

**To Google Or Not to Google - What employers are entitled to discover
and consider in employment hiring decisions**

By

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In a world where, for better or worse, a quick Google search of someone's name can reveal a wealth of information about a person's personal and/or criminal history, the lines of privacy have become a bit blurred. As an employer evaluating potential employees, several basic questions arise in this context, such as, whether there is an obligation to conduct a basic internet search of a potential applicant, what can and should be done with the information that is found and how such knowledge affects employer liability with regard to negligent hiring claims. The answers to these questions are not so clear cut nor intuitive.

Despite common misconceptions to the contrary, California law does not require background checks be conducted for all types of employment and, in fact, imposes significant restrictions on employers with regard to use of same when making employment related decisions. While on the one hand, employers have a duty to act reasonably with respect to selecting the persons they employ in view of the work or instrumentalities entrusted to him or her, they also have to be mindful of respecting the privacy rights of potential employees. Striking a balance between the two can pose quite a quandary for employers in California.

In terms of restrictions, pursuant to California Civil Code 1786.18, California employers are only permitted to ask job applicants about felony convictions within the last seven (7) years. For example, employers will not be subject to a claim for negligent hiring for failing to ask job applicants intrusive questions or to conduct psychological evaluations, both of which would violate job applicants' privacy rights. *Roman Catholic Bishop v. Superior Court* (1996) 42 Cal.App.4th 1556,1567—child sexually molested by priest could not recover from church for failing to ask him about his sexual practices or requiring him to undergo psychological evaluation before hiring him. California law also expressly prohibits the use of the state's sex offender registry information for employment purposes, except as otherwise provided by statute or to "protect a person at risk." In particular, California Penal Code Section 290.46(j)(2) expressly prohibits the use of information disclosed on the Megan's Law (sex-offender registry) website for purposes relating to health insurance, insurance, loans, credit, **employment**, education, housing, or benefits, privileges, or services, provided by any business establishment. The statute further provides that a user is authorized to use the website's information "only to protect a person at risk," who is defined by Penal Code section 290.45(a)(8) as a person who "is or may be exposed to a risk of becoming a victim of a sex offense committed by the offender." "Person at risk" has generally been interpreted under the statute to include work around children, the disabled, or unsupervised in people's homes.

In light of these parameters, employers face the difficulty of trying to make responsible hiring decisions to protect themselves from negligent hiring claims while having to operate off of sometimes limited information. To help address this dilemma, the courts have narrowed the circumstances under which an employer will be held liable for negligent hiring. To establish a cause of action for an employer's liability to a third person for negligently hiring, supervising, or

retaining an unfit employee, plaintiff must show that the employer knew or should have known that hiring the employee created a particular risk or hazard and that particular harm materialized. *Doe v. Capital Cities* 50 Cal.App.4th 1038 (Cal.App.2.Dist.1996) More specifically, an employer may be liable to a third person for the employer's negligence in hiring or retaining an employee who is incompetent or unfit if the employer has reason to know that the employee, because of his or her qualities, is likely to harm others in view of the work or instrumentalities entrusted to him or her. However, an employer is not liable merely because the employee is incompetent, vicious, or careless. If liability results, it is because, under the circumstances, the employer has not taken the care that a prudent person would take in selecting the person for the business in hand. *Federico v. Superior Court* (Jenry G.) 59 Cal.App.4th 1207 (Cal.App.3.Dist.1997). In other words, employer liability results not because of the relation of the parties but because the employer antecedently had reason to believe that an undue risk of harm would exist because of the employment. *Id.* at 1215; *Roman Catholic Bishop v. Superior Court* (1996) 42 Cal.App.4th 1556, 1564-1565.

The *Federico* case explored the question of employer liability for negligent hiring in detail. In that case, an action was brought against the owner of a hairstyling college alleging that defendant's employee had sexually molested plaintiff, a juvenile male whose mother was a student at the college, and that defendant knew, or should have known, that the employee had previously been convicted of sexually molesting juvenile males and therefore was negligent in hiring him to manage and supervise the training of students at the college. The employer in *Federico* moved for summary judgment as to plaintiff's negligent hiring claim on the basis that there had been no breach of duty. The court agreed and held that summary judgment in favor of defendant was proper because an employer's duty is breached only when the employer knows, or should know, facts that would warn a reasonable person that the employee presents an undue risk of harm to third persons *in light of the particular work to be performed*. The court further held that there was no evidence that defendant, even if aware of the employee's background, acted unreasonably in hiring the employee because nothing in the employee's history would have indicated to defendant that the employee posed a threat of harm to minors he might encounter in the course of his position as a supervisor to adult students and performing administrative tasks for the college.

As the foregoing authority shows, employers have to make a difficult judgment call in their hiring practices when it comes to discovering and using information regarding a potential employee's past, especially when finding it may be as easy as conducting a simple internet search. Thus, the answer to the question "to Google or not to Google" is "it depends" – as employers must carefully consider and weigh this choice in light of the risks associated with a particular job position.