

Negligent hiring of
rental store employees
and the necessity of
criminal background checks

BY ED WINN III

Negligent hiring lawsuits are on the rise. For example, an employee commits some heinous crime against a customer, another employee or some random third party and the company gets sued by the injured party because the company did not use proper care when hiring this employee in the first place.

The plaintiff will argue that the company should have uncovered the employee's troubled past, which would have revealed that he was dangerous and likely to inflict harm in the future. These lawsuits attempt to hold employers liable for the criminal conduct of employees. Plaintiffs make the argument that the employer acted negligently when hiring the employee who committed the wrongful act and therefore must pay for what the employee did even when the act was not directly related to the job.

In the rental context, if a customer or a customer's

property is injured during a collection effort by a company employee, the rental company can expect, among other claims, one for negligent hiring. These kinds of lawsuits are on the rise due to an increased concern over workplace safety, generally after 9/11, and repeated stories of employees "going postal" during the 1990s and, lately, corporate scandals involving white-collar criminals that have crumbled empires.

The law does not yet require that employers guarantee that its employees will always act properly, but it does require employers to act reasonably when hiring employees. Today that includes conducting criminal background checks on certain job candidates.

employee CRIME AND PUNISHMENT employer

New developments in the law

The Texas Legislature recently passed a new statute in this area with implications for rental dealers everywhere. The new statute requires Texas rental dealers and all other merchants who send employees out to deliver, install or repair items in a person's residence to obtain a criminal background report from the Department of Public Safety on all such employees. The criminal background checks are required to go back 20 years for felony convictions and 10 years for misdemeanor convictions.

If the company conducts the search and it comes back clean, the law then provides that in the case of a lawsuit for negligent hiring brought against the company, a rebuttable presumption arises that the company did not act negligently when hiring the employee. There are various record-keeping requirements concerning the information collected by the employer. There are no penalties in the statute for failing or refusing to conduct such background checks other than the loss of the presumption in a lawsuit.

At least one other state, Florida, has had a similar statute in place since 1999. In Florida, for the presumption to arise, the employer must do four things: 1) obtain a criminal background check on the employee; 2) make a reasonable attempt to contact "references and former employers"; 3) require the employee to complete a job application that includes questions concerning convictions of a crime; and 4) obtain a driver's license check if such check is relevant to the work to be performed. This Florida statute applies to all employees in the state.

Similar statutes have been on the books around the country in selected industries that deal with employees who work with especially vulnerable people—children, the aged and the infirm. Specific industries are also covered—e.g. the nuclear power industry, various licensed industries, certain airline personnel and other sensitive industries.

The broad scope of the Texas and Florida statutes portend similar statutes in other states in recognition of the rise in negligent hiring lawsuits. The issue of whether a company is liable for the acts of its employees can be a tricky one. The legal standard—the question a jury will get in a case against the company—is whether the employee, when the injury was inflicted, was acting "within the course and scope of the employment," in which case the company must pay for the damage, or whether the employee was "was off on a frolic of his own," in which case the company is not ordinarily liable.

However, an injured plaintiff may still be able to tag the company, where the money is in such a case, if the plaintiff can prove that the company was negligent when it hired the employee. In the negligent hiring lawsuit, the employee's conduct is less at issue than the company's conduct when it hired the employee. If the company hires an ax murderer and knew or should have known of the employee's past when it hired him and then sends him out to chop wood, it becomes foreseeable that trouble will ensue.

The negligence standard against which hiring practices

are measured changes over time. In the pre-Internet era, criminal background checks were expensive and time-consuming. In those days, companies probably had to have some knowledge of a suspected criminal past before the duty to explore further would arise.

Today, criminal background checks at every level are relatively inexpensive and can be done in a matter of hours. There are still competing privacy issues at work, but privacy rights are rapidly giving way to societal concerns over security and that is clearly where the law is heading.

States compile and keep information on criminal convictions different ways. Some have centralized databases kept by law enforcement agencies; others keep the information at the county level, court by court. Some maintain records at both levels. Statewide databases have timeliness and accuracy issues and the most complete and accurate information can usually be found at the county level. Of course, county by county searches cost more and take more time.

Rental dealers should be aware that while their rights to run criminal background checks on job applicants are unfettered in most states, there are restrictions in several states, the details of which are beyond the scope of this article. By way of quick example, California employers cannot inquire about marijuana convictions more than two years old. Dealers in the following states will have to consult their state statutes for limits on their ability to conduct criminal background checks: Alaska, California, Georgia, Massachusetts, Missouri, New Hampshire, New Jersey, Ohio, Rhode Island, South Dakota and Utah.

Playing by the rules

If rental dealers understand the advantages of conducting criminal background checks at least on employees who will be going into customers' homes, then there are some rules by which they must play. It is primarily the Federal Fair Credit Reporting Act that will apply, assuming that the rental company uses a third party to conduct the checks instead of going to the state registries or county courthouses using its own employees, in which case the FCRA does not apply. The definition of a "credit check" under this federal law includes a criminal background check. (For a partial list of companies offering criminal background check services for employers, see the sidebar.)

In a nutshell, the FCRA requires that dealers get a job applicant's consent to run a check. The dealer must make a clear and conspicuous disclosure that a credit report may be procured. The disclosure must be separate from other information in the application packet. The dealer must notify the applicant separately within three days of making the request

There are still competing privacy issues at work, but privacy rights are rapidly giving way to societal concerns over security and that is clearly where the law is heading.

for the information if the dealer does run a report. In addition, before taking any adverse action based in whole or in part on information received, the dealer must give the applicant a copy of the report and a copy of the applicant's rights under the FCRA in the form prescribed in the law. The notice the applicant gets must include the name, address and phone number of the company furnishing the report to the dealer.

Failure to comply with the requirements for conducting criminal background checks can result in liability for the company.

Here are some tips for conducting criminal background checks properly.

★ Get complete information on the job applicant. This will include the full legal name and any other names the applicant has used, date of birth, social security number, driver's license number and times and places of previous employment. Get this information in writing and have the applicant verify that it is accurate. Get the applicant's consent to run a criminal background check and make that consent continuing so that additional checks can be run in the future, if the need arises.

When researching criminal records, dealers want to make sure that the information received does, indeed, apply to the applicant. And the information does not always match up perfectly. The more information about the applicant that the dealer can provide, the better the check will be and the better the opportunity for the dealer to investigate discrepancies between the information provided by the employee and the information contained in the background check

★ Be sure that the application asks about criminal conviction history, both misdemeanor and felony, and state on the form that the criminal history information provided by the applicant will be reviewed for its relation to the position and length of time since any convictions. Dealers can use this information to gauge the honesty of the applicant.

It may not be a good idea to inquire only about felony convictions. Often fairly serious criminal charges can be pled down to misdemeanor charges by aggressive defense lawyers, so that violent behavior of the type rental dealers need to screen for carefully may end up as a misdemeanor conviction, especially the first time.

★ Be cautious asking about arrest records. The EEOC has determined that an employer's use of arrest records, distinct from records of criminal convictions, has a discriminatory

effect on minorities (more people of color are arrested than are white people). Therefore, the employer may be risking claims of discrimination if he is making employment decisions based on the arrest records of job applicants.

★ Allow a job applicant the opportunity to explain the results of the criminal background check and any discrepancies between the report and the application. In this information age, not all of the information collected and stored on individuals is completely accurate. Rental dealers will not want to act on inaccurate information and should be willing to investigate further when the background check shows something different from what the applicant has provided. The applicant may be lying, which will eventually be uncovered, or there may be bad information in the system, which needs to be corrected.

★ Be reasonable in assessing information in the criminal background report. There may be information in a report that will make an employee too risky to trust with a delivery position, but a conviction for a hot check written seven years ago may not rise to that level.

★ Have a written policy within the company concerning criminal background checks and ensure that the policy is applied consistently. If the staff in charge of hiring can pick and choose upon whom they run criminal background checks—for example, only when something does not "add up" or "feels suspicious"—the company will be open to charges of discrimination.

Rental dealers add to the safety of their employees and customers by taking what has become a fairly inexpensive step in the hiring process by running criminal background checks on employees who will be going into customers' homes. There will still be judgment calls that need to be made. There are good employees out there with checkered pasts and it is not suggested that anyone with a criminal past should forever be barred from working in a rental company. We have trouble enough finding good employees without invoking such a strict rule. Running the checks, however, will give dealers additional valuable information with which to build a reliable workforce. ■

Ed Winn is APRO's general counsel. His e-mail address is edwinn@e-bylaw.com.

CHECKING OUT THE CHECKERS

There are literally scores of companies offering inexpensive, instantaneous criminal background checks of job applicants on a nationwide basis. As with all vendors, rental dealers should check references and "try it before they buy it." There is no magic in what these companies are doing. The information they are collect-

ing is public information. The service they are providing is the accumulation and cataloguing of the information in quick and easy-to-use formats. A good company will acknowledge coverage of the activity by the FCRA and offer assistance in complying with this statute. A good company will offer references of satisfied cus-

tomers—lots of industries are regularly conducting criminal background checks on most job applicants. A good company will stand behind its work. Here are a few companies that offer criminal background services. APRO does not have any knowledge concerning the reputation or trustworthiness of any company on this list:

For a list of companies, see http://dmoz.org/business/business_services/security/investigation/employment