Every employer fears the discontented or unbalanced worker who commits a violent act. Yet quite often, the ordeal continues, even after the arrest or conviction of the enraged employee.

Problems can arise if you hire employees who have dangerous or violent inclinations. If you hire an employee who does have a dangerous or violent nature, that employee may be put into a situation—by you—where he or she could injure another employee or customer. If that happens, the injured person (a member of the public or another employee) is going to hire an attorney to sue you if you engaged in "negligently hiring" this person.

"Negligent hiring" is a legal term that describes the situation that prevails when a company violates its basic duty of care. What that means to individuals who are ordinarily involved in the hiring process is that they will be questioned as to whether they took all reasonable steps that they should have or could have taken to identify whether the applicant had any past problems with misconduct or unfit behavior.

More and more businesses are being held liable for the reprehensible behavior of their employees. Recent court rulings say that if you are contacted by a company that is doing a pre-employment check of a former employ-
ee of yours, you must reveal any serious misconduct on the part of your former employee. Although you may prefer to not disclose such information, withholding it could put you at risk.

California’s Supreme Court recently ruled that employers who give favorable job references for ex-employees are legally obligated to mention any misconduct involving violence or acts that physically endanger other individuals. Another California decision involved an employer who gave glowing references for a middle school vice principal, despite having knowledge that the man had been dismissed or forced to resign from several other school systems for molesting students. The court held that by deliberately giving this individual a favorable job reference, the employer was negligent and liable for the former employee’s subsequent behavior. Now that may seem harsh, but that is the law, at least in California. The majority of court rulings thus far indicate that if you fail to disclose past misconduct by an employee, you could be held liable for damages the employee might inflict on someone else at his or her new job.

Complying with such rulings can create new problems for you. Allegations about misbehavior in job referrals could trigger legal action against you by your former workers. You have two choices concerning how you will handle inquiries about former employees, and neither is very desirable: First, you can disclose both positive and negative information about a worker—and risk a lawsuit, or, second, you can say virtually nothing—and risk similar legal action.

Until now, many companies try to avoid legal problems with former “problem” employees by offering little more than routine information about them—such as employment dates, job title and salary history. Yet, this “don’t ask, don’t tell” practice is beginning to look like it could come back to haunt you.

**PRESCREENING**

Most employers hiring new employees know that it is important to conduct some type of applicant prescreening or background check, and the recent court decisions mentioned earlier should underscore that point. The proper prescreening of job applicants can save your company from many years of problems. Not only are civil liability issues a concern, but you should also be concerned about disruption of the workplace, theft of assets, sexual harassment, vehicle accidents and violence. In today’s legal envi-
ronment, the employer is the person who is being held responsible for events that happen while people are on the premises. The employer is the person who is being blamed for virtually anything that happens in the workplace today. Because of this, it is essential that you make a concerted effort to conduct in-depth and effective pre-employment (background) investigations to avoid the claim of negligent hiring. The courts have repeatedly ruled that once a person is hired, the employer holds much of the responsibility for that employee’s behavior.

The Ohio State Court of Appeals recently upheld a judgment against a furniture rental company that was found guilty of failing to conduct adequate applicant prescreening. The company subsequently hired a delivery driver with a criminal record; he later assaulted a customer in her home. In other words, the court said the employer was liable for the assault of the customer.

You could find yourself in a similar predicament if you do not perform background checks on your employees. For an employer, this means checking references and/or prior employers and, for certain jobs, even doing criminal or motor vehicle department checks. Most people in human resources know how to do a background check, so what’s important is to make sure that your HR people understand what’s at stake and that they give background checks top priority.

You must also tailor your background check to the needs of the job. If you are hiring someone to work on an assembly line, you may not want to do as thorough a background check as you would if you were hiring a customer service representative who is going in customers’ homes. On the other hand, if you hire an assembly line worker with a violent history, and if that worker intentionally injures one of your employees, you could be held liable. At a minimum, you should ask job applicants if they have ever been convicted of a crime. It is inappropriate to ask about arrests, but it is OK to ask about convictions.

**DOCUMENTATION**

You should keep a checklist type of document in each person’s file that states who you contacted and what you learned when checking a prospective employee’s background and references. It is a fact of life that many employers will not respond to a reference check—particularly with negative information—because they are afraid of potential liability.

Still, it is important to try to check each reference and be able to prove you checked it. It’s not that you must always get the information; there will be times when you cannot. But you must be able to show that you tried to get it. If you did not try, you are negligent.

**EMPLOYMENT DECISIONS**

When making an employment decision, you must establish a business necessity for use of an applicant’s conviction record in your employment decision.

The U.S. Equal Employment Opportunity Commission says you must consider three factors to justify use of a job applicant’s conviction record:

* The nature and gravity of the offense for which the person was convicted.

* The amount of time that has elapsed
since the applicant’s conviction and/or completion of sentence.

* The nature of the job in question as it relates to the nature of the offense committed.

Although each case must be evaluated on its own merits, the EEOC guidelines suggest that if, for example, you’re interviewing someone who will be going into people’s homes, you don’t want to ignore a prior conviction for assault and battery. On the other hand, you could reasonably ignore a conviction for writing a bad check since that should not have any bearing on whether the prospective employee is likely to assault a customer. Of course, you might consider such a conviction in a different light if the person you were interviewing was a candidate for a vacant bookkeeper position.

**WARNING SIGNS**

You can be held liable for the conduct of employees who have shown signs in the past that they may be potentially violent, so hiring such employees is dangerous. If you know or should have known that an employee had a problem, say with his temper, and you never did anything about it, you could be found liable for “negligent retention,” which can leave you vulnerable to a lawsuit.

Certain personality or behavioral traits should alert you that that individual might be violent. There is a list of characteristics that experts in the field say indicate the possibility of workplace violence. Make sure your HR people are aware of these characteristics. If an applicant or employee possesses one of these triggers/characteristics, you should investigate it, while at the same time making sure you do not violate the employee’s rights of privacy and make certain you document your efforts in the employee’s file.

**VERIFICATION**

Studies show that more than 35 percent of job applicants lie on their employment application. A leading security firm estimates that nearly two in 10 job appli-
cations conceal information—such as a criminal record—that would disqualify them for employment consideration. Thus far, the courts have not ruled that you must verify what an applicant tells you on his or her job application. However, if you do not ask the applicant whether he or she had any prior convictions, you have no defense if you hire an employee with a prior assault conviction who subsequently harms one of your customers.

If you want to lessen the risk of hiring decisions, you can hire a firm that specializes in background checks. Pre-employment screening background checks performed by a professional firm can check criminal, civil and federal records as well as an applicant’s previous employment, education, credit and motor vehicle records. A professional background investigation company knows what to look for and where to find it. Also, an investigation company is familiar with the common ways applicants hide information or avoid detection.

The Fair Credit Reporting Act governs the activities of consumer credit reporting agencies, as well as the users of the information procured from these agencies. A consumer report contains information on a consumer’s (job applicant’s) character, reputation and other personal data. You can obtain such reports to screen job applicants. The FCRA prohibits you from obtaining a consumer report unless you disclose to the applicant, in writing that such a report is acquired. This release must state that if you deny employment based on information from a background report, the applicant may make written inquiry requesting a disclosure of the
nature and scope of the investigation. Whoever does your background check for you will provide a form that meets your requirements and the requirements of all applicable laws.

INSURANCE ISSUES

Another potential problem that you should be aware of is insurance coverage. If you hire a known embezzler for a cashier’s position, and that person embezzles funds from your company, your insurance company may not pay the claim if it discovers that you did not conduct a thorough background investigation. If you had, you would have learned that the person was an embezzler, and you would not have hired him.

Because you did not conduct the investigation properly, the insurance company can elect to void the insurance policy. A small company should be particularly sensitive to the consequences of failing to conduct a proper background investigation. A Fortune 500 company may be able to afford to write a check for a $1 million court judgment, but a small company could be forced out of business.

PRIOR EMPLOYER LIABILITY

If you specifically ask a previous employer about wrongdoing by a job applicant, does failure to provide that information make the former employer liable? No easy answer presents itself. As an employer, you should realize that by hiring new workers, you expose yourself to increasingly thorny legal dilemmas, and claims resulting from workplace violence, sexual harassment and other misconduct are expected to grow. That is the reality confronting you. And along with this increase in litigation will be more employee lawsuits alleging negligent hiring, retention and supervision.

A study found that between 1983 and 1995, judgments for such lawsuits averaged $810,000. In light of this fact, employers would be wise to exercise increased diligence to avoid hiring problem employees in the first place.

About the Author

Milton Zall is a free-lance writer based in Silver Spring, Md., who specializes in taxes, investments and business issues.