

# The Legal Ramifications for Employers When Job Candidates Misrepresent Credentials to Secure Employment Positions

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## I. INTRODUCTION

On February 13, 2009, Andrew M. Cuomo, the Attorney General of New York, announced the guilty plea of Maria Geizer, a Saratoga Springs woman, who lied about her educational and professional credentials in order to obtain employment with a school district as a social worker.<sup>1</sup> The circumstances surrounding Geizer's case began when she applied for employment in 1999 and falsely claimed on her employment application that she held a master's degree in psychology, which was a requirement for the position of a social worker.<sup>2</sup> Additionally, Geizer falsely claimed that she was licensed by the New York State Education Department—a requirement necessary for school districts to bill Medicaid for counseling services.<sup>3</sup> Approximately seven years after she applied for employment, Geizer was asked to provide a copy of her master's degree and professional license.<sup>4</sup> In response, Geizer allegedly altered her spouse's master's degree and his New York State Education Department license and attempted to pass off the altered degree and certificate as her own.<sup>5</sup> Geizer is one among the countless number of people who have misrepresented their credentials in order to obtain employment positions in both the private and public employment sector. Indeed, cases involving employees misrepresenting their credentials include both those instances where job candidates have not yet been hired<sup>6</sup> and those instances where employees have already been hired.<sup>7</sup>

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<sup>1</sup> In an effort to address the widespread trend of employees misrepresenting employment credentials, some states have enacted state statutes prohibiting the falsification of employment credentials. *See Attorney General Cuomo Announces Guilty Plea of Capital District Social Worker for Faking Credentials*, STATE NEWS SERVICE, February 13, 2009; Emily Donohue, *Psychologist Who Worked for Saratoga County Public Defender's Office, Family Court, Charged with Falsifying Credentials*, SARATOGIAN, June 6, 2010, available at <http://www.saratogian.com/articles/2010/06/06/news/doc4c0b0a8fb95b4932686804.txt> (last visited Jan. 13, 2011); *see also*, WASH. REV. CODE § 9A.60.070 (2011) (using a false academic credential is a gross misdemeanor); N.D. CENT. CODE § 15-20.4-15 (2011) (using a false academic degree is a class C felony.); TENN. CODE ANN. § 49-7-133 (2011) (the misrepresentation of employment credentials is a crime when the act is committed in order to obtain employment at an institution of higher education).

<sup>2</sup> *Woman Pleads Guilty to Faking Credentials*, SARATOGIAN, Feb. 14, 2009, available at <http://www.saratogian.com/articles/2009/02/14/news/doc4995d0c57e92b278856336.txt> (last visited on Jan. 4, 2012).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *See* Julia Levashina & Michael A. Campion, *Expected Practices in Background Checking: Review of the Human Resource Management Literature*, 21 EMP. RESP. & RTs. J. 231-49 (2009) (“An employer who fails to perform a thorough background check on a prospective employee may be vulnerable to the charges of negligent hiring or employment discrimination.”).

In an effort to address this recent trend of employees misrepresenting their credentials to obtain employment positions, this paper will provide illustrations of individuals who have engaged in such behavior. Moreover, it will discuss the impact of this behavior on employers. Finally, the paper will suggest techniques that employers and human resource managers can implement to minimize the likelihood of hiring job candidates who have engaged in this type of behavior.

## II. THE MISREPRESENTATION OF EMPLOYMENT CREDENTIALS

The misrepresentation of employment credentials poses a serious dilemma for both prospective employers and current employers, throughout the country, in their quest to obtain the best employees for available job positions.<sup>8</sup> In its 2009 Hiring Index study, Automatic Data Processing Inc. (“ADP”)<sup>9</sup> Screening and Selection Services reported that forty-six percent of reference and credential verifications “revealed a discrepancy between information provided by candidates and what the screening revealed on employment, education and/or reference checks.”<sup>10</sup> This number is up from a few years earlier when ADP reported in its 2007 Hiring Index Study that “41% of individuals’ resumes showed discrepancies in employment, credentials or employment history.”<sup>11</sup>

### A. *The Means by which Job Candidates Misrepresent Credentials*

Given the increase in the occurrences of the misrepresentation of credentials by job candidates, it is important for employers and human resource managers to be aware of those circumstances under which this type of behavior can occur and the impact such misrepresentations can have on the hiring agency. In particular, the misrepresentation of credentials can occur when the job candidate engages in resume fraud, provides false references or fails to disclose pertinent information on job applications and during job interviews. Each of these will be discussed separately.

#### 1. Resume Fraud

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<sup>7</sup> See Tamar Lewin, Christy Mckernet & Sara Rimer, *MIT’s Admissions Dean Resigns; Ends 28 Year Lie About Degrees*, N.Y. TIMES, Apr. 27, 2007 at 1; *Coach’s Blarney Loses Him Job with Fighting Irish*, Vol. 11, Issue 4 WIS. EMP. L. LETTER, Apr. 2002 (“Notre Dame recently lost its football coach, George O’Leary, when the university discovered that he had misrepresented that he had a master’s degree.”).

<sup>8</sup> See John E. Matejkovic & Margaret E. Matejkovic, *Whom to Hire: Rampant Misrepresentation of Credentials Mandate the Prudent Employer Make Informed Hiring Decisions*, 39 CREIGHTON L. REV. 827, 828 (2006) (“An additional, and often unexpected, challenge for the employer . . . is awareness of and managing applicant misrepresentations about education, work experience, and the like.”).

<sup>9</sup> ADP “is one of the world’s largest providers of business outsourcing solutions.” *About ADP*, ADP, available at <http://www.adp.com/about-us.aspx> (last visited on May 24, 2010).

<sup>10</sup> *Twelfth Annual ADP Screening Index Reveals Nearly 10 Percent of Job Candidates Have Criminal History, Credit Issues of Driving Citations*, ADP, available at <http://www.adp.com/media/press-releases/2009-news-releases/twelfth-annual-adp-screening-index.aspx> (last visited on May 24, 2010).

<sup>11</sup> *Id.*

Job candidates frequently misrepresent their credentials through resume fraud.<sup>12</sup> Resume fraud encompasses providing: (1) phony employment history; (2) bogus credentials, including degrees, licenses and certificates; and (3) exaggerating job responsibilities and achievements.<sup>13</sup> Falsifying ones' educational credentials has been reported as the most common type of resume fraud.<sup>14</sup> The second most common type of resume fraud reported is when a job candidate enhances his or her job title.<sup>15</sup> This type of fraud can also include a candidate doing the following: covering up a humiliating period of unemployment;<sup>16</sup> lying about prior salary and benefit information in order to obtain a higher salary from the prospective employer; and lying about the reason for leaving prior employment in an attempt to prevent the prospective employer from learning that he or she was terminated from a previous position.<sup>17</sup>

An example of an employee engaging in resume fraud is noted in *Stephens v. A-Able Rents Co.*, a case in which a truck driver misrepresented his employment history by claiming that from September 1987 to June 1989 he worked in Tulsa, Oklahoma while also claiming that from May 1984 to May 1989 he worked in Cleveland, Ohio.<sup>18</sup> Furthermore, a similar misrepresentation of employment credentials existed in a case where an employee who was hired as a "T-shirt employee," which required him to take tickets for concerts; conduct pat-down searches and metal searches; and serve as an usher claimed that "he was a college graduate on page one" of his employment application, but also indicated on another page that he had only "completed 12 years of high school."<sup>19</sup>

Interestingly, it should not be assumed that resume fraud is only committed by young, inexperienced job seekers or low level employees; instead, in recent years, many seasoned top-level employees have been found guilty of committing such fraud.<sup>20</sup> As a matter of fact, several

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<sup>12</sup> See Matejkovic & Matejkovic, *supra* note 8, at 835, n.43 ("For purposes of this paper, the authors define resume fraud as the falsification of credentials by a job applicant in the recruitment process, particularly as related to educational degrees and employment history.").

<sup>13</sup> *Id.*

<sup>14</sup> See, e.g., *Wartsila N. Am., Inc. v. Hill Int'l, Inc.*, 342 F.Supp.2d 267, 270 (2004) (a case in which an employee falsely claimed on his resume that he held engineering degrees and professional certifications none of which he had); see also, Tammy Prater & Sara Bliss Kiser, *Lies, Lies and More Lies*, 67 S.A.M. ADVANCED MANAGEMENT J 9., (2002).

<sup>15</sup> Amy Winter, *Don't Even Think of Fudging on Your Resume*, COPLEY NEWS SERVICE, May 4, 2007.

<sup>16</sup> Michael Kinsman, *Who Gets Hurt By those Fibs on a Resume?*, SAN DIEGO UNION-TRIB., Dec. 24, 2001 at E-1.

<sup>17</sup> Sherri C. Goodman, *Don't Lie on Resume; Employers May Check*, BIRMINGHAM NEWS, Feb. 22, 2006, at 3D.

<sup>18</sup> 654 N.E.2d at 1315, 1318 (Ohio Ct. App. 1995). (The plaintiff brought a negligent hiring claim against the defendant-employer after she was attacked by the defendant's employee who smoked crack cocaine the day before the attack and the morning of the attack.).

<sup>19</sup> *Carlsen v. Wackenhut Corp.*, 868 P.2d 882, 885 (Wash. Ct. App. 1994) (holding that although the corporation did not have actual knowledge that the employee was potentially dangerous, a trier of fact could have found that the corporation breached the duty of ordinary care by not doing more to determine whether the employee was fit to work in the job he performed for the corporation).

<sup>20</sup> See Roland E. Kidwell Jr., *Small Lies, Big Trouble: The Unfortunate Consequences of Resume Padding, from Janet Cooke to George O'Leary*, Vol. 51, Issue 2 J. BUS. ETHICS 175 ("Janet Cook and George O'Leary could not appear more different. . . . But the two have one thing in common. The lies they told on their resumes eventually

top-level employees have been publically exposed for engaging in this type of behavior. For instance, in 2007, the dean of admissions at Massachusetts Institute of Technology (MIT) was forced to resign after nearly thirty years at the school after she admitted that she had fabricated her educational credentials by falsely claiming that she had degrees from Albany Medical College, Union College and Rensselaer Polytechnic Institute when in fact she did not have an undergraduate degree from any institution.<sup>21</sup> In September 2005, the director of the Federal Emergency Management Agency resigned from this position after concerns were raised that he among other things, committed resume fraud by: (1) claiming that he was an assistant city manager when in fact he was the assistant to the city manager, meaning that he never had management responsibilities; (2) claiming that he was a political science professor at Central State University when he had only attended the school as a student; (3) claiming that he was the national head of a trade group even though he only ran a regional chapter; and (4) failing to include former employment from which he was terminated.<sup>22</sup> Similarly, in February 2006, the chief executive officer of Radio Shack was forced to resign after it was revealed that he had misrepresented his academic record and in actuality, he did not hold degrees in either theology or psychology.<sup>23</sup>

These high-profile cases of employees misrepresenting credentials are only symbols of what is occurring regularly in everyday life. Actually, the misrepresentation of credentials has occurred in the legal profession, the medical profession, the accounting profession, and the engineering profession—just to name a few.<sup>24</sup> An ironic case of such misrepresentation of

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cost them prestigious jobs and brought dishonor on two major national institutions: The Washington Post newspaper and the University of Notre Dame.”).

<sup>21</sup> Lewin, Mckernnet & Rimer, *supra* note 7, at 1.

<sup>22</sup> See *FEMA Chief Relieved of Katrina Duties*, MSNBC.COM, Sept. 12, 2005, available at [http://www.msnbc.msn.com/id/9266986/ns/us\\_news-katrina\\_the\\_long\\_road\\_back/t/fema-chief-relieved-katrina-duties/](http://www.msnbc.msn.com/id/9266986/ns/us_news-katrina_the_long_road_back/t/fema-chief-relieved-katrina-duties/) (last visited on Aug. 29, 2011).

<sup>23</sup> Heather Landy, *Ex-CEO Leaving with a Package*, STAR-TELEGRAM, Feb. 22, 2006, at C1; *RadioShack CEO Resigns Amid Resume Questions*, USATODAY.COM, available at [http://www.usatoday.com/money/industries/retail/2006-02-20-radioshack-ceo\\_x.htm](http://www.usatoday.com/money/industries/retail/2006-02-20-radioshack-ceo_x.htm) (last visited on Jan. 24, 2011).

<sup>24</sup> See generally, Vincent R. Johnson & Shawn M. Lovorn, Article: *Misrepresentation by Lawyers About Credentials or Experience*, 57 OKLA. L. REV. 529 (2004); see, e.g., Elaine Riviera, *Man Guilty of Larceny in Acting Like Lawyer; Alexandria Jury Urges 6-Month Term*, WASH. POST, Dec. 11, 2004 at B02 (“An Alexandria jury convicted a local businessman . . . on charges of misrepresenting his legal credentials and taking money from unwitting clients.”); Jean Marie Lutes & Scott Higham, *Fake MD “Knew He’d Get Caught” and He Finally Was*, MIAMI HERALD, Sept. 29, 1989 at B2 (“A former supermarket butcher posing as a family doctor wrote prescriptions and treated patients for nearly two years before . . . police caught up with him . . . by donning white coats and faking a job interview.”); Mark Reynolds, *At Mayor’s Behest, Official Drops CPA from Documents*, PROVIDENCE J., May 4, 2006 at D-04 (“The School Department’s director of administration had repeatedly presented himself as a certified public accountant even though he doesn’t have a license.”); Gordon Russell, *City Engineer Lied on Resume; Asim Mohammed Claimed to have Earned a Master’s Degree.; City Officials Decided to Take No Action After Learning in October that the Assistant City Engineer Had Lied on His Resume. But They Learned Last Week that He had Also Lied about the Master’s Degree in a Deposition*, SARASOTA HERALD-TRIB., Feb. 24, 1999 at A1A (“A city engineer who plays a key role in Sarasota’s transportation decisions falsely claimed to have a graduate degree in civil engineering on his job application 10 years ago, and repeated the claim during a deposition last spring and again during an update of his qualifications last fall.”).

credentials involved a law school graduate who continuously advertised himself as a former administrative law judge even though he had never passed the bar.<sup>25</sup>

## 2. Providing False References

Job candidates have also misrepresented their credentials by providing false references. A commonly used method of faking one's references is when the reference is not actually who it purports to be such as when the reference turns out to be a relative purporting to be a former manager.<sup>26</sup> If employers are not careful, they can fail to determine whether references provided by job candidate are phony such as in the *Stephens* case where the employer failed to discover that an employee's job reference was actually his roommate as opposed to a professional reference like a former supervisor.<sup>27</sup>

An alternative method of providing phony references is to create forged recommendation letters. In August 2008, unbeknownst to an Oregon school district, a math teacher applying for a job with the district engaged in this type of behavior.<sup>28</sup> Moreover, the teacher failed to disclose that he had previously been fired by New York City school officials in 2007 for dating a 16-year old student, and he failed to disclose that he had lost his New York state teaching license.<sup>29</sup> The teacher was subsequently convicted of sexual abuse in Oregon regarding a sexual relationship with a 16-year old, female student.<sup>30</sup>

## 3. Failing to Disclose Pertinent Information on Job Applications or During Interviews

Another means by which job candidates misrepresent their credentials is through a lack of disclosure of pertinent information on job applications or during employment interviews. This type of misrepresentation of credentials can encompass candidates failing to disclose terminations from prior employment and failing to provide criminal arrests and convictions for criminal conduct when asked.<sup>31</sup> For instance, in the case discussed above where the employee

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<sup>25</sup> Henri E. Cauvin, *Phony Ex-Judge Receives 2 Years*, WASH. POST, June 4, 2004 at B02 ("It was the maximum the judge could impose and the stiffest penalty yet in the long saga of Simon Baker, 65, who kept advertising himself as a former administrative law judge, even though he never passed the bar.").

<sup>26</sup> See, e.g., *Ponticas v. K.M.S., Inv.*, 331 N.W.2d 907, 908 (Minn. 1983) (an employer failed to discover that an applicant applying for the position of resident manager listed his mother and sister as references).

<sup>27</sup> *Stephens v. A-Able Rents Co.*, 654 N.E.2d at 1315, 1318 (Ohio Ct. App. 1995).

<sup>28</sup> Rick Bella, *Missed Signals in Hiring Teacher*, SUNDAY OREGONIAN, Sept. 27, 2009.

<sup>29</sup> *Id.* (After the Oregon school district hired the teacher, he began a sexual relationship with a 16-year old female student, which resulted in the teacher being convicted of sexual abuse.).

<sup>30</sup> *Id.*

<sup>31</sup> See *Connes v. Molalla Transport System, Inc.*, 831 P.2d 1316, 1381 (Colo. 1992) (where a job applicant failed to disclose his criminal convictions prior to being hired); *Lingar v. Live-In Companion, Inc.*, 692 A.2d 61 (N.J. Super. Ct. 1997) (where an employee represented on his application for employment that "he had not been convicted of a 'felony' in the last seven years" although "he had a formidable record of criminal and disorderly person convictions for offenses ranging from possession and distribution of cocaine to shoplifting, trespassing, and receiving stolen property."); *Crawford Rehabilitation Services Inc. v. Weissman*, 938 P.2d 540 (Colo. 1997) (a case where a former

was hired as a “T-shirt employee,” this particular employee indicated—in response to a question on his employment application regarding criminal convictions—that he had never “been convicted for the violation of any law in a military or criminal court which has not been sealed, annulled or deleted from record.”<sup>32</sup> However, in actuality, the employee had prior criminal convictions including third degree theft; criminal trespass, no valid operator’s license and a second degree robbery conviction.<sup>33</sup>

An additional example of employees failing to disclose pertinent information involved a case in 2004 where four firefighters in Houston, Texas failed to disclose their criminal pasts when applying for employment.<sup>34</sup> Notably, one of those firefighters was fired after it was determined that he was arrested for driving while intoxicated when he was a cadet at a training academy.<sup>35</sup>

B. *The Impact of Job Candidates Misrepresenting their Credentials*

The misrepresentation of employment credentials can be categorized as either: (1) absolutely wrong or (2) in “a moral gray zone” or debatably wrong.<sup>36</sup> Instances that have been considered absolutely wrong would include fraud that may pose a danger or threat to the public like when a “high school dropout” claims to be “a physician with a medical degree” or “a person with a history of DUI traffic offenses and statutory rape convictions” conceals “his past to get a job driving a school bus.”<sup>37</sup>

On the other hand, those situations that have been considered to be in “a moral gray zone” or debatably wrong have included situations where the misrepresentation of credentials does not pose a danger or threat to the public like when a person claims to have worked as a manager of a restaurant, when in actuality that person was only an assistant manager of the restaurant.<sup>38</sup> Even if the misrepresentation of credentials involves the debatably wrong category, this does not mean that such misrepresentation does not have any harmful consequences.<sup>39</sup> Hiring someone who has misrepresented credentials may mean the company is forced to deal—even if for a short time—with an employee who inadequately performs his or her job duties.<sup>40</sup> Such a hiring decision may also negatively impact the reputation of the company particularly when this person does not have the skills to perform his or her job duties.<sup>41</sup>

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employee made fraudulent statements on the employment application, which included false statements that she had never been discharged from employment).

<sup>32</sup> Carlsen v. Wackenhut Corp., 868 P.2d 882, 885 (Wash. Ct. App. 1994).

<sup>33</sup> *Id.* at 885.

<sup>34</sup> Peggy O’Hare, *City Disciplines 4 Firefighters; 3 are Suspended and 1 Fired for Not Disclosing Arrest*, HOUS. CHRONI., Aug. 11, 2004 at 3.

<sup>35</sup> *Id.*

<sup>36</sup> Anita L. Allen, *Dishonest Resumes Poison an Already Flawed System*, PATRIOT NEWS, May 27, 2007 at F03.

<sup>37</sup> *See id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> Courtney Price, *Check Out Those Job References*, ST. LOUIS POST-DISPATCH, Oct. 27, 1997 at 17.

<sup>41</sup> Peta Hodge, *Lies, Damn Lies and CV’s*, 16 ABI/INFORM GLOBAL 64-67, 66, May 2008.

And, if an employer hires an employee who has misrepresented his or her credentials and this person is terminated, there may be some replacement costs with replacing this employee and the company's overall employee morale may also be affected.<sup>42</sup> Relationships with customers, vendors, investors and lenders may be affected when an employee misrepresenting his or her credentials is hired by a company.<sup>43</sup> In essence, "hiring individuals who lie on their resumes or applications can create financial and legal burdens for organizations, including recruiting and hiring replacements, potential lost customers and legal fees/settlements associated with negligent hiring claims."<sup>44</sup> What is more, the misrepresentation of employment credentials wrongs those job candidates who are actually qualified for the position who are not hired because the candidate misrepresenting his or her credentials is hired.<sup>45</sup>

### C. *Rationales Cited for Job Candidates' Tendency to Misrepresent Credentials*

The real world cases where job candidates have misrepresented their credentials may trigger the question of why do individuals engage in this type of behavior? While there is no particular answer that fits all cases, in some instances, the misrepresentation is truly committed by individuals who have no intention of deceiving prospective employers, which may occur when job candidates are confused about the difference between "acceptable puffery" and "dishonesty or fraud?"<sup>46</sup> For example, a statement on a resume that one was an integral part of a team may under the appropriate circumstances be considered to be "acceptable puffery", whereas a statement that one was the team leader when he or she was only a member of the team would most likely be considered to be "dishonesty or fraud."

However, most of the reasons cited for the misrepresentation of credentials involve a more intentional or purposeful act by the job candidate in misrepresenting his or her credentials such as when the candidate doubts his or her qualifications for a position or the candidate feels pressure from external sources to secure a position for which the candidate may not be qualified.<sup>47</sup> Further, job candidates may be more likely to misrepresent credentials as economic conditions worsen.<sup>48</sup> A blogger speculated in a March 2009 article titled *CEO Departures Fall-Resume Fraud Again a Concern*—discussing the number of CEO turnovers for February 2009—that: "[r]esume fraud is likely to become more prevalent in the downturn, even among high level-executives. With increased competition for available positions, there is more pressure to find and keep a position. With this pressure comes the temptation to embellish one's education or

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<sup>42</sup> See Prater & Kisser, *supra* note 14, at 9.

<sup>43</sup> See John L. Tonsick, *Reality Check*, DAILY DEAL, Mar. 21, 2003.

<sup>44</sup> Jennifer L. Wood & Diane L. Decker, *Lying on Job Applications: The Effects of Job Relevance, Commission, and Human Resource Management Experience*, 22 J. BUS. PSYCHOL. 2007 1-9.

<sup>45</sup> Hodge, *supra* note 41, at 66.

<sup>46</sup> Wood & Decker, *supra* note 44.

<sup>47</sup> *Id.*

<sup>48</sup> Cari Tuna & Keith J. Winstein, *Theory & Practice: Economy Promises to Fuel Resume Fraud-Practices Vary for Vetting Prospective Employees, but Executives Usually Face Tougher Background Checks*, WALL ST. J. Nov. 17, 2008 at B4 ("Experts warn that the prevalence of resume fraud may increase as the economy worsens.").

work record.”<sup>49</sup> In fact, one high-level executive cited in this article who was found to have committed resume fraud during an economic downturn was the former President and Chief Operating Officer (“COO”) of chemical miner Intrepid Potash, Inc.<sup>50</sup> The executive claimed to have earned a bachelor’s degree from Colorado University and a master’s degree from Loyola Marymount.<sup>51</sup> In actuality, he had only taken classes at both institutions, but had never received a degree.<sup>52</sup> Thus, the possibility of increased resume fraud during an economic downturn may mean that during this type of economic climate hiring managers may need to be more attentive to the possibility of job candidates attempting to perpetrate fraud when representing their credentials.<sup>53</sup>

Additionally, the tendency of job candidates to misrepresent credentials may be facilitated by the prevalent existence of diploma mills throughout the country.<sup>54</sup> These organizations have been described as “companies that sell degrees to consumers without requiring them to do any substantial course work to obtain the degrees.”<sup>55</sup> Diploma mills are not new and have been in existence at least as far back as the 1920’s.<sup>56</sup> However, the advent of the Internet has made it easier for job candidates to fake their degrees.<sup>57</sup> As a result, the popularity of the diploma mills—which was at one time waning—has made a recent resurgence.<sup>58</sup>

In general, signs of the existence of a diploma mill may include: (1) providing “degrees for work or life experience alone, with no studies or exams involved”; (2) no requirement that students attend class and fulfill course requirements; (3) charging a flat-fee per degree as opposed to charging students by the credit, course or semester; (4) a “guaranteed degree in a few days, weeks or even months”; and (5) using “aggressive sales tactics to find customers, including

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<sup>49</sup> *CEO Departures Fall-Resume Fraud Again a Concern*, Mar. 12, 2009, available at <http://challengeratworkblog.blogspot.com/2009/03/ceo-departures-fall-resume-fraud-again.html>, (last visited on Feb. 5, 2011).

<sup>50</sup> “Intrepid Potash, Inc. has become the largest producer of potash (potassium chloride) in the United States. In addition, it produces three valuable byproducts: Solar Salt, Magnesium Chloride brine and Sulfate of Potash Magnesia. *About Intrepid Potash, Inc.*, INTREPID POTASH, available at <http://www.intrepidpotash.com/about/main.html> (last visited on Jan. 10, 2012); see *CEO Departures Fall-Resume Fraud Again a Concern*, *supra* note 49.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> See Creola Johnson, *Credentialism and the Proliferation of Fake Degrees: The Employer Pretends to Need a Degree; the Employee Pretends to Have One*, 23 HOFSTRA LAB. & EMP. L.J. 269 (2006).

<sup>55</sup> *Id.* at 271.

<sup>56</sup> *EmployeesscreenIQ Shares ‘Elementary’ Facts About Education Falsification; Global Employment Screening Company Notes Research Findings and Expresses Concern Regarding the Explosion of Diploma Mills*, BUS. WIRE, Sep. 30, 2008.

<sup>57</sup> Johnson, *supra* note 54, at 279 (citing Allen Ezell & John Bear, *Degree Mills* 20-21, 55-56 (2005)).

<sup>58</sup> *EmployeesscreenIQ Shares ‘Elementary’ Facts About Education Falsification*, *supra* note 56.



email spam, pop-up ads and telemarketing”.<sup>59</sup> Ironically, diploma mills often use names that sound similar to well-known colleges or universities.<sup>60</sup>

One such diploma mill was the Saint Regis University, which was “identified by the FBI as one of the largest Internet degree mills.”<sup>61</sup> A reporter was able to purchase a master’s degree from Saint Regis for \$995 after completing a multiple choice test online.<sup>62</sup> In December 2004, Regis University—a creditable university--sued five individuals operating the Saint Regis University claiming that the Saint Regis University was damaging its reputation; infringing on its trademark and engaging in unfair business practices.<sup>63</sup> Interestingly, the defendants in the lawsuit settled the claim with Regis University and were enjoined from using the name Regis University or any other similar name.<sup>64</sup>

### III. POTENTIAL EMPLOYER LIABILITY STEMMING FROM THE MISREPRESENTATION OF EMPLOYMENT CREDENTIALS

When a job candidate misrepresents his or her employment credentials, this type of behavior could possibly expose employers to legal liability to third parties who have been harmed by the job candidates’ behavior.<sup>65</sup> Thus, in addition to understanding the impact of the misrepresentation of employment credentials, employers and human resource managers should be knowledgeable of the potential legal liability that can result from this type of behavior.

#### 1. Negligent Hiring

One type of potential claim that may be brought against employers when they hire job candidates who have misrepresented their credentials is a claim for negligent hiring.<sup>66</sup> This tort,

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<sup>59</sup> *Avoid the Diploma Mill Scam*, CHATTANOOGA TIMES FREE PRESS, Apr. 30, 2008 at E4.

<sup>60</sup> Johnson, *supra* note 54, at 283 (citing Allen Ezell & John Bear, Degree Mills 20-21, 15 (2005)) (“Diploma mill operators select names of existing prestigious American or foreign schools.”).

<sup>61</sup> Thomas Bartlett, *Member of Accrediting Group Has Ph.D. from ‘Notorious Diploma Mill*, CHRON. HIGHER EDUC., Apr. 2, 2004 at 29.

<sup>62</sup> *Id.*

<sup>63</sup> Regis Univ. v. Lohan, No. CV-04-462-RHW, slip op. at 6 (E.D. Wash. Dec. 6, 2004), *available at* [http://www.hep.uiuc.edu/home/g-gollin/pigeons/2004\\_12\\_06\\_Complaint\\_for\\_Trademark\\_Infringement.pdf](http://www.hep.uiuc.edu/home/g-gollin/pigeons/2004_12_06_Complaint_for_Trademark_Infringement.pdf) (last visited on Aug. 12, 2011); *see also*, Amanda Harmon Cooley & Aaron Cooley, *From Diploma Mills to For-Profit Colleges and Universities: Business Opportunities, Regulatory Challenges, and Consumer Responsibility in Higher Education*, 18 S. CAL. INTERDIS. L.J. 505, 512-15 (2009); Johnson, *supra* note 54, at 283.

<sup>64</sup> Stipulation & Order for Permanent Injunction at 1-2, Regis Univ. v. Lohan, No. CV-04-462 RHW (E.D. Wash. June 22, 2005) (stating that the parties released claims against each other and the defendants were enjoined from using the plaintiff’s name or similar designation), *available at* [http://www.hep.uiuc.edu/home/g-gollin/pigeons/St\\_Regis\\_Stip\\_and\\_Order\\_Perm\\_Injunction.pdf](http://www.hep.uiuc.edu/home/g-gollin/pigeons/St_Regis_Stip_and_Order_Perm_Injunction.pdf) (last visited on Aug. 12, 2011); *see also*, Cooley & Cooley, *supra* note 63, at 515.

<sup>65</sup> *See* Levashina & Campion, *supra* note 6, at 232.

<sup>66</sup> *See, e.g.*, Nate Delesline, *Lawsuit Upheld Against Counseling Firm*, STAREXPONENT.COM, *available at* <http://www2.starexponent.com/news/2010/dec/05/lawsuit-upheld-against-counseling-firm-ar-695665/> (last visited on Feb. 10, 2011) (In December 2010, a judge denied the defendant’s motion to dismiss a civil lawsuit brought

which is recognized by most states as a viable cause of action<sup>67</sup>, “is based on the principle that a person conducting an activity through employees is subject to liability for harm resulting from negligent conduct ‘in the employment of improper persons or instrumentalities in work involving risk of harm to others.’”<sup>68</sup> Generally, to prove negligent hiring claims, the plaintiff must demonstrate that: “(1) the employer knew or, in the exercise of ordinary care, should have known of the employee's unfitness at the time of hiring and (2) the negligently hired employee proximately caused the plaintiff's injury.”<sup>69</sup>

An important issue that arises in cases involving the misrepresentation of employment credentials is whether the employer is required to conduct an independent background check prior to hiring an employee. A duty to conduct a separate independent background check on the job candidate may exist when the employer is contractually obligated to conduct such a check.<sup>70</sup> In *Rucshner v. ADT Security Systems, Inc.*, the plaintiff brought a negligent hiring claim against an authorized security services dealer for ADT Security, Inc., after the security services dealer hired an employee who raped the plaintiff's 14 year old daughter.<sup>71</sup> The authorized security services dealer warranted in several of its contracts with ADT that all employees performing services under these agreements had passed a drug screen and a criminal background check.<sup>72</sup> Despite these assertions, the authorized security services dealer did not conduct such tests for all employees, including the employee who raped the plaintiff's daughter.<sup>73</sup> On appeal from the trial court's grant of summary judgment, the plaintiff contended that the authorized security services dealer's agreements with ADT created a contractual duty to customers which was breached by the company in failing to perform a criminal background check and drug screening on the assailant-employee.<sup>74</sup> The court determined that because of its contract with ADT, the authorized security services dealer voluntarily assumed a duty of care not to hire employees with criminal records and by hiring the assailant-employee, the authorized security services dealer breached this duty.<sup>75</sup>

The question of whether an employer should be liable for a job candidate's misrepresentation of employment credentials may also arise when the employer has a policy that

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against a local private counseling firm for negligently hiring an employee with seedy credentials who was later accused of sexually assaulting a teen boy under his care.).

<sup>67</sup> Timothy L. Creed, *Negligent Hiring and Criminal Rehabilitation: Employing Ex-convicts, Yet Avoiding Liability*, 20 ST. THOMAS L. REV. 183 (2008).

<sup>68</sup> *Connes v. Molalla Transport System, Inc.*, 831 P.2d 1316, 1381 (Colo. 1992) (quoting Restatement (Second) of Agency § 213(b) (1958)).

<sup>69</sup> *Rucshner v. ADT Security Systems, Inc. et al*, 204 P.3d 271, 278 (Wash. Ct. App. 2009); *see also*, *Carlsen v. Wackenhut Corp.*, 868 P.2d 882, 882 (Wash. Ct. App. 1994)

(“To prove negligent hiring . . . the plaintiff must demonstrate that: (1) the employer knew or, in the exercise of ordinary care, should have known of its employee's unfitness at the time of hiring, and . . . (2) negligently hired employee proximately caused the resulting injuries.”).

<sup>70</sup> *Rucshner*, 204 P.3d at 272.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 274.

<sup>74</sup> *Id.* at 278.

<sup>75</sup> *Id.* at 278-281.

requires it to verify the employee's credentials as in the case of *Wartsila North America, Inc. v. Hill International, Inc.*<sup>76</sup> The facts in that case were that the defendant, a construction firm in the business of providing expert advice and project management for major construction projects, was sued by the plaintiff, an engineering and construction company, for negligent hiring after one of the defendant's "expert" employees assigned to work for the plaintiff lacked the credentials claimed on his resume.<sup>77</sup> The employee subsequently became a primary witness in arbitration between the plaintiff and a third party. According to the plaintiff, the employee's misrepresentation of credentials caused it to lose millions of dollars in the arbitration and a related lawsuit. Specifically, the employee falsely claimed on his resume, among other things, that he held an engineering degree from Penn State and was licensed as a professional engineer in New York, Pennsylvania, and Massachusetts.<sup>78</sup>

Moreover, the plaintiff in *Wartsila* claimed that the defendant had a duty to check the employee's resume and that the verification policy utilized by the defendant created a duty to check the employee's credentials before listing them on the defendant's materials.<sup>79</sup> In response to the parties' claims, the court determined that there was evidence in the record that could lead a jury to conclude that the defendant knew or should have known of the falsity of the employee's resume. One point that the court found to be essential was that there was a policy in place requiring the defendant's human resources department to verify the credentials of its employees, which was not followed in this case.<sup>80</sup> Another point that the court found to be relevant was the fact that the employee submitted an employment application to a subsidiary of the defendant in 1991 that listed credentials inconsistent with those on his resume.<sup>81</sup>

Even when there is no policy requiring the employer to verify the job candidate's credentials, employers may still be held liable to a third party for a negligent hiring claim for the failure to verify this information. Consider the case of *Ponticas v. K.M.S., Investments*, where both the owner and the operator of a residential apartment complex were found negligent in hiring a resident manager who sexually assaulted one of the female tenants of the apartment complex.<sup>82</sup> When the resident manager was hired for the position, he listed two references on his application form—without including a telephone number for both references and failing to list an address for one of those references.<sup>83</sup> The references listed on the resident manager's application were his mother and sister.<sup>84</sup>

However, this fact was never discovered by the apartment complex because the individual responsible for hiring the resident manager did not investigate the references listed

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<sup>76</sup> *Wartsila N. Am., Inc. v. Hill Int'l, Inc.*, 342 F.Supp.2d 267, 270 (2004).

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 287.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Ponticas v. K.M.S., Inv.*, 331 N.W.2d 907, 908 (Minn. 1983).

<sup>83</sup> *Id.* at 910.

<sup>84</sup> *Id.*

and rushed in hiring the resident manager after the employee initially chosen for the position backed out.<sup>85</sup> Interestingly, in *Ponticas*, the court indicated that for negligent hiring claims “[l]iability is predicated on the negligence of an employer in placing a person with known propensities or propensities which should have been discovered by reasonable investigation, in an employment position which, because of the circumstances of the employment, it should have been foreseeable that the hired individual posed a threat of injury to others.”<sup>86</sup>

An employer, however, does not always have a duty to do an independent background check to verify the veracity of statements made by a job candidate applying for employment. This is demonstrated in the case of *Connes v. Molalla Transport System, Inc.*<sup>87</sup> In *Connes*, the defendant-employer was a Washington corporation licensed by the Interstate Commerce Commission to transport goods using long-haul trucks.<sup>88</sup> While one of the defendant’s employees was travelling through Colorado, the employee entered a Holiday Inn and sexually assaulted a night clerk at the hotel.<sup>89</sup> The night clerk sued the employer on the theory of negligent hiring because the employer failed to verify the accuracy of the employee’s application in which he falsely claimed to have had no criminal convictions, which he repeated during his interview.<sup>90</sup>

According to the *Connes* court, the degree of liability for negligent hiring depends on the expected degree of contact the employee will have with others.<sup>91</sup> The court noted that if the employment requires only very little contact between the employee and other persons there may be no need for the employer to conduct any investigation of the employee’s background “beyond obtaining past employment information and personal data during the initial interview.”<sup>92</sup> Nonetheless, the court also noted that where the job responsibilities will regularly bring the employee into contact with the public or “will involve close contact with particular individuals as a result of a special relationship between such persons and the employers, some court have expanded the employer’s duty and have required the employer to go beyond the job application form and personal interview and to make an independent inquiry into the candidate’s background.”<sup>93</sup>

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<sup>85</sup> *Id.* (The resident manager was given “20 minutes within which to give a ‘yes’ or ‘no’ answer” to accept the job or not”).

<sup>86</sup> *Id.* at 911.

<sup>87</sup> *Connes v. Molalla Transport System, Inc.*, 831 P.2d 1316, 1381 (Colo. 1992).

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> Actually, the employee had been convicted of three felonies in Colorado, which included a 1973 conviction for possession of burglary tools; a 1975 conviction for second-degree forgery and a 1977 conviction for felony theft. The employee had also been issued three citations for lewd conduct and another citation for simple assault in 1983 and 1984 and he had been issued a citation for fourth-degree assault and domestic violence in 1985. *Id.*

<sup>91</sup> *Id.* at 1321.

<sup>92</sup> *Id.*; see also *Garcia v. Duffy*, 492 So.2d 435, 441 (Fla. Dist. Ct. App. 1986) (“Where the employee’s duties include outside work with only incidental contact with others, this court . . . found no obligation on the part of the employer to make an independent inquiry into an employee’s past.”); *Betty y. v. Al-Hellou*, 988 P.2d 1031 (Wash.Ct App. 1999) (Since a manual laborer was not hired to work with potential victims, the appellate court affirmed the trial court’s grant of summary judgment of the plaintiff’s negligence claim against the employer of a the manual labor after he raped a minor child. ).

<sup>93</sup> *Connes v. Molalla Transport System, Inc.*, 831 P.2d 1316, 1321-22 (Colo. 1992).

As indicated in *Connes*, employers may be held liable because the employee holds a special relationship with the third party such as in the case of a doctor and a patient. An illustration of this type of case is *Johnson v. Misericordia Community Hospital*, which arose from a surgical procedure that was performed at the hospital by a physician.<sup>94</sup> The plaintiff claimed that as a result of the surgical procedure he suffered nerve and artery damage, causing a permanent paralytic condition of his right thigh muscles.<sup>95</sup> Based on this claim, the plaintiff sued alleging that the hospital was negligent because, among other things, it failed to investigate the abilities and qualities of the physician prior to his performance of the orthopedic surgery.<sup>96</sup> The evidence in the record showed that in his application for employment with the hospital, the physician stated that he was on the active medical staff at another hospital with orthopedic privileges, and held consultant privileges at two other hospitals.<sup>97</sup> The physician further stated that his privileges at other hospitals had never “been suspended, diminished, revoked, or not renewed.”<sup>98</sup> In another part of the application form, the physician did not answer any of the questions regarding his malpractice insurance and represented that he had requested privileges only for those surgical procedures in which he was qualified by certification.<sup>99</sup>

The hospital failed to contact any of the physician’s references and the hospital failed to conduct any reasonable investigation of the physician’s application or his statements made as part of the application process before appointing him to its medical staff.<sup>100</sup> Furthermore, shortly after arriving at the hospital, the physician was elevated to Chief of Staff.<sup>101</sup> The evidence also demonstrated that if the hospital had “adhered to the standard and accepted practice of investigating a medical staff applicant’s qualifications” it would have examined the physician’s degree, post graduate training and contacted the hospitals referred to in his application.<sup>102</sup>

If this had been done, the hospital would have determined that the physician – contrary to his statements – “had in fact experienced denial and restriction of his privileges, as well as never having been granted privileges” he claimed he had been granted at one of the hospitals listed on his application.<sup>103</sup> Also, with a reasonable investigation the hospital would have determined that various Milwaukee orthopedic surgeons and hospital personnel viewed the physician’s competence as an orthopedic surgeon as “suspect” and viewed his abilities with “a great deal of concern.”<sup>104</sup>

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<sup>94</sup> *Johnson v. Misericordia Community Hospital*, 301 N.W.2d 156, 158 (Wis. 1981).

<sup>95</sup> *Id.* at 158.

<sup>96</sup> *Id.* at 158.

<sup>97</sup> *Id.* at 159.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 159.

<sup>100</sup> *Id.* at 160.

<sup>101</sup> *Id.* at 159.

<sup>102</sup> *Id.* at 161.

<sup>103</sup> *Id.* at 161.

<sup>104</sup> *Id.* at 161.

As well as in the case of where there is a special relationship between an employee and a third party, an employer's duty to conduct a background check may also arise for a current employee when the employee's job duties have been expanded or changed from what they were when the employee was first hired.<sup>105</sup> For example, in *Williams v. Feather Sound, Inc.*, a victim of an assault by an employee of condominiums and residential home sites brought suit against the employer for negligent hiring.<sup>106</sup> The court concluded that although the employer had no duty to make a reasonable inquiry into the employee's past when he was first hired, the employer had a duty to making a reasonable inquiry into his background before changing his job duties.<sup>107</sup> In particular, when the employee was hired his job duties included performing yard work outside the condominiums.<sup>108</sup> However, three weeks later, the employee's job duties were changed to work inside the condominiums and he was given access to passkeys for the condominium units.<sup>109</sup> In reaching this holding the court explained, "[w]e think that in analyzing the employer's responsibility to check out an applicant's background, it is necessary to consider the type of work to be done by the prospective employee."<sup>110</sup>

From the holdings in *Ponticas*, *Connes* and *Williams*, it can be surmised that the answer to the question of whether employers must conduct independent background checks of job candidates depends on the facts and circumstances present in each case. Thus, an employer's liability for negligently hiring a job candidate who misrepresents his credentials will be determined on a case by case basis. Nevertheless, employers and human resource managers must be aware of the potential liability for negligently hiring candidates who misrepresent their credentials.

## 2. Negligent Retention

Besides being subject to possible negligent hiring claims, employers who retain employees who have misrepresented their credentials may also be subject to potential negligent retention claims. The tort of negligent retention "is the breach of an employer's duty to be aware of an employee's unfitness and to take corrective action through coaching, reassigning, or termination."<sup>111</sup> As in negligent hiring claims, negligent retention claims usually require that "the employer knew or should have known of the employee's propensity for the conduct which caused the injury."<sup>112</sup>

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<sup>105</sup> See, e.g., *Williams v. Feather Sound, Inc.*, 386 So.2d 1238 (Fla. Dist. Ct. App. 1980); see also *Tallahassee Furniture Company, Inc. v. Harrison*, 583 So.2d 744 (1<sup>st</sup> DCA Fla, 1991) (holding that there was sufficient evidence to find for a victim of an assault by an employer on both negligent hiring and retention because the employer knew of the employee's past criminal record and should have been aware that the employee was unsuitable for customer contact positions).

<sup>106</sup> *Williams*, 386 So.2d at 1240.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> John E. Lattin, IV, *Negligent Hiring and Retention*, HUMAN RESOURCES 2007, 25-32, 25, available at [http://www.laborlawyers.com/files/12587\\_HR%202007%20Negligent%20Hiring.pdf](http://www.laborlawyers.com/files/12587_HR%202007%20Negligent%20Hiring.pdf) (last visited on Mar. 19, 2011).

<sup>112</sup> *Kladstrup v. Westfall Health Care Ctr., Inc.*, 701 N.Y.S.2d 808, 809 (N.Y. 1998); see also, *Ray v. County of Delaware*, 239 Ad.2d 755, 757 (N.Y. App. Div. 1998) ("A claim based on negligent hiring requires that defendant

In one such case, *Blair v. Defender Services, Inc.*, the court found that there was a material factual dispute on a student's negligent retention claim brought against a corporation whose employee attacked the student while she was on campus. The employee was employed by a corporation that had a contract with the university to perform janitorial services.<sup>113</sup> Prior to the attack, the employee indicated on his job application that he did not have any criminal convictions.<sup>114</sup> The corporation took the employee's statement at face value and failed to conduct a criminal background check even though the corporation's contract with the college specifically required the corporation to perform criminal background checks on all personnel.<sup>115</sup> Furthermore, the evidence in the record showed that if the corporation had conducted a background investigation, it would have discovered that the employee was the subject of a protective order and criminal complaint.<sup>116</sup>

Likewise, in *Kladstrup v. Westfall Health Care Center, Inc.*, the court refused to grant a health care center's motion for summary judgment on a plaintiff's claim for negligent retention after the plaintiff was subjected to non-consensual sexual contact by a nurse's aide employed by the health care center.<sup>117</sup> To support its holding, the court pointed to the fact that a certified nurse aide was "responsible for hands on care to and for the resident [including] feeding and toileting and bathing." Based on these duties, the court found that the health center had a duty "to make an in-depth inquiry to assure that an applicant does not have a history of sexual misconduct."<sup>118</sup> Contrary to this duty, the evidence in the record revealed that the reference forms were incomplete and the employee failed to answer the question on his application as to whether he had "been convicted of a criminal offense and/or patient abuse/neglect."<sup>119</sup> Further, the court pointed to the fact that prior to the incident with the plaintiff, the employee was "suspected of having committed some unspecified act(s) against another patient."<sup>120</sup>

#### IV. TECHNIQUES FOR REDUCING THE IMPACT OF JOB CANDIDATES MISREPRESENTING EMPLOYMENT CREDENTIALS

Given the potential legal liability for negligent hiring and retention claims, employers and human resource managers must implement policies and procedures to reduce the impact of the

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knew of the employee's propensity to violate ethical conduct requirements between a treating therapist vis-à-vis the clients under his care or that defendants should have known of such propensity had they conducted an adequate hiring procedure.").

<sup>113</sup> *Blair v. Defender Services, Inc.*, 386 F.3d 623 (4th Cir. 2004).

<sup>114</sup> *Id.* at 626.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 627.

<sup>117</sup> *Kladstrup*, 701 N.Y.2d at 811.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

widespread trend of job candidates misrepresenting their employment credentials.<sup>121</sup> One such policy that should be implemented by all employers is a rule prohibiting this type of behavior and the consequences for violation of this rule should be immediate termination.<sup>122</sup> It is important that this policy is applied consistently on every occasion where the misrepresentation of employment credentials has occurred to protect against potential negligent hiring and retention claims, not to mention possible discrimination claims for not fairly applying the policy.<sup>123</sup>

In addition to developing a policy for dealing with currently hired employees who have misrepresented their credentials, employers and human resource managers must be diligent in ensuring that the policies and procedures used in their hiring process significantly reduce the possibility of hiring job candidates who are misrepresenting their credentials. In other words, the key is for a company to have good hiring practices which can begin as early as the posting of the job announcement. While it may seem far-fetched, statements made in this announcement can dictate whether a job candidate who would engage in the misrepresentation of credentials will be more inclined to apply for the position in the first place.<sup>124</sup>

To protect themselves from hiring job candidates who have misrepresented their credentials, employers can do the following: requiring that candidates complete job applications; thoroughly checking resumes and references; and conducting background checks.

#### A. *Requiring Candidates to Complete Job Applications*

In order to obtain adequate information about the job candidate, it is important that every candidate be required to complete an application of employment even if the candidate has submitted a resume.<sup>125</sup> Additionally, the prospective employer must ensure that the job application contains certain pertinent information.<sup>126</sup> For example, the application should require that the candidate verify the truth of the information provided by including a certification statement that must be signed by the candidate affirming that the information on the application is accurate.<sup>127</sup> Also, the certification statement should state that the candidate acknowledges that his or her application may be rejected for providing untrue or deceptive statements.<sup>128</sup>

Moreover, as part of the application process, the job candidate should be required to sign an authorization and release which allows the prospective employer to confirm and examine the

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<sup>121</sup> See Megan Oswald, Comment and Casenote, *Private Employers or Private Investigators? A Comment on Negligently Hiring Applicants with Criminal Records in Ohio*, 72 U. CIN. L. REV. 1771, 1788 (2004); Mark Minuti, Note: *Employer Liability Under the Doctrine of Negligent Hiring: Suggested Methods for Avoiding the Hiring of Dangerous Employees*, 13 DEL. J. CORP. 501, 524-33 (1988).

<sup>122</sup> *Dallas Business Litigation Attorney Warns That Companies Must Guard Against Resume Fraud*, JUSTICENEWSFLASH.COM, May 2, 2008, available at [http://www.justicenewsflash.com/2008/05/02/dallas-business-litigation-attorney\\_2008050218.html](http://www.justicenewsflash.com/2008/05/02/dallas-business-litigation-attorney_2008050218.html) (last visited on Mar. 9, 2011).

<sup>123</sup> *Id.*

<sup>124</sup> *Here's How to Hire Ethical Employees*, VIRGINIAN-PILOT, Jan. 24, 2011 at 37.

<sup>125</sup> See Oswald, *supra* note 121, at 1788; Minuti, *supra* note 121, at 524; Weiss v. Furniture-in the Raw, 306 N.Y.S.2d 253 (N.Y. Civ. Ct. 1999) (an employer hired an unidentified teenager off the street to help him deliver furniture to a customer without even asking the teenager's name and address).

<sup>126</sup> See Minuti, *supra* note 121, at 524-25.

<sup>127</sup> *Avoiding Negligent Hiring Claims in Texas*, Vol. 5, Issue 3 TEX. EMP. L. LETTER, Mar. 1994.

<sup>128</sup> *Id.*



information provided by the candidate.<sup>129</sup> It is also a good idea for the application to contain statements advising candidates that the company policy is that the misrepresentation of employment credentials – no matter when discovered – will result in immediate termination of employment.<sup>130</sup> Also, the application should include questions about criminal convictions,<sup>131</sup> but employers should be very careful of the wording used so as to not make the language overbroad and to prevent violating state laws.<sup>132</sup> It is advisable for employers to have legal counsel draft statements regarding criminal convictions or at the very least to seek the advice of counsel regarding these statements.<sup>133</sup>

The job application should also ask questions of job candidates regarding their prior employment history and this information should be verified by the employer.<sup>134</sup> Such employment history should include the name and address of former employers, dates of employment, job titles and duties, rate of pay, reasons for leaving, and supervisor's names and phone numbers.<sup>135</sup> The fact that the application contains thorough questions that will illicit pertinent information for a job candidate is not enough. The prospective employer must be diligent in verifying the pertinent information provided on the application.<sup>136</sup> Furthermore, as part of their job application, candidates should be required to provide proof of their credentials and any licensures for their profession.<sup>137</sup> And, for job candidates who have not previously been hired by employers, these candidates should be expected to present proof of their educational achievements such as diplomas, degrees, or transcripts.<sup>138</sup> In order to avoid the possibility of hiring job candidates who have received degrees from diploma mills, it is important for prospective employers to verify the accuracy of this information with two organizations, which are: (1) the Council for Higher Education Accreditation and (2) the U.S. Department of Education.<sup>139</sup>

## B. *Thoroughly Checking Resumes and References*

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<sup>129</sup> See Minuti, *supra* note 121, at 525.

<sup>130</sup> See Miller & Martin, *Dealing with Fake Degrees*, Vol. 9, Issue 8 TENN. EMP. L. LETTER, Aug., 2004 (“It’s wise to include a separate section on [the] application form for applicants to list coursework completed at unaccredited schools. That way, they can’t later claim they didn’t intend to deceive anyone by passing off degrees at an unaccredited school.”).

<sup>131</sup> *How to Avoid the Repercussions of Negligent Hiring*, Vol. 2006 No. 10 HRFOCUS, Oct. 2006.

<sup>132</sup> See Rodolfo A. Camacho, *How to Avoid Negligent Hiring Litigation*, 14 WHITTIER L. REV. 787, 805 (1993).

<sup>133</sup> See *id.*

<sup>134</sup> See Minuti, *supra* note 121, at 524-25.

<sup>135</sup> See *id.*

<sup>136</sup> *How to Avoid the Repercussions of Negligent Hiring*, *supra* note 131.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> Gina Bliss, Commentary: *Be wary of Resume Fraud and Diploma Mills*, DAILY RECORD OF ROCHESTER, Apr. 25, 2008.

As well as requiring candidates to submit applications and verifying this information, it is important for prospective employers to thoroughly check the candidates' references and the information contained on job candidates' resumes.<sup>140</sup> When checking the resume, prospective employers should investigate any problematic areas on the candidate's resume.<sup>141</sup> Problematic areas can arise from gaps in a candidate's employment history.<sup>142</sup> Gaps in employment can indicate "possible omissions and lies."<sup>143</sup> Therefore, it is crucial for prospective employers to inquire about these gaps and to confirm the responses given by the candidate in explaining these gaps.<sup>144</sup>

Besides resumes, prospective employers must verify the references provided by candidates.<sup>145</sup> Certain references are of more value than others in assessing information about a candidate. In other words, the specific type of references requested by a prospective employer can determine whether the employer will obtain valuable information to assess the candidate's qualifications. For instance, personal references, such as those from family members or friends, usually have less probative value than do professional references.<sup>146</sup> This means that as a general rule prospective employers should require that the candidate, as part of their application process, provide professional references as opposed to personal references, especially when hiring new employees.

An example of a professional reference that is extremely helpful in assessing job candidates' qualifications is a reference from a prior employer.<sup>147</sup> Indeed, a prior employer's view of a job candidate is one of the most important sources of information regarding the candidate's strengths and weaknesses.<sup>148</sup> It will provide information regarding the "applicant's attendance record, ability to follow directions, assisting co-workers, timeliness and disciplinary record."<sup>149</sup> If a candidate has failed to list a previous supervisor as one of his or her references, the prospective employer must question the candidate about this.<sup>150</sup> Further, prospective employers must actually contact previous supervisors to obtain their perceptions of job candidates.<sup>151</sup>

However, prospective employers should be cognizant of the fact that some former employers may be unwilling to provide detailed information regarding job candidates other than

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<sup>140</sup> See Oswald, *supra* note 121, at 1789; Minuti, *supra* note 121, at 527-28.

<sup>141</sup> *Avoiding Negligent Hiring Claims in Texas*, *supra* note 127.

<sup>142</sup> *Id.*

<sup>143</sup> Bliss, *supra* note 139.

<sup>144</sup> See Oswald, *supra* note 121, at 1788 (citing Donald H. Weiss, Fair, Square & Legal Safe Hiring, Managing & Firing Practices to Keep You and Your Company Out of Court 89 at 88 (3d ed. 2000)).

<sup>145</sup> See *Ponticas v. K.M.S., Inv.*, 331 N.W.2d 907, 908 (Minn. 1983); *Stephens v. A-Able Rents Co.*, 654 N.E.2d at 1315, 1318 (Ohio Ct. App. 1995).

<sup>146</sup> See *id.*; *Ponticas*, 331 N.W.2d at 908.

<sup>147</sup> See Minuti, *supra* note 121 at, 527-28.

<sup>148</sup> See *id.*

<sup>149</sup> *Here's How to Hire Ethical Employees*, *supra* note 124, at 37.

<sup>150</sup> *Id.*

<sup>151</sup> See Oswald, *supra* note 121, at 1789 ("employers should request to speak with an applicant's former boss . . .").

a confirmation of dates of employment and job titles.<sup>152</sup> One reason for this is to protect the former employer from potential defamation claims by former employees.<sup>153</sup> The good news is that many states have enacted laws providing immunity for former employers who give references, which means that prospective employers will most likely be able to obtain detailed and accurate information about job candidates from former employers.<sup>154</sup>

### C. Conducting Background Checks

Finally, to obtain comprehensive information about job candidates prior to hire or prior to changing the job duties of current employees, employers can perform background checks.<sup>155</sup> “There is no single definition of [the meaning of the term] ‘background check.’”<sup>156</sup> It can include checking references, prior employers, public record sources, and confirming employees’ academic achievements.<sup>157</sup> Background checks can also include information regarding the candidate’s criminal records, motor vehicle reports, Social Security verification and credit checks.<sup>158</sup> If an employer has a legal duty to conduct a background check, the extent of the background check required and thoroughness of the check may depend on the nature of the job.<sup>159</sup>

Employers may wonder when background checks should be conducted. A wise response to this inquiry may be that background checks should be conducted whenever employees are hired. In essence, it may be advisable for prospective employers to adopt a mandatory company policy requiring that all job candidates are investigated.<sup>160</sup> If prospective employers decide

<sup>152</sup> See *How to Avoid the Repercussions of Negligent Hiring*, *supra* note 131.

<sup>153</sup> *Id.*

<sup>154</sup> See, e.g., *Gengler v. Phelps*, 589 P.2d 1056, 1058 (N.M. Ct. App. 1978) (“A former employer has absolute immunity from damages in a slander suit when the alleged defamation stems from an inquiry addressed to the former employer and concerns an employee’s job capabilities); N.M. STAT. ANN. §50-12-1 (2010) (“When requested to provide a reference on a former or current employee, an employer acting in good faith is immune from liability for comments about the former employee’s job performance.”); DEL. CODE ANN. tit. 19, §709 (a) (2011) (“An employer or any person employed by the employer who discloses information about a current or former employee’s job performance to a prospective employer is presumed to be acting in good faith; and unless lack of good faith is shown, is immune from civil liability for such disclosures or its consequences.”); KAN. STAT. ANN. § 44-119a (2009) (“Unless otherwise provided by law, an employer, or an employer’s designee, who discloses information about a current or former employee to a prospective employer of the employee shall be qualifiedly immune from civil liability.”); see also, *How to Avoid the Repercussions of Negligent Hiring*, *supra* note 131 (“40 states now have some law protecting employers who give references”).

<sup>155</sup> See *Oswald*, *supra* note 121, at 1789-90.

<sup>156</sup> *How to Avoid the Repercussions of Negligent Hiring*, *supra* note 131.

<sup>157</sup> *Avoiding Negligent Hiring Claims in Texas*, *supra* note 127.

<sup>158</sup> *Here’s How to Hire Ethical Employees*, *supra* note 124, at 37.

<sup>159</sup> See, e.g., *Ponticas v. K.M.S., Inv.*, 331 N.W.2d 907 (Minn. 1983)); *Williams v. Feather Sound, Inc.*, 386 So.2d 1238 (Fla. Dist. Ct. App. 1980); *Garcia v. Duffy*, 492 So.2d 435, 441 (Fla. Dist. Ct. App. 1986); *Connes v. Molalla Transport System, Inc.*, 831 P.2d 1316, 1381 (Colo. 1992).

<sup>160</sup> See *Levashina & Campion*, *supra* note 6, at 240; George D. Webster, *Background and Reference Check*, 44, ASSO’N MANAGEMENT 143 (1992).

against a uniform policy requiring some type of background check of all candidates, there are certain areas where background checks may be essential in positions such as: “security personnel, firefighters, real estate brokers, financial institution personnel, bus drivers, emergency service personnel, and personnel who work with children or vulnerable adults (e.g. the elderly, the disabled).<sup>161</sup> Another instance where background checks are advisable – which may commonly be overlooked by employers – is when an employee is currently working for the company and the employer is attempting to decipher whether this employee will be qualified for another position with the company.<sup>162</sup> The failure of an employer to conduct such a background check is what led to the employer’s liability in the *Williams* case discussed earlier in this article.<sup>163</sup>

Regarding the extensiveness of the scope of a background checks, this depends on the actual job position at issue.<sup>164</sup> For example, the following jobs may be characterized as of “greater sensitivity”: (1) those “dealing with customers or the public”; (2) those involving “vulnerable people (e.g. children, ill, disabled, elderly)”; (3) those “involving personal care and medical treatment”; (4) those that involve “relatively unsupervised work”; (5) those involving the “operation of motor vehicles or dangerous equipment”; (6) those “affording substantial access to employer property and the homes and personal possession of others.”<sup>165</sup> As a result of this characterization, these types of jobs may require a more extensive background check than other types of jobs.<sup>166</sup>

When prospective employers gather information from background checks, it is important that they keep detailed written notes of the information received during these checks.<sup>167</sup> Given the fact that the Internet has made life “more transparent,” this may provide prospective employers with additional sources from which to conduct background checks of job candidates.<sup>168</sup> Arguably, prospective employers could face a greater degree of liability because of the availability of the Internet if such information was readily available to prospective employers and they failed to discover this information. Internet sources that are now commonly used to investigate prospective job candidates include social media sources such as Twitter and Facebook.<sup>169</sup> The problem with these social media sites is that there is no verification process involved and the information can be edited by anyone with access to the Internet, which means that companies utilizing these sites could potentially be exposing themselves to liability for violating the Equal Employment Opportunity Commission’s hiring guidelines and may

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<sup>161</sup> Levashina & Campion, *supra* note 6, at 236.

<sup>162</sup> See *Williams v. Feather Sound, Inc.*, 386 So.2d 1238 (Fla. Dist. Ct. App. 1980).

<sup>163</sup> See *id.*

<sup>164</sup> Levashina & Campion, *supra* note 6, at 240.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> See Oswald, *supra* note 121 at, 1790.

<sup>168</sup> *Here’s How to Hire Ethical Employees*, *supra* note 124, at 37.

<sup>169</sup> *Should You Check Facebook before Hiring*, WASH. POST, Jan. 22, 2011, available at <http://www.washingtonpost.com/wp-dyn/content/article/2011/01/22/AR2011012203193.html> (last visited on Feb. 21, 2011)(“A Microsoft-sponsored survey from December 2009 found that 75 percent of recruiters and human resource professionals say their bosses require them to research job applicants online. Seventy percent report they have rejected candidates after such sleuthing.”)

unintentionally be engaging in behavior that violates the Fair Credit Reporting Act.<sup>170</sup> As a result, prospective employers have to be careful in using the Internet, including social media sites, to screen job candidates because they could inadvertently expose themselves to potential liability in their attempt to protect themselves from hiring candidates who have misrepresented their credentials.

## V. CONCLUSION

In recent years, prospective and current employers have been faced with the prevalent trend of job candidates misrepresenting their credentials through various means including candidates: (1) engaging in resume fraud; (2) providing false references; and (3) failing to disclose pertinent information in the job application and during the interview. Factors that have been asserted for the reason for this recent trend include weak economic conditions and the pervasive existence of diploma mills throughout the country. Job candidates' actions of misrepresenting their credentials can negatively impact the hiring agency and result in potential legal liability. In order to defend against such legal liability, when hiring employees, employers and human resource managers should: require that job candidates complete employment applications; thoroughly check resumes and references; and conduct background checks.

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<sup>170</sup> See *A Summary of Your Rights Under the Fair Credit Reporting Act*, available at <http://www.yale.edu/hronline/careers/screening/documents/FairCreditReportingAct.pdf> (last visited on Feb. 21, 2011) (“The federal Fair Credit Reporting Act (FCRA) promotes the accuracy, fairness and privacy of information in the files of consumer reporting agencies.”).