

## **Michigan's New Criminal History Legislation for 2006**

### **Frequently Asked Questions**

1. To which long-term care supports and services do the laws apply?

The Governor signed four bills into law that cover a broad range of long-term care supports and services. Public Act 28 of 2006 (Enrolled Senate Bill 621) amends the Public Health Code and applies to 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. Public Act 29 of 2006 (Enrolled Senate Bill 622) amends the Adult Foster Care Facility Licensing Act and applies to all categories of adult foster care facilities.

Comparable legislation was enacted for psychiatric facilities and intermediate care facilities for people with mental retardation under Public Act 27 of 2006 (Enrolled House Bill 5448). Under Public Act 26 of 2006 (Enrolled House Bill 5168), beginning May 1, 2006, a health professional applicant for initial licensure or registration is subject to a Federal Bureau of Investigation (FBI) national criminal history check.

**Please note that the answers to the following questions pertain specifically to Public Acts 28 and 29 of 2006.**

2. When do the new criminal history requirements become effective under Public Acts 28 and 29?

April 1, 2006 is the effective date referenced under these laws for the new criminal history requirements.

3. What types of workers are covered under these laws?

The laws cover all "direct access" workers seeking employment, an independent contractor relationship or clinical privileges. They are subject to the new criminal history standards and the background check requirements. (Again, the laws cover persons seeking these types of positions as of April 1, 2006.)

4. How is "direct access" defined?

Direct access means access to a patient or resident or a patient or resident's property, financial information, medical records, treatment information or any other identifying information.

5. Do the laws apply to all independent contractors?

For adult foster care facilities, the laws do not apply to an independent contractor if the contractual work performed by the individual is not directly related to the clinical, health care, or personal services delivered by the adult foster care facility. For health facilities and agencies, the laws do not apply to an independent contractor if the services for which he or she is contracted are not directly related to the provision of services to a patient or resident. Both laws do not apply to an independent contract if the individual's duties are not performed on an ongoing basis with direct access to residents. This exclusion includes but is not limited to individuals who independently contract for utility, maintenance, construction or communication services.

6. Do the laws apply to independent contractors under contract directly with the consumer or his or her authorized representative?

The laws only apply to independent contractors entering into a contract directly with the adult foster care facility or a health facility or agency. In contrast, if a resident or his or her authorized representative employs or contracts with an individual who has "direct access" to the resident, it is not the responsibility of the adult foster care facility or the health facility or agency to conduct a background check. Of course, the facility is free to establish management policies that incorporate stricter safeguards not required by these laws.

7. Are volunteers subject to the criminal history check requirement?

Volunteers are not subject to these new laws. The laws include a provision that the feasibility of implementing criminal history checks on volunteers will be evaluated in a written report that the Department of Community Health must submit to the Legislature within one year after the effective date of the new legislation.

8. Do these laws apply to persons employed prior to the effective date of the laws' criminal history requirements?

The laws do not impose the FBI background check requirement upon individuals who were employed by or under contract to an adult foster care facility or a health facility or agency prior to the April 1, 2006 effective date. However, within 24 months after the effective date of these new laws, an individual who is working prior to the effective date of the laws shall provide the Michigan State Police (MSP) a set of fingerprints which shall be inputted into the automated fingerprint identification system database. A full background check will not be done and the existing workers will generally be subject to a grandfathering provision.

9. In general terms, how do these laws change the current criminal history laws?

The new laws are significantly different in two ways. First, covered direct access workers are subject to a FBI national criminal history check. Second, the laws provide

changes in the criminal history standards for determining whether a person is eligible to work in a long-term care setting that is subject to these new laws. For example, current law strictly prohibits all convicted felons from working in this field for a minimum of 15 years. The new laws redefine the types of felony convictions that automatically disqualify an applicant and create a new tiered approach for establishing the number of years that must lapse prior to performing “direct access” work.

10. Who is prohibited from seeking employment, independent contract or clinical privileges?

As explained in further detail in the statute and attachment, persons with the following histories are strictly prohibited:

- Persons who have been the subject of an order or disposition under section 16b of Chapter IX of the Michigan Code of Criminal Procedure relating to not guilty by reason of insanity.
- Persons who have been the subject of a substantiated finding of neglect, abuse or misappropriation of property by a state or federal agency pursuant to an investigation conducted in a skilled nursing facility in accordance with 42 USC 1395i-3 or 1396r.
- Persons convicted of a relevant crime under 42 USC 1320a-7 relating to crimes such as patient abuse, felony conviction related to health care fraud and felony conviction related to controlled substances.

The law also prohibits the employment, independent contract or granting of clinical privileges to persons with many other felony or misdemeanor crimes within certain time periods.

11. Must the adult foster care facility or health facility or agency obtain written consent to perform the background check?

The law requires that written consent be obtained. (A sample consent form appears later in this material.) The law also requires that a good faith offer of conditional employment be provided. (Sample language appears later in this material.)

12. Are employers still required to conduct criminal history checks through the Michigan State Police?

State Police checks are required prior to conducting the FBI checks. If the results of the State Police check do not disqualify the applicant, then the FBI check will be conducted.

13. Who is responsible for the cost of the State Police and FBI checks?

The laws provide that neither the employee nor the facility may be charged for the cost of the initial criminal history check. The laws provide that if the MSP or FBI charges a fee for conducting the initial criminal history check, the charge shall be paid by or reimbursed by the Department of Community Health with federal funds as provided to implement a pilot program for national and state background checks on direct patient

access employees of long-term care facilities or providers in accordance with Section 307 of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003, Public Law 108-173.

14. Who will conduct the fingerprinting required as part of the FBI check?

The fingerprinting process will be conducted by Identix, a national company contracting with the state of Michigan. Identix will have mobile units and other locations available throughout the state to conduct the fingerprinting. More information on Identix is available online at [www.identix.com/iis](http://www.identix.com/iis).

15. Are there any other approved vendors besides Identix?

The state of Michigan has contracted exclusively with Identix to provide the fingerprinting services.

16. Does the employer have to perform annual or periodic criminal history checks after the initial check?

The criminal history check is required only at the time of hire.

17. How long does it take to get the FBI clearance information back to the employer?

The employer should receive the information within 10-14 days if the employee has no criminal record. If the employee has a criminal record, the FBI will notify the applicable state agency who will then inform the employer and the employee of the type of crime committed without disclosing the details of the crime. The time frame for this notification is not known.

18. Can a person be assigned work prior to the return of the criminal history information?

The employer may conditionally employ the person and assign him or her to work if the employer requests the criminal history check and the person signs a statement that he or she meets the applicable law's criminal history standards. (A sample signed statement appears later in this material.) Of course, an organization can enforce a higher standard and prohibit assignment to duty until the background information is processed and analyzed.

19. What happens if the applicant's statement about his/her identity or criminal history is contradicted by the criminal history check?

The laws permit the person's employment to be terminated unless and until the person can prove that the information is incorrect.

20. Can an applicant appeal the accuracy of the background check information?

The applicant may appeal to the applicable department if he or she believes that the criminal history report is inaccurate. The appeal shall be conducted as a contested case hearing pursuant to the Administrative Procedures Act. The individual must file the appeal with the Director of the Department within 15 business days after receiving the written report of the criminal history check unless the conviction contained in the report is one that may be expunged or set aside.

If an individual has been disqualified or denied employment based on a conviction that may be expunged or set aside, then he or she shall file the appeal within 15 business days after a court order granting or denying his or her application to expunge or set aside that conviction is granted. If the order is granted and the conviction is expunged or set aside, then the individual shall not be disqualified or denied employment based solely on that conviction. The Department Director shall review the appeal and issue a written decision within 30 business days after receiving the appeal. The Director's decision is final.

21. Can an employer have stricter standards than those proposed under these laws?

The employer may impose stricter criminal history standards in determining whether an applicant qualifies for employment. The new laws establish minimum standards.

22. Can an applicant be required to consent to having a former employer forward the background check information to the new employer?

The applicant is not required to provide such consent. Even if the former employer forwards the background check information to the new employer with the consent of the applicant, the new employer is still required to perform a new criminal history check.

23. Will the Department of Community Health evaluate the effectiveness of this pilot?

The Department is required to submit within one year after the effective date of the new laws a written report on the impact and effectiveness of these laws.

24. Can you perform the necessary background checks without access to the Internet?

An alternative process will be available to conduct the required background checks by mail rather than the Internet.

25. What is the penalty for not complying with this law?

A licensee, owner, administrator, or operator of an adult foster care facility, nursing home, county medical care facility, hospice, hospital that provides swing bed services, home for the aged, or home health agency who knowingly and willfully fails to conduct the required criminal history checks is guilty of a misdemeanor punishable by imprisonment for not more than one year or a fine of not more than \$5,000.00, or both.

In addition, an individual who knowingly uses or disseminates the criminal history record information in violation of the new laws is guilty of a misdemeanor punishable by imprisonment for not more than 93 days or a fine of not more than \$1,000.00, or both. Use of the information is limited to evaluating a person's qualifications for employment. Disclosure of the information is prohibited to a person who is not directly involved in evaluating the person's qualifications for employment.

26. What written documentation will be available to be placed in the worker's file?

The applicant's written consent and identification for the criminal history check should be included in the worker's file. This file should also include the applicant's statement regarding his or her prior criminal history if a conditional job offer has been extended. Documentation should also be included in the file to verify that the criminal history check has been conducted.

27. Should criminal history records be kept in the regular employee personnel file?

Since the laws impose strict criminal penalties for improper use or disclosure of the criminal history record information, it is recommended that this information be maintained in a separate administrative file. Again, the law specifically prohibits the disclosure of criminal history record information to persons who are not directly involved in evaluating the applicant's qualifications for employment, independent contract or clinical privileges.