

# A Case on Background Checks

What can happen if you don't do a thorough background check on a new hire? See what one facility had to contend with when they hired someone with a criminal record.

Employee A was hired by an LTC facility for a position that involved medical records maintenance. He was chiefly responsible for maintaining the completeness of medical records when residents were discharged or had expired. Functions delineated in the job description also included data entry and safeguarding highly confidential information. During the pre-employment screening of this employee, the facility failed to conduct a criminal background check. It also neglected to contact previous employment references.

Within weeks of the hiring date, employee A engaged in identity theft of patients who had expired. This criminal activity went unnoticed for six months. The facility was subsequently served with several claims filed on behalf of the decedents, one of which asserted breach of confidentiality.

An investigation by the facility ensued, but disclosed little evidence to help bolster its defense against the claims. Employee A's orientation did not include a review of confidentiality requirements as set forth in the employee handbook. A confidentiality agreement was never executed at the time of hire. The department supervisor did not

communicate the significance of failing to maintain the utmost discretion with clinical data. Most importantly, had the facility conducted a criminal background check it would have revealed a prior conviction for computer identity theft.

To avoid a similar situation, demonstrate a firm commitment to policy and procedure when pre-screening and hiring job applicants.



Keep in mind that state laws govern the hiring of persons with a criminal record. Therefore, when developing your policy and procedure on hiring personnel you should review such legal provisions. It would be prudent to consult legal counsel on whether a conviction may or may not affect potential employment.

When performing background checks, consistently look for all relevant history. During the pre-screening process, clearly articulate the requirements of each position. Also, carefully monitor the performance and competency of new hires and consider entering into confidentiality agreements with all employees at the time of hire. (See "SAMPLE EMPLOYEE CONFIDENTIALITY AGREEMENT" on page 2)

## Terminating an Employee: Don't Risk a Lawsuit

Firing an employee, though it may be difficult and unpleasant, sometimes is necessary. The key is to avoid making the dismissal unnecessarily disagreeable, and to steer clear of potential lawsuits.

First, ascertain whether the individual is employed on an at-will basis, meaning that the employee can be terminated for any reason, with or without cause. If you are unsure, consult with your risk manager, human resource manager or lawyer to ensure that the dismissal does not violate a contractual agreement or federal, state or local laws, including statutes that protect against discrimination based on age, race or gender.

Along with your facility policies and procedures manual, always keep a record of your facility's disciplinary policies and performance standards on hand. Make sure you have complete and accurate documentation on the employee. The employee's file should include any performance evaluations, along with records of progressive discipline, including verbal and written warnings or eyewitness accounts of misconduct or unsatisfactory performance. If you're sued for wrongful dismissal, the documentation could be used as evidence in your defense.

When you inform the employee of the termination, have another member of the staff present, if possible. But avoid giving the impression that you are ganging up on him or her by, for example, having just one person speak. Be direct yet courteous. Clearly and firmly explain the reasons for the dismissal. Present the employee with a written agreement for a severance package and information about COBRA coverage, if applicable. The employee should be informed of her rights if she signs the agreement.

Determine how long it will take to finish or hand off the terminated employee's current patient load. Then arrange for a quick and graceful exit. If circumstances permit, allowing the employee to wait until her shift is completed to turn patient records over to someone else instead of requiring an immediate departure could make the separation more amicable. Just be sure patient safety is preserved.

Finally, document the discussion and the termination process with the employee. Be sure to keep all details surrounding the dismissal confidential.

## SOUND HIRING PRACTICES CURB RISK EXPOSURES

Every healthcare practice is responsible for ensuring that all patient care personnel are qualified, competent and dedicated to patient welfare. Sound employee hiring and assessment practices, as described below, are fundamental to providing quality care, reducing organizational exposure and gaining a competitive edge in the marketplace. While these general guidelines can be useful in developing and improving hiring practices, consult with legal counsel to determine the optimal approach for your own organization.

### Hiring and Orienting Employees

Widespread staffing shortages have tempted some organizations to hire quickly and employ individuals who are less than ideally qualified for positions requiring specialized skills. However, an impetuous decision may result in a costly lawsuit and a blemished reputation. By incorporating the following strategies into your screening and hiring procedures, you can significantly minimize risk:

**Application.** Require all potential employees to complete, sign and date an application. The application form should request only information that demonstrably relates to the applicant's suitability for the position – e.g., educational attainments, certifications and past employment history. Include a statement authorizing the practice to contact previous employers and other references regarding past job performance.

Also, clearly state on the application that providing false or misleading information is grounds for rejection or immediate termination.

Where applicable, note that employment is on an at-will basis, meaning that



either the employer or the employee may terminate the employment relationship at any time and for any reason.

### References/criminal background check.

General and criminal background checks are the most effective means of identifying unsuitable applicants and thus maintaining a safer environment for patients and staff. (Check for motor vehicle citations as well, if the job description includes driving duties.) Before conducting any background check, have the applicant authorize the inquiry in writing. If the background check involves a consumer reporting agency, ensure that the applicant's written authorization form complies with the requirements of the federal Fair Credit Reporting Act and applicable state laws.

After receiving authorization, verify the applicant's professional licensure, certification and registration. Then contact all references provided, ask about the candidate's reliability and integrity, and compare these responses with those of the applicant.

Note that federal and state laws may govern the hiring of persons with a criminal record. Organizations should review these provisions with legal counsel when developing their hiring policies and procedures. It is always prudent to consult

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legal counsel before hiring an individual who has ever been convicted of a crime.

**Health screening.** Focus primarily on the applicant's immunization history and exposure to tuberculosis, hepatitis B, herpes simplex, herpes zoster and other communicable diseases. Screening should extend not only to caregivers, but also to staff involved in areas that require less direct patient contact, such as patient administration and housekeeping. To avoid allegations of discrimination, screen all those applying for similar positions in a consistent manner, and in accordance with established protocols as well as applicable federal and state law.

**Drug testing.** Formal, well-documented drug-testing programs filter out many potentially undesirable employees, and also may provide for a stronger legal defense against liability claims involving accidents, neglect or property theft. The National Institute for Drug Abuse recommends testing for marijuana, cocaine, opiates, amphetamines and PCP. Many employers also test for barbiturates and tranquilizers. Keep in mind that your organization's drug-testing procedure must conform to applicable state laws and to the Americans with Disabilities Act. Model guidelines are available from the Institute for a Drug-Free Workplace at [www.drugfree workplace.org](http://www.drugfree workplace.org).

**Job description.** The job description should specify:

- essential job functions
- necessary skills
- competency-based performance requirements

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- educational and/or experience requirements
- general behavioral expectations

Require newly hired employees to indicate in writing that they have read the job description, reviewed it with their supervisor and understand what is expected of them.

**Employee handbook.**

Maintain a comprehensive and current employee handbook that articulates your organization's mission, goals, ethics, policies and procedures. Have all employees sign a form attesting that they have received a copy of the handbook, read it, understand its contents and will conduct themselves accordingly. The handbook should state prominently that management may revise the contents at any time without prior notice. Also note in the handbook that it is not a contract of employment and is not intended to be interpreted as a promise or guarantee of future or continued employment. Your legal counsel should review the handbook contents prior to publication, and update the handbook periodically and when circumstances dictate.

**Employee orientation.** Newly hired staff members should undergo an orientation process that gives them the opportunity to learn about the organization, ask questions, attend to administrative matters, and meet future managers and co-workers. A thorough, consistent orientation process plays an important part in integrating new employees into the workplace and preventing future misunderstandings.

**Confidentiality statement.** To comply with the Health Insurance Portability and Accountability Act of 1996, healthcare organizations must make all reasonable efforts to disclose the minimal amount of

protected health information necessary to accomplish the intended purpose of the disclosure. You can reduce the risk of violating statutory privacy protections by requiring new hires to sign a confidentiality agreement that commits them to protect sensitive information and prohibits the release of unauthorized patient care data. The executed agreement should be maintained in the employee's personnel file. See insert for a sample agreement.

**SAMPLE EMPLOYEE CONFIDENTIALITY AGREEMENT**

As a staff member of (insert your facility name), I recognize that candid and objective discussions of patient conditions are necessary for effective care and management. I further acknowledge the right of each patient to not have personally identifiable medical and/or other information disclosed to any third party without the express informed consent of the individual patient. I agree to respect and maintain the confidentiality of all discussions, deliberations, information and records whether in written, electronic and/or other formats, generated in connection with the care of patients.

I understand that by signing this agreement I am binding myself by contract to maintain such confidentiality. I agree that I will not make any voluntary disclosure of such confidential information except to persons authorized to receive it. This obligation of strictest confidence shall survive the termination of my employment.

Signed \_\_\_\_\_ Dated \_\_\_\_\_

Position or Title \_\_\_\_\_

**Probationary period.** Recently, some organizations have stopped providing a probationary period for new employees out of concern that termination may be warranted before the period has expired, or that time constraints may prevent management from carrying out the required action plan or other due process requirements. If you do grant a probationary period, specify the date of performance assessment, and maintain detailed documentation on performance and competency testing

during the period. Also, give new employees the opportunity to obtain necessary training and remediate any deficiencies that may arise. In your written policy on probationary periods, reserve the right to terminate employees for serious misconduct or performance issues prior to the end of the probationary period without further remediation.

The actions described here can help your practice minimize the likelihood of making a poor hiring decision. By implementing a thorough and deliberate hiring process, you can ensure that new employees have all necessary qualifications, fit smoothly into the team and are committed to the common goal of providing safe, quality care.



**N**egligent hiring litigation is a growing problem. According to a recent CNA article, employers lose 79% of all negligent hiring suits. USA Today reported that the average plaintiff award in employment law cases exceeds \$1.6 million.

Damages are often awarded because of employer negligence and failure to perform a reasonable search into the employee's background prior to hiring. Courts have ruled that an employer has a general duty to check criminal records for employees who will interface with the public or who could have a foreseeable opportunity to commit a violent crime against someone in the course of their employment.

So, what actions should you take into consideration when hiring new employees so you can avoid being sued for employer negligence due to inadequate hiring practices?

**PRELIMINARY CHECKLIST**

Before you even begin the hiring process, there are steps you can take that can complement your employee background and drug screening program, and can help safeguard your practice:

1. Seek legal employment counsel to determine all county, state and federal laws within your operating states.
2. Place prominent signs around your office that state you conduct background checks and drug testing.
3. Place a notice on your Web site stating the same, in multiple languages.
4. When you are ready to advertise a job opening, consider placing the following words after the ad: "background checks required."
5. With the help of your lawyer, write a background screening policy and plan on distributing it to all potential employees. This will advise applicants that your company performs background checks.
6. Create background screening authorization forms for applicants and try to obtain their authorization in advance. Think about doing this before they complete your employment application.
7. Establish a policy to insist that your temporary employment agency perform criminal background checks and get copies of the reports before employing any temporary worker.
8. Require vendors and independent contractor companies who are on your premises to perform background checks on their employees.

9. Determine if Web-based services can assist you in convenient, simple compliance of your substance abuse program.

Adopting these precautionary measures is the first step in establishing your organization's health and safety culture, and can help avoid long-term financial and operational problems. Selecting skilled, dependable employees is your next move. This can be accomplished during the interview process, if you know what to look for.

**WHAT A NON-VERBAL RESPONSE CAN SAY...**

A successful interview requires that the interviewer be perceptive to non-verbal signals. While interview questions must focus on performance of the essential job functions, taking note of the manner and gesture in which an applicant responds to a question can be just as revealing as the verbal answer.

The following questions are intended to elicit responses that may help you evaluate an applicant's suitability for your facility.

- Describe how you would gain the trust of a patient?
- Recount a stressful work experience and how you recently coped with it?
- List three conditions you disliked about your former work environment?
- Articulate how you approach uncooperative co-workers and patients?

Cautiously note when an applicant responds to the above questions with frustration or sudden anger. A quickness to blame others or the system for failings of the past may signal an unwillingness to accept responsibility for actions. If an applicant has difficulty describing positive work relationships, it may be indicative of poor interpersonal skills.

Stressful situations can be commonplace in healthcare. If a candidate's overall reaction to prior jobs is negative, it is not likely the individual will thrive when placed in a position similar to one previously held. An inability to effectively deal with stress in the work environment is a notable finding that should be carefully weighed when making a hiring decision.

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