

DEPARTMENT OF HEALTH AND SOCIAL SERVICES

DIVISION OF LONG TERM CARE RESIDENTS PROTECTION

Statutory Authority: 16 Delaware Code, Section 1141(e) (11 Del.C. §1141(e))
16 DE Admin. Code 3105

FINAL

3105 Criminal History Record Checks and Pre-employment Drug Testing for Persons Working in Nursing Homes and Other Facilities Licensed Under 16 Del.C. Ch. 11.

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 Nursing homes. 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 accommodate the statutory amendment enacted last year which eliminated payment by the State for Criminal Background Checks at Nursing Homes and Similar Facilities. The proposal permits the Division of Long Term Care Residents Protection to require that the entities obligated to secure such checks to submit quarterly reports so that compliance can be monitored. The entities governed by this regulation are facilities licensed by the Division of Long Term Care Residents Protection which includes "Nursing homes" which is defined as: "any facility licensed pursuant to [16 Del.C., Ch.11], including but 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. Also included are temporary employment agencies which refer individuals to nursing homes.

Statutory Authority

16 Del.C., Ch. 11 §§1141.

Background

The proposed regulatory change is necessary to ensure that the statutory change does not compromise compliance 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:

- 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 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 3105 - Criminal History Record Checks and Drug Testing, with the modification indicated herein, is adopted and shall be final effective April 1, 2010.

Rita Landgraf, Secretary, DHSS

3105 Criminal History Record Checks and Drug Testing

1.0 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 Those 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 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].

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.

13 DE Reg. 1314 (04/01/10)