

# DEPARTMENT OF HEALTH AND SOCIAL SERVICES

## DIVISION OF LONG TERM CARE RESIDENTS PROTECTION

Statutory Authority: 31 Delaware Code, Sections 1145 and 1146 (31 Del.C. §§1145 & 1146)  
16 DE Admin. Code 3110

### PROPOSED

### PUBLIC NOTICE

#### 3110 Criminal History Checks and Drug Testing for Home Health Agencies

In compliance with the State's Administrative Procedures Act (APA - Title 29, Chapter 101 of the **Delaware Code**) and under the authority of Title 29 of the **Delaware Code**, Section 7971(d)(1), Delaware Health and Social Services (DHSS) / Division of Long Term Care Residents Protection is proposing to amend Regulation 3110 Criminal History Record Checks and Drug Testing for Home Health Agencies.

Any person who wishes to make written suggestions, compilations of data, testimony, briefs or other written materials concerning the proposed new regulations must submit same to Tom Murray, Deputy Director, DHSS/DLTCRP, 3 Mill Road, Suite 308, Wilmington, DE 19806 or by fax to (302) 577-6661 by Thursday, January 31, 2013.

The action concerning the determination of whether to adopt the proposed regulation will be based upon the results of Department and Division staff analysis and the consideration of the comments and written materials filed by other interested persons.

#### SUMMARY OF PROPOSED CHANGES

This regulatory proposal revises the existing regulations to comport with the electronic background system and Federal EEOC guidelines.

#### Statutory Authority

29 Del.C. §7971(d)(1), Delaware Health and Social Services (DHSS) / Division of Long Term Care Residents Protection

#### 3110 ~~Criminal History~~ Background Checks and Drug Testing for Programs and Home Health Care Agencies

#### 4.0 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)g, 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(e) 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.~~

## **1.0 Legal Basis**

The legal basis for these regulations is 16 Del.C. §§1145 and 1146 and 29 Del.C. §7972.

## **2.0 Purpose**

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

## **3.0 Definitions**

“Agency” means all programs or home care agencies licensed pursuant to 16 Del.C. §122(3)(m), or (3)(0), or (3)(x).

“Applicant” is a person seeking employment with an employer as defined in 16 Del.C. §1145(b)(1).

“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 collected and 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)” means 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. Chapter 11.

“Grandfathered employee” is a current employee who was employed by an agency prior to July 1, 2001, and thus was exempted from the requirement enacted at that time that all agency 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.

“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 by an employer as defined in 16 Del.C. §1145(b)(5);
- : Are employed by a temporary employment agency, home health or personal care agency, or any other entity to work for an agency 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 for agencies 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 number 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 individuals 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 conviction.
- 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 choses 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 number is not already known by DLTCRP due to prior fingerprinting.

A copy of the Grandfathered employee consent form shall be maintained in a discreet 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 their place on the Master List pursuant to 6.2 above shall be maintained in separate discreet files which are readily accessible, without delay, upon request by an agent of the Department.

## **7.0 Service Letters**

- 7.1 Before hiring an Applicant, employers are 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 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) or any theft-related misdemeanor conviction within the past 18 months, or theft-related felony within the past 10 years.
- 8.2 **Disqualifying convictions.** No agency 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, or of a theft-related misdemeanor within the past 2 years, or of a theft-related felony within the past 10 years. 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
- 8.3.1 **Individualized Assessment** – Before excluding a prospective employee on the basis of a criminal conviction, other than a disqualifying conviction as described in 8.2 above, the employer must conduct an individualized assessment. Individualized assessment generally requires that an employer informs the individual that he or she may be excluded because of past criminal conduct; provides an opportunity to the individual to demonstrate that the exclusion does not properly apply to them; and considers whether the individual's additional information shows that the past criminal conduct is not job related and consistent with business necessity.
- 8.3.2 The individual's showing may include information that he or she was not correctly identified in the criminal record, or that the record is otherwise inaccurate. Other relevant individualized evidence includes, for example:
- : The facts or circumstances surrounding the offense or conduct;
  - : The number of offenses for which the individual was convicted;
  - : The fact that the individual is now older than age at the time of conviction, or release from prison;
  - : Evidence that the individual performed the same type of work, post-conviction, with the same or a different employer, with no known incidents of criminal conduct;
  - : The length and consistency of employment history before and after the offense or conduct;
  - : Rehabilitation efforts, e.g., education/training;
  - : Employment or character references and any other information regarding fitness for the particular position; and
  - : Whether the individual is bonded under a federal, state, or local bonding program.
- 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 discreet file and be available for inspection, without delay, upon request from an agent of DLTCRP.

## **10.0 Further Employer Responsibilities**

- 10.1 An employer must ensure that all persons who perform services for the agency comply with the law.
- 10.2 The employer shall ensure that every application for employment 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 discreet file which is immediately available, upon request, from any agent of the Department.
- 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 Master List by promptly reflecting the termination of any person no longer working in the agency.
- 10.6 An employee whose employment is terminated may remain on the Master List to facilitate reemployment by the same or another agency up to 3 years beyond the date the individual was last fingerprinted. See 6.2 above. 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 other person, agency, or facility except when requested because the subject of the BCC disclosure will be working for that employer in a facility or in the personal private residence of the requesting party.
- 10.9 The employer shall use the BCC disclosures solely for the purpose of determining the suitability of an Applicant for employment.

## **11.0 Confidentiality**

- 11.1 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.
- 11.2 DHSS shall limit the use of BCC disclosures to the sole objective of assisting employers determining the suitability of an Applicant for employment.
- 11.3 DHSS shall not release to employers copies of actual electronic reports of criminal history records prepared by the Federal bureau of Investigation.
- 11.4 The BCC is designed to allow participants to put information regarding their agency 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.
- 11.5 The following procedure shall be established to permit the review of personal BCC disclosures by an Applicant:
- 11.5.1 An Applicant shall submit a request in writing to the Department for an on-site review of their BCC disclosures.
- 11.5.2 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.
- 11.5.3 The BCC disclosures shall be reviewed in the presence of a DLTCRP employee.
- 11.5.4 Written documentation of the date and time of the review and the name of those present shall be maintained by DLTCRP.
- 11.5.5 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.

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

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

**16 DE Reg. 717 (01/01/13) (Prop.)**