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BILL ANALYSIS



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Senate Bills 1253, 1254, and 1255 (as introduced 4-13-10)

Sponsor: Senator Patricia L. Birkholz (S.B. 1253)

Senator Tony Stamas (S.B. 1254)

Senator Buzz Thomas (S.B. 1255)

Committee: Health Policy

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CONTENT

Senate Bill 1253 would amend the Public Health Code to revise provisions related to criminal background checks for people who are employed by, work under contract for, or have clinical privileges with certain health facilities and agencies; and extend those provisions to adult foster care facilities, and psychiatric facilities and intermediate care facilities for people with mental retardation.

Under the bill, a covered health facility or staffing agency would have to request criminal history information from a licensing or regulatory department, and could rely on that information if the applicant met requirements regarding a previous criminal history check, continuous employment, and Michigan residency.

Senate Bills 1254 and 1255 would amend the Adult Foster Care Facility Licensing Act and the Mental Health Code, respectively, to eliminate criminal background check requirements specific to adult foster care facilities and psychiatric facilities and intermediate care facilities for people with mental retardation, and instead require those facilities to comply with the criminal background check provisions of the Public Health Code.

The bills are tie-barred to each other.

Senate Bill 1253**"Covered Facility"**

Under Section 20173 of the Public Health Code, except as otherwise provided, a health facility or agency that is a nursing home, county medical care facility, hospice, hospital that provides swing bed services, home for the aged, or home health agency may not employ, independently contract with, or grant clinical privileges to an individual who regularly has direct access to or provides direct services to patients or residents in the facility if he or she has been convicted of a specified crime or engages in conduct that becomes the subject of a substantiated finding of neglect, abuse, or misappropriation of property. Such a health facility or agency may not employ, independently contract with, or grant privileges to a person who regularly has direct access to or provides direct services to patients or residents until it has a criminal history check conducted on the person.

The bill would refer to a "covered facility" in these provisions and throughout the amended section. "Covered facility" would mean any of the following:

- A health facility or agency that is a nursing home, county medical care facility, hospice, hospital that provides swing bed services, home for the aged, or home health agency.

- A psychiatric facility or intermediate care facility for people with mental retardation under the Mental Health Code.
- An adult foster care facility.

The bill also would prohibit a covered facility from employing, contracting with, or granting privileges to a person who had direct access or provided direct services to patients or residents until it had a criminal history check conducted or received criminal history record information in compliance with Section 20173a.

Criminal History Check

Under Section 20173a, a person who applies for employment as an employee or independent contractor or for clinical privileges with a facility and who has received a good faith offer of employment, an independent contract, or clinical privileges must give written consent for the Michigan Department of State Police (MSP) to conduct an initial criminal history check, along with identification acceptable to the MSP. The bill would refer to a covered facility or staffing agency in this provision, and refer to a person who had not been the subject of a criminal history check rather than a person who had received a good faith offer.

(Currently, "independent contract" means a contract entered into by a health facility or agency with an individual who provides the contracted services independently or a contract entered into by a health facility or agency with an organization or agency that employs or contracts with an individual after complying with the Code's requirements to provide the contracted services to the health facility or agency on behalf of the organization or agency. The bill would refer to a covered facility, rather than a health facility or agency, and would refer to a staffing agency rather than an organization or agency that employs or contracts with an individual. "Staffing agency" would mean an entity that recruits candidates and provides temporary and permanent qualified staffing for covered facilities, including independent contractors.)

Additionally, if the applicant already had been the subject of a criminal history check under the Code, he or she would have to give written consent at the time of

application for the covered facility or staffing agency to obtain his or her criminal history record information from the relevant licensing or regulatory department and for the MSP to conduct a criminal history check if requirements regarding the previous check, the applicant's continuous employment by the staffing agency or facility, and the applicant's status as a Michigan resident were not met and a request to the FBI for a determination of any national criminal history pertaining to the applicant were necessary, along with identification acceptable to the MSP.

Upon receiving written consent, the staffing agency or covered facility that made a good faith offer of employment, a contract, or clinical privileges to the applicant would have to request the criminal history record information from the relevant licensing or regulatory department and make a request regarding that applicant to the relevant department to conduct a check of all relevant registries established under Federal and State law for any substantiated finds of abuse, neglect, or misappropriation of property.

If the requirements regarding a previous criminal history check, continuous employment, and Michigan residency were not met and a request to the FBI for a subsequent determination of any national criminal history were necessary, the covered facility or staffing agency would have to request the MSP to conduct a criminal history check and forward the applicant's fingerprints to the FBI. A staffing agency that employed an individual who regularly had direct access to or provided direct services to patients or residents under an independent contract with a covered facility would have to submit information regarding the criminal history check it conducted to the covered facility that made a good faith offer of independent contract to the applicant.

Under Section 20173a, upon receiving an applicant's written consent to conduct a criminal history check, a facility that has made a good faith offer to the applicant must request the MSP to conduct the criminal history check, enter the applicant's fingerprints (which the applicant must provide) in the MSP's automated fingerprint identification system (AFIS) database, and forward the applicant's fingerprints to the

FBI. The MSP must request the FBI to determine the existence of any national criminal history pertaining to the applicant. The relevant licensing or regulatory department must conduct a check of all relevant registries established pursuant to Federal and State law and regulations for any substantiated findings of abuse, neglect, or misappropriation of property.

The MSP must conduct a criminal history check on the applicant named in the request and give the Department of Community Health (DCH) a written report containing any criminal history record information on the applicant maintained by the MSP. In addition, the MSP must provide the results of the FBI investigation determination to the DCH within 30 days after the request is made. The bill would refer to the relevant licensing or regulatory department in these provisions rather than the DCH.

Currently, if the requesting health facility or agency is not a State department or agency and if a criminal conviction is disclosed on the MSP's written report or the FBI's determination, the DCH must notify the facility and the applicant of the type of crime disclosed without disclosing its details. The bill would refer to the relevant licensing or regulatory department, rather than the DCH, and the staffing agency or covered facility instead of the health facility or agency. The bill also would revise references to these entities in provisions related to payment of costs for criminal history checks and use of the criminal history information.

Licensing or Regulatory Department Review

Under the bill, upon an applicant's consent and upon request from a staffing agency or covered facility that made a good faith offer of employment or an independent contract or clinical privileges, the relevant licensing or regulatory department would have to review the criminal history record information, if any, and notify the requesting agency or facility of the information. Until the FBI implemented an automatic notification system similar to the system required of the MSP, and Federal regulations allowed the Federal criminal record to be used for subsequent authorized uses, as determined in an order issued by the DCH, a staffing agency or covered health facility could rely on the criminal history record information provided by the relevant

licensing or regulatory department, and a request to the FBI to make a subsequent determination of the existence of any national criminal history pertaining to the applicant would not be necessary if all of the following conditions were met:

- The criminal history check was conducted during the immediately preceding 12-month period.
- The applicant had been continuously employed by the staffing agency or covered facility since the check was conducted in compliance with the Code or met the continuous employment requirement other than being on layoff status for less than one year from a covered facility.
- The applicant could provide evidence acceptable to the relevant licensing or regulatory department that he or she had been a Michigan resident for the immediately preceding 12-month period.

Currently, upon written request from another health facility or agency, psychiatric facility or intermediate care facility for people with mental retardation, or adult foster care facility that is considering employing, independently contracting with, or granting clinical privileges to an individual, a facility or agency that has obtained criminal history record information on that person must, with the applicant's consent, share that information with the requesting facility or agency. The bill would delete this language.

Exceptions

The Code's criminal history check requirements and the prohibition against employing, contracting with, or granting clinical privileges to an individual convicted of a disqualifying crime do not apply to certain people, including an individual who was employed by, under independent contract to, or granted clinical privileges in a facility before April 1, 2006.

Beginning April 1, 2011, such a person will have to give the MSP a set of fingerprints, which the MSP must enter into its AFIS database. Under the bill, the fingerprint requirement would apply to a person who was exempt under this provision and who had not been the subject of a criminal history check.

Currently, a person exempt under this provision is not limited to working within the facility with which he or she was employed by, under independent contract to, or granted clinical privileges on April 1, 2006, but may transfer to another facility or agency that is under the same ownership. If the person wishes to transfer to a health facility or agency that is not under the same ownership, he or she may do so provided that a criminal history check is conducted by the new facility or agency. Under the bill, the person could transfer to another covered facility, which would not have to be under the same ownership. The bill would delete the requirement that the new facility or agency under different ownership conduct a criminal history check.

Under the Code, if a person who is exempt under this provision is subsequently convicted of a disqualifying crime or found to be the subject of a substantiated finding of abuse, neglect, or misappropriation of property, he or she is no longer exempt and must be terminated from employment or denied employment. Under the bill, the person also would have to be denied clinical privileges.

The Code also exempts an independent contractor with a facility if the services for which he or she is contracted are not directly related to the provision of services to a patient or resident or if the services allow for direct access to patients or residents but are not performed on an ongoing basis. Under the bill, this exception would apply to an independent contractor who was not under the facility's control. "Under the facility's control" would mean an individual employed by or under independent contract with a covered facility for whom the facility determines whether the person who has access to patients or residents may provide care, treatment, or other similar support service functions to patients or residents served by the facility; and for whom the facility directs or oversees at least one of the following:

- The policy or procedures the individual must follow in performing his or her duties.
- The tasks he or she performs.
- The individual's work schedule.
- The supervision or evaluation of the person's work or job performance,

including imposing discipline or granting performance awards.

- The compensation the individual receives for performing his or her duties.
- The conditions under which the individual performs his or her duties.

Conditional Employment/Clinical Privileges

Under Section 20173a, if a facility or agency determines it necessary to employ or grant clinical privileges to an applicant before receiving the results of his or her criminal history check, the facility may conditionally employ or grant conditional privileges to the person if it requests the criminal history check or criminal history record information upon conditionally employing or granting clinical privileges to the individual, and he or she signs a written statement described in the Code.

Under the bill, the facility could not permit the person to have regular direct access to or provide direct services to patients or residents without supervision until the criminal history check or criminal history record information was obtained and the individual was eligible for the employment or clinical privileges. The facility would have to provide on-site supervision of the person by an individual who had undergone a criminal history check.

Automated Fingerprint Database

The Code requires the MSP to establish an automated fingerprint identification system database that allows the MSP to store and maintain all fingerprints submitted under Section 20173a and provides for an automatic notification if a subsequent criminal arrest fingerprint card submitted into the system matches a set of fingerprints submitted previously. The bill would require the MSP also to maintain the system.

Upon notification, the MSP immediately must notify the DCH, which must immediately contact the facility or agency with which the individual is associated. The bill instead would require the MSP to notify the relevant licensing or regulatory department, and would require that department to notify the respective staffing agency or covered facility.

Electronic Web-Based System

The Code requires the DCH and the MSP to maintain an electronic web-based system to assist facilities required to conduct relevant registry and criminal history checks and to provide for automated notice to those facilities for people entered in the system who, since the initial criminal history check, have been convicted of a disqualifying offense or have been the subject of a substantiated finding of abuse, neglect, or misappropriation of property. The bill would refer to all relevant licensing and regulatory departments rather than the DCH and the MSP, and would refer to staffing agencies and covered facilities rather than health facilities and agencies.

Also, the bill would allow the relevant licensing and regulatory departments to charge a staffing agency a one-time set-up fee of up to \$100 for access to the system.

Convictions

Under the bill, for a crime that is not a relevant crime, "convicted" would mean a final conviction, the payment of a fine, a plea of guilty or no contest if accepted by the court, or a finding of guilt for a criminal law violation or a juvenile adjudication or disposition by the family court for a violation that would be a crime if committed by an adult.

For a relevant crime described under 42 USC 1320a-7(a), "convicted" would mean that term as defined in that section. (That section of the U.S. Code refers to program-related crimes (i.e., offenses related to the delivery of an item or service under a Federal or state health care program), patient abuse crimes, health care fraud felonies, and controlled substance felonies. An individual is considered to have been "convicted" of a criminal offense under circumstances described in that statute.)

Senate Bills 1254 and 1255

The Adult Foster Care Facility Licensing Act and the Mental Health Code both contain provisions similar to those found in Section 20173a of the Public Health Code. The bills would delete these provisions and prohibit an adult foster care facility or a psychiatric facility or intermediate care facility for people with mental retardation from

employing, independently contracting with, or granting clinical privileges to an individual who regularly has direct access to or provides direct services to patients or residents until the facility complied with Section 20173a of the Public Health Code and conducted the required criminal history check.

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330.1134a (S.B. 1255)

Legislative Analyst: Julie Cassidy

FISCAL IMPACT

Senate Bill 1253

The bill includes provisions that would permit individuals seeking employment in a covered facility to demonstrate compliance with criminal history requirements through criminal history checks completed by other State agencies. To the extent that these provisions would be less administratively burdensome than the processing of new criminal history checks, the State could see minor, indeterminate cost savings. To the extent that covered facilities are affiliated with local units of government, provisions that would permit the use of already complete criminal history checks to meet State requirements could lead to small cost savings.

Senate Bills 1254 and 1255

The bills would have no fiscal impact on State or local government.

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.