

CLIENT ALERT

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Protecting Your Company from Negligent Hiring Claims Are you doing enough?

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Negligent Hiring in Rhode Island

It has been over twenty years since the Rhode Island Supreme Court handed down the seminal case of *Welsh Manufacturing v. Pinkerton's, Inc.*, but a recently settled 10 million dollar lawsuit has renewed employers' interest in the law of negligent hiring.

Negligent hiring claims, like all negligence actions, consist of injury caused by a breach of a duty of care owed to the injured party. Employers owe third parties a duty of care based on a contract or based on a foreseeable risk of harm to third parties resulting from an employee's job position.

Liability based on negligent hiring occurs when an employer fails to exercise reasonable care in selecting a person for a position whom the employer "knew or should have known was unfit or incompetent for the employment, thereby exposing third parties to an unreasonable risk of harm."

Reasonable care in employee selection includes a duty to conduct an investigation into a potential applicant's work experience, background, character and qualifications.

The extent of the pre-employment investigation required to avoid liability varies based upon the level of risk to third parties the position presents. High-risk positions have historically included jobs which entail guarding the safety of others or valuables, jobs that require carrying weaponry or handling hazardous materials, and jobs that require contact with vulnerable populations, such as children. Moreover, certain jobs clearly require a specific type of investigation based upon a corresponding specific risk associated with the position; for example, positions which require driving an automobile should be accompanied by an investigation into the applicant's driving record. Given the rise of identity theft, employers should also consider positions which expose employees to third parties' sensitive personal data, such as social security numbers, to be of a higher risk.

In the *Welsh* case, Pinkerton was a security company who hired a twenty-year-old employee named Lawson and assigned him to guard Welsh's valuable property. After Lawson stole the valuables he was hired to protect, the Court found Pinkerton's pre-employment screening practices to be insufficient, despite the fact that the employer required Lawson to fill out an application, contacted Lawson's high school, a previous employer, and a supervisor in the Navy, and reviewed Lawson's Rhode Island criminal record. The *Welsh* court specifically criticized Pinkerton's failure to uncover information from one of Lawson's former employers who reported Lawson had "sticky fingers" relating to vending machine proceeds and the failure to inquire into Lawson's degree of honesty.

The level of inquiry the *Welsh* court believed was necessary for the security guard position can be contrasted to what would probably be required for a trash collection position, which would seem to be the paradigm of a position which requires a low-level pre-employment screening process. Yet it is this position that formed the basis of the 10 million dollar suit recently settled for an undisclosed sum. The lawsuit was lodged against the trash company which employed Christopher McCowen, who was convicted for the 2002 murder of fashion writer Christina Worthington. McCowen's employer reportedly did not utilize any sort of criminal background check when hiring McCowen, thus leaving the employer unaware that McCowen had convictions in Florida and Massachusetts for burglary, grand theft, trafficking in stolen property, and felony assault, as well as having various restraining orders against him. The question that the suit raised, which will for now remain unanswered, is what pre-employment screening practices satisfy the reasonableness requirement for a low-risk position such as trash collecting.

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As members of the Firm's Employment and Labor Group, Mr. Gamboli and Ms. Byrd advise clients on the potential impact of employment decisions. They have significant experience providing practical, cost-effective solutions to clients' human resources needs, focusing on allowing our clients to attain their business objectives and goals while minimizing the risks of human resources conflicts.

If you have questions about this Client Alert or other Employment and Labor law issues, please feel free to contact Mr. Gamboli or Ms. Byrd.

Pre-employment Screening Practices

In light of the increasing popularity of negligent hiring lawsuits throughout the nation, it is best to utilize some level of pre-employment screening procedures regardless of the job position, job duration, size of the company or how the applicant came to apply for the position.

Job Applications. Employers should always require a job applicant to fill out a written application. When designing this application, a Rhode Island employer should ask for the applicant's current and previous addresses, complete employment history, educational history (but no graduation dates), personal and professional references, and information regarding prior convictions (but not prior arrests). Employers should review their applications with local counsel to ensure the form does not violate state or local laws regarding discriminatory hiring practices. For example, in Massachusetts it is unlawful to ask for information regarding convictions for specific misdemeanors and any misdemeanor conviction over five years old. The application should give the employer the permission to verify all information provided in the application, and must comply with the Fair Credit Reporting Act ("FCRA") requirements, discussed *infra*.

Interviews. The employer should ensure the interviewer knows what tasks and responsibilities the position will entail, as it is important the interviewer ask questions tailored to the skills the position will require. The interviewer should always ask the applicant to fill in any time gaps in employment history, as a period of unemployment can signify incarceration. In fact, a number of reported negligent hiring cases involve situations where the employer utilized an application and background check but failed to inquire into a glaring one- or two-year gap in employment which turned out to be a "smoking gun" of sorts (i.e. incarceration for a violent crime) and ultimately led to a finding of liability against the employer.

Verification. After the interview, the employer should independently investigate the applicant or hire a third party to do so. All recent employers and references should be contacted. Although former employers and references may not prove forthcoming with supplying negative information, it is the questions asked – not the answers received – that most often insulate employers from potential negligent hiring claims. Depending on the risk of the position, a criminal background check – or multiple background checks from different states in which the applicant has lived – may be advisable.

Documentation. Above all, documentation is a crucial part of the hiring process. Interviewers should carefully take notes in interview sessions and the employer should meticulously record attempts to contact references and former employers and obtain records.

Special considerations regarding background checks

The threat of negligent hiring claims has led many employers to pay third-party investigators to perform background investigations or perform such investigations themselves. Employers who choose to hire a third-party to perform a background check should be familiar with the FCRA. Although the FCRA speaks of consumers, the act applies to most employers who use a third-party investigator in background inquiries of job applicants. The FCRA requires certain procedures regarding an applicant's permission to obtain the background report, certain disclosure procedures if an employer decides not to hire the applicant based upon the results of the report, and certain disposal procedures for the reports themselves when the employer decides to discard their files.

Given the expanding liability for negligent hiring, and the growing protection afforded job applicants, employers need to be more informed and more careful than ever when screening and hiring employees.

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