

DEPARTMENT OF HEALTH AND SOCIAL SERVICES

DIVISION OF LONG TERM CARE RESIDENTS PROTECTION

Statutory Authority: 16 Delaware Code, Section 1145(f) (11 Del.C. §1145(f))
16 DE Admin. Code 3110

FINAL

3110 Regulations for Criminal History Record Checks and Drug Testing for Home Health Agencies

ORDER

Nature of the Proceedings

Delaware Health and Social Services ("Department"), Division of Long Term Care Residents Protection, initiated proceedings to amend the regulations regarding Criminal Background Checks for Home Health Agencies. The Department's proceedings to amend its regulations were initiated pursuant to 29 Del.C., §10114, with authority prescribed by 29 Del.C., §7971.

The Department published its notice of proposed regulatory change pursuant to 29 Del.C., §10115 in the February 2010 *Delaware Register of Regulations*, requiring written materials and suggestions from the public concerning the proposed regulations to be produced by February 28, 2010 at which time the Department would receive information, factual evidence and public comment to the said proposed changes to the regulations.

Summary of Proposed Change

The proposal updates the regulations to provide a process for oversight of Home Health Agencies to ensure that they are meeting their statutory obligation to secure Criminal Background Checks of new hires. The proposal permits the Division of Long Term Care Residents Protection to require Home Health Agencies, as defined in 16 Del.C., §122(3)o, to submit quarterly reports so that compliance can be monitored.

Statutory Authority

16 Del.C., Ch. 11 §§1145.

Background

The proposed regulatory change is necessary to ensure that Home Health Agencies comply with the statutory obligation to secure Criminal Background Checks.

Summary of Proposed Amendment

The proposed Amendment specifically permits the Division to require quarterly reports listing new hires.

Summary of Comments Received with Agency Response and Explanation of Changes

The Governor's Advisory Council for Exceptional Citizens, the Developmental Disabilities Council, and the State Council for Persons with Disabilities offered the comments and recommendations summarized below. DLTCRP has considered each comment and responds as follows:

Comment: The regulation would be improved by the addition of the following words "*which shall conform in format and content to Division standards*".

Response: *The suggestion is good, the language will be added to provide flexibility in the reporting obligation.*

Findings of Fact

The Department finds that the proposed changes set forth in the February 2010 *Register of Regulations* should be adopted, subject to the modification set forth above which is not substantive. The regulation will read:

3.3.9 The Department reserves the right to obtain data from employers on the employment status of applicants covered under these regulations, including but not limited to the requirement that agencies submit on a quarterly basis a list of applicants hired which shall conform in format and content to Division standards.”

THEREFORE, IT IS ORDERED, that the proposed changes to Regulation 3.3.9 - Criminal History Checks and Drug Testing for Home Health Agencies, with the modification indicated herein, is adopted and shall be final effective April 1, 2010.

Rita Landgraf, Secretary, DHSS

3110 Criminal History Checks And Drug Testing For Home Health Agencies

1.0 Purpose

The purpose of these regulations is to ensure the safety and well-being of residents in this State who use the services of home health agencies licensed pursuant to 16 **Delaware Code**, §122(3)o, and/or self-employed healthcare givers in the resident’s own home or home of residence. To this end, persons selected for employment by home health agencies shall be subject to pre-employment criminal history checks and pre-employment drug testing; persons selected for employment by private individuals may be subject to pre-employment criminal history checks and pre-employment drug testing at the discretion of the private individual selecting the person for employment.

2.0 Definitions

“**Conditional Employment**” pertains to the period of time during which an applicant is working while his/her employer has not received the results of (a) the state criminal history record, (b) the federal criminal history record, and (c) the results of the testing for illegal drugs. Conditional employment must end immediately if either the state or federal criminal history record contains disqualifying crime(s) as delineated in Section 3.1 of these regulations.

“**Department or DHSS**” means Department of Health and Social Services.

“**Employer**” is any person, business entity, management company, home health agency, temporary agency, or other organization that hires persons or that places persons in a private residence for the purposes of providing licensed nursing services, home health aide services, physical therapy, speech pathology, occupational therapy or social services.

“**Final Employment**” means employment upon the employer’s receipt of the State Bureau of Identification criminal history record containing evidence of no disqualifying convictions, a report by the Department that there are no disqualifying convictions in such person’s federal criminal record, and the results of the testing for illegal drugs.

“**Hire**” means to begin employment of an applicant, or to pay wages for the services of a person who has not worked for the employer during the preceding three-month period, or to refer a caregiver to a private residence in return for a finder or placement fee.

“**Home Health Agency**” is any business entity, public or private, which provides directly or through contract arrangements, to individuals in their home or private residence, either (a) two or more of the following services: licensed nursing, home health aide, physical therapy, speech pathology, occupational therapy, or social services where at least one of these services is licensed nursing or home health aide services or (b) home health aide services exclusively, provided under appropriate supervision.

“**Illegal drug**” for purposes of these regulations means marijuana/cannabis, cocaine, opiates including heroin, phencyclidine (PCP), amphetamines, barbiturates, benzodiazepene, methadone, methaqualone and propoxyphene.

“**Promotion**” means any change in job classification that results in additional responsibility and/or an increase in wages. It does not include a change in job status from part-time to full-time.

3.0 Criteria For Unsuitability For Employment

- 3.1 The following types of criminal convictions (or convictions in another jurisdiction which are comparable under Delaware law) automatically disqualify a person from providing home health services when such conviction occurred within the time periods specified:
 - 3.1.1 Conviction of any act causing death as defined in 11 **Delaware Code**, Chapter 5, Subchapter II, Subpart B with no time limit;
 - 3.1.2 Conviction of any sexual offense designated as a felony in 11 **Delaware Code**, Chapter 5, Subchapter II, Subpart D with no time limit;
 - 3.1.3 Conviction of any violent felony as specified in 11 **Delaware Code**, Section 4201(c) within the last ten years;
 - 3.1.4 Conviction of any felony involving a controlled substance, a counterfeit controlled substance, or a designer drug as specified in 16 **Delaware Code**, Chapter 47 within the last ten years;
 - 3.1.5 Conviction of any felony other than those specified above within the last five years;
 - 3.1.6 Conviction of any misdemeanor involving a controlled substance, a counterfeit controlled substance, or a designer drug as specified in 16 **Delaware Code**, Chapter 47 within the last five years;
 - 3.1.7 Conviction of any Class A misdemeanor included in 11 **Delaware Code**, Chapter 5, Subchapter II, Subpart A within the last five years;
 - 3.1.8 Conviction of any attempt to commit a crime, as defined in 11 **Delaware Code**, Section 531, with respect to any of the above listed offenses.
- 3.2 For other criminal convictions, the following criteria are to be used by the employer in determining whether a person is suitable for employment in home health care:
 - 3.2.1 Type of conviction(s);
 - 3.2.2 Frequency of conviction(s);
 - 3.2.3 Length of time since conviction(s) occurred;
 - 3.2.4 Age at the time of the conviction(s);
 - 3.2.5 Record since the conviction(s);
 - 3.2.6 Relationship of conviction(s) to type of job assignment.
- 3.3 Employer Responsibilities
 - 3.3.1 The employer shall ensure that a *Criminal History Record Request Form* has been completed and that the employer copy is maintained in the employer's files.
 - 3.3.2 The employer shall maintain a signed copy of the *Receipt/Verification of Providing Fingerprints Form* from the Delaware State Police.
 - 3.3.3 If an employer wishes to have a criminal history record check conducted on an applicant who has been the subject of a qualifying State and Federal background check within the previous 5 years, the costs shall be borne by the employer. Payment shall be made directly to the Delaware State Police. The Department shall, at no cost, provide the results of the Federal Bureau of Investigation information to the employer in the same manner as for any other applicant.
 - 3.3.4 If a person is fingerprinted under the auspices of these regulations more than once during a five-year period, the costs shall not be borne by the State. If the State is billed for such fingerprinting costs, payment shall be obtained from the employer specified on the *Criminal History Record Request Form*. Such employer may obtain payment from the applicant.
 - 3.3.5 If an applicant who has been conditionally hired is separated from employment for any reason prior to completion of the criminal history check process, the employer shall notify the Department upon such separation.
 - 3.3.6 Upon receipt of the results of the criminal history record check and the results of the testing for illegal drugs, the employer shall determine the suitability of an applicant for final employment using the criteria in Section 3.2 unless the state or federal criminal history record check has identified a

- conviction of one or more automatically disqualifying crimes. An applicant for final employment with a conviction of an automatically disqualifying crime shall be terminated immediately.
- 3.3.7 The employer shall notify the applicant of the findings of the criminal history record check and the testing for illegal drugs.
- 3.3.8 The employer may provide to the individual in need of care a statement that the applicant has satisfactorily completed the criminal history record check and the testing for illegal drugs.
- 3.3.9 The Department reserves the right to obtain data from employers on the employment status of applicants covered under these regulations, including but not limited to the requirement that agencies submit on a quarterly basis a list of applicants hired [which shall conform in format and content to Division standards].
- 3.4 Applicants' Responsibilities
- 3.4.1 Applicants are responsible for completing all information accurately and completely on the *Criminal History Record Request Form* and any form provided by the employer for use in obtaining mandatory pre-employment testing for illegal drugs. Any applicant who refuses to complete one or more of these forms shall be deemed to have voluntarily withdrawn his/her application.
- 3.4.2 The applicant is responsible for having his/her fingerprints taken and for returning a *Receipt/Verification of Providing Fingerprints to the Delaware State Police Form* to the employer.
- 3.4.3 The applicant is responsible for informing any potential employer if he/she has already been fingerprinted in accordance with these regulations. The cost of additional fingerprinting, exceeding the one fingerprinting per five-year period required by these regulations, shall not be borne by the State.
- 3.4.4 The applicant is responsible for submitting to the required testing for illegal drugs and providing verification of the testing to the employer.
- 3.5 Department's Responsibilities
- 3.5.1 When the Department has received all necessary documentation, it shall perform a review and ensure that the employer receives a copy of the applicant's state criminal history report and issue a written summary of the federal criminal history report. If conviction of a disqualifying crime is included on the state or federal criminal history report, the Department shall notify the employer immediately, prohibiting either the hire or continued conditional employment of the applicant.
- 3.5.2 Upon notification that an employer intends to hire a person who has previously had the criminal history check conducted by the Department, the Department shall review the criminal history on file and shall review the applicant's criminal history via the Criminal Justice Information System for any subsequent criminal information. If the review reveals a disqualifying conviction subsequent to the original review, the applicant shall be disqualified from employment with the new employer and the previously listed employers shall be notified of the recent conviction and encouraged to make personnel decisions based on the new information.
- 3.6 Confidentiality
- 3.6.1 In accordance with 11 **Delaware Code**, Section 8513(c), the Department shall receive information from the State Bureau of Identification pertaining to the identification and conviction data of any person for whom the Bureau has a record solely for the purpose of determining suitability for employment of the person whose record is received.
- 3.6.2 The Department shall store written and electronically recorded criminal history record information in a secure manner to provide for the confidentiality of records and to protect against any possible threats to their security and integrity.
- 3.6.3 The Department shall not release to employers, as defined in Section 3 of these regulations, copies of actual written reports of criminal history records prepared by the Federal Bureau of Investigation.
- 3.6.4 The following procedure shall be used to permit the review of criminal history record files by any applicant:
- 3.6.4.1 An applicant shall submit a request in writing to the Department for the on-site review of his/her criminal history record file.

- 3.6.4.2 An applicant shall make an appointment to review the record at the Department in the presence of a Department employee. The applicant shall present photo identification at the time of the review.
- 3.6.4.3 Written documentation of the date and time of the review and the names of those present shall be filed in the criminal history record file of the applicant.
- 3.6.4.4 Upon completion of such a review, the Department shall return criminal history records (written or electronic) to secure storage.
- 3.6.5 Criminal history record information shall not be disseminated to any person(s) other than the applicant, his/her employer or subsequent employer(s) as defined in Section 3 of these regulations, or the Department.
- 3.6.6 All employers shall store criminal history record information in a secure manner to provide for the confidentiality of records and to protect against any possible threats to their security and integrity.
- 3.6.7 Employers shall limit the use of criminal history record information to the sole purpose of determining suitability for employment.

6 DE Reg. 1208 (3/1/03)

13 DE Reg. 1317 (04/01/10)