

# How to Avoid the Repercussions of Negligent Hiring Practices

Hiring is hard enough these days. Hire the wrong person and not only will you have to hire a new, right person, but you could possibly face legal challenges from both the wrong choice and those who worked with him or her.

Negligent hiring claims are a fast-growing area of employment litigation. This is a good reason to be aware of the effects on productivity that the wrong workers can have, in addition to the costs for replacing employees.

Your organization has a legal duty to exercise due diligence in hiring. “An organization can be sure for negligence if it hires someone it knew, or in the exercise of reasonable care, should have known was dangerous, unfit or unqualified for the job.”

No one knowingly hires dangerous people who will hurt others in the workplace, but your company may have to answer for its hiring practices in court. Violent employees are an obvious danger, but those who lie about criminal backgrounds and their credentials also could pose a risk to company data or other financial assets.

If a claim reaches a jury, watch out: Jurors tends to believe the employer had a duty, ability and resources to perform safe hiring. “If you could have known, you should have known.”

As a result, HR professionals should audit their hiring practices to assess whether they could make their organization susceptible to negligent hiring claims.

## **What diligence is due?**

Due diligence will be “what the jury says it is for private firms”; public entities are regulated by statute. The specifics will be examined in a court case, so employers would do well to background screen and document their efforts before hiring.

Whether or not you convince the jury that you exercised due diligence, the organization will still have to go through the litigation process, pay attorney fees and risk negative publicity about the case.

Standard defenses, such as claiming the employee lied on the job application, the organization is also a victim of criminal behavior or past employers didn't warn of danger behavior, are not likely to help your case. You may have a better outcome if you can show that the problem wasn't foreseeable and that the organization performed a reasonable amount of due diligence. Again, what is reasonable will vary with the facts.

## **Safe Hiring Practices**

There is no single definition of a “background check.” However, there are safe hiring practices that can help your organization to identify potential problem applicants before you hire. Rosen recommends that background checks should be a part of the hiring process.

The first stage is the interview and reference check. The second stage should be used for all “finalists.” This stage involves a background search; including making sure the information given is accurate and checking for a criminal history. The screening should include checking public and private records.

The following steps will help to ensure that your application process is complete and on solid legal ground:

- Get consent to perform a background check
- Use the application form with standard questions about criminal convictions and checking for gaps in employment can often stop you from “hiring a lawsuit waiting to happen” in early stages of the application process.
- Ask about criminal convictions on the application form. It’s fine to ask, but be careful about your wording. State on the application that a prior criminal conviction won’t necessarily bar employment. Avoid an overly broad question about whether the applicant has been “convicted of any crime.” Also, some states draw a distinction between how you can treat job applicants who have prior convictions for a felony versus a misdemeanor. Check with an employment lawyer in your state for specifics.
- State on the application form that lying about information on the forms is grounds for dismissal no matter when it is discovered.
- Review applicants carefully for red flags such as applicants who avoid questions about a criminal background, who provide no details on criminal convictions, or who “can’t remember” past supervisors.
- Check schools and past employers on the form
- Check information on vendors and temp workers.
- Have post-offer procedures in place, including I-9 verification.

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