



Senate Fiscal Agency
P. O. Box 30036
Lansing, Michigan 48909-7536



Telephone: (517) 373-5383
Fax: (517) 373-1986

Senate Bill 378 (Substitute S-2 as passed by the Senate)
Sponsor: Senator Marty Knollenberg
Committee: Regulatory Reform

Date Completed: 6-23-17

RATIONALE

The Public Health Code defines "home for the aged" as a supervised personal care facility, other than a hotel, adult foster care facility, hospital, nursing home, or county medical care facility that provides room, board, and supervised personal care to 21 or more unrelated, nontransient, individuals 60 years of age or older. "Home for the aged" includes a supervised personal care facility for 20 or fewer individuals 60 years of age or older if the facility is operated in conjunction with and as a distinct part of a licensed nursing home. The Code requires a home for the aged to be licensed.

Before the Department of Human Services (DHS) and the Department of Community Health were merged in 2015, becoming the Department of Health and Human Services, under Executive Order 2015-4, the former DHS regulated and licensed homes for the aged. The Executive Order transferred that authority to the Department of Licensing and Regulatory Affairs (LARA). However, the supervised care industry has changed over the years, and LARA apparently interprets current regulations differently than the DHS did. To find a balance between how homes for the aged were regulated previously and how they are regulated currently, and to resolve other concerns, it has been suggested that the Code be amended.

CONTENT

The bill would amend the Public Health Code to do the following:

- **Modify the definition of "home for the aged" to refer to a facility at a single address, and to individuals 55 years of age or older, rather than 60 or older.**
- **Require LARA to make a determination, based on two sets of criteria, on whether a facility was exempt from licensure as a home for the aged.**
- **Require LARA to grant an exemption from licensure to an existing facility or a facility under construction, under certain circumstances.**
- **Specify that an exemption could not be granted after December 31, 2019, except to a successor owner, operator, or governing body.**
- **Allow LARA to revoke an exemption under certain circumstances.**
- **Limit the number of criminal history checks of prospective employees that LARA would have to pay for, after October 1, 2018, to 40 per year for a home for the aged with fewer than 100 licensed beds, or 50 per year for a home for the aged with 100 or more beds.**
- **Require the Bureau of Fire Services to amend rules to allow facilities in existence on or before the bill's effective date and continuously operating up to the time of application for a home for the aged license, to be reviewed and inspected to comply with certain provisions of a National Fire Protection Association standard.**

The bill would take effect 90 days after its enactment.

Home for the Aged Definition

The Code defines "home for the aged" as a supervised personal care facility, other than a hotel, adult foster care facility, hospital, nursing home, or county medical care facility, that provides room, board, and supervised personal care to 21 or more unrelated, nontransient, individuals 60 years of age or older. "Home for the aged" includes a supervised personal care facility for 20 or fewer individuals 60 years of age or older if the facility is operated in conjunction with and as a distinct part of a licensed nursing home. The bill would refer to a supervised personal care facility at a single address that provides room, board, and supervised personal care to individuals 55 years of age or older.

The bill would define "supervised personal care" as the direct guidance or hands-on assistance with activities of daily living offered by a facility to its residents that include two or more of the following services provided by the facility to any resident for 30 or more consecutive days as documented in the resident's service plan:

- Direct and regular involvement by staff in assisting a resident with the administration of his or her prescription medications, including direct supervision of the resident taking medication in accordance with the instructions of his or her licensed health care professional.
- Hands-on assistance by staff in carrying out two or more of the following activities of daily living: eating, toileting, bathing, grooming, dressing, transferring, and mobility.
- Direct staff involvement in a resident's personal and social activities or the use of devices to enhance resident safety by controlling resident egress from the facility.

Minimum Allowed Age

The Code provides that a home for the aged may not admit an individual under 60 years of age. However, upon request of a home for the aged and subject to a requirement for documentation, the Director of LARA may waive the age limitation if the individual, the individual's guardian or other legal representative, if appointed, and the owner, operator, and governing body of the home for the aged, upon consultation with the individual's physician, agree on each of the following:

- The home for the aged is capable of meeting all of the individual's medical, social, and other needs as determined in the individual's plan of service.
- The individual will be compatible with the other residents of that home for the aged.
- The placement in that home for the aged is in the best interests of the individual.

The bill would change the minimum age for a person to be admitted to a home for the aged from 60 to 55, subject to the current waiver provisions.

Licensing Exemption

As noted above, the Code requires a home for the aged to be licensed. Under the bill, LARA would have to make a determination that a facility was exempt from licensure as a home for the aged if the owner, operator, or governing body of the facility submitted to LARA an attestation that assured that one of two sets of criteria was met.

Under the first set of criteria, all of the following requirements would have to be met:

- The owner, operator, or governing body that provided room and the person that provided supervised personal care were not related.
- The individual had the right to contract for supervised personal care from a person of his or her choice.
- The applicant acknowledged that the penalty for submitting a false or inaccurate attestation would be an administrative fine of \$5,000.
- The attestation was provided by the owner or managing company that certified that the people described above were not related.

Under the second set of criteria, both of the following requirements would have to be met:

- The entity that provided room and the entity that provided supervised personal care were related, and the facility was registered as a continuing care community under the Continuing Care Community Disclosure Act, and included a licensed nursing home as part of the continuing care community.
- The applicant acknowledged that the penalty for submitting a false or inaccurate attestation would be an administrative fine of \$5,000.

("Continuing care community" means a retirement community in which a person undertakes to provide or arrange for continuing care, and that is one or more of the following:

- An adult foster care facility.
- A home for the aged.
- An independent living unit.
- A nursing home.
- A home health care services agency.
- Hospice.
- A place that undertakes to provide care to a member for more than one year.)

Beginning on the bill's effective date, an exemption from licensure would have to be given to an existing facility or a facility under construction where board was offered through a person not related to the person that provided room or supervised personal care, or both, or supervised personal care was offered through any person whether or not that person was related to the person that provided room or board, or both, if the supervised personal care arrangement had been in effect for at least five consecutive years before the exemption was requested and residents at the facility had the option to select any supervised personal care provider, if that facility met the requirements of the bill. The owner or managing company would have to provide an attestation certifying that the people described in this provision were not related. The applicant would have to acknowledge that the penalty for submitting a false or inaccurate attestation would be an administrative fine of \$5,000. An exemption granted under this provision would continue to exist for a successor owner, operator, or governing body if the successor filed the required attestation. An exemption could not be granted after December 31, 2019, except to a successor owner, operator, or governing body.

A denial of an exemption from the licensing requirement, an issuance of a fine, or a revocation of an exemption would be subject to a review by LARA upon the applicant's providing further information or an appeal, or both. The Department would have to act on an exemption request as soon as practicable but not later than 60 days after receiving it.

The Department could revoke an exemption if it determined one of the following:

- The false or inaccurate information provided in the attestation was material to granting the exemption.
- The applicant receiving the exemption was found to be negligent, and the negligence resulted in serious physical injury, death of a resident, or serious mental anguish, and there continued to be a risk to the health and safety of the residents at that facility.
- The applicant receiving the exemption did not cooperate in LARA's investigation to make a determination for either of the provisions above.

As used in these provisions, "board" would mean food service provided at a facility.

"Related" would mean any of the following relationships by marriage, blood, or adoption: spouse, child, parent, brother, sister, grandparent, grandchild, aunt, uncle, stepparent, stepbrother, stepsister, or cousin. "Related" also would mean an entity owns or is owned by any person that has a direct or indirect ownership interest in any other entity that provides a component of operations or service concerning the provision of room or supervised personal care.

"Serious mental anguish" would mean damage suffered by a resident that a physician, physician assistant, or nurse practitioner determines caused or could have caused extreme emotional distress that resulted in hospitalization, psychiatric treatment, or death of a resident. "Serious physical injury" would mean damage suffered by a resident that a physician, physician assistant, or nurse practitioner determines caused or could have caused death of a resident, the impairment of his or her bodily function, or the permanent disfigurement of a resident.

Criminal History Checks

Under the Code, 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 covered facility if the individual has been convicted of a crime listed in the Code, or meets other criteria. (A covered facility is 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.)

A covered facility may not employ, independently contract with, or grant privileges to an individual who regularly has direct access to or provides direct services to patients or residents in the covered facility until the facility or staffing agency has a criminal history check conducted in compliance with the Code or has received criminal history record information, subject to certain exceptions. The Code establishes procedures regarding the consent, request, and possession of a criminal history check.

Upon receiving from an applicant a written consent to conduct a criminal history check and required identification check, a staffing agency or covered facility that has made an offer of employment or an independent contract or clinical privileges to the applicant must request the Michigan State Police (MSP) to conduct a criminal history check on the applicant, enter the applicant's fingerprints into the automated fingerprint identification system database, and forward the applicant's fingerprints to the FBI. The MSP must request the FBI to determine the existence of any national criminal history pertaining to the applicant. The applicant must provide the MSP with a set of fingerprints.

If the MSP or the FBI charges a fee for conducting the criminal history check, the staffing agency or covered facility must pay the cost of the charge; however, LARA must pay the charge for a covered facility that is a home for the aged. A prospective employee or prospective independent contractor may not be charged for the cost of a criminal history check.

Under the bill, after October 1, 2018, LARA would have to pay the cost of up to 40 criminal history checks per year for a covered facility that was a home for the aged with fewer than 100 beds, and 50 checks per year for a home for the aged with 100 beds or more.

Fire Inspection & Review

Under the Code, the Bureau of Fire Services must enforce rules promulgated by the Bureau for health facilities and agencies to ensure that physical facilities owned, maintained, or operated by a health facility or agency are planned, constructed, and maintained in a manner to protect the health, safety, and welfare of patients.

The Department of Licensing and Regulatory Affairs may not issue a license or certificate to a health facility or agency until it receives an appropriate certificate of approval from the Bureau of Fire Services.

Under the bill, beginning on its effective date, the Bureau of Fire Services would have to amend the rules to allow facilities in existence on or before the bill's effective date and continuously operating up to the time of application for a home for the aged license, to be reviewed and inspected to comply with the provisions of Chapter 18 or 19 or Chapter 32 or 33 of the National Fire Protection Association (NFPA) Standard No. 101. Chapter 32 or 33 would apply only if the

residents were assessed as capable of self-preservation or the physical facility were adequately staffed to evacuate residents in an emergency.

An applicant for a license or certificate would have to provide information requested by LARA to verify that the facility was in existence on or before the bill's effective date and had been continuously operating up to the time of application.

(The NFPA Standard No. 101, known as the Life Safety Code, governs construction and operating conditions for health care organizations. Chapters 18 and 19, and 32 and 33, pertain to health care occupancies and residential board and care occupancies, respectively.)

MCL 333.10106 et al.

ARGUMENTS

(Please note: The arguments contained in this analysis originate from sources outside the Senate Fiscal Agency. The Senate Fiscal Agency neither supports nor opposes legislation.)

Supporting Argument

Currently, some facilities cannot be considered a home for the aged because of their building structure, or for other reasons. Owners of an older facility might have spent money on the facility, or purchased additional facilities, under the belief that either they did not need a license or the facility was considered a home for the aged by the former DHS under its interpretation of the law. The bill would clarify current law through amendments to the definition of "home for the aged" and would add an exemption process to accommodate facilities that were previously considered a home for the aged, or exempt from licensure, by the DHS. In addition, by allowing a determination of which chapter of the Life Safety Code applies to a facility, the bill could create more opportunities for licensure.

Supporting Argument

By specifying the maximum number of employee background checks LARA would have to pay for, the bill would provide the Department with more budgetary certainty.

Legislative Analyst: Drew Krogulecki

FISCAL IMPACT

The bill would have an indeterminate fiscal impact on the Department of Licensing and Regulatory Affairs and no fiscal impact on local units of government. The bill effectively would cap the amount LARA would pay out for employee background checks per facility. According to LARA, the caps on background checks would not significantly change the number that it pays for currently, but rather would control its costs going forward. In fiscal year (FY) 2015-16, LARA paid a total of about \$585,500 for background checks for employees at homes for the aged.

Another impact of the bill would be on the number of homes for the aged licensed as such. The bill specifies criteria under which a facility could be exempt from licensure as a home for the aged; it is unknown how many facilities would pursue exemption but those that did would reduce revenue received by LARA, as well as expenditures associated with licensure. The homes for the aged licensure program receives revenue from an annual fee of \$6.27 per bed, which in FY 2015-16 generated about \$108,000. The Department's total expenditures for the program in that year were about \$960,000, with the expenditures in excess of fee revenue covered by Federal sources as well as the State General Fund. Any reduction in the number of licensed homes for the aged would result in some savings to the General Fund.

Additionally, the bill would establish a way for currently unlicensed facilities operating before the date the bill went into effect, to pursue licensure with relaxed facilities requirements. To the extent

that this provision would cause additional facilities to pursue licensure, LARA would require additional resources from the State General Fund.

Currently, there are 232 licensed homes for the aged. It is unknown what the net impact on the number of licensed facilities would be under the bill, so the fiscal impact of the bill is indeterminate.

Fiscal Analyst: Josh Sefton

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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.