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Community Health Centers

### **Important Content Note:**

This technical assistance resource was developed prior to the August 2017 release of the Health Center Compliance Manual by the Health Resources and Services Administration's (HRSA) Bureau of Primary Health Care (BPHC). The BPHC Compliance Manual, issued August 2017, indicates where PINS, PALs and other program guidance are now superseded or subsumed by the BPHC Compliance Manual.

See: <https://bphc.hrsa.gov/programrequirements/pdf/healthcentercompliancemanual.pdf>

# HR

## Information Bulletin #1

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**Note that in all Information Bulletins:**

The term “health center” refers to public or private nonprofit entities that: (1) receive grants under Section 330 of the Public Health Service Act (Section 330), including Sections 330(e), 330(f), 330(g) and 330(h) (collectively “Health Center Program Grantees”); and (2) entities that have been determined by the Department of Health and Human Services (DHHS) to meet the Section 330-Related Requirements to receive funding without actually receiving a grant (“health center look-alikes”).

The term “Section 330-Related Requirements” refers to requirements set forth in:

- Health Center Program Statute: [Section 330 of the Public Health Service Act \(42 U.S.C. §254b\)](#),
- Program Regulations: [42 CFR Part 51c](#) and [42 CFR Parts 56.201-56.604](#)
- Health Center Program Requirements: <http://www.bphc.hrsa.gov/programrequirements/index.html>

The term “Grant Requirements” refers to Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards: 2 CFR Part 200, as adopted by DHHS at 45 CFR Part 75.

This publication is designed to provide accurate and authoritative information in regard to the subject matter covered. It is published with the understanding that the publisher is not engaged in rendering legal, financial or other professional service. If legal advice or other expert assistance is required, the services of a competent professional should be sought.

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# Conducting Effective Job Interviews and Background Checks in Compliance with Federal Employment Discrimination Laws

Employees who are knowledgeable, hardworking, and conscientious not only make a favorable impression on patients and others, but also help to ensure that the care and services provided by the health center comply with professional standards and legal requirements. While on-the-job training and education play an important role in maintaining a competent and reliable staff, a health center would be well advised to make the most of its hiring process so as to minimize the risks associated with hiring an unqualified or careless employee.

This information bulletin provides an overview of the Federal employment discrimination laws that impact the vetting of prospective health center employees and offers tips on what to do and what not to do.<sup>1</sup> Specifically this bulletin:

- ◆ Addresses Federal employment discrimination laws, also known as equal employment opportunity laws, as they apply to the employee selection process. Laws such as Title VII of the Civil Rights Act of 1964 (“Title VII”), the Age Discrimination in Employment Act, and the Americans with Disabilities Act (“ADA”), prohibit discrimination against certain groups of individuals, such as “protected classes.” Consequently, the questions asked during a job interview should not relate to a job applicant’s status as a member of a protected

<sup>1</sup> Because employment activities also are regulated on the state and local levels, health centers always should consult an attorney familiar with state and local employment laws to determine any additional legal requirements that may apply to the hiring process.

class. In addition, the Genetic Information Nondiscrimination Act of 2008 (“GINA”) prohibits employers from requesting or using genetic information, including among other things, an applicant’s family medical history or information about the individual’s genetic tests, in making hiring and other employment-related decisions.

- ◆ Contains examples of the types of questions that should be avoided in a job interview setting
- ◆ Outlines some proven interview strategies that will make an interviewer’s task easier and help to ensure compliance with the law
- ◆ Explains how to lawfully use background checks and social media in the employee selection process.

This Bulletin is not intended to be a general discussion of employment discrimination law, nor is it intended to cover all of the impermissible topics in the hiring process.

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## FEDERAL EMPLOYMENT DISCRIMINATION LAWS

There are numerous federal laws that prohibit discrimination in the hiring process. It is important to remember that, with only a few exceptions, these laws do not require employers to give preferential treatment to a particular job applicant simply because he or she belongs to a protected class. Rather, they are intended to protect individuals from discrimination by prohibiting employers from taking protected characteristics, such as the applicant’s religion, race, or national origin, into account in hiring and other job-related actions. Employment discrimination laws protect individuals against discriminatory employment practices in the pre-employment stage, when hiring decisions are made, as well as in subsequent employment situations when

issues relating to compensation, job advancement, and termination can arise.

## Disparate Impact Discrimination

As a health center reviews its employment interview policies and practices, it should keep in mind that Federal employment discrimination laws prohibit inquiries that have a disparate impact on members of a protected class. In other words, a health center could be in violation of one or more anti-discrimination laws if an interviewer asks a job candidate a question that, although it appears neutral, disproportionately affects members of a protected class. For example, if an interviewer asks an applicant about language skills when fluency in English, or in another language, is not required to perform the essential functions of the job, the question could tend to screen out applicants belonging to a protected group, such as people not born in the United States.

## Permissible Questions After an Offer Is Made

It also is important to keep in mind that some questions that should not be asked during an interview are perfectly permissible to ask after an offer of employment is made. For example, while an interviewer should never ask an applicant’s birth date, because that could suggest an illegal age bias in hiring, a health center can legitimately obtain that information after the person is employed if it is relevant to the employment, such as insurance coverage or other employee benefits.

## ILLEGAL INTERVIEW QUESTIONS AND COMMENTS

The job interview is an important tool available to a health center in the employee selection process. Used correctly, an interview can guide the center in making sound hiring decisions and help to promote the health center as a desirable and professional workplace. However, the interview process also can create problems for a health center if those who conduct employment interviews are not sufficiently familiar with the law or otherwise are ill prepared. A poorly conducted interview may well deter the best candidates from pursuing an opportunity to work at the health center. Conversely, applicants who do not secure a job offer may claim that an interviewer's questions or conduct during the interview are evidence of employment discrimination and, as such, file charges against the health center.

In today's competitive job market, health centers are more likely to receive applications from a large number of diverse candidates vying for the same job. It is important that centers be confident that interviewers are asking questions solely pertaining to a candidate's ability to perform the job, and that they are avoiding questions that could reveal a candidate's protected status under one or more federal or state employment discrimination laws. Even seemingly innocent questions that elicit information pertaining to the candidate's religion, national origin, or other protected characteristics may be taken as evidence of an improper motive and undermine the center's best efforts to hire the most qualified candidate for the job.

### Topics to Avoid Under Federal Employment Discrimination Laws

- ◆ AGE
- ◆ GENDER
- ◆ MARITAL STATUS
- ◆ CHILD CARE OBLIGATIONS
- ◆ RELIGION
- ◆ RACE, ETHNICITY, NATIONAL ORIGIN
- ◆ PRESENCE OF A DISABILITY
- ◆ FAMILY MEDICAL HISTORY

### Discrimination Based on Age

The Age Discrimination in Employment Act (ADEA) protects individuals 40 years and older from discrimination in hiring and other employment decisions.<sup>2</sup>

#### Questions and Comments About an Applicant's Age

A candidate who is directly or indirectly asked about age in a job interview might later believe that age played a role in the center's decision to hire someone else. Even if the interviewer asked the question to clarify the candidate's education or employment history, an age-related question could be used against the center as evidence of discriminatory hiring practices.

<sup>2</sup> 29 U.S.C. §§ 621 et seq.

- ◆ Sometimes, an interviewer will have to ask questions that relate, directly or indirectly, to a candidate's age. For example, it is permissible to ask applicants whether they are of legal age to work. Also, if a certain level of education is required to perform the job, questions about a candidate's educational background and degree, if any, are permissible. Health centers should, however, take care to pose the same questions to all candidates for the same position and to make sure that the requirement for a particular level of education is properly documented in the written job description for the position.
- ◆ Off-hand comments and the use of certain inappropriate terms also can suggest an age bias, and ought to be avoided. For example, interviewers should not suggest to a job candidate that the center wants to hire "a recent medical school graduate" or a "younger person."

**Examples of inappropriate questions about an applicant's age are:**

- ✗ What is your date of birth?
- ✗ How old are you?
- ✗ When did you attend or complete primary and secondary school?
- ✗ Will you be uncomfortable working with a boss who may be younger than you?

## Discrimination Based on Sex, Religion, Race, Ethnicity, or National Origin

Title VII makes it unlawful for an employer with 15 or more employees "to fail or refuse to hire or to discharge any individual ... because of such individual's race, color, religion, sex, or national origin."<sup>3</sup> Moreover, the U.S. Equal Employment Opportunity Commission ("EEOC") has held that Title VII prohibits discrimination based on sexual orientation and gender identity.

Executive Order 11246, which applies to employers with a Federal contract of \$10,000 or more, similarly prohibits discrimination on the basis of race, color, religion, sex, sexual orientation, gender identity, or national origin. Contractors (and subcontractors) with 50 or more employees and \$50,000 or more in government contracts must take affirmative action to remedy any underutilization (as compared to their availability in the workforce) of women and minorities in their employ.<sup>4</sup>

It is important to note that Executive Order 11246 does not apply to federal grantees. It applies only to organizations that receive federal procurement contracts (or, in some cases, state contracts) or that are subcontractors under a federal procurement contract of \$50,000 or more, and that employ 50 or more persons. Obligations under Executive Order 11246 typically are included directly, or by reference, in such contracts. In those limited cases, it may be permissible to make inquiries concerning race to meet the contractor's affirmative hiring obligations.

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3 42 U.S.C. § 2000e-2(a)(1) (emphasis added).

4 30 Fed. Reg. 12319

## Questions and Comments About an Applicant's Race, Color, or National Origin

As discussed above, it is unlawful for covered employers to discriminate in the hiring process on the grounds of race, color, or national origin. Questions or comments on the topic of race, ethnicity or national origin generally should be avoided.

- ◆ Interviewers should refrain from asking questions that might be regarded as being aimed at eliciting information about an applicant's race, ethnicity, or nationality, such as questions about the applicant's participation or membership in social or other non-professional organizations that draw membership from a particular nationality or ethnic group.
- ◆ Proficiency in English or another language may well be a bona fide requirement for certain jobs, in which case employers can ask questions about the candidate's proficiency or skills in the identified language. As with other specific job qualifications, language requirements should be stated expressly in the written job description for the position.
- ◆ It is permissible to pose questions regarding U.S. citizenship or other authorizations to work after a job offer has been extended. Indeed, such inquiry is required. Federal immigration law makes it illegal for an employer to knowingly hire anyone not authorized to work in the United States and requires employers to verify all new employees' authorization to work in the United States.<sup>5</sup>

### Examples of inappropriate questions concerning an applicant's race, ethnicity, or national origin are:

- ✗ Are you a U.S. citizen?
- ✗ Where are you from originally?
- ✗ What is the origin of your last name?

## Questions and Comments About an Applicant's Gender

Federal employment discrimination laws prohibit discrimination, intentional or otherwise, based on an applicant's gender.

- ◆ Generally speaking, any question that an interviewer asks of persons of one gender and not the other is likely to infer a discriminatory intent in the hiring process. For example, because questions should never be asked only of female applicants (and it may be awkward to ask those questions of male applicants as well), certain questions are best avoided entirely.
- ◆ A question asking the applicant's sex, or the candidate's preferred title, such as "Mr., Mrs., Ms., or Miss," is not illegal if asked in good faith for a "non-discriminatory purpose."<sup>6</sup>
- ◆ Further, inquiries about a job candidate's gender are permitted when a particular gender is required as a legitimate business necessity, which in all likelihood, would not be the case for most health center employment situations. Under this very limited exception, an employer is permitted to discriminate in the hiring process and ask otherwise illegal questions about an applicant's gender when gender is a "bona fide occupational qualification" for the position. For example, a center may believe that it needs to hire a female nurse to assist a male provider performing OB/GYN procedures. To ensure compliance with Title VII and other applicable law, health centers should consult with a knowledgeable employment law attorney before recruiting for a position that specifies "men only" or "women only" among the requirements stated for the job.

<sup>5</sup> The Immigration Reform and Control Act, 8 U.S.C. §§ 1324a & 1324b

<sup>6</sup> 29 C.F.R. § 1604.7.

- ◆ Note that federal law does not prohibit discrimination based on marital status, but many states and localities have laws that prohibit such discrimination.

**Examples of inappropriate questions relating to gender are:**

- ✗ Are you married?
- ✗ Do you have a maiden name?
- ✗ Do you have plans to start a family
- ✗ Are you pregnant?

**Questions and Comments About an Applicant's Religion**

As indicated above, Title VII makes it unlawful for an employer to discriminate on account of religion. Thus, an employer may not take into account an applicant's religious beliefs or the applicant's intention to observe religious holidays in hiring decisions. A limited exception exists for employers that are religious organizations, which may give preferential treatment to members of their religion if the work performed is related to the organization's religious activities.

- ◆ It is permissible to inquire whether the applicant is available to work the days and hours of the week needed to meet the position's posted job requirements, for example, Saturday office hours or scheduled Sunday call coverage.

- ◆ After an employer has hired someone, it also can inquire about an employee's religious beliefs and practices to determine if a religious accommodation is needed.
- ◆ Employers must accommodate the religious beliefs and practices of an employee unless it imposes an "undue hardship" on the conduct of the employer's business.

**Examples of inappropriate questions on the topic of religion:**

- ✗ Are you religious?
- ✗ Do you work on Saturdays?
- ✗ What holidays do you observe?

**Discrimination Based on Disability**

The protections afforded individuals with a disability are largely derived from the ADA, which forbids employers with 15 or more employees from discriminating against qualified individuals with a disability when considering applicants for a job.<sup>7</sup> Section 504 of the Rehabilitation Act of 1973, applicable to health centers receiving federal financial assistance, has a similar disability discrimination prohibition.<sup>8</sup> Among other things, these laws aim to ensure that qualified individuals with a disability are considered for employment and are treated no differently in the hiring process than their counterparts who do not have a disability.

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7 42 U.S.C. §§ 12101 et seq.

8 29 U.S.C. § 794.

## Questions or Comments About an Applicant's Disability

As a general matter, the ADA and Section 504 of the Rehabilitation Act prohibit pre-employment inquiries about the existence of a disability and pre-employment medical examinations so that a person with a disability is not screened out before his or her actual ability to do a job is evaluated. For example, an interviewer must avoid asking questions about a candidate's medical condition or the presence of any disabilities.<sup>9</sup>

- ◆ While an employer may not ask about the presence of a disability or a condition that could imply that an applicant has a disability, the employer is permitted to ask questions to determine if an applicant can perform specific job functions. For example, an interviewer could show an applicant a written job description that lists specific job functions, or orally describe the required functions, and ask the applicant if she can perform those functions with or without an "accommodation."<sup>10</sup>
- ◆ If an applicant indicates that he or she can perform the required functions, but with an accommodation, the applicant may be asked how he or she would perform them and with what accommodations.

### Examples of inappropriate questions concerning the presence of a disability:

- ✗ Do you have any disabilities or impairments that may affect your job performance?
- ✗ Are you taking any prescribed drugs?
- ✗ Have you ever been treated for any mental health condition?
- ✗ Have you ever been treated for drug addiction or alcoholism?
- ✗ Have you ever been injured on the job?
- ✗ Have you ever filed a workers' compensation claim?
- ✗ Have you had or been treated for any [of the following] conditions or diseases?
- ✗ What conditions have you had or been treated for in the past [number of] years?
- ✗ How many days of work did you miss last year because of illness?

<sup>9</sup> In some circumstances, Federal contractors and subcontractors may have an affirmative obligation to employ and to advance in employment opportunities qualified individuals with a disability, e.g., Section 503 of the Rehabilitation Act of 1974 and the Vietnam Veterans' Readjustment Assistance Act of 1974. In these situations, an employer can legitimately inquire as to an applicant's disability in order to satisfy statutory requirements. However, these laws typically apply to procurement contracts for goods and to construction contracts, not to contracts for personal services. In the unlikely event that a health center has such a contract (as a prime contractor to the government or as a subcontractor), it should obtain guidance from the awarding government agency (or the prime contractor, if appropriate) as to its obligations.

<sup>10</sup> Employers are required to provide a reasonable accommodation to the known physical or mental limitations of a person who otherwise is qualified to perform the essential functions of a particular job, provided that doing so would not impose an undue hardship on the employer. Reasonable accommodation is any modification or adjustment to a job, an employment practice, or the work environment that makes it possible for an individual with a disability to enjoy an equal employment opportunity. Some common examples of a reasonable accommodation include making an employer's facilities readily accessible to and usable by an individual with a disability, altering when or how an essential job function is performed, modifying equipment and devices, and modifying work schedules.

### Examples of PERMISSIBLE questions:

- ✓ This job requires attendance from 9 a.m. to 5 p.m. Monday through Friday. Can you keep that schedule?
- ✓ Are you able to perform [described] job functions, with or without accommodation?
- ✓ How would you perform the [described] tasks?
- ✓ Did you have a good attendance record on your prior job?

[But NOT whether a poor attendance record was due to illness, accident or disability.]

If an applicant has an obvious disability that might affect his or her ability to perform the job, an employer may ask the applicant to explain or to demonstrate how he or she would perform the job functions, even if other applicants are not asked to do so. For example, if an applicant for a medical file clerk position is confined to a wheelchair, an interviewer could ask the applicant to demonstrate the required function of accessing medical records with or without an accommodation. If that same applicant were seeking employment as a receptionist, where the known disability would not interfere with the performance of job functions, the applicant could be required to demonstrate or describe how he or she would perform a job only if all applicants for the position were required to do so. In any case, the interviewer may not inquire as to the nature or severity of the disability, the prognosis for the underlying physical or mental condition, or whether the applicant will need treatment or time off from work on account of the disability.

Centers should note an important distinction among questions concerning the need for a reasonable accommodation. Employers may ask applicants if they require an accommodation during the hiring and interview process. An applicant may, for example, need special accommodation in completing the health center's written application form, or an applicant with an apparent disability may need an accommodation if the applicant opts to demonstrate (rather than explain) during the interview that he or she can perform the job's essential functions.

## Other Examples of Illegal or Inappropriate Questions and Comments

### Genetic Information

As noted, the GINA prohibits the use of genetic information in employment decisions and, except in very limited circumstances,<sup>11</sup> prohibits an employer from requesting, requiring, or purchasing genetic information. GINA defines "genetic information" to include information about an individual or a family member's genetic test (the analysis of human DNA, RNA, chromosomes, proteins, or metabolites that detects genotypes, mutations, or chromosomal changes) and, importantly, any family medical history (information about the manifestation of disease or disorder in family members of an individual). GINA prohibits the acquiring of genetic information even if it is never used in an employment scenario.

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11 For example, an employer may request medical information to support an employee's request for reasonable accommodation under the ADA or to document the need for family or medical leave, provided that the request for documentation complies with applicable law.

According to the EEOC, GINA is concerned primarily with protecting individuals who may be discriminated against because an employer thinks that they are at increased risk of acquiring a medical condition in the future. Other laws, such as the ADA, may protect an individual whose medical condition meets the definition of a “disability.” Accordingly, while under the ADA an employer may conduct a medical examination *after* making a job offer (or during employment to the extent allowed by law), under GINA, the examination may not include the collection of family medical history because the history might reveal a predisposition to certain diseases.<sup>12</sup> In short, making requests for information about an individual’s current health status in a way that is likely to result in obtaining genetic information or requesting an applicant’s family medical history should be “off limits” for interviewers.

### Smoking

State or local law may protect job applicants from questions concerning cigarette use or other off-duty, lawful activities. Again, where those laws are in effect, interviewers should avoid asking such questions.

<sup>12</sup> The EEOC suggests that employers include the following, or similar, language when requesting medical information: “The Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits employers and other entities covered by GINA Title II from requesting or requiring genetic information of an individual or a family member of the individual, except as specifically allowed by this law. To comply with this law, we are asking that you not provide any genetic information when responding to this request for medical information. ‘Genetic information’ as defined by GINA, includes an individual’s family medical history, the results of an individual’s or family member’s genetic tests, the fact that an individual or an individual’s family member sought or received genetic services, and genetic information of a fetus carried by an individual or an individual’s family member or an embryo lawfully held by an individual or family member receiving assistive reproductive services.”

## MAKING THE MOST OF THE INTERVIEW OPPORTUNITY

The opportunity to meet a job applicant face-to-face is a critically important tool in the hiring process. Health centers should make the most of that opportunity. Being knowledgeable about the position and its requirements will afford the interviewer little opportunity to stray off course and ask questions with the potential to cause problems for the health center.

- ◆ Prior to advertising a position, the health center’s interviewer should review the written job description for the position to make sure that it is current, and that it accurately describes the essential duties and requirements of the position and specific job functions.
- ◆ Develop a standard application form designed to elicit information about the job candidate’s skills, personal qualities, and overall competence for the job.
- ◆ Carefully tailor standard interview questions for each vacant position so that the questions are specifically relevant to the position’s essential duties and obligations. Using a standard set of questions for all candidates for a particular job facilitates the decision making process by allowing a health center to compare more easily the strengths and weaknesses of each job applicant. Consequently, it leads to consistency and uniformity in the hiring process, which is strong evidence of a selection process that treats all applicants fairly and equally.

- ◆ Before each interview, the interviewer should take the time to learn as much as possible about the position so that he or she can describe the position, tailor questions to elicit relevant information, and answer any questions the candidate might have. If, for example, the position requires extensive patient contact, the center will want to be assured that the applicant has the necessary verbal communication skills, possesses the ability to be compassionate, and is adept at handling various situations, such as dealing with difficult patients.
- ◆ Determine whether the applicant has experience managing other employees if the position calls for supervising other members of the health center's staff.
- ◆ Learn how the applicant handled particularly difficult management situations in the past.

By utilizing a standardized hiring process and staying focused on the position's specific and essential job functions, an interviewer can more easily conduct an interview that serves the health center's objectives and complies with employment discrimination laws.

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## CONDUCTING LEGAL BACKGROUND CHECKS

Health centers and other employers may have a legitimate interest in work history, education, criminal record, and financial history of applicants (or current employees) being considered for employment. Except for medical history and genetic information, it generally is permitted under Federal law to inquire into an applicant's (or employee's) background or to conduct a background check.<sup>13</sup>

However, an employer must comply with the Federal anti-discrimination laws when it uses background information to make an employment decision, without regard to how the information was obtained. Similarly, when an employer uses a company that is in the business of compiling background information to conduct a background check, the employer must comply with the Fair Credit Reporting Act ("FCRA"). To that end, the EEOC, which enforces the Federal anti-discrimination statutes, and the Federal Trade Commission ("FTC"), which enforces FCRA, have issued *joint* guidance on conducting background checks.<sup>14</sup> The key features of a lawful background check, according to the EEOC and the FTC are as follows:

### Treat Everyone Equally

- ◆ A decision to conduct a background check should not be based on an applicant's race, sex, national origin, etc.
- ◆ Apply the same standards to everyone when using background check information to make hiring decisions. For example, if the health center does not reject applicants of one ethnicity with certain financial histories, it should not reject applicants of other ethnicities because they have same or similar financial histories
- ◆ Take special care when basing employment decisions on background problems that may be more common among people of a certain race, color sex, etc. (any "protected class"). For example, employers should not use a policy or practice that excludes people with certain criminal records if the policy or practice significantly disadvantages

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13 Note that state or local laws may have different requirements regarding the collection and use of background information in making employment decisions.

14 *Background Checks: What Employers Need to Know*, a joint publication of the EEOC and FTC (2014)

individuals of a particular race, national origin or other protected characteristic and does not accurately predict who will be a responsible, reliable, and safe employee. Otherwise, the policy or practice may subject the employer to a charge of discrimination based on “disparate impact.”

## Obtain Background Information

When obtaining background information (e.g. credit report or criminal background report) from a company in the business of compiling background information:

1. Inform the applicant in writing, but in a document separate from the job application, that the health center might use the information for employment decisions. If you also are asking for an “investigative report” – a report based on personal interviews concerning a person’s character, general reputation, personal characteristics and lifestyle – the center must also inform the applicant of their right to a description of the nature and scope of the investigation.
2. Obtain the applicant’s written permission to do the background check.
3. Certify to the company conducting the background check that the center:
  - Has notified the applicant and obtained written permission for the check
  - Has complied with all of the FCRA requirements
  - Will not discriminate against the applicant or otherwise misuse the information in violation of law.

## When Taking an Adverse Action

If the health center does not hire an applicant based on information obtained from a company in the business of compiling background information:

1. Give the applicant advance notice of the adverse action, including a copy of the consumer report relied on in making the decision, and a summary of the applicant’s rights under the FCRA so that the applicant has an opportunity to review and explain any negative information
2. Inform the applicant orally, in writing, or electronically:
  - He or she was rejected on account of information in the report
  - The name, address, and phone number of the company that sold the report
  - The company did not make the hiring decisions and cannot give specific reasons for the decision
  - He or she has the right to dispute the accuracy of the report and to obtain an additional free report from the reporting company within 60 days.
3. Observe retention and disposal requirements for background information

## Required Record Retention and Destruction

The EEOC requires that an employer preserve all personnel or employment records – including all application forms and other records related to hiring, regardless of whether the applicant was hired – for one year after the record was made or after a personnel action was taken, whichever comes later

Once the record retention period is satisfied, background information reports can be destroyed. However, FCRA requires that the records be disposed of securely including burning, pulverizing, or shredding of paper documents and disposing of electronic information in a manner that prevents reading or reconstruction.

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## USING SOCIAL MEDIA IN HIRING DECISIONS

Employers increasingly are using social media, such as Facebook, Twitter, as well as more generalized Google and other internet search engines to obtain information in vetting prospective employees. The utility of social media in predicting employee behavior is a matter of debate, and the reliability of internet-sourced information is a concern. Separate from the question of the appropriate function of social media in the hiring process, there are legal “minefields” that should be recognized and avoided.

An employer may well obtain information online that it is not permitted to consider in the hiring process, such as race, sex, disability. Once there is evidence that the employer obtained such information online, it is difficult to demonstrate that it did not use prohibited hiring information in making an employment decision.

GINA (discussed above) poses a particular social media risk. GINA prohibits an employer from requesting genetic information about both the individual and a family member of an individual. The regulations implementing GINA specifically define a “request” to include “conducting an internet search of an individual in a way that is likely to result in an [employer] obtaining genetic information.”<sup>15</sup> Since the definition of “request” is so broad, an employer using social media to vet an applicant may inadvertently acquire protected “genetic information” such as an applicant tweets that his mother is recovering from breast cancer surgery.<sup>16</sup> A health center can effectively protect itself from this risk by retaining a third-party vendor to conduct the social media search, which will insulate the center from inadvertent access to protected information. Note, however, that the FCRA disclosure requirements discussed above will have to be made.

Accordingly, if a health center decides to review social media as part of its hiring process, it would be well advised to wait until after there has been a face-to-face meeting with the applicant. This will make it less likely to be accused of relying on protected characteristics learned from a social network profile.

Further, if a health center chooses to use social media, it should have a written policy describing exactly how it will conduct a search. The policy should:

- ◆ Establish a “firewall” between the person conducting the internet search and the person who makes the hiring decision to filter out any information that might reveal a protected characteristic.

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15 29 C.F.R. § 1635.8(a)

16 There is a limited exception when the person conducting the social media search was given access permission by the creator of the profile, such as when both persons are “connected” on the social networking site.

- ◆ Identify which social media sites will be reviewed and what criteria will be used in assessing the information obtained. Such criteria should be relevant to an applicant's fitness for the job and, as with background checks, social media searches should be used evenly with all applicants in a non-discriminatory manner.
- ◆ Provide that the applicant will be informed that a social media search will be conducted and prohibit asking the applicant for passwords or log-in credentials. Asking for passwords and other access to internet accounts is illegal in many states and may, in fact, discourage well-qualified candidates from pursuing employment on account of privacy concerns.

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## CONCLUSION

Hiring and maintaining a qualified, knowledgeable, hardworking, competent, and reliable staff is one of the most important components of a health center's operations. As such, preparation that focuses on the questions to ask a candidate and, equally importantly, the questions NOT to ask, is essential for a successful interview, which ultimately, should result in an effective hiring process.

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