

Legislative Analysis



CRIMINAL BACKGROUND CHECKS: HEALTH AND ADULT FOSTER CARE FACILITIES

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Senate Bill 621 (Substitute S-5)
Sponsor: Sen. Patricia L. Birkholz

Senate Bill 622 (Substitute S-5)
Sponsor: Sen. Tony Stamas

House Committee: Senior Health, Security, and Retirement
Senate Committee: Senior Citizens and Veterans Affairs

Complete to 1-23-06

A SUMMARY OF SENATE BILLS 621 & 622 AS PASSED BY THE SENATE 12-13-05

The bills would expand the requirements for criminal background checks for new employees at health facilities and agencies and adult foster care facilities. In each case, a request would be made to the Department of State Police to conduct a criminal history check, put the applicant's 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) to require criminal history checks on new employees of 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, 622 are tie-barred to each other and to House Bills 5166 and 5448.

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 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the necessary waiver and files a written notice, the existing sections of law dealing with background checks would be repealed.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.

Prohibited Employment

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 (except certain federal health care fraud and abuse felonies); 2) 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 immediately preceding 10 years (except for certain federal health care fraud and abuse felonies); 3) had been convicted of a relevant federal health care fraud and abuse crime; 4) 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; or 5) is the subject of an order or disposition under the section of the Code of Criminal Procedures dealing with findings of not guilty by reason of insanity.

Background Checks

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 for employment.

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. Within 24 months after the effective date of this section, an exempt individual would be required to provide the DSP a set of fingerprints and the DSP would be required to put those fingerprints into the AFIS database established under this act. Further, already employed individuals could transfer to another facility. If the individual was subsequently convicted, or found to have been convicted of a relevant crime or offense, he or she would no longer be exempt and could be denied employment or terminated from employment.

The background check provisions also would not apply to independent contractors 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. 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 as a conditional employee 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.

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 a fine of up to \$5,000, or both, and may be subject to civil liability for personal injury or death of another resident caused by an individual employed, independently contracted with, or granted clinical privileges within a facility or agency who would have been terminated or denied employment if the licensee, owner, administrator, or operator of that facility would have conducted the criminal history check as required.

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.

Reports to the Legislature

Under Senate Bill 621, the Department of Community Health 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 Medicaid and Medicare funding used to pay for and reimburse charges for conducting criminal history checks, and the amount of those funds remaining.

Under Senate Bill 622, the Department of Human Services would have to study the effect criminal history checks would have on volunteers and state agency employees, the potential for abuse in adult foster care facilities, and the status of federal funds being used to perform criminal history checks. Under both bills, the appropriate department would have to submit a written report to the Legislature within three years regarding a plan to continue criminal history checks if federal funding is not available (or adequate).

Appeal Procedure

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. The individual would need to file the appeal with the director of the department within 15 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 was 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. 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 department 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.

FISCAL IMPACT:

Senate Bill 621 (S-5), as passed by the Senate, has fiscal implications for state government. However, some of 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 potentially offset some of the costs incurred by state government.

Senate Bill 621 (S-5) 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 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, and the establishment of an automated fingerprint identification system database.

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.

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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.