

§9054. Background Check Center; procedures

1. Bureau responsibilities. The bureau is responsible for working with the Background Check Center and federal and state agencies to facilitate background checks. [PL 2015, c. 299, §25 (NEW).]

2. Employer obligations. An employer subject to this chapter shall use the Background Check Center to conduct a comprehensive background check that includes a criminal history records check for all direct access workers. The employer shall comply with the requirements of this chapter, including, but not limited to, a biometric identifier-based background check, when making employment-related decisions for direct access workers. [PL 2023, c. 241, §59 (AMD).]

3. Direct access worker information. An employer seeking to hire, place or continue to employ an individual as a direct access worker shall:

A. Obtain personally identifiable information for the individual that is sufficient to secure the required components of the background check using the Background Check Center; [PL 2015, c. 299, §25 (NEW).]

B. Obtain the individual's executed consent to release information to all entities as needed to conduct the background check investigation, analysis and monitoring process; [PL 2015, c. 299, §25 (NEW).]

C. Secure a release executed by an individual seeking placement through a temporary nurse agency, personal care agency, placement agency or other agency to obtain the results of existing background checks conducted at the direction and expense of the temporary nurse agency, personal care agency, placement agency or other agency; and [PL 2015, c. 299, §25 (NEW).]

D. Use and distribute department-approved forms as required for all pre-hire and post-employment background checks. [PL 2015, c. 299, §25 (NEW).]
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4. Placed or temporary direct access workers. A temporary nurse agency, personal care agency or placement agency engaged in the business of securing or attempting to secure direct access employment for individuals or of securing or attempting to secure a direct access worker for placement with another provider shall:

A. Conduct and pay for the background check process required by this chapter; [PL 2015, c. 299, §25 (NEW).]

B. Upon request, provide the background check record to the provider seeking to fill a position where the direct access employment will take place; and [PL 2015, c. 299, §25 (NEW).]

C. Repeat the background check process for placed direct access workers after placement as mandated by rules adopted pursuant to this chapter, until the employment status shifts away from the placing entity to another entity, in which case the other entity then acquires the burden of paying for and conducting periodic background checks for the direct access workers who remain employed. [PL 2015, c. 299, §25 (NEW).]

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5. Subsequent background check; 5 years. An employer shall conduct a periodic subsequent background check in accordance with rules adopted pursuant to this chapter. Criminal history record checks for all direct access workers using a biometric identifier must be completed every 5 years subsequent to the anniversary date of a previous background check completed through use of the Background Check Center.

[PL 2023, c. 241, §60 (AMD).]

6. Notice. An employer shall provide a department-approved notice to each individual who is required to participate in a background check.

[PL 2015, c. 299, §25 (NEW).]

7. Providers; mandatory use. Use of the Background Check Center is mandatory for the following providers:

A. [PL 2019, c. 660, §7 (RP).]

B. [PL 2019, c. 660, §8 (RP).]

C. [PL 2019, c. 660, §9 (RP).]

D. [PL 2019, c. 660, §10 (RP).]

E. [PL 2019, c. 660, §11 (RP).]

F. Hospice providers; [PL 2015, c. 299, §25 (NEW).]

G. Home health care providers; [PL 2015, c. 299, §25 (NEW).]

H. Nursing facilities; [PL 2015, c. 299, §25 (NEW).]

I. Personal care agencies and placement agencies; [PL 2015, c. 299, §25 (NEW).]

J. Temporary nurse agencies; [PL 2015, c. 299, §25 (NEW).]

K. Adult day care programs; [PL 2015, c. 299, §25 (NEW).]

L. Assisted housing facilities; [PL 2023, c. 176, §38 (AMD).]

M. Residential care facilities; [PL 2015, c. 299, §25 (NEW).]

N. Intermediate care facilities for individuals with intellectual disabilities; [PL 2015, c. 299, §25 (NEW).]

O. Mental health services facilities or providers; [PL 2023, c. 241, §61 (AMD).]

P. Drug treatment centers; [PL 2023, c. 241, §62 (AMD).]

Q. Substance use disorder treatment agencies; and [PL 2023, c. 241, §63 (NEW).]

R. Hospitals. [PL 2023, c. 241, §64 (NEW).]

[PL 2023, c. 176, §38 (AMD); PL 2023, c. 241, §§61-64 (AMD).]

8. Background Check Center responsibilities. The Background Check Center's responsibilities include, but are not limited to, the following:

A. Operating an online portal used by employers to secure background checks for individuals employed as direct access workers; [PL 2015, c. 299, §25 (NEW).]

B. [PL 2023, c. 241, §65 (RP).]

B-1. Collecting fingerprints to determine eligibility of individuals to work in direct access positions in accordance with standards adopted by department rule, and in accordance with applicable policies and rules of the Department of Public Safety, Bureau of State Police. The Bureau of State Police shall take, or cause to be taken, an individual's fingerprints, along with any other information necessary for a statewide and nationwide criminal history record check. All fingerprints must be maintained by the State Bureau of Identification and the Federal Bureau of Investigation in accordance with their policies and procedures, and the Background Check Center shall obtain the results of the fingerprinting queries from the State Bureau of Identification; [PL 2023, c. 241, §66 (NEW).]

C. Generating background check reports for employers regarding the presence of disqualifying offenses, including criminal charges without disposition, in a direct access worker's background; [PL 2015, c. 299, §25 (NEW).]

D. Monitoring and enforcing compliance with the requirements of this chapter; [PL 2015, c. 299, §25 (NEW).]

E. Providing for a process by which an individual subject to actions taken by the Background Check Center may challenge the accuracy of information in a background check report and correct the information in accordance with rules adopted pursuant to this chapter; [PL 2015, c. 299, §25 (NEW).]

F. Specifying offenses, including offenses that may appear in publicly available criminal record information, that disqualify an individual from employment as a direct access worker for a term of 5, 10 or 30 years or, for disqualifying offenses that occur in health care settings, the lifetime of the individual, including, but not limited to, convictions and other events or notations; [PL 2023, c. 241, §67 (AMD).]

G. Coordinating with federal and state criminal justice agencies as required to facilitate a criminal record rap back monitoring program; and [PL 2015, c. 299, §25 (NEW).]

H. Providing for an independent process for a waiver based on a criminal conviction that gives an individual with a disqualifying offense who has been banned from employment pursuant to this chapter the opportunity to demonstrate that the ban should be waived because the individual does not pose a risk to patients, facilities, property or others. [PL 2015, c. 299, §25 (NEW).]
[PL 2023, c. 241, §§65-67 (AMD).]

9. Background check reports. A background check report under this chapter is considered preliminary until the individual subject to the background check has had the opportunity to challenge or decline to challenge the accuracy of the records obtained, after which the report is considered final. [PL 2015, c. 299, §25 (NEW).]

10. Background check report content. The background check report must inform employers whether the individual submitted for a background check has offenses that disqualify the individual for employment as a direct access worker. The background check report must include information specific to the individual along with information about the source and type of offense sufficient to allow the individual named in the report to challenge the information. The content of the background check report must include, but is not limited to, notice that the individual submitted for a background check is:

A. [PL 2023, c. 241, §68 (RP).]

A-1. Eligible for hire; or [PL 2023, c. 241, §68 (NEW).]

B. [PL 2023, c. 241, §68 (RP).]

B-1. Ineligible for hire and the length of any ban on employment as a result. [PL 2023, c. 241, §68 (NEW).]

C. [PL 2023, c. 241, §68 (RP).]

[PL 2023, c. 241, §68 (AMD).]

11. List of disqualifying offenses. The department shall adopt rules under section 9065 in accordance with the requirements of this chapter and other federal and state laws to create and maintain a list of disqualifying offenses that adversely affect an individual's eligibility for employment as a direct access worker. Disqualifying offenses that prohibit employment as a direct access worker include, but are not limited to:

A. Convictions or notations involving crimes or abuse related to a federally funded health care program or a state-funded health care program that mandate a disqualification from participation or employment with the program; [PL 2015, c. 299, §25 (NEW).]

B. Substantiated findings that the individual has committed an act of patient or resident abuse or neglect, exploitation or a misappropriation of patient or resident property or other types of acts that the department may specify for purposes of protecting vulnerable individuals receiving care or services; [PL 2015, c. 299, §25 (NEW).]

C. Convictions under federal or state law of a criminal offense relating to neglect or abuse of patients in connection with the delivery of a health care item or service; [PL 2015, c. 299, §25 (NEW).]

D. Convictions under federal or state law of a criminal offense relating to the health and safety of vulnerable individuals receiving care or services; [PL 2015, c. 299, §25 (NEW).]

E. Convictions relating to health care fraud in connection with the delivery of a health care item or service or with respect to any act or omission in a health care program operated by or financed in whole or in part by any federal, state or local government agency or convictions of a criminal offense consisting of a felony relating to fraud, theft, embezzlement, breach of fiduciary responsibility or other financial misconduct; [PL 2015, c. 299, §25 (NEW).]

F. Convictions for a Class A, B or C crime in this State or similar crime in another jurisdiction for an offense relating to the unlawful manufacture, distribution, prescription or dispensing of a controlled substance; and [PL 2015, c. 299, §25 (NEW).]

G. Convictions relating to other federal or state laws, provisions of this chapter or rules adopted under this chapter that otherwise mandate an employment prohibition. [PL 2015, c. 299, §25 (NEW).]

[PL 2015, c. 299, §25 (NEW).]

12. Appeal by individual. The department shall establish procedures in accordance with the provisions of the Maine Administrative Procedure Act to ensure that each individual submitted for a background check in compliance with this chapter has the opportunity to challenge and correct errors in records created and generated by the Background Check Center.

[PL 2015, c. 299, §25 (NEW).]

13. Waiver; disqualifying offense. In the event that no other federal or state law mandates an employment prohibition by an employer subject to this chapter, an individual who is banned from employment because of a disqualifying criminal offense may initiate a request for a waiver under subsection 8, paragraph H in accordance with a process established by rules adopted pursuant to this chapter under the following circumstances:

A. The individual is seeking to be employed or is currently employed by an employer subject to the requirements of this chapter; [PL 2015, c. 299, §25 (NEW).]

B. The employer has chosen to sponsor the individual's request for the removal of the ban in order to create or maintain an employment relationship; and [PL 2015, c. 299, §25 (NEW).]

C. The employer must attest to the department that the decision to sponsor the waiver request occurred after the employer considered the objectively reasonable factors under subsection 15 and the following factors:

- (1) The nature and gravity of the disqualifying offense or offenses;
- (2) The time that has passed since the disqualifying offense or offenses;
- (3) The nature of the employment held or sought;
- (4) Whether the criminal conduct was employment-related; and

(5) A reasonable conclusion that the individual does not pose a threat of harm to a protected individual or others in the care and support of the individual. [PL 2015, c. 299, §25 (NEW).]

The waiver must be sought with respect to the prospective or continued employment by a specific employer that is willing to sponsor the individual's request. An employee seeking a waiver may be conditionally employed in accordance with section 9057, subsection 4 and section 9058-A, subsection 3 until the waiver is denied.

[PL 2023, c. 241, §69 (AMD).]

14. Approval of waiver. The department shall specify in rule the criteria for issuing a waiver for a disqualifying offense. The waiver determination is based on a consideration of the facts and circumstances of the specific individual's conviction that include the passage of time, extenuating circumstances, a demonstration of rehabilitation and the relevancy of the particular disqualifying offense with respect to the current or prospective employment with a sponsoring employer. All waivers are contingent on a final determination by the department that the employer has reasonably determined that the health and safety of a protected individual is not in jeopardy and a denial of a waiver request is not otherwise warranted in accordance with federal or state law.

[PL 2015, c. 299, §25 (NEW).]

15. Waivers; factors. The department shall specify in rule the minimum factors that an employer must consider when sponsoring a waiver under subsection 13. Any factors that an employer chooses to consider must be objectively reasonable in supporting the attestation that the individual to whom the waiver would apply is unlikely to cause harm to a protected individual or others in the employer's care. Objectively reasonable factors include:

A. The age of the individual applying for a waiver at the time of the disqualifying offense; [PL 2015, c. 299, §25 (NEW).]

B. The amount of time that has passed since the disqualifying offense occurred; [PL 2015, c. 299, §25 (NEW).]

C. The total number and type of disqualifying offenses; [PL 2015, c. 299, §25 (NEW).]

D. Any proven mitigating circumstances surrounding the disqualifying offense; [PL 2015, c. 299, §25 (NEW).]

E. Objective evidence that the individual has successfully completed a criminal rehabilitation program; [PL 2015, c. 299, §25 (NEW).]

F. The relevance of the circumstances pertaining to the disqualifying offense with respect to the nature of the proposed employment; [PL 2015, c. 299, §25 (NEW).]

G. The length and consistency of similar employment post-conviction if applicable; [PL 2015, c. 299, §25 (NEW).]

H. Whether the individual is bonded under federal or state law; and [PL 2015, c. 299, §25 (NEW).]

I. Personal references or recommendations from employers on behalf of the individual. [PL 2015, c. 299, §25 (NEW).]

[PL 2015, c. 299, §25 (NEW).]

16. Denial or revocation of waiver. The department shall establish by rule informal and formal review procedures for denial or revocation of a waiver. Denial or revocation of waiver procedures must comply with the Maine Administrative Procedures Act and final determinations may be appealed pursuant to the Maine Administrative Procedures Act in Title 5, Part 18, Chapter 375, subchapter 4. Rules concerning the denial or revocation of waiver procedures include, but are not limited to, the following:

- A. The process of filing a waiver request; [PL 2015, c. 299, §25 (NEW).]
- B. The time frame for filing a waiver request; [PL 2015, c. 299, §25 (NEW).]
- C. The time frame for issuing a waiver request decision; [PL 2015, c. 299, §25 (NEW).]
- D. The rules for employment during the waiver request process; and [PL 2015, c. 299, §25 (NEW).]
- E. A written determination stating the objectively reasonable factors under subsection 15 explaining the department's determination to grant, deny or revoke a waiver. [PL 2015, c. 299, §25 (NEW).]

Rules adopted pursuant to this subsection are routine technical rules as defined in Title 5, chapter 375, subchapter 2-A.

[PL 2015, c. 299, §25 (NEW).]

17. Immunity. A provider that denies employment for an individual selected for hire or continued employment as a direct access worker, including during any period of conditional employment, and that reasonably relies upon information obtained through a final background check report regarding the individual is not liable in an action brought by the individual based on an employment determination resulting from the information.

[PL 2015, c. 299, §25 (NEW).]

18. Presumption of good faith. In a proceeding regarding immunity from liability, there is a rebuttable presumption of good faith.

[PL 2015, c. 299, §25 (NEW).]

SECTION HISTORY

PL 2015, c. 299, §25 (NEW). PL 2019, c. 660, §§7-11 (AMD). PL 2023, c. 176, §38 (AMD). PL 2023, c. 241, §§59-69 (AMD).

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