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How Reforming The Tort Of Negligent Hiring Can Enhance The Economic Activity Of A State, Be Good For Business And Protect The Victims Of Certain Crimes

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How Reforming The Tort Of Negligent Hiring Can Enhance The Economic Activity Of A State, Be Good For Business And Protect The Victims Of Certain Crimes

Cover Page Footnote

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HOW REFORMING THE TORT OF NEGLIGENT HIRING CAN ENHANCE THE ECONOMIC ACTIVITY OF A STATE, BE GOOD FOR BUSINESS AND PROTECT THE VICTIMS OF CERTAIN CRIMES

SHAWN D. VANCE*

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INTRODUCTION

In order to enhance economic development and to ensure the influx of new businesses into a community, governments are consistently creating incentives to attract businesses to their respective states. While tax incentives have been the favored method to attract employers, states have long considered the benefits of limiting the liability of an employer to draw business into its borders. Such efforts to limit liability have come in the form of diminishing employee’s rights to sue their employer, creating more stringent standards for patrons to sue an employer, and other forms of tort reform.

This article will focus on reforming the tort of negligent hiring to limit the liability of employers while also ensuring the compensation of certain victims when the employer fails to meet the requirements of the reformed tort. While the tort is currently recognized by most states, the states that have recognized the tort have different standards for liability and little clarity is provided to employers on how to avoid liability. By creating certainty in the marketplace through a reformed

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negligent hiring tort, states can encourage business activity from civic-minded businesses while holding businesses, which fail to exhibit good civic behavior, strictly liable for the actions of its employees in certain situations.

Currently most victims of tortious conduct of an individual hired by a particular employer seek remedies from that employer under the concept of respondeat superior and/or vicarious liability. However, these concepts limit the employer's liability to situations where the employee's actions are in furtherance of the employer's interest or arise out of the scope of employment.¹ Such limitations generally preclude a victim from bringing a claim against an employer for the violent acts committed by employees of that employer. The tort of negligent hiring potentially creates another avenue for a victim to seek a remedy against an employer for the tortious actions of its employees.²

In certain situations the tort of negligent hiring allows a victim who was harmed by the actions of an employee to hold the employer liable for those actions.³ Generally under the tort of negligent hiring the employer is liable for the harm their employees inflict on third parties when the employer knew or should have known of the employee's potential risk to cause harm or if the risk would have been discovered by a reasonable investigation.⁴

Consider the following hypothetical situations while assessing the contents of the remainder of this article⁵:

The City's Parks Department hired John Jenkins to perform certain duties at its area parks.⁶ Specifically, Mr. Jenkins duties included: 1) picking up trash at the parks, 2) performing basic maintenance on park equipment, and 3) ensuring that the parks were clean. He was granted use of a city vehicle to move from park to park in a particular geographical area of the city. Ten years prior to being hired by the city, Mr. Jenkins was arrested and charged with carnal knowledge of a

¹ Bruce D. Platt, *Negligent Retention and Hiring in Florida: Safety of Customers Versus Security of Employers*, 20 FLA. ST. U. L. REV. 697, 698 (1992-93); see also Kelly M. Feeley, *Hiring Sexters to Teach Children: Creating Predicable and Flexible Standards for Negligent Hiring in Schools*, 42 N.M. L. REV. 83, 90 (2012).

² Rodolfo A. Camacho, *How to Avoid Negligent Hiring Litigation*, 14 WHITTIER L. REV. 787, 792 (1993).

³ *Id.*

⁴ Feeley, *supra* note 1, at 90.

⁵ Two of the three examples contained herein are loosely based on the facts from specific cases.

⁶ The facts of this hypothetical involving John Jenkins were largely derived from the facts of *Haddock v. City of New York*, 553 N.E.2d 987 (N.Y. App. Div. 1990) as described in Thomas L. Creed, *Negligent Hiring and Criminal Rehabilitation Employing Ex-Convicts, Yet Avoiding Liability*, 20 ST. THOMAS L. REV. 183, 193 (Winter 2008).

juvenile. Despite being formally charged, the District Attorney decided against prosecuting Mr. Jenkins. The city uncovered this information but still hired Mr. Jenkins. After being employed for about a month, Mr. Jenkins raped a 9 year old boy in the bathroom of the park. The child had come to the park to play in a league soccer game that was sanctioned by another unit of the Parks Department. Mr. Jenkins induced the boy to get into the city vehicle and he drove the boy to the other side of the park away from where the soccer games were being held. He then took the boy into a maintenance shed where he raped him. The boy's family attempted to sue the City under the theory of respondeat superior. However, the city claimed that the actions of Mr. Jenkins were not in furtherance of its interests and as such, liability could not extend to the City as the employer of Mr. Jenkins. As a result, the plaintiff's suit was dismissed.

State University hired Peter Bulger to serve as an evening janitor.⁷ Mr. Bulger was assigned to the library at State University. The library at State University was well-known for its stately architectural design. It had very high ceilings with wood columns throughout the six-story building. The lighting was not as bright as in most libraries and so to offset this fact, the university officials placed desk lamps on all of the tables in the library. Six years prior to beginning his employment with State University, Mr. Bulger was released after serving four years in prison. Mr. Bulger had been convicted of sexual assault of his girlfriend at the time. Three months after Mr. Bulger had begun his employment, he was working in the library on a stormy Saturday night during the fall semester. On the night in question, State University was hosting its homecoming football game on campus. As a result, the library was pretty desolate. Mr. Bulger observed a 19 year-old female student who was in her sophomore year. Mr. Bulger raped the young student and her family sued the university. Before hiring Mr. Bulger, the university did not conduct a criminal background check and thus had no official information regarding his conviction. However, the story of his trial was published in the local paper and discussed on the local news broadcast for weeks leading up to and including his sentencing. The Director of Human Resources at the university was actually a witness in the trial of Mr. Bulger concerning the sexual assault of his girlfriend. Based on this information, the victim of Mr. Bulger's attack in the library sued the university. The university claimed that Mr. Bulger had violated its established policies regarding contact with students by janitorial employees and as such he was not engaged in actions that furthered

⁷ The facts of this hypothetical involving Peter Bulger were derived, in part, from the facts of *Blair v. Defender Services, Inc.*, 386 F.3d 623, (4th Cir. 2004) as described in Creed, *supra* note 6, at 183-84.

the interests of the university. The university successfully argued that it was not liable for the actions of its employee, Mr. Bulger.

Big Department Store hired Fred Howard to sell clothes in its Juniors Department.⁸ Mr. Howard had a long history of working in sales at other clothing stores in the city. His most recent past employment was with the Young Clothing Company, which specialized in youth attire. While employed with Young Clothing, Mr. Howard was accused, by a customer, of peeking into the dressing room while a child was trying on clothes sold in the store. Mr. Howard indicated that he was simply trying to ascertain whether the boy needed any assistance. When management received the complaint, Young Clothing Company decided to terminate Mr. Howard because his personnel file contained several similar complaints from customers. Prior to Big Department Store hiring Mr. Howard, a verification of employment was conducted. Pursuant to standard procedures, a Human Resource Specialist of Big Department Store contacted all of Mr. Howard's prior employers to verify employment. In each instance she requested information regarding whether Mr. Howard had engaged in any activities while employed which would suggest that he presented harm to others. When Young Clothing Company was contacted, it informed the Human Resources Specialist about the various incidences involving Mr. Howard but pointed out that it could not verify whether the allegations were true. Big Department Store decided to hire Mr. Howard based on his superior sales record. Two years after hiring Mr. Howard, Big Department Store was contacted by a customer who said that Mr. Howard had recently touched their child in a sexual manner while the child was in the changing room of the store. The family ultimately sued the store. In response to the petition, the store claimed it was not responsible for the conduct of Mr. Howard under the theory of respondent superior. The case was dismissed.

Each of the aforementioned examples provides insight into the difficulties of holding employers liable for the actions of their employees. Despite the heinous nature of the actions of the employees, employers typically can avoid liability. The tort of negligent hiring may, if applied with a more effective standard, give remedies to the victims of crimes that do not exist under the theory of respondeat superior or vicarious liability.

⁸ The facts for this hypothetical involving Fred Howard were not derived from a specific case. Instead the facts were detailed to describe the impact of an employer's receipt of information from a previous employer as it relates to the tort of negligent hiring and whether the employer had sufficient information to indicate it knew or should have known that the employee being hired had a foreseeable risk of harm to others. Any similarity to an actual case was not intended.

The purpose of this article will be to articulate a uniform standard for the application of the tort of negligent hiring that creates a limited investigatory pre-employment requirement on the part of employers, limits their legal exposure, and protects the public. This uniform standard should be adopted by the legislative bodies and/or courts in all states. The implementation of the proposed standard will serve the interests of states in attracting new employers and accomplish this goal without exposing the citizens of those states to greater risks without adequate legal recourse.

I. HISTORY OF THE CONCEPT OF NEGLIGENT HIRING

The claim of negligent hiring has largely been noted to have derived from the common law fellow servant rule.⁹ The fellow servant rule was born out of cases involving the concept of respondeat superior.¹⁰ While these two theories are similar there are important distinctions between the two theories. Under the theory of respondeat superior an employer is liable for the actions of its employees that occurred during the course and scope of the employee's employment.¹¹ As such, an employer must answer for the wrongs of its employees committed against third parties.¹² On the other hand, the fellow servant rule allowed a co-worker (fellow servant)—as opposed to a third party—to recover for the actions of another employee if the co-worker could prove that the employer failed to exercise due care in the hiring process.¹³

One of the earliest cases recognizing the fellow servant rule took place in the early nineteenth century. Specifically, in 1837, a butcher was sued by an employee for the actions of another employee.¹⁴ However, the court ultimately determined that the employer should not be liable for the actions of an employee that caused harm to a fellow employee and cited various policy considerations to justify the finding.¹⁵ Despite the holding, some have pinpointed this case as the birth of the fellow servant rule.¹⁶ Consistent with the conclusion in the aforementioned

⁹ Feeley, *supra* note 1, at 91; Camacho, *supra* note 2, at 790; Morgan Fife, Comment, *Predator in the Primary: Applying the Tort of Negligent Hiring to Volunteers in Religious Organizations*, 2006 BYU L. REV. 569, 577 (2006).

¹⁰ Frederick Wertheim, *Slavery and the Fellow Servant Rule: An Antebellum Dilemma*, 61 N.Y.U. L. REV. 1112, 1121–22 (1986).

¹¹ RESTATEMENT (SECOND) OF AGENCY § 219 (1958); *see also* Pittard v. Four Seasons Motor Inn, Inc., 688 P.2d 333, 338 (N.M. Ct. App. 1984) (citing Gonzales v. Sw. Sec. & Port. Agency, Inc., 665 P.2d 810 (N.M. Ct. App. 1983)).

¹² Camacho, *supra* note 2, at 790 (“Unlike the doctrine of respondeat superior . . .”).

¹³ *Id.* (“This rule held that the master is not liable . . .”).

¹⁴ Priestley v. Fowler, (1837) 150 Eng. Rep. 1030 (Ex.); 3 M. & W. 1. *See also* Wertheim, *supra* note 10, at 1123–24.

¹⁵ *Id.*

¹⁶ Wertheim, *supra* note 10, at 1123.

case, under the fellow servant rule employers often avoided liability for the actions of their employees.¹⁷ Thus, a tort action was created but only in rare cases were employers being found liable under the tort.

The concept of negligent hiring was created in the 1900s to respond to the apparent unfairness of the fellow servant rule.¹⁸ In fact, some have articulated that the concept of negligent hiring should be seen as an exception to the fellow servant rule.¹⁹ In 1908 the Kentucky Supreme Court, in the case of *Ballard's Administratrix v. Louisville & Nashville Railroad Co.*,²⁰ assessed the liability of an employer for the actions of an employee who harmed another employee. In *Ballard*, an employee played a prank on another employee by using a high pressure air hose which resulted in the death of the employee upon whom the prank was played.²¹ The employer's managers were aware of the dangerous nature of the high pressure air hose and they were aware that the playful employee had used it to play pranks on others.²² However, the managers took no action to warn against, restrain, or prevent this conduct.²³ The court held that the employer would be liable for such actions under the theory of respondeat superior but only if those actions occurred within the scope of the employee's employment.²⁴ However, the court implied that an employer could be liable, in certain situations, for the negligent hiring of an employee.²⁵

The concept of negligent hiring created a responsibility on the part of the employer to hire competent and safe employees and expanded the employer's liability to employees as well as customers of the employer's business. In *Priest v. F.W. Woolworth Five & Ten Store*²⁶, the court indicated that an employer could possibly be held liable because it failed to exercise sufficient care in employing a manager who was notoriously guilty of violent playful acts.²⁷ In *Priest*, a manager of the

¹⁷ Fife, *supra* note 9, at 577 (citing Mark Minuti, Note, *Employer Liability Under the Doctrine of Negligent Hiring: Suggested Methods for Avoiding the Hiring of Dangerous Employees*, 13 DEL. J. CORP. L. 501, 502 (1988); see also William L. Prosser, *The Law of Torts* § 80, at 525–37 (4th ed. 1971).

¹⁸ Fife, *supra* note 9 (citing Amanda Richman, Note, *Restoring the Balance: Employer Liability and Employee Privacy*, 86 IOWA L. REV. 1337, 1339 (2001)).

¹⁹ Fife, *supra* note 9, at 577 (citing Minuti, *supra* note 17, at 502).

²⁰ 110 S.W. 296 (Ky. 1908). See also Fife, *supra* note 9, at 577.

²¹ *Ballard*, 110 S.W. at 296.

²² *Id.*

²³ *Id.*

²⁴ Fife, *supra* note 9, at 577–78 (citing Minuti, *supra* note 17, at 503).

²⁵ *Ballard*, 110 S.W. at 297 (“When the master has selected fellow servants competent to discharge the duties assigned to them, he is not responsible for an injury which they may do in a prank outside of their duties, unless they use an instrument that was dangerous, and the master, with knowledge of the deadly character of the thing, has failed to exercise such care as a man of ordinary prudence would exercise in keeping it so that it would not do injury.”).

²⁶ 62 S.W.2d 926 (Mo. Ct. App. 1933).

²⁷ *Id.* at 928; see also Camacho, *supra* note 2, at 791.

employer's store playfully lifted a female customer and bent her over a counter causing her some injury.²⁸ The manager was known to engage in such behavior and the employer had not taken steps to cease the conduct.²⁹ While the court held that the employer could not be held liable under respondeat superior, it suggested that a better claim for the plaintiff would have been to assert that the employer failed to "exercise ordinary care in employing a proper servant."³⁰ The concept of negligent hiring was slowly expanded by other judicial decisions. Nearly twenty years after *Priest*, a Florida court determined that an employer should be held liable for hiring an employee who it knew or should have known had vicious and dangerous characteristics. Specifically, in *Mallory v. O'Neil*,³¹ the court determined that in cases where an employer knew or should have known of the propensities of an employee and that employee harms someone on the employer's premises, the employer should be held liable for the harm incurred by those legally on the employer's property.³² In *Mallory*, the defendant hired a handyman to live in and work at an apartment complex with 30 apartment units.³³ The defendant was aware that the handyman had a violent past but hired him nonetheless.³⁴ The handyman shot a female tenant of one of the apartment units, and she was crippled for life.³⁵ The court held the employer liable for negligently hiring or retaining an employee that it "knew or should have known was dangerous and incompetent and liable to do harm to the tenants."³⁶ Additionally, it has been determined that the concept of negligent hiring was not limited to actions that took place on the employer's property. In *Fleming v. Bronfin*,³⁷ the court held that an employer could be liable for the actions of a delivery person, under the theory of negligent hiring, even though the tortious action took place away from the employer's property.³⁸ In *Fleming*, the employer hired a deliveryman who committed an "indecent attack" upon a female customer who had ordered groceries to be delivered to her home.³⁹ The employer was well-aware of the delivery man's addiction to vanilla extract (which apparently caused him to become intoxicated) but retained him despite this fact.⁴⁰ While

²⁸ *Priest*, 62 S.W.2d at 926.

²⁹ *Id.*

³⁰ *Id.* at 928.

³¹ 69 So. 2d 313 (Fla. 1954).

³² *Id.* at 315; see also Camacho, *supra* note 2, at 791.

³³ *Mallory*, 69 So. 2d at 314.

³⁴ *Id.*

³⁵ *Mallory*, 69 So. 2d at 314.

³⁶ *Id.* at 315.

³⁷ 80 A.2d 915 (D.C. 1951); see also Camacho, *supra* note 2, at 791.

³⁸ *Fleming*, 80 A.2d at 917. See also Camacho, *supra* note 2, at 791.

³⁹ *Fleming*, 80 A.2d at 916.

⁴⁰ *Id.* at 917.

the indecent attack took place in the home of the female customer, the employee was at her home to deliver groceries.⁴¹

Thus, the concept of negligent hiring evolved into a doctrine that required an employer to exercise reasonable care to hire and/or supervise employees who conducted their duties, at or away from the employer's property, in such a manner that would not result in harm to fellow employees and/or third parties who did business with the employer. As stated above, the doctrine of respondeat superior limited an employer's liability to situations where injuries occurred within the scope of the employee's employment. One commentator has distinguished the two concepts in the following manner: "The doctrine of negligent hiring addresses the risks incurred by subjecting members of society to a potentially dangerous employee, 'while the doctrine of respondeat superior is based on the theory that the employee is the agent of or is acting for the employer.'"⁴² As such, the doctrine of negligent hiring generally does not contain the scope of employment limitation that exists within the doctrine of respondeat superior.⁴³

Additionally, there are advantages to negligent hiring claims due to the sorts of remedies that may be available to the victim. For example, "an injured party can recover for an intentional wrong inflicted by a negligently-hired employee, although normally such wrongs are considered to be outside the scope of employment."⁴⁴ Further differing from a claim under respondeat superior, a plaintiff in a negligent hiring claim will not be subjected to defenses such as guest statutes or assumption of the risk.⁴⁵ Finally, there may be a greater likelihood to have certain evidence of past behavior of the offending employee deemed admissible; especially when that evidence speaks to the employee's reputation or prior negligent or intentional acts.⁴⁶

II. STATE'S INDUCEMENT(S) TO ATTRACT EMPLOYERS

It may not be obvious how potential tort liability and/or tort reform may impact the decision-making process of a business with respect to where they will locate or whether they will hire additional employees. While there is debate about the positive impact of tort reform, a failure to reach consensus on the topic does not preclude an exploration of the matter. A historical perspective of the evolution of tort litigation,

⁴¹ *Id.* at 916.

⁴² Camacho, *supra* note 2, at 792 (referencing *Di Cosala v. Kay*, 450 A.2d 508, 515 (N.J. 1982)).

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

the institution of tort reform, and the precise examples of the positive impact of such reform is appropriate.

As a result of the nation's increase in industrialization and progressive jurisprudence, the field of Torts became a recognized independent field of law in the late 1800s.⁴⁷ Over the next eight or nine decades there was an increase in tort litigation.⁴⁸ In the 1970s California and Indiana took what many have viewed as the initial steps into the concept of tort reform.⁴⁹ Some blamed tort litigation for an increase in tort liability, which constrained the innovative genius of businesses while others claim that no such constraint was present.⁵⁰ Nonetheless, there seems to be a more positive consensus building around tort reform, at least in the confines of the legislative halls of the states. William Matsikoudis wrote that "in 1985, when insurance companies declared that there was an insurance crisis, sixty percent of the state legislatures responded a year later with some sort of tort reform legislation."⁵¹

A more specific example of a state using tort reform to attract and maintain businesses is Mississippi. In the 1990s and the first five years of this century, the state of Mississippi developed a "reputation as an unfavorable legal forum for many civil defendants, particularly employers with their principal places of business in other states."⁵² This unfavorable reputation was known beyond the boundaries of the state and apparently adversely affected the state's ability to attract businesses to Mississippi. Not only was the state given the moniker of the "lawsuit capital of the world"⁵³ but it was also voted as the worst legal system in the country for the years 2002, 2003, and 2004.⁵⁴ The latter designation

⁴⁷ G. EDWARD WHITE, *TORT LAW IN AMERICA* 3 (1980); see also William Matsikoudis, *Tort Reform New Jersey Style: An Analysis of the New Laws and How They Became Law*, 20 SETON HALL LEGIS. J. 563, 564 (1996).

⁴⁸ Matsikoudis, *supra* note 47, at 564.

⁴⁹ *Id.*

⁵⁰ See generally Matsikoudis, *supra* note 47, at 564–65.

⁵¹ *Id.* at 565 (citing Glen Blackmon and Richard Zeckhauser, *State Tort Reform Legislation: Assessing Our Control of Risks, in Tort Law and the Public Interest: Innovation, Competition, and Consumer Welfare* 272–73 (Peter H. Schuck, ed., 1991) and Nancy L. Manzer, Note, *1986 Tort Reform Legislation: A Systematic Evaluation of Caps on Damages and Limitations on Joint and Several Liability*, 73 CORNELL L. REV. 628 n.1 (1988)).

⁵² Mark A. Behrens & Cary Silverman, *Now Open for Business: The Transformation of Mississippi's Legal Climate*, 24 MISS. C. L. REV. 393 (2005) (citing Jerry Mitchell, *Hitting the Jackpot in Mississippi Courtrooms: Out-of-State Cases, In-State Headaches*, CLARION-LEDGER (JACKSON, MISS.), June 17, 2001, at A1.).

⁵³ *Id.* (citing Tim Lemke, *Lawyers in Paradise: Mississippi Has a Reputation as a Haven For Trial Lawyers Pursuing Mega-Lawsuits*, INSIGHT ON THE NEWS, Aug. 12, 2002, available at <http://business.highbeam.com/4977/article-1G1-90439295/lawyers-paradise-mississippi-has-reputation-haven-trial>).

⁵⁴ *Id.* (citing Harris Interactive, Inc., U.S. Chamber of Commerce State Liability Systems Ranking

was made by the U.S. Chamber of Commerce.⁵⁵ To add insult to injury, a federal appellate court determined that the state courts in Mississippi became “a mecca” for claims against certain businesses.⁵⁶

As a result of the reputation that had been developed, Mississippi enacted a series of tort reform measures as one means of attempting to improve its image.⁵⁷ Immediately after passage of these measures, the business community responded positively. On the day that Governor Haley Barbour signed a set of tort reform measures into law the Massachusetts Mutual Life Insurance Company announced its return to the state’s market for municipal bonds.⁵⁸ In fact, the company proclaimed that by implementing the reforms that the State of Mississippi had once again signaled that it was open for business.⁵⁹

As the examples listed above indicate, states can attract businesses through the use of tort reform. This article proposes an adjustment to the tort of negligent hiring thereby creating a form of tort reform. Such an action would be welcomed by businesses as well as the public. The proposed reform would be beneficial for any state in light of the common concepts embodied in the various current versions of the tort across the nation.

III. IMPORTANCE OF LAW TO NATION

The legal concept of negligent hiring or some similar law (such as negligent supervision or negligent retention) is well recognized in most jurisdictions within the United States of America.⁶⁰ The concept has been recognized by both federal and state courts. Therefore it is

Study, Jan. 11, 2002, *available at* <http://www.instituteforlegalreform.com/resources/012202.pdf>; Harris Interactive, Inc., Case File: State Liability Systems Ranking Study, Apr. 9, 2003, *available at* <http://www.instituteforlegalreform.com/resources/IRLLiabilityStudy.pdf>; Harris Interactive, Inc., State Liability Systems Ranking Study, Mar. 8, 2004, *available at* <http://www.instituteforlegalreform.com/pdfs/ILR%20Harris%20Poll.pdf>).

⁵⁵ *Id.*

⁵⁶ Behrens et al., *supra* note 52 (citing *Arnold v. State Farm Fire & Cas. Co.*, 277 F.3d 772, 774 (5th Cir. 2001)).

⁵⁷ *Id.* at 412.

⁵⁸ *Id.* at 422.

⁵⁹ Behrens et. al., *supra* note 52, at 422 (referencing Press Release, MassMutual Fin. Group, MassMutual Re-Enters Mississippi Municipal Bond Market Company Cites Passage of Tort Reform Legislation [sic] (June 16, 2004), *available at* <http://www.governorbarbour.com/Tort2004.htm> (last visited May 16, 2005) [hereinafter MassMutual Press Release]; Shelly Sigo, Bond Buyer, Industrial Buyers: MassMutual Ends Mississippi Boycott After Tort Reform Passes (June 23, 2004) (*available at* 2004 WLNR 1267176).

⁶⁰ Katherine A. Peebles, *Negligent Hiring and the Information Age: How State Legislatures Can Save Employers From Inevitable Liability*, 53 WM. & MARY L. REV. 1397, 1404 (2012). See specifically footnote 35: the author mistakenly indicates that every state recognizes the tort of negligent hiring—citing to Lex Larson’s publication, *State-by-State Analysis, Employment Screening (MB)* pt. 1, ch. 11 (2010).

appropriate to take a closer look at the commonality of these provisions.

In 1883, the U.S. Supreme Court considered a case involving negligent hiring.⁶¹ In *Wabash Railway Co. v. McDaniels*,⁶² the Supreme Court assessed the appropriateness of a jury's finding that Wabash Railway Company was negligent in the hiring of an employee who caused injuries to the plaintiff.⁶³ The Court found no error in the jury's monetary award to the plaintiff under the theory of negligent hiring.⁶⁴

A review of applicable legal provisions across the country reveals that most jurisdictions recognize some version of the tort of negligent hiring.⁶⁵ One commentator has written that every state has a negligent hiring tort.⁶⁶ As indicated below this statement is not accurate. With the exception of Maine and Vermont, every state has some version of the concept of negligent hiring. In fact, the District of Columbia has also recognized this concept. While Louisiana and Idaho appear to recognize the tort, liability in those states is assessed under the state's normal negligence paradigm.

The following provisions are applicable in the respective jurisdictions:

Alabama

A review of jurisprudence finds that Alabama courts have recognized liability for an employer for the actions of an employee that are similar to the attributes of negligent hiring. Specifically, in *Lane v. Central Bank of Alabama, N.A.*,⁶⁷ the Supreme Court of Alabama acknowledged that it had previously recognized the tort of negligent supervision even though finding it inapplicable in the case at bar.⁶⁸ As of 1910, Alabama acknowledged an employer's liability for the harms caused by an employee.⁶⁹ Additionally in the case of *Thompson v. Havard*,⁷⁰ the Court held that the master is held responsible for his servant's incompetency when notice or knowledge of the servant's incompetency has been brought to the attention of the master.⁷¹ The Court indicated that the employer's liability is based on the incompetence of the employee who

⁶¹ *Wabash Ry. Co. v. McDaniels*, 107 U.S. 454 (1883).

⁶² *Id.*

⁶³ *Wabash*, 107 U.S. at 454–55.

⁶⁴ *Id.* at 463.

⁶⁵ Peebles, *supra* note 60, at 1404.

⁶⁶ *Id.*

⁶⁷ 425 So.2d 1098 (Ala. 1983).

⁶⁸ *Id.* at 1100.

⁶⁹ *Id.*; see also *Sloss-Sheffield Steel & Iron Co. v. Bibb*, 51 So. 345 (Ala. 1910).

⁷⁰ 235 So. 2d 853 (Ala. 1970).

⁷¹ *Id.*

was hired and/or retained by the employer.⁷²

Alaska

Alaska has recognized the concept of negligent hiring. In *Svacke v. Shelley*,⁷³ the Alaska Supreme Court specifically described the legal requirements for a claim of negligent hiring. The Court held that “an employer is liable to a third person for injuries inflicted upon him by an employee who has been retained in employment after the employer knows, or [should] know, that because of his incompetency or vicious propensities he is likely to assault persons during the course of his employment”.⁷⁴

Arizona

Courts in Arizona have determined that the tort of negligent hiring is available to plaintiffs but only in limited circumstances. The courts have held that in order “[f]or an employer to be held liable for the negligent hiring, retention, or supervision of an employee, a court must find that the employee committed a tort.”⁷⁵ In *McGuire v. Arizona Protection Agency*,⁷⁶ an Arizona court held that a cause of action for negligent hiring could exist under circumstances where an employee of an alarm company burglarized a home after the employee had installed the system when the employee had a history of criminal activity prior to being hired.⁷⁷ The Court indicated that liability could be determined in cases where the employer knew of the criminal proclivity or in situations where the proclivity could be reasonably determined.⁷⁸

Arkansas

The state of Arkansas has recognized the tort of negligent hiring as well as negligent retention and supervision. In *St. Paul Fire & Marine Ins. Co. v. Knight*,⁷⁹ the Arkansas Supreme Court discussed the inapplicability of the tort of negligent hiring to the facts of the case. In that case the plaintiff alleged that the employer conducted

⁷² Lane v. Central Bank of Alabama, N.A., 425 So. 2d 1098, 1100 (Ala. 1983).

⁷³ 359 P.2d 127 (Alaska 1961).

⁷⁴ *Id.* at 130 (noting “[t]his rule is discussed and the authorities in support thereof are set forth in 40 A.L.R. 1212, at pages 1215–19 (1926); C.S. Patrinelis, Annotation, *Liability of Employer, Other Than Carrier, for a Personal Assault Upon Customer, Patron, or Other Invitee*, 34 A.L.R. 2d 372, at pages 390–95 (1954); Murray v. Modoc State Bank, 313 P.2d 304, 309–12 (Kan. 1957)”).

⁷⁵ Kuehn v. Stanley, 91 P.3d 346, 352 (Ariz. Ct. App. 2004) (citing Mulhern v. City of Scottsdale, 799 P.2d 15, 18 (Ariz. Ct. App. 1990)).

⁷⁶ 609 P.2d 1080 (Ariz. Ct. App. 1980).

⁷⁷ *Id.*; see also Pruitt v. Pavelin, 685 P.2d 1347, 1353 (Ariz. Ct. App. 1984).

⁷⁸ *McGuire*, 609 P.2d at 1082.

⁷⁹ St. Paul Fire and Marine Ins. Co. v. Knight, 764 S.W.2d 601, 601 (Ark. 1989).

an inadequate background check and should therefore be liable for the violent actions of the employee.⁸⁰ The Court determined that the employee in question had no criminal record and no history of violent acts or sexual misconduct.⁸¹ As such, the Court concluded that there was no rational basis upon which to conclude that the employer should be held liable under the tort of negligent hiring.⁸² Additionally, in *Saine v. Comcast Cablevision of Arkansas, Inc.*,⁸³ the Arkansas Supreme Court noted that Arkansas had recognized the torts of negligent supervision and negligent retention.⁸⁴ Under both theories of recovery employers are subject to direct liability when third parties are injured due to the tortious acts of an employee.⁸⁵ The “employer’s liability rests upon proof that the employer knew or through the exercise of ordinary care, should have known that the employee’s conduct would subject third parties to an unreasonable risk of harm.”⁸⁶ The Court also noted that a plaintiff must show that the employer’s conduct with respect to the employee who caused the harm was a proximate cause of the injury and that the harm to third parties was foreseeable.⁸⁷

California

Similarly, California recognizes the torts of negligent hiring and negligent retention. According to *Evan F. v. Hughson United Methodist Church*,⁸⁸ California follows the Restatement of Agency with respect to the imposition of liability on an employer for the acts of his employees.⁸⁹ Under California law, when an employer negligently hires or retains an employee who is incompetent or unfit, the employer has exposed himself to liability for the harm caused to a third person by such an employee.⁹⁰ Moreover, liability will only be imposed if the employer knew or should have known that “hiring the employee created a particular risk or hazard and that particular harm materializes.”⁹¹

Colorado

⁸⁰ *Saine v. Comcast Cablevision of Arkansas, Inc.*, 126 S.W.3d 339, 344 (Ark. 2003).

⁸¹ *Knight*, 764 S.W.2d at 605.

⁸² *Id.*

⁸³ 126 S.W.3d 339 (2003).

⁸⁴ *Id.* at 342.

⁸⁵ *Id.*

⁸⁶ *Jackson v. Ivory*, 120 S.W.3d 587 (Ark. 2003) (citing *Madden v. Aldrich*, 58 S.W.3d 342 (Ark. 2001)).

⁸⁷ *Id.*

⁸⁸ 8 Cal. App. 4th 828, 836 (Cal. App. 3d Dist. 1992)

⁸⁹ See *Delfino v. Agilent Technologies, Inc.*, 145 Cal. App. 4th 790, 815 (Cal. App. 6th Dist. 2006); as well as RESTATEMENT (SECOND) OF AGENCY § 213 (1958).

⁹⁰ See *Roman Catholic Bishop v. Superior Court*, 42 Cal. App. 4th 1556, 1564–65 (Cal. App. 4th Dist. 1996).

⁹¹ See *Doe v. Capital Cities*, 50 Cal. App. 4th 1038, 1054 (Cal. App. 2d Dist. 1996).

Colorado imposes a similar standard to the one listed above for California. While Colorado appears to recognize negligent hiring and supervision,⁹² there does not appear to be separate legislation dealing with the concept of negligent retention. In order for a plaintiff to prevail in such claims, they must establish that the employer knew or should have known that its employee posed a risk to the plaintiff and that the harm that occurred was a foreseeable manifestation of that risk.⁹³

Connecticut

A review of Connecticut jurisprudence reveals that the state recognizes the claim of negligent hiring and negligent supervision.⁹⁴ Under the theory of negligent hiring, an employer is liable where a third party is injured by an employer's own negligence in failing to select an employee who is fit or competent to perform their job duties.⁹⁵ Under the theory of negligent supervision a plaintiff simply has to prove that they were injured by an employee who the employer negligently supervised.⁹⁶

Delaware

In *Fanean v. Rite Aid Corp. of Delaware, Inc.*,⁹⁷ the Superior Court of Delaware reiterated its previous finding that the state recognizes the torts of negligent hiring, supervision, and retention.⁹⁸ The court noted that "an employer is liable for negligent hiring or supervision where the employer is negligent . . . in the employment of improper persons involving the risk of harm to others or in the supervision of the employee's activities."⁹⁹ The court indicated that the aforementioned rule was expanded, in *Matthews v. Booth*,¹⁰⁰ to include negligent retention.¹⁰¹ Specifically, the court was analyzing a claim entitled "Negligent Supervision and Retention" when it held that the employer is negligent (resulting from a failure to exercise due care to protect third parties from foreseeable harms) when it employs improper persons, thereby creating an unreasonable risk of harm.¹⁰²

⁹² See *Keller v. Koca*, 111 P.3d 445 (Colo. 2005); see also *Mountain States Mut. Cas. Co. v. Hauser*, 221 P.3d 56, 60 (Colo. App. 2009).

⁹³ *Keller*, 111 P. 3d at 446.

⁹⁴ *Shanks v. Walker*, 116 F. Supp. 2d 311, 314 (Conn. 2000).

⁹⁵ *Shore v. Town of Stonington*, 444 A.2d 1379, 1383 (Conn. 1982).

⁹⁶ *Shanks*, 116 F. Supp. 2d at 314.

⁹⁷ 984 A.2d 812 (Del. Super. Ct. 2009).

⁹⁸ *Id.* at 825–26.

⁹⁹ *Id.* (citing *Simms v. Christina School District*, 2004 WL 344015, at *8 (Del. Super. Ct. Jan. 30, 2004)).

¹⁰⁰ 2008 WL 2154391 (Del. Super. Ct. May 22, 2008).

¹⁰¹ *Fanean v. Rite Aid Corp. of Del.*, 984 A.2d 812, 826 (Del. Super. Ct. 2009).

¹⁰² *Id.* at 826.

District of Columbia

Similar to many of the states listed thus far, the District of Columbia has recognized the tort of negligent hiring as well as negligent supervision. In *Giles v. Shell Oil Corporation*,¹⁰³ the court determined that to prove liability under negligent hiring or supervision it is incumbent upon the plaintiff to show that the employer knew or should have known its employee behaved in a dangerous or otherwise incompetent manner, and that the employer, armed with that actual or constructive knowledge, failed to adequately supervise the employee.¹⁰⁴

Florida

Under Florida law, an employer may be liable for the acts that an employee commits outside the scope of employment under the theories of negligent hiring, negligent retention, or negligent supervision.¹⁰⁵ The principal difference between negligent hiring and negligent retention, as it relates to the employer's liability, is the time at which the employer became aware of the employee's unfitness.¹⁰⁶ With respect to negligent hiring, the employer's knowledge is assessed prior to the decision to hire the employee and involves an assessment of the adequacy of the employer's pre-employment investigation into the employee's background.¹⁰⁷ As it relates to the claim of negligent retention, the employer will be found to be liable if during the employee's employment the employer became aware or should have become aware of problems with an employee that indicated his lack of fitness and the employer failed to take further corrective action, such as investigation, discharge, or reassignment.¹⁰⁸ In all claims, the plaintiff must demonstrate that his or her injury falls within the zone of risk that would be reasonably foreseeable by the employer, and that the employer breached its duty to exercise reasonable care in hiring or keeping the employee.¹⁰⁹

Georgia

The Georgia Supreme Court has recognized the claims of negligent hiring and negligent retention.¹¹⁰ Specifically, in *Munroe v. Universal*

¹⁰³ 487 A.2d 610 (D.C. 1985).

¹⁰⁴ *Giles*, 487 A.2d at 613.

¹⁰⁵ *Garcia v. Duffy*, 492 So. 2d 435, 438 (Fla. Dist. Ct. App. 1986).

¹⁰⁶ *Id.*

¹⁰⁷ *Williams v. Feathersound, Inc.*, 386 So. 2d 1238 (Fla. 2d Dist. Ct. App. 1980); *see also Garcia*, 492 So.2d at 438.

¹⁰⁸ *Garcia*, 492 So. 2d at 438–39 (referencing *McCrink v. City of New York*, 71 N.E.2d 419 (N.Y. 1947); *Fernelius v. Pierce*, 138 P.2d 12 (Cal. 1943)); *see also Riddle v. Aero Mayflower Transit Co.*, 73 So. 2d 71 (Fla. 1954).

¹⁰⁹ *Garcia*, 492 So. 2d at 439.

¹¹⁰ *Munroe v. Universal Health Services, Inc.*, 596 S.E.2d 604 (Ga. 2004).

Health Services, Inc.,¹¹¹ the court noted that an employer is bound to exercise ordinary care in the selection of employees and is bound not to retain them after knowledge of the employee's incompetency.¹¹² The court further asserted that an employer will be held liable "[w]hen an incompetent employee is hired for a particular position, it is reasonably foreseeable that such employee may injure others in the negligent performance of the duties of that position . . . [and] the employer knew or should have discovered the incompetency."¹¹³ However, an employer will not be liable under these theories "absent a causal connection between the employee's particular incompetency for the job and the injury sustained by the plaintiff."¹¹⁴

Hawaii

The Supreme Court of Hawaii, in *Janssen v. American Hawaii Cruises, Inc.*,¹¹⁵ considered an employer's liability under the theory of negligent hiring. The Court indicated that such liability is generally assessed under the Restatement (Second) of Agency.¹¹⁶ The ability to establish a duty under the theory of negligent hiring depends on whether it was reasonably foreseeable that the risk of harm resulting from hiring the employee would result in harm to the plaintiff.¹¹⁷

Idaho

Idaho does not recognize the torts of negligent hiring, negligent retention, or negligent supervision; instead it processes such claims under the general theory of negligence.¹¹⁸ The Supreme Court of Idaho articulated that "Idaho follows the general rule that, absent special circumstances, one does not have a duty to control the conduct of another."¹¹⁹ Instead, "one owes the duty to every person in our society to use reasonable care to avoid injury to the other person in any situation in which it could be reasonably anticipated or foreseen that a failure to use such care might result in such injury."¹²⁰ Thus, it appears that the

¹¹¹ 596 S.E.2d 604 (Ga. 2004).

¹¹² *Id.* at 605 (citing Ga. Code Ann. § 34-7-20).

¹¹³ *Munroe*, 596 S.E.2d at 606 (referencing *Piney Grove Baptist Church v. Goss*, 565 S.E.2d 569 (Ga. Ct. App. 2002); *Georgia Electric Co. v. Smith*, 134 S.E.2d 840 (Ga. Ct. App. 1964).

¹¹⁴ *Munroe*, 596 S.E.2d at 606 (referencing *Kelley v. Baker Protective Services*, 401 S.E.2d 585 (Ga. Ct. App. 1991)).

¹¹⁵ 731 P.2d 163 (Haw. 1987).

¹¹⁶ *Janssen v. Am. Haw. Cruises, Inc.*, 731 P.2d 163, 166 (Haw. 1987) (citing RESTATEMENT (SECOND) OF AGENCY § 213 (1958)).

¹¹⁷ *Id.* at 166.

¹¹⁸ *Hunter v. Dept. of Corrections*, 57 P.3d 755, 761 (Idaho 2002).

¹¹⁹ *Id.* at 761 (citing *Turpen v. Granieri*, 985 P.2d 669, 673 (Idaho 1999)).

¹²⁰ *Id.* at 761 (citing *Alegri v. Payonk*, 619 P.2d 135, 137 (Idaho 1980) (quoting *Kirby v. Sonville*, 594 P.2d 818, 821 (Or. 1979))).

concepts of the negligent hiring claim are still available to a plaintiff in Idaho, albeit not as a standalone tort claim.

Illinois

The state of Illinois recognizes the tort of negligent hiring. It is well-settled law of the state that there is a viable cause of action against an employer when the employer negligently hired “someone [who] the employer knew, or should have known, was unfit for the position sought to be filled.”¹²¹ Such a claim is recognized even though the employee acts outside the scope of employment.¹²²

Indiana

The State of Indiana also recognizes the torts of negligent hiring and retention of an employee.¹²³ However, Indiana has adopted section 317 of the Restatement (Second) of Torts¹²⁴ to determine whether the aforementioned torts have been satisfied.¹²⁵ As such, “to determine whether an employer is liable for negligent hiring or retention of an employee, the court must determine if the employer exercised reasonable care in hiring or retaining the employee.”¹²⁶

Iowa

The Supreme Court of Iowa has recognized the torts of negligent hiring, negligent retention, and negligent supervision. In *Kiesau v. Bantz*,¹²⁷ the court indicated that these torts were based on the state’s adoption of section 213 of the Restatement (Second) of Agency¹²⁸ and that it has recognized these torts since 1999.¹²⁹ Under these theories of recovery, an injured party may recover even when the employee’s conduct falls outside the scope of his or her employment, “because the employer’s own wrongful conduct has facilitated in some manner the tortuous acts or wrongful conduct of the employee.”¹³⁰

¹²¹ *Gregor by Gregor v. Kleisar*, 443 N.E.2d 1162, 1166 (Ill. App. Ct. 1982) (citing *Easley v. Apollo Detective Agency, Inc.*, 387 N.E.2d 1241, 1248 (Ill. App. Ct. 1979)).

¹²² *Id.* (citing *Rosenberg v. Packerland Packing Co., Inc.*, 370 N.E.2d 1235, 1239 (Ill. App. Ct. 1977)).

¹²³ *Sandage v. Bd. of Comm’rs of Vanderburgh Cnty*, 897 N.E.2d 507, 511 (Ind. Ct. App. 2008) (citing *Konkle v. Henson*, 672 N.E.2d 450, 454 (Ind. Ct. App. 1996)).

¹²⁴ RESTATEMENT (SECOND) OF TORTS § 317 (1965).

¹²⁵ *Sandage*, 897 N.E.2d at 511–12.

¹²⁶ *Id.* at 512; *see also Konkle*, 672 N.E.2d at 454–55; RESTATEMENT (SECOND) OF TORTS § 317 (1965).

¹²⁷ 686 N.W.2d 164 (Iowa 2004).

¹²⁸ RESTATEMENT (SECOND) OF AGENCY § 213 (1958).

¹²⁹ *Kiesau v. Bantz*, 686 N.W.2d 164, 171 (Iowa 2004) (citing *Godar v. Edwards*, 588 N.W.2d 701, 709 (Iowa 1999)).

¹³⁰ *Kiesau*, 686 N.W.2d at 172 (citing *Island City Flying Service v. Gen. Elec. Credit Corp.*, 58 So. 2d 274, 278 (Fla. 1991)).

Kansas

The torts of negligent hiring and negligent retention are recognized under Kansas law. Under these tort theories, liability will be imposed when the employer knew or should have known that the employee was unfit or incompetent.¹³¹ The plaintiff must also prove that the employer, by virtue of his knowledge of the employee's qualities and/or propensities, had reason to believe that an undue risk of harm to others existed and the harm which resulted from the employment and/or retention of employment fell within the risk created by the employer's knowledge.¹³²

Kentucky

The state of Kentucky also recognizes the concepts of negligent hiring and negligent retention. Under Kentucky law, "an employer can be held liable when its failure to exercise ordinary care in hiring or retaining an employee creates a foreseeable risk of harm to a third person."¹³³ The employer must exercise ordinary care in hiring or retaining an employee and the failure to exercise such care creates a foreseeable risk of harm to a third person.¹³⁴

Louisiana

Louisiana does not have a particular provision of law in its Civil Code dealing with the torts of negligent hiring or negligent retention. Instead, Louisiana assesses such liability under its general negligence standard.¹³⁵ Notwithstanding the aforementioned, the courts of Louisiana have addressed these specialized torts during litigation. When conducting such an assessment, Louisiana courts have held that for an employer to be liable for a negligent hiring, retention, and/or supervision claim, the plaintiff must prove the employer's liability under a "duty/risk" negligence analysis.¹³⁶

Maine

Maine does not recognize the torts of negligent hiring, negligent retention, or negligent supervision with respect to assessing an

¹³¹ *Thomas v. Cnty Comm'rs of Shawnee Cnty*, 198 P.3d 182 (Kan. Ct. App. 2008) (citing *Plains Resources, Inc. v. Gable*, 682 P.2d 653 (Kan. 1984)).

¹³² *Thomas*, 198 P.3d at 193 (citing *Hollinger v. Stormont Hosp. & Training Sch. for Nurses*, 578 P.2d 1121 (Kan. Ct. App. 1978)).

¹³³ *Oakley v. Flor-Shin, Inc.*, 964 S.W.2d 438, 442 (Ky. Ct. App. 1998).

¹³⁴ *Id.*

¹³⁵ *Bourgeois v. Allstate Ins. Co.*, 02-0105, p. 3 (La. App. 5 Cir. 5/29/02); 820 So. 2d 1132, 1135.

¹³⁶ *Id.* at 1136.

employer's liability for the actions of its employees. Specifically, the courts of Maine have indicated that the state assesses the Restatement (Second) of Agency¹³⁷ or the Restatement (Second) of Torts¹³⁸ to determine whether an employer will be liable for the actions of its employees under any circumstance.¹³⁹ To date, the courts in Maine have specifically declined to recognize these actions as independent torts.¹⁴⁰

Maryland

Maryland recognizes the torts of negligent hiring and negligent retention. In *Ruffin Hotel Corp. of Maryland v. Gasper*,¹⁴¹ the court held that in order to prevail in a negligent hiring or retention claim, the plaintiff must prove that the employer knew or should have known by the exercise of diligence and reasonable care that the employee was capable of inflicting harm and such harm was inflicted upon the plaintiff.¹⁴²

Massachusetts

Massachusetts recognizes the torts of negligent hiring and retention. In order to prevail in such claims a plaintiff must prove that an employer failed to use due care in the selection or retention of an employee whom the employer knew or should have known was unworthy, by habits, temperament, or nature to deal with persons who the employer has solicited.¹⁴³

Michigan

The Michigan Supreme Court has ruled that an employer can be liable under the torts of negligent hiring, negligent retention, or negligent supervision.¹⁴⁴ In *Hersh v. Kentfield Builders, Inc.*,¹⁴⁵ the court concluded that an employer would be liable for the actions of its employees if the employer knew or should have known of the employee's propensities and criminal record before the commission of the intentional tort committed by the employee upon someone who was at the employer's place of business.¹⁴⁶

¹³⁷ RESTATEMENT (SECOND) OF AGENCY § 213 (1958).

¹³⁸ RESTATEMENT (SECOND) OF TORTS § 317 (1965).

¹³⁹ *Mahar v. StoneWood Transports*, 823 A.2d 540, 543–44 (Me. 2003).

¹⁴⁰ *Id.* at 543.

¹⁴¹ 17 A.3d 676 (Md. 2011).

¹⁴² *Ruffin*, 17 A.3d at 695.

¹⁴³ *Foster v. Loft, Inc.*, 526 N.E.2d 1309, 1310–11 (Mass. App. Ct. 1988).

¹⁴⁴ *Hersh v. Kentfield Builders, Inc.*, 189 N.W.2d 286, 288 (Mich. 1971).

¹⁴⁵ 189 N.W.2d 286 (Mich. 1971).

¹⁴⁶ *Hersh*, 189 N.W.2d at 288 (citing *Bradley v. Stevens*, 46 N.W.2d 382 hn.2 (Mich. 1951)).

Minnesota

A review of Minnesota jurisprudence indicates the state recognizes the torts of negligent hiring and negligent retention and that these claims are based on direct liability as opposed to vicarious liability.¹⁴⁷ The theories of recovery impose liability when the employer, through a reasonable investigation, knew or should have known that an employee was violent or aggressive and might engage in harmful conduct.¹⁴⁸

Mississippi

The state of Mississippi also recognizes the torts of negligent hiring and negligent retention. In Mississippi, an employer will be liable for these claims “when an employee injures a third party if the employer knew or should have known of the employee’s incompetence or unfitness.”¹⁴⁹

Missouri

Likewise, Missouri recognizes the torts of negligent hiring and negligent retention. Like Mississippi, the courts of Missouri have provided a straightforward standard for assessing liability under these concepts. “To establish a claim for negligent hiring or retention, a plaintiff must show: (1) the employer knew or should have known of the employee’s dangerous proclivities, and (2) the employer’s negligence was the proximate cause of the plaintiff’s injuries.”¹⁵⁰

Montana

The Montana Supreme Court has recognized the torts of negligent hiring, negligent retention, and negligent supervision.¹⁵¹ Such claims can be brought against an employer for the damages caused by an unfit employee.¹⁵² In such cases, liability for the negligent hiring or retention of an unfit employee will be imposed on the employer for only those injuries proximately caused by the employer’s negligence.¹⁵³

¹⁴⁷ Ponticas v. K.M.S., Inv., 331 N.W.2d 907, 911 (Minn. 1983).

¹⁴⁸ Yunker v. Honeywell, Inc., 496 N.W.2d 419, 422 (Minn. App. Ct. 1993).

¹⁴⁹ Doe v. Pontotoc Cnty. Sch. Dist., 957 So. 2d 410, 416–17 (Miss. Ct. App. 2007) (citing Eagle Motor Lines v. Mitchell, 78 So. 2d 482, 486–87 (Miss. 1955)).

¹⁵⁰ Gibson v. Brewer, 952 S.W.2d 239, 246 (Mo. 1997) (citing Gaines v. Monsanto Co., 655 S.W.2d 568, 571 (Mo. Ct. App. 1983)); see also McHaffie v. Bunch, 891 S.W.2d 822, 825–26 (Mo. 1995); Porter v. Thompson, 206 S.W.2d 509, 512 (Mo. 1947).

¹⁵¹ See generally Peschel v. City of Missoula, 664 F. Supp. 2d 1149, 1168 (D. Mont. 2009).

¹⁵² Maguire v. State, 835 P.2d 755, 760 (1992).

¹⁵³ Peschel, 664 F. Supp. 2d at 1169 (citing Vollmer v. Bramlette, 594 F. Supp. 243, 248 (D. Mont. 1984)).

Nebraska

The Nebraska Supreme Court has assessed the liability of an employer under the theories of negligent hiring and negligent retention.¹⁵⁴ The court set out a standard for assessing the liability of the employer for the harms caused by an improper employee.¹⁵⁵ In order to impose liability on the employer, “a plaintiff must not only show that the employer negligently selected a person incapable of performing the work but also show that the conduct of the incompetent employee was a proximate cause of [the plaintiff’s injury].”¹⁵⁶

Nevada

Nevada has recognized the torts of negligent hiring, negligent supervision, and negligent retention. For the purposes of a negligent hiring claim, an employer has a general duty to conduct a reasonable background check to determine an employee’s fitness for the position for which they are being employed.¹⁵⁷ The employer also has a duty to use reasonable care in the supervision and retention of employees to ensure that its employees are fit for their positions.¹⁵⁸ These duties are breached when the employer knew or should have known that the employee they hired had dangerous propensities.¹⁵⁹

New Hampshire

The torts of negligent hiring and negligent retention are recognized in New Hampshire. Under these torts an employer will be liable if the employer knew or should have known that the offending employee was unfit for the job so as to create a danger of harm to third persons.¹⁶⁰ New Hampshire factors a foreseeability element when assessing these torts. Thus, New Hampshire courts have held that such claims do not lie whenever an unfit employee commits a criminal or tortious act consistent with a known propensity unless the plaintiff establishes a causal connection between the plaintiff’s injury and the fact of employment.¹⁶¹

¹⁵⁴ *Greening by Greening v. Sch. Dist. of Millard*, 393 N.W.2d 51 (Neb. 1986); *see also Strong v. K&K Investments, Inc.*, 343 N.W.2d 912 (Neb. 1984).

¹⁵⁵ *Greening by Greening*, 393 N.W.2d at 58.

¹⁵⁶ *Id.*

¹⁵⁷ *Rockwell v. Sun Harbor Budget Suites*, 925 P.2d 1175, 1181 (Nev. 1996) (citing *Burnett v. CBA Security Service*, 820 P.2d 750, 752 (Nev. 1991)).

¹⁵⁸ *Id.* at 1181.

¹⁵⁹ *Hall v. SSF, Inc.*, 930 P.2d 94, 99 (Nev. 1996).

¹⁶⁰ *Cutter v. Town of Farmington*, 498 A.2d 316, 320 (N.H. 1985); *LaBonte v. National Gypsum Co.*, 313 A.2d 403, 405 (N.H. 1973).

¹⁶¹ *Marquay v. Eno*, 662 A.2d 272, 280 (N.H. 1995).

New Jersey

In *Di Cosola v. Kay*,¹⁶² the Supreme Court of New Jersey recognized the torts of negligent hiring and negligent retention. The court held that an employer could be held liable for hiring or retaining an incompetent, unfit, or dangerous employee that injured a third person.¹⁶³ The court further held that the “employee’s conduct which may form the basis of the cause of action need not be within the scope of employment.”¹⁶⁴

New Mexico

In New Mexico “liability for negligent hiring flows from a direct duty running from the employer to those members of the public whom the employer might reasonably anticipate would be placed in a position of risk of injury as a result of the hiring.”¹⁶⁵ The Supreme Court of New Mexico has indicated that the basic inquiry in such cases is whether the employer knew or should have known of circumstances in the background of the employee that created an unreasonable risk of harm to the person with whom it could be reasonably expected that the employee would interact.¹⁶⁶

New York

The state of New York also recognizes the torts of negligent hiring and supervision. A claim based on negligent hiring and supervision requires a showing that the employer knew of the employee’s propensity to commit the tortious actions or that employer should have known of such propensity had it conducted an adequate hiring procedure.¹⁶⁷ It is important to note that New York also has an antidiscrimination law that prohibits an employer from refusing to hire employees solely because the employee has a criminal record.¹⁶⁸

North Carolina

The torts of negligent hiring and negligent retention have been recognized by the courts of North Carolina. The Supreme Court of North Carolina has held that “[a]n employee injured by the negligence of an incompetent or unqualified fellow employee may recover against the employer . . . on the theory that the employer negligently hired, or

¹⁶² 450 A.2d 508 (N.J. 1982).

¹⁶³ *Di Cosola v. Kay*, 450 A.2d 508, 516 (N.J. 1982).

¹⁶⁴ *Id.*

¹⁶⁵ *Spencer v. Health Force, Inc.*, 107 P.3d 504, 508 (N.M. 2005).

¹⁶⁶ *Grassie v. Roswell Hosp. Corp.*, 258 P.3d 1075, 1093 (N.M. Ct. App. 2010).

¹⁶⁷ *Travis v. United Health Services Hosp., Inc.*, 804 N.Y.S.2d 840, 841 (N.Y. App. Div. 2005).

¹⁶⁸ *See* N.Y. CLS Correc. § 752.

after hiring, negligently retained the incompetent fellow employee.”¹⁶⁹ Additionally, “[a] third party not contractually related to and injured by an incompetent or unqualified independent contractor may proceed against one who employed the independent contractor on the theory that the selection was negligently made.”¹⁷⁰

North Dakota

The Supreme Court of North Dakota has held that the torts of negligent hiring and supervision are valid causes of action. In a claim asserting negligent supervision, the plaintiff must prove that the employer failed to exercise ordinary care in supervising the employment relationship to prevent the foreseeable misconduct of an employee that caused harm to the plaintiff.¹⁷¹ The court has also held that in order to render an employer liable for negligent hiring of an independent contractor, “it is necessary to establish that, at the time of hiring, the employer had either actual or constructive knowledge that the independent contractor was incompetent.”¹⁷²

Ohio

The State of Ohio recognizes the torts of negligent hiring, supervision, and retention. In order to prevail on a claim of negligent hiring, supervision, and/or retention of an employee, the plaintiff must show: 1) the existence of an employment relationship; 2) the employee’s incompetence; 3) the employer’s actual or constructive knowledge of such incompetence; 4) the employee’s act or omission that caused the plaintiff’s injuries; and 5) the employer’s negligence in hiring or retaining the employee as the proximate cause of the plaintiff’s injuries.¹⁷³ The employer’s negligence is assessed based on whether he knew or should have known that the employee had a propensity for violence and that the employment might create a situation where the violence would harm a third person.¹⁷⁴

Oklahoma

The Supreme Court of Oklahoma has recognized the torts of

¹⁶⁹ Woodson v. Rowland, 407 S.E.2d 222, 239 (N.C. 1991) (citing Pleasants v. Barnes, 19 S.E.2d 627 (1942); Walters v. Durham Lumber Co., 80 S.E. 49 (1913); Hogan v. Forsyth Country Club Co., 340 S.E.2d 116 (1986)).

¹⁷⁰ *Id.* at 239 (citing Page v. Sloan, 190 S.E.2d 189 (N.C. 1972)).

¹⁷¹ Nelson v. Gillette, 571 N.W.2d 332, 340 (N.D. 1997).

¹⁷² Schlenk v. Nw. Bell Tel., Co., 329 N.W.2d 605, 614 (N.D. 1983).

¹⁷³ Steppe v. K-Mart Stores, 737 N.E.2d 58, 66 (Ohio Ct. App. 1999).

¹⁷⁴ Staten v. Ohio Exterminating Co., 704 N.E.2d 621, 624 (Ohio Ct. App. 1997).

negligent hiring, retention, and supervision.¹⁷⁵ Under these theories, “the focus of the inquiry is whether the employer had reason to believe that the employee would create an undue risk of harm to others.”¹⁷⁶ Additionally, employers are held liable for their prior knowledge of the employee’s propensity to commit the harm for which damages are sought.¹⁷⁷

Oregon

The Supreme Court of Oregon has recognized the torts of negligent hiring and retention.¹⁷⁸ Employers whose employees may come into contact with the public as a result of their employment are responsible for exercising a duty of reasonable care in selecting and/or retaining those employees.¹⁷⁹ A failure to exercise reasonable care will expose the employer to liability for the injuries one incurred as a result of the failure to exercise such care. The liability will be based on the employer placing an employee with known dangerous propensities, or dangerous propensities which could have been discovered by a reasonable investigation, in a position where it is foreseeable that the employee, while in the course of his or her work, could injure the plaintiff.¹⁸⁰

Pennsylvania

The Supreme Court of Pennsylvania has recognized the torts of negligent hiring and negligent retention.¹⁸¹ The court indicated that an employer will be held negligent for the failure to exercise reasonable care in determining an employee’s propensity for violence in an employment situation where the violence would harm a third person.¹⁸² The court concluded that the employer’s duty extended to employees who the employer knew or should have known were dangerous, careless, or incompetent when such employee’s conduct harmed third persons.¹⁸³

Rhode Island

¹⁷⁵ See generally *N.H. v. Presbyterian Church*, 998 P.2d 592 (Okla. 1999).

¹⁷⁶ *Schovanec v. Archdiocese of Oklahoma City*, 188 P.3d 158, 170 (Okla. 2008) (citing *Presbyterian Church*, 998 P.2d at 600).

¹⁷⁷ *Presbyterian Church*, 998 P.2d at 600.

¹⁷⁸ *Hansen v. Cohen*, 276 P.2d 391 (Or. 1954); see also *Chesterman v. Barmon*, 727 P.2d 130, 131 (Or. Ct. App. 1986).

¹⁷⁹ *Hansen*, 276 P.2d at 393.

¹⁸⁰ *Chesterman*, 727 P.2d at 132.

¹⁸¹ *Dempsey v. Walso Bureau, Inc.*, 246 A.2d 418 (Pa. 1968).

¹⁸² *Id.* at 423.

¹⁸³ *Brezenski v. World Truck Transfer Inc.*, 755 A.2d 36, 39–40 (Pa. 2000) (referring to *Dempsey*, 246 A.2d 418).

Under Rhode Island law, “an employer’s liability for negligent hiring [and negligent supervision] is based on a failure to exercise reasonable care, by selecting a person who the employer knew or should have known was unfit or incompetent for the work assigned, and thereby, exposing third parties to an unreasonable risk of harm.”¹⁸⁴ The extent of the employer’s duty to supervise such employees is governed by the nature of the job to which the employee was assigned.¹⁸⁵ As such, an employer has a duty to protect those who may be reasonably expected to come into contact with his employee and such a duty lasts for the duration of the employee’s tenure with the employer.¹⁸⁶

South Carolina

A review of South Carolina jurisprudence reveals that the state recognizes the torts of negligent hiring and negligent retention. An employer will be held negligent in the hiring of an employee when the employer knew or should have known that the employee’s selection created an undue risk of harm to the public.¹⁸⁷ Such claims are assessed on primarily two elements: 1) the knowledge of the employer and 2) the foreseeability of harm to third persons.¹⁸⁸

South Dakota

The Supreme Court of South Dakota has recognized the torts of negligent hiring, negligent retention, and negligent supervision.¹⁸⁹ Specifically, the Court held that an employer has a duty to exercise reasonable care when hiring, training, and retaining an employee to protect third parties.¹⁹⁰ The employer’s duty is impacted by whether the employee is hired in a position that will result in a particular level of contact with the public. Thus, when an employee’s contact with the public is minimal there is no duty to perform a background check.¹⁹¹ However, where the employee’s “job requirements bring [him or her] into frequent contact with the public, or individuals who have special relationships with the employer, the inquiry required expands beyond the job application and personal interview to an investigation of the applicant/employee’s background.”¹⁹²

¹⁸⁴ *Welsh Mfg. Div. of Textron, Inc. v. Pinkerton’s Inc.*, 474 A.2d 436, 440 (R.I. 1984).

¹⁸⁵ *Fraioli v. Lemcke*, 328 F. Supp. 2d 250, 264 (D.R.I. 2004) (citing *Welsh*, 474 A.2d at 441).

¹⁸⁶ *Liu v. Striuli*, 36 F. Supp. 2d 452, 467 (D.R.I. 1999) (referencing *Welsh*, 474 A.2d at 441).

¹⁸⁷ *Kase v. Ebert*, 707 S.E.2d 456, 459 (S.C. Ct. App. 2011).

¹⁸⁸ *Doe v. ATC, Inc.*, 624 S.E.2d 447, 450 (S.C. Ct. App. 2005).

¹⁸⁹ *Rehm v. Lenz*, 547 N.W.2d 560, 566 (S.D. 1996).

¹⁹⁰ *Kirlin v. Halverson*, 758 N.W.2d 436, 452 (S.D. 2008).

¹⁹¹ *Id.* at 452.

¹⁹² *Id.* at 452–53.

Tennessee

In Tennessee, an employer must exercise the degree of care commensurate with the position for which the employee is to be hired and the employer must exercise due care to discover whether the employee is incompetent prior to the selection.¹⁹³ A review of Tennessee jurisprudence reveals that “state courts recognize the negligence of an employer in the selection and retention of employees and independent contractors.”¹⁹⁴ “A plaintiff . . . may recover [under these torts] if he establishes, in addition to the elements of a negligence claim, that the employer had knowledge of the employee’s unfitness for the job.”¹⁹⁵

Texas

In Texas, courts have recognized the torts of negligent hiring and supervision as not being dependent upon a finding that the employee was acting in the course and scope of his employment when the tort took place.¹⁹⁶ An action for negligent hiring provides a remedy to injured third parties who would be prevented from recovering under the traditional master-servant concepts.¹⁹⁷ The theory of negligent hiring and supervision imposes a general duty on an employer to adequately hire, train, and supervise employees.¹⁹⁸

Utah

The Supreme Court of Utah has recognized the torts of negligent hiring, negligent supervising, and negligent retention.¹⁹⁹ As late as 1992, Utah still viewed these claims as novel in the state and couched them as a claim for negligent employment.²⁰⁰ The Court held that in order to prevail under such a claim, the plaintiff must show that: 1) the employer knew or should have known that its employees posed a foreseeable risk of harm to third parties, to include fellow employees; 2) the employee inflicted harm on a third party; and 3) the employer’s negligence in hiring, supervising, or retaining the employees proximately caused the injury.²⁰¹

¹⁹³ *Wishbone v. Yellow Cab Co.*, 97 S.W.2d 452, 453 (Tenn. Ct. App. 1936).

¹⁹⁴ *Marshalls of Nashville, Tenn., Inc. v. Harding Mall Associates, Ltd.*, 799 S.W.2d 239, 243 (Tenn. Ct. App. 1990).

¹⁹⁵ *Doe v. Catholic Bishop for Diocese of Memphis*, 306 S.W.3d 712, 717 (Tenn. Ct. App. 2008) (citing *Phipps v. Walker*, 1996 WL 155258, at 3 – cases not reported in a reporter).

¹⁹⁶ *Dieter v. Baker Service Tools, Inc.*, 739 S.W.2d 405, 408 (Tex. App. 1987); see generally *Salinas v. Fort Worth Cab & Baggage Co.*, 725 S.W.2d 701 (Tex. 1987).

¹⁹⁷ *Id.*

¹⁹⁸ *Houser v. Smith*, 968 S.W.2d 542, 544 (Tex. App. 1998).

¹⁹⁹ *Retherford v. AT&T Communications of Mountain States, Inc.*, 844 P.2d 949 (Utah 1992).

²⁰⁰ *Id.* at 972–73 & n.15.

²⁰¹ *Id.* at 973.

Vermont

A review of jurisprudence in Vermont does not reveal that the state recognizes the tort of negligent hiring. In *Haverly v. Kaytec, Inc.*,²⁰² the Supreme Court of Vermont appears to recognize the tort of negligent supervision; however, the plaintiff asserted the claim based not on a physical altercation but due to his termination.²⁰³ The plaintiff was not successful in his claim.²⁰⁴ In light of the absence of any legal provision evidencing the existence of the tort, it must be concluded that it does not exist.

Virginia

The Supreme Court of Virginia has recognized the tort of negligent hiring.²⁰⁵ In fact the Court indicated that it has long recognized the tort of negligent hiring.²⁰⁶ Under negligent hiring, “the employer is principally liable for negligently placing an unfit person in an employment situation involving unreasonable risk of harm to others.”²⁰⁷

Washington

The State of Washington has recognized the torts of negligent hiring, supervision, and retention.²⁰⁸ The courts have held that in order to establish these claims, as the proximate cause of an injury to the plaintiff, the plaintiff must have been injured by some negligent or other wrongful act of the employee.²⁰⁹ Thus, an employer will be liable to the plaintiff for hiring or retaining an incompetent or unfit employee when the employer knew or by failing to exercise reasonable care should have known that the employee was incompetent or unfit.²¹⁰

West Virginia

West Virginia has recognized the tort of negligent hiring.²¹¹ A review of jurisprudence indicates that the Restatement (Second) of Torts²¹² was the genesis of the law.²¹³ In West Virginia an employer

²⁰² 738 A.2d 86 (Vt. 1999).

²⁰³ *Haverly*, 738 A.2d at 86.

²⁰⁴ *Id.* at 86.

²⁰⁵ *J. v. Victory Tabernacle Baptist Church*, 372 S.E.2d 391 (Va. 1988).

²⁰⁶ *Victory Tabernacle Baptist Church*, 372 S.E.2d at 392.

²⁰⁷ *Id.* at 394.

²⁰⁸ *Haubry v. Snow*, 31 P.3d 1186 (Wash. Ct. App. 2001).

²⁰⁹ *Id.* at 1193.

²¹⁰ *Id.*

²¹¹ *State ex rel. West Virginia State Police v. Taylor*, 499 S.E.2d 283, 289 (W. Va. 1997).

²¹² RESTATEMENT (SECOND) OF TORTS § 411 (1965).

²¹³ *King v. Lens Creek Ltd.*, 483 S.E.2d 265, 269 (W. Va. 1996).

will be liable for the physical harm to a third person caused by the employer's failure to exercise reasonable care to employ a competent and careful employee.²¹⁴

Wisconsin

The Supreme Court of Wisconsin has recognized the torts of negligent hiring, training, and supervision.²¹⁵ The Court found that these claims did not contravene the state's public policy considerations.²¹⁶ These claims appear to follow a traditional negligence analysis. In order to prevail, the plaintiff must show that: 1) the employer has a duty of care; 2) the employer breached that duty of care; 3) the act or omission of the employee was the cause-in-fact of the plaintiff's injury; and 4) the act or omission of the employer was a cause-in-fact of the wrongful act of the employee.²¹⁷

Wyoming

In *Cranston v. Weston County Wee and Pest Board*,²¹⁸ the Supreme Court of Wyoming recognized the tort of negligent hiring.²¹⁹ The Court held that the tort derived from the Restatement (Second) of Agency.²²⁰ Additionally, the claim for negligent hiring must contain some misconduct by the employee that caused damages to the plaintiff.²²¹

In short, the common themes embodied in the laws discussed above suggests that all employers in the country—with the exception of those located in Maine and Vermont—can be held liable for hiring and retaining an incompetent and unfit employee who causes harm to a fellow employee or a third person when the incompetent or unfit employee causes harm based on conduct that falls outside the scope of employment.²²² Therefore, the majority of employers can be exposed to liability for the actions of an employee even when that action does not further the employer's interest. Some may argue that an employer should only be liable for the risk of harm that they knew their employee possessed prior to that risk causing harm to another. However under the overwhelming majority of negligent hiring torts detailed above,

²¹⁴ *Id.*

²¹⁵ *Miller v. Wal-Mart Stores, Inc.*, 580 N.W.2d 233, 241 (Wis. 1998).

²¹⁶ *Id.* at 241.

²¹⁷ *Id.*

²¹⁸ 826 P.2d 251 (Wyo. 1992).

²¹⁹ *Cranston*, 826 P.2d at 258.

²²⁰ RESTATEMENT (SECOND) OF AGENCY § 213 (1958).

²²¹ *Beavis ex rel Beavis v. Campbell County Memorial Hosp.*, 20 P.3d 508, 515 (Wyo. 2001) (citing *McHaffie* by and through *McHaffie v. Bunch*, 891 S.W.2d 822, 826 (Mo. 1995).

²²² *Peebles*, *supra* note 60, at 1405.

an employer's liability can extend to what the employer should have known about the offending employee. This standard requires employers to conduct some form of pre-employment screening.²²³ Employers who fail to conduct a pre-employment screening will be held "liable if a reasonable search would have uncovered relevant information."²²⁴

IV. PROPOSED NEGLIGENT HIRING STANDARD

As revealed above, the tort of negligent hiring has not been consistently developed across the nation. In some states, the law is derived from the Restatement (Second) of Agency²²⁵ while others are derived from the Restatement (Second) of Torts²²⁶ and still others are a by-product of the evolution of case law. It would appear that there are varying levels of foreseeability required for some employers to be liable under the tort. More importantly most provisions fail to provide any guidance on what an employer could do to avoid liability. In light of the aforementioned, a more uniform law is required.

Based on the various provisions for negligent hiring, this author is proposing a new standard that includes what is believed to be the finer qualities of the laws detailed in the previous section of this article. The proposed law not only defines the concept of negligent hiring in a broad manner, but it also provides clear guidelines on the application of its various terms. The proposed law also ensures that if states and/or municipalities will induce businesses to their communities using this tort reform provision, then those businesses should be good stewards with respect to the hiring of persons who will provide services to members of the public. The additional costs imposed by this provision are minimal and are not outweighed by the benefits derived by all of the stakeholders—i.e., the state passing the provision, the business taking advantage of the provision, the communities in which the business will be located, as well as any victim who is able to use the provision to seek a remedy for the tortuous harm they have suffered.

The proposed provision is as follows:

Proposed Negligent Hiring Standard

- A. An employer will be liable for the tort of negligent hiring when the employer has hired, retained, and/or supervised

²²³ *Id.* at 1407–08.

²²⁴ *Id.* at 1409 & n.58.

²²⁵ RESTATEMENT (SECOND) OF AGENCY § 213 (1958).

²²⁶ RESTATEMENT (SECOND) OF TORTS § 411 (1965).

an employee who causes harm to a third person when the employer knew or in the exercise of reasonable care should have known that the employee possessed a trait, characteristic or evidenced a propensity to engage in behavior that indicated the employee was unsuitable to perform the duties for which the employee was employed. Under this provision, a third person would include individuals and juridical persons.

- B. An employee is unsuitable to perform the duties of the job when 1) the employee will have access to members of the public or personal information of members of the public by virtue of their job duties and 2) there is information or events from the employee's recent past that reveal a tendency on the part of the employee to harm others. There must be some reasonable proximity between the hiring of the employee and the occurrence of the events bearing on the employee's unsuitable status, which in most instances will be within ten years of the employee being hired. Events occurring during employment will be deemed to bear the proximity required in this provision. To be clear, this provision imposes a duty of reasonable care on an employer with respect to the hiring and retention of employees who by virtue of their job duties will have access to members of the public or to personal information of members of the public.
- C. An employer shall be strictly liable for the damages occasioned by one of its employees, against a third person that takes place in or beyond the course and scope of the employee's employment as long as the employee's contact with the third person was a result of the employee's

employment with the employer. The employer bears no liability under this provision when the employee's contact with the third party has no connection with the employee's employment.

- D. An employer will be absolutely immune from liability under this provision if the employer took each of the actions listed below and was not aware at the time of hiring nor subsequent thereto, nor should the employer have been aware that the employee possessed a trait, characteristic or evidenced a propensity to engage in behavior that indicated the employee was unsuitable to perform the duties for which the employee was hired without harming another. The employer:
1. required the applicant to complete an application for employment that, at a minimum, requested that the applicant a) identify all of the applicant's previous employers along with contact information for each employer and b) identify any crime for which the applicant has been convicted;
 2. conducted a detailed criminal background check on the applicant; a background check made via the criminal database of the Federal Bureau of Investigation will be considered a sufficient criminal background check under this provision of law;
 3. contacted each of the applicant's previously identified employers, where possible, to conduct an employment verification check that not only obtains the details of the previous employment but also

information regarding whether the applicant had engaged in behavior that would meet the definition of unsuitable for employment listed in this provision, to specifically include violent actions towards co-workers, customers of the employer, and/or any other person to whom the applicant came into contact by virtue of his or her employment with the previous employer; and,

4. conducted a detailed job interview of the applicant where, at a minimum, questions regarding the applicant's employment history and criminal background were asked in order to assess whether a disqualifying circumstance may be present and to give the applicant an opportunity to respond to the information that has been collected and explain why that information does not make the employee unsuitable for employment.
- E. Nothing in this provision should be read as to adversely affect the application of the applicable Workers' Compensation laws with respect to an employee who causes damages to a fellow employee while engaged in actions that are within the course and scope of his or her employment.
- F. Notwithstanding the aforementioned provisions, no employer shall deny employment of an applicant solely upon the basis that the applicant or employee has been arrested, charged, and/or convicted of a criminal offense unless there is a direct correlation between the position for which the applicant applied (or employee held) and the offense for

which the applicant for employment (or employee) was arrested, charged, and/or convicted that would render the applicant or employee unsuitable for the particular employment. For example, if the applicant is seeking a position with a job duty that requires the employee to handle money and the applicant had been arrested, charged, and/or convicted of an action involving some impropriety with money within the last five years. In a situation such as the aforementioned, it would not be a violation of this provision for an employer to deny employment to such an applicant. However, if the crime happened fifteen years prior to the hiring, then it is less likely that the employee is unsuitable for employment based on the conviction alone.

- G. An employer who in good faith provides information to a prospective employer about a current or former employee, if the prospective employer is attempting to obtain information in an effort to comply with the requirements contained in this law, shall have qualified immunity under the torts of defamation, invasion of privacy or a similar tort for providing the information unless the employer engaged in gross negligence in making the disclosure.

While the proposed standard shares the general concept of the various negligent hiring provisions across the country, it does much more than those provisions. First, the proposed standard defines the tort of negligent hiring but limits its application to employers who employ persons who will have access to the public or the private information of members of the public. It would be unreasonable to hold an employer liable for any and all actions of its employees. As the Supreme Court of Idaho has held, "absent special circumstances, one does not have a duty to control the conduct of another,"²²⁷ however, "one owes the duty

²²⁷ Hunter v. Dept. of Corrections, 57 P.3d 755, 761 (Idaho 2002) (citing Turpen v. Granieri, 985 P.2d 669, 673 (1999)).

to every person in our society to use reasonable care to avoid injury to the other person in any situation in which it could be reasonably anticipated or foreseen that a failure to use such care might result in such injury."²²⁸ Thus, it is more appropriate to limit the employer's liability to situations whereby the employer has—through his business practice—caused members of the public to interact with the employee in some shape, form, or fashion.

The proposed standard differs from all existing iterations of the concept of negligent hiring in that it provides a specific set of steps that an employer must take in order to have exercised reasonable care in the hiring of an employee.²²⁹ Moreover the proposed standard "rewards" a compliant employer by providing immunity from liability in a claim of negligent hiring.²³⁰ Conversely, if an employer fails to comply with the specified steps and hires an employee who causes harm to a member of the public, then such an employer will be strictly liable to the victim of the tortious conduct.²³¹

Additionally, the proposed standard does not conflict with the application of workers compensation laws.²³² It is estimated that nationally about 96% of workers are covered by worker compensation laws.²³³ Generally speaking an employee who is injured in a work place accident that arises out of employment and occurs during the course and scope of employment will be limited to the benefits provided in the workers' compensation laws of the state and will be precluded from suing the employer or a co-worker in a civil action based in torts.²³⁴ Since the proposed standard focuses on the harm caused to third parties as opposed to co-workers, the standard does not conflict with workers' compensation laws.

Similar to provisions of law in New York—which will be discussed in greater detail below—the proposed standard prohibits an employer from refusing to hire an applicant simply because the applicant has been convicted of a crime.²³⁵ Moreover, the proposed standard attempts to avoid the unfortunate never-ending stigma of a criminal conviction that could potentially forestall an applicant from ever being hired. This

²²⁸ *Id.* (citing *Alegri v. Payonk*, 619 P.2d 135, 137 (1980) (quoting *Kirby v. Sonville*, 594 P.2d 818, 821 (Or. 1979))).

²²⁹ See Section D of the Proposed Negligent Hiring Standard.

²³⁰ *Id.*

²³¹ See Section C of the Proposed Negligent Hiring Standard.

²³² See Section E of the Proposed Negligent Hiring Standard.

²³³ STEVEN L. WILLBORN ET. AL., *EMPLOYMENT LAW: CASES AND MATERIALS* 863 (Lexis-Nexis 4th ed. 2007).

²³⁴ *Id.*

²³⁵ See Section F of the Proposed Negligent Hiring Standard.

is accomplished by suggesting that a conviction that took place more than ten years prior to an employee applying for a job is insufficient, standing alone, to warrant a conclusion that an applicant is unsuitable for employment.²³⁶ Additionally the conviction must bear some direct correlation to the job duties for which the applicant was being hired before a reasonable conclusion can be reached that the conviction was sufficient to deem the applicant unsuitable.²³⁷ Finally, the proposed standard attempts to assist prospective employers in obtaining helpful information from previous employers of an applicant by insulating the previous employer from liability for disclosing truthful information about a former or current employee during a verification of employment process.²³⁸

V. BENEFITS OF PROPOSED STANDARD

The proposed standard is good for the public welfare as evidenced by the fact that so many states and the District of Columbia have enacted laws governing the negligent hiring, retention, and supervision of employees.²³⁹ “Many jobs in today’s economy require an employee to associate with the general public on a regular basis.”²⁴⁰ While some employees interact closely with the employer or supervisor as they carry out their job duties, some other employees interact with the general public without any level of employer-based supervision.²⁴¹ In both situations the public is at risk when an employer hires an incompetent, unfit, and/or unsuitable employee who has a tendency to do harm to the public. The employer or someone acting at the direction of the employer—the personnel manager or other person—bears control over the applicant screening process and is thus responsible for screening out unfit applicants.²⁴² Generally, negligent hiring torts are rooted in “an employer’s liability and responsibility for employing a dangerous person because of a failure to conduct a thorough and complete investigation of that person’s background, experience, criminal history, violent tendencies, and risks to others.”²⁴³ Thus, the proposed standard requires employers who hire employees that will interact with the public to act as good stewards and only hire employees who do not

²³⁶ See Section B of the Proposed Negligent Hiring Standard.

²³⁷ See Section F of the Proposed Negligent Hiring Standard.

²³⁸ See Section G of the Proposed Negligent Hiring Standard.

²³⁹ See generally ABA Conference State-By-State Analysis by Nesheba M. Kittling of Fisher & Phillips, LLC on November 6, 2010.

²⁴⁰ Michael F. Wais, *Negligent Hiring – Holding Employers Liable When Their Employee’s Intentional Torts Occur Outside of the Scope of Employment*, 37 WAYNE L. REV. 237, 238 (Fall 1990).

²⁴¹ *Id.*

²⁴² Frank C. Morris, *Employment Discrimination and Civil Rights Actions in Federal and State Courts*, C429 ALI-ABA 221, 225 (July 24, 1989).

²⁴³ Feeley, *supra* note 1, at 89 (citing Creed, *supra* note 6, at 186.).

have a foreseeable possibility of harming the public.

Employers are often the beneficiary of lavish gifts from the public in the form of tax incentives to make it more cost effective to conduct business and tort reform to limit the liability of engaging in business. As such, employers owe the public not only the services that they provide but that those services be provided with an eye toward protecting the public who ostensibly granted the employer the bounty of gifts that allow the employer to turn a profit. As the Supreme Court of New Mexico held, "liability for negligent hiring flows from a direct duty running from the employer to those members of the public whom the employer might reasonably anticipate would be placed in a position of risk of injury as a result of the hiring."²⁴⁴ Moreover, as the Georgia Supreme Court held in *Munroe v. Universal Health Services, Inc.*,²⁴⁵ an employer is bound to exercise ordinary care in the selection of employees and is bound not to retain them after knowledge of the employee's incompetency.²⁴⁶

The proposed standard rewards the employer who acts as a good steward with immunity from liability. The ability to avoid the costly costs of litigation allows the employer to achieve a larger profit margin and expand the services that it provides. The economic certainty created by the proposed standard is a situation that employers crave. As stated earlier, due to a negative reputation that had formed as a result of the high volume of claims being filed against employers, Mississippi enacted a series of tort reform measures to improve its image.²⁴⁷ The business community immediately began to respond positively and signaled a return to the state's marketplace.²⁴⁸ In fact, one company specifically proclaimed that by implementing the reforms the State of Mississippi had once again signaled that it was open for business.²⁴⁹ The proposed standard will provide a similar response from the business community of the state that enacts the standard.

²⁴⁴ *Spencer v. Health Force, Inc.*, 107 P.3d 504, 508 (N.M. 2005).

²⁴⁵ 596 S.E.2d 604 (Ga. 2004).

²⁴⁶ *Id.* at 605 (citing GA. CODE ANN., § 34-7-20).

²⁴⁷ *Behrens et. al.*, *supra* note 52, at 412.

²⁴⁸ *Id.* at 422.

²⁴⁹ *Id.* (referencing Press Release, MassMutual Fin. Group, MassMutual Re-Enters Mississippi Municipal Bond Market Company Cites Passage of Tort Reform Legislation [sic] (June 16, 2004), available at <http://www.governorbarbour.com/Tort2004.htm> (last visited May 16, 2005) [hereinafter MassMutual Press Release]); Shelly Sigo, Massmutual Ends Mississippi Boycott After Tort Reform Passes, THE BOND BUYER, June 23, 2004, at 6, available at 2004 WLNR 1267176.

VI. RESPONSES TO THE POTENTIAL DRAWBACKS OF THE PROPOSED STANDARD

While there are many accolades to be asserted surrounding the proposed standard, it would be disingenuous to assert that there are no drawbacks to the standard or the concepts outlined therein. Efforts to improve a circumstance generally require input from all stakeholders. Such is the case with respect to a successful implementation of the proposed negligent hiring standard. In order for the implementation to be successful, all stakeholders will have to bear some level of responsibility.

As indicated by the proliferation of the negligent hiring tort across the country, there appears to be a consistent public policy to use the tort action to compensate victims harmed by employees.²⁵⁰ As is the case with most tort actions, victims seek out the party with big pockets in an effort to obtain relief.²⁵¹ Employers traditionally limit the harm from this reality by passing the cost of providing such relief to a victim on to their customers.²⁵² The public—which is made up, in part, by the employer’s customers—has a desire that its elected leaders are wise enough to develop legislative compromises to limit the impact of the employer passing on costs to them. Moreover, there is no evidence that there would be additional costs based on conducting criminal background checks under the proposed standard. In 2010, more than 14 million requests for criminal background checks were processed by the Federal Bureau of Investigation’s Instant Criminal Background Check System.²⁵³ In that same year, a study was conducted by the Society for Human Resource Management which revealed that 92 percent of employers ran criminal background checks on all or some applicants.²⁵⁴ Pre-employment criminal background checks have been increasing over time.²⁵⁵ A 2004 study conducted by the Society for Human Resource Management found that in 1996 only 51 percent of employers were conducting criminal background checks; however, that number rose to more than 80 percent in 2003 (86 percent for large employers).²⁵⁶ Therefore the cost, if any, for conducting criminal

²⁵⁰ Creed, *supra* note 6, at 193.

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ Jeremiah Rygus, *Collateral Damage: Saddling Youth with a Lifetime of Consequences*, 26 WTR CRIM. JUST. 37, 38 (Winter 2012).

²⁵⁴ *Id.* (citing *Background Checking: Conducting Criminal Background Checks*, SOCIETY FOR HUMAN RESOURCE MANAGEMENT (Jan. 22, 2010), <http://tinyurl.com/2ftrb4r>).

²⁵⁵ Roberto Concepcion, Jr., *Need Not Apply: The Racial Disparate Impact of Pre-Employment Criminal Background Checks*, 19 GEO. J. ON POVERTY L. & POL’Y 231, 236 (Spring 2012).

²⁵⁶ *Id.* at 236–37; *see also id.* at 237 n.38 (referring to SOCIETY FOR HUMAN RESOURCE MANAGEMENT, *WORKPLACE VIOLENCE STUDY 19* (2004)).

background checks under the proposed standard would be minimal, in light of the extremely high volume of employers currently conducting such checks. The proposed standard would allow legislative bodies across the country to reach compromise without causing harm to the public. Instead, the legislative bodies can focus on enacting a rule that forces employers to hire competent employees so that injuries to their constituency are less likely to occur.

There is however another adverse public consideration that arises when considering the proposed standard—the issue of the rate of recidivism for persons convicted of crimes. It is in the best interest of society to create an environment where criminality is limited and when a member of the public commits a crime then “society is encouraged to reintegrate [those persons] to further rehabilitation and reduce recidivism.”²⁵⁷ One of the best ways to aid in the rehabilitation process of a person convicted of a crime is to provide that person with employment.²⁵⁸ In fact, one commentator has stated that “society’s best interests can be served by employing ex-offenders so they are less likely to commit crimes in the future.”²⁵⁹

While the cause of reducing recidivism is noble and more than worthwhile, employers would argue that they should not bear that responsibility mostly on their own. Society as a whole—not the employer alone—should share the responsibility of reducing recidivism.²⁶⁰ “The burden of recidivism . . . should not be inflicted imprudently on the employer who aids the assimilation process, but rather requires a more delicate balance of society’s interests and responsibilities.”²⁶¹

At least two states have decided to simply prohibit employers from denying employment to persons convicted of crimes based solely on the fact that those persons have a criminal record. In his article, *Negligent Hiring and Criminal Rehabilitation: Employing Ex-Convicts, Yet Avoiding Liability*, Timothy Creed points out that both New York and Wisconsin have passed anti-discrimination laws prohibiting employers from denying employment to an individual solely because that person has

²⁵⁷ Creed, *supra* note 6, at 184 (citing as an example, *County of Milwaukee v. Labor and Indus. Review Comm’n*, 407 N.W.2d 908, 914–15 (Wis. 1987)).

²⁵⁸ Jennifer Leavitt, *Walking a Tightrope: Balancing Competing Public Interests in the Employment of Criminal Offenders*, 34 CONN. L. REV. 1281, 1286 (Summer 2002).

²⁵⁹ *Id.* (referencing *Soto-Lopez v. N.Y. City Civil Service Comm’n*, 713 F. Supp. 677, 679 (S.D.N.Y. 1989) and *Haddock v. City of New York*, 553 N.E.2d 987, 992 (N.Y. 1990)).

²⁶⁰ Creed, *supra* note 6, at 194 (citing Cindy M. Haerle, *Minnesota Developments: Employer Liability for the Criminal Acts of Employees Under Negligent Hiring Theory: Ponticas v. K.M.S. Investments*, 68 MINN. L. REV. 1303, 1318 (1984)).

²⁶¹ Haerle, *supra* note 260, at 1326.

previously been convicted of a crime.²⁶² At first glance, such provisions should cause trepidation in employers that are located in states with negligent hiring torts. This is because the employer may be required to hire someone who might create the sort of risk to the public for which the negligent hiring tort was designed to prevent.

Under Section 752 of New York's Correction Law, it is unlawful for an employer to deny employment or take an adverse action against a current employee solely because the applicant or employee has previously been convicted of one or more criminal offenses or because the employer determined that the applicant or employee lacked good moral character due to being previously convicted of one or more criminal offenses.²⁶³ However, an employer can take such action if there is a direct relationship between the criminal offense(s) committed by the applicant/employee and the specific position for which the person would be or is employed.²⁶⁴ Likewise, if by hiring the applicant or retaining the employee, the employer would create an unreasonable risk to property or to the safety or welfare of specific individuals or to the general public, then the employer can refuse to hire the applicant or retain the employee.²⁶⁵ Finally, New York requires an employer to consider several factors when considering whether to hire a person previously convicted of a criminal offense, to include, how much time has passed since the offense was committed, the age of the applicant/employee at the time the offense was committed, and the duties that the applicant/employee would be performing.²⁶⁶

Under Wisconsin's Fair Employment Act (WFEA), the state has prohibited discrimination in employment based solely on the fact that the applicant or employee has been convicted of a criminal offense.²⁶⁷ This Act treats persons with a conviction record as a protected class similar to the immutable characteristics of a person, such as race, creed, and color.²⁶⁸ The WFEA—similar to the New York law referenced above—provides an exception to the prohibition of discrimination for conviction records. An employer can refuse to hire a person with a criminal conviction for an offense that substantially relates to the "circumstances of the particular job."²⁶⁹

²⁶² Creed, *supra* note 6, at 196.

²⁶³ See N.Y. CORRECT. § 752 (2013).

²⁶⁴ See *id.*

²⁶⁵ *Id.*

²⁶⁶ CORRECT. § 753.

²⁶⁷ WIS. STAT. § 111.321 (2013).

²⁶⁸ *Id.*

²⁶⁹ WIS. STAT. § 111.335 (2013). The law also provides an exception if the applicant/employee is an individual who "is not bondable under a standard fidelity bond or an equivalent bond where such bondability is required by state or federal law, administrative regulation or established business

While New York and Wisconsin have taken this extraordinary step in prohibiting an employer from discriminating against an applicant as a result of a criminal conviction, both states also provide the employer discretion in the hiring process. As such, employers in New York and Wisconsin can avoid liability under their respective negligent hiring torts by refusing to hire persons who might pose a risk of harm to others. Thus, both states have implemented provisions that reduce recidivism, provide guidance to employers with respect to hiring decisions, and protect the public by having negligent hiring provisions.

While the actions of New York and Wisconsin are notable, there are interesting steps being taken at the federal level. At the time of the drafting of this article, there was no federal provision that extended protection from discrimination in employment to persons who have been previously convicted of a crime. However, there has been some discussion of granting protection for such persons under Title VII of the Civil Rights Act of 1964.²⁷⁰

In theory under Title VII an applicant for employment could successfully sue the employer with whom employment was sought but only if the applicant could prove liability under a disparate impact analysis.²⁷¹ “Disparate impact claims ‘involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity.’”²⁷² If an employer routinely conducted criminal background checks in order to assist the employer in making hiring decisions, it would stand to reason that the employer may exclude more Blacks and Hispanics from employment than it would exclude Whites from employment.²⁷³ Such a conclusion is based on statistics which find that Blacks while constituting approximately 12.3% of the nation’s population “account for 39% of prison and jail inmates” and Hispanics while constituting approximately 15.1% of the nation’s population account for “almost 20% of the prison and jail population.”²⁷⁴ In his article, *Need Not Apply: The Racial Disparate Impact of Pre-Employment Criminal Background Checks*, Roberto Concepcion, Jr. provides a great deal of statistical data to support the proposition that disparate impact claims based on pre-employment criminal background checks are

practice of the employer.” *Id.*

²⁷⁰ See generally Creed, *supra* note 6, at 202 and Concepcion, Jr., *supra* note 255, at 236–41.

²⁷¹ Creed, *supra* note 6, at 202.

²⁷² Concepcion, Jr., *supra* note 255, at 235 (citing *Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977)).

²⁷³ *Id.* at 236–41.

²⁷⁴ *Id.* at 237–38.

possible under Title VII of the Civil Rights Act.²⁷⁵ However, he did not provide a recent case where the court found in favor of a plaintiff making such an assertion in a state with a negligent hiring provision that requires some sort of background check, to include criminal background checks.

An additional ripple appears to be manifesting itself at the federal level involving the Equal Employment Opportunity Commission (EEOC). Currently EEOC is completing its E-RACE Initiative²⁷⁶ and has acknowledged that facially neutral employment policies on the basis of arrest and conviction records may disadvantage applicants and employees based on race.²⁷⁷ It is the prediction of this author that the general statistics, standing alone, are insufficient in every case to result in successful litigation. Thus, while the general argument has flare, there is greater difficulty encountered when attempting to apply the argument to a given case.

Moreover the proposed negligent hiring standard enunciated herein does not appear to be in conflict with the goals and early findings of the E-RACE Initiative. Instead, the proposed standard provides a very limited ability for the employer to use an applicant's prior conviction to deny employment which should not bear the same disparate impacts suggested by EEOC. Consistent with the New York and Wisconsin provisions listed above, the proposed standard only allows an employer to deny employment solely on the basis of a prior criminal conviction when the conviction bears a direct correlation to the job duties to be performed. As such, the proposed standard would most likely meet the business necessity exception, as discussed in the Supreme Court's decision of *Griggs v. Duke Power, Co.*,²⁷⁸ for disparate impact claims.²⁷⁹ The criminal background check in the proposed standard relates directly to whether the applicant is fit to perform the job duties in a manner less likely to expose third parties to a foreseeable risk of harm.

²⁷⁵ Concepcion, Jr., *supra* note 255.

²⁷⁶ The E-RACE Initiative is an initiative of the Equal Employment Opportunity Commission (EEOC) with a detailed set of goals and objectives to be achieved between fiscal year 2008 and fiscal year 2013. "The initiative is designed to improve EEOC's efforts to ensure workplaces are free of race and color discrimination. Specifically, EEOC will identify issues, criteria and barriers that contribute to race and color discrimination, explore strategies to improve the administrative processing and the litigation of race and color discrimination claims, and enhance public awareness of race and color discrimination in employment." See *The E-RACE Initiative*, EEOC, <http://www.eeoc.gov/eeoc/initiatives/e-race/>.

²⁷⁷ Concepcion, Jr., *supra* note 255, at 239.

²⁷⁸ 401 U.S. 424 (1971).

²⁷⁹ *Griggs*, 401 U.S. at 431.

Two final critiques may exist of the proposed standard. First, the standard appears to have provisions that would be better suited legislatively to be in separate laws as opposed to being grouped into one large bill. Specifically, the section of the proposed standard dealing with the prohibition on discriminating against an applicant solely based on the appearance of a criminal conviction in the applicant's past²⁸⁰ as well as the section granting employer's qualified immunity for disclosures to prospective employers during employment reference checks²⁸¹ are two sections that could, some would argue should, be written as separate legal provisions. Such an argument is one of construction of the law as opposed to one of concept. Legislative bodies in states considering the enactment of the proposed standard are better equipped to resolve the unique problems that may arise on enacting the proposed standard. In order to have the maximum impact as proposed in this article, all of the provisions of the proposed standard should be enacted irrespective of whether such enactment is accomplished by one law or several laws. Second, with respect to the qualified immunity provision, the law would lose effectiveness if the previous employer was located in another state that had not adopted the proposed standard and the prospective employer was located in a state with the proposed standard. In such a situation the prospective employer potentially would not receive a complete and full set of information about the employee because the previous employer would not have immunity for disclosing information that might prevent the employee from being hired. This sort of legal exposure may cause the previous employer to withhold valuable information from the prospective employer. Such an outcome would not expose the prospective employer to any additional liability because the prospective employer would not have received information that would indicate the employee possessed a propensity to harm another. While it would be ideal to have the proposed standard adopted by every state in the nation, the absence of unanimous acceptance by state legislative bodies across the nation does not make the proposed standard any less effective.

CONCLUSION

All governments, including state governments, have the primary obligation to protect the people who fall within their governing authority. These governments typically work diligently to provide opportunities for their people to ascend the economic and social ladders of the community. As such, state governments have used tort reform in the past to attract businesses to their state. The proposed negligent

²⁸⁰ See Section F of the Proposed Negligent Hiring Standard.

²⁸¹ See Section G of the Proposed Negligent Hiring Standard.

hiring standard detailed and explained in this article will amplify a state's effort to use tort reform as one of the tools to lure new business to a state.

The proposed standard, while being used to induce new business to the state, will also provide protection to the state's citizens which adopt the provision. This will be accomplished because the proposed standard requires employers to be good stewards of the public faith and good will that has been entrusted to the employer by requiring the employer to only hire competent suitable employees to work with the public. If an employer abides by the proposed standard, it will not be held liable for the unforeseen conduct of one of its employees. However, if the employer fails to honor the public trust, then it will be strictly liable for the harm caused to the victim of the tortious conduct of its employee.

While the employer of a park employee, janitor, or sales clerk may avoid liability under the concept of respondeat superior for the actions of the employee despite the employer's actual or constructive knowledge of the harmful proclivities of the employee, this is not the case under the proposed standard for negligent hiring. In the examples provided in the introduction to this article, the victims of those atrocities would be compensated by the employer under the strict liability provision of the proposed standard. Such an outcome would force employers to hire only competent and suitable employees to work with the public—the same public that allowed its elected officials to induce the employer to conduct business in the state. As such, the proposed standard allows all stakeholders to win.