



Criminal Background Checks After the *Peake* Decision

What You Need to Know to Remain Compliant

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Objectives

- Analyze hiring implications of the *Peake* decision
- Interpret Court's guidance regarding hiring discretion on a case-by-case basis
- Adapt hiring practices to ensure compliance with OAPSA and other federal, state and local laws

Stuck Between A Rock and A Hard Place



Federal Requirements for Skilled Nursing Facilities (SNFs): 42 CFR § 483.13

(b) Abuse. The resident has the right to be free from verbal, sexual, physical, and mental abuse, corporal punishment, and involuntary seclusion.

(c) Staff treatment of residents. The facility must develop and implement written policies and procedures that prohibit mistreatment, neglect, and abuse of residents and misappropriation of resident property.

Federal Requirements for SNFs: 42 CFR § 483.13

(c)(1) The facility must—

(i) Not use verbal, mental, sexual, or physical abuse, corporal punishment, or involuntary seclusion;

(ii) Not employ individuals who have been—

(A) Found guilty of abusing, neglecting, or mistreating residents by a court of law; or

Federal Requirements for SNFs: 42 CFR § 483.13

(c)(1)(ii) (B) Have had a finding entered into the State nurse aide registry concerning abuse, neglect, mistreatment of residents or misappropriation of their property; and

(iii) Report any knowledge it has of actions by a court of law against an employee, which would indicate unfitness for service as a nurse aide or other facility staff to the State nurse aide registry or licensing authorities.

Federal Requirements to Prevent Abuse

- Facility must provide evidence and maintain efforts to determine if persons hired have records of abuse or neglect
 - CMS State Operations Manual, Appendix Q, Guidelines for Determining Immediate Jeopardy
- Survey Guidance - Surveyors determine if: the facility screens potential employees for a history of abuse, neglect, or mistreating residents as defined by the applicable requirements
 - 42 CFR 483.13(c)(1)(ii) (A)&(B)

Federal Guidance to Surveyors F Tag 226

- Screening (483.13(c)(1)(ii)(A)&(B): Have procedures to: Screen potential employees for a history of abuse, neglect or mistreating residents as defined by the applicable requirements at 483.13(c)(1)(ii)(A) and (B)
 - This includes attempting to obtain information from previous employers and/or current employers, and checking with the appropriate licensing boards and registries
 - SOM, Appendix PP

Federal Intent §483.13(c)(1)(ii) and (iii) F Tag 225

- SNF must not hire a potential employee with a history of abuse, if that information is known to the facility. SNF must report knowledge of actions by a court of law against an employee that indicates the employee is unfit for duty. The facility must report alleged violations, conduct an investigation of all alleged violations, report the results to proper authorities, and take necessary corrective actions.

Interpretive Guidelines §483.13(c)(1)(ii) and (iii): F Tag 225

- SNFs must be thorough in their investigations of the past histories of individuals they are considering hiring. In addition to inquiry of the State nurse aide registry or licensing authorities, SNFs should check information from previous and/or current employers and *make reasonable efforts to uncover information about any past criminal prosecutions.*
- SOM, Appendix PP

Interpretive Guidelines §483.13(c)(1)(ii) and (iii): F Tag 225

- “Found guilty ... by a court of law” applies to situations where the defendant pleads guilty, is found guilty, or pleads nolo contendere.
- “Finding” is defined as a determination made by the State that validates allegations of abuse, neglect, mistreatment of residents, or misappropriation of their property.

Interpretive Guidelines §483.13(c)(1)(ii) and (iii): F Tag 225

- A certified nurse aide found guilty of neglect, abuse, or mistreating residents or misappropriation of property by a court of law, must have her/his name entered into the nurse aide registry.
- A licensed staff member found guilty of the above must be reported to their licensing board.

Interpretive Guidelines §483.13(c)(1)(ii) and (iii): F Tag 225

- Further, if a SNF determines that actions by a court of law against an employee are such that they indicate that the individual is unsuited to work in a nursing home (*e.g.*, felony conviction of child abuse, sexual assault, or assault with a deadly weapon), then the facility must report that individual to the nurse aide registry (if a nurse aide) or to the State licensing authorities (if a licensed staff member).

Interpretive Guidelines §483.13(c)(1)(ii) and (iii): F Tag 225

- Such a determination by the facility is not limited to mistreatment, neglect and abuse of residents and misappropriation of their property, but to *any treatment of residents or others inside or outside the facility which the facility determines to be such that the individual should not work in a nursing home environment.*

Department of Health (DOH) SNF Regulations

Governing body shall adopt and enforce rules relative to:

- (1) The health care and safety of the residents.
- (2) Protection of personal and property rights of the residents, while in the facility, and upon discharge or after death.

28 Pa. Code § 201.18 (b)(1)(2)

DOH SNF Regulations

- Personnel records shall be kept current and available for each employee and contain sufficient information to support placement in the position to which assigned

28 Pa. Code § 201.19

- SNF is responsible for insuring that personnel and services provided by outside resources meet all necessary licensure and certification requirements ...as well as requirements of this subpart

28 Pa. Code § 201.21(a)

OIG: Criminal Convictions for Nurse Aides With Substantiated Findings of Abuse, Neglect, and Misappropriation (10/2012)

- 19% of nursing aides who were found guilty of on-the-job abuse, neglect, or property theft in 2010 had prior criminal convictions
- Most common prior conviction (53%) was for crimes against property (burglary, shoplifting and writing bad checks)
- CNAs with substantiated findings of either abuse or neglect were 3.2 times more likely to have a conviction of crime against persons than nurse aides with substantiated findings of misappropriation

OIG 2010 Findings

Table 2: Percentages of Nurse Aides With Convictions Prior to Substantiated Findings by Elapsed Time Between Most Recent Conviction and Date of Substantiated Finding

Elapsed Time Before Substantiated Finding Date	Percentage of Nurse Aides With Convictions Prior to Substantiated Findings (n=300)
Less than 1 year	28.0%
1 year to less than 5 years	30.7%
5 years to less than 10 years	15.7%
10 years to less than 15 years	11.0%
15 years to less than 20 years	7.0%
20 years to less than 30 years	5.0%
30 years or more	2.7%
Total*	100.0%

Source: OIG analysis of FBI criminal history records and data on nurse aides with substantiated findings, 2012.

OIG: Home Health Agencies Conducted Background Checks of Varying Types (5/2015)

- PA home health agency (HHA) employed certified nurse assistant in March 2013
 - Two convictions for assault and two convictions for possessing an instrument of crime in February 2010
- IOIG wrongly concluded this was not problematic, based on its belief that in PA, neither assault nor possessing an instrument of crime are among the offenses that disqualify an individual from HHA employment

Moving Forward

- Take seriously what you see and act accordingly
- Make a reasonable decision
- Document in accordance with applicable laws

Older Adult Protective Services Act (OAPSA)

- First enacted 1987
- Amended December 1996
- Amended June 1997
- *Nixon I*, Pa. Commonwealth Ct., 2001
- *Nixon II*, Pa. Supreme Ct., 2003
- Department of Aging, Interim Policy
- *Peake*, Pa. Commonwealth Ct., Dec. 2015

OAPSA Covered Facilities — Statutory

- Domiciliary care home
- Home health care agency
- Long term care nursing facility
- Older adult daily living center
- Personal care home

Other OAPSA Covered Facilities—Licensed By Department of Human Services

- | | |
|--|--|
| <ul style="list-style-type: none">• Assisted Living Residences• Community Residential Rehabilitation Services• Community Homes For Individuals With Intellectual Disabilities• Family Living Homes• ICF/IIDs (Private and State) | <ul style="list-style-type: none">• Residential Treatment Facilities For Adults• State Mental Hospitals• Nursing Facilities (Licensed By DHS)• Long Term Structured Residences• Sexual Responsibility Treatment Programs |
|--|--|

Other OAPSA Covered Facilities—Licensed By Department of Health

- Hospices
- Birth Centers
- Home Care Agencies - any public or private organization which provides care to a care-dependent individual in their place of residence
- Home Care Registry or "registry"
- Hospitals, but only if they have a SNF or extended care unit

Who Must Be Screened?

- Applicant/employee: defined as an individual who is employed by a facility
 - Includes contract employees who have direct contact with residents or unsupervised access to their personal living quarters
 - Includes any person who enters into a contractual relationship to provide care to a care-dependent individual for monetary consideration in their place of residence

OAPSA Prohibitive Offenses

OLDER ADULTS PROTECTIVE SERVICES ACT

Prohibitive Offenses Contained in Act 169 of 1996 as Amended by Act 13

May 2011
Dept. of Aging

<i>Following Offenses as Contained in PA Crimes Code (18 Pa. C.S.)</i>		
Offense Code	Prohibitive Offense Description	Type/Grading of Conviction
CC2500	Criminal Homicide	Any
CC2502A	Murder I	Any
CC2502B	Murder II	Any
CC2502C	Murder III	Any
CC2503	Voluntary Manslaughter	Any
CC2504	Involuntary Manslaughter	Any
CC2505	Causing or Aiding Suicide	Any
CC2506	Drug Delivery Resulting in Death	Any
CC2702	Aggravated Assault	Any
CC2901	Kidnapping	Any
CC2902	Unlawful Restraint	Any
CC3121	Rape	Any
CC3122.1	Statutory Sexual Assault	Any
CC3123	Involuntary Deviate Sexual Intercourse	Any
CC3124.1	Sexual Assault	Any
CC3125	Aggravated Indecent Assault	Any
CC3126	Indecent Assault	Any
CC3127	Indecent Exposure	Any
CC3301	Arson and Related Offenses	Any
CC3502	Burglary	Any
CC3701	Robbery	Any

OAPSA Prohibitive Offenses (cont.)

CC3901	Theft	<p>Any ONE (1) FELONY or TWO (2) MISDEMEANORS within the 3900 Series (CC3901-CC3934)</p>
CC3921	Theft By Unlawful Taking	
CC3922	Theft By Deception	
CC3923	Theft By Extortion	
CC3924	Theft By Property Lost	
CC3925	Receiving Stolen Property	
CC3926	Theft of Services	
CC3927	Theft By Failure to Deposit	
CC3928	Unauthorized Use of a Motor Vehicle	
CC3929	Retail Theft	
CC3929.1	Library Theft	
CC3929.2	Unlawful Possession of Retail or Library Theft Instruments	
CC3929.3	Organized Retail Theft	
CC3930	Theft of Trade Secrets	
CC3931	Theft of Unpublished Dramas or Musicals	
CC3932	Theft of Leased Properties	
CC3933	Unlawful Use of a Computer	
CC3934	Theft From a Motor Vehicle	
CC4101	Forgery	Any
CC4114	Securing Execution of Documents by Deception	Any
CC4302	Incest	Any
CC4303	Concealing Death of a Child	Any
CC4304	Endangering Welfare of a Child	Any
CC4305	Dealing in Infant Children	Any
CC4952	Intimidation of Witnesses or Victims	Any
CC4953	Retaliation Against Witness or Victim	Any

OAPSA Prohibitive Offenses (cont.)

CC5902B	Promoting Prostitution	Felony
CC5903C	Obscene or Other Sexual Materials to Minors	Any
CC5903D	Obscene or Other Sexual Materials	Any
CC6301	Corruption of Minors	Any
CC6312	Sexual Abuse of Children	Any
<i>Offenses as Contained in PA Controlled Substance, Drug, Device & Cosmetic Act (P.L. 233, No. 64)-PARTIAL LISTING*</i>		
Offense Code	Prohibitive Offense Descriptor	Type/Grading of Conviction
CS13A12	Acquisition of Controlled Substance by Fraud	Felony
CS13A14	Delivery by Practitioner	Felony
CS13A30	Possession with Intent to Deliver	Felony
CS13A35 (i), (ii), (iii)	Illegal Sale of Non-Controlled Substance	Felony
CS13A36	Designer Drugs	Felony
CS13Axx*	ANY OTHER FELONY DRUG CONVICTION APPEARING ON PA RAP SHEET	

Produced by: PA Department of Aging

May 2011

30/90 Day Provisional Employment Requirements

- The applicants must provide proof they have applied for the background check.
- Applicants swear or affirm in writing that they have not been convicted of any of the offenses contained in the act.
- Administrator has no knowledge of information pertaining to the applicant which would disqualify the applicant from employment pursuant to the act.

30/90 Day Provisional Employment Requirements

- The provisionally employed applicant shall receive an orientation which provides information on policies, procedures and laws which address standards of proper care and recognition and reporting of abuse or neglect, or both, of recipients;
- The provisionally employed applicant shall receive regular supervision with the results of the observations documented in the employee personnel file.

The *Peake* Plaintiffs

- 52: rode in a stolen car age 18, served 3 years probation
- 60, LPN: possession of drugs with intent to deliver age 43, jail and drug rehab program
- 55, cook: robbery, attempted theft by unlawful taking, aggravated & simple assault related to altercation at neighborhood basketball court age 20; disorderly conduct age 22; sober for 24 years

The *Peake* Plaintiffs

- 48, maintenance, cleaning, food service: borrowed a stolen car from friend, was afraid of losing job so pled to theft by receiving stolen property, age 33, served 2 years probation
- 39, elder/child care for friends; writing bad checks, age 23; borrowed stolen car from cousin, auto theft, age 24

What Did the *Peake* Case Change?

- Unconstitutional to have a lifetime employment ban
- Pre-*Peake*: “When the PA Department of Aging's response to the FBI Background Check is received for the provisionally hired employee and the provisional employee has been found to have a conviction for one of the prohibitive offenses, the applicant will be immediately dismissed by the administrator.”

What Did the *Peake* Case Change?

- Post-*Peake*: Criminal background check results go directly to applicant
- Facilities need to exercise judgment *and* comply with a multitude of other employment laws

Peake Factors

- Nature of the crime
- Facts surrounding the conviction
- Time elapsed since the conviction
- Evidence of individual's rehabilitation
- Nature and requirements of the job

Dept. of Aging Current Policy

- Criminal background checks are still required
- “The Department recommends that facilities subject to OAPSA requirements consult with an attorney prior to making an employment decision to ensure compliance with the Commonwealth Court’s guidance regarding exercising hiring discretion on a ***case-by-case*** basis.”**

(**Source: http://www.aging.pa.gov/organization/advocacy-and-protection/Pages/Criminal-History-Background-Checks.aspx#.Vx1nNp3D_3g)

Criminal Background Checks Post-*Peake*

- Multiple federal, state and local requirements re: the use of criminal background checks
- Active and dynamic area of the law - especially on the local level
- Lots of procedural hurdles to contend with to remain compliant

How to Collect the Information-Fair Credit Reporting Act (FCRA)

- Federal law that *applies* to criminal background reports obtained by third-party consumer reporting agency
- Federal Trade Commission is tasked with enforcing
- Need to obtain written consent prior to obtaining criminal background report

How to Collect the Information-Fair Credit Reporting Act (FCRA)

The term “consumer reporting agency” means any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports.

15 U.S.C. § 1681a(f).

How to Collect the Information- FCRA

- Pre-adverse action notice - If an employer thinks it might take an adverse action because of something in the report, it must give the applicant/employee a copy of the report and a summary of rights that tells the applicant or employee how to contact the company that provided the report.

How to Collect the Information- FCRA

- Adverse action notice - if decide not to hire/retain/promote because of criminal history, must notify the applicant/employee (best practice in writing). Notice needs to include specific information, including:
 - Name, address, and phone number of the company that supplied the criminal history or public records report;
 - Company that provided the information did not make the decision to take the adverse action and cannot give specific reasons for it; and
 - Applicant/employee has the right to dispute the accuracy and completeness of any information in the report, and to an additional free report from the company that supplied it, if it is requested within 60 days of the employer's decision not to hire/retain/promote.

How to Collect the Information- FCRA

- Remedies under FCRA for negligent non-compliance:
 - Any actual damages sustained as a result of the violation; and
 - Attorneys' fees and costs
- Remedies under FCRA for willful non-compliance:
 - Any actual damages sustained or damages of \$100 to \$1,000 per violation
 - Punitive damages
 - Attorneys' fees and costs

How to Collect the Information- FCRA

- Surge in class actions under FCRA
- Lots of technical requirements, easy to foot fault
- Examples:
 - \$6.8 million settlement in case brought by applicants against Public Supermarkets (M.D. Tenn) - plaintiffs claimed that the notice requesting authorization to obtain background checks violated FCRA

What Information Can Be Considered Title VII/PHRA

- Prohibits discrimination on the basis of certain categories, including race and national origin
- EEOC Guidance on Consideration of Arrest and Conviction Records in Employment Decisions
 - Takes the position that criminal record exclusions have a disparate impact based on race and national origin.
 - Disparate treatment- have same background check process for all similarly situated.

What Information Can Be Considered Title VII/PHRA

- Arrests
 - The fact of an arrest does not establish that criminal conduct occurred.
 - An arrest may trigger an inquiry into whether the underlying alleged conduct justifies an adverse employment action.
 - An employer can investigate the underlying conduct and make a decision based on that conduct if it makes the individual unfit for the position in question.

What Information Can Be Considered Title VII/PHRA

- Employer must demonstrate that the challenged practice is job related for the position in question and consistent with business necessity.
- Employer must show that its policy “operates to effectively link specific criminal conduct, and its dangers, with the risks inherent in the duties of a particular position.”

What Information Can Be Considered Title VII/PHRA

- Three Part Test advanced by EEOC, employers should consider:
 - The nature and the gravity of the offense or conduct;
 - The time that has passed since the offense, conduct and/or completion of the sentence; and
 - The nature of the job held or sought.

What Information Can Be Considered Title VII/PHRA

- Title VII remedies - disparate impact
 - Injunctive relief
 - Back pay
 - Reinstatement/front pay in lieu of reinstatement
 - Attorneys' fees and costs
 - No compensatory or punitive damages

What Information Can Be Considered Title VII/PHRA (continued)

- Class action lawsuits
 - \$475,000 settlement in case brought against Driver Solutions, LLC - challenged disparate impact of policy that excluded consideration of applicants with criminal history
 - Undisclosed settlement in case brought against Integrity Staffing Solutions - class action compliant brought by African-American applicant denied job because of his criminal record (convicted of killing a man three decades earlier)

What Information Can Be Considered Title VII/PHRA

- Best practices recommended:
 - Eliminate categorical exclusions
 - Develop a narrowly tailored written policy
 - ▶ Identify essential job requirements (update job descriptions)
 - ▶ Conduct individual assessments based on both job requirements and criminal history
 - Train managers and those involved in hiring on policy and implementation

What Information Can Be Considered Title VII/PHRA

- Title VII does not preempt federal statutes and regulations that otherwise govern eligibility
- CMS

Interplay between federal, state and local laws

- State and local laws are preempted by Title VII if they “require or permit the doing of any act which would be an unlawful employment practice” under Title VII
- **If an employer’s exclusionary policy or practice is not job related and consistent with business necessity, the fact that it was adopted to comply with a state or local law or regulation does not shield the employer from Title VII liability**

What Information Can Be Considered Criminal History Record Information Act

- Pennsylvania's Criminal History Record Information Act (CHRIA)-
 - Employers can consider felony and misdemeanor convictions "only to the extent to which they relate to the applicant's suitability for employment in the position for which he has applied."
 - Employers must notify the applicant if the decision not to hire is based ***in whole or in part*** on criminal history record information.

What Information Can Be Considered CHRIA

- Remedies available:
 - Attorney General, other agency or individual may bring suit to enjoin violations of the statute
 - Private right of action for damages:
 - ▶ Actual damages (of not less than \$100), reasonable costs of litigation, attorney's fees
 - ▶ Punitive damages (of not less than \$1,000 and no more than \$10,000) for willful violations

What Information Can Be Considered CHRIA

- Case against PA SNF by job applicant pending in Court of Common Pleas, Chester County alleging violations of CHRIA
 - Applied for the position of Senior IT Auditor in May 2015
 - Complaint alleges multiple violations of CHRIA (improper consideration of arrests; consideration of offenses unrelated to suitability for employment; failure to provide notice)
 - ▶ Convictions: 1998- misdemeanor overpayment of welfare benefits; 2010- misdemeanor harassment
 - ▶ Arrests: 1999- endangerment

What Information Can Be Considered CHRIA

- Given conditional offer of employment for Senior Auditor position
- Convictions were disclosed; applicant was told that they would not interfere with hiring; applicant resigned from prior position, then offer rescinded
- Employer filed preliminary objections (which were overruled)
- Case in discovery

Philadelphia's Ban the Box

- Became law in 2012, amended in 2015, with an effective date of March 14, 2016
- Now applies to all employers (limited exceptions) irrespective of size
- Prohibits any inquiry into criminal background until after extending a conditional offer of employment

Philadelphia's Ban the Box

- **Does not apply if the inquiries or adverse actions prohibited by the ordinance “are specifically authorized or mandated by any other applicable law or regulation.”**
- Employment application cannot include question re: criminal background even if it specifies that question should not be answered for Philadelphia

Philadelphia's Ban the Box

- Ordinance contains similar provisions to FCRA re: notice and has developed a test similar to the EEOC Guidance, although some requirements are more onerous
- After conditional offer employers can only consider criminal convictions within 7 years of date of application (not including times of incarceration)

Philadelphia's Ban the Box

- Prohibits inquiry into arrests/criminal accusations that did not lead to conviction
- **Specifically prohibits blanket exclusion of applicants with criminal convictions**

Philadelphia's Ban the Box

- Employers must conduct an individualized assessment, which shall include an analysis of:
 - The nature of the offense;
 - The time that has passed since the offense;
 - The applicant's employment history before and after the offense and any period of incarceration;
 - The particular duties of the job being sought;
 - Any character or employment references provided by the applicant; and
 - Any evidence of the applicant's rehabilitation since the conviction.

Philadelphia's Ban the Box

- Notice obligations:
 - If applicant is rejected in whole or part because of criminal record information, an employer must notify the applicant in writing of the decision and its basis
 - Must provide the applicant with a copy of the criminal history report
 - Must allow the applicant 10 business days to provide evidence of the inaccuracy of the information or to provide an explanation
 - Posting requirement - on website and premises of obligations under the ordinance

Philadelphia's Ban the Box

- Remedies:
 - Potential fines
 - Filing of Charge with Philadelphia Commission to exhaust administrative remedies
 - Injunctive relief
 - Compensatory damages
 - Punitive damages
 - Reasonable attorneys' fees
 - Court costs

Key Takeaways re: Criminal Background Information

- The best ways to mitigate against litigation risk are:
 - Develop FCRA-compliant forms
 - Develop policies and protocols that provide for individualized assessment of conviction in relation to particular job
 - ▶ Document basis for adverse action
 - Provide adverse action/CHRIA notice as appropriate
 - Philadelphia employers - comply with additional obligations in the newly amended Ban the Box
 - Stay abreast of developments in this area

Other Proactive Considerations

- Revise job applications to include Exclusion Inquiries:
 - Have you ever been or are you currently excluded?
 - List all names you have used
 - Specify that falsification is grounds for immediate termination
 - Advise that you are running exclusion checks

Other Proactive Considerations

- Non-exclusion should be a condition of employment
 - Job descriptions -- Qualification/essential function
 - Advertisement for position
 - On-going obligation to notify of exclusion
- Collective Bargaining Agreements (CBAs)
 - Side agreement or memorandum of understanding

Questions



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