



Senate Fiscal Agency
P. O. Box 30036
Lansing, Michigan 48909-7536

BILL ANALYSIS



Telephone: (517) 373-5383
Fax: (517) 373-1986
TDD: (517) 373-0543

House Bill 5184 (Substitute H-2 as reported without amendment)
Sponsor: Representative Gary Woronchak
House Committee: Senior Health, Security and Retirement
Senate Committee: Health Policy

Date Completed: 3-24-04

RATIONALE

Public Act 303 of 2002 amended the Public Health Code to require criminal background checks for all new nursing home employees who provide direct care services to patients. This was in response to several high-profile cases of nursing home residents' being abused by nurse aides who evidently were later discovered to have had previous convictions for assaults. Like nursing homes, adult foster care homes serve a vulnerable population and have a high employee turnover. These facilities are residential settings that provide 24-hour personal care, protection, and supervision for people who are developmentally disabled, mentally ill, physically handicapped or aged who cannot live alone but do not need continuous nursing care. It has been suggested that potential adult foster care employees should undergo a similar background check before being hired.

CONTENT

The bill would amend the Adult Foster Care Facility Licensing Act to do the following:

- Prohibit an adult foster care facility from employing or independently contracting with an individual who would be providing direct services regularly to residents if he or she had been convicted of a felony within the previous 15 years; a misdemeanor against a vulnerable adult within the previous 10 years; or an offense evidencing lack of good moral character under the Michigan Administrative Code.**
- Require background checks on new employees or independent**

contractors of adult foster care facilities.

- Increase from five years to 10 years the length of time for which the Family Independence Agency (FIA) may not issue a license to or renew the license of a person who has been convicted of a specific misdemeanor (involving a vulnerable adult or a resident); or an applicant whom the FIA determines has a relationship with a former licensee whose license has been suspended, revoked, or nonrenewed for the specified misdemeanors.**
- Allow a licensee to receive a minor child placed in foster care under Michigan laws after it had applied for a license for a foster family home or a foster family group home, at the discretion of the FIA Director or his or her designee.**

(Although the bill refers to the Department of Consumer and Industry Services, its responsibilities under the Act were transferred to the FIA by Executive Order 2003-18.)

The bill is described below in further detail.

Licensee Convicted of a Misdemeanor

The Act prohibits the FIA from issuing a license to or renewing the license of a person who has been convicted of a misdemeanor under the Act or Chapter XXA of the Michigan Penal Code for a period of five years after the conviction. The bill would increase the time period to 10 years.

(Under Chapter XXA of the Penal Code, the following individuals are guilty of a misdemeanor:

- A caregiver who intentionally causes physical harm to a vulnerable adult is guilty of third-degree vulnerable adult abuse.
- A caregiver or other person with authority over a vulnerable adult is guilty of fourth-degree vulnerable adult abuse if his or her reckless act or failure to act causes physical harm to a vulnerable adult.
- A caregiver, other person with authority over a vulnerable adult, or licensee who intentionally commingles, borrows, or pledges funds of a resident that are required to be held in a separate trust account; interferes with or obstructs an investigation under the Act, the Public Health Code, or the Social Welfare Act; or files information required by the Act or the Public Health Code that is false or misleading.
- A caregiver, other person with authority over a vulnerable adult, or licensee who intentionally retaliates or discriminates against a resident or employee because he or she provides information to a State or local official enforcing the Act or the Public Health Code; makes a complaint against a facility; or initiates, participates in, or testifies in an administrative or criminal action against the facility or a civil suit related to the criminal action.

Under the Penal Code, "vulnerable adult" means one or more of the following:

- An individual at least 18 years old who, because of age, developmental disability, mental illness, or physical disability requires supervision or personal care or lacks the personal and social skills required to live independently.
- A child placed in an adult foster care family home or small group home by an authorized child placing agency or approved governmental unit.
- A vulnerable person who is at least 18 years old and who is believed to be abused, neglected, or exploited.)

The Act allows the FIA to suspend, revoke, or modify an applicant's license for a period of five years if the FIA determines that the applicant has a relationship with a former licensee whose license has been suspended,

revoked, or nonrenewed as a result of a crime described above, or because the licensee falsifies information on the license application. The bill also would increase this time period to 10 years.

Prohibitions on Employment

The bill would prohibit an adult foster care facility from employing or independently contracting with an individual who regularly would provide direct services to facility residents after the bill's effective date if the individual had been convicted of any of the following:

- A felony or an attempt or conspiracy to commit a felony within the 15 years immediately preceding the date of application for employment or the date of the execution of the independent contract.
- A misdemeanor involving abuse, neglect, assault, battery, or criminal sexual conduct (CSC); or involving fraud or theft against a vulnerable adult; or a State or Federal crime that was substantially similar to any of those misdemeanors, within the immediately preceding 10 years.
- An offense listed under R 400.1152 of the Michigan Administrative Code.

(Under R 400.1152 of the Michigan Administrative Code, the following offenses presume a lack of good moral character for purposes of issuing an original or renewal license, a certificate of registration, or an approval to a child care organization; and for issuing an original or renewal license to an adult foster care facility:

- Conviction of the license applicant of any crime involving a substantial misrepresentation of any material fact, including bribery, fraud, filing of false claims, aiding or abetting the filing of false claims, and allowing an establishment to be used for illegal purposes.
- Conviction of any crime involving homicide, murder, attempt to commit homicide or murder, manslaughter, mayhem, or negligent homicide.
- Conviction of any crime, felony, or misdemeanor involving assault or battery.

- Conviction of any crime that involves a violent act or a threat of a violent act against a person, or a crime constituting a sexual offense, including CSC in any degree or attempt to commit CSC; activity for profit involving child abuse, child neglect, child exploitation, kidnapping, adoption schemes, or prostitution or related crimes; or cruelty toward, or torture of, any person, or attempt to commit cruelty or torture.
- Conviction of robbery, armed robbery, or burglary, or attempt to commit any of those crimes; receiving or concealing stolen property; extortion; obtaining property by false pretenses; larceny by trick or conversion; embezzlement; arson; offenses involving narcotics, alcohol, or controlled substances that result in a felony conviction; offenses involving adulterating drugs, controlled substances, or preparations; poisoning; or unlawful manufacture or delivery of drugs or possession with intent to manufacture or deliver drugs.)

Background Checks

The bill would prohibit an adult foster care facility from employing or independently contracting with an individual who regularly would provide direct services to residents, without receiving a report on his or her criminal history, as described below. This provision would apply only to employees or independent contractors hired after the bill's effective date.

(Under the bill, "independent contract" would mean a contract entered into by an adult foster care facility with an individual who provided the contracted services independently or a contract entered into by a facility with an organization or agency that employed or contracted with an individual after complying with the bill's requirements to provide the contracted services to the facility on behalf of the organization or agency.)

An individual who applied for employment as an employee or independent contractor and received a good faith offer of employment or independent contract from the adult foster care facility would have to provide identification acceptable to the Michigan Department of State Police (MSP) at the time of the application and give written

consent for the MSP to conduct a criminal history check. If the MSP or an equivalent State agency had conducted a criminal history check on the individual within the immediately preceding 24 months, the facility could use a copy of that criminal history check instead of obtaining written consent and requesting a new criminal history check. If the individual used a prior criminal history check, the facility would have to accept the copy of the results of the check only from the adult foster care facility or health facility or agency that previously had employed or independently contracted with the individual.

Upon receiving the written consent and identification, if the individual had resided in Michigan for at least three years preceding the good faith offer, the facility would have to make a request to the MSP to conduct a criminal history check, in a manner prescribed by the MSP. The facility would have to make the written consent and identification available to the MSP. If there were a charge for conducting the check, the facility would have to pay the cost, and could not seek reimbursement from the subject of the check. The MSP would have to give the facility a written report of the criminal history check, containing any information the MSP maintained on the individual. As a condition of employment, the individual would have to sign a written statement that he or she had been a Michigan resident for at least three years before the good faith offer.

If an individual had applied for employment with a facility licensed for more than six people and had resided in Michigan for less than three years before the good faith offer, the facility would have to request a criminal history check from the MSP, and also request the MSP to forward the individual's fingerprints to the FBI. The MSP would have to request the FBI to determine the existence of any national criminal history pertaining to the individual. An individual would have to give two sets of fingerprints to the MSP. The MSP would have to complete the criminal history check and give the results of its determination to the facility and the results of the FBI determination to the FIA within 30 days after the request was made. If the requesting facility were not a State department or agency and if a crime were disclosed on the FBI determination, the

FIA would have to give the facility written notice of the type of crime disclosed but could not disclose details of the crime.

If an individual had applied for employment with a facility licensed for six people or less and had resided in Michigan for less than three years before the good faith offer, the facility would have to request the criminal history check from the MSP and also request the state police or state agency responsible for maintaining statewide criminal history information of all the states in which the individual resided during the preceding five years, to conduct a criminal history check.

Conditional Employment

If a facility determined it necessary to employ or independently contract with an individual before receiving the results of the criminal history check, the facility could conditionally employ the individual if the facility requested the criminal history check upon conditionally employing the individual, and he or she signed a written statement indicating all of the following:

- He or she had not been convicted of a felony or an attempt or conspiracy to commit a felony within the 15 years immediately preceding the date of application for employment or the date of the execution of the independent contract; or a misdemeanor involving abuse, neglect, assault, battery, or CSC, or involving fraud or theft, against a vulnerable adult, or a State or Federal crime that was substantially similar to any of these misdemeanors, within the 10 immediately preceding years.
- He or she agreed that, if the information in the criminal history check did not confirm the individual's statement, his or her employment would be terminated by the facility unless and until he or she could prove that the information was incorrect. (The facility would have to provide a copy of the results of the criminal history check to the individual upon request.)
- He or she understood the conditions described above that would result in the termination of his or her employment and that those conditions were good cause for termination.

On the bill's effective date, the FIA would have to develop and distribute a model form for the statement and make it available to adult foster care facilities at no charge.

If an individual were conditionally employed, and the report, if applicable, did not confirm the individual's statement that he or she had not been convicted of any of the specified felonies or misdemeanors, the facility would have to terminate his or her employment.

An individual who knowingly provided false information regarding a criminal conviction on the written statement would be guilty of a misdemeanor punishable by imprisonment for up to 90 days, and/or a maximum fine of \$500.

Disclosure of Information

An adult foster care facility could use criminal history record information only for the purpose of evaluating an individual's qualifications for employment in the position for which he or she had applied, and for the purposes of determining whether the information in the criminal history check confirmed an individual's statement upon being hired conditionally. A facility or employee of the facility could not disclose criminal history record information to a person who was not directly involved in evaluating the individual's qualifications for employment or independent contract. Upon written request from another adult foster care facility or health facility or agency that was considering employing or independently contracting with the individual, a facility that had obtained criminal history record information would have to share the information with the requesting facility or agency. Except for a knowing or intentional release of false information, an adult foster care facility would have no liability in connection with a background check or the release of criminal history record information.

Continued Employment

As a condition of continued employment, each employee or independent contractor would have to agree in writing to report to the facility immediately upon being arrested for or convicted of any of the criminal offenses for which a facility could not employ or contract with an individual.

Placement of Minor Children

Under the Act, an adult foster care family home may be concurrently licensed as a foster family home or a foster family group home. Additional minor children who are not related to a resident of the adult foster care family home may not be received in the home after the filing of an application for a license.

Under the bill, a licensee could receive a minor child placed in foster care under Michigan laws after filing an application for a license. Such a placement would have to be approved at the discretion of the FIA Director or his or her designee and would have to be based upon a recommendation by a licensed child placing agency or an approved governmental unit and would be subject to appropriate terms and conditions as determined by the FIA.

MCL 400.713 et al.

ARGUMENTS

(Please note: The arguments contained in this analysis originate from sources outside the Senate Fiscal Agency. The Senate Fiscal Agency neither supports nor opposes legislation.)

Supporting Argument

Adult foster care facilities provide services at a lower level and on a smaller scale, compared with nursing homes; but still serve a vulnerable population. Many adult foster care homes house Alzheimer's patients, developmentally disabled adults, and people with mental illnesses, as well as the elderly. Assistance is provided in bathing, dressing, feeding, personal care, and oversight of medications, in addition to 24-hour supervision. Like nursing homes, adult foster care homes tend to have high employee turnover, with many workers moving from state to state. It is imperative that procedures are put in place to ensure that residents are not placed under the care of people who pose a threat to their safety.

The bill would establish a criminal background check process similar to that established for nursing homes but with key differences. Adult foster care homes are smaller than nursing homes, with no more than 20 residents. A name check costs only \$10, whereas a fingerprint check costs \$54. Having to pay \$54 for each potential

employee who has lived out-of-state for the past three years or more could create a financial hardship for smaller facilities. The bill would require a fingerprint check only for applicants of larger adult foster care homes (those with more than six residents) who had lived in Michigan for less than three years. For the smaller homes, the bill would require the facility to contact the appropriate agency in each state in which the applicant had previously lived and request a name check. All potential employees who had lived in the State for at least three years also would have to have a name check done.

Response: A name check alone is unreliable. The only way to ensure a person's identification is through fingerprinting. Exempting small homes from the fingerprinting requirement could enable some dangerous people to fall through the cracks if they concealed residency in a state where they had a record. As a matter of resident safety, potential adult foster care employees should have to withstand the same scrutiny as nursing home employees do. Although a fingerprint check is more expensive, a price should not be put on an individual's safety. Perhaps other ways of funding fingerprint checks for small group homes could be explored.

Legislative Analyst: Julie Koval

FISCAL IMPACT

The bill would have an indeterminate impact on the Family Independence Agency. The development and distribution, at no charge, of a model form for a potential employee's written declaration could result in some administrative cost to the State.

The bill would require that certain criminal history background checks and fingerprint background checks be made through the Department of State Police. The cost to the Department for these background checks is \$10 and \$54, respectively, and would have to be paid by facilities as provided under the bill.

Fiscal Analyst: Constance Cole
Bruce Baker

H0304\5184a

This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.