

BACKGROUND CHECKS

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Why Do A Background Check?

- ▶ Assists in finding the **best-qualified** applicant for the job
- ▶ Ensures **accuracy** of information provided by applicant
- ▶ Protects employer from **liability** if history reveals undesirable traits

General Guidelines

- ▶ Use investigative tools that are **reasonable** and appropriate
- ▶ Background checks should not have a disparate impact on any **protected** class
- ▶ Checks should be **conducted** by people with special training

Quality Assurance

- ▶ Background checks can **test** the accuracy of information provided
- ▶ **Confirm** or **deny** the employer's first impression of applicant

Preventing Legal Liability for Employee Actions

- ▶ Background checks can **protect** an employer from legal liability
- ▶ Employers can be held **liable** for action of employees acting under the scope of employment
- ▶ Employers can be **sued** based on negligent hiring, retention and referral

Duty to Warn

- ▶ Employer can be **held liable** for employee actions if employer knew or should have known and did not provide a warning
- ▶ Care must be taken with **warning**
- ▶ **Improper warning** could lead to defamation, invasion of privacy suit

Duty to Warn - Court Interpretation

Duffy v. Oceanside (1986)

- ▶ City hired male employee on **parole** for kidnaping, rape and sexual assault
- ▶ Coworker **complained** she was being sexually harassed by him
- ▶ Four years later the male kidnaped and killed the coworker

Duffy v. Oceanside

- ▶ Victim's children sued, alleging City was **negligent** in failing to warn their mother
- ▶ Court noted the Employer had a **duty to warn** employee of the danger based on prior complaint of sexual harassment and his past criminal conduct

Randi W. v. Muroc Joint Unified School District (1997)

- ▶ Student sued administrator for alleged sexual misconduct and administrator's former employers who gave positive hiring **recommendation**

Randi v. Muroc School District

- ▶ California Supreme Court concluded that writer of letter of recommendation:
 - ▷ Owed prospective employers and third persons a **duty** not to misinterpret facts
 - ▷ Made affirmative misrepresentation by providing positive evaluation without **disclosing** disciplinary action for alleged sexual misconduct

An Employer May be Liable for NEGLIGENT HIRING if:

- ▶ Employer **knew** or should have known that the **applicant was unfit**
- ▶ A person to whom the employer **owed a duty** of protection was injured and
- ▶ A **connection** between the **injury** and the **employment** of the **unfit person**

Negligent Hiring Standard

Yunker v. Honeywell (1993)

- ▶ Rehired convicted murderer **harassed** female employee and ultimately killed her. She had requested, but received **no assistance** from Honeywell
- ▶ Court **upheld** the negligent retention claim based on employer's knowledge of danger and **failure to prevent harm** to female employee

Negligent Hiring Standard

Hoke v. May Dept Stores (1995)

- ▶ Shoplifting suspect had a claim of **negligent retention** against store since the security guard sexually assaulted her and had **previously** been charged with sexually abusing another shoplifting suspect

Negligent Hiring Standard

Christianson v. ESU No. 16 (1993)

- ▶ Employer must not only **negligently select** person **incapable** of performing, but the **conduct** of the person must be the proximate cause of **injury** to another

Bonnie W. v. Commonwealth (1994)

- ▶ Sexual assault victim brought tort claim action based on alleged **negligence** of attacker's parole officer
 - ▷ Allegation that parole officer was negligent in failing to **supervise**
 - ▷ Allegation that parole officer negligently recommended continued employment of attacker by **misrepresenting** criminal history

Bonnie v. Commonwealth

- ▶ Attacker worked at trailer park as maintenance man
 - ▷ Attacker had **keys** to all trailers
 - ▷ Attacker entered **locked** mobile home and assaulted victim
 - ▷ Local police chief advised parole officer of recommendation that attacker be **terminated**

Bonnie v. Commonwealth

- ▶ Parole officer did **not** require attacker to meet requirements of "Maximum Supervision"
 - ▷ Parole officer **misrepresented** criminal record
 - ▷ Parole officer **recommended** continued employment
 - ▷ Summary judgment for Defendant reversed

Haddock v. City of New York (1990)

- ▶ Victim raped by City employee at City playground brought **negligence** action against the City
 - ▷ Governmental **immunity** for tort liability did not apply to discretionary functions
 - ▷ Public policy favoring rehabilitation did not excuse City from following **normal procedures**

Haddock v. New York

- ▶ Victim was nine-year-old child at playground and was assaulted by Parks Department employee
- ▷ Employee application reflected **no** arrest record
- ▷ Employee stated he had **not** been convicted of any crime
- ▷ City did **no** further checking

Haddock v. New York

- ▶ Employee **fingerprints** taken at time of application in August
- ▷ Prints not given to Police Department until December
- ▷ Results in January showed “**substantial** criminal past”
- ▷ Employee released from **prison** several weeks before application

Haddock v. New York

- ▶ Governmental immunity did not apply to City employee
- ▷ City made **no effort** to comply with its own procedures
- ▷ City made **no analysis** of results of criminal check received several months before attack

Aquillard v. McGowan (2000)

- ▶ **Wrongful death** action brought under Section 1983 against deputy sheriff and county from shooting by deputy during the execution of an arrest warrant
- ▶ Victim pointed gun at officer and was shot three times

Aquillard v. McGowan

- ▶ Fifth Circuit concluded that County may have been **negligent** in hiring deputy:
- ▷ Deputy had never wrongfully shot anyone before being **hired**
- ▷ Deputy’s **record** did not reveal “a trigger-happy nature in particular”
- ▷ Employment decision **error** “does not reach constitutional” level

After-Acquired Evidence

McKennon v. Nashville Banner (1995)

- ▶ Plaintiff’s **damages** cut off from date the employer learned of misconduct that would be severe enough to **justify** termination

After-Acquired Evidence

Mandall v. Harleysville (1995)

- ▶ Plaintiff **misrepresented** experience on application
- ▶ Damages **cut off** at the time the fraud was discovered

After-Acquired Evidence

Red Deer v. Cherokee Country (1999)

- ▶ After-acquired evidence of applicant **lies** about previous discharges was **admissible**
- ▶ Employer must show that her wrongdoing in application process was so **severe** that she would not have been hired if it had known

After-Acquired Evidence

O'Day v. McDonnell Douglas (1988)

- ▶ Misconduct discovered during discovery may be used as a **defense** to liability
- ▶ Employer must show it would have **fired** the employee had it known of the misconduct

After-Acquired Evidence

Crawford v. Weissman (1997)

- ▶ After-acquired evidence of **resume fraud** barred plaintiff's claims of wrongful discharge
- ▶ Employer must show it would **not** have hired employee if it had discovered misrepresentation

Legitimate Reasons Not to Hire

Hartman Bros. V. NLRB (2002)

- ▶ Union organizer may lie about status as a "salt" on **application**
- ▶ But . . . may **not lie** about facts **relevant** to job **qualifications**

Hartman v. NLRB

- ▶ Union organizer Starnes hired for job that **required** driving
- ▶ He **misrepresented** his driving record and admitted **only one** speeding ticket
- ▶ Starnes announced he was going to **organize** employees and was sent home

Hartman v. NLRB

- ▶ Starnes' driving record was checked
- ▶ He had **two** speeding tickets
- ▶ Insurance company notified employer they **would not insure** Starnes and he was discharged

Hartman v. NLRB

- ▶ Board held **discharge was proper**
- ▶ Discharge was due to a **universally applied** policy on **mandatory** job qualification

Methods of Performing Background Checks

- ▶ *Fair Credit Reporting Act* – Amendments of September 30, 1997 placed **restrictions** on pre-employment inquiries

Consumer Reports

- ▶ Consumer report may be used to **establish** consumer's eligibility for employment
- ▶ May be used to **evaluate** applicant for employment, promotion, reassignment and retention
- ▶ Employer must **notify** applicant on use of the reports

Consumer Reports

- ▶ Effective 9/30/97, in order to obtain a consumer report, an Employer **must:**
 - ▷ Make a **clear disclosure** in writing that the report may be used for employment purposes
 - ▷ Applicant or employee must provide written **authorization** to employer

Consumer Reports

- ▶ Before taking adverse action based on a consumer report, an Employer is **required** to:
 - ▷ Provide a **copy** of the report to applicant or employee
 - ▷ Provide a description of the **rights** of the consumer

Consumer Reports

- ▶ Employer is **required** to:
 - ▷ Provide **notice** of adverse action to applicant or employee
 - ▷ Provide name, address and telephone number of consumer reporting agency, and reasons why **adverse** action was taken

Consumer Reports

- ▶ Employer is **required** to:
 - ▷ Provide a statement that the reporting agency **did not** make the **decision** to take the adverse action and is **unable** to provide the applicant or employee the specific reasons why the adverse action was taken

Consumer Reports

- ▶ Employer is **required** to:
 - ▷ Provide notice of applicant's or employee's rights to obtain a **free copy** of the consumer report
 - ▷ Provide notice of applicant's or employee's **right to dispute** the accuracy or completeness of the consumer report

Credit Checks

- ▶ A **credit check** is also considered a consumer report
- ▶ Credit checks of an applicant may be requested when the information is **relevant** to the position, i.e., bank teller
- ▶ Employers should **avoid rejecting** applicants based on poor credit ratings

Investigative Consumer Reports

- ▶ Employers must **inform** applicants:
 - ▷ It intends to obtain an investigator consumer report
 - ▷ The report will **include** information about his/her character, reputation, personal characteristics, mode of living, etc.
 - ▷ Upon request, employer will **disclose** nature and scope of information requested

Penalties

- ▶ **Failure** to comply with the Fair Credit Report Act requirements may involve actual and punitive **damages** plus the consumer's cost
- ▶ Employer obtaining information under "false pretenses" could be fined up to **\$5,000 fine** or **imprisonment** of two years or both

Criminal Records

- ▶ Employer may **investigate** criminal record of an applicant if information is **job-related and consistent** with business necessity
- ▶ Public employers **may not disqualify** applicants based on criminal record for that reason alone unless crime directly **relevant**

Harris v. Polk County (1996)

- ▶ ADA does not protect **criminal conduct**
- ▶ Employer has right to hold **disabled employees to same standard** of law-abiding conduct

FOP Lodge No. 5 v. City of Philadelphia (1987)

- ▶ Police Union brought action challenging constitutionality of **questionnaire** used by police department for use in selecting applicants for special investigations unit

FOP Lodge No. 5 v. Philadelphia

- ▶ Background questionnaire did not unconstitutionally infringe on **privacy** interests with questions about:
 - ▷ Physical and mental condition
 - ▷ Financial status
 - ▷ Gambling habits
 - ▷ Alcohol consumption
 - ▷ Arrest record of applicant's families

FOP Lodge No. 5 v. Philadelphia

- ▶ Questionnaire did violate **association** rights of applicants asking questions about:
 - ▷ Positions held by applicants
 - ▷ Positions held by spouses
 - ▷ Positions held by minor children
- ▶ In profit and non-profit associations

FOP Lodge No. 5 v. Philadelphia

- ▶ Third Circuit concluded that City must develop **policies** containing adequate safeguards against unnecessary disclosure of **confidential** information which are:
 - ▷ Written
 - ▷ Explicit
 - ▷ Binding

Walls v. City of Petersburg (1990)

- ▶ Black employee in City Police Department who was discharged after refusing to answer a background **questionnaire** brought suit under Title VII and also alleged constitutional right to privacy invasion

Walls v. Petersburg

- ▶ Fourth Circuit concluded that employee's constitutional right to **privacy** was not violated by questions concerning:
 - ▷ Sexual history
 - ▷ Marital history
 - ▷ Family's criminal record
 - ▷ Financial background

AFGE v. Perry (1996)

- ▶ Union brought action challenging legality of government's request for **information** and for authorization to collect information from third parties for employees holding positions requiring secret security clearance

AFGE v. Perry

- ▶ Questionnaire may ask about **criminal history** which is a matter of public record
- ▶ Questions may **also** ask about:
 - ▷ Arrest
 - ▷ Expunged charges and convictions

References

- ▶ Employer may use references from applicant
- ▶ Obtain a **release** from the applicant acknowledging information obtained may not be positive
- ▶ Releases employer from any **legal liability** for checking references
- ▶ Questions about **protected class** status should be avoided

Guidelines

- ▶ Have a statement on application about **consequences** of falsification of information on application
- ▶ Require **applicant signature** to attest to accuracy of information provided

Court Interpretation

Welch v. Liberty Machine (1994)

- ▶ Employee **omitted** information on his application and was later terminated
- ▶ Company asserted his omission was **just cause for dismissal**
- ▶ Court held that Company **failed** to prove it would not have hired Welch

Court Interpretation

Maier v. Police & Fire Credit Union (1993)

- ▶ Plaintiff **lied** during interview for job
- ▶ Company **contended** it would have fired him for fraud
- ▶ Court held company **did not prove** it would have discharged him because used the word "may" on application form

Summary

- ▶ Background checks can **assist** in hiring the most qualified applicants; and to **limit liability** for negligent hiring and retention claims
- ▶ But ... may also subject employer to **liability** under federal, state or common law

Summary

- ▶ Use background checks to obtain **only** job-related information and information **relevant** to position sought
- ▶ Comply with all state and federal laws
- ▶ Obtain **release** prior to checking references
- ▶ Stress importance of **truthful** applications to applicant

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