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The reasons for performing pre-employment background investigations extend far beyond the legalities and potential exposure a wrong employee can create.

Whether your company is large, small or any size in-between, it only takes one news-making incident concerning an employee, or even an ex-employee, to do significant damage to your reputation.

With the emergence of new case laws in many states, your hiring decisions, and even your referrals after an employee leaves, could expose your company to lawsuits and time in court that may ultimately lead to unsavory press coverage, further damaging your reputation.

Keeping your company's reputation in mind, employers need to be aware of two significant legal issues that are emerging with the potential to affect us all.

Under the doctrine of negligent hiring, employers are being held liable for the criminal acts of their employees. Under the doctrine of negligent referral, they are being held liable for not revealing important information about former employees.

In both cases, the pre-employment background investigation has evolved as the pivotal factor. Let's first look at negligent hiring, by examining the following cases:

In an Ohio case, *Stephens v. A-Able Rents Company*, a delivery person employed by the defendant brutally assaulted and attempted to rape a customer while delivering furniture to her home.

The employee had resigned from his prior employment after refusing to take a drug test and after admitting to having a substance abuse problem. The court ruled that the rental company could be held negligent because it should have learned about the employee's substance abuse problem as part of its pre-employment background investigation.

The Court of Appeals allowed a negligent hiring claim for compensatory and punitive damages to proceed to trial. Considering the issue of punitive damages, the *Stephens* court stated:

“This court believes the failure to conduct the pre-employment investigation directly contributed to the violence perpetrated on (the plaintiff). Consequently, A-Able Rents showed a conscious disregard for the rights and safety of others.”

In a Delaware Superior Court case, *Saxon v. Harvey & Harvey*, a woman and her son were struck by a vehicle, killing the son and injuring the woman. A jury found that the truck driver had several previous traffic convictions, including reckless driving.

The family won its negligent hiring lawsuit. More importantly, had a routine background check been performed, this tragedy could have been avoided.

A Washington state Superior Court considered a case where a nine-year-old girl was raped by a janitor in the building where the child’s day care center was located. The janitor was hired despite the fact that he had previously served time in prison for child molestation.

A routine pre-employment background check would have revealed the prior conviction. The cost to the child is immeasurable. The cost to the building management is uncertain since the parents have filed a negligent hiring lawsuit.

Ascertaining Backgrounds

The common thread running through these and most other negligent hiring cases is the duty now placed upon employers to ascertain the backgrounds of potential employees prior to placing those individuals on the payroll.

This legal duty extends beyond a thorough interview of the employee and should include a check of references, prior employers, and public record sources.

Negligent hiring cases have clearly created a need for employers to thoroughly investigate the backgrounds of potential employees. Public record sources are a good start, but not all criminal activity becomes a public record.

For instance, in the Stephens case, the employee’s substance abuse problem was not a matter of public record. Instead of being fired, he was allowed to resign.

Indeed, most claims of sexual harassment, theft, workplace violence or substance abuse are resolved internally and a public record never filed. The most vital information can only be obtained through an exchange of information between the potential employer and the former employer.

But many employers refuse to provide sensitive or derogatory information, fearing a defamation suit from the former employee.

They offer only what is called a standard reference to confirm job titles and dates. They refuse to give qualitative information – such as drug abuse histories – to prospective employers who would gain valuable insight from this data.

But this will no longer be possible because more and more employers are being sued under the negligent referral doctrine, which holds an employer accountable for not revealing critical information.

Consider the highly publicized Florida case of *Firemen's Fund Insurance Co. v. Allstate Insurance Co.* In this case, **Paul Calden** shot three employees at the **Firemen's Fund Insurance Co.** before killing himself. Relatives of the deceased sued Calden's former employer – **Allstate** – for giving Firemen's standard job reference on Calden. Allstate had failed to mention that Calden had been fired from Allstate for carrying a gun to work, that he believed he was an alien, or that he wrote the word "blood" next to the names of his co-workers. The families claimed that Allstate had a duty to disclose the former employee's problems during a job reference interview.

Negligent hiring cases have clearly created a need for open, honest sharing of employment information. Yet the threat of defamation suits has caused many employers to refrain from revealing critical information.

Factor in the growing trend of negligent referral suits, and the current situation becomes an absolute quagmire for employers – "Damned if you do and damned if you don't."

The negligent hiring cases force companies to screen potential employees and create a need for a free flow of information between past and prospective employers. The negligent referral cases require the disclosure of sensitive information to prospective employers. Yet the threat of a defamation action lingers as another source of exposure. Many employers have expressed their displeasure at this no-win scenario.

Legislators seem to agree. Twenty-six states have now enacted legislation granting employers qualified immunity from suits in connection with providing information to a prospective employer.

These state laws now protect employers from exposure provided that they are acting in good faith. The free exchange of information is so vital that many states are expected to follow suit.

First and foremost, employers should adopt a companywide policy to conduct pre-employment investigations for all positions. Investigations can be scaled to match the position level and budgeted for.

These investigations should include a public records check and a reference from the employee's past employer. A free flow of information, in both directions, should be encouraged.

By adopting a mandatory investigation policy, an employer can minimize exposure for the negligent hiring of new employees. Consider it an insurance policy against hiring the wrong people and include it in the cost of doing business, as you would other corporate insurance policies.

Investigators at one company found that approximately 17 percent of the applicants for employment have questionable items in their backgrounds. These findings included misrepresentation, criminal backgrounds, abuse (domestic violence), credit history problems, fabrications of employment dates or fraudulent reasons for leaving the previous job.

Background checks are absolutely vital if:

- Your company is involved in technology, has proprietary information or deals with confidential documents.
- You are hiring for a high-level position where the employee will have access to sensitive information or competitive data.
- The position will have any involvement with financial records, accounts payable, receivables or payroll.
- The employee will have access to corporate computer networks.
- The position interfaces with the public.
- You are hiring employees in the health care industry.
- You are hiring employees who come in contact with children.

There are several levels of background checks. A full inquiry typically includes verification of education, professional licensing, employment histories, and other data listed on an employee application.

It also includes supervisory and personal reference interviews, as well as a review of civil and criminal court records at the county and federal level. Depending on the position applied for, it is also recommended that a person's credit and driver's history be reviewed. The process usually takes from three to five days, depending on the thoroughness of the investigation. Cost is also determined by the scope of the inquiry.

To comply with the Fair Credit Reporting Act, each applicant must be made aware that a background check will be performed, and a release must be signed to permit the investigation.

The release provides the employer with express authorization to perform the investigation. This also enables the individual to protect his or her privacy by denying permission. However, if an applicant refuses, the employer is wise to question why.

The reasons for performing pre-employment background investigations extend beyond the legalities and the potential exposure an unchecked employee can create. The safety and welfare of your clients and employees is at stake as well.

Placing a dangerous employee into your work force or into the homes of your customers can cause tragic results. The most devastating aspect of these cases is the knowledge that they could easily have been prevented.

Pre-Employment Background Checks

Here are some commonly asked questions about pre-employment background checks:

What are my legal reasons for conducting a background check?

There is no law that requires a company to conduct pre-employment investigations. However, every company has the responsibility to protect its employees, and its reputation. Companies today are at risk of negligent hiring lawsuits if they fail to meet these obligations.

What precautions must I take to ensure the investigations are performed correctly?

The best precaution is to hire a professional investigative firm. Quality and accuracy should be their primary concern. Employers should seek out references and request test cases before choosing a vendor.

Should cost be a factor in determining which investigative firm to hire?

In reality, cost is a factor in every business decision we make today. When comparing investigative services, however, higher costs should mean more comprehensive reporting. Fees for an investigation can range from \$50 to several hundred dollars, depending on the scope of the investigation.

Will the potential employee find out about the investigation?

If an outside firm is engaged to conduct the investigation, each applicant must sign a release before that inquiry can be initiated. This is in accordance with the Fair Credit Reporting Act.

Will a highly qualified applicant be insulted by a background investigation?

It is difficult to predict behavior, however, high-level applicants should be agreeable to an investigation. If an applicant strongly protests, this could be a warning sign that the individual's credentials may not be exactly as they were presented.

How long does it take to conduct an investigation?

A typical background check normally takes three to five days to complete.

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