

THE UNIVERSITY OF MONTANA EMPLOYEE CRIMINAL BACKGROUND CHECK POLICY:
LEGAL ISSUES

*****David Aronofsky**
Holly March, Megan Morris, and Katie Bell

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I. GENERAL INTRODUCTION

In 2002, The University of Montana adopted a comprehensive criminal background check requirement for all newly hired employees, including faculty. This requirement, reflected in the Policy and the revisions thereto attached at the end of this paper, resulted after extensive deliberations about the need and desirability for such a requirement. The requirement resulted from two separate significant employee criminal thefts discovered during audits, as well as a number of high visibility public employee criminal acts around the State of Montana. An example of how the requirement has been implemented in connection with the current University of Montana Athletics Director search is also attached. Set forth below are the legal issues and analysis of criminal background checks generally. Although the University currently imposes no criminal background check for students, the legal materials and analysis referred to below address student background check legal

***David Aronofsky is The University of Montana General Counsel. Holly March, Megan Morris and Katie Bell are third-year University of Montana law student clinical interns assigned to the UM General Counsel's office during the 2004-05 academic year. issues and developments. Given recent attention to the student background check questions on campuses generally, this would appear to be a future "hot" legal topic.

II. GENERAL LEGAL CONSIDERATIONS

There is a rapidly emerging expanse of case law, law review articles and news articles that address the issues surrounding background checks on employees and to a lesser extent, on students. Some of the consequences of failing to perform a background check on employees that are addressed include negligent hiring or retention lawsuits, a breach of a duty to protect, agency issues involving respondeat superior and issues arising under OSHA. However, performing background checks may cause as many problems as it solves. These problems may include issues involving privacy, discrimination/EEOC and even accuracy.

A: Criminal Background Checks -- Employees/Faculty

1. *Generally*

Background checks are becoming a fact of life, especially after the terrorist attacks of September 11, 2001 and a substantial increase in workplace violence over the last few years. A recent report issued by OSHA found that on average twenty U.S. workers are murdered and 18,000 are victims of non-fatal violence each week. Lawrence L. Summers, *Workplace Violence: Its Scope, Employer Liability and Prevention*, 681 PLI/Lit 315, 322 (Sept. 2002). Another study indicated that 11 percent of rapes, 7 percent of robberies and 21 percent of assaults happen at work. *Id.*

Given the high number of people affected by workplace violence, it isn't surprising that nearly 91 percent of employees think that background checks on perspective employees are acceptable and 87 percent

don't believe that such checks are an invasion of privacy. *Conducting Background Checks*, HR Series-Policies and Practices §39:5 (Oct. 2004). One article reported that many schools have started to do background checks on faculty applicants, including Penn State, Purdue and Princeton. Jacob Gershman,, *Professors Issue Warning on Spread of Background Checks*, N.Y. Sun. (Apr. 30, 2004). A president of a company that specializes in performing background checks suggested that background checks in academia will soon be commonplace. *Id.* As evidence of this trend, he pointed out that “[a] consortium of the Committee on Institutional Cooperation, which includes the ‘Big Ten’ schools and the University of Chicago, [has allowed] schools within that group to start background check programs . . .” *Id.*

2. *Consequences of Failing to Conduct a Criminal Background Check*

Currently, many schools and universities do not perform criminal background checks on their employees and/or faculty. This may save the institution from some significant problems, including time and expense, but it also opens an institution to several serious issues.

Negligent Hiring or Retention: One of the most significant consequences of not performing a background check is the potential for a negligent hiring or retention lawsuit. The majority of states now recognize “negligent hiring” as a viable legal claim. *Conducting Background Checks*, HR Series-Policies and Practices, §39:2 (Nov. 2004). The tort of negligent hiring states that an employer has a duty “to exercise reasonable care in view of all the circumstances in hiring individuals who, because of their employment, may pose a threat of injury to members of the public.” Befort, 14 Hofstra Lab. L. J. at 376. For an employer to be held liable, the plaintiff must prove the following elements: (1) the employer owed a duty of reasonable care; (2) that duty was breached; (3) the breach was the cause of the plaintiff’s harm. *Id.* An employer only owes a duty to those “within the zone of foreseeable risk . . . and a breach of this duty occurs if an employer either knew or should have known of an applicant’s unfitness . . .” *Id.* at 377. The “general rule is that an employer will be liable only if information it could have discovered through a reasonable investigation would have shown that the employee was unfit for the job.” HR Series at §39.2. Deciding which employees, if not all to investigate can be difficult and expensive. One article recommended that “applicants for a position that involves contact with the public or issues of trust” should always be thoroughly screened. *Id.* at §39.4.

Voluntary Assumption of Duty to Protect: Some courts have been willing to hold employers liable under a theory of voluntary assumption of a duty to protect their employees. Two Illinois cases have held that employers liable for workplace violence under a theory of voluntary assumption of a duty to protect the employees. Summers, 681 PLI/Lit at 332. In one case, the duty arose when the employer implemented a security policy and the other arose through a written contract that the employer would protect the employees and their property. *Id.* at 332-333. Not taking adequate steps to protect employees when an employer has voluntarily assumed a duty to do so may be a breach of duty. *Id.*

OSHA: OSHA imposes a general duty to employers to provide their employees with a safe work environment, which includes a workplace free from violence. *Id.* at 326-327. OSHA, however, has had only one workplace violence proceeding up through 2002. *Id.*

Agency: Respondeat Superior: “Under the doctrine of Respondeat Superior, an employer may be liable for the acts or omissions by an employee that cause injury to another’s property or person” and is limited to acts or omissions that were within the scope of the employee’s employment duties. Befort, 14 Hofstra Lab. L. J. at 373

3. *Potential Consequences of Performing Background Checks on Employees*

Using background checks in the hiring process can have several benefits, including reducing the risk of negligent hiring lawsuits, verifying information on the application and avoiding challenges to the hiring process. Poievent et al., *Employer Investigations*, 7 La. Emp. L. Letter 1 (Oct. 1998). Despite these

benefits, there are potential risk and consequences that stem from such checks.

Privacy Issues: There is potential for a lawsuit claiming invasion of privacy if an employer “intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns where the intrusion would be highly offensive to a reasonable person.” Stephen F. Befort, *Pre-Employment Screening and Investigation: Navigating Between a Rock and a Hard Place*, 14 Hofstra Lab. L. J. 365, 401 (1997). Courts generally consider the employer’s business need for the intrusion, the scope and manner of the intrusion and the employees notice or consent. *Id.* One West Virginia court held that:

“In [the] pre-employment context, it is apparent . . . that a person clearly has a lowered expectation of privacy. Employers regularly perform pre-employment background checks . . . that are far more intrusive than what would be considered tolerable or existing employees without special circumstances.” Andrew J. Ruzicho, *Invasion of Privacy*, 3 Empl. Law Checklists & Forms §76:10, (A)(2) (Oct. 2004).

One article addressed the issue of privacy of public school teachers and uses a Rhode Island case to illustrate the arguments of both sides of the issue. A group of public school district teachers in Rhode Island brought suit claiming that background checks (via fingerprinting) violated the due process clause as the checks imposed a “presumption of guilt and . . . violated the constitutional right to privacy and the search and seizure provision of the Fourth Amendment by requiring [background checks] without requiring . . . probable cause or a warrant.” Christina Buschmann, *Mandatory Fingerprinting of Public School Teachers: Facilitating Background Checks or Infringing on Individuals’ Constitutional Rights?*, 11 Wm. & Mary Bill Rts. J. 1273, 1292 (Apr. 2003). The court rejected the teachers’ argument, stating:

“[E]mployment history, criminal-record checks, and fingerprinting are not part of a criminal investigation . . . [and] do not invade individual privacy rights. They merely require, as part of the licensing or employment process, certain background information to ensure the safety of the children . . .”

Id.

Discrimination: Discrimination is another issue that may arise when background checks are implemented. Some commentators believe that background checks may be discriminatory if such checks result in the disproportional denial of employment opportunities to applicants in a protected class. Carl E. Foote, *Reference and Background Checking on Prospective Employees: Strategies to get Good Information Without Infringing on Privacy and Civil Rights*, SG005 ALI-ABA 145, 147 (Mar. 2002). It may also be a form of discrimination to automatically disqualify an applicant because of his or her criminal record if such a practice would result in “disproportionate rejection of applicants of a protected class.” *Id.* Stem

EEOC: Another article suggested that if the information gathered from a check is used improperly, problems with EEOC may occur. According to the EEOC, an employer is not allowed to use the existence of convictions as an absolute bar to employment. Befort, 14 Hofstra Lab. L. J. at 402. Instead, the employer may only use convictions as a bar when it is consistent with business necessity and after analysis of the facts and circumstances of each case. *Id.*

Accuracy: One procedural problem that many employers that perform background checks run into is accuracy. One newspaper reported that a recent study showed that “a private firm, given a list of 120 people known to be on probation, found criminal records for only fifty-six of them.” Mary McCauley, *Background Checks Rile Professors*, Christian Sci. Monitor 11 (Aug. 5, 2004). Even the F.B.I. had accuracy problems, finding only eighty-seven of the 120 criminal records. *Id.* Accurate reports are also difficult to find as applicants are likely to have “lived, worked or driven through a number of jurisdictions in their travels.” *Id.* Human mistake and clerical errors add into the equation also. *Id.*

Avoiding Problems: To avoid these issues, one article suggested that employers should have applicants sign a release allowing the employer to contact references and past employers and perform

background checks. *Conducting Background Checks*, HR Series- Policies and Practices §254:15 (Nov. 2004). This helps to avoid invasion of privacy issues and may deter violent or dangerous applicants from applying. *Id.* An employer should also keep in mind the necessary duties and responsibilities of the job, scope of authority or responsibility, and the nature of the conviction in determining whether or not to hire an applicant with a criminal history. *Id.* Finally, employers should always check the completeness and accuracy of checks and results.

4. *Recent Cases and News Articles:*

Law Reviews and News Articles:

In 2003, it was discovered that a professor at Penn State had brutally murdered three men on a fishing trip in Texas years prior and was on life parole. Gershman, N.Y. Sun. Ironically, the professor was supposedly given two background checks at previous jobs, none of which turned up the murder convictions. McCauley, Christian Sci. Monitor at 11. No problems had occurred at Penn State involving this professor and his colleagues thought of him as an exemplary professor. *Id.*

In 1998, a culinary professor at Delgado Community College in Louisiana was convicted of raping a student that was accompanying him on a visit to several local restaurants. Poievent, 7 La. Emp. L. Letter at 2. The professor had prior convictions, including possession of drugs, theft and forgeries. *Id.* The school did not conduct a criminal background check prior to hiring the professor and the student sued the school for the negligent hiring of the professor. *Id.* The claim was dismissed at the trial court level but reversed by the appellate court, which found the school negligent in its hiring of the professor. *Id.* at 3, citing *Harrington v. Louisiana State Board of Elementary and Secondary Education*, 714 So. 2d 845 (La. App. 4th Cir. 1998). The court reasoned that:

“When an employer hires an employee who will have a unique opportunity to commit a crime against a third party in the performance of his duties, the employer has a duty to exercise reasonable care in the selection of that employee . . . [A] professor is in a position where character, moral turpitude, and a clean record should be essential. The risk of being raped or harmed by a professor in a position of authority can be associated with the duty to use reasonable care when hiring.”

Id. at 850, 851.

The court concluded that the school’s failure to check the professor’s criminal background was substandard and the cause of the student’s injuries as the school had placed the professor in a “position of authority in which it was reasonably foreseeable that he might rape one of his students.” *Id.* at 851.

The results of the *Harrington* case have caused some commentators alarm, as they feel it overextend the notion of what is reasonably foreseeable. Specifically, they question the court’s reasoning that it was reasonably foreseeable from the professor’s criminal record of nonviolent and non-sexual crimes that he would later rape a student. *Id.* Another concern raised by *Harrington* is whether the holding implies “that any employer who fails to undertake a criminal background check of any applicant is guilty of negligence . . .” *Id.* at 4. Another commentator noted that *Harrington* is the first to “hold a college’s governing board vicariously liable under state tort law for a college instructor’s sexual assault against a student.” Richard Fossey, *Can a College be Held Vicariously Liable When an Instructor Sexually Assaults a Student?*, 142 Ed. Law Rep. 1, 8 (Apr. 2000). *Harrington* also highlights the possible liability that a

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university could face for violence occurring during clinical or other off-campus experiences. *Id.*

A clerical employee of Norfolk State University (NSU) was accused of killing an NSU student in December 2003. *NSU Failed to Check Backgrounds of Workers*, *Virginian-Pilot & Ledger Star* B8 (April 6, 2004). The employee was a convicted rapist and no background check was done by NSU when he was hired. *Id.* The employee had access to files, records and databases of all students at the university. *Id.* The failure of NSU to complete a background check “provided [the employee] access to [the victim] that he probably wouldn’t have had otherwise.” *Id.* After the slaying, NSU completed checks on all of its employees against the state’s sex offenders registry and implemented a policy requiring new hires to have criminal background checks completed. *Id.*

According to an Arizona newspaper, the University of Arizona recently discovered that one of its professors had killed a student more than fifty years ago. Eric Swedlund, *Prof’s Case May Revive Calls for Stiff Checks*, *Ariz. Daily Star* A15 (November 19, 2004). The UA did not perform background checks on potential professors at the time that the professor in question was hired. *Id.* Unfortunately, even if they had, the circumstances surrounding the murders did not result in a murder conviction and likely would not have turned up in a background check. *Id.* Nevertheless, the discovery prompted UA to extend its background checks beyond staff to include all potential professors starting in February of 2004. *Id.* In addition, Arizona regents drafted a proposal that would require Arizona Universities to complete background checks on all staff and faculty. *Id.* The article did not address the current status of the regents’ proposal.

The University of Connecticut began requiring disclosure of all criminal convictions for applicants to its athletic program after an assistant coach was charged with solicitation of prostitutes. Robert A. Frahm, *UConn Alters Screening for Athletic-Job Applicants*, *Hartford Courant* B7 (September 4, 2004). After the coach’s arrest, it was determined that the coach had several similar convictions in his past and as a result, UC is now “discussing whether to impose a similar policy,

possibly including criminal background checks, for job applicants in all university departments . . .” *Id.*

A little closer to home, a janitor employed at Montana State University turned out to be a convicted rapist. Heidi Haemeier, *Judge Drops Charges in Case Against Convicted Rapist*, *Bozeman Daily Chronicle* (Sept. 25, 1999). The janitor worked in “one of the campus’s largest co-ed dormitories since 1997 and possessed a master key to all the rooms.” *Id.* The janitor was charged with raping another woman during the time he was employed by MSU, but the rape appeared to be unrelated to his employment as it did not occur at MSU nor was an MSU student involved. *Id.*

A Virginia Tech student was assaulted by a janitor that was employed through a contract with a janitorial service. LeClair Ryan, *Janitor’s Assault Could Lead to Employer’s Liability*, 16 No. 11 Va. Emp.L. Letter 5 (Dec. 2004). The janitorial service used by Virginia Tech was obligated to run background checks on all of the janitors it sent to the university, but failed to do so for the janitor in question. *Id.* The court of appeals held that the janitorial service was not liable because the acts of the janitor fell outside the scope of his employment, but remanded it on whether a background check would have revealed pertinent information. *Id.*

A university that administered a counseling program was found not liable for negligent hiring despite its counselor’s sexual assault of a middle school student. Francis Amendola et al., *Municipal, County, School & State Tort Liability*, 57 Am. Jur. 2d § 592 (May 2004). The court found that because the school had no knowledge of any problems in the counselor’s past and there was no evidence that a background check would have turned up any such problems, the school was not negligent. *Id.*

III. CRIMINAL BACKGROUND CHECKS ON STUDENTS

1. Why Do Background Checks on Students National Association Of College and University Attorneys

One of the main reasons criminal background checks on student applicants are being performed is the need for universities to maintain a safe, comfortable and healthy environment for their students and employees. Derek Langhauser, *Use of Criminal Convictions in College Admissions*, 154 Ed. Law Rep. 733, 736 (Aug. 2001). Background checks are particularly relevant when taking into account campus housing issues, especially for students with sexual assault records. *Id.* at 737. Another reason to ask students about prior criminal history is to allow the university to advise students of licensing and/or internship problems that may arise because of a conviction before the student completes a substantial amount of a program. *Id.* Finally, “disclosure helps a college comply with the recent federal law that bars financial aid to students with certain drug-related convictions.” *Id.* Most universities that complete criminal background checks do so in the admission’s application, residency application and/or in financial aid application. *Id.* at 738.

2. Problems That Arise Regarding Background Checks on Students

Criminal background checks on students raise similar problems to those faced by employees (see above section), but also come with some unique problems. One of the strongest arguments against a student background check is that the legal field surrounding “negligent admission” has been slow to develop and whether colleges have such a duty is still unclear in most states. *Id.* at 737. As such, a college may not want to “assume a duty that it could be held to breach” when there may be no legal requirement to do so in the first place. *Id.* However, even if the university did not do a check, it could potentially be put “on notice” of a conviction or issue with a student through other sources, such as newspapers or rumor. This might be sufficient notice to create a duty also, depending on the strength of the information. *Id.*

Completing background checks on student applicants creates other problems. For example, complete information on a conviction is not always available for various reasons and some believe that denying admission to a school based upon a conviction may unfairly impact minorities. Other commentators believe that denying admission based on convictions is punishing the applicant once again for a wrong that the applicant has already been punished for committing. *Id.* at 738.

There are administrative issues to consider also. Colleges must take into account the financial burden that background checks will entail, as background checks can cost \$20-100 per check. *Colleges Debate Background Checks*, Evansville Courier A9 (July 7, 2004); Gershman, N.Y. Sun.

A university must always be sure to verify and get complete information regarding any offense before making a decision. The information should be taken in light of how recent it was, the nature of the conduct and its severity. Langhauser, 154 Ed. Law Rep. at 740. This information should then be balanced against the interests of the college, such as an interest in safety, in the character of its students, its ability to graduate the student and its reputation. *Id.*

3. Consequences of Failing to Conduct a Criminal Background Check

Negligent Admissions: As mentioned earlier, the legal footing on which negligent admission claims stand is still shaky. One commentator stated that “whether colleges do or should have such a duty . . . is the subject of an extensive debate that I can only reference.” Langhauser, 154 Ed. Law Rep. at 737. Others feel that “negligent hiring standards should be applied to claims of negligence in the university admissions process [as] these theories appear to be at least as applicable to university students as they are to employees.” Jerome W.D. Stokes & Allen Groves, *Rescinding Offers Admission When Prior Criminality is Revealed*, 105 Ed. Law Rep. 855, 862 (Feb. 1996). Stokes and Grove argue that university admission officers would not need to do a full investigation of all applicants, but rather, fully review all applications for “red flags” and investigate only those students that are flagged. *Id.* at 864. “As in the negligent hiring context, a balancing test would be employed to determine if a given applicant appeared to require the extra burden of a more thorough back ground check . . .” *Id.* However, this red-flag approach assumes that

students will be truthful about their identity or in revealing their past on application questions concerning criminal history. One story highlights this problem. Princeton admitted Alexi Indris-Santana, who had made up an elaborate story, (including that he was home schooled, orphaned and lived in the wilds of Montana), to explain why he essentially had no traceable background. However, it later was discovered that Alexi was an alias used by a Utah convict who was wanted in Utah for parole violations. *Id.*

Title IX: Several cases have been brought under Title IX of the Education Amendments of 1972 (Title IX), alleging that universities failed to provide safe and secure educational environments to students, which involved recruited athletes with criminal histories or pending criminal charges. Christopher M. Parent, *Personal Fouls: How Sexual Assault by Football Players is Exposing Universities to Title IX Liability*, 13 Fordham Intell. Prop. Media & Ent. L. J. 617, 618-623 (2003). One central Title IX case, *Davis v. Monroe County Board of Education*, suggests that:

“Federally funded educational institutions may be liable for damages under Title IX in instances where the institution is deliberately indifferent to student-on-student sexual harassment such that the victim is deprived of opportunities or benefits provided by the institution . . . or for permitting . . . sexual assault and harassment to go undeterred on campus.” *Id.* at 621.

The author of the law review article suggested that schools take “pre-emptive measures like in-depth background checks” in order to avoid sexual assault and/or harassment issues that give rise to Title IX claims. *Id.* at 624.

Contract Issues: Before an applicant is accepted by a university, they generally do not have a contractual or due process claim, so denying admission generally does not raise these problems. However, one commentator suggested that the university should always provide a reasonable explanation for its decision to deny admission. Langhauser, 154 Ed. Law Rep. at 735.

On the other hand, contractual issues may come to the forefront if a university revokes a student’s admission *after* accepting the student.

“Students at public institutions may have expectations that give rise to both property and liberty interest. Although such interests are less substantial than those of students who have matriculated and attended for some period of time, a public institution cannot deprive the student of that interest without due process.” *Id.*

However, there are several exceptions to the due process requirement, including fraud. If the applicant lied on his or her application, the university could argue fraud or a lack of “mutual understanding” in an attempt to invalidate the contract. *Id.* Even if the university is required to proceed with due process, it only needs to prove a “reasonable and substantial basis for its deprivation” in order to comply. *Id.* at 736.

Athletes: Several law review articles specifically addressed issues surrounding athletes and crimes of violence. One statistic found that sexual assault claims were “38% higher among college basketball and football players than the average male college student,” and that in 1998, “more than 175 athletes were arrested for criminal activity at the 112 NCAA Division 1-A schools.” Thomas N. Sweeney, *Closing the Campus Gates: Keeping Criminals Away from the University—the Story of Student-Athlete Violence and Avoiding Institutional Liability for the Good of All*, 9 Seton Hall J. Sport L. 226, 230 (1999).

Generally, student athletes are not considered employees in a negligent hiring claim context. B. Fried, *Illegal Moves Off the Field: University Liability For Illegal Acts of Student Athletes*, 7 Seton Hall J. Sport L. 69, 81 (1997). Universities nonetheless can be subject to Title IX liability for sexually related misconduct by student athletes, so it has been recommended that universities limit their exposure to such liability by looking into the past criminal histories of athletes and denying admissions to those athletes with serious criminal records. Sweeney, 9 Seton Hall J. Sport L. at 259. This article mentions Idaho State University and Northwestern as examples of universities that will not admit athletes who have been convicted of felonies. *Id.*

4. Cases and News Articles:

One of the most recent and well-covered stories regarding student-on-student violence that prompted a university to begin background checks of certain students comes from the University of North Carolina. Two female UNC students were killed by male students that had criminal backgrounds that were not uncovered by UNC when they applied. *Background Checks*, Winston-Salem Journal 8 (Aug. 9, 2004). UNC has admitted that had it known of the students' backgrounds, it would not have admitted the students in question. *Id.* After the two deaths, UNC officials decided to carefully review each application for particular kinds of anomalies, such as unexplained time lapses or changes in schools. *Prudent Campus Checks*, News & Observer A16 (Dec. 22, 2004). Only these "suspect" applications will be submitted for background checks. *Id.* However, background checks on only certain students, and not all students, has caused concerns that it may lead to discrimination charges. Winston-Salem.

Harvard revoked an offer of early admission to Gina Grant when Harvard discovered that Ms. Grant had bludgeoned her mother to death several years earlier. Stokes, 105 Ed. Law Rep. at 855. Similarly, Seton Hall University revoked its offer to Richie Parker, one of the nation's top high school basketball players, when it discovered that Mr. Parker had been convicted of sexually assaulting a classmate. *Id.*

Cases involving the liability for employers who either fail to do a background check on a prospective employee or fail to complete an adequate background check on a prospective employee.

✓ *Spencer v. Univ. of New Mexico Hospital*, 91 P.3d 73 (N.M. App. 2004)

Plaintiff, acting as personal representative, brought a negligent hiring claim against the hospital and a home health care staffing agency after a quadriplegic was killed by a lethal dose of heroin injected by her home health care aide. The aide had a long criminal record, which included aggravated assault, armed robbery, and embezzlement. The agency failed to complete a criminal background check on the aide. The trial court granted the agency summary judgment, and Plaintiff appealed. Plaintiff claimed that the agency had a statutory duty to conduct criminal background checks on all caregivers. While the statute did exist, the court found that the statute provided specific procedures, through which the criminal checks were to be conducted, were impossible to perform. Thus, the court found that it could not base a duty in a statute that outlined procedures that could not be followed. The court also refused to recognize a common-law duty that would require criminal background checks as it believed that the imposition of such a duty should be left to the legislature.

✓ *Blair v. Defender Services, Inc.*, 386 F.3d 623 (4th Cir. 2004)

Plaintiff, a student at Virginia Tech, brought claims of *respondeat superior*, negligent hiring, and negligent retention against the contractor that supplied janitorial services to the university after she had been attacked by one of the contractor's employees. While the attacker did not have any criminal convictions, a protective order had been filed against the man for an unrelated attack. Although the contractor was required to conduct a criminal background check on all employees it provided to the university, the contractor failed to do so during each of the three periods in which the attacker was employed. Plaintiff appealed the district court's dismissal of all of her claims. The Fourth Circuit affirmed the dismissal of the *respondeat superior* claims because the attacker's actions occurred outside the scope of his employment. However, the court found that there was an issue of fact as to whether the contractor negligently hired and retained the attacker. An expert opined that had the contractor conducted a background check after it re-hired the attacker for the third time (during which the attack occurred), it would have discovered the protective order against him. A university official also stated that he would have never allowed the attacker to work at the university had he been aware of the protective order. As such, a jury might reasonably find the contractor negligently hired and retained the attacker by failing to conduct a

background check.

✓ *Lori D. v. County of Riverside*, 2004 WL 2030219 (Cal. App.)

A county hospital patient (presumably mental patient) filed suit against the county on claims of *respondeat superior* and violations of 42 U.S.C. § 1983 after she was sexually assaulted by a nurse employed by the county. Although Plaintiff filed four different complaints (an initial and three amended complaints), the district court dismissed her claims. Affirming the decision of the lower court, the court found that the county did not owe a duty to protect Plaintiff from the acts of others unless it created the peril or it had a special relationship with Plaintiff. The court found that Plaintiff's complaint as to the issue of peril creation addressed whether the county was negligent in failing to investigate the nurse. The court noted that the county could not be held liable for negligent hiring unless there was a statute imposing such liability; Plaintiff failed to identify such a statute. Additionally, there was no special relationship between the county employees responsible for the nurse and Plaintiff. Thus, the county was not negligent. As to Plaintiff's § 1983 claim, the court found that Plaintiff failed to plead that the county's actions under its official customs and policies caused the deprivation of Plaintiff's constitutional rights. Rather, Plaintiff's claims that the county's failure to conduct a criminal background check on the nurse, even though it was required to do so, merely alleged negligence and did not constitute a violation under § 1983.

✓ *TGM Ashley Lakes, Inc. v. Jennings*, 590 S.E.2d 807 (Ga. App. 2003)

Defendants, an apartment complex, its manager, and its leasing agent, appealed from a multi-million dollar jury verdict against them on several counts, including negligent hiring and retention. Plaintiffs were the parents of a woman killed by a maintenance worker recommended by the leasing agent, hired by the manager, and employed by the complex. Although the leasing manager, who recommended the worker for the position, knew that the worker had a criminal history, the agent failed to check into this history. The manager, who knew that the worker had a criminal history, also failed to conduct a check into his criminal background even though the corporate headquarters required such a check. The worker's previous crimes included rape, armed robbery, and burglary. The court found that the defendants had a duty to conduct a criminal background check on the worker once they knew that he had a criminal history. Furthermore, the failure to conduct this check was the proximate cause of the murder because it was foreseeable from the worker's criminal history that he might become violent. Additionally, the defendants were negligent in the retention of the worker because they failed to conduct a background check on all

complex workers after residents reported many instances of theft and even suggested criminal background checks into workers.

✓ *Frith v. Fairview Baptist Church*, 2002 WL 1565664 (Tex. App.)

Plaintiff, mother of a minor child, brought suit against a church for negligent hiring after one of its Sunday school teachers molested her daughter. The district court dismissed the claims for lack of evidence, and Plaintiff appealed. The court found that the church had a duty to conduct a criminal investigation into its volunteers and employees who were in contact with children because the church had assumed such a duty. Although the church failed to conduct a criminal background check on the teacher, the court affirmed the dismissal of the suit because there was no foreseeable risk to others. While the teacher did have a criminal history, his crimes were unrelated to a propensity to molest children. Finally, the court refused to impose a duty upon employers to conduct criminal background checks on prospective employees even though the teacher did have a protective order against him for alleged violence against his daughter.

✓ *Wise v. Complete Staffing Services, Inc.*, 56 S.W.3d 900 (Tex. App. 2001)

Plaintiff, a bakery manager, brought a negligence claim against a staffing agency after a temporary worker, hired by the agency, attacked him. Plaintiff claimed that the agency had a duty to perform an

adequate background check and failed to do so. The district court entered summary judgment for the agency, and Plaintiff appealed. The court found that the agency did not have a duty to conduct a background check on its employees because there was not foreseeable risk of harm to others given the nature of the position (i.e. manual labor at a bakery versus working as a security guard). An employer has only a duty to ascertain whether an applicant/employee will be unsafe, dangerous on the job, or incompetent. However, Plaintiff alternatively claimed that the staffing agency undertook a duty to conduct an adequate background check (it did conduct a criminal check) but failed to do so. Because the agency limited its criminal investigation to the county in which it was located and the attacker/employee did have a criminal history in another county, there was an issue of fact as to whether the agency was negligent in conducting a background check.

✓ Ludwig v. Northwest Airlines, Inc., 98 F.Supp.2d 1057 (D. Minn. 2000)

Plaintiff, a female flight attendant, brought a sex discrimination suit against the airline company after she was not hired as a pilot. In order to become a pilot, the airline screened candidates by using standardized tests designed to measure cognitive ability and personality characteristics. Although the airline continued using these tests, it later began relying on background checks as it believed these checks were a more accurate measure of personality characteristics. Plaintiff, who received adequate scores on the standardized tests, was dropped from the applicant pool after her background check revealed several concerns regarding her ability to cope with stressful situations and authority. Plaintiff claimed sex discrimination through both disparate treatment and disparate impact. With regard to her disparate treatment claim, Plaintiff claimed that she was qualified to be a pilot and the airline discriminated against her on the basis of her sex by using background checks instead of objective test scores to evaluate candidates. Although Plaintiff proved she was qualified, the airline had a legitimate non-discriminatory basis for its hiring decision – her failed background check – and it proved that it did hire females who failed the standardized test but nevertheless passed the background check. With regard to her disparate impact claim, the court assumed, without deciding, that the use of background checks did exclude members of a protected group. However, the court found that the use of background checks was a business necessity because it was a better screening process for pilot candidates than the standardized tests.

✓ Brown v. Youth Services Int'l of South Dakota, Inc., 89 F.Supp.2d 1095 (D. S. Dak. 2000)

Plaintiffs, residents at a juvenile treatment facility, brought suit against the facility after they were sexually molested by one of the counselors. Among their many claims was a claim for negligent hiring. The facility did conduct a criminal background check on the counselor prior to his hiring, but the check revealed no indication that the counsel had a propensity to abuse children. However, one of his references did state she was “not sure” how the counselor would handle adolescents. Plaintiffs claim that the facility’s failure to follow-up on this statement resulted in negligent hiring. The court denied the facility’s motion for summary judgment on negligent hiring because there was evidence that the facility should have known the counselor posed a threat to adolescents based on the reference statement.

✓ Mirelez v. Bay City Independent School Dist., 992 F.Supp. 916 (S.D. Tex. 1998)

Plaintiff, acting on behalf of her minor daughter, sued Defendant under 42 U.S.C. § 1983 after her daughter was sexually molested by a substitute teacher on school grounds. Defendant did not conduct a background check on the teacher, and the superintendent had previously received a complaint of molestation from another student two years prior. The court found that summary judgment was improper because there was an issue of fact as to whether there existed a policy requiring immediate reporting of molestation to the superintendent. However, the court did find that the Defendant was not deliberately indifferent to Plaintiff’s rights by failing to perform a background check on the teacher because there was no nexus between conducting such a check and the potential for the teacher to sexually abuse a student.

✓ Doe v. Hillsboro Independent School Dist., 81 F.3d 1395 (5th Cir. 1996)

Plaintiff, father of a minor child, brought a claim under 42 U.S.C. § 1983 against a school district after his daughter was raped by a janitor when she stayed after school to work on a project. The student had been sent on an errand by her teacher to get more supplies when she was attacked by the janitor. Specifically, Plaintiff claimed that his daughter's civil rights were violated because the procedures under the district's hiring policy were inadequate, school officials were deliberately indifferent in adopting the policy, and the inadequate hiring policy directly caused Plaintiff's injury. The court found that the hiring policy was inadequate because the district failed to conduct criminal background checks on its employees even though state law required such a check. Because of the high interest in student safety, the court found that the backgrounds of prospective district employees should be scrutinized, much like the backgrounds of prospective law enforcement officers. Therefore, the district's continued failure to conduct criminal background checks (its policy) did constitute deliberate indifference. Finally, the court concluded that there was a causal connection between the failure to conduct a criminal background check and Plaintiff's injury as nearly one-third of all district employees had a criminal history and were in constant contact with children. Thus, Plaintiff was entitled to go forward with this theory of liability under § 1983.

✓ *Doe v. Hillsboro Independent School Dist.*, 113 F.3d 1412 (5th Cir. 1997)
(en banc)

The court, *en banc*, upon petition for rehearing, reversed its earlier decision in which it held Plaintiff stated a claim under § 1983 because of its hiring practices. The court found that Plaintiff failed to establish a causal connection between the district's failure to conduct a criminal background check and Plaintiff's injury because Plaintiff failed to introduce evidence of the janitor's criminal history or previous sexual misconduct towards students.

✓ *Flood v. State of Alabama Dept. of Industrial Relations*, 948 F.Supp. 1535 (M.D. Alabama 1996)

Plaintiff, who was employed as a workers' compensation claims' examiner, filed multiple claims against the state alleging injury from the treatment he received after he publicly revealed (against policy and direction) discrepancies within the department. Among the many claims, Plaintiff alleged constructive discharge because he was forced to resign from his position after the state instigated a background check on him. Plaintiff claimed that he previously worked as an undercover officer and the background check revealed confidential information that put his family in danger; he alleged the state released some of this information. Plaintiff claimed that as the result of this background check and other negative treatment, he had a heart attack and had to resign from his position. The district court denied summary judgment because there were issues of fact as to whether the background check and other negative treatment resulted in a hostile work environment. Though Plaintiff claimed that the background check and negative treatment were initiated after his public revelations, the state claimed he was not treated unfairly and the background check was initiated as a routine procedure and was a necessity as Plaintiff was being considered for a promotion.

✓ *Andrews v. Fowler*, 98 F.3d 1069 (8th Cir. 1996)

Plaintiff brought suit under 42 U.S.C. § 1983 against individual police officers and the city of North Sioux City after she was raped by an on-duty officer. In part, Plaintiff claimed that the city's hiring policy and procedures were inadequate, the city was deliberately indifferent to her rights in adopting them, and that the inadequate policies and procedures were the cause of her injury. While the city did conduct a thorough criminal background check on the officer, Plaintiff alleged the city was deliberately indifferent to her rights by failing to fully verify the officer's employment history and did not require psychological evaluations. The court found that the city's failure to check every reference or all past employment records did not constitute deliberate indifference. There was no indication, based on the officer's application, that he did not adequately perform his duties at his former positions. Furthermore, even though the officer was dishonest in stating his military record (he stated he was honorably discharged but was actually given a

general discharge), the city's failure to discover this did not constitute deliberate indifference. The officer's criminal background check revealed no criminal record.

✓ *Moricle v. Pilkington*, 462 S.E.2d 531 (N.Caro. App. 1995)

Plaintiff brought suit against the owner of a plumbing repair service company for negligent hiring after two of his employees stole jewelry from Plaintiff when they were supposed to repair a plumbing problem at her house. Although both employees had criminal records, the owner did not do a criminal background check on either of the employees; one was his nephew, and the other claimed he had no criminal convictions. The owner did call one former employer of the employee that was not his nephew. The trial court granted summary judgment for the owner, and Plaintiff appealed. The court found that the owner followed hiring practices customary to those used by other plumbing companies. Given the relationship with his nephew and the interview and reference check with the former employer, the court found that there were no indicators that would have reasonably led the owner to perform a more thorough investigation. Furthermore, the court noted that there is no duty to conduct a criminal background check on employees in North Carolina and that a presumption exists that employers use due care in hiring employees. Plaintiff failed to produce any evidence showing the existence of a duty and that the owner failed to exercise due care.

✓ *Search EDP, Inc. v. American Home Assurance Co.*, 632 A.2d 286 (N.J. Super. 1993)

Plaintiff, an employment agency, brought suit against its insurer demanding defense and indemnity coverage for a claim brought against the agency. A woman sued the agency for professional negligence based on the agency's failure to conduct an adequate background search on one of its employees who assaulted her. The agency sought coverage from its insurer for its defense costs and indemnification based on its professional negligence policy. The insurer denied coverage claiming that the policy included an exclusion against coverage involving a claim for bodily injury. The court found that the professional negligence policy did provide coverage to the agency for its defense and indemnification in the underlying suit. The court noted that the exclusion, upon which the insurer relied, would defeat the purpose of the policy.

✓ *Webster Soda Fountain Manufacturing Corp. v. Chemical Bank*, 1991 WL 286180 (N.Y.Sup.)

Plaintiff, a manufacturing company, brought suit against two banks that processed checks forged by the manufacturing company's bookkeeper. Plaintiff's claims included negligence, breach of contract, and conversion. Seeking dismissal, one bank claimed that the manufacturing company was estopped under UCC § 3-406 from bringing claims for losses as the result of the manufacturing company's own negligence. Specifically, the bank claimed that the manufacturing company was negligent by failing to conduct a criminal background search on its bookkeeper, who had a criminal history that included convictions for grand larceny. The court found that issues of fact existed as to whether the manufacturing company was negligent in failing to conduct a criminal background check on the bookkeeper, even though it did produce evidence that it would not have discovered the bookkeeper's criminal history because he had several aliases.

✓ *Malorney v. B & L Motor Freight, Inc.*, 496 N.E.2d 1086 (Ill.App. 1986)

Plaintiff brought a claim for negligence against a transportation company after one of its drivers raped her when she was hitchhiking. The transportation company verified the driver's driving record but failed to conduct a criminal background check on the driver, who had been convicted of several violent sex crimes.

The company filed a motion to dismiss the claims, arguing it had no duty to complete a criminal background check. The trial court denied the motion, and the company appealed. The court found that the company did have a duty to check its drivers' criminal backgrounds because it had a duty to exercise reasonable care in selecting drivers who can perform their duties competently. Additionally, there was evidence that truckers often pick up hitchhikers, despite the company policy against doing so.

The court determined that it was a question of fact as to whether the company breached its duty to ascertain whether the driver was a fit employee.

✓ *Welsh Manufacturing v. Pinkerton's, Inc.*, 474 A.2d 436 (R.I. 1984)

A manufacturer, which produced gold sunglass-frames for the government, brought a negligence suit against the security company it contracted to provide security services after one of its security officers assisted with the theft of over \$200,000 in gold. A jury found that the security company was negligent in the hiring of the security officer for failing to conduct an adequate investigation into the individual's background. The security company appealed. The Court found that although the security company did a criminal background check into the individual and some reference checking, the nature of the position (i.e. guarding substantial amounts of gold) required a more thorough investigation into the individual's honesty and trustworthiness as the methods used by the security company did not inquire into this area. As such, the security company breached its duty to exercise reasonable care into the hiring of its employees. The Court noted that the nature of the position dictates the degree of reasonable care that must be exercised – those positions involving large amounts of money and temptation require more reasonable care in the selection, i.e. a more thorough background check.

✓ *Ponticas v. K.M.S. Inv.*, 331 N.W.2d 907 (Minn. 1983)

Plaintiff brought a negligent hiring suit against her apartment complex after the complex manager raped her. The complex checked only a few references and did not complete a criminal background check on the manager, who did have a criminal record that included armed robbery. The jury awarded damages to Plaintiff, and the complex appealed. The court recognized, for the first time in Minnesota, a claim for negligent hiring and held that liability can be imposed if an employer places a worker, with propensities either known or should have been known through reasonable investigation, posing a foreseeable risk to others. The court found that the complex had a duty to conduct an investigation into the manager's background, as he was given unfettered access to tenants and could pose a risk to them. While the court did not impose a general duty on employers to complete a background check on all prospective employees, it did hold that the level of investigation should be commensurate with the type of position – i.e. the greater risk of harm and the greater contact with others, the more thorough an investigation should be. The court also found that the complex breached its duty to conduct an adequate investigation into the manager because it was foreseeable with his criminal record that he posed a risk to tenants. Finally, the complex's failure to adequately investigate the manager was

the proximate cause of Plaintiff's injury as the complex owners would not have hired the manager had they been aware of his criminal background.

Cases where employers did a background check and there was an allegation of a violation of privacy.

✓ *American Federation of Government Employees v. Department of Housing & Urban Development*, 118 F.3d 786 (D.C. Cir. 1997)

The Department of Housing and Urban Development (HUD) and the Department of Defense (DOD) required their employees to answer background questionnaires concerning things such as financial history,

illegal drug use, bankruptcy, and mental and emotional history. In its analysis, the court noted that the employees to be questioned had jobs that involved a lot of risk and responsibility. While it declined to hold that no constitutional right of privacy exists in the nondisclosure of personal information, the court did hold that in this case, “both agencies have presented sufficiently weighty interests in obtaining the information sought by the questionnaires to justify the intrusion into their employees’ privacy.” It went on to state that the background questionnaire records were maintained under secure conditions, which reduced the employees’ privacy interests.

✓ *Doe v. Anoka County Board of Commissioners*, 1992 WL 238373 (Minn.App.)

An employer hired a company to conduct background checks on applicants for a job. The background check on Doe showed that he had been convicted of a felony several years before and had then received a pardon. When Doe was not hired for the job, he filed a complaint alleging, in part, a violation of the right to privacy. In its affirmation of summary judgment, the appellate court stated that Minnesota did not recognize an invasion of privacy in the publication of his prior conviction as a tort. Additionally, the court stated that the pardon record was open to the public anyway, so “the fact a pardon ha[d] been granted to appellant [was] not ‘private’ information whose disclosure would violate appellant’s rights.”

✓ *Walls v. City of Petersburg*, 895 F.2d 188 (3rd Cir. 1990)

Plaintiff Walls was hired as the administrator of a city program that provided alternative sentencing for non-violent criminals. A year later, the program was transferred to the city’s police department, and the department required all the program’s employees to undergo the same background checks as its other employees. However, Walls refused to complete the background questionnaire, which resulted in her termination. Walls then brought suit, alleging that she was discharged in violation of her constitutionally protected right to privacy. The four background questions to which Walls specifically objected included whether any of her family members had been convicted of a crime; marriages and children she had had; whether she had ever had same-sex sexual relations; and to list all her outstanding debts and judgments. The court looked to case law dealing with similar situations (those involving police departments and what questions it could ask through a background check of its employees). It cited *Fraternal Order of Police, Lodge 5 v. Philadelphia*, 812 F.2d 105 (3rd Cir. 1987), where the background questionnaire included questions about financial status, behavior and habits, physical and mental conditions, and arrests of family members. In *Fraternal Order of Police*, the Third Circuit acknowledged that this kind of information was entitled to privacy protection, but it held that “the questions are specific, relevant, and permissible because the City’s need for the information overrides the applicants’ rights not to disclose it. However, the court looked to other cases which have held that certain personal questions are a violation of privacy. In *Shuman v. City of Philadelphia*, 470 F.Supp. 449 (E.D.Pa. 1979), the court held that a police officer’s privacy was violated when his employers asked about an alleged off-duty affair. The court held that without a showing that off-duty, personal activities had an impact upon his job performance, the questions violated his right of privacy.

Using this case law to analyze Walls’ background questionnaire, the court decided that the questions about marriages, divorces, children, and arrests of family members did not trigger privacy protection. The court noted that this information is available in public records, and thus Walls did not have a reasonable expectation of privacy. Regarding the inquiries about Walls’ financial information, the court noted that this information is protected by a right to privacy. However, the court held that the city had a compelling interest in this information due to the nature of Walls’ work. Because she was the administrator of the program and had considerable responsibilities, the city had a need to be aware of her financial situation in order to protect against possible corruption.

Finally, the question about homosexual activities was held to not violate Walls' privacy. The court based its holding on *Bowers v. Hardwick*, 478 U.S. 186 (1986), which held that a right of privacy does not extend to homosexual activity. Because of this holding, the court in *Walls* concluded that this question did "not ask for information that Walls ha[d] a right to keep private." However, *Bowers* has subsequently been overruled, and this part of the holding may be affected.

✓ *American Federation of Government Employees, R.R. Retirement Bd. Council, AFL-CIO v. U.S. Railroad Retirement Board*, 742 F.Supp. 450 (N.D. Ill. 1990)

The U.S. Railroad Retirement Board (the Board) sought to make its employees complete a questionnaire as a condition of employment. The employees alleged, in part, that certain questions violated their constitutional right to privacy. One question to which the employees objected asked them to disclose their membership in organizations other than political or religious organizations or labor unions. The court held that such a question violated the employees' First Amendment rights. Other questions were found to be a violation of the employees' right to privacy; such questions included whether the employee had any substance abuse and whether the employee had ever had a nervous breakdown. The court held that the Board did not advance sufficient justification for asking questions of such a highly personal nature.

IV. CONCLUDING COMMENTS ABOUT THE UNIVERSITY OF MONTANA EXPERIENCE

Since adopting its criminal background check requirement, The University of Montana has experienced no significant problem. Occasionally, criminal records from other jurisdictions are delayed in arrival and in one instance a person provisionally hired resigned when post-hire information indicated prior criminal history undisclosed in the employment application. In that instance, the employee had been notified before hiring that continued employment was contingent upon a satisfactory background check. The University is prepared to assume the risk of defending any legal challenges to this requirement or its implementation. The requirement has proved to be no impediment in hiring top quality people, and anecdotally the University is beginning to realize that the requirement may well be precluding inappropriate hires based on applicant self-screening. The University has no intention of softening its policies and procedures at the present time.



Office of Human Resource Services
The University of Montana – Missoula
Emma B. Lommasson Bldg, Rm 252

Missoula, Montana 59812-1800

Phone: (406) 243-6766
FAX: (406) 243-6095

POLICY MEMORANDUM

DATE: November 25, 2002

TO: Deans, Directors, Administrators

FROM: Kathy Crego, Director, HRS

RE: **New Policy – Background Investigations for New Hires**

Attached is a copy of the “Background Investigation” policy and procedures recently adopted by the University. The policy takes effect immediately.

Unfortunately, a notable increase in the number of criminal offenses occurring on our own campus, as well as within the entire employment community, requires that we become even more attentive to potential safety and security concerns.

Criminal background investigations are now required prior to hiring any non-temporary faculty, staff, contract administrator, or contract professional position. The University has conducted background investigations on a limited number of staff positions, based on assigned duties, for many years. Recent occurrences and trends justify the need to include all University positions. Details are explained in the attached policy document.

Results of background investigations will be maintained in strictest confidence and will be shared only on a need-to-know basis. The hiring authority will be notified only if an offer of employment may be extended or if the request to hire has been denied.

I know that this will create some inconvenience and very limited delay in hiring new employees. However, the welfare of current faculty and staff, as well as University resources, is a goal we all share.

Please call me if you have any questions.



The University of
Montana

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Missoula, Montana 59812-1800

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FAX: (406) 243-6095

November 2002

**BACKGROUND INVESTIGATIONS
POLICY and PROCEDURES**

Staff, Contract Professional, Contract Administrator, Faculty
Vacant Positions

PURPOSE

The University is committed to protecting the security, safety, and health of faculty, staff, students and others, as well as safeguarding the assets and resources of the University of Montana-Missoula. In response to increasing numbers of negligent hiring legal actions and escalating local and state instances of employment fraud, theft, violent acts, etc., the University has enacted a policy requiring pre-employment background investigations.

POLICY

Background investigations shall be required prior to employing permanent staff members, contract administrators, contract professionals, and faculty members. This policy includes positions for which recruitments are conducted, along with individuals hired through approved recruitment exceptions.

PROCEDURES:

I. **Notification:**

All candidates for staff, contract administrator, contract professional, and faculty positions will be notified, in writing, of the requirement to successfully pass background investigations. Human Resource Services will develop the required form.

II. **Process:**

A. *Staff:* After completion of the initial screening, reference checks, and interview processes, the hiring authority/committee will select one finalist. Prior to offering the position to the finalist, the criminal background investigation must be completed and results assessed.

- B. *Contract Administrators, Contract Professionals, and Faculty:* Background investigations will typically be conducted prior to conducting interviews.

The Director of EEO/AA or Director of HRS will notify the Office of Public Safety when a background investigation is needed. A check of Montana state records will be conducted on all individuals. Candidates who have lived in other states will undergo investigations in each state in which they have resided. Out-of-state background checks will typically cover a candidate's prior 10-year employment history.

III. Investigation Results

- A. *Staff:* Results of background investigations will be conveyed to the HRS Director. If background investigations result in the detection of criminal records, the Captain of Public Safety and Director of HRS, in consultation with Legal Counsel, will determine the candidate's appropriateness for employment. The hiring authority will be notified of the decision.
- B. *Contract Administrators, Professionals and Faculty:* Results of background investigations will be discussed among the Director of EEO/AA, Captain of Public Safety, Legal Counsel, hiring authority, and the President, as appropriate.

In determining whether criminal convictions will preclude individuals from being hired, the University will consider the number, nature, gravity, recency, and job-relatedness of any records, along with rehabilitation efforts and success.

Results of the background investigations will remain confidential and will be maintained by the Office of Public Safety and will be shared only on a need-to-know basis.

IV. Cost

Hiring authorities will pay the costs associated with background investigations. In-state background checks will be conducted by the Department of Justice at a cost of \$18 each. A private firm will conduct out-of-state criminal investigations, and will vary in cost from an additional \$18.00 to \$60.00, depending on the state.



The University of
Montana

Office of Human Resource Services
The University of Montana – Missoula
Emma B. Lommasson Bldg, Rm 252

Missoula, Montana 59812-1800

Phone: (406) 243-6766
FAX: (406) 243-6095

March 2003
Rev. May 2003

CRIMINAL BACKGROUND INVESTIGATIONS
POLICY and PROCEDURES
Staff, Contract Professional, Contract Administrator, Faculty, and Letters of Appointment
Vacant Positions

PURPOSE

The University is committed to protecting the security, safety, and health of faculty, staff, students and others, as well as safeguarding the assets and resources of the University of Montana-Missoula. In response to increasing numbers of negligent hiring legal actions and escalating local and state instances of employment fraud, theft, violent acts, etc., the University has enacted a policy requiring pre-employment criminal background investigations.

POLICY

Criminal background investigations shall be required prior to employing permanent staff members, contract administrators, contract professionals, all faculty members, individuals on Letters of Appointment, and designated temporary staff members. **This policy includes positions for which recruitments are conducted, along with individuals hired through approved recruitment exceptions.**

PROCEDURES:

V. Notification:

All candidates for covered staff, contract administrator, contract professional, Letter of Appointment and faculty positions will be notified, in writing, of the requirement to successfully pass background investigations. The required form is available at the Human Resource Services web site.

VI. Initiation of Investigations:

- A. *Permanent Staff Positions:* After completion of the initial screening, reference checks, and interview processes, the hiring authority/committee will select one finalist. Prior to offering the position to the finalist, the criminal background investigation must be completed and results assessed. The Recruitment Specialist in the Office of Human Resources will provide necessary information to the Office of Public Safety.
- B. *Contract Administrators, Contract Professionals, Letters of Appointment, Coaches and Faculty:* Background investigations will be initiated concurrent with the scheduling of interviews. This section applies to individuals hired through standard recruitment and selection procedures, as well as those employed through recruitment exceptions.

The appropriate Dean's office will ensure that completed forms and required information for faculty positions is submitted to the Office of Public Safety. The

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appropriate Executive Officer or Dean will submit required information for Administrator, Letter of Appointment, Contract Professional, and Coach positions. This procedure also applies to those individuals written into grants.

- C. *Temporary Staff*: Temporary staff members expected to be employed at least six (6) consecutive months are subject to criminal background investigations. The hiring authority shall submit required information to the Office of Human Resource Services prior to employment of the individual.

In the event an initial employment period of less than six (6) months is subsequently extended to exceed six months, a criminal background investigation must be completed at the time employment is extended.

VII. Required Information

The following information shall be submitted to the Office of Public Safety or Human Resource Services, as designated above.

- i. Completed and signed Authorization for Pre-Employment Criminal Background Investigation. *Note: Out-of-state background investigations will cover the past five years or a period of time that includes at least two former employers.*
- ii. The University account to which to charge the costs associated with the background investigation.

VIII. Offer of Employment

An offer of employment may be extended pending the outcome of criminal background investigations.

Individuals hired for permanent staff positions shall be notified by the hiring authority that they are subject to immediate dismissal during their probationary period if adverse, relevant information is discovered as a result of the investigation.

Temporary staff hired, pending the results of a background investigation, are subject to immediate dismissal if the results of the investigation are unacceptable.

Individuals hired for all other positions (i.e., faculty, contract administrator, contract professional, letter of appointment) shall be provided with a written letter of offer that includes the following statement:

“Employment is contingent upon a satisfactory criminal background investigation. The determination of “satisfactory” is at the sole discretion of the Employer. Immediate dismissal will occur if criminal background investigation results are unsatisfactory.”

IX. Investigation Results

Results of background investigations will be conveyed by the Director of Public Safety, or his designee, and to the HRS Director. If background investigations result in the detection of criminal records, the Director of Public Safety or designee and Director of HRS, in consultation with Legal Counsel, will determine the candidate's appropriateness for employment. If necessary, the hiring authority, Executive Officer, and/or President will be consulted. The hiring authority will be notified of the decision. Details of investigation results will not be provided to the hiring authority, search committee chair, Executive Officer, or any other individuals.

In determining whether criminal convictions will preclude individuals from being hired, the University will consider the number, nature, gravity, recency, and job-relatedness of any records, along with rehabilitation efforts and success.

Results of the background investigations will remain confidential, will be maintained by the Office of Public Safety, and will be shared with authorized individuals only on a need-to-know basis. Criminal background investigation results are protected by laws and regulations governing confidential criminal justice information.

X. Cost

Hiring authorities will pay the costs associated with background investigations. In-state background checks will be conducted by the Montana State Department of Justice, and out-of-state criminal investigations will be conducted by the appropriate agency(ies), as determined by the Office of Public Safety. Costs will vary from a minimum of \$18.00 for Montana only to approximately \$200.00 per investigation for out-of-state investigations. Costs may change.

Office of Human Resource Services
The University of Montana – Missoula
EL Cntr, Rm 252
Missoula, Montana 59812
Phone: (406) 243-6766
FAX: (406) 243-6095

MEMORANDUM

DATE: November 21, 2003
TO: Deans and Academic Department Chairs
FROM: Kathy Crego, Director, HRS
RE: Criminal Background Investigations – Clarification

In response to specific questions that have arisen, clarification of two aspects of the University's criminal background investigation procedures and policy follows:

Q: Is it mandatory that every academic position advertisement contain a notice that criminal background investigations will be conducted?

A: It is **not** mandatory to include such a statement in advertisements for academic positions. However, it is mandatory that candidates selected for an interview be informed of the criminal background investigation process when they are notified that they have been selected for an interview.

Q: Does a felony criminal conviction of any type or at any time **automatically** disqualify a candidate for employment by the University?

A: No. As stated in the policy (<http://www.umt.edu/hrs/forms/forms/background%20procedures.doc>), "In determining whether criminal convictions will preclude individuals from being hired, the University will consider the number, nature, gravity, recency, and job-relatedness of any records, along with rehabilitation efforts and success."

The University must balance an individual's constitutional right to privacy with its need to hire appropriate individuals and protect itself from negligent hiring claims.

Information obtained during the criminal background check is shared with only Captain Jim Lemcke of Public Safety, Legal Counsel David Aronofsky, and the Director of Human Resources. The above-stated criteria are used to determine whether the candidate will be considered further for employment. Remember that the University checks Montana state records and locales where the candidate has been employed during the most recent five years.

I hope this clarifies the recent confusion. Please call me at ext. 5708 if you have any

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questions. I would also be happy to meet with you or attend departmental meetings to further clarify the criminal background investigation process.



**CRIMINAL BACKGROUND INVESTIGATION
INSTRUCTIONS FOR CONTRACT ADMINISTRATORS/PROFESSIONALS, COACHES, FACULTY, AND
LETTERS OF APPOINTMENT**

- Step 1: Refer to Policy dated March 2003. (rev. May 2003)
The appropriate Executive Officer's or Dean's office will submit required information as follows.
- Step 2: Complete the information on the Authorization for Background Check Form. E-mail or Fax the Authorization for Background Checks to candidate(s) selected for interview. Request immediate return of signed authorization.
- Step 3: A) At the same time interviews are being scheduled, fax the signed Authorization for Criminal Background Investigation to Jim Lemcke, Asst. Director of Public Safety at x4298. Be certain the candidate's full name, social security #, and date of birth are included on the form. Include out-of-state information as defined in the form.
- B) Fax the completed cover sheet.
- Step 4: The contact person shown on the fax cover sheet will be notified by Public Safety if positive results are obtained through the criminal background investigation. The hiring process may then proceed in accordance with standard procedures.
- Step 5: In the event the criminal background investigation results are negative, the Assistant Director of Public Safety will contact the Director of Human Resources. A final decision regarding employability of the candidate will be made in accordance with policy, and the individual requesting the investigation will be notified. The hiring process will then proceed accordingly.



Pc **Director - Department of Intercollegiate Athletics**

Position Descr The University of Montana invites applications and nominations for the position of Director of Intercollegiate Athletics. Reporting to the President, the Athletic Director has responsibility for the leadership, planning, and administration of the Intercollegiate Athletic Department and its \$10.5 million budget.

The University seeks an experienced, energetic, and talented leader with the proven ability to manage the complexity found in an NCAA Division I athletic program. In 2004, the Grizzlies made the 1-AA football playoffs for the 13th consecutive time and this year sent both the Women's and Men's Basketball teams to the NCAA Tournament.

Submissions: Screening of applications will begin in early **May** and will continue until the appointment is made.

Qualifications:

- A baccalaureate degree in a relevant discipline
- A minimum of 5 years of responsible and progressive experience in an NCAA Division I athletic program involving personnel and fiscal management, fund raising, and public relations.

Preferred:

- Familiarity with The University of Montana, the Big Sky Conference
- An advanced degree.

Application Process: Send resume, letter of application, and the names and phone numbers of five professional references to the address below. Electronic application submissions (email) are preferred.

Chair, Search Committee
The University of Montana, University Hall 125
Missoula, Montana 59812
Ph; 406-243-4662
Fax: 406-243-5537
Email: Barbara.Denman@mso.umt.edu

Background Check is Required Prior to Offer of Employment

In accordance with University regulations, finalists for this position will be subject to criminal background checks.

ADA / EOE / AA / Veterans' Preference

As an Equal opportunity/Affirmative Action employer, we encourage applications from minorities, Vietnam era veterans, and women. This material is available in an alternative format upon request. Qualified candidates may request veterans' preference in accordance with state law.

This position announcement can be made available in alternative formats upon request.



Office of Human Resource Services
The University of Montana – Missoula
Emma B. Lommasson Bldg, Rm 252

Missoula, Montana 59812-1800

Phone: (406) 243-6766
FAX: (406) 243-6095

November 2002

**BACKGROUND INVESTIGATIONS
POLICY and PROCEDURES**
Staff, Contract Professional, Contract Administrator, Faculty
Vacant Positions

PURPOSE

The University is committed to protecting the security, safety, and health of faculty, staff, students and others, as well as safeguarding the assets and resources of the University of Montana-Missoula. In response to increasing numbers of negligent hiring legal actions and escalating local and state instances of employment fraud, theft, violent acts, etc., the University has enacted a policy requiring pre-employment background investigations.

POLICY

Background investigations shall be required prior to employing permanent staff members, contract administrators, contract professionals, and faculty members. This policy includes positions for which recruitments are conducted, along with individuals hired through approved recruitment exceptions.

PROCEDURES:

XI. **Notification:**

All candidates for staff, contract administrator, contract professional, and faculty positions will be notified, in writing, of the requirement to successfully pass background investigations. Human Resource Services will develop the required form.

XII. **Process:**

- A. *Staff:* After completion of the initial screening, reference checks, and interview processes, the hiring authority/committee will select one finalist. Prior to offering the position to the finalist, the criminal background investigation must be completed and results assessed.

- B. *Contract Administrators, Contract Professionals, and Faculty:* Background investigations will typically be conducted prior to conducting interviews.

The Director of EEO/AA or Director of HRS will notify the Office of Public Safety when a background investigation is needed. A check of Montana state records will be conducted on all individuals. Candidates who have lived in other states will undergo investigations in each state in which they have resided. Out-of-state background checks will typically cover a candidate's prior 10-year employment history.

XIII. Investigation Results

- A. *Staff:* Results of background investigations will be conveyed to the HRS Director. If background investigations result in the detection of criminal records, the Captain of Public Safety and Director of HRS, in consultation with Legal Counsel, will determine the candidate's appropriateness for employment. The hiring authority will be notified of the decision.
- B. *Contract Administrators, Professionals and Faculty:* Results of background investigations will be discussed among the Director of EEO/AA, Captain of Public Safety, Legal Counsel, hiring authority, and the President, as appropriate.

In determining whether criminal convictions will preclude individuals from being hired, the University will consider the number, nature, gravity, recency, and job-relatedness of any records, along with rehabilitation efforts and success.

Results of the background investigations will remain confidential and will be maintained by the Office of Public Safety and will be shared only on a need-to-know basis.

XIV. Cost

Hiring authorities will pay the costs associated with background investigations. In-state background checks will be conducted by the Department of Justice at a cost of \$18 each. A private firm will conduct out-of-state criminal investigations, and will vary in cost from an additional \$18.00 to \$60.00, depending on the state.