

# CHAPTER 1

## Hiring the Right Employees

### Disclaimer

As I begin discussing the importance of sound hiring practices, I want to highlight that I am not an attorney and by no means am I providing you with legal advice. In my opinion nothing replaces the advice of counsel based on their experience and expertise. The discussions that follow are based solely on my personal experiences during my more than 22 years of working with clients and counsel to prevent and resolve a wide range of employment-related issues, many of which stem from some type of theft or embezzlement of assets, money, proprietary information, or a combination of all three.

### Where Do You Start?

The first line of defense against employee fraud and embezzlement is to hire the most qualified and most trustworthy individuals to work in your business, especially those employees who will have access to your company's finances. The problem is, in this day and age, that is easier said than done. There are so many laws and rules geared toward protecting potential employees from improper hiring practices that even when you perform proper due diligence with your candidates, you will be limited in what you can ask, where you can gain information, and how you

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can use the information you do obtain in your hiring decision. Contacting past employers will likely yield you no more than the individual's date of hire, date of termination, and whether the individual is eligible for rehire. In my experience, as much as the past employer would love to tell the next potential employer more of the details, especially if the individual was terminated for something like stealing, the past employer was advised by counsel to limit responses in order to minimize potential litigation brought by the terminated individual. Furthermore, if by chance the past employer did provide such details, the terminated individual likely has a right to know what information was provided and would be allowed an opportunity to provide a response. As with any other information obtained, you may find yourself defending a claim by a candidate and be forced to show how the information you received impacted your hiring decision. In my opinion, the deck is stacked against small business owners trying to create job opportunities while also trying to ensure that they don't hire someone who could negatively impact their business.

Often small business owners rely on referrals and references from colleagues and other known business associates. While these referrals should carry much weight, you would be wise to still perform an independent due diligence on the referred individual to ensure that the potential employee is qualified and trustworthy. Here's why. In one of my recent cases, it was discovered that the business manager was stealing from the business. This man had been strongly recommended by a vendor close to the business owners, who hired him, relying mainly on that recommendation. The same vendor was also serving other competing businesses within the same industry, and once the business manager was terminated from the company for stealing, he landed his next job at one of the competitors not far away. It is believed the business manager landed that next position due to the vendor's recommendations to the next company.

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No reference calls were received from the competing business prior to hiring the business manager.

### **Advice of Counsel**

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As I mentioned earlier, nothing replaces the advice of counsel. This is what I recommend to every client I meet: If you envision having employees in your business, you should establish a relationship with an attorney who specializes in labor laws right from the inception of the business. Counsel's insight into how policies and procedures should be established will prove invaluable. If an attorney is involved in the design and implementation of your employment policies and procedures, he or she will be prepared to defend any labor actions brought against you and your company. The initial and ongoing investment you make with counsel will pay dividends should you ever find yourself defending a pre-employment or employment claim.

The caveat is that once the policies and procedures have been established and implemented, they need to be followed every time. The best defense regarding many labor issues is strict adherence to established policies and procedures and detailed documentation. The better a file is documented, the better a claim against you can be defended. I cannot overemphasize the need for adequate documentation.

### **Application Policy**

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Your company, regardless of its size, should have, at minimum, basic written policies and procedures regarding hiring and maintaining employees. You should have an established set of information you require from each candidate when filling job openings. The application you require every candidate to complete should be comprehensive and, as stated, should be

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reviewed by counsel to ensure completeness and adherence to hiring laws. All applications should be retained for a period of time, even after a successful hire, so in the event a candidate who didn't get hired brings about a claim for improper hiring practices, you have retained the details in your files for your defense.

In addition, clearly stated somewhere on the application should be your policy regarding a candidate providing false, incomplete, or misleading information, or omitting information that would identify a problem in the candidate's background, along with your company's consequences should such false, incomplete, misleading, or omitted information be identified, whether the candidate is still in the hiring process or has already been hired. I talk more on the subject of false information later in the chapter.

Depending on the position being filled, your policies should require additional information from each candidate, such as:

- Resume
- Letters of reference
- Military records
- Copies of diplomas or degrees
- Copies of transcripts

While these may not be required for filling basic-level positions, they are highly recommended when hiring someone at a management level, such as a business manager, office manager, and controller.

I also recommend that somewhere in the application process, whether it is on the application form itself or on a separate form, you seek the candidate's permission to perform a credit check, especially for positions that require access to your company's finances or assets. A credit report cannot be lawfully obtained without the individual's permission, and due to the

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frequency of identify thefts, individuals will receive notice if inquiries are made into their credit. Therefore, by incorporating candidates' authorization to access their credit report within the application process, you will have their permission and they will receive proper notice if you ultimately access it. I am not suggesting that you obtain a credit report for every candidate for every position you need to fill; I do suggest it be obtained at a minimum for those candidates who become finalists for a position involving access to company finances and assets.

I am also not suggesting that every candidate who has poor credit, who has filed bankruptcy in the past, or who has other negative marks on a credit report should be precluded automatically from your hiring decision. I am simply saying that it is better to know these things exist in a person's background, to allow you to consider them along with all of the candidate's information when making your hiring decision. As discussed earlier, information you receive about a potential employee must be maintained and preserved, and how the information affected your hiring decision could be scrutinized somewhere down the road.

## **Due Diligence**

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Once you have candidates complete your application form and provide you with copies of the other documents you require, what should you do next in the hiring process to better protect yourself and your business? The answer is an easy one: due diligence. You need to objectively verify the information they provided to ensure that it is complete and accurate. Candidates often lie or omit details on their applications. According to hiring professionals, during difficult economic times with high unemployment rates, the frequency of lying or embellishing increases as competition for scarce jobs increases.<sup>1</sup> Although providing

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anything less than complete and accurate information is considered resume fraud, I found through searches on the Internet many terms to describe this growing problem, terms such as embellishing, reaching, exaggerating, tailoring, fudging, shading, and tuning. Reaching, shading, and tuning are all terms that simply mean stretching the truth. I discovered web sites devoted strictly to resume fraud, such as [www.fakeresume.com](http://www.fakeresume.com). In some cases the web sites assist potential employers to better screen applicants; other sites are designed to aid candidates in perpetrating these practices.

In what areas can a candidate be less than complete or truthful? Virtually any of the provided information can be false, starting with information relating to a person's identity. In one case I am familiar with, the suspect working in a medical office was terminated from her employment and prosecuted, and her arrest landed her in the local newspapers. An investigative reporter tracked her down while she was pending trial and discovered she was working again, this time in a preschool setting. Further digging by the reporter revealed that the woman had used her maiden name on her application, something the preschool failed to verify. When questioned about why she used her maiden name (as she was still married), she said she had made a mistake on her application. She referred to her error as an oversight. I, however, am sure she didn't use her married name as she had just been in the media for being arrested for stealing from her employer.

In another case, I received a call from a colleague whose client had hired a new finance person. The client told my colleague that the company was aware the man had recently been released from prison but the matter he was sentenced for was a minor theft from his employer. They hired him despite the fact that he had admitted serving time in prison for stealing, and they didn't do any due diligence because he was up-front about what he had done and they considered him rehabilitated. What

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they failed to identify was that he had served over four years for stealing close to \$1.5 million from his employer. Had they dug a bit deeper, they could have learned he had stolen from employers even before the theft he was sentenced for. This man had downplayed what had actually happened, and the client failed to verify his story.

According to a recent 2008 Careerbuilder.com survey, while only 8 percent of respondents admitted to some type of misinformation, 50 percent of hiring managers reported identifying lies on resumes they received.<sup>2</sup> The most common areas of lying and embellishing found through that survey were:

- Job responsibilities: 38 percent
- Skill sets: 18 percent
- Employment start and end dates: 12 percent
- Academic degrees: 10 percent
- Companies/previous employment: 7 percent
- Job titles: 5 percent

Misrepresenting or omitting information on an application or resume is not a new phenomenon, but the frequency of occurrences has likely increased in the past 10 years. A similar survey conducted in 2002 by the American Management Association revealed that 31 percent of resumes contained material misrepresentations about an individual's background.<sup>3</sup>

You need to verify the information provided by candidates applying for any positions.

## **Personal Information**

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Start with personal information. Perform a search on the Internet on a candidate's name and address. Using Internet-based resources like Google Earth and Google Satellite, enter the candidate's address to see what actually exists at the address. As simple as it sounds, your search, which will take less than a

minute, could be the only means of determining if a house or building actually exists at the address provided. Alternatively, you could drive by the address to see what is there, but searching addresses right from your desk through the Internet will likely be more efficient.

Once you make a hiring decision, the candidate will be required to complete a series of required forms, such as a Form W-4 and a Form I-9. The W-4 will be used to determine the federal taxes to be withheld from the candidate's payroll, and the I-9 will be used to verify that the candidate is in the country legally and eligible for employment. Form I-9 requires you to obtain verification of the candidate's identity and to obtain copies of the verification forms provided. Doing this gives you another opportunity to ensure that the personal information (name, address, date of birth, and Social Security number) match between the application, I-9, verification forms, and any other information provided by the candidate. Take a moment to compare the information before actual employment begins.

## **Past Employment**

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As with the candidate's address, perform Internet-based searches of the identified prior employers and their addresses to ensure that they actually exist. I recommend searching the Internet for the business names provided, looking for an address. If I find an address, I search for the address and use the satellite features to see what is located there (i.e., does it look like a commercial building, a house in a residential area, a wooded area, or a big open undeveloped lot?). Candidates do not expect potential employers to drive out and verify that a business actually exists at the address provided, but with these search engines, this verification is relatively easy to perform.

Once you are satisfied that it appears a business does exist at the location provided, contact each past employer to verify



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employment information supplied. I don't rely on the phone numbers candidates provide. Often if a candidate doesn't want to have a past employer contacted, or worse, wants to ensure that the employer is not contacted due to what he or she could say about the candidate, the contact information provided may be inaccurate or directed toward someone at the company who is not authorized to provide such details but could cover for the candidate.

I rely only on phone numbers publicly listed for the business, found through a search using the Internet, directory assistance, or the old-fashioned phone books. I call the number listed for the business, listen to how the phone is answered, and then ask to be directed to the most appropriate person for my verification. What I am trying to determine is that the information provided is legitimate and reliable, something I will determine by using only phone numbers and information obtained independently of the candidate.

You should want to know as much as possible about the candidate to help you with your hiring decision, but you should expect nothing more than date of hire, date of termination, and whether the individual is eligible for rehiring. As mentioned, most employers have been advised by counsel to provide nothing beyond those items. Once you obtain the dates, compare them with the dates provided by the candidate.

## **Education**

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Obtaining copies of diplomas, degrees, and transcripts from candidates is not sufficient to verify that they did in fact earn them by attending the identified schools. Authentic-looking documents can be purchased through web sites for as little as \$200, along with corresponding transcripts. For each diploma and degree identified by a candidate, start by verifying that the schools

listed actually exist. Once again, Internet-based searches can be performed to help verify their existence.

Once you know that they exist, you need to determine how credible each school is and whether it is accredited. Credential mills do exist, as do correspondence schools whose sole existence is limited to a web site and an 800 number.

Diplomas and degrees can be confirmed with the schools. Based on the position being filled, you should consider verifying that the candidate actually attended, graduated, and was awarded the diploma or degree. It is not uncommon for a candidate to list attendance at a school with no mention of any degree awarded. It is up to you and your verification process to identify when a candidate does this and to ask if he or she graduated and was awarded a degree.

### **Case Study 1.1 University of Nonexistence**

In one of my cases, the controller had stolen funds and was terminated prior to my involvement. When I asked to review the controller's personnel file, I found a copy of his MBA degree along with his MBA transcript—a 4.0 student. Since I had never met the individual, I asked the client if the controller appeared to be a 4.0 MBA graduate. The client's description was consistent with what I expected—someone much less than competent to have performed in that position. I asked the human resources director to contact the school from which he obtained his MBA, and she found the school didn't exist except on paper. There was no known physical address for the school, and a call to the listed 800 number led to an answering system. My question for the client: Why wasn't this information verified prior to hiring the controller?

## References

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As with all the other information, you should independently verify that the references listed are valid. Search the addresses provided to determine what actually exists at each address. Contact each reference provided, but be aware that it is not uncommon for candidates to list friends and family members as references. Ask each reference how he or she knows the candidate. By asking each reference questions about the candidate, you can learn whether the individual is a legitimate business reference. Ask questions the references would not expect, and listen to their reaction as well as their response. I always like to ask references, since they know the candidate well enough to provide a recommendation, to identify the candidate's greatest strengths and weaknesses.

Ask them for the make and color of the car the candidate drives, or where he or she went to school. (Doing this also helps to corroborate the educational information provided by the candidate.) If the reference cannot answer your non-business-related inquiries about the candidate, you should ask yourself whether the reference is legitimate and how well he or she really knows the candidate.

## Criminal and Civil History Checks

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Depending on the position you are filling, you should consider running a criminal background check on the final candidates. However, don't be complacent with results that turn up nothing. Here is a word of caution regarding the results of these searches: Individuals could have a criminal history and not appear on the search results for at least three reasons.

1. The individual may have committed the crimes as a juvenile. In that case, records prior to turning 18 years old would not be available for disclosure.

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2. The individual could have been involved in criminal activity in the past, but for a number of reasons, the crime might not have been prosecuted and/or the charges might have been subsequently dropped. The criminal history will reveal criminal convictions only, if anything at all.
3. The individual could have received a special sentence, such as accelerated rehabilitation available for first-time offenders. His or her criminal record would be erased as part of that program after three years with no further criminal activity and therefore would not be reported in the search results.

A good resource to search for prior criminal activity is in newspapers around the country. By using a commercial database service, such as LexisNexis, or simply searching online through Google News, you may locate an article involving the individual in a local news story. Here, too, it is important not to place sole reliance on the fact that nothing was found, particularly in the case of embezzlements, because statistically, only one in nine cases ever appears in the public eye.

You should be able to access an individual's civil history relatively easily. You can access most states' judicial system records via web sites. Once you find the judicial site, you can search the person's history based on last and first names. In my home state of Connecticut, the web site is at [www.jud.state.ct.us/jud2.htm](http://www.jud.state.ct.us/jud2.htm). Select the venue (civil, family, motor vehicles, small claims) and enter the individual's name into the fields provided to conduct your search.

The mere fact that an individual has a prior criminal and/or civil history doesn't necessarily make him or her a bad person or a poor choice for employment. However, if you are seriously considering the candidate for a position, consider discussing his or her past to ensure that you have all the information to make an informed decision. Also, review the candidate's history in

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light of the job responsibilities he or she will have once hired. Although an individual may be ideal for a position, a history of stealing from employers may make the person less than desirable in a position that gives him or her access to your company's finances or other assets.

As mentioned earlier, be prudent about how you use the results of these searches in your hiring decisions. You should discuss this issue with counsel to ensure that a candidate doesn't make some type of complaint or take action against you because you excluded him or her from consideration due to information you discovered.

### **Credit Checks**

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Another important consideration in your hiring process is whether you run a credit report on the finalists being considered for a position. Here, too, you should proceed with advice of counsel, as many laws protect an individual's personal credit and identity information. The most important thing to remember, as mentioned earlier, is that you *cannot* run a person's credit report without his or her permission, and in response to new laws, the individual will receive notice if his or her credit is run. Therefore, as part of your hiring process, you need to obtain candidates' permission to run their credit report. I believe all applicants should provide permission to access their credit history on every job application. It may not make sense and would be costly to obtain every applicant's credit history, but you can identify and screen out candidates who are not willing to have their credit history obtained early in the process.

As with the criminal and civil histories, the mere fact that an individual has less-than-stellar credit history does not in and of itself make him or her a bad person or poor hire. However, it would be better to know during the screening process if a candidate has poor credit and a history of bankruptcies,

especially if the successful hire will have access to your business's finances. It goes without saying that you need to be prudent in how you use the credit information you obtain. You should discuss this issue with counsel as well to avoid unwanted legal issues.

## **Hiring Time**

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Once you have narrowed down the candidates, verified their information, and made your hiring decision, you need to continue thinking about protecting your business. Consider establishing a policy outlining confidentiality and information proprietary to your business, such as customer lists, sales and product information, and trade secrets. The policy should indicate that all information provided within employment at the business is the property of the business. Upon termination of employment, all property of the company is to be immediately returned to the business, including any electronic records.

Theft of company information happens all the time. Your confidentiality and proprietary information policies should also state that your company has a zero tolerance policy. Any instances of theft or fraud of any company assets, finances, or information will be subject to disciplinary action up to and including termination of employment, and the individual will be held criminally and/or civilly responsible if it is shown that his or her actions caused any harm or damage to the business. During their orientation, all new employees should be provided with a copy of the policy and be required to sign it. The signed forms should be maintained in their personnel files to provide proof that they were made aware of the policies.

Such policies establish the strict ethical tone of your company at the inception of a new employee's employment and

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should also act as a deterrent. Consider having your attorney draft such policies for your use and distribution to all existing employees and every new hire.

**Case Study 1.2 “My” Clients Go Wherever I Go**

An accountant left his position with a large accounting firm after many years of employment, having reached the level of senior manager. As part of his employment, the accountant had signed a written agreement that the client lists and staff belonged to the firm. The accountant was prohibited from poaching clients or staff of the firm for a two-year period after terminating employment. Within weeks of starting with a smaller firm, the accountant began contacting clients he had serviced through his old firm. In addition, the new firm sent out a mailing specifically targeting clients of the former firm.

When partners of the former firm learned of the poaching activity, they contacted counsel, and a cease order was drafted and sent out to the accountant. The partners then initiated an investigation into the accountant’s activities during the last few months of his employment. By searching the server backups, e-mail activity, and user tracking logs, the firm was able to determine that the individual had copied the files pertaining to his clients in the weeks leading up to his resignation. Further, they found e-mail communications between the accountant and individuals at his new firm regarding business “development” opportunities (i.e., bringing clients over to the new firm). The firm also determined that the accountant had run reports regarding clients of the firm other than those whom he had serviced.

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The partners, through counsel, demanded the return of client and firm information and threatened professional, civil, and criminal actions if the poaching did not stop immediately and if the proprietary information was not returned. The accountant never expected this response from the former firm, nor did his new firm. Without admitting to any wrongdoing, the new firm agreed to cease all “marketing” activity toward clients of the former firm. As far as the return of any information, the new firm and accountant indicated they had no information to return. (Here they were likely well advised by counsel, as anything else would have proven that the accountant had in fact stolen the data.) The former firm monitored the situation for months, but nothing further ever happened with any of its clients.



Now that you have made your hiring decision, the process of learning as much as possible about potential employees shifts to the process of knowing and monitoring your existing employees, the focus of discussions in Chapter 2.

## Notes

1. Kathy Gurchiek, “Mensa Membership, Kennedy Kinship among Outrageous Resume Lies,” Society for Human Resource Management, August 14, 2008; available at: [www.shrm.org/Publications/HRNews/Pages/OutrageousResumeLies.aspx](http://www.shrm.org/Publications/HRNews/Pages/OutrageousResumeLies.aspx).
2. “Nearly Half of Employers Have Caught a Lie on a Resume,” July 30, 2008; available at: [www.careerbuilder.com/share/aboutus/pressreleasesdetail.aspx?id=pr448&sd=7/30/2008&ed=7/30/2009](http://www.careerbuilder.com/share/aboutus/pressreleasesdetail.aspx?id=pr448&sd=7/30/2008&ed=7/30/2009).
3. Scott Moritz, “Don’t Get Burned by Smiling CEO Candidates,” *Fraud Magazine* (September/October 2002). Available online at: [www.acfe.com/resources/view.asp?ArticleID=198](http://www.acfe.com/resources/view.asp?ArticleID=198).



*Hiring the Right Employees***Hiring the Right Employees: Considerations****Application Process** **Completed**

Candidates complete written job application.	<input type="checkbox"/>
Candidates provide resume and any other required information.	<input type="checkbox"/>
Applications include permission to obtain credit information.	<input type="checkbox"/>
Applications are screened for applicability to position being filled.	<input type="checkbox"/>
Potential hires are identified.	<input type="checkbox"/>

**Due Diligence**

Past employers are verified for existence.	<input type="checkbox"/>
Past employers are contacted.	<input type="checkbox"/>
Education is verified.	<input type="checkbox"/>
References are validated.	<input type="checkbox"/>
References are contacted.	<input type="checkbox"/>
Criminal history search is considered and obtained if warranted.	<input type="checkbox"/>
Civil history search is considered and obtained if warranted.	<input type="checkbox"/>
Credit history is considered and obtained if warranted.	<input type="checkbox"/>
Screening process is completed.	<input type="checkbox"/>

**Hiring**

Offer extended to candidate.	<input type="checkbox"/>
Company policies provided to new hire upon commencement of employment.	<input type="checkbox"/>

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Signed acknowledgments placed in employee's personnel file, along with the application and other information they provided or you obtained during the hiring process.

