

“Have I Been Clear(ed)?”: Counseling Students on Government Background Checks

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- I. Definitions
 - a. Credentialing
 - i. This process determines whether the federal government may issue someone an identity card that allows access to federal facilities and information systems
 - b. Suitability
 - i. Refers to a person’s identifiable character traits and conduct sufficient to decide whether employment or continued employment would or would not protect the integrity or promote the efficiency of the service
 - ii. 5 C.F.R. § 731 establishes criteria and procedures for suitability investigations, determinations, and actions
 - iii. Covered positions include only: competitive service positions; career appointments in the Senior Executive Service; and excepted service positions that can be non-competitively converted to competitive service
 - c. Fitness
 - i. Refers to the level of character and conduct determined necessary for an individual to perform work for, or on behalf of, a federal agency as an employee in the excepted service or as a contractor employee
 - ii. Excepted service positions are any federal or civil service positions which are not in the competitive service or the Senior Executive Service
 - iii. Per 5 C.F.R. § 302.101(c)(8), this includes attorneys for the federal government
 - d. Security Clearance
 - i. Positions that require access to classified information and secure facilities to perform the job will require security clearances
 - ii. This investigation process considers whether the applicant’s employment would constitute a risk to national security
 - iii. The security determination is a discretionary agency responsibility made in addition and subsequent to the suitability or fitness determination
 - iv. Three levels: confidential, secret, and top secret
 - v. Top secret clearances may also include access to certain compartmented classified intelligence
 - e. Background Investigation
 - i. Seeks information about an applicant’s employment, criminal, and personal history in an effort to investigate behavioral reliability, integrity, and personal adjustment
 - ii. Conducted to determine whether there are any historical facts that would interfere with an applicant’s ability to perform the job, including violations of statutes, regulations, or laws
 - iii. Data are primarily used when screening personnel for positions of trust in which integrity and positive psychological adjustment are particularly desirable
 - iv. In addition to collecting information directly from an applicant, information is sometimes collected from other sources who know the applicant, such as former employers and co-workers, friends, and neighbors
 - f. Continuous Evaluation
 - i. Maximizes the use of automated records to identify security-relevant information earlier and more frequently than the current reinvestigation cycles
 - ii. Records checks supplement information obtained during initial and periodic reinvestigations, transforming them into ongoing reviews rather than snapshots
 - iii. Applies to all executive branch personnel who require eligibility for access to classified information or eligibility to hold a sensitive position

- II. Federal Government Forms (can be found on www.OPM.gov)
 - a. Standard Form (SF) 85
 - i. Questionnaire for Non-Sensitive Positions
 - ii. Does not lead to a security clearance
 - iii. Looks back at the last five years of applicant's life
 - b. SF-85P
 - i. Questionnaire for Public Trust Positions
 - ii. Most federal government attorneys will complete this form
 - iii. Does not lead to a security clearance
 - iv. Look-back period: seven years
 - c. SF-86
 - i. Questionnaire for National Security Positions
 - ii. Generally, only attorneys working in national security will complete this form
 - iii. May lead to security clearance
 - iv. Look-back period: ten years
- III. Common Red Flags
 - a. Drug Use
 - i. Marijuana
 - ii. Other drugs
 - iii. Misuse of prescription drugs
 - b. Financial Considerations
 - i. Significant personal debt
 - ii. Failure to pay taxes
 - c. Alcohol Abuse
 - i. Including getting in trouble for underage use
 - d. Psychological Conditions
 - i. Excluding situational depression
 - e. Criminal Conduct
 - f. Foreign Contacts
- IV. Adjudicative Guidelines - Security Executive Agent Directive (SEAD) 4
 - a. Type "SEAD 4" into your preferred search engine for the online PDF
 - b. Purpose
 - i. Establishes the single, common adjudicative criteria for all covered individuals who require initial or continued eligibility for access to classified information or eligibility to hold a sensitive position
 - c. Guidelines
 - i. A: Allegiance to the United States
 - ii. B: Foreign Influence
 - iii. C: Foreign Preference
 - iv. D: Sexual Behavior
 - v. E: Personal Conduct
 - vi. F: Financial Considerations
 - vii. G: Alcohol Consumption
 - viii. H: Drug Involvement and Substance Misuse
 - ix. I: Psychological Conditions
 - x. J: Criminal Conduct
 - xi. K: Handling Protected Information
 - xii. L: Outside Activities
 - xiii. M: Use of Information Technology
 - d. How to Use Them
 - i. Each guideline addresses the following:
 - 1. The underlying concern
 - 2. Aggravating factors
 - 3. Mitigating factors

- e. Recently Proposed Updates
 - i. Clarifying that dishonest conduct “need not be criminal to be considered relevant” to a determination of suitability or fitness
 - ii. Removing a requirement that evidence of rehabilitation be “substantial” after prior illegal drug use or excessive alcohol use
 - iii. Adding a factor for “violent behavior” that does not fall under any other factor
 - iv. Replacing a former standard of “knowing and willful engagement in acts or activities designed to overthrow the U.S. government by force” with
 - 1. “Acts of force, violence, intimidation, or coercion with the purpose of denying other the free exercise of their rights”
 - 2. “Attempting to indoctrinate others or to incite them to action in furtherance of illegal acts”
 - 3. “Active membership or leadership in a group with knowledge of its unlawful aims, or participation in such a group with specific intent to further its unlawful aims”
 - 4. Expanding “government” to include state, local, or tribal governments
 - v. Ongoing Issue: Rescheduling Marijuana
 - 1. Pursuant to President Biden’s Executive Order in October 2022, the FDA conducted a review of marijuana’s classification
 - 2. On August 29, 2023, HHS sent a letter to the DEA, recommending that the DEA reclassify marijuana from a Schedule I drug to a Schedule III drug under the Controlled Substances Act
 - 3. On January 13, 2024, HHS determined marijuana poses a lower public health risk than other controlled substances and offers possible medical benefits before proposing ending its designation as among the riskiest drugs
 - 4. Now the DEA will review the recommendations, its own findings, and any other relevant facts to determine on its own the proper scheduling of marijuana
 - 5. If the DEA chooses to reschedule marijuana, it will likely initiate the administrative rulemaking process under the Administrative Procedures Act
- V. Counseling Students and Alumni
 - a. Best Practices (more of an art than a science)
 - i. Speak with students in real time; minimize writing
 - ii. Pull up the forms; read the questions
 - iii. Check red flags against the SEAD 4
 - iv. Factors to consider:
 - 1. Nature of the position and core duties (e.g., prosecutor)
 - 2. Nature and seriousness of the conduct
 - 3. Circumstances surrounding the conduct
 - 4. Recency and frequency of the conduct
 - 5. Age of the applicant at the time of the conduct
 - 6. Absence or presence of rehabilitation
 - v. If possible, seek an advisory opinion
 - b. A word about polygraphs
 - i. Mixed reviews but still used
 - ii. Types conducted
 - 1. Counterintelligence (CI) poly
 - 2. Lifestyle poly
 - 3. Both together
 - iii. *Fight Club* rule for applicants – Do NOT ask other applicants about their polygraph exams or conduct research on how to outsmart the test