

Minimizing Some of the Risks Involved in Background Screening

You believe in background screening. You are confident it is a necessary part of a comprehensive best practices-based risk management program. And, you can be quite certain about what will happen if you don't conduct background screening on your employees and a wrongdoer infiltrates your workplace—you will have attorneys (and perhaps even the clients) asking: "Did you do a background check?" And, everyone wants to avoid being in *that* position. But, isn't background screening the best way to minimize potential trouble from your pool of job candidates?

Background screening is not a panacea for eliminating wrongdoers from your workplace. In fact, there are many liars, cheaters, and thieves who have no criminal record at all. But, background checks provide you with a reasonable chance of catching those *with* criminal records. And by conducting background screening, you send a strong message to potential applicants—which may help prevent some wrongdoers from applying.

But, what about the day-to-day risks you face when you probe into a person's past? These are the issues that make background screening a frightening proposition. These are the issues you don't read about in the newspaper, but that jeopardize your organization if you do something incorrectly.

So, is there more to the best practice advice on background checks other than: Just do them?

You bet there is. Much more.

Here are a few of the best practices procedures you should follow:

1. First, you should have a clear and established policy that before any person is considered a candidate for employment, he or she must sign a standardized application and a separate and distinct acknowledgement form stating that a background check may be conducted. If you don't have an acknowledgement form giving notice to

conduct a background check, you will run afoul of federal and state laws, as well as other laws protecting consumer privacy.

2. Second, you should have your proposed acknowledgement form reviewed by legal counsel in the jurisdictions where you are conducting the screening. Not all state and local laws are the same.
3. Meanwhile, you should realize that some government regulators are suspicious of background screening. In fact, some regulators are downright hostile toward background screening—even in this age of concern about financial irregularities and potential terrorism. They argue that background checks—credit checks and criminal background checks in particular—keep certain minorities from having equal access to employment.



The Equal Employment Opportunity Commission (EEOC) frowns on almost anything, other than job qualifications, that might filter minority applicants from a job. A criminal background check is one such filter. The EEOC points to statistics showing that minorities are more likely to have a criminal record or bad credit; therefore, indiscriminate use of background checks is discriminatory and violates this country's civil rights laws.

So, you thought you were doing a good thing, but now you discover that you are balancing two diametrically opposing needs. One is your need to conduct background screening to shield your workplace from white-collar criminals and even violent offenders. The other is your need to stay within

(continued on next page)

The AICPA Professional and Personal Liability Insurance Programs Committee objective is to assure the availability of quality insurance products at reasonable rates for local firms and to assist them in controlling risk through education. For information about the AICPA program, call your Regional Representative or the national administrator, Aon Insurance Services, at 800-221-3023, write Aon at Aon Insurance Services, 159 East County Line Road, Hatboro, PA 19040-1218, or visit the AICPA Insurance Programs Web Site at www.cpai.com.

(continued from cover)

the framework of the law—specifically, within the framework of laws prohibiting discrimination—laws that question the potentially discriminatory ramifications of background checks. What should you do?

The best practice answer—the third step—is rather simple. You should not conduct checks on all job applicants and you should only filter out those people who threaten what you hope to protect. In other words, to prevent fraud, you should develop policies and procedures on background checks that require only those persons that work with money or financial records to be checked—and checked *only* for those criminal activities that threaten the integrity of your financial transactions, record-keeping, and reporting. By creating a narrow scope for background checks you limit potential claims of discrimination.

The problem is real-life application. For example, what should you do if a background check uncovers that an applicant for a financial auditor's position has a drug possession conviction that occurred nine years ago when the applicant was a college student. On the one hand, do you want a person who has used drugs conducting audits on behalf of your organization and your clients? On the other hand, drug possession nine years ago—when the person was a college student—creates a far different context for an auditor than a conviction for theft, or embezzlement, or perjury. This is the type of situation where you'll want to work with an attorney or other expert to help you work through this issue.

4. Finally, a best practices program always calls for confidentiality and for protocols for effective disclosure of information. A person's background is private. You should establish protocols with your background screening service provider that keep the information as confidential as possible. You should also create a protocol for a considerate and respectful means of letting an applicant know that he or she is disqualified, and a means for an applicant to appeal the disqualification—if he or she should desire to do so.

It is sometimes difficult to abide by best practices. Conducting background checks is no exception. But if you use common sense, follow the golden rule, and have good advisors that do the same, you usually can come up with the right solution to most best practices problems.

You will find additional information on this and many other important risk management topics on Aon Track. For example, you can access a helpful article entitled "What Employers Need to Know about Resume Fraud" in the Experts' Forum section of "My Library" at: <http://www.aontrack.com>.

Samples of professional employment applications appropriate for CPAs are available to CPA EmployerGard® policyholders. Contact your AICPA Program Regional Representative or Aon Insurance Services, the National Program Administrator, at (800) 221-3023 for these samples.

Department of Labor Develops Interactive Web Site



The Department of Labor (DOL) has developed an interactive web site that provides employers with information on a variety of topics that the agency regulates. The site is located at <http://www.dol.gov/elaws/>. The site contains interactive advisors that help employers and employees understand their rights and responsibilities under the employment laws and regulations administered by the DOL such as the Family and Medical Leave Act and the Uniformed Services Employment and Reemployment Rights Act. Each advisor simulates the interaction a user might have with a DOL employment law expert by asking questions and providing answers based on the user's responses.

Help is Just A Telephone Call Away



For immediate legal advice on employment law and practice management issues such as national origin discrimination, employee complaint procedures, and employee evaluations call **800-569-3679**. As a CPA EmployerGard policyholder, your firm is entitled to 30 minutes of legal advice per month, at no additional charge, from experienced attorneys at the national employment and labor law firm of Ford & Harrison LLP. Please have your CPA EmployerGard policy number handy.

Recognizing the Need for an Investigation

Workplace investigations are much more than just “a good idea.” Often the law—and the courts interpreting it—effectively require employers to undertake prompt, thorough, and objective investigations to meet their legal obligations.

Any employer that either *knows* or *should know* about an allegation of discrimination, harassment, or an unsafe situation is required to take prompt and effective remedial action. And, an investigation is key to determining the appropriate action to take. When an employee brings a claim that is not on its face unsustainable, an employer that fails to investigate the allegations of wrongdoing generally loses.

When is an investigation required?

Alleged violations of the more significant laws and legal circumstances that either require or imply an employer’s duty to investigate are:

- Job discrimination laws—these include Title VII of the Civil Rights Act of 1964 (which prohibits discrimination and harassment on the basis of gender, race, and other protected categories), as well as the Americans with Disabilities Act (ADA) and the Age Discrimination in Employment Act (ADEA).
- Health and safety laws—such as the Occupational Safety and Health Act of 1970 (OSHA) and related regulations.
- Drug-free workplace laws—including the federal Drug-Free Workplace Act of 1988, many state and local laws, as well as regulations issued by the U.S. Department of Transportation and other agencies.
- Background screening—as part of your hiring process, and in order to minimize the likelihood of liability for negligent hiring, employers should investigate employees’ backgrounds, subject to the limitations of the Fair Credit Reporting Act (FCRA) and other relevant laws.
- Fraud laws—including the familiar Sarbanes-Oxley Act of 2002, which was recently enacted to combat corporate misconduct.
- State tort laws—which cover a wide range of allegations of wrongful conduct, such as defamation, invasion of privacy, and infliction of emotional distress.

Commonly overlooked investigation triggers

It is easy to recognize the need for an investigation when someone directly reports an allegation of wrongdoing to you. However, managers and supervisors often overlook some less obvious triggers that may also indicate the need for an investigation.

And, while best practices can help prevent wrongdoing, one easily neglected best practice is observation. A successful investigation relies upon keen observation to help prevent important events and facts from being missed. Heightened observation begins with you. Some of these commonly overlooked triggers are:

- A communication by someone who insists the report of wrongdoing is being made to you only “as a friend” or as some other type of confidante and not in your official capacity within the organization. Anytime someone wants to limit your authority or reaction to what they tell you, it is a subtle, but important, warning sign. And, an investigation is probably in order.
- A seemingly benign comment that could indicate a more serious problem. For example, you might overhear a conversation where it is being described that a particular employee has been “pulling a co-worker’s leg.” This type of reference to being

“teased” may escape proper scrutiny because the more alarming word, “harassment,” wasn’t used. And, while you may discover that only good-natured and acceptable “teasing” was occurring, your duty is to be aware of—and to address—any potential problems.

- A “bogus claim,” such as a report of wrongdoing that is not likely to occur again or perhaps involves conduct that you believe could not have happened or should not be believed. There really is no such thing as a bogus claim *unless* and *until* a completed investigation reveals that there is no credible evidence to support the claim. Your subjective belief about a report of wrongdoing must not be allowed to disrupt your best practices response. A prudent manager or supervisor will initiate an appropriate investigation of even the most *seemingly flimsy* of claims.
- Claims or even comments from non-employee participants in your workplace. Be aware of and observe everyone who interacts with your employees. This includes customers, vendors, contractors, board members, visitors, and others—anyone who interacts with your workplace.

In addition to being aware of all important events and facts, it is also important for managers and supervisors to observe and note any possible bad-faith motives for reports of wrongdoing, such as:

- A personality conflict gone awry.
- Revenge for a perceived personal slight or rejection.
- Revenge for a management decision regarding employment status.
- Inconsistent treatment—actual or perceived—in terms of compensation, benefits, or other matters.

Possible bad-faith motives should be reported along with the allegations of wrongdoing, so an investigation can attempt to reveal the facts surrounding such issues. It is important that the investigation is conducted in a confidential manner.

Observation goes a long way toward minimizing wrongdoing, but remember that observation, alone, will not prevent wrongdoing. A comprehensive prevention program includes *all* of the Five Core Principles of Smart Risk Management®: (1) Zero tolerance for wrongdoing, (2) Observation, (3) Communication, (4) Empathy, and (5) Fairness. For a manager or supervisor, however, careful and objective observation is the critical first step toward initiating an investigation in your workplace.

When workplace wrongdoing is alleged, the initial investigation often sets the tone for the ultimate outcome. Make sure your organization protects itself by making managers and supervisors aware of both the common and commonly overlooked investigation triggers ... and by conducting prompt, thorough, and objective investigations.

CPA EmployerGard policyholders can find additional information on this and many other important risk management topics on Aon Track. For example, you can access a helpful training bulletin entitled “Investigation and Documentation: Necessary for All Allegations of Misconduct” in the “My Training” section at: <http://www.aontrack.com>.



Reference Checks may be Your Best Defense to Lawsuits ... and to Loss

Litigation is an expensive, unpleasant reality these days. Naturally, when faced with a lawsuit, a firm expends a significant amount of time trying to establish a legal defense and avoid a costly verdict. This lost time impacts revenue generation and other indirect costs of litigation including loss of business and client focus.

However, the best defense is readily available and inexpensive. And, it provides a defense not just to a lawsuit, but also in order to prevent wrongdoing in the first place. Indeed, every firm has an obligation to protect its staff – and, at least to a certain extent, members of the public at large – from wrongdoing and harm.

When managing people, your best defense truly is the reference check. Among the many steps you must take when hiring an employee, enlisting a volunteer, or even retaining an outside vendor or other independent party, the reference check is unique in its ability to allow you to defend against a wide range of risks.

Your first line of defense

Again, the reference check is only one of several important steps that you must take. For example, background screening is essential. As the companion article, *Minimizing Some of the Risks Involved in Background Screening* in this issue of *EmployerGardian* makes clear, background checks are a necessary part of any comprehensive best practices-based risk management program for the workplace.

Additionally, your own internal process is critical as well. This essentially includes all stages of staff management; the initial application, all stages of the interview process, new employee orientation, continued staff and management training and even ongoing supervision as time passes.

But when you check references, you have the opportunity to obtain information not directly provided by the applicant while you maintain a high degree of control over the information-gathering process. At its most basic level, a reference check is a professional investigation that, when done properly, can provide you with invaluable information to protect your firm and your community from wrongdoing and, more

importantly, from wrongdoers. As such, it can form your first line of defense to loss and liability.

Benefits far outweigh the costs

There is relatively little economic cost to the reference-checking process – regardless of whether it is done in-house or by an outside vendor. And this is especially true in comparison to the injuries and other losses that tend to arise when you do not effectively check references. Even so, many organizations neglect to check references, typically because they lack the time, fail to appreciate the benefits of the process, or simply have not been able to develop their own programs.

Ironically, doing proper reference checks actually saves time in many ways. For example, even a few minutes of investigation will help you find the right person for a job, thereby increasing productivity and decreasing turnover. Additionally, those few minutes of prevention can help you avoid hours and hours – literally years of misery – dealing with the effects of wrongdoing. And a reference check today might well keep you out of court tomorrow.

Of course, no reference check is a panacea. There are some practical limitations that your firm must be prepared to face. Most obvious, applicants tend to provide references that they believe will be favorable or at least relatively so, given the applicant's particular background. On occasion, you may even receive a fraudulent reference. However, since a proper reference check is essentially a professional investigation, your firm can effectively deal with these challenges, especially in conjunction with the rest of your hiring/retention process. In particular, an oral reference check is an excellent tool for a skilled investigator to address these concerns.

Rather than looking at reference checks simply as a “defense,” perhaps it is more accurate to consider them your best protection – protection against wrongdoing and injury, against loss of productivity and, in the long run, against litigation and liability. And, even if all else fails, you and your firm will be in a much better position as a result of a professional process. Put simply, reference checking is a best practice – in fact, in most cases, it is the best practice.

You will find additional information on this and many other important risk management topics on Aon Track. For example, you can access a helpful article entitled “Hiring Practices: Your Job Application,” which discusses reference checks and other sound hiring practices, in the *Experts’ Forum* section of “My Library” at: <http://www.aontrack.com>.

AON TRACK

UNLIMITED ACCESS 24 HOURS A DAY, SEVEN DAYS A WEEK

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
- Best Practices Knowledge Base
- Workplace Self-Assessments
- 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.

AVAILABLE EXCLUSIVELY TO CPA EMPLOYERGARD POLICYHOLDERS

Aon Insurance Services is a division of Affinity Insurance Services, Inc.: in CA, MN & OK, (CA License #0795465) Aon Insurance Services is a division of AIS Affinity Insurance Agency, Inc.; and in NH & NY is a Division of AIS Affinity Insurance Agency.

These articles should not be construed as legal advice or a legal opinion on any factual situation. As legal advice must be tailored to the specific circumstance of each case, the general information provided herein is not intended to substitute for the advice of professional counsel. CNA does not make any representations, endorsements, or assurances about information contained on the web site referred to herein or the accuracy of any information contained on such site. The views, statements and materials contained on this web site are solely those of the owner of the site.

The statements, analysis and opinions set forth in these articles are solely those of the author and do not reflect the statements, opinions or analysis of any third party, including CNA or any of its subsidiary or affiliated companies. Continental Casualty Company, one of the CNA insurance companies, is the underwriter of the AICPA Professional Liability Insurance Program.

CNA is a service mark and trade name registered with the U.S. Patent and Trademark Office.

Copyright © 2004, Continental Casualty Company. All rights reserved.