



SAFE HIRING: HOW YOU CAN AVOID BAD HIRES

PREVIEW



STUDY GUIDE

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This booklet is for educational purposes only, and is not intended to substitute for the advice of counsel. Because this study guide cannot address your specific situation, please use your own judgment and the assistance of a qualified legal professional to the extent you believe appropriate.

All stories quoted in this booklet are fictionalized and not intended to identify any individual person.

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Chapter One. Introduction

It is the ultimate nightmare for every hiring manager or human resources professional: your phone rings late Friday afternoon as you wind up loose ends from yet another challenging week and look forward to a quiet weekend. A panic-stricken voice informs you that Pat in accounting has assaulted a coworker and threatened to harm a supervisor. It turns out Pat was not only stealing money, but did not even have the experience claimed when applying to work for your company.

As the mess is being sorted out, everyone will be asking you the same question over and over. From the company CEO, CFO, and corporate attorney to managers, supervisors, and coworkers, there is one thing everyone wants to know: how did that person get hired in the first place?

If the matter turns into litigation, you will find that in addition to your normal duties, you now have a second and nearly full-time job—dealing with the discovery process in litigation and the resulting organizational fallout. Lawsuits can be brought against your firm by injured coworkers, or members of the public who were damaged by the violence or false credentials. Even the bad employee can sue, claiming wrongful termination if fired after the incident. The legal fees for just one incident of workplace misconduct can soar into the six figures, and jury awards can be astounding.

Even without litigation, industry statistics suggest the cost of a bad hiring decision can exceed \$100,000. This takes into account the time spent recruiting, hiring, and training; and the amount of time the job is left undone—or done badly—by an unqualified applicant. And there are other costs that are hard to measure, such as the harm to employee morale or to the firm's reputation.

Given the enormous price tag of a bad hiring decision, it is no surprise that employers of all sizes are turning to various tools to boost the effectiveness of their hiring process. These methods have proved most effective in weeding out bad candidates when used in conjunction with a program of pre-employment background screening to obtain hard facts about a candidate.

A safe hiring process that includes pre-employment background screening works in four critical ways:

1. The simple fact of having background screening can discourage applicants with something they are trying to hide.
2. Having a screening program encourages applicants to be especially forthcoming in their interviews.
3. It limits uncertainty in the hiring process. Although using instinct can provide useful insights, it is better to base a decision on solid information.
4. A screening program demonstrates that an employer has exercised “due diligence,” providing a great deal of legal protection in the event of a lawsuit.

Due diligence

Every employer has legal duty to exercise “due diligence” in hiring. This means employers are negligent if they hire someone who they knew, or in the exercise of reasonable care should have known, was dangerous or unfit for the particular job. Employers are liable for hiring someone

who is likely to harm others in view of the work involved. In fact, employers not only have a duty of due diligence in the employees they hire, but employers can be sued for failure to exercise due diligence in retention, supervision or promotion, as well!

Safe hiring techniques are not intrusive, nor are they an invasion of privacy. Employers are restricted to looking only into those things that an applicant has done in his or her “public life.” For example, checking court records for criminal convictions or calling past employers or schools does not invade a zone of personal privacy. Employers are limited only to gathering information that is a valid and non-discriminatory predictor of future job performance.

The secret of HR

Like other human resource issues, safe hiring must be approached seriously and methodically. But the same commonsense principles apply: establish a program, make it fair and reasonable, then follow it, and be consistent, documenting along the way.

Commonsense HR principles:

- Have a program
- Make it fair and reasonable
- Follow it
- Be consistent
- Document

The process outlined in this booklet is NOT intended to pry into an applicant’s private life, or turn hiring managers or HR professionals into the “hiring police.” Employers who engage in safe hiring practices do not find that good applicants are deterred. Honest candidates understand that background screening is a sound business practice that helps a firm’s employees as well as the bottom line. Such applicants want to work with qualified and safe coworkers, in a profitable environment.

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Chapter Two. Overview of the Safe Hiring Process

Some firms view pre-employment screening as a process that does not start until after an applicant has been selected, and the name is submitted to security or human resources for a background report. However, an effective safe hiring program starts at the very beginning of the hiring process, and it requires a company-wide commitment to safe hiring by everyone involved. Recruiters, hiring managers and interviewers all need to understand that these duties can't wait to be handed off to someone else after they make a hiring decision. Instead, safe hiring practices are everyone's responsibility.

The first three steps that take place in the early stages of the hiring process, before a hiring decision is made and before a background report is requested.

Initial stages of the hiring process:

1. Applications
2. Interviews
3. References

Using more effective application forms, and requiring every applicant to sign them; using effective interview questions that ferret out safe hiring information; and checking all references to confirm previous employment and discover unexplained gaps—these techniques protect your organization without discouraging good applicants. They also take relatively little time and money compared to the benefits they provide.

After these initial techniques are used, you will have narrowed down your applicant pool to those individuals who are more likely to become employees. The next steps, involving background checks, will help you to confirm the suitability of individual applicants. Depending on the particular job requirements of the opening you need to fill, these checks may involve verification of education and credentials, driving records, criminal background checks, and even civil judgments or credit checks in certain limited situations.

Understanding how and when to use safe hiring methods appropriately throughout the hiring process will help you select safer and more qualified applicants for every job you need to fill.

Consistency

As is critical in nearly every area of employee relationships, remember that similarly situated people should be treated in a similar fashion. When it comes to pre-employment screening, this does not mean that all applicants need to be screened exactly the same. What it does mean is that all applicants for a particular job opening should receive the same level of scrutiny. A firm may choose to screen candidates for a vice president's position in more detail than those applying to be on the maintenance crew. However, all vice-presidential applicants should be screened in the same way, while all maintenance workers should go through the same processes that fit their particular job opening.

If a firm utilizes an outside agency to perform background screening, not all applicants have to be submitted for review by the outside firm. An employer will typically only utilize those services for a finalist or finalists. However, each similarly situated finalist should be screened in the same fashion. Similarly, if background checks are handled in-house, it is acceptable only to perform the

courthouse searches for those individuals that you have narrowed down to be potential new hires, as long as this is done consistently.

The degree of scrutiny that should be given to any particular category of jobs is determined by factors such as access to money or assets, the level of authority over others that the position carries, or access to the public or coworkers. Also to be taken into account is the difficulty you would face in replacing the new hire if he or she did not work out, or the damage that could be done to your organization's productivity if you ended up with an incompetent person in that position. Once you have determined how intensively this position should be researched, then all applicants for this job level should receive consistent treatment.

Scope

It is vital to keep the scope of reference checking and screening within legal boundaries. There are certain matters that are not valid predictors of job performance, and delving into them can be considered discriminatory. This can include information about religion or race, national origin, age, medical condition, and so forth. An employer cannot ask reference questions or obtain background information on those same subject areas that cannot legally be raised in an interview situation with an applicant face-to-face.

In pre-employment screening, the laws have sought to achieve a balance between privacy and due diligence. Although there are a number of laws that limit, prohibit, or regulate obtaining and using background information, there is a great deal of information an employer is entitled to obtain and use in making the best hiring decisions. Certain citizens have a reasonable expectation to privacy and a right to be treated fairly. Yet, at the same time, an employer has the right to make diligent and reasonable job-related inquiries into a person's background so that the company, its employees and the public are not placed at risk.

For example, the applicant's date of birth is an example of protected information that must not be used in a hiring decision. The Age Discrimination in Employment Act is a federal law that protects certain applicants and employees aged 40 and over. And depending on your location, there may be state laws that protect other age groups from discrimination. However, date of birth is an important identifier when doing background checks. So you'll need to use procedures to obtain the date of birth for the purpose of identification only, without infringing on applicants' rights.

The federal Civil Rights Act and the Americans with Disabilities Act (ADA) are both well known as they apply to discriminatory hiring practices. In addition, you can obtain information about protected groups from the Equal Employment Opportunity Commission (EEOC) and the Office of Federal Contract Compliance Programs (OFCCP). State statutes and municipal ordinances may include additional protected characteristics, so it is advisable to check with local and state equal employment agencies that cover your location.

Basically, an employer is generally allowed to obtain and use information from public records, schools, licensing authorities, former employers, references, or credit agencies provided that:

- The information is reasonably job-related and is a valid predictor of job performance
- The information is not legally prohibited or regulated
- It does not discriminate on its face against a protected group

- It does not tend to screen out certain groups even if it appears neutral on its face
- It does not violate any privacy or legal right

It comes down to this: if you keep your inquiries tied to specific, job-related requirements, your due diligence as an employer to provide a safe workplace obliges you to perform legitimate research that helps you determine the suitability of individual candidates who apply to work for you.

Exercise: Has there been a situation in your previous employment where a difficult employee was hired, and your organization found out about the problem after the fact? Without identifying specifics (company name, names of the people) and without using examples from your present employer, discuss:

- The problem that was uncovered
- How it came out into the open
- How it was dealt with
- The issues it raised

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Chapter Three. Applications

Why use an application form?

Although resumes can make a useful contribution to the hiring process, human resource professionals and labor lawyers often advise employers to use employment application forms for all candidates, regardless of whether or not a resume is offered. Because employment applications provide legal and practical advantages, some organizations even reject resumes and require that job seekers only fill out the company's form.

Certain practical and administrative problems are created when companies rely on resumes. One problem is that resumes are written in lots of different styles, and provide inconsistent types of information. An application form, on the other hand, makes it clear what information an applicant is supposed to supply, and allows employers to compare relevant information between the different applicants. Another problem with resumes is the risk of accepting information that an employer should not have—information that cannot be used in a hiring decision. For example, a resume may list affiliations or organizations that reveal details about a person that are irrelevant to a hiring decision, or cannot be legally considered. A professionally reviewed, job application should prevent an employer from receiving impermissible information. Many employers now utilize online application forms through an employee portal or by use of an Applicant Tracking System. Whether the form is on paper or electronic, there are advantages to using an application instead of just accepting resumes.

An effective application form provides a vehicle to ask critical questions and to advise applicants about critical matters. A standardized form also makes it easier to prescreen candidates because employers can see at a glance all the essential information they need. For example, any unexplained gaps in an applicant's work history would become readily apparent in a format that is laid out chronologically.

What should be on an application?

Numerous states, counties and cities have passed laws that prohibit asking about convictions on application forms. This is often known as "Ban the Box" because it removes the previously common question about past criminal records and the box for answering "Yes" or "No." The purpose of this ban is to allow ex-offenders to apply for jobs and compete based on their qualifications instead of being immediately rejected. There are a substantial number of people with criminal records, and it is critical for everyone to have an equal chance at gainful employment.

"Ban the Box"

- Refers to application forms
- Delays asking about criminal records
- Prevents automatic elimination of those with convictions

Even if state or local laws do not cover your situation, it is better not to include questions about criminal records on your application forms. Guidance from the federal Equal Employment Opportunity Commission supports this concern that the automatic elimination early in the process of anyone with a criminal conviction can have a discriminatory impact. We will cover more about

this in a later chapter. In addition, with numerous state and local “Ban the Box” laws, it can be difficult to keep up with what law applies to your business, especially if you have multiple locations. It is also doubtful that the early elimination of anyone with a criminal record makes hiring more efficient, especially when compared to the potential for the unfair or potentially discriminatory treatment of ex-offender. In addition, just because a person has a past record does not mean they may not make a great candidate. The idea is to consider everyone on an individual basis, and not automatically eliminate people because of their status as an ex-offender.

For now, employers CAN ask about relevant criminal records LATER in the process, at or after an interview or after a conditional job offer, depending upon the particular law that may impact you.

Release form

All applicants should be asked to sign a release indicating consent to pre-employment background screening, including educational and professional credentials, past employment and court records. As a practical matter, and in order to meet legal requirements, it is best for this release to be a separate document. Additionally, if an employer uses an outside agency to perform any of the pre-employment screening, the federal Fair Credit Reporting Act (FCRA) requires a stand-alone disclosure form separate from the application.

Note: As an added benefit, you’ll find that a waiver and release that protects the former employer, as well as your company and the applicant, has the extra advantage of helping to open up more channels of communication when you later call for a reference.

The application form should emphasize that untruthfulness or material omissions are grounds to terminate the hiring process or later employment, no matter when discovered. If a person is not truthful during the application or hiring process, the dishonesty may become the basis for disqualification in the event something is uncovered later on.

It is important to indicate that any release for a background investigation is also valid for future screening (for retention, promotion or reassignment) unless revoked in writing. This is helpful, for example, when an employer needs to conduct a post-employment investigation into allegations of sexual harassment or other workplace problems.

In addition to language about background screening, certain basic questions should be asked on your application form. You’ll want to ask for addresses for the last seven years, which can be used to determine the scope of any criminal record search. The form should also allow the applicants to tell you whether their current employers may be contacted for a reference.

Examples of other standard matters that can be covered on your application form include your organization’s “at will” policy; the applicant’s ability to perform the essential job functions; and the requirement to provide original documents that verify identity and right to work in the United States, if employed.

How can a careful review of applications protect your company?

Employee lawsuits often catch employers by surprise. Yet, an examination of the application forms submitted initially by the employees involved often shows that the employers could have