Tiptoeing the Minefield

By Matt Boyer

Avoiding the Pitfalls of Background Checks, Negligent Hiring, and "Ban the Box" Legislation

Hiring of new employees still remains an imperfect and uncertain process, even with numerous rounds of interviews, use of personality tests, professional reference checks, and scouring of social media. A new hire who turns out to not be the "best fit" for your organization can result in lost time, productivity, and training costs, but these can be the least of a company's worries. Most jurisdictions recognize causes of action against employers for negligent hiring and retention of employees. In contrast to the theory of *respondeat superior*, under which an employer is held liable for the actions of his employee, negligent hiring and retention torts are based on a separate duty imposed upon the employer in the hiring and supervision of its employees. Recent verdicts and settlements indicate that the potential exposure for such torts can be in the hundreds of thousands to millions of dollars. Employers are particularly susceptible to tortious liability when they hire an individual with a criminal history without inquiring about his or her criminal background or simply ignoring that background.

In order to avoid such exposure, most companies have instituted criminal background checks as a normal course of their employment process and some have even asserted blanket prohibitions on hiring anyone with even a criminal arrest, regardless of whether he or she was convicted. While these may seem like easy fixes, recent legislation and litigation regarding these practices demonstrate the need for a more nuanced approach. This article takes a look at the wisdom of solely relying on criminal background checks and addresses both the exposure businesses face from negligent hiring liability and the various pitfalls a company can succumb to by taking too simplistic an approach to avoid such liability.

Background Checks

The use of criminal background checks has become an almost standard practice in the hiring process. Once utilized primarily for government jobs requiring a security clearance, by 2005 it was reported that more than 90 percent of U.S. employers performed criminal background checks on prospective employees. M.E. Burke, Soc. For Human Res. Mgmt., *2004 Reference and Background Checking Survey Report* (2005). In fact, in 2012 alone, there were more than 17 million employment-related FBI criminal background checks. Madeline Nealy & Maurice Emsellem, Nat'l Employment Law Program, *Wanted: Accurate FBI Background Checks For Employment* (2013). At first blush, this may appear to be a common sense practice, resulting in the "win-win" of assuring employee and customer safety while reducing potential tort liability. However, reliance on this practice has been called into question recently for its inaccuracies and its negative social impact.

Testifying before Congress on behalf of the American Bar Association this past year, Mathias Heck, Jr., noted the unreliability of the FBI criminal records database, the resource most commonly used by employers for job-related background checks. First, "[c]riminal background checks can contain inaccurate information, perhaps due to identity theft, or incomplete information, such as information on arrests that did not lead to criminal convictions. Moreover, many employers have little knowledge of how the criminal justice system works and what a particular record actually represents, so even when completely accurate information is proved, employers can misinterpret the information contained in a background check." Mathias H. Heck, Jr., American Bar Assoc., *Testimony before the Committee on the Judiciary Task Force on Over-Criminalization of the U.S. House of Representatives* (June 26, 2014). Highlighting the lack of accuracy is the fact that "roughly 50 percent of the FBI criminal records are incomplete or inaccurate," with an estimated 1.8 million workers each year subject to background checks that include faulty or incomplete information. *Id.* With such inaccuracy, a criminal background check may not really be the security blanket most companies believe it to be. Moreover, blind reliance on the results of a criminal background check may not be an unassailable defense in demonstrating a company's diligence or reasonableness in its hiring decisions.

In addition to lack of accuracy, sole reliance on whether an individual has a criminal background may come with broader societal implications. It is estimated that nearly 65 million Americans have a criminal record, with more than 700,000 individuals released from state and federal prisons and another nine million released from jails annually. Michelle Natividad Rodriguez & Maurice Emsellem, Nat'l Employment Law Program, *65 Million "Need Not Apply"* (2011); Office of Justice Programs: Center for Faith Based and Neighborhood Partnerships, *Prisoner Reentry*, http://ojp.gov/fbnp/reentry.htm. Hard and fast policies adopted by employers excluding individu-

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als with a criminal background from employment result in a collateral punishment neither intended nor accounted for in our criminal justice system. This punishment is particularly inequitable when applied to individuals who have been accused but not convicted of crimes. Further, contrary to their intent, such policies may play a part in undermining societal safety. "The reality is that ex-offenders who cannot find jobs, as well as those who cannot find jobs that provide sufficient income to support families and children… are more likely to commit criminal acts." Heck, *supra.* "If a former offender cannot support himself or herself with honest employment, criminal activity is the unfortunate, likely alternative." *Id*. Demonstrating the clear link between employment and recidivism, an ABA report found in 2007 that 60 percent of former prisoners were unemployed a year after release from prison and that those offenders jobless after reentry were three times more likely to return to prison. *Id.*

Negligent Hiring

The flip side of the coin is that despite societal concerns and the potential unreliability of background checks, many businesses do not want nor can they afford the potential liability of hiring an ex-offender. The torts of negligent hiring and negligent retention are causes of action in a majority of jurisdictions. *See e.g. Ponticas v. KMS*, 331 N.W.2d 907 (Minn. 1983); *Connes v. Molalla Transport Syst., Inc.*, 831 P.2d 1316, 1321 (Col. 1992). A 2001 report estimated that employers lose 72 percent of negligent hiring cases, with significant financial impact. Mary L. Connerly *et al.*, *Criminal Background Checks for Prospective and Current Employees: Current Practices among Municipal Agencies*, 20 Pub. Personnel Mgmt. 173, 174 (2001). That study further estimated the average settlement in negligent hiring cases at $1.6 million, and more recent verdicts have continued in the range of hundreds of thousands to millions of dollars. *Id.*; *see e.g. Santos v. Scott Villa Apartments, et al.*, 2008 WL 9355870 (Cal.Super.) ($12M verdict where Defendant apartment complex did not perform a background or criminal record check and hired a convicted felon and sex offender as a maintenance man who subsequently murdered the Plaintiff's 30 year old daughter); *Brooks v. Ten Broeck Hospital*, 2004 WL 4203231 (Tenn.) ($2M verdict where Plaintiff was employed by the Defendant hospital and was raped by another hospital employee. Plaintiff asserted that her assailant had a criminal record and the Defendant hospital failed to perform thorough background checks).

What is unclear, and therefore problematic for employers, is what amounts to a sufficiently thorough investigation to insulate employers from liability and in what instances can an employer hire an individual with a criminal background without facing tremendous exposure.

Unlike a claim of vicarious or supervisory liability, liability for negligent hiring exists in many jurisdictions even if the employee injures another while acting outside the scope of his or her job or duty. *See e.g. Perkins v. Spivey*, 911 F.2d 22, 31 (8th Cir. 1990); *DiCosala v. Kay*, 450 A.2d 508, 515 (N.J. 1982); *Garcia v. Duffy*, 492 So.2d 435, 438 (Fla. Dist. Ct. App. 1986). Liability may even exist *after termination*, where the terminated employee uses his association with the former employer to gain access to the victim through "color of employment." *Underberg v. S. Alarm, Inc.*, 284 Ga. App. 108, 113 (2007).

The primary issue of liability in negligent hiring suits is whether it was reasonable for an employer to hire an employee and permit him to do his job despite dangerous proclivities that the employer knew or should have known about. *See Brown v. Zaveri*, 164 F.Supp.2d 1354, 1360 (S.D. Fla. 2001); *Gibson v. Brewer*, 952 S.W.2d 239, 246 (Mo. 1997). Therefore, an employer typically faces liability where they either failed to adequately vet a candidate or employed a candidate despite his or her criminal history. What is unclear, and therefore problematic for employers, is what constitutes a sufficiently thorough investigation to insulate employers from liability and in what instances an employer can hire an individual with a criminal background without facing tremendous exposure.

Certainly, a complete absence of a background check would seem to leave an employer most vulnerable. *T.W. v. City of N.Y.*, 286 A.D.2d 243 (N.Y. App. Div. 2001); *John Doe v. Diamond Transp. Servs.*, 181 F.3d 86, 1999 WL 350513 (4th Cir. 1999). And, it seems to be conventional wisdom that doing a criminal background check is enough to preclude liability. But in reality, this demarcation in most jurisdictions is too simplistic. First, as demonstrated, the reliability of background checks is far from ironclad, leaving sole reliance on this practice open for challenge. Further confusing the issue, while some jurisdictions have held that a background check is sufficient to avoid liability for negligent hiring or at least create a presumption against such liability, others have held that even where a background check is done, it may not be enough if an applicant has a poor reputation or has been alleged to have committed, but not convicted of, past criminal conduct. *Compare Kelly v. Baker*, 198 Ga. App. 378 (1991), Fla. Stat. Ann. §768.096; *Jester v. Hill,* 161 Ga. App. 778 (1982); *Evan F. v. Hughson United Methodist Church*, 8 Cal. App. 4th 828 (1992). Further still, some courts have declined to adopt a bright-line rule regarding the necessity of background checks, instead looking to the industry standard or the specific job in determining whether the employer has a duty to conduct a background check. *Connes v. Molalla*, 831 P.2d 1316 (Col. 1992); *C.C. v. Roadrunner*, 823 F.Supp. 913 (D. Utah 1993). While all of the variables make it difficult, if not impossible, to know whether your company's evaluation of its employees is truly sufficient, it is important to understand that most negligent hiring claims, even where a background check has been done, turn on two issues: (1) the foreseeability of the

risk and (2) the degree of risk associated with the nature of the employment. Adrial Garcia, Temple Law Review, Vol. 85, *The Kobayashi Maru of Ex-Offender Employment: Rewriting the Rules and Thinking Outside Current "Ban the Box" Legislation*.

In regard to foreseeability of risk, the Illinois Court of Appeals found that "it is not essential that one should have foreseen the precise injury which resulted from the act or omission, [but rather] requires an employer to exercise… such care as a reasonably prudent person would exercise in view of the consequences that might reasonably be expected to result if an incompetent, careless, or reckless agent was employed for a particular duty." *Maloney v. B&L Motor Freight*, 496 N.E.2d 1086, 1088 (Ill. App. Ct. 1986). Generally, there are two tests courts have applied in evaluating foreseeability of risk, at least with respect to criminal backgrounds. Garcia, *supra*. In some cases, courts will look only to see whether the employee who committed the tortious act had prior similar incidents—was the individual's prior conviction similar to the tortious act in question? *See Stansfield v. Goodyear Tire*, 1999 WL 1419253, *1 (Va. Cir. Ct. 1999) (where the plaintiff was raped and sodomized by the defendant's employee, the court found that despite the employee's past convictions of three counts of robbery with a deadly weapon, three counts of the use of a handgun in the commission of a felony or crime of violence, and a drug conviction, "there [was] no fact pleaded that would demonstrate that [the employee] had a propensity, which should have been discovered by reasonable investigation, to engage in criminal sexual activity." Accordingly, the court dismissed the negligent hiring and retention claims against the defendant.) This standard appears straightforward and seemingly limits an employer's exposure by narrowing the type of crime they could be liable for under negligent hiring.

However, it is still ambiguous, making evaluation of criminal histories unpredictable, because there is no clear guidance as to what is considered "similar." For example, is a pizza delivery person's past DUI sufficiently "similar" to an automobile wreck caused by running a red light, such that his employer was negligent in hiring him, simply because both occurred behind the wheel of a car? Is a warehouse worker's armed robbery with a handgun sufficiently similar to attempted rape with a handgun, simply because both involved a gun? *See Stansfield, supra*. Therefore, some courts have gone beyond the "similar incidents" test, requiring a more in-depth analysis, evaluating not only the similarity of convictions, but also factoring in elapsed time, mitigating factors, and number of convictions, as well as the employer's diligence in the investigative process. *See Ponticas, supra* (finding that liability of an employer is not to be predicated solely on failure to investigate criminal history of an applicant, but rather, in the totality of the circumstances surrounding the hiring, whether the employer exercised reasonable care). Where this standard is applied, employers have a good bit more freedom to justify their hiring decision, but it will take a more thorough and nuanced evaluation of job candidates that may be more costly and time-consuming.

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Also factoring into whether an employer acted negligently in hiring an individual with a criminal background or conviction is the degree of risk associated with his or her job. To be clear, this is not the degree of risk to the *employee*, but rather refers to the susceptibility of third parties based upon the nature of the job. Relevant factors include: the type of work the employee is being hired to do, his or her position, and the amount of contact between that employee and the public, customers, and other employees. In particular, the degree of risk is heightened where the employees have contact with more vulnerable members of the public (children, disabled, elderly), where their job allows them to enter homes (repairmen, home alarm installer, maintenance at apartment complex, hotel employees, etc.), or affords them more a heightened level of trust (security guard). *See C.K. Sec. Sys. v. Hartford Accident & Indem. Co.*, 137 Ga. App. 159, 223 S.E.2d 453 (1976). Therefore, an employer must be wary that the scrutiny it applies to applicants for some positions will need to be different from others. Indeed, a warehouse worker's criminal history may be less significant than that of a delivery person. In addition, companies must be aware that for certain jobs and industries, the government has stepped in and made this decision for them. Florida, for example, has codified proscriptions against hiring employees with criminal convictions, including such private positions as mortgage brokers, nursing home employees, and fire and burglar alarm installers. *See* Fla. Stat. Ann. §§435.03, 435.04, 489.518, 494.00312; 58A-5.019 F.C.A.

In light of the high risk of liability and lack of clear guidance from courts as to what supports a negligent hiring cause of action, many companies have adopted a blanket policy refusing to hire anyone with a criminal background. In response, state and municipal legislatures have sought to institute "Ban the Box" legislation.

"Ban the Box" Legislation and Other Limits to the Use of Background Checks

Referring to the "box" on job applications requesting prospective employees to identify whether they have been convicted of a crime, "ban the box" is the term for a variety of legislation in state and local jurisdictions seeking to circumscribe the use of criminal convictions as the sole basis for denying employment. The prevalence of this legislation is on the uptick. As of August 2014, 13 states and approximately 70 cities and counties had passed some version of "ban the box" laws. As state legis-

latures begin to reconvene this year, more are likely to come. Roy Maurer, Society for Human Resource Management, *Ban the Box Movement Goes Viral*, August 22, 2014).

While a majority of "ban the box" legislation is only applicable to public employers, there is significant movement recently for the institution of this legislation for private employers, as well. Notably, both New Jersey and Illinois passed laws last year dictating when private employers with more than 15 employees can inquire about an applicant's criminal history or do a background check. Maurer, *supra*. Further, several large cities such as San Francisco, Washington D.C., Baltimore, Philadelphia, and Seattle also have their own ban the box legislation applicable to private employers. *Id.* Stopping short of legislation related to all convictions, many other states preclude inquiry or consideration of expunged or sealed convictions or require that a criminal conviction can only be inquired about or considered if it has a reasonable relation to the job. *See* Margaret Colgate Love, NACDL Restoration of Rights Project, *Chart #5 – Consideration of Criminal Record in Licensing and Employment*, November 2014. As recently as this fall, in a settlement with the New York Attorney General's Office, national retailer Party City agreed to pay $95,000, as well as meet other requirements related to its hiring process, as a result of its practice of disqualifying ex-offenders from employment. Jolene Almendarez, *Party City to "Ban the Box" during hiring process after Attorney General's investigation*, Syracuse.com, October 1, 2014.

While none of the legislation outright prevents private employers from ever running a background check or inquiring about criminal history, the legislation does prevent an employer from using it as an initial screening tool. The goal is to place ex-offenders on more even footing with other applicants. What this means for employers is that ex-offenders may no longer be out of sight, out of mind during the hiring process. It is imperative that employers are aware of the particular statutes and regulations applicable in their state, county, and city. In particular, they have to know not only when they can perform a criminal background check or inquire about an applicant's criminal history, but also whether it is permissible for the results of such inquiry to impact their hiring decision. What is clear is that there are almost innumerable potential permutations regarding whether criminal records (including both conviction and arrest records) can or cannot be considered, when in the hiring process such records can be considered, and for which jobs background checks must be done and which ones require the employer to identify a correlation between the job and need for a background check. Add to this the Fair Credit Reporting Act's requirements regarding consent and notification to the applicant when doing background checks, as well as similar state obligations, and the potential pitfalls become not only apparent but seemingly unavoidable.

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Moreover, even in states where "ban the box" legislation has not yet taken hold, an employer utilizing a blanket no-hire policy based on criminal convictions is susceptible to a claim of civil rights violations. In 1975, the Eighth Circuit found in *Green v. Missouri Pacific Railroad Co.* that a "sweeping disqualification for employment resting solely on past behavior can violate Title VII where the employment practice has a disproportionate racial impact and rests upon a tenuous or insubstantial basis." 523 F.2d 1290, 1296, aff'd 549 F.2d 1158 (8th Cir. 1977). Applying this disparate impact theory, an employer's absolute bar on hiring individuals with criminal records from employment, without a real tie to safety or job performance, could violate Title VII as excessively excluding groups like African-Americans who comprise a disproportionate number of the population with criminal backgrounds. While disparate impact claims such as this are difficult to prove and thus far have not been successful with respect to criminal background checks, presently there are two potentially significant suits in Washington, D.C., and New York that could change the landscape. *Little v. Washington Metro Area Transit Auth.*, 1:14-cv-01289 (D.D.C.); *Houser v. Pritzker*, 1:10-cv-03105-FM (S.D.N.Y.)

In *Little*, African-American individuals with criminal records in Washington, D.C., are seeking class certification alleging violations of their civil rights under Title VII. Specifically, the plaintiffs are contending that the Washington Metro Transit Authority's criminal background screening disproportionately impacted the members of the proposed class leaving them unable to obtain employment they were qualified for, terminated from employment even though competence was demonstrated, unable to apply for promotions for fear of being terminated, and unable to take leave due to the fear that they would not be permitted to return to work. Further, in *Houser*, a federal court in New York has already certified a class including African-Americans and Latinos based on the criminal background check the U.S. Census Bureau obtained for its nearly one million temporary workers hired for the 2010 Census. Specifically, the lawsuit alleges that the Census Bureau's criminal background screening erected unreasonable, and largely insurmountable, hurdles for applicants with arrest records, regardless of whether the arrests were decades old, for minor charges, or led to criminal convictions.

What all of this means for employers is that navigating the hiring process is truly a minefield, particularly where a company does business in multiple jurisdictions and consists of employees in different professions with varying access to customers and other employees.

Navigating the Minefield

With the risk of negligent hiring liability on one side and legislation, discrimination

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suits, and the unreliability of backgrounds checks on the other, employers would seem to be stuck between a rock and a hard place. However, there are some statutory protections that employers may be able to rely on. First, as mentioned, state law may require background checks or criminal background exclusions in some professions or jobs, creating a "safe harbor" from ban the box legislation and likely discrimination suits. Additionally, some states have also created protections and barriers to negligent hiring liability. In particular, several states provide for certifications available to ex-offenders that indicate their recovery and rehabilitation from their criminal past. *See* New Jersey, N.J.S.A 2A:168A-7; California, Cal. Penal Code 4852; Rhode Island, R.I. Gen. Laws §13-8.2-1. While these certifications benefit the ex-offenders as they search for a job and reintegrate into society, several states such as Illinois, North Carolina, and Ohio have also provided for tort immunity for their employers, where such certifications are obtained. *See* 730 ILCS 5/5-5.5-15; N.C.G.S.A. §15A.173.5; Ohio R.C. §2953.25(G)(2). Further, even where immunity is not express, such certifications may create a presumption of non-negligence by the employer or at least can be utilized as evidence to rebut negligent hiring claims.

With the various competing interests and numerous opportunities for pitfalls, creating, implementing, and executing a hiring process that accounts for all these concerns can be a treacherous task. Therefore, an employer must be aware of what the applicable laws are in their states and cities of operation with regard to background checks and criminal history inquiries. In addition, the employer should keep abreast of industry practices with respect to criminal background screenings, as well as the relevant negligent hiring standards in their jurisdictions. What this will undoubtedly yield for most employers is a requirement for clear, well-thought-out, and specific processes and policies for considering and hiring individuals with criminal backgrounds, coupled with regular and thorough training for those implementing the process on a day-to-day basis. Ignorance is not bliss; knowledge and action are the only ways to navigate the minefield.