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## CRIMINAL CHECKS ON NURSING HOME EMPLOYEES

### House Bill 4727 (Substitute H-2) First Analysis (4-11-00)

**Sponsor: Rep. Gerald Law**  
**First Committee: Health Policy**  
**Second Committee: Senior Health, Security  
and Retirement**

#### ***THE APPARENT PROBLEM:***

In recent years, the media has reported numerous stories involving residents of nursing homes suffering abuse at the hands of employees. Abuse can range from neglect to theft of personal items, physical and sexual assault, and even murder. Such treatment at the hands of care givers and other staff is all the more heinous considering the vulnerable nature of nursing home residents, many of whom suffer from diseases and disabilities that leave them unable to protect or defend themselves. Several incidents in Michigan over the last few years underscore the potential harm to residents. A nurse aide in a Detroit nursing home slapped a resident, cutting the resident's face and requiring the resident to undergo emergency treatment. A criminal background check conducted as part of the investigation revealed that the aide had prior felony convictions that included second degree murder, felony armed assault with intent to rob, and assault with a deadly weapon. In another case, a nursing home worker was convicted of sexual misconduct with a mentally incapacitated patient who had a closed head injury. A subsequent criminal history check of that worker revealed a prior history of criminal sexual assault.

Under federal law, states are required to maintain a registry that tracks competency evaluated nurse aides (CENAs), but only for actions that occur in a nursing home, and that were reported to the Department of Consumer and Industry Services. There is no such registry for other positions in health facilities, such as maintenance staff, food service, or housekeeping, even though the employees may have direct contact with residents. Under current state and federal law, nursing homes and other health facilities and agencies are not required to conduct criminal history checks on potential employees, though according to members of the nursing home industry, the majority do. However, most background checks are limited to a check of the

state Law Enforcement Information Network (LEIN), which only reveals convictions in Michigan. Many people feel that due to the transitory nature of entry-level health care workers and other positions in nursing homes, it is important to require not only a state-wide criminal background check, but also a national one in order to screen out those with histories of violent behavior.

#### ***THE CONTENT OF THE BILL:***

The bill would amend Part 201 of Article 17 of the Public Health Code, which regulates health facilities and agencies, to require criminal background checks on employees of nursing homes, county medical care facilities, and homes for the aged. Under the bill, a nursing home, county medical care facility, or home for the aged could not employ, grant clinical privileges to, or independently contract with an individual who would be providing direct services to patients or residents after the bill's effective date if he or she had been convicted of either a felony or an attempt or conspiracy to commit a felony within the previous fifteen years, or a misdemeanor that involved abuse, neglect, assault, battery, or criminal sexual conduct or fraud or theft against a vulnerable adult (as defined under the Michigan Penal Code), or a state or federal crime that was substantially similar to the preceding misdemeanor offenses, within the previous ten years. However, this prohibition, and the provision pertaining to individuals convicted of the above mentioned crimes, would not apply to current employees.

Under the bill, a nursing home, county medical care facility, or home for the aged would be prohibited from employing, contracting with, or granting privileges to an individual without first running a criminal history check on the person. Any applicant for employment, contract services, or clinical privileges in a nursing

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home, county medical facility, or home for the aged, who had received a good faith offer of employment or clinical privileges, would first have to give written consent for the Department of State Police (DSP) or other authorized law enforcement agency to conduct a criminal history check. If a criminal history check had been performed on the applicant within the previous six months, a certified copy of the criminal history check could be used instead of obtaining written consent and requesting a new check. After receiving the signed consent form from the applicant, the facility would have to request the DSP or other agency to conduct a criminal history check on the applicant. The facility would have to bear any cost of the criminal history check, and would be prohibited from seeking reimbursement from the applicant. The law enforcement agency conducting the check would have to provide the facility with a report containing any criminal history record information on the applicant maintained by the agency. Further, each report would have to be certified with an official seal or other symbol of authenticity.

A nursing home, county medical care facility, or home for the aged could employ or grant clinical privileges to an applicant as a conditional employee or staff member before receiving the results of the criminal history check as long as the criminal history check had been requested and the applicant signed a statement that he or she had not been convicted of the types of felony or misdemeanor offenses previously mentioned; that he or she would be terminated if the background check did not confirm the signed statement; and that he or she understood the conditions leading to such a termination. With 90 days of the bill's effective date, the Department of Consumer and Industry Services (DCIS) would have to develop and distribute a model form for the statement of prior criminal convictions at no cost to facilities. If a criminal history check revealed information that did not confirm the applicant's statement, the person's employment would have to be terminated by the facility. Knowingly providing false information would constitute a misdemeanor punishable by 90 days imprisonment and a fine of up to \$500, or both.

Information provided on a criminal history record could only be used for evaluating an applicant's qualifications, and a facility would be prohibited from disclosing information to a person who was not directly involved in evaluating the applicant's qualifications for employment or clinical privileges.

MCL 333.20173

## ***BACKGROUND INFORMATION:***

A similar bill, House Bill 4495, was introduced in the 1997-1998 legislative session and was passed by the House.

Criminal history checks. Currently, there are several mechanisms for conducting a criminal history check.

- LEIN. The Law Enforcement Information Network can be used by law enforcement agencies and the state police to run a name search for convictions in the state of Michigan. However, only the state police can access LEIN for non-criminal justice purposes. A \$5 fee is charged for name searches for a civil purpose, such as for employment purposes, but is generally waived for nonprofit agencies such as nursing homes. If a person uses a false name or birth date, the information provided by LEIN would be inaccurate.

- NCIC. The National Crime Information Center maintains a national database of convictions. Terminals linked to the database can be set up in law enforcement agencies such as local police stations and prosecutor's offices. A national name search can be conducted in a matter of minutes, but is only available for criminal justice purposes. As with the state LEIN system, an NCIC search cannot guarantee an accurate identification, especially if an alias is used. According to staff at the Department of State Police, recent Federal Bureau of Investigation (FBI) statistics report that 11.7 percent of name checks reflected the use of a different name, resulting in approximately 70,000 false hits a year.

- Fingerprint checks. The only way to accurately verify a person's identity, and therefore establish his or her criminal background, is to do a fingerprint check at the national level. Only the FBI can process fingerprints and conduct such a search (several states retain their own database of fingerprints and those states will run a search and report back to the FBI). Under current state law, only the Criminal Justice Information Center within the Department of State Police can submit fingerprints to the FBI for noncriminal justice purposes and receive the FBI report. Upon a request for a national fingerprint search, the department first runs a fingerprint check for Michigan convictions, then sends the report and fingerprints to the FBI. According to a representative of the FBI, there is a 24-hour turn around on criminal background checks for civil

purposes (two hours for criminal investigations), with a few extra days needed to search the records maintained by individual states. The FBI charges \$26 for each background check done for a civil purpose (checks for criminal cases are free). The entire process for a background check for civil purposes takes about 90 days. The state police assess a fee on top of the FBI fee, bringing the cost of a background check for a civil purpose to approximately \$40.

**The National Crime Prevention and Privacy Compact.** According to an article in State Legislatures magazine dated May, 1999, the compact, which went into effect several months ago, binds the FBI and ratifying states to participate in the civil access program of the Interstate Identification Index (a decentralized system that handles interstate and federal-state criminal record searches), re-authorizes use by current users of FBI file records, and requires participating states to make all unsealed criminal history records available in response to authorized noncriminal justice requests. Civil access to the system would require fingerprints, and dissemination of information on the records would be governed by the laws of the receiving state. An advisory council of federal and state officials and others representing the interests of system users has been established to promulgate rules and establish operating policies for civil uses of the Interstate Identification Index disputes between states and the FBI. Currently, five states have ratified the compact and several more are moving closer to ratification. Michigan has not ratified the compact, but is one of the 39 states that participates in the system.

### ***FISCAL IMPLICATIONS:***

According to the House Fiscal Agency, the bill would increase costs to the Department of State Police and local law enforcement agencies to conduct the background checks. State and local revenue would also increase if the department and local law enforcement agencies charged fees to cover the costs of these services. (4-7-00)

### ***ARGUMENTS:***

#### ***For:***

The Michigan Nurse Aide Registry only tracks competency evaluated nurse aides (CENAs), and then only for actions that occur in a nursing home. A violent crime committed outside a nursing home would not appear on the registry, nor would the name of a person who abused or stole from a resident but was not

yet a CENA, as departmental policy allows an aide to work for four months while undergoing the training and testing to become a CENA. Currently, agencies can request a name check from the Department of State Police, but not all health agency employers do so. Even if a name check through the Law Enforcement Information Network (LEIN) was conducted, it only reveals if a person had a conviction in Michigan; this does little to expose workers who commit crimes in nursing homes and other facilities and then travel from state to state. It also does little to reveal if a person is working under an assumed name or has given a false birth date. The only way to verify a person's identity and to discover if he or she has a criminal record is to do a fingerprint search through the FBI. The bill would create a mechanism by which employers could identify those with histories of violent and predatory behaviors by requiring that all licensed nursing homes, county medical facilities, and homes for the aged in the state request the Michigan State Police to run a criminal background check on new employees. In this way, workers with past histories of abusive or violent behavior who pose a risk to the health and safety of patients and residents can be screened out before abuses can occur.

#### ***Against:***

Though the nursing home industry is generally in support of the bill, there is a concern regarding the costs and the time frame needed for a national fingerprint check to be conducted. Currently, the cost for the state police to run a LEIN check is only \$5, and the department waives the fee for nonprofit agencies. However, a national criminal background check for noncriminal justice purposes involves having the FBI do a fingerprint check and would cost approximately \$39 to \$40 for each set of fingerprints. Even if the state police waived the department's part of the charge, facilities would still have to pay the FBI portion, which is \$26. In light of the high turnover in staff in many facilities, especially those who work in housekeeping or as nurse aides, the cost could be prohibitive. It has been suggested that since these facilities care for many Medicaid patients, that Medicaid should pay for a representative portion of the fee.

Another concern that has been raised relates to the time frame needed to conduct a national background check. According to Department of State Police, a request for a national search triggers a state fingerprint search by the department. At the completion of the state fingerprint search, the entire file is mailed to the FBI. Though the FBI reports a 24-hour turnaround for noncriminal justice background checks, the state

process coupled with the time needed for the reports to travel through the mail results in the entire process taking about 90 days. Industry members maintain that in light of tremendous staff shortages at many nursing homes and homes for the aged, this time delay is unacceptable. Though the bill allows an employee to be hired on a conditional basis pending the outcome of a criminal background check, the time frame involved could require facilities to pay unemployment compensation for employees who would have to be terminated under the bill's requirements, in addition to the cost of the background check.

***Against:***

Requiring criminal background checks on new employees is a good beginning, but checks should also be done on those currently working in health facilities who have direct contact with patients and residents. To do less would continue to expose patients and residents to potentially dangerous workers. Since the intent of the legislation is to take a proactive step in protecting a vulnerable population, checking employees with less than 15 years of service (the bill establishes a 15-year look-back for felony offenses) should be considered.

***Response:***

Similar bills in previous legislative sessions did require all employees, current and new hires, to undergo criminal background checks. However, since a background check on the national level for noncriminal justice purposes requires the state and FBI to do a fingerprint check at the rate of approximately \$39 per person, the cost was considered to be prohibitive considering the sheer number of people currently working in nursing homes, county medical care facilities, and homes for the aged. Many of these facilities are already struggling to stay afloat financially as health care costs escalate at the same time that insurance, Medicaid, and Medicare reimbursements are being decreased. As it stands, without the state being willing to pick up at least a part of the cost of the checks for new employees, many facilities do not feel that they can meet the bill's requirements. To require current employees to undergo background checks as well could force some facilities out of business, leaving many frail and elderly with no place to go.

Besides, some of the problem could be mitigated by the administrators of nursing homes and other health facilities taking appropriate disciplinary measures and following existing law in regards to reporting incidents to the Department of Consumer and Industry Services. Reportedly, some homes have been hesitant to report certain incidents or institute disciplinary actions out of

a fear of incurring lawsuits at the hands of disgruntled employees. Tighter adherence to current laws, coupled with greater scrutiny in supervising staff or investigating suspicious bruises on residents, could minimize harm to the residents and screen out problem workers.

***For:***

The bill would prohibit nursing homes, county medical care facilities, and homes for the aged from employing, contracting with, or granting clinical privileges to workers with felony convictions or certain misdemeanor offenses involving theft or physical or sexual abuse. However, since all people must be given a chance to demonstrate that they have been rehabilitated, and many feel that a person's debt to society has been paid by serving his or her time in prison, the bill includes a time limit to the restriction on employment.

***Response:***

The observation has been made through the years that a person could walk out of prison today and be working in a nursing home tomorrow, and therefore a screening mechanism should be established. The bill would not necessarily prevent this scenario from continuing to happen. Though the bill specifies that a person convicted of a felony or certain misdemeanor offenses could not be newly hired for a period of 15 years and 10 years after the conviction date, respectively, this time frame coincides with current sentencing guidelines for a number of serious, assaultive crimes. Therefore, a person who spent 15 years in prison for murder or attempted murder, or crimes involving sexual assaults, could still walk out of prison today and be working with a vulnerable population tomorrow as long as he or she had served one day longer than the bill's time frames. On the other hand, an eighteen-year-old convicted of a non-assaultive crime, such as writing fraudulent checks, could not work as a doctor, nurse, physical therapist, or even a maintenance worker in a facility until he or she was 33 years of age!

Since certain crimes have a high recidivism rate, the bill may not provide sufficient time to demonstrate whether a person has been rehabilitated or not. Rather than setting a time frame in years after a conviction, a better approach would be to establish or incorporate a time period in which the person did not re-offend. In that way, a person convicted of a non-assaultive felony who only served a year in prison would not have to wait 14 years before seeking a career in the health industry, but would have to demonstrate for a set

period of time that he or she does not present a danger to others.

***Against:***

The bill is problematic on several counts. Besides the time frame and the cost needed to process each request for a background check, other weaknesses have been identified. For instance, the bill would require the state police or other law enforcement agency to issue a certified copy with an official seal. According to state police staff, it is impossible to issue a certified copy, and no mechanism currently exists to mark a copy of the background check as official. Further, even if a facility requested that the state police run a fingerprint check, the FBI is restricted under federal laws as to what types of information can be released and to whom. Since under federal privacy laws, records could not be released to health facilities, the state police may require additional time and staff to read through a file to verify if a conviction date fell within the bill's ban on employment and if a misdemeanor charge was for one of the prohibited offenses. Complicating the issue further is the fact that what constitutes a misdemeanor for some offenses in Michigan could be a felony in another state and vice versa. Only a person with the training and expertise to properly decipher an FBI report and fit it to the bill's parameters should do so.

***Against:***

Though the bill specifies that persons who independently contract with nursing homes, county medical care facilities, and homes for the aged must undergo background checks, it does not clearly address whether employees of agencies such as temporary employment agencies that a facility may contract with would come under the bill's requirements. Therefore, a social worker or physical therapist under contract to a facility may have to undergo a criminal history check, but a temporary worker in a nursing home caring directly for residents as a competency evaluated nurse aide may not come under the bill's regulations. In the case of the nursing home worker who sexually assaulted the mentally incapacitated resident previously mentioned, the worker was from a "temp" agency.

***Against:***

Perhaps the timing of requiring federal background checks is part of the problem. Though running a criminal check through LEIN is not ideal, it is at least affordable and fast and so represents a good start in beginning to require criminal background checks on employees in some health care facilities. Currently, it

takes the state police about 90 days to run a state and federal fingerprint check. Part of this time includes mailing time, as all requests must move in and out of the Criminal Justice Information Center in Lansing. Michigan is one of only a few states that does not transmit fingerprints electronically to the FBI. Reportedly, the capability for the state to do so is still one to two years away. Once that system is up and running, several weeks may be able to be shaved off the needed response time, since time spent for the records to travel to and from the center via the mail system could be eliminated.

Another issue to consider is whether or not Michigan should ratify Public Law 105-251 of 1998 and become a member of the National Crime Prevention and Privacy Compact (see *Background Information*). The compact establishes policies on civil access (e.g., background checks for employment purposes) of the Interstate Identification Index. Unfortunately, the compact is so new, that all the bugs have not been worked out yet. Reportedly, some have interpreted the new legislation as opening the door for the FBI to release criminal history records directly to noncriminal justice agencies. This would be unprecedented and opens up a plethora of questions and concerns regarding privacy and personal liberty. Since the bill alludes that criminal history records could be kept by nursing home administrators, the feasibility and desirability of such personal information being kept by noncriminal justice professionals in a less than secure environment opens up liability as well as privacy concerns. According to FBI staff, the advisory council created by the federal legislation to implement the compact is currently discussing such issues along with possible conflicts with existing federal laws that govern how the FBI is to disseminate criminal background information.

Perhaps a little more time is needed before requiring nursing homes and other facilities to do federal fingerprint searches. In time, the compact will be fully operational and any possible conflicts with existing federal laws should be resolved. In addition, time should allow for the development of technology that could speed up the response time for the background checks and possibly trim costs. Further, time will allow funding issues to be discussed and if so decided, allow additional revenue to be appropriated to cover increases in costs to the state police and nursing homes. In the meantime, doing statewide name checks through the LEIN system would at least be a good starting point.

***Against:***

Many vulnerable elderly are cared for in adult foster care homes, but these facilities are not mentioned in the bill. Further, under current law, assisted living facilities do not have to be licensed by the state, though some are. However, these facilities are also not covered by the bill. The bill's provisions prohibit persons with criminal backgrounds from being employed only at nursing homes, county medical care facilities, and homes for the aged, and could therefore inadvertently redirect persons with violent or predatory natures to seek employment at adult foster care facilities and assisted living centers. If the intent of the legislation is to protect a vulnerable population, then the ban on persons with criminal backgrounds should be expanded across the board.

Michigan Protection and Advocacy Service (MP&A) supports the concept of the bill. (4-5-00)

***Response:***

Adult foster care homes are regulated under a separate statute, the Adult Foster Care Licensing Act (MCL 400.701 et al.). Reportedly, legislation to address background checks for employees of adult foster care homes is being considered and may be introduced at a future time. Likewise, the issue of licensing or regulating assisted living facilities, along with requiring background checks for employees, is not without merit, but is outside the scope of this bill.

***POSITIONS:***

The Department of Consumer and Industry Services supports the bill. (3-30-00)

The Michigan Health and Hospital Association (MHA) supports the bill. (3-27-00)

The Health Care Association of Michigan supports the bill. (4-7-00)

The Michigan Association of Homes and Services for the Aging (MAHSA) supports the bill, but is still concerned about the cost to do a national criminal background check. (3-30-00)

The Michigan Assisted Living Association is generally supportive of the bill, but has concerns regarding the cost and implementation of a national search utilizing fingerprinting. (3-31-00)

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■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.