

A man in a light blue dress shirt and a purple tie is smiling and pointing his right hand towards the camera. The background is a blurred office setting.

Negligent hiring:

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How to reduce your chances of hiring a claim



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“employers are usually on the losing end of negligent hiring cases, losing about 75 percent of the time”

An employee fired for stealing from his employer comes into work the next day with a gun and kills eight people. A trucker with a history of driving under the influence drives drunk and kills a pedestrian. An employee with a history of fraud steals a co-worker's identity and racks up thousands of dollars of fraudulent charges. What do these scenarios straight out of the headlines have in common? They are all examples of situations in which an employer could be sued for negligent hiring.

Claims of negligent hiring can have serious implications on a business' reputation and a huge impact on its finances. In a recently decided case, *Diaz v. Carcamo*, the plaintiff was injured when her vehicle was hit by a car that was in a collision with a truck that was driven by the defendant truck driver. The plaintiff sued the driver and the trucking company in its capacity as the truck driver's employer. The plaintiff successfully argued that the employer was negligent in hiring the truck driver, who had a poor driving record prior to being hired. A jury subsequently awarded the plaintiff \$23 million.

In addition to monetary costs and negative publicity, it seems that negligent hiring cases are literally a no-win situation for employers. According to the experts, employers are usually on the losing end of negligent hiring cases, losing about 75 percent of the time, and the average settlement of such claims is \$1 million. Approximately 35 states allow for a lawsuit to be brought under a theory of negligent hiring. It is therefore of paramount importance for employers to implement consistent pre-hiring screening procedures.

Claims of negligent hiring are not limited to claims arising out of violence against employees, but also to third parties. In a recently decided case, \$26.5 million was awarded to the plaintiff after a home healthcare worker robbed and murdered both the healthcare client and his relative in his home. The employer had not performed a background check that would have revealed the worker's six prior felony convictions.

What is negligent hiring?

A claim of negligent hiring is brought against an employer based on the theory that the employer knew or should have known about the employee's background which, if known, would indicate that the employee had previously been dangerous or dishonest.

According to legal experts, the employment relationship generally includes a duty of care on the part of the employer for the health, safety, and security of their employees. Under the legal doctrine of respondeat superior, an employer is legally responsible for the actions of its employees arising out of, and in the course of, their employment. Employers also have obligations under various state and federal laws to provide a safe working environment and to protect employees from the violent acts or harassment of other employees.

Claims of negligent hiring arise out of the duty of the employer to keep their employees safe at work and seek to hold the employer liable for violent acts or harassment occurring in the workplace that could have or should have been prevented. In cases where the employer is found liable for negligent hiring, the

¹ EEOC Focus On Criminal Background Checks
Raises Negligent Hiring Concerns, Mary
Swanton, April 1, 2010

courts have found the employer liable where the facts demonstrate that the resulting action was foreseeable; the employer knew or should have known that a particular employee had violent or criminal propensities.

An employer also owes a duty of care to protect its customers and other members of the public from harm caused by an employee. When an employer does not thoroughly examine the background of a prospective employee, the employer has breached its duty to its employees and customers. Additionally, to bring a viable negligent hiring claim, the plaintiff must show that the harm caused by the employee was foreseeable. That is, it is foreseeable that the failure to check the backgrounds of employees who may have a history of violence could lead to harm to other employees, customers or other members of the public.

In the scope of employment

Previously, for an employer to be liable to a third party under the theory of negligent hiring, the harm to the third party must have been caused by the employee during “the scope of employment.” However, courts have recently enhanced the meaning of “scope of employment” to include basically any action even remotely related to employment. In a recent case, a grocery store manager with a history of violence was off-duty, but stopped by his store to do some grocery shopping after drinking at a local bar. The manager saw a teenager vandalizing his store and attacked the teenager’s four-year-old brother, throwing him into the air and inflicting injuries that required the boy to be hospitalized for four days . A jury awarded (and later upheld on appeal) the child \$150,000 based on the theories of negligent hiring and negligent retention. Years earlier, while working for the same employer, the manager had thrown a milk crate at a co-worker and was not disciplined for the incident. The manager had also been previously convicted of aggravated battery for an attack on his own son.

How can you protect your organization?

Employers must know the background of the individuals working for them. This includes knowing of any criminal convictions and employment history. Employers should note however, that a routine background check that reviews criminal and employment history may not be sufficient if the employee will be dealing with “sensitive groups”, i.e., children, the elderly or the disabled. In these situations, employers should conduct more in-depth reviews including reference checks, license status verification and a search of civil and criminal court records. It should also be noted that crimes committed before the age of 18 will most likely not show up in a criminal background check of an adult.

The danger of an extended workforce

Respondents to a 2010 survey by the Society for Human Resource Management (SHRM) indicated that over 80 percent of employers have some sort of background screening in place for potential new hires. A 2008 study by SHRM revealed that only 10 percent of employers had a background review process in

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place for their extended workforce, which includes temporary, contract and per diem workers. These workers often have the same access to documents, people and sensitive information as the permanent employees whose background information has been verified. It is recommended that employers put procedures in place that set consistent requirements for the screening of its extended workforce. As staffing agencies usually collect the background data from the prospective worker, the staffing agency should be instructed to conduct a thorough screening of the background information of the workers they want to provide to the employer. However, employers may want to audit, verify or otherwise supplement the temporary agency's background checks because the employer ultimately retains liability for a negligent hire.

Best practices to help reduce negligent hiring claims

The best way to help reduce an unpleasant surprise about an employee is to learn as much as you legally can about an employee before you make an offer of employment:

- Have each applicant complete an application for employment; make sure the application is comprehensive in scope.
- Get explanations for gaps in employment.
- Use a reputable background check vendor to provide a thorough review of the applicant's background, criminal, and driving record where applicable to job requirements.
- Check references.
- Require drug testing, as users of illegal drugs often pose a greater risk of violence.
- Keep documentation. It is possible that a criminal conviction does not show up on a background check due to timing of the incident and the report. Keeping the background check documentation is essential to show due diligence.
- For employees working with sensitive groups, a more comprehensive analysis of the employee's background should be performed.

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