



# A Catch-22? Discrimination or Negligent Hiring and Retention?

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## Why do Employers use Criminal Background Checks?

- Reveal information about an applicant's honesty, integrity, reliability, responsibility and propensity for violence
- Prevent workplace violence, theft and fraud
- **Prevent tort liability under theories such as negligent hiring and retention**
- **Mandatory** in some industries (e.g., banks, schools)



## How Prevalent is Workplace Violence?

- In 2009, over 1 in 5.5 fatalities at work were caused by assaults and violent acts
- Approximately 5% of all businesses in the US experienced an incident of workplace violence in 2005
- Nonfatal workplace assaults alone result in more than 876,000 lost workdays and \$16 million in lost wages
- On average more than 2 million acts of workplace violence occur each year, with women targeted more often than men
- According to a study in the 1990s, workplace violent tort cases averaged \$500,000 per settlement and a \$3 million jury verdict.

Source: [www.workplaceviolencenews.com](http://www.workplaceviolencenews.com)



## Occupational Safety and Health Act

- Congress created the Occupational Safety and Health Administration (OSHA) to assure safe and healthful working conditions for working men and women by setting and enforcing standards and by providing training, outreach, education and assistance.
- OSH Act requires employers to maintain a safe work environment for employees



## How Prevalent is Workplace Crime



- Recent Chamber of Commerce survey found that 75% of employees steal at least once
- Various organizations estimate that losses due to employee theft and fraud range from 20-40 billion dollars annually
- Americandatabank.com reports that 42-89% of applicants put false information on their resumes (variation by industry)



## Countervailing Public Policy Concerns

- Possible disparate impact against people of color who have higher conviction rates than whites
- Public safety: growing recognition of the relationship between unemployment and recidivism
  - Studies show that a high percentage of individuals who violate the terms of their probation are unemployed at the time of the violation
  - As a result, many states have restricted the extent to which an employer may make decisions based on conviction history

## State Restrictions on Use of Criminal Records

- **Many States have restricted the use of certain records**
  - Arrests, expunged, sealed, pardoned convictions; convictions over 10 years old
- **Colorado, Missouri, Pennsylvania, West Virginia, Wisconsin, Louisiana** (effective 8/2011) 
  - Conviction must be job-related
- **Hawaii** 
  - Only after conditional offer of employment; conviction must be job-related (effective 1/2012)

## State Restrictions on Criminal Records

- **Massachusetts**



- No questions on initial written application (except when employers are prohibited by law from hiring sex-offenders); no decisions based on certain first offenses (e.g., drunkenness, simple assault); Criminal records sealed for misdemeanors after 5 years, for felony convictions after 10 years; written criminal record policy (effective 5/2012)

- **Georgia**

- First offender probation rules

- **Utah**

- Only employee/applicant can obtain records; Only felonies can be considered





## State Restrictions on use of Criminal Records

- **Idaho**
  - Criminal records can be obtained by employers, agencies, or individuals by written request; after 12 months, arrest records may only be disclosed to criminal justice agencies; limits on disseminating criminal records history
- **California**
  - Misdemeanors where probation completed; certain marijuana-related convictions over 2 years old
- **Washington**
  - Only employees with access to trade secrets, confidential or proprietary business information, money, or items of value



## New York

- New York employers may not lawfully deny an applicant employment based on criminal conviction, *unless*:
  - “There is a direct relationship between one or more of the previous criminal offenses and the specific license or employment sought or held by the individual; or
  - The...granting or continuation of the employment would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public.”

Source: N.Y. Correc. Law, Article 23-A § 752



## New York

- Employers must provide a copy of New York Corrections Law Article 23-A **twice** when doing a criminal record check:
  - Once before the check is requested and again if the report shows a criminal record
  - A copy of the law must also be posted by the employer in a place accessible to employees

Source: N.Y. Gen. Bus. Law § 380-c(b)(2)



## New York – Factors to Consider

- The public policy to encourage the employment of persons previously convicted of criminal offenses
- The specific duties and responsibilities necessarily related to the employment sought
- The relationship between the criminal offenses and the person's fitness or ability to perform the job
- How much time has elapsed since the occurrence of the criminal offense
- The age of the person at the offense
- The seriousness of the offense
- Any information that may bear on the person's rehabilitation and good conduct
- The legitimate interest of the employer in protecting property and the safety of others



## Employer Quandry

- Prevention of crime and violence and potential tort liability v. Prevention of unintentional disparate impact discrimination and recidivism



## Negligent Hiring and Retention Litigation

- Many states have recognized claims for negligent hiring and retention
- Americandatabank.com reports that employers lose 72% of negligent hiring suits
- Trend is to allow injured third parties to sue employers for hiring or retaining dangerous employees
- **General Rule**: Claims against employees can be brought by third parties, but generally not co-employees.
  - Reasoning: The New York Workers' Compensation Law bars common law negligence claims in the workplace.
    - See *Rosario v. Copacabana Night Club, Inc.*, 1998 WL 273110 (S.D.N.Y.)



## Negligence Suits by Employees Generally Barred by Workers Compensation

- New York courts recognize an exception to Worker's Compensation law for **intentional wrongs committed by the employer.**
  - To fall within the intentional tort exception, the employee must allege that the employer's conduct was engaged in to bring about the consequences of the act.
  - Mere knowledge or appreciation of risk is not sufficient to invoke the exception.
  - there must be an intentional or deliberate act by employer directed at causing harm to particular employees.
    - *Walker v. Weight Watchers Int'l*, 961 F. Supp. 32, 35 (E.D.N.Y. 1997)



## Negligent hiring & Negligent retention

- Negligent hiring and negligent retention are among the most common claims against employers.
- The difference between the claims is when the employer became aware of a threatening employee; often, the arguments are that employers inadequately screened job applicants or failed to act on complaints about an employee who later committed a violent act.

- Source: Connecticut Law Tribune, *Taking Aim at Workplace Disputes*, Sept. 28, 2009





## Negligent Hiring: The Elements

- **What is the basic cause of action for negligent hiring?**
  - The person causing injury was the employee of the defendant;
  - The employee was unfit for employment;
  - The employer knew or should have known that the employee was unfit;
  - The plaintiff was injured by the employee's tortious act;
  - The employer owed a duty of care to the plaintiff; and
  - The hiring of the employee was the cause of the plaintiff's injuries



## Who is considered an “employee”?

- In negligent hiring and retention cases:
  - Generally, an employee is anyone who is subject to the employer’s right of control with respect to any work to be performed in the course and scope of employment.
  - Right to control establishes an employment relationship.

### Independent contractors

- General rule is that an employer is not liable for torts committed by independent contractors.
- A negligent hiring claim may be possible where the defendant employer was negligent "in selecting, instructing, or supervising the contractor."
  - *Becker v. Poling Transp. Corp.*, 356 F.3d 381 (2d Cir. 2004)
- As with negligent hiring in an employer-employee or agency relationship, the claim with respect to independent contractors is a form "of direct liability because it 'concerns the employer's liability for its own acts or omissions rather than its vicarious liability for the acts and omissions of the contractor.'"
  - *Corazzini v. Litton Loan Servicing LLP*, 2010 U.S. Dist. LEXIS 27398 (N.D.N.Y Mar. 23, 2010)

## What makes an employee “unfit” for employment?

- The employer has a **duty to investigate** a prospective employee when it knows of facts that would lead a reasonably prudent person to investigate the person
  - Example: *T.W. v. N.Y.C. Police Athletic League* 286 A.D.2d 243 (1st Dept. 2001)
    - Employer held liable for negligent hiring when it did not engage in a criminal background check and an employee sexually assaulted a minor while at work
    - Court found that there had been a duty to investigate since the employer had actual knowledge that the employee had a conviction.



## New York Rule for Negligent Hiring

- The New York Corrections Law does not require employment when it would involve “an unreasonable risk . . . to the safety or welfare of specific individuals or the general public.”

Source: *T.W. v. N.Y.C. Police Athletic League* A.D.2d 243 (1st Dept. 2001)



## States with “Safe Harbor” Provisions

- New York law establishes a “rebuttable presumption” in favor of excluding evidence of prior incarceration or conviction of an individual in cases alleging negligent hiring or retention ***if the employer has complied with the law***
  - To comply, the employer must have evaluated the Corrections Law factors and made a good faith and reasonable determination in favor of hiring the person
  - The employer must have properly balanced the 8 factors outlined by law

Source: N.Y. Exec. Law § 296 (15)



## States with “Safe Harbor” Provisions

- **Florida**

- Rebuttable presumption in favor of employer if the employer engaged in a background check of the prospective employee and the investigation did not reveal any information demonstrating the unsuitability of the prospective employee for the particular work to be performed.

- Fla. Stat. Ann. 768.096



## States with “Safe Harbor” Provisions

- **Louisiana**

- Any prospective employer who reasonably relies on information pertaining to an employee's job performance or reasons for separation, disclosed by a former employer, shall be immune from civil liability including liability for negligent hiring, negligent retention, and other causes of action related to the hiring of said employee, based upon such reasonable reliance, unless further investigation, including but not limited to a criminal background check, is required by law.

- La. R.S. 23:291(B)



## States with “Safe Harbor” Provisions

- **Texas:**

- Limited to actions against in-home service or residential delivery companies that arises out of a criminal act or omission by an employee of the company, and
  - (1) the company had previously obtained that person’s criminal records, and
  - (2) The negligent hiring claim is brought by the person whose home or office the employee entered while performing his or her job duties
- (Continued on next slide)
  - See Tex. Civ. Prac. & Rem. Code § 145.003





## States with “Safe Harbor” Provisions

- **Texas**

- If requirements are met, then there is a rebuttable presumption that the in-home service company or residential delivery company *did not* act negligently, if:
  - At the time the person was hired, the company obtained the employee’s criminal records; and
  - The criminal history showed that, in the 20 years preceding the date the information was obtained for a felony or in the 10 years preceding the date the information was obtained for a misdemeanor, the employee had not been convicted of:
    - An offense against the person or the family;
    - An offense against property
    - Public indecency
      - See Tex. Civ. Prac. & Rem. Code § 145.003



## Negligent Hiring Cases

- ***Glover v. Augustine and Ponte Equities***, 38 A.D.2d 364 (1st Dept. 2007)
  - Employer held liable for negligent hiring of an elevator operator when the employer did not engage in a background check and the employee committed an assault while at work.
- ***Adorno v. Corr. Servs. Corp.***, 312 F. Supp. 2d 505, 513 (S.D.N.Y. 2004)
  - Employer not liable for negligent hiring of workers in a halfway house when the workers sexually assaulted residents at the house and the employer did not and could not have known of the employees' propensity to commit violent acts.



## Negligent Hiring cases

- ***Mon v. City of New York***, 163 A.D.2d 212 , 557 N.Y.S.2d 925 (1st Dep't 1990)
  - **New York City held liable for the negligent hiring of an officer who shot the plaintiff while off-duty. When the City hired the officer, it was aware of his prior conviction for disorderly conduct and the remarks by the arresting officer in that case concerning the arrested officer's disregard for the seriousness of the offense.**

## Arrests: Can Knowledge of Arrest be Evidence of Negligent Hiring/Retention?

- When can arrest records be used? (N.Y. Exec. Law § 296(16))
  - EEOC:
    - As with conviction records, conduct that indicates unsuitability for a particular position may be a basis for exclusion
    - However, in the case of arrests the employer must additionally consider the likelihood that the applicant actually committed the conduct alleged in the charges
    - In New York, an employer may not lawfully terminate or fail to hire an employee based on an arrest that led to acquittal
    - Most states restrict consideration of arrests
  - The rule is the same in negligent hiring claims:
    - Showing that an employee who engaged in a violent act at work had previously been arrested for crimes involving violence is not enough to show that the employer should have known that the person was dangerous when the person had not been convicted of any crimes.
      - See *Morgan v. Nassau County*, 2009 U.S. Dist. LEXIS 79180 (E.D.N.Y. Sept. 1, 2009)



## Best Practices for Employers

- Background checks remain a lawful and useful tool in hiring
- Train HR Recruiters and Hiring Managers
- Tailor policies on criminal histories to the needs of the business and applicable law
- Enforce policies consistently
- Develop an application form that asks for references and check references
- Document due diligence around circumstances of conviction and positive changes since release
- Stay current on legal developments



# Criminal Background Checks and the Law: What Employers Need to Know

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