



Spotting Bad Apples in the Hiring Process ... A Better Way to Know

By Matthew Heins, Law Enforcement Action Forum Coordinator

The most valuable assets in any organization are its people. Ensuring you have the right people, in the right spots, is vital to running an efficient, successful operation. Thus, it stands to reason, the most important decisions an executive can make are hiring employees whose skills and talents are suited to their positions and whose attitude, commitment, and ethical integrity are compatible with the organization's culture and standards.



Finding qualified police officer candidates is a tremendous problem currently being experienced by law enforcement agencies in Michigan and across the nation. It's debatable why this is occurring, but the end result is there just are not enough officers to fill the vacancies in law enforcement. Officers are more transient now than in years past. Some who move from one agency to another are good, hardworking officers who understandably appreciate today's increased opportunities to find the perfect fit, or career advancement. However, some move on because they have little choice. They bounce from agency to agency, attempting to stay ahead of previous poor performance or behavior.

If you hire an officer who has had issues in past positions; who has behaved unethically, inappropriately, or criminally; or who has been written up repeatedly or received multiple citizen complaints; the long-term impact on your operations can be enormous — from the moral, legal, financial, and public relations points of view. This article will explore your legal obligations in a hiring process to avoid employing such "bad apples" and to prevent them from moving from department to department without notice.

The Hiring Process

Hiring new employees can be a complex and lengthy process with a wide array of standards and legal requirements to meet. While you may have good intentions, one wrong question or step taken out of sequence can expose you to liability. It is strongly recommended that a human resources professional or legal counsel be involved in the development of your hiring procedures and to have one or both participate directly in the hiring process. If this is not feasible then, at a minimum, they should be regularly consulted to review your procedures and ensure they are adequate and legally correct.

Michigan Public Act 289 of 2016 authorizes the Michigan Commission on Law Enforcement Standards (MCOLES) to establish **minimum** professional standards for the education, selection, employment, and

licensing of our law enforcement officers (see links under Resources, page 4). Of particular relevance to this article, MCOLES' rule R28.14203(e) states that a person selected to become an officer shall:

Possess good moral character as determined by a favorable comprehensive background investigation covering school and employment records, home environment, and personal traits and integrity. Consideration shall be given to a history of, and the circumstances pertaining to, having been a respondent to a restraining or personal protection order. Consideration shall also be given to all law violations, including traffic and conservation law convictions, as indicating a lack of good moral character.

As you can see, not only is conducting a comprehensive background check a good mechanism to prevent a bad hire, it's also required by MCOLES.

According to the Merriam-Webster dictionary "comprehensive" is defined as "complete; including all or nearly all elements or aspects of something." This means doing more than merely a Law Enforcement Information Network (LEIN) check or calling references listed on the application and asking if the candidate would be a good hire.

Some will complain they don't have the time or resources to conduct a thorough investigation, but this is not an area to cut corners. The wrong hire can have devastating, far-reaching consequences for an agency, its staff, and its community. When things go south, hours, days, and weeks can be lost to administrative investigations and hearings, consultations with attorneys, depositions, court hearings, and trials. Time will be spent with the media, your governing body, and the community, answering questions about how such a thing could have happened, how the person could have been hired in the first place, and how you plan to fix the problem. A bad hire can also cost your organization and community financially and damage their reputations (and yours). All of this can be avoided by taking the time to conduct a thorough pre-hire investigation to make sure you are hiring the right person, not just someone who can pass a minimal background check to quickly fill a vacancy.

A key part of a thorough background investigation is obtaining information about the reasons for the officer's separation of service from former employers. As of January 15, 2018, this is legally mandated by the Law Enforcement Officer Separation of Service Act, Public Act 128 of 2017, which **requires**:

- 1) a law enforcement agency to create and maintain a record of the reasons for, and circumstances surrounding, a law enforcement officer's separation of service from that agency;
- 2) an agency to allow a separating officer to review their separation of service record upon request and, should the officer disagree with it, allow them to request a correction or removal of the portion they believe to be incorrect. If no agreement can be reached, the officer may submit a written statement explaining their position and the basis for their disagreement;
- 3) a law enforcement officer to sign the MCOLES *Waiver & Authorization for Release of Information* form, allowing their former employing agency or agencies to provide the prospective employing agency with a copy of the officer's separation of service record;
- 4) a former employing agency to give a copy of an officer's separation of service record to a prospective employing agency, upon receiving a valid waiver and release;

- 5) a prospective employing agency to receive records prior to hiring a law enforcement officer regarding the reason or reasons for, and circumstances surrounding, that officer's separation of service from each prior employing law enforcement agency. A hiring law enforcement agency shall not hire an officer unless it has received the officer's separation of service records.

The act also provides that a former employing agency which discloses information in good faith after receiving a valid waiver and release will be immune from civil liability for the disclosure unless a preponderance of evidence shows the information was false or misleading, or was disclosed with a reckless disregard for the truth, or the disclosure was prohibited by state or federal statute.

The intent of the Separation of Service act is to help ensure law enforcement agencies are doing their due diligence in the hiring process and that misconduct is not overlooked if an officer leaves one police department and applies for a job with another.

Tim Bourgeois, Executive Director of MCOLES, states, "If we want to be recognized as a profession, we must act in a professional way. Professionals self-regulate. Just one of the ways to do that is to conduct comprehensive background investigations, including full compliance with all our responsibilities under PA 128 of 2017. It is good for your agency, our profession, and required by law."

Negligent Hiring

Performing due diligence in the hiring process not only helps in hiring the right person but also helps reduce exposure to liability for negligent hiring. This is a legal claim made by individuals who are injured in some way by an employee, attempting to hold the employer responsible for hiring a person who posed a risk to others due to factors such as a criminal background or an unsafe driving record.

In general, employers have not been found responsible for criminal acts or intentional torts committed by employees in the workplace *if* the employee was acting outside the scope of their employment. *Zsigo v. Hurley Medical Center*. However, this exception doesn't apply if the employer "knew or should have known of his employee's propensities and criminal record." *Hersh v. Kentfield Builders, Inc*. In such cases, the issue of liability primarily focuses upon the adequacy of the employer's pre-employment investigation into the employee's background. *Garcia v. Duffy*.

Put simply: if you failed to check an officer's history thoroughly, you will be at a significant disadvantage defending any claim made against you for their bad acts, even if the officer was acting outside the scope of employment.

As noted by Audrey Forbush of Plunkett Cooney PC, LEAF legal advisor, due diligence is crucial – a comprehensive background check should not only include a review of prior employer personnel files but compliance with the Law Enforcement Officer Separation of Service Act. It is no longer permissible to purge an officer's personnel file as part of a settlement/discharge agreement, enabling or facilitating them in obtaining employment with some unsuspecting agency. The days of "gypsy officers" (who flit from one department to another due to disciplinary issues) should be ended. The Act will assist law enforcement in achieving this goal while protecting both former and prospective employers from liability.

Practical Steps to Reduce Your Exposure

Hiring employees is a multifaceted, time-consuming, and extremely important aspect of an organization. An incredible amount of staff time will be committed to the process so it should be done correctly the first time. A detailed, methodical approach can reduce your exposure and safeguard you from making poor decisions. Below are the minimal steps that should be taken when developing a hiring process.

- 1) Develop and institute a written, detailed, step-by-step hiring process that includes thorough background check measures. (Model background check procedures can be located on the MCOLES website.) Have the process reviewed regularly by the human resources department or a labor attorney to ensure compliance with U.S. Equal Employment Opportunity Commission standards and MCOLES standards. Follow the full process each time you hire.
- 2) Complete comprehensive background investigations as prescribed by PA 289 of 2016. These standards can be found under the licensing standards on the MCOLES website (see link below).
- 3) Ensure all candidates complete the MCOLES *Waiver & Authorization for Release of Information*, available on the MCOLES website (link below). Your agency may use an additional waiver/release of its own design if desired, but the MCOLES form is still required.
- 4) Create and maintain a record of the reason(s) for, and circumstances surrounding, the separation of licensed law enforcement officers from your agency. It is recommended you develop and use a standard separation of service form to ensure complete, consistent documentation at the time of separation. Allow the employee to review, and if necessary, respond to the explanation for separation. Once completed, place in the employee's personnel file.
- 5) After separation of service, maintain all records of each employee's hiring process, employment, and separation of service as prescribed by your records retention policy.
- 6) Provide the necessary training to any individual(s) who will be conducting background investigations to ensure proper compliance with federal and state laws.

Resources

Michigan Commission on Law Enforcement Standards Act; Public Act 289 of 2016
<https://legislature.mi.gov/documents/2015-2016/publicact/pdf/2016-PA-0289.pdf>

MCOLES Licensing Standards for Law Enforcement Officers, as of 1/2/2017
<https://www.michigan.gov/mcoles/0,4607,7-229--150169--,00.html>

The Law Enforcement Officer Separation of Service Act; Public Act 128 of 2017
[http://www.legislature.mi.gov/\(S\(tykitcqrccgyl3a51rr1typ\)\)/mileg.aspx?page=getObject&objectName=mc l-Act-128-of-2017](http://www.legislature.mi.gov/(S(tykitcqrccgyl3a51rr1typ))/mileg.aspx?page=getObject&objectName=mc l-Act-128-of-2017)

MCOLES *Waiver & Authorization for Release of Information* (form)
https://www.michigan.gov/documents/mcoles/Release_of_Info_Authorization_Web_613297_7.pdf

While compliance to the loss prevention techniques suggested herein may reduce the likelihood of a claim, it will not eliminate all exposure to such claims. Further, as always, our readers are encouraged to consult with their attorneys for specific legal advice.

LEAF continues to develop policies and resource documents designed to help Law Enforcement Executives manage their risk exposure.

Do not hesitate to contact the Michigan Municipal League's Loss Control Services at 800-482-2726 for your risk control needs and suggestions.

Are you an MML Insurance Program Member? Are you a Law Enforcement Executive?

If so, visit the MML's online [Law Enforcement Risk Control Manual](#) to access model policies and procedures developed by the LEAF Committee.

Go to: <http://www.mml-leaf.org/lerc.php>

Click on the green "Member Login" box in the left-hand panel.

At the Login screen, enter your username and password.

If you don't have a username and password, click "Request Access" and complete the online form.

The LAW ENFORCEMENT ACTION FORUM (LEAF) is a group of Michigan law enforcement executives convened for the purpose of assisting loss control with the development of law enforcement model policy and procedure language for the Law Enforcement Risk Control Manual. Members of the LEAF Committee include chiefs, sheriffs, and public safety directors from agencies of all sizes from around the state.

The LEAF Committee meets several times yearly to exchange information and ideas relating to law enforcement issues and, specifically, to address risk reduction efforts that affect losses from employee accidents and incidents resulting from officers' participation in high-risk police activities.

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