

ALERTS

Employment Law News

WHEN DOES AN EMPLOYER OBTAIN A BACKGROUND CHECK ON AN APPLICANT?

Employment & Labor Practice Team

Historically, employers in most circumstances have had no duty to investigate a prospective employee's prior work history or background, unless the employer knew of circumstances indicating the applicant was unsuitable. Exceptions were made for jobs that could pose unusual danger if the wrong person were hired e. g., armed security guards. A recent decision by the federal Court of Appeals for North and South Carolina demonstrates the continuing evolution in the employer's duty to make an appropriate investigation into an applicant's background before extending an offer of employment.

In *Blair v. Defender Services, Inc.*, however, the U.S. Court of Appeals for the Fourth Circuit recently affirmed that such a duty existed with respect to an employee of a janitorial service who had assaulted a female student while working at a Virginia college. A background check could have turned up a criminal complaint filed in a neighboring county by another woman whom the employee had attacked.

The employee had denied any criminal convictions on his job application and the employer had no actual notice of a criminal record. The janitorial service argued that it had no duty to investigate the employee's background. The Fourth Circuit rejected that argument, reasoning that the "circumstances of the employment" were such that "it should have been foreseeable that hiring the wrong person posed a threat of injury to others."

The *Blair* decision was not applying North or South Carolina law and is not binding on state courts. Nevertheless, this decision by the Fourth Circuit, widely viewed as the most conservative and employer-friendly in the country, indicates that the range of positions for which a background check is appropriate will only continue to grow. Obvious candidates are any jobs in which the employee's duties involve unsupervised contact with customers or other members of the public, or special access to their home. Examples are numerous: a janitor or repairman in a college dormitory or apartment complex, a cleaning service employee who works in office buildings after hours where office workers may be working alone, service people who make home inspection or repair calls, driving instructors, and home health care workers among others. With the proliferation of firms offering low cost background checks and the growing number of employers who include a background check as part of their normal applicant screening process, courts are more likely to find such a check part of an employer's ordinary duty of care for a variety of jobs that involve public contact.