

Protecting Patients and Assets: Pre-Employment Background Checks and Drug Screening

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A number of patients who had been dispensed the narcotic hydrocodone called the urgent care center to complain that their meds “weren’t potent enough,” that they “didn’t work,” or that the pills in the bottle “didn’t match the description on the label.” Initially dismissed by the medical director as “drug seeking behavior,” the volume and corroboration of complaints soon led to an internal investigation. It turned out that a staff member with access to the center’s drug vault had used a surgical scalpel to carefully remove the bottle’s “tamper-proof” film, exchange its contents for generic acetaminophen, and then carefully re-tape the package to avoid detection.

A dozen dissatisfied patients, incalculable risk to patient safety, and about \$7,500 in detective and legal fees later—the culprit was identified as a radiology technician who had recently been fired by the local hospital for forging narcotics prescriptions—an offense for which criminal charges were pending. She was hired by the urgent care center based on her credentials but without conducting a thorough background check. Once “caught,” she submitted her written resignation. The center did not press charges due to lack of “proof” (other than circumstantial evidence and a confession), so she likely went to work for yet another practice where she may have continued her criminal behavior.

Think this couldn’t happen at your urgent care center? The good news is that 76 percent of employers say they conduct some form of background check on all new employees and that only two percent say they don’t conduct any background checks at all.ⁱ But because many urgent care centers are small businesses, background checks require time and money, and operators are hesitant to show “distrust” of team members—often background checks occur only at hiring and are insufficiently detailed to uncover the true risks of bringing on a candidate. The result can be theft and fraud—costing U.S. businesses more than \$50 billion annually—increased liability, and decreased productivity.ⁱⁱ Table 1 provides the reasons why background checks are essential for an urgent care center.

Table 1: Five Reasons Why Background Checks Are Essential for the Urgent Care Center

Negligent Hiring: If an employee commits a crime on the job or if an employee injures a patient because of negligence on the job, the employer can be found directly responsible if it failed to complete a thorough background investigation.ⁱⁱⁱ It’s therefore no longer sufficient to base a hiring decision on what you *know* about a person—it’s what the employer *should have known* that’s critical. An employment application is a legal document, and once the applicant has filled out an application, employers have a responsibility to verify the information provided. Not doing a thorough background check is just as dangerous as not having insurance. With negligent hiring claims estimated at \$150,000 per incident—the cost and time involved in a background check is miniscule compared to the potential liability.

False Skill or Training Claims: Although only five percent of job applicants will admit to it, 57 percent of hiring managers say they’ve caught an applicant lying on his or her job application^{iv}—and those are just the ones that got caught. Fortunately for employers, verifying information on applications is reasonably straightforward and can easily be conducted in-house. Although this can be a time-consuming process for busy managers, the cost of not checking out an employee’s claims is estimated at \$32,000 per incident, resulting from high turnover, loss of business, loss of productivity and high liability exposure.

Workplace Violence: On-the-job violence has become a high-profile problem. On average, 564 work-related homicides occur each year in the U.S.^v In 2008 alone, 421 workplace shootings took place, and homicide is now the second greatest cause of death in the workplace. Many of these incidents might have been avoided by implementing more stringent background checking processes. In addition to the tragic human cost of these events, the associated business disruption—workplace trauma, dismissal from employment, rehiring, training, and litigation, for example—means the cost of these incidents is extreme, at approximately \$1 million per incident.

Employee Theft and Fraud: The U.S. Chamber of Commerce indicates that approximately 30 percent of all business failures are a direct result of employee theft and fraud,^{vi} and it’s estimated that repeat offenders commit 70 percent of these crimes. As the opening paragraphs illustrate, it only takes a little homework to make sure an offender doesn’t get a chance to repeat his or her fraudulent behavior at your center. The average estimated cost of each theft/fraud incident is \$650—far more than a simple check of criminal, civil, motor vehicles and workers’ compensation records will cost you.

Lawsuits and False Claims: Urgent care operators must be on the lookout for individuals trying to take advantage of the business through nuisance lawsuits or even fraudulent insurance or workers' compensation claims. The dollar cost is estimated at \$7,500 per incident—a cost that recurs long after the employee departs through increased insurance premiums, protracted legal action and the cost of legal counsel. A few simple, precautionary background checks can protect the center and dramatically reduce its litigation risk.

How, What, When and Who: Methods for Conducting Background Checks

Once a center decides to conduct background checks, a process should be established and performed the same way for every single applicant to which a conditional employment offer is made. Table 2 describes the common screening criteria used by urgent care operators. Consistency is important to avoid appearance of singling out applicants for harassment or discrimination. Background checks may be performed by the urgent care operator, by specialized firms, or by using Internet resources. The most appropriate method will depend on the number of employees at the center, their frequency of turnover, and the level of position hired:

- **In-House:** Larger, multi-unit operations that frequently hire new employees may find it worthwhile to train a member of the human resources staff to conduct the majority of—if not all—background checks. Eligible employers can register with the Department of Justice to conduct criminal records checks through the Live Scan system. Large employers can also install a Live Scan electronic fingerprinting machine in-house, and train an employee to process fingerprints through the system.
- **Outsourced:** A host of background-checking services and private investigation agencies provide background checks for centers that don't have the capacity—or desire—to perform the task in-house. All or just parts of the process can be outsourced—such as utilizing the local sheriff's office for fingerprinting—while keeping the rest in-house. It's up to the operator whether the center will pay for the applicant's background check or if it will require the applicant to bear the cost.
- **Internet:** A number of government agencies—such as the Internal Revenue Service and the U.S. Department of Health and Human Services—now allow employers to check records by entering an applicant's name into an Internet database. This makes checking an applicant's information much simpler and easier than in years past. Other public information—such as court records—may also be freely available on the Internet in some states and counties.

Although an employer can—and often does—conduct a reference check of former employers before extending a conditional offer of employment, full background checks are typically conducted **prior to hire, but after a conditional offer of employment has been made**. This is not just because it's cheaper to test only successful applicants. In many cases, legislation—such as the Americans with Disabilities Act and the Fair Credit Reporting Act—actively prohibits employers from seeking information like medical details or credit reports until after a conditional offer has been made to the applicant. Some states, such as Hawaii, go a step further and prohibit any criminal record checks until after the conditional offer has been made.^{vii} These laws were introduced for two primary reasons:

- **Prevention of Discrimination:** Requiring applicants to undergo background screening prior to the offer stage enables employers to discriminate between applicants and base their hiring decisions on the results of the screen, rather than on which applicant is the most skilled or suitable for the job. By contrast, requiring an employer to decide which candidate is the best fit *before* discovering any information that could be prejudicial, helps to ensure jobs are awarded for legitimate, non-discriminatory reasons.
- **Increased Transparency:** When an offer has already been made to an applicant, and the only thing standing in his/her way is a “clean” background check, it's clear to all parties why a candidate has been rejected.^{viii} Employers are forced to justify hiring decision based on job-related reasons while applicants are provided the opportunity to explain how they could still perform the job duties with certain accommodations.

Controlled Substances Distribution

If your center is engaged in the distribution of controlled substances, the Federal Drug Enforcement Agency (DEA) suggests checking the following criminal records, at a minimum:

- **Local Inquiries:** Inquiries should be made by name, date, place of birth, and other identifying information to local courts and law enforcement agencies for records of pending charges and convictions. Depending on the agency, such inquiries may need to be made in person rather than by mail, and a copy of an authorization from the employee may also be required.
- **DEA Inquiries:** Inquiries supplying identifying information should also be furnished to the DEA Field Division Offices along with written consent from the concerned individual for a check of DEA files for records of convictions.^{ix}

What Background Checks Reveal

Although applicants fail background checks for many reasons, most can be summarized into three common themes. Knowing these red flags can help you avoid hiring problematic new employees:

- **Inaccurate or Incomplete Work History** Whether it's extending the end date of a job to cover a suspicious gap in employment, or omitting a job altogether to hide the fact he was fired, an applicant can very easily manipulate his resume to conceal a less-than-stellar work history. The good news is that an employer can find this out simply by calling and verifying the work history with his previous employers. Use your judgment to decide if the inaccuracy was a deliberate omission as opposed to an innocent mistake. For example, an applicant who states the date he left the job was January 12 instead of January 21 probably made a simple error. But the applicant who said he left in September when he really left in March may be hiding something.
- **Embellishment and Misrepresentation** Over 40 percent of resumes contain some form of embellishment or misrepresentation. The most common lie was embellishment of an applicant's job duties and responsibilities, but other more blatant falsehoods—such as degrees from an institution the applicant had never attended—can also be found.^x One hiring manager even reviewed a resume that included work samples that actually belonged to the manager himself, according to a survey by CareerBuilder. You probably won't discover the lie *that* easily, but verification of the applicant's credentials, school attendance and a reference check of former employers should rule out date fudging, embellished responsibilities and blatant misrepresentation.
- **Omissions and Misstatements of Fact** A critical piece of your background check should include an opportunity for the applicant to disclose and explain—prior to the check itself—any problematic issues, such as a criminal record. An applicant's failure to disclose a conviction also evidences his dishonesty, which may be an additional consideration when evaluating a misdemeanor or infraction that might not otherwise be disqualifying.

An employer's policy should clearly state that lying or omission on the application form—whether about job history, qualifications or criminal records—is grounds for termination of employment. If an issue is discovered at a later date, the employer can dismiss the applicant due to dishonesty alone, and the applicant's knowledge of this policy will encourage greater disclosure during the pre-employment stage.

Drug Screening and the Americans with Disabilities Act

Many employers combine a basic medical examination—to determine the applicant's ability to perform the essential functions of the job safely and effectively—with a urine drug screening of prospective employees. But if you were thinking of requiring every job applicant to undergo such examination, think again. The Americans with Disabilities Act (ADA) prohibits any type of pre-employment medical examination before a conditional offer of employment has been extended.^{xi}

It's important to note that the ADA does **not** consider testing to establish current illegal drug use a "medical examination," meaning a simple drug screening alone is not covered by the Act. However, if your screen includes blood alcohol testing—which **is** protected—it must wait until after a conditional offer of employment has been made.

Make sure that if you conduct pre-employment testing, each prospective employee undergoes the same examination—otherwise you could be accused of discrimination. And be aware that drug screening may reveal evidence of prescription drugs to treat specific conditions. This information is considered personal health information and must be safeguarded as such. An employer may not refuse to hire a person who has been extended a conditional offer of employment based upon the results of a medical examination unless the reason is **job-related** and justified by **business necessity**.

Medical Marijuana—Emerging Case Law

Certain states, such as California and Colorado, have enacted laws permitting the use of marijuana for medicinal purposes. However, this does not impact the federal status of the drug as an illegal substance. Although this is an emerging area of case law, and one that has not yet been fully tested, the legislation itself states that employers are not required to accommodate the use of marijuana in the workplace, nor must they tolerate employees being under the influence of the drug. For example, the Nevada state legislation specifically provides that "the provisions of this chapter do not...require any employer to accommodate the medical use of marijuana in the workplace."^{xii}

Complicating the issue is the long life of the drug in an employee's system. Companies may wonder if testing positive for marijuana—even though the employee used it for medicinal reasons and not on the job—is still grounds for dismissal. The current state of case law and precedent seems to support that it is. Employers subject to federal contracts are still required to maintain a "drug-free workplace" which entails prohibiting the use of marijuana. The Department of Transportation has addressed the issue directly as it relates to the Omnibus Act, and explicitly states that "safety-sensitive" employees—such as pilots and school bus drivers—remain prohibited from using medical marijuana.^{xiii}

Given the requirement for all employees to maintain a safe workplace under the Office of Safety and Health Administration, and the unique safety concerns in a medical environment, employers in the health sector are likely to be able to continue their normal practice of zero-tolerance.^{xiv} Because case law in this area is still developing, however, and specific regulations vary by state, employers are encouraged to seek guidance from an attorney if such a situation arises.

Ongoing Checks

Background checks are not necessarily limited to the pre-employment process. While reference checks with former employers is a one-time occurrence, criminal activity and substance abuse issues can occur at any time during employment so you may want to conduct ongoing checks and screening. Some employers choose to conduct a second check within the 90-day probationary period, to pick up any recent criminal activity—such as an action that may be pending from the most recent employment. Others inform their employees that continued checking may occur at any time. Eligible employers who use the Department of Justice's Live Scan service may be entitled to receive ongoing updates of any criminal activity on the part of an employee in a critical position.^{xv}

The importance of clear and comprehensive policies is paramount. Your employees should understand that they could be subject to random drug testing at any time, in addition to drug testing upon suspicion of impairment. To protect management from liability, your drug and alcohol policy should clearly state the indicators of impairment—such as slurred speech and erratic behavior—and describe the evaluation process. For example, your policy might state that both a manager and supervisor must evaluate the employee and concur that the behavior warrants a drug test.

The same principles apply to continued access of credit reports under the Fair Credit Reporting Act. An employer is permitted to obtain this information—as long as a clear nexus to the job exists—but you must obtain the employee's written permission and say "clearly and conspicuously" if you want the authorization to continue throughout employment.^{xvi}

Although conducting an extensive background check and drug-screening test may be time-consuming initially, the time and money saved by your center in the long term is priceless. If nothing else, your reputation for rigorous verification of an applicant's claims and a stringent screening process will discourage unsuitable candidates from applying.

Table 2: Common Background Screening Criteria

Criminal Record:

When checking a candidate's criminal record, arrests don't count and can't be considered. Ask the applicant to disclose and explain any convictions he has received, then review the report to determine if the conviction will be disqualifying. Although employers should have a clearly defined policy about what is—and is not—acceptable, to minimize liability you should consider each applicant on a case-by-case basis. A conviction for disturbing the peace when the applicant was in college is a very different prospect than a recent conviction for embezzlement from an employer.

Previous Employment:

Check dates of employment, duties and responsibilities and job performance—if you can convince the employer to provide you the necessary information. Most employers want as much information as possible when they are conducting reference checks, but when giving them out, tend to stick to the basic “name, rank, and serial number.” Ask the applicant to sign a waiver authorizing the former employer to disclose all pertinent records, and provide this upfront to encourage greater disclosure on the employer's part.

Education:

There's no excuse for not checking educational records. A simple call to an institution's registrar can usually confirm the applicant's attendance, or you can ask for certified transcripts. Don't just take the applicant's degree certificate as proof—more than one candidate has doctored a certification on his home computer.

Driving Record:

Be certain there is a nexus to the job if you consider the applicant's driving record. A minor traffic infraction may be relatively meaningless if the applicant won't ever be driving on company business, but may be a much more significant concern for an employee who is hired as a driver.

Credit Report:

The Fair Credit Reporting Act regulates employers' use of credit reports for employment screening purposes. You must provide notice to the employee and get his written permission before accessing his credit report. If you make an “adverse action” based on the report—if you decide not to hire the applicant, for example—you must provide notice in advance, which will allow him a chance to respond or correct any inaccurate information.

Social Security Number:

This one isn't optional—the IRS^{xvii} requires employers to obtain the employee's SSN for W2 purposes. You can verify an applicant's SSN online or by phone using free services provided by the IRS. If the card states “not valid for employment,” you must **not** employ that individual without further verification and production of a new card that gives him authorization to work in the U.S.

Professional References:

Professional references are useful, but consider the source. Ask the reference to explain exactly what his relationship to the applicant is—you might take him a little less seriously if you find out he happens to be the employee's father!

Social Media:

Employers today have a much greater ability to check up on applicants using social media. Although it's quick and easy to do, these are relatively untested waters, so employers should be wary of privacy considerations and the potential for discrimination allegations. The best use of the Internet may be to confirm what the applicant has already told you on his or her resume—for example you may be able to confirm his employment or academic records—rather than making a decision based on his personal Facebook photos.

Specific Tools for Medical Practices:

The Office of the Inspector General for the U.S. Department of Health and Human Services maintains specific services employers can use to verify the suitability of applicants. One such example is the online, searchable database for excluded individuals and entities.^{xviii} This free online search allows employers to type in a prospective employee's name to determine if that individual is excluded from any medical programs receiving federal funding. Reasons for exclusion include patient abuse, Medicare fraud or certain felony convictions. State licensing boards also provide websites to check the credentials of anyone—a doctor, nurse, or technician—who is licensed by the state.

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