

## Long-Term Care Survey Alert

### Cover These Bases For Background Checks Or Risk Survey Liability

Taking these simple steps can offer more protection than you might think.

An apple a day may keep the doctor away, but a bad apple in the form of a negligent or rogue employee can create all kinds of survey ills.

On the other hand, if a facility can show it has policies and procedures to do background checks, and a bad apple slipped through, regulators or prosecutors will factor that in when deciding what action to take against the facility, says attorney **Paula Sanders**, partner, **Post & Schell** in Harrisburg, PA. In addition, Sanders has heard that surveyors are checking nursing and other healthcare professionals' licenses, as well as employees' files to see if the facility contacted employees' prior employers before hiring them.

**Watch out for SOM language:** "If you read the federal regulations, there's nothing in them that specifies a facility has to contact previous employers," Sanders says. But the State Operations Manual does say under the abuse prevention tags that the facility should check information from previous and/or current employers and make reasonable efforts to investigate potential employees, Sanders points out. Also, when hiring CNAs, facilities must check a state-mandated registry that includes information about allegations of abuse or neglect against CNAs, says attorney **Christopher Lucas**, in private practice in Mechanicsburg, PA.

Also check state professional licensure online and the HHS Office of Inspector General excluded list. (To check the OIG list, go to <http://exclusions.oig.hhs.gov> and key in the person's name.)

Some states require mandatory background checks. "For example, Missouri has an Employee Disqualification List or EDL that nursing homes must check," says attorney **Patrick Gavin, JD**, with **Husch Blackwell Sanders** in Kansas City, MO.

**Tip: TSW Management Group**, which owns and manages facilities in California, runs applicants for a CNA position through the CNA board, says **Kathy Hurst, RN, JD**, director of healthcare operations for the Anaheim-based company. "We sometimes find people whose certification was revoked will apply to nursing homes for housekeeping positions," Hurst cautions.

**Check now, hire later:** "The best practice is to avoid starting someone before the facility has all of the background information on hand," cautions Gavin.

#### Document Conversations, Compare Dates of Employment

If you do call a job candidate's previous employers, often they will only provide the dates of employment, Sanders says. "That's because most employment lawyers tell employers to stick to those facts when they give references unless they have a release from the former employee," she notes. "A facility can ask the job candidate to sign such a release in a certain case -- for example, for a DON or MDS coordinator -- or even as standard practice for all job candidates. Even having the release however, will not guarantee that the former employer will give a full and honest reference."

Yet, Sanders points out that if the facility has documentation that a staff person spoke to the prospective employee's former HR director on x date and confirmed dates of employment, at least the facility can show it made a reasonable effort to check the person's employment history.

And just because a job candidate's former employer refuses to disclose more than the essentials doesn't mean you can't ask questions, Gavin says. For example, ask whether the employer would hire the person again, he suggests.

Also check dates of employment and other factual information against the person's resume and what the person tells you, Gavin suggests. Sometimes people put information on their application or resume that's either somewhat inaccurate or completely untrue, he says. For example, the person really performed a job for a spouse or family member rather than a company.

#### Build Protections Into Contracts

What happens if the therapy company or other ancillary provider sends the facility a bad actor? To address that scenario, Lucas urges his clients to devise contracts that require ancillary providers to implement the facility's employee screening procedures. "The buck still stops with the facility," he says. But it's sufficient to use "contract flow down provisions requiring the ancillary provider to do whatever the facility is obligated to do to maintain its licensure status with the state and federal government," in Lucas' view.

**Another suggestion:** Build an indemnification provision in the contract that requires the ancillary provider to pick up the tab for any survey citations a facility receives for the ancillary provider's failure to comply with any provision in the agreement. "Most therapy companies will sign that," Lucas says.