Negligent Hiring

Managing a company's human resources, already a challenging task, has become more difficult with the proliferation of alternative staffing options. One alternative alone—temporary staffing—has evolved and grown into a nearly $40 billion industry, largely in response to corporate demand. Sophisticated employers seek tailored solutions to staffing problems, rather than simply increasing payroll when increased productivity is needed. Although most companies rely on some alternative staffing arrangements, those arrangements often develop haphazardly or on a departmental basis, rather than as part of a comprehensive staffing strategy managed and administered by HR professionals. In some companies, employees from non-HR disciplines such as purchasing, budgeting or accounting have begun to take the lead in making those arrangements. But HR does not have to—and should not—accept a reduced role in this critical arena. Only HR professionals have the unique perspective and qualifications to evaluate a company's overall staffing needs, develop a comprehensive staffing strategy and, with senior management's approval, administer that strategy. Too often, purchasing agents or cost accountants who take on this task focus on the unit cost of employees, while giving short shrift to critical human factors such as morale, training and development, and building team spirit. But as HR professionals know, those factors translate into productivity, which in turn leads directly to profits. The need for alternative staff should not set up a turf battle between purchasing and HR. Just as HR managers typically defer to purchasing when a new telephone system is needed, purchasing should be subordinate to HR when staffing decisions are made and policies adopted. Purchasing and cost accountants simply do not share the experience and training HR professionals have in making sure organizations have the right human resources in the right place, at the right time, to do the job most productively and cost effectively. To develop a comprehensive staffing strategy, HR professionals must thoroughly understand alternative staffing, particularly the distinctions among the various alternatives. What is alternative staffing? In conventional employment, the organization directly hires, supervises, pays wages/salaries, and provides benefits to individuals. Both employer and employee typically contemplate a relationship of indefinite duration. All other staffing arrangements are considered alternative. But the alternative category includes many different types of staffing arrangements. According to the most recent Bureau of Labor Statistics data, about one of ten U.S. employees is employed in an alternative working arrangement. In a typical corporation, conventional employees may make up about 60 percent of the workforce, with the remaining 40 percent divided among various types of alternative staffing. The 12 most common types of staffing arrangements are as follows: In developing a comprehensive staffing strategy, H.R.’s first task is to understand the advantages and disadvantages of each type of arrangement from three key perspectives: operational, financial and legal. Armed with that knowledge, they can then match the appropriate staffing solution to their employer's specific business needs and objectives. Then, one or more agreements with appropriate staffing vendors can be negotiated and executed. Which alternative staffing solution will work best depends on many factors, including the functions to be performed, time and financial constraints, and concerns

about legal risks and liability. There is no one-size-fits-all solution. On the contrary, most organizations benefit from using several arrangements simultaneously. Operational considerations In any situation, the optimal staffing solution produces the correct number of qualified workers for the job in the most cost-effective manner. HR professionals must never shortchange operational requirements—getting the job done should be the paramount consideration in any staffing strategy. Even the most elegantly designed staffing strategy will fail if line managers do not continuously see results. When developing a staffing strategy, one must pay careful attention to the transition period, whether from regular to alternative staffing, or from one type of alternative staffing arrangement to another. The transition must be carefully planned and implemented in phases, with advance notice to all affected managers and employees. Many well-designed staffing strategies have been short-circuited because of confusion and problems during this phase. Different alternative staffing options require different emphasis in planning. For example, clear communication and written explanations to managers and employees are often enough for the transition to an arrangement with a Professional Employer Organization (PEO), because employees' daily work assignments and supervision should hardly be affected. In contrast, outsourcing a function may lead to layoffs or transfers of regular employees to another company entirely, so the planning process must be considerably more detailed. Time differentials must be factored into arrangements, also. Converting to a technical contract service in lieu of independent contractors can be implemented quickly. But converting from multiple vendors to a master vendor program may take a full year. Maintaining successful operations during that period will be vital. There is significant controversy in the staffing industry about the legality and propriety of payroll transfers of temporary employees from one staffing firm to another. One such controversy in New Jersey culminated in a 1996 jury verdict of $250,000 against the master vendor, which had been sued for so-called temp-napping— taking several dozen temporary employees from the staffing firm that had originally assigned them to the client company. (2) When entering into a master vendor arrangement, HR Professionals must be sure to take into account the concerns and legal rights of outgoing staffing vendors. Once the transition period is behind you, focus on maintaining the staffing solution to meet operational needs. Be flexible, let costs concerns and operational requirements drive the staffing strategy, not vice-versa. Financial considerations HR professionals who carefully assess the costs associated with each staffing option can counter inaccurate but widespread perceptions that they are not attentive to bottom-line concerns, and that HR programs are all expense items the revenue producers must work hard to pay for. Carefully managing a sophisticated alternative-staffing strategy gives HR an opportunity to prove otherwise. Each staffing option is priced differently and all have both indirect costs and direct costs. For example, using traditional temporary employees is attractive because of their relatively low hourly cost, but may increase training costs, produce more absenteeism, interrupt workflow and impair productivity. Those indirect costs must be added to the wage rate to gauge the true cost of using many short-term temporaries, rather than outsourcing the function, implementing a temp-to-lease program, or engaging independent contractors for specific projects as needed. In assessing an alternative staffing strategy's cost, the benchmark should be the difference between the cost of getting the same volume of work done at the same quality and in the same time frame by regular employees and the cost of using alternative staff. When budget analysts

complain that the company is over budget on temps, they rarely compare what it would have cost to have the same volume of work done by conventional employees. HR professionals who want to manage alternative staffing arrangements must become tough, but fair, negotiators. Alternative staffing arrangements require HR professionals to manage business relationships with independent staffing firms, many of which are larger than their clients and more sophisticated about staffing. Negotiating with a staffing firm is not strictly a price-and-terms deal that you take or walk away from. Because the staffing firm will be an integral part of your corporate culture for a long time, and will play a significant role in helping meet your business objectives, it should be viewed as a partner, not an adversary. By better understanding the business and operations of staffing firms, HR can more effectively fine-tune the negotiating strategy to obtain the lowest feasible cost. Negotiating the best price does not mean gouging the staffing firm. If you force it to agree to a price much lower than what other clients are paying, the firm will likely place its highest qualified, most productive employees or consultants with other clients. But do not be reluctant to insist on volume discounts, rebates based on usage, and free value-added services. Many staffing firms offer comprehensive training and cross-training programs, and they are often willing to allow a client's regular employees to take advantage of their training facilities. The National Association of Temporary and Staffing Services estimates that staffing services spend more than $250 million annually for job-related skills training. Competitive bidding is often a useful cost-control technique, but evaluating the true cost of a professional employer organization strategy is far more complicated than evaluating the best price for something like office furniture. When engaging the services of people, remember that reliability and productivity vary widely. Consider building on an existing good relationship with a staffing vendor, rather than simply awarding a contract to a new firm that promises the lowest hourly rate per person. You usually get what you pay for. . Similarly, micromanaging a staffing firm's business methods to keep your direct costs as low as possible may produce unintended negative consequences. For example, some companies try to dictate the staffing firm's markup by stipulating the bill rate (what the client firm pays) and the pay rate (what the temporary worker is paid), but this approach eliminates the incentive for the staffing firm to be as creative as possible in finding the right person for the job at the lowest cost. By negotiating only the bill rate, you give the staffing firm a tremendous incentive to work hard for maximum profit per person placed. Unlike purchasing departments or accountants, HR professionals must be able to do more than just negotiate the best price for an alternative staffing solution. They must be able to compare quantitatively the costs of completely different staffing arrangements, taking into account direct and indirect costs and operational concerns, while factoring in supervision and control issues as well as potential legal liability under each option. For example, once HR decides to use a PEO, such as an employee-leasing firm, the cost negotiations are fairly circumscribed. But deciding whether to go the PEO route, which PEO to use, and how that decision affects overall benefits administration and staffing clearly falls in HR's advantage. Legal considerations Before entering into any alternative staffing arrangement, HR professionals must understand, and advise management of, the legal implications and potential liabilities that arise with each type of alternative staffing arrangement. There are legal implications in both the relationship with the staffing firm and the relationship with temporary employees working at the company's site. Potential liability varies enormously

depending on the nature of the staffing arrangement. A developing legal doctrine, sometimes referred to as co-employment, summarizes the legal relationship, rights and obligations in some alternative staffing arrangements. In traditional temporary help models, the staffing firm and its client are likely to be viewed as co-employers, or joint employers, under most employment laws. But the further the relationship departs from that model, the more difficult it becomes to determine whether or not a co-employment relationship exists. For example, in a true outsourcing relationship, courts may view only the staffing firm as the employer obligated to comply with the employment laws. But in some cases, the client company alone may be liable for a legally invalid staffing relationship. In 1998, a court found Microsoft Corp. had misclassified workers as independent contractors; (3) the company had to pay back taxes and penalties, and the workers were retroactively eligible to participate in certain benefits plans available to conventional employees. Potential liability for co-employment varies significantly, depending on two principal factors: the context in which the specific claim of liability is asserted and the specific nature of the alternative staffing arrangement. HR professionals can best serve their organizations by demanding a role in the management of alternative staffing that is comparable to the part they play in managing staffing policies and practices for conventional employees. HR practitioners can demonstrate leadership in staffing—an increasingly important component of their profession—by developing a comprehensive strategy. Hiring of negative employees Homicide is the second leading cause of death to workers in the United States. It accounted for 1,071 or 16 percent of worker fatalities in 1998. Moreover, in 1997, nearly 21,3000 workers were reported injured in non-fatal assaults in the preceding 12 months.(4) These statistics do not include threats of physical violence. They do not include fights or assaults that involve no significant injury or which, for one reason or another, go unreported either by victim or their employer. They also include few, if any, of the thousands of claims filed each year for sexual or other discriminatory harassment. Those claims can include allegations of rape physical assault, and a wide range of threatening or aggressive behavior. Finally, customers, clients, and other outsiders also are victims of workplace violence. News headlines focus on sensational acts by “disgruntled” workers and terrorists. These possibilities must be considered by today’s employer. However, there are other causes of workplace violence. About half of the fatalities occur at convenience stores, groceries, and other small retail establishments, with robbery being the usual motive. Nearly two-thirds of non-fatal assaults take place at nursing homes, hospitals, or residential care facilities or involve other social services. Although men account for 82 percent of the fatalities, women comprise 56 percent of the victims of non-fatal assaults.(5) Duties to provide a safe workplace Federal and State job safety laws require employers to make reasonable efforts to provide a safe workplace. This duty may include steps to reduce the risk of violence. The federal Occupational Safety and Health Administration (OSHA) is beginning to issue guidelines for health care operations, night retail establishments, and employers in general. These guidelines are designed to help employers fight violence, but they also raise the prospect of OSHA citations if the problem is ignored. Employers also may be liable for negligence if they fail to exercise ordinary care to avoid potential violence. Violence by employees can create liability for negligent hiring, retention, supervision, or training if their conduct was reasonably foreseeable. Employers and business property owners also face potential liability for failing to address an increased

risk of violence from the outside, such as threat of nighttime assaults or robberies in a high-crime area. But what is negligent hiring and retention? The legal doctrine of "Respondeat Superior" (let the master rule) (6) mean that you can be held liable for the wrongful acts of your employees who were acting within the scope of their employment. In other words, if an employee is acting on behalf of you when the wrongful act is committed, you are liable to the third party injured by the wrongful conduct. Negligent hiring is much broader in scope and therefore exposes you to a much greater degree of liability for the acts of your employees. The theory of negligent hiring holds Professional Employer Organizations and even employers/clients responsible to third parties that are injured by employees when they fail to carefully select competent and safe employees. Negligent hiring is broader than Respondeat Superior because the employee does not have to be acting on the behalf of the employer when the wrongful act is committed for the company to be liable. For example, ABC Company could be held responsible to a third party who was injured by an intentional act of an employee, such as an employee who intentionally punches another. While punching is not normally an act within the scope of employment, ABC Company could be liable for negligent hiring if they were not careful when hiring the employee. There are four elements that must be proven for a PEO/company/employer to be liable for negligent hiring. First, there must be an employment relationship between the client and the employee that existed at the time of the injury to the third party or parties. West Virginia is one of the states that extends liability not only for the negligent hiring of an employee, but also for the negligent hiring of independent contractors. (7) The second element that must be proven is that the wrongful act of the employee was reasonably foreseeable given the nature of his or her job. Third, you must have known or should have known that the employee was incompetent or dangerous. Lastly, the injury to the third party or parties must have been caused by the hiring of the employee. This is proven by showing that the employee came into contact with the third party through the employee's job at hand. An organization's liability for negligent hiring frequently turns on whether they knew or should have known that the employee in question was incompetent or full of danger. Businesses are not responsible for the employee's wrongful acts if you did not know that the employee was incompetent or dangerous or if a reasonable investigation by the business, would not have revealed that information. The reasonableness of an investigation depends on two things: (1) The nature of the job duties the prospective employee will be performing (2) The potential risk of harm to third parties that could result from the conduct of an unfit employee. So what is negligent retention? There is only one true difference between negligent hiring and negligent retention: TIMING. Negligent retention occurs after an employee has been hired, and you become aware, that the employee may be dangerous. If you learn of an employee's unfitness after you have hired the employee and fail to take any corrective action or actions, you then become liable for negligent retention. Aside from the timing element, legal liability is the same under both negligent hiring and negligent retention. Negligent Hiring Court Cases The Texas Supreme Court has sided with a woman who sued The Kirby Vacuum Cleaner Company because she said she was raped by a door-to-door salesman from the company. The divided court ruled that the Kirby Company should have required its distributor to do a background check before hiring salesman Mickey Carter, which would have revealed previous complaints of sexual misconduct. "I hope this decision will cause Kirby to change it's ways to make

sure that criminals are not sent into people's homes to sell Kirby vacuum cleaners," the rape victim said in a statement. "I also hope that it will prevent another woman from having to go through what my family and I have been through." Justice Raul Gonzalez said Kirby's way of doing business—selling its products in customer's homes—poses a potential danger. "Kirby dealers, required to do in-home demonstrations, gain access to homes by virtue of the Kirby name. A person of ordinary intelligence should anticipate that an unsuitable dealer would pose a risk of harm," he wrote. The victim told authorities that Mickey Carter raped her in her Seguin, Texas home as her children slept in the next room. (8) Duty of the employer Most courts hold that the duty of the employer is to exercise reasonable care in hiring individuals who, due to the employment, may pose a threat of harm to others. The nature of the employment directly relates to the duty imposed upon the employer. In situations where the job provides access to property or homes, or a special relationship exists between the employer and the victim, such as: customers, invitees, licensees, passenger, guests and others, the employer may have a duty to conduct a reasonable investigation into the employee's background. In addition, the employer's duty may extend only to victims within the sphere of foreseeable risks created by the employment. For instance, in Guidry - vs. - National Freight, Inc. (9) a Texas appellate court held that a trucking company did not have a duty to protect the plaintiff from the criminal acts of one of its drivers because the company could not have foreseen that the driver would stop to interact with the plaintiff to rape her. What can PEOs and employers do to avoid liability? In order to avoid liability for negligent hiring and retention, business must establish careful methods of screening applicants and monitoring existing employees. There are several procedures that can be instituted the hiring process to reduce the chances of liability. First, require every job candidate to fill out an employment application that requires the candidate to list employment and educational history. The history should be reviewed to check for gaps of time that suggest that the candidate has had a problem that may not be indicated on the application, such as an incarceration period. Then ask the candidate follow-up questions about any gaps to get further information about him or her before making a hiring decision. The employment application should also require the candidate to list references who are not related to the candidate. He or she should be required to sign a release as part of the application, giving permission to contact both references and former employers to get additional information about the candidate. Finally, the application should contain an affirmation clause that is signed by the applicant stating that the information given on the application is true and correct. Hiring for jobs in which the safety of third parties is particularly at issue may desire to inquire into the criminal history of the job applicant on the application. It is important to know that it is a violation of federal law to ask about the arrest records of potential employees. However, the applicant should be asked about prior convictions. If that is done, it must be disclosed that prior convictions were related to the job in question and were not used simply to bar employment of persons with a criminal conviction. Second, conduct personal interviews of prospective employees. This gives the opportunity to follow up on information received in the job application, ask questions not covered in the application, and have another chance to get information from candidates that show whether they will be competent and safe employees. A personal interview also allows a personal assessment of a job candidate's character. Next, check references and contact former employers to ensure that there is no negative information about the

candidate's background that the candidate did not disclose. If a job candidate has a history of violence or other behavior that would make him or her unfit, references and former employers are likely to know about it. When contacting references and former employers, specifically inquire about the candidate's honesty and reliability, as well as whether he or she has any traits that would make him or her unfit as an employee, especially any problems with violence. Once an employee has been hired, still take care to monitor his or her fitness. For example, any allegation of misconduct by an employee should be thoroughly investigated. Also, any other incidents that indicate that the employee may be a danger to other persons must be dealt with by taking immediate corrective action to remove the potential threat to third persons. The nature of the corrective action will depend on the seriousness of the employee's conduct. If the conduct was inappropriate, but not necessarily dangerous, it may be enough to simply discipline the employee. Respond to conduct on the part of an employee that causes harm to others, or is likely to result in harm to others in the future by either removing the employee from contact with other parties or by firing the employee so that any future harm is avoided. Furthermore, if an employee seeks to change positions or take on new job responsibilities, reevaluate his or her suitability for the new position and duties sought. Lastly, document all protective measures taken, including the dates that each measure was taken. Job applications and personal interview notes should be kept with the employee's personnel file. Notes should be kept of all conversations with references and former employees, and they should also be included in the personnel file. In addition, all discipline or other corrective actions should be documented in detail and filed with the rest of the information kept by Human Resource or management. That documentation can be used to demonstrate the care was taken to ensure that employees hired and retained were safe and competent to the best of knowledge. Reasonable Investigation On the other hand, Title VII and state EEO laws limit an employer’s legal right not only to ask about arrests without convictions, but also to make decisions based on criminal records that are not job-related. (10) The American with Disabilities Act limits the ability to make pre-employment inquiries relating to a person’s mental health. And, private sector employers are not allowed to submit job applications to polygraph tests. Background checks and pre-employment tests also involve balancing an employer’s need to know with individual ‘s protection from defamation or intrusions into their privacy. Many states recently have enacted “job reference immunity” laws designed to encourage companies to provide good-faith references to prospective employers without fear of liable suits. However, whether these statutes really change the rules are debatable. In order to conduct a reasonable investigation, the employer must take into account the severity of the potential risk of harm the employee may pose in the employment position. Depending upon the nature of the work, employers should make an appropriate investigation into the background of the employee by going beyond the job application form and interview by making an independent background check and in some instances, when it may be appropriate, look at the employee’s driving record and criminal record. Typically state laws only allow the use of criminal conviction information if there is a direct relationship between the crime for which the job applicant was convicted and the job for which the person is applying. In an example, a person who is convicted of theft applying for a job as a laborer (would have no contact with anything of significant monetary value). Using the person’s conviction record would not be appropriate in considering him for employment. Perhaps

not surprisingly, employers do not always welcome these guidelines. Some believe that certain EEOC guidance policies do not reflect a practical application of the principles of Title VII and claim that the EEOC "goes way too far" in its requirements for them to be considered reasonable. In one controversial interpretation, The Equal Employment Opportunity Commission's position is that an employer is precluded by [EEOC interpretation of] Title VII of the Civil Rights Act of 1964 from asking a potential employee about arrest records. The rationale behind this position is that arrests do not prove guilt and that screening out applicants with arrest records has an adverse impact on minorities. (11) Such a stance on the part of the EEOC places employers in somewhat of a double bind so that "every stage in the hiring process can subject the employer to legal liability, including discrimination claims and negligent hiring. Proper Nexus in Causation To prove a case of negligent hiring and or retention effectively, the accuser must show that information about the wrongdoer was available before or after hiring and was directly related to the injuries he or she suffered as a result of the individual hired by the employer. The landmark US Supreme Court case Griggs vs. Duke Power (12) interpreted disparate impact as any neutral employment practice that adversely affects a protected class of people (e.g. Blacks, women and so on). The court stipulated that discrimination could be practiced legally only: 1. If a manifest relationship could be established between employment requirement and employee job performance. 2. In the event of safety considerations for a so-called Requiring a•business necessity. Examples of adverse impact theories include: Using arrest•job applicant to meet minimum height and weight specifications and conviction records in selection Many Human Resource professionals and managers have interpreted the Supreme Courts Griggs EEO Opinion too narrowly. These supervisors might conclude that the relationship needed to argue in favor of a business necessity exception in using a particular employment qualification is nearly impossible to attain. As such, the overly awed human resources professional might ignore the need to incorporate certain job requirements into a job description, fearing an EEO charge alleging disparate impact. These managers, however, must look at each job and the effective and safe performance of that job, and then compare performance to equivalent and required job specifications. If there is a Bona Fide need to affect a protected class adversely so that a particular job may be performed effectively and safely, claim the business necessity exception. By ignoring such exceptions, the human resources and or management personnel manager may be increasing his or her exposure to negligent hiring/retention claims. So what can be done? Prudent Human Resources Professionals and Professional Employer Organizations must address the need of awareness and understanding associated with the legal theory of negligent hiring and retention. Monitor Conduct at Work Employers have a right to control the workplace. They can regulate access to the jobsite with security guard, physical barriers, identification requirements, and high-tech surveillance techniques. They also have broad discretion to search work areas in response to suspected employee misconduct and to monitor worker's telephone and E-mail communications. Employers/Clients, and Professional Employer Organizations also can be ready to enforce criminal laws against threats and violence, and to assist threatened employees in getting protective orders. California is one of the only states that now allow employers to petition for civil orders to enjoin work-place stalking. Suspects (as stated earlier) also have rights however. Policies on searches and monitoring should be clearly communicated to avoid liability for privacy

or wiretap violations. Work rules prohibiting violence, harassment, fighting, and weapons should be clearly stated and enforced evenly. If management acts too incautiously without investigation, or investigates unwisely, the accused could sue the client, employer, PEO or all of the above for invasion of privacy, defamation, false imprisonment, wrongful discharge, breach of contract and or job discrimination. Closing To round up the summary of this thesis paper, it is understood that when it comes to employment relationships, not only does the liability of negligent hiring falls on all companies and organizations involved. One must not assume simply because the company does not write the employees paycheck, that they are exempt from the responsibility or actions of a temp/employee or contract employee. Of course, in all actuality, the responsibility of the wrongful act falls with the employee/contract/ or temporary worker, employees and staffing organizations must create a battle plan to prepare for this type of negativity. Creating a threat assessment team to analyze the risks present at the work site and then develop and implement a program to respond to those risks. In addition to physical modifications to facilities and administrative controls, training of supervisors and employees on violence-related issues is essential. A crisis management team should also be in place to respond effectively when an incident occurs. If these actions are taken, business cannot guarantee that they are always hiring the "prefect employee", but instead be prepared to deal with the battle that comes with hiring a "bad" employee. Resources Used (1) Bureau of Labor Statistics (2) Gregory, D., "Reducing the risk of negligence in hiring," Employee relations journal. Summer 1988 p34. (3) CNET News.com November 1998 (4) "Employer Liability for the criminal acts of employees under negligent hiring theory: Ponticas vs. K.M.S. Investments," Minnesota Law Review. 1303 (1984) (5) Fenton, J., "The negligent hiring and retention doctrine" Sept 1989 p28 (6) Restatement (Second), Agency 219 1957 (7) James Rapp and Frank Carrington, "Victims' Rights: Law and Litigation P.10-58 (8) Associated Press— January 02, 1999 (9) 944 S.W. 2d 807, (Tex. App.-Austin 1997); see also, Connes v. Molalla Transport System, Inc. 831 P. 2d 1316 (Colo. 1992) (10) Murray v. Modoc State Bank, 313 P.2d 304 (Kan. 1957) (11) Greylin, M., "Fired Managers winning more lawsuits," The Wall Street Journal 7 Sept. 1989 page b-1. (12) Blumrosen, H., "Strategies in Paradise: Griggs vs. Duke Power Co. and the concept of Employment Discrimination," Michigan Law Review, 1972