

CHAPTER 303
FORMERLY
SENATE BILL NO. 216
AS AMENDED BY
SENATE AMENDMENT NO. 1

AN ACT TO AMEND TITLE 29 AND TITLE 16 OF THE DELAWARE CODE BY ESTABLISHING AN ELECTRONIC WEB-BASED BACKGROUND CHECK CENTER FOR EMPLOYMENT IN LONG TERM CARE OR COMMUNITY SETTINGS.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELAWARE:

Section 1. Amend Subchapter VI, Title 29 of the Delaware as follows:

§7972. Background Check Center.

(a) Purpose

(1) It is the purpose of this Section to establish an electronic system (Background Check Center) for the consolidation of various data streams necessary to provide a prospective employer or a current employer with information related to the suitability for employment of a person who provides care or services:

(A) In any capacity, including as an employee, an agent, or an independent contractor working in a nursing facility or similar facility licensed pursuant to 16 Del.C. Ch. 11.

(B) As an employee of a hospice agency, a home health agency, or a personal assistance services agency (Home Care Agency) licensed pursuant to 16 Del. C. §122(3)(m) and §122(3)(o) and §122(3)(x) working in an Private Residence.

(2) It is the further purpose that the Background Check Center be self-supporting after the initial construction and initial operational phase.

(3) Utilization of the Background Check Center by an employer is mandatory to ensure that all persons working in a nursing facility or similar facility or for a Home Care Agency are subject to comprehensive screening and updating of their criminal record.

(4) The Background Check Center must be a reliable source of information which enables prompt decision making.

(5) Each person screened through the Background Check Center shall have a right of Appeal.

(b) Definitions.

As used in this chapter:

(1) "Background Check Center (BCC)" means the electronic system which combines the data streams from various sources within and outside the State of Delaware in order to assist an employer in determining the suitability of a person for employment in a nursing facility or similar facility, or Home Care Agency.

(2) "Department" means the Department of Health and Social Services (DHSS).

(3) "Employer" is a person or other legal entity which employs people to work in a nursing facility or similar facility licensed pursuant to 16 Del.C. 1103, or for a Home Care Agency, as defined below.

(4) "Home Care Agency" includes all programs or agencies licensed pursuant to 16 Del.C. §122(3)(m), or §122(3)(o), or §122(3)(x).

(5) "Nursing Facility or Similar Facility" means any nursing facility or similar facility licensed pursuant to 16 Del.C. Ch. 11, including but not limited to nursing facilities (commonly referred to as nursing homes), assisted living facilities, intermediate care facilities for persons with intellectual disability, neighborhood group homes, family care homes, rest residential facilities, and intensive behavioral support and education residences.

(6) "Private Residence" means the domicile of the individual in need of care, either personally owned by that individual or considered the place of residence of that individual. A Private Residence does not include those healthcare facilities licensed by the Department of Health and Social Services under 16 Del.C. Chapter 11.

(c) Mandatory participation.

All Employers who are required to secure Criminal Background Checks pursuant to 16 Del.C. §1141 or §1145 must process all applicants for employment through the BCC.

(d) Assessment of cost.

The Department's Division of Management Services, with the approval of the Secretary of Health and Social Services, shall establish the appropriate fee to collect from BCC users. The fee shall approximate and reasonably reflect all costs

necessary to defray the maintenance, operation, and development of the BCC after September 30, 2012. At the beginning of each calendar year the Division of Management Services, or any other state agency acting in its behalf, shall compute the appropriate fee and determine the effective date of any fee modification. All revenue generated pursuant to this section shall be deposited in a special BCC fund account in the Division of Management Services.

(e) Appeal.

Due process protections of notice and opportunity to be heard shall be provided to an applicant for employment who wishes to appeal BCC errors, or to appeal the imposition of sanctions under 16 Del.C §1141 or §1145. The hearing process shall be consistent with the Administrative Procedures Act, Chapter 101 of Title 29.

Section 2. Amend §§ 1141 and 1142, Title 16 of the Delaware Code as follows:

Subchapter IV. Criminal Background Checks; Mandatory Drug Screening; Nursing Home Compliance with Title XIX of the Social Security Act

§1141. Criminal background checks.

(a) Purpose. The purpose of the criminal background check and drug screening requirements of this section and § 1142 of this title is the protection of the safety and well-being of residents of nursing facilities and similar facilities licensed pursuant to this chapter. These sections shall be construed broadly to accomplish this purpose.

(b) Definitions.

(1) "Applicant" means any of the following:

(A) A person seeking employment in a Facility, as defined below;

(B) A current employee of a Facility who seeks a promotion in the facility;

(C) A self-employed person or a person employed by an agency for work in a Facility;

(D). A current employee of a Facility or a person as defined in (C) above who the Department of Health and Social Services has a reasonable basis to suspect has been arrested for a disqualifying crime since becoming employed or commencing work;

(E) A former employee who consents prior to leaving employment to periodic review of his or her criminal background for a fixed time period.

(2) "Background Check Center (BCC)" means the electronic system which combines the data streams from various sources within and outside the State of Delaware in order to assist an employer in determining the suitability of a person for employment in a nursing facility or similar facility.

(3) "Criminal History" means a report from the Department of Health and Social Services regarding its review of the Applicant's entire federal criminal history from the Federal Bureau of Investigation, pursuant to Public Law 92-544 as amended (28 U.S.C. 534) and his or her Delaware record from the State Bureau of Identification.

(4) "Department" means the Department of Health and Social Services (DHSS).

(5) "Facility" means any facility licensed pursuant to this chapter, including but not limited to nursing facilities (commonly referred to as nursing homes), assisted living facilities, intermediate care facilities for persons with intellectual disability; neighborhood group homes, family care homes, rest residential homes, intensive behavioral support and educational residences; retirement homes and rehabilitation homes with such terms to have such meaning as set forth in this title or, if not defined therein, as such terms are commonly used.

(6) "Grandfathered Employee" means an employee of a Facility who was not fingerprinted pursuant to this statute because the employment commenced before the effective date of the statute (March 31, 1999), and no requirement for fingerprinting has since applied (see (b) (1) above).

(7) "SBI" means the State Bureau of Identification.

(c) No employer may employ an Applicant for work in a Facility before obtaining a Criminal History. The Criminal History of any person not employed directly by the Facility must be provided to the Facility upon the person's commencement of work.

(d) Conditional hire. -- The requirements of subsection (c) of this section may be suspended for sixty (60) days if the employer wishes to employ the Applicant on a conditional basis. Before an employer may offer conditional employment, the employer must receive verification that the Applicant has been fingerprinted by the SBI for purposes of the Criminal History. No Criminal History will be issued if the Applicant fails to provide information to DHSS

regarding the status or disposition of an arrest within forty-five (45) days from the date of notice from DHSS of an open criminal charge. DHSS may extend the time limits for good cause shown.

(e) No employer is permitted to employ or continue to employ a person with a conviction deemed disqualifying by DHSS's regulations.

(f) Any employer who employs an Applicant and fails to secure a Criminal History shall be subject to a civil penalty of not less than \$1,000 nor more than \$5,000 for each violation. An employer is also subject to this penalty if that employer conditionally employs an Applicant before receiving verification that the Applicant has been fingerprinted for purposes of the Criminal History.

(g) The Criminal History provided to the employer is strictly confidential. It may be used solely to determine the suitability of an Applicant for employment or continued employment in a Facility. It must be stored in a manner that maintains its confidentiality.

(h) No Applicant is permitted to be employed in a Facility, other than conditionally pursuant to (d) above, until the Applicant's employer has secured the Applicant's Criminal History.

(i) Before an Applicant is permitted to be employed in a Facility, the Applicant must, upon request:

(1) Provide accurate information sufficient to secure a Criminal History;

(2) Execute a full release to enable the employer to secure a Criminal History and to update the Criminal History while employed;

(3) Execute a full release giving the employer permission to provide the Criminal History to the facility where the work is to be performed if the employer is other than the Facility.

(j) An Applicant who fails to comply with (i) is subject to a civil penalty of not less than \$1,000 nor more than \$5,000 for each violation.

(k) All Grandfathered Employees must be fingerprinted by the SBI within 120 days from the date of BCC implementation. SBI:

(1) Shall use the fingerprints to establish the Grandfathered Employee's identity and to assign an SBI identification number for the sole purpose of enabling the person's criminal record to be monitored for new arrests while the Grandfathered Employee continues to work at a Nursing Facility or Similar Facility;

(2) Shall not secure a state or federal criminal history on the Grandfathered Employee unless the Grandfathered Employee is also an Applicant as defined in Section (b) (1) above;

(3) Shall comply with Title 11 Del.C. §1911.

(l) No employer is permitted to continue to employ a Grandfathered Employee who has not been fingerprinted within 120 days from the date of BCC implementation and assigned an SBI number.

(m) DHSS shall promulgate regulations regarding:

(1) The criteria it uses to determine unsuitability for employment;

(2) The policies and procedures for preparing the Criminal History which govern the frequency of criminal record review and updating;

(3) The frequency with which fingerprints must be obtained;

(4) The information that DHSS provides in the Criminal History about disqualifying and non-disqualifying criminal convictions;

(5) The methods for notifying Applicants and employers of the results of DHSS's review, and for providing Applicants with the Criminal History;

(6) The administrative review process available to a person desiring to contest adverse information;

(7) Other provisions required to achieve the purpose of this Section.

§1142. Mandatory drug screening.

(a) No employer is permitted to employ an Applicant, as defined in § 1141 of this Subchapter, without first obtaining the results of that Applicant's mandatory drug screening.

(b) All Applicants, as defined in § 1141 of this Subchapter, must submit to mandatory drug screening, as specified by regulations promulgated by the Department of Health and Social Services (DHSS).

(c) DHSS shall promulgate regulations regarding the pre-employment testing of all applicants for use of the following illegal drugs:

- (1) Marijuana/cannabis;
- (2) Cocaine;
- (3) Opiates;
- (4) Phencyclidine ("PCP");
- (5) Amphetamines;
- (6) Any other illegal drug specified by DHSS, pursuant to regulations promulgated pursuant to this section.

(d) An agency, including but not limited to temporary agencies, must provide the drug screening results it receives regarding an Applicant referred to work in a Facility, as defined in § 1141 of this Subchapter, to that particular Facility so that the facility is better able to make an informed decision whether to accept the referral.

(e) The employer must provide confirmation of the drug in the manner prescribed by DHSS's regulations.

(f) Any employer who fails to comply with the requirements of this section is subject to a civil penalty of not less than \$1,000 nor more than \$5,000 for each violation.

Section 3. Amend §§ 1145 and 1146, Title 16 of the Delaware Code as follows:

§1145. Criminal background checks.

(a) Purpose. –The purpose of the criminal background check and drug screening requirements of this section and § 1146 of this title is the protection of the safety and well-being of residents of this State who use the services of home health agencies, hospice agencies, or personal assistance services agencies licensed pursuant to this title or who employ a person to provide care in a Private Residence, as defined below. These sections shall be construed broadly to accomplish this purpose.

(b) Definitions.

(1) "Applicant" means any of the following:

(A) A person seeking employment with an Employer, as defined below;

(B) A current employee who seeks a promotion from an Employer, as defined below;

(C) A self-employed person seeking employment in a Private Residence for the purpose of providing services to protect the health, safety and well-being of an individual who requires home health care service as defined in 16 Del.C. §122(3)o.

(D) A current employee of an employer as defined below who DHSS has a reasonable basis to suspect has been arrested for a disqualifying crime since becoming employed.

(E). A former employee who consents prior to leaving employment to periodic review of his or her criminal background for a fixed time period.

(2) "Criminal History" means a report from the Department of Health and Social Services regarding its review of the Applicant's entire federal criminal history from the Federal Bureau of Investigation, pursuant to Public Law 92-544 as amended (28 U.S.C. 534) and his or her Delaware record from the State Bureau of Identification.

(3) "Background Check Center (BCC)" means the electronic system which combines the data streams from various sources within and outside the State of Delaware in order to assist an employer in determining the suitability of a person for employment in a nursing facility or similar facility, or Home Care Agency.

(4) "Department" means the Department of Health and Social Services (DHSS).

(5) "Employer" means: a home care agency as defined in this section; a management company that contracts to provide services on behalf of a home care agency; or other business entity (including but not limited to a temporary employment agency) that contracts to provide services on behalf of a home care agency.

(6) "Grandfathered Employee" means an employee of an Employer who was not fingerprinted pursuant to this statute because the employment commenced before the 2001 effective date of the statute, and no requirement for fingerprinting has since applied. See (b) (1) above.

(7) "Home Care Agency" includes all programs or agencies licensed pursuant to 16 Del.C. §122(3)(m), or §122(3)(o), or §122(3)(x) that provide services to individuals in their Private Residence, as defined below.

(8) "Private Residence" means the domicile of the individual in need of care, either personally owned by that individual or considered the place of residence of that individual. A Private Residence does not include those healthcare facilities licensed by the Department of Health and Social Services under 16 Del.C. , Chapter 11.

(9) "SBI" means the State Bureau of Identification.

(c) No employer is permitted to employ an Applicant for work in a private residence before getting a Criminal History. Upon request the Criminal History must be provided to the person for whom the services are to be provided, or to the person's guardian, agent for health care decisions, or surrogate upon the Applicant's commencement of work.

(d) A private individual seeking to hire or employ a self-employed individual to provide services in a Private Residence may secure access to the BCC from DHSS. The BCC user fee shall be set by regulation, but may not exceed that charged to an Employer. The cost of the criminal background check from SBI and/or drug screening shall be borne by the person making the request.

(e) Conditional hire. -- The requirements of subsection (c) of this section may be suspended for sixty (60) days from the date of hire if the employer wishes to employ the Applicant on a conditional basis. Before an employer may offer conditional employment, the employer must receive verification that the Applicant has been fingerprinted by the SBI for purposes of the Criminal History. No Criminal History will be issued if the Applicant fails to provide information to DHSS regarding the status or disposition of an arrest within forty-five (45) days from the date of notice from DHSS of an open criminal charge. DHSS may extend the time limits for good cause shown.

(f) No employer other than a private person is permitted to employ or continue to employ an individual with a conviction deemed disqualifying by DHSS regulations.

(g) Any employer other than a private person who employs an Applicant and fails to secure a Criminal History shall be subject to a civil penalty of not less than \$1,000 nor more than \$5,000 for each violation. An employer is also subject to this penalty if that employer conditionally employs an Applicant before receiving verification that the Applicant has been fingerprinted for purposes of the Criminal History.

(h) The Criminal History provided to the employer is strictly confidential. It may be used solely to determine the suitability of an Applicant for employment or continued employment in a private residence.

(i) No Applicant is permitted to be employed by an Employer other than conditionally pursuant to (e) above, until the Applicant's Employer has secured the Applicant's Criminal History.

(j) Before an Applicant is permitted to be employed by an Employer, the Applicant must, upon request:

(1) Provide accurate information sufficient to secure a Criminal History;

(2) Execute a full release to enable the Employer to secure a Criminal History and to update the Criminal History while employed;

(3) Execute a full release giving the Employer permission to provide the Criminal History to the person for whom the services are to be provided, or to the person's guardian, agent for health care decisions, or surrogate.

(k) An Applicant who fails to comply with (j) is subject to a civil penalty of not less than \$1,000 nor more than \$5,000 for each violation.

(l) All Grandfathered Employees must be fingerprinted by SBI and be registered in the BCC within 120 days from the date of BCC implementation. SBI:

(1) Shall use the fingerprints to establish the Grandfathered Employee's identity and to assign an SBI identification number for the sole purpose of enabling the person's criminal record to be monitored for new arrests while employed in a private residence.

(2) Shall not secure a state or federal criminal history on the Grandfathered Employee, unless the Grandfathered Employee is also an Applicant as defined in Section (b) (1) above;

(3) Shall comply with Title 11 Del.C. §1911.

(m) No employer is permitted to continue to employ a Grandfathered Employee who has not been fingerprinted and assigned an SBI number within 120 days from the date of BCC implementation.

(n) DHSS shall promulgate regulations regarding:

(1) The criteria it uses to determine unsuitability for employment;

- (2) The policies and procedures for preparing the Criminal History which govern the frequency of criminal record review and updating;
- (3) The frequency with which fingerprints must be obtained;
- (4) The information that DHSS provides in the Criminal History about disqualifying and non-disqualifying criminal convictions;
- (5) The methods for notifying Applicants and employers of the results of DHSS's review, and for providing Applicants with the Criminal History;
- (6) The administrative review process available to a person desiring to contest adverse information;
- (7) Other provisions required to achieve the purpose of this Section.

§1146. Mandatory drug screening.

(a) Definitions.

- (1) "Applicant" is defined in § 1145 of this title.
- (2) "Department" means the Department of Health and Social Services (DHSS).
- (3) "Employer" means: a home care agency as defined in this section; a management company that contracts to provide services on behalf of a home care agency; or other business entity (including but not limited to a temporary employment agency) that contracts to provide services on behalf of a home care agency.
- (4) "Home Care Agency" includes all programs or agencies licensed pursuant to 16 Del.C. §122(3)(m), or §122(3)(o), or §122(3)(x) that provide services to individuals in their Private Residence, as defined below.
- (5) "Private Residence" means the domicile of the individual in need of care, either personally owned by that individual or considered the place of residence of that individual. A Private Residence does not include those healthcare facilities licensed by the Department of Health and Social Services under 16 Del.C. , Chapter 11.

(b) No Employer is permitted to employ any Applicant without first obtaining the results of that Applicant's mandatory drug screening.

(c) All Applicants, with the exception of self-employed individual seeking employment from a private person to provide services in a private residence, must submit to mandatory drug screening, as specified by regulations promulgated by DHSS. The requirement for drug screening for persons seeking employment in a Private Residence is left to the discretion of the employer.

(d) DHSS shall promulgate regulations regarding the pre-employment screening of all Applicants for use of the following illegal drugs:

- (1) Marijuana/cannabis;
- (2) Cocaine;
- (3) Opiates;
- (4) Phencyclidine ("PCP");
- (5) Amphetamines;
- (6) Any other illegal drug specified by DHSS, pursuant to regulations promulgated pursuant to this section.

(e) No employer may employ an Applicant for work in a private residence before getting the results of that Applicant's drug screening. Upon request, the results of the drug screen must be provided upon the Applicant's commencement of work to the person for whom the services are to be provided, or to the person's guardian, agent for health care decisions, or surrogate.

(f) The employer must provide confirmation of the drug screen in the manner prescribed by DHSS's regulations.

(g) Any employer who fails to comply with the requirements of this section shall be subject to a civil penalty of not less than \$1,000 nor more than \$5,000 for each violation.

Section 4. Amend §§ 5137, 5138 and 5139, Title 16 of the Delaware Code as follows:

§5137. Legislative intent; definitions.

(a) Legislative intent. -- The General Assembly's purpose in requiring criminal background checks and drug testing of Department of Health and Social Services' employees working at the Delaware Psychiatric Center is to

protect the safety and well-being of the patients and staff of such facility. The provisions of this subchapter shall be broadly construed to accomplish this purpose.

(b) Definitions. --

(1) "Applicant" means any of the following:

(A) A person seeking employment with the Department in any position at the Delaware Psychiatric Center; or

(B) A current Department employee who seeks a promotion or transfer to any position at the Delaware Psychiatric Center.

(C) A former employee who consents prior to leaving employment to periodic review of his or her criminal background for a fixed period of time.

(2) "Background Check Center (BCC)" means the electronic system which combines the data streams from various sources within and outside the State of Delaware in order to assist an employer in determining the suitability of a person for employment.

(3) "Criminal History" means a report from the Department of Health and Social Services regarding its review of the Applicant's entire federal criminal history from the Federal Bureau of Investigation, pursuant to Public Law 92-544 as amended (28 U.S.C. 534) and his or her Delaware record from the State Bureau of Identification.

(4) "Department" means the Department of Health and Social Services;

(5) "Grandfathered Employee" means an employee of a the Delaware Psychiatric Center, who was not fingerprinted pursuant to this statute because the employment commenced before the effective date of the statute, and no requirement for fingerprinting has since applied (see (b), (1) above).

(6) "Reasonable suspicion" means the Department, acting through its supervisory personnel, has a reasonable basis to suspect to that a Delaware Psychiatric Center employee:

(A) Has been convicted of a disqualifying crime since becoming employed; or

(B) Is impaired by an illegal drug.

§5138. Criminal background checks.

(a) The Department shall not hire or employ an Applicant for any position at the Delaware Psychiatric Center without first obtaining a report of the person's Criminal History.

(b) The Department shall promulgate regulations establishing the criteria for unsuitability for employment, including the types of criminal convictions which shall automatically disqualify a person from working at the Delaware Psychiatric Center and, as to other criminal convictions, the criteria for determining whether a particular individual is unsuitable for employment at the Delaware Psychiatric Center.

(c) Conditional hire. – The requirements of subsection (a) of this section may be suspended for sixty (60) days if the employer wishes to employ the Applicant on a conditional basis. Before an employer may offer conditional employment, the employer must receive verification that the Applicant has been fingerprinted by the SBI for purposes of the Criminal History. No Criminal History will be issued if the Applicant fails to provide information to the Department regarding the status or disposition of an arrest within forty-five (45) days from the date of notice from the Department of an open criminal charge.

(d) The Department shall immediately terminate the employment any Delaware Psychiatric Center employee who is, or has been, convicted of any disqualifying crime upon notification of such conviction.

(e) The Criminal History information provided to the employer, is strictly confidential. It may be used solely to determine the suitability of an Applicant for employment or continued employment at the Delaware Psychiatric Center.

(f) Before an Applicant is permitted to be employed at the Delaware Psychiatric Center, the Applicant must, upon request:

(1) Provide accurate information sufficient to get a Criminal History;

(2) Execute a full release to enable the employer to secure a Criminal History and to periodically update the Criminal History while employed;

(g) An Applicant who fails to comply with (f) is subject to a civil penalty of not less than \$1,000 nor more than \$5,000 for each violation.

(h) All Grandfathered Employees must be fingerprinted by the SBI within 120 days from the date of BCC (see 29 Del.C. § 7971B, (a)) implementation. SBI:

(1) Shall use the fingerprints to establish the Grandfathered Employee's identity and to assign an SBI identification number for the sole purpose of enabling the person's criminal record to be monitored for new arrests while the Grandfathered Employee continues to work at a Nursing Facility or Similar Facility.

(2) Shall not run a state or federal background check of the Grandfathered Employee, unless the Grandfathered Employee is also an Applicant as defined in Section (b), (1) above;

(3) Shall comply with Title 11 Del.C. §1911.

§5139. Drug testing required.

(a) Preemployment testing. -- The Department shall not hire or employ an applicant for any position at the Delaware Psychiatric Center without first obtaining the results of such applicant's mandatory drug screening.

(b) Reasonable suspicion testing. -- The Department, acting through its supervisory personnel, may also conduct a drug test based on a reasonable suspicion that a Delaware Psychiatric Center employee is impaired by an illegal drug.

(c) Any person applying for employment with the Department in a position at the Delaware Psychiatric Center shall be required to submit to mandatory drug screening pursuant to this section and the regulations promulgated by the Department. Such regulations shall require drug testing for the following controlled substances:

(1) Marijuana/cannabis;

(2) Cocaine;

(3) Opiates;

(4) Phencyclidine ("PCP");

(5) Amphetamines;

(6) Any other controlled substances specified by the Department in the regulations promulgated pursuant to this subchapter.

(d) Conditional hire. -- Notwithstanding the provisions of this section, whenever exigent circumstances exist, and the Department must fill a position in order to maintain an appropriate level of patient care, the Department may hire an applicant on a conditional basis when the Department receives evidence that the applicant has actually had the appropriate drug screening. The final employment of any applicant conditionally hired pursuant to this subsection shall be contingent upon receipt of the results of the drug screening. In addition, all applicants conditionally hired pursuant to § 5138 of this title shall be informed and acknowledge in writing that the results of those applicants' drug screens have been requested. Under no circumstances shall an applicant hired on a conditional basis pursuant to this subchapter remain employed on a conditional basis for more than 2 months.

(e) Any applicant who wilfully fails to comply with the requirements of this section shall be subject to a civil penalty of not less than \$1,000 nor more than \$5,000.

(f) The Department shall adopt policies and procedures for imposing sanctions, which may include suspension and termination, upon any Delaware Psychiatric Center employee whose drug screen indicates that such employee has consumed an illegal drug or drugs. However, no such employee shall be sanctioned when the person has used or consumed the drug or drugs detected according to the directions and terms of a lawfully obtained prescription for such drug or drugs.

Section 5. Amend Title 16 Section 122 (3)o as follows:

o. Establish standards for public health quality assurance in the operation of home health agency programs and regulate the public health practice of such programs.

Approved July 05, 2012