

## MDS Alert

### Staffing: Consider This Recent Court Ruling When Hiring

**Hint: Put policies in place before you 'need' them.**

According to a recent survey released by the American Health Care Association, which represents more than 14,000 nursing homes and long-term care facilities across the United States, 71 percent of nursing homes surveyed said that the lack of interested or qualified candidates is their top obstacle in hiring, and 73 percent of facilities surveyed are concerned that they'll have to close due to staffing woes.

"We all agree that nursing homes need to hire more caregivers - the question is how," says **Mark Parkinson**, president and CEO of the American Health Care Association.

If your facility is in the throes of issues hiring or retaining staff, you're not alone. Check out this recent court ruling that could affect legality and flexibility extending or rescinding job offers.



#### What Happened in the Case

A job applicant was offered a job and agreed to a criminal background check. On her application, she said that she had never been convicted of a felony (though she had been arrested at 17 but found not guilty). However, the background check and public records showed that this individual had been tried as an adult in a murder case, convicted, sentenced to 25 years in state prison and served 12 years. She had also written a book detailing her experience being convicted.

When the employer found this information, they rescinded the job offer, and she sued, saying she was entitled to the right to explain the results of the background check to the employer.

After some extensive litigation and appeals, the 8th Circuit U.S. Court of Appeals said that the Federal Credit Reporting Act (FCRA) doesn't guarantee applicants with the right to explain "negative" information prior to the employer taking an adverse employment action, sums up attorney **Mark Sabey** at Hall Render in online analysis. The Court also ruled that technical violations of the FCRA that don't inflict "concrete" injury or harm aren't actionable in court, Sabey adds. (This aspect of the ruling hangs on the fact that the applicant consented to the background check.)

The upshot, Sabey says, is that the ruling gives employers some flexibility in how they approach background checks for new hires.

#### What This Means for Employers

Still, even granted a bit more flexibility, organizations hiring employees should prepare now for potential issues and thus hopefully avoid the headache of litigation. Create or otherwise enforce policies that protect you as an organization by being transparent with candidates about your and their responsibilities for compliance with the FCRA. Sabey also recommends that employers provide applicants with advanced notice if they pursue adverse employment actions based on information that they gleaned in a background check.



Considering the state of the long-term care industry, there's a good chance your organization is having trouble recruiting or retaining staff. The AHCA survey reports that 60 percent of nursing homes say their workforce situations have worsened since January 2022, and 61 percent are limiting new admissions due to staffing shortages. In fact, 87 percent are facing moderate to high shortages, and 48 percent say they're experiencing a high level of staffing shortages. A

whopping 98 percent of facilities surveyed say they are having trouble hiring staff - all of which may make hiring candidates more of a priority than hiring quality candidates.

"The survey shows the severe and persistent workforce shortage nursing home providers have been facing with too many facilities still struggling to hire and retain staff despite making every effort," Parkinson said. "Lawmakers across the country must prioritize long-term care residents and staff and that begins with providing resources to address workforce challenges. As a provider that uniquely relies on government funding, policymakers must help nursing homes better compete for nurses and nurse aides, as well as build up the pipeline to incentivize more people to pursue a career in long term care."