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# Long-Term Care Newsletter

## The New Wave in Background Checks By Shirley Williams

The Federal Trade Commission's Division of Privacy and Identity Protection recently conducted an investigation of Social Intelligence Corporation, which is an internet and social media background screening service, and in May, 2011, issued a finding giving the company the green light to proceed with its investigations of social media for primarily pre-employment background screening. A potential employer can hire the company to perform a background check before making a job offer. Basically, Social Intelligence then performs a search of all social media, such as Facebook, Twitter, Flickr, blogs or any other internet postings, which gives a much more detailed picture than merely googling a potential candidate. For example, if the individual is tagged in a photo on Facebook, has a Twitter account, a blog, or is mentioned on Craigslist, that information will be compiled by Social Intelligence. This information is then scrubbed of "protected class" characteristics, as such are defined by federal anti-discrimination law. Basically, information concerning race, religion, national origin, age, sex, family status, sexual orientation, disability status and other such qualities that are not to be utilized in the hiring process, are removed. This, the company claims, protects the employer from discrimination claims; the theory being that if the hiring company did not know of the existence of any protected class characteristics, they cannot be held to have taken such into account when making any hiring decision. Social Intelligence indicates it can generate a report in 24 to 48 hours and will report on only objectionable mate-

rial, as defined by the potential employer. Such objectionable material often includes racist remarks or behavior, explicit photos or reference to illegal activity. Social Intelligence summarizes the information and gives the employer screen shots of pertinent material.

Examples provided by the company of what has previously turned up in an applicant's background checks include a job seeker who had an internet photo featuring him holding multiple guns and a sword, another who was a member of what they determined to be a "racist" Facebook group entitled "I Shouldn't Have to Press One for English! Learn the Language"; and another whose internet footprint indicated drug use, they thought, because he was a member of a pro-cannabis campaign. Needless to say, not everyone is convinced that such postings actually indicate these characteristics. The Federal Trade Commission has determined the potential employers are required to let job applicants know when something that turned up in a background check had an adverse affect on their getting employed.

Approximately 20 percent of people that are searched do not pop up in an internet/social media screen; approximately 60 percent have a neutral or positive internet footprint; and approximately 5 to 20 percent, depending primarily on the age of the applicant, have something negative out there about them. The younger the applicant pool, the higher this percentage of negative findings, presumably because they use social media more in general and are much less guarded about it. Social Intelligence claims they can be confident

they are finding the right person with a certain name typically with just the information available on a resume.

Also this service can be retained to conduct ongoing monitoring of current employees but it only provides such services if the employer has a social media policy set up already with its employees. Mainly this scanning is done to ensure employees are not disclosing confidential or propriety information, there is no professional misconduct or illegal activity, or that employees are not criticizing the company.

From the employer's perspective, this is potentially a valuable service, as it provides a more detailed and broader search than one would get from merely googling a name and it also filters information so there is some insulation from potential discrimination charges. From the potential employee's perspective, positive information can be obtained through this, which may help in a job search. On the other hand, postings can be misconstrued and a job applicant's chances can be adversely affected by, for example, being tagged in a photo someone else posted. There is clearly danger of sabotage by, for example, a former friend or ex-spouse. But in an attempt to control what one can, it is definitely a good idea to check one's privacy settings on Facebook and to attempt to scrub all Facebook, Twitter, Flickr, blogs, or other internet postings of any negative information or anything that could be so construed. Basically, if one would not say something in a job interview, they should not put it out there on the internet. The website for Social Intelligence is [www.socialintelligencehr.com](http://www.socialintelligencehr.com).



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**When we do  
the best that  
we can, we  
never know  
what miracle is  
wrought in our  
life, or in the  
life of another.**

**Helen Keller  
(1880 - 1968)**

## **LB600: Shell Game or Sure Thing** By Michael W. Khalili

LB600, adopts the Nursing Facility Quality Assurance Assessment Act or it is commonly referred to "Provider Tax".

In Governor Dave Heineman's veto message, he referred to the assessment as a "shell game," in which the federal tax dollars returned to the state are seen as "free money" when those funds actually are Nebraska citizens' federal tax dollars.

On April 28, 2011, lawmakers voted 44-0 to override the governor's veto of the bill.

But what really is LB600? At first it may seem counterintuitive because really, how can further taxing of nursing facilities prevent Nebraska's insufficient funding to these facilities in order to maintain quality services? However, when you delve into the mechanics of LB600 you can recognize how the nursing facilities derive benefits.

Under the bill, nursing facilities will pay an assessment to the state of \$3.50 per day for Medicaid and private pay patients, which then will be reimbursed to facilities through a federal match. Payments to nursing facilities are

financed approximately 40 percent from the State General Fund and 60 percent from federal funds. Under a Quality Assessment, providers pay the assessment to the State which is reimbursed to facilities; however, when it is reimbursed, a far greater amount is received from the federal government than was initially assessed. Thus, *in aggregate*, for every \$1 assessed to facilities, they are reimbursed \$2.50.

The financing mechanism outlined in LB600 is based on a model used by 39 other states and is a legitimate option for leveraging federal tax dollars. Although the federal government is considering ending the reimbursement program, the bill specifically prohibits the use of general fund dollars to pick up the slack.

The benefits include maintaining the ability to provide quality services, preventing facility closure and resulting loss of jobs and economic activity, reducing the need to recover losses by increasing private pay rates and maintaining access to Medicaid services. Also, this bill helps offset losses that the state's

nursing homes will face under the governor's proposed budget cuts of a 5 percent reduction in provider rates.

A drawback of this bill is that under federal regulations, the assessment is made against days of service to Medicaid and private-pay residents. This helps facilities with higher percentages of Medicaid residents over those with low or none. (42 CFR 433.68)

- Providers pay assessment to the State;



- State pays it back to facilities which qualifies for federal matching funds (60% federal, 40% state);



- Example: provider pays \$1 and gets back \$2.50. (\$1 initial assessment plus \$1.50 federal funds)



## EEOC Issues Regulations for the ADA Amendments Act of 2008

By Jeanelle R. Lust

On September 25, 2008 the ADA was amended to expand the definition of disability covered under the Americans with Disabilities Act after a series of lawsuits that had severely restricted the definition of disability. Although the Act became effective on January 1, 2009 the EEOC finished the rule making process for the ADA-AA on March 25, 2011. The regulations run 202 pages and are beyond the scope of this article. However, here are some highlights:

- The definition of **major life activity** under the act has been expanded. Major life activities now include, eating, sleeping, standing, sitting, reaching, lifting, bending, reading, concentrating, thinking, communicating and interacting. A major life activity also now includes major bodily functions like the im-

mune system, cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, reproductive, sense organs, genitourinary, cardiovascular, hemic, lymphatic and musculoskeletal functions or any operation of an individual organ within a body system.

- **Impairments that are Episodic or in Remission** count as a disability. Under the new regulations controlled diseases are now considered disabilities. Examples include: cancer in remission, epilepsy, hypertension, asthma, diabetes, major depressive disorder, bipolar disorder and schizophrenia.
- The **regarded as disabled** standard has

been expanded.

Even if a person is not disabled, a person can bring an ADA claim if the employer regards the person as disabled. Now an employee need only show that an employer made a work decision based on a perceived impairment.

- The standard for **substantially limits** no longer includes a concept of **significantly restricted**. Instead an “impairment is a disability ... if it ‘substantially limits’ the ability of an individual to perform a major life activity as compared to most people in the general population.”



## MDS 3.0 Modifications

By Kevin R. McManaman

CMS recently revised its modification policy under MDS 3.0. Nursing home and swing bed providers wishing to revise an MDS 3.0 record to correct an event date or

reason for the assessment must now inactivate the entire incorrect record in the Quality Improvement and Evaluation System Assessment Submission and Procession (QIES

ASAP) system. Then, a new MDS 3.0 record with the correct date or reason for an assessment must be created and submitted.

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