

THE EMPLOYER'S BURDEN

By: Marisa Manley

What you don't know about the people you hire can come back to haunt you

It used to be that negligent-hiring claims were filed only by employees who had been injured by a co-worker. While a customer could sue if a job poorly done proved damaging in some way, the public had little recourse against employers for other kinds of harm done by an employee.

Now, however, courts in many states hold employers liable for injuries that employees inflict on anyone while on the job. You're supposed to know enough about your employees' characters to avoid trouble. You can be held liable for punitive damages as well as medical bills, lost wages, and the like. The stakes can be substantial: a Maryland jury recently awarded a plaintiff \$2 million in a negligent-hiring case.

The fundamental issue is whether you have taken reasonable precautions to avoid hiring people whose history suggests they might pose a significant risk to others in the job you're trying to fill. For example, Gino Rida was hired as a bartender for The Loft, in Worcester, Mass. co-manager James Flynn knew Rida had a criminal record, but he didn't check it.

One evening, when a customer complained to Rida about the way he'd mixed his drink, Rida cursed and made obscene gestures. The customer threw his drink at Rida, who started punching. Rida hit the customer's companion, Nicholas A. Foster, fracturing his cheekbone and injuring his right eye.

Foster sued The Loft Inc. Rida had been hired for a job that involved working with customers, who, of course, can be difficult. Rida's record turned out to be for kidnapping, assault with a knife, and assault with attempt to commit rape. He was on probation when he slugged Foster. The Loft was found guilty of negligent hiring.

Cases like this may discourage you from hiring anyone with a criminal record, but such a policy could violate antidiscrimination laws. When an employee has a criminal record, your liability depends on the relevance of the crime to the job at hand. Take the case of Thomas J. Brennan, hired by a Wisconsin company, City Wide Insulation of Madison Inc. The company didn't check Brennan's employment references or ask whether he had a criminal record. It just made sure his driver's license was current and valid. About a year later Brennan had an accident while driving a City Wide truck, killing 12-year-old Cynthia Guillermo. Her parents sued City Wide for negligent hiring.

The case looked bad for the company. An after-the-fact investigation revealed that Brennan had been convicted of battery and burglary. Some years earlier his license had been suspended due to a damage judgment outstanding, and he didn't get the license back for seven years. Brennan also had a dubious work record; he'd held each of his previous three jobs for less than a year. He was drunk when he hit the car Cynthia Guillermo was riding in.

But the court determined that Brennan's past record wasn't relevant to the driving accident. Even if City Wide had done a more thorough check and had learned about Brennan's burglary convictions, these wouldn't have proved he was unfit to drive a truck. Though he had had an earlier problem with alcohol, it wasn't considered relevant since his employers had no evidence to make them suspect he had a drinking problem. The company had allowed him to drive a truck only after he had been on the job for several months and a supervisor observed him to be a competent driver. So although the judge sympathized with the Guillermos, City Wide was found not guilty of negligent hiring.

Expanded liability for negligent hiring means you may want to rethink your employee-screening process. For instance, Pinkerton's Inc. thought it had adequately screened security guard Donald Lawson. But when he was assigned to protect Welsh Manufacturing, he collaborated with thieves to take more than \$200,000 worth of its gold inventory. Welsh sued Pinkerton's for negligent hiring.

Pinkerton's based its defense on the screening it had done. It had sent reference forms to Lawson's high-school principal and a prior employer. They had responded with mixed comments regarding his competence but no comments about his honesty. Pinkerton's determined that Lawson didn't have a criminal record. The jury found its efforts inadequate because the company hadn't done much to check Lawson's honesty, a key issue for anyone in the security business.

You should think about the risks associated with any job you're trying to fill. Employers have been held liable for negligent hiring because workers weren't properly trained; didn't have enough experience; had a physical or mental handicap; were often drunk, forgetful, inattentive, or careless; or had a history of horseplay, recklessness, or maliciousness.

This doesn't mean you have to conduct a major investigation before you hire anyone. Several courts have said that you are not obligated to inquire routinely into an applicant's criminal record -- and some state or local laws prohibit it. Your duty is simply to use reasonable care in hiring, recognizing that the degree of care varies with the job at issue. The more intimate contact an employee will have with your customers or the public, the more careful you'll want to be.
