

# The Liability of Negligent Hiring

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# The Liability of Negligent Hiring

In recent years, the number of negligent hiring lawsuits filed against employers has increased. Ordinarily, a third party who is injured by your employee files this type of lawsuit. The third party claims that you failed to conduct a thorough background check before hiring the employee and if there had been such an investigation, the employee would never have been hired.

## Examples of negligent hiring.

Lawsuits could include circumstances like the following:

1. A hospital's failure to discover that a nurse was discharged by a prior employer because of unsafe handling of patients - lawsuit filed by a patient allegedly injured by the nurse;
2. A company's failure to discover a security guard's prior record of sex crimes - lawsuit filed by a customer allegedly molested by the security guard;
3. An apartment owner's failure to discover prior burglary convictions of a maintenance employee who had the pass key to all apartments - lawsuit filed by a tenant allegedly burglarized by the employee; and
4. The hiring of the an employee by a security firm which handled large sums of money without doing a thorough investigation of the employee's job history - lawsuit filed by a client from whom the employee allegedly stole a substantial sum of money.

## Negligent hiring liability.

Employers face the potential for negligent hiring or negligent retention liability if they fail to conduct an adequate pre-employment investigation into an applicant's background. If an employee has a history of misconduct indicating a propensity for violent behavior or other misconduct that an

employer could have discovered through a background investigation, the employer could be liable for resulting injuries. Failing to adequately investigate prior to hiring can expose the employer to liability for actual injuries, pain, suffering, and even punitive damages under common law theories of negligence. An employer incurs a similar risk if it fails to take action against an employee after knowing or suspecting that an employee poses a risk of harm to co-workers, customers, or others.

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## Avoiding negligent hiring liability.

In order to avoid negligent hiring liability, a thorough background check is the best defense against a negligent hiring lawsuit. As a consequence, an employer would be wise to keep in mind the following points:

1. Carefully review all information provided by a job applicant.
2. Pay special attention to gaps between jobs, the failure of an applicant to answer all questions, or "strange" answers.
3. Obtain a "consent and release" and a waiver to gather information from former employers. Even if the former employers have a policy against releasing the information, a "consent and release" documents your effort to obtain such information.
4. Contact personal references provided by the applicant and thoroughly check the information provided.

5. Verify the chronologies offered by applicants to ensure they check out in the appropriate sequence.
6. In cases which may involve security or safety-sensitive positions, determine whether an applicant has a criminal record.
7. Carefully document the efforts you have made and the information obtained.

## Hiring the best person

### Be a good listener.

In order to hire the best person for the job, it is important to be a good listener. Although you may want to sell the company and the job position, it is important to listen carefully to the applicant's story, including the applicant's history and experience. You should require the applicant to give you as much information as possible, and look for any holes in the applicant's employment or educational history.

### Applications.

Applications should be structured in such a way that the applicant is required to provide detailed explanations to critical employment questions such as prior work history or education related to the position sought. Employers can make use of the basic information that a job applicant provides. First, all information regarding educational experience, degrees and licenses held, and employment history should be verified. Second, all references should be checked, both business and personal. Third, require all applicants to give their consent to a background search by signing a statement on the employment application.

The application should state that all information will be verified and all references will be checked. It should also state that any information will be kept confidential and only communicated to those individuals who are directly involved in the screening and hiring process. The applicant should also agree in writing to release former employers and others

from any liability that might arise from the disclosure of information. The applicant should be asked to sign the statement as part of completing the employment application. The statement may be amended to the application or be part of a separate acknowledgment that also states that employment is "at will" and may be terminated at any time by either party.

### Other questions to ask.

You should obtain information about the employee's wages and benefits to ensure that you are not going to be putting the person in a situation where he or she might grow even more dissatisfied about compensation than in the previous position. Also, information should be solicited concerning the names of previous supervisors. If the employee cannot recall the supervisor's name, there may be a problem with this applicant.

In soliciting the reasons for leaving previous employment, many employers design questions to avoid the simple and somewhat evasive response of "personal reasons." An employer may inquire whether an employee has ever been dismissed or asked to resign from a previous position. If the response is yes, the employee should be asked to explain in writing on the application, and orally in the interview, the background concerning the situation.

Questions should be structured to encourage the applicant to divulge information about attitudes concerning how employees and employers should work with each other. From these questions, an employer should be able to decipher the applicant's willingness to be a team player in the employment relationship. The employer should attempt to assess whether the applicant will cooperate with the terms and conditions of employment, communications, and other facets of the relationship, which can be the source of employment disputes. Certainly, an employer should be put on alert if the applicant's attitude toward the employment relationship appears to be one of competition or confrontation as opposed to mutual cooperation.



## Gathering criminal conviction information.

In addition to the "rank, file, and salary" information often provided as the only response to a reference check from a former employer, a prospective employer may broaden the search to include public records on felony and misdemeanor convictions. If a search turns up a criminal conviction, its use is limited to situations where there are job-related reasons for disqualifying an applicant such as criminal negligence, assault, battery, fraud, theft, and other crimes involving violence or dishonesty.

While this information is generally available to the public, searching through public records is a time-consuming task. Investigative services and other document and information retrieval services may be helpful but costly. For that reason, it is advisable to devise guidelines as to when such additional information is necessary. Such guidelines should be applied consistently and uniformly to avoid any appearance of discrimination or unfair treatment of certain job applicants.

## Gathering consumer credit reports.

Another source of information on job applicants is a consumer credit report. While this information is obtainable, there are legal notice requirements for conducting a credit check, as well as requirements for advising applicants about their rights in connection with such a search. Additionally, as with other kinds of background information, credit history may only be used in making hiring decisions if the information

is reasonably related to the position being sought. Again, guidelines may help to streamline the process and assure consistency and fairness.

By following the above suggestions, you may not only avoid a negligent hiring claim, but you may also avoid a poor employee. All too often employers, saddled with an expensive employment lawsuit, complain that the difficulties and expenses associated with a lawsuit never would have happened if they hadn't hired the person in the first place. Employment screening is critical, not only to hire the right or best person for the vacancy, but also to ensure that you do not hire the wrong person.

Disclaimer: This publication provides a general overview of the subjects covered and is not legal advice or other professional service. The law changes regularly and is different in each state, and you should contact an attorney when determining a course of action.

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