

**NEGLIGENT HIRING:**  
*A Time Bomb Ticking* or *Your Silent Liability*  
©2009 Wayne Outlaw

The receptionist has just told you there has been an incident at a customer's location and it appears it was caused by a new employee you hired a couple of months ago. Your first question probably is, A) What happened? and B) How will this affect me and my company? To a technology company, even if you carry insurance, this could be a disaster.

Workplace violence is not new and is becoming more prevalent every day. More than two million Americans are physically assaulted each year and one in four workers is harassed, threatened, or assaulted on the job. The most recent government statistics on workplace homicides show at-work associates, current and former, accounted for more than 14 percent of the job related homicides and has increased 55 percent from the previous period measured. When you hire someone you do not think a tragedy like this will strike your company, however, it is becoming more and more commonplace.

The liability of employers for violent acts committed on their premises, (or at the customer's location), has never been greater. Courts increasingly award recovery to employees, customers, and others who have suffered assaults, harassment, or worse from vicious workers.

You say you do not or did not know an employee was a risk. This is a case of what you do not know **can** hurt you. A company may become liable for its own negligence by hiring an employee who proves dangerous to others if the company knew, or should have known, through reasonable hiring efforts, that the person was dangerous or unfit. In short, if through your negligence you hire an individual who could pose a threat to employees, customers, and others, you are putting your entire company at risk. While the Americans With Disabilities Act prohibits you from discriminating when hiring workers who may have disabilities, employers are not obligated to hire individuals who pose a direct threat or a significant risk of substantial harm to the health and safety of the individual and others that cannot be eliminated or reduced by reasonable accommodations.

As a business owner, knowing this will not protect you. Only your actions will protect the individual hiring manager and the organization from litigation. To ensure that you have done the due diligence necessary to screen out anyone who poses a direct and significant threat to employees, customers, and others, be sure to do the following:

Begin by determining risk-related essential job functions so you can see what steps must be taken. The more the risk, the more steps to be taken. Questions to be considered are:

< **To whom does this person have access?**

Employees with frequent and unrestricted access to customers and employees present a greater risk than those who work in relative isolation.

< **What security factors are present in the job?**

The main question is whether the individual works alone or is supervised by others or by electronic means.

< **What tools or equipment do employees typically use?**

If dangerous items could be a normal part of the employee's equipment, or readily concealed in things such as toolboxes, that deserves careful consideration.

< **Are there any unique risk factors during normal contact with others?**

The main consideration here is whether normal forms of job contact, in conjunction with mental disorders, contribute to the potential for violent behavior.

Before presenting a job offer, the hiring manager and company must do an effective job of screening to eliminate candidates who pose a threat. The following are screening methods.

< **Job interview.**

Ask probing questions to uncover examples of behavior that could indicate tendencies that put others at risk.

< **Criminal record request on application.**

The application should ask, Have you been convicted of a felony? If, so give details.

**Background checks.**

For as little as \$25, an employer can get a basic report drawn from national data on prior convictions and prison records associated with violent crimes and drug offenses. Felony conviction records are available at local courthouses.

< **Drug test.**

The Center for Substance Abuse and Prevention--Workplace Help Line can provide the names of competent laboratories that can screen for illegal drugs for those considering being hired and for current employees. They can be reached at 800-843-4971 or [workplace.samhsa.gov](http://workplace.samhsa.gov).

< **Employment references.**

For as little as \$12 per reference listed, employers may have outside services verify pre-employment information (dates of employment, job titles) and such risk-related information as to the applicant's ability to get along with others, safety issues, and honesty. However, the best person to check employment references is the person who conducted the interview. Remember to get a signed authorization waiver from the applicant before conducting these activities.

< **Pre-employment evaluation instruments.**

A number of paper and pencil integrity instruments are available to assess an applicant's attitudes toward integrity, substance abuse, reliability, and work ethic. Instruments are becoming more convenient to use because of accessibility via the Internet. (*Information on Integrity Instruments is available at [www.OutlawGroup.com](http://www.OutlawGroup.com).*)

Employers face a difficult situation. If they go too far in conducting pre-employment screening, an applicant's civil rights might be violated. But, if little or none is done and problems occur, those affected might seek damages for negligent hiring.

For a technology company, the workplace is considered all areas the individual would be in while under your employment, which includes traveling to and from the customer's location. You may also be liable for the employee's after hours behavior if the initial contact took place as a part of work. As you can see, the exposure to liability is quite extensive.

While the law may limit methods or even the extent to which certain information can be used, it does not limit normal due diligence or prudent fact checking to ensure you are hiring an individual who is not a known threat to others, and, most importantly, a productive employee. Because of the importance of the due diligence, over half the states have enacted statutes that give employers a

qualified privilege when checking references. It is a good idea to check with a local labor attorney or BTA counsel to find out if in your state you have this Aqualified privilege.

If that fateful phone call comes notifying you of an unfortunate incident, your company will be a much safer legal group, and you will rest much easier from a moral perspective if you know you did everything reasonably possible to prevent it. Begin today by examining your hiring process and making the changes necessary to prevent violence and illegal activities in your workplace. As an additional benefit, it will help you select and retain more productive customer-oriented employees, which will raise the performance and productivity of your technology company.