

DEPARTMENT OF HEALTH AND SOCIAL SERVICES
DIVISION OF LONG TERM CARE RESIDENCE PROTECTION

3105 Criminal History and Drug Testing for Nursing and Similar Facilities

1.0 Legal Basis

The legal basis for these regulations is 16 **Del.C.** §§1141 and 1142 and 29 **Del.C.** §7972.

2.0 Purpose

The overall purpose of these regulations is to ensure the safety and well-being of residents of facilities licensed pursuant to 16 **Del.C.**, Ch 11. To that end, persons selected for employment in facilities will be subject to pre-employment background checks and pre-employment drug testing.

3.0 Definitions

“Applicant” is a person seeking employment in a facility as defined below; a current employee of a facility who seeks a promotion in the facility; a self-employed person or a person employed by an agency for work in a facility; a current employee, regardless of when hired, who the Department has a reasonable basis to suspect has been arrested for a disqualifying crime since becoming employed or commencing work; a former employee who consents prior to leaving employment to periodic review of his or her criminal background for a fixed time period. See 16 **Del.C.** 1141.

“Background Check Center (BCC)” means the electronic system which combines data streams from various sources within and outside the State 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 as those terms are defined in the enabling statute. See 29 **Del.C.** §7972.

“BCC disclosures” means the data on an Applicant that is generated by the BCC system.

“BCC consent form” means the form provided by DHSS which informs the Applicant of the scope of the BCC, the Applicant’s legal obligations, and the legal sanctions for failure to provide complete and accurate information.

“Criminal background check (CBC)”: The process conducted by the State Bureau of Identification of using an individual’s fingerprints to identify the person and to conduct both a State and a federal criminal background check.

“Criminal History” means a report from DLTCRP regarding its review of the Applicant’s entire federal criminal history from the Federal Bureau of Investigation, pursuant to Public Law 92-544 and amended (28U.S.C. § 534) and his or her Delaware record from the State Bureau of Identification. The Criminal History shall not include arrests that did not result in a conviction. It shall be limited to convictions and arrests for which no disposition is available.

“Delaware Health Information Network (DHIN)” means the State’s sanctioned provider of health information exchange services. 16 **Del.C.** Ch. 103

“Department” or “DHSS” means the Department of Health and Social Services. DHSS owns and operates the BCC.

“Delaware Judicial Information System (DELJIS)” means the agency which maintains all records of criminal arrests and convictions in the State of Delaware.

“Division” or “DLTCRP” means the Division of Long Term Care Residents Protection, Department of Health and Social Services. The Division is responsible for background checks for licensed facilities.

“Facility” means a nursing facility or similar facility licensed pursuant to 16 **Del.C.** Ch. 11.

“Grandfathered employee” is a current employee who was employed by a facility prior to March 31, 1999, and thus was exempted from the requirement enacted at that time that all facility employees have a criminal background check.

“Grandfathered employee consent form” is a consent form to be used for Grandfathered employees who are not subject to the entire review process of the BCC, and thus need consent only to the assignment of an SBI number, which may involve providing fingerprints at SBI. All Grandfathered persons must be on the BCC Master List within 120 days from commencement of the BCC system.

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“Individualized Assessment” is the process of evaluating the suitability of an individual with a criminal history for employment.

“Master List” is the list maintained by the BCC for each employer. The list contains the names of all persons who:

- Are employed in the employer’s facility as defined in 16 **Del.C.** 1141(b)(5);
- Are employed by a temporary employment agency, home health or personal care agency, or any other entity to work in a facility or in a private residence as defined in 16 **Del.C.** 1145(b)(8);
- Are self-employed individuals working as an independent contractor for the employer;
- Are listed on an employer’s Master List and wish to stay on the Master list to facilitate rehire and have consented to stay on the Master List for not more than 3 years.

“Master List retention form” means the form provided by DHSS which an employee whose employment is terminating may choose to execute in order to stay on the Master List for up to 3 years post-fingerprinting in order to facilitate re-employment.

“Rap-back” is the process of continuous monitoring an employee’s arrest and conviction record through DELJIS. The process is limited to Delaware arrests and convictions.

“SBI” means the State Bureau of Identification. It is the agency which processes all criminal background checks in the State of Delaware.

“Service Letter” means a letter containing specific information about a prospective employee’s prior employment. Service Letters are a statutory requirement found at 19 **Del.C.** §708.

4.0 Persons Subject to the Law

- 4.1 All persons working in facilities are required to be on the Master List of the BCC. New Applicants must be processed through the BCC and will automatically be placed on the Master List if hired. Current employees, whether grandfathered or not, must be added to the Master List through the process directed by DLTCRP.
- 4.2 No employer is permitted to continue to employ a grandfathered employee who has not been assigned an SBI number (through fingerprinting or retrieval by DLTCRP of an SBI# previously assigned) and entered into the BCC within 120 days from the date of BCC implementation.
- 4.3 Non-grandfathered current employees must be entered into the BCC by September 30, 2013

5.0 Rap-back

- 5.1 The BCC Rap back is designed to accomplish two objectives:
 - 5.1.1 To provide the employer with refreshed information related to the criminal convictions of an employee in order to ensure the safety of the residents served and;
 - 5.1.2 To reduce the frequency of criminal background checks by maintaining current information regarding each employee’s criminal record, avoiding the need to repeat the processing of criminal histories.
- 5.2 The BCC automatically conducts a Rap-back on all employees listed on the Master List. The Rap-back process will provide DLTCRP with information regarding any new arrest or conviction in the state. DLTCRP will determine, at its discretion and depending of the nature of the alleged crime, whether or not to inform the employer of the arrest. DLTCRP will monitor the charge until there is a disposition. When the disposition is known, DLTCRP will inform the Employer of the outcome.
- 5.3 The Rap-back does not include convictions reported through the FBI. In order to capture that information, a person who is an Applicant is subject to a criminal background check if the previous check is 3 years old or older.

6.0 Consent forms

- 6.1 An employee must execute a BCC consent form as a condition of employment. The consent ends when the employment ends unless the employee chooses to extend the consent to expedite rehire by avoiding the need for repeat fingerprinting if last fingerprinted within 3 years.
- 6.2 An employee whose employment is terminating may, at the time of separation, execute a Master List retention form in order to remain on the Master List of the BCC. The consent period is 3 years from the date last fingerprinted, less the intervening time. E.g. A person fingerprinted on June 1 of year X; can consent to remain on the Master List until May 30 of year x+3 [June 1, 2013 to May 30, 2016]. Consent cannot extend beyond 3 years from the date last fingerprinted.

- 6.3 The original Grandfathered employee consent form shall accompany the employee to SBI for fingerprinting if so directed by DLTCRP because an SBI# is not already known by DLTCRP due to prior fingerprinting. A copy of the Grandfathered employee consent form shall be maintained in a discrete file which is readily accessible, without delay, upon request by an agent of DLTCRP.
- 6.4 A copy of the BCC consent form executed by an Applicant for employment and a copy of the Master List Retention form executed by an employee who seeks to continue inclusion on the Master List pursuant to 6.2 above shall be maintained in separate discrete files which are readily accessible, without delay, upon request by an agent of DLTCRP.

7.0 Service Letters

- 7.1 Before hiring an Applicant, employers are generally required by law to obtain from prior employers and to provide to prospective employers Service Letters which provide specific information as required by the Department of Labor. 19 **Del.C.** §708.
- 7.2 When an employee hired after the effective date of the BCC is terminated, the employer shall promptly complete a Service Letter which will be stored by the BCC and available to the next prospective employer. The Service Letter shall expire after 5 years.

8.0 Criminal History

- 8.1 The SBI is authorized to furnish information pertaining to the identification and conviction data for any person to employers or prospective employers so long as the information is used solely for purposes of making an employment decision. 11 **Del.C.** 8513(c) and(c)(1).
- 8.2 Disqualifying convictions. No facility shall employ a person who has, within the past 15 years, been convicted of abusing, neglecting or mistreating a resident of a facility, or an adult who is impaired. See 11 **Del.C.** 8564 and 42 CFR §483.13(c)(1)(ii).
- 8.3 DHSS adopts the guidance from the Equal Employment Opportunity Commission, Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, 915.002, issued 4/25/2012
- 8.4 Notification of Criminal History review - If the Criminal History review reveals no criminal history, DLTCRP has no duty to inform the Applicant. If a criminal history is revealed, DLTCRP shall inform the Applicant by United States Mail, or in whatever alternate method the Applicant requests, such as e-mail or text message.

9.0 Drug Tests

- 9.1 The BCC provides an electronic conduit through the Delaware Health Information Network (DHIN) to transmit the results of a drug test from a DHIN participating laboratory to the employer. An employer that chooses not to engage a DHIN-participating laboratory will certify that a drug test has been secured by checking a box in the BCC. If the box is checked, it constitutes a representation that a drug test which complies with statutory requirements, 11 **Del.C.** 1142, has been secured prior to hiring.
- 9.2 Evidence of all drug tests not transmitted through the BCC which have been represented to have been secured must be maintained in a discrete file and be available for inspection, without delay, upon request from an agent of DLTCRP.

10.0 Further Facility/Employer Responsibilities

- 10.1 An employer whose facility includes both licensed and unlicensed areas must ensure that all persons who perform services in the licensed areas comply with the law.
- 10.2 The employer shall ensure that every application for employment at a facility executes the BCC consent form.
- 10.3 The employer shall ensure that copies of all BCC consent forms signed by Applicants are maintained in a discrete file which is immediately available, upon request, from any agent of DLTCRP.
- 10.4 The employer must ensure that no Applicant is employed without first receiving the results of the Applicant's mandatory drug test.
- 10.5 The employer must maintain an accurate BCC Master List by promptly reflecting the termination of any person no longer working in the facility.
- 10.6 An employee whose employment is terminated may remain on the Master List to facilitate reemployment by the same or another facility up to 3 years beyond the date the individual was last fingerprinted. See 6.2 above.

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When that date is reached the employee will automatically be removed from the Master List without further action by the employer.

- 10.7 An Applicant who is entered into the BCC whose employment status (withdrawn, hired) is not completed by the employer within 30 days will be dropped from the BCC system.
- 10.8 The employer is prohibited from sharing BCC disclosure information with any other person, employer or agency.
- 10.9 The employer shall use the BCC disclosures solely for the purpose of determining the suitability of an Applicant for employment.

11.0 Responsibilities of non-facility employers who are within the scope of the BCC.

Any non-facility employer working or providing workers to a facility is subject to the following requirements:

- 11.1 All the requirements listed in Section 10 above.
- 11.2 The obligation to provide BCC disclosures to any facility or individual who will be receiving the services of the employee.

12.0 Confidentiality

- 12.1 DHSS shall store written and electronically-recorded BCC disclosures in a secure manner, to provide for the confidentiality of records and to protect against any possible threats to the security or integrity of the information.
- 12.2 DHSS shall limit the use of BCC disclosures to the sole objective of assisting employers determining the suitability of an Applicant for employment.
- 12.3 DHSS shall not release to employers copies of actual electronic reports of criminal history records prepared by the Federal Bureau of Investigation.
- 12.4 The BCC is designed to allow participants to put information regarding their facility or organization on a dedicated page titled "Employment Information". The page was designed to provide an additional resource to the public, and to provide a vehicle for the posting of available employment opportunities. DHSS retains the authority to block or edit material placed on the BCC which it deems false, misleading, or otherwise inappropriate.
- 12.5 The following procedure shall be established to permit the review of personal BCC disclosures by an Applicant:
 - 12.5.1 An Applicant shall submit a request in writing to the Department for an on-site review of his BCC disclosures.
 - 12.5.2 DLTCRP shall schedule an appointment at a mutually convenient time to enable the Applicant to review the BCC disclosures. Photo identification will be required at the time of the appointment.
 - 12.5.3 The BCC disclosures shall be reviewed in the presence of a DLTCRP employee.
 - 12.5.4 Written documentation of the date and time of the review and the names of those present shall be maintained by DLTCRP.
 - 12.5.5 DLTCRP shall assist the Applicant who wishes to challenge the BCC disclosures by providing information about the source of the data and the way to pursue an appeal.

13 DE Reg. 1308 (04/01/10)

16 DE Reg. 974 (03/01/13)