EMPLOYER Gardian

EMPLOYMENT PRACTICES RISK REDUCTION STRATEGIES

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What You Don't Know *Can* Hurt You!

The Importance of Employee Background Checks

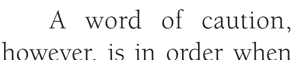
A CPA firm's greatest asset is its employees. Unfortunately, employees can also be a firm's greatest liability if some simple steps are not taken during the hiring process. Job applicants sometimes falsify such things as social security numbers, criminal records, length of previous employment, job titles, responsibilities, degrees, schools attended, licenses, or past salaries in order to increase their chances of securing a position. Bad hires can result in costly lawsuits and poor office morale. Ensuring the safety and security of your employees and customers, and protecting your firm's assets and reputation are the main reasons for conducting pre-employment background checks. Employers need to exercise due diligence in hiring to prevent both liability claims and wrongful termination claims. A few dollars spent up front could save the firm plenty in terms of a bad hire or a wrongful termination lawsuit.

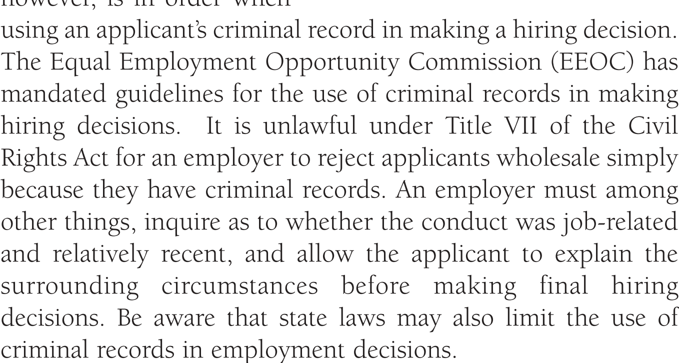
What Records Should Be Checked?

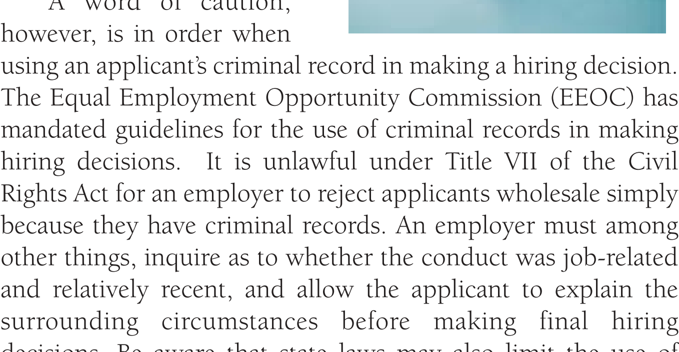
Employers may assume unwanted liability risk if they do not conduct employee background checks. Employee violence is on the rise and in most states employers have a legal duty of reasonable care when hiring employees. You need to know who you are hiring before you put clients and employees at risk of personal injury. If your employee physically injures a client or coworker, you can be subject to a lawsuit charging negligent hiring or negligent retention. This type of claim can be difficult to defend if the employee had a history of violent behavior. A criminal background check could help prevent and defend against these types of claims.

Unfortunately, employers also take on liability risk if they conduct employee background checks improperly or use the information in a discriminatory fashion. Therefore, once you decide that your firm will conduct pre-employment background checks you must develop a sound written policy and apply it consistently and uniformly within job classifications. Investigate everyone, not just suspicious applicants or hires. Inconsistency can be viewed as discrimination and result in lawsuits.

As a potential employer you can review criminal records, credit history, motor vehicle reports, and references. You can also verify employment history, education, and professional licenses. So how much checking should you do? Determine what is reasonable to verify based upon the position. While all employees should be screened for violence via a criminal background check, CPAs should also be screened for dishonesty since they handle financial and other sensitive information and have contact with the public. At a minimum, you should verify previous employment, degrees and licenses indicated on applications and resumes. If applicants are not honest on these documents, they may not be honest in their dealings with your clients.







A word of caution, however, is in order when using an applicant's criminal record in making a hiring decision. The Equal Employment Opportunity Commission (EEOC) has mandated guidelines for the use of criminal records in making hiring decisions. It is unlawful under Title VII of the Civil Rights Act for an employer to reject applicants wholesale simply because they have criminal records. An employer must among other things, inquire as to whether the conduct was job-related and relatively recent, and allow the applicant to explain the surrounding circumstances before making final hiring decisions. Be aware that state laws may also limit the use of criminal records in employment decisions.

Who Should Do the Checking?

You can do the background check yourself or use a company that specializes in this type of work. However, if a third party conducts the checks, the notice and consent requirements of the Fair Credit Reporting Act (FCRA) apply. The FCRA is a federal statute that gives job applicants substantial legal rights regarding the screening process so that

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they can challenge the accuracy of any information used in making hiring decisions. The FCRA requires the employer to disclose to applicants that consumer reports may be used for employment purposes and to notify individuals promptly if information in a consumer report may result in a negative employment decision. Under the FCRA, a consumer reporting agency cannot release a report to an employer without the applicant's consent. For more information on employer compliance with the FCRA, visit the Federal Trade Commission's web site at http://www.ftc.gov/bcp/conline/pubs/buspubs/credempl.htm.

The FCRA requires a signed release if a third party conducts the background check, so your firm's employment application should contain a separate disclosure and release form. Although the FCRA does not require a signed release if the search is conducted in-house, it is still a good idea to obtain the applicant's authorization.

If you decide to leave pre-employment screening to the professionals, there are many local and national background check companies to choose from. They can be found in your local telephone directory under "Investigators" and through the Internet using search terms such as "pre-employment screening" and "background checks." Make sure the third party vendor you select is compliant with all federal and state laws governing employment background checks and have an attorney familiar with the FCRA review your service agreement. The cost for these services typically ranges between $50-$200 depending on the depth of the search requested.

If you choose to verify employment application and résumé information yourself, be sure to keep written documentation including the name of the person you spoke to, dates, the questions you asked and the responses given. However, don't be surprised to find that many former employers will refuse to comment on your prospective hire's previous job performance due to concerns over legal liabilities. Many will only provide basic information such as dates of employment and salary information.

While there are risks associated with not doing background checks on all job applicants, there are also risks associated with misusing background information in making hiring decisions. For more information on pre-employment screening contact an attorney who specializes in employment law and is familiar with the laws in your state.

Policies to Minimize Exposure to Negligent Employment Claims

- Develop an effective employment application form based on negligent employment concerns. Require the listing of every employer and supervisor for the past seven or ten years and an explanation regarding any periods of unemployment. Review the employment application, specifically looking for gaps in the applicant's employment record and other unusual entries or omissions.
- Obtain the applicant's written authorization to gather information from all former employers, educational institutions and personal references. Indemnification of prior employers and the prospective employer for liability arising out of such inquires should also be included in the authorization.
- Contact each prior employer and each supervisor listed on the application. If the information provided by the applicant is insufficient, obtain further information, such as forwarding addresses. If a former employer is reluctant to give a reference, be sure to at least document that you have contacted the reference and attempted to get the necessary background information regarding the applicant.
- Contact each personal reference listed on the application. Document all information received from personal references.
- Ask all former employers and personal references whether there is a reason for them to doubt the applicant's competency, honesty, trustworthiness or reliability. Also, ask whether they are aware of anything in the applicant's background that would affect their suitability for your employment, including whether the applicant has engaged in any violent, criminal, or improper conduct in the past.
- Check the driver's license and driving record of any applicant who, if hired, will be required to drive in the course of their employment.
- Verify educational degrees and professional licenses.
- Conduct reference checks on employees referred by employment agencies and on temporary employees.
- Do not offer any applicant employment until the pre-employment screening process has been completed.

Source: Ford & Harrison LLP

Help is Just A Telephone Call Away

For immediate legal advice on employment law and practice management issues such as pre-employment screening, office dating policies, and The Americans with Disabilities Act call 800-569-3679. As a CPA EmployerGard policyholder, your firm is entitled to 30 minutes of legal advice per month, without charge, from experienced attorneys at the national employment and labor law firm of Ford & Harrison LLP. Please have your CPA EmployerGard policy number handy.

The Perils of Office Romance

Since we spend so many hours of our waking lives in the workplace, it is inevitable that an occasional office romance will result. However, with so many sexual harassment lawsuits making the headlines, the thought of coworkers dating can make firm management more than a little nervous. Happily, studies show that nearly half of all office romances lead to a long-term commitment or marriage. However, this leaves a large number of relationships that may end less than amicably and could result in sexual harassment allegations. Furthermore, some would argue that office romances can also lead to decreased productivity, lowering the morale of coworkers due to real or perceived favoritism, and strained post-break-up relationships. The risk of employer liability for workplace romances is real. So, should your firm institute a no-dating policy?

Failed Romances Can Lead to Sexual Harassment Allegations

There are basically two types of sexual harassment discrimination, a form of gender discrimination, which can take place in the workplace. *Quid pro quo* harassment occurs when an employee's position, advancement, or salary is made contingent upon agreeing to unwelcome sexual advances. A supervisor or other employee in a position of power usually commits such harassment against the complaining employee.

The other form of workplace discrimination is called hostile work environment harassment. This occurs when coworkers make unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature that unreasonably interferes with work performance or creates an intimidating, hostile or offensive work environment. Hostile work environment harassment includes unwanted flirtations, persistent requests for dates, repeated unwanted compliments about appearance and dress as well as sexual advances. This form of harassment can occur between supervisors and subordinates as well as between coworkers.

For an employer, perhaps the most dangerous form of workplace sexual harassment is the ***quid pro quo*** variety. That's because the Supreme Court ruled in 1998 that an employer may be held strictly liable for a supervisor's harassment even if the employer was not aware of the harassment. A consensual relationship between a supervisor and a subordinate does not constitute sexual harassment *per se;* however, if the relationship ends badly, the subordinate may recall the circumstances surrounding the failed relationship differently and wish to seek revenge and/or money. At that point, the employer has the burden of proving that the relationship was consensual and not coerced. Proving what the employee's state of mind was during the relationship can be difficult, if not impossible. This relatively recent development in the law makes it even more imperative that employers take proactive steps to prevent sexual harassment in the workplace.

Balance Business Interests with Employee Privacy Interests

While gender discrimination is illegal, it is still legal to ask a coworker on a date. There are no federal or state laws that prohibit employee dating, and there are also no laws preventing employers from forbidding employee dating. Which brings us back to the question, should management interfere in the personal lives of dating employees? Very few companies have official policies in place regarding employee dating; however, employers do have some options when it comes to regulating romantic workplace relationships.

The most stringent approach to regulating coworker relationships is to adopt a strict non-fraternization policy where the firm terminates any employees who become romantically involved. A modified version of this option would be to terminate only supervisors or managers who date subordinates and take no action against non-management employees. Another option would be to restructure the working relationship between romantically involved

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A valuable risk management tool available to insureds as part of the CPA EmployerGard Program is access to Aon Track. This web-based human resources risk management tool is a master database containing "best practices" tools, information on claims exposure and state-of-the-art employee training programs. Features of Aon Track include:

- **Experts' Forum™ Articles**
- **Weekly Training Bulletins**
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- **Model Forms**
- **Workplace Links**

At initial policy inception, CPA EmployerGard insured firms will receive a letter detailing benefits and features of Aon Track. A customer service representative will contact your firm by phone to provide access instructions and answer your questions. For immediate access, call (800) 205-5262 and ask to be connected with your Aon Track account manager. Be sure to identify yourself as an Aon insured.

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superiors and subordinates. The least stringent approach would be a policy that strongly discourages rather than forbids romantic or sexual involvement between employees.

Another option some companies are using is the "Love Contract." Under this policy, when two employees enter into a romantic relationship, they are required to sign a contract stating that the relationship is consensual and that they agree to abide by the firm's sexual harassment policy and some other guidelines. The goal of this method is to discourage the dating employees from making a sexual harassment claim should the romantic relationship sour. However, the validity of these contracts has not been tested by the courts so questions remain about their enforceability.

This is a difficult issue because office romances are a fact of life and will happen regardless of the rules. The downside to all of these policies is the negative impact they could have on the hiring and retention of good employees. You must be the judge as to which approach is best for your firm. If you adopt a policy that completely bans dating, people are likely to date anyway and just not tell anyone. Also, be aware that wrongful termination claims could result from all of these approaches so be sure to consult with an employment law attorney prior to implementing a policy.

Implement Policies and Training Programs

The grim reality is that a successful sexual harassment claim, like other forms of litigation, has the potential to bankrupt a firm. Therefore, firms must balance their legitimate business interests with respecting the privacy of their employees. A firm that publishes a sexual harassment policy, conducts regular sexual harassment training, and adopts some form of dating policy goes a long way in providing an affirmative defense to vicarious liability for supervisor harassment. Rather than relying solely on employees to use their common sense, it is wise for firm management to hold regular training on sexual harassment for both managers and employees. The pitfalls of office romances should be addressed and managers should be trained on how to manage workplace romances. Perhaps most importantly, treat employees professionally and with respect when implementing your sexual harassment prevention program.

Facts About the Americans With Disabilities Act (ADA)

- It is unlawful to discriminate in employment against a qualified individual with a disability.
- The ADA applies to all employers with 15 or more employees.
- The ADA does not interfere with your right to hire the best qualified applicant nor does it impose any affirmative action obligations. It simply prohibits you from discriminating against a qualified individual because of his or her disability.
- Under the ADA, a person has a disability if he has a physical or mental impairment that substantially limits a major life activity such as hearing, seeing, speaking, breathing, performing manual tasks, walking, caring for oneself, learning or working.
- An individual with a disability must also be qualified to perform the essential functions of the job with or without reasonable accommodation. This means that he or she must satisfy your job requirements for educational background, employment experience, skills, and licenses.
- It is a violation of the ADA to fail to provide a reasonable accommodation to the known physical or mental limitations of a qualified individual with a disability, unless to do so would impose an undue hardship (significant difficulty or expense) on the operation of your business.
- Examples of reasonable accommodations include acquiring or modifying equipment or devices, job restructuring, part-time or modified work schedules, adjusting or modifying examinations, training materials or policies, providing readers and interpreters, and making a workplace readily accessible to and usable by people with disabilities.
- It is unlawful to ask an applicant whether he is disabled or about the nature or severity of a disability, or to require the applicant to take a medical examination before making a job offer. You can ask an applicant questions about their ability to perform job-related functions, as long as the questions are not phrased in terms of disability.
- After a job offer is made you may require that an applicant take a medical examination if everyone who will be working in the job category must also take an examination. You may condition the job offer on the results of the medical examination.
- The ADA prohibits an employer from retaliating against an applicant or employee for asserting his or her rights under the ADA.

Source: The Equal Opportunity Employment commission

These articles are of a general nature and are not intended as specific legal advice. Readers should consult with a lawyer if they have specific concerns. Neither The EmployerGardian, Aon Insurance Services, nor Virginia Surety Company, Inc. assume any liability for how this information is applied in practice or for the accuracy of this information.

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