

Published by the  
Glatfelter Insurance Group  
York, Pennsylvania

# Employment Practices UPDATE

## BACKGROUND CHECKS

### *Have you done your homework?*



In December 2003, a 16-year veteran of a New Mexico fire department was charged with drunken driving. Administrators of the 600-employee department didn't know that the firefighter had previously been convicted 10 times of driving while intoxicated (DWI). In fact, the firefighter had faced his first DWI charge three years before joining the department. Shocked fire officials were unaware this respected co-worker's driver's license was suspended five times during his tenure with the department.

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Community members were appalled that the man was not in jail, much less working in such a respected and trusted profession. This fire department typically ran extensive background checks on new hires. After the hire, however, the department relied on the "honor system," asking veteran firefighters to turn themselves in if they encountered any criminal problems. Clearly, self-reporting failed as an effective risk management procedure. In statements to numerous media outlets, the city's mayor pledged the fire department would "work hard to rebuild its credibility."

Emergency Services Organizations (ESOs) are held to a high standard for public trust and safety. Conducting comprehensive background checks for both employees and volunteers ("members") is a necessary risk management step for ESOs of all sizes. This article analyzes important aspects of implementing and maintaining background checks for applicants and existing members of your ESO.

## BENEFITS OF BACKGROUND CHECKS

The many reasons for conducting criminal background checks include:

- Increasing the quality of the applicant pool and existing membership
- Ensuring accuracy of information submitted in an application and/or resume
- Limiting violence, embezzlement, theft, and other wrongdoing
- Reducing legal liability associated with negligent hiring, selection, retention, and workplace violence

## NEGLIGENT HIRING / SELECTION / RETENTION

Negligent hiring, selection, and retention are recognized employment law claims. An ESO is required to select and retain members who will not endanger others with whom the members may foreseeably come into contact. In general terms, your ESO may be held liable for negligent hiring, selection, or retention where it is established that: (1) your ESO knew, or should have known, that the member in question had a particular unfitness for the position so as to create a danger of harm to other members or third parties; (2) such unfitness was known, or should have been known, at the time of hiring, selection, or retention; and (3) the unfitness proximately caused the claimed injury.

We welcome comments, suggestions and questions from our readers.

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### SCOPE OF BACKGROUND CHECKS

Many ESOs run criminal background checks for full-time employee positions. Take additional steps to expand the scope of criminal background checks and prevent future problems.

#### *Beyond full-time employees*

- Consider instituting criminal background checks for part-time, paid-on-call, and volunteer members of your ESO. This author recently encountered a fire department that failed to conduct a background check on a paid-on-call member who had a criminal record of violence and drug use and later physically assaulted a fellow member of the department.

#### *Check other jurisdictions*

- Conduct criminal background checks in an applicant's current residential jurisdiction as well as in those where the applicant has lived in the past. Those convicted of crimes often move to avoid barriers to future employment or affiliation with an ESO.

#### *Periodic ongoing checks for current ESO members*

- When faced with the prospect of discipline or even dismissal, an existing member may choose not to divulge a recent arrest or criminal conviction. Given the safety risks associated with emergency services, conduct regular ongoing background checks on all members to prevent being caught off guard.



## ANALYZING CRIMINAL RECORDS

A criminal history record check is one part of a screening process, not necessarily a stand-alone selection criterion. Assess background check results in their entirety, including mitigating factors such as the nature of the offense, whether it is job related, when it occurred, and what the individual has done since to improve his or her life.

It is advisable to primarily base criminal background screening criteria on convictions rather than arrests. Legal risks can be associated with arrest record inquiries as certain minority groups may be arrested in numbers disproportionate (disparate impact theory) to their representation in the general population. However, an ESO may consider arrests for which applicants could be disqualified from employment or membership if a guilty verdict were rendered. An ESO may disqualify an applicant until the final disposition of the charge.

Be wary of policy language that suggests any criminal felony conviction automatically results in a denial of an employment or volunteer opportunity. More discretionary policy language could read, *“ABC reserves the right to deny employment or affiliation based on the results of a criminal background check. ABC will consider criminal convictions and arrests, particularly those involving moral turpitude. Examples of criminal felony and misdemeanor convictions or arrests that may result in denial of employment or affiliation with ABC include, but are not limited to, crimes involving violence, sexual assault or exploitation, drugs or alcohol, weapons, theft, fraud or embezzlement. As a matter of public trust, it is essential that all members uphold the mission, values, and integrity of ABC.”*

## Fair Credit Reporting Act (FCRA)

ESOs must familiarize themselves with the requirements of the FCRA if utilizing an outside third-party entity or individual to conduct applicant background checks, as corresponding reports are generally considered an investigative consumer report under the act. Consult with retained labor and employment counsel to determine whether the FCRA regulations apply to your ESO's specific criminal background check processes.

Other key FCRA requirements for an ESO to consider when conducting applicant criminal background checks:

- Disclose to the applicant on a stand-alone form (separate from the job application) plans to obtain an investigative consumer report that will be used solely for employment/membership purposes.
- Obtain written authorization and consent from the applicant.
- If the ESO decides not to hire or select an applicant based in whole or in part on information in the consumer report, inform the applicant that it plans on taking adverse action; give a copy of the consumer report to the applicant; and advise of his or her rights under the FCRA to dispute inaccurate or incomplete information contained in the report.

## CONCLUSION

Give serious consideration to conducting criminal background checks on all applicants and current members. Sound risk management demands taking all reasonable steps to ensure safety for ESO members and the citizens they serve.

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### Employment Practices UPDATE

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