

CRIMINAL CHECKS ON HEALTH FACILITY EMPLOYEES

House Bill 4495 (Substitute H-3) First Analysis (5-5-98)

**Sponsor: Rep. Lingg Brewer
Committee: Health Policy**

THE APPARENT PROBLEM:

Many employees of hospitals, hospices, nursing homes, and homes for the aged, and even those employed by clinical laboratories and first responder services such as ambulance services, are in direct contact with a very vulnerable population who may be unable to protect themselves from the abuses of such workers due to severe illness, injuries from accidents, or the effects of dementia and old age. Though the vast majority of health care workers are dedicated professionals who strive to provide quality care to their patients, abusive actions towards patients at the hands of care givers do happen. In one recent example, a nurse aide in a Detroit nursing home slapped a resident, cutting the resident's face and requiring the resident to undergo emergency treatment. A criminal background check revealed that the aide had prior felony convictions that included second degree murder, felony armed assault with intent to rob, and assault with a deadly weapon. In another case, a nursing home worker was convicted of sexual misconduct with a mentally incapacitated patient who had a closed head injury. A criminal history check of that worker revealed a prior history of criminal sexual assault.

Currently, potential employees of health facilities and agencies do not have to be screened for prior criminal behavior. The Michigan Department of State Police does run name checks upon request, but not all employers request criminal history checks of job applicants. In addition, the Michigan Nurse Aide Registry flags the names of Competency-Evaluated Nurse Aides (CENAs) reported to the registry who have been charged with abusive or neglectful behavior or theft of a resident's property, but the registry only tracks events taking place in nursing homes, and so information on crimes that a person may have committed outside a nursing home would not be reflected on the registry. Therefore, in an attempt to screen health care workers with previous criminal convictions from working in various health-related arenas, legislation has been proposed to require

employees of health facilities and agencies to undergo criminal history checks and to screen out those persons with felony and certain misdemeanor convictions.

THE CONTENT OF THE BILL:

The bill would amend Part 201 of Article 17 of the Public Health Code, which regulates health facilities and agencies, to require background checks on employees. Under the code, the definition of health facilities and agencies includes medical first response services, clinical laboratories, hospitals, nursing homes, hospices, and homes for the aged. Under the bill, a health facility or agency could not employ, grant clinical privileges to, or independently contract with an individual after the bill's effective date if he or she had been convicted in Michigan or any other state or in federal court of either a felony or an attempt or conspiracy to commit a felony within the previous fifteen years, or a misdemeanor that involved abuse, neglect, assault, battery, fraud, theft, or criminal sexual conduct within the previous ten years.

Under the bill, any applicant for employment, contract services, or clinical privileges in a health facility or agency would first have to give written consent for the Department of State Police (DSP) or other authorized law enforcement agency to conduct a criminal history check. A facility would be prohibited from employing, contracting with, or granting privileges to an individual without first running a criminal history check on the person. After receiving the signed consent form from the applicant, the facility would have to request the DSP or other agency to conduct a criminal history check on the applicant. The facility would have to bear any cost of the criminal history check, and would be prohibited from seeking reimbursement from the applicant. The law enforcement agency conducting the check would have to provide the facility with a report containing any criminal history record information on the applicant maintained by the agency.

A facility could employ or grant clinical privileges to an applicant as a conditional employee or staff member before receiving the results of the criminal history check as long as the criminal history check had been requested and the applicant signed a statement identifying crimes for which he or she had been convicted. The Department of Consumer and Industry Services (DCIS) would have to develop and distribute a model form for the statement of prior criminal convictions at no cost to facilities. A conditional employee whose information on the statement form differed from the criminal history check could be terminated by the facility. Knowingly providing false information would constitute a misdemeanor punishable by 90 days imprisonment and a fine of up to \$500, or both.

Information provided on a criminal history record could only be used for evaluating an applicant's qualifications, and a facility would be prohibited from disclosing information other than a felony conviction or a misdemeanor conviction involving sexual or physical abuse to a person who was not directly involved in evaluating the applicant's qualifications for employment or clinical privileges.

In addition, health facilities and agencies would have to report to the DCIS any disciplinary action taken by a facility against an employee that involved sexual or other abuse, neglect, physical harm, theft, or fraudulent behavior against a patient of the facility. (This report would be in addition to a report currently required regarding disciplinary actions against employees licensed or registered under the code). Such a report, as well as reports currently required by law regarding licensed and registered employees, would be public information. Further, failure to report under either of these requirements would be added to the list of actions that can result in the denial, limitation, suspension, or revocation of a facility's or agency's license or certification.

The bill is part of a package of bills that are tie-barred to each other. House Bills 4497 and 4498 would similarly amend the Adult Foster Care Facility Licensing Act (MCL 400.701 et al.) and the Mental Health Code (MCL 330.1001 et al.), respectively, to apply to adult foster care facilities licensed by the Family Independence Agency and residential facilities operated by the state or licensed by the Department of Community Health.

MCL 333.20165 and 333.20175.

FISCAL IMPLICATIONS:

Fiscal information is not available.

ARGUMENTS:

For:

Just over a week ago, the Office of Attorney General brought criminal charges against a nurse aide in a Detroit nursing home for striking a resident in the face. The resident had to undergo emergency medical treatment. In another incident, a nursing home worker sexually assaulted a resident who was mentally incapacitated. The men involved in both of these cases had prior convictions for violent crimes. Reportedly, the man involved in the latter incident even kept a diary of his victims, and had as a career goal a desire to own and operate his own nursing home. Other stories circulate of hospital and nursing home workers suspected or even convicted of assaulting, abusing, or murdering patients moving from state to state. Currently, agencies can request a name check from the Department of State Police, but not all health agency employers do so. The Michigan Nurse Aide Registry only tracks competency evaluated nurse aides (CENAs), and then only for actions that occur in a nursing home. A violent crime committed outside a nursing home would not appear on the registry, nor would the name of a person who abused or stole from a resident but was not yet a CENA, as departmental policy allows an aide to work for four months while undergoing the training and testing to become a CENA. A mechanism must be created by which employers can screen out those with histories of violent behaviors. The bill would require that all licensed health facilities in the state request the DSP to run a criminal background check on employees. In this way, potential health care workers with past histories of abusive or violent behaviors who pose a risk to the health and safety of patients and residents can be screened out before abuses can occur.

Response:

Currently, the information contained in the Law Enforcement Information Network (LEIN) pertains only to Michigan convictions. So, health facilities and agencies requesting a background check would only be able to find out if a person had a conviction in Michigan; this would do little to expose workers who travel from state to state and commit crimes in nursing homes and other facilities. However, the bill would prohibit a facility or agency from employing, contracting with, or granting clinical privileges to any person with a conviction in another state or in federal court. According to the Department of State Police,

the only way to do a nationwide search in order to determine if any out-of-state or federal convictions exist is through fingerprinting. It is important to note that the committee-passed version of the bill removed a requirement for job applicants and others to be fingerprinted due in part to the high cost (approximately \$39 per person for an FBI and state fingerprint check) and length of turnaround (about 60 to 90 days for the FBI report, two to three weeks for a state report). The point is, that although a facility is not required to do a fingerprint search, if the facility hired a person who had a conviction in another state or had a federal conviction, and it became known to the department that the facility had hired such a person (perhaps because the person was subsequently arrested for harming a patient in the facility), the facility could face fines and possible license suspension or even revocation for violating a provision of the Public Health Code. So, the bill would not require a facility to conduct a nationwide criminal background check, but failure to do so could result in the facility losing its license.

Further, even if a facility requested that the DSP run a fingerprint check, the FBI restricts the DSP to stating only that a person does or does not have a criminal record. Since federal records could not be released to health facilities, the DSP may require additional time to read through a file to verify if a conviction date fell within the bill's ban on employment and if a misdemeanor charge was for one of the prohibited offenses. Even applying the background checks only to new employees could result in increased costs to some facilities (the DSP could not charge nonprofit agencies), and certainly would increase costs to the DSP in additional staff time to read reports and to absorb the costs of criminal checks for nonprofit agencies and facilities. Or, since the bill apparently only prohibits a facility from charging an applicant for a check of the LEIN system, employers could attempt to charge job applicants for the cost of the fingerprint check. Since most entry-level health care jobs are low paying, this would be a tremendous hardship to job seekers, and would further erode the pool of available or willing low-level health care workers such as nurse aides and home health care workers.

For:

The bill would prohibit health facilities and agencies from employing, contracting with, or granting clinical privileges to workers with felony convictions or certain misdemeanor offenses involving theft or physical or sexual abuse. However, since all people

must be given a chance to demonstrate that they have been rehabilitated, and many feel that the debt to society has been paid by serving his or her time in prison, the bill includes a time limit to the restriction on employment.

Also, since there may be a time factor involved in doing a criminal history check, employers would be able to hire a person while the search is going on. A job applicant would have to sign a statement and detail any past criminal behavior. A person who knowingly put inaccurate information on the form would be subject to possible fines and imprisonment.

Against:

Notwithstanding references to job applicants, the bill as written apparently would apply both to new employees and current employees, as the bill states that after the effective date, facilities and agencies could not "employ" a person without doing a criminal check or employ persons with certain criminal convictions. Considering the sheer number of people currently employed by nursing homes, hospitals, hospices, ambulance services, and the other health facilities and agencies affected by the bill, the cost to businesses would be prohibitive. It is reported that hospital and health systems in the state alone account for at least 183,000 employees. Nursing homes employ tens of thousands of workers. Though the Department of State Police (DSP) will do a name check for nonprofit organizations for free, for-profit businesses must pay \$5 per name.

In addition, some have interpreted the bill as meaning that long-term health facility workers who had a criminal conviction within the specified time frames before starting employment with the facility could be subject to termination. At the least, the bill should be amended to clarify whether the background checks would be for new employees only, or for all current employees; for example, specifying that after the bill's effective date, a facility could not hire a person without doing a background check or who had certain criminal convictions.

Against:

The bill does not distinguish between employees who would be responsible for direct patient care and those with access to patients (e.g. custodial and maintenance staff) from those employees who work separately from residential areas such as administrative staff, certain kitchen staff, grounds keepers, or laundry personnel. Also, though the bill species that contract employees must undergo background checks, it does not clearly

address whether employees of agencies such as temporary employment agencies that a facility may contract with would come under the bill's requirements. Therefore, a person washing dishes in a hospital kitchen who would have no patient contact may have to undergo a criminal history check, but a temporary worker in a nursing home caring directly for residents may not come under the bill's regulations. In the case of the nursing home worker who sexually assaulted the mentally incapacitated resident previously mentioned, the worker was from a "temp" agency.

Against:

The observation has been made through the years that a person could walk out of prison today and be working in a nursing home or hospital tomorrow, and therefore a screening mechanism should be established. The bill would not necessarily prevent this scenario from continuing to happen. Though the bill specifies that a person convicted of a felony or certain misdemeanor offenses could not be hired for a period of 15 years and 10 years after the conviction date, respectively, this time frame coincides with current sentencing guidelines for a number of serious, assaultive crimes. Therefore, a person who spent 15 years in prison for murder or attempted murder, or crimes involving sexual assaults, could still walk out of prison today and be working with a vulnerable population tomorrow as long as he or she had served one day longer than the bill's time frames. On the other hand, an eighteen-year-old convicted of property damage over \$100 (a felony offense), could not work as a doctor, laboratory technician, paramedic, or even a secretary in an office of a facility until he or she was 33 years of age!

Since certain crimes have a high recidivism rate, the bill may not provide sufficient time to demonstrate whether a person has been rehabilitated or not. Rather than setting a time frame of years after a conviction, a better approach would be to establish or incorporate a time period in which the person did not re-offend. In that way, a person convicted of a non-assaultive crime who only served a year in prison would not have to wait 14 years before seeking a career in the health industry, but would have to demonstrate for a set period of time that he or she does not present a danger to others.

POSITIONS:

The Health Care Association of Michigan supports the bill. (4-28-98)

The Michigan Association of Homes and Services for the Aging supports the bill. (5-1-98)

Citizens for Better Care has not yet taken a position on the bill. Philosophically, CBC generally feels that all direct care workers should have background checks. (5-1-98)

The Service Employees International Union (SEIU) has not yet taken a formal position on the bill, but states that it would affect a variety of labor organizations who have collective concerns on the bill's effects. (5-4-98)

The Michigan Health and Hospital Association (MHA) has not yet taken a formal position, but has concerns about the breadth of the bill's effects on hospitals and health systems. (5-4-98)

The Michigan Hospice Organization is neutral on the bill, but has concerns about problematic language in the bill. However, the MHO does support the concept of qualified direct care workers. (5-4-98)

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■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.