

## ***An Overview of the Law and Your Liability***

### **Exercising Reasonable Care**

Employers have a duty to exercise reasonable care when hiring employees. An employer that negligently hires an employee who is incompetent or unfit in some way may be held liable to third parties who are harmed by the employee. Accordingly, at a minimum, every hiring program should include a thorough employment application, interview and reference check. Among other things, these measures will provide the employer with basic information about the applicant's qualifications, prior employment, education, criminal history and skills.

Because job applicants sometimes misrepresent or exaggerate their background, however, it can be difficult for an employer to accurately and meaningfully assess the applicant's fitness for employment. Accordingly, it also is important for employers to consider hiring a third party to conduct the background investigation. Indeed, employers who outsource background checks may not only uncover more detailed and accurate information, but also may be entitled to more legal protection as the federal Fair Credit Reporting Act provides limited legal immunity to employers that hire third party background check companies. This legal immunity covers defamation suits, invasion of privacy claims, and allegations of negligence in connection with the investigation. In addition, in-house human resources representatives often do not have the time to adequately perform background checks. As such, hiring a third party to conduct the investigation may conserve an employer's resources.

Thus, employers who conduct background checks on applicants gain significant benefits. Conducting a thorough investigation helps to remove uncertainty from the hiring process and provides employers with the information necessary to appropriately assess the applicant's suitability for employment. Careful screening of applicants through background checks also serves to maximize the employer's investment in hiring and training new employees and to reduce the likelihood of litigation concerning terminations. Legally, background checks function to greatly reduce the likelihood of lawsuits and liability for negligent hiring and retention, failure to create and maintain a safe workplace, infliction of emotional distress, and various other contractual, tort and statutory remedies available to those who might otherwise be harmed.

### **The Law Governing Applicant Background Checks**

The Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681 *et seq.*, is the federal law that governs the acquisition and use of most background information on applicants and employees. Although it is lawful for employers to obtain and use background information on applicants and employees, they must follow several important procedures when obtaining and using these materials. In addition to the

requirements under the FCRA, several states have enacted legislation regulating the background check process. For example, the California Consumer Credit Reporting Agencies Act and the California Investigative Consumer Credit Reporting Agencies Act impose many requirements on employers that conduct, obtain or use background information or investigative reports on applicants and employees. Other states that regulate the use of background check reports in the employment context include Colorado, Kansas, Louisiana, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New Jersey, New Mexico, New York, Oklahoma, Rhode Island, Tennessee, Texas, Vermont, Virginia and Washington. Several of these states, like California, require unique procedural steps for compliance.

The FCRA generally does not preempt state consumer reporting laws unless the state laws are inconsistent with its provisions, and then, only to the extent of the inconsistency. There are, however, a few areas where the FCRA expressly preempts state law. These areas of preemption have been the subject of much debate and litigation and are beyond the scope of the Littler Help System. Until further legislative or judicial guidance is provided, the most conservative approach would be to comply with both federal and applicable state law to the extent that there are no inconsistencies.

A concern for many employers is identifying which state fair credit reporting statute or statutes regulate a particular background check. The most conservative approach is to follow the law that provides the most protection to the consumer (i.e., job applicant). Thus, if an individual in California applies for employment in Georgia, or vice versa, the safest approach would be to apply California law as it provides more protection to the applicant. Specifically, under California law, consumer reporting agencies ("CRAs") may not report convictions that predate the report by more than seven years unless a broader report is required by law. In contrast, there is no time restriction for reporting convictions under Georgia law. Under this approach, the CRA would not report convictions that predate the report by more than seven years. This is not a perfect solution, however. Arguably, to avoid negligent hiring suits, the prospective employer may want as much information as possible, rather than following the more restrictive law in another state.

In addition to the fair credit reporting statutes, employers must be mindful of the other federal and state laws that regulate the hiring process and influence background check investigations. These include the fair employment laws, such as Title VII of the Civil Rights Act and the Americans With Disabilities Act, along with their state law counterparts. Moreover, employers who obtain personal information about an applicant during the hiring process must exercise caution not to use the information in a manner that would subject the employer to liability for invasion of privacy. Employers must understand that even if they can lawfully *request* a background check report from a background check company, compliance with all applicable restrictions for *using* the report to make hiring decisions is still required.

### **Employer Liability for Failing to Screen**

Although background checks of employees are statutorily-mandated for certain workers only (e.g., health care workers, certain employees of educational institutions, commercial drivers, etc.), many courts have held that an employer may be held liable for an employee's actions if the employer fails to conduct a reasonable investigation into the employee's background prior to hire. Indeed, almost every state recognizes negligent hiring as a viable tort cause of action.

Negligent hiring is based on the principle that an employer has a duty to protect its employees and customers from injuries caused by employees whom the employer knows, or *should know*, pose a risk of harm to others. Thus, an employer may be liable for negligence in selecting an applicant for employment when, for example, the employer neglected to contact the applicant's former employers or to check references, and such an investigation would have demonstrated the applicant's violent or criminal background. See, e.g., *T.W. v. City of N.Y.*, 286 A.D.2d 243 (N.Y. App. Div. 1st Dep't 2001) (summary judgment in favor of employer reversed where employer did not investigate criminal background of an applicant who admitted having a criminal conviction, and who later sexually assaulted a young girl on work premises).

On the other hand, cases across the country suggest that employers who thoroughly investigate applicants may be able to minimize or avoid liability for negligent hiring. In *Burnett v. C.B.A. Security Service*, 820 P.2d. 750, 752 (Nev. 1991), for example, the Nevada Supreme Court noted that "[t]he tort of negligent hiring imposes a general duty on the employer to conduct a reasonable background check on a potential employee to ensure that the employee is fit for the position." In *Burnett*, the employer was not liable for a security guard's auto theft and careless driving because the employer conducted an adequate background check. The background check involved verifying the information on the employee's application and requiring the employee to obtain a sheriff's card, which subjected the applicant to additional screening. Similarly, in *Munroe v. Universal Health Services, Inc.*, 596 S.E. 2d 604 (Ga. 2004), the Georgia Supreme Court held that a patient failed to state a claim of negligent hiring against a hospital whose employee raped her, since the hospital had hired a professional investigation service to conduct a background check and the investigation indicated that the employee had no prior record of convictions or any record of criminal activity.