



HHS OIG Issues 2015 Work Plan – Series Installment Six – A Review of Background Screenings

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Background screening practices in the healthcare industry continue to draw the government's attention, emphasizing how important it is that providers review their screening procedures and ensure they are complying with federal and state laws. The good news is that doing so will also serve to mitigate the risk of exposure to private lawsuits alleging violations of those background screening laws and regulations.

The U.S. Department of Health and Human Services' Office of Inspector General's (OIG) 2015 Work Plan addresses background screening issues in four key areas. First, the OIG will evaluate implementation of the national background check program for long-term care employees that is required by the Patient Protection and Affordable Care Act. Second, the OIG will investigate the extent to which home health agencies employ individuals with criminal convictions. Third, OIG will determine how hospitals assess medical staff candidates before granting initial privileges, including verification of credentials and review of the National Practitioner Databank. And fourth, the OIG will review whether states are complying with Medicaid requirements calling for termination of program providers that have been terminated under Medicare or other state Medicaid programs.

This increased attention and oversight by the OIG, coupled with the many state and federal background screening requirements governing the healthcare industry, highlights how important it is for healthcare employers to use defensible screening procedures in hiring and job reassignments.

To help mitigate your risk of litigation, here are a few key issues (by no means exhaustive) to consider before engaging in any background screening activities:

- Be sure you have insurance that covers the types of litigation and government enforcement actions to which background screening can give rise (e.g. claims under the Fair Credit Reporting Act – FCRA) and make sure your policies do not contain exclusions for federal statutory or regulatory claims.
- Be sure your contract with your background screening company (known as a “consumer reporting agency” or a “CRA”) addresses all of the issues necessary to ensure compliance and decrease the chances of liability.
- You are permitted to order a background report on an individual only for certain statutorily-approved purposes, and you must certify to the CRA that your order complies with this and other requirements.
- Some states require employers to perform an individualized assessment of an applicant's qualifications and ability to do the job at issue, so if you perform background searches relating to those states, be cautious in treating certain criminal background events as automatic disqualifiers for employment.
- Before you may order a background report on an individual, you must provide the individual with certain disclosures, and you must secure the individual's authorization.
- Before you may take any adverse employment action based on a background report, you must provide the individual with notice, a copy of the background report, and a summary of the individual's rights under the FCRA; then you must wait for a period of time before actually taking the adverse action.
- When you take the adverse employment action, you must provide a new notice to the individual.

The law in this field is rapidly changing, as are the specific steps one must take to comply with each of the last five bullet points. Employers are well-advised to engage counsel to assist them in auditing their background screening processes and documentation on a regular basis.

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