



## New Statutory Defense for Negligently Hiring or Supervising a Convicted Criminal



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The Texas Legislature has created a measure of protection for “employers, general contractors, premises owners, and other third parties” from being sued for negligent hiring or failure to supervise adequately based solely on evidence the employee has been convicted of a criminal offense. Effective September 1, 2013, a new Chapter 142 is added to the Texas Civil Practice and Remedies Code to prohibit such causes of action unless one of two strict exceptions is met.

One exception is when the suit concerns the misuse of funds or property of a person other than the employer, general contractor, premises owner or other third party if (a) as of the date of hire, the employee had been convicted of a crime that includes fraud or the misuse of funds or property as an element of the offense and (b) it was foreseeable that the position for which the employee was hired would involve discharging a fiduciary duty in the management of funds or property.

The other exception applies if the covered defendant knew or should have known of the conviction which was one of three types of offenses: (1) one committed while performing duties substantially similar to those reasonably expected to be encountered in the employment, considering the factors listed in Sections 53.022 and 53.023(a) of the Occupations Code; (2) one of the serious offenses listed in Article 42.12, Section 3g of the Code of Criminal Procedure; or (3) a sexually violent offense as defined by Article 62.001 of the Code of Criminal Procedure.

The sponsors of the bill noted that a job applicant with a criminal record receives half as many offers as an applicant with no criminal record. That is in part because of fears of potential liability in negligent hiring actions. The goals of the bill are to provide employers with more hiring options, decrease recidivism, raise employment rates, enhance public safety, and allow job seekers with criminal records to become self-sufficient, law-abiding citizens. The bill passed without amendments and with no witnesses testifying against it. It was supported by both sides of the trial bar.

The statute includes an oddity in setting out general contractors as a separate category from employers, along with premises owners, and an open-ended category “other third parties.” Since the legislation only concerns suits arising from acts or omissions of employees, which are defined to exclude independent contractors, it is unclear what additional protection may accrue to general contractors besides what they may have as employers. The wording may be simply a “belt and suspenders” approach to comfort the industries that were the primary impetus for the bill. It might also be intended to ensure that a general contractor or premises owner is protected where, even if not nominally the employer, that party is alleged to have some type of joint or vicarious responsibility, along with the actual employer, because of supervisory duties.

The intent and effect of providing protection for “other third parties” is also unclear. If some third party facilitated the hiring or participated in the training or job supervision of the wayward employee and an innovative plaintiff’s counsel adds that third party as a defendant on some theory of responsibility, then the third party language could be beneficial.

If a plaintiff pleads the criminal past of a defendant’s employee as the basis of a negligence claim, an appropriate motion based on this statute should be urged to dismiss the claim. When the defense learns that plaintiff’s counsel is aware of a criminal conviction which may potentially be presented to the jury, although not expressly pled, a motion in limine and diligence with objections at trial in that regard would be advisable. Those efforts may be overcome if the conviction is not the sole grounds of the asserted liability of the employer.

Based upon the exceptions, a general contractor is potentially at greatest risk when hiring an employee who is to handle the money or property of others. The second major vulnerability would be when the new employee is given a job similar to one the employee has previously performed for another employer. In either case, ignorance of a prior criminal conviction arguably involving the same type of job will be unlikely to shield the employer when a plaintiff asserts the defendant should have known of the conviction.

Hiring convicted criminals can still pose an enhanced litigation risk, but this new statute does provide some additional protection. The statute is purely one restricting the rights of plaintiffs. It contains an express provision that it does not create any new cause of action or expand any already in existence. ■