



Don't Be Sued for Negligent Hiring

Here are ways to avoid a painful lawsuit.

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Negligent-hiring lawsuits are mushrooming in the non-profit sector. Yet few nonprofits understand how to guard against such suits. As a nonprofit employer, here's what you need to know about the negligent-hiring law:

- **You are guilty of negligent hiring if you don't use reasonable care** in selecting an applicant in light of the risk created by the position to be filled. Thus, you must screen individuals carefully before you hire them, especially if the job requires contact with others. And if the contact could harm a third party (such as the job of counselor, which calls for regular, close contact with emotionally fragile people), you must hire with even greater care.

- **You can be held liable** for the wrongful actions of your employees even if they perform those actions outside the scope of their employment.

- **Laws against negligent hiring apply** to volunteer as well as paid positions. The laws also extend to independent contractors and part-time workers.

- **Plaintiffs have sought recovery** for damages stemming from murder,

assault, theft, and sexual harassment, among other things.

- **In a number of cases, courts have awarded substantial monetary damages** against employers who didn't conduct proper pre-hire investigations. Employers have had to pay damages for injuries as well as punitive damages.

What Questions Will the Court Ask?

Courts ask a number of questions when deciding if an employer has made a reasonable inquiry into the applicant's background and qualifications:

- **Did the employer** know—or should the employer have known—of the employee's unfitness for the position?

- **Could the risk** have been discovered through a reference or background check?

- **What was the cost** of conducting a background check?

- **Was pertinent information** readily available? Were sources such as previous employment records sufficient to justify a determination of fitness?

- **Was the risk greater** because of the type of position being filled? What degree of trustworthiness was required for the position?

Be sure to document the scope and depth of your investigation.

- **Did the employee cause injury** to a third party, such as a co-worker, client, or visitor?

What Steps Will Guard Against Lawsuits?

While there is no foolproof way to ensure against hiring an unfit or dangerous person, you can reduce your exposure to negligent-hiring claims by taking these steps:

1. **Conduct a comprehensive** pre-employment check. Obtain as many personal references as possible, and check them all. Don't hire an applicant before all inquiries are completed.

2. **Tailor your investigation** to the job sought. When hiring employees to work with vulnerable people, you have a greater duty to conduct a more thorough background check. If you are hiring someone to operate a day-care center, for example, you must conduct an exten-



sive inquiry, including a check of the applicant's criminal background.

3. Document the scope and depth of your investigation. Note even those reference requests for which you obtain no information.

4. If you obtain adverse information about an applicant from a former employer, try to confirm it by asking the job candidate, "What do you think your former employer might say about you?"

5. Carefully examine employment applications. Interview applicants thoroughly. Make a careful record of what you ask and how each question is answered.

6. Ask the job applicant to explain any gaps in employment history or between school and jobs.

7. If you uncover suspicious factors such as short residencies, gaps in employment, or admissions of criminal convictions, you must make further inquiries into the applicant's background, including a criminal-record check. The failure to do so can result in liability if the individual commits criminal acts after being hired.

8. If you're served with a negligent-hiring lawsuit, call your lawyer immediately. Time is critical, because you have only a certain number of days to file an answer to the lawsuit. The number of days will vary depending on where the suit was filed, but you could have as little as two weeks to respond.

Your reference checks will likely yield more information than in the past because of new laws protecting employers who share information about ex-workers. In the past few years, 26 states have enacted such laws. With these laws in place, you may find former employers more forthcoming about potential troublemakers than they used to be. (The impetus for change stems from a Florida case in which Allstate Insurance fired a man for bringing guns to work but didn't

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tell Fireman's Fund Insurance Company when they checked his references. Fireman's Fund hired the man, who later shot five co-workers, killing three of them. Survivors and victims' families filed lawsuits against both companies for negligent hiring and negligent referral.)

Which Background Searches Should You Conduct?

In addition to a thorough interview and check of a candidate's application and references, a background search is often a good idea. Here are some useful searches you can perform:

- **A consumer-credit inquiry** shows the applicant's debt load, payment history, and public-record information of a civil nature (liens, judgments, bankruptcies). Used properly, this information will help you build a profile of the applicant's reliability and sense of responsibility. Release of this information is covered in the Fair Credit Reporting Act (Public Law 91-508) under Section 604. Law requires you to have a signed release from the person whose record you're seeking.

- **A criminal-convictions inquiry** is a key part of offsetting the liabilities of negligent hiring. Criminal searches may be conducted by phone, computer, or fax. Such an inquiry is crucial when hiring anyone who will work with money, drugs, valuable inventory, or vulnerable populations (such as people who are elderly or have disabilities) or who will be working unsupervised in clients' homes. Criminal records are regulated by state law and can be accessed with or without

a signed release as directed by the individual states. Currently, 20 states have given employers authorization to access their central repository, thus allowing a full state-wide search of criminal records. If your state isn't one of these 20, you will have to conduct this search on a county-by-county basis.

- **A motor-vehicles inquiry** is critical when hiring anyone who will drive vehicles for the organization. Driving records, which are regulated by state law, can reveal an important pattern of reckless behavior. You can obtain this information via computer from the State Department of Motor Vehicles. You don't need a release to do so.

While these searches take time—usually several days—they are well worthwhile if you're hiring someone for a sensitive position. A bad hire doesn't just jeopardize your organization's safety. If it leads to a negligent-hiring lawsuit, your organization's very survival may be at risk. ■

Resources

Garcia, Bennie, Malcolm G. Meador, Jr., & Brian Kleiner, "How to Hire the Right Person the First Time," *Nonprofit World*, Vol. 21, No. 2.

Muehrcke, Jill, ed., *Volunteer Liability and Risk Management*.

Nussbaum, L. Martin, "Don't Let Volunteers Put Your Organization at Risk," *Nonprofit World*, Vol. 10, No. 1.

Schmidt, Sarah J., "Volunteers: Resource or Risk?", *Nonprofit World*, Vol. 15, No. 5.

Srinivasan, Thiagarajan et al., "Hire the Best, But Hire with Care," *Nonprofit World*, Vol. 20, No. 6.

These resources are available from the Society's Resource Center, www.snpo.org.

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