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Blevins, Connor, Henry, McDowell;
Reps. Lofink, Scott, Wagner

DELAWARE STATE SENATE

141st GENERAL ASSEMBLY

SENATE BILL NO. 5

AS AMENDED BY

SENATE AMENDMENT NO. 1

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

1 Section 1. Amend § 122(3)o.2., Title 16 of the Delaware Code, by striking the semi-colon (“;”) as it
2 appears at the end thereof and by substituting in lieu thereof the following:

3 “ The Department shall not issue a license to any applicant, nor shall it renew any
4 previously issued license unless, together with the proper licensure fee and filing/application, the
5 agency/applicant has included evidence that it has obtained from the State Bureau of Identification
6 a report of the entire criminal history record of any of its employees, contractors, or contractors’
7 employees who may enter the home or private residence of any resident of this State for the
8 purposes of providing them with any of the services herein described;”

9 Section 2. Amend Chapter 11, Title 16 of the Delaware Code, by redesignating Subchapters V and VI
10 thereof as Subchapters VI and VII respectively, and by inserting therein a new Subchapter V as follows:

11 “*Subchapter V. Home Health Agencies and Private Residences -*

12 *Criminal Background Checks; Drug Testing*

13 § 1145. Criminal background checks.

14 (a) Purpose

15 It is the intent of the General Assembly that the primary purpose of the criminal
16 background check and drug testing requirements of this section and § 1146 of this title is
17 the protection of the safety and well-being of residents of this State who use the services

of home health agencies licensed pursuant to this title and/or private healthcare givers in the resident's own home or home of residence. 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;
- b. A current employee 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; or
- 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.
- 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

46 physical or mental capacity to provide these things for
47 him/herself in an adequate manner. This definition
48 specifically excludes any person directly related to the person
49 needing care, unless covered under some other section of this
50 statute.

51 (2) 'Home health agency' is as defined in 16 Del. C. § 122(3)o.;

52 (3) 'Private residence' is defined as the domicile of the individual in need
53 of care, either personally owned by that individual or considered the
54 place of residence of that individual, and that is not licensed, operated
55 for profit or any other reason as a healthcare 'facility' as defined in
56 Title 16 of the Delaware Code §1131.

57 (c) No employer who operates a home health agency, or a management company or
58 other business entity that contracts to provide services on behalf of a home
59 health agency, may hire any applicant without obtaining a report of the person's
60 entire criminal history record from the State Bureau of Identification and a
61 report from the Department of Health and Social Services ("DHSS") regarding
62 its review of a report of the person's entire federal criminal history record
63 pursuant to the Federal Bureau of Investigation appropriation of Title II of
64 Public Law 92-544.

65 (d) No agency, including but not limited to temporary employment agencies, may
66 refer an applicant to a home health agency or a private residence without
67 obtaining, at said agency's expense, a report of the person's entire criminal
68 history record from the State Bureau of Identification and a written report from
69 DHSS regarding its review of the person's entire federal criminal history record
70 pursuant to the Federal Bureau of Investigation appropriation of Title II of
71 Public Law 92-544.

72 (e) Private individuals seeking to hire a self-employed healthcare giver to work in
73 that capacity in a private residence have the option of requesting and receiving a

Criminal Background Check. The cost of such a check, in that it is volitional on the part of the employing individual, shall be borne by the employer or the employee.

(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. 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.

(g) Conditional hire.

Notwithstanding the provisions of subsection (c) of this section, the employer may hire 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 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.

(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 his or her 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 he or she conditionally hires 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) 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 be borne by the State. The State shall pay such costs one time per individual in a 5-year period. Additionally, the State shall pay for any criminal background checks conducted regarding DHSS employees who serve in a regulatory or advocacy capacity regarding home health agencies, again one time per individual in a 5-year period.

(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.

§ 1146. Drug testing.

(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,

185 or a management company or other business entity that contracts to provide
186 services on behalf of a home health agency, may hire any applicant, as defined
187 in § 1145 of this title, without first obtaining the results of such applicant's
188 mandatory drug screening.

189 (b) All applicants, as defined in § 1145 of this title, with the exception of self-
190 employed healthcare givers seeking employment from a private individual to
191 work in that capacity in a private residence on a private basis, shall submit to
192 mandatory drug testing, as specified by regulations promulgated by DHSS. The
193 requirement for drug tests for healthcare givers seeking employment in a private
194 residence on a private basis is left to the discretion of the employer. Costs for
195 such tests are borne by the employer or the applicant.

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

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

205 (d) Conditional hire.

206 Notwithstanding the provisions of subsection (b) of this section, when exigent
207 circumstances exist, and an employer must fill a position in order to maintain the
208 required level of service, the employer may hire an applicant on a conditional
209 basis when the employer receives evidence that the applicant has actually had
210 the appropriate drug screening.

211 The final employment of an applicant pursuant to this subsection shall be
212 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/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 (d) 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.

(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.

(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..

(f) 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 3. This Act shall take effect on July 1, 2001