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Legal Issues for HR Professionals: Reference Checking/Background Investigations

By William J. Woska, J.D.

Employers have a legal duty to protect their employees, customers, clients and visitors from injury caused by employees that the employer knows or should have known poses a risk to others. When an employer breaches this duty, they may be liable for damages under the tort of negligent hiring. *Reference checking* performed by employers is essential in satisfying their legal obligations. However, human resources specialists often find themselves in a quandary when reference checking becomes an issue. Confusion often results from legal advice to attempt to obtain as much information as possible on a potential hire while providing as little information as possible on a current employee because of the possibility of lawsuits. This article addresses issues the employer must consider when conducting reference checks and background investigations.

Human resources specialists may become uncomfortable when the term *reference checking* enters a conversation because of the difficulty in obtaining information from current or former employers. Employers may do some investigation into a potential employee's background in order to protect against negligent employment litigation. However, because of the reluctance of employers to provide information about an individual's employment history, the possibility of lawsuits, the time involved, and other related reasons, it is not unusual for employers not to conduct thorough reference checks.

Employers have a duty to protect their employees, customers, clients, and visitors from injury caused by employees the employer knows, or should have known, pose a risk to others. This duty arises from the common law and is breached by employers who fail to exercise reasonable care to ensure that workers and customers are free from the risk of harm that may be inflicted by unfit employees.¹ If employers breach this duty, they may be liable for damages under the tort of negligent hiring.

Employers are exposed to lawsuits for defamation of character and invasion of privacy claims when they provide information about current or former employees to other employers seeking job references. In a number of states it is considered privileged communication when an employer communicates information about the job performance or qualifications of a current or former employee upon the request of a prospective employer. In California, a "qualified privilege" has been established when

a prospective employer requests information from a former employer, and the former employer acts without malice providing truthful job-related information. The former employee cannot later recover from the former employer under a defamation theory.²

The failure by employers to either do or adequately complete reference checks or background investigations has caused considerable embarrassment and liability to the parties involved. Two recent high profile situations receiving national publicity illustrate the problem: (1) In May of 2002 Sandra Baldwin resigned as president of the United States Olympic Committee after admitting that she lied about her academic credentials by claiming that she had a doctorate from Arizona State University. She has since reported that she did not complete her dissertation.³ (2) George O'Leary was hired as the head football coach at the University of Notre Dame in December 2001. O'Leary had been the head coach at Georgia Tech prior to being appointed to his new position. However, several days after his appointment it was found that O'Leary made untrue statements on his resume. Five days after his appointment, he resigned.⁴

Another incident several years ago involved United States Senator Barbara Boxer of California. Boxer's office did not screen out an individual with a record of threats and illegal gun use from working as a receptionist in her San Francisco office. The police subsequently arrested the individual at work for carrying a 9mm Beretta handgun and mushrooming bullets—the same kind of bullets that were used to kill eight people at 101 California Street in San Francisco in 1993. Boxer's receptionist explained to the investigating officers that he was investigating UFOs for the CIA.⁵

Human resources professionals are responsible for providing the best qualified candidates for vacant positions. The final selection must include a comprehensive background investigation for higher level and other sensitive positions within the workforce. This article addresses many of the legal and related issues involving reference checking and background investigations. Situations resulting in liability to the employer when background investigations were either inadequate or not done are provided to assist the human resources professional in better understanding possible repercussions. Additionally, the issue of negligent employment practices is addressed to illustrate the relationship to reference checking and background investigations. Finally, job related employment practices are discussed in detail to better emphasize the nexus between the privacy rights of an individual and the employment process.

Reference Checking Considerations

Reference checking is a critical component of the hiring process for all new employees. It does not matter if the position to be filled is entry level or at the top of the organization. Hiring someone who may otherwise be screened out through reference interviews can be harmful to the organization.

Attorneys often advise employers to limit responses to reference inquiries to the "basics" such as name, job title, and dates of employment to protect against litigation. The "basic" employee information is also regularly provided with respect to employment verification for credit purposes. The purpose for advising limited reference information is because of the possibility of lawsuits alleging defamation and/or invasion of

privacy if responses expand to other matters such as addressing performance related issues. Additionally, if the current or former employee has been involved in any type of adverse employment situation, retaliation may become an issue.

Employers often find themselves in a catch 22 as to legal advice concerning reference checking. They are encouraged by counsel to obtain as much information as possible with respect to prospective employees. However, employers are also advised to restrict the information they give in reference checks. The limitations involved with obtaining and/or receiving reference information can be frustrating for both the employer seeking to hire a qualified individual, and the individual who is applying for the position who is unable to obtain a reference from a current or former employer where s/he may have outstanding performance.

Reference checking and background investigations are essential in hiring competent employees. An employer must be able to determine an applicant's honesty and qualifications for the position. Background information may also be a priority when hiring for sensitive positions such as security or public safety or where an employee may have access to money or confidential information.

Increasingly, employers are concerned about workplace violence and the threat of negligent hiring lawsuits.⁶ Considering the value of obtaining as much information as possible on a prospective employee (performance, education, credentials, driving, etc.), and understanding that the need for information must be carefully tailored around the type of job and the privacy rights of the individual, some suggestions on the approach supported by legal considerations are addressed herein.

Privacy Considerations

Although the U.S. Constitution contains no express privacy provisions, the U.S. Supreme Court recognized that an implied privacy right applies to the states through the 14th Amendment of the Constitution.⁷ The Court subsequently held that public sector employees may have a reasonable expectation of privacy in the workplace.⁸ The reasonable expectation of privacy is impacted by the type of job—whether an individual is in a private office as opposed to an open office area, whether a lock, if required, is provided by the employer or the employee—and related issues.⁹ Private sector employers are not constrained by the provisions of the U.S. Constitution. However, state constitutions and statutory law, in addition to the common law, may limit the nature and scope of permissible searches. Many states have enacted laws restricting employers' inquiries (i.e. arrest records) in the absence of specific state constitutional or statutory protections.¹⁰ In California, the state constitution provides the right to privacy for each individual.¹¹

Job applicants have a reduced expectation of privacy from that of an employee.¹² Many employers consider the application process as an opportunity to obtain information on individuals interested in employment who may not otherwise be readily available. For example, some applications include statements that the employer may conduct background investigations or conduct drug testing prior to employment. Applicants may be required to provide employers with written authorization with

respect to reference checks through the application process. Most applications ask whether the applicant has been convicted of a crime. Some applications require that only convictions of felonies be reported. Furthermore, applicants applying for positions which require driving vehicles may be required to provide a current copy of their motor vehicle driving record. Employers have a duty to provide a safe workplace and the application process can be a critical part of ascertaining that an individual is qualified for the position.¹³

The Nexus between the Invasion of Privacy and Waivers

Article 1, Section 1 of the California Constitution provides persons, *inter alia*, the right to privacy.¹⁴ With respect to employment, there is a balancing test between the employee's right to privacy and the employer's legitimate business reason to know.¹⁵ The privacy rights of an individual are impacted in a number of ways ranging from obtaining consumer credit to applying for a job. When an individual applies for a job the applicant is waiving certain rights held prior to the application for employment. These include addresses, telephone numbers, prior employers and other job related information relevant to the position for which the individual is applying.

As the individual progresses through the employment process, and prior to an offer of employment, the expectation of privacy is further reduced with respect to background and reference information from prior employers. Since prior employers have information concerning performance and other job related criteria, both positive and sometimes negative, a waiver signed by the applicant provides protection to the employer and may eliminate or reduce the invasion of privacy risk. It is not unusual for prior employers to refuse to provide other than basic information (i.e. job, dates of employment) concerning the individual's prior employment without a signed waiver for protection from the possibility of subsequent lawsuits.

The approach to waivers and releases will differ between employers. Some will include waivers on application forms. Others provide terminating employees with the opportunity to sign complete or limited waivers at the discretion of the individual. A limited waiver provides the terminating employee with the opportunity to specifically identify what may be released in the event of a subsequent reference inquiry. Although waiver language will vary between employers, the following is an example of a general waiver:

"I am an applicant for the position of _____ with the (name of employer). The (name of employer) requires a comprehensive background investigation be completed prior to an offer of employment. The (name of employer) will inquire into all areas of my background to determine my suitability for employment. I hereby authorize any duly accredited representative of (prior employer) to provide any information, positive, negative, and or derogatory, concerning my prior employment. This may include but is not limited to salary, achievement, past job performance, attendance, personal history, disciplinary information, etc. I direct

you to release such information upon request of the duly accredited representative of (name of employer) regardless of any agreement I may have made with you previously to the contrary. I hereby release any individual, including records custodians, from any and all liability for damages of whatever kind and nature that may at any time result to me on account of compliance or any attempts to comply with this authorization.”¹⁶

The waiver of the right of privacy provides the prospective employer the opportunity to obtain job related information relevant to the position that may not otherwise be provided. However, even when an applicant has signed a release, an employer may be liable for invasion of privacy if specific questions intrude unreasonably on the applicant’s private life in areas that are entitled to privacy or defamation claims if the applicant argues that negative comments are not true.¹⁷

Finally, after an offer of employment and acceptance by the candidate, the reasonable expectation of privacy is further reduced because of the legitimate business interest of the employer and the need to know personal information for insurance and other employment related reasons.

The message with respect to checking references is that the employer has a legal duty to provide a safe workplace and reference checking is essential in satisfying this duty. It is suggested that employers have counsel consider developing a comprehensive waiver to protect against potential defamation and privacy claims if not presently available and have the applicant review and execute. If the applicant refuses to do so, move on to the next applicant.

The “Job Related” Element of Reference Checking:

Job related is a critical term impacting the employment process, the extent to which is sometimes not fully understood. Job related impacts the employment process from the determination of qualification standards to all aspects of the testing and employment process including written, oral, performance, psychological and physical examinations, background investigations, reference checking, and other testing devices. The concern for job related employment standards was established by the *Griggs v. Duke Power Co.* decision handed down by the United States Supreme Court in 1971.¹⁸

Griggs is one of the most far-reaching decisions impacting the human resources profession to come down from the Court. The Court held that Title VII of the 1964 Civil Rights Act required the “removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.”¹⁹ The removal of these barriers requires that all components of the job selection process be job related. With respect to qualification standards, Chief Justice Burger, in delivering the opinion of the Court, wrote:

“The facts of this case demonstrate the inadequacy of broad and general testing devices as well as the infirmity of using diplomas or degrees as fixed measures of capability. History is filled with examples of men and women who rendered highly effective performance without the conventional

badges of accomplishment in terms of certificates, diplomas, or degrees. Diplomas and tests are useful servants, but Congress has mandated the commonsense proposition that they are not to become the masters of reality.”²⁰

Title VII of the Civil Rights Act of 1964 establishes the standard that pre-employment inquiries, including reference checks and background investigations, are unlawful if they disproportionately screen out members of minority groups or adversely impact either men or women and cannot be justified by business necessity.²¹ There must be a nexus between the inquiry and the job for the selection instrument to be lawful.²²

State discrimination laws applying to employment procedures include reference checking.²³ It is imperative that persons conducting interviews with former employers or other individuals refrain from questions addressing race, color, religion, sex, national origin, age, disabilities, and other protected categories. Reference decisions are to be based on objective job related facts. Some examples of appropriate questions generic to most jobs would include:

1. Dates of employment.
2. Position(s) held.
3. Describe the job duties/tasks performed.
4. Describe the quality and quantity of work including examples.
5. Describe your strengths as observed in the performance of duties.
6. Describe any weaknesses you may have that were observed in the performance of your duties.
7. Describe job specific skills.
8. Describe your attitude toward work.
9. Describe how you got along with coworkers (interpersonal relations).
10. Are there any reasons why your company would not rehire you?

Examples of inappropriate questions would include:

1. Providing examples of any personal situations that impacted the workplace.
2. Questions impacting age, race, color, religion, marital status, sexual orientation and other protected classifications.
3. Questions concerning arrests, financial disclosure matters, family history, medical history.
4. Questions as to whether the individual has filed claims or lawsuits against the former employer.
5. Questions as to whether the individual has attempted to organize a union of the employer's workers.
6. Questions that identify an individual who is otherwise protected by law.

If an employer can establish a nexus (job related reason) between the question and the job, a major hurdle has been taken with respect to liability avoidance. Employers responding to reference questions are provided with immunity laws in many states. In California, the Civil Code provides a *qualified privilege* for job performance and quali-

fications information provided by a former employer in response to a written request when providing truthful job related information in good faith.²⁴ It reads, in part:

“...This subdivision applies to and includes a communication concerning the job performance or qualifications of an applicant for employment, based upon credible evidence, made without malice, by a current or former employer of the applicant to, and upon request of...the prospective employer...”

Nevertheless, even with the protection intended through statutory enactments, it is not unusual for employers to receive advice from their legal counsels regarding the risk of litigation outweighing the benefit to the employer from giving reference information. Even when an employee provides a release concerning reference information, a truthful, factual, statement that negatively impacts the employee may result in a claim or lawsuit from subsequent self-publication by the employee.

Self-publication of Defamatory Statement

The self-publication of a defamatory statement may be imputed to the originator of the statement if “the person defamed (is) operating under a strong compulsion to republish the defamatory statement and the circumstances which create the strong compulsion are known to the originator of the defamatory statement at the time he communicates it to the person defamed.”²⁵ That is, republication might be required if “a job seeker must tell a prospective employer what is in his personnel file in order to explain away a negative job reference.”²⁶

The rationale for making the originator of a defamatory statement liable for its foreseeable republication is the strong causal link between the actions of the originator and the damage caused by the republication. This causal link is no less strong where the foreseeable republication is made by the person defamed.

This exception has been limited to a narrow class of cases, usually where a plaintiff is compelled to republish the statements in aid of disproving them. Thus, where a derogatory statement is placed in a personnel file, the employee must explain the statement to subsequent employers who may learn of it if they investigate the employee's past employment.²⁷

The courts have recognized two separate concepts with respect to liability where the disclosure is the natural and probable consequence of the originator's actions. The first is where the originator of the defamatory statement has reason to believe a letter addressed and sent to the defamed will fall into the hands of a third party before the defamed reads it or is informed of its contents.²⁸ The second is where the originator of the defamatory statement has reason to believe that a person defamed will be under a strong compulsion to disclose the contents of the defamatory statement to a third person after he has read it or been informed of its contents.²⁹

The elements of a self-publication claim require the plaintiff to be able to show that there is a “negative job reference” attributable to the employer and that the plaintiff was subsequently required to provide an explanation concerning the matter. The plaintiff further argues that his/her injury resulted from the loss of the job.

Reference Checking and the Fair Credit Reporting Act

Reference checking and background investigations are critical elements in satisfying the employer's duty to provide a safe workplace. The extent of the inquiry will be determined by many factors. For example, will the person hired perform customer service functions on a regular basis? Will the new hire have access to customer's homes or other property? Will the individual have access to sensitive and secure information? Situations such as these create a higher degree of care on behalf of an employer in assuring that the right person is hired.

When placing an employee in a position of trust, the scope of the background investigation is directly related to the severity of risk that third parties are subjected to by an incompetent employee.³⁰ In a leading case applying the theory of negligent hiring, the plaintiff was sexually assaulted by the manager of her apartment complex who entered her apartment in the early morning hours with a passkey. The court determined that the property management company had done a poor job in confirming the information provided on the apartment manager's employment application. Had the employer been thorough, it would have found that the employee had received an early discharge from the Army, had been fired from his job as a school bus driver for drinking on the job, and had listed as references his mother and sister. Additionally, he had criminal convictions for burglary and armed robbery. The case is significant in establishing a nexus between liability, actual or constructive knowledge, and the totality of the circumstances surrounding the hiring.

When conducting a background investigation or contacting references, employers must be sensitive to the requirements of the federal Fair Credit Reporting Act (FCRA).³¹ In California, the state counterpart to the FCRA is the Investigative Consumer Reporting Agencies Act (ICRAA).³² Recent amendments to the ICRAA exempt an employer from the consumer notification requirements for in-house investigations and reference checks unless certain public records are obtained.³³ Because of the disclosure requirements under both federal and state law, the employer must be concerned about the confidentiality of the information obtained from the investigation.

An "investigative consumer report" is defined as "...a consumer report in which information on a consumer's character, general reputation, personal characteristics, or mode of living is obtained through any means..."³⁴ The ICRAA covers all companies doing business in California including consultants and investigative agencies.

Because of the sensitivity of the notification provisions of both the FCRA and ICRAA legislation, and recently enacted clarification of the ICRAA, it is suggested that employers review with their counsel the provisions of the law with respect to disclosure requirements for reference checking and background investigations.³⁵

Negligent Employment Practices in the Employment Process

Since only a small percentage of background investigations reveal information that may impact the hiring decision, employers may take a chance that there will be no

ramifications as opposed to delaying an appointment. However, lawsuits are regularly filed against employers for their negligence in failing to do background investigations and hiring individuals who subsequently cause harm to others. Thorough reference checks would have revealed information that may have resulted in the individual not being hired.

Employer liability is predicated on the theory of negligent hiring. Negligent hiring occurs when, prior to the time the prospective employee is actually hired, the employer knew or should have known of the individual's unfitness, and the issue of liability focuses upon the adequacy of the employer's pre-employment investigation into the person's background.³⁶ The employer is principally liable for negligently placing an unfit person in an employment situation involving an unreasonable risk of harm to others.³⁷ The Restatement Second of Agency states that "[a] person conducting an activity through servants or other agents is subject to liability for harm resulting from his conduct, if he is negligent or reckless...in the employment of improper persons...in work involving risk of harm to others..."³⁸ Liability is predicated on the negligence of an employer in placing a person with known propensities, or propensities that would have been discovered by a background investigation, in an employment position that because of the circumstances of the employment, it should have been foreseeable that the individual posed a threat of injury to others.³⁹

"Circumstances of employment" often reflect the sensitive nature of the position's interaction with the public. In a Florida case involving an individual employed to deliver furniture, the person was hired without completing a job application. Additionally, the company did not contact any references. A negligent hiring lawsuit was filed after the employee attacked a customer in her home while delivering furniture. It was subsequently found that the person hired had a record for armed robbery and burglary, a conviction for attacking his former wife and cutting her face with a knife, and a voluntary hospitalization for psychiatric problems. He was an intravenous drug user and had been fired from his former employment.⁴⁰

These cases are significant in establishing a special duty upon the employer to investigate the prospective employee's background when placing an individual in a position of trust. Generally, the scope of the pre-employment investigation should correlate to the degree of opportunity the prospective employee would have to do harm to third persons. A minimum investigation consisting of the completion of an application and a personal interview may be satisfactory for a clerical position, but a full background inquiry including an application, criminal record check, and reference checking would be necessary for a safety or security position.⁴¹ Also, cases such as these are significant in establishing a nexus between liability, actual or constructive knowledge, and the totality of the circumstances surrounding the hiring.⁴²

Conclusion

It is essential that prospective employers obtain complete and thorough information with respect to a prospective employee's background prior to an offer of employment. Detailed reference policies and procedures are necessary in ascertaining compliance

with legal requirements. History has illustrated that no matter how qualified an individual appears to be, employers have a responsibility to its employees and other persons with whom it does business to confirm through reference checking and background investigations on an individuals qualifications. Liability avoidance may be achieved when employers establish uniform procedures for responding to reference inquiries and coordinate with counsel in designing waivers and releases for reference and background investigations.

Notes

¹ Rest.2d Torts, Sec. 314 *et seq.*

² Civil Code Sec. 47(c) (West Supp. 2002).

³ Hersh, Philip. "USOC Head Resigns Post; Resume Errors Costly." *Chicago Tribune*, 25 May 2002.

⁴ Fountain, John W. & Wong, Edward. "Notre Dame Coach Resigns After 5 Days and a Few Lies." *New York Times*, 15 December 2001, A1.

⁵ "Boxer Aide to be Fired Over Gun Incident." *San Francisco Chronicle*, 15 July 1993, A19.

⁶ "Personnel Practices: Background Investigations," International Personnel Management Association, The Center for Personnel Research Series, January 1997.

⁷ *Griswold v. Connecticut*, 381 U.S. 479, 85 S. Ct. 1678 (1965).

⁸ *O'Connor v. Ortega*, 480 U.S. 709, 107 S. Ct. 1492 (1987).

⁹ *National Treasury Employees Union v. Von Raab*, 109 S. Ct 1384 (1989).

¹⁰ Government Code Sec. 12900 *et seq.*

¹¹ California State Constitution, Article I, Sec.1.

¹² *Harmon v. Thornburgh*, 928 F.2d 484 (D.C. Cir. 1989); *Willner v. Thronburgh*, 928 F.2d 1185 (D.C. Cir. 1991); *Loder v. City of Glendale*, 14 Cal. 4th 846 (1997).

¹³ 29 U.S.C. 651; California Code of Regulations, Title 8, Sec. 3203.

¹⁴ *O'Connor v. Ortega*, *op. cit.*, pp. 709, 1492.

¹⁵ *Doyle v. State Bar of California*, 32 Cal.3d 12, 20 (1982).

¹⁶ *Cox v. Nasche*, No. 94-35308, 9th Cir. (1995).

¹⁷ Shepard, Ira Michael, Duston, Robert L., & Russell, Karen S. *Workplace Privacy*, 2nd Ed., p. 139, The Bureau of National Affairs (1989).

¹⁸ *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); 91 S.Ct. 849 (1971).

¹⁹ *Ibid.*, p. 431.

²⁰ *Ibid.*, p. 433.

²¹ 42 U.S.C. Sec. 2000e-2(k)(1)(A)(i).

²² *Thorne v. City of El Segundo*, 469 U.S. 979 (1984) *cert. denied*; 726 F.2d 459, 469 (9th Cir. 1983).

²³ Government Code Sec. 12940 (f)(2) (West Supp. 2002).

²⁴ Civil Code Sec. 47(c)(3) (West Supp. 2002).

²⁵ *McKinney v. County of Santa Clara*, 10 Cal.App.3d 787 (1980).

²⁶ *Live Oak Publishing Co. v. Cobagan*, 234 Cal.App.3d 1277, 1287 (1991).

- ²⁷ *McKinney*, 110 Cal.App.3d @ 795; *Churchey v. Adolph Coors Co.*, 759 P.2d 1336, 1344-45 (1988).
- ²⁸ *Bander v. Metropolitan Life Ins. Co.*, 47 N.E.2d 595 (1943).
- ²⁹ *Grist v. Upjohn Company*, 168 N.W.2d 389 (1969); *Bretz v. Mayer*, 203 N.E.2d 665 (1963).
- ³⁰ *Ponticas v. K.M.D. Investments*, 331 N.W.2d 907, 913 (1983).
- ³¹ 15 U.S.C. Sec. 1681 *et seq.*
- ³² Civil Code Sec. 1786 *et seq.*
- ³³ California Assembly Bills Nos. 1068, 2868, enacted effective September 28, 2002 as clarification to Civil Code Sec. 1786 *et seq.*
- ³⁴ Civil Code Sec. 1786.2(c) (West Supp. 2002).
- ³⁵ Civil Code Sec. 1786 *et seq.*
- ³⁶ *Garcia v. Duff*, 492 So.2d 435 (1986).
- ³⁷ Woska, William J. "Negligent Employment Practices," *Labor Law Journal*, p. 603, (September 1991): Commerce Clearing House, Inc.
- ³⁸ Rest.2d Agency, Sec. 213.
- ³⁹ *Ponticas*, 331 N.W.2d 910 (1983).
- ⁴⁰ *Tallabasse Furniture Company, Inc. v. Harrison*, 583 So. 2d 744 (Fla. App. 1991).
- ⁴¹ Womey, David P. *Labor and Employment Law*, 10th Ed., (West Educational Publishing Co., 1998) p. 570.
- ⁴² *Harvey Freeman & Sons, Inc. v. Stanley*, 378 S.E.2d 907 (1989).

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