



Background Screening – Past, Present and Future

History of the Screening Industry The Advent of Negligent Hiring

The rise in the screening industry, and particularly the use of criminal background checks to pre-screen job candidates, tenants, vendors and volunteers, stems in large part from the growth of claims alleging that an employer, organization or association can be negligent for hiring or retaining an individual who subsequently engages in violence. The advent of the theory of negligent hiring (and negligent retention) greatly increased an organization's exposure for large damage awards, making the use of background checks not only a means to prevent violence, but also a defense to liability should violence occur.

The tort claim of negligent hiring first appeared nearly a century ago, as an outgrowth of the common law fellow servant rule.¹ The fellow servant rule originally shielded an employer from liability when an employee was injured by the negligence or intentional acts of another employee. Eventually, the expansion of tort law led to a redefinition of the fellow servant rule to recognize that employers had an affirmative duty to provide a safe workplace, which included hiring and retaining safe employees.²

Through the years, various state courts slowly expanded the tort of negligent hiring to cover a broader range of situations where the acts of an employee caused injury.³ However, negligent hiring claims did not really become prevalent as a cause of action in cases of workplace violence until the late 1970s. Prior to that, the various legal theories under which an employer usually was sued for injuries caused by the acts of its employees all had limitations on recovery or scope.

A major limitation to early theories of recovery against employers for acts by employees was that the employee had to be acting within the scope of his or her employment. Increasingly, employers could be held liable for the conduct of an employee if the injury occurred within the scope of the employee's employment. Thus, intentional acts of violence were usually excluded. Furthermore, the "scope of employment" requirement generally prohibits an employee from recovering under his or her state's workers' compensation statute for intentional injuries perpetrated by a co-worker. Because the doctrine of negligent hiring does not require that the injury occur within the scope of employment, both third parties and other employees may bring this cause of action against employers when they are injured by

¹ Ballard's Administratrix v. Louisville & Nashville RR Co., 110 S.W. 296 (1908)

² Mark Minuti, Employer Liability Under the Doctrine of Negligent Hiring: Suggested Methods for Avoiding the Hiring of Dangerous Employees, 13 Del.J.Corp.L. 501 (1988)

³ Missouri, Kansas & Texas Railway Co. of Texas v. Day, 136 S.W. 435 (1911) (expanding the tort of negligent hiring to acts outside the scope of the employee's employment); Priest v. F.W. Woolworth Five & Ten Cent Store, 62 S.W.2d 926 (1933) (allowing a claim of negligent hiring to be brought by a third party injured by an employee).

either the negligent or intentional acts of an employee. An employer may be found liable if it is shown to have breached its duty of care in selecting and retaining only competent and safe employees.⁴ In a recent example, a Colorado jury awarded damages of \$210,000 in a sexual assault case where the jury found that the employer would have learned of the employee's prior child molestation conviction if it had conducted a thorough reference check. These and related cases have spurred great interest in making informed hiring and retention decisions based on thorough background screening.

The background screening industry serves several critical functions, including:

- √ Protecting the rights of consumers;
- √ Helping employers comply with hiring standards set by state and federal law;
- √ Helping public and private employers avoid legal exposure for negligent hiring;
- √ Helping ensure a safe workplace and avoid the nightmares associated with workplace violence, theft, hiring based upon fraudulent credentials, or hiring terrorists;
- √ Playing a critical part in the homeland security effort and working on behalf of the American economy;
- √ Helping improve both the profitability and productivity of American business by helping employers make better hiring decisions, and lowering the high cost of turnover.

What is a Background Check?

A background “investigation” or “check” is, in very broad terms, an inquiry into an individual’s character, general reputation, personal characteristics, and/or mode of living. It may be as simple as a criminal history search or, for persons in more sensitive, high-level positions, or persons dealing with vulnerable populations, it may involve not only a check of criminal records, but also a thorough investigation of civil records, asset and bankruptcy records, credit reports, and driving records. Background checks also usually include the verification of professional licenses held, educational achievements, employment history, and information provided by personal and professional references. Finally, background checks may also include drug testing, a physical, and even psychological evaluations or assessments. Searches normally involve looking back seven years.

Why Conduct Background Checks?

The need to hire the most qualified candidate, and the inherent risk in hiring the wrong candidate, has never been greater. Workplace crime, unethical business practices, and misleading résumés are on the rise. The costs of fraud, embezzlement, theft and violence are a multi-billion dollar drain on our economy, bleeding organizations both large and small. Furthermore, negative publicity associated with negligent hiring—especially as the result of a less than thorough background check—can devastate the

⁴ Fleming v. Bronfin, 80 A.2d 915 (Mun.Ct.App. D.C. 1951)

very foundation of a trusted organization. Organizations owe it to themselves and to everyone with whom they come into contact to know everything they can about their employees and volunteers, and the most effective method to accomplish this is by conducting thorough background checks.

Background checks are being used today to not only screen prospective employees and volunteers, but also to screen prospective business partners, political candidates, board members, trial witnesses, community leaders, sporting coaches and jurors. Additionally, the press frequently uses background checks for its news stories. Background checks are also an integral part of criminal, civil, or financial investigations.

Background checking has exploded in the workplace over the last 10 years. Some of the most compelling reasons organizations now conduct background checks:

- √ Making background checking a part of an organization's culture can not only enhance its effectiveness (e.g., through greater productivity and retention), but also its reputation.
- √ Background checking can supplant an organization's loss prevention efforts by helping provide a safer environment for employees, volunteers, and others.
- √ The most common reason among employers for not conducting background checks is cost. However, the cost of background checks represents a fraction of the cost of: terminating an individual; re-recruiting, re-hiring, and re-training his or her replacement; and defending a lawsuit brought by a victim of a dishonest or violent individual's actions (which can range in the multi-millions of dollars). Additionally, background checks may uncover a history of fraud or theft, and many organizations—especially retail companies—experience very high levels of employee theft. A study by the University of Florida⁵ reports that employee theft accounts for as much as 48% of a retail company's shrinkage, which can amount to nearly 2% of annual revenues. The cost of conducting background checks is a fraction of the amount lost to employee theft. While these costs and damages may be recovered through an organization's insurance, the cost of a lost reputation is irreplaceable.
- √ A background check may uncover deception. It can affirm an individual's professional or personal integrity by confirming that an individual told the truth on his/her résumé or application regarding criminal, employment and education history.
- √ In some organizations and industries some form of background checking is often required—whether because it is mandated by law, or because an insurance company demands it.

Historically an often overlooked subject of background screening has been the volunteer. Companies and organizations are often so happy to have volunteers that they assume a volunteer's spirit of public service and dedication to community denote someone who couldn't possibly have a blemish in their background. However, newspaper headlines in recent years have made it clear that persons with

⁵ University of Florida; 2002 National Retail Security Survey by Richard C. Hollinger, PhD, Director and Jason L. Davis, Graduate Research Associate, Department of Sociology and the Center for Studies in Criminology and Law; www.soc.ufl.edu/srp.htm

unsupervised access to children, the elderly and other vulnerable populations have blemishes, too—and sometimes they’re serious enough to put the safety of these special populations at great risk.

A simple background check could be the difference between an organization’s success or its succumbing to the notorious headlines or tremendous losses that can result if a diligent effort is not made to assure a safe environment.

The Advent of the Professional Screening Company

While anyone may search public records on anyone they want, the use of a professional screening or investigating company with a trained, experienced staff that knows where to look assures greater thoroughness and accuracy. In addition, background checking is highly regulated. Organizations face many federal and state requirements, and consumers have a full array of mandated rights and remedies. Screening firms can help organizations assure compliance with these requirements.

Obstacles to the Screening Process

Thorough screening cannot be done without reliable and timely access to public records—particularly records containing criminal history information. Yet there are many restrictions on the collection and confirmation of information that deter employers from performing their due diligence, and delay the employment process—hurting both employers and consumers. Restrictions have included such practices as deleting dates of birth from files and public indices, and yet dates of birth are the primary identification used to confirm that a record belongs to a particular individual. Masking a date of birth does not promote privacy or consumer protection, but it does delay employment decisions. This delay can ultimately hurt the individual who wants a prospective employer to have their information. Other government restrictions and impediments that serve to hurt employers and candidates are delays in providing access to public records, or excessive court fees.

It is critical for employers, legislators, the courts, and public officials to understand that background screening companies are not in the same category as data miners and other entities that are “data profiteers.” Employers depend on bona fide, relevant pre-employment information to make safe hiring decisions, and avoid litigation. The bottom line is that unreasonable restrictions on the ability of screening firms to access public records on behalf of employers—particularly if candidates have formally consented to and have authorized the release of such information—only benefit criminals, terrorists and cheaters. The restrictions are detrimental to employers, employees, and honest candidates.

Legal Issues

The Fair Credit Reporting Act (FCRA)

Reacting to a proliferation of background information requests, Congress enacted the Fair Credit Reporting Act (FCRA) in 1970. Its provisions protect the privacy rights of individuals (referred to in the Act as “consumers”) who were the subjects of background checks (referred to in the Act as “consumer reports”) supplied by third party businesses that compile such information (referred to in the Act as “consumer reporting agencies” or “CRAs”). Although the Act was directed initially at regulating the

obtaining and use of credit information, it has since been amended and interpreted to apply to most of the information distributed by consumer reporting agencies to end-users such as employers and landlords.

The FCRA sets the standards of privacy and consumer protection, and thus controls many of the operations of background screening firms. As currently interpreted, the FCRA provides specific procedures for the assembly and evaluation of information about consumers with regard to confidentiality, accuracy, relevancy, and the proper utilization of information. Screening firms can only obtain information on consumers who have provided their written authorization, and who have received an extensive written disclosure. Background reports are governed by detailed procedures designed to provide accuracy, transparency and accountability. The rules for the screening industry also include an extensive procedure to give consumers notice of any adverse information, and recourse in the event a consumer considers any information contained in a consumer report to be inaccurate or incomplete. Consumers have a right to obtain their reports and have their results re-investigated. Furthermore, consumers are protected by the rules of the Equal Employment Opportunities Commission, as well as numerous other federal and state laws.

Under the FCRA, a CRA is anyone who, for a fee, dues, or on a cooperative nonprofit basis, regularly assembles or evaluates credit or other information on consumers for the purpose of furnishing reports to third parties. The FCRA recognizes two different types of reports—“consumer reports” and “investigative consumer reports.” Consumer reports are communications from a CRA that bear upon a consumer’s credit worthiness, character, general reputation, personal characteristics, or mode of living. Investigative consumer reports go one step further than consumer reports, in that they include personal interviews with such as neighbors, friends or associates of the person being investigated.

The FCRA requires that employers who use CRAs to gather background information to first notify the individual that a consumer report may be obtained, and get the individual’s permission to obtain the report. If any adverse action is taken based in whole or in part upon the report (e.g., to not hire, or not promote), the employer has to comply with a two-step process that involves notifying the individual and providing a complete copy of the report to the individual and then giving the individual the opportunity to dispute the information contained within the report before actually taking the adverse action. The FCRA also imposes significant accuracy and reinvestigation requirements on CRAs to ensure that the information provided is as accurate as possible. The FCRA also requires that information from CRAs be provided only for a permissible purpose to users who will respect the private and confidential nature of such information.

The National Association of Professional Background Screeners (NAPBS)

Founded as a non-profit trade association in 2003, the National Association of Professional Background Screeners (NAPBS) was established to represent the interests of companies offering employment and tenant background screening services. Just as importantly, however, the initial members—more than 200 companies—wanted to establish and promote a high level of ethics and performance standards for the screening industry, as demonstrated by the Association’s mission statement.

The Mission of NAPBS

The National Association of Professional Background Screeners exists to promote ethical business practices, promote compliance with the Fair Credit Reporting Act, and foster awareness of issues related to consumer protection and privacy rights within the background screening industry.

The Association provides relevant programs and training aimed at empowering members to better serve clients and to maintain standards of excellence in the background screening industry.

The Association is active in public affairs and provides a unified voice on behalf of members to local, state and national lawmakers about issues impacting the background screening industry.

The NAPBS Board and Committees

The Association elected a board and began its first full year of operation in 2004. A traditional board, it includes two co-chairs, two chair-elects, a secretary, a treasurer, and several board members. In addition, the board created several committees, including:

- Ethics and Accreditation
- Finance
- Membership
- Provider Advisory
- Best Practices and Compliance
- Government Relations
- Public Awareness and Communication
- Resource Library.

Membership in NAPBS

There are three categories of membership in the NAPBS:

Regular Members---companies that offer their screening services to an end user (e.g., an employer or landlord); and

Associate Members---companies that supply the regular members with various resources (e.g., public record researchers or drug screening companies); and

Affiliate Members---companies that supply goods and services to support the industry (e.g., software suppliers).

Members include individually owned companies and publicly traded corporations, both large and small. Members can further be classified as employment and tenant screening companies, court record retrievers, or vendors.

Standards, Ethics and Accreditation

As of late, the surge in employment screening has created a stir among watchdog groups and privacy rights activists. As screening becomes more widespread, and more fully integrated into standard hiring practices, these groups have voiced concerns that employment background checks create unfair barriers to employment and constitute an unnecessary invasion of privacy. Because the background screening industry is so large, there is little standardization amongst competing firms. This lack of uniformity fuels the critics who see the industry as a threat to job seeking consumers. Legislators at both the Federal and State levels have been mobilized by the critics' testimonies and in response have begun to enact restrictive laws. Many in the industry fear it is only the start of a tidal wave of new legislation.

In response to these external threats, and because of a need within the industry, the Ethics and Accreditation Committee of NAPBS has developed a plan to facilitate a uniform approach to many of the issues facing consumers, employers and screeners. The committee has been subdivided into several subcommittees, each designed to address specific and unique needs for uniformity and standardization. Once a set of uniform practices has been developed, adherence to these principles can be monitored from within the industry.

Developing ethics and accreditation standards for an entire industry is clearly a monumental task. The committee has set goals and has already achieved much. Ethics and accreditation for the background screening industry will evolve, but the framework currently being built will be used as a basis to create standardized guidelines and generally accepted principles that will be used by screening firms for the benefit of screeners, employers and the public at large.

The Future

An increase in negligent hiring lawsuits and the threat of terrorism have given rise to an increased demand for background screening, driving more organizations to more closely scrutinize potential employees and volunteers. Screening is no longer for sensitive or high-level positions only: organizations that employ minimum wage workers and use volunteers are now rolling out screening programs. Additionally, the screening of tenants, vendors, and contractors has grown increasingly sensitive to liability when leasing to, contracting with, or utilizing individuals who might have undesirable backgrounds. Many organizations are engaging in this type of screening in order to distinguish themselves from their competition with claims of "criminal-free" or "judgment-free" associates.

One thing is certain: background screening is here to stay. Thousands of companies are directly impacted by the screening industry, and industry revenues are now estimated to be in the multi-billion dollar range. In a survey of recent college graduates, the three things they expect when job-hunting after graduation are a background check, a drug test and to have their previous employment verified. From more awareness of potential threats like terrorism to extended screening for other applications, more and more companies will be trying to become better acquainted with whom they are doing business.

Increasingly technology has become an integral part of the screening industry. Organizations are looking at enterprise level systems such as software used to assist with their internal recruiting processes, and screening companies are being asked to integrate with these technologies to further streamline the workload for an organization's human resources staff. These integrations, the Internet, and other client-

specific requirements are changing what used to be a very manual, fax-based process into a more technology-driven industry. In order to remain competitive, many companies are demanding that screening companies work within their clients' environments.

Another growing trend in screening is the use of commercially compiled databases to supplement the traditional hands-on court research. Known for providing more of a shotgun approach to screening, many of these databases are inexpensive ways to provide a look at an individual's background. Information provided by commercial databases should not be used as the *sole* source of information because of potential gaps in data, and the less than timely updates in some jurisdictions. However, they still can give a greater sense of protection to an organization by throwing a broader net across the country's criminal records.

In Conclusion

With our common goal of helping provide our country and its citizens with a safer environment in which to live, work and play, screening companies and the NAPBS will continue to work together to identify best practices, and promote the highest ethical standards. Promoting an awareness of the importance of screening to organizations, government entities, legislators, and consumers will always be one of our primary goals.