane  
21 Dietrich and I am the Manager of Human Resources  
22 for Keystone Railway Equipment Company, a  
23 manufacturing company based here in Camp Hill.  
24 I am also here in my role as a Legislative  
25 Affairs Coordinator for the Capital Area Society

1 of Human Resources. In my role as Legislative  
2 Affairs Coordinator, in my role as the  
3 Legislative Affairs Coordinator for the Capital  
4 Area Society, I have had limited exposure to  
5 this particular legislation. And I am here  
6 really speaking on behalf of employers dealing  
7 with the types of issues that both Miss Warner,  
8 and others, have referred to today.

9 Briefly, the Capital Area Society is a  
10 group of human resource professionals who are  
11 representing both large employers such as AMP  
12 Incorporated as well as employers similar in  
13 size to Keystone. In the past few years, the  
14 Capital Area ShRM has grown from a handful of  
15 dedicated professionals to an organization  
16 representing over a hundred different employers.  
17 The main purpose of the organization is not only  
18 to provide some opportunity for human resource  
19 professionals to get together, discuss issues  
20 similar to the reference checking bill, but to  
21 also provide some community benefits, in terms  
22 of various projects that we get involved with.

23 As Miss Warner indicated, human  
24 resource professionals handle a variety of  
25 duties, including compensation, benefits, and

1 most importantly, training and recruiting and  
2 selection of employees. We deal with a number  
3 of issues on a daily basis and try and balance  
4 both the needs of the employer and the employee.

5 Personally, I have been employed at Keystone  
6 Railway Equipment Company as Manager of Human  
7 Resources for approximately the past five years  
8 and I have encountered many of the difficulties  
9 surrounding the issue of reference checking,  
10 both here and in my previous tenure as a human  
11 resource professional. I have been a student of  
12 labor history and human resources practitioner  
13 for approximately 10 years and I realize that  
14 the continued critical role that employees may  
15 play in the success of any organization. My  
16 current and past work experience have enabled me  
17 to experience, firsthand, some of the problems  
18 that both employers and prospective employees  
19 face when dealing with the absence of sound  
20 reference checking laws.

21 Just to give you some background about  
22 Keystone, using Keystone as kind of a typical  
23 employer situation. We are based in Camp Hill,  
24 we have approximately a hundred and fifty  
25 employees at our location, as well as other

1       manufacturings throughout Kansas and abroad.  
2       Our workforce includes all types of positions,  
3       from welders, janitors, machine workers, as well  
4       as engineers, accountants and other types of  
5       professionals.

6                 There are numerous examples of  
7       corporate downsizing due to increased  
8       competition and, unfortunately, Keystone has not  
9       been immune to increased competition in our  
10      industry and subsequent downsizing. As with  
11      other industries, we have experienced some  
12      growing pains and it is very critical to us to  
13      make sure that our workforce is able to handle  
14      the challenges that we face in the future. Part  
15      of that process is to establish good hiring  
16      practices and ensure that, from the start, we  
17      have employees that can handle diverse tasks, as  
18      well as be flexible, to meet our changing needs.

19                We are very fortunate, at Keystone, to  
20      have a very strong core workforce of  
21      hardworking, loyal and bright employees, but we  
22      have not been immune to some of the problems  
23      that all employers face with the present lack of  
24      ability to check or provide references.

25                To be successful, the organization not



1 only has to meet the needs of our customers, but  
2 also the needs of the community, our employees,  
3 and shareholders.

4 And I cannot stress enough the  
5 importance of the hiring process. We have been  
6 invested a great deal of time and money, as all  
7 employers do, in recruiting individuals for our  
8 organization. And the absence of the ability to  
9 get accurate and vital information through  
10 reference checking only hampers these efforts  
11 and actually works to the detriment of both  
12 employers and prospective employees.

13 I would like to take a few minutes and  
14 just provide you some examples, based on my  
15 personal experience, both at Keystone and within  
16 my previous tenure in human resources. We  
17 talked a little bit about workplace violence. I  
18 think you mentioned that that seems that is an  
19 ongoing concern for employers. And in recent  
20 years, it is an unfortunate fact that many  
21 employers have faced the threat of an employee  
22 who physically threatens co-workers and possibly  
23 acts upon those threats. However, as the  
24 current reference checking law stands, rather  
25 than take a risk that an employer would be

1 potentially liable, most employers have made it  
2 a policy to just simply give name, rank and  
3 serial number or position and dates of  
4 employment. In some instances, employers may  
5 even try and provide a neutral reference as part  
6 of a discharge settlement, simply to have an  
7 employee go away quietly.

8           Unfortunately, in my personal  
9 employment, I have dealt firsthand with an  
10 employee who has had a history, not only of  
11 substance abuse, lost time due to absenteeism  
12 and tardiness, but also a history of threatening  
13 co-workers, including a history of physical  
14 assault.

15           This individual was hired by a company  
16 I worked for based upon information that he had  
17 performed similar work for several years for  
18 another employer.

19           And, essentially, the company that I  
20 worked with had been provided with a neutral  
21 reference stating that, yes, the work was  
22 satisfactory, and that, in fact, this individual  
23 had been employed for this particular date.

24           What the former employer could not and  
25 would not mention, however, is the fact that

1 this individual performed the work  
2 satisfactorily only when he happened to be  
3 there, which was very infrequently.

4 In addition, this individual had also  
5 physically threatened several co-workers in the  
6 past employment and this information was not  
7 subsequently passed on to the other employers.

8 We have hired the individual based on  
9 the information available and the knowledge that  
10 we had a probationary period available to us in  
11 order to further evaluate the performance.

12 As with many individuals, he  
13 successfully completed our probationary period,  
14 no absenteeism, no signs of any other types of  
15 behavior we would consider inappropriate. And  
16 subsequent to the probationary period, we  
17 embarked upon a path where we were dealing with  
18 a series of performance issues that utilized  
19 substantial resources and effected the morale of  
20 the entire workforce.

21 Following a history of attempts to work  
22 with the individual through counseling,  
23 substance abuse rehabilitation on two attempts,  
24 discipline in order to correct the behavior  
25 regarding absenteeism, this individual was

1 eventually terminated because of threats and  
2 actual physical assault against one of his  
3 co-workers and supervisor.

4 In the course of defending the employer  
5 against allegations of wrongful discharge, the  
6 information was discovered that the same  
7 individual had had a history of such incidents.  
8 Basically, we were told through the previous  
9 employer that, yeah, the same behavior occurred  
10 at our institution but we didn't want to pass  
11 that along because of the possibility of a  
12 lawsuit by this employee. That was told in  
13 strictest confidence off the record and,  
14 obviously, that happens more frequently than any  
15 of us would care to admit.

16 After almost a year of defending our  
17 position, the company was successful in  
18 defending the discharge for just cause.  
19 However, if we had been able to get more  
20 information in the initial hiring process, we  
21 would have potentially been able to save a great  
22 deal of time and money in the selection,  
23 training and subsequent lost time and legal  
24 costs incurred surrounding this one individual.  
25 Further, we would have been able to employ

1 possibly another well-qualified individual who  
2 was otherwise denied employment.

3           Some of you may hear this type of  
4 scenario and feel that, as an employer, we have  
5 an obligation to protect the privacy of former  
6 employees and to allow such individuals the  
7 opportunity to find subsequent employment.  
8 However, I am also responsible, in my role as a  
9 human resources professional, to the remaining  
10 workforce and the community that we do business  
11 in. And we need to provide a safe environment  
12 for all individuals, not just one. I do not  
13 feel that we should be forced to protect the  
14 rights of individuals who create fear and use  
15 force against others over those who simply want  
16 to come to work each day in a safe and  
17 productive environment.

18           One thing that stands out clearly in my  
19 mind, after dealing with this particular  
20 incident, was the change in atmosphere that we  
21 have in our workplace. The other employees were  
22 much more upbeat about coming to work every day.  
23 And when I commented on their attitude, they  
24 indicated that it was a much safer place to work  
25 and felt much more comfortable in coming to

1 work, now that this particular individual was  
2 gone.

3 I could also provide you with other  
4 similar examples of, quote, unquote, bad  
5 employees, where, because of lack of references,  
6 we have subsequently encountered difficulties  
7 with that individual. However, many of you may  
8 also question how this will help potential good  
9 employees. At some point or another, all of us  
10 will face the prospect of job hunting during our  
11 career and I would much prefer to give employers  
12 the ability to go through a valid reference  
13 check where they can get credible and reasonable  
14 information to confirm my work ethic skills,  
15 than to try and provide a letter of reference  
16 which may be viewed with some skepticism.

17 Often times, employers will agree to  
18 give a vague and very neutral letter of  
19 reference simply to get an employee to go away  
20 quietly or to settle some allegations of  
21 wrongdoing or wrongful discharge, rather than  
22 having to defend their position through  
23 arbitration or other legal recourse, and they  
24 hope the information does not come back to haunt  
25 them. I have also faced some situations where

1 we have terminated an individual for cause,  
2 including absenteeism or inability to perform  
3 the job, but turned around and then provided a  
4 letter of reference simply documenting the dates  
5 of employment and neutral information regarding  
6 that individual's performance in order to get  
7 the individual to leave a little more quietly.

8           Unfortunately, this practice has become  
9 more the norm, so that when an individual who is  
10 actually well-qualified and has done a good job  
11 for an employer, leaves with a letter in hand,  
12 it is often viewed, that letter of reference is  
13 often viewed as a negative by prospective  
14 employers because they want to know what the  
15 real reason is for terminating someone.

16           To illustrate this point: in one of my  
17 work experiences, we had hired several  
18 production employees and another supervisor in  
19 an effort to meet anticipated demands. The  
20 individual we hired as a supervisor brought to  
21 us over 15 years' experience and was a bright,  
22 innovative and very dedicated employee. He  
23 worked with us for close to a year, and because  
24 of some downturn in our marketplace, we were  
25 subsequently forced to eliminate his position.

1 I provided a letter of reference,  
2 giving a detailed summary of this individual's  
3 qualifications, including strong work ethic,  
4 overall leadership capabilities and  
5 innovativeness in dealing with some issues in  
6 our workplace.

7 He subsequently contacted several  
8 recruiters and in the course of searching for  
9 new employment, I was called and asked by some  
10 of these recruiters and other prospective  
11 employers whether we could provide a reference.  
12 When I referred to the letter that I had written  
13 for him, I was told that the individual may have  
14 seen the letter but they wanted to know what the  
15 real reason was for termination. In fact, one  
16 even asked if he was quote, unquote, deadwood  
17 and was laid off because he was not performing.

18 Although I assured these individuals  
19 that the only reason for the reduction was the  
20 drastic downturn in business and tried to assure  
21 them that this was a person who could contribute  
22 a great deal to their organization, as he had  
23 contributed to ours, I was left with a distinct  
24 impression that the individual would only be  
25 successful in getting future employment through



1 a combination of luck and perseverance.

2           Employers may also use other methods in  
3 order to really test an employer before hiring  
4 him on a regular, full-time employ. That,  
5 again, hurts the good employees that are out  
6 there. For example, companies often will fill  
7 an opening that they have that they know is a  
8 regular full-time position with the temporary,  
9 quote, unquote, temporary employee so that they  
10 may have more time to evaluate that person and  
11 really get a feel for whether or not they'll  
12 perform well over the long term. Some employers  
13 may have a probationary period which lasts 30 to  
14 60 or 90 days. But with the temporary  
15 situation, you can keep a person on six months,  
16 eight months to a year and really evaluate  
17 whether or not what they told you through the  
18 interviewing process is true. Unfortunately,  
19 that works to the detriment of this prospective  
20 individual, in that they are not treated as  
21 regular employees, in terms of benefits or  
22 compensation, but they have to perform all the  
23 regular duties anyone else would.

24           If we had the ability to do a more  
25 thorough job in the initial hiring stage and get

1 some valid and accurate information from  
2 previous employers, some of these individuals  
3 would be hired up front as a regular full-time  
4 employee rather than a temporary.

5 As the law currently stands, and the  
6 perception of the employers, employers have too  
7 great an investment in each person recruited to  
8 be able to take the risk of that -- if the  
9 particular individual is not going to work out.

10 In summary, I would like to recommend  
11 that you look at the passage of this bill as a  
12 win, win for both employees and employers. It  
13 would provide information for employers to  
14 provide in good faith regarding the performance  
15 of an individual and protect them from frivolous  
16 claims while also providing prospective  
17 employees with sound references that they can  
18 use for future employment.

19 I again want to thank you for this  
20 opportunity.

21 CHAIRMAN GANNON: Thank you, Miss  
22 Dietrich.

23 Representative Manderino.

24 REP. MANDERINO: Thank you,  
25 Representative Gannon.

1           Miss Dietrich, you have been with  
2           Keystone Railway Equipment for five years in  
3           your Director of Human Resources capacity?

4           MS. DIETRICH: Correct.

5           REP. MANDERINO: Do you give  
6           directory-only information out on employees, is  
7           that your current kind of modus operandi?

8           MS. DIETRICH: Yes. In fact, we have a  
9           very strict policy that no one except the human  
10          resources group is allowed to give that  
11          information. And that is strictly name and  
12          dates of hire, dates of termination and  
13          positions held.

14          REP. MANDERINO: And five years ago,  
15          was your policy the same five years ago?

16          MS. DIETRICH: Yes.

17          REP. MANDERINO: Okay. So for at least  
18          five years, you have had that same policy?

19          MS. DIETRICH: Yes.

20          REP. MANDERINO: Okay. Given what you  
21          have heard today about everyone's  
22          characterization of House Bill 1972, which is  
23          that it is to pass a law that states clearly  
24          what the current status of Pennsylvania law is  
25          today, how does the passage of 1972, if we pass

1 it, how would that change your policy at your  
2 company?

3 MS. DIETRICH: I think, with the  
4 passage of this bill, particularly as Miss  
5 Warner stated, it would clarify for employers  
6 what is acceptable, in terms of giving you a  
7 reference, and clarify for them the potential  
8 liability that is out there.

9 Right now, we are told by counsel,  
10 look, an employee can come back to you, sue you  
11 for hundreds of thousands, millions of dollars.  
12 Your best bet is to say nothing, except confirm  
13 name, date of employment. This would, I think  
14 send a strong message to all employers that it  
15 is okay if you are giving valid, accurate  
16 information, to provide that to other employers.

17 REP. MANDERINO: And you are saying  
18 that knowing that you understand that is what  
19 the status of the law today is, but you think  
20 the passage of the law will eliminate all the  
21 fear that is out there so that people are not  
22 doing what they currently do now, is that pretty  
23 much what you are saying?

24 MS. DIETRICH: Yes, based on my  
25 understanding -- I am certainly no expert, in

1 terms of the current case law that is out there  
2 -- but from what I heard today and my experience  
3 in dealing with this issue, is that the  
4 potential is there so you are better off not  
5 saying anything. And if this were enacted, I  
6 think a lot of employers, including my company,  
7 would look again at their policy and determine  
8 that it is okay, in fact, to give out valid  
9 information.

10 REP. MANDERINO: If we pass this law  
11 today, there would still be cases litigated in  
12 the area of employment defamation.

13 MS. DIETRICH: Um-hum.

14 REP. MANDERINO: Whether that will drop  
15 from what might be 3 percent today down to  
16 1 percent tomorrow, there will still be a lawyer  
17 or a human relations consultant who will come to  
18 your company and tell you that there is a  
19 1 percent -- Well, they probably won't tell you  
20 the percentages. I suspect that the percentage  
21 is less than 3 percent today. But my point is,  
22 they will still come and tell you the worse case  
23 scenario. That is their job.

24 MS. DIETRICH: Um-hum.

25 REP. MANDERINO: But what you are

1 saying is that that won't scare you tomorrow if  
2 we pass the bill like it scares you today  
3 without the bill?

4 MS. DIETRICH: I think the bill  
5 clarifies, for all employers, what their  
6 responsibility is and what would be considered  
7 reasonable and accurate information. There is  
8 no doubt that there will still be litigation  
9 because there are plenty of lawyers out there to  
10 litigate. But I think right now, what I told  
11 you, I have never been involved personally with  
12 a company that has faced that particular type of  
13 lawsuit but the fear is that you could face it  
14 and that's why employers don't say anything.

15 REP. MANDERINO: Besides Keystone, how  
16 many other companies have you been involved in  
17 that human resource capacity?

18 MS. DIETRICH: I have worked with two  
19 other organizations, one employer with about  
20 15,000 employees and one was actually a law  
21 firm, a labor law department.

22 REP. MANDERINO: Okay. And that was  
23 over the course of how many years?

24 MS. DIETRICH: About 10 years, close to  
25 11.

1 REP. MANDERINO: Thank you.

2 CHAIRMAN GANNON: Thank you,  
3 Representative Manderino.

4 Representative Hennessey.

5 REP. HENNESSEY: Thank you, Mr.  
6 Chairman.

7 Miss Dietrich, on the third page of  
8 your testimony, you relayed the story about an  
9 employee who would be violent in previous  
10 employments, you learned that in the course of  
11 litigation, you did not know at the time that  
12 you hired him?

13 MS. DIETRICH: Right.

14 REP. HENNESSEY: And you spent a lot of  
15 money trying to rehabilitate him and get  
16 counseling. Finally, he left because he got  
17 involved in some other altercation with an  
18 employee and he was terminated, right?

19 MS. DIETRICH: Um-hum.

20 REP. HENNESSEY: When your company was  
21 asked for a reference the next time, what did  
22 you do?

23 MS. DIETRICH: Fortunately, we have not  
24 been asked for a reference at this point for  
25 this individual.

1           REP. HENNESSEY: You never have. What  
2 would you do?

3           MS. DIETRICH: At this point, I would  
4 have to think very carefully about providing  
5 more information than we normally do, in terms  
6 of the name and dates of employment, because I  
7 would not want what happened to us to happen to  
8 another employer. And the potential is  
9 certainly there with this type of individual.

10          REP. HENNESSEY: So you would like to  
11 provide more information, but you are not sure  
12 you would because you do not know whether or  
13 not, you think, it would be better to take the  
14 safe route?

15          MS. DIETRICH: Right, certainly.

16          REP. HENNESSEY: Do you know that Miss  
17 Warner, right behind you, might sue you for  
18 failing to disclose something that should be  
19 disclosed?

20          MS. DIETRICH: The potential certainly  
21 exists. And that is something we would have to  
22 consider, whether we take the risk on that end  
23 or take the risk on the end of the employee  
24 trying to come back and sue us for defamation of  
25 character.



1           REP. HENNESSEY: I missed part of the  
2 discussion. The truth is always in defense in  
3 these matters, right?

4           MS. DIETRICH: Yes.

5           REP. HENNESSEY: So if you accurately  
6 reflect in your references what happened at your  
7 employment and what the reasons were for  
8 termination, ultimately you should win the  
9 lawsuit that is brought, right?

10          MS. DIETRICH: I would hope so.

11          REP. HENNESSEY: But it is the fear of  
12 just potential for being named as a defendant  
13 that stops companies from giving this  
14 information out?

15          MS. DIETRICH: Certainly. You know,  
16 most employers face that situation where it is  
17 better simply to say as little as possible than  
18 to get into a gray area of whether I consider  
19 three days absenteeism excessive versus someone  
20 else who may consider five days absenteesim  
21 excessive.

22          REP. HENNESSEY: Well, when you get  
23 into terms like excessive -- you know, that is  
24 argumentative, I understand -- that can mean  
25 different things to different people, but you

1 say somebody is fired because they did not show  
2 up for 14 days, either the person did or he did  
3 not and you should be able to successfully  
4 defend yourself, right?

5 MS. DIETRICH: I would hope so. But,  
6 again, the fear is the employee will come back  
7 and say, well, I had doctors' excuses and I was  
8 disabled and I told my employer that and you get  
9 into a whole can of worms, I guess, in terms of  
10 trying to defend that. And, as I said,  
11 employers really feel it is easier just to give  
12 the name and dates rather than get into that,  
13 those types of situations.

14 REP. HENNESSEY: Thank you.

15 Thank you, Mr. Chairman.

16 CHAIRMAN GANNON: Thank you,  
17 Representative Hennessey.

18 Representative Reber.

19 REP. REBER: No questions.

20 CHAIRMAN GANNON: Representative Wogan.

21 REP. WOGAN: I have no questions of  
22 Miss Dietrich. Thank you, Mr. Chairman.

23 CHAIRMAN GANNON: Representative  
24 Manderino.

25 REP. MANDERINO: I am sorry. Thank

1 you, Mr. Chairman. And I forgot, I did have one  
2 other question and I was going to save it for  
3 the next witness, but I have another hearing to  
4 go to so I probably won't be able to stay.

5 But a couple of different, yourself and  
6 Miss Warner, both refer to what seems to be a  
7 common enough phenomena in the industry that  
8 people recognize it and that is something that  
9 you referred to as the neutral reference. And  
10 both of you refer to the neutral reference and  
11 it is easier to give a neutral reference and  
12 make the problem employee go away or quit  
13 bothering me. And I guess, again, my question  
14 is, how will -- won't that practice still --

15 I mean, I see that as a real problem.  
16 I am not denying that that is your problem. I  
17 am just trying to figure out how this will solve  
18 that because I do not see anything in here that  
19 addresses that problem or would solve the  
20 problem of employers just saying, I don't want  
21 to deal with this guy in having to have him come  
22 bug me, or whatever, so I am going to give him a  
23 neutral letter of recommendation and get him out  
24 of my workplace and my problem has gone away.  
25 And I guess part of me is saying, I am trying to

1 be real realistic about what we are going to  
2 accomplish here and I want you to be, too, and I  
3 do not see how we can accomplish this, you know?  
4 And maybe I am missing something.

5 MS. DIETRICH: I think to a degree that  
6 practice may continue, but I think, overall,  
7 employers will feel much more comfortable in  
8 being able to give well-documented, reliable  
9 information regarding the employment of a  
10 particular individual without fear, so much fear  
11 of retribution. And I think, overall, that when  
12 evaluating that type of settlement, they would  
13 think twice about it, if this was passed.

14 REP. MANDERINO: Thank you.

15 Thank you, Mr. Chairman.

16 CHAIRMAN GANNON: Thank you,  
17 Representative Manderino.

18 From reading your testimony, it appears  
19 that that employee in your anecdote that you  
20 gave here was terminated and he filed a lawsuit  
21 against your company for wrongful termination.

22 MS. DIETRICH: Actually, we were in the  
23 it was a union employee so we went through the  
24 arbitration procedure, discharge for cause.

25 CHAIRMAN GANNON: And this information

1 about his prior records did not come out until  
2 you went through that arbitration proceeding?

3 MS. DIETRICH: Correct.

4 CHAIRMAN GANNON: One other comment --  
5 and I am sure you will agree with me -- but it  
6 seems to me that if this would become law, in  
7 one form or another, that when you give good  
8 information about an employee, it would have  
9 more credibility?

10 MS. DIETRICH: That's absolutely true.  
11 As I said, we have given valid references about  
12 some individuals that have been dealt with a  
13 great deal of skepticism because the whole  
14 process is viewed as really noncredible by most  
15 individuals.

16 CHAIRMAN GANNON: They do not believe  
17 it when you say something good about them?

18 MS. DIETRICH: Right.

19 CHAIRMAN GANNON: Thank you for your  
20 testimony, Miss Dietrich.

21 MS. DIETRICH: Thank you.

22 CHAIRMAN GANNON: Our next witness is  
23 Mr. David Coldwell, Out-placement Consultant,  
24 Millard Consulting Services.

25 Welcome, Mr. Coldwell.

1           MR. COLDWELL: Thank you, Mr. Chairman.  
2 Good morning.

3           REP. HENNESSEY: Good morning.

4           MR. COLDWELL: Mr. Chairman, Committee  
5 Members, my name is David Coldwell. I am a  
6 human resources professional and currently the  
7 Pennsylvania State Director for the Society of  
8 Human Resources Management, hereafter to be  
9 known as SHRM; and a principal of Millard  
10 Consulting Services, in Fort Washington,  
11 Pennsylvania. Millard is an out-placement and  
12 human resources consulting firm. Thank you for  
13 allowing me to address this committee.

14           Since I am not an attorney, I think you  
15 will find that my remarks will be somewhat  
16 brief. I am also reminded of an anecdote. I am  
17 also reminded of an amusing story that my son  
18 brought home after returning from fourth grade  
19 and had said that, Dad, today, we had to talk  
20 about what our parents did or working parents.  
21 I said, oh, Chris, what did you say about me?  
22 He said, you fire people and give speeches.

23           Well, I am obviously not going to fire  
24 anyone this morning, and I hope that my remarks  
25 are not so much in the way of a speech, but I do

1 hope you find them interesting.

2 I have practiced as a human resources  
3 professional since 1972. During that time, I  
4 have been responsible for many functions under  
5 the human resources umbrella: compensation,  
6 benefits, planning, design, administration,  
7 Equal Employment Opportunity, employee and labor  
8 relations, and training development. However,  
9 one of the most critical functions was  
10 management of the employment process.

11 Recruitment and selection of qualified, skilled  
12 and competent candidates. How many times have  
13 we heard an organization is only as good as its  
14 people or people are our most important asset?

15 Employment decisions have a significant  
16 and direct impact on how an organization will  
17 carry out its commitment to quality, safety and  
18 customer satisfaction.

19 Just like a carpenter, a dentist, a  
20 plumber, an artist, a chef, we need tools to  
21 practice the trade. A human resources  
22 professional needs tools to practice their  
23 trade. One of those tools is a reference check.  
24 The ability to speak with an authorized  
25 representative who can, in good faith, disclose

1 information about the candidate's previous work  
2 history.

3 Rightly or wrongly, in today's  
4 environment, the ability to gain information on  
5 a candidate through a reference may be the  
6 determining factor as to whether an offer of  
7 employment is made. If no reference is  
8 available, the possibility of no offer is made.  
9 When this occurs, an employer has lost a  
10 potentially valuable new addition to their  
11 organization and an out-of-work person has lost  
12 an opportunity to join a new organization where  
13 they could make a contribution. Frankly, the  
14 name of the game is to minimize risk. If in  
15 good faith I can't gain information on a  
16 candidate, through a recognized professional, I  
17 have minimized my risk.

18 My 24 years in human resources have  
19 included the petroleum industry, automobile  
20 manufacturing, and banking. Today, I find  
21 myself practicing as a consultant in  
22 out-placement. As an out-placement consultant,  
23 I am called upon to counsel and advise many  
24 people who, generally through no fault of their  
25 own, have lost their job.



1           One of the key points that we counsel  
2           and coach candidates on is their ability to gain  
3           and manage their references. This includes  
4           identifying and obtaining permission of those  
5           people to act as a reference when called upon.  
6           When coaching our candidates, we emphasize the  
7           importance of managing your references and  
8           knowing what they will say about you if  
9           contacted. Again, the ability of the reference  
10          checking process is critical, too. In this  
11          case, the candidate, to gain an offer. Without  
12          the ability to have references, represent the  
13          candidate offers of employment will be far and  
14          few between.

15                 A recent article in the Human Resource  
16          Report, published by Millard Consulting -- and I  
17          brought a copy of that article along this  
18          morning -- stated that: dambed if you do and  
19          dambed if you don't. Should you give a  
20          reference for a former employee? It depends on  
21          where you live.

22                 Fifteen states have passed reference  
23          checking laws. The first of them Georgia in  
24          1991. The most recent nine in 1995. As you  
25          know, legislation is pending in three more

1 states, including our own state Pennsylvania.

2 Our SHRM State Council believes that  
3 employers and employees of Pennsylvania would be  
4 well-served by the adoption of a statute similar  
5 to those in other states. House Bill 1972 is  
6 offered for the Pennsylvania Legislature's  
7 consideration as a solution to this troublesome  
8 problem. Enactment of the bill would permit  
9 employees to obtain references that may enhance  
10 employment opportunities while offering  
11 protection to employers providing those  
12 references.

13 Under the statute, the employer is  
14 presumed to be acting in good faith when  
15 responding to requests for information about a  
16 current or former employee. Enactment of the  
17 bill would also allow that if the employer is  
18 acting in good faith, the employer is then  
19 protected from civil liability. Immunity from  
20 civil liability would be enjoyed only if the  
21 prospective employer makes the reference request  
22 in writing and provides the former employer with  
23 a written release signed by the current or  
24 former employee.

25 The SHRM Pennsylvania State Council

1       urges the Pennsylvania State Legislature to  
2       recognize the unstable climate that has been  
3       created regarding employment references, such a  
4       climate where the free flow of information is  
5       discouraged, is harmful to Pennsylvania  
6       employers and employees. It is increasingly  
7       difficult for employers to obtain information to  
8       make responsible hiring decisions and for  
9       employees to enjoy the benefits offered by  
10      positive reference. To inhibit the growth of  
11      counter productive nondisclosure policies and to  
12      address the inequitable results when employers  
13      need to request information but fear responding  
14      to reference requests, the SHRM Pennsylvania  
15      State Council urges passage of House Bill 1972.  
16      The proposal offers urgently needed clarity,  
17      uniformity and protection.

18                   Thank you.

19                   CHAIRMAN GANNON: Thank you, Mr.  
20      Coldwell.

21                   Representative Hennessey, do you have  
22      any questions?

23                   REP. HENNESSEY: Mr. Coldwell, on page  
24      five, you just indicated in the middle of the  
25      page there, immunity from civil liability would

1 be enjoyed only if the prospective employer  
2 makes the request in writing. Is that just a  
3 matter of proof? I mean, the statute doesn't --  
4 or the bill, I suppose, does not say that, but I  
5 guess you are saying that --

6 MR. COLDWELL: It is offered as a  
7 suggestion, Representative.

8 REP. HENNESSEY: Okay. And you also  
9 talk about a written release. The bill just  
10 calls for the request from the potential  
11 employee, but you are suggesting that?

12 MR. COLDWELL: Again, I can take it a  
13 step further, in terms as a suggestion to this  
14 committee and proposed legislation, that it  
15 might clarify some of the ambiguity and it might  
16 make the process easier for us practitioners.

17 REP. HENNESSEY: I understand. You are  
18 not an attorney. You have heard the discussions  
19 that have been taking place all morning. Were  
20 you aware, before today's discussion, that there  
21 was this tort out there called negligent  
22 referral for failing to disclose information  
23 that should have been disclosed?

24 MR. COLDWELL: I might also mention  
25 that for the past five years, I have been an

1 adjunct faculty member at Villa Nova University  
2 where I teach a course in Human Resource  
3 Management. The students in my class are  
4 generally HR practitioners, generally new to the  
5 profession. This has been a common concern for  
6 the past five years.

7 REP. HENNESSEY: What has been?

8 MR. COLDWELL: Voiced in my class is  
9 the concern about negligent and with regard to  
10 --

11 REP. HENNESSEY: For failure to  
12 disclose?

13 MR. COLDWELL: Exactly.

14 REP. HENNESSEY: But House Bill 1972  
15 only deals with the front end of that, the  
16 disclosure of information which is alleged then  
17 to have been given in -- Well, to get around it,  
18 you would have to allege it was given in bad  
19 faith, right?

20 MR. COLDWELL: Correct.

21 REP. HENNESSEY: What about the other  
22 side of that? Shouldn't we be dealing with  
23 that, in your view here, in this statute?  
24 Should we be amend it, expand the scope so that  
25 we include the idea that somebody is protected

1 or would not be protected if they do not  
2 disclose something that a judge or a jury  
3 believes should have been disclosed?

4 MR. COLDWELL: I think it is a real  
5 life problem. I know one of the major concerns  
6 in the workplace today and probably the hottest  
7 topic discussed in human resource circles is  
8 violence in the workplace. So I do see that as  
9 a concern, as a practitioner and as a past  
10 practitioner, the nondisclosure of certain  
11 information. I am not proposing that it be  
12 addressed in this bill. However, I can tell  
13 you, as a practitioner, that it would continue  
14 as a concern.

15 REP. HENNESSEY: So as a practitioner,  
16 you would have to look to the bill to see what  
17 your immune status would be if you say something  
18 and look to the common law to figure out what  
19 your status would be if you do not say anything?

20 MR. COLDWELL: My feeling is that  
21 passage of House Bill 1972 would open the door  
22 and allow for HR practitioners to feel a breath  
23 of fresh air, in terms of, I now can practice  
24 what I need to do in good faith and alleviate a  
25 lot of those nondisclosure issues, especially

1 the burden of, I withheld information that later  
2 on approved to be harmful in certain situations.  
3 I don't know, I don't want to --

4 REP. HENNESSEY: I was following you  
5 until your last sentence. That is still going  
6 to be a problem even if we pass HB 1972.

7 MR. COLDWELL: I am not so sure it will  
8 be a problem.

9 REP. HENNESSEY: The failure to  
10 disclose information that you should have  
11 disclosed will still be that negligent that --

12 MR. COLDWELL: Coming from that  
13 environment for the past 24 years, what I see is  
14 people in this profession saying, give me  
15 something, give me another tool so I can do what  
16 I need to do. Do the right thing, if you will.  
17 So although the legislation does not  
18 specifically address that, in terms of practice  
19 I would see people doing the right thing.

20 REP. HENNESSEY: Okay.

21 MR. COLDWELL: I am speaking about my  
22 fellow HR practitioners.

23 REP. HENNESSEY: And I don't want to  
24 beat a dead horse here. Is the negligent  
25 referral just such a new cause of action that

1 people are not as aware of it, that it exists  
2 out there? Is that why it has not gotten the  
3 kind of notoriety that the other side generally  
4 gets?

5 MR. COLDWELL: I would generally agree  
6 with you. It is something that I didn't see 10  
7 to 15 years ago, but I am seeing more of it  
8 today.

9 REP. HENNESSEY: What do you recommend  
10 I do before I hire a baby sitter? No, no.

11 MR. COLDWELL: See if they are a U.S.  
12 Citizen.

13 REP. HENNESSEY: That is always step  
14 number one, right?

15 CHAIRMAN GANNON: And get the baby  
16 sitter's Social Security Number.

17 REP. HENNESSEY: Yes.

18 CHAIRMAN GANNON: And you pay them.

19 Thank you, Representative Hennessey. I  
20 have to go to another meeting so I am going to  
21 turn the meeting over to Representative Wogan  
22 for continuation of the balance of the hearing.

23 ACTING CHAIRMAN WOGAN: Thank you, Mr.  
24 Chairman. I have no questions of Mr. Coldwell.

25 So I want to thank you for sharing your



1 opinions with us in House Bill 1972 and we  
2 really do appreciate your being here this  
3 morning.

4 MR. COLDWELL: I appreciate the  
5 opportunity. Thank you.

6 ACTING CHAIRMAN WOGAN: The next on the  
7 agenda, just added, I believe this morning, is  
8 Patricia Miller.

9 MS. MILLER: Thank you. I guess I  
10 should say good afternoon now, instead of good  
11 morning. I would like to deviate from my  
12 comments that I have submitted a little bit. I  
13 think we have had much testimony and I could go  
14 into the same testimony of specific incidents.

15 My name is Patricia Miller. I am with  
16 Miller Consulting Services. I have had 18 years  
17 in a large corporation as an HR Director and the  
18 past five to six years as a Human Resource  
19 Consultant for a small business.

20 As I have listened to the testimony  
21 today -- and this is my first day to ever be  
22 involved in a situation like this -- I think we  
23 have come down to looking at: do we need this  
24 law or not? Is it going to help us as  
25 practitioners?

1           I deal mostly with employers that have  
2 under a hundred employees, many with seven to  
3 ten employees. As I go into their business,  
4 they constantly tell me: it is against the law  
5 to give references. This is what I hear. They  
6 have heard the horror stories. They don't know  
7 what the risks of those stories are. They are  
8 just convinced that they can't do this. I can  
9 quote laws to them. I can go into that. That  
10 is not going to change their minds.

11           On other situations, other laws, if I  
12 give them a sheet of paper that says, this is  
13 legislation, it makes a difference. They then  
14 would look at that and believe that they could  
15 give honest references. I think by having an  
16 act and showing it to them, it would alleviate a  
17 lot of the problems.

18           When we talk about the negligent  
19 hiring? Yes, I think that is something new that  
20 has come out. I think it has come out more  
21 because people are giving less references so you  
22 are seeing more in that backlash in the other  
23 direction. I think that would go away if people  
24 would start giving honest references. And I  
25 think it would, if we had this act in front of

1 us.

2 And just to touch some of the things  
3 that I have done in just a couple of months, the  
4 past months with my clients, I had one we just  
5 went into a hiring situation, we needed to hire  
6 40 new production employees. Their past record  
7 was abominable. They had gone to the extent of:  
8 they just bring them in, hire them and let them  
9 go within 90 days if they did not measure up.  
10 This is bad for both the employer who is  
11 incurring a lot of cost and the employee who  
12 maybe was a good employee and just had a poor  
13 fit because they couldn't feel that they could  
14 get honest information in either the interview  
15 or reference check.

16 In working with the employer, I taught  
17 them how to do interviewing and I taught them  
18 how to do reference checking. They have seen a  
19 great improvement. In fact, since January, they  
20 have hired 38 people. Between 38 and 40 people,  
21 I guess it would be, because 38 were production  
22 and there were a few on the salary aspects.  
23 They have not lost an employee. They have not  
24 terminated an employee. In other times, they  
25 would have employees walk off the job because

1 they were a poor fit. In showing them how to do  
2 reference checking, though, it was a major  
3 effort because we could not get anything but  
4 name, rank and serial number, so to speak.

5 But being in the business for as many  
6 years as I have been in the business, I have  
7 learned how to get references. And it is not  
8 above board. It is by knowing people in the  
9 industry, it is by calling supervisors, getting  
10 information from the applicants, getting the  
11 supervisor's home phone number, would be  
12 anything you can get, to try to make it a  
13 perfect fit as you can make it. That is the  
14 honest way to go because when an employee has  
15 two to three jobs that they haven't had a good  
16 fit, I want to tell you, if that person goes  
17 into an employment situation, they don't get  
18 hired. They don't worry about the reference  
19 checking, they just look at the work history and  
20 just assume that they are not a good employee.  
21 On many times, that is not the case. If you get  
22 the employee in the right situation, they will  
23 be a good employee.

24 I think we are seeing a lot of backlash  
25 from not having this law. And I can see, from

1 some of the faces on the other side of this  
2 table, why do we really need this law? And I  
3 can see them looking at case law and say, well,  
4 we already have that protection. Yes, maybe, in  
5 theory, it doesn't change, but the perception  
6 changes. And if the perception changes, the  
7 performances will change and we will see people  
8 giving more references and we will see that we  
9 will not have the backlash from this.

10 Thank you.

11 ACTING CHAIRMAN WOGAN: Thank you very  
12 much, Miss Miller.

13 Representative Hennessey, do you wish  
14 to be recognized for any questions?

15 REP. HENNESSEY: I am sorry. I have to  
16 confess that I missed most of what she said so I  
17 will see if I can develop something as you take  
18 other questions.

19 MR. PRESKI: Yes, I have just one  
20 question.

21 From a practical standpoint, as you are  
22 checking references, how do you check the person  
23 who is giving the reference? I see this as a  
24 question when we debate this on the Floor, that  
25 you go out to Employer A and Employer A says

1 that this was either a good or a bad employee.  
2 What criteria do you use, if any, to rate the  
3 person who gives you the reference?

4 MS. MILLER: I try to look at more than  
5 just one reference. You look at as many  
6 references as you can get. You validate that  
7 with what you have in your own interview. It  
8 more or less is a second tool to use. And if  
9 you ask the questions in a manner that you can  
10 find out how close a fit that employee's job was  
11 because maybe that person was not a good  
12 employee of that company, but I have hired  
13 people with bad references because I thought  
14 they would be a good fit for the company that I  
15 was hiring them for, and you have to evaluate if  
16 someone says they missed three days at that  
17 company, maybe that was critical to that  
18 employer, it might not be critical to the  
19 employer that I am working with, but I still  
20 need that information. I don't take: he had  
21 poor attendance. What attendance? Or I don't  
22 take he had --

23 Just yesterday one, I had that I was  
24 evaluating a person for a fast-moving assembly  
25 line. In the interview, everything seemed fine,

1 but there was something I just felt wasn't sure  
2 I wanted to validate. It seemed, I was  
3 concerned whether she could keep up with the  
4 assembly line. When I called the employer, the  
5 reason she was not laid off, she was actually  
6 terminated, because she couldn't keep up with  
7 their fast-moving assembly. I asked them to  
8 give me facts about that assembly line, which  
9 eventually I could evaluate how she could keep  
10 up in ours. To make a long story short, I hired  
11 her for another position that wouldn't require  
12 her to be that. And I think she will make a  
13 very good employee, but I think she probably  
14 would have got lost in the shuffle. I hired her  
15 for the other position.

16 MR. PRESKI: Thank you.

17 ACTING CHAIRMAN WOGAN: Representative  
18 Hennessey.

19 REP. HENNESSEY: Miss Miller, in your  
20 experience when employers get sued for giving  
21 improper references, or allegedly improper  
22 references, what really is the nature of the  
23 reference? Is it a characterization like he's a  
24 bad employee as opposed to a good employee, or  
25 he is unacceptably absent as opposed to he was

1 absent four days, one of which I thought was  
2 critical? I mean, are employers putting  
3 themselves in a position where they can't defend  
4 themselves because some people would even argue  
5 that way whether a good employee is a good  
6 employee if he misses four days but you have to  
7 miss it during inventory? I guess most Wal-Mart  
8 managers would say he's a bad employee.

9 MS. MILLER: In my experience, I have  
10 been involved in human resources for 20 plus  
11 years, I have never been involved in a suit, I  
12 have never had anyone come back to me on a suit.  
13 And the clients that I have had, which are  
14 numerous in the last five years, I have never  
15 had anyone come back on a suit. I find it more  
16 hysteria than fact. And the cases that I have  
17 --

18 When I was first advised by attorneys  
19 not to give out information when I worked for a  
20 large corporation, I am the type that I want to  
21 know why and I want to read the case law and I  
22 want to evaluate my own risk.

23 In anything that I could find, it would  
24 be employers being very subjective. I can only  
25 recall of one that I would have -- if I had been



1 an employee, I probably would have sued. He  
2 said something to the effect, this employee  
3 needs a frontal lobotomy. I hired the  
4 individual and he was there for 10 years before  
5 I left that company.

6 I evaluated the decisionmaker. And  
7 what I had found out in the interview about the  
8 situation, but that is very rare. But I find  
9 most employers, especially the small employers  
10 and even some of the larger employers that won't  
11 give out any other information but name, rank  
12 and Social Security Number, that if they had  
13 this paper in front of them that said statute,  
14 that says they have more rights, even though it  
15 is there in the case law, I think we would see  
16 more reference checking and we would see a  
17 valuable tool that we would be able to use. If  
18 that answers your question?

19 REP. HENNESSEY: Yes. Thank you.

20 MS. MILLER: Thank you.

21 ACTING CHAIRMAN WOGAN: Thank you, once  
22 again, Miss Miller.

23 Also added to our agenda is Robert  
24 Niedzielski and also sitting in with Mr.  
25 Niedzielski is Al Taubenberger.

1 MR. TAUBENBERGER: That's correct.

2 ACTING CHAIRMAN WOGAN: Would both of  
3 you gentlemen identify yourselves for the  
4 purposes of the record and perhaps spell your  
5 names also.

6 MR. NIEDZIELSKI: Certainly. My name  
7 is Robert J. Niedzielski, N-i-e-d-z-i-e-l-s-k-i.

8 MR. TAUBENBERGER: My name is Al  
9 Taubenberger and that is spelled  
10 T-a-u-b-e-n-b-e-r-g-e-r, and I am President of  
11 the Greater Northeast Philadelphia Chamber of  
12 Commerce.

13 ACTING CHAIRMAN WOGAN: Thank you and  
14 good afternoon, gentlemen.

15 MR. NIEDZIELSKI: Thank you. And I  
16 would like to express my appreciation for giving  
17 me the opportunity to present testimony this  
18 afternoon.

19 I am the Director of Human Resource  
20 Development for Tighe Industries, located in  
21 York, Pennsylvania. Our company manufactures  
22 costumes for the performing arts industry and we  
23 employ approximately 400 hardworking employees.

24 A main segment of my responsibilities,  
25 of course, is recruiting staffing for my

1 company. In attempting to fulfill this  
2 responsibility, it is becoming increasingly  
3 difficult for me to obtain data from prior  
4 employees to assess work history, performance,  
5 conduct, all of which are critical in the  
6 recruitment process. Our company, as well, is  
7 caught up in this defensive posturing.

8           Why? Why have employers become so  
9 afraid of speaking out and speaking honestly and  
10 factually about employment issues? Quite  
11 frankly, it is simple: for years, employers have  
12 been attempting to function around what we  
13 perceive as a conflict of legislative standards.  
14 On one hand, we have been mandated to provide a  
15 safe working environment for our workers, a law  
16 I fully support. On the other hand, employers  
17 out of fear of litigation have been denied  
18 access to the very data that will help us to  
19 provide such a safe working environment.

20           The recruitment and subsequent hiring  
21 of qualified candidates for employment has  
22 become a task that is severely impeded by  
23 legislation efforts. Employers are spending a  
24 lot of time in assuring candidates' civil rights  
25 are protected, they are not discriminated

1     against under the provisions of the Civil Rights  
2     Act, A.D.A., Age Discrimination, etc. All of  
3     these issues are certainly extremely important.  
4     However, they add nothing to determining whether  
5     or not the candidate is employable or fits  
6     within the company's culture.

7             Additionally, employers are confronted  
8     within increased litigation for disclosure of  
9     important information that is work related. The  
10    final insult, however, is that becoming  
11    embroiled in litigation for wrongful hiring  
12    because references failed to disclose crucial  
13    information.

14            Obviously, there appears to be  
15    something that is very wrong. We can't have it  
16    both ways. The burden of responsible hiring is  
17    placed squarely on employers but they are not  
18    permitted access to crucial information to  
19    making informed hiring decisions that compliment  
20    and protect the company and their co-workers.

21            If you expect employers to remain  
22    accountable for workplace safety, then you have  
23    the responsibility to provide the legislative  
24    tools that aid in that effort.

25            Workplace violence has been said,

1 mentioned a number of times here, and it's  
2 occurring at an alarming rate in our society,  
3 companies are spending a great deal of money for  
4 security systems, employee assistance programs,  
5 drug and alcohol counseling and screening, in  
6 part, to control this violence.

7           Legislation that permits employers to  
8 disclose factual employment data without fear of  
9 litigation is urgently needed in our continuing  
10 effort to reduce the escalating violence in the  
11 workplace. On several occasions, our company  
12 had to become involved in worker safety issues  
13 because of marital disputes. This certainly is  
14 not part of the hiring process but graphically  
15 illustrates the extent of safety issues  
16 confronting employers today.

17           Many states are also considering such  
18 legislation -- and you have heard all those  
19 before -- Illinois, Michigan, Arizona, South  
20 Dakota, Tennessee and Virginia, are just a few.

21           And there are those that would argue  
22 that employers would abuse the privilege if  
23 enacted. Frankly, this is no different than any  
24 other type of legislation that subjects itself  
25 to that type of abuse. However, there is a much

1 greater and I think a more ominous concern, I  
2 think, if we do nothing. And that is my concern  
3 today.

4 I would like to see Pennsylvania become  
5 the leader in addressing this issue, frankly. I  
6 believe in the adage that you are either part of  
7 the problem or you are part of the solution.  
8 And I also believe that industry and government  
9 have an equal responsibility for worker safety.  
10 I would hope that we as industry and you as  
11 legislators can work together to be part of the  
12 solution and let's cease having to function out  
13 of a fear of litigation.

14 Thank you very much for your time and  
15 for giving me the opportunity to present this  
16 testimony today.

17 ACTING CHAIRMAN WOGAN: Thank you, sir.

18 Representative Hennessey, do you have  
19 any questions?

20 REP. HENNESSEY: Yes, I do.

21 Mr. Niedzielski, at the bottom of your  
22 first page, you talk about employers not being  
23 permitted access to critical information to make  
24 informed hiring decisions. Actually, that is  
25 not the case. You are entitled to it, you just

1 can't get it because other employers -- not the  
2 state -- don't want to hear it.

3 MR. NIEDZIELSKI: The fear of  
4 litigation has permitted a certain deny of  
5 access to that information.

6 REP. HENNESSEY: But it is not the  
7 state that did it?

8 MR. NIEDZIELSKI: Not the state, no.

9 REP. HENNESSEY: But you would like us  
10 to somehow solve the middle category now.

11 Okay. Thank you.

12 ACTING CHAIRMAN WOGAN: Thank you.

13 Mr. Taubenberger, did you have a few  
14 remarks for the benefit of the committee?

15 MR. TAUBENBERGER: Yes, just a few  
16 brief remarks. I want to thank the committee  
17 for allowing us to speak.

18 A little bit on our Chamber. We were  
19 formed in 1922 and we were a private business  
20 association of 800 members dedicated to the  
21 success of our community, our members and the  
22 free enterprise system.

23 Our program includes networking  
24 opportunities, group health insurances, as well  
25 as other purchasing service arrangements. We

1 publish a directory and a community buyers  
2 guide. We conduct business seminars and  
3 individual business counseling through SCORE  
4 which is the Seniors Core of Retired Executives.  
5 We have numerous other programs.

6 Eighty percent of our membership is  
7 made up of small businesses with employment  
8 numbers ranging from 1 to 10 employees. These  
9 businesses are involved in the service industry,  
10 retailing and manufacturing.

11 For these small businesses, getting the  
12 best and most accurate information on a  
13 potential employee is critical to their very  
14 survival.

15 Each new hire with many of these  
16 companies represents a large part of their  
17 workforce. For example, a growing company with  
18 only three employees hires a fourth, that person  
19 represents 25 percent of the workforce.

20 A bad hire at these percentages could  
21 cause great harm to that company.

22 And, quite frankly, this was brought  
23 out by Mr. Frankel from the ACLU, this morning.

24 It is essential for these small  
25 companies to be able to hire with confidence by



1 having the most accurate and detailed  
2 information available from past employers.  
3 Large companies, that are also members of our  
4 Chamber, like Bell Atlantic, are also in need of  
5 accurate information and also would like to give  
6 accurate information, but, because of the  
7 current state of affairs, fail to do so and give  
8 only name, rank and serial. And they also would  
9 be in favor of this legislation so they could  
10 more articulate their position with their fellow  
11 companies.

12           On behalf of my membership of 800 plus  
13 and also knowing of the thousands of small  
14 businesses throughout the Commonwealth, I  
15 believe House Bill 1972 is essential for a more  
16 positive business climate in Pennsylvania. We  
17 enthusiastically support its passage. We must  
18 allow our small businesses to hire with  
19 confidence.

20           I thank you for your time.

21           ACTING CHAIRMAN WOGAN: Thank you, Mr.  
22 Taubenberger.

23           Are there any questions from any  
24 members of the staff?

25           MR. PRESKI: No.

1           ACTING CHAIRMAN WOGAN: They are going  
2 to let you off easy.

3           Thank you, gentlemen, very much, for  
4 sharing your thoughts with us this afternoon.

5           The Chair recognizes Miss Warner for a  
6 brief remark or two.

7           MS. WARNER: May we have just one  
8 person stay just for a minute or two?

9           ACTING CHAIRMAN WOGAN: That would be  
10 fine. Can we have that person come forward and  
11 take the microphone?

12          MS. WARNER: Yes. Can we tell you  
13 something off the record?

14          (Discussion held off the record.)

15          MR. FREIDHOFF: Good afternoon,  
16 gentlemen.

17          ACTING CHAIRMAN WOGAN: Good afternoon.

18          MR. FREIDHOFF: I am John Freidhoff. I  
19 am here today to represent the Capital Area  
20 Society of Human Resource Management. I  
21 currently am employed by one of Central  
22 Pennsylvania's -- and I am going to say --  
23 largest employers, but I am not here to speak on  
24 their behalf today.

25          One of the things that I see, though,

1 so much in our organization, is the fear, and  
2 you talked a lot about that today. But one of  
3 the things that I see very prominent also is the  
4 business climate in Pennsylvania, the State of  
5 Pennsylvania. I am a life-long resident of  
6 Pennsylvania. My children live here. And,  
7 today, so many of the young people, the best and  
8 brightest, are leaving the area because, I am  
9 going to say, chances for employment and also  
10 some of the business climate that they are faced  
11 with.

12 We see this bill as an opportunity to  
13 help both employers and employees in  
14 Pennsylvania to hire qualified, willing  
15 responsible workers, which in turn can only give  
16 support toward a more positive business climate  
17 in the State of Pennsylvania. We see a number  
18 of other states considering enacting this  
19 legislation. I am asking that Pennsylvania be a  
20 forerunner in passing this type of legislation.

21 Thank you.

22 ACTING CHAIRMAN WOGAN: Thank you, Mr.  
23 Freidhoff.

24 All right. Ladies and gentlemen, as  
25 Acting Chairman, I want to thank everyone who

1 testified today. Although I am the prime  
2 sponsor of House Bill 1972, I did learn a great  
3 deal about what I regard as an extremely  
4 unfortunate situation in Pennsylvania. This  
5 quite clearly represents a Catch-22 for human  
6 resource professionals and I hope that House  
7 Bill 1972 will contribute to some creeping  
8 sanity in this area and that we simply must  
9 change this unfortunate situation.

10 And, again, I would thank you. This  
11 meeting is hereby adjourned.

12 (Whereupon, the hearing was adjourned  
13 at 12:35 p.m.)

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1           I hereby certify that the proceedings  
2 and evidence are contained fully and accurately  
3 in the notes taken by me on the within  
4 proceedings, to the best of my ability, and that  
5 this copy is a correct transcript of the same.

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Roxy Cressler, Reporter

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Notary Public

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