

Criminal Background Checks in Negligent Hiring Litigation

by Joseph A. Kinney

This article will consider the issue of criminal background investigation in negligent hiring litigation—the role of criminal background checks during the hiring process and the relevancy of such information to a negligent hiring cause of action. The discovery that an employee who has injured another party or otherwise behaved improperly in the workplace has a criminal background, or similar deficiency, is an increasingly salient factor in negligent hiring litigation. If adverse information of this nature is discovered, it quickly becomes a plaintiff's attorney's objective to contend that such an individual should have never been hired in the first place. Using this reasoning, he or she argues that employment of such a person was a link in the chain, well within the control of the employer, that led to the injury.

Criminal background issues are becoming increasingly important due to the accessibility of such information, especially via the Internet. However, this does not mean that an employer can easily obtain such information, even with a diligent hiring process. As will be discussed below, many people convicted of crime conceal their past. Indeed, public policy has sometimes facilitated concealment, perhaps unwittingly, and made it otherwise difficult to acquire such information.

The author has dealt with negligent hiring issues for a number of years. The issues are complex, with a variety of nuances; rarely are they simple. The first time I addressed negligent hiring was in litigation involving pizza delivery drivers, some of whom had deficient driving records. Those particular factual scenarios were comparatively uncomplicated: the employer could have fairly easily investigated the vehicle operating record of each prospective delivery person, but failed to do so. Some of the drivers had multiple violations (e.g., speeding, reckless driving), violations that should have disqualified them from employment that involved motor vehicle operation. Juries can be outraged by such neglect: they recognize—and of course plaintiff's counsel reminds them—that the poor driving record could have been discovered by a single telephone call to the state agency responsible for such records.

The scope of my experience rapidly changed as I moved into cases involving workplace violence. In the late 1980s, I led research on what led to the "Breaking Point" study, a landmark examination of non-robbery workplace violence in the United States. An issue that was considered in that study was whether the

offender had a past history of violence, and how difficult it would have been for an employer to discover such a history.

Two issues will be addressed in this article. First, the article will examine the question of criminal background checks as this procedure relates to the hiring process. An examination of the hiring process raises issues about how an employer elicits information from an applicant and how checks are done.

The second issue is the relevancy of a criminal history to the cause of action (negligent hiring). This can be expressed in these questions: Is it a reasonable expectation that employers will conduct criminal background checks? What is the impact of learning that an employee has a criminal record? How could an employer have learned of behavior that would have made an employee's potentially damaging conduct foreseeable?

Sources of Information

The bare fact that one of the defendant's employees has been charged with a crime and has a criminal background may be all that a lay jury believes that it needs to know to decide a civil case against the employer based on a theory of negligent hiring. The public despises criminals, and finding that the person responsible for an injury was previously convicted of a crime makes for an easy explanation for why the event took place. This dislike for criminals comes at a time when the public believes that employers should take effective steps to keep the workplace safe, which is translated into keeping criminals out of the office, the retail shop, or other place of business—and protecting those who work for the company or patronize it.

The ready accessibility to and reliance on computers has pushed criminal background checks into the forefront, not only for the hiring specialist, but also for the public at large. Entrepreneurs have responded to this demand for information. Today, Internet-generated criminal background checks are

a \$1 billion business, according to some estimates. In researching this article, I quickly identified 35 criminal background check companies and could have found more. These firms often promise complete criminal background checks in a matter of a few days, sometimes for as little as \$9.95. These checks have the appearance of conclusiveness, and the low asking price fuels the demand for such information. The general public may even ask for checks on their neighbors, caregivers, and others.

Both employers and the public seem to rely on Internet-based firms rather than seeking information directly from state agencies, which are less expensive and more reliable than most of the private services. Because public agencies need error-free information, it makes sense to contact them first for background checks on a prospective employee.

Hiring Standards and Procedures

In order to determine whether an employer has been negligent in hiring an individual who has a criminal background, the employer's behavior must be measured against an established and widely recognized standard. Hiring standards are explicit in industries such as nuclear power, transportation, day care, education, or health care. Even in smaller and more informally run organizations, some sort of standard or routine practice is functioning as a guide to appropriate hiring conduct. In any organization, the practices may not yet be stated explicitly in a firm policy or procedure, but they are nevertheless operative, and eventually management will ratify them in some manner, at some level in even small and informally run organizations. The practices, in broad terms, relate to how the human resources function is carried out, and they become the applicable standards for, *inter alia*, the degree to which the background of each prospective employee is investigated.

Learning how an employer actually operates under the established standards can be a difficult quest, but the lawyer representing the employer needs to know. The standards can be clearly articulated in a formal policy, or they can be reflected in an amalgam of even contradictory practices engrained in the minds of employees. All too often, an



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expressed policy can be undermined or supplanted by alternative practices that, *de facto*, sabotage management's intended or stated policy. Also, employees may deal with essentially the same work task in contrary ways. As a result, the lawyer counseling the employer should periodically audit what is actually going on in the workplace, and advise the employer to reinforce institutional values and intended policies through awareness and training programs.

Informality and inconsistency can be frustrating to the attorney who is concerned with the company's hiring policies. But the deficiencies identified here are increasingly common as businesses struggle to cut down on overhead (*e.g.*, human resources staff) and flatten the organizational hierarchy. Too many employers have reduced the number of hiring specialists and some have even outsourced much of the hiring process. For a defense attorney, having clearly stated hiring policies and procedures (including the reliance on criminal background investigations) consistently implemented at all levels of the business can place an employer in a sound position in the event of litigation alleging negligence in hiring an employee who then commits a criminal act.

When an employee with a criminal record behaves inappropriately in the workplace, with disastrous consequences, the typical reaction is that the employer's hiring process has failed the test. However, such alleged failure of an employer cannot be evaluated in a vacuum. The employer's conduct must be compared to a statutory requirement, industry standard, or common practice. Such practices are constantly changing, and so it is difficult to know where to set the bar. In some cases, the appropriate standard may flow from established procedures that have been broadly adopted by a specific industry or business group.

The Hiring Process

The lawyer representing an employer needs to understand the dynamics of the hiring process, and how the employer occasionally makes a mistake that could lead to a legal complaint of negligent hiring. Hiring is important because whom the employer chooses to join his or her organization is an expres-

sion of what they believe is important. Many businesses tend to employ those who they feel will fit in and go with the flow. Regrettably, hiring is not always accorded the priority attention it should receive and, as consequence, mistakes are made. This is especially true when the employer rushes to fill a vacancy or newly created position—and fails to investigate the background of the new hire as thoroughly as he or she should have.

Hiring is a complicated process. Employ-

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ers want hiring to help build capacity and meet goals. Certain considerations somewhat beyond the employer's control cloud the hiring process. For example, labor agreements often play a role in how people are chosen for the workforce. Also, hiring decisions made here in the United States can be far different than how hiring is accomplished by a foreign subsidiary. Away from the day-to-day demands of the business, the lawyer may find it easy to "Monday morning quarterback" hiring decisions made by overworked hiring personnel. The lawyer should place himself or herself in the shoes of the human resource specialist doing the hiring to understand as much as possible about how and why a specific decision was made, and why the background check was not especially diligent. While this sometimes helps the lawyer to understand what happened, it is no substitute for experiencing the pressures that HR specialists encounter. Here are questions to consider:

- Was the hiring process deliberate or a rush to hire a "warm body"?

- Was the application process properly completed and verified?
- Was the applicant qualified?

No law compels an employer to hire a particular person, but certain types of discrimination (*e.g.*, age, race) are prohibited. The hiring process can be complicated and frustrating. Traditionally, there are three thoughts on the minds of those hiring: Can the person do the job? Will they get along with others? Will they last?

Importance of Criminal Background Checks

Criminal background checks are required by statute for some jobs. For other jobs, industry practice may mandate such reviews. Background checks are mandated for specific jobs that are considered "safety sensitive" (*e.g.*, nuclear power employees). Another specific example: background checks are used to prohibit known pedophiles from jobs in the daycare industry. Bank security officers, in many states, must pass checks, as well as those who are employed in certain positions in hospitals. Generally, background checks should be performed for safety-sensitive positions irrespective of a statutory mandate. The theory behind such requirements is that protection of the public interest demands that people who have criminal records not be placed in certain jobs where they could jeopardize the well-being of others.

Criminal background checks are increasingly used by employers; their number is increasing at a rate of perhaps 25 percent annually. Such checks do not always uncover criminal records, however, because a substantial number of job applicants fail to provide accurate information. The sheer number of companies that perform criminal background investigations creates an illusion that reliable information about a person's history is readily available to those who can best use it.

The accuracy and thoroughness of a background check depends to a large extent on the willingness of the job applicant to share his or her personal information. This is unfortunate, for the obvious reason that many persons with criminal records are not open and truthful about their past. Felons routinely and systematically conceal or lie about their personal history. And efforts to un-

earth such information often fail. Even if the job applicant person provides truthful information, a seemingly insignificant typo in an online check can result in a false report. Eventually, we might have national ID cards or possibly fingerprints or DNA data on every person of working age. Until such identification is used, criminal background checks will have limited reliability.

The importance of applicant integrity cannot be overstated. According to a report published by Automatic Data Processing, Inc., a significant percentage of applicants conceal critical data or provide false information during the hiring process. The ADP Hiring Index contains 2.6 million background checks conducted in 2001. It indicated that five percent had a criminal record in the last seven years, and that 51 percent of employment, education, and/or credential reference checks revealed discrepancies between what the application provided and what the source reported.

The ADP study also showed that criminal background checks were used by only a small segment of American business in 2001. It reported that:

- 6 percent of manufacturing entities conducted criminal background checks.
- 3 percent of health services entities conducted criminal background checks.
- 8 percent of food service entities conducted criminal background checks.
- 4 percent of business services entities conducted criminal background checks.
- 5 percent of transportation entities conducted criminal background checks.

These figures demonstrate that most American businesses do not conduct criminal background checks. Surprisingly, large firms (1,000+ employees) are not substantially more likely to conduct criminal background checks than small firms (1–49 employees). Five percent of large companies check criminal backgrounds, while four percent of small firms conduct such checks.

The number of convicted felons in the workplace is growing at a rapid rate. About 500,000 men and women are coming out of prison each year and there is no question that most will enter the workforce, making the issue of criminal backgrounds an important human resources and legal concern for

years to come. To be sure, most of the former prisoners have “learned their lesson” and can be counted on as reliable, hard-working employees. However, this is obviously not true of all of them. The employer must keep in mind that one out of four of the former prisoners (men and women) have histories of violence. Many of those released will be on parole, and a condition for parole is often steady employment. Because of this, parolees often conceal their convictions. To further complicate the situation, parole officers generally will not reveal a parolee’s status to an employer.

No hard and fast rules govern when a criminal background check is advisable or should be required. Perhaps one of the first issues that should be addressed is the integrity of the information on the application and the employer’s “gut feeling” about the applicant. If he or she has confidence that the applicant has provided accurate information about Social Security number, date of birth, and residential addresses going back seven years or so, then there is a chance that a criminal background investigation is not necessary.

Discovering a Criminal Record

What steps should be taken by the employer if a criminal background is discovered after the applicant has been hired and has been working for a while? Is this grounds for an automatic termination, regardless of how well behaved the employee has been on the job? Of course, if the employee commits a crime, his or her criminal record is likely to be discovered when the offender is booked and charged.

Some people will actually reveal convictions on the job application. For others, such a discovery might come via a third party, especially those wishing to harm the felon, who tip the employer to the criminal past. Whenever such information comes out, it is likely to cause consternation for the employer and its attorney, for they may face a lawsuit stemming from the allegation that the charged individual should not have been hired in the first place.

It is important to take a reasoned approach when information about a job applicant’s criminal past becomes known. The employer needs to weigh this information against the

requirements of the job. In some situations, it is obviously inconceivable to hire someone with a particular past. An employer should be reluctant to hire someone convicted of fraud for a job in the treasurer’s office. Convictions involving violence or involvement in drugs are red flags for many employers. In general, hiring officials who encounter a person with a *chronic* history of violence should avoid hiring that individual unless intensive supervision is possible. While official or criminal records of violence are most important, other evidence of aggression, if available, should be evaluated. An applicant’s behavior during the interviewing may reveal an aggressive personality that is not desirable for a particular job.

The central question here is: was the employer acting reasonably—or negligently—when it hired an individual with a known criminal past? This is the issue that will be decided in the civil action against the employer.

When and how a violent crime took place is important in evaluating and weighing the effect of this experience on the individual now seeking a job. A person who was involved in a violent incident at a young age, and who appears to have been rehabilitated, should not be seen in the same light as a multiple offender who remains aggressive over a long period of time. An act of violence in close proximity to the date of employment must be a matter of concern to a hiring officer.

There are at least three factors that can possibly mitigate the impact of a criminal record, and thus the reasonableness of the act of hiring this person with a known record. First, a substantial amount of time has passed since the individual committed the crime. Second, evidence indicates that the individual would be substantially less likely to engage in similar behavior in the future. Third, the employer will be able to place the new hire in a position involving adequate supervision.

Foreseeability of Criminal Behavior

When a criminal act in the workplace is followed by a civil action alleging that the employer was negligent in hiring an ex-convict,

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Criminal Background Checks, from page 21 the issue often turns on foreseeability: was the perpetrator's act foreseeable to the employer who hired and placed him in the workplace?

Some will assert that the very existence of a criminal past makes future criminal activity by the offender likely. One theory holds that criminals will engage in higher and higher levels of crime until they are permanently removed from society—once a crook, always a crook. In this hypothesis, today's drug dealer will become tomorrow's rapist, and so on. The reality of predicting future criminal behavior is far more complex; a number of factors must be considered.

Deductive reasoning is helpful in determining how convicted felons will perform on the job. There are millions of individuals who have matriculated into the workplace after incarceration. The ADP report, *supra*, suggests that as many as one out of 25 employees has a criminal record, and clearly the vast majority of these individuals do not conduct themselves in a way that draws attention to their work or behavior, let alone commit criminal acts. If criminals became violent on the job, then workplace violence and other job crimes would escalate beyond control. The fact that most workplace violence perpetrators had clean criminal histories indicates that other factors, including issues external to the workplace such

as financial or mental stability problems, trigger violent episodes by such people.

The matter of the foreseeability of future criminal behavior by those who have committed prior criminal acts is a complex matter. The literature is inconclusive; few generalizations can be made. A prior criminal history could have more relevance if the act that resulted in the lawsuit occurred in close proximity to when the felon was hired.

Also, did the act closely resemble the crime (*e.g.*, armed robbery) for which the person was imprisoned?

Foreseeability loses saliency with the passage of time. Presumably, an ex-convict would manifest various inappropriate behaviors at work in order for the act to be foreseeable. Indeed, perpetrators often forecast their intentions through threats and inappropriate behavior. Evidence to support a negligent hiring claim will often include a workplace record of discipline and a need for close supervision. The ex-convict's employment record and job performance should be thoroughly reviewed. If the person has a reasonably good employment record, then the cause of action loses steam.

A strong negligent hiring case would include evidence that the employee engaged in improper behavioral patterns that would be apparent to supervisors and managers. If employees have difficulty complying with company

regulations, then they should be counseled or disciplined. The longer that they engage in aberrant behaviors without correction, the more plausible the negligent hiring claim becomes.

Summary

The defense attorney in a negligent hiring lawsuit involving an ex-convict must gather data regarding the personality of the perpetrator and his or her criminal background. The attorney must then develop an argument that the employer acted reasonably in hiring this individual, and that his criminal behavior was not foreseeable. In gathering data and developing the argument, the attorney will benefit greatly from the services of an expert in hiring matters. The expert will know how to obtain the records, map out discovery, and evaluate and apply data on what other employers have done—all to the end of determining that the employer conducted its affairs in a reasonable fashion.

Employers make choices about who to hire and how to conduct their affairs. An organization that proceeds with caution, does a thorough background check on all potential hires, and responds to claims efficiently and properly, will have a strong defense to the claim. Most jurors understand that an employer who acts reasonably in hiring, in supervising its employees, and heeding ample warnings, should not be liable for unforeseeable mishaps. **FD**