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BILL



ANALYSIS

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House Bill 5448 (Substitute H-1 as passed by the House)
Sponsor: Representative Barbara Vander Veen
House Committee: Senior Health, Security, and Retirement
Senate Committee: Health Policy

Date Completed: 1-25-06

CONTENT

The bill would amend the Mental Health Code to require criminal history checks on individuals seeking employment, an independent contract, or clinical privileges with a psychiatric facility or intermediate care facility for people with mental retardation. Specifically, the bill would do the following:

- Prohibit a facility described above from employing, independently contracting with, or granting clinical privileges to an individual who regularly had direct access to or provided direct services to patients or residents if the individual had been convicted of certain crimes; had been the subject of a substantiated finding of neglect, abuse, or misappropriation of property; or were the subject of an order or disposition under the Code of Criminal Procedure.**
- Require a facility to request that the Michigan Department of State Police (MSP) conduct a criminal history check on an applicant for employment and forward the applicant's fingerprints to the Federal Bureau of Investigation (FBI) to determine the existence of any national criminal history.**
- Prohibit a facility from employing, contracting with, or granting privileges to an individual with direct access to patients or residents until it complied with the criminal history check requirements, subject to specified exceptions.**

- Allow a facility conditionally to employ, contract with, or grant privileges to an individual before receiving criminal history check results under certain circumstances.**
- Require an employee, independent contractor, or individual granted privileges to report to the facility immediately if he or she were convicted of certain crimes.**
- Prescribe criminal penalties for an applicant who knowingly provided false information regarding his or her criminal history, an individual who used an applicant's criminal history information in violation of the bill, and the director of a facility who did not conduct the required criminal history checks.**
- Require the Department of Community Health (DCH) to report to the Legislature one year after the bill took effect on its impact and effectiveness.**

The bill would take effect 60 days after the DCH secured the necessary Federal approval or waiver to use Federal funds to enable the Department to pay for or reimburse the costs incurred by adult foster care 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 approval or waiver had been secured.

The bill is tie-barred to House Bill 5168, which would amend the Public Health Code to enact similar employment prohibitions

and criminal history check requirements for other health professionals.

House Bill 5448 (H-1) is described below in further detail.

Disqualification from Employment

Under the bill, except as otherwise provided, a psychiatric facility or intermediate care facility for people with mental retardation could not employ, independently contract with, or grant clinical privileges to an individual who regularly had direct access to or provided direct services to facility patients or residents after the bill's effective date, if the individual satisfied any of the following:

- He or she had been convicted of a felony, or an attempt or conspiracy to commit a felony, other than a felony for a relevant crime described under 42 USC 1320a-7 (described below, under **BACKGROUND**), unless 15 years had lapsed since he or she completed all of the terms and conditions of his or her sentencing, parole, and probation before the date of application for employment or clinical privileges or the date of the execution of the independent contract.
- He or she had been convicted of a misdemeanor, other than a misdemeanor for a relevant crime described under 42 USC 1320a-7, involving abuse, neglect, assault, battery, or criminal sexual conduct or involving fraud or theft, a misdemeanor under Part 74 of the Public Health Code (which prescribes penalties for various controlled substance violations), or a substantially similar State or Federal crime, within the 10 years immediately preceding the date of application or the execution of the contract.
- He or she had been convicted of a relevant crime described in 42 USC 1320a-7.
- He or she had been the subject of a substantiated finding of neglect, abuse, or misappropriation of property by the DCH pursuant to an investigation conducted in accordance with 42 USC 1395i-3 or 1396r (described below, under **BACKGROUND**).
- He or she was the subject of an order or disposition under Section 16b of Chapter IX of the Code of Criminal Procedure (which pertains to a disposition regarding

a person who is found not guilty of an offense by reason of insanity).

The bill would define "direct access" as access to a patient or resident or a patient's or resident's property, financial information, medical records, treatment information, or any other identifying information.

"Independent contract" would mean a contract entered into by a health facility or agency with an individual who provided the contracted services independently or a contract entered into by a psychiatric facility or intermediate care facility for people with mental retardation with an organization or agency that employed or contracted with an individual after complying with the bill's requirements to provide the contracted services to the facility on behalf of the organization or agency.

Except as otherwise provided, a facility 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 after the bill's effective date until the facility complied with the bill's criminal history check requirements.

Exemptions

The provisions described above would not apply to an individual who was employed by, under independent contract with, or granted clinical privileges in a facility before the bill's effective date, except as otherwise provided in the bill. Such an individual would not be limited to working within the facility with which he or she was employed by, under contract to, or granted clinical privileges on the bill's effective date. He or she could transfer to another facility if the criminal history check did not indicate a prohibited offense subsequent to the bill's effective date. If the person subsequently were convicted of a crime, found to be the subject of a substantiated finding or an order or disposition, or found to have been convicted of a relevant crime described above, he or she would be subject to the prohibition against employment, contracting, or privileges and could be denied or terminated from employment.

The bill also would exempt an individual who was an independent contractor with a facility if the services for which he or she was

contracted were not directly related to providing 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. This exception would include independent contractors who provided utility, maintenance, construction, or communications services.

Criminal History Check

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

Upon receiving the written consent and identification, the facility would have to request the MSP to conduct a criminal history check and to forward the applicant's fingerprints to the FBI. The MSP would have to request the FBI to determine the existence of any national criminal history pertaining to the applicant. The applicant would have to give the MSP a set of fingerprints. The request would have to be made in the manner prescribed by the MSP. The facility would have to make the written consent and identification information available to the MSP.

The facility also would have to request the DCH to conduct a check of all relevant registries established according to Federal regulations for any substantiated findings of abuse, neglect, or misappropriation of property.

If there were a charge for conducting the criminal history check, it would have to be paid by or reimbursed by the DCH with Medicaid and Medicare funding as appropriate. The facility could not seek reimbursement for the charge from the individual who was the subject of the background check.

The MSP would have to conduct a criminal history check on the applicant named in the request. The MSP would have to give the DCH a written report of the criminal history check if it contained any criminal history

record information. The report would have to contain any criminal history record information the MSP maintained on the applicant. The MSP would have to provide the results of the FBI determination to the DCH within 30 days after the request was made.

The DCH would have to notify the individual in writing of the FBI determination of the type of criminal conviction disclosed on the determination without disclosing the details of the conviction. The notice would have to include a statement that the individual had a right to appeal a decision made by the DCH regarding his or her employment eligibility based on the criminal background check. The notice would have to include information regarding where to file the appeal and information describing the appellate procedures established under Section 20173b of the Public Health Code (as House Bill 5168 (H-2) would add).

(Under proposed Section 20173b, the DCH would have to establish an Employment Eligibility Appeal Board consisting of members appointed by the Governor. The 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 that was a nursing home, county medical care facility, hospice, hospital that provided swing bed services, home for the aged, or home health agency, or by an adult foster care facility, based on a criminal background check.)

Conditional Employment

Under the bill, if a facility found it necessary to employ, contract with, or grant clinical privileges to an applicant before receiving the results of his or her criminal history check, the facility could conditionally employ, contract with, or grant clinical privileges to the individual if the facility requested the criminal history check upon doing so.

Additionally, the individual would have to sign a written statement that indicated all of the following:

- He or she had not been convicted of any of the crimes described in the bill within the applicable time period.

- He or she had not been the subject of a substantiated finding or an order or disposition described in the bill.
- He or she agreed that, if the information in the criminal history check did not confirm his or her statements described above, his or her employment or clinical privileges would be terminated by the facility as required under the bill until he or she appealed and could prove that the information was incorrect.
- He or she understood the conditions described above that resulted in the termination of his or her employment or clinical privileges and that those conditions were good cause for termination.

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

On the bill's effective date, the DCH would have to develop and distribute a model form for the required statement. The DCH would have to make the model form available to a facility upon request at no charge.

If an individual were employed as a conditional employee or independent contractor or were granted conditional clinical privileges, and the report regarding his or her criminal history check did not confirm his or her statement, the facility would have to terminate his or her 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 imprisonment for up to 93 days and/or a maximum fine of \$500.

Use of Criminal History Information

A facility could use criminal history 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 the purposes of verifying the accuracy of a conditional employee's written statement. A facility could not disclose criminal history record information to a person who was not directly involved in evaluating the applicant's qualifications.

An individual who knowingly used or disseminated the information in violation of the bill would be guilty of a misdemeanor punishable by imprisonment for up to 93 days and/or a maximum fine of \$1,000. A person who suffered injury as a result of a violation of this provision could bring a civil cause of action for damages against the violator.

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 contract with, or granting clinical privileges to an individual, an agency that had obtained criminal history record information under the bill on that individual would have to share, with the applicant's consent, the information with the requesting agency or facility. Except for a knowing or intentional release of false information, a psychiatric or intermediate care facility for people with mental retardation would have no liability in connection with the release of criminal history record information.

Reporting Requirements

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 facility immediately upon any of the following:

- Being convicted of any of the criminal offenses specified in the bill.
- Being the subject of a substantiated finding of neglect, abuse, or misappropriation of property.
- Being the subject of an order or disposition as described in the bill.

Failure to Conduct Required Checks

In addition to sanctions set forth in the Code, a licensee, owner, administrator, or operator of a facility who knowingly and willfully failed to conduct the required criminal history checks would be guilty of a misdemeanor punishable by imprisonment for up to one year and/or a maximum fine of \$5,000.

Report to the Legislature

Within one year after the bill took effect, the DCH would have to submit to the Legislature a written report regarding the bill's impact and effectiveness and on the feasibility of implementing criminal history checks on volunteers who worked in the facilities.

MCL 330.1147 et al.

BACKGROUND

42 USC 1320a-7

Under this section of the U.S. Code, the Secretary of the U.S. Department of Health and Human Services (HHS) must exclude from participation in any Federal health care program individuals and entities who have been convicted of the following:

- A criminal offense related to the delivery of an item or service under U.S. Code provisions related to health insurance for the aged and disabled or under any state health care program.
- A criminal offense relating to neglect or abuse of patients in connection with the delivery of a health care item or service.
- A felony that occurred after August 21, 1996, in connection with the delivery of a health care item or service or with respect to any act or omission in a health care program operated by or financed by any government agency, relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct.

Additionally, the HHS Secretary may exclude from participation in any Federal health care program individuals and entities convicted of the following:

- A misdemeanor or other criminal offense that occurred after August 21, 1996, relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct in connection with the delivery of a health care item or service, or with respect to any act or omission in a health care program operated by or financed by any government agency.
- Interference with or obstruction of any investigation into any criminal offense described above.

- A misdemeanor relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance.

42 USC 1395i-3 or 1396r

These sections of the U.S. Code require a state to provide, through the agency responsible for the surveys and certification of nursing facilities, for a process for the receipt and timely review and investigation of allegations of neglect and abuse and misappropriation of resident property by nursing facility employees. Under these sections, after notice to the individual involved and an opportunity for a hearing for the individual to rebut the allegations, the state must make a finding as to the accuracy of the allegations. If the state finds that a nurse aid has neglected or abused a resident or misappropriated resident property, the state must notify the nurse aid and the state's nurse aid registry. If the state finds that any other individual used by the facility has neglected or abused a resident or misappropriated resident property, the state must notify the appropriate licensure authority. A state may not make a finding that the individual has neglected a resident if the individual demonstrates that the neglect was caused by factors beyond his or her control.

Legislative Analyst: Julie Koval

FISCAL IMPACT

The Department of Community Health has received a grant from the Federal Centers for Medicare and Medicaid Services for \$5.0 million to provide criminal background checks for health facility employees. This grant would cover costs of providing criminal background checks from 2005 through 2007. The State could incur some additional administrative expense associated with managing the criminal background check process and meeting the reporting requirements proposed by the bill.

Additionally, State and locally operated psychiatric facilities and locally operated intermediate care facilities for the mentally retarded would see increased administrative cost associated with processing criminal history requests for job applicants.

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.

Criminal history fingerprint background checks required under the bill would cost \$54 each, with the amount to be paid to the Department of State Police to cover real and actual costs of the analysis and report.

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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.