



Loss Control TIPS

Technical Information Paper Series

Innovative Safety and Health SolutionsSM

The Duty to Protect: The Employer's Responsibility to Provide a Safe Environment

In 1979, a \$750,000 judgment against Avis Rent-a-Car was awarded to an employee who was attacked by a co-worker. Management failed to verify information on the attacker's employment application. The "guilty" employee indicated he was in high school and college during a specific time period, when he actually had been serving a 3 year prison term for robbery.

In Smith v. Amtrak (1987), an employee was awarded \$3.5 million after being shot while performing their job as supervisor. Management failed to take action against the "guilty" employee, who had a history of violent behavior.

A furniture store delivery man attacked a customer in the home when making a delivery. Management had failed to verify the information on the employment application. The "guilty" employee had been dismissed from his previous two jobs for harassment and inappropriate behavior toward customers.

An employer's liability to provide a safe work environment for its employees and to assure the safety of the general public is at risk by the actions of its agents or employees. *In each of these scenarios, the employer was held liable for the acts of its employee.*

In the first two situations, the employer's Workers Compensation could provide the primary coverage; in the third, the employer's General Liability could be primary. In *any* of the three, the employer could be sued by the injured party.

Negligent Hiring

"*Negligent hiring* occurs when, prior to hiring, the employer knew or should have known that a particular applicant was not fit for the job." Good employee selection procedures can reduce the risk presented by hiring employees that are not suitable for particular positions. Proper procedures give the employer the opportunity to determine if the applicant can safely perform the task relative to the safety of other employees and the general public.



Employee Selection Process

Employment Application

An application form should be well structured and should contain questions that address *specific* employer needs based on an analysis of each job. At a minimum, the form should solicit an employment history and personal references. Verification of the information is the next critical step. A significant part of the application should be a *release* wherein the applicant consents to the investigation by the employer of any information contained in the application. It is worth noting that information that can be asked is fairly limited by EEOC, ADA, etc.

Reference Checks

Many states recognize that *the public interest is well-served* by allowing communication between former and prospective employers. In most states, employers are protected under the concept of *qualified privilege*, because *they* could be *required* to make known the reason for termination. It is important that the Human Resources department determine current state law and keep abreast of changes and trends.

Arrest or Conviction Records

The application should indicate that a conviction does not necessarily eliminate the individual from consideration. "According to a 1978 EEOC decision, the employer may [or should] disqualify an applicant only after examining all factors and determining that the conviction affects[, or is likely to affect,] the applicant's ability to perform the job consistent with safe [and/or legal] operations of the business."²

Injury and Medical History

The format and timing of these inquiries are regulated by the Americans with Disabilities Act. The key is that any medical examinations and inquiries must be made after a conditional offer of employment.

Credit Checks

Under the Fair Credit Reporting Act the employer must give the prospective employee written notice, within three days, that a credit report has been requested. The applicant does have the right to obtain the report and provide it to the prospective employer. If a credit check will be requested, a statement to that effect should be part of the application.

Employers' Liability for Employees

Three legal theories may impact an employer's liability for its employees or agents: *negligent retention*, *respondeat superior*, and *negligent entrustment*.

"*Negligent retention* occurs when an employer becomes aware of an employee's unsuitability—or should be aware of it—and fails to act on that knowledge".³

Respondeat superior is based on the premise that employer/master and employee/servant are one. The employer is directly responsible for the actions of the employee.

Negligent entrustment involves the improper use of a "weapon" by the employee. The definition of "weapon" is generally interpreted very liberally (e.g., an employee's improper use of a motor vehicle). Under this theory, it must be proven that the employer knew that the employee was incompetent or inexperienced, yet did nothing to train the employee to compensate for the lack of knowledge or experience.

Once an employee has been hired, it is incumbent upon the employer to provide supervision to assure that the assigned task(s) are performed in such a manner that does not endanger other employees or the general public.

Duty of Care Standards

Black's Law Dictionary defines due care as "just and sufficient care, so far as the circumstances demand it; the absence of negligence. The care which an ordinary prudent person would have exercised under the same or similar circumstances. Due care is care proportional to any given situation, its surroundings, peculiarities, and hazards. It may and often does require extraordinary care."

Employers demonstrate due care when they take reasonable and appropriate precautions to reduce the potential of hiring and retaining employees who might present hazards to fellow employees and the general public.

Five Duty of Care Standards factors were identified in a 1976 landmark case, *Tarasoff v. Regent University of California*.⁴

- Forseeability of harm
- Connection between the incident and the injury sustained
- Degree of injury
- Blame attached to the defendant's conduct
- Policy of preventing future harm

Courts view employers as accountable for negligent actions under these criteria:⁵

- There is a relationship between the action of the employee and injury to a third party
- Information relative to the employee's unsuitability for the job was available before hiring or became available after hiring
- The information was used to make a decision to assure that the general public was taken out of "harm's way"

Conclusion

An employer is often caught between a rock and a hard place. Failure to thoroughly screen a prospective employee may subject an employer to suits for negligent hiring. Failure to provide "reasonable and prudent" supervision could subject employers to a suits for negligent retention. Too much of either can create the potential for a charge of invasion of privacy or discrimination.

Admittedly, the duty to protect is a very broad concept based on the belief that employees and the general public are entitled to a safe environment.

References

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3. Kaufer, p. 21.
4. Kaufer, p. 22.
5. Fenton, James W. "Recruitment: Negligent Hiring/Retention Adds to Human Resource Woes." *Personnel Journal*, April 1990. pp. 62-73.

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