

## You're Hired.....But Not So Fast

*What a corporate employer can do to  
eliminate risk in the hiring process*

*By David S. Katz, Esq.*

**Y**our new hire may not have to jump through as many hoops as the candidates did in “The Apprentice,” but what you see is not often what you get when it comes to hiring employees. As an employer, you don’t want to have to utter the phrase, “you’re fired” when it comes to a problem employee so it is important to find out as much as legally possible about that employee’s past before you say “you’re hired.”

In today’s workplace, the need to know who you are hiring is more crucial than ever. In the aftermath of 9/11, employers, experiencing heightened safety concerns for their employees and their businesses, have flooded investigative companies with requests for employee background checks. Whether employees engage in background checks themselves or hire companies who perform such services, employers should keep in mind that permissible pre-employment inquiries vary from state to state. Inadvertent violations of credit and anti-discrimination laws can expose a company and sometimes high ranking executives and managers to substantial liability. The focus of this article is not necessarily to discuss those various federal and state statutes that control how far an employer or its outside consultant service can go, but rather to discuss the advantages in a complicated employment marketplace of the advantages of delegating such tasks to an outside firm. Needless to say, it is much easier to control the damage before the damage takes place, rather than exposing the employer to a reactive and unpredictable situation.

Accordingly, employers should proceed with caution in undertaking employee background checks. In most cases, the employer is better served due to time, costs and issues of liability to hiring a credible, insured outside firm to handle this kind of service rather than use in-house personnel to gather background information. Additionally, using an outside service to check background information allows for greater objectivity in this process. Take, for example, the situation of a Springfield, Massachusetts handgun maker, Smith and Wesson. Recently, Smith and Wesson found out that its new chairman, James Minder, had spent fifteen years in prison during the 1950’s and 1960’s for a series of armed robberies and an attempted prison break in Michigan. Needless to say, once this information surfaced regarding Minder’s past, he resigned from his position as chairman, but retained a seat on the board.

Workplace and recruitment specialists with whom I have spoken have indicated that the misdeeds of corporate executives and the tarnished backgrounds of top managers have focused attention on the need to do background checks, even when employees have stellar credentials. Companies, they contend, should not hesitate to hire independent professionals to investigate the employment history, education, criminal backgrounds, driving records, and credit reports of potential hires. More employers are paying attention to this issue, according to a recent report by the Society of Human Resource Management in Alexandria, Virginia. This professional association reported that 82 percent of human resource professionals say their companies routinely check the backgrounds of job candidates, up from 66 percent in 1996.

The report also noted that employers worried about on-the-job violence that prompted many to have background searches done. To the extent that background searches are not perfect, they often bring to the forefront evidence of certain behavior of a prospective employee that may predict future violence. Moreover, when a company performs a background

check and the employee commits an act of violence in the workplace, the fact that the employer has previously done a check protects the employer from a subsequent negligent hire law suit. Professionals in the employee search and background arena suggest that employers do not limit their respective searches to ten years. Additionally, in order to make the criminal portion of the employee background check as comprehensive as necessary, some states routinely do not update their criminal databases. Employers should have their search services look at a variety of factors including where the person has lived, prior work history, credit information, education, assets and a complete review of state and federal criminal records. The level of detail in a report can vary depending on how much money an employer wants to pay for such a service. For example, national fingerprint searches can cost up to \$28.00 and take up to 30 days to complete. A simple county criminal search can cost between \$10.00 and \$55.00 to complete.

The other major area of concern for employers is screening resumes. According to the Cleveland-based Background Information Services, 56 percent of all resumes reviewed by fact checkers contained false or misleading information. Of those resumes, nine percent falsely list a college degree or false employer. Thirty-four percent of all applications contain lies about experience, education, and the ability to do the job. The costs to an employer for hiring the wrong person for the job is great including training fees, recruiting costs, and replacement of the employee, not to mention the time spent by other employees of the company in this process. Obviously, the cost is higher for hiring the wrong executives which costs include relocation, membership dues and travel, just to name a few. Resume checks are absolutely critical in today's workplace as prospective employers have become more creative and adept at hiding information and, more frequently, stretching the truth. Trust should never stand in the way of doing such checks either. Quite often, corporate hiring executives assume they know a candidate because that candidate has been a member of the same club or graduated from the same college. You are well advised to make absolutely no assumptions about an applicant's fitness as a future employee.

Having said this, there are several steps an employer can take to minimize the risk of hiring a dangerous person and to provide an outside employee background check service with the most accurate and comprehensive information possible.

1. Conduct such background searches in each and every case. No assumptions can and should be made about a candidate's fitness for a particular job even if that candidate appears to be familiar to the hiring recruiter.
2. Compel applicants to complete all entries on the application form.
3. Investigate gaps in employment closely.
4. Put a notice on the application telling the applicant that all references will be checked.
5. Ask the applicant to sign a form authorizing the investigation and releasing of their employers from liability for providing a complete reference.
6. Rather than calling the person identified by the applicant as the supervisor, look up the main number yourself and ask to speak with the human resources department of that company.
7. Make a separate call to speak directly with the employee's supervisor.
8. Fax a copy of the applicant's authorization for the reference checks to the company in advance of your call to avoid the standard response that only dates of employment will be provided. When this process is followed, former employers who fail to reveal information about employees know to be violent can be held liable themselves under a theory of "negligent reference."
9. Avoid questions relating to mental or physical disability or drug addiction or information as it might pertain to national origin, race, and ethnicity of an applicant. Additionally, questions relating to religious denomination or religious practices must be avoided.
10. Proof of eligibility to work in the United States is fair game.
11. Questions about felony convictions no matter what type are allowable. Only misdemeanors resulting in incarceration are allowable.
12. Obtain authorization from a candidate to obtain a credit report. Authorization for an investigative consumer report is not required from the applicant in the first instance, but disclosure of the report to the applicant is later required if the information contained in the investigative credit report results in the employee not being hired.

By following these steps and assuming greater vigilance in the hiring process, employers can forego potentially ruinous situations involving employee violence and sabotage and, at the same time, protect against potential third-party actions.