



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

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Editor's note: In the coming months, JUCM will be reviving the Health Law column with a fresh look at the legal and compliance issues affecting the urgent care space. In support of covering a broad scope with a diverse voice, we have recruited a panel of experts to serve as guest columnists. It is with great pleasure that we lead off the inaugural column of Health Law and Compliance with insight on new-hire background checks from our very own Practice Management Editor, Alan Ayers.

A number of patients who had been dispensed the narcotic hydrocodone called the urgent care center to complain that their medications “weren’t potent enough,” that they “didn’t work,” or that the pills in the bottle “didn’t match the description on the label.” Although these reports were 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-prevention film, exchange its contents for generic acetaminophen, and then carefully retape 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 on the basis of her cre-

dentials, but no thorough background check on her was conducted. Once caught, she submitted her written resignation. The center did not press charges because of lack of proof (other than circumstantial evidence and a confession), so she likely went on to work for yet another practice, where she might have continued her criminal behavior.

Do you think that this could not happen at your urgent care center? The good news is that 76% of employers say that they conduct some form of background check on all new employees and that only 2% say that they do not conduct any background checks at all.¹ 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.² **Sidebar 1** gives the reasons background checks are essential for an urgent care center.

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

Once center managers decide 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. **Sidebar 2** describes the common screening criteria used by urgent care operators. Consistency is important to avoid the 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 at which hiring is being done:



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Sidebar 1. Five Reasons Background Checks Are Essential for an Urgent Care Center

Negligent hiring: If an employee commits a crime on the job or 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. It is therefore no longer sufficient to base a hiring decision on what you *know* about a person. It is what you *should have known* that is 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 are minuscule in comparison.

False skill or training claims: Although only 8% of job applicants will admit to lying, 50% of hiring managers say that they have caught an applicant lying on a job application³—and those are just the ones who 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 applicant’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 United States.⁴ 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 that the cost of these incidents is extreme, at approximately \$1 million per incident.

Employee theft and fraud: The U.S. Chamber of Commerce reports that approximately 30% of all business failures are a direct result of employee theft and fraud,² and it is estimated that repeat offenders commit 70% of these crimes. It only takes a little homework to make sure an offender does not get a chance to repeat fraudulent behavior at your center. The average estimated cost of each theft or fraud incident is \$650—far more than a simple check of criminal, civil, motor vehicle department, 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 financial 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 centers.

- **In-house:** Large, multiunit 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 U.S. 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 do not 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. It is up to the operator whether the urgent care center will pay for the applicant’s background check or if it will instead 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 areas.

Although an employer can 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 is cheaper to test only successful applicants. In many cases, U.S. laws—such as the Americans with Disabilities Act (ADA) and the Fair Credit Reporting Act—actively prohibit 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.⁶ These laws were introduced for two primary reasons:

- **Prevention of discrimination:** Requiring applicants to undergo background screening before the offer stage enables employers to discriminate between applicants and base their hiring decisions on screen results, rather than on which applicant is the most skilled or suitable for the

Sidebar 2. Common Background Screening Criteria

Criminal record: When you are checking a candidate’s criminal record, arrests do not count and cannot be considered. Ask the applicant to disclose and explain any convictions, and then review the report to determine whether 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 from 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 they tend to stick to the basics. Ask the applicant to sign a waiver authorizing the former employer to disclose all pertinent records, and provide this up front to encourage greater disclosure on the part of the former employer.

Education: There is no excuse for not checking education records. A simple call to an institution’s registrar can usually confirm the applicant’s attendance, or you can ask for certified transcripts. Do not just take the applicant’s degree certificate as proof; more than one candidate has doctored a certification on a 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 will not ever be driving on company business, but it may be a much more significant concern for an employee who is hired as a driver.

Credit report: The U.S. Fair Credit Reporting Act regulates employers’ use of credit reports for employment screening purposes. You must provide notice to employee candidates and get their written permission before accessing their credit reports. If you take an adverse action on the basis of a report—if you decide not to hire an applicant, for example—you must provide notice in advance, which will allow the applicant a chance to respond or correct any inaccurate information.

Social Security number: The Internal Revenue Service (IRS) requires employers to obtain the employee’s Social Security number for completing IRS form W-2.⁵ You can verify an applicant’s Social Security number online or by phone, using free services provided by the IRS. If the applicant’s Social Security card states “not valid for employment,” you must *not* employ that individual without further verification and a new card that authorizes the person to work in the United States.

Professional references: Professional references are useful, but consider the source. Ask the reference to explain exactly what his or her relationship to the applicant is. You might take a reference less seriously if you find out that he is the applicant’s father.

Social media: Employers today have a much greater ability to check up on applicants using social media. These are relatively untested waters, so be wary of privacy considerations and the potential for discrimination allegations. The best use of the Internet may be to confirm what applicants have already told you on their résumés—for example, confirming employment or academic records—rather than making a decision on the basis of their 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 that employers can use to verify the suitability of applicants, such as the online searchable database for excluded individuals and entities: <http://exclusions.oig.hhs.gov/>. This free online search allows employers to type in a prospective employee’s name to determine if that individual is excluded from any federally funded medical programs. Reasons for exclusion include patient abuse, Medicare fraud, and certain felony convictions. State licensing boards also provide websites for checking the credentials of anyone—a physician, nurse, or technician—who is licensed by the state.

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 that jobs are awarded for nondiscriminatory reasons.⁷

- **Increased transparency:** When an offer has already been made to an applicant and the only thing standing in the way is a clean background check, it is clear to all parties why a candidate has been rejected.⁸ Employers are forced to justify hiring decisions on the basis of job-related reasons, whereas applicants are provided the opportunity to explain how they could still perform job duties with certain accommodations.

Controlled-Substances Distribution

If your urgent care center is engaged in the distribution of controlled substances, the U.S. Drug Enforcement Agency (DEA) suggests checking the following criminal records, at a minimum⁸:

- **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 have 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.

What Background Checks Reveal

Although applicants fail background checks for many reasons, most failures 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 is extending the end date of a job to cover a suspicious gap in employment or omitting a job altogether to hide the fact that the applicant was fired, an applicant can very easily manipulate a résumé 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 previous employers. Use your judgment to decide whether the inaccuracy was a deliberate omission as opposed to an innocent mistake. For example, an applicant who reports leaving a job on January 12 instead of the January 21 date reported by the employer probably made a simple error. But the applicant who reports leaving in September when the actual end date was in March may be hiding something.
- **Embellishment and misrepresentation:** Over 40% of résumés contain some form of embellishment or misrepresentation. The most common lie is embellishment of job duties and responsibilities, but other more blatant falsehoods—such as degrees from an institution the applicant has never attended—can also be found.⁹ Verification of an applicant's credentials and school attendance and a reference check of former employers should rule out date-fudging, embellishment, and misrepresentation.
- **Omissions and misstatements of fact:** A critical piece of the 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 is evidence of 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 because of 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 ADA prohibits any type of pre-employment medical examination before a conditional offer of employment has been extended.¹⁰

It is important to note that the ADA does *not* consider testing to establish current illegal drug use a medical examination, meaning that a simple drug screening alone is not covered by the ADA. 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. It is essential that you remain consistent. In addition, 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. In fact, these types of records must be kept in a file separate from the employee's personnel file. If a person has been extended a conditional offer of employment, an employer may not refuse to hire them on the basis of the results of a medical examination, unless the reason is *job-related* and justified by *business necessity*.

Medical and Recreational Marijuana: Emerging Case Law

More than 20 U.S. states, including California, Arizona, Nevada, and Delaware, have now passed laws allowing marijuana to be used for medical reasons, and even more states are considering doing so. However, medical use does not affect 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 says that “the provisions of this chapter do not . . . require any employer to accommodate the medical use of marijuana in the workplace.”¹¹ These new laws can be very confusing.

Complicating the issue is the long life of the drug in a person's body. Tetrahydrocannabinol, which is the active ingredient in marijuana, can stay in a person's system for 30 days or more.¹² How long employees test positive has to do with how much and how often they use the drug. 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 the interpretation 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 U.S. 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—are prohibited from using medical marijuana.¹³

Given the requirement for all employees to maintain a safe workplace under the regulations of the Office of Safety and Health Administration, and given 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.¹⁴ However, because case law in this area is still developing and specific regulations vary from state to state, employers are encouraged to seek guidance from an experienced attorney if such a situation arises. The legal issue has to do with whether an employee was intoxicated on the job. With the way in which the testing is done, this can be difficult to find out.

In both Washington and Colorado, states that have recently legalized marijuana for recreational purposes, employers have the option to not hire a person who tests positive for marijuana.¹⁵ In the states of Delaware and Arizona, state laws actually ban employers from firing workers for off-duty use of the drug. These are laws that employers will need to stay on top of because they continually evolve.

Ongoing Checks

Background checks are not necessarily limited to the pre-employment process. Although a reference check 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 a legal 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.¹⁶

It is paramount to have clear and comprehensive policies. Your employees should understand that they could be subject to random drug testing at any time, in addition to drug testing on 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 to credit reports under the Fair Credit Reporting Act. As an em-

ployer, you are 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 must say “clearly and conspicuously” whether you want the authorization to continue throughout employment.⁵

Although conducting an extensive background check and a drug-screening test may be time-consuming initially, your urgent care center will save time and money over the long term. If nothing else, your reputation for rigorous verification of claims and a stringent screening process will discourage unsuitable candidates from applying. ■

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