

# **Know Your Workforce: Checking Databanks, Exclusion Lists and Other Employment Screenings**

Kelly S. McIntosh  
March 24, 2016

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## **Written Materials**

- Copy of slides
- OIG Special Advisory Bulletin on the Effect of Exclusion from Participation in Federal Health Care Programs
- CMS Fact Sheet on Strengthening Provider and Supplier Enrollment

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## Preliminaries

- Presentation will be recorded and available for download at [www.hhhealthlawblog.com](http://www.hhhealthlawblog.com)
- If you have questions, please submit them using chat line or e-mail me at [ksmcintosh@hollandhart.com](mailto:ksmcintosh@hollandhart.com)
- If you experience technical problems during the program, please contact Luke Kelly at [lskelly@hollandhart.com](mailto:lskelly@hollandhart.com)

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## Preliminaries

- This program offers an overview of legal issues and considerations
- Always review applicable law
  - Different application of law/process may be necessary based on type of facility, type of practitioner, your governing documents and contracts
- This program does not establish an attorney-client relationship
- This program does not constitute the giving of legal advice

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## Workforce Screenings



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## Types of Screenings

- Exclusion lists
  - LEIE, GSA
- NPDB
- Medicare Opt-Out
- State professional boards
- References
- Credit
- Criminal
- Job History
- Driving

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## Exclusion Screening – Why?

- Civil Monetary Penalties Law (42 U.S.C. § 1320a-7a)
- Duty to self-report and make repayments
  - Medicare overpayments must be repaid 60 days after identify existence of overpayment, or by the date the corresponding cost report is due
- Fines and Settlements
- Accreditation requirements
- Reputation Harm
- Negligent credentialing
- Operational Interruptions
- Lost Profits

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## Exclusion Screening – Why?

- Federal payment cannot be made for services furnished, ordered, prescribed or provided by excluded persons
- Beyond direct patient care
  - Administrative and management services
  - Leadership roles
- Excluded person need not receive compensation (direct or indirect) for a violation to occur
  - Volunteers
  - Staffing agencies

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## Exclusion Screening – Why?

- Penalties
  - Denial of payment for services
  - Repayment of amounts improperly received
  - CMP of \$10,000 per item or service provided by excluded party and treble penalty
  - Criminal penalties
  - Exclusion



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## Exclusion Screening – Who?

- Individuals and entities may be excluded
  - Fraud and abuse or other misconduct
  - 42 USC 1320a-7 and 1320c-5
- Employees
- Contracted parties
- Volunteers



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## Exclusion Screening - How?

- Standard: “knew or had reason to know” of the exclusion
  - 42 CFR 1001.1902(b)(1)
  - 42 CFR 1003.102(a)

## Exclusion Screening - How?

- Search databases
  - LEIE
  - GSA
- OIG recommends checking all employees or contractors who provide items or services payable by federal health care programs
- Online search system and downloadable data files

## Exclusion Screening - How?

- **Frequency**
  - Pre-hire/contract
  - Monthly
  - Government checks occur continuously
- **Documentation**
  - Print screen
- **Cross-checks**
- **Notification requirements/contract language**

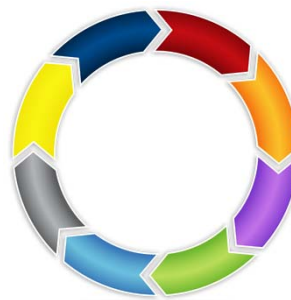
## Exclusion Screening - How?

- **Compliance Plan/Internal Policies**
  - Update as appropriate – at least review annually
  - Identify who is responsible under each policy
  - Educate staff and responsible parties on policies

## Exclusion Screening – How?

- **Process**

- Continually review
  - Is plan being followed?
  - Updates necessary?
  - Are staff and leadership aware of plan?
- Assess for effectiveness
  - Set goals and benchmarks
- Assess for new risks



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## Exclusion Screening – How?

- **What to do with an excluded party**

- Assess what services/items provided
- Consider repayment requirements
- Confirm timing of exclusion
  - Advisory Opinion indicating payment for pre-exclusion services permitted

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## NPDB Searches

- **Hospitals**
  - Only entity type mandated to query the NPDB
  - Initial appointment and every 2 years
  - Individuals “considered part of the medical staff”
  - Locum tenens, residents, interns

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## NPDB Searches

- **Other health care entities**
  - May query the NPDB when:
    - entering into employment or affiliation relationships
    - health care practitioners apply for privileges
    - engaging in professional review activity
- **Practitioners may query themselves**
- **Health plans, professional societies, law enforcement, others able to query**

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## NPDB Searches

- What to do with information on reported actions
  - Assess nature of reported actions
  - Consider time
  - Appropriate consideration in credentialing process

## Other Considerations Pre-Service

- Check opt-out list with MAC
  - All providers
- Search state professional boards for adverse licensing actions
- Ensure any required trainings prior to providing services have been completed
  - Elder abuse trainings in certain settings



## Background Checks

- There is no “universal” or “one size fits all” background check
  - Five common types: references, credit, criminal, job history and driving records.



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## Criminal Background Checks

- The EEOC’s guidance concerning the use of criminal background checks by employers has several significant points:
  - The guidelines specifically state that “[a]lthough an arrest record standing alone may not be used to deny an employment opportunity, an employer may make an employment decision based on the conduct underlying the arrest if the conduct makes the individual unfit for the position in question.”

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## Criminal Background Checks

- The guidelines give an example where an employee is arrested. The employer conducts an investigation and the employee denies the conduct, while the accusers claim that the conduct occurred. The guidelines specifically state that “[t]he[employer] does not find [the employee’s] explanation credible” and terminated him, even though a person arrested is innocent until proven guilty.
- The EEOC indicates that, in such a situation, they would find that “no discrimination occurred.” This is a significant example to appear in the EEOC guidance because it has the EEOC finally endorsing the Swenson v. Potter concept that an employer can make reasonable credibility determinations.

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## Criminal Background Checks

- Adopts the Green v. Missouri Pacific Railroad factors:
  - targeted screening that considers at least the nature of the crime,
  - the time elapsed, and
  - the nature of the job.
- The policy should allow an opportunity for the applicant to explain the arrest/conviction and then the employer should do an individualized assessment (e.g., the Green factors).

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## Criminal Background Checks

- When does the EEOC agree that a person is properly eliminated from a position based on a conviction?
  - Title VII has a federal security clearance exception
  - Title VII does not preempt federal statutes and regulations that govern eligibility for occupational licenses and registrations (transportation, finance and import/export are a few examples)

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## Criminal Background Checks

- Title VII does not preempt federal statutes and regulations that govern the employment of individuals with specific convictions in certain industries (e.g., security screener, federal law enforcement officers, child care workers in federal facilities, bank employees, port workers, etc).
- Where the exclusion “is job related for the position in question and consistent with business necessity.”

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## Criminal Background Checks

- The guidance urges employers to not ask about convictions on applications.
  - EEOC urges employer to wait until later in the process, after they have had a chance to learn about the person and their qualifications. Then the individualized Green factors assessment can be done in the context of knowing their qualifications.
  - This process is not required and may not make sense for some employers

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## Criminal Background Checks

- It is important to remember that when an applicant is rejected because of a background check, the Fair Credit Reporting Act likely applies.

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## Additional Holland & Hart Resources

- *Healthcare Update and Health Law Blog*
  - Under “Publications” at [www.hollandhart.com](http://www.hollandhart.com).
  - [www.hhhealthlawblog.com](http://www.hhhealthlawblog.com)
  - E-mail me at [ksmcintosh@hollandhart.com](mailto:ksmcintosh@hollandhart.com)
- Future Webinars
  - April 7 - Bundled Payments: Oncology Care Model
  - April 14 - Health IT: Legal Issues
  - April 21 - Government Contracts in Healthcare

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## Questions?

Kelly S. McIntosh  
Holland & Hart LLP  
5441 Kietzke Lane, Second Floor  
Reno, Nevada 89511  
(775) 327-3004  
[ksmcintosh@hollandhart.com](mailto:ksmcintosh@hollandhart.com)

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