



DEPARTMENT OF HEALTH AND HUMAN SERVICES

OFFICE OF INSPECTOR GENERAL

WASHINGTON, DC 20201



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TO: Marilyn Tavenner
Administrator
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/s/

FROM: Brian P. Ritchie
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SUBJECT: Memorandum Report: *State Requirements for Conducting Background Checks on Home Health Agency Employees*, OEI-07-14-00131

In response to a congressional request, the Office of Inspector General (OIG) initiated two related evaluations regarding home health agencies' (HHAs) employment of individuals with criminal convictions. This memorandum report presents the results of the first evaluation, conducted to (1) identify State background-check requirements for HHAs and (2) identify the types of criminal convictions that, under State law or regulation, disqualify individuals for HHA employment. The second evaluation, entitled *Home Health Agencies' Employment of Individuals With Criminal Convictions* (OEI-07-14-00130), will (1) determine the extent to which HHAs employed individuals with criminal convictions as of January 1, 2014, and identify criminal convictions of selected employees that potentially disqualify them for HHA employment, and (2) identify the procedures that HHAs use to perform background checks on prospective and/or current employees.

SUMMARY

We surveyed State officials to identify State requirements for conducting background checks for prospective HHA employees, including the job positions for which States require HHAs to conduct background checks, and the types of convictions that States consider to be disqualification for HHA employment. The survey found that, of the 50 States and the District of Columbia (hereinafter referred to as States), 41 States require HHAs to conduct background checks on prospective employees. Of the 10 States that have no background-check requirement, 4 States reported that they have plans to implement background-check requirements in the future. Of the 41 States that require background checks, 15 States require HHAs to receive the results of background checks before individuals can begin employment and 26 States allow individuals to work while the results of their background checks are pending. Fifteen States require additional background checks of employed individuals subsequent to the initial checks. Thirty-five States specify convictions that disqualify individuals from employment, and

16 States allow an individual who has been disqualified from employment to submit an application to have his/her conviction(s) waived. The Centers for Medicare & Medicaid Services (CMS) may wish to use the information from this report as it administers the Nationwide Background Check Program. The report may also be useful to States that are considering establishing or enhancing background-check requirements for HHA employees.

BACKGROUND

Medicare Home Health Services

Beneficiaries receiving care from HHAs are especially at risk of mistreatment because employees are providing services, usually unsupervised, in beneficiaries' homes. However, there are no Federal laws or regulations that require HHAs to conduct background checks prior to hiring individuals or to periodically conduct background checks after an individual has been hired. In 2012, HHAs provided services to approximately 3.5 million Medicare beneficiaries, averaging 34 visits per beneficiary. Medicare paid nearly \$18.5 billion for HHA services that year.¹

Requirements for Conducting Background Checks

There are no Federal laws or regulations that require HHAs to conduct background checks prior to hiring individuals, or to periodically conduct background checks after individuals have been hired.² There are also no Federal laws or regulations that prohibit HHAs from hiring individuals who have been convicted of crimes (e.g., assault, rape, and theft) or who have had a finding concerning abuse, neglect, mistreatment of beneficiaries, or misappropriation of beneficiary property entered into State-based abuse and neglect registries or databases (such as State nurse aide registries). However, as a condition of participation in Medicare, HHAs must comply with State laws.³ State requirements for background checks vary in terms of what sources of information must be checked, which job positions require background checks, and what types of convictions prohibit employment.

Types of Background Checks

In general, there are two kinds of background checks that States require HHAs to use: Statewide and Federal Bureau of Investigation (FBI). Statewide background checks are typically conducted by a State law enforcement agency (e.g., State Highway Patrol, State Police) and include information for crimes committed within that State. FBI background checks are also typically conducted by a State law enforcement agency, which provides identifying information and a set of fingerprints to the FBI to match against criminal background information maintained in its database. The FBI database includes information on both Federal crimes and crimes reported by States.

¹ CMS, *2013 Medicare & Medicaid Statistical Supplement: Table 7.1*. Accessed at http://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/MedicareMedicaidStatSupp/Downloads/2013_Section7.pdf#Table7.1 on April 14, 2014.

² In April 2014, CMS released guidance that it would phase in the implementation of fingerprint-based background checks for individuals with a 5 percent or greater ownership interest of a HHA newly enrolling in the Medicare program. This action is part of the enhanced enrollment screening provisions contained in P.L. No. 111-148 § 6401.

³ 42 CFR 484.12(a).

Nationwide Background Check Program

The Patient Protection and Affordable Care Act established the Nationwide Program for National and State Background Checks on Direct Patient Access Employees of Long-Term Care Facilities and Providers (Nationwide Background Check Program).⁴ The program awards grant funds to States that volunteer to conduct background checks on prospective long-term-care employees. Under the program, potential “direct patient access” employees in any of 10 provider types (e.g., HHAs) must undergo fingerprint-based Statewide and FBI background checks, as well as checks of State-based abuse and neglect registries.⁵ To date, CMS has awarded 25 such grants, totaling more than \$50 million.

METHODOLOGY

We surveyed officials from every State and the District of Columbia. We gathered information on State requirements for HHAs to conduct background checks on prospective employees and job positions for which HHAs are required to conduct background checks. We asked whether HHA employees must undergo periodic background checks after they are hired. We also asked about the types of convictions that disqualify individuals from employment and whether any of these convictions can be waived to allow employment. We received survey responses from all 51 States. We did not perform a legal analysis to determine whether the State requirements reported to us represented all pertinent legal requirements or whether State officials had correctly described the characteristics of the requirements.

This study was conducted in accordance with the *Quality Standards for Inspection and Evaluation* issued by the Council of the Inspectors General on Integrity and Efficiency.

RESULTS

In the Absence of Federal Laws, 41 States Require HHAs To Conduct Background Checks on Prospective Employees

Forty-one States require HHAs to conduct background checks on prospective employees.⁶ However, even in the absence of State requirements, HHAs in the remaining 10 States may choose to conduct background checks on their own initiative. Table 1 shows the type of background check(s) required and whether the requirement applies to all individuals or only to certain individuals.

⁴ P.L. No. 111-148 § 6201.

⁵ P.L. No. 111-148 § 6201(a)(3)(A).

⁶ State-reported laws requiring background checks for HHA employees can be found in Appendix A.

Table 1: HHA Background Check Requirements by State

Type of Check Required	State(s)	Number of States
FBI and Statewide for All Individuals	DE, DC, FL, ID, IL, MI, MS, NV, NY, OK, UT	11
FBI and Statewide for Certain Individuals	AK, NE, NM, NC, OH, SC	6
Statewide for All Individuals	AZ, ME, MD, MA, MO, NH, OR, VA, WI	9
Statewide for All Individuals and FBI for Certain Individuals	AR, CO, IN, KY, MN, PA, WA	7
Statewide for Certain Individuals	CA, IA, KS, LA, RI, TX, VT	7
Other	TN*	1
None	AL, CT, GA, HI**, MT, NJ, ND, SD, WV, WY	10
Total		51

Source: OIG analysis of State surveys, 2014.

*Note: Tennessee reported that it requires HHAs to perform checks of registries of sex offenses, adult abuse, and elder abuse.

**Note: The Hawaii legislation requires that the State agency adopt rules to mandate background checks on HHA employees; however, no implementing rules have been published.

Some States reported differing requirements determined by the individuals' job duties and/or length of residency in a State. For example, Ohio requires background checks for those individuals providing direct care. North Carolina requires checks for individuals who enter beneficiaries' homes. If an individual has been a North Carolina resident for more than 5 years, only a Statewide background check is required. For individuals who have not lived in North Carolina for at least 5 years, an FBI check is required in addition to the Statewide check.

We asked States whether they verify that HHAs are complying with requirements for background checks. All 41 States that require background checks responded that they did verify compliance, most commonly through onsite visits, audits, or certification surveys. For example, New Hampshire verifies compliance with its background-check requirement by reviewing personnel records during certification surveys.

Of the 10 States that have no requirement for background checks, 4 States (Connecticut, Georgia, Hawaii, and West Virginia) reported that they have plans to implement such requirements in the future. These States have received Nationwide Background Check Program grants from CMS to establish or improve State programs for background checks of long-term-care employees.

Of the 41 States That Require Background Checks, 15 States Require HHAs To Receive the Results Before Individuals Begin Employment

In 15 States, HHAs must receive the results of background checks prior to allowing an individual to work. Individuals with convictions that disqualify employment cannot be hired. In the remaining 26 States, background checks are initiated and individuals are allowed to work while the results of their background checks are pending. Twenty States allow individuals to work only for a specified timeframe while a background check is completed. Timeframes ranged from 5 days to 3 months. For example, Indiana requires that the background check be initiated within 3 days of providing care for a client and completed within 21 days of hire. Six States (Kentucky, Maryland, Michigan, Nevada, New Mexico, and Washington) have no maximum timeframe during which an individual may work without a completed background check. Specific characteristics of the background-check requirements for the 41 States can be found in Appendix B.

Fifteen States Require Additional Background Checks Subsequent to Initial Checks

Twelve States require HHAs to conduct periodic background checks on employed individuals. The frequency of these checks ranged from annually to every 6 years. An additional three States (California, Delaware, and New York) reported that State agencies receive automatic notifications of subsequent arrests, a process commonly referred to as “rap back.” Under rap back, an individual’s fingerprints are retained by a criminal history repository after the initial background check. Any criminal convictions occurring subsequent to the initial background check are proactively reported to the designated agency or employer, eliminating the need to resubmit an individual’s fingerprints for periodic background checks after he or she has begun employment.

Thirty-Five States Specify Convictions That Disqualify Individuals From Employment

Thirty-five States have identified specific types of convictions that disqualify individuals from obtaining employment in HHAs. States differ in regard to what types of convictions disqualify individuals and how recently they must have occurred to disqualify them. For example, Wisconsin State statute contains a list of offenses—including homicide, battery, and sexual assault—that prohibit HHA employment. Minnesota groups its disqualifying convictions into four categories, by the time that must have elapsed since the discharge of the sentence imposed before the individual is eligible for HHA employment. These categories are 7 years (e.g., misdemeanor domestic assault), 10 years (e.g., misdemeanor receiving stolen property), 15 years (e.g., felony robbery), and forever (e.g., kidnapping). Six States (Colorado, Iowa, Maryland, North Carolina, Tennessee, and Vermont) do not specify convictions that disqualify individuals from employment.

Sixteen States allow individuals who have been disqualified from employment because of a conviction the opportunity to submit applications to have the conviction waived. When a waiver is granted, the hiring restriction is removed and the individual is allowed to be employed. For example, Missouri’s “Good Cause Waiver” process requires an applicant to provide an explanation for each arrest that led up to the conviction, a sponsorship letter from a current or potential employer, employment history, and information related to any pending charges, if applicable. Waiver applications are reviewed by a panel of health care professionals.

Seven States allow for any conviction to have the potential to be waived, and nine States allow only certain kinds of convictions to be waived.

CONCLUSION

The information in this report will be useful to CMS in administering the Nationwide Background Check Program. The report may also be useful to States that are considering establishing or enhancing background-check requirements. This report is being issued directly in final form because it contains no recommendations. If you have comments or questions about this report, please provide them within 60 days. Please refer to report number OEI-07-14-00131 in all correspondence.

APPENDIX A

State-Reported Laws and Regulations Requiring Background Checks for Home Health Agency Employees

State	Citation*
Alaska	7 AAC 10.900
Arizona	ARS § 36-411
Arkansas	Arkansas Code § 20-38-103
California	Health & Safety Code §§ 1796.10–1796.63
Colorado	6 C.C.R. 1011-1, Chapter 26
Delaware	16 Del. C. § 1145
District of Columbia	22 DCMR §§ 4700–4799
Florida	§ 400.512, Fla. Stat. (2013)
Idaho	IDAPA 16.03.07 § 9
Illinois	225 ILCS 46
Indiana	IC 16-27-2
Iowa	Iowa Code 2014, Section 135C.33
Kansas	K.S.A. 65-5117
Kentucky	902 KAR 20:081
Louisiana	La. R.S. 40 § 1300.51
Maine	22 M.R.S.A. §§ 2141–2150
Maryland	Annotated Code of Maryland §§ 19-1901–19-1912
Massachusetts	105 CMR 155.010 G(3)
Michigan	MCL § 333.20173a
Minnesota	Minn. Stat. § 245C (2013)

*For a given State, the listed citations may not include all citations related to background checks for HHA employees.

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State-Reported Laws and Regulations Requiring Background Checks for Home Health Agency Employees (continued)

State	Citation*
Mississippi	Miss. Code Ann. § 43-11-13
Missouri	Section 660.317, RSMo
Nebraska	175 NAC 14
Nevada	NRS 449.123
New Hampshire	RSA 151: 2-d
New Mexico	7.1.9 NMAC
New York	NY CLS Pub Health § 2899-a (2010)
North Carolina	N.C. Gen. Stat. § 131E-265
Ohio	OAC - 3701-60-04
Oklahoma	63 O.S. § 1-1947
Oregon	OAR 333-027-0064
Pennsylvania	35 P.S. § 10225.502
Rhode Island	R.I. Gen. Laws § 23-17-34
South Carolina	S.C. Code Ann. § 44-7-2910
Tennessee	Tenn. Code Ann. § 63-1-116 (2013)
Texas	THSC § 250
Utah	Utah Admin. Code r. 432-35 (2014)
Vermont	33 V.S.A. Chapter 63, Subchapter 1A
Virginia	Va. Code Ann. § 32.1-162.9:1
Washington	WAC 246-335-065
Wisconsin	Wis. Stat. § 50.065

*For a given State, the listed citations may not include all citations related to background checks for HHA employees.
Source: State survey responses, 2014.

APPENDIX B**State-Reported Characteristics of Background-Check Requirements in the 41 States That Require Such Checks**

State	Background Check Results Must Be Received Prior to Hire	Individuals May Work Provisionally Pending Background-Check Results	Additional Background Checks of Employed Individuals Subsequent to Initial Check
Alaska	X		X
Arizona		X	X
Arkansas	X		X
California	X		X
Colorado	X		
Delaware		X	X
District of Columbia	X		X
Florida	X		X
Idaho		X	
Illinois		X	
Indiana		X	
Iowa	X		
Kansas		X	
Kentucky		X	
Louisiana		X	
Maine	X		X
Maryland		X	
Massachusetts	X		
Michigan		X	X
Minnesota		X	

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State-Reported Characteristics of Background-Check Requirements in the 41 States That Require Such Checks (continued)

State	Background Check Results Must Be Received Prior to Hire	Individuals May Work Provisionally Pending Background-Check Results	Additional Background Checks of Employed Individuals Subsequent to Initial Check
Mississippi		X	
Missouri		X	
Nebraska		X	
Nevada		X	X
New Hampshire	X		
New Mexico		X	
New York		X	X
North Carolina		X	
Ohio		X	X
Oklahoma		X	
Oregon	X		X
Pennsylvania	X		
Rhode Island		X	
South Carolina	X		
Tennessee	X		
Texas		X	X
Utah		X	
Vermont	X		
Virginia		X	
Washington		X	
Wisconsin		X	X

Source: OIG analysis of State surveys, 2014.