

## An Update on “Negligent Hiring” Claims: What the Employer “Should Have Known”

### Question:

What should employers do in order to avoid negligent hiring claims?

### Response & Analysis:

Under the doctrine of negligent hiring, an employer is liable for harm its employees inflict on third parties when the employer knew or should have known of the employee’s potential risk to cause harm, or if the risk would have been discovered by a reasonable investigation. Employers can avoid negligent hiring claims by following EEO Guidelines, complying with applicable states’ laws and employing an effective applicant background check program.

### Negligent Hiring

Employers are expected to take reasonable care with their employees. The level of required care depends on the job itself and how much the hired individual may come into contact with third parties. An important factor is *foreseeability*, or whether the employer should have been able to foresee if the potential employee is a threat to engage in dangerous conduct. The necessary legal elements of negligent hiring or retention include:

- *Existence of an employment relationship*
- *Employee's incompetence*
- *Employer's actual or constructive knowledge of such incompetence*
- *Employee's act or omission causing plaintiff's injuries*
- *Employer's negligence in hiring or retaining the employee as the proximate cause of plaintiff's injury*

If all of the above factors are present, it can lead to a guilty verdict for employers.



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Negligent hiring claims are preventable provided employers follow certain requirements. Negligent hiring claims arise when (1) the employer *knew or should have known* (had the employer exercised ordinary care) of the employee's unfitness at the time of hiring, and (2) whether that foreseeable unfitness was the cause of the resulting injuries.<sup>1</sup> The standard for liability varies among the states.<sup>2</sup> The American Bar Association provides a state-by-state document that details each states' definition of negligent hiring.<sup>3</sup>

The best practice standards, covering both employers and consumer reporting agencies, are grounded in the Equal Employment Opportunity Commission's (EEOC's) 2012 *Enforcement Guidance on the Use of Arrest and Conviction Records in Employment Decisions under Title VII of the Civil Rights Act of 1964*.<sup>4</sup> They are intended to mitigate the risks of negligent hiring claims, as well as to help prevent violations of laws regarding employment discrimination and background checking.

The best approach for employers to consider is a multi-faceted due diligence approach, employing EEO guidelines, applying states' laws where applicable and employing a strong applicant screening process.

## EEOC/Fair Credit Reporting Act

1. *Employers should not ask about criminal records on application forms, the EEOC report states. They should consider only convictions and pending prosecutions, and only those that are relevant to the job in question and recent enough to indicate significant risk.*
2. *Employers should provide applicants the opportunity to challenge any report, in compliance with the Fair Credit Reporting Act (FCRA), and they should consider evidence of rehabilitation.*
3. *The EEOC states that if a criminal conviction appears on the candidate's criminal background check, the information cannot be used in a discriminatory way.*<sup>5</sup>

<sup>1</sup> Margaret M. Clark, *How to Address Negligent Hiring Concerns: Exercise due diligence to avoid negligent hiring nightmares*, SHRM (Feb. 27, 2019), <https://www.shrm.org/hr-today/news/hr-magazine/spring2019/pages/how-to-address-negligent-hiring-concerns.aspx>.

<sup>2</sup> *Id.*

<sup>3</sup> See Nesheba M. Kittling, *Negligent Hiring and Negligent Retention: A State by State Analysis*, American Bar Ass'n. (Nov. 6, 2010), [https://www.americanbar.org/content/dam/aba/administrative/labor\\_law/meetings/2010/annualconference/o87.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/labor_law/meetings/2010/annualconference/o87.authcheckdam.pdf)

<sup>4</sup> <https://www.eeoc.gov/laws/guidance/enforcement-guidance-consideration-arrest-and-conviction-records-employment-decisions>

<sup>5</sup> *Id.*



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4. *The EEOC recommends assessing the criminal record to determine the nature and gravity of the crime, the time since the crime or completion of a sentence, and if the crime affects the employee's ability to do the job safely and without potential cause for harm.*<sup>6</sup>

## State/Jurisdictions

Many jurisdictions have passed “Ban-the-Box” laws whereby employers must remove the “criminal question” from employment applications and instead ask such questions at some point later in the application process (varies by jurisdiction). Ban-the-Box laws generally prohibit employers from inquiring into an applicant’s criminal background until after an applicant has been selected for an interview or a conditional offer of employment is made. Alluding to the Ban-the-Box movement, the EEOC favorably remarked that “[s]ome states require employers to wait until late in the selection process to ask about convictions.”<sup>7</sup> It went on to recommend, as a best practice, “that employers not ask about convictions on job applications.”<sup>8</sup>

While fair-chance hiring laws and limitations on employer liability efforts noted above are attempts at mitigating liability for employers, these concepts are neither sufficiently widespread nor standardized to guarantee sufficient protection against negligent hiring claims against employers. In the absence of a uniform national standard, it is perhaps more effective and maintainable to adopt best practices for due diligence in hiring people with criminal records.

## Laws to Mitigate or Avoid Negligent Hiring Claims

Twelve states have passed laws which attempt to insulate employers from negligent hiring claims. In general, these laws fall into three categories:

1. **Evidentiary limitation.** The use of an employee’s criminal history is limited as evidence unless the nature of the criminal history bears a direct relationship to the facts underlying the claim. For example, a Driving While Intoxicated record would not be applicable to a subsequent case of theft in the workplace.

<sup>6</sup> *Id.*

<sup>7</sup> EEOC Enforcement Guidance: Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, Number 915.002 (April 25, 2012).

[http://www.eeoc.gov/laws/guidance/arrest\\_conviction.cfm](http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm). Last visited: November 25, 2014.

<sup>8</sup> *Id.* at § V(B)(3).



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2. **Restoration of rights certificate.** A judge may issue a person with a criminal record who meets certain criteria a certificate that creates a presumption of due care so long as an employer knew of the certificate at the time of hiring.
3. **Presumption against liability.** An employer's compliance with applicable laws in connection with their criminal-background investigations creates, under certain conditions, a presumption against liability for negligent hiring.

## Applicant Background Checks

*If properly crafted and implemented, background screening policies allow employers to minimize the risk of employee theft and fraud, ensure a safe workplace for all employees, and avoid liability for negligent hiring.*

As noted, the doctrine of negligent hiring is focused on employers exercising due diligence when hiring employees.<sup>9</sup> Employers can take steps to avoid these claims by running applicant background checks prior to hiring an individual. It is important to note that employers who contract with consumer reporting agencies are subject to the requirements listed in the FCRA.<sup>10</sup> Under the FCRA, a CRA may not report records of arrests that did not result in entry of a judgement of conviction, where the arrests occurred more than seven years ago.<sup>11</sup> However, they may report convictions indefinitely.<sup>12</sup>

Employing a comprehensive background check program has proven critical for employers to protect against negligent hiring claims. Some points to consider when establishing a background check program:

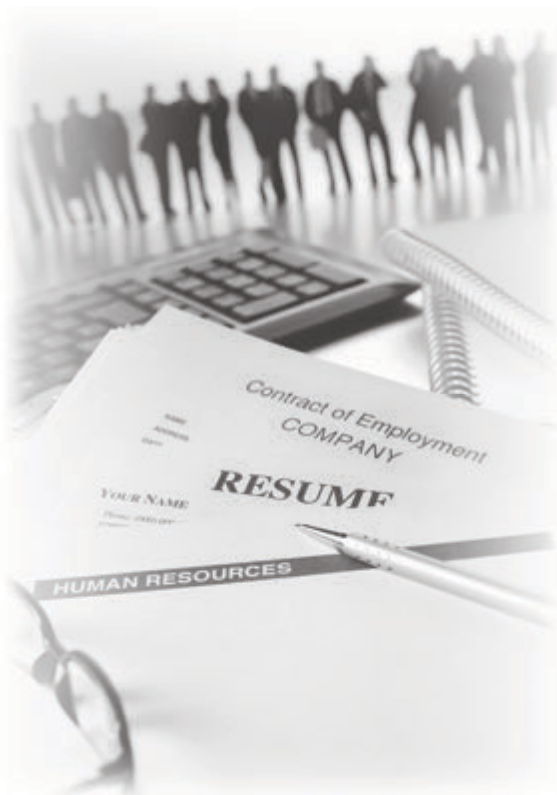
- *Work with the background check provider to get a thorough screening conducted suitable to the organization's requirements*

<sup>9</sup> Margaret M. Clark *supra* note 1.

<sup>10</sup> EQUAL EMP'T. OPPORTUNITY COMM'N., *Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions under Title VII of the Civil Rights Act*, <https://www.eeoc.gov/laws/guidance/enforcement-guidance-consideration-arrest-and-conviction-records-employment-decisions>, (Apr. 25, 2012). See also EQUAL EMP'T. OPPORTUNITY COMM'N., *What You Should Know: The EEOC and Arrest and Conviction Records*, <https://www.eeoc.gov/laws/guidance/what-you-should-know-eeoc-and-arrest-and-conviction-records>, (May 18, 2012).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*



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- *Consider employment verifications and seek explanations for gaps in employment*
- *Consider checking all references*
- *Consider including a drug testing program as part of the screening process*
- *Comply with all applicable federal, state, local and industry laws with respect to the background screening requirements*

Courts in some jurisdictions have imposed a duty on employers to perform pre-employment background checks<sup>13</sup> and employers in certain industries are statutorily required to do so. Even in the absence of an affirmative statutory or common-law duty, many employers recognize that background checks show diligence in vetting job candidates and, therefore, provide much of the ammunition needed to successfully ward off negligent hiring claims.

### *The Risk of Not Exercising Due Diligence*

By not taking the necessary steps to avoid potential claims, it could cost employers highly, not only in monetary penalties but also in damage to the institution's reputation. In Texas, a nursing home was liable for \$35,000 in actual damages and \$200,000 in punitive damages after the jury found that the nursing home was both negligent and grossly negligent in the hiring of an unlicensed nurse who assaulted an eighty year old visiting its nursing home.<sup>14</sup> The court stated that the nursing home had a duty to exercise reasonable care in the selection of its medical staff.<sup>15</sup> In this case, the unlicensed nurse had fifty-six prior convictions of theft, which the court considered crimes of moral turpitude.<sup>16</sup> A Texas statute provided for the exclusion of nurse licensing for persons convicted of felonies or crimes of moral turpitude.<sup>17</sup> The nurse was hired over the telephone "sight unseen" and in his application he falsely stated that he had a Texas LVN license and that he had not been convicted of a crime. The nursing home breached its duty of care by failing to validate the credentials of the nurse.<sup>18</sup>

<sup>13</sup> See, e.g., *Mindi M.*, 439 S.W.3d at 557 (expert testimony regarding hiring practices within the hospitality industry provided basis for imposing duty on employer to conduct criminal background checks of applicants); *Spencer v. Health Force, Inc.*, 107 P.3d 504 (N.M.2005) (employer had common law duty to conduct criminal background check before hiring in-home caregiver); *Munroe v. Universal Health Servs., Inc.*, 596 S.E.2d 604, 607, n. 4 (Ga.2004) (holding that employers in "more sensitive businesses" who fail to conduct criminal background checks of job applicants may be held liable for negligent hiring even absent a statutory duty).

<sup>14</sup> *Deerings West Nursing Center v. Scott*, 787 S.W.2d 494, (Tex. Ct. App.,1990).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*



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In Michigan, a jury awarded \$12.5 million to a 14 year old girl who was molested while being transported in an ambulance between two hospitals.<sup>19</sup> The girl was trapped to a gurney during a 50 minute ambulance ride when she was assaulted.<sup>20</sup> The ambulance driver reported the crime to his supervisor.<sup>21</sup> The ambulance company only found out at the time the crime was reported that the assaulter was a convicted felon.<sup>22</sup> The plaintiff filed suit alleging that the company was negligent in failing to properly screen its employees or provide appropriate training and supervision.<sup>23</sup> The jury found the attendant 70% responsible and the ambulance company 30% responsible.<sup>24</sup>

A Massachusetts jury awarded \$26.5 million to the estate of a man who was murdered by a healthcare professional hired to care for him.<sup>25</sup> The victim suffered from cerebral palsy and had hired an in-home healthcare nurse.<sup>26</sup> The nurse stabbed him repeatedly and robbed him.<sup>27</sup> The family sued the Visiting Nursing Association and Trusted Health Resources claiming that they did not screen their employees adequately.<sup>28</sup> They were able to present evidence during trial showing that no background check was conducted, and if they would have conducted a background check, they would have found that the nurse had six prior felony convictions and that the nurse also never attended nursing school as he claimed on his application.<sup>29</sup> Both companies were found equally liable for the injury caused to the victim.<sup>30</sup>

## In Conclusion

To avoid potential negligent hiring claims, employers should conduct thorough background checks on their employees and verify all information provided by potential new employees. Employers should assess the criminal records of applicants before making a hiring decision and ensure that they follow adverse action procedures if the candidate failed their background check. It is important that employers also obtain consent before screening and follow any applicable state law regarding background screening. ■

<sup>19</sup> CBS DETROIT, *Jury Awards \$12.5M to Girl Molested in Ambulance*, CBS DETROIT (May 12, 2011, 7:20 AM), <https://detroit.cbslocal.com/2011/05/12/jury-awards-12-5m-to-girl-molested-in-ambulance/>. See also Lucy Campbell, *Teenager Sexually Assaulted in Ambulance Awarded \$12.5 Million*, LAWYERS AND SETTLEMENTS.COM (Aug. 15, 2011) <https://www.lawyersandsettlements.com/settlements/16066/sexually-assault-law-sexual-lawsuit-rape.html>.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> Teresa Anderson, *Negligent Hiring*, *Security Management* Vol. 42, No. 6, (Jun. 1998), <https://www.questia.com/magazine/1G1-20853154/negligent-hiring>.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*



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