



GREEN·SEIFTER
ATTORNEYS, PLLC

Keeping Employment Liability at Bay

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Introduction

Introduction

- Goal of Seminar
- Why conduct employment background checks?
 - Hiring an employee is like making an investment.

Introduction

- Costs associated with Hiring the Wrong Employee
 - lawsuits, litigation, and lawyers;
 - loss of productivity;
 - negative affect on employee morale;
 - high employee turnover;
 - negative impact for clients and the general public.

Negligent Hiring

Negligent Hiring

- Claims by Co-Workers Against Employer
 - General Rule - Claims by employees against an employer are dismissible as worker's compensation is often deemed exclusive remedy to an employee injured on the job.
- Exceptions to the General Rule
 - Negligence of third party
 - Intentional tort by employer

Negligent Hiring

- Third party claims against employer
 - Respondent superior – employee must be acting within the scope of employment
 - Negligent hiring, supervision or retention – employer can be held liable even if employee acts outside the scope of employment

•Elements of Negligent Hiring Claim

- Employee was unfit for hiring or retention;
- Employer knew or should have know employee was unfit for hiring or retention;
- Employer could foresee employee coming into contact with a customer under circumstances creating a risk of danger.

Negligent Hiring

- New York State law
 - Kenneth v. Roman Catholic Diocese of Brooklyn, 2nd App. Div., 2d Dept 1997 – favorable decision for employers.
 - Glover v. Augustine, App. Div., 1st Dept 2007 – Is the tide turning?

Discrimination Against Ex-Convicts

Discrimination Against Ex-Convicts

- Ex-cons are a protected class
- New York law “encourages” their employment
- Recidivism rates are high and raise concerns for hiring ex-convicts

Discrimination Against Ex-Convicts

- §752 of the New York Corrections Law instructs that employers may not deny employment to an applicant who was previously convicted of one or more criminal offenses, unless:
 - there is a direct relationship between one or more of the previous criminal offenses and the specific employment sought; or
 - granting the employment would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public.

Discrimination Against Ex-Convicts

- New York Law provides that you must consider the following factors before making your determination:
 - a) the public policy of the State of New York encourages the employment of persons previously convicted of a criminal offense;
 - b) the specific duties and responsibilities necessarily related to the employment sought;
 - c) the bearing, if any, to criminal offense or offenses for which the person was previously convicted will have on his fitness or ability to perform one or more of such duties or responsibilities;
 - d) the time that has elapsed since the occurrence of the criminal offense or offenses.

Discrimination Against Ex-Convicts

- the age of the person at the time of the occurrence of the criminal offense or offenses;
- the seriousness of the offense or offenses;
- any information produced by the person, or produced on his or her behalf, in regards to which rehabilitation and good conduct;
- the legitimate interest of the private employer in protecting property, and the safety and welfare of specific individuals or the general public.

Discrimination Against Ex-Convicts

- Protection for those arrested? Yes, but only if subsequently acquitted/charges dropped.

Drug and Alcohol Testing

Drug and Alcohol Testing

- Legality
 - New York has no prohibition against drug and alcohol testing
 - Federal Law-American's with Disabilities Act is neutral
- So what is the issue?
 - Proper test procedures
 - Ensuring that testing and testing results are used for lawful nondiscriminatory motives

Drug and Alcohol Testing

- The basic prohibition against discrimination:
 - an employer may not discriminate against an employee or prospective employee based upon that employee's disability, so long as the employee can perform the essential functions of his or her job with or without a reasonable accommodation.

Drug and Alcohol Testing

- What is a disability?
 - Americans with Disability Act has a narrow definition of what constitutes a disability. To qualify as a disability, the condition must have a substantial impact on an individual's "major life activities."
 - New York has a broad definition of disability: a physical, mental or medical impairment resulting from anatomical, psychological, genetic, or neurological conditions which prevents the exercise of a normal bodily function, or is demonstrable by medically accepted clinical or laboratory diagnostic techniques.

Drug and Alcohol Testing

- New York Law is far broader identifying a disability as:
 - Both New York and Federal law, however, also protect those who are perceived as being disabled.
 - ADA – current users are not protected.
 - New York State Division of Human Rights has taken an expansive view to protect employees who have testified positive for drugs or alcohol.

Drug and Alcohol Testing

- Unlawful discrimination may also occur in the testing and administration of tests
 - Random testing concerns

Drug and Alcohol Testing

- Liability can be minimized by taking the following steps:
 - have a drug testing policy;
 - have the policy acknowledged by employees;
 - have employees acknowledge the obligation to be tested;
 - ensure that the drug testing procedures are designed to avoid discrimination and are administered correctly;
 - follow the policy uniformly.

Medical Examinations and Inquiries

Medical Examinations and Inquiries

- Pre-employment examinations
 - Prohibition against discrimination
 - ADA
 - Employer
 - New York Rule

Medical Examinations and Inquiries

- Acceptable examinations and inquiries
- Entrance examinations – A confidentiality and use rule
- New York Rule

Medical Examinations and Inquiries

- Pre-employment vs entrance examinations – the distinction
 - Three Reasons

Medical Examinations and Inquiries

- EEOC Resources
 - Interpretive Guidance on Title I of the “Americans with Disabilities Act”
 - Enforcement Guidance

Polygraph Testing

Polygraph Testing

- The PPA bans the use of polygraph tests by most private employers, The Polygraph Protection Act of 1988:
 - Ongoing Investigations
 - Security Service Employers

Polygraph Testing

- New York Rules:
 - Psychological Testing
 - No Dissemination of Test Results

Background Checks

Background Checks

- Available to the employer:
 - Education
 - Military
 - Medical
 - DMV
 - Credit-related

Background Checks

- Unavailable to employer per under Fair Credit Reporting Act (“FCRA”):
 - Bankruptcies (after 10 yrs)
 - Civil suits
 - Civil judgments and arrest records (after 7 yrs)
 - Paid tax liens (after 7 yrs)
 - Accounts put in collection (after 7 yrs)
 - Negative information (after 7 yrs)

Background Checks

- Criminal history records
 - National criminal history records
 - New York Statewide criminal history records
 - Statewide criminal history records other than NY

Background Checks

- Commercial criminal history record services
 - Choicepoint - online criminal records search service with access to criminal records from 28 States.
 - Accurate Background Checks, Inc. – online search service with a nationwide network of court researchers and investigators.
 - Specific Information Resources – online criminal records search service that provides a comprehensive list of online court records that are available publicly.

Background Checks

- DMV Records
 - The Drivers Privacy Protection Act (DPPA)
 - Personal information under DPPA
 - Permitted Use
- Records available
- Fees
- Obtaining records
- National Driver Register Database

Background Checks

- Consumer Reports and Credit Information
 - Fair Credit Reporting Act (“FCRA”)
 - Notice and authorization provisions of FCRA
 - Written authorization

Background Checks

- Adverse Action Procedures
 - Pre-adverse action disclosure
 - Oral, written or electronic notice

Background Checks

- Certifications to Consumer Reporting Agencies
- Non-compliance
- Internet Searches



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