

Federal Legislation To Transform Criminal Background Checks by Long-Term Care Providers

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In the future, long-term care providers across the United States may be required to implement much more comprehensive criminal background checks upon prospective employees and independent contractors. This Spring, Congress re-introduced the Patient Safety and Abuse Prevention Act (H.R. 2223 and S. 631, the “Act”), proposing a nationwide, expanded system of criminal background checks. Sponsored by Sen. Herbert Kohl (D-WI) and Rep. Joe Sestak (D-PA), the Act would build upon a three-year pilot program undertaken by seven States¹. If passed by Congress, the Act would transform the way in which providers conduct criminal background checks.

The Act applies to a broad range of long-term care providers,² and requires that they do more than simply obtain and review a State criminal background report. Each provider (or its designated agent) would also be required to (1) fingerprint the applicant for use with the FBI’s Integrated Automated Fingerprint Identification System;³ (2) search State-based abuse and neglect registries and databases;⁴ and (3) obtain the records of any proceedings that may contain disqualifying information about an employee, such as proceedings conducted by State professional licensing and disciplinary boards and State Medicaid Fraud Control Units.⁵

Further, the Act would prohibit the hiring of an individual who has a “conviction for a relevant crime” or a “finding of patient or resident abuse.”⁶ A “conviction for a relevant crime” would include a conviction (1) of Medicare or Medicaid program-related crimes, (2) relating to patient abuse, (3) of felonies for health care fraud, and (4) of felonies relating to controlled substances.⁷ A “finding of patient or resident abuse” means any substantiated finding by a State or Federal agency that the employee has committed an act of resident abuse or neglect or misappropriation of resident property.⁸ Notably, under the

Act, a State would have the ability to specify additional prohibited offenses.

The Act would not only apply to employees, but also to independent contractors. Particularly, the Act applies to an individual who is a “direct patient access employee”:

Any individual who has access to a ... resident of a [facility] through employment or through a contract with such facility or provider and has duties that involve (or may involve) one-on-one contact with a patient or resident.”⁹

The Act does not address how a provider would determine the criminal background of an independent contractor. Nor does the Act mandate a penalty for failure to comply. Under the Act, a prospective employee would be given notice that the employer is required to perform a background check, and the employee would be required to disclose any disqualifying information. Also, an employee could be employed on a provisional basis for 30 days while the results of a background check are pending. If an employee is denied employment as a result of the background check, an appeals process would allow an aggrieved employee to dispute the background check.¹⁰

1 The seven pilot States are Alaska, Idaho, Illinois, Michigan, Nevada, New Mexico & Wisconsin.

2 The providers to which the Act would apply include skilled nursing facilities, nursing facilities, home health agencies, hospice, long-term care hospitals, personal care services, adult day care, assisted living facilities, and intermediate care facilities. H.R. 2223 & S. 631 § 3(a)(6)(A).

3 H.R. 2223 & S. 631 § 3(a)(3).

4 How these background checks are conducted would be determined by the Secretary of the Department of Health and Human Services.

5 H.R. 2223 & S. 631 § 3(a)(3).

6 108 P.L. 173 §§ 307(g)(1)-(3).

7 42 U.S.C. 1320a-7(a).

8 108 P.L. 173 § 307(g)(3).

9 H.R. 2223 & S. 631 § 3(a)(6)(B).

10 H.R. 2223 & S. 631 §§ 3(a)(4)(B)(iii) & (iv).

The version of the Act proposed in Congress' last session provided for reimbursement to providers for the cost of conducting national criminal background checks. Instead, the current Act funds the States to implement the program. In other words, the Federal government would contract with the States to adopt procedures consistent with the Act in exchange for funding.¹¹

Support for the Act appears to be widespread. Forty-one State Attorneys General supported the previous version of the Act. The Elder Justice Coalition, AARP, American Health Care Association, National Citizens' Coalition for Nursing Home Reform, and American Association of Homes and Services for the Aging have expressed support for the current Act. Rep. Sestak's office has indicated that there is broad, bipartisan support for the Act and expressed the hope that it will pass this session. The Act is currently in the Senate Finance Committee and House Ways and Means and Energy and Commerce Committees.

11 H.R. 2223 & S. 631 § 3(a)(1).

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