



## Focus on Human Resources

### NEGLIGENT HIRING RISK

By Ronald Rice, Diamond Corporate Services

**“Protect your business by improving your hiring process.”**

*Disclaimer: Anyone reading this material should not rely on it as a substitute for specific legal advice. This material is not written by attorneys, is not intended as legal advice, nor should it be used as legal advice regarding employment law or specific policy recommendations.*

The concept of negligent hiring has developed in the courts over the last 15 years, and has now been recognized in at least 30 states (including Texas, Georgia and Florida). It has become a substantial business risk to employers, yet many owners know little about it.

The theory of negligent hiring is that an employer can be liable for the violent acts or wrongdoing of its employees if the employer did not investigate adequately their backgrounds and qualifications. Consider this: You hire an employee. A few months later the employee commits a violent crime while on duty. The victim then sues your business on the basis that you knew, or should have known, that the employee was a risk because of a prior criminal record and other problems in their employment history. Your business loses, or settles, and the victim receives a huge payment. Your general liability or business insurance may exclude coverage and the settlement may become a direct cost to you. This is just one example of negligent hiring. Cases have already occurred in industries such as: delivery drivers, in-home service, health care workers, security guards, counseling, apartment maintenance, taxi drivers, even religious personnel.

Although the definition can vary by state, negligent hiring is generally defined as the failure of an employer to exercise reasonable care in selecting an applicant in light of the risks created by the position to be filled. Thus the job description of the employee is a huge factor in determining what types of background checking is required to reduce potential liability. Positions where a worker goes into a private residence, or has private one-on-one interactions with customers pose a greater risk, it seems.

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Some of the factors in demonstrating negligent hiring are: (a) the employee was unfit or dangerous at the time of hiring, (b) the employer knew this, or should have known in the exercise of ordinary care, that prior actions by the employee would create an undue risk or harm to others in carrying out his/her employment responsibilities (c) the employee's actions caused the victim's injuries, and (d) the employer's negligence in hiring the employee is a direct cause of the victim's injuries.

### **How can employers reduce their risk?**

First, employers should have a well-conceived screening process to review and hire applicants. Documentation of the process, and proof that it is being followed consistently, can be shown as a defense. Secondly, although the screening process varies by job type, certain elements should always be in place. These elements should include a written application form.

**The Application:** This form should contain details of the applicant's work history, education, and licenses held. It should also contain a written authorization from the applicant allowing for verification of all information and indicate that false statements are grounds for immediate dismissal or non-hire. The form should contain a question asking if the applicant has had a felony conviction in the last seven years. The form should also contain information regarding work references and personal references.

**The Interview:** The personal interview is an opportunity to clarify the information on the written application. You can ask about gaps or unusual aspects of the employee's history to gather further information. In talking with the applicant, you can also form some opinion of the employee's character that will effect your hiring decision. If the applicant was evasive in answering questions or is confused about their own history, these are warning signs.

**Reference Checks:** Calling employment references and personal references can be tedious and often unrewarding in terms of collecting information. At the very least, you can verify the accuracy of employment locations and dates. Sometimes you find that an applicant has blatantly lied on their written application or in the interview. Sometimes you get positive confirmation, reinforcing a decision to hire. The advantage of reference checking is the occasional clear signal (either positive or negative) and, especially, the fact that you made the effort to try. A 2005 survey of the Society for Human Resources Management showed that 73% of HR professionals felt reference checking is somewhat or very

effective at identifying poor performers. 96% of organizations reported doing some form of reference check or background checking. Over half of these reported outsourcing at least a portion of their verifications process. It is recommended that you consistently document that references were called and make notes on the input you received. Ask if the applicant was reliable, trustworthy and honest. Ask if there was any improper conduct by the applicant while employed. Document the response even if the reference refuses to offer one. Proof of your effort is a good response against a negligent hiring claim in the future.

**Verify Licenses:** Call and verify that licenses are current, if the licenses are required as a condition of employment.

**Background Check Firms:** There is an industry built on performing computer generated background checks on job applicants. You can check criminal records, driving record, personal credit, social security number, workers comp claims, and watch lists on government databases. You pay a fee per applicant for whichever research you want. The nature of the job responsibilities dictates your policy on which verifications are appropriate. For example, you may want to look at the credit report and criminal record of an employee who will be handling large sums or money.

**Negligent Retention:** Another scary concept is negligent retention. This issue involves an employer who continues to employ someone who has direct contact with the public and who has already demonstrated careless, dangerous or violent behavior. The employer may be liable if that employee subsequently injures another person. If an employer becomes aware of problems with an employee, it should take action, such as investigating the situation and either discharging or reassigning the employee.

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## **REBELS: TERMINATING WITHOUT A CAUSE**

**By Ronald Rice, Diamond Corporate Services**

Confronting an employee about your dissatisfaction with their performance on the job is an uncomfortable task for many business owners. It is unpleasant to meet with an employee to let them know their performance is unacceptable, and their job is in jeopardy. Employers are even more hesitant to tell an employee they are terminated. For some of my clients, this part of their job is their least favorite task.

***“Termination procedures to help you control risks and maintain morale.”***

As a result, a few business owners are terminating employees without notice and without any cause being given. The owner just leaves the employee's name off the work schedule for the following week. The employee figures out that their services are no longer needed and leaves. Another variation is the employer cuts the work hours drastically and the employee gets upset and quits. The owner may use these approaches for their own convenience or to avoid a direct confrontation with the employee. They feel it is an acceptable approach and is allowed under the law. Most states have "Employment at Will" right?

There are several concerns about terminating employees without notice and without giving any cause. One concern is that the ex-employee is more likely to file for unemployment and is more likely to win an unemployment claim. The person may file that they were laid off for lack of work, when in fact they were let go for performance issues or misconduct. Successful unemployment claims raise the employers tax rate and increase your labor cost of doing business.

Another concern is that the ex-employee may be angry and may take action against the owner by complaining to a government agency or to an attorney. The result could be defending yourself during a government inquiry, audit or even a lawsuit. Although you could explain, at that time, the causes for the termination, the employee may include in their complaint some unexpected attacks on you and your business. For example, the ex-employee could claim they were discriminated against due to their gender, age, race, or religion. A lawsuit from several ex-employees together could be difficult to defend if each one was a member of a class of employee specifically protected from discrimination under the law. Maintaining some documentation on a termination conversation which occurred on a particular date becomes a useful tool to address issues down the road.

Employment at Will law is subject to limitations in most states. Some of these are issues of public policy, whistle blowing actions, existence of a contract (or implied contract), and a covenant of good faith/fair dealing. These exceptions to Employment at Will can vary by state. It would be prudent to check your employee handbook to see if any termination or disciplinary procedures were given in writing to employees. An attorney or HR professional could review your written material for proper compliance under state law.

*“Understand the rules for employing youth workers”*

Perhaps the biggest concern you should have, as a business owner, is the impact of your actions on your other employees. The surviving employees are always affected by negative actions against a co-worker. If no cause is given and no notice provided, other employees will lose their sense of camaraderie and loyalty. Imagine the morale problem knowing that your boss has a pattern of terminating people for no reason and without warning. Employees often treat their customers in a similar way to how they are treated as employees. Thus customer service levels and productivity will decline. It is best to give the employee a reason for the termination and document what was said. Specific rules violations or misconduct are appropriate reasons when terminating for cause.

## **HIRING TEENAGE WORKERS**

**By Ronald Rice, Diamond Corporate Services**

Employees between the ages of 14 & 17 are an overlooked source of labor available to your business. Teenagers' energy and enthusiasm can be a positive influence on your business and your customers. Your knowledge of the labor rules for employing young workers can help you feel more comfortable recruiting and hiring youth workers.

The labor rules under the Fair Labor Standards Act (FLSA) for teenagers mainly focus on two areas: jobs that are considered hazardous that are prohibited, and some limits on the hours worked.

14 and 15-year-olds can work outside school hours and only during the day between 7 a.m. and 7 p.m. Hours are extended to 9 p.m. between June 1<sup>st</sup> and Labor Day. A few states allow labor between 7 p.m. and 9 p.m. year round. Hours worked are limited to 3 on a school day and 18 in a school week. Hours worked are limited to 8 hours on a non-school day and 40 hours in a non-school week.

14 and 15-year-olds may work in a variety of jobs including those located in offices, grocery stores, retail stores, restaurants, movie theatres, amusement parks, baseball parks or gasoline service stations. However, they are prohibited from working in jobs declared hazardous by the Secretary of Labor. Additionally, any involvement with heavy equipment, machinery or manufacturing operations should be reviewed carefully since it would likely be prohibited.

16 and 17-year-olds may work in any job that hasn't been declared hazardous. There is a list of 17 hazardous jobs young workers under the age of 18 are prohibited from doing. Some of these jobs include mining, meat packing or processing, using power-driven bakery machines, roofing, and excavation operations. Most driving is also prohibited. The FLSA does not limit the number of hours or times of day for workers 16 and older.

Many state have issued their own child labor laws, often similar to FLSA and sometimes more restrictive. In situations where both the FLSA child labor provisions and state child labor laws apply, the more restrictive standard must be obeyed. To review any state differences in child labor laws, or to get additional information, see [www.youthrules.dol.gov](http://www.youthrules.dol.gov) or call 1-866-4USWAGE.

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