

Legislative Analysis



VOLUNTEER EMPLOYEE CRIMINAL HISTORY SYSTEM ACT

Phone: (517) 373-8080
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House Bill 4045 (H-1) as reported from committee

Sponsor: Rep. Kathy Schmaltz

Committee: Judiciary

Complete to 3-16-23

Analysis available at
<http://www.legislature.mi.gov>

(Enacted as Public Act 23 of 2023)

BRIEF SUMMARY: House Bill 4045 would create a new act to enable certain entities that provide care or care placement services to children, the elderly, or individuals with a disability to request the Department of State Police (MSP), under a program the department would develop and administer, to conduct a criminal history record check of employees and volunteers who would be in contact with members of those populations.

FISCAL IMPACT: The bill would not have a fiscal impact on the Department of State Police or any other state or local government units. The bill would provide MSP with the authority to continue activities that the department already conducts and that are funded under current department appropriations.

THE APPARENT PROBLEM:

Numerous state and federal laws require or allow a criminal history record check based on an individual's name or fingerprints for certain types of employment or volunteer service. Currently, the federal National Child Protection Act and Volunteers for Children Act authorize MSP's Criminal Justice Information Center (CJIC) to coordinate state and national background checks of applicants for employment or volunteer positions who will be responsible for the safety and well-being of certain vulnerable populations. However, a 2017 amendment to the federal law now requires states to have specific language added to their laws to offer a program in order to coordinate the criminal history checks. Legislation has been proposed to bring Michigan into compliance with the federal requirements and enable MSP to continue to provide the coordination of background checks for various entities that are required by other laws to conduct checks on applicants for certain types of employment or volunteer positions.

THE CONTENT OF THE BILL:

House Bill 4045 would create a new act, called the Volunteer Employee Criminal History System Act, to do all of the following:

- Require the MSP to develop and administer the Volunteer Employee Criminal History System (VECHS) program.
- Authorize certain businesses or organizations to request of MSP, and authorize MSP to conduct, a national and state criminal history record check of individuals applying for employment or to volunteer with the business or organization who have or may have access to a child, elderly individual, or individual with a disability for whom the business or organization provides care or care placement services.
- Allow those businesses or organizations to require employees or volunteers to submit their fingerprints for a criminal history record check.
- Allow those businesses or organizations to participate in a Rap Back program.
- Allow MSP to charge a fee for conducting a criminal history record check.

VECHS program

The bill would create the VECHS program in the Department of State Police for the purpose of authorizing a national and state ***criminal history record information*** check of the ***covered individuals*** of a ***qualified entity***.

Criminal history record information would mean (as defined in 1925 PA 289) all of the following:

- Name.
- Date of birth.
- Personal descriptions including identifying marks, scars, amputations, and tattoos.
- Aliases and prior names.
- Social Security number, driver's license number, and other identifying numbers.
- Information on misdemeanor and felony arrests and convictions.

Qualified entity would mean a public or private business or organization (whether for profit or not for profit) that provides ***care or care placement services*** or that licenses or certifies others to provide care or care placement services.

Care or care placement services would mean the provision of care, treatment, education, training, instruction, supervision, or recreation to a ***child*** (a nonemancipated individual less than 18 years old), an ***elderly individual*** (an individual at least 65 years old), or an ***individual with a disability*** (an individual with a mental or physical impairment who requires assistance to perform one or more tasks of daily living).

Covered individual would mean an individual who meets either of the following:

- The individual is employed by, or is a volunteer of, a qualified entity and has, seeks to have, or may have supervised or unsupervised access to a child, an elderly individual, or individual with a disability for whom the qualified entity provides care or care placement services.
- The individual owns, operates, or seeks to own or operate a qualified entity.

MSP would have to develop the application, approval, and compliance process and standards necessary to operate and manage the VECHS program as well as develop the application form and any other forms required for a qualified entity's registration and participation in the program.

Request for and use of information

Under the program, a qualified entity could submit a request to MSP for a covered individual's national and state criminal history record information. A qualified entity submitting a request would have to register with MSP and agree to comply with state and federal law, including the federal National Child Protection Act.

A qualified entity could require a covered individual to submit fingerprints to determine whether the national and state criminal history information shows a conviction or pending indictment for any crime bearing on the individual's fitness to be responsible for the safety and well-being of a child, elderly individual, or individual with a disability.

A qualified entity could submit a request only if the covered individual provides the entity with their fingerprints and a signed, written statement that includes at least all of the following:

- The individual's name, address, and date of birth as they appear on a valid identification document as defined in the bill.
- Notice that the individual's fingerprints may be used to conduct a national and state criminal history record information check and that the criminal history record may be used by the qualified entity to deny the individual's access to a vulnerable individual for whom the qualified entity provides care or care placement services.
- A waiver allowing the qualified entity to request, receive, and use the information as described above.
- A disclosure stating whether the individual has ever been convicted or is the subject of pending charges for a criminal offense and, if convicted, a description of the offense and the result of the conviction.
- Notice of the individual's right to obtain a copy of any background screening report, including any national and state criminal history record information contained in it, and the right to challenge the accuracy or completeness of information in the report and get a prompt determination of the validity of that challenge before a final determination by the qualified entity of the individual's fitness. An individual could challenge information only as provided in federal regulations.¹

A qualified entity would have to include a copy of the covered individual's fingerprints and signed statement with its request for the individual's national and state criminal history record information. The qualified entity also would have to maintain the completed and signed statement in its records.

The determination of the covered individual's fitness could be made only by the qualified entity. MSP would not be required to make a fitness determination on behalf of a qualified entity. The national and state criminal history information received under the act could be used by the qualified entity only to determine the fitness of a covered individual as described above.

If federal or state law requires a qualified entity to apply screening criteria to the national and state criminal history record information of a covered individual, including any right to contest or request an exemption from disqualification, the qualified entity would have to apply the screening criteria under that other law to the information received for the covered individual.

Rap Back program

A qualified entity could participate in a Rap Back program, defined by the bill as a state or federal **record of arrest and prosecution background** program that enables qualified entities to receive ongoing status notifications of any criminal history reported on covered individuals whose fingerprints are registered in the system, thus eliminating the need for repeated background checks on covered individuals by qualified entities.

If a qualified entity participates in a Rap Back program, it would have to notify a covered individual subject to a national and state criminal history record information check under the bill that the individual's fingerprints could be retained by the MSP's automated fingerprint

¹ Specifically, 28 CFR 16.34: <https://www.ecfr.gov/current/title-28/chapter-I/part-16/subpart-C/section-16.34>

identification system (AFIS) and the Federal Bureau of Investigation (FBI) for all purposes authorized for fingerprint submissions subject to ongoing monitoring.

Provisions concerning MSP

MSP would have to store and retain all fingerprints submitted under the bill in an automated fingerprint identification system database that searches against latent fingerprints and would have to forward all submitted fingerprints to the FBI to be retained in the next generation identification system or its successor system.

MSP also would have to do both of the following:

- Provide directly to the qualified entity the state criminal history record information that is not exempt from disclosure under 1925 PA 289² and is not otherwise confidential under state or federal law.
- Provide directly to the qualified entity the national and state criminal history information as authorized by law and the covered individual's signed and written statement described above.

MSP could charge a fee for conducting a national and state criminal history record information check that is not more than the actual and reasonable cost of conducting the check, plus the amount prescribed by the FBI for the national criminal history record information in compliance with the National Child Protection Act.

MSP could, in its sole discretion, audit a qualified entity registered in the program to ensure compliance with state and federal law, including the National Child Protection Act.

Liability

The bill would not do either of the following:

- Create additional duties or obligations for a qualified entity to obtain the national and state criminal history record information authorized under the bill.
- Relieve a qualified entity of its duty to obtain a covered individual's criminal history or any other information in accordance with the requirements of any other applicable law.

The state, a political subdivision of the state, or any agency, officer, or employee of the state or a political subdivision would not be liable for damages to a covered individual for the timely provision of an accurate national and state criminal history record information requested under the bill.

Other provisions

The VECHS program would not create an entitlement or right to use the program.

MSP would not have to administer the program unless the legislature appropriated sufficient funds for the program. However, without such an appropriation, MSP could administer the program subject to any limitations it considered necessary or appropriate.

The bill would take effect May 1, 2023

² <http://legislature.mi.gov/doc.aspx?mcl-28-242a>

ARGUMENTS:

For:

Some employers and service organizations are required under state or federal law to require applicants for employment or volunteer positions to disclose previous felony convictions and pending criminal prosecutions if they will have direct contact with vulnerable populations. Under provisions of the federal National Child Protection Act and Volunteer Protection Act, the Department of State Police has been operating a program through which it can coordinate with certain organizations, both for-profit and nonprofit, to run both state and national criminal history record checks of their employees and volunteers. Not only does this program save an organization time in getting results back, it also allows the organization to participate in the Rap Back program. Rap Back provides real-time updates on an organization's employees or volunteers. For example, a participating organization would be notified immediately if an employee or volunteer were arrested or convicted of an offense that would disqualify the person from continuing in their position with the entity. Without the ability to participate in the Rap Back program, the entity may not know of the person's offense until a repeat background check was run—typically every three to five years.

Recently, however, federal regulations have changed, and a state may not offer a program that coordinates the state and national background checks unless it has specific statutory language authorizing a state department to do so. Michigan currently does not have the required language in law. MSP could lose its ability to operate its program if the federal government finds that Michigan is out of compliance with the new regulations. Participating entities, which include governmental agencies such as schools and many organizations that provide services to children, seniors, and persons with a disability, could then lose their ability to participate in the Rap Back program. Although they could still do fingerprint-based background checks, it would take longer to get a result because the organization would have to directly and separately contact the FBI and the MSP Criminal Justice Information Center for a search of the national and state databases, rather than just working with the CJIC for both. According to the testimony offered by MSP to the committee, the bill would not add anything new to what MSP is already doing under its current program.

Against:

The Michigan Department of Civil Rights issued a memorandum³ that opposed authorizing MSP to create the VECHS program because it would circumvent the spirit of Executive Order 2018-4, which instructed state departments and agencies to remove the box that job applicants had to check if they had a felony conviction. The department also raised concerns that some provisions in the bill, including vague terms, could allow employers to evade protections provided by the Elliott-Larsen Civil Rights Act and that the bill, and the program it would authorize, could have an adverse impact on historically disadvantaged communities by preventing employment (or volunteer service) when no nexus has been demonstrated between the applicant's criminal history record and the duties of the employment or service being sought. In addition, the department noted that section 205a of the Elliott-Larsen Civil Rights Act prohibits most employers from requesting information concerning the misdemeanor arrest, detention, or disposition of a job applicant that has not resulted in a conviction. This would

³ https://www.house.mi.gov/Document/?Path=2023_2024_session/committee/house/standing/judiciary/meetings/2023-03-15-1/documents/testimony/022223%20HB%204069%20MDCR.pdf

appear to be in conflict with the bill’s requirement that prospective employees submit a written disclosure stating whether they are “the subject of pending charges for a criminal offense.”

POSITIONS:

A representative of the Department of State Police testified in support of the bill. (3-15-23)

The Michigan Association of Chiefs of Police indicated support for the bill. (3-15-23)

The Michigan Department of Civil Rights indicated opposition to the bill. (2-21-23)

Legislative Analyst: Susan Stutzky
Fiscal Analyst: Marcus Coffin

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