



## Know Who You're Hiring

by Duncan Ross MacKay

Do you know who you are hiring when you take on a new employee? Your answer might be, "No, and besides, what I don't know can't hurt me." But there is an emerging trend in the law known as "negligent hiring," which says that a lack of knowledge about your employees can indeed hurt you — and hurt butt good.

The concept of negligent hiring is a modified and expanded version of the doctrine of *respondeat superior*. That concept says an employer can be held liable for wrongful or negligent actions of an employee if that worker was acting within the course of the employment relationship when the wrongful or negligent act was performed.

A common example is where an employee operating a crane at a construction site negligently drops the crane's bucket on a passerby. Because this act occurred within the course of the employee's job, the employer will be held liable for any damages incurred by the passerby. This legal chain of responsibility is fairly straightforward and has existed for many years.

### A New Tool

The negligent hiring or retention doctrine, on the other hand, has risen only within the last 10 years or so. This fast-emerging tool for the plaintiff's attorney takes the old *respondeat superior* doctrine a leap forward. Under the principle of negligent hiring, an employer may be held liable for negligently hiring or retaining an individual he or she knows or should know is not fit for the job, if the employee's unfitness and employment together create an unreasonable risk of harm to others.

These cases usually manifest themselves in claims of physical assault, theft, or sexual harassment of co-workers, customers, and others. In these cases, the employer's liability is based on his or her possession of, or reasonable access to, information that would give knowledge of the employee's propensity for or record of violence, thievery, sexual harassment or abuse, or other unreasonable behavior.

An example of this is found in a 1984 Rhode Island case, *Welsh Manufacturing Division of Tectron, Inc. v. Pinkertons Inc.*, where Pinkertons, a security agency, was found liable for over \$300,000 in damages for several thefts of gold from Welsh's manufacturing facility. The gold, which was used in the manufacture of frames for sunglasses, was stolen by a Pinkertons security guard assigned to

watch the plant. Welsh sued Pinkertons for negligently hiring the person without properly checking his references and determining his trustworthiness. In addition, Welsh offered evidence that one of Pinkertons' supervisors had reason to believe that the employee may have been involved in a separate theft of vending machine proceeds.

The court found Pinkertons negligent, even though it had requested copies of the prospective employee's police records prior to hiring him. The court reasoned that when an employer is hiring someone to fill a sensitive position, such as guarding gold, a mere lack of negative information doesn't remove the employer from potential liability for the employee's acts. The court found that the employer should have checked out the individual further, including calling all personal references, to avoid being subject to liability.

A more gruesome example occurred in a New York case, where a city maintenance man assigned to work near a playground raped a young girl who was playing there. The city had taken the employee's fingerprints as part of its application process, but did not check those prints against police files. Had the city done so, it would have found the employee had a prior rape conviction, and would presumably not have hired him to work unsupervised near a playground. The parents' attorney argued that the city should have undertaken such checks as long as they had the means available, that is, the fingerprints. The court agreed, ruling that since the city could have found out this vital information with a reasonable effort, it was liable for a judgment of \$2.5 million.

### Know What's Reasonably Knowable

The basic premise of the negligent hiring concept is that an employer has a duty to use reasonable efforts to protect the public from any employee or applicant that the employer reasonably should know presents some type of risk of harm to others.

To establish liability for negligent hiring or retention, a plaintiff must prove three things: that the employee who caused the harm should not have been hired; that the employee's job was causally related to the injury; and that the employer knew or should have known that the employee posed a risk of injury to others.

*Is there a known record of*

*problems?* To prove the first element, the plaintiff must show that the employee's background demonstrates that he or she poses a risk to others in that particular position. This can be shown in a pattern of conduct, such as a history of violence, abuse, theft, harassment, or convictions that indicate employment of this person will present a risk to others.

**Did the employment help create the risk?** The plaintiff must next show some connection between the sustained injuries and the employee's job. That is, it must be shown that employment put the employee in a position to harm others. For instance, if the crane operator of our earlier example had a known history of alcohol abuse and was drunk when he dropped the bucket on the passerby, the victim (or victim's family) could successfully argue that the employment relationship created a situation in which passersby were put at unreasonable risk of being harmed by the employee.

**Should the employer have known?** The plaintiff must show that the employer knew or should have known of the employee's unreasonable or abusive tendencies. In most cases, the employer will not have actual knowledge of an employee's propensities — certainly the employee is not likely to volunteer that information. As a result, most of the emphasis in these cases is placed on the question of whether the employer should have known. That question involves whether the employer could have, through reasonable means such as checking references, background checks, or obtaining criminal conviction records, found out about the person's abusive and unreasonable tendencies. This protects the public against employers who simply bury their heads in the sand and make no effort to find out who they are hiring.

### Employer Protection

Employers should take steps to protect themselves against the risk of negligent hiring and retention. To begin with, you should carefully screen every job applicant, especially those seeking jobs of high sensitivity or increased levels of unsupervised contact with the public, customers, or co-workers. Applications for employment should be developed to provide enough detail to give you a full picture of the applicant, particularly his or her work record.

You should also do the following, to the extent permitted by your state's laws:

- Have the applicant list all former employers and personal references, and check them. Call or, better, write every one and find out if the employee had any problems there.
- Obtain written authorization from the applicant to conduct a thorough background check, such as from former employers. This release may help loosen the tongues of former employers.

Some states, to protect the employee's rights, prohibit employers from revealing any information about a former employee beyond "name, rank, and serial number," unless the employee has signed such a release. If the individual refuses to execute such a release, you may want to consider not pursuing the applicant further unless there are other ways to check his or her background.

- If you find that any information obtained from an applicant you hired is false, consider immediately firing the person if some adequate explanation isn't given.
- Have the applicant explain any gaps in employment or short periods of residency, which can indicate periods of incarceration or institutionalization.
- If the applicant says he or she left any job for "personal reasons" or other vague reasons, find out what they were. This could really mean that the applicant or employee was fired for anything from minor misconduct to violence.
- If possible and where permitted by state law, obtain information on the applicant's prior criminal convictions. Don't ask the applicant about his or her arrest record for employment-related decision-making purposes, because such questions are considered unlawful under Title VII of the Civil Rights Act of 1964, and are also outlawed by many states. You should check with a lawyer in your state on what you can inquire about and how to go about it.

The presence of a prior conviction alone, however, will not justify firing or not hiring someone. You must consider several factors, such as the nature and gravity of the conviction offense; the person's age at the time and how much time has passed since then; the person's efforts at rehabilitation; and the nature of the position involved. If after considering this information you or your lawyer feel the individual presents an unreasonable risk of injury to others, then you shouldn't hire or retain the person.

As you can see, not knowing who your employees are is a dangerous and potentially expensive mistake — bury your head in the sand, and you may bury your business. You should consult with labor counsel to refine your hiring and firing procedures and to be sure that your "screening" of applicants does not run afoul of federal or state employment and privacy laws. ■

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