

Stop Passing the

TRASH

There's a strong backlash against employers who lie or remain silent when asked about previous employees. Know what's legal to say and do when hiring and referring, so you won't become part of the garbage glut.

Background checking, from a public perspective, is a mysterious, possibly invasive technique used by employers to check out job applicants. On the other hand, the public, not unreasonably, expects employers to consider the safety of those who patronize their business.

The Occupational Safety and Health Administration, the Food and Drug Administration, the Federal Aviation Administration and other federal agencies oversee the workplace and other aspects of public safety, but no federal or state agency exists to protect the public from employers hiring criminal, unethical or potentially dangerous employees. There exists, instead, piecemeal records and information, and spotty support by federal and state legislation. Little has been done to help an organization protect itself or the public, which has been endangered time and time again. A short list of recently documented public-safety accidents includes:

- substance-abusing train drivers who cause fatal accidents;
- incompetent airline pilots who crash making routine approaches;
- drunken crane operators who rain destruction on pedestrians;
- clergy, scoutmasters and school teachers who molest children;
- medical personnel who beat, rob and intimidate patients in hospitals and nursing homes; and
- violent police officers who attack their already submissive quarry.

Lacking an oversight agency or centralized records of job applicants, each employer is responsible for checking relevant information for individuals under consideration for employment. Conducting background checks protects both the employer and the public from dangerous applicants. If employers can get accurate information, background checking can be a lifesaver!

Passing the Trash

Many employers don't know the law and mistakenly fear that they're liable for an unfavorable report about a past employee. Some routinely give good references to get rid of unsatisfactory employees. Insiders commonly call this process passing the trash.

Trash passers can be sued with success. The torts of negligent hiring and negligent failure to warn (also called negligent referral) give relief to those individuals suing an organization when they feel an employee has harmed them. If employers don't do a better job of hiring and referring, it will cost their organizations uninsured, bottom-line money — because they will get caught.

If all this is true, why don't all hiring entities conduct background checks, and why do some employers think passing the trash is acceptable?

You can see the standard reasons for inaction by rounding up the usual culprits: no perceived problem, lack of time, lack of money, ignorance of the law, and - the most insidious of all - plain old bad advice.

Hiring has moved from the one-dimensional “will this be good for the organization and good for the applicant?” And now, we have a recently discovered, further responsibility to a huge and very powerful third dimension: the community at large. This is probably due to an expanded awareness of public risk, violent workers, Megan's law (requiring the identification of sexual offenders), and - coming on strong - court rulings against employers for lack of hiring diligence.

FCRA IMMUNITY

According to Fair Credit Reporting Act, Section 610(e), “No consumer may bring any action or proceeding in the nature of defamation, invasion of privacy or negligence with respect to the reporting of information or any person who furnishes the information to a consumer reporting agency... except as to false information furnished with malice or willful intent to injure such consumers.”

NOTE: The FCRA defines a “consumer reporting agency” as a background-checking company and a “consumer” as the subject of the report

A VIABLE THREAT

Out of the thousands of applicants checked, we found that:

- 7 percent had a criminal record
- 30 percent of resumes and work references conflict with past employer statements

Sorting Truth from Trash

Here's another short list of actual behavior at public entities taken from the local news last year.

Can you imagine dealing with these employees?

- A recreation center volunteer who molested several boys on the community basketball team
- A county truck driver, who after causing a fatal accident with a dump truck, was found to have a DUI and two speeding tickets less than six months old
- A summer municipal employee who sold several pieces of equipment he had stolen from the city garage
- A city library employee who embezzled from the overdue book account
- A junior high school secretary who embezzled more than \$6,000 from the school band's travel fund
- A county social worker who drove children under county's care in a vehicle without valid driver's license and with an invalid state safety inspection sticker
- A long-time county employee who was allowed to resign with maximum severance after being accused of sexual harassment

While you're imagining your thoughts, here are some in-basket thoughts to lose sleep over:

1. Your boss will want an explanation.
2. Most of these individuals had a history of this type of behavior before your organization hired them.
3. All of them are eventually going on to new jobs and you'll be asked for referrals.
4. You'll need to prevent similar incidents when hiring their replacements.
5. You'll have to explain to the public (not to mention the mayor, county commissioners, the press, the court, neighbors and family members) how these folks got hired in the first place.

The most stable and clear legal basis for rejecting an applicant is to demonstrate his or her dishonesty. A lie in the applicant's own hand on your form is incontrovertible.

Sorting Truth from Trash

So, what do you do? A “bulletproof” hiring process can play a significant role in preventing harmful incidents, helping manage referrals, and providing standardized guidance for all levels of supervision in your organization.

First, you may need a new attorney. (As if you have a choice in the matter! After all, if dangerous incidents happened in your organization, it could be said that a “keeper” attorney should have foreseen the problems and suggested some preventative measures.) You need one who’s well-versed in current employment tort actions, recent state legislation regarding job referrals and employment laws in general. If you can’t change attorneys, you at least need to know where you stand with the one you have.

Fair warning; if you’ve heard the following statements before, stand by for major problems implementing an effective background checking system:

- The less written down, the better.
- It’s against privacy laws to conduct background checks.
- It’s illegal to ask date of birth in the employment process.
- We could get sued if we give anything for a referral other than dates of employment.
- If you don’t know it, the court can’t use it against you, so don’t ask.
- These things take care of themselves.
- The Fair Credit Reporting Act has nothing to do with employment.

All these statements are false. If they sound all too familiar, you may want to do some background checking on a new attorney.

The ADA made almost all existing application forms out of date, if not illegal. Today, most forms remain traditional-bound and sterilized to the point of being useless.

A Fair and Objective Process

What follows is a list of procedures you should have in place before conducting background checks or giving referrals. You’re obligated to follow the law and balance the applicant’s rights and the public’s safety with your organization’s need for competent, honest and safe employees. Such a system can be developed (for most organizations) in a few days. The advisory comments are meant to stimulate thought and help uncover the unique aspects of your situation. They’re by no means complete without input from staff and management and a competent legal review.

A Fair and Objective Process

1. Policies and Procedures

A complete set of guidelines for managers responsible for hiring and referring is the foundation for standardized, fair and consistent treatment of job applicants. The outcome of every element of background checking must have objective, defined limits. If you're hiring equipment operators, and you obtain their driving histories, what do you do with the information? Is the south county garage superintendent going to hire a driver with an 18-month-old DUI, while the north county garage super refuses to hire one with a three-year-old DUI and two speeding tickets? The following subjects should be considered essential for the hiring section of the policies and procedure manual.

Background Checking Procedures — Who gets checked? Full-time, part-time, seasonal and volunteer workers all carry risk into your organization. Explain job specific checking:

- Those handling cash will have their credit checked.
- Those around children, the elderly and the disabled will have their criminal records checked.
- Those with access to vehicles will have their driving records checked.
- All candidates will have their last three employers contacted.

Don't issue a start date until checks are complete. Review the whole process, including applicant rights and recourse as defined by the FCRA and the ADA.

Driving Policy — When every employee has access to "pool" vehicles, it may be best to write a very inclusive policy that says, "all employees are considered drivers, either essential or nonessential." Then, proceed to define employee categories for each group, qualifications, reporting violations, revoking driving privileges (for nonessential drivers), etc. The drivers need to know that, in accordance with this policy, you intend to check their driving records every six months.

Criminal Record Policy — Write what constitutes an unacceptable criminal record for the job, how far back in time you will check and where you will look. What type of record will be absolutely unacceptable for any job in your organization? Can you manage an employee with a history of theft? A history of assault? There are many individuals looking for jobs with a bond posted and disposition pending for some scary crimes. How will you handle such an applicant? Are you going to check the criminal records of volunteers?

Termination Referral Policy — This relatively new type of policy is part of your commitment to stop passing the trash. The purpose is to inform all new employees that, once they leave the organization, a referral will be given to them and their prospective employers. As a condition of employment, all employees must agree to cooperate in the completion of a reference information form when they leave the organization's employment. The form will also contain a statement holding the organization harmless and permitting its release to any prospective employer requesting such information.

Application, Release and Honesty Policy — As a condition of employment or the performance of volunteer work, an application form and background information release form must be completed in full. Don't give a start date until all references and background information have been reviewed. As stated on the application form, any dishonest entries or information withheld will be grounds for applicant rejection. If such dishonesty is discovered after employment, the employee will be discharged.

Rejection Policy — This is a tender area few hiring managers understand. For example, the FCRA is very specific about informing the candidate when the decision not to hire was made because of the discovery of adverse information. Will there be a standard letter of rejection? Will it be managed by the personnel department?

A Fair and Objective Process

2. Job Description

This represents the most basic level of understanding of the agreement between successful applicant and employer. Recent federal legislation implies the more thoroughly written, the better. The ADA sets the scene for determining the fairness and legality of rejecting an application based on the job description. Specifically, if the applicant can't perform the essential functions of the job with appropriate accommodation, you can fairly and legally reject that application.

If the job description and essential functions are not available to the applicant, the basis for the decision is lost and the arbitrary rejection becomes legally dangerous for the employer. For a well written book of job descriptions, call the U.S. Government Printing Office at (202) 512-1800 and ask for the Directory of Occupational Titles. (If you don't want to spend the \$50, check out any municipal library.) You will still need to make some minor changes to suit your needs and the job's essential functions.

3. Forms

The forms listed here are the backbone for an organized and effective information system. The need for these forms is supported by detailed policy.

Application Form — It's been years since the ADA's effective date. That legislation made almost all existing application forms out of date, if not illegal. Today, most forms remain tradition-bound and sterilized to the point of being useless. Does your form waste valuable space asking about military service (okay, if you're hiring tank drivers) or citizenship (the three page I-9 form does an adequate job)? You want the form to work for you. Ask for the last seven years of states and counties of residence to facilitate a criminal-record check. Ask about other names and social security numbers used. Require detailed past job information (the information operator charges 65 cents each time you have to dig out a past employers number); and ask for criminal information, education and credential.

The objective is to have the candidate answer all vital questions on the form. The most stable and clear legal basis for rejecting an applicant is to demonstrate his or her dishonesty. A lie in the applicant's own hand on your form is incontrovertible. Some states have quirky requirements for application forms. Check with competent legal counsel.

Conditional Job Offer Form — if you want to check worker's compensation histories and/or require a physical examination, you'll need a conditional job offer form. This allows you to follow the ADA rules, learn the applicant's workers' compensation history, and place an applicant who's physically capable with or without accommodation in the job.

Background-information Release Form — This form must have the applicant's signature giving permission to obtain information and hold both you and the information provider harmless. This form should be designed to be faxed to past employers and record holders. In addition to a signature, it must contain date signed, date of birth, Social Security Number, present residence, race and sex. A statement giving reasons for having this information and exactly what the form is for is important to the applicant. This isn't a personnel form that stays in the file with the application. Its only purpose is to obtain job-related background information. Once the information requested has been received, all but the applicant's signature and the form's release language can be separated and destroyed.

A Fair and Objective Process

Reference Information Form — This form must be given to any employer requesting information about a former employee of the organization. It will include an objective and factual assessment of the past three years' performance, a brief job description, job title, dates of employment, last salary, reason for leaving, and, space for a statement if the departing employee disputes facts or the employer's opinion. It will be signed by the employee and witnessed by a member of the human resources department. When hired, the employee agreed to cooperate in completing this form.

4. Interviewer Training

The interview represents a truly intimate situation: two people alone in a private setting, exchanging detailed and often personal thoughts. For many interviewers, it's a unique opportunity to display power and control. The questions become less and less job-related replaced by more and more innuendo for the purpose of demonstrating the interviewer's authority. Bad questions are red flags. It's not unusual for the applicant to be more sophisticated in the areas of illegal questions than the interviewer. If so, you'll be lucky to avoid a lawsuit generated by some dumb questions. If possible, four hours of training every six months can do wonders for the quality of interviews.

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TRASH PASSING IN PUBLIC SCHOOLS

A few years back, a superintendent of schools had to face three sets of parents of third-grade boys who had been molested by a recently hired music teacher. When asked if he'd run a background check on the teacher, the super said "Sort of. At that time, general belief was giving referrals will get you sued, so we shouldn't expect one. We asked anyway and got a neutral referral. We were happy to fill the job." Unknown to the superintendent, the music teacher faced similar unproved allegations at his previous place of employment. His former employer gave a neutral referral in exchange for a resignation and a promise to leave the district. The trash got passed.

This tradition continues to be acceptable in public school administration. The superintendent of schools said whenever he thinks of those frightened little boys and their angry and frustrated parents, it still costs him sleep. Whenever he thinks of passing the trash, he gets very upset. Does he have a good background-checking system in place now? Yes, and he also has one of the best referral systems.

"I expect to get straight answers and I'm also prepared to give them. It wasn't that hard to get bulletproof," he says.

He's got a referral system similar to the one described in this article. It's supported by state law and immune from civil suits - and he's got a staff that knows how to use it.

A Fair and Objective Process

5. A Process for Checking Backgrounds

This is more difficult and time-consuming than it sounds. Who manages the process, calls the past employers and pays the record fees? Do you use the sheriff's office for criminal checks? If so, where do they check and how far back do they go? What if you can't find a past employer? Usually, hiring a background checking company to do the work is far more reliable and cost-effective. Not only can they efficiently and accurately obtain information, but you also get a strong level of immunity from civil action by applicants and former employees. The FCRA and several state laws say that when a third party (a consumer-reporting agency) follows certain rules in obtaining information, both the recipient and source (also following certain rules) are protected from civil action by the subject of the information.

THE DATE-OF-BIRTH HANG-UP

Dozens of attorneys (and many more personnel professionals) will tell you it's illegal to ask date of birth or high school/college graduation year in the hiring process. Yet, when challenged, they're unable to produce a copy of a law to that effect. The Age Discrimination in Employment Act states it's illegal to discriminate against someone in the hiring process who is at least 40 years old because of his or her age.

There's a huge difference between "illegal to ask about your age" and the assumed "illegal discrimination." In the risk management business, it's difficult enough to assess risk without someone interpreting (incorrectly) for you. In considering the balance of risk, many information sources will not release records unless date of birth is provided along with name and, often, Social Security Number. This is true for driving records in about half the states and in many venues (along with sex and race), it's required when requesting criminal records.

Date of birth can be used legally and fairly to obtain records of job-related information as defined by a written job description and supported by published policies.

Cleaning Up the Process

Organizations have an obligation to conduct hiring and referral processes in a morally responsible and legal way. When they don't, they lose money and even lives. Allstate Insurance Co. wrote a letter of recommendation for an employee, Paul Calden that said he was "let go" as a part of corporate restructuring. He was actually fired for bringing a gun to work. Fireman's Fund Insurance Co. hires Calden based, in part, on the letter from Allstate.

In 1993, Calden shot five co-workers in the Fireman's Fund cafeteria, killing three before taking his own life. *The Wall Street Journal* (July 8, 1996) suggests that lawsuits filed against Allstate were responsible for legislation protecting employers against litigation from employees in the reference-giving process. Now 25 states have some type of law helping former employers be more forthright in their evaluations and communications with prospective employers. The often overlooked (25-year old) FCRA contains essentially the same language as many of the new state laws.

The torts of negligent hiring and negligent referral punish lax employers. The public will be better served when the dangerous practice of "passing the trash" is replaced by a useful hiring and referral service. That process, briefly described above, is an inter-related chain of background checking, policies and procedures, forms, job descriptions and training. Only when we follow appropriate background-checking procedures will we effectively avoid the tragic consequences of passing the trash.