

## **Pre-employment Screening: Part One**

### **Background Investigations: Is Your Organization Prepared?**

As an employer, are you responsible for reacting to complaints of inappropriate employee behavior or do you have an affirmative duty to prevent troublesome employees from entering the workplace? Do you really know? Most employers know too well that they are responsible when one of their employees injures someone on the job, but did you know that you might be responsible if one of your employees commits a crime at work? It cost officials at Trusted Health Resources Inc. \$26.5 million to learn that lesson when one of their employees robbed then stabbed a home-care patient to death. Was Trusted Health responsible for the stabbing? No. But they were responsible for putting an employee with a violent criminal history in a position to commit this horrible crime through base negligence in their hiring practices. According to the Workplace Violence Research Institute in Newport Beach, CA, lawsuits claiming "negligent hiring" or "negligent retention" cost U.S. businesses an estimated \$18 billion a year. Could some of that weight fall on your shoulders?

Diogenes LLC has the answer. Background investigations are nothing new. The recent expansion of employer liability for negligent hiring practices has refocused employers on their Pre-employment screening procedures. With heavy and often conflicting considerations like privacy, liability, and discrimination, Pre-employment screening remains a fluid concept. In the next three issues, Diogenes LLC will explore background investigations as the key element of an effective Pre-employment screening program. We will first explore the duties and responsibilities of employers with respect to Pre-employment screening. Next, we'll discuss what elements are required to make a background investigations program successful, including a review of major legislation effecting employer's duties. Finally, we'll analyze one Pre-employment screening process to test the program's efficacy. Our coverage begins with Part One: Why Conduct Background Investigations?

#### *Part 1: Why conduct Background Investigations?*

The short answer is simply because you must. State and Federal legislation aimed at protecting public health, safety, and welfare generally strives to ensure that employers and employees act responsibly within the workplace. Employers are responsible for providing a safe, comfortable working environment, including the duty to prevent potentially harmful employees from entering the workplace. When harm occurs, either to the public or to other employees, employers must prove that they took the proper steps to prevent accidents and promote the public safety. In other words, an employer must demonstrate due diligence.

Broadly defined "due diligence" requirements vary across jurisdictions covering a wide range of responsibilities. Employers must, for example, comply with all local and federal health and safety standards, defend against corporate criminal liability, and satisfy industry reporting requirements, just to name a few. Today, employers see increased

attention focused on their individual hiring practices as chief among their broad due diligence concerns.

### *Negligent Hiring Practices Liability*

The concept of negligent hiring as a basis for civil action has existed in Virginia since 1903 when the Supreme Court acknowledged that companies owed patrons a duty to exercise reasonable care with respect to patron safety. In the first major action under this theory, *Big Stone Gap Iron Co. v. Ketron* the Court held an employer liable for hiring a doctor with sub-par skills, noting that "in the selection of a surgeon" it was the duty of a company to exercise "reasonable care." Later, in *Davis v. Merrill*, a case involving a renegade railroad employee, the Supreme Court expanded employer's duty generally to include employee background investigations before hiring, noting that the defendant in *Davis* had "made no inquiry of anyone else concerning the [employee's] past record, habits or general fitness for the position, and had [the defendant] looked up his record, he would probably not have given him the position."

Negligent hiring liability was originally intended to protect employees from the careless acts of other, unfit employees while on the job. Early cases focused on physical harm caused to employees by other employees, and the courts often looked to whether the offending employee acted within or without their scope of employment to determine if the employer should be held liable. Under this system, persons assaulted or raped by an employee in their place of business often could not recover against employers because it was believed in such instances that the employee was acting outside the scope of their employment. In the time since, the concept of negligent hiring has expanded into an independent tort protecting third parties regardless of whether the offending employee acted within the scope of their employment.

The Supreme Court of Virginia established the boundaries of negligent hiring litigation in *J. v. Victory Tabernacle Baptist Church*, stating, "[N]egligent hiring is a doctrine of primary liability; the employer is principally liable for negligently placing an unfit person in an employment situation involving an unreasonable risk of harm to others. Negligent hiring, therefore, enables plaintiffs to recover in situations where *respondeat superior's* "scope of employment" limitation previously protected employers from liability."

The Tabernacle Court also distinguished negligent hiring from the doctrine of *respondeat superior* by holding that corporate liability may be imposed in negligent hiring cases even if the employee harms others with actions outside the scope of his or her employment, provided the misconduct was foreseeable under the circumstances.

The same analysis applies today as employers face liability for negligent hiring practices even when employees commit independent acts of violence. Several recent examples illustrate the point. A Louisiana jury held Kmart Corp. liable for the bizarre attack by one of its employees against two female shoppers. The employee, Robbie Brown, attacked the two women with an unloaded air pistol, firing several 'shots' in their direction before pressing the gun into one woman's chest and pulling the trigger. Although the weapon

was not loaded with pellets, the noise and air pressure were enough to convince the women that Brown was shooting at them. Testimony showed that Brown had recently been fired from a Wal-Mart store for repeated insubordination and inappropriate behavior. The jury decided that, had Kmart Corp. properly checked Brown's background, it would not have hired such an unstable person, and held the company liable in the assault.

In 1998, a Massachusetts jury awarded a Boston family \$26.5 million in punitive and compensatory damages, holding a home-care provider liable in the death of their quadriplegic son and his grandmother. The provider hired Jesse Rogers as a home care nurse without checking Rogers' criminal background or checking Rogers' claims that he had worked for a state home-care agency and taken nursing classes at Northeastern University. Had the provider done so, it would have been made aware of Rogers' six prior larceny convictions, and likely would not have hired Rogers, the jury said. Instead, Rogers was hired and placed in charge of John Ward, a 32-year old quadriplegic, and Alba Pellegrini, Ward's grandmother. Rogers stole several items from Ward's home, then brutally beat and stabbed Ward and Pellegrini to cover up the theft. The jury decided that the home-care provider negligently hired Rogers by failing to investigate his criminal record and check his references.

The general trend expanding corporate liability continued in 1998, when the United States Supreme Court broadened the scope of employer liability with respect to discrimination and harassment in the workplace. In *Burlington Industries, Inc. v. Ellerth.*, the Supreme Court held Burlington Industries liable for the actions of one of its managers in creating a hostile working environment, effectively transforming an employer's duty from one requiring it to react to hostile working environments to a duty to prevent such environments from forming. Prior to Burlington, employers could only be held liable for a hostile working environment where a complainant could prove that the employer was negligent in allowing adverse behavior to occur. The decision in Burlington, however, created a presumption that a hostile working environment imputes employer negligence that can only be defended by the employer's showing that it exercised reasonable care to prevent and correct adverse behavior, and that the complainant failed to take advantage of corrective opportunities provided by the employer. This represents a significant change in how courts look at harassment claims, and places the onus on employers to take affirmative steps to prevent hostile working environments.

The test relied upon by most courts in negligent hiring cases is whether the employer has negligently placed an unfit person in an employment situation involving an unreasonable risk of harm to others. This test does not appear to be a fixed formula, but rather a bifurcated analysis considering first whether the employer owes a duty to the injured person, and second whether the employer failed in that duty by not investigating the offending employee's background. Duty, the first threshold test, concerns the degree of danger to the public created by the job in question. Employees whose jobs directly impact the public health, safety and welfare are held to owe a higher duty of care to the public than do employees whose jobs do not generally affect others.

In other words, the airline pilot will more often be held to owe a higher duty to protect the public from harm than will the data entry clerk.

Causation, the second threshold test, concerns the reasonable connection, if any, between the act or offense and information reasonably discoverable about the employee's past that, if known, would tend to dissuade an employer from hiring the offending employee. For example, the employer of an airline pilot who crashed as a result of intoxication is much more likely to be held liable in a negligent hiring suit if the pilot had a documented history of alcohol abuse.

The decisive factor in many negligent hiring claims concerns the employer's knowledge. For purposes of the tort, knowledge can be established by demonstrating 1) that an employee had a propensity for the conduct that ultimately resulted in the injury to others; 2) knowledge of the propensity was reasonably discoverable; 3) the employer failed to make proper inquiries; and 4) had the employer inquired, it would not have placed the employee in the position that it did. Notwithstanding a court's analysis of an employer's duty to investigate potential employees relative to possible danger created by their position, it seems incumbent upon every employer to investigate, at least minimally, the background of any potential employee. Failure to do so places the employer in a precarious position if an employee, any employee, intentionally or negligently harms another in a manner reasonably foreseeable by a prudent review of the employee's past, and the employer failed to conduct such a review, then the employer is exposed to liability for negligent hiring. In short, employers who fail to conduct background investigations do so at their own risk.

### *The Need for Balance*

On the other side of the coin, conducting a thorough background investigation raises the specter of unfair labor practice charges, charges of discriminatory hiring practices, and allegations of wrongful termination, defamation, and invasion of privacy. Employers must balance their need for information about a potential employee against privacy and discrimination pitfalls. Disclosure on the part of the inquiring party is the best means to avoid charges of wrongdoing. Pre-employment screening, as a process, should not be shrouded in mystery. Applicants should be made aware of exactly what information is required, and employers must temper their thirst for information to include only information relevant to the job. We'll explore this topic more fully in Part Two of this series, when we explore the elements necessary to satisfy an employer's due diligence. Look for Background Investigations Part Two: Satisfying Due Diligence in the next issue of the Diogenes White Papers.