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Smooth Operators: Minimizing Employee Risk in Healthcare Practices

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For many healthcare providers, their role as employers is often overlooked. It takes a backseat to the role of the provision of actual healthcare, which raises concerns about patient safety and a host of regulatory issues.

The two roles should not be viewed, however, as separate. Although employees can be your greatest asset, they can expose you to liability, as well. Hiring the right employees and hiring them properly will assist you in regulatory compliance and mitigating risk, whether that be with regard to potential medical practice claims, workplace violence or harassment, or HIPAA violations.

This article addresses specific areas of concern for practice owners to consider as they try to balance business ownership with healthcare delivery.

What to Ask and How to Ask

Before going through the due diligence process and/or making an offer, there may be questions you'd like to ask, outside of the interview itself. For example, employers have historically asked prospective employees about their salary history before making an offer.

However, there is a trend for jurisdictions to enact laws that ban

employers from doing so. Thus, avoid questions about current or past salaries. Instead, focus on setting salaries relative to the market and inquiring about applicants' expectations or what they would be willing to accept.

And, even before you determine what salary you are willing to offer, you will need to make certain that the prospective employee can actually perform the job that you are seeking to fill. In thinking about whether the prospective employee will meet your expectations, you may be tempted to inquire about limitations or disabilities, children or sick family members that are being cared for, or pregnancy. However, you should not ask questions about any of those topics or you run the risk of being sued for discrimination.

Rather, focus on inquiring about whether the individual can, with or without accommodation, perform the essential functions and hour requirements of the job.¹ The job-related requirements should be in writing and part of the job description.

Background Checks

In general, background checks are an important tool that can help an entity ensure that it is hiring individuals that will not damage its reputation or expose it to liability. They are particularly crucial in the healthcare

industry given concerns for patient safety, unauthorized use/disclosure of information/records, access to controlled substances and regulatory compliance. They must be handled correctly though. Prior to conducting background checks, you should have a policy that spells out:

- When and/or for whom background checks will be conducted
- What information will be sought as part of the check
- Who will conduct the check and the process that should be followed
- Guidelines for handling background check results

Any policy that is adopted should comply with applicable federal, state, and local laws and should be applied consistently. All steps, including proper disposal or secured retention of records, should be documented.

To avoid potential discrimination claims, as well as potential negligent hiring claims, conduct background checks on all prospective employees. However, you may, and in some cases should, consider requesting only particular classes of information relative to certain classes of jobs.

It is recommended that you include Social Security number validation, screening for aliases, criminal records search, social media investigation,

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education and work history verification, and registry (sex offender, child abuse, elder abuse, etc.) searches. Additionally, the following checks may be necessary:

- Motor vehicle records for individuals who will be operating company vehicles or driving during company business
- Credit reports for positions that involve the handling of money or authority for transactions involving large sums—unless otherwise prohibited by your state's law
- For any position requiring a license, the prospective employee's license should be verified and you should check for any adverse action in other states.

Moreover, if you participate in federal healthcare programs, such as Medicare, a condition of participation requires



ensuring that no employees or vendors have been excluded from participation in such programs. Accordingly, you should conduct a fraud and abuse control information system check (including a search on the Department of Health and Human Services Office of Inspector General's exclusion list).

As for the timing of background checks, check state and local law. Many jurisdictions have adopted fair-chance laws, which seek to delay inquiries about conviction records until later in the hiring process. These laws include but are not limited to "ban-the-box laws" (laws that prohibit asking about criminal convictions on initial employment applications), which are becoming increasingly common.

Many organizations elect to use third parties to conduct their search; oftentimes, this is efficient for

obtaining accurate information. It may also decrease the chances that you will encounter information about a prospective employee's protected characteristics.

When using such third parties, be mindful of the Fair Credit Reporting Act (FCRA), which aside from certain exceptions, applies to any communication from "a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living" for, among other things, employment purposes.² The FCRA imposes requirements on what you must do before obtaining a background check and disclosures that you must make before denying any employment on the basis of background check results.

When analyzing background check results, it is recommended that you use a panel of individuals (if possible) to mitigate potential scrutiny. You should provide them with written guidelines that focus on job-related criteria that are consistent with business necessity, and obviously, exclude consideration of any protected characteristic. Consult the EEOC's enforcement guidance and legal counsel in developing these guidelines/policies.

Due Diligence

Background checks are a critical component of due diligence measures to ensure that you are hiring the right employees. A checklist should be used to keep track of your prehire due diligence process. A checklist does not supplant the need to document the activities performed for each step, which will be useful and even critical in the event that any labor or employment dispute arises in the future. Proper documentation includes retaining copies of initial, completed job applications and prehire questionnaires.

In addition to background checks, consider drug testing at least for those positions that involve access to controlled substances or entail responsibility over patient safety. Given the recent trend for states to legalize medical, and in some places even recreational marijuana, you must carefully assess exceptions to any drug testing policy.

As of now, marijuana is still deemed an illegal drug under federal law. Thus, its use (medical or otherwise) is not afforded protection by the Americans with Disabilities Act (ADA).³ However, certain individuals may qualify for ADA protection for past drug use.⁴ State law varies. An exception to a drug policy for an individual's medical marijuana use for the treatment of a disability may be required as a reasonable accommodation⁵ or a medical marijuana statute may prohibit discrimination against medical marijuana users.

You should consult counsel on the status of your state's law. Any drug testing policy that is adopted should be applied uniformly and indiscriminately. Additionally, consider waiting until after a conditional offer is made before testing as to avoid legal issues in the event that the testing raises disability-related issues.

Due diligence also requires you to verify the prospective employee's eligibility to work in the United States. The Immigration Reform and Control Act of 1986 (IRCA) prohibits you from knowingly hiring any unauthorized aliens and requires you to properly and timely complete Form I-9 for all new employees. You may also be required by state law or federal contract to verify the employee's status through E-Verify.

Credentialing

Credentialing is another key element of due diligence. This is especially true if you own a healthcare facility (ASC, urgent care center, surgical suite, etc.), provide surgical services in-office or allow outside providers to perform procedures in your facilities. If you plan on obtaining accreditation from bodies such as JACO, AAAHC, or AAAASF, you will almost certainly be required to credential all providers.

Providers

Credentialing activities should focus specifically on license verifications (in all states where the provider is licensed), comprehensive criminal and credit check, and verification of past employment. If you are extending ownership or partnership interests to providers, a more comprehensive review of tax filings may be warranted.

Analyzing financial information

seeks to deter potential for financial crimes (embezzlement/fraudulent billing); meanwhile license verifications focus more on potential malpractice exposure. Criminal records can provide insight on general responsibility and the potential for any risk exposure, such as violence or abuse.

Staff

Staff should also be subject to comprehensive criminal and credit checks. If you are verifying mid-level providers, license verifications should also be conducted. It is important to verify licensure for every state in which the provider is/was licensed.

Our office recently worked with a client in a small Midwest town where patients recognized a medical assistant as a former high school classmate who had criminal and drug charges in the past. The office conducted a thorough background check and were aware of the employee's background.

When patients contacted the office, the doctor was able to speak directly with the concerned patients (with the assistant's knowledge) and let them know that the office was aware of the background and was willing to give the medical assistant the opportunity to get back on the right track. Knowledge of the employee's background allowed the office to prepare, in conjunction with counsel, appropriate responses to patient concerns.

Staff Turnover

The loss of key employees can be destabilizing to a healthcare practice for three primary reasons:

- 1.** Productivity loss
- 2.** Financial loss (industry experts suggest the financial loss associated with an employee can cost up to two times their annual salary)
- 3.** Potential patient dissatisfaction

Modern healthcare, while it has focused on metrics and statistics, still revolves around the relationship between a patient and his/her doctor, which can be damaged by the loss of key employees. You have to routinely check on the pulse of the practice and responsibly maintain and empower staff.

Understanding Why

Generally speaking, in the healthcare industry, staff turnover should not exceed 15 percent per year. This may vary a bit by staff size—for example, losing one staff member will have a greater impact on a staff of five than a staff of 100.

Conduct an assessment of your staff turnover for the past three years, noting how many left, why they left and the new position they took. Get into the habit of conducting **exit interviews** with departing employees so that you can maintain a list of this information.

Exit interviews allow for a confidential, honest assessment of an employee's experience at the practice, their reason for leaving and an invaluable critique about the work environment. Most importantly, they help put staff turnover in perspective.

Improving Deficiencies

Your practice should be viewed as a constant work in progress. You should actively try to improve any identifiable areas of concern. Moreover, one of the best things you can do is to cross-train staff members to avoid a practice slowdown in the event of a loss.

This will also help your staff become familiar with different aspects of the practice and appreciate the work of others. You can do this by periodically rotating staff, without forcing them into permanent roles (especially if they don't like the new role).

Preventing Staff Turnover

Staff turnover tends to result from one or any combination of the following three factors:

- 1.** Better pay
- 2.** Professional growth
- 3.** Team member conflict

There are a number of industry pay scales you can check to ascertain the industry average. Merit-based pay increases tend to be better than seniority-based pay increases in keeping staff incentivized.

Pay raises are not the only way to reward staff and keep them happy.



Consider other tokens of appreciation, particularly when tied to length of service, such as extra days off. Similarly, invest in training and work on developing positive relationships and camaraderie, such as through office retreats where staff can work on developing professional skills and have fun.

Most importantly, don't hire someone just to fill the position. Find the right person! Doctors always say an ounce of prevention is worth a pound of cure. If you spend time in finding the right employee and show them some appreciation, you will see improvement in staff turnover rates.

Rogue Employees

Rogue employees, defined (very loosely) as employees who don't follow rules or try to do more than what they have been asked to do, can create significant problems for your practice, especially if there are no consequences. When employees don't listen to you or follow practice procedures, a lack of consequences serves as a tacit approval of their behavior or shows that you, as a practice owner or office manager, don't pay attention or care about the practice.

Instead of avoiding the situation, talk to the rogue employee. Your first approach should be to assess if there are other external factors that may be impacting their behavior. If a good employee **all of a sudden** starts disregarding rules or doing things beyond their role, it could indicate outside issues are distracting them from work. By talking to the employee, you can help find solutions for the external factors. Likewise, if they long for finding their role fulfilling, you can

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honestly discuss with them the changes that would help them stay at your practice.

If the issue relates to serious matters, such as patient care, or involves a pattern of violating policies/procedures, immediate consequences are warranted. One real scenario involved an employee who filled narcotics and anti-depressant prescriptions in violation of office policy. If not for the pharmacy calling the doctor's office to confirm the prescription and the doctor being the first one in the following day to check the phone messages, the rogue employee's conduct could have gone on unnoticed. The doctor had to self report the events to the DEA, notify the state's prescription monitoring program and file a police report.

An employee isn't a rogue employee if the practice/owner knew and did nothing. The need to curtail rogue conduct provides yet another reason why it is important to stay alert to employee issues and activities in your practice.

Reporting Criminal Activity

In the event you identify criminal activity—whether it be embezzlement or some form of fraud and abuse—what should you do? Talk to your malpractice/business insurance provider and your lawyer! You should absolutely report financial crimes to the police, and you must walk through any possible fraud reporting obligations with your lawyer.

Sample Forms Available

Go to the Forms Library in the Risk Management section of psicinsurance.com for:

- Employee Hire/Orientation Checklist
- Exit Interview Assessment

By reporting such activities, you help to:

- Remove bad actors from seeking employment elsewhere (criminal charges show up on background checks)
- Limit financial impact of fraud on the larger marketplace
- Set yourself up for possible recovery of embezzled funds through insurance claims

Conclusion

It is crucial for every employer, particularly a healthcare provider, to thoroughly vet its employees. Consider performing background checks and conducting drug tests to ensure you are hiring the right people. And, make sure you are properly credentialing your staff.

Conduct routine staff audits to identify how to keep the right people while staying alert to employee behavior so that you can appropriately address any rogue conduct. Your employees and your employment practices have a direct impact on the health of your practice.

¹ 15 U.S.C. § 1681a(d)(1).

² James v. City of Costa Mesa, 700 F.3d 394 (9th Cir. 2012).

³ 42 U.S.C. § 12114(b)..

⁴ See Barbuto v. Advantage Sales & Mktg., LLC, 477 Mass. 456 (Mass. 2017).

⁵ <https://www.americannursetoday.com/confronting-racism-in-health-care>

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