Pre-employment Screening: Part Two
Background Investigations: Is Your Organization Prepared?

In the first installment, we examined the troubles encountered by Trusted Health Resources Inc. for failure to properly screen its employees. A Massachusetts jury held Trusted Health liable for negligent hiring and awarded the family of a slain home-care patient $26.5 million when a Trusted Health employee stabbed the 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, and they paid a high price.

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?

In this installment, we continue our exploration of pre-employment screening and background investigations by examining the elements necessary to satisfy an employer's due diligence. We'll discuss what elements are required to make a background investigations program successful, including a review of major legislation effecting employer's duties. Our series continues with Background Investigations Part Two: What is Required to Satisfy Employer Due Diligence?

What information is required to satisfy the employer's due diligence?
Due diligence requirements vary across jurisdictions, and cover several key components of every employers' basic operations. Employers must, for example, comply with all local and federal health and safety standards, defend against corporate criminal liability, and satisfy industry reporting requirements. To some extent, due diligence requirements will vary from industry to industry across jurisdictions.

Regardless of the industry, every employer must 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.

As a matter of fact, checking an applicant's records is generally required to avoid liability for negligent hiring practices. Several factors contribute to a successful pre-employment screening program. Some are drawn out in detail below.

What makes a Pre-employment background screening program effective?

1. Screening program must verify all references offered by the applicant.
A reference check can be just as vital as a criminal background check in assessing the character of the applicant. Most employment lawyers will verify that defending an employer on negligent hiring practices allegations can be difficult, if not impossible where the employer has failed to check employment references. If for no other reason,

employment reference checks verify the location of the applicant for the past several years, and eliminate unexplained gaps in an applicant's history that could represent undesirable activity. A solid work history is often indicative of stable character.

2. Screening program must obtain factual information to supplement impressions gleaned during personal interviews.

The background check should only seek out information that has either been directly requested from the applicant or that the applicant could voluntarily provide. There exists a fine line between diligent background investigation and invasion of privacy. If the screening process is used as a verification process of information offered by the applicant instead of a search for information that may disqualify an applicant, the process will be viewed as much less violative of individual rights.

As an example, criminal background checks are typically limited to examination of public records for each jurisdiction in which the applicant lived or worked, including the federal courts, to ascertain whether the applicant has been convicted of any crimes or held liable under a civil action. However, discovering whether the applicant has otherwise been involved in the criminal or civil justice system, charged with a crime for example, may be an appropriate inquiry for some employers. Such investigation, though technically legal, can be tricky and raise both privacy and discrimination concerns. One means toward a more thorough review of criminal or civil litigation history is to phrase interview or application questions broadly enough so as to encourage comprehensive replies. Most applicants will not volunteer unflattering information if they do not feel its been requested. For example, the question "If we were to check with state and federal courts, would we find any criminal convictions or pending matters involving you?" is broad enough to capture the conviction or pending prosecution of any crimes committed by the applicant. This same question, however, would not prompt the applicant to reveal an acquittal on narcotics possession charges, which could be an important issue to review with the applicant. Would this same question prompt a reasonable individual to provide information about a misdemeanor conviction? Does the question ask only for felony convictions? How many people know the difference? Compare the first example question to the following, "Have you ever been involved in a civil or criminal proceeding in any court?" This version is simpler than the first, yet it will encourage a more thorough response. This question asks plainly whether the applicant has been ever been in court for any reason, and thus will capture a fuller range of activity, including arrests, dismissed cases, acquittals, and successful defense in a civil suit. It should be noted that some states forbid asking questions regarding criminal conduct if the matter was an arrest, misdemeanor or non-conviction incident.

But beware, delving into criminal or civil records beyond conviction or judgement raises issues of invasion of privacy and discriminatory hiring. The presence of a criminal charge alone should never be used as a basis for hiring decisions, and companies must take steps to ensure that, if in-depth criminal and civil information is obtained, instances other than conviction or judgement do not wrongfully color an applicant's character. In addition, applicants should be made aware, through use of a disclaimer, that the

company will not deny employment to any applicant solely because the person has been convicted or charged with a crime. The company may consider, however, the nature, date, and circumstances of any offense as well as whether the nature of the offense is relevant to the duties of the position applied for in evaluating the applicant.

3. Screening program must be thorough enough and transparent enough to discourage applicants with something to hide, and to encourage applicants to be truthful. Employers are required to notify applicants of their intention to gather and use background information, which ironically is the most effective means of sorting applicants. Employers find applicants with nothing to hide are not discouraged by citing successful completion of a background check as a condition of employment. Applicants who fear they may not survive a background review are not likely to apply. Therefore, make the required consumer reporting disclaimer a vivid part of the application process, beginning with the advertisement. Prominent notice provides sufficient transparency. Remember, applicants should be asked to sign a background search consent form to reduce employer liability and to make all applicants aware that such checks will be performed. This is especially critical with respect to criminal background checks.

Did You Know? Employers polled indicate variably that between 55 and 75% of all applicants lie on employment applications.

Sometimes, scam artists develop elaborate schemes involving friends and co-workers to defeat background screening. In fact, falsifying employment records through fake corporations has become a cottage industry in some states. Prudent researchers develop independent methods to verify applicant information beyond the traditional phone call. For example, does the number provided by the applicant dial directly into the reference's office, or pass through a corporate switchboard? Is there a way to otherwise verify the existence of the alleged prior employer? Being duped by fraudulent applicants will not protect employers against negligent hiring claims unless the employer can demonstrate that it acted in good faith with all due diligence to discover the truth.

4. Screening programs must comply with federal and state legislation.

In addition, employers developing employment screening processes must consider the impact of expanding legislation regarding consumer reporting, discrimination, and equal opportunity hiring. In particular, employers must consider the impact of sweeping changes in three major areas: consumer reporting, disability discrimination, and immigration.

Compliance with the Fair Credit Reporting Act:

Recent amendments to the Fair Credit Reporting Act ("FCRA") affect an employer's use of outside reporting agencies to obtain information for use in hiring decisions. The FCRA covers any "consumer report" produced by a "consumer reporting agency" used for "employment purposes". Where does that leave you? Well, the FCRA applies to any person who obtains information about a consumer. The Federal Trade Commission,

author of the FCRA, defines "person" and "consumer" in a manner broad enough to include every employer, from solo practitioners to large corporations, and all potential employees.

Did You Know? The Federal Trade Commission: FCRA Definitions:

Person- Any individual, partnership, corporation, trust, estate, cooperative, association, government, or government subdivision or agency, or other entity.

Consumer- An individual.

Consumer Report- Any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used for the purpose of establishing the consumer's eligibility for employment.

Consumer Reporting Agency- Any person which, for monetary fees, dues, or on a cooperative non-profit basis, regularly engages in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties.

But don't let the name mislead you. The FCRA covers far more than just consumer credit reports. By definition, the FCRA covers any information generated by an outside agency for use in hiring decisions, and mandates that employers disclose such reports before taking any action. Therefore, employers who conduct background investigations using any outside agency to gather information, including credit checks and criminal records checks, must comply with the FCRA.

Compliance with the FCRA should come almost naturally to most employers who follow basic notice, consent and disclosure procedures. Under the FCRA, employers must first provide clear and independent notice to all potential applicants, in writing, of their intent to obtain a consumer report and possibly use that report in the hiring process. Next, the employee must consent in writing to the gathering and use of the report. Then, to obtain the report from a consumer reporting agency, the employer must certify that it has provided the applicant with ample notice, that it will comply with the FCRA if the report results in an adverse hiring decision, that the employer will not violate the FCRA or any equal opportunity employment laws, and that it will provide the applicant with a copy of the report if the employer decides not to hire that individual. Any in-depth investigation conducted by the employer into an applicant's character, personal interviews with neighbors, for example, is classified as an investigative consumer report, and subject to higher scrutiny.

Any employer who desires to make an adverse hiring decision based in whole or in part on information contained in the report must provide the applicant a true copy of the report and a description of the applicant's rights under the FCRA. In addition, the

employer must observe a reasonable waiting period, typically five business days, after furnishing the report before taking any adverse action. At the end of the waiting period, the employer must provide the applicant with a written description of the adverse action and the name and contact information of the reporting agency.

Perhaps the best way to summarize the FCRA is to invoke the old adage, "honesty is the best policy". Employers who act at all times in a forthright manner concerning how they conduct background investigations and make hiring decisions are likely to fall in line with the FCRA. Employers are well motivated to stay in line since penalties for failure to comply range from civil liability for negligent or willful non-compliance to federal criminal penalties and hefty fines.

Compliance with the Americans with Disabilities Act:

In theory, the Americans with Disabilities Act ("ADA") is a simple piece of legislation that prohibits employers from discriminating against disabled persons. In practice, however, the implications of the ADA are much subtler and require careful attention to detail. The ADA prohibits employers from discriminating on the basis of physical or mental disabilities, inquiring into physical or mental wellness, or maintaining work facilities that restrict the movements of disabled persons. The Act applies to both private and public organizations with 15 or more employees, and protects applicants who, though disabled, are capable of performing the essential functions of the job based on their skill, experience, and training.

The difficulty in complying with the act lies in questioning applicants during the hiring process. Formerly, employers were permitted to inquire whether applicant's had been hospitalized, treated for a mental condition, or treated for any physically debilitating disease. The ADA prohibits such inquires but employers still need information regarding applicants' physical and mental abilities in order to make effective hiring decisions. Again, employers must make a fine-line distinction between important information and over-intrusive questions. Generally, employers may inquire into an applicant's ability to perform job-related tasks and only job-related tasks. For example, employers may ask if an applicant can carry 20 pounds up three flights of stairs, but they may not ask if the applicant has any disability that would prevent them from carrying 20 pounds up three flights of stairs. The distinction is key -- employers may ask about the ability to perform the job, but may not ask any question which may elicit information about a disability.

The ADA provides a lengthy list of pre-approved disabilities requiring protection, including recovered alcoholics and drug users. The act also provides for individuals with non-specific disabilities that restrict basic life activities e.g. walking, talking, seeing, hearing, speaking, breathing, standing, moving, reasoning, or learning. The act does not protect alcoholics or drug users who still engage in their illicit activities, so inquiries into current drug or alcohol use is permitted. Inquiries into past drug use are also permitted, as long as they do not elicit information regarding the extent of such prior use.

Compliance with the Immigration Reform and Control Act:

The onslaught of phony identification materials in the workplace makes compliance with the Immigration Reform and Control Act a little tricky. The Immigration Reform and Control Act, 8 U.S.C. §1324(a), makes it unlawful to hire an individual without complying with certain employment eligibility verification requirements. The employment verification system established under §1324(a) specifies documents acceptable to establish both identity and eligibility to work in the United States. When an employer hires and individual, the potential employee must sign INS Form I-9 certifying first their eligibility to work, and second that the documents presented to the employer demonstrating the individual's identity and work authorization are genuine. The employer must sign the same form, indicating which documents were examined, and attest that the documents appear genuine. The employer must accept any documents presented by the employee which reasonably appear on their face to be genuine and to relate to the person presenting them. The Immigration Act of 1990 established that an employer's refusal to accept certain documents or demand that an employee submit other forms of identification in order to complete Form I-9 violates anti-discrimination policies of the Act.

However, the employer sanctions provisions of the Act authorize civil and criminal penalties against employers who employ unauthorized aliens in the United States, and further authorizes civil penalties against employers who fail to comply with the statute's employment verification and record-keeping requirements. Civil penalties for employers who knowingly employ unauthorized aliens range from $250 to $2,000 per individual per incident. Similarly, Civil penalties for employment verification and record-keeping violations range from $100 to $1,000 per individual per incident. Courts consider various factors in determining at what level each fine will be set, including prior violations, size of the business, seriousness of the violations, and absence or presence of good faith on the part of the employer.

So, employers must balance the need to discover forgeries with harsh penalties associated with immigrant employment discrimination. Employers in a sense have their hands tied, in that they are required to apply "good faith efforts" to identify phony I-9 documents, yet are restrained from asking for identity verification or employment authorization other than the documents listed on the I-9. For example, an employer presented with a passport it believes to be phony is prohibited from asking for another form of identification, to do so constitutes possible discriminatory practices. At the risk of sounding trite, the balance lies in the employer’s ability to act reasonably. If an employer is presented with identification documents that appear valid, and would appear so to the average individual, then the employer must accept the documents and can expect protection from sanction under the Act. If however, the circumstances indicate that documents presented for employment authorization may be forged, then the employer must take reasonable steps to determine if they are valid documents. It is a fine line, with negative repercussions on either side.

Did You Know? Implications of the FCRA, the ADA, or the Immigration and Naturalization Act here contemplate only how each substantive doctrine affects pre-employment screening. Internal Investigations will be the subject of future Diogenes LLC articles. Be careful to note, however, that just as the FCRA or the ADA or the Immigration and Naturalization Act dictate guidelines covering Pre-employment screening, those acts similarly affect internal investigations of current employees.

Thoughts going forward…

Research aside, the only way to develop a successful pre-employment screening program, one that comports to relevant due diligence requirements, is to dedicate company resources to the task. Often, pre-employment screening receives minimal attention, and that's exactly how due diligence requirements get missed. Often a function of the human resources department, background investigations and pre-employment screening processes should be reviewed and updated regularly by corporate representatives from senior management, legal counsel, and department managers. Like any corporate process, pre-employment screening requires constant review, improvement and refinement.

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