

Condo Insights

#48 Background Checks - Part 1

Association board members and unit owners want to know who and why an individual is on association property. While it is generally safe to assume most individuals have legitimate reasons for their presence, how well are condominium and community association boards and members really able to control who is present at the property and know why an individual is on site?

This article will address questions related to gathering information about employees, contractors, owners, tenants, guests, the legality of such, and what an association can and cannot do when investigating certain individuals. Part 1 will discuss background checks for employees and contractors. An association will either employ its own staff or hire contractors to perform essential services to operate and maintain the building, facilities and grounds.

Association personnel can include management, office staff, operations, maintenance and security staff and other employees depending on the building, amenities and level of services expected by association members. Some employees may have access to private information about the association, the board and association members. Some association employees may be required to enter condo units in performance of their duties.

Should an association conduct third-party background checks on job applicants? A background check is part of the screening process that typically provides critical information to determine if a candidate for employment is qualified, dependable, stable and trustworthy. In most cases, conducting a background check is prudent so long as the background check practices comply with State and local laws.

Background screening checks are used to confirm essential information such as criminal history, education and employment history, credential verification, motor vehicle records, sex offender registry checks and drug testing. A background check ensures a candidate is who they claim to be. Background checks can also include follow-up on personal references to confirm the applicant has the experience, character and qualities to perform in the position.

In New Jersey, the State Police can respond to requests for criminal history reports and the Department of Education can provide information for educational history. But most employers will defer to a professional background screening service to gather accurate background information in a timely manner. Independent third-party background investigation and screening will provide the most accurate information and protect the association from potential liability claims caused by spread of misinformation. Many companies will only provide name, position and dates of employment when contacted for employment verification and background information on past employees.

The lookback period for background checks in New Jersey is seven years for most positions. There are exceptions and limitations. Positions earning above certain income levels may legally require a background check to look beyond seven years. The seven-year lookback does not apply to education and employment verification. If an individual has had criminal records sealed or expunged, such information is not accessible, even if it occurred within the past seven years.

The New Jersey Law Against Discrimination ("LAD") is one of the most comprehensive anti-discrimination laws on the county. It includes protections against discrimination to include sexual orientation, gender, race and marital status. Associations should make sure their background check and hiring practices do not violate the LAD by discriminating against any of the protected classes which include but are not limited to sex, ancestry and disability.

An online search for information about a potential employee is not a reasonable nor responsible substitute for professional background screening. There is little control over information that appears online and the accuracy of such information may be difficult to verify. There could be confusion between different individuals with the same name. An online newspaper article may include information about an

individual such as past arrests but may not include follow-up reporting as to whether charges were dismissed, changed, or whether the individual was convicted or exonerated.

What does an association do when a background search turns up a history of criminal activity on a prospective employee? It is easy to understand why hiring employees with a criminal history record can be concerning from a safety and liability standpoint. The board should proceed carefully, closely review any such situation and consider all factors to evaluate the situation before making a final decision. The evaluation process should include a review of mitigating factors beyond any arrest or criminal record to balance protection of the Association while guarding against unintentional effects on potential employees. A board may want to involve legal counsel for guidance to assess and process the information and not rush to judgment.

It may be practical for a board to develop a background screening policy compliant with all applicable laws. The searches being conducted should apply to the specific requirements of the position, to protect the association against discrimination or other potential claims and also to improve chances to hire the best individual for the position.

While not association employees, some service contractors such as property maintenance, landscapers, elevator service companies and private security will have an ongoing relationship with the association. Most contractors and vendors working for an association are not subject to background screening checks on their employees, but background research and reference checks on the contractor may be appropriate.

Depending on the type of services being performed (such as private security services), a contractor may be requested to document that its employees have no criminal history and pass drug testing. Background and reference checks improve the likelihood of hiring contractors that deliver quality work in a timely manner, communicate well and respect the members' right to privacy.

Background checks for contractors should include proof of licenses and insurance and compliance with state and federal immigration and labor laws. Certain types of contractors are required to carry specific licenses and maintain professional liability insurance. It is important to make sure that vendors and contractors have necessary minimum coverage including workers compensation insurance and that they provide the association with an insurance certificate

Most businesses will gladly provide references for competent professional contractors. Contractors will obviously not provide contact information for dissatisfied customers when asked for references. The Better Business Bureau is a resource for verifying contractor's records, reviews and status of any outstanding claims. Again, use judgment with any online reviews.

As part of due diligence before entering into contracts for major repair, replacement or rehabilitation projects that run into hundreds of thousands of dollars, the association attorney should perform background research and public records search on the contractor to ensure the contractor doesn't have a history of litigation with clients and/or hasn't filed for bankruptcy.

This second part of this article will address issues related to gathering information about potential condo owners, tenants, visitors and guests; the legality of such, and what an association can and cannot do when investigating certain individuals.

Jim Yost owns Elite Management and Advisory Services, LLC and is Managing Partner for Ocean Property Management Corporation, based in Wildwood. The firms manage numerous community, condominium and homeowner associations in southern New Jersey. He can be reached at yostpmc@comcast.net. Past columns are available online at www.oceanpropertymgmt.com.

Karim Kaspar, Esq. is Senior Counsel with Lowenstein Sandler LLP. He serves as general counsel to numerous community and condominium associations throughout New Jersey. He specializes in complex commercial litigation and real estate matters and has been active and instrumental in the firm's pro-bono activities. He can be reached at kkaspar@lowenstein.com.