

**Privacy Issues in the Workplace—
Handling Client Requests for
Candidate Information**

2015 ASHA Staffing Law CONFERENCE

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Handling Client Requests for
Candidate Information**

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Client Requests/Audits—Forms I-9

- Very common for MSP agreements to require that staffing firms produce I-9s and supporting documents for staffing firm personnel placed on client sites
- May also require that staffing firms collect the same information from subcontractors

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Can You Provide/Collect I-9s and Supporting Documents?

- Law is clear that you CANNOT
- Documents can only be used to verify identity and employment authorization at time of hire
- Can only be provided to government agencies charged with enforcement of I-9 obligations:
 - U.S. Immigration and Customs Enforcement (ICE)
 - U.S. Department of Labor (DOL)
 - U.S. Office of Special Counsel (OSC)
- Not even redacted copies



What if They Only Ask for Proof of E-Verify Employment Authorization?

- Same answer. Can't do it.
 - Will only use for completion of I-9
 - Will safeguard access to this information to ensure that it is not disseminated to anyone other than those employees charged with complying with MOU
- New Monitoring & Compliance Unit is drafting regulations to fine for violations



Any Exceptions?

NO EXCEPTIONS!



Should I Provide Them Anyway?

- Pros:
 - Satisfy client
 - Easy to provide
- Cons:
 - Increased exposure to government investigations



What Is the Exposure?

- "Document Abuse"
 - \$110 - \$1,100 per I-9
- Violation of E-Verify MOU
 - Debarment from E-Verify
 - Debarment from federal contracts



How to Balance?

- Manage the issue at the initial contract phase (unlikely)
- At time of audit request, refer to the contract, which rarely specifies which documents "must" be provided



How to Balance?

- Present client with Technical Assistance Letters from Office of Special Counsel, Civil Rights Division making it clear it is improper
- Offer to provide an attestation in lieu of actual documents



What Should Be in the Attestation?

- Confirm that an I-9 was completed for all employees on site
- Confirm that all employees on site have valid employment authorization
- Confirm that any employees with expiring employment authorization have been calendared for reverification and will be updated prior to expiration



Anything Else?

- If client is asking for E-Verify results, attestation can include:
 - All employees placed on site have been run through E-Verify, if hired after date of enrollment
 - There are no FNCs for any employees placed on site



Any Other Client Requests/Audits?

- Some clients ask that staffing firms provide information on
 - Citizenship status
 - Permanent resident status
 - Employment authorization expiration dates
- Do the same rules apply? No.



Citizenship Requirements

- This can arise in two ways:
 - Ask that you only provide U.S. citizen candidates
 - Ask that you provide detailed citizenship information on all candidates, U.S. citizen or otherwise



Is "Citizens Only" Permissible?

- As a starting point, generally not permissible
- Two controlling laws:
 - Title VII of the Civil Rights Act
 - National Origin Discrimination
 - Immigration Reform Control Act
 - Citizenship Status Discrimination



Any Exceptions?

- “National Security”:
 - In the “interest of national security”
 - Under a “security program”
 - Origin in a statute or Executive Order



Any Other Exceptions?

- U.S. Export Control Laws:
 - “Export” of certain information to “foreign persons” of certain countries is unlawful without an export license
 - U.S. citizens are not “foreign persons”
 - But permanent residents are also not “foreign persons” so can’t be excluded
 - Inquiry of citizenship status is required of all employees to assess whether an export license is needed



How to Collect the Data?

- Attestation works here as well
- Make clear that information is gathered solely for International Traffic in Arms Regulation (ITAR) compliance
- Separate from the I-9 process



Other Audit Requests?

- Common to request documentation of W-2s and/or pay stubs
- Intended to prove that contractor has not subbed out employees



Can I Provide That Information?

- W2s include Social Security numbers—lots of privacy issues here, laws vary widely by state
- Better to offer copy of payroll ledger or paystubs, assuming Social Security number is blocked



Personnel/Medical Information

- This information should be treated as “private” records belonging to the employer and individual employees
- Access to records should be spelled out in a policy
- All records should be kept in locked filing cabinets



Personnel/Medical Information

- ADA imposes strict rules for handling personal medical information (access to the information)—must be kept CONFIDENTIAL and SEPARATE from other personnel records
- HIPAA also imposes privacy obligations on employers that provide group health plans (with 50 or more participants—other exceptions apply), as does the FMLA



Medical Examinations

- The ADA limits an employer's ability to require medical exams (and disability-related inquiries) at three stages:
 - Pre Offer—ADA prohibits medical examinations and disability inquiries



Medical Examinations

- The ADA limits an employer's ability to require medical exams (and disability-related inquiries) at three stages:
 - Post Offer (after conditional job offer but before work starts)—Employer may make disability-related inquiries and conduct medical exams (whether job-related or not) as long as all applicants in same job category have same exam and/or are asked the same questions



Medical Examinations

- The ADA limits an employer’s ability to require medical exams (and disability-related inquiries) at three stages:
 - During Employment—Per the EEOC Enforcement Guidance, employers can only require medical examinations IF they are job-related and consistent with business necessity



Medical Examinations

- Must be treated as a “confidential medical record”
 - Shared only in limited circumstances with a supervisor/manager, first aid or safety emergency personnel (“when appropriate”), and government officials investigating compliance with the ADA, upon request
- Kept in a separate medical file



Disability Inquiries

- What is a “disability-related” inquiry?
 - Any questions or series of questions that is likely to elicit information about a disability—asking about prior workers’ compensation history, genetic information, having boxes that the employee checks indicating a certain disability, asking about prescription drug use



Disability Inquiries

- What inquiries are permitted (and not considered disability-related)?
 - Asking an employee if s/he can perform the essential functions of the job
 - Asking about current illegal drug use
 - Asking general “well-being” questions such as “Are you feeling OK?”



Disability Inquiries

- What inquiries are permitted (and not considered disability-related)?
 - Asking whether an individual has been drinking
 - Asking for an emergency contact name and number in case of a medical emergency



Medical Examinations

- What is considered a medical examination?
 - A procedure that seeks information about an individual's impairments or health



Medical Examinations

- What is considered a medical examination?
 - **Factors to look at**
 - Is it administered by a health care professional
 - Is a test interpreted by a health care professional
 - Is it designed to reveal impairment or physical or mental health
 - Is it invasive
 - Does it measure an employee's physiological response to performing tasks
 - Is it normally given in a medical setting
 - Is any medical equipment used



Medical Examinations

- Medical examinations include, but are not limited to
 - Vision tests conducted by an ophthalmologist or optometrist
 - Blood urine and breath analyses to check for alcohol use
 - Blood pressure screening and cholesterol testing
 - Nerve conduction tests that screen for susceptibility to injury (such as carpal tunnel)
 - Pulmonary function testing
 - Psychological testing



Medical Examinations—Client Requests

- Types of client examination scenarios:
 - “Pass/Fail” exams
 - Exams that ask extensive medical history such as questions about nonvisible disabilities
 - Diabetes, epilepsy, heart disease, cancer, and mental illness—and even family medical history
 - Ask the staffing company to do an exam (without any knowledge of job criteria)



Medical Examinations—Client Requests

- Types of client examination scenarios:
 - Exams the client wants to do and not share with the staffing company
 - Exams based strictly on the physical requirements of the job as detailed by a job description and a physician review



Medical Examinations—Client Requests

- Language in the EEOC Guidance is broad and “any employee” (not just ones with disabilities) can challenge a disability-related inquiry or medical exam that is not job related and consistent with business necessity if the person is already employed (as they are with most staffing situations)



Medical Examinations

- Client medical exams should never ask family medical history (a violation of GINA)
- People who do not “pass” or are asked “impermissible” questions can become your future class action participants!



Medical Examinations

- Medical exams generally do not include:
 - Tests to determine the current use of illegal drugs (although state law may differ)
 - Physical agility tests as long as these tests do not include "medical" assessments such as measuring heart rate or blood pressure
 - Tests that evaluate an employee's ability to read labels or distinguish objects as part of a demonstration of the ability to perform actual job functions
 - Psychological tests that measure personality traits such as honesty, preferences, and habits (be sure they are validated as nondiscriminating)



Medical Examinations

- Clients need to be educated about tests on staffing company employees; all testing should be job-related and consistent with business necessity (this is not post-offer, in most cases)



Medical Examinations

- To turn someone down, the employer/client must have a "reasonable belief based upon objective evidence" that the person cannot do the job because the employee's ability to perform essential job functions will be impaired by a medical condition, or the employee will pose a direct threat due to a medical condition



Medical Examinations

- Such a belief requires an assessment of the employee's position and cannot be based upon assumptions
- Also, disability-related inquiries or medical exams that follow up on a request for reasonable accommodation when the disability is not known or obvious must also be job-related and consistent with business necessity



New Job, Same Employer?

- Is there an out for staffing companies?
- There is an example in the EEOC 2000 Guidance about how an employer can treat a current employee who applies for a new (different) job with the same employer
- Can you do medical examinations for this "different job"?



New Job, Same Employer?

- Yes—As long as every one in the same category is asked the same questions and it is after the "conditional offer" is made for this new job
- However, if anyone is turned down (offer withdrawn) based upon a disability from the medical examination, the employer must show that the reason WAS JOB RELATED AND CONSISTENT WITH BUSINESS NECESSITY!
- NO OUT for staffing companies



Barriers to Hire?

The EEOC has told us that we, and all staffing companies, need to know what our employees are being examined for, to make sure the questions are legal and to ensure that these exams are not "barriers to hire." Every staffing company needs to review the questions asked of its employees.



Prescription Medications



May an employer ask all employees what prescription medications they are taking? Generally no, employers can only ask about prescriptions that the employer can demonstrate are job-related and consistent with business necessity AND pose a direct threat. EEOC uses examples of police using firearms and airlines asking about ability to fly. How many clients ask this question? How many staffing firms answer it for them?



Releasing Medical Information to Clients

- Any confidential private information should not be released without an employee's signed release authorizing the specific release
- A company may require a doctor's note to substantiate sick leave only if the employer has a policy or practice requiring all employees with and without disabilities to do so



Releasing Medical Information to Clients

- What if the client does not want the staffing firm to get a copy of its requested exam? Not acceptable; these are the staffing company's employees



Releasing Medical Information to Clients

- What about pass/fail results? I recommend not limiting them to the medical exam. Make them a broad statement that this person did not meet the client's hiring criteria, not that the person failed the "medical exam"



Releasing Medical Information to Clients

- Best Practices
 - Do not do medical exams except as required by law (DOT, OSHA fit test, etc.); tell the client that if this examination is so vital, the client should do it when it hires staffing employees permanently on its own payroll. If the client still wants an exam, limit it to tasks that directly relates to the essential elements of the job
 - Obtain representations that the medical exams requested by clients are job related and consistent with business necessity



Releasing Medical Information to Clients

- Best Practices
 - Ask for an indemnification for the above representation
 - Release other types of medical documentation (FMLA certification, return to work from sick leave, reasonable accommodations needed) only with a temporary employee's permission, and then limit to job-related criteria and make sure there is a policy that applies to everyone in that specific job classification



Other Medical Situations With Clients

- Third Party Information: "Tom told me he has TB." Can an employer make a disability-related inquiry or require a medical exam based in whole or in part on information learned from another person? YES—if reliable—still needs to be kept as confidential as possible, depending upon the condition. Is it serious enough to pose a direct threat?



Other Medical Situations With Clients

- Factors to consider about the information: 1) the relationship of the parties; 2) possible motivation; 3) seriousness of condition; and 4) how the person learned of the information
- What about documentation? Yes, must be kept confidential and in the medical file



Drug Testing

- Drug tests that test for the current use of illegal drugs are GENERALLY NOT considered medical exams (check state law)
- Most customers ask for drug tests that screen for substances that could be prescription also; this would be considered a medical examination; and generally need a signed release to give to a customer



Drug Testing

- Sharing should be on a "need-to-know" basis. Let internal staff know pass/fail results
- What about clients of a staffing company?



Drug Testing

- Best Practices:
 - Try to have the client accept a pass/fail result on all the client's hiring criteria (not just drug testing), so no confidential information is released and if a drug test is positive, all the client hears is "the individual failed to meet the client's hiring criteria"
 - DO NOT ask about medications not related to an assignment
 - Release to a client only if you have a signed, written release from the candidate/employee allowing the release of the information to a third party



OSHA—Confidential Information

- Types of information requested by clients for their OSHA Incident reporting can include confidential employee personal information such as DOB, address, and SSN (information listed on the OSHA 301 incident report)



OSHA—Confidential Information

- Solutions:
 - Request a signed release from your temporary employee prior to the assignment
 - Build your release into your Incident Report form
 - Have employees fill out client incident reports as well as the staffing firm's internal ones



In Summary

- Keep medical information confidential and in a separate medical file
- Employee information should not be released without a signed release from the employee



In Summary

- Medical exams on current employees should be job-related and consistent with business necessity
- Drug tests that test for prescription drugs are medical exams; and questions on prescription drugs should be job-related and consistent with business necessity



Is There Confidential Info in a Criminal Background Check?

- Confidential information likely shown in report
 - SSN
 - DOB
 - Address
 - Phone number
 - Driver's license number



Is There Confidential Info in a Criminal Background Check?

- Duty to protect that information from disclosure



May I Share a Candidate's Background Check With a Client?

- Not a risk-free proposition
 - Connecticut case
 - Consider a certification instead
- What does client contract say?
 - Negotiate away provision requiring production of report
 - Consider confidentiality provision
 - Consider indemnification provision



May I Share a Candidate's Background Check With a Client?

- What does the contract with the consumer reporting agency say?
 - Any limitations about providing reports to third parties?



Adams Case in Connecticut

- Staffing firm provided background report to MSP
- Report showed felony conviction, but inaccurate
- Email to MSP said “the item below explains why the background has been dragging on. This is not good at all”



Adams Case in Connecticut

- Candidate not hired
- Court held that staffing firm was consumer reporting agency under FCRA
- Staffing firm “prepared” a consumer report and sent it to MSP



Adams Case in Connecticut

- Because staffing firm “prepared” report and was a CRA, must follow reasonable procedures to assure maximum possible accuracy of info in report
- Summary judgment denied and case allowed to proceed



Types of Claims That Could Be Pursued

- Fair Credit Reporting Act (FCRA)
 - Failure to follow reasonable procedures to assure maximum possible accuracy and other claims
 - Difficult standard because staffing firm relies on CRA
- IIED
- NIED
- Negligence
- Defamation and others



Consider Providing a Certification Instead



- Certification should indicate that
 - Staffing firm agreed to obtain criminal history from CRA about candidates who will be placed on assignment with client
 - Candidate was notified that firm would obtain criminal history from CRA
 - Candidate provided written authorization



Consider Providing a Certification Instead

- Certification should indicate that:
 - CRA produced report containing candidate's criminal history
 - Staffing firm reviewed report, and it met the terms of the agreement (don't say candidate "passed")
 - Certification is true and accurate



May I Share a Candidate's Background Check With a Client?

- Some clients may require actual report
- Check disclosure and authorization forms
 - Did the candidate consent to report's disclosure to client?
 - Must have before conducting background check and disclosing to client
 - Consider redacting personal info



May I Share a Candidate's Background Check With a Client?

- The information gathered by the Company and any consumer reports and/or investigative consumer reports may also be communicated to other companies where you may be eligible to be staffed or employed based on your qualifications.



What Should the Communication to the Client Say?

- Don't add commentary if sending report (Adams case)
- Example:
 - Attached is a consumer report that was prepared by Insert CRA. Please note that Staffing Company had no involvement in the preparation of this report and is passing this on to you merely as an administrative service.



FCRA Reminder

- FCRA requirements before taking adverse action
 - Pre-adverse action letter
 - Wait reasonable period time
 - Adverse action letter
 - Required even if candidate hired and placed on different assignment
 - Multiple states have additional requirements
- Class action litigation seen in industry



May I Share a Candidate's Credit History Check With a Client?

- Same rules as above
- FCRA applies if report from a CRA
- Should obtain the candidate's authorization before sharing
- Consider state laws on whether credit check is allowed



May I Share a Candidate's Job References With a Client?

- Client may be interested in these for professional placements
- Obviously staffing company would not recommend candidate with bad references
 - Sharing those could lead to defamation claim
 - If third party did reference, FCRA claims

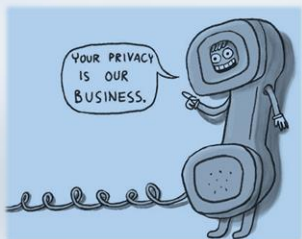


May I Share a Candidate's Job References With a Client?

- Client contract
 - Consider confidentiality provision
 - Consider indemnification provision



What Are the Assets in Our Business?



Questions?