LEGAL HOT TOPIC:

Background Checks: What do we have to do now?

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This issue’s legal hot topic focuses on the importance of background checks, as well as what is required, and the best practices
Background Checks: What do we have to do now?

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I. Introduction

Home health, hospice and private duty providers (“Homecare Providers”) take care of the sick, recovering, vulnerable and dying in their homes. Homecare Providers cannot monitor their staff in their patients’ homes each day, but must trust the individuals whom they send to discharge their duties, respect their patients, accurately and honestly complete their paperwork and not neglect, abuse or otherwise harm the individuals under their care. Homecare providers are left in a position of having to place a great deal of trust in their staff, due to the Homecare Providers’ inability to supervise their staff in the same manner as more traditional employers.

This inability to supervise staff directly on a day to day basis makes it all the more important to properly screen job applicants before hiring. One important tool Homecare Providers ought to employ in this regard is a thorough background check for each applicant. A proper background check is not only important to properly screen job applicants, but certain aspects of a proper background check are required by law. Performing these required checks are an excellent start for screening applicants, although they are, at best, a minimum.

II. Required Checks

Indiana Law Requires Licensed home health agencies, hospice agencies and personal services agencies to perform criminal background checks on certain employees. Although all three provider types are required to perform background checks, the requirements are outlined in different statutes. Because they are in different statutes, there are a few differences in the requirements for home health and personal services background checks that
are not contained in the hospice statute. These differences are the results of several amendments to the home health and personal services background check statute that were made without amendments to the hospice statute.

A. Key similarities in the background check requirements.

Although there are differences in the requirements for hospice and home health and personal services background checks, there are several important similarities. All providers have the same timing requirement for performing the checks and have the same list of disqualifying offenses.

1. Which employees must undergo background checks?

The home health/personal services background check statute and the hospice background check statute are each describe the individuals subject to a background check slightly differently. Both require owners to undergo a background check, but it is in the area of personnel that they are worded differently. Although each describes the individuals subject to a background check differently, the practical impact is that both statutes require the provider to perform background checks on individuals utilized to provide services to their patients/clients.

   a. Home health agencies and personal services agencies.

   Home health agencies and personal services agencies must perform background checks on owners and certain staff. Staff required to undergo a background check are those who “provide services in a patient’s or client’s temporary or permanent residence.” This means agencies must perform background checks on their field staff, the personnel who travel to patients homes to perform the services outlined on the plan of care/service plan, to supervise that care, etc.

   b. Hospice agencies

   A hospice agency must perform a background check on any employee or volunteer who is providing hospice services. Hospice services are “palliative care for the physical, psychological, social, spiritual, and other special needs of a [hospice patient]; and (2) care for the psychological, social, spiritual, and other needs of the [hospice patient’s] family before and after the [hospice patient’s] death.” Any employee or volunteer who provides care to the hospice’s patients or to the family members of the hospice’s patient must undergo a background check.

   One key difference is that the hospice statute references volunteers. This addition makes little practical difference, but simply reflects the reality that hospices utilize volunteer personnel. The other difference is that, unlike home health and personal services, the hospice background check requirement is not limited to employees or volunteers who provide services in the hospice patient’s home. Any employee or individual who provides the defined care
must be checked, regardless of the location where the hospice services are provided. This is also simply a practical reflection of a difference in the services. A hospice may provide care in a SNF or other setting that would not be considered the patient’s residence. This means employees and volunteers who provide services in an inpatient setting or at the hospice’s offices as part of a bereavement counseling session must be checked.

c. Practical impact

The key in both of these statutes is that all personnel who provide care to the agency’s patients must undergo an appropriate background check to comply with the licensure requirements. Agencies must consider whether they should perform checks on employees beyond those listed in these statutes. Providers have administrative personnel who handle confidential information, Protected Health Information and claims and billing information. These individuals are also responsible for preparing claims, auditing charts, etc. Performing background checks on these individuals is a best practice for preventing fraud and abuse.

2. When must we apply for and/or obtain the background checks?

Another similarity in the background check requirements for homecare providers is the timing of the check. The agency must “apply for” an appropriate background check on an employee or volunteer no more than three (3) business days after the date that individual begins to provide services. The agency cannot allow the employee to provide services for more than three (3) days without requesting the check. This does not mean the agency has to have received the results of the background check. It means the agency has to document that, within three (3) business days of placing the employee in the home, the agency submitted a request for a background check on the employee. It is important to document the request, including the date of the request, because there is a period of time in which a result must be received.

If the agency timely requests the background check, they agency may utilize the individual to provide services for up to twenty-one (21) calendar days without receiving the results of the background check. If the agency does not receive the results of the background check within the twenty-one (21) calendar day window, the agency must cease using the individual to provide services until the results of the background check are received. If the background check was not received within the twenty-one (21) calendar day window because the entity performing the background check has caused the delay, then the agency may continue to use the individual to provide services.

Agencies must consider whether they should perform checks on employees beyond those listed in these statutes. Providers have administrative personnel who handle confidential information, Protected Health Information and claims and billing information.

Although the statute allows an agency to use
an individual to provide care to the patient, as long as the request for the background check was made timely, it is recommended that agencies not place an employee in a patient’s home before receiving the results of the background check. Using the individual to provide services before the background check is received denies the agency the opportunity to identify potential problems before they happen. If the individual causes any loss or harm to the patient and is later determined to have a disqualifying offense, the patient’s family may argue the resulting harm is the result of the decision to place the individual before receiving the screening results.

3. What are the statutory disqualifying offenses?

The home health/personal services and hospice background check statutes contain an identical list of disqualifying offenses. A home health agency or personal services agency may not place an employee in a patient’s home and a hospice may not utilize an employee or volunteer if the individual has been convicted of any of the listed offenses. The listed offenses are rape, criminal deviate conduct, exploitation of an endangered adult, failure to report battery, neglect, or exploitation of an endangered adult, and theft, if the conviction is more than ten years prior to the individual’s application date.

Because the home health and personal services statute requires a national check, it also disqualifies an employee for any felony conviction that is substantially equivalent to a listed felony. If a felony conviction is for theft or is substantially similar to theft, it would only disqualify the applicant if the convictions was less than ten years prior to the application date.

Despite the numerous revisions to the home health and personal services background checks, the list of disqualifying offenses has remained the same for many years. The list of disqualifying offenses is rather limited. An individual could have a number of criminal convictions – arson, kidnapping, fraud, forgery, burglary, just to name a few – and still be considered qualified for employment as a caregiver. Providers need to consider whether they think this list is sufficient.

Another problem that arises when reviewing background check results is that the list of disqualifying offenses is not extremely clear. For example, both statutes prohibit utilizing an individual who has been convicted of theft, as defined at I.C. § 35-43-4. Although the background check requirement cites to all of Chapter 4, theft is a specific offense set forth in a single section of that Chapter 4. I.C. § 35-43-4-2. Chapter 4 includes a number of other offenses, which include criminal conversion (a misdemeanor), dealing in altered property, auto theft and receiving stolen auto parts, unlawful entry of a motor vehicle, failure to return items borrowed from a library, unauthorized control over a benefit and vending machine vandalism. These offenses are all listed in the chapter, but are in separate sections and are clearly distinct from the offense of theft. ISDH has stated it considers this to be a reference solely to theft, not to the other offenses in the statute.
The classification of theft as an offense illustrates another potential compliance issue. Prior to the recodification of the criminal code, theft was a felony. After the legislature recodified the criminal code, theft could be charged as either a misdemeanor or a felony. The home health/personal services requirement notes that, for out of state checks, an offense is disqualifying if it is “substantially similar to a felony” listed in the background check statute. This leads to the question of whether a misdemeanor theft conviction is disqualifying. It is a conviction for theft, but if it is a misdemeanor, it is not a felony conviction. These are just a few examples of the lack of clarity introduced by the revisions to the background check statutes and the changes to the Indiana criminal code. As discussed in more detail below, it is recommended that providers consider these issues in advance. Providers should develop a more robust and more concrete list of disqualifying offenses.

B. Key differences in the background check statutes.

1. What type of background checks must an agency perform?

   One of the key changes in the Home health and personal services agency background check statute has been to the specific requirements for a valid background check. The required check for home health and/or personal services agencies has been changed several times over the past few years, without any changes to the hospice statute. As a result, the checks a home health or personal services agency must run are different than a hospice provider.

   a. Home health agencies/personal services agencies must perform either a National Criminal History Background Check or an Expanded Criminal History Check.

   Home health agencies and personal services agencies no longer have the option to check the Indiana criminal history repository. With the revision to the statute that went into effect on July 1, 2016, home health agencies and personal service agencies have two options for background checks that meet state licensure requirements. An agency can request a national criminal history background check or an expanded criminal history check.

   i. National Criminal History Background Check

   A national criminal history background check refers to the determination provided by the Indiana State Police. The Indiana State Police are able to request the Federal Bureau of Investigation check individuals against the National Criminal Information Center database (“NCIC”). A home health agency or personal services agency may submit a
request, with fingerprints, for a national criminal history background check to the Indiana State Police. The Indiana State Police will request the FBI perform a check of the NCIC utilizing the provided fingerprints. The resulting NCIC report, which would contain a list of any arrests or convictions, is not provided to the employer. The Indiana State Police receive the results of the NCIC check from the FBI and compare it to the list of disqualifying offenses contained in the home health and personal services background check statute. If the NCIC report does not show any convictions for the listed disqualifying offenses, the individual is determined to be qualified. If the NCIC report shows any convictions for disqualifying offenses, the individual is determined to not be qualified.

The Indiana State Police determination is conveyed in a letter stating that the individual is or is not qualified. If the individual is not qualified, the letter does not explain or describe the disqualifying conviction. The letter may determine the individual is qualified, despite other criminal convictions, but it would provide no indication of these other convictions. This means an employer could receive a letter for an applicant with a significant criminal history that stated the individual was qualified, because none of their convictions was for an offense listed as disqualifying in the statute. This renders the NCIC as a less effective means of screening applicants.

ii. Expanded Criminal History Check

The other option home health and personal services providers have for performing a background check is the Expanded Criminal History Check. An expanded criminal history check is a background check performed by “a consumer reporting agency regulated under 15 U.S.C. § 1681 et. seq. that does not include a written, oral, or other communication of information concerning the individual’s credit score, creditworthiness, credit standing or credit capacity.” A expanded criminal history background check must include: (A) verification of the applicant’s identity; (B) search of all names associated with the applicant; (C) search of the records maintained by all counties in Indiana in which the individual who is the subject of the background check resided; (D) search of the records maintained by all counties or similar governmental units in another state, if the individual who is the subject of the background check resided in another state; (E) search of United States district court records from the districts in which the applicant resided; (F) check of sex offender registries in every state or the national sex offender registry maintained by the United States Department of Justice; and (G) multistate criminal data base search.

The statute provides an alternative means to obtain an expanded criminal history background check. A background check that includes a National Criminal History Background Check and “a check of the sex offender registries in all fifty (50) states; or the national sex offender registry maintained by the United States Department of Justice” will also qualify as an expanded criminal history check. A provider seeking to utilize this second option would obtain the National Criminal History
Background Check from the state police and then pursue the sex offender registry check through a third party. If a provider wishes to use the National Criminal History Background Check, the better option is to obtain the Indiana State Police determination.

When obtaining an expanded criminal history check, providers should also be aware of a practical issue. ISDH specifically requires the Expanded Criminal History Check must be a lifetime history check. This means the company that performs the check must look back to the applicant’s 18th birthday. A check cannot look past the 18th birthday, because records prior to the applicant turning 18 are juvenile records and will be sealed. But if the company states they only look back ten years or otherwise appears to limit the search they perform, ISDH will not consider it to be compliant.

b. Hospice providers may continue to perform a check of the Indiana criminal history repository.

Hospices are only required to obtain a copy of the employee’s or volunteer’s limited criminal history from the Indiana Central Repository. Because the hospice statute was not updated when the home health and personal services background check statutes were revised, hospices may still comply with the background check requirement by performing the limited criminal history check. Hospices are not required to obtain an NCIC or an expanded criminal history check.

The limited criminal history is a state only check that can be performed through the state of Indiana’s website. The employer will receive a copy of the individual or employee’s limited criminal history. This will show all arrests, convictions and/or other dispositions. This was, at one time, the standard background check for all home health providers.

For agencies that operate both a home health agency or personal services agency in one legal entity, the difference in the two background check statutes means the agency will have different background check standards for different categories of employees. However, ISDH has indicated that for providers that provide both home health and hospice services, the provider could standardize on expanded criminal history checks for all personnel. This would allow a more streamlined background check requirement.

III. Office of Inspector General List of Excluded Individuals and Entities

Another important background check consideration is the Department of Health and Human Services’ Office of Inspector General (the “OIG”) List of Excluded Individuals and Entities (the “Exclusion List”). Individuals and entities who are placed on the Exclusion List are prohibited from receiving money from any federal reimbursement program for providing reimbursable services. OIG has interpreted this exclusion
broadly to include individuals who do not provide care, but who provide support to the agency to allow the provision of care – administration, management, etc. The result of OIG’s expansive interpretation is that providers who receive federal reimbursement (Medicare, Medicaid, Medicaid Waiver) cannot employ individuals who are on the exclusion list.

Employing an individual who is on the Exclusion List will result in the provider owing money back to the government. The amount owed is calculated as a percentage of the employee’s salary and benefits for the entire time they were employed while excluded. The percentage recovered is equal to the ratio of federal dollars received by the agency to total reimbursement received by the agency. The OIG will also seek penalties of an equal amount. This can make employing an excluded individual very costly.

In order to avoid this issue, providers’ background check process should include checking the exclusion list before hiring an individual, in any capacity. Checking the Exclusion List is not as easy as performing a criminal history check. There is no way to search the list by fingerprint or social security number. The Exclusion List is also not cross-referenced. This means if an individual has multiple names under which they have been known, a maiden name and a married name, or simply an alias, the only name on the Exclusion List is the specific name under which they were excluded. If an individual discloses the name John Smith on their application, but they were excluded under the name William Smith and the provider searches the Exclusion List under the name John Smith, the search will show John Smith was not excluded, even though he was.

This makes it very important for the provider’s job application to request applicants provide all aliases, also known as names or formerly known as names as part of the application process. Of course, you must be careful how you phrase the question. Asking for married names or maiden names is strictly prohibited and will lead to claims of discrimination. You cannot ask if the applicant has been married. This might tip you off that there is a maiden name, but you cannot ask such a question. You can, and should, ask them to state any other names by which they have been known, any formerly known as names, any aliases, etc. You can ask about formerly known as names, you just cannot ask in a way that could be construed as attempting to determine the applicant’s marital status.

Another question to ask on your job application is whether or not the applicant has been excluded from participation in federal health care programs. If they have been and answer the question truthfully, you will be able to avoid the problem. If they have been excluded, but lie on the application, when you later identify that they are excluded, you will have yet another basis for terminating them or not hiring them.

Once you have received all of the applicant’s aliases, you will need to check each one against the Exclusion List. The OIG’s website allows you to check up to five names at a time. If a name results in a response indicating the individual is excluded, you can then use the individual’s
social security number to verify that the result is the applicant.

The OIG list is updated on a monthly basis. OIG and Indiana’s Medicaid Fraud Control Unit, have opined that providers ought to check all employees against the list on a monthly basis. If you choose to not check the list monthly, you could be responsible for a payback resulting from an employee being excluded during the period between checks. For example, if you checked on an annual basis, and an employee was placed on the list the month after your agency’s annual check, you would have eleven months of overpayment arising from the employee’s salary and benefit during the period you had not checked the Exclusion List.

The tradeoff is the cost of checking more frequently. Depending upon the number of employees in your agency, checking on monthly basis may be extremely burdensome. It may even take an dedicated staff person to address this, if you choose to handle it in house. Providers who are using a third party to perform their background checks ought to discuss having the third party company perform the exclusion list checks. This can be more cost effective and most companies perform the check automatically each month.

IV. Background Checks and the EEOC

A. The EEOC has recently raised a concern that employers are using background checks as a proxy for discriminatory hiring practices. The EEOC has stated its opinion that background checks have little to do with employer’s actual job requirements, but are simply a means to disqualify minority candidates. Because of the EEOC’s expressed concern, homecare employers need to take steps to prevent scrutiny of their background check process.

1. Business rationale

A key consideration in recent EEOC statements is the EEOC’s conclusion that most businesses lack a business rationale for using criminal history checks in hiring. Homecare providers have a number of very good reasons to perform these checks. First, as licensed providers in Indiana, homecare providers have an express requirement to perform background checks and exclude individuals who have been convicted of offenses listed in the statute. Second, homecare providers send their employees and volunteers into their patients’ homes with no supervision. Homecare patients are generally older, frail, vulnerable individuals whom providers have a responsibility to protect. Performing background checks and disqualifying certain individuals from employment is an important tool for protecting homecare patients. Third, most homecare services are paid for by state and federal payers. Receiving this reimbursement is dependent upon documentation submitted by provider personnel. Performing background checks to screen applicants is an important tool to protect the Medicare and Medicaid systems from fraud.
2. Basis for disqualification

The EEOC is also concerned that providers are utilizing evidence of arrests to disqualify individuals. This is inappropriate, because an arrest, without a conviction, is not indicative the individual engaged in the alleged wrongdoing. The EEOC has stated that because minorities are arrested at far higher rates than whites, utilizing evidence of arrests to disqualify applicants has a disproportionate impact on minorities. A more important consideration than this is that an arrest is not proof of the alleged misconduct. An individual is innocent until proven guilty and the lack of a conviction could be due to a number of factors, including that the individual did not commit the alleged act. Conviction are far more relevant to screening than arrests and providers policies should only disqualify based upon proof of convictions.

V. Best Practices

A. Written background Check Policy

Although Indiana law and OIG guidance spell out the minimum requirements for employee background checks, in order to better protect your agency and your patients you should do more than just the minimum. You should have a written policy. In order to address the EEOC’s “business rationale” concern, the policy should explicitly state the reasons that the agency performs these checks.

The policy should clearly state the list of offenses your agency considers disqualifying. It should state that the agency will only disqualify an applicant based upon evidence of convictions and that arrests alone are not disqualifiers. The policy should state the background check process in a step by step fashion. It should state what information is requested on the job application, when requests are submitted, what happens with the results, the checks the agency will perform, how requests are documented to prove they were made timely, and what to do if the results are not received timely.

If the agency will perform checks on more than just the individuals in the statute, the policy should state this clearly. For example, all staff will undergo background checks.

A written policy will make clear to your staff how these checks must be handled. It will help to ensure the background checks are handled appropriately and consistently. It will also provide protection against claims of discriminatory hiring practices.
2. Follow the Policy

Once the agency has developed its policy, it is important that it is followed. Agencies will occasionally find themselves wanting to hire a candidate that has an offense that is prohibited by the Agency’s Policy, but is not included on the list in the statute. A common example is the applicant who has a prior conviction for possession of a controlled substance from twenty (20) years ago. The agency may wish to hire the individual despite this conviction, because they have had no other convictions in the intervening twenty (20) years. An ad hoc decision to ignore the policy can lead to claims that although the policy is not discriminatory, it is being enforced in a discriminatory fashion. The policy should address under what circumstances a disqualifying conviction may cease to be disqualifying or under what circumstances exceptions are granted. This policy must then be followed as written, without any exceptions. This may occasionally lead to an otherwise excellent candidate being passed over, but it is necessary to avoid later claims of discrimination.

4. Disqualifying Offenses

This is extremely important. Agencies should consider whether to disqualify applicants for a broader range of convictions than those that are contained in the Indiana statutes. For example, because agency staff complete documentation that is the basis for billing, the agency should consider not only convictions for theft, but also forgery, fraud and other “crimes of dishonesty.” None of those crimes are listed as disqualifying convictions in the statute, but an applicant with convictions for any of them may not be an individual that should be handling Medicare/Medicaid documentation. Similarly, agencies may want to consider excluding individuals for convictions involving harm to property or others such as battery, arson, burglary and similar offenses. Individuals with convictions for these types of violent offenses may present a greater risk of causing physical harm to agency patients.

Despite the fact that homecare employees drive with great frequency, the Indiana statutes do not list any driving convictions. Because Agency personnel drive to clients’ homes and agencies may be responsible for any accidents they cause, agencies should consider disqualifying applicants for convictions for driving related offenses such as driving under the influence. The template policy included with this article starts with the baseline that any conviction is disqualifying. The list of disqualifying offenses is every criminal offense in the Indiana Code. Agencies can review this list and determine if there are offenses they would like to remove.

C. Job Application

In order to properly screen your staff, you need to be sure you have
sufficient information. As noted above, you need to know the individual’s name and any names by which they have ever been known. The job application should specifically ask for aliases, formerly known as names or also known as names. The application cannot ask and interviewers should not ask about maiden names, married names or any other questions that might appear to be seeking information about the applicant’s marital status, family plans, etc.

The job application should ask whether the applicant has been excluded. It should also ask about prior convictions. Job application questions about prior convictions need to be worded carefully, due to changes in Indiana law. Indiana’s revised expungement statute makes it clear that the applicant need not disclose and the employer should not ask about expunged convictions. It is recommended that the job application ask the employee, “Have you ever been convicted of a crime that is not the subject of a court ordered expungement?” This makes it clear that the employer is not seeking information about expunged convictions.

B. Exclusion List Checks

An agency’s background check policies should specifically state how frequently it will re-check its staff against the OIG exclusion list. The agency will need to consider the trade-off between the cost of more frequent checks and the risk associated with checking less than monthly. If the agency is utilizing a third party to perform background checks, it ought to discuss with them their capability for performing exclusion list checks and the additional cost, if any, of ongoing staff checks. The policy should address what documentation is generated to prove the check was performed and the individual is not excluded and how that documentation is maintained. If the provider is ever investigated regarding allegations of employing excluded individuals, proof of the checks and their results will be important.

C. Fair Credit Reporting Act

Agencies who use a third party to perform background checks, will need to comply with the Fair Credit Reporting Act (“FCRA”). FCRA provides employees with certain rights and requires certain notices. Agencies should discuss with their vendor who is responsible for FCRA compliance and, if it is the agency’s responsibility, what if any support the vendor provides.

CONCLUSION

Background checks are not only required by Indiana law, but are also an important tool to protect homecare patients and agencies from potential harm. Providers need to carefully consider their background check policies and procedures to not only ensure compliance with state licensure requirements, but also with the EEOC. Providers also need to ensure their process provides adequate screening to prevent foreseeable
harm to your patients, including the need to screen for a broader range of offenses than those listed in the statute. A carefully considered and properly drafted written background check policy is key to an agency’s efforts to comply with the law and protect its patients.

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