

# Background Checks

How and why we need to investigate applicants.

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## **BACKGROUND CHECKS**

### **I. Introduction**

Employee problems seem to take up an inordinate amount of supervisor and employee work time. Time spent in grievance hearings, counseling sessions, preparing disciplinary actions, and dealing with discharging an employee and the more and more frequent legal challenges on those decisions is frustrating and greatly hampers a Department's efficiency and ability to render the public services the Department exists to provide. Many times the problem can be traced back to a poor or uninformed hiring decision.

Often, if the employer had been aware of a certain trait or prior history, the problem employee would not have been hired and thus would have become someone else's problem. In addition to this concern, employers must be careful to insure that employees that they place in positions of trust or contact with susceptible citizen have no history that indicates a likelihood of taking improper advantage of their employment situation.

### **II. Statutory Restrictions**

Public employers today face a number of obstacles to finding the best qualified candidate to fill a position. HIPPA, the ADA, Title VII, state laws, and other Constitutional provisions properly limit the amount of information that can be considered in the employment decision. These laws are important to insuring a level playing field for all applicants but we must be careful not to screen out relevant information that is essential to determining an applicant's qualifications or disqualification.

### III. Immunity Issues

Public employers in Texas generally have the advantage of governmental immunity from intentional torts and negligence, absent use of tangible personal property or motorized equipment. The limited exceptions to immunity and the federal constitutional protections provide potential causes of action for even a public employer, or supervisor, who fails to perform his due diligence in reviewing an applicant's background.

### IV. General Liability Standards

If the immunity obstacle is overcome, a negligent hiring claim based on a failure to screen could be successful if the plaintiff can show that anything found in a background check "would cause a reasonable employer to not hire" the employee, or would be sufficient to put the employer "on notice that hiring [the employee] would create a risk of harm to the public." *Fifth Club, Inc. v. Ramirez*, 196 S.W.3d at 788, 796-97 (Tex.2006). The plaintiff must also prove that the risk that caused the entrustment or hiring to be negligent caused the incident at issue. *Schneider v. Esperanza Transmission Co.*, 744 S.W.2d 595, 597 (Tex.1987).

A thorough background check however, is a vital part of the hiring process. Employers who fail to review the work history, criminal history, and references of any prospective employee do so at their own peril. Employers should document the background research and retain that documentation in the event that their decision is challenged in a negligent hiring lawsuit. The depth of the background investigation will vary based upon the specific duties and responsibilities of the position that you are filling but every position requires at least some background review to reduce the chances of an uninformed decision that will cost time and money in the future.

## V. Special Circumstances

If an employer places its employees in a position where it is foreseeable that the employees could cause harm to third parties, the employer must take reasonable steps to prevent that harm, which may include conducting a properly tailored background investigation. *Compare Read v. Scott Fetzer Co.*, 990 S.W.2d 732, 736–37 (Tex.1998) (holding a general contractor liable when in-home salesperson committed sexual assault after salesperson was hired without a reference or criminal history check, which would have revealed prior inappropriate sexual conduct in the workplace and a conviction for indecency with a child), *with Guidry v. Nat'l Freight, Inc.*, 944 S.W.2d 807, 809–11 (Tex.App.-Austin 1997, no writ) (holding that a trucking company had no duty to check its driver's criminal history for sexual misconduct to ensure long-haul truck drivers would not rape third parties when drivers stopped for a rest).

Police and Fire; employees working with children, the elderly, or the disabled; and employees handling money are a few of the positions that obviously require special attention and have a higher threshold for passing a background check. The background check process, just as the factors for qualification/disqualification, should be specific to each position and the legitimate business necessities for that position. Any disqualifying factors, such as felony convictions, must be specifically related to the position being filled.

## VI. Third Party Investigators

Employers, in an effort for greater neutrality, avoiding liability for problems in the investigative process, or because of a lack of resources to conduct such reviews in-house, may use a third-party to conduct the background investigation. The Fair Credit Reporting

Act (FCRA) is likely to be invoked when an employer chooses to send the investigation outside. When the third party provides an employer with information for employment purposes, regarding an individual's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living that is a consumer report regulated by the Act. To conform to the act the employer must:

- provide the applicant with clear notice that the background investigation will be conducted
- notify the applicant that the report will be used in the employment process.
- obtain the applicant's written permission to proceed.
- notify the applicant of any adverse action resulting from the investigation.
- provide the applicant an opportunity to respond to the information.
- give the name and contact information regarding the agency.
- notify the applicant of the employer's decision.

## VII. Conducting Internal Investigations

When conducting an internal review, employers must conduct a "reasonable review" while avoiding information that is irrelevant or that could later be used as a basis for a discrimination or a legal attack upon the hiring decision. The application process has been the basis for previous seminar presentations and most employers have deleted obvious problems such as (1) are you married, (2) date of birth, (3) race, (4) have you ever been convicted of a crime; from their applications. The background investigation should also avoid seeking out this information. Criminal convictions should be reviewed to the extent that they are related to the applicant's ability to do the job. A decision to deny a cashier position to a convicted bank robber is likely to pass muster with the Courts while disqualifying a convicted jaywalker for that position may not. The background criminal investigation should therefore be geared to finding convictions connected with the job duties.

It is certainly reasonable to review the personnel files of past employers. The more important the position is with your organization, the more in depth that investigation should be. Most Human Resource Departments today will provide only very limited information over the phone. Our advice to you is that you should give nothing more than dates of employment when receiving a cold call regarding a former employee. You however need much more than this to make a reasoned employment decision. You should therefore require a signed release from each applicant so that you can send a supervisor to the previous employer to review the file. Personnel files can be very instructive as to whether or not this is a good employee. Public employers may not destroy records even if the employee has made some sort of a deal to leave employment so generally you will get a good picture of their past performance. This is a great resource for information so use it.

Checking references is essential. Most people name references who like them or who they at least think like them. A negative reference hear can be very telling. References also generally feel some guilt about misinforming someone regarding the applicant. There may well be some clues to an applicant's abilities in the manner in which your questions are answered. Prepare a thorough list of questions for the reference before calling and be prepared to adjust your inquiry based on the answers you receive. In person interview are always must helpful but in many cases may not be practical.

Some employers screen applicants by reviewing the internet, Facebook, twitter and other social media. This method can be very helpful in gaining background information regarding the applicant but can also be a liability for employers, especially public employers. These sites can provide an abundance of information about the

applicant's qualifications, relationship with previous employers, hobbies, social life, and judgment. The sites may provide specific reasons not to hire the applicant that can save the employer many headaches in the future. Remember though that the sites can provide are subject to manipulation by the applicant or others with access to the site. Also, you may learn things that are better not know at the early stages of the application process. Protected status such as age, disability, veteran status, medical problems, pregnancy, family planning, and other personal issues may be provided there and if known by the employer may serve as the basis for a legal claim attacking the hiring decision. It is certainly a balancing test and the depth of the review should depend upon the importance of the position being filled.

#### VIII. Conclusion

Employers are highly encouraged to perform background checks on all applicants. The importance of the position should dictate the level of inquiry in the background investigation. The review for police officer applicants should go well beyond the TCOLE information and requires, at minimum, actual review of previous personnel files and a review of references. Avoid review for protected status but focus upon the qualifications, previous job performance, criminal convictions, and other information directly related to the applicant's ability to do the job. Allow only trained employees to perform the background check and document the results of the check. If limited resources or other considerations prevent you from performing the investigation in-house use an outside agency but remember to follow FCRA requirements.

A thorough background investigation can avoid many problems for supervisors and increase the efficiency of the group. Even if you hire an applicant who commits

improper acts on the job, that decision is much more defensible if you have a documented reasonable background investigation that you can demonstrate failed to turn up any evidence of tendency toward such behavior. Pay attention to the findings of the investigation and don't fail to give due consideration to any information that reflects upon the applicants' ability to properly do the job.