



Center for Clinical Standards and Quality/Survey & Certification Group

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DATE: April 12, 2013

TO: State Survey Agency Directors

FROM: Director
Survey and Certification Group

SUBJECT: Report of the National Background Check Program (NBCP) Long-Term Care (LTC) Criminal Convictions Work Group

*****Revised to reflect new comment deadline*****

Memorandum Summary

- **The National Background Check Program Purpose:** To provide grants to States to implement background checks on prospective direct patient access employees in the LTC field.
- **Role of The Office of Inspector General (OIG):** Tasked by statute with evaluating the NBCP and has recommended that the Centers for Medicare & Medicaid Services (CMS) develop standards in defining direct patient access and identifying convictions that disqualify an individual from nursing facility employment.
- **NBCP LTC Criminal Convictions Work Group:** Made up of grantee State Agency representatives and other interested state officials and has prepared options in response.
- **Request of Stakeholders:** To review the Work Group's options and provide CMS comments.

The Patient Protection and Affordable Care Act (P.L. 111-148) became Federal law in March 2010. Section 6201 of the Affordable Care Act established the National Background Check Program to identify efficient, effective, and economical procedures for LTC facilities or providers to conduct background checks on prospective direct patient access employees on a national basis.

The OIG issued interim report OEI-07-09-00110 in March 2011, which revealed, through an analysis of Federal Bureau of Investigation-maintained criminal history records, that 92% of nursing facilities employed one or more individuals with a history of criminal conviction. In response, the OIG recommended that CMS define those employee classifications that are direct patient access employees and work with participating States to develop a list of convictions that

disqualify an individual from nursing facility employment, including periods for which each conviction bars the individual from employment.

A Work Group made up of CMS employees and volunteers from 11 State Agencies has developed options to respond to this directive. The Work Group's mission was to provide CMS with options to consider in developing:

- Common definitions of direct access employee; and
- A list of State convictions that should disqualify individuals from direct access employment with long-term care facilities and providers, the conviction types that should be considered for mitigation or rehabilitation, and the time period for which each conviction should disqualify individuals from employment.

The Work Group developed a Consolidated Option for defining a direct access employee:

- An individual who has direct access to a resident or beneficiary through ownership, employment, or a contract/agreement with a LTC facility or provider. This does not include volunteers or students, unless they perform regular or unsupervised functions equivalent to those of direct access employees. This does not include contractors performing repairs, deliveries, installations, or similar services only for the facility or provider.
- Direct access is having, or expecting to have, duties that involve one-on-one contact with a resident or beneficiary, or access to the resident or beneficiary's property, personally identifiable information, or financial information.

The Work Group suggested the utilization of categories of disqualifying convictions rather than lists of individual crimes. This categorization was developed due to the wide variance among States regarding definitions of specific crimes. Suggested categories included: (1) crimes against care-dependent or vulnerable individuals, (2) crimes against the person, (3) crimes against property, and (4) crimes related to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance.

Regarding rehabilitation factors, the Work Group elected to follow those noted in Section 6201 of the Affordable Care Act, including:

- Passage of time;
- Extenuating circumstances;
- Demonstration of rehabilitation; and
- Relevancy of the particular disqualifying information with respect to the current employment of the individual.

Minimum disqualification times were based on whether the charges were felonies or misdemeanors, whether they were violent or non-violent, and the amount of time that had elapsed from time of conviction or time of release from prison.

CMS will consider the Work Group's findings and options for the definition of a direct access employee, disqualifying convictions, and rehabilitation factors. They recognize the need for balance between the need to protect the safety and well-being of residents and beneficiaries and the need to manage, employ, and provide employment opportunities to a high-quality workforce.

The LTC Criminal Convictions Work Group report is being made available to internal and external stakeholders and the public for their review. CMS will formulate a plan for future action regarding the Work Group's recommendations.

Comments should be directed to Martin Kennedy at background_checks@cms.hhs.gov by Friday, August 30, 2013.

/s/

Thomas E. Hamilton

Attachment

cc: Survey and Certification Regional Office Management