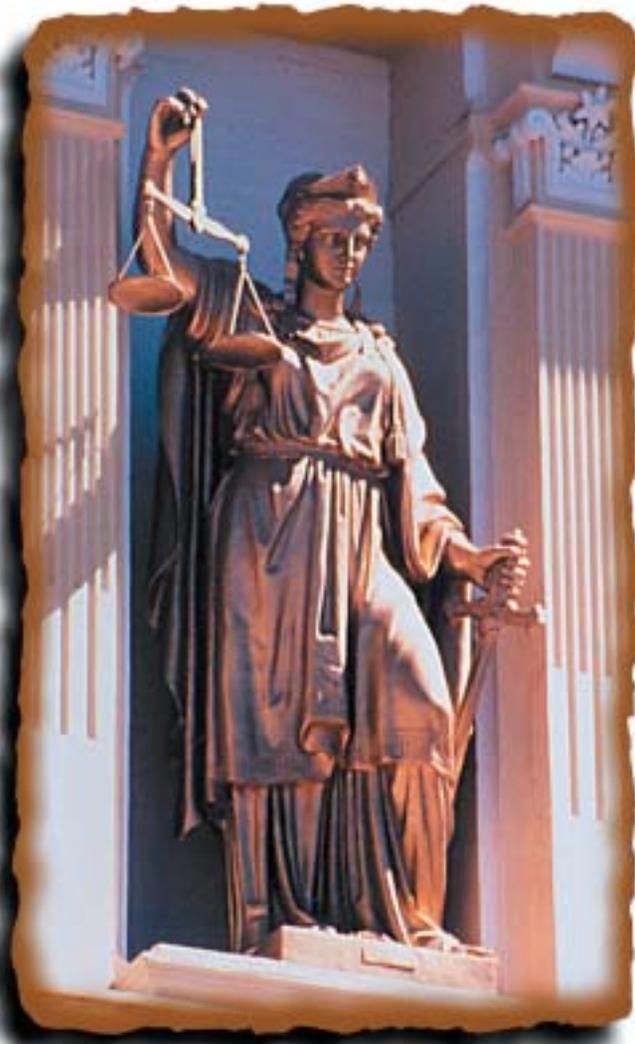


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# CONDUCTING EMPLOYEE BACKGROUND CHECKS

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## I. Failure to Do Background Checks Can Lead to Liability -- Negligent Hiring Claims.

- A. One of the best reasons to perform background checks on all potential employees is the possibility of employer liability for the acts or omissions of the employee toward a third party. These claims often assert negligent hiring by the employer, seeking to impose liability where the employer knew, or should have known, that the employee posed an unreasonable risk of harm to others when hired.
- B. Nevada has specifically recognized the tort of negligent hiring. The Nevada Supreme Court has held that an employer has a general duty to “conduct a reasonable background check on a potential employee to ensure that the employee is fit for the position.” Burnett v. C.B.A. Security Service, 107 Nev. 787, 789 (1991). An employer breaches this duty when it hires an employee despite the fact that it knew, or should have known, of the employee’s dangerous nature or incompetence. Hall v. SSF, Inc., 112 Nev. 1384, 1392 (1996).
- C. An employer who fails to conduct a reasonable background check will be held liable for damages if that failure proximately causes any harm to another. In Rockwell v. Sun Harbor Budget Suites, 112 Nev. 1217 (1996), an employee had been discharged from at least two security positions because of violent behavior. In addition, the employee was a convicted sex offender, and had lied about military service on his application. Without the employer conducting a thorough background check, the employee was hired as a security guard for an apartment complex. The employee had a 6-month sexual affair with a tenant, and when she attempted to break off the relationship, he murdered her by shooting her 18 times. The court found that a material issue of fact existed as to the negligence of the employer, given the events in the employee’s background which might have been discovered had the employer conducted a reasonable check, and may have impacted the hiring decision.
- D. In Hall v. SSF, Inc., 112 Nev. 1384 (1996), a bouncer employee struck a nightclub patron. Prior to his employment, the employee had been dishonorably discharged from the military for striking a superior officer. The Nevada Supreme Court found that such background information was relevant to a claim of negligent hiring because it would aid the jury as to (1) the violent propensities of the employee, and (2)

whether the employer knew or should have known of the employee’s prior violent behavior.

- E. Suggestions on how to avoid negligent hiring claims.
  1. **Have a comprehensive employment application.** Utilize an employment application which requires applicants to list all former employers, military experience, criminal convictions and education. In addition, the application should require personal references. The application should also contain a release which allows the employer to protect itself and those who provide information on the applicant from liability. The application should clearly state that any discovery of misrepresentation or falsehood will result in refusal of employment or immediate termination.
  2. **Follow up on the information provided.** Some employers review the information given on the application with only a cursory glance and rely entirely on the face to face interview. Employers should actually contact each former employer, institutions of higher education, military institutions and personal references to verify the accuracy of all information disclosed on the application.
  3. **Document your background check.** Write down the names of former employers, personal references and institutions you contacted. Document the person spoken to, the information received, and when the contact occurred. If you cannot reach a former employer or reference, document your inability to contact them. If a former employer is uncooperative in releasing information, document it.
  4. **Secure the necessary documents for the position.** Make sure that any licenses, documents or certifications that the position requires are obtained. For example, if the position requires driving, make sure you have a copy of a valid driver’s license for the class of vehicle the employee will be driving. In addition, secure a copy of driving records for the prospective employee from the Department of Motor Vehicles.
  5. **Determine any special needs related to the nature of the position.** If the position involves responsibilities such as interaction with members of the public, operation of heavy machinery or issues of trustworthiness (handling cash, access to confidential information, access to hotel

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rooms/apartments), a background check for criminal convictions is especially prudent. Any information regarding a propensity toward violence should be thoroughly discussed and investigated.

6. **Look for “red flags” and ask questions to follow up.** If the prospective employee has gaps in employment, find out why. If the applicant refuses to grant permission to contact current and/or former employers, find out why. If the applicant has criminal convictions, request details and follow up by obtaining more information. If the applicant has been involuntarily terminated from a former job, find out the surrounding circumstances. If the applicant’s personal references cannot be reached, request others.
7. **Do not offer the applicant a position until the background check is *completely* finished.** It is much easier to not extend an offer of employment than to revoke an offer after it is given.

## II. How to Properly Conduct a Background Check -- Complying with Federal Statutes.

### A. *The Fair Credit Reporting Act (FCRA).*

1. The FCRA was enacted in 1968 to ensure accuracy and fairness in credit reporting. 15 U.S.C. § 1681(a). This act requires all “consumer reporting agencies to adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance and other information in a manner that is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy and proper utilization of such information.” 15 U.S.C. § 1681(b).
2. The FCRA requires users of consumer reports to make certain disclosures and credit reporting agencies to correct inaccurate or misleading information contained in such reports. The FCRA provides civil and criminal remedies for violations. 15 U.S.C. §§ 1681i, 1681m-1681o, 1681q-1681r.
  - a. Under the FCRA, a consumer report is “any written, oral or other communication of any information by a consumer reporting agency bearing on a consumer’s credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer’s eligibility for . . . employment purposes.” 15 U.S.C. § 1681a(d)(1).
  - b. Under the FCRA, a consumer reporting agency is “any person which, for monetary fees, dues,

or on a cooperative nonprofit basis, regularly engages . . . in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties. . .” 15 U.S.C. § 1681a(f).

- c. Under the FCRA, “employment purposes” means “a report used for the purpose of evaluating a consumer for employment, promotion, reassignment or retention as an employee.” 15 U.S.C. § 1681a(h).
3. Employers must be very careful about the types of information they seek in conducting background checks. The definitions of “consumer report” and “consumer reporting agencies” are very broad. Any reports that involve the “character, general reputation, personal characteristics, or mode of living” of an employee or potential employee are considered consumer reports under the FCRA. This definition will encompass things like driving records and criminal history checks, which most employers would not generally consider to be a consumer report.
  4. What requirements does the FCRA impose on employers?
    - a. **The employer must obtain and use reports covered by the statute only for the purposes which the statute allows.** Courts have found civil liability in instances where a credit report of an employee’s spouse was obtained (Zamora v. Valley Fed. Sav. & Loan Ass’n, 811 F.2d 1368 (10<sup>th</sup> Cir. 1987)) and where a credit report was obtained to prepare for litigation against an employee (Comeaux v. Brown & Williamson Tobacco Co., 915 F.2d 1264 (9<sup>th</sup> Cir. 1990)).
    - b. **The employer must disclose to the employee or applicant that it plans to obtain a consumer report, and secure the employee’s or applicant’s written permission before obtaining the report.** Permission can be obtained through the employment application. The FCRA does not prohibit adverse action taken against an applicant for refusing to give permission for the employer to obtain consumer reports. 15 U.S.C. § 1681b(b)(2)(A).
    - c. **Notice is required before adverse action is taken.** If the employer decides to take an adverse action (failure to hire, failure to promote, etc.) on the basis of information contained in a consumer report (either in whole or in part), the employer must provide the employee or prospective employee with a copy

of the report it relied on and a written description of the employee or prospective employee's rights under the FCRA. The purpose of this section is to allow the employee or prospective employee to discuss the report and its validity (or inaccuracy) with the employer *before the adverse action is taken*. Therefore, the employer should provide the copy of the report and the statement of rights *before* it takes action that adversely affects the employee or applicant. 15 U.S.C. § 1681b(b)(3)(A). The employer must wait a reasonable amount of time (usually five business days) after the notification to take the adverse action.

- d. **Notice is required within 30 days after adverse action is taken.** After taking adverse action, the employer must provide the employee or prospective employee with (a) notice of the adverse action; (b) the name, address and telephone number of the consumer reporting agency that furnished the report; (c) notice that the consumer reporting agency did not make the decision to take the adverse action; and (d) notice of his/her right to obtain a copy of the report within 60 days and dispute its validity. 15 U.S.C. § 1681m.

#### **B. The Americans with Disabilities Act (ADA).**

1. The ADA, 42 U.S.C. § 12101 et seq., requires that employers give the same consideration for employment opportunities to disabled individuals that they give to non-disabled individuals.
2. The ADA prohibits pre-employment medical examinations.
  - a. An employer may not inquire as to whether a job applicant has a disability, or the nature or severity of a disability. 29 C.F.R. § 1630.13(a).
  - b. An employer may make pre-employment inquiries into the ability of a prospective employee to perform essential job-related functions. 42 U.S.C. § 12112(d)(2)(B).
  - c. The EEOC Technical Assistance Manual § 5.5(g) states that in performing background checks, an employer may not ask any questions or request any information from outside sources that it cannot ask or seek from the prospective employee. Simply put, if you cannot ask it in an interview, you cannot ask it in a background check.
    - (1) An employer may ask about such things as job functions performed by the applicant, quality and quantity of the

applicant's work, the applicant's attendance record, and any accommodations made by a former employer for the applicant.

- (2) The employer may not ask whether the applicant has a disability, the nature or severity of any disability, how much sick time was taken, or worker's compensation claim history.
- d. The employer may make a preliminary job offer conditioned on the results of a post-offer medical examination.
3. Different rules apply after the employment offer is made.
  - a. An employer may require a medical examination after an offer of employment is extended.
  - b. Post-offer examinations need not be related to performance of essential job functions, HOWEVER, if the employer seeks to use the results to revoke the offer of employment, the criteria for revocation must be job-related and consistent with business necessity – the essential functions of the job must not be able to be accomplished with reasonable accommodation.
  - c. At the post-offer stage, the employer may ask about the employee's general physical and mental health, worker's compensation history, prior sick leave usage, illnesses, diseases, and other impairments.

#### **C. Title VII of the Civil Rights Act of 1964.**

1. Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment based on race, color, religion, sex or national origin. This law applies to all employers with 15 or more employees.
2. Employers must be careful in relying on criminal background checks – a decision not to hire based *solely* on a criminal background check may be a violation of Title VII.
  - a. EEOC Policy Statement No. N-915, Feb. 4, 1987, states that because minorities are more often convicted of crimes, exclusive use of conviction records as a determining factor in hiring may result in a disparate impact on African American and Hispanic individuals.
  - b. The EEOC urges employers to look at the following three (3) factors before making an employment decision based on a criminal conviction:

- (1) The nature and gravity of the offense;
- (2) How much time has passed since the conviction; and
- (3) Relation between the offense and the position sought.

### III. Conducting Criminal Background Checks in Nevada.

- A. NRS 179A.075 creates the Central Repository for Nevada records of criminal history. The Central Repository is a division of the Nevada Highway Patrol.
- B. NRS 179A.100(3) provides that the Central Repository “shall disseminate to a prospective employer, upon request, records of criminal history concerning a prospective employee or volunteer which: (a) reflect convictions only; or (b) pertain to an incident for which the prospective employee or volunteer is currently within the system of criminal justice, including parole or probation.”
- C. NRS 179A.100(4) allows an employer to gain all information regarding any sexual offenses concerning a prospective employee if the prospective employee gives written permission for the information to be disseminated.
- D. The Nevada Central Repository conducts criminal background checks through the use of fingerprint identification cards.
  1. An employer may set up an account with the Central Repository, which can be contacted at (775) 687-1600. Setting up an account requires an employer to fill out a form which states its organization’s purpose, address, telephone number, and contact person.
  2. The Central Repository will distribute fingerprint cards to the employer, which include an authorization for release of information.
  3. The completed fingerprint cards are turned over to the Central Repository with a processing fee.
    - a. For a Nevada state criminal history, the fee is \$15 per search.
    - b. If the employer wishes a second fingerprint card to be forwarded to the FBI for a search through FBI files, the fee increases to \$39 (the \$15 state fee plus a \$24 FBI user fee).
  4. After the fingerprinting search is complete, a written response will be sent from the Central Repository to the employer.
- E. Other information about Criminal Background Checks:
  1. The employer may limit the information given to it by indicating limitations on the “Request for Applicant Fingerprint Processing” form. For example, if an employer is concerned with felony convictions only, it may indicate “Felony Convictions Only” on the request form.
  2. The Central Repository is relatively new. Currently, the repository only contains information about approximately one third of criminal convictions in Nevada. Therefore, the information on the state criminal history report is not always complete and may not release an employer from liability. This is especially true if criminal conviction information is available in the FBI databases, but the employer decides to cut costs by not paying the extra \$24 for an FBI search. Given the fact that the Nevada Central Repository information is not complete, it is wise for an employer to run an FBI search as well.
  3. Employers should include a separate authorization for release of information in application materials, and keep the release in the employee’s personnel file.
  4. Employers should remember that criminal histories obtained from the Central Repository should NOT be disclosed to third parties. Such disclosure is a violation of NRS 179A and could result in an invasion of privacy action against the employer.

### IV. Use of Employee Social Security Numbers (SSN).

- A. Some employees may be hesitant to give employers access to SSN. Some may even claim that the Privacy Act of 1974 precludes the employer from requesting their SSN. THIS IS NOT THE CASE.
  1. The Privacy Act of 1974 regulates the use of SSN by federal, state and local government agencies. The law requires these entities to inform a person of the legal authority allowing the agency to request a person’s SSN, whether disclosure is mandatory or voluntary, what uses will be made of the information and what will happen if the SSN is not provided.
  2. While there are some narrow legal restrictions placed on the use of SSN by financial institutions and certain cable and video rental companies, there are NO federal or state laws which prevent employers from requiring and using employees’ SSN for internal tracking purposes.
  3. While employees or potential employees are not legally required to give an employer their SSN, no law prevents the employer from taking adverse employment action against an employee or

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prospective employee who refuses to provide this information.

**B. Words of Caution to Employers Regarding SSN:**

1. An employer should not disclose SSN information to third parties. Doing so could subject an employer to liability in the form of an invasion of privacy claim.
2. In this age of identity theft, employers should be mindful of the potential for misuse of SSN information. If an identity theft is traceable to the employer, it could face liability. With that in mind, employers may want to use SSN information as sparingly as possible.

**V. Outsourcing Background Checks.**

A. A new trend in background checks is the formation of independent companies that perform background checks on behalf of employers. There are both benefits and drawbacks to using this type of arrangement.

**B. Benefits:**

1. An independent company that specializes in background checks is likely to be intimately familiar

with laws like the FCRA and their attendant requirements and prohibitions.

2. The FCRA provides employers with limited legal immunity from defamation, invasion of privacy or negligence in connection with a background investigation if it is handled by a third party investigator. There is no comparable immunity for employers who conduct their own investigations.
3. An independent company that specializes in background checks is likely to know better where to direct its efforts in order to obtain complete and accurate information.

**C. Drawbacks:**

1. Usually more costly than in-house background checks performed by the employer.
2. There is no official regulation or licensing for companies conducting background checks. As a result, investigators may be unskilled in background searches, either because of poor track records or unfamiliarity with applicable laws.