

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** 3105

FINAL

ORDER

3105 Criminal History and Drug Testing for Nursing and Similar Facilities

NATURE OF THE PROCEEDINGS:

The Department of Health and Social Services ("Department") / Division of Long Term Care Residents Protection (DLTCRP) initiated proceedings to revise Regulation 3105 Criminal History Record Checks and Drug Testing. The Department's proceedings to establish the regulation was initiated pursuant to 29 **Delaware Code** Section 10114 and its authority as prescribed by 16 **Delaware Code** Section 1124 and 31 **Delaware Code** Section 512.

The Department published its notice of proposed regulation changes pursuant to 29 **Delaware Code** Section 10115 in the January 2013 Delaware *Register of Regulations*, requiring written materials and suggestions from the public concerning the proposed regulations to be produced by January 31, 2013, at which time the Department would receive information, factual evidence and public comment to the said proposed changes to the regulations.

SUMMARY OF PROPOSED AMENDMENT

The proposal establishes Regulation 3105 History Record Checks and Drug Testing. The proposed change will establish the regulation as required by 16 **Del.C.**, §1141(m).

Statutory Authority

29 **Del.C.** Chap. 79, "Department of Health and Social Services."

16 **Del.C.** §1141(m), "Criminal Background Checks."

Background

DLCTRP is revising these regulations pursuant to 16 **Del.C.** §1141(m).

Summary of Proposed Amendment

The proposal revises regulations to incorporate the role of the new "Background Check Center" established by statute and to conform to 2012 EEOC guidance on reliance on arrest and conviction records as they apply to hiring decisions.

SUMMARY OF COMMENTS RECEIVED WITH AGENCY RESPONSE AND EXPLANATION OF CHANGES

On further review, the Division has determined that it is beyond the scope of our authority to issue or mandate the use of guidelines set forth by federal agencies. Therefore we have deleted §§8.3.1 and 8.3.2 that mandated that employers abide by the Equal Employment Commission, Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, 915.002, issued 4/25/12. The Division will provide copies of this document on request and have posted a link to the document on the Division website: <http://www.dhss.delaware.gov/dhss/dlctcrp/>

The Governor's Advisory Council for Exceptional Citizens ("GACEC"), the State Council for Persons with Disabilities (SCPD) offered comments and The Delaware Health Care Facilities Association ("DHCFA") also offered comments and suggestions. DLTCRP has considered each comment and responds as follows:

Comment: 1: First, in §3.0, definition of "criminal history", the Division includes the following sentence: "It shall be limited to convictions and arrests for which no disposition is available.". This is problematic. The EEOC guidance (incorporated by reference at §8.6) discourages reliance on arrest records by employers. Moreover, the incidence of arrest records without disposition is high:

A 2006 study by the DOJ/BJS found that only 50% of arrest records in the FBI's III database were associated with a final disposition.

At 5. Routinely including a high volume of arrest records without disposition manifestly violates a basic precept of the EEOC guidance.

Response: *Except for the offenses listed at §8.2 the Division will no longer automatically disqualify applicants. The burden of analyzing and assessing suitability for employment rests with the employer. We are providing employers with the full record so they can conduct such an analysis and assessment in accordance with the EEOC guidelines.*

Comment 2: Second, §5.2 envisions the BCC continuously monitoring employees in its Master List for both arrests and convictions. The BCC is then authorized to use its discretion in sharing arrest information with the employer. This is not consistent with the EEOC guidance. The EEOC provides the following characterization of arrest records:

The fact of an arrest does not establish that criminal conduct occurred. Arrests are not proof of criminal conduct. Many arrests do not result in criminal charges, or the charges are dismissed. Even if an individual is charged and subsequently prosecuted, he is presumed innocent unless proven guilty.

Response: *The Division will receive and analyze the rap back updates. Charges with unknown dispositions or non-convictions will only be forwarded to the employer at the discretion of the Division. Again, the only convictions the Division will classify as disqualifying” are listed at §8.2. Other considerations are left to the employer.*

Comment 3: Third, §5.2 contains the following sentences:

DLTCRP will monitor the charge until there is a disposition. When the disposition is known, DLTCRP will inform the Employer of the conviction.

This incorrectly presumes that all dispositions will be convictions. Consider substituting “any conviction” for “the conviction”.

Response: *The Division reserves the discretion to notify employers of any new criminal court action including both pending and resolved cases, and any wanted status. The Division will inform the employer of the resolution of the criminal court action when known. We have replaced the word “conviction” with “outcome.”*

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 outcome]**.

Comment 4: Fourth, the term “discrete” should be substituted for “discreet” throughout the document. It is incorrectly used in §§6.3, 6.4, 9.2, and 10.3.

Response: *Substitutions made as recommended.*

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 **[discreet 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 their place on the Master List pursuant to 6.2 above shall be maintained in separate **[discreet discrete]** files which are readily accessible, without delay, upon request by an agent of DLTCRP.

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 discrete]** file and be available for inspection, without delay, upon request from an agent of DLTCRP.

10.3 The employer shall ensure that copies of all BCC consent forms signed by Applicants are maintained in a **[discreet discrete]** file which is immediately available, upon request, from any agent of DLTCRP.

Comment 5: Fifth, in §6.4, there is a plural pronoun (their) with a singular antecedent (employee). Consider substituting “inclusion” for “their place”.

Response: *Substitutions made as recommended.*

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 inclusion]** on the Master List pursuant to 6.2 above shall be maintained in separate **[discreet discrete]** files which are readily accessible, without delay, upon request by an agent of DLTCRP.

Comment 6: Sixth, §7.1 states as follows:

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.

This is not entirely accurate. Title 19 Del.C. §708(b)(6) authorizes conditional employment based on difficult circumstances. At a minimum, consider inserting “generally” prior to “required”.

Response: *Revision made as recommended.*

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.

Comment 7: Seventh, §7.2 recites as follows:

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.

While this employer requirement may be conceptually sound, it may lack statutory authority. Title 19 **Del.C.** §708(b)(5) contemplates employers maintaining the Service Letters and honoring requests from prospective employers for the Service Letters pertaining to applicants. Violations of the law result in civil penalties. Council could not locate any statute which permits an employer to simply send the Service Letters to the BCC which would then respond to employer requests for the Letters.

Response: 19 **Del.C.** §708(b)(5) requires the previous employer to provide the letter, it does not specify the manner in which it must be delivered. The mandatory posting of the letter in the BCC by the previous employer upon termination of the employee will result in increased compliance with the statute and provide the letter to the new employer with no delay by the previous employer.

Comment 8: Eighth, in §8.1, first sentence, the word “to” should be inserted between “authorized” and “furnish”. Moreover, in the first sentence, the word “to” should be inserted between “person” and “employers”.

Response: Insertions made as recommended.

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).

Comment 9: Ninth, in §8.2, the 15-year period for abuse/neglect convictions seems a bit long. By analogy, felony theft convictions have a 10-year disqualifying period. Consider a shorter period for misdemeanors involving abuse/neglect. The conviction information would still be disclosed pursuant to the criminal background check but there would not be a categorical, “no-exceptions” disqualification from employment if the 15-year standard were modified.

Response: Theft will no longer be an automatic disqualifier. The Division has determined that 15 years is an appropriate time period.

Comment 10: Tenth, in §8.3.1, consider substituting “inform” for “informs”. There is also a plural pronoun (them) with a singular antecedent (individual). Consider substituting “the individual” for “them”. Alternatively, the term “him” could be substituted. See Delaware Administrative Code Style Manual, §3.3.2.1.

Response: §8.3.1 has been deleted.

Comment 11: Eleventh, in §8.3.2, I believe the fourth “bullet” (Evidence...conduct) is “bunched” with the third bullet.

Response: §8.3.2 has been deleted.

Comment 12: Twelfth, in §12.3, capitalize “Bureau”.

Response: Amended as recommended.

12.3 DHSS shall not release to employers copies of actual electronic reports of criminal history records prepared by the Federal **[b B]**ureau of Investigation.

Comment 13: Thirteenth, in §12.5.1, there is a plural pronoun (their) with a singular antecedent (Applicant). Consider substituting “his”. See Delaware Administrative Code Style Manual, §3.3.2.1.

Response: Amended as recommended.

12.5.1 An Applicant shall submit a request in writing to the Department for an on-site review of **[their his]** BCC disclosures.

Comment 14: Fourteenth, in §11.5.4, substitute “names” for “name”.

Response: Not found in §11.5.4 but amended as recommended at §12.5.4.

12.5.4 Written documentation of the date and time of the review and the **[name names]** of those present shall be maintained by DLTCRP.

Comment 15: Fifteenth, Title 29 **Del.C.** §7972 provides for due process and a hearing to contest BCC errors. Hearings must be consistent with the APA. The regulation omits information in this context. For example, in §11.5, an applicant should be able to obtain a written copy of BCC disclosures to bring to an attorney or facilitate checking accuracy based on other records. Moreover, there is no mention of a hearing in the regulation. There is only an obtuse reference to “appeal” in §15.5.5.

Response: The determination of a disqualifying conviction based on §8.2 is the only determination made by the Division. Consistent with the statutory language at 29 **Del.C.** §7972 challenges to those determinations will be consistent

with the Administrative Procedures Act, 29 **Del.C.** Chapter 101. That process for appeal has been successfully applied previously under 16 **Del.C.**, in particular for appeals of remedies imposed for noncompliance and is set forth at §1114. All other information provided through the BCC originates from other sources. Determinations are made by those other sources or by the employers themselves and challenges will be directed to those sources for resolution.

Comment 16: We believe that some “grandfathered employees” may not consent to be fingerprinted to obtain an SBI number or may not comply within the 120 day timeframe prescribed in the proposed regulations and will have to be terminated by the employer.

Response: *The 120 day timeframe is a statutory requirement.*

Comment 17: It has been reported to our association that regularly employees who are terminated for “abuse or neglect” have successfully obtained unemployment benefits. We believe that this should not be permitted under any circumstances but fear it will also occur with grandfathered employees that are terminated for lack of compliance with the new BCC regulations.

We hereby request that language be included, where appropriate, to prevent grandfathered employees who refuse to comply with the new requirements from collecting unemployment benefits.

Response: *Unemployment benefits are the purview of the Department of Labor. The Division cannot control or regulate policies or decisions of another agency. We appreciate the comment and will share it with the Department of Labor administration.*

FINDINGS OF FACT:

The Department finds that the proposed changes as set forth in the January 2013 *Register of Regulations*, amended as noted herein, should be adopted.

THEREFORE, IT IS ORDERED, that the proposed regulation to amend the Title XIX Medicaid State Plan and the Division of Social Services Manual (DSSM) regarding the Medical Assistance during Transition to the Medicare Program is adopted and shall be final effective March 11, 2013

Rita Landgraf, Secretary, DHSS

3105 Criminal History ~~Record Checks~~ and Drug Testing for Nursing and Similar Facilities

4.0 Legal Basis

The legal base for these regulations is in the 16 **Del.C.** Ch. 11 §§1141 and 1142.

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 this end, persons selected for employment in these facilities, effective March 31, 1999, will be subject to pre-employment criminal history checks and pre-employment drug testing. Further, these regulations apply to any person referred by a temporary agency, as herein defined, to such facilities for temporary employment who was hired by such agency on or after March 31, 1999.

3.0 Definitions

“Applicant” means any person seeking employment in a nursing home; a current employee of such facility, as defined herein, who seeks promotion within the same facility; and/or a person hired on or after March 31, 1999, by a temporary agency (as defined below and including, but not limited to, contractors and home health agencies) who is sent by that agency to work in a nursing home.

“Conditional Employment” is the period of time during which an applicant is working in a nursing home 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 drug test. Conditional employment must end immediately if either the State or Federal criminal history record contains disqualifying crime(s).

“Department or DHSS” means Delaware Health & Social Services.

“Disqualifying Convictions or Disqualifying Crimes” are the items delineated in Section 6.0 of these regulations.

“Employer” is any person, business entity, management company, temporary agency, or other organization that hires persons to work in a nursing home or that places persons for work in a nursing home.

~~“Evidence” means verification from the State Bureau of Identification or designee that the applicant has been fingerprinted and that his/her criminal history records have been requested. In addition, evidence means documentation that drug testing has been performed.~~

~~“Final Employment” is contingent upon the employer’s receipt of the State Bureau of Identification criminal history record containing evidence of no disqualifying crimes or of any factors which would render that applicant unsuitable for employment in a nursing home; a report by the Department that there are no disqualifying crimes in such person’s Federal criminal record; and the results of the drug testing.~~

~~To “hire” means to begin employment of an applicant after March 31, 1999, or to pay wages for the services of a person who has not worked for the employer during the preceding twelve-month period.~~

~~“Illegal Drug” means: marijuana/cannabis; cocaine; opiates including heroin; phencyclidine (PCP); amphetamines; and any other illegal drug subsequently specified by the Department in the absence of a valid physician prescription.~~

~~“Nursing Home” means a residential facility that provides shelter and food to more than one person who, because of their physical and/or mental condition, require a level of care and services suitable to their needs to contribute to their health, comfort, and welfare; and who are not related within the second degree of consanguinity to the controlling person or persons of the facility. The facilities covered here are those licensed pursuant to 16 ~~Del.C.~~ Ch. 11, and include but are not limited to nursing facilities (commonly referred to as nursing homes); assisted living facilities; intermediate care facilities for persons with mental retardation; neighborhood group homes; family care homes; and rest residential facilities.~~

~~“Promotion” means any change in job classification which results in additional responsibility and/or an increase in wages. It does not include a change in job status from parttime to fulltime.~~

~~“Temporary Agency” for purposes of these regulations means any organization, employer, business entity, contractor, or home health agency that provides services in a nursing home. In the case of contractors, services are covered if they are provided on a regular basis.~~

~~“Regular Basis” for purposes of this definition means that the services are provided for 20 hours or more per week. Companies, contractors, and/or vendors working on the physical structures, systems or grounds of nursing homes on an as-needed basis are not included within this definition or these regulations.~~

4.0 Persons Subject To The Law

~~All applicants hired on or after March 31, 1999, and all current employees who seek promotion in a nursing home are subject to the provisions of 16 ~~Del.C.~~ §1141 and §1142. In addition, all persons hired on or after March 31, 1999, by a temporary agency (as defined herein) and referred on or after March 31, 1999, to a nursing home are subject to the provisions of 16 ~~Del.C.~~ §1141 and §1142.~~

5.0 Frequency Of Criminal History Record Checks

~~Any applicant who has been the subject of a qualifying background check in Delaware within the previous 5 years shall be exempt from 16 ~~Del.C.~~ §1141, except that the applicant is not exempt from subsequent employer access to the information contained in that background check. To qualify, such a check must include both State and Federal criminal history record checks and be pursuant to 16 ~~Del.C.~~ §1141. However, employers, at their own expense, shall have the right to require more frequent background checks.~~

6.0 Criteria For Unsuitability For Employment

~~The following types of criminal convictions (or such crimes, if committed in another jurisdiction, which are comparable under Delaware law) automatically disqualify a person from working in a nursing home, if the person was convicted of the offense within the time parameters specified:~~

- ~~6.1 These Class A misdemeanors included in 11 ~~Del.C.~~ Ch. 5 Subchapter II, Subpart A, if convicted within the last five years.~~
- ~~6.2 Any misdemeanor involving a controlled substance, a counterfeit controlled substance, or a designer drug as specified in 16 ~~Del.C.~~ Ch. 47, if convicted within the last five years.~~
- ~~6.3 Any felony involving a controlled substance, a counterfeit controlled substance, or a designer drug as specified in 16 ~~Del.C.~~ Ch. 47, if convicted within the last ten years.~~
- ~~6.4 Any violent felony, as specified in 11 ~~Del.C.~~ §4201(c), if convicted within the last ten years.~~
- ~~6.5 Conviction of any act causing death, as defined in 11 ~~Del.C.~~ Ch. 5 Subchapter II, Subpart B, with no time limit.~~
- ~~6.6 Conviction of any sexual offense designated as a felony in 11 ~~Del.C.~~ Ch. 5 Subchapter II, Subpart D, with no time limit.~~
- ~~6.7 Any felony, other than those specified above, if convicted within the last five years.~~

7.0 In regard to other criminal convictions, the following criteria are to be used in determining whether a person is suitable for employment in a nursing home:

- 7.1 Type of offense(s)
- 7.2 Frequency of offense(s)
- 7.3 Length of time since the offense(s)
- 7.4 Age at the time of the offense(s)
- 7.5 Severity of the offense(s)
- 7.6 Record since the offense(s)
- 7.7 Nature of the offense(s) in relation to the type of job assignment
- 7.8 Disposition of the offense(s).

8.0 Sanctions

- 8.1 Sanctions against applicants shall be applied and enforced in the following circumstance(s):
 - 8.1.1 Failure by an applicant to disclose relevant criminal history information on a *criminal history record request form* that is subsequently disclosed as a result of the criminal history record check shall result in a civil penalty of not less than \$1,000 nor more than \$5,000 for each violation.
 - 8.1.2 Failure of an applicant to comply with pre-employment drug testing, as required, shall result in a civil penalty of not less than \$1,000 nor more than \$5,000 for each violation.

9.0 Sanctions against employers shall be applied and enforced in the following circumstance(s):

- 9.1 An employer who hires an applicant conditionally before receiving verification that the applicant has been fingerprinted and that the State and Federal criminal history record checks have been requested shall be subject to a civil penalty of not less than \$1,000 nor more than \$5,000 for each violation.
- 9.2 An employer who hires an applicant for final employment 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 shall be subject to a civil penalty of not less than \$1,000 nor more than \$5,000 for each violation.
- 9.3 An employer who hires an applicant for final employment and fails to request and/or fails to obtain a written report regarding 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.
- 9.4 Employer failure to comply with the pre-employment drug testing law shall result in a civil penalty of not less than \$1,000 nor more than \$5,000 for each violation.
- 9.5 Violations are to be reported to the Division of Long Term Care Residents Protections.

10.0 Employer Responsibilities

- 10.1 Criminal history record checks and drug testing are to be completed on applicants who have been prescreened and to whom an offer of employment may be made. Payment for drug testing is the responsibility of the employer or the applicant.
- 10.2 Conditional employment cannot begin until the employer has received evidence that the applicant's State and Federal criminal history records have been requested, he/she has been fingerprinted, and he/she has requested the appropriate drug testing. Under no circumstances shall an applicant be employed on a conditional basis for more than 2 months if his/her employer has not received the test results.
- 10.3 An employer whose nursing home includes both licensed and unlicensed areas must ensure that all persons who perform services in the licensed areas comply with the law.
- 10.4 The employer shall ensure that every application for employment at a nursing home specifies that the applicant is required 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 Investigations appropriation of Title II of Public Law 92-544. In addition, every application for employment shall contain a statement that must be signed by the applicant in which the applicant grants full release for the employer to request and obtain any such records or information contained on a criminal history record.
- 10.5 The employer shall ensure that a *criminal history record request form* has been completed and that the employer copy is maintained in its files.
- 10.6 The employer shall also maintain a signed copy of a *verification of providing fingerprints to the Delaware State Police form*.

- 10.7 When exigent circumstances exist, and an employer must fill a position in order to maintain the required level of service, the employer may hire an applicant on a conditional basis when the employer receives evidence that the applicant has actually had the appropriate drug testing, as long as the person has also provided verification of fingerprinting. All persons hired shall be informed in writing and shall acknowledge, in writing, that his/her drug test results have been requested.
- 10.8 The employer must ensure that no applicant remains employed in conditional status for more than two months without receiving the results of the mandatory drug testing. If the drug testing results are not received within two months, the applicant must be terminated from employment, or in the case of an applicant who was conditionally promoted, the applicant can be returned to his/her prior position or removed from employment in the nursing home.
- 10.9 The employer must provide to the Department a copy of each applicant's final drug test results within 10 business days of their receipt.
- 10.10 When the employer is notified of conviction of one or more disqualifying crimes in either the State or Federal criminal history of an applicant, the employer shall terminate the applicant immediately.
- 10.11 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 cost for this must be borne by the employer. Payment must be made directly to the State Police. The Department will, at no cost, provide the results of the Federal Bureau of Investigation information, just as it would for an applicant who had not had such a check conducted within the previous 5 years.
- 10.12 If a person is fingerprinted under the auspices of these regulations more than once during a five-year period, the cost of that fingerprinting will not be borne by the State. If billed, the Department will obtain payment from the employer specified on the *criminal history record request form*. Such employer may obtain payment from the applicant.
- 10.13 The employer will notify the Department if an applicant is separated from employment for any reason prior to completion of the criminal history check process.
- 10.14 The employer will have the responsibility for using the results of the criminal history record check and the drug testing as factors in making the determination of suitability for final employment, unless the State and/or Federal criminal history record check identifies the presence of a conviction of one or more disqualifying crimes, in which case the applicant is automatically disqualified for final employment and must be terminated.
- 10.15 The employer will notify the applicant of the findings.
- 10.16 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 facilities submit on a quarterly basis a list of applicants hired which shall conform in format and content to Division standards.

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

11.0 Responsibilities Of Temporary Agencies

- 11.1 As employers, temporary agencies are responsible for all items delineated above under the section titled "Employer Responsibilities" (section 10).
- 11.2 In addition, temporary agencies are responsible for the cost of criminal history record checks.
- 11.3 In the case of contractors covered by these regulations, all applicants who provide services in a nursing home as an employee of a contractor must comply with the requirements of 16 **Del.C.** §1141 and §1142. Thus, each individual — even though he/she may not work in the nursing home for 20 hours in any given week — must comply, if the contractor is providing services in the nursing home for 20 hours or more per week.
- 11.4 Temporary agencies are required to inform nursing homes of any criminal background identified in the criminal history information provided by the State Bureau of Identification and the Federal report, as summarized by the Department, regarding any applicant placed or referred for work at such facility. The temporary agency must have each applicant sign a full release giving the agency permission to provide any such criminal history information received about him/her to any nursing home where the person is placed to work.
- 11.5 Temporary agencies are required to inform nursing homes of the mandatory drug test results of applicants referred for work in such facilities. Applicants shall sign a full release giving the agency permission to provide any such information to any nursing home where they are placed to work.

12.0 Applicants' Responsibilities

- 12.1 Applicants are responsible for completing all information accurately and completely on a *criminal history record request form*; a *verification of providing fingerprints to the Delaware State Police form*; and any form provided by the employer for use in obtaining mandatory pre-employment drug testing. Any applicant who refuses to complete any one or more of these forms is deemed to have voluntarily withdrawn his/her application.

- 12.2 ~~The applicant is responsible for having his/her fingerprints taken and returning a *verification of providing fingerprints to the Delaware State Police form* to the employer.~~
- 12.3 ~~The applicant is responsible for informing any potential employer if he/she has already been fingerprinted under the jurisdiction of these regulations. The cost for additional fingerprinting, done above and beyond the one fingerprinting per five-year period required by these regulations, shall not be borne by the State.~~
- 12.4 ~~The applicant is responsible for completing the required drug testing and providing verification to the employer.~~

13.0 The Department's Responsibilities

- 13.1 ~~The Department is responsible for promulgating these regulations and revising them, as the need may arise.~~
- 13.2 ~~Since an applicant's Federal criminal record may not be provided to a privately-owned entity or to the applicant, the Department will issue a report to the employer based upon the information received.~~
- 13.3 ~~Once the Department has received all necessary documentation, it shall perform a review, guided by criteria and timelines developed by the Department, and issue a written summary of findings to the employer. If conviction of a disqualifying crime is included on the State or Federal criminal history report, the Department will notify the employer immediately, prohibiting either the hire or continued conditional employment of the applicant.~~

14.0 Confidentiality

- 14.1 ~~Title 11, subsection 8513 (c) (1) of the **Delaware Code** permits the State Bureau of Identification to "furnish information pertaining to the identification and conviction data of any person...of whom the Bureau has record...to ...[i]ndividuals and agencies for the purpose of employment of the person whose record is sought, provided...[t]he use of the conviction data shall be limited to the purpose for which it was given..."~~
- 14.2 ~~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.~~
- 14.3 ~~The Department shall limit the use of the criminal history record information to its purpose of determining suitability for employment.~~
- 14.4 ~~The Department shall not release to employers, as defined in these regulations, copies of actual written reports of criminal history records prepared by the Federal Bureau of Investigation.~~
- 14.5 ~~The following procedure shall be established to permit the review of criminal history record files by the applicant:~~
 - 14.5.1 ~~An applicant shall submit a request in writing to the Department for the on-site review of his/her criminal history record file.~~
 - 14.5.2 ~~An appointment shall be made for the applicant to review the record at the Department. Photo identification will be required at the time of the review.~~
 - 14.5.3 ~~The record shall be reviewed in the presence of a Department employee.~~
 - 14.5.4 ~~Written documentation of the date and time of the review and the name of those present shall be filed in the criminal history record file for the applicant.~~
 - 14.5.5 ~~The Department shall not remove criminal history records (written and electronic) from the secure files for any purpose other than to permit review by the named applicant.~~
- 14.6 ~~Criminal history record information shall not be disseminated to any persons other than the applicant, his/her employer or subsequent employer(s), nursing homes to which a person is referred by a temporary agency, or the Department (11 **Del.C.** § 513(d)).~~
- 14.7 ~~All employers are required to 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. Employers are reminded that the confidentiality of such information is required under 11 **Del.C.** §8514. Knowing and reckless violation is a Class A Misdemeanor.~~
- 14.8 ~~Employers must limit the use of the criminal history record information to its purpose of determining suitability for employment.~~

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.

“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 **[conviction 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 **[discreet 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 **[their place inclusion]** on the Master List pursuant to 6.2 above shall be maintained in separate **[discreet 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
- ~~**[8.3.1 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 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 ~~**[discreet 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. 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 ~~[b]~~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 ~~[their]~~ 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 name[s] 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) (Prop.)