

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 Code by making insertions as shown by underlining and deletions as shown by strike through 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, by making insertions as shown by underlining and deletions as shown by strike through as follows:

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

§1141. Criminal background checks.

(a) Purpose. ~~It is the intent of the General Assembly that the primary~~ The purpose of the criminal background check and drug ~~testing~~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 ~~other~~ 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 ~~nursing home~~ Facility, as defined below;

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

(C) ~~A person referred by a temporary agency to a nursing home;~~ self-employed person or a person employed by an agency for work in a Facility;

(D). A current employee of a ~~nursing home or temporary agency~~ Facility or a person as defined in (C) above who the Department of Health and Social Services has a reasonable ~~suspicion~~ basis to suspect has been ~~convicted of~~ 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).

(2) "Nursing home"

(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 ~~mental retardation~~ intellectual disability; neighborhood group homes, family care homes, ~~and~~ 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 who operates a nursing home or a management company or other business entity that contracts to operate a nursing home may hire or employ any applicant without obtaining a report of the person's entire~~

~~criminal history record from the State Bureau of Identification and a report from DHSS regarding its review of a report of the person's entire federal criminal history record pursuant to the Federal Bureau of Investigation appropriation of Title II of Public Law 92-544. 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) No agency, including but not limited to temporary employment agencies, may refer an applicant to a nursing home without obtaining, at said agency's expense, a report of the person's entire criminal history record from the State Bureau of Identification and a written report from DHSS regarding its review of the person's entire federal criminal history record pursuant to the Federal Bureau of Investigation appropriation of Title II of Public Law 92-544.~~

~~(e) The State Bureau of Identification shall be the intermediary for the purposes of this section, and DHSS shall be the screening point for the receipt of said federal criminal history records. DHSS shall promulgate regulations regarding the criteria for unsuitability for employment, including the types of criminal convictions which automatically disqualify a person from working in a nursing home, and as to other criminal convictions, the criteria for determining whether a particular individual is unsuitable for such employment. These regulations shall also address the DHSS review of the federal criminal records, and the means for notifying employers of the results of that review.~~

~~(f) Conditional hire.— Notwithstanding the provisions of subsection (c) of this section, the employer may hire or employ an applicant on a conditional basis when the employer receives evidence that the applicant has requested his or her state and federal criminal history record, and has been fingerprinted by the State Bureau of Identification. "Evidence" for purposes of this subsection shall be a verification from the State Bureau of Identification that the person has been fingerprinted and both the state and federal criminal history records have been requested.~~

~~The final employment of an applicant pursuant to this subsection shall be contingent upon the employer's receipt of the State Bureau of Identification criminal history record if there are no disqualifying convictions as defined by DHSS regulations and a report by DHSS that there are no disqualifying convictions in such person's federal criminal record. Thus, an employer must immediately terminate a conditionally hired employee or any current employee upon notification of the employee's conviction of any disqualifying crime (as defined by DHSS regulations) — whether the information is received from the State Bureau of Identification or from the DHSS report regarding the federal criminal history.~~

~~(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.~~

~~(g) Any employer who hires or employs an applicant for employment and fails to request and/or fails to obtain a report of the person's entire criminal history record from the State Bureau of Identification and/or a written report regarding the suitability of the applicant based on the applicant's federal criminal history shall be subject to a civil penalty of not less than \$1,000 nor more than \$5,000 for each violation. Any such employer shall also be subject to this penalty if that employee conditionally hires or employs an applicant before receiving verification from the State Bureau of Identification that the applicant has been fingerprinted and that the state and federal criminal background checks have been requested.~~

~~(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.~~

~~(h) Notwithstanding any requirements of Chapter 85 of this title to the contrary, the State Bureau of Identification shall furnish information to the employer, including but not limited to temporary agencies, pertaining to the entire Delaware criminal history record of any applicant to work in a nursing home. Such information shall be~~

~~provided to the employer and to DHSS pursuant to the procedures established by the Superintendent of the State Police. The criminal history information provided to the employer, to a nursing home by the agency/employer referring an applicant to a nursing home, and to DHSS is strictly confidential. Its use is restricted to the purpose of determining suitability of an applicant for employment in a nursing home.~~

(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.

~~(i) Every application for employment with a nursing home or for referral to work in a nursing home shall require the applicant to provide any and all information necessary to obtain a report of the person's entire criminal history record from the State Bureau of Identification and a report of the person's entire federal criminal history record pursuant to the Federal Bureau of Investigation appropriation of Title II of Public Law 92-544. In addition, every application for employment shall contain a signed statement from the applicant that the applicant grants full release for the employer to request and obtain any such records or information contained on a criminal history record. If the employer is a temporary agency referring the applicant to work in a nursing home, the applicant must also sign a full release giving the employer permission to provide any criminal history information received about the applicant to any facility to which the applicant is referred to work.~~

~~(j) Any individual who either fails to make a full and complete disclosure on an application or a full and complete disclosure of any information required to obtain a criminal history record as required by subsection (c) of this section, shall be subject to a civil penalty of not less than \$1,000 nor more than \$5,000 for each violation.~~

~~(k) Except as otherwise noted in this section, the costs for the State Bureau of Identification and Federal Bureau of Investigation background checks made pursuant to this section shall not be borne by the State.~~

~~(l) Notwithstanding any provision of this title to the contrary, any applicant who has been fingerprinted and received a qualifying state and federal background check, pursuant to the terms of this section within the previous 5 years, shall be exempt from the provisions of this section. However, employers, at their own discretion and expense, shall have the right to require more frequent background checks~~

(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 testing screening.

(a) ~~No employer who operates a nursing home, management company, other business entity contracted to operate a nursing home, or agency that refers employees to work in a nursing home may hire any~~ is permitted to employ an Applicant, as defined in § 1141 of this ~~title Subchapter~~, without first obtaining the results of ~~such that a~~ Applicant's mandatory drug screening.

(b) All ~~a~~ Applicants, as defined in § 1141 of this ~~title Subchapter~~, ~~shall~~ must submit to mandatory drug ~~testing 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) Conditional hire. — Notwithstanding the provisions of subsection (b) of this section, when exigent circumstances exist, and an employer must fill a position in order to maintain the required level of service, the employer may hire an applicant on a conditional basis when the employer receives evidence that the applicant has actually had the appropriate drug screening. The final employment of an applicant pursuant to this subsection shall be contingent upon receipt of the results of the drug screening. In addition, all persons hired pursuant to § 1141 of this title shall be informed in writing and shall acknowledge, in writing, that his/her results have been requested. Under no circumstances shall an applicant hired on a conditional basis pursuant to this subsection be employed on a conditional basis for more than 2 months.~~

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

~~(f)~~ (e) ~~Mandatory drug testing. — The employer shall~~ must provide to DHSS copies of the results of any confirmation of the drug screening required by this section pursuant to ~~in the manner prescribed by DHSS's regulations.~~

~~(g)~~ (f) Any ~~a~~ Applicant or employer who fails to comply with the requirements of this section ~~shall be 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, by making insertions as shown by underlining and deletions as shown by strike through as follows:

§1145. Criminal background checks.

(a) Purpose. — ~~It is the intent of the General Assembly that the primary purpose~~ The purpose of the criminal background check and drug testing 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 and/or private healthcare givers in the resident's own home or home of residence 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 in a home health agency, or a management company or other business entity that contracts to provide services on behalf of a home health agency, for the purposes of providing to individuals in their home or private residence (excluding residents of hospitals and nursing homes) licensed nursing services, home health aide services, physical therapy, speech pathology, occupational therapy or social services.~~ with an Employer, as defined below;

(B) ~~A current employee who seeks a promotion from an Employer, as defined below; of a home health agency who seeks a promotion in the agency, or a management company or other business entity that contracts to provide services on behalf of a home health agency, in order that he or she may provide to individuals in their home or private residence (excluding residents of hospitals and nursing homes) licensed nursing services, home health aide services, physical therapy, speech pathology, occupational therapy or social services; of an Employer, as defined below;~~

(C) ~~A person referred by a temporary agency to a home health agency, or a management company or other business entity that contracts to provide services on behalf of a home health agency;~~ 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) ~~Any individual seeking employment in a private residence for the purpose of providing for the health, safety and well being of an individual in that residence who is unable as a result of physical or mental capacity to provide these things for himself or herself in an adequate manner. This definition specifically excludes any person directly related to the person needing care, unless covered under some other section of this statute; or 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 current employee of a home health agency, management company or other business entity that contracts to provide services on behalf of a home health agency for the purposes of providing to individuals in their home or private residence (excluding residents of hospitals and nursing homes) licensed nursing services, home health aide services, physical therapy, speech pathology, occupational therapy or social services; or any individual, currently employed in a private residence for the purpose of providing for the health, safety and well-being of an individual in that residence who is unable as a result of physical or mental capacity to provide these things for himself or herself in an adequate manner, who the Department has a reasonable suspicion has been convicted of a disqualifying crime since becoming employed.~~ A former employee who consents prior to leaving employment to periodic review of his or her criminal background for a fixed time period.

(2) ~~"Home health agency" is as defined in § 122(3)o. of this title.~~ "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) ~~"Private residence" is defined as the domicile of the individual in need of care, either personally owned by that individual or considered the place of residence of that individual, and that is not licensed, operated for profit or any other reason as a healthcare "facility" as defined in § 1131 of this title.~~ "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 who operates a home health agency, or a management company or other business entity that contracts to provide services on behalf of a home health agency, may hire or employ any applicant without obtaining a report of the person's entire criminal history record from the State Bureau of Identification and a report from the Department of Health and Social Services ("DHSS") regarding its review of a report of the person's entire federal criminal history record pursuant to the Federal Bureau of Investigation appropriation of Title II of Public Law 92-544 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) No agency, including but not limited to temporary employment agencies, may refer an applicant to a home health agency or a private residence without obtaining, at said agency's expense, a report of the person's entire criminal history record from the State Bureau of Identification and a written report from DHSS regarding its review of the person's entire federal criminal history record pursuant to the Federal Bureau of Investigation appropriation of Title II of Public Law 92-544. 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) Private individuals seeking to hire or employ a self-employed healthcare giver to work in that capacity in a private residence have the option of requesting and receiving a criminal background check.

(f) The State Bureau of Identification shall be the intermediary for the purposes of this section, and DHSS shall be the screening point for the receipt of said federal criminal history records. DHSS shall promulgate regulations regarding the criteria for unsuitability for employment, including the types of criminal convictions which automatically disqualify a person from providing to individuals in their home or private residence (excluding residents of hospitals and nursing homes) licensed nursing services, home health aide services, physical therapy, speech pathology, occupational therapy or social services while working in or on behalf of a home health agency and, as to other criminal convictions, the criteria for determining whether a particular individual is unsuitable for such employment.

(g) Conditional hire -- Notwithstanding the provisions of subsection (c) of this section, the employer may hire or employ an applicant on a conditional basis when the employer receives evidence that the applicant has requested his or her state and federal criminal history record and has been fingerprinted by the State Bureau of Identification. "Evidence," for purposes of this subsection, shall be a verification from the State Bureau of Identification that the person has been fingerprinted and both the state and federal criminal history records have been requested.

The final employment of an applicant pursuant to this subsection shall be contingent upon the employer's receipt of the State Bureau of Identification criminal history record if there are no disqualifying convictions as defined by DHSS regulations and a report by DHSS that there are no disqualifying convictions in such person's federal criminal record. Thus, an employer must immediately terminate a conditionally hired employee or any current employee upon notification of the employee's conviction of any disqualifying crime (as defined by DHSS regulations) — whether the information is received from the State Bureau of Identification or from the DHSS report regarding the federal criminal history.

(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) Any employer who is required under this statute to obtain a criminal background check for an applicant and fails to request and/or fails to obtain a report of the person's entire criminal history record from the State Bureau of Identification and/or a written report regarding the suitability of the applicant based on the applicant's federal criminal history shall be subject to a civil penalty of not less than \$1,000 nor more than \$5,000 for each violation. Any such employer shall also be subject to this penalty if the employer conditionally hires or employs an applicant before receiving verification from the State Bureau of Identification that the applicant has been fingerprinted and that the state and federal criminal background checks have been requested.~~

~~(i) Notwithstanding any requirements of Chapter 85 of this title to the contrary, the State Bureau of Identification shall furnish information to the employer, including but not limited to temporary agencies, pertaining to the entire Delaware criminal history record of any applicant to work in a home health agency. Such information shall be provided to the employer and to DHSS pursuant to the procedures established by the Superintendent of the State Police. The criminal history information provided to the employer, to a home health agency by the agency/employer referring an applicant to a home health agency, to a management company or other business entity that contracts to provide services on behalf of a home health agency, or to DHSS is strictly confidential. Its use is restricted to the purpose of determining suitability of an applicant for employment in a home health agency or a management company or other business entity that contracts to provide services on behalf of a home health agency.~~

~~(j) Private individuals who request a criminal background check under the provisions of this statute will not be furnished the entire Delaware criminal history record of the applicant. Rather, both the state and federal criminal history records will be reviewed by DHSS, and a summary report will be sent to the requestor with sufficient detail to allow a reasoned decision as to hiring the applicant. DHSS will provide guidance in this evaluation as needed, and the same criteria for automatic disqualification as set out in regulations promulgated by the Department pursuant to this legislation will apply.~~

~~(k) Every application for employment with a home health agency or a management company or other business entity that contracts to provide services on behalf of a home health agency or for referral to work in a home health agency or a management company or other business entity that contracts to provide services on behalf of a home health agency, shall require the applicant to provide any and all information necessary to obtain a report of the person's entire criminal history record from the State Bureau of Identification and a report of the person's entire federal criminal history record pursuant to the Federal Bureau of Investigation appropriation of Title II of Public Law 92-544. In addition, every application for employment shall contain a signed statement from the applicant that the applicant grants full release for the employer to request and obtain any such records or information contained on a criminal history record. If the employer is a temporary agency referring the applicant to work in a home health agency, or a management company or other business entity that contracts to provide services on behalf of a home health agency, the applicant must also sign a full release giving the employer permission to provide any criminal history information received about the applicant to any agency to which the applicant is referred to work.~~

~~(l) Similarly, private individuals who voluntarily request a criminal background check must obtain the cooperation of the applicant in the criminal background check process. Such cooperation includes providing sufficient and truthful information on the request form, and a signed release to allow the requesting individual to receive the summary report of the applicant's criminal history. Proper forms may be obtained from DHSS.~~

~~(m) Any individual who either fails to make a full and complete disclosure on an application or a full and complete disclosure of any information required to obtain a criminal history record as required by subsection (c) of this~~

section and allowed by subsections (e) and (l) of this section shall be subject to a civil penalty of not less than \$1,000 nor more than \$5,000 for each violation.

~~(n) Except as otherwise noted in this section, the costs for the State Bureau of Identification and Federal Bureau of Investigation background checks made pursuant to this section shall not be borne by the State.~~

~~(o) Notwithstanding any provision of this title to the contrary, any applicant who has been fingerprinted and received a qualifying state and federal background check pursuant to the terms of this section within the previous 5 years shall be exempt from the provisions of this section. However, employers, at their own discretion and expense, shall have the right to require more frequent background checks.~~

(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. ~~Drug testing~~Mandatory drug screening.

~~(a) No employer who operates a home health agency or a management company or other business entity that contracts to provide services on behalf of a home health agency, or agency that refers employees to work in a home health agency or a management company or other business entity that contracts to provide services on behalf of a home health agency, may hire any applicant, as defined in § 1145 of this title, without first obtaining the results of such applicant's 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) All applicants, as defined in § 1145 of this title, with the exception of self employed healthcare givers seeking employment from a private individual to work in that capacity in a private residence on a private basis, shall submit to mandatory drug testing, as specified by regulations promulgated by DHSS. The requirement for drug tests for healthcare givers seeking employment in a private residence on a private basis is left to the discretion of the employer. Costs for such tests are borne by the employer or the applicant. No Employer is permitted to employ any Applicant without first obtaining the results of that Applicant's mandatory drug screening.~~

~~(c) DHSS shall promulgate regulations regarding the preemployment 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.~~

(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) Conditional hire.— Notwithstanding the provisions of subsection (b) of this section, when exigent circumstances exist and an employer must fill a position in order to maintain the required level of service, the employer may hire an applicant on a conditional basis when the employer receives evidence that the applicant has actually had the appropriate drug screening. The final employment of an applicant pursuant to this subsection shall be contingent upon receipt of the results of the drug screening. In addition, all persons hired pursuant to § 1145 of this title shall be informed in writing and shall acknowledge in writing that his or her results have been requested. Under no circumstances shall an applicant hired on a conditional basis pursuant to this subsection be employed on a conditional basis for more than 2 months. The provisions of this subsection regarding a conditional hire shall not apply to private individuals seeking to hire a self-employed healthcare giver to work in that capacity in a private residence.~~

(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) An agency, including but not limited to temporary agencies, must provide the drug screening results it receives regarding a person referred to work in a home health agency or a management company or other business~~

~~entity that contracts to provide services on behalf of a home health agency to that particular home health agency, management company or business entity so that the home health agency, management company or business entity is better able to make an informed decision whether to accept the referral. 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 shall provide to DHSS copies of the results of any drug screening required by this section as directed by regulations promulgated by DHSS pursuant to this statute. The employer must provide confirmation of the drug screen in the manner prescribed by DHSS's regulations.~~

~~(g) Any applicant or 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. Any applicant or 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 proposed below:

§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 ~~either~~ 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.

~~(2)~~ (4) "Department" means the Department of Health and Social Services;

~~(3)~~ (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).

~~(5)~~ (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 ~~a~~ Applicant for any position at the Delaware Psychiatric Center without first obtaining a report of the person's ~~entire Delaware e~~ Criminal h ~~History, record from the State Bureau of Identification and a report of the person's entire federal criminal history record pursuant to the Federal Bureau of Investigation appropriation of Title II of Public Law 92-554.~~

~~(b) The State Bureau of Identification shall be the intermediary for the purpose of this section, and the Department shall be the screening point for receipt of said federal criminal history checks.~~

(eb) 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.

~~(d) Conditional hire.—Notwithstanding the provisions of subsection (a) 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 for a position at the Delaware Psychiatric Center on a conditional basis when the Department receives evidence that the applicant has requested that applicant's own state and federal criminal history record, and has been fingerprinted by the State Bureau of Identification. "Evidence" for purposes of this subsection shall be verification from the State Bureau of Identification that the person has been fingerprinted and their state and federal criminal history records requested. The final employment of any applicant conditionally hired pursuant to this subsection shall be contingent upon receipt by the Department of such applicant's State Bureau of Identification criminal history record verifying that there are no disqualifying convictions, as defined by Department regulations, and a report by the Department that there are no disqualifying convictions in such applicant's federal criminal record.~~

(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.

(ed) 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.

~~(f) Notwithstanding any requirements of Chapter 85 of Title 11 to the contrary, the State Bureau of Identification shall furnish information to the Department pertaining to the entire Delaware criminal history record of any applicant. Such information shall be provided to the Department pursuant to the procedures established by the Superintendent of the Delaware State Police. The criminal history information provided to the Department is strictly confidential and its use is restricted to the purpose of determining an applicant's suitability for employment at the Delaware Psychiatric Center.~~

(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.

~~(g) Every application for employment with the Department in a position at the Delaware Psychiatric Center shall require the applicant to provide any and all information necessary for the Department to obtain a report of the person's entire criminal history record from the State Bureau of Identification and a report of the person's entire federal criminal history record pursuant to the Federal Bureau of Investigation appropriation of Title II of Public Law 92-554. In addition, every application for employment shall contain a signed statement from the applicant that the applicant grants full release for the Department to request and obtain any such records or information contained on a criminal history record.~~

(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;

(h) Any individual who either fails to make a full and complete disclosure on an application, or a full and complete disclosure of any information required to obtain a criminal history record as required by subsection (a) of this section, shall be subject to a civil penalty of not less than \$1,000 nor more than \$5,000 for each violation.

(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.

~~(j) The Department shall obtain a report of the person's state and federal criminal history whenever it has a reasonable suspicion that a Delaware Psychiatric Center employee has been convicted of a disqualifying crime since becoming employed.~~

§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~~willfully 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 by making insertions as shown by underlining and by deletions as shown by strike through 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.

~~6. The Department shall not issue a license to any applicant, nor shall it renew any previously issued license, unless, together with the proper licensure fee and filing/application, the agency/applicant has included evidence that it has obtained from the State Bureau of Identification a report of the entire criminal history record of any of its~~

~~employees, contractors or contractors' employees who may enter the home or private residence of any resident of this State for the purposes of providing them with any of the services herein described.~~

Approved July 05, 2012