

Practice Management

The Sword and the Shield: Best Hiring Practices for Urgent Care Facilities

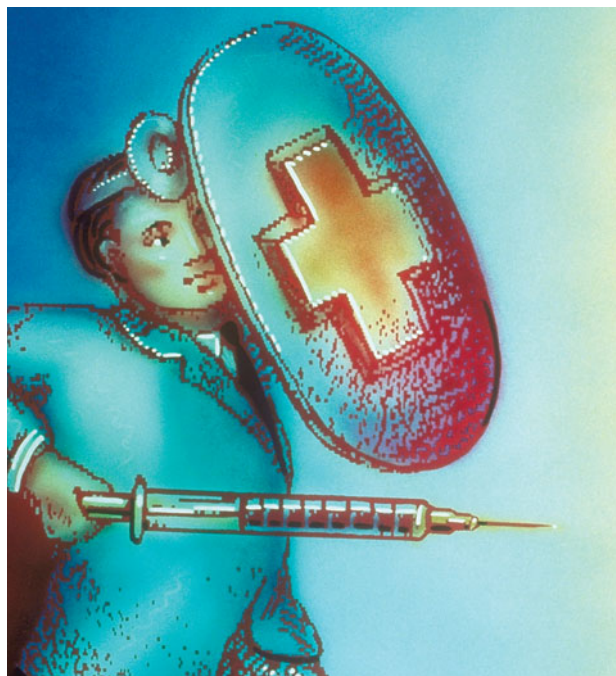
Urgent message: It is imperative that urgent care centers utilize the various tools at their disposal to recruit the best candidates, while implementing best practices that mitigate the potential for lawsuits.

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Urgent care is one of the fastest growing segments of American health care. Historically, many urgent care facilities were considered small businesses because they employed fewer than 15 people, making them exempt from certain hiring discrimination claims under The Federal Civil Rights Act of 1964 (usually referred to as Title VII) because compliance with these laws was thought to be too burdensome. However, the need for immediate access to medical care has fueled growth, prompting many urgent care centers to outgrow their small business, “mom and pop” status. As a result, they must take into account a whole host of factors when making their hiring decisions.

Many urgent care centers, for instance, have developed a thorough application process to ensure the hiring of good employees, not realizing that as they grow beyond a staff of 15, there are legal restrictions on the types of information they can request. Employment lawsuits based on discriminatory hiring, therefore, have been on the rise. It is important for urgent care centers to understand the potential risks, the relevant law, and to adapt their hiring practices to avoid what could be construed by a job candidate as discrimination.

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Title VII

Title VII prohibits discrimination in the workplace. Under Title VII, an employer is prohibited from intentionally using race, color, gender, religion or national origin as a basis for its hiring decisions. A myriad of federal anti-discrimination laws have subsequently been

enacted to include additional protected classes of people, including:

- Age (Age Discrimination Act of 1967)
- Sex (Equal Pay Act of 1963)
- Pregnancy (Pregnancy Discrimination Act)
- Citizenship (Immigration Reform and Control Act)
- Familial Status (Title VIII of the Civil Rights Act of 1968)
- Disability Status (Vocational Rehabilitation and Other Rehabilitation Services of 1973 and Americans with Disabilities Act of 1990)
- Veteran Status (Vietnam Era Veterans' Readjustment Assistance Act of 1974 and Uniformed Services Employment and Reemployment Rights Act)
- Genetic Information (Genetic Information Nondiscrimination Act)

Many states have enacted laws that increase the scope for discrimination lawsuits. For example, in California, it is illegal to discriminate against a potential hire based on sexual orientation. Other states are quickly following suit.

Growing urgent care centers need to make optimum hiring decisions that will help their practice run smoothly and avoid potential issues with "problem employees." It may sound obvious, but the best way to deal with problem employees is to ensure that you steer clear of them when hiring. The following are some best practices that urgent care facilities can implement to ensure hiring compliance while avoiding hiring mistakes.

- **Use Job Applications and Background Checks.** Job applications are typically an employer's first significant written communication from a prospective employee. Effective applications ask for detailed job and education history, references, and the employee's written promise that everything in the application is accurate. Employers can use this information to look for gaps in work history, evaluate questionable career moves, and contact former employers. When used in conjunction with a background check, discrepancies between the check and the application, such as residential addresses compared to job locations, may surface. In addition, if the employee later sues, the employer can use application fraud as an argument to reduce damages. Employers must ensure that all applications and background checks comply with applicable federal and state law.
- **Establish At-Will Employment.** Employees often attempt to claim that their termination was without "good cause," and therefore, the employer is liable

for breach of contract. Employees will sometimes try to create contracts for good cause termination by pointing to promises of continued employment, progressive discipline policies, or historical treatment of employees at the company. Employers can counter such claims by having employees acknowledge, in writing, that their employment is "at will": that the employer or the employee can terminate the employment relationship at any time or for any (lawful) reason. While it is always good for employers to document performance problems and reasons for termination, at-will employment status makes terminations easier to justify, by eliminating any "good cause" requirement.

- **Screen with Confidence.** Urgent care centers can quickly eliminate unqualified candidates by using employment tests. Personality exams, credit checks, background checks, drug tests, and medical examinations are all popular modes of screening a potential hire. Employees will frequently allege that the tests are inherently discriminatory, and have a disproportionate impact on a protected class. In order to counter these allegations, an employer must be able to demonstrate that the test is job-related and consistent with business necessity. However, an employee can prevail by showing that a less discriminatory alternative is available. These standards make it difficult for employers to strike a balance between administering effective tests and being sued for discrimination.

EEOC Guidelines for Employment Testing

The Equal Employment Opportunity Commission (EEOC) has established its own set of guidelines regarding employment tests, and urgent care centers would be wise to review them.¹ They are as follows:

- Administer tests without regard to protected characteristics, to make sure they are anti-discriminatory in nature.
- The tests must be properly validated for the positions and the purposes for which they are used, i.e., job-related.
- Consider alternatives if the test results have a propensity to detrimentally impact a protected group.
- Train managers to fully understand the testing and the proper way to administer the tests.
- Technology is constantly evolving and changing the way jobs are performed, so keep tests current in order to keep up with job requirements.

- Tests should be specifically tailored to the skill set for a particular position.
- Employers should conduct an independent review when purchasing pre-made tests, in order to ensure that they are free of bias.
- Track the effects of tests on particular applicant groups, and even consider hiring consultants to have selection procedures professionally validated.
- At least annually, review the tests to determine whether they are achieving their stated purpose, and make the necessary adjustments.

Understanding and Conveying the Position

It is fundamental that urgent care facilities have a firm grasp of the positions for which they are hiring, and detail responsibilities in an extensive written job description complete with a requirements section and additional information (travel, work hours). This will go a long way in providing prospective candidates with helpful criteria, and weeding out unqualified candidates. Look closely at cover letters and resumes, examining all information including substantive work experience, writing style, spelling and grammar. Does the candidate pay close attention to detail? Poor appearance, vague phrasing, and typographical errors will quite often provide tremendous insight into the approach the person will take toward his or her work. Also, use a critical eye when examining gaps in work history and make sure that listed jobs follow a logical career trajectory. However, do not discount people with varied backgrounds and experiences. Many people take time off to raise families, travel, and follow their passions. Therefore, being too formal and rigid on this issue can be a mistake.

Applications

When using applications, urgent care centers should ask questions designed to elicit skills and qualifications that will pertain to the position. Use closed questions—concise requests for specific information that begin the conversation and summarize progress. Open-ended questions, on the other hand, are better suited for the interview process because they tend to draw out opinions and feelings that hand control of the conversation over to the applicant.

Always ask specific questions regarding mandatory job criteria, in order to knock candidates lacking in experience or skills out of the running. However, make sure to ask questions that do not violate the law. It is a best practice to include a statement that the application

should in no way be construed as an employment contract and to list that you are an Equal Opportunity Employer. In addition, avoid phrasing that could lead to discrimination allegations, such as “looking for a young and energetic team member.” Both young and energetic could possibly be construed as ageist and may therefore lead to a lawsuit.

The Interview Process

An initial phone interview is a great screening tool urgent care facilities can utilize when considering potential hires. Further, as the candidate gets a better sense of the position, he or she might decide the job is no longer a good fit. Once you decide to bring the person onsite, do your homework to adequately prepare. It is important to remember that eliciting specific information is imperative so you can review it later when stacking up your top picks.

Never ask a question about a particular characteristic that the law does not allow you to consider when evaluating a candidate. If an interviewee opens the door to national origin or disability, you will want to tread lightly and try to steer the conversation in a different direction. In addition, always respect the candidate's privacy and never ask about sensitive topics like religion or sex.

The following are topics to keep *off* applications and avoid in interviews to ward off potential discrimination lawsuits:

- How old are you? (However, it is permissible to ask if the potential hire is 18 or older.)
- What is your race?
- What is your gender?
- What is your sexual orientation?
- What religion do you belong to?
- What country are you from? (You *are* permitted to ask if someone is legally authorized to work in the United States.)
- Are you married? (If you know the person is married, it is fine to inquire about the candidate's spouse's job, but do not pry.)
- Are you disabled? (It is okay to ask if someone is able to perform the job functions, as clearly defined in the job description. However, inquiring about medical/psychiatric problems is prohibited behavior under the law.)
- Excessive assurance about job security.

Social Media

In these days of cyberspace, it is not uncommon for employers to do some investigative work on potential hires

by perusing Facebook, LinkedIn or Twitter. However, requiring that someone provide you with his or her password(s) to these websites has been a hot topic lately, and generally viewed as a violation of a candidate's privacy rights. Maryland, California, Illinois, and Michigan have all passed laws banning this behavior. Further, the federal government is looking into whether these practices violate federal discrimination and privacy laws.

Candidate Investigations

As already touched upon with screening tests and social media, it is important to look into the pasts of your top candidates. This is critical from a legal perspective and can save you from litigation down the road. A perfect example would be an urgent care center hiring an employee who had a violent criminal history. If this individual winds up attacking a co-worker, inflicting serious injuries, the injured employee may have recourse to sue for negligent hiring. In addition, if a current employee exhibits problematic behavior at the facility, you may be sued for negligent retention and face serious liability if you act carelessly in your treatment of the matter.

References and Background Checks

References are a great way to get more information about a candidate, and it is a good idea to have potential hires sign a release that gives former employers permission to talk to you. Keep questions relevant to the job, and the same rules apply regarding questions that violate the law.

Again, you will want to have candidate consent in writing to do a background check. Explain the kind of information you are hoping to acquire—this will allow people to take themselves out of the running if they believe the background check will reveal problematic findings. Under the Fair Credit Reporting Act (FCRA), it is mandatory for employers to obtain written consent before pulling and reviewing a person's credit report, and some states have additional laws surrounding these reports as well. If you decide not to hire someone based on information in the report, you are required to provide the candidate a copy of the report and explain to them that they have the right to challenge the report under the FCRA. However, it is illegal to take someone's bankruptcy history into account when making hiring decisions. If you use a third party to conduct your background check, as is often the case, you must first obtain consent from the applicant. Lastly, be aware that it is illegal to refuse to hire someone for having collected unemployment or Workers' Compensation in the past.

Criminal Background Checks

In 2013, the Equal Employment Opportunity Commission (EEOC) issued an updated enforcement guidance regarding employers' ability to consider criminal records when making hiring decisions. The EEOC's previous guidance was issued over two decades ago, when conducting criminal background checks was more difficult. The new guidance, according to the EEOC, is necessary for the electronic age.

According to the EEOC, a company that rejects all candidates with criminal records could be discriminating against certain minority groups, as some statistics suggest that these minority groups are convicted of some crimes at a rate higher than their percentage of the overall population. The EEOC believes that such a blanket ban could result in unlawful discrimination under the "disparate impact" theory of discrimination recognized by courts under federal and state anti-discrimination law.

Best practices for conducting criminal background checks include:

- Eliminate policies or practices that exclude people from employment based on any criminal record;
- Develop a narrowly-tailored written policy and procedure for screening applicants and employees for criminal conduct;
- Determine the specific offenses that may demonstrate unfitness for performing such jobs;
- Identify the criminal offenses based on all available evidence;
- Determine the duration of exclusions for criminal conduct based on all available evidence;
- Include an individualized assessment;
- Record the justification for the policy and procedures;
- Note and keep a record of consultations and research considered in crafting the policy and procedures; and
- Train managers, hiring officials, and decision makers on how to implement the policy and procedures consistent with anti-discrimination law.

When asking questions about criminal records, limit inquiries to records for which exclusion would be job related for the position in question and consistent with business necessity and keep information about applicants' and employees' criminal records confidential. Only use it for the purpose for which it was intended. ■

Reference

1. Fact Sheet on Employment Tests and Selection Procedures. http://www.eeoc.gov/policy/docs/factemployment_procedures.html