

NOVEMBER, 2017

“The Voice of the Industry”



OSHA

reported that homicide in the workplace is the third-leading cause of workplace deaths in the United States.

As a human resources manager, I’m responsible background checks in my organization. If managed right, they should have minimal impact upon hiring times and cost very little. Most background check services only cost around \$35 to \$50 per use and results often come back in 24 to 48 hours.

A few things to keep in mind when using background checks to screen employees:

CONVICTIONS, NOT ARRESTS: An arrest does not mean the same thing as a conviction. You should **ONLY** turn down someone for hiring if they have been convicted. If someone is charged and found not guilty, but are turned down for hiring, they can have grounds to sue.

RECENTY AND RELEVANCY: You can also face legal actions from those turned down, as well as government agencies, if the offenses used as the reasons for turning someone down are not related to the job or many years in the past. Turning down hires for old and unrelated offenses got BMW fined \$1.6 million two years ago.

DON’T SCREEN ALL APPLICANTS: You should only use background check services on those you may actually consider hiring, not all applicants. Background checks take time and money so be sure to only use them when you are sure you are ready to extend a formal offer of employment.

CHOOSE CAREFULLY: Not all background check services are alike. I have used good ones and bad ones – and many aren’t that good. On two occasions in my career, I’ve come in after individuals convicted of financial crimes were hired after receiving a clean report. Both ended up ripping the companies off, one for six figures, so reliability is crucial.

DISCLOSE FIRST: You should disclose that you are using a background check service to all potential hires and have them to sign a release form authorizing any kind of background check. Any decent background check service will require you to follow this procedure with applicants as a condition of using

(Continued on page two)

Not surprisingly, OSHA and the U.S. Department of Labor now consider workplace violence an occupational safety issue. Having an effective background check program in place should be a key part of how we protect our employees as well as our businesses.

It’s understandable that employers conduct background checks of those who are in roles of financial trust. However, I’ve talked with many whose background check efforts leave the rest of their workers unchecked and unscreened. This is ironic as many employers will spare no expense or amount of effort to protect employees from a wide range of hazards, many of which aren’t even in top ten of workplace safety issues.

While the most concerning aspect of workplace violence is the human effect upon employees, customers and others, workplace violence incidents can also expose a company to lawsuits which can result in crippling financial losses. David Boling, Senior Vice President of Swimmer Insurance in Charlotte, cautions that when a workplace violence incident takes place, failure to conduct background checks can result in costly lawsuits against the employer. He also points out that having a background check process in place can help provide a valid defense against allegations of negligence in hiring.

Last year, a Texas jury awarded over \$1 million to the family of an employee shot and killed by an employee who had a prior conviction for carrying a gun in a workplace. At the time of the shooting, the shooter was awaiting trial for making a “terroristic threat”. The company was found negligent for not conducting background checks, which would have revealed the shooter’s criminal history. A jury award of this size could easily put a company out of business after such a tragedy, making a bad situation worse.

(Continued from page 1) **Background Check**

their service, as well as provide you a release form for potential hires to sign.

The costs and adverse publicity related to workplace violence can severely impact your bottom line, not to mention the human costs of those who are victims or bystanders. Having an effective background check service for screening potential hires can be a valuable part of protecting your workers from workplace violence.

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2017—2018
ASAC Event Calendar

11.14.17 **Triangle Chapter Meeting**—
Industry Update with Perry Safran

12.07.17 **Midlands Chapter Christmas Social** @ Pearlz

12.08.17 **Charleston Chapter Christmas Party/Awards Banquet** - Charleston Country Club

01.09.18 **Triangle Chapter Meeting** -
NC OSHA—Silica Panel Discussion

01.11.18 **ASAC Board of Directors Meeting**

01.22.18 **Charleston Chapter Meeting**—
Dave Berstrom, Palmetto Railways Project

01.23.18 **Midlands Chapter Meeting**
GC Roundtable w/AGC Participation

02.09.18 **Charleston Oyster Roast**
Truluck Island

02.13.18 **Triangle Chapter Meeting**
GenConnect Social

02.28.18 **ASA National SUBExcel, Tempe, Arizona**

03.23.18 **Triangle Chapter 2nd Annual Skeet Shoot @ Deep River**

04.10.18 **Triangle Chapter Meeting**
Delay Claims featuring Daniel Knight, Anderson Jones Law

05.08.18 **Triangle Chapter** - NC Legislators Meet & Greet

06.06.18 **Annual Convention**
Embassy Suites, Wilmington Riverfront Hotel, Wilmington NC

For additional meeting details visit
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States Address Workforce Shortages

“The U.S. must work to find innovative ways to expand its workforce and improve productivity,” said Federal Reserve Bank of Dallas CEO Robert Kaplan in a [Bloomberg op-ed](#) earlier this year. Kaplan added, “[T]he majority of this decline [in the rate of labor force participation] is due to aging-population demographics, and that this trend will intensify in the years ahead. In addition, middle-class jobs are increasingly requiring higher skill levels.” Indeed, according to a 2016 [Georgetown University study](#), of the 7.2 million jobs lost during the Great Recession, 5.6 million—or 77 percent—were jobs that required a high school degree or less. In this environment, state legislatures increasingly are studying and passing legislation intended to help workers obtain the skills they need to participate in the middle-wage market, including the construction industry. According to the [National Conference of State Legislatures](#), in 2016 37 states enacted 97 workforce development laws. NCSC reported that these workforce development laws “spanned the gamut but focused largely on the following strategies:

- Offering and incentivizing **apprenticeships and other work-based learning**.
- **Sharing workforce information and data** to identify workforce needs and make sure training and education programs are aligned to meet those needs.
- **Tailoring job services** to specific folks such as youth, people with disabilities, veterans and their families, and people with criminal backgrounds.
- **Aligning K-12 education with job needs** via career pathways, tailored plans for students and offering dual credit at postsecondary institutions.
- **Meeting federal requirements** by organizing workforce plans and/or boards and adhering to reporting requirements.”

Some states are offering to share with employers the cost of training employees. For example: Alabama and South Carolina have a tax credit for employers that hire an apprentice; Colorado provides financial incentives to schools that engage students in earning certificates or participate in apprenticeships for high demand industries; Maryland established a program to offset the costs of hiring apprentices in the construction industry; and Rhode Island reimburses employers up to \$5,000 annually for apprentice training costs. See the NCSL report for information on your state’s laws. “These laws certainly can spur workforce development,” said ASA Chief Advocacy Officer E. Colette Nelson. “Ultimately, however, construction employers must invest their own resources in workforce development, including hiring apprentices; providing employees with specialized training; and working with local high schools, technical schools and community organizations to develop training programs to fill their needs.”

OSHA Issues Enforcement Guidance for Now Effective Silica Rule

On Oct. 19, the Occupational Safety and Health Administration issued a [memorandum](#) to OSHA’s regional administrators intended to help them enforce the agency’s rule on crystalline silica in the construction industry. OSHA has been enforcing the Respirable Crystalline Silica in Construction standard since Sept. 23. However, for the first 30 days, OSHA offered compliance assistance in lieu of enforcement for those employers who were making good faith efforts to comply with the silica standard. Effective Oct. 23, OSHA began fully enforcing the standard with respect to construction. The new memorandum highlights some of the requirements of the OSHA rule, but does not provide guidance on all the standard’s provisions. The attachments provide inspection and citation guidance; as well as flow charts to assist with evaluating employers’ control methods. The memo also says that OSHA is in the process of developing a final compliance directive



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ASA Announces SAP 'Total Risk Acceptance' Award

ASA announced a Subcontractors Are Prey (SAP) Award to a subcontract clause that shifts every conceivable risk to the subcontractor. The SAP "Subcontractor Total Risk Acceptance" Award goes to the following clause:

"DESIGN-BUILD SUBCONTRACTOR's Acceptance. *DESIGN-BUILD SUBCONTRACTOR agrees to receive and accept the prices shown in Exhibit A, which is attached hereto and incorporated by reference herein, as full compensation for furnishing all materials and equipment, obtaining all applicable permits, and for doing all the work contemplated and embraced in this Agreement; also for all loss or damage arising out of the nature of the work aforesaid, or from the action of the elements, or from any unforeseen difficulties or obstructions which may arise or be encountered in the prosecution of the work until its acceptance by the City Council of CITY, and for all risks of every description connected with the work; also for all expenses incurred by or in consequence of the suspension or discontinuance of the work and for well and faithfully completing the work, and the whole thereof, in the manner and according to the contract documents, plans, and specifications, and the requirements of the Public Works Director."*

The subcontractor who accepts this clause could be in for a doozy of a headache if anything at all goes wrong on the project. Gone is any recovery for differing site conditions, *force majeure*, delay, or subrogation or indemnity for any damage caused by others. Worse, the subcontractor would receive no extra pay for performing extra work required by the whim of the Public Works Director. Everything after the first semicolon should be stricken. ASA's tongue-in-cheek SAP Awards recognize achievements in the use of predatory contract language in the construction industry. Nominations for SAP Awards can be submitted to ASA Chief Advocacy Officer E.

Nelson Inducted into National Academy of Construction

On Oct. 26, ASA Chief Advocacy Officer E. Colette Nelson was inducted as a member of the prestigious [National Academy of Construction](#). NAC recognized Nelson for her work "to insure equal protections, particularly payment for all stakeholders" and to build coalitions "to achieve consensus on construction issues." The NAC recognizes and honors individuals for their distinguished contributions to the construction industry and shares this reservoir of expertise as a service to the nation. The Academy membership represents 250 exceptional industry leaders with a bias for action. The membership represents the entire array of construction industry stakeholders—owners, designers, construction managers, general and specialty contractors, financial managers, labor leaders, academicians and researchers, journalists and editors, and professional and trade association executives. Nelson said, "I've had the opportunity to help identify and disseminate best practices with the goals of integrity, productivity and sustainability in construction. I know these are values shared by the members of NAC." Nelson added, "It has been an honor to serve the construction industry during a time of enormous change."



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The Foundational Logic of Zero Injury

The [National Academy of Construction](#) has urged construction leaders to embrace the operational concept of “achieving Zero Injury” as a corporate safety performance norm. NAC offers the following safety precepts on which the Zero Injury safety concept is based:

1. Know that the fact injuries occur does not mean that injuries must occur; all injuries are preventable.
2. View the objective of Zero Injury outcome as a commitment, not a target or goal. There is a difference.
3. Understand there are many reasons injuries occur, but only one cause, which is always linked to some form of at-risk behavior.
4. Ensure all employees make a commitment to avoid all at-risk behaviors.
5. Accept that committing to Zero Injury is not saying there will never be another injury, but that another injury is never wanted.
6. Know employees will fully support a company's Zero Injury efforts since no employee nor their families want an injury to occur to anyone.
7. Acknowledge that safety has always been about working more hours without injury. It is clear that Zero Injury is statistically possible.
8. Recognize that an informed construction leader's job is simply to apply the Zero Injury research of the Construction Industry Institute to redefine a company's longest string of hours worked at Zero Injury.
9. If Zero Injury is not your heart's desire for a safety outcome, then what is?

According to NAC, these statements give insight into how to begin the process that yields in Zero Injury outcomes. The Zero Injury precepts assist individuals in forming their foundational safety beliefs. The NAC is a professional society of 200 construction leaders honored for their distinguished contributions

Guideline Helps Subcontractors Understand Dispute Avoidance/Resolution Options

“Dispute avoidance” and “dispute resolution” are words that people sometimes use as if they have a single, understood meaning. However, the truth is that these terms encompass a wide variety of activities to prevent or resolve conflicts. There are different approaches to dispute avoidance and different approaches to dispute resolution. Subcontractors who are aware of their options can choose the dispute avoidance and resolution methods that are most appropriate according to the clients or projects they are bidding. The worst approach is for a subcontractor not to think ahead about reducing disputes and to not consider what method will work to quickly and inexpensively dispose of disputes once they arise. Taking the wait-and-see approach means that preventable disputes will occur, and the forums in which the disputes will be resolved will be left up to chance. A subcontractor may not always want, for example, to have disputes resolved through the legal system, involving attorneys and others who will decide the fate of their claims but who don’t understand construction. The “Guideline on Avoidance and Resolution of Construction Disputes,” developed and published by ASA, the Associated General Contractors of America (AGC), and the Associated Specialty Contractors (ASC), notes:

“Resorting to lawsuits can be costly and time consuming, and judges and juries generally lack an understanding of the construction process. The net result is all too often that only lawyers, consultants and expert witnesses benefit from lengthy court actions.”

This guideline, one of the [Guidelines for a Successful Construction Project](#), is a good resource for learning about subcontractors’ numerous options. It discusses several strategies for preventing disputes:

- Equitable risk allocation in contracts.
- Post-award partnering meetings to identify issues.
- Group bonuses for achieving project goals.
- Knowledgeable construction team members who can settle issues without third-party intervention.

It also discusses numerous dispute resolution choices that subcontractors and their clients may employ, including:

- Direct discussions among appropriate project team members.
- Litigation.
- Third-party mediation.
- Third-party arbitration.
- Dispute resolution and counseling panels.
- Initial decisions by the architect.
- Advisory rulings by neutral experts.

Subcontractors who read the guideline will have greater awareness of the potential advantages and disadvantages of each option. This, in turn, should make it easier to select options that fit the needs of a client/project, and even make it easier to price work according to the level of risk that exists for extended, lengthy disputes.

Contract Changes and Claims: Accounting Systems, Part 1

The ability to clearly link costs incurred with specific causes often leads to quick resolution of change order requests and claims. The best system for accomplishing this is one which records the costs of impacts of changes or changed conditions concurrently with the performance of the work as the impacts are being experienced. To the extent that changed or extra cost items can be segregated from those relating to unaffected areas of performance, the subcontractor should seek to contemporaneously record the costs for all portions of affected work. The subcontractor must establish and maintain suitable accounting and recordkeeping systems to permit measurement and evaluation of the cost consequences of changes and other conditions affecting the work. The particulars of a cost control and accounting system are dictated by the size and complexity of the project, the volume and nature of the subcontractor’s business, and the management resources available. ASA’s [Contract Changes and Claims](#) is a series of articles providing tips for the management of changes and changed conditions and how to realize full adjustment to the contract price or contract time.

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