

State Policies on Criminal Background Checks  
for Medicaid-Supported In-Home Direct Care Workers

December 18, 2008

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NATIONAL CONFERENCE *of* STATE LEGISLATURES

*The Forum for America's Ideas*

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### Introduction

#### *Overview and Study Purpose*

With AARP support, the National Conference of State Legislatures (NCSL) examined state requirements for criminal background checks for in-home direct care workers whose services are covered by Medicaid. The study identifies, classifies and analyzes criminal background check laws and regulations governing in-home direct care workers.

#### *Background*

As states revamp their Medicaid-supported systems of long-term services and supports, community-based services have become the backbone of the service system. Although community-based services encompass a range of service types—including out-of-home services such as adult day services, residential environments such as assisted living, and periodic support services such as transportation—in-home direct care services typically are at the heart of community caregiving. Family members or paid caregivers provide assistance with a broad range of activities of daily living, including bathing and dressing, and with essential household tasks such as meal preparation, all of which are essential to maintaining independence.

Federal laws and regulations provide a framework to qualify people as certified nursing assistants in Medicare-certified nursing homes or home health agencies. States must maintain a nurse registry and conduct pre-employment background checks on such workers, although implementation practices are not standard across the states. For other in-home direct care workers, states are solely responsible for rules governing selection, hiring and retention. Criminal background checks, among the screening tools commonly used by states for direct care workers, are the focus of this study.

#### *Relevant Literature*

Other sources of information on this topic include the following recent studies.

Under contract with the U. S. Department of Health and Human Services, the Lewin Group issued a May 2006 [report](#), *Ensuring a Qualified Long-Term Care Workforce: From Pre-employment Screens to On-the-Job Monitoring*. The report examined the utility of nurse aide registries and criminal background checks as strategies to reduce the incidence of nursing facility resident abuse. The study found that extensive variation among states affects the ability to make a definitive statement about the efficacy of these strategies. It suggested modernizing background check processes and urged greater attention to post-employment strategies to ensure a qualified workforce. The report includes a matrix of state requirements for background checks for certified nursing assistants.

In December 2006, the American Bar Association issued a state-by-state [chart](#) and [explanation](#) of Adult Protective Services laws designed to protect vulnerable adults from abuse and neglect. The ABA study identifies and summarizes direct care worker criminal background check laws when they are mentioned in Adult Protective Services laws but notes that such checks are not consistently referenced there.

The 2007 Cash and Counseling project analyzed policies governing consumer-directed services projects in 12 states. Each of the 12 projects reported on criminal background checks within their programs; (see [chart](#)) most said they were required for all workers.

In October 2007, the Montana Department of Public Health and Human Services issued a summary ([state survey](#)) of state statutes, rules or procedures governing criminal background checks for direct care workers. The summary identified 43 states with regulations and seven without them; it also included a chart with contact information for each state.

The majority staff of U.S Senate Special Committee on Aging issued a paper on July 30, 2008, describing a pilot program to conduct background checks on long-term care workers. The report said the pilot program in seven states prevented more than 9,500 applicants with criminal histories from working with individuals with disabilities and Aging Committee Report on Criminal Background Check Pilot Project. It urged passage of a federal law to provide systematic background checks.

#### *Contribution of this Study*

NCSL's study focuses exclusively on state laws and regulations as policy vehicles and builds a base of knowledge through a comprehensive review of these policy vehicles. The study categorizes the states' policy decisions and provides information about differences and similarities in background check policies across the states, especially on topics where many states have policies.

The study includes a 50-state table on criminal background check policies, a summary of each state's approach, and a link to each state law and regulation (when available).

#### **Study Methodology**

NCSL identified and analyzed state laws and regulations that govern hiring or credentialing in-home direct care workers. NCSL did not analyze laws that affect only certified nurse assistants or home health care aides. NCSL identified relevant laws and regulations through

searches of various legislative databases, including Westlaw, StateNet and Netscan, and public databases of individual state legislatures.

#### *Limitations of Data*

The study's analysis is based on a careful review of state laws and regulations. Review of documents other than laws or regulations was outside the scope of this study. Some states may have additional policy documents, such as instructional memos or policy issuances, that clarify policy for particular types of workers or funding sources or for new service delivery approaches, such as consumer selection and direction of workers. This study reviews the requirements of state law but does not assess compliance with the law's provisions, nor does it review the effectiveness of the laws.

#### **Introduction to Findings**

Criminal background checks are widely used by states to assess the fitness of people to be hired as in-home direct care workers. State laws vary greatly in their breadth, scope and specificity and in the degree of flexibility afforded employers and applicants when they use the checks to make hiring decisions. Several states have broad requirements that include any workers who provide direct care to the disabled or elderly in their home. Others reference specific workers by type, using terminology such as personal care attendants, home care aides, or companion service providers.

#### *Use of Background Checks*

Most states have statutes or regulations that govern criminal background checks (CBC) for certain Medicaid-funded in-home direct care workers. Only Louisiana, Montana, Nevada and North Dakota do not have laws related to criminal background checks.

#### *Categories of Workers*

States generally identify workers subject to check by title rather than by funding source. Thus, workers who are reimbursed under Medicaid or by other public funds typically are referenced under statutes that cover broader categories of in-home workers.

Statutes in 43 states, the District of Columbia and Puerto Rico apply to broad categories of in-home direct care workers and do not make distinctions by funding source. These states include both Medicaid or other publicly funded in-home workers and privately paid in-home workers under their CBC statutes.

Among the 46 states, the District of Columbia and Puerto Rico that have CBC statutes, only those in Alaska, Hawaii and Vermont apply exclusively to workers reimbursed by Medicaid or other state funds. Vermont statute, for example, requires background checks for all workers who are paid with funds administered by the Department of Disabilities, Aging and Independent Living who provide care to a person receiving services or who manage funds or services for a person.

Some state laws require separate background checks for similar workers who operate in different settings. Florida, for example, has separate background check procedures for home health agency personnel working with the elderly and for direct services providers for the developmentally disabled. Under state law, those who work with the developmentally

disabled must undergo more extensive checks and meet more rigorous disqualifying offense standards.

#### *Mandatory or Discretionary*

Criminal background checks generally are mandatory rather than discretionary for in-home direct care workers identified in the law.

Only three state statutes—California, South Dakota and Tennessee—allow employers full discretion on whether to conduct background checks for potential employees. California’s statute, for example, *authorizes* but does not compel certain employers—including those under the state-funded In-Home Supportive Services program—to conduct background checks on potential workers. Despite the lack of a mandate for background checks, California statute precludes those convicted of certain crimes from receiving Medicaid reimbursement, thus providing an incentive for using criminal background checks. Three additional states—Delaware, Kansas and Vermont—make background checks discretionary for certain employers when hiring providers. Kansas, for example, allows complete discretion on whether to request a background check for consumers who select their own personal care attendant under the state’s Consumer Direct Services Program.

#### *Exemptions*

Many states specifically exempt certain people who provide care in the home from mandatory background checks. Sixteen states specifically exclude one or more categories of providers from their CBC requirements.

Groups commonly excluded include volunteers, family members or religiously affiliated groups. Six states—Alabama, Alaska, Delaware, Florida, South Carolina, and Utah—exclude family members or relatives from CBC requirements. Laws in 23 states reference volunteer home care workers. Seventeen of those states require volunteers to undergo checks, and thirteen states do not.

#### *Federal or State Checks*

Whether a state uses only a state data source or both state and federal sources varies. Of the 46 states (plus the District of Columbia and Puerto Rico) that have CBC statutes, all but two require, at a minimum, a state criminal history check. Colorado and Georgia do not specify what type of check should be performed.

Fifteen states require both state and federal checks at all times. Seventeen states require state checks at all times and mandate federal checks only under certain conditions. Arkansas statute, for example, requires at least state checks for all applicants, but requires additional federal background checks for those who have lived in the state less than five years or who have not previously provided in-home care for at least 60 continuous days.

#### *Disqualifying Offenses*

The criminal offenses that disqualify an applicant from employment vary considerably. Most states list a number of offenses that prohibit employment if revealed by a criminal history check, but the types and numbers of disqualifying crimes included are diverse across states. A few states, such as Hawaii and Connecticut, make no mention of specific disqualifying offenses. Five state statutes list offenses that an employer can consider when

evaluating an applicant for employment, but do not list offenses that are automatically disqualifying. North Carolina statutes list a number of offenses—including homicides, other violent offenses, sex-related offenses, offenses against dependent or vulnerable individuals, drug-related offenses, property crimes, fraud-related offenses and DUI—but home care agencies are given complete discretion on whether anyone should be disqualified based on any of these convictions.

Most states use their CBC statutes to target individuals who have been convicted within a range of serious felonies such as homicide, other violent offenses or sex-related offenses. Thirty-two state statutes disqualify, at least, for convictions of homicide, other violent crimes (i.e., assault, armed robbery, kidnapping) or sex-related crimes (i.e., rape, incest, prostitution).

A few states specifically disqualify only those who have a history of offenses against dependent or vulnerable individuals or fraud-related offenses. Missouri statute, for example, requires the Department of Social Services to maintain a list of individuals convicted of knowingly or recklessly abusing or neglecting a patient. Those on this list are disqualified from employment as a care provider, but no other offenses are specified in statute as disqualifying. California does not allow anyone to be hired to provide services under Medi-Cal (Medicaid) or other state-funded in-home services programs who has been convicted of fraud against a government program or child or elder abuse. Barring individuals from employment due to convictions for other crimes are at the discretion of the employer.

Although most states do not make reference to property crimes or traffic offense, a few do. Fifteen states disqualify for property crimes, such as burglary, breaking and entering or arson. Statutes in Arizona, North Carolina, and Oregon disqualify applicants based on convictions of driving under the influence or related offenses.

Five states with CBC statutes do not specify any crimes that automatically disqualify or may be considered to disqualify an individual from employment. New Hampshire, for example, allows the employer to review the results of an applicant's mandatory criminal history check before extending a final offer of employment, but the state's statute lists no offenses that should be considered by the employer. Hiring an applicant after viewing his or her record is at the complete discretion of the employer.

#### *Time Periods of Disqualification*

Several states classify disqualifying offenses and assign longer periods of disqualification for certain crimes. Some offenses might ban an applicant from employment for a certain number of years following conviction. Other offenses might preclude employment for life.

Statutes in 13 states allow applicants with certain offenses to be employed after a specific time period has elapsed. Minnesota statute lists crimes such as homicide or criminal sexual conduct as permanently disqualifying. A conviction of fraud against a federal assistance program, however, would disqualify an applicant for up to 15 years following a completion of sentence or probation. Additional crimes are assigned a 10-year or seven-year disqualification under statute.

#### *Waivers or Appeals*

Most states with CBC requirements allow the subject of a background check to dispute a disqualification from employment. Referred to as a waiver or appeal, the process can give employers or the state the chance to reconsider an applicant for employment despite his or her criminal record. In some states, the appeal process can denote a practice that allows individuals to dispute a criminal record they feel is inaccurate. Twenty-five states outline, in statute, some type of waiver or appeal processes.

Alabama permits an employer to overturn an applicant's disqualification if he or she presents evidence of successful rehabilitation and the probation or sentence for a felony conviction ended at least 10 years prior (or five years prior for a misdemeanor conviction). Michigan's mandatory CBC statute outlines an appeal process in which applicants can appeal the state's Department of Community Health if they believe their criminal history is inaccurate.

### *Conditional Employment*

Most state CBC statutes include conditional employment provisions that allow an applicant to work prior to receiving the results of the criminal background check. Twenty-eight states have conditional employment provisions. The terms of these provisions, however, vary significantly from state to state.

New Mexico statute, for example, allows an employer to conditionally hire an applicant once his or her fingerprints and request for a background check have been submitted. The applicant's work must be supervised, and the conditional employment can last only until the employer receives the check results. Pennsylvania statute allows applicants to be employed for up to 30 days, or 90 days if they must undergo a federal check (if they have not been a resident of the state for the past two years).

### **Conclusion**

The widespread use of mandatory criminal background checks for in-home direct care workers suggests states view the process as an important component of hiring qualified workers for vulnerable people. State policies reflect diverse perspectives on the amount and type of discretion granted to employers and potential employees in interpreting and making use of background checks. In particular, wide variation exists in the nature of disqualifying crimes and the time periods associated with disqualification; conditional employment provisions; and exemptions, waivers and appeals. States generally are consistent in their insistence on criminal background checks for in-home direct care workers, but universal approaches on a range of policy issues associated with checks have not yet emerged.