

Don't get sued

FOR WHAT A WORKER DOES

by PHILLIP M. PERRY

The six bucks it costs to psychologically test an applicant could save you mega-bucks down the road. 'Better safe than sorry,' as they say.

Suppose one of your employees drives a fellow worker home after drinking alcohol in the parking lot, and injures his passenger in a car wreck.

Or he gets mad and slugs a customer or golfer.

Or burglarizes a home during his

lunch hour.

In any of those cases, are you and your business liable for damages?

Too often, the answer is yes! Even if an employee's criminal act is outside the workplace, you may be liable for damages.

Why? Two new business-eating beasts have been born in the field of employment law: "negligent hiring" and "negligent supervision."

The former charge claims that you failed to perform diligent background checks when you hired an employee. The latter claims that you failed to investigate allegations that an employee was performing acts that would indicate a tendency to harm others in the future.

"This whole area has taken on more urgency for employers," says Richard J. Reibstein, a partner with McDermott, Will & Emery in New York City.

"Over the past five years, plaintiff's attorneys have become

more familiar with the doctrine of negligent hiring and retention. The doctrine is now being applied with full vigor."

You are at a disadvantage in defending yourself, since most of these suits—if pursued to the bitter end in the court system—end up as jury trials. And most jury members are employees rather than employers. They often identify with a victim and look upon a company as a "deep pockets" source of cash to right a wrong.

Forget insurance, too. You can insure against negligence, say brokers, but not against willful misconduct. "In all general liability policies, there are exclusions for willful acts of employees," says Deane K. Felter of Arthur A. Watson & Co. business insurance of Wethersfield, Conn.

A way out

Yet there are steps you can take to protect yourself and your organization from such suits:

1) Do background checks for each job applicant, and write down the steps you take.

"You must consider every hiring decision as if it represented potential litigation," says Reibstein. "When you are dealing with a position where you have reason to believe the individual you are hiring may come into contact with the public, with clientele, or with co-workers, do a full background check—even for a temporary worker."

Ask why each period of former employment ended. Ask about

Sources for integrity tests

McGraw-Hill London House

9701 West Higgins Rd.
Rosemont, IL 60018
(708) 292-1900

Reid Psychological Systems

200 S. Michigan Ave.
Chicago, IL 60604

Pinkerton Services Group

6100 Fairview Rd. #900
Charlotte, NC 28210
(800) 528-5745

any problems with drugs, alcoholism or violent behavior. Remember that it is the act of asking for such information from applicants and their former employers that provides your defense against a negligent hiring charge. Write down all of the questions you asked, even if you got no helpful answers.

2) Have each applicant take a written integrity test.

Tests can be selected in many areas critical to personnel management, such as integrity, drug use, and attitudes toward theft. Price per test typically ranges from \$5.75 to \$17.50, depending on quantity ordered and depth of testing desired.

"Model Guidelines for Pre-Employment Integrity Testing" is available for \$10 from the Association of Test Publishers, 655 15th St. NW, Suite 320, Washington, DC 20005; phone (202) 857-8444.

You do need to make sure that such tests do not conflict with any of your state discrimination laws, or invade employee

privacy. Run it by your attorney first.

Take the test results seriously. In one example, an applicant had been given the tests, and it predicted violence and emotional instability. The applicant was hired, anyway. The fact that a test was given increased the employer's liability when the person committed an act of violence.

3) Perform criminal background checks where appropriate.

In one recent Florida case, an employer was found guilty of negligent hiring when an employee broke into a nearby home. The employer had failed to discover that the applicant had been previously convicted of breaking, entering and assault with intent to kill.

Criminal background checks are usually time-consuming, and a new employee may commit a crime long before the results of the check land on your desk. The fact you requested such a check provides evidence of conscientious hiring procedures, even if it

turns up no information.

4) Respond appropriately to allegations of wrongdoing or suspicious behavior by the employee.

Investigate to the fullest extent possible and document what you do. If, later on, the employee commits an act for which you are sued, you have the written evidence that you were supervising correctly. You can show that you operated in a reasonably prudent fashion, which is a significant defense.

5) Test for drug use.

"Drug testing is being done by more and more of the larger employers," says Peter A. Susser of Littler, Mendelson, Fastiff, Tichey & Mathiason of Washington, D.C. "The courts have, in most instances, upheld their use. But state laws vary widely and can restrict their use, so you need to check with your attorney." **LM**

—The author is a freelance business writer based in New York City.

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