



Helping You Run Your Condo or Homeowners Association Legally and Efficiently

DECEMBER 2018

FEATURE

Don't fall into a costly legal trap called "negligent hiring."

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Avoid Insider Crimes with Four Safeguards for Employee Hiring Process

Every person who works in your community—from maintenance employees to office staff—will interact with members and potentially have access to sensitive information, including financial documents. When employees are trustworthy, this exposure isn't an issue. But it's incredibly difficult to ensure that a new hire won't turn out to be an opportunist who uses her position for an ulterior motive. This creates serious risks for you and the association. If news of a crime the employee has committed gets out, your community's reputation may plummet and you may fall into a costly legal trap called "negligent hiring." The association or your management office may be liable because you exposed members or visitors to dangerous employees through poor hiring practices.

So how can you be as careful as possible when hiring employees who will have access to homes and gain the trust of members? Learn about your responsibility when hiring and set up the following four safeguards for your hiring process that protects you from liability and your members from harm.

Court Will Evaluate Due Diligence, 'Reasonable Care'

When deciding negligent hiring claims against employers, a court will first consider whether the association or management company could have done more to prevent the crime. In particular, was enough information gathered about the job applicant's past to make a reasonable hiring decision? Or was a vital piece of information missed, such as a criminal conviction that would have warned the association that the prospective employee was likely to commit a crime?

Not all employee crimes are the employer's fault. An association can't always be hyper-vigilant regarding crime, but it must be careful about the kinds of people who are hired. You must do your best to exercise "reasonable care" when making hiring decisions. That's because an employer's job is to prevent "foreseeable" risks. A risk is foreseeable when "a person of average common sense would recognize the danger."

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Avoid Insider Crimes

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In general, whether it's foreseeable that a job applicant will commit a crime depends on two factors: the nature of the job and the applicant's background.

#1: Nature of the job. Some jobs are riskier than others, and courts expect associations and management companies to be more careful when they are filling high-risk positions.

Some positions that are high risk include: (1) custodial positions, including maintenance operators, property managers, garage attendants, and on-site repair workers; (2) positions designed to assist and protect members, including security guards, courtesy patrols, and doormen; and (3) positions that involve contact with members.

#2: Applicant's background. Past criminal convictions, a history of illegal drug use, or a violent mental disorder are all good indicators that a candidate is high risk. Suppose, for example, that a maintenance worker strikes a member. No one would reasonably expect someone with a spotless record to do this, but if the worker was a convicted felon with a history of job and disciplinary problems, most people would expect you to have foreseen that he might commit a crime, and they might question your judgment in hiring a felon for a position with member contact.

Safeguard #1: Ask for Critical Information

Your first line of defense is to get applicants to give you critical information on your employment application form. You need to get this information from all applicants, so make sure all applicants fill out application forms, even if they

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COMMUNITY ASSOCIATION MANAGEMENT INSIDER [ISSN 1537-1093 (PRINT), 1938-3088 (ONLINE)]
is published by Vendome Group, LLC, 237 West 35th St., 16th Fl., New York, NY 10001.

Volume 18, Issue 6

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Avoid Insider Crimes

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have already submitted resumes. Ask for the following information, with input from the association's attorney.

History of criminal convictions. Ask whether the applicant has ever been convicted of a crime, and if so, what crime. Some states, such as New York, have laws that bar you from asking applicants about arrests or criminal accusations that didn't result in convictions. But these state laws may let you ask about charges currently pending against applicants. You should speak to your attorney to find out what your state allows.

Previous employment information. Find out where the applicant has worked and get the name and telephone number of a reference at each place of employment so that you can contact the references.

Required licenses. If you're hiring the applicant for a position that requires a license, ask whether the applicant's license has ever been revoked. For example, if your state requires security guards to be licensed, get license numbers for all applicants for security guard positions.

Personal references. Have the applicant provide the names and contact information of three personal references.

Applicant's certification that information is accurate. This is an important step because it puts pressure on the applicant to be honest. Like our *Model Agreement: Ask Job Candidate to Certify Employment Application*, your pre-employment statement in which the applicant swears that the information is true should be attached to the application.

Safeguard #2: Look Out for Common Red Flags

You don't have to reject an applicant just because you uncover something suspicious. But you do have to get an explanation. Here are the most common things that should put you on notice that something may be wrong.

Gaps in employment history. More often than not, any compromising information in the applicant's past is somewhere in these gaps.

Suspiciously short terms of employment. This is a clue that the applicant might be hiding something.

Failing to answer any questions on the application form. This is another indication that the applicant might be trying to hide something.

Safeguard #3: Conduct Background Check

Relying on the information an applicant provides isn't enough. You should conduct a thorough background check on all applicants. This involves double-checking the facts stated in the application, contacting references, and getting copies of certain records.

You can do some of this checking on your own, but you'll probably have to use a pre-employment screening company to get certain critical records. Hire a reputable screening firm to check applicants' criminal records, driving records, credit reports, military records, and possible name changes before you hire them.

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Avoid Insider Crimes*(continued from p. 3)***Safeguard #4: Screen Again Before Reassignment**

Finally, rescreen employees before you reassign them from low-risk positions with little member contact to high-risk positions with member contact. For example, don't assign an outdoor maintenance worker to work inside a condominium unit without first doing a criminal background check.

It doesn't matter that you've known and trusted the employee for a long time. What matters in court is whether you made a reasonable investigation. And what was a reasonable investigation for the employee's original position may not be appropriate for the newer higher risk position. ♦

MODEL AGREEMENT**Ask Job Candidate to Certify Employment Application**

Using a pre-employment statement to certify the accuracy of a prospective employee's application can help protect the community association you manage from claims that it wasn't careful enough during the hiring process. Before starting your pre-employment screening process, get the job applicant to sign this pre-employment statement that should be a part of, or attached to, your employment application forms.

EMPLOYMENT APPLICATION CERTIFICATION

Please read and sign the statement below:

1. I hereby certify that the information I have provided on this application is true and complete to the best of my knowledge. I agree that any misrepresentation or omission of any fact in my application, resume, or any other materials, or during any interviews, is good reason to refuse to hire me or, if I am employed, to end my employment.
2. I understand that any offer of employment I may receive from *[insert name of association or management company]* is contingent on my successful completion of *[insert name of association or management company]*'s total pre-employment screening process, including receipt of references that it considers satisfactory.
3. I have been notified that, in processing my application, *[insert name of association or management company]* may take steps to verify all the information I provide or may hire a preemployment screening company to conduct a background check. For this purpose, *[insert name of association or management company]* may get information about my prior employment, military record, education, character, general reputation, personal characteristics, criminal record, and mode of living. I authorize *[insert name of association or management company]* to verify all the information I am providing and to hire a pre-employment screening company to conduct a background check. I understand that if I request in writing that *[insert name of association or management company]* tells me that it requested a background check, *[insert name of association or management company]* will do so and will give me full information as to the nature and scope of this investigation.
4. I authorize *[insert name of association or management company]* to obtain, verify, and exchange information and reports about me, including, but not limited to, reports and information from city, county, state, or federal law enforcement agencies, educational institutions, and present and/or past employers.
5. I authorize and request all of my present and former employers and those individuals whom I have listed as personal references to furnish information about my employment record, including a statement of the reason for the termination of my employment and information about my work performance, abilities, and other qualities pertinent to my qualifications for employment. I hereby release my present and former employers and those individuals whom I have listed as personal references from any and all liability for damages arising from furnishing the requested information.
6. I authorize and request city, county, state, and federal law enforcement agencies and educational institutions to provide information and records about me to *[insert name of association or management company]*. I release and hold harmless these institutions and agencies from and against any and all such claims, demands, suits, or expenses from or related to the accuracy or handling of said information and reports.

APPLICANT'S SIGNATURE _____ DATE _____

DEALING WITH MEMBERS

Take Four Steps to Minimize Heat Complaints from Members This Winter

Winter weather can make community managers' jobs more challenging if they're managing associations that are located in cold-weather climates. You'll typically field an influx of heating complaints. Often, these complaints are unfounded or result from easily correctable problems. Provide too much heat, however, and you're just wasting fuel and money. The best bet is to address heating complaints right away, while also controlling your heating costs. But a global strategy that can help avoid complaints in the first place is stressing energy efficiency practices on a day-to-day basis, rather than just for heat in the winter. Consider taking the following steps and adapt our *Model Letter: Tell Members How to Conserve Energy*, for your community, which should be part of your overall plan.

Step #1: Install Energy Management System

One successful measure for condominium buildings has been to use technology to balance out the heat in a building and address member complaints regarding inadequate heat. Heat balancing systems basically work by installing wireless sensors in some units in the building that can read the building's inside temperature. In a traditional building, a boiler will start cycling at a set outside temperature and keep supplying heat, even if the inside temperature is within a comfortable range.

The different wireless sensors placed throughout the building also allow the building to operate more effectively for members' comfort. Various sides of a building may be cooler due to greater wind gusts or other natural elements. With these systems, the equipment can be programmed to send more heat to that part of the building.

A centrally heated building can't provide a comfortable 72 degrees on one floor and yet provide greater heat for a single member in a particular unit. You and the building's board must decide the "right" temperature level for the building as a whole, weighing individual demands against collective comfort and peace of mind. But using technology that tracks indoor and outdoor temperatures provides the means of making your entire building more comfortable for members, while identifying and alleviating most problem areas. This reduces fuel costs and increases efficiency, conservation, and sustainability.

Step #2: Address Members' Heating Complaints

When members complain about inadequate heat, it's best to have a record of the building's indoor temperature to refer to. If you don't have an energy

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Dealing with Members*(continued from p. 5)*

management system, you can still establish a record of temperatures to determine if there's a problem or if the member's complaints are unfounded.

Take temperature, record results. Give your staff an electronic infrared noncontact thermometer to carry around at all times. If a member complains, the staff person should go to his unit and take the temperature with the thermometer. Readings are taken by pointing the thermometer at an indoor wall or surface.

Share results with elderly or sensitive members. Frequently, members, especially elderly members, feel cold even when their unit is warm. But if you show members that the temperature in the unit is actually at or above a reasonable temperature, they'll usually back down from their complaint. Remember that before you take the temperature of the unit, check for any open windows and ask the member if he has recently left any windows open. Sometimes members will acknowledge that they've left the windows open a crack to let in fresh air. If so, take the temperature after all the windows have been closed. Also, explain to the

*(continued on p. 7)***MODEL LETTER****Tell Members How to Conserve Energy**

Here's a Model Letter you can give members to help make their units more energy efficient, which will in turn minimize heat complaints that you have to deal with.

*[Insert date]*Dear *[insert member's name]*:

Making your unit more energy efficient year-round can help reduce your utility expenses and help the environment, but it's especially important during the winter months when there is an opportunity to save on heating costs. Here are some measures you can take to improve energy efficiency in your unit:

- Properly insulate walls, water lines, and water heaters, and put weather stripping on doors and caulk around exposed pipes. Properly insulating these areas can save you money.
- Use ENERGY STAR products and appliances, such as refrigerators, dishwashers, laundry machines, air-conditioning units, storm windows, and other household products. Appliances with the ENERGY STAR label use significantly less electricity and/or water than comparable new appliances. And ENERGY STAR windows are much more efficient than the average window.
- Use low-flow faucets, showerheads, and toilets. Low-flow faucets and showerheads use 1.5 gallons of water per minute, instead of the 2.5 gallons per minute that standard models use, but the water comes out with greater force so that it feels just as strong as a standard model.

We hope you find these energy-saving tips helpful. Please feel free to call the management office with any questions.

Yours truly,
Jane Manager

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Dealing with Members

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member that leaving the windows open causes the unit temperature to go down, counteracting the heat the building is providing.

Take multiple overnight readings. If the member isn't satisfied by one temperature reading (for example, she claims that the unit gets cold during the night), you can temporarily install a special device, called a temperature data logger, that measures and records the temperature in the unit at predetermined intervals. This device stores the information in its memory, and you can upload it to a computer to access the information. For example, you can set the device to take the temperature at 15-minute intervals over a 24- to 48-hour period.

Check radiator valves, window seals. If a unit's temperature isn't at or above the level decided upon by the association board, check for two common, easy-to-fix problems. Sometimes, the radiator valve isn't turned on. Often a heat problem is due to the simple fact that the radiator valve is in the off position. So check to make sure the valve is turned on. And check whether the window seals are tight. The window seals may be letting in drafts and may be in need of resealing if they aren't.

Step #3: Minimize Open Window Effects

One rough way to check if your building is overheated is to see how many windows are open. This is a common problem. When you overheat units, members will open windows in their units or in stairwells. This wastes fuel and money.

Because the cost of supplying fuel for heat and hot water for a multiple dwelling can be the biggest expense an association faces, it's worth it to have your staff periodically check during the winter months how well the radiators are working, how hot the units are, and whether windows are being left open for hours at a time while the heat is on. ♦

RECENT COURT RULINGS

► 'One Contract' Theory Didn't Relieve Association's Obligation to Repay Loan

FACTS: Over the course of several years, a construction company performed construction work for an association. When the association encountered financial trouble, it requested a loan from the construction company. The association also needed to replace a deteriorating retaining wall and asked the construction company to bid on the project. The parties agreed to and executed: (1) a promissory note memorializing the loan; and (2) a contract for the construction of the wall.

The association defaulted on repayment of the loan. The construction company sued to enforce the note. The association filed a counterclaim and third-party suit against the construction company, alleging breach of contract due to the construction company's failure to obtain proper permits for the wall project.

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Recent Court Rulings

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The association asked the trial court to construe the promissory note and wall construction contract together. The trial court construed the promissory note and wall construction contract separately, ruling in favor of the construction company on the promissory note and for the association on the breach of contract claim. Both sides appealed the judgments against them.

DECISION: A Washington appeals court upheld the portion of the trial court's decision that treated the promissory note and contract separately.

REASONING: The appeals court determined that the trial court properly construed the promissory note and wall contract as separate agreements. In front of the trial court, the association had argued the "affirmative defenses" of mistake, misrepresentation, and fraud, claiming that it would never have entered the wall repair transaction knowing the contractor wouldn't obtain permits. But the appeals court noted that the association's defenses were inapplicable to the promissory note claim, so the trial court properly rejected them.

The appeals court pointed out that the association's affirmative defenses depend in large part on a so-called "one-contract" theory. That is, if the promissory note and wall are part of one agreement, then success on the affirmative defenses regarding the wall would theoretically allow the association to avoid liability on the note. But, under the proper interpretation of the promissory note and construction contracts as two separate agreements, these affirmative defenses didn't relieve the association's obligation on the promissory note. It was still obligated to pay the loan. ♦

- Babbitt v. Kingsgate Ridge Manor Assn., November 2018

DEALING WITH BOARDS

Defining Board Officers' Duties

While serving on the board of a community association is a volunteer position, board members can get very invested in it. It's not uncommon to hear about board members who overstep boundaries. That's why it's important to be able to gently—or in some cases, more firmly—remind a member who's taking over duties that aren't part of her position about the board members' official duties and why it's important for everyone to play his or her role.

Here's a primer for new managers or those that need a refresher about board responsibilities—and information about how you might have to take over in certain situations.

Overview for All Participants

Most community association boards of directors have at least a president, secretary, and treasurer, although state law may permit an association to have fewer officers. And many associations also have one or more vice presidents. These

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Dealing with Boards

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officers are vital to the effective and efficient management of the association. While the board's directors are responsible for setting an association's policies, the officers are responsible for carrying out those policies, as well as other key administrative functions.

In general, the officers have a "fiduciary" duty to the association—that is, the officers must act in good faith and in the best interests of the association's members, and not exceed the scope of their authority. For example, the officers can't use the association's money or property for their own personal advantage or gain.

The precise duties of the officers on your association's board are spelled out in your state law and your association's declaration, articles of incorporation, and bylaws, as well as in the manual adopted by the association as rules of order or "parliamentary authority." But an association's bylaws will typically contain the most detailed explanation of each officer's duties, so make sure to carefully read those.

Typical Descriptions for Positions

Although a board of directors often has the power to delegate additional duties to its officers, the officers' duties commonly include the following:

President. The president generally has all of the powers of a corporation's chief executive officer. He's involved in the day-to-day administration of the association, unlike the other officers, who aren't as frequently involved with the board's administrative functions. The president presides over all board and member meetings, and prepares meeting agendas. He can order specific actions to be taken to ensure that board resolutions are carried out, and he has the authority to sign legal documents such as leases, mortgages, maintenance agreements, easements, and deeds on the association's behalf.

Vice president. If the president is absent or otherwise unable to act, the vice president steps into his shoes. The board may also require the vice president to carry out other duties, such as chairing a board committee.

Secretary. The secretary keeps and maintains the association's official records, including the minutes of all board and member meetings, and a directory of the association's members and their addresses. The secretary is also responsible for ensuring that members have access to those records. And he records votes, transcribes the minutes, keeps the corporate seal of the association, and serves notices of board and member meetings.

If the association doesn't have a vice president, the secretary will often step into the president's shoes if he's absent or unable to act. Note that many states' laws and associations' governing documents bar the same person from holding the office of president and secretary at the same time.

Treasurer. The treasurer is the guardian of the association's funds, securities, and financial records. Therefore, the treasurer is responsible for getting and

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depositing the association's funds in appropriate bank accounts and disbursing those funds as the board directs. The treasurer signs checks and promissory notes on the association's behalf and is required to keep proper books of account. She also helps prepare the association's proposed annual budget and the annual report on the association's financial status, which is given to the association's members.

Be Prepared to Fill In

Often an association's bylaws let the secretary and/or treasurer delegate their duties to the association's manager. For example, the manager may take over the secretary's duty of transcribing the minutes of board and member meetings. And the manager may take over the treasurer's duties of depositing payments, issuing checks, and presenting financial reports to the members. Unlike the secretary and treasurer, the manager is involved in the association's day-to-day operations, so delegating these duties typically makes sense. But a secretary or treasurer won't be off the hook for duties delegated to the association's manager; rather, the secretary or treasurer is responsible for overseeing the manager and ensuring that the delegated duties are accurately and properly performed. ♦

DOS & DON'TS

✓ **Avoid Fair Housing Violations When Enforcing Community Rules**

There are some common fair housing problems that can arise from community rules. But you can avoid them if you understand where you might go wrong. In general, community rules trigger fair housing problems in one of two ways—either the rules are enforced unfairly or the rules themselves are unfair.

The first relates to consistency. Communities face potential liability if members of a protected class are singled out for strict enforcement of the rules, while enforcement against others is lax. For example, it would be unlawful to come down hard on African-American residents for breaking the rules while ignoring similar infractions by white residents.

The second relates to the fairness of the rules themselves. For example, communities have legitimate reasons to govern resident behavior in common areas, such as hallways, parking lots, and outside spaces, but rules that unreasonably target children or limit their behavior in common areas could lead to a complaint of discrimination based on familial status.

The federal Fair Housing Act bans discrimination in housing because of race, color, religion, sex, national origin, familial status, or disability. And many state and local governments have expanded their fair housing or civil rights laws to include marital status, sexual orientation, gender identity, source of income, age,

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Dos & Don'ts*(continued from p. 10)*

ancestry, military status, and other characteristics. Check with your local fair housing council or attorney to find out what your local laws cover.

X *Don't Fire Staff Before Investigating Complaint*

Unfortunately, you might encounter a situation where a member of the community association you manage complains about a maintenance or other type of worker who is left alone with the member. But what if it isn't clear exactly what the employee may have done wrong? Sometimes, an interaction might be described in general terms as "creepy" or as having made the member feel "scared." But if the member didn't say anything specific that the worker did that was inappropriate and you've never had any complaints before, you should tread lightly.

Although you can't take any chances when it comes to sexual harassment, you shouldn't fire or suspend the worker without pay if there's no proof. But you can't sit back and do nothing, either. Your best plan of action is to take steps to investigate the complaint. As with any complaints that deal with harassment in the community, it's key to contact the association's attorney for guidance.

But, on your own, speak to the worker and other residents whom he has visited on maintenance calls. And during your investigation, have another employee go on maintenance visits with the worker. Although you should take precautionary measures by not allowing the worker to be alone with residents until the investigation is complete, don't act impulsively. The first step is investigating the complaint against the worker, not firing him. ♦