

Liability and Screening: Proceed with Caution

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Second edition of popular text offers new insights

Recently the Nonprofit Risk Management Center released the second edition of the Staff Screening Tool Kit — one of the organization's most popular books since its debut in 1994. The new edition, subtitled Building a Strong Foundation Through Careful Staffing," includes new material on the use of record checks and other informational tools, as well as an updated section on legal issues pertaining to screening. In addition, the book features a state-by-state directory of agencies that maintain records useful for screening. An excerpt from Chapter 2 — Legal Issues Pertaining to Screening is featured in the paragraphs below.

Just as builders must be familiar with building codes before beginning any construction project, so too must you be aware of certain legal issues before starting the screening process.

From a legal standpoint, screening can be a perilous activity. There are legal risks associated with a thorough screening process as well as risks in not screening. In this chapter we will outline some of the legal risks of screening and suggest policies and practices to minimize these risks.

Risks associated with not screening paid and volunteer staff can be significant. The basic legal standard that applies to screening is reasonableness under the circumstances. If a nonprofit's screening process is challenged in court, a judge or jury will evaluate the reasonableness of the process employed; the foreseeability of the risk (whether the organization knew or should have known of the risk of harm); and whether the screening process, or lack of it, caused or contributed to the harm at issue. An opponent may well argue that failing to conduct any screening is unreasonable.

For many nonprofits, a sense of moral duty and sincere concern for service recipients are the primary motivators behind the development of a screening process. In other cases, the overwhelming fear of potential legal liability is the principal motivator.

There are two basic categories of legal risk in screening:

- the risk of not screening thoroughly enough, and
- the risk of violating an applicant's legal rights.

Under the first scenario, the potential plaintiff is someone injured by a paid or volunteer staff member who was unfit for service. Liability is imposed when a court determines that the nonprofit employer should have known that the applicant posed an undue risk. Under the second scenario, the likely plaintiff is an applicant who was rejected by a nonprofit. There are no hard-and-fast legal rules about screening. Liability for negligent screening requires a thoughtful analysis of the circumstances. There are, however, some basic principles that apply and are helpful in evaluating whether your screening practices and policies will withstand legal scrutiny.

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Some Processes Mandated by Law

Under certain circumstances, a component of a screening process – such as a criminal history records check – may be mandated by state law. For example, your state may require that applicants for day care positions undergo state-based criminal history checks. States may issue specific licenses – e.g., to drivers or child care workers – that define a necessary level of competence. If the state determines that specific qualifications (such as a commercial driver’s license) are required for a specific position (e.g., school bus driver), your screening process should be designed so that only applicants who meet the standard are given consideration.

Screening Practices Judged Under Negligence and Reasonableness Standards

Claims alleging inappropriate or inadequate screening are typically based on negligence theory. *Black’s Law Dictionary* defines negligence as “[t]he omission to do something which a reasonable man guided by those ordinary considerations which ordinarily regulate human affairs would do, or the doing of something which a reasonable and prudent man would not do.” (6th Ed. (1990) at 1032.)

Negligent hiring is a legal theory based upon the negligence of an employer in placing a person with known propensities, or propensities that should have been discovered by reasonable investigation, in a position in which it should have been foreseeable that the person posed a threat of injury to others (*Ponticas v. K.M.S. Investments*, 331 N.W.2d at 911). Under the theory of negligent hiring, an employer can be liable for an employee’s intentional tort – an action invariably outside the scope of employment – when the employer knew or should have known that the employee was violent or aggressive and might engage in harmful conduct (*Di Cosala v. Kay*, 450 A.2d 508 (1982) (New Jersey)).

Individuals and nonprofits as well as large corporations can be negligent. Fortunately, most injuries do not result in lawsuits. Most people who are injured – whether while receiving services from a nonprofit or while shopping in a supermarket – do not sue. Furthermore, simply suffering an injury on premises belonging to someone else or while participating in an event sponsored by an organization does not necessarily entitle an injured party to compensation. Each state has adopted rules that are used in the determination of whether and when an injured plaintiff can recover. Recovery is never automatic. A plaintiff in a standard negligence action must prove four essential elements of the cause of action: duty, breach of the duty, causation, and damages.

1. **Duty.** The defendant owed the plaintiff a duty or obligation to act in accordance with legal standards of reasonable conduct given a foreseeable risk of harm.
2. **Breach.** The defendant did not meet the appropriate standard of care.
3. **Causation.** The defendant’s failure to meet the required standard of care was causally connected to the harm suffered by the plaintiff.
4. **Damages.** The loss or injury to the plaintiff’s person or property was caused by the defendant’s negligence or breach of his duty.

When a law requires the use of certain screening tools, the “reasonableness” standard is clear. Failure to use the mandated screening tool may render the organization negligent per se (as a matter of law) if the harm that occurs is of the nature the law was intended to prevent. In most instances, however, such clarity is not available. When will a nonprofit be held responsible (liable) for negligent hiring? Absent statutory provisions, your nonprofit’s potential liability – and the requisite standard of care – are essentially defined by the standard of reasonableness. The outcome of a suit alleging negligent hiring (screening) may turn on a court’s determination of whether you acted reasonably under the circumstances.

The concept of “reasonableness” is a moving target. Its meaning changes as circumstances, public perception, environments, victims, and available safeguards change. Actions considered reasonable in a rural community may be considered unreasonable in an urban setting. Inaction in a situation involving adults may be reasonable; the same inaction with children present could be unreasonable.

The reasonableness standard of the negligent hiring doctrine is flexible. It requires that the judge or jury consider the availability of various screening tools with the ability of the nonprofit to use those methods. For example, your nonprofit uses adult volunteers to drive young people to local nursing homes for visits with

elderly patients. One day, a car driven by a volunteer driver is involved in a collision with a truck. Two of the four children in the car suffer serious injuries. During the investigation of the accident, you learn that the volunteer driver's license was suspended six months ago after a charge of reckless driving. This fact could have been discovered in a Motor Vehicle Records (MVR) check. Did your nonprofit take reasonable steps to protect young volunteers and the general public from harm?

To order your copy of the *Staff Screening Tool Kit: Building a Strong Foundation Through Careful Staffing (2nd edition)*, call (202) 785-3891 or [click here](#). The single copy price is \$30 plus shipping and handling. Quantity discounts are available.