



**House  
Legislative  
Analysis  
Section**

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**CRIMINAL HISTORY CHECKS ON  
NURSING HOME AND AFC  
EMPLOYEES**

**House Bill 4057 as passed by the House  
Sponsor: Rep. Patricia Birkholz**

**House Bill 4453 as passed by the House  
Sponsor: Rep. Gary Woronchak**

**Committee: Senior Health, Security and  
Retirement**

**Second Analysis (5-10-01)**

***THE APPARENT PROBLEM:***

In recent years, the media has reported numerous stories about residents of nursing homes who have suffered 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. Several years ago, 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, an adult foster care home worker beat a resident with a disability so badly that the man's face was severely bruised and swollen and he required hospitalization. The worker was fired after an investigation had been conducted. Later, this person was hired by a different service provider and was subsequently involved in another abusive incident involving a resident of a group home.

Incidents such as these have led many to believe that if criminal history checks were done on employees of nursing homes and group homes that care for the elderly and disabled, that persons with a history of abuse could be screened out during the application process. 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. 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. It is believed that requiring criminal history checks on new employees in nursing homes and other facilities would be one way to increase protection for the elderly and disabled.

***THE CONTENT OF THE BILLS:***

House Bill 4057 would amend Part 201 of Article 17 of the Public Health Code (MCL 333.20173) to require background checks on new employees of nursing homes, county medical care facilities, and homes for the aged. House Bill 4453 would amend the Adult Foster Care Facility Licensing Act (MCL 400.734a) to apply the same requirement to adult foster care facilities. Under the bills, these facilities could not employ, independently contract with, or grant clinical privileges to an individual who would be providing direct services to residents after the bills' effective dates 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) within the previous ten years. Further, a facility would be prohibited from

House Bills 4057 and 4453 (5-10-01)

employing or contracting with an individual without first running a criminal history check on the person. However, these provisions would not apply to individuals who were employed by, under contract to, or granted clinical privileges at a facility on the effective dates of the bills.

A person who had applied for employment, contract services, or clinical privileges in a nursing home, county medical care facility, home for the aged, or adult foster care facility and had received a good faith offer of employment would have to give written consent, along with acceptable identification, for the Department of State Police (DSP) to conduct a criminal history check. If a criminal history check had been performed on the applicant within the previous 24 months, a copy of the criminal history check could be used in lieu of obtaining written consent and requesting a new check. However, if the person were using a prior criminal history check, the facility would have to receive a copy of the previous criminal history check directly from the previous employer, and the applicant would have to provide written consent for the release of the information.

As a condition of employment, an individual would have to sign a written statement that he or she had been a resident of Michigan for three or more years preceding the good faith offer of employment or independent contract. After receiving the signed consent form from the applicant, the facility would have to request the DSP to conduct a criminal history check on the applicant. (For individuals with three or more years of residency, the criminal check would be limited to a name check of the state Law Enforcement Information Network.) The DSP would have to provide the facility with a report containing any criminal history record information on the applicant maintained by the department. The facility would have to bear any cost of the criminal history check, and would be prohibited from seeking reimbursement from the applicant.

If the individual had resided in Michigan less than three years preceding the good faith offer of employment, the individual would have to supply the DSP with two sets of fingerprints. The facility would have to request the DSP to conduct a criminal history check of information maintained by the department and then forward the fingerprints to the Federal Bureau of Investigation (FBI) to do a national criminal history check. The DSP would have to provide the results of its criminal history check to the facility and provide the results of the FBI determination to the Department of Consumer and Industry Services (CIS). If the requesting facility was not a governmental agency, CIS would have to notify

the facility in writing of the type of crime disclosed on the FBI report without disclosing the details of the crime. The facility requesting the criminal history check would be responsible for paying any fees for the FBI check and could not pass this cost on to the applicant.

A nursing home, county medical care facility, home for the aged, or adult foster care facility could employ or contract with an applicant as a conditional employee 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 a felony or the listed misdemeanor offenses; that he or she agreed that if the criminal history check did not confirm the applicant's statements, that his or her employment would be terminated; and that providing such incorrect information was a good cause for termination. If the criminal history report did not confirm a conditionally-employed individual's signed statement, the facility would have to terminate the employment. Knowingly providing false information would constitute a misdemeanor punishable by 90 days imprisonment and a fine of up to \$500, or both. Upon the effective dates of the bills, CIS would have to develop and distribute a model form for the statement of prior criminal convictions at no cost to facilities.

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. Upon written request from a facility that was considering employing, independently contracting with, or granting clinical privileges to an individual, a facility that has already obtained criminal history record information under this section on that individual would have to share the information with the requesting facility. A facility would have no liability in connection with a background check or the release of such information except for a knowing or intentional release of false information.

As a condition of continued employment, each employee or independent contractor would have to agree in writing to report to the nursing home, county medical care facility, home for the aged, or adult foster care home immediately upon being arrested for or convicted of one or more of the criminal offenses listed above.

The bills would define "independent contract" as a contract that was entered into by a health facility or

agency or an adult foster care facility with an individual who provided the contracted services independently. It would also apply to a contract entered into by one of the above facilities with an organization or agency that employed or contracted with an individual after complying with the bills' requirements to provide the contracted services to the facility on behalf of the organization or agency. "Health facility or agency" is defined in the Public Health Code (MCL 333.20106).

### ***BACKGROUND INFORMATION:***

House Bill 4495 introduced in the 1997-1998 legislative session and House Bill 4727 introduced in the 1999-2000 legislative session, which were similar to House Bill 4053, were 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. Only the state police can access the LEIN for non-criminal justice purposes, though recently the Department of State Police created a web browser that allows registered employers to conduct name checks on-line. A \$5 fee is charged for name searches for a civil purpose, such as for employment purposes, but the fee has generally been waived for nonprofit entities. If a person uses a false name or birth date, the information provided by a LEIN name check 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 non-criminal 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) if the fingerprints were transmitted electronically, with a few extra days needed to search the records maintained by individual states. The FBI charges \$24 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 can take several weeks to over a month. The state police assesses a fee of \$15 in addition to the FBI fee, bringing the cost of a background check for a civil purpose to \$39.

The National Crime Prevention and Privacy Compact. According to an article in State Legislatures magazine dated May, 1999, the compact, which went into effect last year, 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 non-criminal 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, and resolve disputes between states and the FBI. As of last year, Michigan had 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 bills would increase costs to the Department of State Police to conduct the background checks. State revenue would also increase from any fees that the department charged facilities to cover the costs of these services. The Department of Consumer and Industry Services would bear new costs related to developing and distributing the model statement required under the bills. Local

incarceration costs and local fine revenue could increase under the bills' penalty provisions for providing false information. (4-25-01)

### ***ARGUMENTS:***

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

Currently, there is no mandate for nursing homes, county medical care facilities, homes for the aged, and adult foster care homes to check the background of a potential employee to see if the person has a history of criminal behavior. There is a mechanism by which the names of nurse aides who committed certain actions can be flagged, but 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. The bills would require that all licensed nursing homes, county medical care facilities, homes for the aged, and adult foster care facilities in the state request the Michigan State Police to run a criminal history check on new employees. For those with less than three years of residency in the state, a national fingerprint check would be conducted. Since it is not uncommon for those who work in the nursing home industry and other adult care facilities to be transient and to move from state to state, the bills would add an additional level of protection from people who may have committed an abusive act in one state and now are seeking employment in Michigan. Simply put, 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:***

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.

Further, all criminal history checks should require FBI checks with fingerprints. A fingerprint check is the only way to verify an individual's true identity and then to check for a history of violent or abusive behaviors. Statistics compiled by the FBI reveal that a significant number of false hits occur with name-based checks. These include false positives, meaning that an innocent person may be denied employment or forced to prove his or her innocence, and false negatives, meaning that a person is using an alias to disguise his or her identity.

In addition, according to testimony given by David Loesch of the FBI before a Congressional committee last year, only FBI examiners and law enforcement personnel "have the training and experience to evaluate name-based background checks correctly, but the same is generally not true of others who would seek to use name-based checks for non-criminal justice purposes." Yet, in the interest of "efficiency", the state police have now instituted an on-line name-based criminal history system whereby persons who lack criminal justice training can conduct their own criminal history checks on prospective employees!

#### ***Response:***

Similar bills in previous legislative sessions would have required all employees, current and new hires, to undergo criminal background checks. However, since a background check on the national level for non-criminal 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 large number of people currently working in nursing homes, county medical care facilities, homes for the aged, and adult foster care facilities. 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. Many facilities do not feel that they could meet the cost of fingerprint checks for all employees. Some facilities could be forced out of business if they were required to conduct background checks on all employees or if fingerprint checks had to be done on all new employees. This could leave many frail and elderly people with no place to go.

Besides, some of the problems could be mitigated if facility administrators were more assertive in taking appropriate disciplinary measures and following existing law with regard to reporting incidents to the Department of Consumer and Industry Services. Reportedly, some homes have been hesitant to report incidents or institute disciplinary actions out of a fear of being sued by 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 bills would prohibit nursing homes, county medical care facilities, homes for the aged, and adult foster care facilities from employing, contracting with, or granting clinical privileges to new 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 bills include 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 bills specify 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 bills' time frames.

Since certain crimes have a high recidivism rate, the bills may not provide sufficient time to demonstrate whether or not a person has been rehabilitated. 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:***

Several weaknesses have been identified in the bills. For instance, the bills would require background checks to be done on employees who regularly provide direct services to patients. However, this terminology has not been defined. Some interpret it to mean only personnel who provide clinical services, such as physical

therapists, nurses, nurse aides, and so on. Others may interpret it to include those who work in housekeeping, food services, and other areas if the employee has regular contact with patients. The broader interpretation would provide greater safety to patients and would better fit the implied intent of the legislation, which is to protect a vulnerable population from exposure to dangerous people who have been hired to provide care for them. Care comes in many forms and is broader than just medical care.

Further, even if a facility requested that the state police run a fingerprint check, the FBI is restricted by federal law as to what types of information can be released and to whom. Yet, the bills require the Department of Consumer and Industry to release information on the types of crime to the requesting facilities. 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 interpret information according to the bills' requirements should do so. However, under the bill as written, CIS staff would be expected to correctly interpret the FBI reports. These issues may require further legislative scrutiny.

***Against:***

Though the bills specify that some persons who independently contract with nursing homes, county medical care facilities, homes for the aged, and adult foster care facilities must undergo background checks, it is not clear whether indirect employees, such as those placed by temporary employment agencies that a facility may contract with, would come under the bills' 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.

***Response:***

This was a concern with past versions of the legislation. However, both bills contain a definition of "independent contract" that addresses this issue. Under the bills, employment agencies providing facilities with "temp" workers would also have to comply with the bills' requirements to conduct background checks on new employees.

***POSITIONS:***

The Department of Consumer and Industry Services supports the bills. (4-24-01)

The Michigan Association of Homes and Services for the Aging (MAHSA) supports the bills. (4-24-01)

The Michigan Assisted Living Association supports the bills. (4-24-01)

Michigan Protection and Advocacy Service (MP&A) supports the bills. (4-24-01)

The Michigan Health and Hospital Association (MHA) supports House Bill 4057. (4-24-01)

The Health Care Association of Michigan supports House Bill 4057. (4-24-01)

The Michigan Advocacy Project supports House Bill 4057. (4-24-01)

Citizens for Better Care has not yet taken a position on the bills. (4-25-01)

Analyst: S. Stutzky

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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.