

CRIMINAL BACKGROUND CHECKS 2006

Health Care

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OVERVIEW

The attached outline analyzes the criminal background check legislation affecting health care that will go into effect April 1, 2006. It is the second in the series that was promised with the analysis on school criminal background check legislation.

There are several key differences between the two programs. To a great extent that is the result of a workgroup that was put together by the Department of Community Health to attempt to develop efforts to reduce the incidence of elder abuse pursuant to a federal grant. Michigan AFSCME Council 25 participated in the grant application and the workgroup.

After agreeing to draft legislation developed by the workgroup, Republican legislative staff revised the recommendation and a number of provisions important to AFSCME were lost. As a consequence, we testified against those changes before the Senate Committee on Health Policy to no avail.

The final version expanded coverage of criminal background checks requirements to a larger universe of workers and included some, but by no means all, of the protections the workgroup recommended. Our key concern – grandparenting for existing employees who have demonstrated their ability to safely care for vulnerable adults – was, for the most part, realized.

**OUTLINE OF HEALTH CARE CRIMINAL BACKGROUND CHECK
LEGISLATION – EFFECTIVE APRIL 1, 2006**

Employers covered

Nursing Homes
County Medical Care Facilities
Hospice facilities and agencies
Hospitals that provide swing bed services
Homes for the Aged
certified Home Health Agencies
Adult Foster Care Facilities
Psychiatric facilities
Intermediate Care Facilities for people with developmental disabilities

Employers NOT covered

State operated psychiatric hospitals
Federally operated psychiatric hospitals

Those covered by fingerprinting and background check requirements

All employees who have regular access to or provide direct services to patients or residents in the facility or agency except for the following:

- Anyone employed on April 1, 2006
- Anyone under contract on April 1, 2006

NOTE: A person loses their exemption under this act if he/she is convicted of a new crime after April 1, 2006

All contractors and contract employees who come in regular and continuous contact with patients or residents except for the following:

- Anyone employed on April 1, 2006
- Anyone under contract on April 1, 2006

NOTE: A person loses their exemption under this act if he/she is convicted of a new crime after April 1, 2006

Any one granted clinical privileges at a covered facility or with a covered agency
Anyone offered a position for any of the above positions except for the following:

- Anyone employed on April 1, 2006
- Anyone under contract on April 1, 2006

NOTE: A person loses their exemption under this act if he/she is convicted of a new crime after April 1, 2006

current licensees upon a finding of good cause by their licensing board or if their license is revoked, suspended or reclassified to a limited license

new licensees effective May 1, 2006

What current employees must do

within 24 months of April 1, 2006 (that is by April 1, 2008) be fingerprinted

all employees are required to give consent to fingerprinting which shall be maintained in a separate data base with the State Police' Automated Fingerprint Information System (AFIS)

agree in writing to

- report arraignment for any crime (can not be fired or denied employment for arraignment)
- report conviction of any crime
- report any substantiated finding

What applicants for employment must do

all prospective employees must give written consent for criminal background checks at time of application

What facilities and agencies must do

all employers listed above must "not employ" or "contract" with any individual or grant clinical privileges to any one who has been convicted of a crime during the below designated disqualification periods

a licensee is subject to the same disqualification periods for any violations as an employee or contractor

submit a request for a criminal background check through AFIS and the FBI (via State Police) for all applicants at time of good faith offer of employment, when enters a contract for services or extends clinical privileges

What employers may not do

disclose information received under this act (The results of the criminal background checks are not subject to the Freedom of Information Act and the information received can only be used for the purposes of the act. Knowing

disclosure is a misdemeanor punishable by 93 days in jail and/or \$1,000 in fines. An employer may disclose the information to another employer with the consent of the applicant.)

Costs

costs shall be borne by the Department of Community Health using federal grant dollars (the federal grant has already been approved)

employees can NOT be charged for fingerprinting or background checks

licensees covered (see above) may be charged a fee by the State Police

Appeal

may appeal a finding of disqualification on accuracy of report only

appeals are contested cases under the Administrative Procedures Act

must file appeal within 15 business days after receiving written notice of report unless crime is eligible to be expunged or set aside

if crime is eligible to be expunged or set aside then the appeal must be filed within 15 business days after a court order on the question of expunging or setting aside the conviction (NOTE: A conviction which is expunged or set aside does not subject the person to the disqualification period.)

if an appeal is filed, the Director of the Department of Community Health must issue a written opinion within 30 days and the decision of the Director is final

Disqualification periods

Permanent disqualification

conviction of a relevant crime under 42 USC 1320a-7 (see Appendix A)

15 year disqualification¹

conviction of any felony with the intent to cause death or serious impairment of a body function

conviction of any felony which causes death or serious impairment of a body function

¹ All periods of disqualification are from the date the person completes all incarceration, parole and/or probation.

conviction of any felony involving the use of force or violence or the threat of force or violence

conviction of any felony involving the use of cruelty or torture

conviction of vulnerable adult abuse in the 1st or 2nd degree

violation of the adult foster care licensing act that causes death of a vulnerable adult

conviction of Criminal Sexual Conduct in the 1st, 2nd, or 3rd degree

conviction of a felony involving abuse or neglect

conviction of a felony involving the use of a firearm or dangerous weapon

conviction of a felony involving diversion or adulteration of a prescription drug or medicine

10 year disqualification

conviction of a felony or misdemeanor involving the use of a firearm or dangerous weapon with the intent to injure

conviction of a felony or misdemeanor involving the use of a firearm or dangerous weapon that results in personal injury

conviction of a misdemeanor involving the use of force or violence or the threat of the use of force or violence

conviction of vulnerable adult abuse in the 3rd or 4th degree

commingling, borrowing, or pledging funds of a resident that are required by law or administrative rule to be held in a separate trust account

interfering with or obstructing an investigation under the adult foster care facility licensing act or section the social welfare act

filing information required by the adult foster care facility licensing act the public health code that is false or misleading

retaliation or discrimination against a resident for providing information to a state or local official enforcing the adult foster care facility licensing act or the public health code, or making a complaint against a facility, or initiating, participating in, or testifying in an administrative or criminal action against a facility or a civil suit related to the criminal action

conviction of criminal sexual conduct in the 4th degree

conviction of any misdemeanor involving cruelty or torture unless the conviction occurs before the person is 16 years of age

conviction of any misdemeanor involving abuse or neglect

5 year disqualification

conviction of a misdemeanor involving cruelty if the conviction occurs before the person is 16 years of age

conviction of a misdemeanor involving home invasion

conviction of a misdemeanor involving embezzlement

conviction of a misdemeanor involving negligent homicide

conviction of misdemeanor larceny unless the conviction occurs before the person is 16 years of age

conviction of Retail Fraud in the 2nd degree unless the conviction occurs before the person is 16 years of age

conviction of a misdemeanor involving assault, fraud, theft, possession or delivery of a controlled substance not covered in the 10 year, 3 year or 1 year disqualification lists

3 year disqualifications

conviction of misdemeanor assault where there is no use of a weapon and there is no intent to commit murder or great bodily harm

conviction of retail fraud in the 3rd degree unless the conviction occurs before the person is 16 years of age

violation of Part 74 of the Public Health Code unless the conviction occurs before the person is 18 years of age

1 year disqualifications

violation of Part 74 of the Public Health Code if the conviction occurs before the person is 18 years of age

conviction of misdemeanor larceny or retail fraud in the 2nd or 3rd degree if the person is less than 16 years of age at the time of conviction

juvenile offenses

substantiation of negligence, abuse or misappropriation of funds under federal law

What State Police must do

receive fingerprints for all covered workers as of April 1, 2006, within 24 months

receive fingerprints for all applicants on or after April 1, 2006

report to the Employer any criminal record and to the Department of Community Health the results of the FBI check within 30 days

develop (in cooperation with the Department of Information Technology) a new file in AFIS to store all fingerprints covered under the act and compare it with fingerprints collected as a result of arrests

report to a covered employer any arrest of an employee (NOTE: such notice is NOT subject to the Freedom of Information Act and may not be used for any purpose other than implementation of this Act)

What the Department of Community Health must do

if the FBI check shows any criminal history and the Employer is not a state department of agency DCH shall give notice to the Employer of the “type of crime” disclosed “without ... details” and with notice of the right of an applicant to appeal and the appeal procedure

develop in cooperation with the State Police a system to automatically notify employers of those convicted of a disqualifying offense

report to the Legislature within one year

- impact and effectiveness of new act on reducing the incidence of abuse and neglect
- feasibility of creating a system to track criminal records of volunteers in the health care system
- amount of federal money received, spent, and remaining to implement the program

report to the Legislature within three years a plan to cover the costs of the program should federal dollars be no longer available

after one year and then every three years, report to the Legislature in writing regarding the appeals process

Miscellaneous Provisions

current workers may transfer to different facilities or agencies owned by the same employee without submitting to a criminal background check

current workers that move to another Employer will be subject to a criminal background check but will not be subject to disqualification unless are found to be unemployable under federal law or have created a new offense after April 1, 2006

conditional employment may be offered pending compliance with the new law if:

the Employer requests it

the applicant signs a written statement that he/she is not within a disqualification period and agrees that a contrary finding will result in his/her discharge unless or until successfully appeals the accuracy of the report

knowing provision of false information as to identification, criminal convictions and substantiated findings is a misdemeanor punishable by 93 days in jail and/or \$500 in fines

the old law concerning criminal background checks is repealed and the new law takes effect on April 1, 2006

Definition of terms

“direct access” means access to a patient, a resident, a patient or resident’s property, financial information, medical records, treatment information or identifying information

APPENDIX A

TITLE 42

§ 1320a–7. **Exclusion of certain individuals and entities from participation in Medicare and State health care programs**

(a) Mandatory exclusion

The Secretary shall exclude the following individuals and entities from participation in any Federal health care program (as defined in section 1320a–7b (f) of this title):

(1) Conviction of program-related crimes

Any individual or entity that has been convicted of a criminal offense related to the delivery of an item or service under subchapter XVIII of this chapter or under any State health care program.

(2) Conviction relating to patient abuse

Any individual or entity that has been convicted, under Federal or State law, of a criminal offense relating to neglect or abuse of patients in connection with the delivery of a health care item or service.

(3) Felony conviction relating to health care fraud

Any individual or entity that has been convicted for an offense which occurred after August 21, 1996, under Federal or State law, in connection with the delivery of a health care item or service or with respect to any act or omission in a health care program (other than those specifically described in paragraph (1)) operated by or financed in whole or in part by any Federal, State, or local government agency, of a criminal offense consisting of a felony relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct.

(4) Felony conviction relating to controlled substance

Any individual or entity that has been convicted for an offense which occurred after August 21, 1996, under Federal or State law, of a criminal offense consisting of a felony relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance.

(NOTE: The federal law gives the Secretary of Health and Human Services the authority to add additional crimes to this list upon notice.)