

Eli's Hospice Insider

COMPLIANCE: Protect Your Hospice with a Solid Background Check Policy

Paid employees aren't the only ones who need to undergo background checks.

Criminal background check requirements may vary from state to state, but one thing's certain -- you're putting your agency at risk if you don't have a thorough procedure in place. Six steps can help make certain your policy makes the grade.

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If you don't conduct thorough background checks, you could be indirectly responsible for repeat offenses from an employee who has committed personal offenses such as theft or patient abuse, says attorney **Marie Berliner** with Lambeth & Berliner in Austin, Texas.

At the corporate level, fraud, false claims, and embezzling can have a negative financial impact on your hospice and open you up to potential penalties. And on the survey side, you're risking a citation for not performing the check, along with citations for failing to provide proper care and failure to follow your own policies and procedures.

Repeat offenses can put your licensure and Medicare enrollment at risk -- make sure your policy takes into account the following:

1. Mind State Regs

In a lot of states, licensing regulations require hospices to do criminal background checks on an ongoing basis for both new and existing employees, Berliner says. Medicare conditions of participation (CoPs) also require the background checks.

Federal regulations for hospice care (42 C.F.R. 418.114 (d) requires "a criminal background check on all hospice employees who have direct patient contact or access to patient records." Furthermore, your contracts must require "criminal background checks on contracted employees who have direct patient contact or access to patient records."

Bottom line: The Feds require you to obtain criminal background checks in accordance with your state's requirements. But if your state has no such requirements, the regulations advise "criminal background checks must be obtained within three months of the date of employment for all states that the individual has lived or worked in the past three years."

2. Know Who to Check

When the Centers for Medicare & Medicaid Services says "hospice employees" must have criminal background checks as a condition of enrollment, it doesn't just mean paid employees, says Berliner. In this case, "employees" means owners, investors, partners, and key personnel -- even if they aren't technically employees -- as well as employees. This can also include independent contractors and volunteers, depending on state requirements.

3. Decide When to Check

Do your background checks within the time allotted by state law and document that they were done and that they were conducted according to your policy, Berliner says. Update your background checks periodically -- at least annually.

Do background checks on:

- New employees
- Employees whose job duties have changed (for example, an employee making the transition from office worker to patient care)
- All employees at regular intervals of at least once a year

4. Consider the Consequences

If you find something negative in a background check, it may not bar you from employing that person -- you may just need to report it to Medicare, Berliner says.

Medicare law requires you to report changes in the information you reported in your enrollment application. You might have to report convictions prior to or within 10 years before you submit your application, and the reporting requirements could be at the state level as well, Berliner says.

While discovering a record of patient abuse would be an obvious bar to employment, other things might not be -- and some offenses present a judgment call. Suppose your check turns up some long-ago arrest for demonstrating in college or for possession of marijuana? Would that be the basis to not hire someone?

Probably not, says attorney **Connie Raffa** partner at Arent Fox in New York City. CMS expects hospices to implement a well-designed policy that will help select employees who are best suited for hospice work.

In the preamble to the CoPs, the government declined "to prescribe the circumstances under which an individual must be precluded from hospice employment on the basis of his or her criminal background check results." (73 Fed. Reg. at 32162 6/05/08) A hospice should develop a policy that includes a description of offenses that would lead to the conclusion not to hire the individual.

Apply common sense, Raffa urges. If the applicant was accused of a violent crime like assault, you should consider not hiring them or take a second look at the circumstances surrounding the assault. Crimes that deal with trustworthiness such as stealing also raise a red flag. However, these decisions are not all black and white. The hospice should look at the specific circumstances surrounding the crime. The joint expertise of health care and employment counsel can assist the hospice in drafting a policy that complies with federal and state labor laws, Raffa says.

5. Put it in Writing

Every hospice agency needs to have documented policies and procedures for conducting criminal background checks, Berliner says. These should be included in your procedural manual. In some states, this may be a requirement of licensure.

In addition to being written documents, a good criminal background check policy should:

- Accurately reflect and comply with state and federal regulations
- Be consistently complied with and followed

Background checks can be hard to keep up with if you don't have a designated person to track employees as they come and go, Berliner says. Document this process information in your policy.

Keep it consistent: Everyone should be treated the same in your policy, Berliner says. For example, anyone entering

the patient's home whether nurse, aide, social worker, or volunteer should all undergo the same background checks.

The same principle holds true for owners, office staff, and other employees without patient contact but who have access to patient records --their background checks should all be equal.

6. Spread the Word.

Once you've established a background check policy, you must make sure every staff member is aware of it, Berliner says. This will stave off complaints over not being notified or claims that no permission was given for the checks.

Make employees aware that they may experience consequences due to any criminal behavior during the course of their employment. For example, if a nurse passes an initial background check, but a year later when you run another check it turns out that she was convicted of dealing drugs, this could be grounds for dismissal. Employees should know this re-checking is part of your policy.

You also need to make job applicants aware of your policy, Berliner says. For example, let applicants know that you hire contingent on the background check being completed within 72 hours.