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Employers Beware: The Risks of Negligent Hiring

In 2005, a cable repairman visited a young man's home to conduct Internet service repairs. Upon entering the home, the repairman assaulted and eventually killed the young man. The repairman was later convicted of first-degree murder. Now, the young man's family is asserting a civil lawsuit against the company that employed the repairman, as well as the company's subcontractor. The lawsuit claims that the company, and its subcontractor, negligently hired the repairman by failing to conduct an adequate background check before offering him employment. Had they performed an adequate screening, the lawsuit alleges, they would have found the repairman had 12 prior felony convictions and therefore the company should not have allowed the repairman to visit customers' private homes.

In light of cases such as this, employers should familiarize themselves with the status of negligent hiring laws, as well as some best practices for screening and hiring applicants.



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I. What is Negligent Hiring?

Under the negligent hiring theory, an employer may be found liable for an employee's conduct that harmed a third-party plaintiff. The third-party plaintiff must show that the employee committed a tort that harmed the plaintiff; and that the employer, at the time of hiring the employee, knew or should have known that the employee posed this specific risk to others. Notably, an employer may even face liability for conduct taken when the employee is off-duty or even when the employee is no longer employed by the company. *See, e.g., McGuire v. Arizona Protection Agency*, 125 Ariz. 380, 382, 609 P.2d 1080, 1082 (Ariz. Ct. App. 1980). Negligent hiring claims have arisen in sexual harassment and assault cases and white-collar cases like fraud and embezzlement, among others.

In a negligent hiring lawsuit, the plaintiff must establish the element of foreseeability – namely, that the employee's job function necessitated some pre-employment screening for prior criminal convictions. In other words, did the employee's job function make it foreseeable that he/she could pose a risk to third parties? Courts have carved out examples of some jobs that would pose a risk to third parties, and therefore require some level of background screening. For example, in *McGuire*, the court found it foreseeable that allowing a person with multiple burglary felonies to install burglar alarms could pose a risk to third-party customers.

By contrast, in *Kassman v. Busfield Enterprises, Inc.*, the court dealt with the issue of whether a drinking establishment negligently hired a doorman who chased down customers in an alleyway and shot one of them. The court posited that the nature of the doorman's employment "involved no risk of harm to others [i.e., dealing with security issues] or the carrying of dangerous weapons." 131 Ariz. 163, 167, 639 P.2d 353, 357 (Ariz. Ct. App. 1981). Therefore, the court found

the employee-doorman's shooting of the plaintiff was not foreseeable by the bar and, as such, did not give rise to liability under negligent hiring.

What if an employee's job function involves some risk of harm to others? If so, the employer should then carefully consider performing some level of pre-employment screening. If the employer becomes aware of an applicant's prior criminal conviction, the employer should then consider whether the employee's prior conviction is sufficiently related to the job function, such that it would be foreseeable for the applicant to cause such harm to a third party in the course of the job. Stated differently, if a bond salesman had a prior conviction involving dishonesty, it may not be foreseeable that the employee would then violently threaten a customer. See *Pruitt v. Pavelin*, 141 Ariz. 195, 202, 685 P.2d 1347, 1354 (Ariz. Ct. App. 1984). If, however, the night manager of an apartment complex with keys to individual apartments had prior convictions for sexual assault, it may be foreseeable that the employee may then enter an apartment and physically harm a resident. See *Ponticas v. KMS Investments*, 331 N.W.2d 907 (Minn. 1983); *Pruitt*, 141 Ariz. at 203 (foreseeable that a real estate salesman-employee with a previous conviction for transferring fraudulent checks would defraud clients).

II. Best Practices

Given the potential liability for negligent hiring claims, listed below are some best practices to consider during the hiring process.

- Consider conducting background checks on certain employees, especially those who interact with customers in the home or other private locations.
- Evaluate whether any state or local law prohibits certain inquiries. Some states prohibit employers from inquiring about prior arrests, but not convictions.

- Become familiar with the Fair Credit Reporting Act (FCRA) when conducting background checks. This includes the requirements to obtain proper written consent and give proper notice before taking any adverse action based on the results of the check.
- Pay attention to any disparate impact. Ensure that background checks do not cause a disparate impact on minorities or other classes protected under Title VII and other employment statutes.
- Take the person's entire application into account. Consider the nature of any prior criminal conviction and when it occurred. If the conviction was for a non-violent felony that occurred 15 years ago, the applicant may still be a viable candidate.
- Use common sense. If an applicant has a prior conviction for burglary and your company is hiring for a position that requires entering residential homes, it may be best to consider other applicants instead. Likewise, if your company is hiring a bouncer and an applicant has prior convictions for assault, it may be prudent to look elsewhere.

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