

DUE DILIGENCE AND LEGAL OBLIGATIONS OF EMPLOYMENT SCREENING IN HEALTHCARE ORGANIZATIONS

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Few career fields are as dynamic as healthcare. Even non-clinical employees and volunteer staff may encounter risks or assume responsibilities unforeseeable in other career fields. Clinical workers in particular must respond to life and death workplace challenges with competence and compassion. Employee reliability is the single most important health system input. Reliability begins with thorough employment background screening. As they minimize risks from “bad hires,” background investigations must also comply with federal, state, and local laws as well as industry standards and best practices. Although predicting the likelihood of future malfeasance by any single employee is impossible, effective backgrounding enhances quality of care, decreases risks, and lowers costs. Managing the vetting process with competence requires a solid working knowledge of all lawful steps needed to ensure full, due-diligence compliant background investigations. If a screening process is transparent and impartial with fair group outcomes, due diligence is satisfied.

I. BACKGROUND

Once considered safe havens, healthcare institutions today are confronting steadily increasing rates of crime, including violent crimes such as assault, rape, and homicide. As criminal activity spills over from the streets onto healthcare campuses and through their doors, providing for the safety and security of all patients, visitors, and staff requires increasing vigilant attention and action by safety and security personnel as well as all healthcare staff and providers.

- The Joint Commission, Sentinel Event Alert, Issue 45¹

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The greater the risk from negligent or malevolent acts, the greater the depth of inquiry needed to validate the job applicant. At the same time, rapid turnover and retention issues,² especially affecting clinical positions, may result in costly overtime, temp staffing, or utilization of traveling staff. Human resources professionals may be pressured to up-tempo onboarding or to even “cut corners.” Demand to fill critical need positions may overcome institutional concerns for safety and security. Additionally, when background screening is performed by third parties, vendor servicing costs may become as important as thorough candidate assessments. Despite the challenges, managers should always bear in mind that trustworthiness and competence are of equal importance. Effective screening narrows the liability gap from negligent hires,³ retentions,⁴ and failures to warn.⁵ Additionally, screening yields indirect advantages via reduced administrative and staff costs from absenteeism, workers compensation fraud, mandatory court appearances, and wage garnishments from debt-collectors.

Employment screening provides a more complete “whole-candidate” assessment of both positive attributes and potential disqualifying behaviors applicants may bring to the job. Due diligence requires sufficient background data regarding conduct, character, and other factors to ensure the safety and security of patients, employees, and infrastructure. Applicant strengths are evaluated to determine whether they outweigh perceived weaknesses. Unfortunately, there is no specific threshold at which hiring authorities may categorically approve or disapprove any candidate. A single instance of prior misconduct may be an aberration or may highlight a pattern of unreliability. Patterns and combinations across multiple perspectives of character, conduct, and morality equate to more than the sum of the whole.

Within this mix, veteran human resources professionals must be wary of “halo-effects”⁶ which may lead to either jaundiced, or overly

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1. The Joint Commission, Sentinel Event Alert, Issue 45, Preventing Violence in the Healthcare Setting, (June 2, 2010, addendum Feb. 2017) https://www.jointcommission.org/sentinel_event_alert_issue_45_preventing_violence_in_the_health_care_setting/.

2. Nursing Solutions, Inc.: 2016 National Healthcare Retention & RN Staffing Report (Mar. 2016), <http://www.nsinursingsolutions.com/Files/assets/library/retention-institute/NationalHealthcareRNRetentionReport2016.pdf>.

3. See, e.g., Rodolfo A. Camacho, *How to Avoid Negligent Hiring Litigation*, 14 WHITTIER L. REV. 787 (1993).

4. Some states recognize negligent retention as a cause of action separate and apart from negligent hiring. See *Garcia v. Duffy*, 492 So. 2d 435 (Fla. App. 1986).

5. See Robert L. Rabin, *Enabling Torts*, 49 DEPAUL L. REV. 435 (1999-2000).

6. E.L. Thorndike, *A Constant Error in Psychological Ratings*, 4(1) JOURNAL OF APPLIED PSYCHOLOGY 25-29 (1920).

optimistic candidate assessment. Applicants with positive personality traits such as friendliness or physical attractiveness may be afforded more tolerance for derogatory information than qualified candidates perceived as unfriendly or unattractive. Subconscious bias must not overcome the fundamental screening principle; any reasonable doubt about reliability, responsibility, or self-control should result in denial of employment. Responsible people accept rules and regulations, respect authority, and deal honestly and fairly with others. They exercise sound judgment and think before acting. They maintain commitments to people and organizations even under challenging circumstances. They avoid alcohol abuse, drug use, criminal activity, and financial irresponsibility.

II. CRIMINAL HISTORY AND ARRESTS

A 2017 International Association for Healthcare Security and Safety (IAHSS) Foundation survey reflects a surge in hospital and healthcare workplace violence.⁷ Most worrisome, the survey reveals that assaults committed by employees accounted for nearly 10% of all violence from 2012 through 2016. Note, the survey only reported violent crimes. Not included were other criminal acts such as vandalism, stalking, theft, and disorderly conduct. The Occupational Safety and Health Administration (“OSHA”) reports that from 2002 to 2013 workplace violence resulting in worker days off from injury were four times more common in healthcare facilities than in private industry.⁸ Theft and diversion, especially of prescription drugs, has also become a matter of great concern. Various sources estimate the cost of employee theft and embezzlement in the United States at \$50 billion dollars (compared to \$10-15 billion dollars in 1975).⁹

Although the Joint Commission on Accreditation of Healthcare Organizations (“JCAHO”) mandates that healthcare organizations conduct primary source license verifications on professionally licensed staff, JCAHO does not require criminal background checks of hospital

7. 2017 Healthcare Crime Survey, IAHSS Foundation, IAHSS-F CS-17 (Apr. 12, 2017), https://c.yumcdn.com/sites/www.iahss.org/resource/collection/48907176-3B11-4B24-A7C0-FF756143C7DE/2017_Crime_Survey_-_IAHSS_Foundation.pdf.

8. OSHA, Caring for Caregivers, *Facts about Hospital Safety, Data for Intentional Injuries Caused by Humans; Excluding Self-Inflicted Injuries*, (Sept. 2013) https://www.osha.gov/dsg/hospitals/documents/1.2_Factbook_508.pdf. See also OSHA, *Guidelines for Preventing Workplace Violence for Healthcare and Social Service Workers*, OSHA 3148-06R 2016, <https://www.osha.gov/Publications/osha3148.pdf>.

9. J. Greenburg, *Employee Theft as a Reaction to Underpayment Inequity*, 75 JOURNAL OF APPLIED PSYCHOLOGY 5 (1990).

employees.¹⁰ JCAHO does generally recommend criminal background checks as a means of preventing violence in the healthcare setting, and that checks be conducted “on staff, students and volunteers where required by state law and/or organization policies.”¹¹ Nonetheless, a 2017 survey of human resource professionals found that 9 of 10 employers run criminal background checks on applicants as part of the hiring process.¹² According to the Bureau of Justice Statistics, about 30% of Americans (92 million people) have a criminal history on file.¹³ These numbers reflect a generally accepted consensus that “past behavior is the best predictor of future behavior.”¹⁴ As a corollary, forensic psychologists generally agree that the more frequent or recent the previous behavior, the more likely future behavior will conform to previous conduct. Previous misconduct is in fact the primary predictor of future criminal behavior, recidivism, and violence.¹⁵ The data holds true even if prior offenders are mentally disordered or free of psychosis.¹⁶

While research suggests a convergence in recidivism between previous offenders and non-offenders, there is no satisfactory research suggesting what time-lapse (in years) is sufficient, much less determinative, regarding when a previous offender no longer represents a threat for recidivism.¹⁷ However, when prudent to do so, ex-offenders

10. *Primary Source Verification of Health Care Professionals: A Risk Reduction Strategy for Patients and Health Care Organizations*, Joint Commission International 8 (2016), <http://www.healthforum.com/connect/resources/pdf-files/certiphi-2017-0301-wp-joint.pdf>.

11. *See, e.g.*, Joint Commission and Criminal Background Checks, certiphi screening, (June 11, 2015) <https://www.certiphi.com/resource-center/background-screening/joint-commission--criminal-background-checks/>.

12. National Association of Professional Background Screeners, *View of Human Resources Professionals on Background Screening Methods and Effectiveness* (Mar. 20, 2017) http://www.napbs.com/NAPBS/assets/File/NAPBS_Survey.pdf.

13. Roy Maurer, *When Background Screens Turn Up Criminal Records*, Risk Management – Society For Human Resource Management (“SHRM”) (May 5, 2014), <https://www.shrm.org/resourcesandtools/hr-topics/risk-management/pages/background-screens-criminal-records.aspx>.

14. C. BARTOL AND A. BARTOL, *CRIMINAL BEHAVIOR: A PSYCHOSOCIAL APPROACH*, (8th ed. 2007). *See also* Gibbons et al., 1998; Ouellette & Wood, 1998; Webb & Sheeran, 2006; Wood et al., 2002; Bronta, Law and Hanson, 1998. Note: similar studies are consistent in finding that it is difficult to predict future emotional responses to any given event or stimulus. *See* Irene B. Janis and M.K. Nock, *Behavioral Forecasts Do Not Improve the Prediction of Future Behavior: A Prospective Study of Self-Injury*, 64(10) *JOURNAL OF CLINICAL PSYCHOLOGY* 1-11 (2008).

15. For psychopathy, the Robert D. Hare Psychopathy Checklist-Revised (PLC-R) is the most widely used and accepted indicator of future potential risk in criminal and correctional settings in the world. *See* R. D. HARE & C.N. NEUMANN, *The PCL-R Assessment of Psychopathy: Development, Structural Properties, and New Directions*, In C. Patrick (Ed.), *HANDBOOK OF PSYCHOPATHY*, 58-88 (2003).

16. *Id.*

17. *See* M.C. Kurlychek, R. Brame, and S.D. Bushway, *Scarlet Letters and Recidivism: Does an Old Criminal Record Predict Future Offending?*, *Criminology & Public Policy* 5 (3) (Sept. 2006); and

should certainly be afforded second chances to rejoin the workforce. Hiring officials assessing prior criminal misconduct should consider previous (successful) employment, housing stability, community reintegration, and social support post release or conviction. Precluding everyone who made a youthful mistake is unwise and likely unlawful. It is important to focus on the actual “conduct” in question and not the “record” itself. For example, an otherwise qualified applicant with a prior conviction for driving while intoxicated (DWI) ten years prior may be an ideal candidate for many positions, bar those that involve driving.¹⁸ On the other hand, a candidate listed as a sex offender, may be given some consideration, but will likely always carry the burden of significant downstream third-party liability risk.¹⁹

Also important to note, many states restrict access to, or consideration of, applicant criminal histories. Various “ban the box” laws are currently part of the legal landscape of twenty-nine states as well as 150 cities and counties.²⁰ Some jurisdictions prohibit employers from asking about non-pending arrests.²¹ Others limit inquiries based upon time, type of offense, expungement, or if committed as a minor. Under federal administrative law, Equal Employment Opportunity Commission (“EEOC”) guidance²² indicates that criminal convictions, not merely arrests, may serve as the basis for rejecting applicants. Despite this oft-repeated (and now historically doctrinal) guidance, there is no federal statute or agency regulation categorically prohibiting consideration of

M.C. Kurlychek, R. Brame, and S.D. Bushway, *Enduring Risk? Old Criminal Records and Predictions of Future Criminal Involvement*, 53 (1) CRIME & DELINQUENCY 64-83 (2007).

18. See, e.g., Lewis Maltby, *How to Fairly Hire Applicants With Criminal Records*, diversityinc.com, (Aug. 24, 2011), <http://www.diversityinc.com/legal-issues/how-to-fairly-hire-applicants-with-criminal-records/>.

19. Articles and White Papers, *What to Do When an Employee is Listed as a Sex Offender on a Megan’s Law Registry*, American Management Association, <http://www.amanet.org/training/articles/what-to-do-when-an-employee-is-listed-as-a-sex-offender-on-a-megans-law-registry.aspx> (last visited Jan. 15, 2018).<http://www.amanet.org/training/articles/what-to-do-when-an-employee-is-listed-as-a-sex-offender-on-a-megans-law-registry.aspx> (last visited Jan. 15, 2018).<http://www.amanet.org/training/articles/what-to-do-when-an-employee-is-listed-as-a-sex-offender-on-a-megans-law-registry.aspx> (last visited Jan. 15, 2018).

20. Hawaii, Minnesota, Connecticut, and New Mexico. Similar legislation is pending in Nebraska, New Jersey, and Rhode Island. Five states prohibit various degrees of employment discrimination against ex-offenders. See Margaret Colgate Love, *Relief from the Collateral Consequences of a Criminal Conviction: A State-By-State Resource Guide*, William S. Hein & Co. (2005), <http://www.sentencingproject.org/doc/File/Collateral%20Consequences/execsumm.pdf>.

21. See, e.g., Background Check Laws By State, <https://www.goodhire.com/background-check-laws-by-state>.

22. See, e.g., US Equal Employment Opportunity Commission, *Enforcement Guidance Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, as amended*, 42 U.S.C. § 2000e et seq., Pre-Employment Inquiries and Arrest & Convictions, No. 915.002, (Apr. 25, 2012), https://www.eeoc.gov/laws/guidance/arrest_conviction.cfm#IIIB.

prior arrests for employment purposes. Nor is there any controlling state or federal case authority to this effect.²³ Thus, arrest records, and in particular records including *multiple arrests*, may be the basis for added scrutiny by hiring officials in most jurisdictions. If not otherwise prohibited by state law, repeated arrests for anti-social behaviors such as disorderly conduct, public intoxication, public urination, affrays, etc. occurring within the previous five or ten years should, at a minimum, be the basis for further inquiry during job interviews.²⁴

For criminal convictions, the EEOC suggests employers consider: (1) the nature and gravity of the offense(s); (2) how much time has passed since conviction or completion of the sentence; and (3) the nature of the position sought.²⁵ The EEOC maintains that business necessity invites added scrutiny regardless of the nature of the job or the type, gravity, or time-lapse since the crime occurred.²⁶ In 2005, the EEOC issued a position statement that employers who utilized "blanket policies" excluding persons with criminal convictions²⁷ "disproportionately excluding members of certain racial or ethnic groups" must demonstrate a business necessity for use of these criteria."²⁸ While statistical data cannot be completely ignored, data in a 2006 Journal of Law and Economics study found that employers who use criminal background screenings are in fact "more likely to hire African-American workers, especially men."²⁹ The data supports a positive hiring correlation that is "stronger among those employers who report an aversion to hiring those with criminal records than among those who do not."³⁰ The authors theorize that employers who do not have access to criminal background

23. See, e.g., *Background Checks: Are There Federal And/Or State Laws Prohibiting Employers From Asking Applicants About Arrest Convictions?*, SHRM, (Aug. 25, 2016), <https://www.shrm.org/resourcesandtools/tools-and-samples/hr-qa/pages/askingaboutarrestsandconvictions.aspx>.

24. See, e.g., Roy Maurer, *When Background Screens Turn Up Criminal Record*, SHRM, (May 5, 2014), <https://www.shrm.org/resourcesandtools/hr-topics/risk-management/pages/background-screens-criminal-records.aspx>.

25. EEOC Policy Statement on the Issue of Conviction Records under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. (1982).

26. See, e.g., A. Blumstein and K. Nakamura, *Redemption in an Era of Widespread Criminal Background Checks*, *NIJ Journal* 263 (June 2009).

27. There is no blanket federal prohibition on the use of arrest information as a screening tool. Various state and local laws may limit or even prohibit consideration of arrests without associated convictions and/or protect applicants from being required to disclose such information. The federal government's standard security clearance form (OPM Standard Form 86: Questionnaire for National Security Positions) at Question 22b specifically asks applicants if they have "ever been arrested by any police officer, sheriff, marshal, or any other type of law enforcement officer."

28. *Supra* note 25.

29. Harry Holzer, Steven Raphael, and Michael A. Stoll, *Perceived Criminality, Criminal Background Checks, and the Racial Hiring Practices of Employers*, *XLIX JOURNAL OF LAW AND ECONOMICS* (Oct. 2006).

30. *Id.* at 451.

checks (i.e. under state “ban-the -box” laws) may actually discriminate more frequently “against black men or those with weak employment records.” In other words, without access to full criminal history, employers may be more likely to resort to racial and gender proxies.³¹ Human resources departments should therefore always document how risk factors associated with prior criminal behavior (both qualitatively and quantitatively) are evaluated in each hiring decision.

Also important is that no matter who conducts background screening, state and federal crime databases are never up-to-date. Even the FBI admits “final disposition information for approximately 50 percent of records are missing.”³² There are other gaps. State records are usually based largely upon records tabulated from correctional agencies. If a person is convicted of a criminal offense but never incarcerated, “no records found” reports may be issued. Third-party background investigative services may limit searches to state databases or restrict time limits to seven, ten, or fifteen years. Complete searches should include cross-checking federal, state, and county database. Sex-offender registries are also woefully inaccurate and incomplete.³³ A 2010 report from the Justice Department’s Office of Inspector General notes that “neither law enforcement officials nor the public can rely on the registries for identifying registered sex offenders.”³⁴ Best practices for criminal background investigations should include searches using the applicant’s full name (including middle name), Social Security number, birthdate, prior addresses, and driver license information.³⁵

Finally, over 66,000 healthcare vendors and providers are listed on the Office of Inspector General of the Department of Health and Human Services, List of Excluded Individuals and Entities (“LEIE”).³⁶ Individuals and entities on the list are barred from participation in all federal healthcare programs, including Medicaid and Medicare, for prior criminal acts, licensure suspensions or revocations, healthcare fraud, defaulting on loans or scholarship obligations, or previous employment

31. *Id.*

32. U.S. Department of Justice, Office of the Attorney General, *The Attorney General’s Report on Criminal History Background Checks*, 18 (June 2006), https://www.bjs.gov/content/pub/pdf/ag_bgchecks_report.pdf.

33. Elizabeth J. Letourneau, Jill S. Levenson, Dipankar Bandyopadhyay, Debajyoti Sinha, Kevin S. Armstrong, *Evaluating the Effectiveness of Sex Offender Registration and Notification Policies for Reducing Sexual Violence against Women and Children*, Doc. No. 231989, (Sept. 2010), <https://www.ncjrs.gov/pdffiles1/nij/grants/231989.pdf>.

34. Michael Doyle, *Justice: Sex Offender Registries Often Inaccurate*, McClatchydc.com (Dec. 15, 2008), <http://www.mcclatchydc.com/news/politics-government/article24515851.html>.

35. For the negative consequences of omitting vital data, see, e.g., Celeste Ricco, *Background Screening Myth: SSN’s and Criminal Records*, choicescreening.com (Jan. 13, 2015), <https://www.choicescreening.com/blog/background-screening-myth-ssn-s-and-criminal-records-1>.

36. Office of Inspector General, U.S. Department of Health and Human Services, Exclusions Database, <http://exclusions.oig.hhs.gov/> (last visited Jan. 15, 2018).

as manager, officer, or owner of a sanctioned healthcare entity.³⁷ Any healthcare provider who hires (or contracts with) an individual or entity on the list is subject to civil penalties and mandatory reimbursements.³⁸ Liability may be imposed upon any entity that provides direct patient care, indirect patient care, or other compensated services when the person furnishing services either knows or should know of the exclusion.³⁹ Even in the rare event that a healthcare facility or organization does not receive funding from federal sources, searching the LEIE is simple and should be part of all screening.⁴⁰

III. ILLEGAL DRUGS AND DRUG TESTING

While post-employment workplace drug testing can be complicated by multiple state and federal laws, especially in public sector employment, pre-employment drug testing is generally allowed with few if any restrictions in every state.⁴¹ Drug testing is critical because workplace drug use has serious negative consequences, particularly in healthcare facilities. Under federal law, the Drug-Free Workplace Act of 1988⁴² mandates that employers receiving federal grants or contracts must establish comprehensive programs to achieve a workplace “essentially free of drugs.”⁴³ Consequently, applicants are almost universally tested even when there is no reason to believe the prospective employee has ever used illegal drugs. The nexus between illicit drug use and compromised workplace safety, productivity, absenteeism, employee theft, and higher medical costs has been recognized for decades.⁴⁴ Nearly thirty years of standardized (non-forensic) drug testing makes it virtually impossible today for otherwise “innocent” applicants to be excluded because of false positives from a certified drug-testing laboratory.⁴⁵ Although healthcare organizations are not technically mandated to use pre-employment drug testing, they

37. 42 CFR § 1001.2 (2017).

38. 42 U.S.C. § 1320a-7a (2017).

39. *Id.*

40. Authors’ observations based on interactions with Exclusions Database, *supra* note 36.

41. In 2013, the Inspector General Office of the U.S. Department of Health and Human Services urged that “all healthcare workers with access to drugs should be required to undergo random drug testing.” Daniel R. Levinson and Erika T. Broadhurst, *Why Aren’t Doctors Drug Tested?*, NEW YORK TIMES, (Mar. 12, 2014).

42. Title 41 U.S.C. §81.

43. 10 CFR § 707.11 (requires government contractors to be tested, at a minimum, for marijuana, cocaine, opiates, phencyclidine and amphetamines).

44. Arthur L. Frank, *Medical Screening and the Employee Health Crisis*, JOURNAL OF THE AMERICAN MEDICAL ASSOCIATION (“JAMA”) (Sept. 1990).

45. Neil A. Fortner, David M. Martin, S. Evren Esen, and Laura Shelton, *Employee Drug Testing: Study Shows Improved Productivity and Attendance and Decreased Workers’ Compensation and Turnover*, JOURNAL OF GLOBAL DRUG POLICY AND PRACTICE (Nov. 16, 2011).

should always do so.⁴⁶

Opiates, usually from use of painkillers, have become the most detected drug in recent urine screens.⁴⁷ Opioid abuse is a major factor in declining labor force participation among workers age 25 to 55.⁴⁸ Deaths from prescription painkillers, or street drug substitutes, now exceed car accidents as the leading cause of accidental death in America.⁴⁹ Also of concern is widespread use of cannabis. Currently twenty-nine states and the District of Columbia have laws legalizing medicinal marijuana or recreational marijuana use, or both. Although cause for celebration among cannabis users, employee drug testing for THC⁵⁰ still matters. Marijuana remains unlawful under federal law and courts have consistently held, even in states with medicinal or recreational cannabis laws, that employers have the absolute right to enforce drug-use policies restricting employment to, or terminating those, who fail to comply. Even California's expansive Proposition 64 Amendment,⁵¹ preserves the absolute right of employers to maintain strict drug and alcohol-free workplaces.⁵²

Use of any unlawful drug affects work performance even when illegal or recreational drug use occurs outside of work hours. While some employers may consider relaxing pre-employment drug standards (i.e. to fill non-clinical staff jobs), there are compelling reasons for not doing so, including workplace safety, insurance, and third party civil

46. See 82 FR § 7920, Mandatory Guidelines for Federal Workplace Drug Testing Programs (Oct. 1, 2017), <https://www.federalregister.gov/documents/2017/01/23/2017-00979/mandatory-guidelines-for-federal-workplace-drug-testing-programs>.

47. Press Release, Center of Disease Control, CDC Releases Guideline for Prescribing Opioids for Chronic Pain (Mar. 15, 2016). See also, Michael C. Milone, *Laboratory Testing for Prescription Opioids*, *Journal of Medical Toxicology*.

48. Mamta Badkar, *Opioid Crisis Weighing on US Labour Force Participation*, *FINANCIAL TIMES* (July 13, 2017), <https://www.ft.com/content/776ba9e3-d47c-3554-8421-9238f79ef1b7>.

49. R.A. Rudd, P. Seth, F. David, and L. Scholl, *Increases in Drug and Opioid-Involved Overdose Deaths — United States, (2010–2015)*. *MMWR Morbidity Mortality Weekly Report* 2016; 65:1445–1452. DOI: <http://dx.doi.org/10.15585/mmwr.mm65051e1>.

50. THC or tetrahydrocannabinol is the psychoactive chemical found in the cannabis plant producing euphoria, elation, delusions, changes in thinking, and even hallucinations. See Zerrin Atakan, *Cannabis, a Complex Plant: Different compounds and Different Effects on Individuals*, 2(6) *THERAPEUTIC ADVANCES IN PSYCHOPHARMACOLOGY* 241-54 (Dec. 2012).

51. Cal. Health & Safety Code § 11362, Control, Regulate and Tax Adult Use of Marijuana Act (2017).

52. “Nothing in § 11362.1 shall be construed or interpreted to amend, repeal, affect, restrict, or preempt: The rights and obligations of public and private employers to maintain a drug and alcohol free workplace or require an employer to permit or accommodate the use, consumption, possession, transfer, display, transportation, sale, or growth of marijuana in the work place, or affect the ability of employers to have policies prohibiting the use of marijuana by employees and prospective employees, or prevent employers from complying with state or federal law.”

liability.⁵³ Although some might argue that an employee who uses marijuana several days before returning to work may not feel or be noticeably impaired, there is evidence that THC metabolites remain in the system for weeks, even after a single use. There is no doubt that if polled, patients would prefer not to be under the care of anyone whose performance or judgment could be even slightly impaired by drugs. As most human resources departments are very familiar with drug testing, they should work closely with clinical leadership (and compliance staff) to ensure drug-screening policies are consistent across all departments.

IV. CREDIT HISTORY SCREENING

Review of applicant credit histories has been a generally accepted practice for at least 60 years.⁵⁴ Polling indicates almost half of employers perform credit checks on some or all job candidates.⁵⁵ This is especially true in banking, property management, hotels, and healthcare. Common sense informs us of the correlation between cautious, financially conscientious people and future risk-taking behavior. Most healthcare workers have access to patient property and financial information and patients are often vulnerable or incapacitated. Credit history screening is important for almost anyone, not just business office employees. Credit history screening allows employers to assess previous financial irresponsibility or distress as it may be associated with greater risks for theft and fraud.⁵⁶ Unfortunately, as few as 13% of organizations routinely conduct credit checks on all job candidates. Fewer than 50% review credit histories for managers and business office staff.⁵⁷ Perhaps the best argument for correlating credit histories with potential job performance is that essentially any federal government employment requiring a security clearance of “confidential” or higher requires a credit history screening.⁵⁸ The employment application (and post-employment periodic review) for all employees within the

53. See, e.g., Steve Bates, *Rethinking Zero Tolerance on Drugs in the Workplace*, SHRM (Dec. 5, 2017), <https://www.shrm.org/resourcesandtools/hr-topics/talent-acquisition/pages/rethinking-zero-tolerance-drugs-workplace.aspx>.

54. *Id.* Note: US civil service employees have been credit-screened since 1953.

55. *Top Workplace Trends/Workplace Forecast Future Workplace Trends* (Poll), SHRM (Feb. 2001), http://www.shrm.org/Research/FutureWorkplaceTrends/Documents/11-0014WPF_Posting_6.pdf.

56. See, e.g., Beverley Earle, Gerald Madek and David Missirian, *The Legality of Pre-Employment Credit Checks: A Proposed Model Statute to Remedy an Inequity*, 20 Va. J. Social Policy & the Law 1, http://www.vjspl.org/wp-content/uploads/2012/08/Page_Proof_Earle_Layout-PDF.pdf.

57. Equal Employment Opportunity Commission, *Background Checking: Has the Use of Credit Background Checks Increased? A Comparative Look - 2010 and 2004*, SHRM (Sept. 22, 2010), https://www1.eeoc.gov/eeoc/meetings/10-20-10/credit_background.cfm?renderforprint=1.

58. FAQs – What are background checks and security clearances? USAJOBS.gov, <https://www.usajobs.gov/Help/faq/job-announcement/security-clearances/> (last visited Jan. 18, 2018).

Executive Branch mandates employees “satisfy in good faith their obligations as citizens, including all just financial obligations . . . especially those such as federal, state, or local taxes . . . that are imposed by law.”⁵⁹

The Federal Fair Credit Reporting Act, 15 U.S.C. § 1681 (“FCRA”)⁶⁰ regulates the accuracy, fairness, and privacy of consumer information gathered by consumer reporting agencies. The FCRA also regulates background investigations and reports prepared by third-party entities on behalf of private employers if they include any financial information.⁶¹ The FCRA applies to professional screening companies, credit bureaus, licensed private investigators, and certain attorneys. The FCRA does not, however, apply to employers who perform screening functions in-house or, generally, for jobs with annual salaries above \$75,000.⁶² For employment purposes, the FCRA requires that employers provide job candidates with an opportunity to refute, explain, or correct information in credit histories if they reflect negatively upon the candidate. Obviously, employers must connect the need for specific criteria or a standard with specific job-related risk.

Equally important is that negative information honestly disclosed by an applicant should be weighed differently than undisclosed information discovered later in the vetting process. Likewise, human resources professionals understand applicants may have experienced financial setbacks from layoffs, divorce, abusive spouses, or medical bills leading to excessive reliance upon credit. Usually, employers should not consider any credit information until the end of the hiring process. In fact, credit history may be better utilized for verifying other credentials than for discriminating among or between candidates.⁶³ In other words, candidates should not be per se “pre-screened” for negative credit information. Likewise, hardship-related financial conditions such as medical debt should be discounted or even ignored completely.

Assessing the fitness of candidates with derogatory credit information generally requires additional investigation, clarification, discussion, and (ultimately) more nuanced evaluation. Several states have also recently enacted laws restricting the use of credit reports for most routine employment screening.⁶⁴ Legislation has also been introduced at the

59. 5 CFR § 2635.809 (just financial obligations).

60. 15 U.S.C. § 1681.

61. FCRA, *Supra* note 4.

62. FCRA §605(b)(3).

63. *Supra* note 60.

64. Hawaii, Illinois, Oregon, and Washington have enacted laws restricting the use of credit reports for most routine employment screening. *See, e.g., State Laws Limiting Use Of Credit Information For Employment*, Microbilt.com (Mar. 1, 2018),

federal level. A proposed amendment to the FCRA⁶⁵ would, with few exceptions, ban private employers nationwide from utilizing credit reports in hiring or promotion.⁶⁶ Critics of credit history screening typically cite “unfairness,” “invasion of privacy,” or “discrimination.” Yet, like criminal behavior, poor credit behavior is a remarkably consistent predictive tool. Poor credit has long been a factor in automobile and life insurance rate calculations. As many as 70 million adults in the United States have neither traditional credit scores nor robust credit histories.⁶⁷ People who have worked to establish credit histories or have made decisions adversely affecting their credit history in the past are not per se “bad people.” Employers must consider the whole candidate. A credit check, while important, is no more than a single, discrete portion of the overall screening process. Credit checks complete the “picture” of an otherwise qualified or acceptable applicant.⁶⁸

V. PSYCHOLOGICAL ASSESSMENTS (SUITABILITY, HONESTY, AND EMOTIONAL INTELLIGENCE)

Since 2001, human resources managers have steadily adopted more employment testing based upon concerns for workplace violence, safety, and third-party liability. Large-scale adoption of online job applications has led employers to seek more efficient ways to screen large applicant pools objectively. Human resources departments employ “recruiting analytics” to measure candidate qualifications and to shortlist candidates for open positions.⁶⁹ Testing often includes basic cognitive measures, psychological screening, emotional intelligence,⁷⁰ personality typing,

http://www.microbilt.com/Cms_Data/Contents/Microbilt/Media/Docs/MicroBilt-State-Laws-Limiting-Use-of-Credit-Information-For-Employment-Version-1-1-03-01-17-.pdf.

65. Codified at 15 U.S.C. §1681 et seq. The FTC, however, follows the pre-codification format (as published by the Government Printing Office) and continues to use FCRA section numbers § 601-629.

66. The Equal Employment for All Act, H.R. 3149, 111th Congress, (July 14, 2009). A bill to amend the FCRA to ban employers from using credit reports entirely in making hiring or promotion decisions.

67. Rachel Schneider and Arjan Schutte, *The Predictive Value of Alternative Credit Scores*, Center for Financial Services Innovation, <https://s3.amazonaws.com/cfsi-innovation-files/wp-content/uploads/2017/02/05053225/The-Predictive-Value-of-Alternative-Credit-Scores.pdf> (last visited Jan. 18, 2018).

68. See the *Resume Liars Club*, www.marquetinternational.com/liars.htm.

69. Nathan R. Kuncel, Deniz S. Ones, and David M. Klieger, *In Hiring, Algorithms Beat Instinct*, HARVARD BUSINESS REVIEW (May 2014).

70. Andrew Coleman, *A Dictionary of Psychology* (3 Ed.), Oxford University Press (2008). Emotional intelligence (“EI”) is the measurement of the perceived capability of individuals to recognize their own emotions and those of others. Despite widespread use of EI tests, the actual correlation between EI and any specific positive employment-related outcomes is generally considered as unsubstantiated within the scientific community at large.

“success prediction,” customer-service, and even “honesty” testing.⁷¹ While tests can make selection more efficient, personnel assessment requires a broad, holistic approach that factors all available information into a “whole person” picture. Psychological and integrity testing may also prove useful as evidence of due-diligence that an employer reasonably investigated an applicant's mental fitness in negligent hiring claims.⁷²

On the other hand, complaints of testing-related discrimination filed with the EEOC, or in post-complaint Title VII lawsuits, have trended upward over the past decade.⁷³ Personality, cognitive, and integrity testing in particular seem most problematic. Title VII (of the Civil Rights Act of 1964)⁷⁴ and implementing EEOC guidelines⁷⁵ address employment-related discrimination. EEOC guidelines direct that employment-related testing or screening may not result in, cause, or create an adverse or “disparate” impact upon a protected class (or run afoul of privacy laws). Adverse impacts are determined by reference to the so-called “80 percent rule.”⁷⁶ The 80% rule holds that employment (or promotion) rates for protected classes which are less than 80% (i.e. 4/5ths) of the rate for the group as a whole are regarded as prima facie evidence of unlawful discrimination.

Adverse impact discrimination is distinguished from “disparate treatment” discrimination in that disparate impact discrimination requires no proof of intent to discriminate. While nonconformity with the 80% rule does not create an automatic, or per se, presumption of discrimination, it does indicate that the test has *potential* discriminatory impact. If unsuccessful applicants establish disparate impacts, the employer must demonstrate the selection criteria are justified by a business necessity “manifestly related” to job duties⁷⁷ and not a mere “pretext” for unlawful discrimination.⁷⁸

71. Kevin Byle and Thomas Holtgraves, *Integrity Testing, Personality, and Design: Interpreting the Personal Reaction*, 4.22 (4) JOURNAL OF BUSINESS AND PSYCHOLOGY 287–95 (Apr. 5, 2008).

72. D.S. Ones, C. Viswesvaran, C., & F.L. Schmidt, *Comprehensive Meta-Analysis Of Integrity Test Validities: Findings And Implications For Personnel Selection And Theories Of Job Performance*, 78 JOURNAL OF APPLIED PSYCHOLOGY 679-703 (1993).

73. Lauren Weber and Elizabeth Dwoskin, *Are Workplace Personality Tests Fair?*, Wall Street Journal (Sept. 29, 2014), <https://www.wsj.com/articles/are-workplace-personality-tests-fair-1412044257>.

74. Pub.L. 88-352, 78 Stat. 241, as amended. Codified at 42 U.S.C. § 2000(e) et seq.

75. § 15, EEOC Compliance Manual, www.eeoc.gov/laws/guidance/compliance.cfm.

76. The 80% test (also known as the “4/5ths Rule”) was developed in 1971 by the California Technical Advisory Committee on Testing, or TACT under auspices of the California Fair Employment Practice Commission. The test was subsequently codified by the EEOC in 1978 as part of the Uniform Guidelines for Employee Selection Procedures (UGESP). See 29 C.F.R. Part 1607.

77. *Griggs v. Duke Power* *supra* note 35. See also *EEOC v. Sambo's of Georgia, Inc.*, 530 F. Supp. 86, 92 (N.D. Ga. 1981).

78. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

According to the EEOC, any screening process, test, or procedure must (1) represent a "reasonable measure of job performance;" and (2) be proven to be reliable and capable of validation by distinguishing between applicants who will be successful from those who will be unsuccessful."⁷⁹ For example, if an employer refuses to hire janitors that are non-high school graduates, this policy may have a disparate impact upon minority applicants. Similarly, a "no-beards" policy might also be discriminatory because of a predisposition for African-American men to develop pseudo-folliculitis barbae (severe shaving bumps).

The seminal impacts-discrimination case is the 1989 Supreme Court's decision, *Wards Cove Packing v. Antonio*.⁸⁰ In *Wards Cove*, the Supreme Court noted that any challenged pre-employment practice must be justified, in a "significant" way, with the legitimate employment goals of the employer. Although the Court equated "significant justifications" with "substantial" or "reasonable justifications," there is no express statutory requirement that a challenged practice be either "essential" or "indispensable" to meet the employer's burden of showing business necessity. The *Wards Cove* standard was essentially codified in the Civil Rights Act of 1991,⁸¹ which states that "[t]he mere existence of a statistical imbalance in an employer's workforce on account of race, color, religion, sex, or national origin is not alone sufficient to establish a prima facie case of disparate impact violation."⁸² To ensure nondiscrimination, testing should never be substituted for reference checks, resume reviews, and in-person interviews. Tests must not be used to screen out applicants but as tools that might provide additional insight into a candidate's potential for success. Multiple tests prevent over-reliance on any one instrument while providing multiple dimensions of personality.

Perceptions are also extremely important. If applicants perceive the hiring process has been unfair or discriminatory, they are more likely to file a complaint.⁸³ How testing is conducted and how results are shared should be professional, transparent, and objective. All testing should be periodically reviewed to ensure it continues to correlate to job-performance, remains scientifically valid, and, most important, does not

79. 29 CFR § 1607.5(B). See also *Watson v. Fort Worth Bank & Trust Co.*, 487 U.S. 977, 998 (1988).

80. 490 U.S. 642 (1989).

81. Pub. L. 102-166 (1991).

82. 42 U.S.C. § 2000e-2(k)(1)(A)(i); See *Connecticut v. Teal*, 457 U.S. 440, 453-55 (1982).

83. See, e.g., Ruth Mayhew, *How to File a Complaint Against My Employer's Unfair Hiring Practice*, CHRON.COM, <http://work.chron.com/file-complaint-against-employers-unfair-hiring-practice-9846.html>.

cause unlawful discrimination.⁸⁴

VI. RESUME FRAUD

Resume fraud is at epidemic levels across all job markets.⁸⁵ This type of employment fraud encompasses fictitious, exaggerated, or misleading information on job applications or resumes. A 2012 study by the Society for Human Resource Management (“SHRM”) reports that 53% of resumes and job applications contain falsifications.⁸⁶ In the same year, ADP reported that almost half (46%) of checks conducted contained material and substantial discrepancies.⁸⁷ Depending upon the source, somewhere between 30% and 50% of resumes submitted annually contain material omissions or false and misleading information. Educational degrees in particular, may have been awarded by non-accredited programs requiring little or no actual academic work. The Council for Higher Education Accreditation, a federally recognized academic accreditation agency, estimates that more than 200,000 fake college degrees are sold annually in the United States.⁸⁸ This includes bogus degrees and even certifications in sensitive professions such as healthcare, law-enforcement, and homeland security. Online business like CareerExcuse.com⁸⁹ and fakeresume.com⁹⁰ offer verification for a price for fake work histories as well as fake but live personal references for job seekers (typically via a 1-800 number).

Besides misrepresenting educational qualifications, two other matters of concern are withholding or minimizing criminal convictions (especially for drug use or impaired driving) and concealing or misrepresenting the circumstances regarding reasons for leaving previous employment. Applicants also misrepresent personal accomplishments, prior job responsibilities, and even professional

84. See, e.g., Bridget Miller, *Is Drug Testing Discriminatory?*, HR DAILY ADVISOR (Nov. 14, 2014), <http://hrdailyadvisor.blr.com/2014/11/07/is-drug-testing-discriminatory/>.

85. Michael Kinsman, *Resume Fraud Rampant In The Work Force*, LAW CROSSING.COM, <https://www.lawcrossing.com/article/3032/Resume-fraud-rampant-in-the-work-force/> (last visited Jan. 18, 2018).

86. *2012 Employee Job Satisfaction and Engagement Survey: How Employees Are Dealing With Uncertainty*, SHRM (2012), https://www.shrm.org/resourcesandtools/tools-and-samples/policies/documents/12-0537%202012_jobsatisfaction_fnl_online.pdf.

87. ADP Research Institute, *National Employment Report* (2012).

88. *Toward Effective Practice: Discouraging Degree Mills in Higher Education*, Council for Higher Education Accreditation (May 2009), https://www.chea.org/userfiles/uploads/Degree_Mills_Effective_Practice.pdf.

89. Career Excuse - Most Trusted Reference Answering Service Since 2009!, <https://www.careerexcuse.com/> (last visited Jan. 15, 2017).

90. Fake Resume – The Machiavellian Guide To Getting A Job, <http://fakeresume.com/> (last visited Jan. 15, 2018).

licensing.⁹¹ Some applicants omit information because they genuinely believe it is not relevant. In most instances, however, omissions are based upon well-grounded fears that information honestly disclosed will result in automatic denial for a job they assume they are fully, if not “best” qualified, to receive. Motives are therefore important. Knowing misrepresentation or deliberate deception in a resume, even for mistakes made in the past, means the applicant carries the present burden of dishonesty and unreliability.⁹²

Although perhaps intuitive, employers are typically unaware that there are no current state or local laws prohibiting or criminalizing resume fraud or falsification of non-government employment forms.⁹³ Courts have addressed “application fraud” in the context of wrongful termination lawsuits by former employees (i.e. following discovery of falsified employment information). The 2001 case of *Sarvis v. Vermont State Colleges* is frequently cited. In the application for a university teaching position, Sarvis stated he was “particularly well qualified to teach business law and business ethics.”⁹⁴ Unfortunately, Mr. Sarvis failed to disclose that immediately prior to applying for the job, he was completing a five-year term in prison for bank fraud. Upon post-hire discovery of this information, Sarvis was terminated. Despite upholding the decision by the university to fire Sarvis, the Vermont Supreme Court held that applicant dishonesty establishes just cause termination if the falsified information is “material to” and directly related to the stated job qualifications and that the employer in question “must actually rely upon” the falsified information in making the original hiring decision.⁹⁵ In other words, lying and a general lack of integrity alone may not provide a legal basis alone to terminate an employment contract.

While businesses face litigation for merely exercising discretion, applicants may obfuscate, evade, lie, quibble, or cheat potential employers with near virtual impunity. While resume fraud may lead to a non-hire at worst, businesses that are not fully candid and honest with applicants may be held civilly liable in “truth-in-hiring” lawsuits based upon fraudulent inducement, even in employment at will jurisdictions.⁹⁶

91. Attewell, Paul & Domina, Thurston, *Educational Imposters And Fake Degrees, Research in Social Stratification and Mobility*, 29, 57-69, 10.1016/j.rssm.2010.12.004 (2011).

92. Brian Tibbs, *The Dangers of Lying on Your Resume*, WORKNET DU PAGE (Nov. 2, 2016), <http://www.worknetdupage.org/blog/2016/11/02/dangers-lying-resume/>.

93. Title 18 U.S. Code §1001 provides that knowingly falsifying or concealing a material fact in a federal employment application or security clearance form is a felony which may result in a fine of 10,000 dollars and imprisonment of five years.

94. 772 A.2d 494, 496 (Vt. 2001). *See also* Crawford Rehab. Services, Inc. v. Weissman, 938 P.2d 540, 542 (Colo. 1997).

95. *Id.* at 502.

96. *See* Navaretta v. Group Health Inc., 595 N.Y.S.2d 839 (N.Y. App. Div. 3d Dept. 1993); and Stewart v. Jackson & Nash, 976 F.2d 86 (2d Cir. 1992).

Under these circumstances, employer reliance upon credit checks to confirm resume or applicant data such as previous addresses or employment becomes even more crucial. Complicating matters further, despite statutory and common-law qualified privilege (i.e., immunity)⁹⁷ from defamation claims arising out of employment queries, many employers prohibit current employees from commenting upon the qualifications or work performance of previous employees. This is unfortunate because fully truthful, non-malicious⁹⁸ disclosures to subsequent prospective employers may be of immense value. For example, letting another business know that “Mr. Jones was terminated for cause from his previous position for misconduct” or “for fighting with a co-worker” should be the basis for further discussion with the applicant but could not, if true, serve as the basis for a defamation lawsuit against the prior employer. Despite this privilege, a decision to share negative information with another (subsequent) prospective employer is best made by the human resources director; and in especially sensitive cases, after consultation with retained counsel.

VII. SOCIAL MEDIA SCREENING

Online behavior should never be discounted. An applicant’s online behavior should be considered as reasonably equivalent to workplace behavior. Employers may bear the risk of a negligent hire or negligent retention lawsuit for failing to access readily available public profile information especially if the content presages violence, abuse, or bullying behavior. Social media screening of online activity includes reviewing activity on Linked-In, Facebook, Twitter, SnapChat, and others.⁹⁹ A SHRM Survey from 2016 indicates that 43% of human resources professionals checked applicant social networking activity¹⁰⁰ and that no less than 36% reported disqualifying candidates based upon social media activity.¹⁰¹ Depending upon privacy settings, reviewing social networking activity is relatively easy and not particularly time-consuming. Social media information or activity may also be useful in

97. See Charles D. Tiefer, *Qualified Privilege to Defame Employees and Credit Applicants*, 12 HARV. C.R.-C.L. L. REV. 143 (1977).

98. See *Boyd v. Nationwide Mut. Ins. Co.*, 208 F.3d 406 (2d Cir. 2000).

99. See, e.g., Debora Jeske and Kenneth S. Shultz, *Using Social Media Content For Screening In Recruitment And Selection: Pros And Cons*, SAGE JOURNAL OF WORK, EMPLOYMENT, AND SOCIETY (Nov. 20, 2015), <http://journals.sagepub.com/doi/pdf/10.1177/0950017015613746>.

100. *Using Social Media for Talent Acquisition*, SHRM (Jan. 7, 2016), <https://www.shrm.org/hr-today/trends-and-forecasting/research-and-surveys/pages/social-media-recruiting-screening-2015.aspx>.

101. *Id.* at 29.

verifying other information provided by the candidate.¹⁰² Positive information such as participation in professional organizations or charitable endeavors should also be noted and shared with hiring managers. Negative information or disqualifying activities may include recreational drug use, discriminatory or extremist viewpoints, negative comments about current or previous employers, bullying,¹⁰³ and even poor grammar. Online association with persons or organizations that are involved in illegal, discriminatory, or other nefarious activity should always be viewed as disqualifying because even casual associations with others engaged in these types of undesirable behaviors is a well-accepted and consistent predictor of criminality and rules-breaking.¹⁰⁴

National Association of Professional Background Screeners (“NAPBS”) Executive Director, Melissa Sorenson, reflected that employers should understand that “whether the individual is an employee, independent contractor or otherwise, the worker represents the employer’s brand and screening ... is a critical risk mitigation tool, regardless of the worker’s classification.”¹⁰⁵ Because of the unique nature of healthcare workers, especially with potential access to vulnerable patients and family members, social media screening for all employees may be a “best practice.” Despite the obvious advantages of social media screening, there are important caveats and possible legal restrictions in reviewing an applicant’s online presence and history. The primary legal considerations involved in social media screening is the danger of potential disparate impact or treatment “profiling” based upon race, national origin, age, pregnancy, or disability of the candidate.¹⁰⁶ Additionally, twelve states actually limit or even bar employers from seeking personal social media account usernames or passwords.¹⁰⁷

102. Lisa Quast, *Recruiting Reinvented: How Companies Are Using Social Media in the Hiring Process*, FORBES (May 21, 2012), <https://www.forbes.com/sites/lisaquast/2012/05/21/recruiting-reinvented-how-companies-are-using-social-media-in-the-hiring-process/#3c34e80678e1>.

103. Almost 20% of U.S. workers report they have been bullied or witnessed bullying at their places of employment. See Zogby Analytics, *2014 Workplace Bullying Survey* (June 2017), <http://www.workplacebullying.org/2017-us-survey/>.

104. T.C. Pratt and F.T. Cullen, *The Empirical Status Of Gottfredson & Hirschi’s General Theory Of Crime: A Meta-Analysis*, 38 *Criminology* 931-964 (2000).

105. Roy Maurer, *Know Before You Hire: 2017 Employment Screening Trends*, SHRM (Jan. 25, 2017), <https://www.shrm.org/resourcesandtools/hr-topics/talent-acquisition/pages/2017-employment-screening-trends.aspx>.

106. See *Social Media Is Part of Today’s Workplace but its Use May Raise Employment Discrimination Concerns*, EEOC (Mar. 3, 2014), <https://www.eeoc.gov/eeoc/newsroom/release/3-12-14.cfm>. See also Hannah Morgan, *Want To Get A Job Fast? Become A Social Media Savant — A Survey Finds More Than Three-Quarters Of Employers Hire Using Social Networks*, U.S. NEWS (Sept. 11, 2013), <http://money.usnews.com/money/blogs/outside-voices-careers/2013/09/11/want-to-get-a-job-fast-become-a-social-media-savant>.

107. See, e.g., National Conference of State Legislatures, *Employer Access to Social Media Usernames and Passwords*, <http://www.ncsl.org/research/telecommunications-and-information-technology/employer-access-to-social-media-passwords-2013.aspx>, (last updated Sept. 28, 2014). See

Always bear in mind that online information may or may not be accurate or even verifiable. However, once verified, if information is gathered lawfully and is not used in an unlawful or discriminatory manner, then it should be considered along with all other applicant data.

Any organization that uses online information should ensure that applicants are advised that online screening may take place, but that only employment-relevant information will be considered. Further, social media content should be assessed after an applicant has been interviewed after human resources managers are aware of any potential concerns about whether the applicant is a member of protected class or group.¹⁰⁸ It is better practice to allow human resources departments (or third-party background services) to conduct reviews and not the actual hiring manager. Human resources professionals are generally more sensitive to what social media information is job-relevant and what other matters might be associated with someone's age, sex, national origin, disability, etc. Before disqualifying any applicant based upon any social media information, the candidate should be provided with a reasonable opportunity to respond, explain, or deny worrisome content.¹⁰⁹ Social media screening should never be initiated in advance of qualified legal guidance and, where implemented, should be one aspect of complete file review of candidates.¹¹⁰

VIII. MILITARY RECORDS AND EXPERIENCE

According to the Center for a New American Security ("CNAS"), "most individual American businesses will hire veterans only when they perceive it is good for business to do so."¹¹¹ Unfortunately, veterans typically fail to demonstrate to human resources managers why their prior military experience and training qualifies them for a job.¹¹² Another advantage in hiring veterans is that most veterans leave active or reserve service with a current national security clearance.¹¹³ While

also Courtney B. Lario, *What Are You Looking At? Why the Private Sector's Use of Social Media Need Not Be Legislated*, 38 Seton Hall Legis. J. 133, 137-140 (2013).

108. Jonathan A. Segal, *LEGAL TRENDS Social Media Use in Hiring: Assessing the Risks*, SHRM, <https://www.shrm.org/hr-today/news/hr-magazine/pages/0914-social-media-hiring.aspx>.

109. *Id.*

110. *Id.*

111. Margaret C. Harrell and Nancy Berglass, *Employing America's Veterans – Perspectives from Businesses*, Center for a New American Security at 8 (June 2012), <https://www.benefits.va.gov/VOW/docs/EmployingAmericasVeterans.pdf>.

112. *Id.* at 18.

113. The U.S government security clearance process is governed by Exec. Order 10865 (As amended by Exec. Order No. 10909, 26 Fed. Reg. 508 (Jan. 17, 1961); Exec. Order No. 11382, 32 FR 16247 (Nov. 28, 1967); and Exec. Order No. 12829, 58 FR 3479 (Jan. 6, 1993)); and DoD Directive

security clearance procedures fall outside the scope of this article, secret or top-secret clearance reviews in particular represent a depth of background vetting that is completely impossible in the civilian sector. But, an active security clearance is not a green light to forgo the usual pre-employment screening. At a minimum, employment professionals should have some familiarity with military ranks and skill identifiers and civilian job equivalents. Additionally, understanding a modest amount of military terminology better illuminates why a veteran candidate is a best fit for a position. Towards these ends, honorably discharged veterans are in many respects “pre-screened.” They have already demonstrated loyalty, commitment, and the ability to work effectively with others under challenging conditions.

Unfortunately, civilian employers often simply take an applicant’s word that (1) they are a veteran, and (2) they were awarded an honorable discharge. Also, employers are typically not able to distinguish the crucial differences between an “Honorable Discharge” and a “General Discharge under Honorable Conditions” (a.k.a. “General Discharge”).¹¹⁴ Although these terms are similar, they are vastly different. The same DD-214 form categorizes the “quality” of a member’s service by a “grade” of discharge. There are in fact five “grades” of discharge: (1) Honorable; (2) General Under Honorable Conditions; (3) Other Than Honorable (OTH); (4) Bad Conduct (BCD); and (5) Dishonorable (DD or Dismissal for a commissioned officer). The first three are administrative determinations. The latter two are outcomes of felony equivalent criminal trials by court-martial. The key to evaluating a veteran’s service, training, and discharge is actually the DD (Department of Defense) Form 214, Certificate of Release or Discharge from Active Duty.¹¹⁵

Employers should only accept an “undeleted certified copy” of the DD-214 (also referred to as the “Long Form DD214”). The long form specifies the exact administrative reason why an applicant was separated from the military (often expressed as a numerical “SPN-Code”). Without researching an SPN Code, hiring managers may inadvertently hire a veteran who was involuntarily discharged for “general unfitness” (SPN #258), “apathy” (SPN #46C), “paranoid personality” (SPN #463), or “pattern of misconduct” (SPN #280).¹¹⁶ Additionally, if an applicant’s service record indicates total service of less than 36 or 48

5220.6. Federal contractors are afforded due process rights in this area before the Defense Office of Hearings and Appeals (“DOHA”).

114. See, e.g., Jeff Walker, *The Practical Consequences of a Court-Martial Conviction*, The Army Lawyer (Dec. 2001), <https://reason.com/assets/db/15099896116404.pdf>.

115. Title 38, United States Code, Chapter 3, § 210(c).

116. Touchstone Research Group, *Instruction Sheet: SPN and Separation Codes*, http://www.dd214.us/reference/SPN_Codes.pdf (last visited Jan. 18, 2018).

months (e.g. 18 months of a four-year enlistment), and/or a discharge date different than the “anniversary” month and date of the original enlistment, then the reason for the early discharge should be determined. Another important data point is the “RE Code” (Reenlistment Eligibility). The RE Code specifies under what conditions veterans who have not retired from longevity or medical reasons may reenlist. Although each branch of the Armed Forces establishes its own reenlistment criteria, as a general rule, an RE Code preceded by the number “1” allows for reenlistment while “2,” “3,” and “4” code numbers are either restrictions or complete bars. While some 2-4 series RE-Codes may be unexceptional or be based upon a physical injury or family responsibilities, any code other than “1” should be identified and correlated with other data in the form. Also important is that all of the military services have recently been cited for lapses¹¹⁷ in reporting felony equivalent court-martial convictions and finger-print data to the FBI’s National Instant Criminal Background Check System (“NCIC”) as required by law.¹¹⁸

IX. THIRD-PARTY SCREENING (VENDORS & CONTRACTED EMPLOYEES)

Exposure to liability from third-party independent contractors is significant. Generally, healthcare entities are not legally responsible for the negligence or misconduct of third-party contractors,¹¹⁹ but broad exceptions have been carved out of this rule to the point where the rule should be restated as “hospitals are not responsible for the actions of independent contractors unless the court thinks they should be.”¹²⁰ Three major exceptions to the rule are situations when: (1) the employer retains direct control over the work leading to the injury;¹²¹ (2) when the work is inherently dangerous;¹²² and; (3) when an injury is the result of a non-delegable duty owed by the employer to the injured person.¹²³ Finally, courts have imposed liability for the negligent selection,

117. A February 1997 report by the Pentagon inspector general found that fingerprint cards were not submitted in more than 80% of cases in the Army and Navy and 38% in the Air Force. See Robert Burns, *Pentagon has known of Crime Reporting Lapses for 20 Years*, AP NEWS (Nov. 7, 2017), <https://apnews.com/8d1635542436469a95831460bdcf8343>.

118. 32 C.F.R. part 635.

119. Restatement (Second) of Torts § 409 (1965).

120. See Note, “*Risk Administration in the Marketplace: A Reappraisal of the Independent Contractor Rule*,” 40 U. CHIC. L. REV. 661, 675 (1973).

121. W. Keeton, D. Dobbs, R. Keeton & D. Owen, PROSSER & KEETON ON TORTS, § 71, at 500 (5th ed. 1984 & Supp. 1988).

122. Restatement (Second) of Torts § 416 (1965) *et. Seq.* (e.g. SECURITY, INFECTION, CONTROL).

123. *Id.*

instruction, credentialing, or supervision of third-party contractors.¹²⁴

Current trends indicate that hospitals remain competitive by providing more services and better amenities. This usually means more outsourcing leading to increased reliance upon temp agencies or other third-party arrangements. This may include retail and food services, pharmacies, florists, banking, and others. In addition, maintenance, security, or housekeeping can be provided by contract. Third-party sales representatives or service providers can also expose your facility to unscreened persons capable of harming patients or employees. Proper screening of vendors and service providers should at a minimum meet the same minimum screening standards of the healthcare organization being serviced. Due diligence requires that host facilities ensure contractors and their employees are reliable and safe. Vetting should take place whenever possible before contracts¹²⁵ are signed. The host facility must insist that safety and security is non-negotiable. Boilerplate indemnification and waiver-of-liability clauses in contracts while advisable are no guarantee of immunity from third parties injured by independent contractors.¹²⁶ Vendor contracts must specify that any falsification, withholding, or knowingly misleading information reported in third-party background reports shall be grounds for immediate exclusion of that person from the host facility. Also, any contractor, or subcontractor, who falsifies or knowingly uses or provides falsified information regarding any person assigned to the premises should constitute grounds for contract termination, damages, and indemnification.¹²⁷

In addition to full-background screening, minimum in-house or third-party vendor credentialing typically also includes Health Insurance Portability and Accountability Act (“HIPAA”) training, immunizations, cyber-security, physical security, and full overview of other institutional policies (i.e. sexual harassment, safety, infection control, HAZMAT, etc.). Access and credentialing of third parties should be integrated with institutional security and compliance data systems to ensure that third-

124. Restatement (Second) of Torts § 409 (1965) *et. Seq.*

125. *See, e.g.*, Shell Oil, Standard Third Party Vendor Agreement, Exhibit 5, *Personnel Surety Program/Contractor Employee Background Screening*, http://www.shell.com/business-customers/aviation/shell-for-suppliers/_jcr_content/par/textimage_0.stream/1447246343695/3ffdf88f3482d34b23ab95aa28488e42f9886170257b54bd4045117d5aa49d0/contractor-employeebackgroundscreening.pdf.

126. Steven B. Lesser, *The Great Escape: How to Draft Exculpatory Clauses That Limit or Extinguished Liability*, *The Florida Bar Journal* 10 (Nov. 2001), <https://www.floridabar.org/news/tfb-journal/?durl=/divcom%2fjn%2fjnjournal01%2ensf%2fAuthor%2f7747D50684A39B0885256AF50015DC32>.

127. Jeff Dehart, *Common Issues in Vendor Contract Management and Invoicing*, Stinnett & Associates (July 20, 2016), https://chapters.theiia.org/san-antonio/News/Documents/2016_07%20-%20Vendor%20Pitfalls.pdf.

party workers are always up-to-date. If the host-facility refuses to credential (i.e. any “adverse employment decision”) based upon credit information found during the background screening report process, you will need to fully comply with applicable FCRA procedures.¹²⁸

X. CONCLUSIONS AND SUGGESTED BEST PRACTICES

Management should utilize every lawfully available, prudent measure to protect patients, employees, and critical infrastructure from harm. Continuous coordination between management, human resources, and qualified counsel enhances screening and selection. Employers must draw clear corollaries between foreseeable risks and the type of background investigations they perform. Striking a reasonable balance is also essential. Second-guessing candidates should never be based upon “leaps of faith.” In healthcare, complete due diligence is the minimum acceptable standard. The ideal end-state is the expeditious selection of qualified and suitable candidates, after full disclosure, in a process free of discriminatory intent, excessive government scrutiny, or litigation. The following non-exhaustive list of best practices should be considered when appropriate in the employment screening of healthcare workers:

- Segregate, restrict, and safeguard applicant files/information in secure storage (or password protected computer). Promptly shred applications, resumes, and other documents containing applicant personal information when no longer needed.¹²⁹
- Prepare job descriptions that include reasons for credit checks and/or criminal background investigations. For example: “Applicant has a demonstrated ability to be fiscally responsible.”¹³⁰
- Pay particular attention to the previous two employers (or five preceding years) in resumes and applications. However talented or exceptional any candidate may be, any reasonable doubts regarding candidate moral fitness must be resolved. Unexplained time-gaps in particular should be carefully assessed to rule out licensure gaps or professional sanctioning.¹³¹

128. See, in particular, *Ernst v. Dish Network, LLC*, 49 F. Supp. 3d 377 (S.D.N.Y. 2014).

129. Charles F. Knapp and Maureen M. Maly, *Disclosure of Employee Personal Data: What Are an Employer’s Legal Obligations?*, Faegre Baker Daniels (Oct. 1, 2006), <https://www.faegrebd.com/disclosure-of-employee-personal-data-what-are-an-employers-legal>.

130. Mark W. Berry, *Legal Challenges to Applicant Credit Checks*, DAVIS WRIGHT TREMAINE LLP (June 3, 2011), www.dwt.com/LearningCenter/Advisories?find=421326.

131. Sabrina Lu, *Employment Verification: A Crucial Check*, HIRERIGHT (Mar. 9, 2015), <http://www.hireright.com/blog/2015/03/employment-verification-a-crucial-check/>.

- When developing screening (and/or assessment) criteria, seek out validity studies that link these measures with identifiable characteristics of successful performance.¹³² Review and update job descriptions with assessment-related job requirements before publication or distribution.¹³³
- Consider outsourcing assessment functions to third-party vendors with solid credentials following legal review by qualified counsel.¹³⁴
- Avoid blanket policies on employee hires. Blanket policies make it difficult to assert that credit or criminal history checks are directly related to specific job-performance or other business necessity. Every qualified applicant deserves good-faith consideration.
- Look for positive and negative patterns of behavior. While background checks are useful in discovering undisclosed negative information, do not overlook consistent positive traits that are useful in selecting the best among several qualified candidates.¹³⁵
- Check all relevant factual assertions made by job applicants. This includes educational degrees, employment history, previous job titles, job responsibilities, salary history, and reasons a candidate may have left a previous position. Anything suspicious constitutes a “red-flag” until ruled out.¹³⁶
- Set a standard for full transparency by management and human resources staff. Encourage candidates to be truthful and forthcoming. By expressing confidence, applicants are usually more willing to address possible misconceptions, mistakes, and reporting errors.¹³⁷

132. *Uniform Guidelines on Employee Selection Procedures*, EEOC, <http://www.uniformguidelines.com/uniformguidelines.html> (last visited Jan. 18, 2018).

133. *Performing Job Analysis*, SHRM (Feb. 8, 2017), <https://www.shrm.org/resourcesandtools/tools-and-samples/toolkits/pages/performingjobanalysis.aspx>.

134. *Help ensure candidates you choose meet your expectations with background screening*, ADP, <https://www.adp.com/solutions/large-business/services/recruitment-and-onboarding/background-screening.aspx> (last visited Jan. 18, 2018).

135. Young Entrepreneur Council, *14 Ways to Identify a Toxic Employee During the Interview*, Inc., <https://www.inc.com/young-entrepreneur-council/14-ways-to-identify-a-toxic-employee-in-an-interview.html> (last visited Jan. 18, 2018).

136. Susan M. Heathfield, *Do You Know Who You're Hiring? Candidate Background Checking Defeats Resume And Job Application Fraud*, THE BALANCE CAREERS (updated June 24, 2018), <https://www.thebalance.com/do-you-know-who-you-re-hiring-1919148>.

137. See, e.g., James O'Toole and Warren Bennis, *A Culture of Candor*, HARVARD BUSINESS REVIEW (June 2009), <https://hbr.org/2009/06/a-culture-of-candor>.

Avoid limiting your screening efforts to criminal and credit histories. In-house background checks are excluded from FCRA. At times (with qualified legal advice) employers may need to review arrest records, bankruptcy filings/petitions, civil judgments, or lawsuit filings not detailed in credit or criminal history reports. This includes paid tax liens, older account charge-offs, etc.¹³⁸

If negative credit information forms any part of the basis for a non-hire, ensure the hiring official documents what specific aspect of the credit report was the basis for the decision. Ensure non-selected applicants are provided with a copy of the credit-report and copy of “A Summary of Your Rights under the Fair Credit Federal Trade Commission (“FTC”).”¹³⁹

Review criminal background check policies to ensure consistency with "business necessity. If criminal history forms the basis for non-hire, management must justify the non-hire based upon: (1) the nature and severity of the offense; (2) length of time since conviction; and (3) the relationship of the offense to the position.¹⁴⁰

Establish a “no tolerance” policy for resume and application fraud. Candidates who provide false and misleading information should be removed from consideration. If resume fraud is discovered post-hire, investigate fully and terminate upon verification of fraud. Application forms should expressly state that material falsehoods or omissions will result in termination “no matter when discovered.”¹⁴¹ Management and salaried employment contracts should include termination for cause provisions for resume fraud or misinformation.¹⁴²

Deal directly with sensitive issues in interviews (within the boundaries of your legal rights to inquire). Research indicates that a majority of applicants will *admit* to previous misconduct and other negative activity if asked. Always allow candidates fair opportunities

138. See, e.g., Joel Greenwald, *Legal Issues with Background Checks*, FORBES (July 10, 2015), <https://www.forbes.com/sites/entrepreneursorganization/2015/07/10/legal-issues-with-background-checks/#342fe0b74ef7>.

139. See, e.g., Federal Trade Commission, *A Summary of Your Rights Under the Fair Credit Reporting Act*, <https://www.consumer.ftc.gov/articles/pdf-0096-fair-credit-reporting-act.pdf>, (last visited Jan. 18, 2018).

140. *Do you know who you're hiring?*, *Supra* note 135.

141. *Id.*

142. See, e.g., Jiang Junlu and Yuting Zhu, *Could False Resume Leads To Unilateral Termination? Not That Simple!*, LEXOLOGY (Oct. 10, 2015), <https://www.lexology.com/library/detail.aspx?g=4a0c1c16-bc0a-4cfb-a368-3ef15fdd62ea>.

to explain, dispute, clarify, or otherwise address negative information before making final hiring decisions.¹⁴³

Crosscheck credit histories with resumes. Ensure job applicants are questioned in detail about prior employment, especially regarding unexplained employment gaps. If doubts arise, request copies of previous W2 forms to verify employment.¹⁴⁴

Use applicant waiver forms (or contract provisions) incorporating blanket authority for future investigations. Recurring post-hire checks of current employees may also reduce the risk of workplace violence and/or employee theft.¹⁴⁵

If not already required by law, take advantage of the USCIS: E-Verify program to verify that the information provided in the Form I-9 is consistent with DHS and Social Security records.¹⁴⁶

Cross-check each candidate with the National Sex Offender registry database and state sex offender databases with verification, if needed, by the Jurisdiction source for any information posted.¹⁴⁷

Ensure temporary employees and contracted workers are screened as thoroughly as permanent hires.¹⁴⁸

Encourage veteran hires and preferences but carefully review “long-form” DD-214’s. Look for and research applicable discharge and reenlistment codes. Distinguish (and discuss with the applicant) discharge characterizations not specified as (simply) “Honorable.”¹⁴⁹

143. George C. Hlavac and Edward J. Easterly, *Legal Issues: Navigating The Interview Process And Avoiding A Legal Landmine*, NACE JOURNAL (Feb. 3, 2014), <http://www.naceweb.org/public-policy-and-legal/legal-issues/legal-issues-navigating-the-interview-process-and-avoiding-a-legal-landmine/>.

144. John Feldmann, *What Should Employers Be Aware Of When Requesting W-2 Forms From Job Applicants?*, FORBES (June 6, 2017), <https://www.forbes.com/sites/forbeshumanresourcescouncil/2017/06/06/what-should-employers-be-aware-of-when-requesting-w-2-forms-from-job-applicants/#2c1818f264a8>.

145. Recent amendments to the FCRA under the Fair and Accurate Credit Transactions Act of 2003 (“FACTA”) set new standards “employee misconduct investigations.”

146. USCIS, *E-Verify and Form I-9*, <https://www.uscis.gov/e-verify/what-e-verify/e-verify-and-form-i-9>, (last visited Jan. 18, 2018).

147. National Sex Offender Public Website, <http://www.nsopw.gov/Core/Portal.aspx> (last visited Jan. 18, 2018).

148. Lainie Petersen, *Advantages and Disadvantages of Temporary Employment Agencies*, CHRON, <http://smallbusiness.chron.com/advantages-disadvantages-temporary-employment-agencies-16150.html> (last visited Jan. 18, 2018).

149. *Supra* note 115.

Do not play favorites. All applicants undergo the same screening process. Never use any single backgrounding tool as a “gatekeeper.” All candidate files should be assessed and reviewed holistically.¹⁵⁰

Ensure an active role of the Compliance Office in the hiring process and that a risk assessment of the background screening process is performed annually as a function of internal control.¹⁵¹ Conduct annual risk assessments of all third-party vendors and vendor employees with credentialed access to the facility or that have access to Protected Health Information,¹⁵² or any other sensitive cyber-data.¹⁵³

150. Alison Doyle, *Job Applicant Pre-Employment Screening*, THE BALANCE (last updated Sep. 19, 2017), <https://www.thebalance.com/job-applicant-pre-employment-screening-2059611>.

151. *Id.*

152. The Health Insurance Portability and Accountability Act of 1996 (“HIPAA”) P.L. No. 104-191, 110 Stat. 2021 (1996), *See* § 1171 of Part C of Subtitle F.

153. Weaver, *Vendor Risk Management Best Practices* (Feb. 13, 2015), https://chapters.theiia.org/san-antonio/Documents/2015_Conference/CS3-3%20Vendor%20Risk%20Management.pdf.