



Can An Inexpensive Background Check Prevent Tragedy?

Bus crash illustrates perils of ignoring an applicant's past

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Can employers face liability for failing to conduct pre-employment background checks? What background information may employers consider? Should a 20-year-old homicide conviction preclude someone from driving a bus? These are some of the questions arising in the wake of a recent tragic bus accident involving a driver with a criminal record.

Based on this tragic story, employers are reminded to determine if their employee-screening strategy is both legal and adequate. Inadequate precautions may lead to disaster (and, obviously, claims by customers, employees, and others). Failing to follow federal and state rules on background screenings may lead to civil rights charges or claims under the Fair Credit Reporting Act (FCRA) by rejected applicants. Below are some of the major issues involved in developing an appropriate strategy. But first, a consideration of the facts of the recent tragedy reveals some practical challenges and potential consequences.

On March 12, 2011, a bus returning to New York City from Mohegan Sun Casino flipped on its side on Interstate 95, striking a sign post which sliced the bus in half. Fifteen people died, but the driver, Ophadell Williams, survived. When questioned by police, Williams claimed he was clipped by a tractor-trailer. However, further investigation disproved this. Moreover, passengers informed police that Williams was driving

erratically and nodded off several times shortly before the crash. These details led police to investigate Williams' criminal and motor vehicle history and discover numerous prior convictions.

Williams' criminal record began in 1987 with a minor offense. However, in 1991, he fatally stabbed a man and was later convicted of manslaughter, serving two years in jail. Subsequent convictions include disorderly conduct, possession of stolen property, and a grand larceny charge for which he served three years in prison. As for motor vehicle violations, Williams' driving privileges were suspended in 1995 after ignoring several tickets for speeding and driving without a license. In 2003, Williams was arrested for driving without a license and carrying three police scanners. Although Williams still obtained a commercial driver's license, reports suggest he likely supplied false information on his application.

On March 22, 2011, the first two lawsuits were filed by injured passengers against both Williams and his employer, World Wide Tours.

Negligent Hiring

Whenever an employee harms someone, injured parties always sue the employer as that's typically "the deep pocket." Often, this is based on a vicarious liability theory, which



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generally holds employers liable for the negligence of employees acting within the scope of their employment. In this case, for example, if Williams is found to have been negligent while driving passengers home, the bus company should be vicariously liable.

However, employers can also be held liable for *their own* negligence in selecting an unfit employee who injures others, even if the employee was *not* acting within the scope of employment. To prevail, plaintiffs must prove the employee's misconduct was foreseeable (e.g., the employee had a propensity or motive). Employers may similarly be liable for their own negligence in *retaining* employees who later demonstrate they are unfit.

Consider a February 2011 Connecticut Superior Court decision involving claims against Stamford Hospital by a woman whose epidural pump was stolen by a physician's assistant while she was in labor. There, the judge granted summary judgment dismissing the vicarious liability claim because stealing was outside the scope of the physician's assistant's employment (his story was

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he wanted to extract the medicine for his dog!). However, because there was evidence hospital staff distrusted him and possibly knew of similar prior conduct, summary judgment was denied as to the negligent retention claim.

Background Checks

One way to minimize negligent hiring claims is conducting pre-employment background checks. However, whether this expense is justified (and the extent of the background check) depends on the specific circumstances. For example, trust-sensitive positions involving unsupervised work with money, medicine, or vulnerable individuals (*e.g.*, children) generally warrant a criminal background check, drug test (a separate topic not addressed in this article), and possibly a credit check.

Also, positions involving driving probably warrant a motor vehicle history check. Once an employer decides background checks are appropriate, the next issue is what information may be legally considered and what compliance obligations exist.

Criminal Convictions

According to the Equal Employment Opportunity Commission (EEOC), because statistics show a higher conviction rate among African Americans and Hispanics, excluding applicants based on con-

victions is an unlawful practice under Title VII of the Civil Rights Act unless justified by business necessity. Business necessity involves consideration of three factors: (1) the nature and severity of the offense, (2) the recentness of the offense, and (3) the nature of the job.

This analysis may be challenging in practice. For example, although Williams' manslaughter conviction involved a serious offense (fatal stabbing), it is 20 years old. Also, although a manslaughter conviction does not relate to driving ability, his duties included close interaction with casino/bar patrons who may be angry over gaming losses or intoxicated. Is this too much of a risk? In this case, however, this was not his sole offense; Williams' record included recent motor vehicle violations (obviously relevant), which could have easily supported a no-hire decision.

Although the legal standard for arrests is the same, there is one major distinction: arrests do not prove the offense actually occurred. Therefore, employers cannot rely on arrest records without proof the offense was committed. This typically proves difficult as employers do not want to take the role of detective. However, some employers may have no choice. For example, a school likely cannot take the position it will refuse to consider arrests. Employers should consult counsel in these cases and

verify there is no state law regulating consideration of arrests.

Complying with FCRA

Lastly, employers who outsource their background investigations must comply with the Fair Credit Reporting Act. First, applicants must give written authorization. Employers can attach a form to the employment application. Next, if information obtained will be used against an applicant, the employer must notify the applicant and provide an opportunity to refute the information (*e.g.*, mistaken identity). The applicant must also be given a copy of the adverse report. Lastly, if the employer ultimately decides not to hire based on the information obtained, another notice must be given to the applicant with another copy of the report.

Conclusion

They say hindsight is 20/20. However, when an employee hurts or kills others, that excuse will neither comfort the bereaved nor sway jurors (and the general public). Employers failing to consider whether background screenings were appropriate may be surprised when a court rules they had a duty to do so (which they breached).

With proper counsel, employers can develop an appropriate strategy to satisfy any such duty, protect the company's assets, and most importantly, minimize preventable tragedies. ■