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“What's the big deal, anyway?”

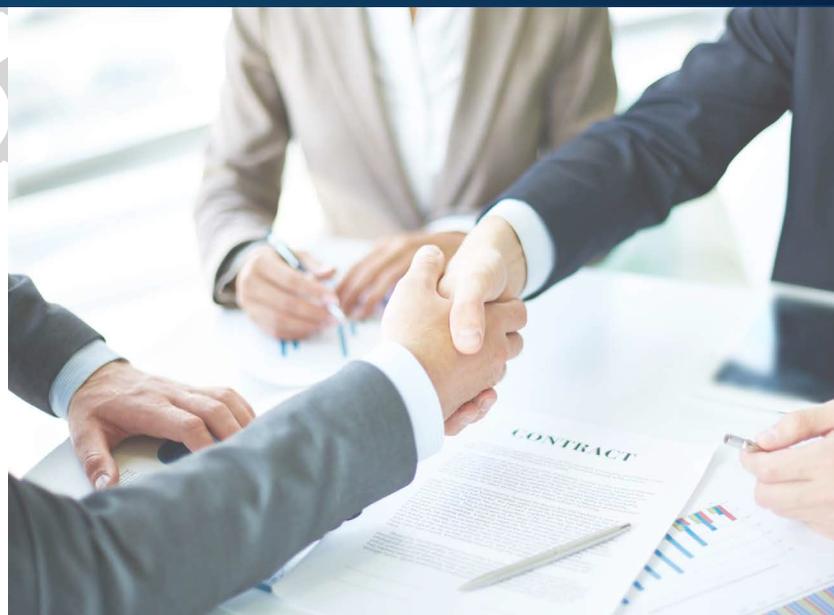
21st century civil liability in hiring.




The change in background screening

It may surprise some in today's post-PATRIOT act world that no more than two decades ago it was a relatively novel occurrence for employers to routinely perform background checks on rank-and-file employees (excluding, of course, those jobs which required a security clearance). Things have certainly changed; today, background screening is an accepted, routine and approved practice for which most job applicants are prepared. U.S. employers, having long understood that looking to person's criminal background is an indicator of possible future behavior, have been able to take advantage of the modern increase in availability of this valuable initial investment in their on-boarding.

With this positive new change, however, has come a commensurate trend of an increase in lawsuits initiated against employers for their hiring practices. This demonstrates that employers should be equally cautious in both implementing an onboarding process that performs background checks on applicants, but in also ensuring only a proper and compliant background check is done. To look at the dynamics between why and how, it will help to examine the "background" on the change in background checks in the last 20 years.




It doesn't take a big push if the wheel's already moving.

First, over the last two decades, several unprecedented and significant events have occurred almost in parallel in the U.S. economy. Insofar as an increased prevalence of background screening is concerned, a perfect storm occurred; HR industry experts point to increasing globalization, the advent of web 2.0, the recession (and the rebound in the last 6 years), and the generally confident projections of continued job growth as all contributing to an increase in job growth and energization of the background screening industry.



Because of these things, simple supply-side economic theory dictated that the time was ripe for entrepreneurs to enter the background screening market. In fact, in the last few decades, the economic spigot that once restrained a deluge of screening firms from bursting forth onto the market was completely opened, resulting in the now over 1,500 pre-and-post employment background screening firms¹ in the United States alone. This, of course, has resulted in both positive and negative outcomes for hiring and background screening industries over the last 10-or-so years.

¹This is a more precise definition of a "background check company" insofar as the services normally provided; to save space, however, this article will shorten the precision definition above to simply "screening firm".



Immediately following the mass influx, it became clear that some of these new-entrant screening firms would fare better than others. The less-skilled firms normally have fallen prey to the strict regulations and the rigorous private-sector enforcement which is incumbent upon the profession of



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a screening firm. Such private-sector regulation worked to "weed out" the less-skilled screening firms by six-figure settlements of lawsuits alleging FCRA or equivalent state law violation(s). Furthermore, other types of civil lawsuits were also brought against the unfortunate employers on whose dime the "kayoed" screening firm happened to be working; typically such allegations involved theories of either negligent hiring or negligent retention. Finally, at all times, both employers and screening firms additionally faced the scrutiny of the Federal Trade Commission and later, the Consumer Financial Protection Bureau on everything from hiring practices to paperwork procedures.

Fool me twice...

The second aspect of the "background" we're discussing has to do with another outcome of the multiplication of firms; just as the increased availability of background screening in the form of a broader array of screening firms on the market resulted in better service and lower prices for those employers already using a screening firm, it caused employers who chose not use a professional screening firm a significant problem: that is, employees who have something to hide and don't want to undergo a screening will simply avoid the firms who screen. It isn't hard to figure out where they will wind up (word about which businesses screen versus which do not travels fast). (as it has) to grow smaller, and many workforces previously unable to reach the greater populace now have that ability.

Thus, while it could be said that the foregoing conditions helped make the good better, it could also be said that they also served to make the bad worse.



Most screening firms felt the competition over the last few years and doubled-down on compliance and focused on increasing the quality of their services. This, needless to say, benefitted the employers who engaged their screening services. On the other hand, the employers who didn't undertake a screening process became subject to bigger risk of hiring a "bad apple". And as the world continues to grow smaller, workforces previously unable to reach the greater populace have now attained a broader reach, and thus, the potential damage of one bad employee has multiplied.



But there is good news...

As mentioned earlier, the increase in availability of screening as a service has resulted in a change in quality across the landscape of screening firms. In fact, some of those changes may result in some important criteria for employers considering a screening firm to compare providers with: For instance, is increased attention is paid to unique firm and brand value? What kind of an emphasis is there on ancillary services useful to employers? Probably most importantly, how would existing clients rate the quality of service of the firm? For a full list, please go to our website.



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What employers stand to lose for the cost of a background check.

Although some economic causes have been explored and implicated as the cause of the increase in hiring litigation, in the background screening community it is almost universally uncontested that the growing trend in recent years is for courts to hold employers strictly accountable for a failure to hire or retain safe employees. In fact, it is estimated in industry circles that a staggering 72% of lawsuits filed against employers for negligence in hiring and retention are successful.

Below is a small sample of landmark lawsuits against employers with causes of action such as negligent hiring, negligent retention, and duty of care owed to employees, etc. (Employers and their counsel need not review every one of these cases, but rather, should simply note that all of them have one thing in common: in each, the employer failed to protect a party from harm caused by an employee of whom it 'knew' or 'should have known' would result by employing the individual.)

1. The theft and arson by a security guard acquired from a 3rd party company.
- *Lou-Con, Inc. v. Gulf Building Services, Inc.*, 287 So.2d 192 (La.App. 4th Cir. 1973)
2. The murder of an employee by a co-worker during work-hours.
- *Gaines v. Monsanto Co.*, 655 S.W. 2d 568 (Mo. App. 1983)
3. A theft of over \$200,000 by a janitorial worker acquired from 3rd party company.
- *Welsh Mfg., Div. of Textron, Inc. v. Pinkerton's, Inc.* 474 A.2d 436 (R.I. 1984)
4. The assault and rape of hitchhiker by truck driver while on the job.
- *Malorney v. B&L Motor Freight, Inc.* 146 Ill. App. 3d 265 (1986)
5. An employee taunted and sexually harassed by co-workers at work.
- *Watson v. Dixon*, 502 S.E. 2d 14 (N.C. App. 1998)
6. An employee administered an unauthorized insulin dose to a disabled girl.
- *Interim Healthcare of Fort Wayne, Inc. v Moyer ex rel. Moyer*, 756 N.E. 2d 429 (Ind. App. 2001)

7. The failure to screen a salesman convicted of burglary and kidnapping.

- *Underberg v. Southern Alarm, Inc.*, 643 S.E. 2d 374 (Ga. App 2007)

8. An employer stole investor's funds for ponzi scheme
- *Dolin v. Contemporary Financial Solutions, Inc.*, 622 F. Supp. 2d 1077 (D.Colo. 2009)

(Cases extracted from the Safe Hiring Manual, by Lester Rosen².)

Such a varied "Parade of Horribles" is likely to present to a reasonable employer with at least one situation in which an employer could possibly relate. These nightmare scenarios of an employee's misdeeds are not only a financial consideration for an employer: the repercussions will extend to the business's professional reputation (and that of its principals).



But, surely those are rare occurrences?

In April of 2016 a lawsuit was filed in federal court which alleged that the failure by the Public School System of Prince George, Maryland to properly conduct background checks resulted in molestation and coerced sexual behavior/pornography with multiple minors by a teacher's aide³.



"In 2007 alone, the background check industry as a whole has unearthed criminal records (both arrests and convictions; there is a difference between the two) at a rate of about 9.5% of all applicants screened."





As horrible as this report is, it is made worse by the fact that these horrors could have been prevented in the first place. According to a reporter, a “simple internet search” which would have revealed the “online court records” of the individual’s past history of sexual abuse . Because of this, not only is the name of the school forever sullied, incalculable harm has been done to the most defenseless persons in society. No employer should be deceived into thinking that only larger employers are “law suit magnets”; the simple fact is that businesses of all sizes and types in the current economy always run a similar risk in hiring.



Consider that in 2007 alone, the background check industry as a whole has unearthed criminal records (both arrests and convictions; there is a difference between the two) at a rate of about 9.5% of all applicants screened⁵ . Moreover:

- The Bureau of Justice Statistics indicate that in this country in 2009, approximately **572,000 individuals age 16 and over were subject to rape/sexual assault, robbery, and aggravated or simple assault at work**, and moreover, **521 persons age 16 and over were victims of homicide at work**⁶ ;
- The Association of Certified Fraud Examiners indicate that in 2016, **approximately 5% of annual company revenues are lost to fraud**⁷ ;
- Monetary awards by a jury for a finding of fault for an employer **who negligently hired an employee have reached as high 26.5 million**⁸ , and
- In an audit of volunteer not-for-profit organizations, it was found that in 2007, **every 11.5 hours a registered sex offender attempted to obtain a position at a non-profit**⁹ .

These are startling statistics for employers who don’t utilize background screening under the assumption that the statistics are in their favor. For employers who understand that recent trends indicate a significant increase in their liability with respect to employment, there isn’t be much need to debate on whether or not background checks *should* be done; rather, the questions are: is my background screening provider giving me 100% compliant, defensible information on my candidate? What is actually getting searched? Am I meeting my time-to-hire goals? Is the cost reasonable?



These considerations are critical and addressing them is the very business of a competent background-screening company. At Hirelect, a core mission is to provide education, compliance and transparency to all clients. In addition to friendly and knowledgeable staff, industry-leading software with 100 + integrations available and state-by-state forms and processes, Hirelect provides compliant, customizable employment screening services for just about any small to mid-size business.

Protecting your company is our business.

That’s why:

- (1) We always go to the courts to confirm the accuracy of our background reports;
- (2) We are 100% U.S. based – that means NO information is sent offshore;
- (3) Our software uses bank-level security, one-click ordering and paperless processes;
- (4) We offer industry-specific checks (PSP for truckers, FACIS for medical, and more), and
- (5) Providing high-quality reports in a timely manner is our primary objective.

Call us and see why we’re proven for the position!





With job growth in the United States projected to remain strong through 2017, it seems unlikely that some of the pressure causing this trend will diminish any time soon. Employers will thus remain under significant pressure to continue to implement and/or operate a high-quality on-boarding process which includes an equally high-quality background screening.

Call us or sign up now and see why Hirelect is **proven for the position**.



SOURCES:

² Rosen, Lester. *"The Safe Hiring Manual Revised 2nd Edition: The Complete Guide to Employment Screening Background Checks for Employers, Recruiters, and Jobseekers."* Facts on Demand Press, 2012. Print. Page 194. 13 Sept. 2016.

³ Bui, Lynh. "Amid Child-pornography Scandal, Pr. George's Schools Sued over Background Checks." *The Washington Post*. 16 Apr. 2016. Web. 13 Sept. 2016. https://www.washingtonpost.com/local/public-safety/-amid-child-pornography-scandal-pr-georges-schools-sued-over-background-checks/2016/04/16/bff23326-024b-11e6-9203-7b8670959b88_story.html

⁴ Murillo, Mike. "Family Sues Prince George's County Public Schools after 8-year-old Daughter is Sexually Abused." *WTOP*. N.p., 2016. Web. 13 Sept. 2016. <http://wtop.com/prince-georges-county/2016/04/family-sues-prince-georges-county-public-schools-after-8-year-old-daughter-is-sexually-abused/>

⁵ "Kroll's Annual Background Screening "Hit Ratio" Report Reveals Importance of Employment Background Screening as U.S. Job Market Becomes More Competitive and Global". *Business Wire*. 22 Apr. 2008. Web. 13 Sept. 2016 <http://www.business-wire.com/news/home/20080422005918/en/Krolls-Annual-Background-Screening-Hit-Ratio-Report>

⁶ Harrel, Erika. Special Report: *Workplace Violence, 1993-2009. National Crime Victimization Survey and the Census of Fatal Occupational Injuries*. Web. 13 Sept. 2016. <http://www.bjs.gov/content/pub/pdf/ww09.pdf>

⁷ "Association of Certified Fraud Examiners 2016 Report to the Nations Executive Summary." Web. 13 Sept. 2016. <http://www.acfe.com/rtn2016/about/executive-summary.aspx>

⁸ See, *"Massachusetts: Ward, et al. v. Trusted Health Resources, Inc."*

⁹ *Choicepoint. The Importance of Background screening for Nonprofits: An Updated Briefing April 2008*. Web. 13 Sept. 2016. <http://consumerdatareporting.com/pdfs/choicepoint%20nonprofits%200408.pdf>

