

# Screening and Hiring; An Employers' First Line of Defense

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## **Screening and Hiring | An Employers' First Line of Defense**

In this day and age of rampant litigation stemming from employment-related issues, it is important for employers to understand that the appropriate screening and hiring of workers is a vital function that must be performed legally, consistently, and diligently. According to a study by liability consultants, damage awards for negligent hiring between 1983 thru 1985 lawsuits averaged \$810,000! In addition, the number of lawsuits filed has increased over the past years. Employers retain and thru premium payments, transfer significant risk due to the intention, conduct, and actions of employees from claims filed under workers' compensation, employment practices liability, general liability, auto liability, and fidelity bonds. A well-thought-out and consistently implemented screening and hiring program provides the employer with the filtering mechanism needed to methodically select only the best candidates that offer the highest probability of enhanced performance in the workplace.

Often when an employee is hired and has a desire to deceive the company, (moral hazard) be it in the form of theft of property, alleging a workplace injury, injury/assault of a customer or other members of the public, the employer has missed an opportunity to prevent those actions from occurring.

Past job performance can be an important predictor of future activity. If workers have skipped around jobs then chances are

they will leave employment after a short while. The employer is responsible for the activities and conduct of employees, which is called vicarious liability. Employers possess tremendous vicarious liability due to the activities of their workforce. Just as the employee is an extension of the business, then the employee's actions are an extension of the employers' legal responsibilities. The principle of "respondent superior" allows that literally any act of an employee acting within the course and scope of his employment can create a vicarious liability problem for the employer, regardless of when or where the act occurs. In the defense of claims for negligent hiring the mechanism used to screen and hire the individuals in question will come under scrutiny.

Negligent hiring is a term used to describe a tortious offense alleged by plaintiffs in the trial against employers who hired employees who have injured customers or members of the public. Employers' have a certain duty of care when selecting employees.

**The basic legal elements of such a claim include but are not limited to:**

- The employee who caused the injury (that the employer is attempting to be held responsible for) was not fit for the position.
- The employer knew or should have known that the employee was unfit for the position.
- The employee caused the third-party's loss. (The third party is someone who is outside of the

employment/insurance contract such as a member of the public)

→ The injury or harm was a foreseeable consequence of the employment of that person.

→ The hiring of the particular person was the proximate cause of the third party's injury and/or loss.

Take for example a carpet cleaning operation or any service company that sends employees to the residences or places of business of customers. If the employee assaults or injures the customer, the employer may be held responsible. If it can be proven that that employee presented a risk of injury to others that the employer knew about or should have known about, that employer may be held responsible and may have to pay monetary damages due to the actions of the employee.

The level of hiring controls needed is in direct relationship to the job the worker is being hired for. Will the worker be decentralized and away from supervision? Will the worker work alone? Will the worker control money, drugs, classified information? Will the worker interact with other people in their homes or businesses?

**Some suggested Screening and Hiring Practices include:**

► Develop Job Descriptions for each position that explains the essential functions and required skills of the position. This is part of the Americans with Disabilities Act (ADA). The Federal Law requires employers to attempt to provide "reasonable accommodations". If an employment candidate is otherwise qualified for a position and such "reasonable accommodations"

would not create any “undue hardship” on the employer, the employer may not disqualify that individual due to the disability. “Undue hardship” may be a function of the financial ability of the company in question. If a candidate is not qualified to do the essential functions of the job and the employer cannot reasonably accommodate the shortfall in performance created by the disability, then the employer may have a defense as to why that person was not hired, if such a suit is brought. The employer is under no duty to accommodate a candidate that may be at an increase of a workplace injury due to a medical condition.

► Use a very comprehensive Application For Employment Form. Employment applications represent a significant opportunity to legally learn as much about a candidate as possible in the very early stages of consideration. The application should contain a “consent to check backgrounds” provision which will include criminal records, past employment, education and verify Social Security Number. Applications should ask about criminal records in the broadest terms, such as listing all convictions and not just felonies. Use criminal information cautiously because certain legal cases cannot be used for employment decisions. Under current law, criminal cases may not be used to automatically disqualify an applicant unless there is a sound business reason to do so. Also, the application should state and be signed by the candidate that all information is true and accurate and will be relied on as material information by the employer and any misrepresentations will be grounds for termination of the hiring process and employment. Additionally,

the Application for Employment should have the candidate grant written approval for the employer to check past employment, past education and release the information to the employer and release those entities from any liability. The application should state consideration for employment is conditional upon a background report that is satisfactory of the employer. The application should also state that the employer has the right to conduct a criminal records check at any time during the employment. This eliminates an issue if the candidate is hired and there is some type of workplace misconduct and an investigation is required.

► Medical physicals should be conducted to ensure that the candidate is physically able to perform the job for which s/he has applied. The job description should be compared by a doctor to an employee's physical condition to determine if they are physically able to perform the job safely. An employer is under no duty to hire an individual who will put themselves or others at risk due to their physical inability to perform the job safely.

► Pre-employment drug screening should be performed to ensure the candidate does not use illegal drugs. A written drug-free workplace policy should express the company's position on drug use, the ramifications of such use, and disciplinary measures. Candidates should sign a 'Consent to Voluntarily Test and Release of Results Form' prior to such testing. Annual education is required as well as 60 days written notice prior to commencement of such a program.

▶ Conduct motor vehicle records checks if the applicant will be driving on company business. The applicant's MVR should be compared to a pre-determined set of objective criteria to make a decision. The predetermined set of objective criteria is a company Driver Qualification Policy.

**Employers should set the criteria such as: Sample Policy:**

Candidates and employees must meet the following minimum criteria to operate a vehicle for this company;

- be at least 23 years of age;
- have no more than one moving violation; and
- no DUI offenses in the past 3 years
- possess the CDL, if required.

▶ Obtain consent to pull a credit history if the job in question has bearing on that information.

▶ Request references and professional licenses. Verify the validity of professional licenses. Document the responses of references.

▶ Social Security trace will verify the Social Security number as matching that person and will verify previous addresses. This will make the criminal records check more valid and not reliant on the information provided by the prospective employee.

▶ Conduct an interview. The goal of the interview is to fill in gaps in information, gain an understanding of the expectations of the applicant and to ensure there will be a fit between the organization needs and the applicant's abilities. Ask if the candidate has any concerns to share. Because they have given

authority to check the background they may volunteer information that gives insight into their character.

► If hired, the new employee should complete a post-hire medical health questionnaire which would allow the employer to access the State Second Injury Fund if the state of employment maintains such a pool. Louisiana does have such a pool. Second injury funds are state-administered pools of money collected from taxing workers' compensation insurance premiums. The pool is designed to offset the cost of workplace injuries if an employer hires a worker with a previous injury or medical condition and the worker sustains a workplace injury of which the original medical condition played a part in an increase in claim cost.

The workers' compensation carrier or employer can subrogate (attempt to collect money from another party) against the Second Injury Fund. If money is collected it should offset the claim cost and reduce the net cost of the case which helps an employers' experience modification factor.

Although this is not legal advice and may or may not be a comprehensive listing of all the screening techniques available to employers, employers should endeavor to implement all of the pre-employment screening activities allowed by law because once a bad apple is allowed into the workforce the opportunity to prevent a negative situation is lost. Granted that all of this due diligence will take time, effort, and money. However, without a systematic process to evaluate and select the most qualified candidate for employment the employer opens themselves up for

lawsuits, workers' compensation claims, and other negative events. Due to the cost and legal issues involved, employers should consider the use of background checking services who are proficient in employment laws to collect data and advise employers on these contentious issues. Each state has different laws and procedures for how can be obtained and used. For example, in California, the prospective employee must be copied on all background information obtained. Collectively, all of the employers' activities to conduct a thorough and proper hiring process sends the signal to the candidate that this employer is serious about who they allow in the workforce.

### **Can I ask about that?**

Take this interviewing quiz and find out how high your legal bill could be for asking the wrong questions in an interview. Answer "YES" if you believe the question is OK to ask in an interview, and "NO" if you feel it is not OK to ask. Answers at the bottom of the page.

1. What is your religious denomination, your religious affiliation, your church, or the name of your pastor?
2. What religious holidays do you observe?
3. What is your lineage, ancestry, national origin, descent, parentage, nationality, or birthplace?
4. What is your marital status?
5. If you have children, what are their ages?
6. How old are you? What was the date of your birth?
7. Do you have any impairment, mental or physical, which would interfere with your ability to perform the job for which you have

applied?

8. How will you get to work?

9. If your original name has been changed by court order or otherwise, what was your original name?

10. Have you ever worked for this company under a different name?

11. What is your place of residence?

12. What part of town is that?

13. How long have you resided in this city or state?

14. Do you own or rent?

15. Did you receive an honorable discharge from the military?

16. Have you ever been arrested? If so, for what?

Answers:

1.N; 2.N; 3.N; 4.N; 5.N; 6.N; 7.Y; 8.N (A better way to ask: Is there any reason you may not be able to come to work on time?)

9.N; 10.Y; 11.Y; 12.N; 13.Y; 14.N; 15.N

(Better to ask, "Where you in the military? What type of discharge did you receive?")

16.N

(Being arrested is not necessarily being convicted. It's OK to ask if an applicant has ever been convicted of a crime).

The cost savings achieved by paying low wages to employees (compared to your competitors) is not a true savings when you factor in the number and cost of injuries to new workers, the mistakes made, the cost to hire and the short-term loss in productivity as the new worker learns the operations.



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