

## **THE INS AND OUTS OF NEGLIGENT HIRE AND BACKGROUND CHECKS**

By Charles Y. Hoff

On November 27, 2006 a Burger King manager was strangled and stabbed to death at his BK restaurant in Illinois. A fellow employee was charged with his murder and is awaiting trial. The victim's family has filed a lawsuit alleging that Burger King and the local restaurant's operator were negligent in hiring the accused in that they failed to determine prior to hiring that the employee had served prison time for rape and unlawful gun possession. The family alleges that a simple criminal record check by the BK operator would have revealed this prior background and the accused would never have been hired and placed in a position where he could do harm to another employee or restaurant patron.

A similar case in North Carolina involved a BK night shift employee who was convicted of assaulting and injuring another employee while robbing the BK store. In 2002 a North Carolina Court of Appeals court concluded that the Burger King operator engaged in misconduct by failing to perform a background check that should have revealed that the employee hired to be a night shift employee and perform a security function had been convicted prior to his employment of several crimes including second degree murder. A legal question arose as to whether Burger King's misconduct was simply a form of "negligence" or if it was so flagrant as to be construed as "intentional" in nature, and thereby justifying punitive damages. This distinction is also important to the operator as it may determine whether or not the restaurant's insurance carrier will deny coverage of the claim under their policy.

As these cases illustrate, failing to properly scrutinize an application and verify background history can lead to serious legal problems. Not only may there be dangerous consequences to human life, but there is also immense exposure to legal liability facing the restaurant. Legal liability attributed to the employer generally stems from the doctrine known as NEGLIGENT HIRING. This doctrine may even apply to off-duty employees if it can be established that the employer knew or should have known that the employee was likely to behave in a wrongful manner and there is a connection between the job and the misconduct. Legal exposure is even greater for employees that have frequent customer contact.

Once a restaurant operator recognizes the wisdom of performing background checks so as to mitigate their risk and protect their employees and patrons (8 out of 10 employers complete criminal record checks on applicants according to the Society for Human Resource Management), the restaurant is not out of the woods as it still must navigate a legal and regulatory minefield to ensure that it does not inadvertently violate the law or invites another form of lawsuit. For instance, there are the following wickets to watch out for:

- 1) State Laws: Many states have laws granting prospective employees with certain protections relating to public record disclosure. Although protections vary from state to state, job applicants do not have to disclose any information pertaining to an arrest or

criminal charge that did not result in a conviction. The same is true for convictions pardoned by a governor. Moreover, states such as California, Massachusetts, and Michigan have been known to file suit when they feel that their protective public record statutes have been violated.

2) EEOC Guidelines: The EEOC offers its interpretation of Title VII of the Civil Rights Act which prohibits employment discrimination on the basis of race, sex, color, national origin and religion. According to the EEOC, rejecting prospective employees on the basis of the type of financial information that comes from a credit report has sometimes been found to disproportionately exclude some minorities and have an “adverse impact” on a legally protected group. However, Title VII is not violated if the employer can show that requiring the financial criteria is job related and consistent with a business necessity. For instance, some courts have provided an exclusion to the extent that employers can use credit report and financial information to screen employee applicants for jobs requiring handling a considerable amount of money as this would constitute a “business necessity.”

The EEOC guidelines also prohibit the use of arrest and misdemeanor information to exclude an applicant without giving consideration to the four following factors: 1) Did the applicant actually commit the offense? 2) What is the nature and gravity of the offense? 3) How long was the offense? 4) What is the nature of the job being applied for?

The EEOC is also of the mind that employers should not directly ask prospective employees about arrests which have not led to convictions as they are concerned that this would have a chilling effect upon minorities and discourage them from applying for the jobs.

- 3) Federal Laws: The Fair Credit Reporting Act (FCRA) governs the activities of consumer reporting agencies, employers and others who use such reports. This federal law, as well as state laws modeled after the FCRA, contain notice and disclosure requirements, authorizations, pre-adverse and adverse notice action disclosures.
- 4) Consumer Reporting Agencies: Make sure that you are working with a reputable company that is knowledgeable of the state and federal rules. Be careful in reviewing consumer reporting company’s service agreements as some of them seek to hold the client responsible for any damages caused by the information they provide regardless of whether the consumer reporting agency submitted inaccurate or prohibited record information (such as purged or sealed documents).

In summary, pre-employment background checks are highly recommended but be sure that you call on your trusted legal advisor to help you ferret out your legal responsibilities in managing the information.