



# **Background Checks and Waivers**

**Lawton W. Hawkins  
February 17, 2010**

## **Mission of Pro Bono Partnership of Atlanta:**

To provide free legal assistance to community-based nonprofits that serve low-income or disadvantaged individuals. We match eligible organizations with volunteer lawyers from the leading corporations and law firms in Atlanta who can assist nonprofits with their business law matters.

## Pro Bono Partnership of Atlanta Eligibility & Other Information

- In order to be a client of Pro Bono Partnership of Atlanta, an organization must:
  - ✓ Be a 501(c)(3) nonprofit organization.
  - ✓ Be located in or serve the greater Atlanta area.
  - ✓ Serve low-income or disadvantaged individuals.
  - ✓ Be unable to afford legal services.
- *Visit us on the web at [www.pbpatl.org](http://www.pbpatl.org)*
- Host free monthly webinars on legal topics for nonprofits  
To view upcoming webinars or workshops, visit the [Workshops Page](#) on our website

## Cautionary Tale

- Little League baseball has an Operating Manual which suggests establishing procedures for background checks;
- a local league took on a volunteer umpire without a background check;
- the umpire molested one of the players;
- parents assumed the umpire had gone through a background check.

## Cautionary Tale

- Little League was sued for negligent supervision of the local league and failure to conduct or require background checks (Hickman v. Little League Baseball, Inc., 2006 Cal. App. Unpub. LEXIS 10890)

## Cautionary Tale

- Little League was not held liable for umpire's acts, as the connection between Little League and the molestation were too attenuated. Thus, Little League's acts were not the proximate cause of the boys' injuries.
- Still, this is a cautionary tale for people involved with nonprofits, especially nonprofits involving children.

## Statistics

- Every 6 minutes a convicted criminal attempts to work with a nonprofit
- Every 43 minutes a sex offender tries to work with a nonprofit for youth
- Every 5 of 100 applicants had a criminal record

*from Choicepoint "A Brief on the Importance of Background Screening for Nonprofits", updated 2/27/2006*

## Background Checks (Why?)

- **Negligent hiring** lawsuits. If an employee's actions hurt someone, the organization may be liable. A bad decision can ruin an organization's reputation and the hiring person's career.
- **Georgia law** requires criminal background checks for anyone who works with children, elderly, mentally ill, etc.

## Background Checks (What?)

- ✓ Look into a person's education, employment, criminal history, personal information, financial information, driving history, etc.
- ✓ Usually go back seven years

## Background Checks (Who?)

- Prospective employees
- Prospective volunteers
- “Companies and organizations are often so happy to have volunteers that they assume a volunteer’s spirit of public service and dedication to community denote someone who couldn’t possible have a blemish in their background.”

## **Background Checks (When?)**

- Prior to extending employment or accepting volunteer services.
- Periodically in response to changed position or specific concern.
- Waiver (discussed below) should specify that checks may be ongoing.

## **Federal Credit and Reporting Act (FCPA)**

- Under the FCRA, the employer must obtain the applicant's written authorization before the background check is conducted.
- Authorization should be clear and conspicuous
- Must be on a document separate from all other documents, such as an employment application.

## **Federal Credit and Reporting Act (FCPA)**

- Employer to certify to Credit Reporting Agency:
  - It has complied with the Disclosure and Written Authorization;
  - It will comply with the law regarding Adverse Action; and
  - It won't use information in violation of any law or regulation

## Investigative Consumer Report

- When information about is gathered from interviews, the FCRA requires a separate disclosure. Applicants are also entitled to know the "nature and scope" of an investigative consumer report if they ask.

## What if There's Bad News?

- **Before** any adverse action is taken, the employer must give the applicant a "pre-adverse action disclosure." This includes a copy of the report and an explanation of the consumer's rights under the FCRA.
- Employer should wait five business days to allow the applicant to challenge information

## What if There's Bad News?

- **After** the adverse action is taken, the individual must be given an "adverse action notice," which must contain the name, address, and phone number of the screening company, a statement that the screening company did not make the adverse decision, rather that the employer did, and a notice that the individual has the right to dispute the information in the report.

## More Information?

- For more on how the FTC staff interprets the term "investigative consumer report" and other key topics under the FCRA, visit the FTC website [www.ftc.gov/os/statutes/fcra/index.htm](http://www.ftc.gov/os/statutes/fcra/index.htm)

## Waivers (Why?)

- Should be signed by participants to help protect organization from lawsuits.
- May also serve to set expectations of participants.

## Waivers (How?)

- Should be drafted broadly (but not too broadly; see below).
- Should also be signed by parent if participant is minor.
- Prudence dictates that waivers be clear, conspicuous, and unambiguous.

## The Good News

- Generally, Ga. courts will enforce written waivers if they cover the matter at issue.
- No consideration is required for a waiver.

## Important Caveat

- O.C.G.A. § 13-8-2 invalidates contractual provisions by which a party indemnifies another party for bodily injury or property damage caused by the other party's sole negligence.

## Example

- Pro Bono, Inc. hires a bus driver, without doing background check.
- Driver, who has record of drunk driving, has an accident, injuring 3d party plaintiff, who sues PBI.
- Provision of waiver requiring participant to indemnify PBI is not enforceable.

## Is Waiver Enforceable?

- Ga. Sup. Court has held that a limitation of liability provision in an engineering firm's contract was unenforceable, even though the provision purported only to limit the engineering firm's liability and did not require either party to indemnify or hold harmless the other.
- The Court ignored clause that expressly excluded limitations that were "otherwise prohibited by law."

## Is Waiver Enforceable?

- If the accident was the result of the sole negligence of PBI, maybe the waiver will not be upheld either.
- Participant may also be able to sue PBI for own injuries.

## Solutions?

- Good precautions (background checks)
- Insurance
- “provided, however, that this limitation of liability shall not apply to third-party claims for personal injury or property damage to the extent caused by or resulting from the sole negligence of [Charity Parties].”

## **For More Information:**

If you would like more information about the services of Pro Bono Partnership of Atlanta, contact us at:

Phone: 404-407-5088

Fax: 404-853-8806

[Info@pbpatl.org](mailto:Info@pbpatl.org)

[www.pbpatl.org](http://www.pbpatl.org)