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BILL ANALYSIS

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Senate Bills 621 and 622 (as enrolled)  
House Bills 5168 and 5448 (as enrolled)  
Sponsor: Senator Patricia L. Birkholz (S.B. 621)  
Senator Tony Stamas (S.B. 622)  
Representative Paula K. Zelenko (H.B. 5168)  
Representative Barbara Vander Veen (H.B. 5448)  
Senate Committee: Senior Citizens and Veterans Affairs (S.B. 621 & 622 and H.B. 5168)  
Health Policy (H.B. 5448)  
House Committee: Senior Health, Security, and Retirement

**PUBLIC ACTS 28 & 29 of 2006**  
**PUBLIC ACTS 26 & 27 of 2006**

Date Completed: 4-18-07

**CONTENT**

**Senate Bill 621** amended the Public Health Code, **Senate Bill 622** amended the Adult Foster Care Facility Licensing Act, and **House Bill 5448** amended the Mental Health Code to prohibit the following facilities 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 of the facility, if the individual has been convicted of certain crimes: a nursing home, county medical care facility, hospice, hospital that provides swing bed services, home for the aged, home health agency, adult foster care facility, psychiatric facility, or intermediate care facility for people with mental retardation. In addition to a conviction, the prohibitions apply to a finding of not guilty by reason of insanity and a substantiated finding of neglect, abuse, or misappropriation of property pursuant to an investigation conducted in accordance with Federal law concerning quality care in skilled nursing facilities.

The bills also do all of the following:

- Require applicants to undergo State and Federal criminal history checks.
- Exempt from the employment prohibitions an individual employed by, under contract to, or granted

clinical privileges in a facility before April 1, 2006, but require the individual to give the Department of State Police a set of fingerprints within 24 months after that date.

- Exempt from the employment prohibitions an individual who is 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 but are not performed on an ongoing basis.
- Provide for conditional employment before a facility receives the results of an applicant's criminal history check, under certain circumstances.
- Restrict the use of a report of a criminal history check.
- Require that, as a condition of continued employment, each employee, independent contractor, or individual granted clinical privileges agree in writing to report to the employer upon being arraigned for a criminal offense for which employment is prohibited, being found not guilty by reason of insanity, or being the subject of a substantiated finding of neglect, abuse, or misappropriation of property.

- **Establish an appeal procedure for an individual disqualified from or denied employment under the bills.**
- **Require the Departments of State Police and Information Technology collaboratively to establish an automated fingerprint identification system database to facilitate the storage and maintenance of all fingerprints submitted under the bills and provide for automatic notification when a subsequent criminal arrest fingerprint card matches a set of fingerprints previously submitted.**
- **Require the Department of Community Health to report to the Legislature and to develop and implement an electronic web-based system to assist facilities required to check relevant registries and conduct criminal history checks.**

**Senate Bills 621 and 622 also repealed, effective April 1, 2006, provisions that had disqualified a person from employment with a nursing home or an adult foster care facility for certain convictions and required criminal history checks of applicants for employment.**

**House Bill 5168 amended the Public Health Code to require an applicant for an initial or reinstated health profession license or registration to undergo a criminal background check, and allow a licensing board to request a licensee or registrant to have a background check.**

The bills were tie-barred. Provisions of Senate Bill 621 and House Bill 5448 regarding employment prohibitions and criminal history checks took effect on April 1, 2006, while other provisions of the bills took effect on February 17, 2006. Senate Bill 622 took effect on April 1, 2006. House Bill 5168 took effect on February 17, 2006.

### **Senate Bill 621**

#### **Employment Prohibitions**

Under the bill, 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 ("health facility or 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 health facility or agency, if the individual has been convicted of any of the following:

- A relevant crime described under provisions of Federal law that exclude certain individuals and entities from participation in Medicare and state health care programs (42 USC 1320a-7).
- Any of the following felonies, an attempt or conspiracy to commit any of those felonies, or any other state or Federal crime that is similar to those felonies, other than a relevant crime described under 42 USC 1320a-7, unless 15 years have lapsed since the individual completed all of the terms and conditions of his or her sentencing, parole, and probation for that conviction before the date of application for employment or clinical privileges or the execution of the independent contract: a felony that involves the intent to cause death or serious impairment of a body function, that results in death or serious impairment, that involves the use of force or violence, or that involves the threat of the use of force or violence; a felony involving cruelty or torture; a felony under Chapter 20a (Vulnerable Adults) of the Michigan Penal Code; or a felony involving criminal sexual conduct (CSC); abuse or neglect, the use of a firearm or dangerous weapon, or the diversion or adulteration of a prescription drug or other medications.
- A felony or an attempt or conspiracy to commit a felony, other than one described above, unless 10 years have lapsed since the individual completed all of the terms and conditions of his or her sentencing, parole, and probation for that conviction before the date of application for employment or clinical privileges or the date of the execution of the independent contract.
- Any of the following misdemeanors, other than a relevant crime described under 42 USC 1320a-7, or a state or Federal crime that is substantially similar to the any of the following misdemeanors, within the 10 years immediately preceding the date of application for employment or clinical privileges or the execution of the independent contract: a misdemeanor involving the use of a firearm or

dangerous weapon with the intent to injure, the use of a firearm or dangerous weapon that results in a personal injury, or the use of force or violence or the threat of the use of force or violence; a misdemeanor under Chapter 20a of the Michigan Penal Code; or a misdemeanor involving CSC, cruelty or torture committed by a person who is at least 16 years of age, or abuse or neglect.

- Any of the following misdemeanors, other than a relevant crime described under 42 USC 1320a-7, or a state or Federal crime that is substantially similar to any of the following misdemeanors, within the five years immediately preceding the date of application for employment or clinical privileges or the execution of the independent contract: a misdemeanor involving cruelty, if committed by an individual who is under 16; a misdemeanor involving home invasion, embezzlement, or negligent homicide; a misdemeanor involving larceny or retail fraud committed by a person who is at least 16; or any other misdemeanor involving assault, fraud, theft, or the possession or delivery of a controlled substance unless otherwise provided.
- Any of the following misdemeanors, other than a relevant crime described under 42 USC 1320a-7, or a state or Federal crime that is substantially similar to any of the following misdemeanors, within the three years immediately preceding the date of application for employment or clinical privileges or the execution of the independent contract: a misdemeanor for assault if there was no use of a firearm or dangerous weapon and no intent to commit murder or inflict great bodily injury; third-degree retail fraud committed by a person who is at least 16; or a misdemeanor under Part 74 of the Public Health Code (which deals with controlled substances violations and penalties), committed by a person who is at least 18.
- Either of the following misdemeanors, other than a relevant crime described under 42 USC 1320a-7, or a state or Federal crime that is substantially similar to either of the following misdemeanors, within the year immediately preceding the date of application for employment or clinical privileges or the execution the independent contract: a violation of Part 74 committed by a person under 18; or larceny or second- or third-degree retail

fraud committed by an individual under 16.

The hiring prohibition described above also applies to an individual who either is the subject of an order or disposition under Section 16b of Chapter IX of the Code of Criminal Procedure (which requires the court to order the disposition entered into the Law Enforcement Information Network if a person is found not guilty by reason of insanity) or has 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 accordance with Federal law concerning requirements for and assuring quality care in skilled nursing facilities (42 USC 1395i-3 or 42 USC 1396r).

In addition, a health facility or agency may not employ, independently contract with, or grant privileges to an individual who regularly has direct access to or provides direct services to patients or residents in the health facility or agency until it conducts a criminal history check in compliance with the bill.

The bill's employment prohibitions do not apply to an individual who was employed by, under contract to, or granted clinical privileges in a health facility or agency before April 1, 2006. Within 24 months after that date, however, the individual must provide the Michigan Department of State Police (MSP) with a set of fingerprints and the MSP must enter those fingerprints into the automated fingerprint identification system (AFIS) database. An individual exempt under this provision is not limited to working with the health facility or agency with which he or she was employed, under contract with, or granted clinical privileges on April 1, 2006, but may transfer to another health facility or agency under the same ownership. If the individual wishes to transfer to another health facility or agency that is not under the same ownership, he or she may do so if the new health facility or agency conducts a criminal history check. If an individual who is exempt under this provision subsequently is convicted of a crime or found to be the subject of a substantiated finding or an order or disposition for which employment is prohibited, then he or she is no longer exempt and must be terminated from or denied employment.

The employment prohibitions also do not apply to an individual who is an independent contractor with a health facility or agency 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 those services allow for direct access but are not performed on an ongoing basis. This exception includes, but is not limited to, an individual who independently contracts with the health facility or agency to provide utility, maintenance, construction, or communications services.

The bill defines "direct access" as access to a patient or resident or to a patient's or resident's property, financial information, medical records, treatment information, or any other identifying information.

#### Criminal History Check

An individual who applies for employment, either as an employee or an independent contractor, or for clinical privileges with a health facility or agency and has received a good faith offer of employment, an independent contract, or clinical privileges from the health facility or agency must give written consent at the time of application for the MSP to conduct an initial criminal history check, along with identification acceptable to the MSP.

Upon receiving the written consent and identification, a health facility or agency that has made a good faith offer to the applicant must request the MSP to conduct a criminal history check on the applicant, to enter the applicant's fingerprints into the AFIS database, and to forward the fingerprints to the FBI. The MSP must request the FBI to determine the existence of any national criminal history pertaining to the applicant. The applicant must provide the MSP with a set of fingerprints. The health facility or agency must make the written consent and identification available to the MSP and request the relevant licensing or regulatory department to 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.

If the MSP or the FBI charges a fee for conducting the initial criminal history check, the Department of Community Health (DCH) must pay or reimburse the charge 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 the Federal Medicare Prescription Drug, Improvement, and Modernization Act. A health facility or agency may not seek reimbursement for a charge imposed by the MSP or FBI from the individual who is the subject of the initial criminal history check. A health facility or agency, a prospective employee, or a prospective independent contractor may not be charged for the cost of an initial criminal history check.

The MSP must conduct a criminal history check on the applicant named in the request and provide the DCH with a written report of the criminal history check if it contains any criminal history record information. The report must contain any criminal history record information on the applicant maintained by the MSP. The MSP must provide the results of the FBI determination to the DCH within 30 days after the request is made. If the requesting health facility or agency is not a State department or agency and if a criminal conviction is disclosed on the written report of the criminal history check or the FBI determination, the DCH must notify the health facility or agency and the applicant in writing of the type of crime disclosed, without disclosing the details of the crime. The notice must include a statement that the applicant has a right to appeal a decision made by the health facility or agency regarding his or her employment eligibility based on the criminal background check. The notice must include information regarding where to file and describing the appellate procedures.

In addition to other sanctions set forth in the Public Health Code, a licensee, owner, administrator, or operator of a health facility or agency who knowingly and willfully fails to conduct the criminal history checks required by the bill is guilty of a misdemeanor punishable by up to one year's imprisonment, a maximum fine of \$5,000, or both.

#### Conditional Employment

If a health 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 health facility or agency may conditionally employ or grant conditional clinical privileges to that individual, if the health facility or agency requests the criminal history check upon conditionally employing or granting clinical privileges and the individual signs a written statement indicating all of the following:

- That he or she has not been convicted of one or more of the crimes for which employment is prohibited, within the applicable time period.
- That he or she is not the subject of an order or disposition regarding a finding of not guilty by reason of insanity.
- That he or she has not been the subject of a substantiated finding of neglect, abuse, or misappropriation of property.
- That the individual agrees that, if the information in the criminal history check does not confirm these statements, his or her employment or clinical privileges will be terminated unless and until he or she appeals and can prove the information incorrect.
- That he or she understands the conditions described above that result in termination and that those conditions are good cause for termination.

The DCH must develop and distribute a model form for the statement required for conditional employment and must make the form available to health facilities at no charge.

If an individual is employed or granted clinical privileges conditionally, and the criminal background report does not confirm his or her statement, the health facility or agency must terminate the individual's employment or clinical privileges.

An individual who knowingly provides false information regarding his or her identity, criminal convictions, or substantiated findings on a statement required for conditional employment is guilty of a misdemeanor, punishable by up to 93 days' imprisonment, a maximum fine of \$500, or both.

#### Use of Criminal History Report

A health facility or agency may use criminal history record information obtained under the bill only for the purpose of evaluating an applicant's qualifications for employment, an

independent contract, or clinical privileges in the position for which he or she has applied and for the purposes of confirming an applicant's conditional employment statement. A health facility or agency or its employee may not disclose criminal history record information obtained under the bill to a person who is not directly involved in evaluating the applicant's qualifications for employment, an independent contract, or clinical privileges. An individual who knowingly uses or disseminates the criminal history record information in violation of this restriction is guilty of a misdemeanor punishable by up to 93 days' imprisonment, a maximum fine of \$1,000, or both.

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 health facility or agency that has obtained criminal history record information on that individual, with the consent of the applicant, must share the information with the requesting health facility or agency, psychiatric or intermediate care facility, or adult foster care facility. Except for a knowing or intentional release of false information, a health facility or agency has no liability in connection with a criminal background check conducted under the bill or the release of criminal history record information under this provision.

#### Conditions of Continued Employment

The bill requires each employee, independent contractor, or individual granted clinical privileges, as a condition of continued employment, to agree in writing to report to the health facility or agency immediately upon being arraigned for one or more of the criminal offenses for which employment is prohibited, upon being the subject of an order or disposition under Section 16b of Chapter IX of the Code of Criminal Procedure, and upon being the subject of a substantiated finding of neglect, abuse, or misappropriation of property. Reporting of an arraignment is not cause for termination or denial of employment.

In addition, if a set of fingerprints is not already on file with the MSP, each employee, independent contractor, or individual

granted clinical privileges must provide the MSP with a set of fingerprints, as a condition of continued employment.

#### Appeal of Disqualification of Employment

An individual who has been disqualified from or denied employment by a health facility or agency or by a psychiatric facility or intermediate care facility for people with mental retardation, based on a criminal history check conducted under the bill or House Bill 5448, may appeal to the DCH if he or she believes that the criminal history report is inaccurate. The appeal must be conducted as a contested case hearing pursuant to the Administrative Procedures Act.

An individual must file an appeal with the DCH Director 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. In that case, he or she must file the appeal on a form provided by the DCH 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, the applicant may not be disqualified or denied employment based solely on that conviction.

The DCH Director must review the appeal and issue a written decision within 30 business days after receiving it. The Director's decision is final.

One year after the bill's effective date and each year after that for the next three years, the DCH must give the Legislature a written report regarding this appeals process. The report must include, for the immediately preceding year, the number of applications for appeal received, the number of inaccuracies found and appeals granted, the average number of days necessary to complete the appeals process for each appeal, and the number of appeals rejected without a hearing and a brief explanation of the denial.

#### AFIS Database: MSP & DIT Collaboration

In collaboration with the MSP, the Department of Information Technology (DIT) must establish an AFIS database that would

allow the MSP to store and maintain all fingerprints submitted under the bill and provide for an automatic notification if and when a subsequent criminal arrest fingerprint card submitted into the system matches a set of fingerprints previously submitted. Upon such notification, the MSP must immediately notify the DCH, which immediately must contact the health facility or agency with which that individual is associated. Information in the database is confidential, is not subject to disclosure under the Freedom of Information Act (FOIA), and may not be disclosed to any person except for purposes of the Public Health Code and for law enforcement purposes.

#### DCH Responsibilities

Within one year after the bill's effective date, the DCH had to submit a written report to the Legislature regarding each of the following:

- The impact and effectiveness of the bill.
- The feasibility of implementing criminal history checks on volunteers who work in health facilities and on State agency employees who are involved in the licensure of those health facilities and regulation of those employees.
- The amount of Federal funds provided to implement a pilot program for national and State background checks on direct access employees of long-term care facilities or providers, the amount of those funds spent to date, and the amount remaining.

Within three years after the bill's effective date, the DCH must submit a written report to the Legislature outlining a plan to cover the costs of the criminal history checks required by the bill if Federal funding is no longer available or is inadequate to cover those costs.

By March 1, 2007, the DCH and the MSP had to develop and implement an electronic web-based system to assist those health facilities required to check relevant registries and conduct criminal history checks of their employees and independent contractors and to provide for an automated notice to those facilities for those individuals entered into the system who, since the initial check, have been convicted of a disqualifying offense or have been the subject of a substantiated

finding of abuse, neglect, or misappropriation of property.

### **Senate Bill 622**

The bill includes prohibitions and requirements regarding employment in an adult foster care facility that are consistent with those in Senate Bill 621 regarding employment in 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.

### **House Bill 5168**

The bill requires an applicant for a health profession license or registration, or for reinstatement or reclassification of a license or registration, to undergo a criminal background check. In addition, the bill allows a licensing board for good cause to request a licensee or registrant to have a criminal background check.

Beginning May 1, 2006, an applicant for initial licensure or registration under the Public Health Code must submit his or her fingerprints to the MSP to have a criminal history check conducted, and request that the MSP forward the fingerprints to the FBI for a national criminal history check. The MSP must conduct a criminal history check and request the FBI to determine the existence of any national criminal history pertaining to the applicant. The MSP must give the DCH a written report of the criminal history check, if it contains any criminal history record information. The MSP also must forward the results of the FBI determination to the DCH within 30 days after the request is made. The DCH must notify the licensing board and the applicant of the type of crime disclosed on the FBI determination, without disclosing the details of the crime. The MSP may charge a reasonable fee to cover the costs of conducting the criminal history check.

The Code allows a person whose license is limited, suspended, or revoked to apply for reinstatement of a revoked or suspended license or reclassification of a limited license. The bill requires an applicant to have a criminal history check conducted and submit a copy of the results of the background check with his or her application.

Criminal history record information obtained under the bill may be used only to evaluate an applicant's qualifications for licensure or registration. A member of a licensing board may not disclose the report or its contents to any person who is not directly involved in evaluating the applicant's qualifications for licensure or registration. Information obtained from the background check is confidential, is not subject to disclosure under FOIA, and may not be disclosed to any person except for the purposes of the bill or for law enforcement purposes.

### **House Bill 5448**

The bill includes prohibitions and requirements regarding employment in a psychiatric facility or intermediate care facility for people with mental retardation that are consistent with those in Senate Bill 621 regarding employment in 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.

MCL 333.20173a & 333.20173b (S.B. 621)  
400.734b and 400.734c (S.B. 622)  
333.16146 et al. (H.B. 5168)  
330.1134a & 330.1147 (H.B. 5448)

Legislative Analyst: Patrick Affholter

### **FISCAL IMPACT**

#### **Senate Bills 621 & 622 and House Bill 5448**

The Department of Community Health has received a grant from the Federal Centers for Medicare and Medicaid Services for \$5.0 million to provide criminal background checks for health facility employees. This grant will cover costs of providing criminal background checks from 2005 through 2007. The State may incur some additional administrative expense associated with managing the criminal background check process and meeting the reporting requirements in the bills.

Additionally, State and locally operated psychiatric facilities and locally operated intermediate care facilities for the mentally retarded will see increased administrative cost associated with processing criminal history requests for job applicants.

There are no data to indicate how many individuals are likely to be convicted of the misdemeanors in the bills. Local government incurs the cost of incarceration in a local facility, which varies by county. Additional penal fine revenue will benefit public libraries.

Criminal history fingerprint background checks required under the bills cost \$54 each, with the amount to be paid to the Department of State Police to cover real and actual costs of the analysis and report.

The bills also require the establishment of a fingerprint database and notification system for facilities' employees processed under the bills. The State Police reports that such a database has been in operation for school and child care employees since November 2005, and the additional employee data required under the bills will need no additional funding to maintain.

### **House Bill 5168**

The Department of Community Health may incur some additional administrative expense associated with managing a criminal background check process for individuals seeking licensure or registration.

Criminal history fingerprint background checks cost \$54 each. Background check costs required by an applicant for an initial license or registration or for reinstatement will have to be paid by the applicant under the bill.

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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.