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 BILL ANALYSIS

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Senate Bills 1253, 1254, and 1255 (as enacted)  
Sponsor: Senator Patricia L. Birkholz (S.B. 1253)  
Senator Tony Stamas (S.B. 1254)  
Senator Buzz Thomas (S.B. 1255)  
Senate Committee: Health Policy  
House Committee: Senior Health, Security, and Retirement

**PUBLIC ACTS 291-293 of 2010**

Date Completed: 2-7-11

**CONTENT**

**Senate Bill 1253** amended the Public Health Code to revise provisions related to criminal background checks for people who are employed by, work under contract for, or have clinical privileges with certain health facilities and agencies. The bill does the following:

- Prohibits a covered facility from employing or contracting with a person, or granting clinical privileges to a person, who has direct access to patients or residents until it has conducted a criminal background check *or* has received criminal history record information.
- Requires a covered facility or a staffing agency to request criminal history information from a licensing or regulatory department, and allows the facility or agency to rely on that information if the applicant meets requirements regarding a previous criminal history check, continuous employment, and Michigan residency.
- Prohibits a covered facility from allowing a person who is conditionally employed or granted conditional privileges to have direct access to patients or residents without supervision, unless certain conditions are met.

**Senate Bills 1254 and 1255** amended the Adult Foster Care Facility Licensing

**Act and the Mental Health Code, respectively, to make changes similar to those made by Senate Bill 1253.**

**Under all of the bills, a criminal history check conducted under any of the three statutes meets the requirement for a criminal history check under all of the statutes.**

The bills took effect on December 16, 2010, and were tie-barred to each other.

**Senate Bill 1253**Employment Restrictions

Under Section 20173a of the Public Health Code, as amended by the bill, and except as otherwise provided, a covered facility may 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 in the facility if he or she has been convicted of a relevant crime described in Federal law or a felony or misdemeanor specified in the Code, or engages in conduct that becomes the subject of a substantiated finding of neglect, abuse, or misappropriation of property.

Previously, this provision applied to a health facility or agency that is a nursing home, county medical care facility, hospice, hospital that provides swing bed services, home for the aged, or home health agency,

rather than a covered facility. The bill's definition of "covered facility" refers to those facilities and agencies.

The bill also prohibits a covered facility from employing, independently contracting with, or granting privileges to a person who has direct access or provides direct services to patients or residents until it has a criminal history check conducted in compliance with Section 20173a *or* has received criminal history record information in compliance with provisions of that section. Previously, a health facility or agency could not employ, contract with, or grant privileges to such a person until it had a criminal history check conducted.

Under the bill, a criminal history check conducted in compliance with Section 20173a refers to a criminal history check conducted under that section or under Section 34b of the Adult Foster Care Facility Licensing Act or Section 134a of the Mental Health Code (the sections amended by Senate Bills 1254 and 1255, respectively).

#### Criminal History Check or Info Request

Previously, a person who applied for employment as an employee or independent contractor or applied for clinical privileges with a facility and who received a good faith offer of employment, an independent contract, or clinical privileges had to give written consent for the Michigan Department of State Police (MSP) to conduct an initial criminal history check, along with identification acceptable to the MSP.

Under the bill, this requirement applies to an individual who applies for employment or for clinical privileges with a staffing agency or a covered facility and who has not been the subject of a criminal history check conducted in compliance with Section 20173a. (The bill defines "staffing agency" as an entity that recruits candidates and provides temporary and permanent qualified staffing for covered facilities, including independent contractors.) If the applicant has been the subject of a criminal history check under Section 20173a, he or she must give written consent at the time of application for the covered facility or staffing agency to obtain his or her criminal history record information from the relevant licensing or regulatory department and for the MSP to conduct a criminal history check

if the applicant does not meet requirements regarding a previous check, continuous employment by the staffing agency or a facility, and Michigan residency, and a request to the FBI for a determination of any national criminal history pertaining to the applicant is necessary; the applicant also must provide identification acceptable to the MSP.

Upon receiving the written consent, the staffing agency or covered facility that has made a good faith offer of employment, a contract, or clinical privileges to the applicant must request the criminal history record information from the relevant licensing or regulatory department and request it to conduct a check of all relevant registries established under Federal and State law for any substantiated findings of abuse, neglect, or misappropriation of property regarding that applicant.

If the requirements regarding a previous criminal history check, continuous employment, and Michigan residency are not met and a request to the FBI for a subsequent determination of any national criminal history is necessary, the covered facility or staffing agency must request the MSP to conduct a criminal history check and forward the applicant's fingerprints to the FBI. A staffing agency that employs an individual who regularly has direct access to or provides direct services to patients or residents under an independent contract with a covered facility must submit information regarding the criminal history check it conducted to the covered facility that has made a good faith offer of independent contract to the applicant.

Under Section 20173a, upon receiving an applicant's written consent to conduct a criminal history check, a facility that has made a good faith offer to the applicant must request the MSP to conduct the criminal history check, enter the applicant's fingerprints in the MSP's automated fingerprint identification system (AFIS) database, and forward the fingerprints to the FBI. The MSP must request the FBI to determine the existence of any national criminal history pertaining to the applicant. The facility must request the relevant licensing or regulatory department to conduct a check of all relevant registries established pursuant to Federal and State law and regulations for any substantiated

findings of abuse, neglect, or misappropriation of property.

The MSP must conduct a criminal history check on the applicant named in the request and give the Department of Community Health (DCH) a written report containing any criminal history record information on the applicant maintained by the MSP. In addition, the MSP must provide the results of the FBI investigation determination to the DCH within 30 days after the request is made.

If the requesting facility is not a State department or agency and if a criminal conviction is disclosed on the MSP's written report or the FBI's determination, the DCH must notify the facility and the applicant of the type of crime disclosed without disclosing its details.

The bill retained all of these provisions.

Also, if the MSP or the FBI charges a fee for conducting a criminal history check, the facility must pay the charge and may not seek reimbursement from the individual who is subject to the check. Under the bill, this applies to a covered facility or staffing agency.

#### Licensing or Regulatory Department Review

Under the bill, upon an applicant's consent and upon request from a staffing agency or covered facility that has made a good faith offer of employment or an independent contract or clinical privileges to the applicant, the relevant licensing or regulatory department must review the criminal history record information, if any, and notify the requesting agency or facility of the information.

Until the FBI implements an automatic notification system similar to the system required of the MSP, and Federal regulations allow the Federal criminal record to be used for subsequent authorized uses, as determined in an order issued by the DCH, a staffing agency or covered facility may rely on the criminal history record information provided by the relevant licensing or regulatory department, and a request to the FBI to make a subsequent determination of the existence of any national criminal history pertaining to the applicant is not necessary if all of the following conditions are met:

- The criminal history check was conducted during the immediately preceding 12-month period.
- The applicant can provide evidence acceptable to the relevant licensing or regulatory department that he or she has been a Michigan resident for the immediately preceding 12-month period.
- The applicant has been continuously employed by the staffing agency or a covered facility, adult foster care facility, or mental health facility since the check was conducted or meets this requirement other than being on layoff status for less than one year from a covered facility, adult foster care facility, or mental health facility.

Previously, upon written request from another health facility or agency, psychiatric facility or intermediate care facility for people with mental retardation, or adult foster care facility, that was considering employing, independently contracting with, or granting clinical privileges to an individual, a facility or agency that obtained criminal history record information on that person was required, with the applicant's consent, to share that information with the requesting facility or agency. The bill deleted this language.

#### Conditional Employment or Privileges

Under Section 20173a, if a facility determines that it is necessary to employ or grant clinical privileges to an applicant before receiving the results of his or her criminal history check--or, under the bill, before it receives criminal history record information--the facility may conditionally employ the person or grant conditional privileges if the facility and the individual meet certain requirements.

Under the bill, in addition to meeting the other requirements, the covered facility may not permit the individual to have regular direct access to or provide direct services to patients or residents until the criminal history check or criminal history record information is obtained and the individual is eligible for the employment or privileges. If required, the covered facility must provide on-site supervision of an individual in the facility on a conditional basis by someone who has undergone a criminal history check. The covered facility may permit the individual to have regular direct access to or

provide direct services to patients or residents without supervision if all of the conditions described below are met.

At its own expense and before the individual has direct access or provides direct services to patients or residents, the covered facility must conduct a search of public records on that individual through the MSP's internet criminal history access tool (ICHAT), and the results may not uncover any information that would indicate that the individual is not eligible to have regular direct access or provide direct services to patients or residents.

Before the individual has direct access or provides direct services to patients or residents of the covered facility, the individual must sign a statement that he or she has resided in this State without interruption for at least the immediately preceding 12-month period.

If applicable, the individual must give the MSP a set of fingerprints within 10 business days after the date he or she was conditionally employed or granted conditional privileges.

#### Exceptions

The Public Health Code's criminal history check requirements and the prohibition against employing, contracting with, or granting clinical privileges to an individual convicted of a disqualifying crime do not apply to certain people, including an individual who was employed by, under independent contract to, or granted clinical privileges in a facility before April 1, 2006.

Previously, the Code required the person to give the MSP a set of fingerprints for entry into its AFIS database, beginning April 1, 2011. Under the bill, on or before that date, a person who is exempt and who has not been the subject of a criminal history check must give the MSP a set of fingerprints.

Previously, a person exempt under this provision could transfer to another facility or agency that was under the same ownership. If the person wished to transfer to a facility or agency that was not under the same ownership, he or she could do so if the new facility or agency conducted a criminal history check. The bill, instead, allows the person to transfer to another covered

facility, adult foster care facility, or mental health facility (regardless of ownership).

Under the Code, if an exempt person is subsequently convicted of a disqualifying crime or found to be the subject of a substantiated finding of abuse, neglect, or misappropriation of property, he or she is no longer exempt and must be terminated from employment or denied employment. Under the bill, the person also must be denied clinical privileges.

The Code also exempts an independent contractor with a facility if the services for which he or she is contracted are not directly related to the provision of services to a patient or resident or if the services allow for direct access to patients or residents but are not performed on an ongoing basis. Under the bill, this exception applies to an independent contractor who is not under the facility's control. The bill defines "under the facility's control" as an individual employed by or under independent contract with a covered facility for whom the facility 1) determines whether the person who has access to patients or residents may provide care, treatment, or other similar support service functions to patients or residents served by the facility; and 2) directs or oversees at least one of the following:

- The policy or procedures the individual must follow in performing his or her duties.
- The tasks he or she performs.
- The individual's work schedule.
- The supervision or evaluation of the person's work or job performance, including imposing discipline or granting performance awards.
- The compensation the individual receives for performing his or her duties.
- The conditions under which the individual performs his or her duties.

#### Automated Fingerprint Database

The Code requires the MSP to establish an automated fingerprint identification system database that allows the MSP to store and maintain all fingerprints submitted under Section 20173a and provides for an automatic notification if a subsequent criminal arrest fingerprint card submitted into the system matches a set of fingerprints submitted previously.

Upon notification, the MSP immediately must notify the DCH, which must immediately contact the facility with which the individual is associated. The bill also requires the DCH to contact each staffing agency with which the individual is associated.

#### Electronic Web-Based System

The Code requires the DCH and the MSP to maintain an electronic web-based system to assist facilities required to conduct relevant registry and criminal history checks and to provide for automated notice to those facilities for people entered in the system who, since the initial criminal history check, have been convicted of a disqualifying offense or have been the subject of a substantiated finding of abuse, neglect, or misappropriation of property. Under the bill, the system must assist staffing agencies and covered facilities required to check registries and conduct criminal history checks of employees, independent contractors, and individuals granted clinical privileges.

Also, the bill allows the DCH to charge a staffing agency a one-time set-up fee of up to \$100 for access to the system.

#### Convictions

As indicated above, the employment restrictions of Section 20173a apply to a person who is convicted of a relevant crime under Federal law or a specified felony or misdemeanor.

The bill defines "convicted", for a crime that is not a relevant crime, as a final conviction, the payment of a fine, a plea of guilty or no contest if accepted by the court, or a finding of guilt for a criminal law violation or a juvenile adjudication or disposition by the family court for a violation that would be a crime if committed by an adult.

For a relevant crime described under 42 USC 1320a-7(a), "convicted" means that term as defined in that section. (That section of the U.S. Code refers to program-related crimes (i.e., offenses related to the delivery of an item or service under a Federal or state health care program), patient abuse crimes, health care fraud felonies, and controlled substance felonies. An individual is considered to have been "convicted" of a criminal offense under circumstances described in that statute.)

### **Senate Bills 1254 and 1255**

Section 34b of the Adult Foster Care Facility Licensing Act and Section 134a of the Mental Health Code both contain provisions that parallel those found in Section 20173a of the Public Health Code. The bills amended those provisions in virtually the same manner as Senate Bill 1253 amended Section 20173a. Senate Bill 1254 applies to adult foster care facilities, and Senate Bill 1255 applies to psychiatric facilities and intermediate care facilities for people with mental retardation, and both bills extend requirements to staffing agencies. The bills also make different changes in regard to exempt individuals.

The employment restrictions under the Adult Foster Care Facility Licensing Act and the Mental Health Code do not apply to an individual who was employed by or under contract to a facility before April 1, 2006. Previously, beginning on April 1, 2009, the Act required an exempt individual to give the MSP a set of fingerprints for entry into AFIS. Under Senate Bill 1254, instead, an exempt individual who has not been the subject of a criminal history check conducted in compliance with Section 34b must give the MSP a set of fingerprints on or before April 1, 2011.

The Mental Health Code had required an exempt individual, by April 1, 2011, to give the MSP a set of fingerprints for entry into AFIS. Under Senate Bill 1255, this applies to an exempt individual who has not been the subject of a criminal history check conducted in compliance with Section 134a.

Under each bill, a criminal history check conducted in compliance with the applicable section refers to a criminal history check conducted under Section 20173a of the Public Health Code, Section 34b of the Adult Foster Care Facility Licensing Act, or Section 134a of the Mental Health Code.

MCL 333.20173a (S.B. 1253)  
400.734b (S.B. 1254)  
330.1134a (S.B. 1255)

Legislative Analyst: Suzanne Lowe

## **FISCAL IMPACT**

### **Senate Bill 1253**

The bill includes provisions that will permit individuals seeking employment in a covered facility to demonstrate compliance with criminal history requirements through criminal history checks completed by other State agencies. To the extent that these provisions are less administratively burdensome than the processing of new criminal history checks, the State may see minor, indeterminate cost savings. To the extent that covered facilities are affiliated with local units of government, provisions that permit the use of already complete criminal history checks to meet State requirements may lead to small cost savings.

### **Senate Bills 1254 and 1255**

The bills will have no fiscal impact on State or local government.

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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.