

CRIMINAL BACKGROUND CHECKS: HEALTH AND ADULT FOSTER CARE FACILITIES

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Senate Bill 621 (Substitute H-2)
Sponsor: Sen. Patricia L. Birkholz

Senate Bill 622 (Substitute H-2)
Sponsor: Sen. Tony Stamas
House Committee: Senior Health, Security, and Retirement
Senate Committee: Senior Citizens and Veteran Affairs

First Analysis (1-31-06)

BRIEF SUMMARY: The bills would expand the requirements for criminal background checks for new employees at health facilities and agencies and foster care facilities, as well as individuals seeking clinical privileges and independent contracts. In each case, a request would be made to the Department of State Police to conduct a criminal history check and to forward fingerprints into the Automated Fingerprint Identification System (AFIS) database and to forward fingerprints to the Federal Bureau of Investigation. The State Police would have to request the FBI to make a determination of any national criminal history pertaining to an applicant for employment.

FISCAL IMPACT: Senate Bills 621 and 622 (H-2), as reported out of the House Senior Health, Security, and Retirement Committee, have fiscal implications for state government. However, the fiscal implications for state government are anticipated to be offset by Medicaid and Medicare reimbursement funding, provided the Department of Community Health (DCH) secures the necessary federal approval or waiver. Furthermore, monetary sanctions in the proposed bills could conceivably offset some of the costs incurred by state government. For additional information, see [Fiscal Information](#) later in the analysis.

THE APPARENT PROBLEM:

A representative of the Department of Community Health has summarized the problem as follows.

Currently, Michigan's long term care criminal background check law applies only to Nursing Homes, County Medical Care Facilities, and Homes for the aged and to Adult Foster Care facilities. For individuals in the state for more than three years, the check consists primarily of a "name" check on the Internet Criminal History Tool (ICHAT). Individuals who have not been in the state for at least three years are required to have an FBI fingerprint check. However, many long term care settings are not currently required to do background checks. This includes Psychiatric Hospitals, Hospices, Home Health Programs, Long Term Care Hospitals, and ICF/MRs. Further, Michigan's current law does not fully meet federal standards because it does not include all prohibited offenses

and substantiated findings under abuse and neglect as required by the Social Security Act.

The department also says that current testing takes too long. When an applicant signs an affidavit upon being hired, the applicant can work, temporarily, for 90 days – the time it takes for a background check to clear. Further, DCH says that unlike many other states, Michigan does not conduct criminal background checks on newly licensed health professionals under the Public Health Code. Legislation has been introduced to address this concern and put Michigan statutes in line with other states.

THE CONTENT OF THE BILLS:

The bills would expand the requirements for criminal background checks for new employees at health facilities and agencies and foster care facilities, as well as individuals seeking clinical privileges and independent contracts. In each case, a request would be made to the Department of State Police to conduct a criminal history check and to forward fingerprints into the Automated Fingerprint Identification System (AFIS) database and to forward fingerprints to the Federal Bureau of Investigation. The State Police would have to request the FBI to make a determination of any national criminal history pertaining to an applicant for employment.

Senate Bill 621 would add two sections to the Public Health Code (MCL 333.20173a and 20173b) applies to a health facility or agency that is a nursing home, county medical facility, hospice, hospital that provides swing bed services, home for the aged, or home health agency. Senate Bill 622 would amend the Adult Foster Care Facility Licensing Act (MCL 400.734b) to apply essentially the same requirements to adult foster care facilities. Senate Bills 621 and 622 are tie-barred to each other and to House Bills 5168 and 5448. House Bill 5168 applies to applicants seeking licensing and registration. House Bill 5448 applies to individuals seeking employment, an independent contract, or clinical privileges with a psychiatric facility or intermediate care facility for people with mental retardation.

Enacting Sections. Senate Bills 621 and 622 each contain enacting sections that would allow the bills to take effect 60 days after the appropriate state department secures the necessary federal approval or waivers to use federal funds to reimburse health care facilities and adult foster care facilities for the costs incurred in requesting a national criminal history check to be conducted by the Federal Bureau of Investigation (FBI) and then files with the Secretary of State a written notice that the approval has been secured and written notice that the department has issued a Medicaid policy bulletin regarding the payment and reimbursement for the criminal history checks. If the department secures the necessary waiver and files a written notice, the existing sections of law dealing with background checks would be repealed.

The following is a more detailed description of the content of the bills.

Disqualifying Offenses

Under the bills, health facilities and agencies and adult foster care facilities (to be called "facilities") could not employ, independently contract with, or grant clinical privileges to an individual who regularly has direct access to or provides direct services to patients or residents after the bill's effective date if:

1) He or she had been convicted of a felony, or an attempt or conspiracy to commit a felony, unless 15 years had elapsed since the individual completed all of the terms and conditions of sentencing, parole, or probation prior to application for employment or clinical privileges or the date of execution of the independent contract. Felonies would include the following:

- A felony involving the intent to cause death or serious impairment of body function, that results in death or serious impairment of a body function, that involves the use of force or violence, or that involves the threat or the use of force or violence;
- A felony involving cruelty or torture;
- A felony against a vulnerable adult;
- A felony involving criminal sexual conduct;
- A felony involving the use of a firearm or dangerous weapon; or
- A felony involving the diversion or adulteration of a prescription drug or other medications.

The 15-year limitation would not apply to certain federal health care fraud and abuse felonies (for which a person would be permanently disqualified).

2) He or she had been convicted of a misdemeanor that involved abuse, neglect, assault, battery, criminal sexual conduct, fraud, or theft, or a similar state or federal misdemeanor, within the 10 years immediately preceding the date of application. Misdemeanor offenses would include the following:

- A misdemeanor involving the use of a firearm or dangerous weapon with the intent to injure, the use of a firearm or dangerous weapon that results in a personal injury or the use of force or violence or the threat of the use of force or violence;
- A misdemeanor against a vulnerable adult;
- A misdemeanor involving criminal sexual conduct;
- A misdemeanor involving cruelty or torture; or
- A misdemeanor involving abuse or neglect.

3) He or she had been convicted of the following misdemeanors or relevant federal health care fraud and abuse crime, within the 5 years immediately preceding application. Other misdemeanor offenses would include the following:

- A misdemeanor involving cruelty if committed before age 16;
- A misdemeanor involving home invasion;
- A misdemeanor involving embezzlement;

- A misdemeanor involving negligent homicide;
- A misdemeanor involving larceny;
- A misdemeanor involving retail fraud in the second degree; or
- A misdemeanor that is not otherwise identified involving assault, fraud, or theft, or possession or distribution of a controlled substance

4) He or she had been convicted of the following misdemeanors against a vulnerable adult within three years immediately preceding the date of application. Other misdemeanor offenses would include the following:

- A misdemeanor for assault if there was no use of a firearm or dangerous weapon and no intent to commit murder or inflict great bodily injury;
- A misdemeanor of retail fraud in the third degree; or
- Misdemeanor drug violations under the Public Health Code.

5) He or she had been convicted of one of the following misdemeanors within one year immediately preceding the date of application:

- Any misdemeanor drug violations under the Public Health Code if under the age of 16; or
- A misdemeanor for larceny or retail fraud in the second or third degree if under the age of 16.

6) He or she is the subject of an order or disposition under the Code of Criminal Procedure dealing with findings of not guilty by reason of insanity.

7) He or she had been the subject of a substantiated finding of neglect, abuse, or misappropriation of property by a state or federal agency under federal health care law.

Background Checks

While there are some differences in the background check provisions between the bills, the following is generally the nature of the process. A person who applies for employment either as an employee or as an independent contractor or for clinical privileges in a facility and receives a good faith offer of employment, an independent contract, or clinical privileges would have to give written consent along with acceptable identification, at the time of application, for the Department of State Police (DSP) to conduct an initial criminal history check

After receiving a written consent form and identification from the applicant, the facility would request the DSP to conduct a criminal history check on the applicant, input the individual's fingerprints into the AFIS database, and to forward the applicant's fingerprints to the FBI. The facility would also request the relevant licensing or regulatory department to conduct a check of all relevant registries. The applicant would be required to provide a set of fingerprints to be forwarded to the Federal Bureau of Investigation (FBI). The DSP would request the FBI make a determination of the existence of any national criminal history pertaining to the applicant. The DSP would

have to provide the facility with a report containing any criminal history record information on the applicant maintained by the department or agency. The DSP would be required to provide the results of the FBI determination within 30 days after the request was made.

If there is a fee for the criminal history check, it would be paid by or reimbursed by the department with federal funds as provided to implement a pilot program for national and state background checks on direct patient access employees of long term care facilities or providers. A facility could not seek reimbursement from an applicant.

If the requesting facility or agency is not a state department or agency and, if a criminal conviction is disclosed on the FBI determination, the department would be required to notify the health facility or agency and the applicant, in writing of the FBI determination without disclosing the details of the crime. Further, the notice would have to include a statement that the applicant has a right to appeal a decision made by the facility regarding eligibility based on the criminal background check. The notice would include information regarding where to file the appeal and information describing the appellate procedures.

Exceptions.

The new background check provisions would not apply to individuals who were employed by, under independent contract to, or granted clinical privileges in a facility before the effective date of the bills. Already employed individuals could transfer to another facility under the same ownership and would only need to submit fingerprints. Employees leaving or going to a new facility not under the same ownership would be required to undergo a full background check. If the individual was subsequently convicted, or found to have been convicted of a relevant crime or offense, he or she would be subject to the requirements of the subsection and may be denied employment or terminated from employment.

The background check provisions would also not apply to individuals if their work was not directly related to the provision of services to a patient or resident or, if the services allowed for direct access to patients or residents but were not performed on an ongoing basis. Within 24 months after the bills take effect, an exempt individual would be required to provide the DSP a set of fingerprints and the DSP would be required to put the fingerprints into the AFIS database. The exception includes independent contractors providing utility, maintenance, construction, and communications services.

Conditional Employment

A facility could employ, contract with, or grant clinical privileges to an applicant on a conditional basis 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 that he or she had not been convicted of one of the relevant felonies or misdemeanors, or been subject to a relevant finding or order; agreed that if the criminal history check did not confirm the applicant's statements, that employment would be terminated, unless and until the individual appealed and proved the history check information was incorrect; and acknowledged that providing incorrect information was a good cause for termination. (A

model form for the statement would have to be developed by the appropriate state department.) The facility would have to provide a copy of the results of the criminal history check to the individual.

If the criminal history report did not confirm a conditionally-employed individual's signed statement, the facility would have to terminate the employment unless and until the individual could prove the information to be incorrect.

Penalty for Providing False Information

An individual who knowingly provided false information on a conditional employment statement would be guilty of a misdemeanor punishable by imprisonment for not more than 93 days and/or a fine of not more than \$500.

Continued Employment

As a condition of continued employment, each employee and independent contractor would have to 1) agree in writing to report the facility or agency immediately upon being arraigned for one or more relevant criminal offense; upon being convicted of a relevant offense; becoming the subject of a relevant order or disposition; or upon being the subject of a substantiated finding; and 2) provide the DSP with a set of fingerprints.

Confidentiality

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 to a person who was not directly involved in evaluating the applicant's qualifications. (Information could be shared with another facility considering employing the same individual, at the second facility's request.) Except for a knowing and intentional release of false information, a facility would have no liability in connection with a criminal background check or the release of criminal history record information. An individual who knowingly used or disseminated criminal history information in violation of confidentiality provisions would be guilty of a misdemeanor punishable by imprisonment for not more than 93 days and/or a fine of not more than \$1,000.

Penalties for Failure to Comply

A licensee, owner, administrator or operator of a facility who knowingly fails to conduct required criminal history checks is guilty of a misdemeanor punishable by up to one year's imprisonment and/or a fine of up to \$5,000.

Fingerprint Identification System Database

The Department of Information Technology, in collaboration with the DSP, would have to establish an automated fingerprint identification system (AFIS) database that would allow the DSP to store and maintain all fingerprints submitted under the bills and would provide automatic notification if and when a subsequent criminal arrest fingerprint card submitted into the system matched a set of fingerprints previously submitted. Upon such notification, the DSP would be required to immediately notify the department and the department would be required to immediately contact the respective facility with which that individual was associated. Information in the AFIS database would be considered

confidential and not subject to disclosure under the Freedom of Information Act (FOIA) or to any person except for the purposes of this act or law enforcement.

Web-Based Criminal History System

By March 1, 2007, the DSP and the Departments of Community Health and Human Services would be required to develop and implement an electronic web-based system to assist those health facilities and agencies required to check relevant registries and conduct criminal history checks of its employees and independent contractors and to provide automated notices of individuals who, after being inputted in the system, were subsequently convicted of a disqualifying offense or the subject of a substantiated finding of abuse, neglect, or misappropriation of property since the initial check.

Reports to the Legislature

Each department (DCH and DHS) would be required, within one year after the effective date of the bills, to submit a written report to the Legislature regarding the impact and effectiveness of the bills; the feasibility of implementing criminal history checks on volunteers working in facilities and state agency employees involved in licensing and regulation; and the amount of federal funds provided to implement a pilot program for national and state background checks on direct access employees or providers, the amount of the funds expended to date, and the amount remaining.

Appeal Procedure and Decision.

An individual who has been disqualified from or denied employment by a facility based on a criminal history check could appeal to the department if he or she believes that the criminal history report is inaccurate and the appeal would be conducted as a contested case hearing. The individual would need to file the appeal with the director of the department within 15 business days after receiving the written report of the criminal history check, unless the conviction contained in the report is one that could be expunged or set aside.

If an individual has been disqualified or denied employment based on a conviction that could be expunged or set aside, then he or she would need to file the appeal within 15 days after a court order granting his or her application to expunge or set aside that conviction is granted or denied. If the order is granted and the conviction is expunged or set aside, then the individual could not be disqualified or denied employment based solely on the conviction. The director would be required to review the appeal and issue a written decision within 30 days after receiving the appeal. The decision of the director is final.

Appeals Report

One year after the effective date of the appeals process provision, and each year thereafter for the next three years, the department would be required to provide the Legislature with a written report regarding the appeals process. The report would have to include, for the preceding year, the number of applications for appeals received, the number of inaccuracies found and appeals granted with regard to the criminal history checks conducted, the average number of days necessary to complete the appeals process

for each appeal, and the number of appeals rejected without a hearing and a brief explanation of the denial.

BACKGROUND INFORMATION:

The Department of Community Health provided the following information to the Committee on Senior Health, Security and Retirement.

In September 2004, Michigan competed for and received federal approval as one of seven Federal Background Check Pilot Project states under the Medicare Modernization Act of 2004. As a pilot project state, Federal Centers for Medicaid and Medicare Services (CMS) has awarded \$5,000,000 over thirty months beginning in January 2005 to implement a model background check program consistent with federal requirements. The Michigan Criminal Background Checks Program is a collaborative partnership between CMS, Michigan Department of Community Health, Michigan Department of Human Services, Michigan State Police, and Michigan State University to expand and improve the criminal background checks for those employees working in or having direct client access in Michigan's long term care settings.

FISCAL INFORMATION:

Senate Bill 621 and Senate Bill 622, as reported out of the House Senior Health, Security, and Retirement Committee, have fiscal implications for state government. However, the fiscal implications for state government are anticipated to be offset by Medicaid and Medicare reimbursement funding, provided the Department of Community Health (DCH) secures the necessary federal approval or waiver. Furthermore, monetary sanctions in the proposed bills could conceivably offset some of the costs incurred by state government.

Senate Bill 621 (H-2) increases costs for the DCH due to imposition of new requirements for criminal history checks on employees of health facilities (nursing homes, county medical care facilities, hospices, hospitals that provides swing beds, homes for the aged, and home health agencies) by the Department of State Police, with notification through the DCH. The provisions of the bill will also increase regulatory and administrative costs for DCH, DHS, and the Departments of Information Technology and State Police as they require the development and distribution of model forms to health facilities, the establishment of an appeal process for individuals denied employment because of criminal history checks, the submission of written reports to the Legislature, the establishment of an automated fingerprint identification system database, and the development and implementation of electronic web-based system to assist health facilities in conducting criminal history checks. Senate Bill 622 (H-2) imposes similar costs on the Department of Human Services (DHS) for criminal history checks on employees and independent contractors of adult foster care facilities.

The DCH has received a 3-year grant of \$5.0 million to establish this criminal history check program on certain health facilities as a pilot, along with a number of other states, and to reimburse 100 percent of these costs. Following the grant period, the federal

funding is expected to be continued at the 100 percent reimbursement level, according to DCH.

ARGUMENTS:

For:

The Department of Community Health outlines six key features of the Background Checks Program:

*It would expand the scope of Michigan's laws and help to protect Michigan long-term care residents by ensuring that individuals with criminal backgrounds do not apply for employment at various long term care settings.

*It would strengthen the power and comprehensiveness of Michigan's criminal background checks to fully require compliance with all federal requirements and to require full federal fingerprint tests, state criminal checks, and checks of all state and national registries for findings of abuse, neglect and misconduct.

*It would provide due process by creating an appeal process and appeal rights for individuals wrongly denied employment.

*It would speed provide objective and rigorous evaluation of the effectiveness of the program by working with MSU and Federal CMS evaluators to assess the program's effectiveness in preventing prohibited individuals access to our vulnerable citizens and its efficiency in offering timely and accurate information to employers and job applicants.

Response:

While the concept of the more extensive FBI check compared to the State Police check is a good one, the new FBI check requirement may reduce the number of applicants for employment in adult foster care and home for the aged settings given the potentially intimidating nature of the fingerprinting process. It is important that the effectiveness of Michigan's new program for background checks be monitored to guard against adverse unintended consequences.

Against:

Critics argue that current law makes it difficult for many people to enter the health care field if there is any prior criminal background. Those convicted and imprisoned for check or welfare fraud are treated in the same way as someone convicted of rape or aggravated assault. The opportunity to appeal is an important aspect of the bill as it will allow a redress of an error that could have a negative impact on an individual for his or her lifetime. Although it is important to ensure the safety of all health care facility patients there also must be employment options for non-violent ex-offenders to ensure they can become contributing members of society.

Response:

In their current form, the bills provide for tiered system of classifying offenses, so that individuals who commit lesser offenses need to wait less time to be employable than those who commit more serious offenses.

POSITIONS:

Department of Community Health supports the bills. (1-24-06)

The Office of the Attorney General supports the bills with amendments. (1-24-06)

The Office of Children and Adult Licensing supports the bills but is still assessing the new language. (1-24-06)

AARP supports the bills. (1-24-06)

The Health Care Association of Michigan supports the bills. (1-24-06)

Michigan County Medical Care Facilities Council supports the bills (1-24-06)

Michigan Protection and Advocacy Services support the bills. (1-24-06)

The Service Employees International Union (SEIU) opposes the bills. (1-24-06)

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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.