PRAESIDIUM

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UNDERSTANDING NEGLIGENT HIRING:

Preventing Sexual Abuse Through Comprehensive Screening Practices

WHO IS PRAESIDIUM?

Praesidium is the leading innovator of scientifically based solutions designed to transform the way organizations approach the prevention of sexual abuse. Praesidium's expertise, consulting, and solutions help to foster safer environments for children, vulnerable adults, staff, volunteers, and all parties involved. For over 30 years, Praesidium has trained more than one million people online and hundreds of thousands in person. As the largest and most comprehensive sexual abuse risk management firm globally, Praesidium knows how sexual abuse happens and, more importantly, how to prevent it.

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Keeping consumers safe begins before they walk in your door or sign up for your services. How you screen and select individuals with access to your consumers enormously impacts your organization's success. It also presents an opportunity for risk and liability.

Comprehensive and consistent screening and selection processes are critical layers of protection that you must have in place for the consumers you serve. Safety-focused hiring practices can also protect your organization in the event of an allegation or instance of harm.

WHAT IS NEGLIGENT HIRING?

Negligent hiring is a civil cause of action. An employer can be liable for negligent hiring because they hire someone who causes harm, and the employer knew or should have known that the individual "was likely to harm others in the position for which they were hired." [1]

In other words, an organization hired someone inappropriate and unsafe for the role even though information existed that would or should have cautioned against hiring that individual.

Tragically, a recently decided case in Texas highlighted the potential severity of the negligent hiring risk.

In 2019, a Charter Communications/Spectrum employee, Roy Holden Jr., made an in-home service call for 83-year-old Betty Thomas. The next day, Holden returned to the home in his Charter Spectrum van, murdered Ms. Thomas, and stole her credit cards.

Criminal charges, of course, followed, but the civil judgment made historic headlines. In one of the largest negligent hiring verdicts in history, the Texas jury that heard the case returned a decision ordering Charter Spectrum to pay upwards of $330 million in compensatory damages and an unheard-of $7 billion in punitive damages.

As an employer, you may be thinking, "Hold on! He committed this act completely independently and not even while on a service call. How can the company be held responsible? What did they do wrong?" According to the jury: negligent hiring.

By returning this decision, the jury found that Charter/Spectrum displayed "'systemic failures' in the company's pre-employee screening, hiring and supervision practices." [2] Charter/Spectrum "negligently hired Holden," and "the attack was a foreseeable result of its action."[3]

The plaintiff's attorneys successfully argued that:

- Holden was hired even though "his resume was a complete fiction";
- The company did not follow its stated employment verification policies "and would have rejected his application for employment if it did";
- An "adequate" employment verification and "background check would have revealed" Holden had been fired for "offenses including harassment of co-workers and forgery"; and
- Before the murder, "he had been issued a written disciplinary action and had exhibited a pattern of stealing credit card and personal finance information from elderly female customers."[4]

WHY IS NEGLIGENT HIRING IMPORTANT FOR YOUR ORGANIZATION?

A recent Society for Human Resources Management (SHRM) article published this initially reassuring headline: *Negligent Hiring Risk Less Than Employers Believe*.

Following the **$7+ billion** judgment against Charter/Spectrum, SHRM's article contextualizes the frequency and severity of negligent hiring claims in the overall landscape of civil judgments and tort liability. For businesses in general, SHRM accurately reports that the risk is low, but for organizations like yours—**people serving people**—the statistics are sobering.

A recent report by the Legal Action Center and National Workrights Institute found that between 1974 and 2022, **435** trial court decisions held employers liable for negligent hiring. An additional **2,260** cases in the same period included negligent hiring and claims settled before trial.

Of the employees and responsibilities involved in the 435 cases that went to trial:

"In **97 percent** of cases . . . the roles entailed:

- Contact with vulnerable populations such as children, [individuals with disabilities], and older adults.
- Operation of a motor vehicle.
- Access to financial assets or customers' homes.
- Use of force, such as police officers or security guards.
- Use of firearms.
- Access to alcohol."

Consider your organization:

- Does your organization serve any vulnerable populations? Minors? Individuals with disabilities? Older adults?
- Do you provide any transportation?
- Do you ever serve or meet with consumers in their homes or places of residence? Do you provide residential services or programs like dorms, overnight care, or senior living?

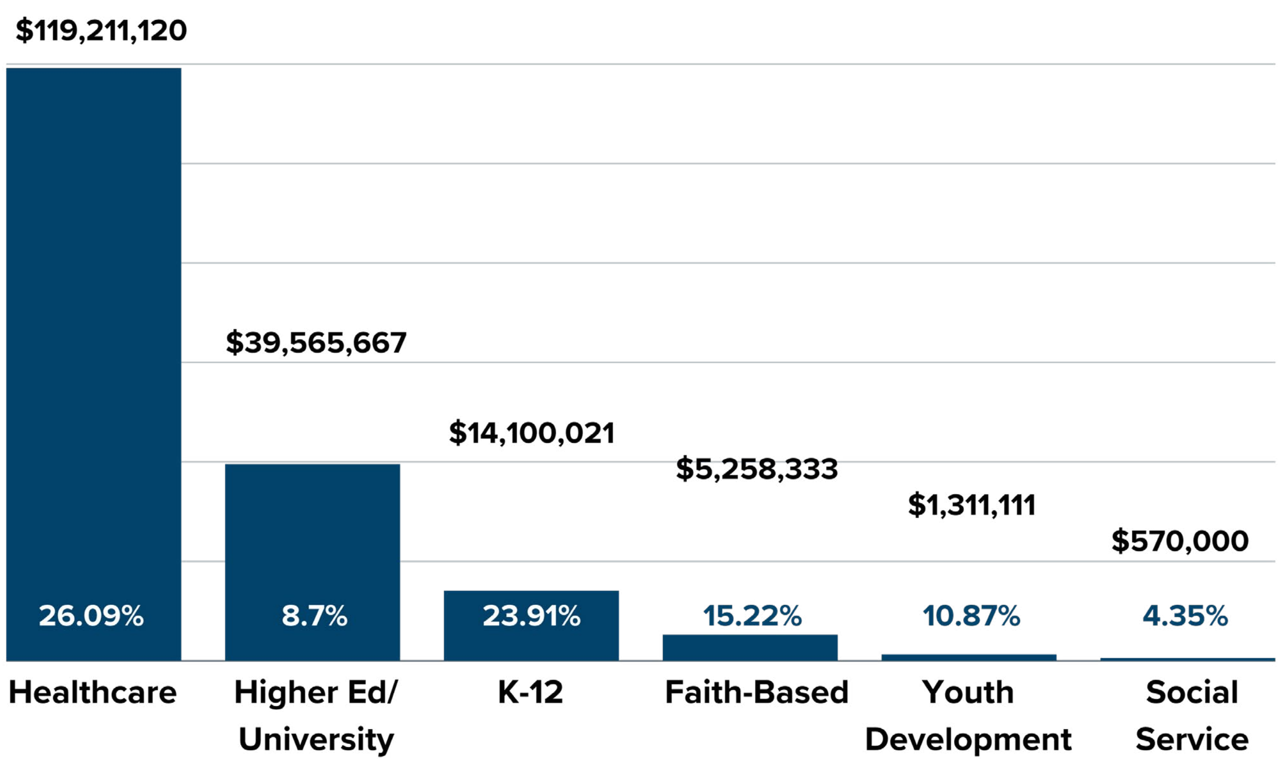
If you answered yes to any of those questions, negligent hiring is an important risk for your organization to understand and mitigate.

NEGLIGENT HIRING & ABUSE PREVENTION

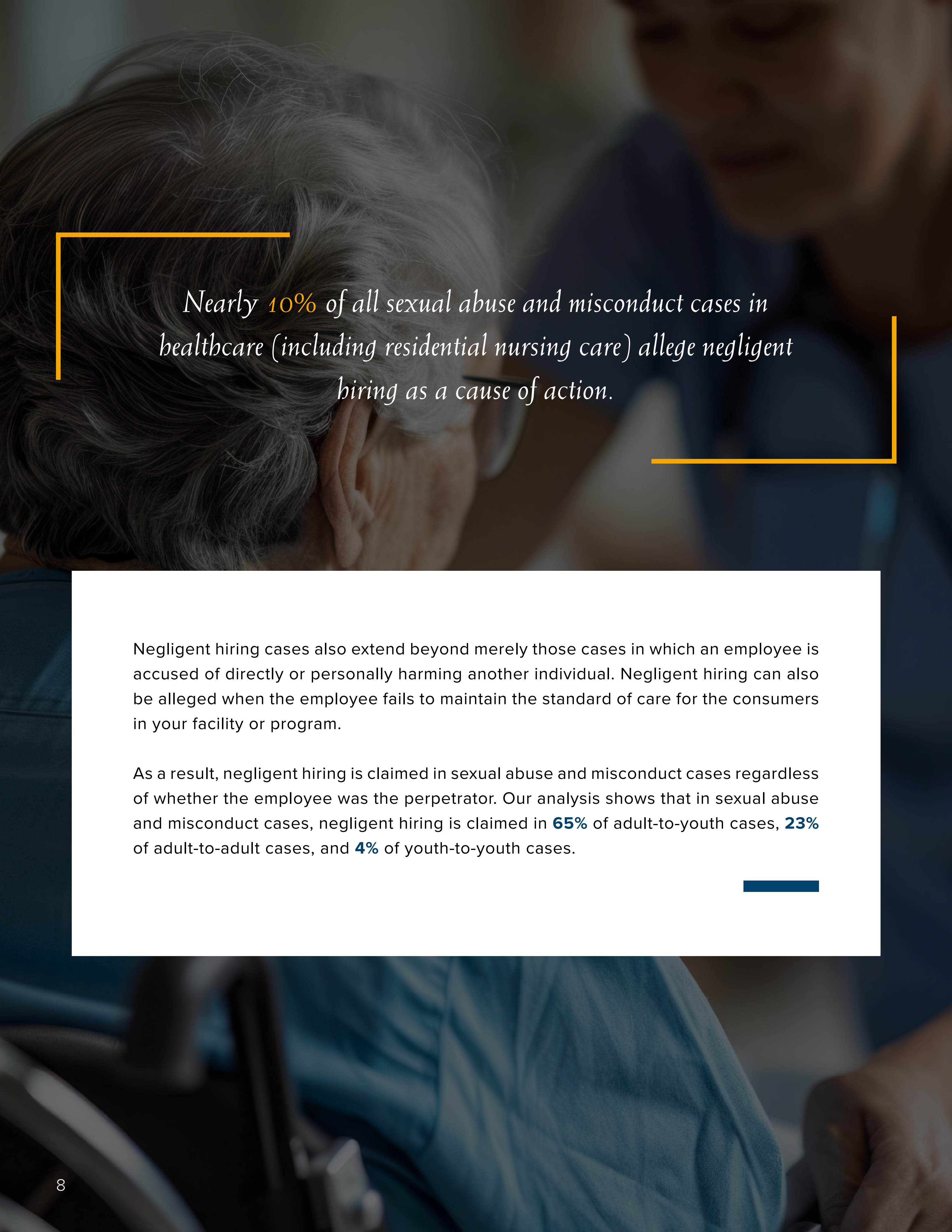
Praesidium analyzed judgment and settlement data for sexual abuse and sexual misconduct cases to explore which sectors experience the highest rate of negligent hiring claims and the average payouts of these claims. Figure 1 below shows that while healthcare and K–12 industries experience the highest rate of negligent hiring claims in cases involving sexual abuse or misconduct (26.09% and 23.91% respectively), healthcare and higher education have the highest average payouts.

Figure 1

AVERAGE PAYOUT FOR NEGLIGENT HIRING CLAIMS BY INDUSTRY



This analysis provides a glimpse at how costly negligent hiring cases can be. For those cases with available settlement or judgment information, the average payout by industry for sexual abuse or misconduct cases involving negligent hiring ranges from half a million dollars in the social services sector to $100+ million in the healthcare space.



Nearly 10% of all sexual abuse and misconduct cases in healthcare (including residential nursing care) allege negligent hiring as a cause of action.

Negligent hiring cases also extend beyond merely those cases in which an employee is accused of directly or personally harming another individual. Negligent hiring can also be alleged when the employee fails to maintain the standard of care for the consumers in your facility or program.

As a result, negligent hiring is claimed in sexual abuse and misconduct cases regardless of whether the employee was the perpetrator. Our analysis shows that in sexual abuse and misconduct cases, negligent hiring is claimed in **65%** of adult-to-youth cases, **23%** of adult-to-adult cases, and **4%** of youth-to-youth cases.

BEYOND HIRING:

ORGANIZATIONAL HUMAN RESOURCES (HR) PRACTICES

In any negligence case involving HR practices and procedures, you can expect a complete review of your employee practices. Negligent hiring allegations are often made alongside similar, related causes of action, such as:

- Negligent supervision
- Negligent retention
- Negligent training
- Negligent investigation
- General/Unspecified negligence

When developing a robust screening and selection process, don't stop thinking critically about safety practices at the point of hire. Ongoing employee supervision, training, remediation, performance reviews, and investigation practices are essential. Praesidium's analysis of publicly available judgment and settlement data indicates that of reported negligent hiring cases:

- 94% also claim negligent supervision
- 61% also claim negligent retention
- 30% also claim negligent training
- 6% also claim negligent investigation
- 25% also claim general negligence

SCREENING & SELECTION BEST PRACTICES

> When an employer is held liable for negligent hiring, the reason is often because they did not conduct any background screening or review before they hired the employee involved.[5]
>
> ***- Lewis Maltby, President of the National Workrights Institute***

The most reliable way to prevent and defend against a negligent hiring claim is to consistently and thoroughly employ rigorous screening practices, and by "exercising due diligence and reasonable care in the hiring process, including conducting a background check."[6]

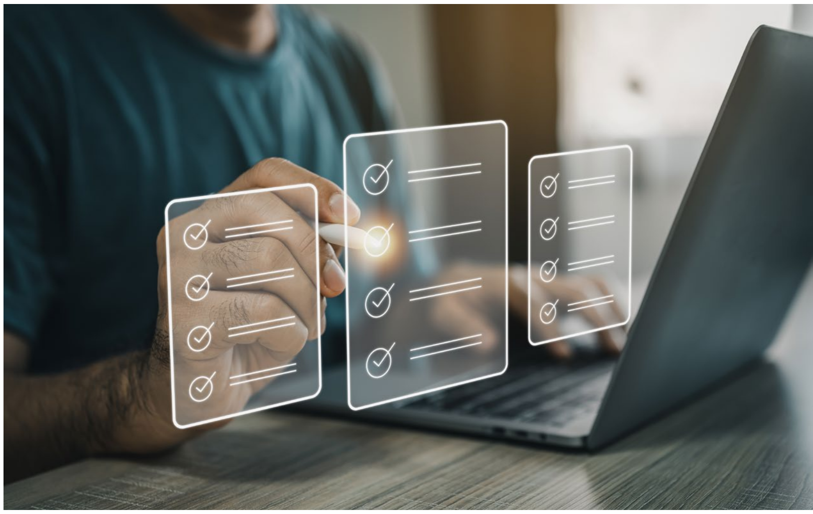
Conducting the background check is an obvious jumping-off point, but you must also use that background check—and the rest of your screening process—to evaluate candidates on a case-by-case basis. The Legal Action Center and the National Workrights Institute collaborated to create the report Second Chance Employment – Addressing Concerns About Negligent Hiring Liability. Their findings demonstrate that "while employers who do not conduct criminal record checks sometimes incur liability, employers who conduct record checks and evaluate the results when making hiring decisions are rarely held liable."[7]

Keep in mind that Praesidium recommends consistent and comprehensive screening not only to reduce the risk of liability, but also because strong screening and selection processes can reduce the risk of abuse in your programs.

1. Comprehensive Background Checks

While there is no standard or universal background check, the best practice is a background check that covers at least the most recent seven years and includes most, if not all, of the following components:

- ☐ Social Security Number trace
- ☐ Federal/County criminal record search
- ☐ National criminal database check
- ☐ National sex offender registry search
- ☐ Motor vehicle report
- ☐ Education verification
- ☐ Employment verification



Other searches can be part of your screening process but are less common and may depend on the type of role you are hiring for. These can include civil records, exclusion lists, credit reports (no credit score), and professional license verification where applicable.

For some applicants, less information may be available, particularly if you hire minors or allow minors to take on volunteer roles. For adolescent/minor employees or volunteers with access to consumers, use more in-depth written applications and personal interviews when employment or criminal histories are unavailable.

While a background check may return a vast amount of information about an applicant, the reports are only as effective as you make them:

1. Do not do background checks in a vacuum. The report should be just one set of information among others in a comprehensive process.

2. Plan ahead.

   - **Pre-Check**: Before running a comprehensive background check, your organization should already have policies in place about what in a background report can or will disqualify an applicant or what may trigger the need for additional information gathering.

   - **Post-Check:** Running the check may cross off an important item on your screening process to-do list, but you must also have a policy in place regarding who then reviews it and how it is to be considered alongside everything else gathered in your screening process.

Merely putting the results into an employee's file is not sufficient and does not demonstrate that your organization has done its due diligence.

3. Make no exceptions. When your policy states that you require background checks for all applicants or volunteers, that must extend up and down the chain of command without exception. This may mean requiring a background check for the CEO or incoming board member, which is appropriate. A comprehensive safety culture starts at the top.

Finally, a robust background screening program requires repeat background checks and ongoing reporting requirements for existing or returning employees and volunteers:

- Conduct background checks at least every two years for continuously employed employees or volunteers.
- Recheck seasonal employees or volunteers at the time of rehire, regardless of length of time away from the organization.
- Require all current employees and volunteers to immediately notify their supervisor and/or HR of any arrests or convictions during employment.

CASE STUDY 1

An elementary school art teacher was arrested for indecency with a minor after fondling a student's genitalia. The teacher was charged, though not convicted, and was placed on a sex offender registry due to the incident. He was fired from his position at the school but secured a job at another elementary school.

At the second school, he continued to engage in inappropriate touching of students and was overheard discussing sexualized topics with children. Other teachers reported his behavior to the principal and shared that they did not feel students were safe with him. Rather than being fired or reported, the teacher was transferred to yet another school.

At the third school, the teacher ingratiated himself with a particular student and their family and began engaging in private tutoring. In that setting, sexual abuse began and became persistent. When the abuse was exposed, the teacher was arrested, but the student's family also successfully sued the third school, claiming that the school should have been more thorough in its screening process.

2. Thorough Interviews & Behavioral Questions

Interviews, when done well, are your primary and best opportunity to assess how the applicant will perform in their potential new role at your organization. They are a chance to understand the applicant's background, motivation, and interests. The interview is also the applicant's best opportunity to learn more about your organization and expectations.

Interviews provide an opportunity to understand whether this applicant is appropriate for the role and whether they will execute it safely while protecting your organization and the consumers in your care.

- Interviews should be face to face whenever possible. Even in today's evolving workplace, inperson is still preferred if available, particularly if appropriate for the role (for example, if the individual's role will be in-person with consumers). If in-person interviews are not possible, virtual interviews with cameras are the next best alternative.

- Ensure more than one interviewer meets with the candidate in a panel setting or individual interviews. This ensures more perspectives, opportunities for questions that touch on different priorities, and multiple impressions of the candidate. Using multiple interviewers also reduces the opportunities for favoritism or bias if an applicant has a connection to the organization.

- Most importantly, interviews should include behaviorally based questions. Behaviorally based questions require the applicant to reflect on situations they have faced in prior settings, as past behavior is the best indicator of how a candidate will perform in the future. Behaviorally based questions should be designed to assess employee and volunteer applicants for potential abuse risks and to determine whether this applicant is appropriate and safe to work with your consumers. You should also ask about their interest in the role, career goals, and what drew them to apply.

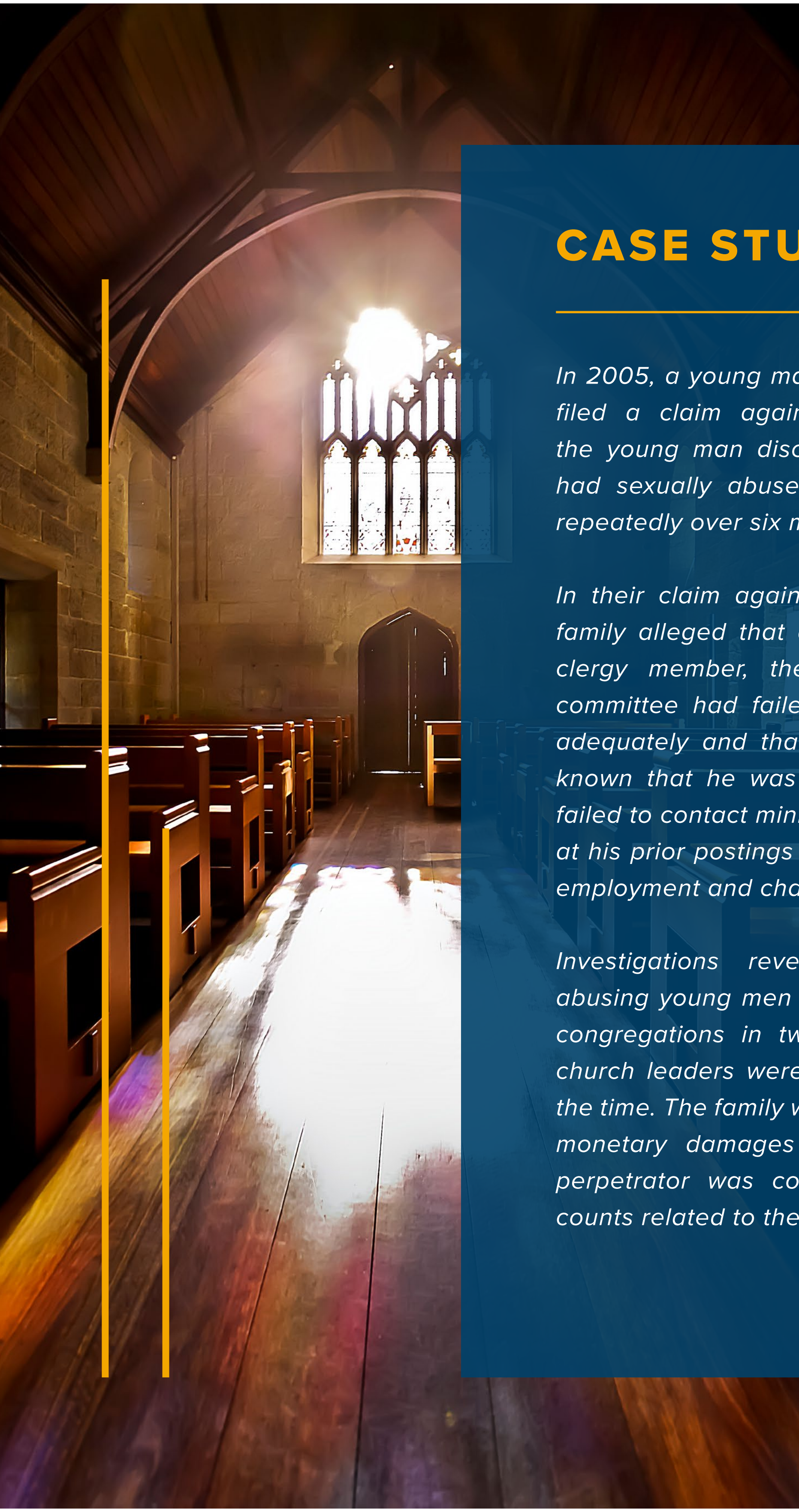
3. Reference Checks

At a minimum, you should complete three reference checks per applicant. References should include two professional references and at least one personal or family reference for organizations that directly serve children, patients, older adults, or vulnerable populations.

Why interview a personal or family reference? Won't they all say glowing things? These references likely provide the fullest picture of the applicant in all facets of their life and may have more information than others about how the applicant might respond in certain situations. Your questions for personal references may include things like "Would you have any concerns about this individual working with children/having access to financial or personal information?" "How does the applicant handle stress or conflict?" or even something as simple as, "Is there anything in that job description that gives you pause for this applicant?" after briefly explaining the role. Personal references can be valuable for screening applicants "out," even if they are less valuable as a data point to screen someone "in."

Reference checks for all applicants for similar positions should follow consistent reference questions, and should include behaviorally based questions.

Reference checks should also be completed for minors applying for roles with your organization. When screening minors, you may need to modify the questions to make them more appropriate for potential references like coaches, teachers, or clergy rather than professional contacts.



CASE STUDY 2

In 2005, a young man and his family successfully filed a claim against their local church after the young man disclosed that the new minister had sexually abused him. The abuse occurred repeatedly over six months.

In their claim against the church, the plaintiff's family alleged that during the search for a new clergy member, the church and their search committee had failed to screen the perpetrator adequately and that they knew or should have known that he was unfit for ministry. They had failed to contact ministers or other church officials at his prior postings to "obtain a reference on his employment and character."

Investigations revealed that he had been abusing young men from at least two of his prior congregations in two different states and that church leaders were aware of those offenses at the time. The family was able to recover significant monetary damages from the church, and the perpetrator was convicted of multiple criminal counts related to the abuse.

4. Beyond Employees—Include All Individuals with Access

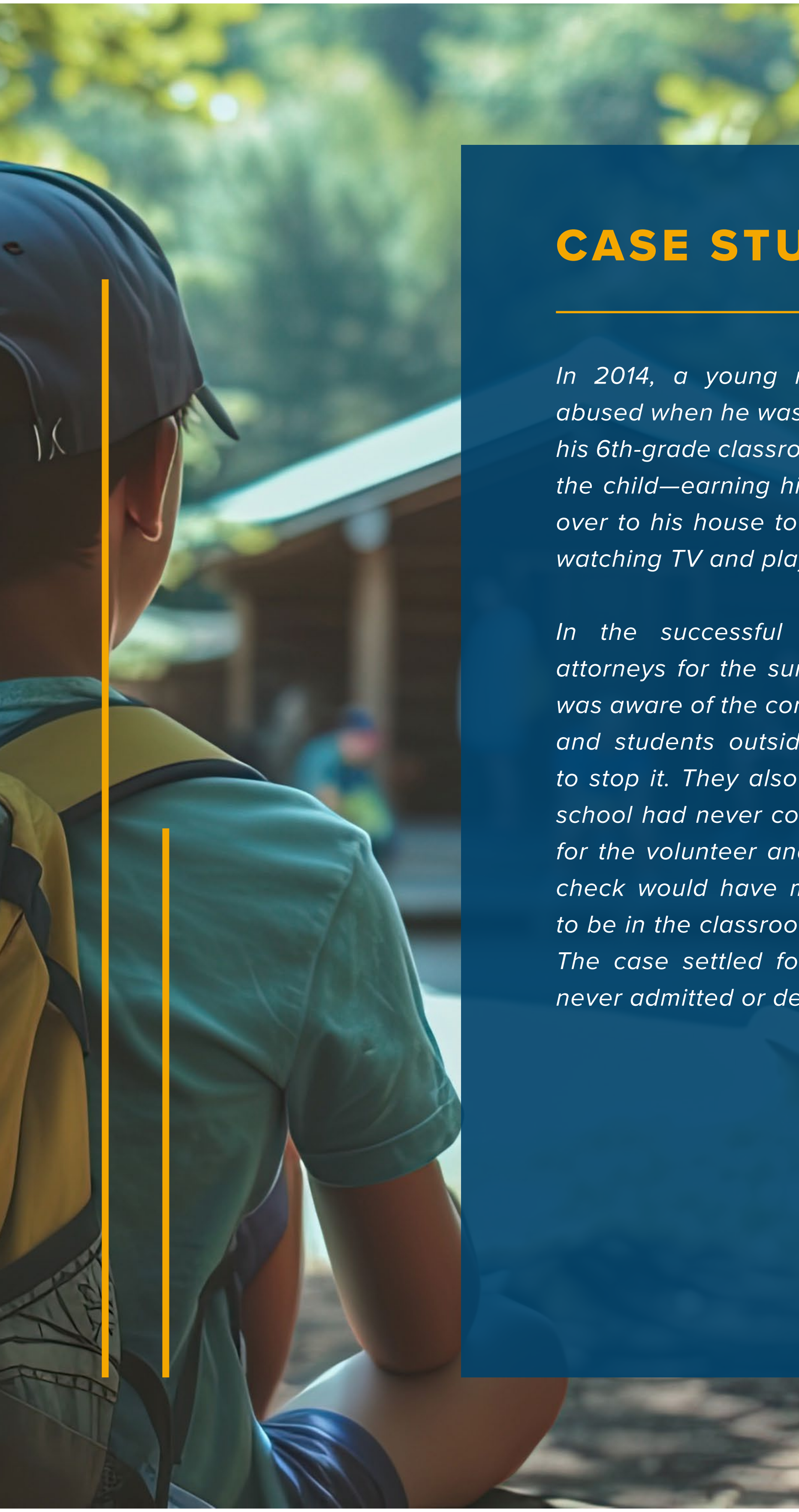
Maintaining rigorous screening procedures protects your organization, staff, and consumers from allegations or opportunities for harm. Unfortunately, we see organizations leave themselves at risk by failing to screen **all** individuals with access to their programs and/or consumers, such as:

- Executives, leaders, and board members, particularly those with long-standing relationships with the organization and/or community;
- Volunteers (including volunteer coaches, field trip chaperones, etc.);
- Contractors or vendors; and
- Other third parties with access to your facilities or with whom your program shares space.

Use these two key factors to assess your screening policies: **access** and **autonomy**. The frequency and duration of access to consumers and the amount of autonomy an employee or volunteer will have should be reflected in the level of screening required for that individual.

- Anyone with access to your consumers, facilities, or programs should be subject to screening, and individuals with unsupervised, frequent, and/or lengthy access to consumers should be subject to your most rigorous screening protocols.

- Individuals with more autonomy, and therefore less oversight, should also be subject to strict screening requirements. Consumers have fewer layers of protection when interacting with staff or volunteers who have more freedom and decision-making in their roles, and staff are also less likely to question the behavior of supervisory or leadership staff. This combination of factors triggers the need for more robust screening.



CASE STUDY 3

In 2014, a young man disclosed that he was abused when he was 11 years old by a volunteer in his 6th-grade classroom. The perpetrator groomed the child—earning his trust at school, inviting him over to his house to jump on the trampoline, and watching TV and playing video games together.

In the successful lawsuit that followed, the attorneys for the survivor argued that the school was aware of the contact between the perpetrator and students outside of school but did nothing to stop it. They also argued successfully that the school had never completed a background check for the volunteer and that a criminal background check would have made the volunteer ineligible to be in the classroom based on prior convictions. The case settled for $1+ million, but the school never admitted or denied liability.

5. Documentation is Nonnegotiable

If you have ever worked with an attorney or insurance company, you have heard a version of this phrase: "*Document it, or it didn't happen*."

For every screening and selection step recommended above, a documentation recommendation is built in: applications, background check reports, reference check notes, employment verifications, communication with applicants, background re-checks for current employees, and so on. Every step of your screening and selection process must be **documented**.

In addition to being documented, this information must also be **organized** and **accessible**. In the event of a claim or suit, you will be required to provide all the information you have available regarding any employees or volunteers involved. Work with your counsel or other advisors to determine the applicable records retention guidelines in your jurisdiction or industry and ensure your practices meet those requirements as the minimum standard.

6. Comprehensive Screening ***and*** Selection

If you have followed the recommended best practices through the steps above, you will have collected valuable information and documentation about the applicant. You will have spent considerable time and energy on this process, and you may be getting excited about your top candidates. But gathering the information isn't enough, and many organizations often miss a crucial step—someone must be responsible for reviewing the entirety of the applicant's file to screen them against your organization's designated criteria.

"Screening and selection" are often considered one and the same. However, **screening** and **selection** must be considered separately. It can even be valuable to divide the decision-making responsibilities among different individuals when possible.

- **Screening**: Review the full background check report, reference check notes, and interview responses to look for any red flags or disqualifying data points. Does this person meet your requirements to be eligible for employment? Do you have any safety concerns for your organization or consumers?

- **Selection**: Determine if this person has the skills and qualifications necessary to meet your job description's needs. Will they be a good fit for your team? Do their goals align with your organization? Will they add to your culture of safety?

By combining screening and selection into one decision-making process, you can inadvertently put hiring managers in the position of trying to balance screening concerns with selection needs. Organizations may make exceptions, be less thorough, or fail to follow through on required screening procedures. Time is often the enemy; during the late stages of the hiring process, everyone is eager to get the selection process wrapped up, secure the candidate you want, and get them started. But as we know from our work with organizations like yours, this can also lead to screening failures—an applicant is selected but not screened. For example, reference checks are taking longer than expected. Summer training is starting this month, and the camp is having trouble finding counselors, so they hire the applicant. The camp is now in an indefensible position in the event of an incident if anything in the reference checks would have disqualified the individual from employment.

Avoid these common traps by ensuring your organization has the following in place:

- ☐ A written policy and process for a systemic review of the entire applicant file following all screening steps, particularly any convictions or arrests discovered through the background check.
- ☐ Defined criteria for what will disqualify an applicant for any position within the organization, or for specific roles within the organization.
- ☐ Consistent guidelines for who will make final selection decisions regarding applicant eligibility, and clear directives for how that individual should communicate those decisions with the hiring manager (when they are not the same person).
- ☐ Clear requirements for hiring managers regarding when they can make final selection decisions and employment offers, after receipt of all screening information and any related screening decisions.
- ☐ A “no exceptions” policy for screening requirements.

AVOIDING THE COMPLACENCY TRAP

Hiring and onboarding new employees and volunteers are challenging tasks. They take time, energy, and resources away from ongoing operations, and as a result, we often see organizations cut corners. Screening and selection easily become "check the box" operations delegated to one person, and employers are often eager to get it done quickly.

When developing and enforcing its screening and selection procedures, your organization must understand the importance of selecting the right candidate based not just on their skills and experience but also on how they will fit into your overall organizational safety priorities, protecting you from future liability by protecting your consumers.

Do a quick assessment of the following best practices:

- ☐ Does your hiring process require more than one individual to be involved in the hiring decision?
- ☐ Does your application clearly state that your organization has a zero-tolerance policy for abuse?
- ☐ Does your organization have written policies indicating what in a background check would disqualify an applicant from certain positions?
- ☐ Does someone in your leadership team champion HR safety practices, for example, by spot-checking files to ensure all screening procedures have been completed and reviewed, ensuring ongoing background checks for current employees, or ensuring follow-up calls if references can't be reached immediately?
- ☐ Are you confident in your organization's documentation practices?

Prioritize screening and selection as not just an employment function but also a critical component of your risk management scheme. Be sure that all employees with hiring and screening responsibilities understand the vital role they play in protecting your organization and those you serve.

People are what make your businesses and programs possible, and hiring is an exciting opportunity to add new perspectives, ideas, expertise, and person-power to your team.

By clearly defining, following, and documenting your screening procedures, you allow your organization to select the best individuals to serve your consumers while upholding your mission safely—and you provide the best protection possible against an allegation of negligent hiring.

If your organization would like more guidance or support regarding hiring and screening best practices, policy guidance, or risk assessments related to abuse prevention, Praesidium can help. Contact Praesidium today at info@praesidiuminc.com

And for more information about screening and selection tips, FAQs, and best practices, check out these additional Praesidium resources:

- Tips for Effective Interviews
- Background Check FAQs
- Screening Out Offenders
- Fair Credit Reporting Act - How the Right Procedures Can Protect Your Organization
- Understanding Employment & Education Verifications

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6. Ibid.

7. Maltby & Douglas (2023). Second Chance Employment Report.

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PRAESIDIUM SCREENING SERVICES

Adopting a solid screening and selection process is your first line of defense in creating a safe environment. A thorough, consistent screening process may also discourage would-be offenders from targeting your organization. Failure to discover a known offender can affect those in your care and the organization's reputation, financial stability, and trust within the community. Who you should screen can depend on many factors, such as if the person is a new full-time hire, a seasonal hire, or even a current employee. In determining the types of checks to utilize, organizations should follow all state, federal, and licensing regulations and consider an individual's level of access.

Praesidium Screening Products Available:

- Employment Credit
- Confidence Multi-State Criminal & Sex Offender Database w/Alias
- 7 Year County Criminal Records Search: Current County of Residence
    - *Additional Counties Added as Needed Based on 7 Year Address History*
- County Civil Records Search (Upper) 1 County
- Motor Vehicle Records Search
- Employment Verification
- Education Verification
- Personal Reference
- Professional Reference
- International Criminal Search
- Social Media Search

For more information on Praesidium's Screening Services and the products offered please visit:
https://bit.ly/praesidium-screening-descriptions:

Praesidium offers a selection of background screening packages plus a la carte services to empower your organization to conduct right-sized research. Praesidium's team can help contextualize the screening process as part of an overall culture of safety and discuss how screening works in hand with other abuse prevention efforts. Praesidium's team can also help you understand who to screen, how often, and the importance of rescreening.

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