

BACKGROUND CHECKS

Helping Employers Navigate the Battle Between Negligent Hiring and Discriminatory Hiring Practices

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With quick and easy electronic access to personal information at an employer's fingertips, employers must learn how to properly utilize such information in the hiring process. The failure to perform adequate background checks can open an employer up to liability for claims based on negligent hiring. These claims can have a negative impact in the marketplace, adversely affect employee morale and be costly to defend. On the other hand, improper use of background checks during employee screening can expose employers to civil rights violations. These opposing pitfalls require employers to perform a precarious balancing act and to understand the liability to which they are exposed. Employers need to develop a hiring process that effectively insulates them from both negligent hiring and civil rights claims.

Employers understand that they bear a certain amount of liability for the actions of their employees during working hours. What some fail to realize is that hiring someone who is incompetent or unfit for the job can expose the employer to a negligent hiring claim based on harm that employee causes even if the employee's conduct is outside the employer's control. For instance, one court found the owner of an apartment complex liable for a handyman's assault on a tenant outside of working hours.¹ Liability existed because the owner failed to investigate the handyman's background, which included a laundry list of violent crimes.

The first step in avoiding liability for negligent hiring is to understand the elements of the claim. To prevail on a negli-

gent hiring claim, a plaintiff must show that (1) an employment relationship existed, (2) the employee was unfit for the position, (3) the employer knew or should have known the employee was unfit, (4) the employee negligently or intentionally caused the injury, and (5) the employee's conduct proximately caused the injury.² Regarding the first element – employment relationship – employers cannot assume they can escape liability through artful contract language or independent contractor relationships.³ Courts will look at the totality of the facts when determining employment status rather than simply reviewing the language of an employment contract. Second, when determining if an employee is unfit, courts will examine both the nature of the position and the risk the employee posed to those with whom he came in contact.⁴ A job applicant cannot be deemed unfit solely because of a criminal conviction.⁵ The third element – requiring an employer to have knowledge that the employee was unfit – can be satisfied by showing that the employer should have discovered information showing the employee was unfit.⁶ For instance, in the example of the apartment owner above, the owner should have discovered the handyman's history of violent crimes by simply checking his references and performing a public information search. Under the fourth element – the employee's tortious conduct – an employer is liable only for an employee's torts. Therefore, if the employee's actions were not negligent or intentional, a claim for negligent hiring would fail.⁷

Finally, on the issue of proximate cause, a plaintiff must show that the injuries were caused by a characteristic of the employee which the employer knew might cause harm.⁸

While applicants with criminal records are legally barred from holding certain positions, there are many others for which they still may be hired. To comply with federal law, a policy cannot blindly reject candidates based on their criminal record. For instance, as arrest and incarceration rates for African Americans and Hispanics exceed those of the general population,⁹ a hiring policy that rejects any applicant with a

criminal history might have a disparate impact on those two protected classes and might violate Title VII of the Civil Rights Act of 1964. Liability can be minimized by fully researching an employee's criminal background and applying that information to the standards set forth under a properly developed hiring policy. An employer should develop a hiring policy that relies on factors that is job related. In order to show that an

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exclusion based on criminal history is a business necessity, the employer must take into account (1) the nature and gravity of the offense, (2) the time that has passed since the conviction or completion of the sentence and (3) the nature of the job sought.¹⁰ Even if a hiring policy does have a disparate impact on a protected group, it might still be legally valid if the requirement is job related and consistent with business necessity.¹¹

For instance, Company A, which processes credit card information, screens for applicants with convictions for credit card fraud. However, Company B, which provides landscaping services, would have a difficult time arguing that credit fraud convictions are related to a business necessity. Thus, while both of the processes for screening applicants can result in a disparate impact on a protected group, only Company A's policy meets the business ne-

cessity requirement.

An employer's potential liability under the doctrine of negligent hiring requires employers to weigh the potential disparate impact of their hiring policies. This should not discourage employers from investigating the backgrounds of their employees and implementing an appropriate application process. To the contrary, by implementing a strong background investigation policy and using that policy in conjunction with a carefully tailored applicant screening process, employers can protect themselves from negligent hiring claims while still meeting the standards set forth under Title VII.

BEST PRACTICES TIPS:

- Conduct a thorough background check by accessing public record sites that would reveal an applicant's criminal background.
- Develop narrowly tailored written policies and procedures for screening applicants and employees for criminal conduct.
- Eliminate policies or practices with blanket exclusions of applicants based on *any* criminal record.
- When asking questions about criminal records, limit inquires to those records related to the job in question, consistent with business necessity.
- Training. Training. And, more training.



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¹ *Ponticas v. K.M.S. Invs.*, 331 N. W.2d 907 (Minn. 1983).

² Rodolfo A. Camacho, "How To Avoid Negligent Hiring Litigation," 14 Whittier L. Rev. 787, 794 (1993).

³ *Santiago v. Phoenix Newspapers*, 164 Ariz. 505, 508, 794 P.2d 138, 141 (1990).

⁴ *Ponticas v. K.M.S. Invs.*, 331 N. W.2d 907, 912 (Minn. 1983).

⁵ See *Green v. Missouri P.R. Co.*, 549 F.2d 1158 (8th Cir. 1977).

⁶ *Stricklin v. Parsons Stockyard Co.*, 192 Kan. 360, 388 P.2d 824 (1964).

⁷ *Di Cosala v. Kay*, 91 N.J. 159, 173, 450 A.2d 508, 516 (N.J. 1982).

⁸ *Ponticas* at 915.

⁹ *EEOC Enforcement Guidance*, No. 915.002, at FN 10, dated 4/25/2012.

¹⁰ *Green v. Missouri P. R. Co.*, 549 F.2d 1158, 1160 (8th Cir. 1977).

¹¹ *EEOC Enforcement Guidance*, 915.002 (April 25, 2012).