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# Screening Potential and Existing Employees a Relatively Simple Way for Health Care Providers to Avoid Potentially Significant Penalties

Health care providers face substantial risks when they inadequately screen current and potential employees. Failing to adequately screen current and potential employees could lead to violations of state and/or federal law. Such violations expose health care providers to significant penalties. Providers can limit the risk of violations and penalties by taking precautionary measures to avoid employing excluded providers and/or individuals that have substantial adverse findings or criminal backgrounds. The discussion set forth below analyzes two areas in which provider employers are required to conduct adequate employment screening. As you will see, the penalties for violating screening requirements can be significant while the burden of conducting the screening is diminutive.

**POSTED:**

Nov 16, 2005

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## A. Health Care Employers May Pay a Significant Price for Employing an Excluded Provider

Health care employers should not underestimate the importance of assuring that potential and current employees are not considered excluded providers for purposes of federal health care reimbursement programs, including Medicare and Medicaid. Excluded providers are those who have been convicted of fraud and abuse related to federal health care programs pursuant to the Exclusion Program administered by the Office of Inspector General ("OIG"), which prohibits excluded providers from receiving Medicare or Medicaid payments for items and services that they furnish.

Health care employers face significant civil monetary penalties ("CMPs") if they submit Medicare or Medicaid claims for health care items or services provided by excluded providers. Such CMPs can reach $10,000 for each item or service provided by an excluded provider. Treble damages may be assessed as well. Such liability could be disastrous when multiplied by the number of items and services that just one excluded provider may perform over a relatively short period of time.

Liability will only be imposed upon providers that submit claims for health care


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items or services furnished by an individual or entity that the provider knew or should have known was excluded from participation in the federal health care programs. However, providers and contracting entities have an affirmative duty to check the program exclusion status of individuals and entities prior to entering into employment or contractual relationships, or run the risk of CMP liability if they fail to do so.

Additional information on CMPs for claims submitted for excluded provider services is available in a special advisory bulletin.

Health care employers can protect themselves from incurring costly CMPs by confirming that potential and current provider employees are not on the OIG's List of Excluded Individuals and Entities. In order to check a provider, simply go to the OIG Exclusions Database. Once there, enter the person's name into the on-line searchable database of excluded providers. If the person is on the list, the database will provide details regarding the exclusion. If the provider is not on the list, the database will return a screen saying, "No results were found for [the provider entered]." For employees and potential employees, health care employers should print a copy of the "No results" page and place it in the employee's file to evidence its good faith effort. This procedure should be made routine for all new employees. Furthermore, because the list is updated regularly, it is also important that employers periodically search the list for all employees.

## B. Federal and State Law Mandate That Long-Term Care Facilities Screen Potential Employees and Check Appropriate Nurse Aide Registries

On September 22, 2005 the Centers for Medicare and Medicaid Services (CMS) released a memorandum reiterating requirements that long-term care facilities screen potential employees and check with all appropriate nurse aide registries.

The Wisconsin Caregiver Background Check law ("Caregiver Law") obligates a provider to make a good faith effort to obtain similar information required under the Caregiver Law from another state, if an applicant indicates that they have lived in another state in the past three years. However, the CMS memorandum does not place a time frame on seeking information from another state, rather long-term care facilities, regardless of the passage of time, must check the nurse aide registries of other states that it believes might contain information about the individual. The following examples illustrate the difference between the



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requirements set forth by the Caregiver Law and those reiterated by CMS:

If any employee indicates that they lived in another state within the past three years, the provider is required by the Caregiver Law to obtain similar information required under the Caregiver Law from that state. This would include checking the nurse aide registry.

If an applicant indicates that they were a caregiver in another state five years ago, the Caregiver Law does not require the obtaining of the similar information; however, the CMS memorandum seems to indicate that the provider should access that state's nurse aide registry.

The OIG has previously recommended that CMS emphasize to long-term care facilities that they must comply with federal requirements for checking nurse aide registries. Furthermore, the OIG has recommended that CMS encourage facilities to use available resources to conduct screening. As to this latter recommendation, the CMS memorandum does provide a link to a site that will easily allow providers to access the various state registries.

Please do not hesitate to contact the Reinhart Health Care Department with any questions regarding applicant/employee screening requirements and/or procedures.

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