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BILL



ANALYSIS

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House Bill 5168 (Substitute H-2 as passed by the House)  
Sponsor: Representative Paula K. Zelenko  
House Committee: Senior Health, Security, and Retirement  
Senate Committee: Senior Citizens and Veterans Affairs

Date Completed: 1-25-06

### **CONTENT**

The bill would amend the Public Health Code to delete and replace provisions pertaining to criminal background checks for employees, contractors, and clinicians of certain health facilities or agencies. The bill would do all of the following:

- Require an applicant for licensure or registration under the Code to submit his or her fingerprints to the Michigan Department of State Police (MSP) for a State and national criminal history background check.
- Allow a licensing board, upon good cause, to request a licensee or registrant to have a criminal background check.
- Require an applicant for licensure or registration to pay the costs of a background check and submit a nominal fee of up to \$2 to the Department of Community Health (DCH) for processing background checks.
- Require a person applying for license reinstatement or reclassification to undergo a background check.
- Prohibit a nursing home, county medical care facility, hospice, hospital that provides swing bed services, home for the aged, or home health agency (collectively referred to as a "health facility or agency") from employing, contracting with, or granting clinical privileges to a person who had been convicted of certain criminal offenses; had been the subject of a substantiated finding of neglect, abuse, or misappropriation of property; or was the subject of a court order or disposition regarding a finding of not guilty by reason of insanity.
- Require a health facility or agency to request a State and national criminal background check of applicants for positions involving regular and direct access to or direct care provided to patients or residents.
- Exempt employees, contractors, and clinicians from the background check requirements, if they were employed before the effective date of the proposed requirements.
- Require the costs of conducting employee, contractor, and clinician background checks to be paid by the DCH with Medicaid and Medicare funding.
- Allow a health facility or agency to employ or grant clinical privileges to an applicant on a conditional basis, before receiving the results of a background check.
- Restrict the use of criminal history information received under the bill to evaluating an applicant's qualifications, and prescribe a criminal penalty and a civil remedy for a violation.
- Require employees, contractors, and clinicians to report to the health facility or agency if they were convicted of a crime prohibiting employment, the subject of substantiated finding prohibiting employment, or found not guilty by reason of insanity.

- **Prescribe a criminal penalty for failing to conduct a background check required under the bill.**
- **Require the DCH to report to the Legislature on matters relating to the bill's criminal background check requirements.**
- **Require the DCH to establish an employment eligibility appeal board to hear and decide applications for appeal from people who had been disqualified from or denied employment under the current or proposed background check requirements.**

Section 20173a of the bill, which contains the proposed criminal background check provisions, would take effect 60 days after the DCH secured the necessary Federal approval or waiver to use Federal funds to enable it to pay for or reimburse the costs incurred by facilities for requesting a national criminal history check to be conducted by the FBI and filed with the Secretary of State a written notice that the Federal approval or waiver had been secured. Section 20173 of the Code, which contains the current criminal background check provisions, would be repealed at that time.

Section 20173b of the bill, which contains the appeal board provisions, would take effect on the date the bill was enacted.

#### Initial Licensure or Registration

The Code requires a licensing board to grant a license or registration to an applicant meeting the requirements for licensure or registration. A license-granting board may certify licensees in those health profession specialty fields within its scope of practice and reclassify licenses on the basis of a determination that the addition or removal of conditions or restrictions is appropriate. Under the bill, upon good cause, a board also could request that a licensee or registrant have a criminal history check conducted as the bill would require.

Beginning January 1, 2006, an applicant for initial licensure or registration under the Code would have to submit his or her fingerprints to the MSP to have a criminal history check conducted, and request that the MSP forward the fingerprints to the FBI for a national criminal history check. The

MSP would have to conduct a criminal history check and request the FBI to determine the existence of any national criminal history pertaining to the applicant. The applicant would have to submit a nominal fee, as determined by the DCH but not more than \$2, for the processing of criminal history background checks.

The MSP would have to provide the licensing board and the applicant with a written report of the criminal history check, including any criminal history record information on the applicant maintained by the MSP. The MSP also would have to forward the results of the FBI determination to the board and the applicant.

If there were any charges for fingerprinting, conducting the criminal history check, or an FBI determination, the applicant requesting the criminal history check would have to pay those charges.

Criminal history record information could be used only for the purpose of evaluating an applicant's qualifications for licensure or registration for which he or she applied. A member of the licensing board could not disclose the report or its contents to any person who was not directly involved in evaluating the applicant's qualifications for licensure or registration.

#### License Reinstatement

The Code allows a person whose license is limited, suspended, or revoked to apply to his or her licensing board or task force for a reinstatement of a revoked or suspended license or reclassification of a limited license. The bill would require an individual who sought reinstatement of a revoked or suspended license or reclassification of a limited license to have a criminal history check conducted, as would be required for initial licensure or registration. The person seeking reinstatement or reclassification would have to submit a copy of the results of the background check to the board with his or her application.

#### Employment Prohibition; Exemptions

A health facility or agency could not employ, independently contract with, or grant clinical privileges to an individual who regularly had direct access to or provided direct services to patients or residents in the health facility

or agency after the effective date of Section 20173a if the individual satisfied one or more of the following:

- Had been convicted of a relevant crime described in a provision of Federal law that excludes certain individuals and entities from participation in Medicare and State health care programs (42 USC 1320a-7).
- Had been convicted of a felony or an attempt or conspiracy to commit a felony, other than a felony for a relevant crime under 42 USC 1320a-7, unless 15 years had lapsed since the individual completed all of the terms and conditions of his or her sentencing, parole, and probation for that conviction before the date of application for employment or clinical privileges or the date of the execution of the independent contract.
- Had been convicted of a misdemeanor, other than a misdemeanor for a relevant crime under 42 USC 1320a-7, involving abuse, neglect, assault, battery, or criminal sexual conduct or involving fraud or theft, a misdemeanor under Part 74 (Offenses and Penalties) of the Public Health Code, or a substantially similar State or Federal crime, within 10 years immediately preceding the date of application for employment or clinical privileges or the date of the execution of the independent contract.
- Had been the subject of a substantiated finding of neglect, abuse, or misappropriation of property by the DCH pursuant to an investigation conducted under Federal law (42 USC 1395i-3 or 1396r).
- Was the subject of an order or disposition under Section 16b of Chapter IX of the Code of the Code of Criminal Procedure (a finding of not guilty by reason of insanity).

A health facility or agency could not employ, independently contract with, or grant privileges to an individual who regularly had direct access to or provided direct services to patients or residents in the health facility or agency after the effective date of Section 20173a until the facility or agency complied with the bill's requirements for requesting the MSP to conduct a criminal background check.

The bill's restrictions against employing, contracting, or granting clinical privileges

would not apply to an individual who was employed by, under independent contract to, or granted clinical privilege in a health facility or agency before the effective date of Section 20173a. An individual who was exempt under this provision would not be limited to working within the health facility or agency with which he or she was employed by, under independent contract to, or granted clinical privileges with on that date. He or she could transfer to another health facility or agency, provided that a criminal history check conducted in accordance with the bill did not indicate a prohibited offense. If an exempt individual subsequently were convicted of a crime prohibiting employment, found to be the subject of a substantiated finding prohibiting employment, or were found to be subject to a disposition of not guilty by reason of insanity, then he or she would be subject to the bill's employment restrictions and could be denied or terminated from employment.

The bill's restrictions against employing, contracting, or granting clinical privileges also would not apply to an individual who was an independent contractor with a health facility or agency if the services for which he or she was contracted were not directly related to the provision of services to a patient or resident or did allow for direct access but were not performed on an ongoing basis. This exception would include independent contractors who provided utility, maintenance, construction, or communications services.

An individual who applied for employment, either as an employee or as an independent contractor or for clinical privileges with a health facility or agency and had received a good faith offer of employment, an independent contract, or clinical privileges from the facility or agency would have to give written consent at the time of application for the MSP to conduct a criminal history check along with identification acceptable to the MSP.

#### Request for MSP & FBI Check

Upon receiving an applicant's written consent and identification, a health facility or agency that had made a good faith offer of employment, an independent contract, or clinical privileges would have to request the MSP to conduct a criminal history check on

the applicant and to forward his or her fingerprints to the FBI.

The request would have to be made in a manner prescribed by the MSP. The health facility or agency would have to make the written consent and identification available to the MSP. The facility or agency also would have to request the MSP to conduct a check of all relevant registries established pursuant to Federal regulations for any substantiated findings of abuse, neglect, or misappropriation of property. The applicant would have to give the MSP a set of fingerprints.

The MSP would have to request the FBI to make a determination of the existence of any national criminal history pertaining to the applicant.

The MSP also would have to conduct a criminal history check on the applicant and give the DCH a written report of the criminal history check, if the report contained any criminal history record information. The report would have to contain any criminal history record information on the applicant maintained by the MSP. The MSP also would have to provide the results of the FBI determination to the DCH within 30 days after the request was made. If the requesting health facility or agency were not a State department or agency and if a criminal conviction were disclosed on the FBI determination, the DCH would have to notify the health facility or agency and the applicant in writing of the type of crimes disclosed on the FBI determination, without disclosing the details of the crime. The notice would have to include a statement that the applicant had a right to appeal a decision made by the health facility or agency regarding his or her employment eligibility based on the criminal background check. The notice also would have to include information regarding where to file and describing the appellate procedure established under the bill.

If there were a charge for conducting the criminal history check, the charge would have to be paid by or reimbursed by the DCH with Medicaid and Medicare funding as appropriate. Any charges for fingerprinting or an FBI determination also would have to be paid by or reimbursed by the DCH with Medicaid and Medicare funding as appropriate. The health facility or agency

could not seek reimbursement for the charge from the individual who was the subject of the criminal history check.

#### Conditional Employment

If a health facility or agency determined it necessary to employ or grant clinical privileges to an applicant before receiving the results of the applicant's criminal history check, the facility or agency could conditionally employ or grant conditional clinical privileges to the person, if the facility or agency requested the criminal history check upon conditionally employing or conditionally granting clinical privileges and the individual signed a statement that indicated all of the following:

- He or she had not been convicted of one or more of the crimes prohibiting employment or clinical privileges within the applicable time period.
- He or she had not been the subject of a substantiated finding prohibiting employment or clinical privileges or an order of disposition for a finding of not guilty by reason of insanity.
- The individual agreed that, if the information in the criminal history check did not confirm his or her statements, his or her employment or clinical privileges would be terminated by the health facility or agency unless and until the individual appealed and could prove that the information was incorrect.
- He or she understood the conditions described above that would result in the termination of employment or clinical privileges and that those conditions were good cause for termination.

The health facility or agency would have to provide a copy of the results of the criminal history check to the applicant.

On the effective date of Section 20173a, the DCH would have to develop and distribute a model form for the statement. The DCH would have to make the model form available to health facilities or agencies subject to the bill, upon request and at no charge.

If an individual were employed as a conditional employee or an independent contractor, or were granted conditional clinical privileges, and the report did not confirm the individual's statement, the

health facility or agency would have to terminate the person's employment or clinical privileges. An individual who knowingly provided false information regarding criminal convictions or substantiated findings on a statement would be guilty of a misdemeanor punishable by up to 93 days' imprisonment, a maximum fine of \$500, or both.

#### Use of Criminal History Information

A health facility or agency could use criminal history record information obtained under the bill only for the purpose of evaluating an applicant's qualifications for employment, an independent contract, or clinical privileges in the position for which he or she had applied and for comparison to a statement for conditional employment. A facility or agency, or an employee of a facility or agency, could not disclose criminal history record information obtained under the bill to a person who was not directly involved in evaluating the applicant's qualifications for employment, an independent contract, or clinical privileges.

An individual who knowingly used or disseminated criminal history record information obtained under the bill in violation of the bill would be guilty of a misdemeanor punishable by up to 93 days' imprisonment, a maximum fine of \$1,000, or both. A person who suffered injury as a result of a violation could bring a civil cause of action for damages against the person who violated the bill.

Upon written request from another health facility or agency or adult foster care facility that was considering employing, independently contracting with, or granting clinical privileges to an individual, a health facility or agency or adult foster care facility that had obtained criminal history record information on that individual would have to share the information, with the applicant's consent, with the requesting health facility or agency or adult foster care facility. Except for a knowing or intentional release of false information, a health facility or agency or adult foster care facility would have no liability in connection with the release of criminal history record information.

#### Employee Self-Reporting

As a condition of continued employment, each employee, independent contractor, or individual granted clinical privileges would have to agree in writing to report to the health facility or agency immediately upon any of the following:

- Being convicted of one or more of the crimes prohibiting employment.
- Being the subject of a substantiated finding of neglect, abuse, or misappropriation of property.
- Being the subject of an order or disposition for a finding of not guilty by reason of insanity.

#### Failure to Conduct Background Check

In addition to other sanctions set forth in the Code, a licensee, owner, administrator, or operator of a nursing home, county medical care facility, hospice, hospital that provides swing bed services, home for the aged, or home health agency who knowingly and willfully failed to conduct the criminal history checks required under the bill would be guilty of a misdemeanor punishable by up to one year's imprisonment, a maximum fine of \$5,000, or both.

#### Reports to the Legislature

Within one year after the effective date of Section 20173a, the DCH would have to submit to the Legislature a written report regarding each of the following:

- The impact and effectiveness of the bill.
- The feasibility of implementing criminal history checks on volunteers who worked in those health facility or agencies and on State agency employees who were involved in the licensing of those health facilities or agencies and regulation of those employees.
- The amount of Medicaid and Medicare funding used to pay for or reimburse charges for conducting criminal history checks in accordance with the bill and the remaining amount of those funds.

Within three years after the effective date of Section 20173a, the DCH would have to submit to the Legislature a written report outlining a plan to cover the costs of the criminal history checks required under the bill if Federal funding were no longer

available or were inadequate to cover those costs.

### Appeal Board

The DCH would have to establish an employment eligibility appeal board. The appeal board would have to consist of the following members, appointed by the Governor:

- Two representatives of the DCH's Bureau of Health Systems who dealt primarily with the licensing of health facilities.
- Two representatives of the Department of Human Services who dealt primarily with the licensing of adult foster care facilities and homes for the aged.
- Two members representing the public.
- One member representing providers.
- One member representing organized labor groups.
- One member representing consumers of long-term care services.

The appeal board would have to hear and decide applications for appeal from individuals who had been disqualified from or denied employment by a health facility or agency or by an adult foster care facility, based on a criminal background check conducted pursuant to current Section 20173 or proposed Section 20173a.

Members of the appeal board would serve three-year, staggered terms or until a successor was appointed. If a vacancy occurred on the appeal board, the Governor would have to make an appointment for the unexpired term in the same manner as the original appointment. Members of the appeal board would serve without compensation, except that they could be reimbursed for actual and necessary expenses.

An individual who had been convicted of a relevant crime under 42 USC 1320a-7 would not have a right to appeal a denial of his or her employment. An individual who was convicted of a felony, other than a relevant crime under 42 USC 1320a-7, involving abuse, neglect, assault, battery, or criminal sexual conduct or involving fraud or theft against a vulnerable adult or a State or Federal crime substantially similar to such a felony, would not have the right to appeal a denial of his or her employment unless three years had lapsed since he or she completed

all of the sentencing requirements for that conviction, including probation, parole, and restitution.

The DCH could charge a fee to cover the cost of an appeal. The DCH would have to promulgate rules to implement the bill's appeal board provisions and could promulgate rules to provide for an expedited administrative appeals process for certain nonviolent crimes. The appeal board would have to hear all appeals within 60 days of receiving an application for appeal. If the appeal board found, upon clear and convincing evidence, that the individual was wrongfully disqualified from or denied employment, the board could grant the appellant a certificate of employability. The appeal board could impose any conditions or limitations on that certificate as it determined necessary to protect the health and safety of patients or residents.

### Repealer

Section 20173 of the Code, which was added by Public Act 303 of 2002, prohibits a nursing home, county medical care facility, or home for the aged from employing, independently contracting with, or granting clinical privileges to an individual who regularly provides direct services to patients or residents in such a health facility or agency if the individual has been convicted of one or more of the following:

- A felony or an attempt or conspiracy to commit a felony within 15 years immediately preceding the date of application for employment or clinical privileges or the date of the execution of the independent contract.
- A misdemeanor involving abuse, neglect, assault, battery, or criminal sexual conduct or involving fraud or theft against a vulnerable adult, or a substantially similar State or Federal crime, within 10 years immediately preceding the date of application for employment or clinical privileges or the date of the execution of the independent contract.

Under Section 20173, an applicant must give consent to a background check, and the health facility or agency must pay the cost of the background check.

The bill would repeal this section upon the effective date of Section 20173a.

MCL 333.16146 et al.

Legislative Analyst: Patrick Affholter

### **FISCAL IMPACT**

The bill would have a negative fiscal impact upon local government. Public nursing homes and county medical care facilities would see increased administrative costs associated with processing criminal history requests for job applicants.

The State would incur some administrative expense associated with managing the criminal background check process, administering an appeals process for individuals denied employment, and meeting the reporting requirements proposed by the bill. Fees authorized in this legislation would offset some of this cost.

Criminal history fingerprint background checks cost \$54 each. Background check costs required by an applicant for an initial license or registration or renewal of same would have to be paid by the applicant under the bill.

The background check costs for employees would have to be paid by the Department of Community Health with Medicaid or Medicare funding as appropriate. The DCH has received a grant from the Federal Centers for Medicare and Medicaid Services for \$5.0 million to provide criminal background checks for nursing home and adult foster care employees. This grant would cover costs of providing criminal background checks from 2005 through 2007.

There are no data to indicate how many individuals would be convicted of the proposed misdemeanors. Local government would incur the cost of incarceration in a local facility, which varies by county. Additional penal fine revenue would benefit public libraries.

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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.