



Center for Clinical Standards and Quality/Survey & Certification Group

Ref: S&C: 14-13-NH

DATE: March 7, 2014

TO: State Survey Agency Directors

FROM: Director
Survey and Certification Group

SUBJECT: **For Information Only:** Public Comments on the Report of the National Background Check Program (NBCP) Long-Term Care Criminal Convictions (LTCCC) Work Group

Memorandum Summary

- **Purpose:** To make State Survey Agency Directors and Stakeholders aware of the release of comments on the LTCCC Work Group report.
- **National Background Check Program (NBCP) Long Term Care Criminal Convictions Work Group:** We convened a workgroup in response to the Office of Inspector General's (OIG) recommendation to the Centers for Medicare & Medicaid Services (CMS) that we develop standards to define direct patient access, as well as convictions that should disqualify individuals from direct access employment with LTC 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.
- **Public Comments:** Public comment was accepted until September 16, 2013.

Background

The Patient Protection and Affordable Care Act, Section 6201 established the National Background Check Program (NBCP) to identify efficient, effective, and economical procedures for long-term care (LTC) facilities or providers to conduct background checks on prospective direct patient access employees on a national basis.

The Office of Inspector General (OIG) issued an interim report, located at: <http://oig.hhs.gov/oei/reports/oei-07-09-00110.pdf> 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 the Centers for Medicare & Medicaid Services define those employee classifications that are direct patient access employees. The OIG also recommended

that CMS work with participating States to develop a list of convictions that should generally disqualify an individual from nursing facility employment, including periods for which each conviction might bar the individual from employment in a LTC program. For example, periods of assured exclusion may be lifetime exclusions or may be for shorter periods. Examples of pertinent factors might include, but not be limited to, the seriousness of the offense, violent and sexual offenses, fiduciary crimes against persons, and crimes against elderly and vulnerable persons.

S&C memorandum 13-24-NH (located at: <http://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/SurveyCertificationGenInfo/Downloads/Survey-and-Cert-Letter-13-24-Memo.pdf>) invited comments on these topics. Comments were received up until September 16, 2013. At the end of the extended deadline, we received approximately 18 public comments from States, health care associations, individuals, provider advocacy organizations, consumer advocacy organizations, industry trade associations, criminal justice support organizations, and other Federal agencies.

Please note that any comments received that did not specifically state which Option to which the comment applied were assumed to be referencing the Consolidated Option.

Next Steps

CMS will consider further action that may require background checks for potential long term care employees and specific standards for state-operated background check systems. CMS's first consideration is to ensure a safe and secure care setting for vulnerable consumers of LTC services. Among the important considerations for assuring that people who require LTC services are not vulnerable are the definition of disqualifying convictions, and the potential periods of exclusion from LTC employment,

Questions regarding this memorandum should be directed to Martin Kennedy at background_checks@cms.hhs.gov.

/s/

Thomas E. Hamilton

Attachment - Summary of Comments

cc: Survey and Certification Regional Office Management

Summary of Comments Received by the Centers for Medicare & Medicaid Services (CMS)

Definition of Direct Access Employee

1. The Work Group's Consolidated Option for defining a direct access employee is as follows:
 - An individual who has direct access to a resident or beneficiary through ownership, employment, or a contract/agreement with an 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.

Comments

Overall, comments were supportive of the Consolidated Option's definition of direct access employee. However, several commenters suggested the addition of the below underlined language to the definition:

- An individual who has direct access to a resident or beneficiary on a day-to-day basis through ownership, employment, or a contract/agreement with a healthcare facility . . . This does not include contractors performing repairs, deliveries, installations, or similar services, e.g., outside maintenance such as landscaping, snow or waste removal, [only] for the facility or provider.
- Direct access is having . . . direct access to the resident or beneficiary's property, personally identifiable information, or financial information.

One commenter wrote in support of the Consolidation Option's exemption of contractors, "because such contractors will not hire people with criminal records if they think that doing so will jeopardize their ability to serve customers."

Several commenters advised explicitly including licensed professionals in the Consolidated Option. Additionally, one commenter suggested the following definition that combines elements from all three options:

Anyone who has or may have access to a resident or beneficiary. This includes, but is not limited to, employees, licensed individuals, contractors, administrators, owners, students, and volunteers who have or may have access to residents/beneficiaries or who have or may have access to the belongings, living quarters, personally identifiable information, financial information, and medical records of residents/beneficiaries.

2. Preliminary Option 1's definition of direct access employee is as follows:
 - Any individual who has or may have access to a patient, resident, client, or recipient receiving Medicare or Medicaid funds. This includes but is not limited to employees, contractors, administrators, owners, students, and direct care facility volunteers who have

or may have access to the residents, residents' belongings, living quarters, personal information, and financial information [and medical records]. "Contractor" does not include individuals or entities performing repairs, deliveries, installations, and similar services for the facility. A "direct care facility volunteer" does not include religious organizations or civic groups not providing direct care.

- Applicable facilities and providers include those receiving Medicare or Medicaid funds.

Comments

There were no comments specifically directed toward the definition of direct access employee as delineated in Preliminary Option 1.

3. Preliminary Option 2's definition of direct access employee is as follows:

- "Direct Access" is where an employee has, or is expected to have, interaction with a patient or patient's property, personally identifiable information, medical records, treatment information, or financial information. "Patient" is a recipient of services provided by a covered facility or provider. "Employee" is any individual who has direct access to a patient through employment or through a contract with such a facility or provider. This includes licensed individuals. This does not include volunteers or students unless they have equivalent functions to those of "direct access employees."

Comments

One commenter supported the exclusion of volunteers and students who do not perform regular or unsupervised functions.

Disqualifying Convictions

1. In the Consolidation Option, the Work Group developed general categories of disqualifying convictions, giving States the flexibility to determine which specific crimes would fall within the broader categories.

Comments

The majority of commenters were supportive of this option's categorical approach, especially of the separate category for crimes against care-dependent or vulnerable individuals. One commenter requested that any future guidance provided by CMS specifically address previous offenses that targeted the elderly, although the commenter conceded this may require additional research to determine the facts and circumstances underlying the information on the criminal history record.

Several comments were made about Disqualifying Crimes Category 4 in the Consolidated Option; crimes related to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance (felony only). It was remarked that this category should also include convictions for crimes related to the abuse of drugs and alcohol. Another commenter felt that there should be differentiation between convictions for marijuana and convictions for other controlled substances and that people convicted for marijuana offenses before recent public policy changes be allowed to work in long term care. They felt that a distinction should be made between current use of marijuana and past use. One commenter stated that the Consolidated

Option is too work intensive because the agency receiving criminal history information will not be able to determine the particulars of a crime, such as whether the victim was part of the vulnerable population. This would require the acquisition of police reports from each crime.

2. Preliminary Option 1 included a three-tier system to classify the categories of disqualifying convictions (felonies only) according to the severity of the crimes.

Comments

Several commenters felt that there should be no permanent or lifetime disqualifications; however, conversely, several commenters supported lifetime bans.

3. Preliminary Option 2 identified categories of disqualifying convictions (felonies and misdemeanors) that would trigger an automatic initial negative fitness determination.

Comments

In general, commenters were supportive of this option, but several commenters suggested the following additional crimes be included in Preliminary Option 2: any felony crimes against care-dependent or vulnerable individuals, murder, rape, cruelty, torture, any sex crime, and attempt/conspiracy to commit any crime in the disqualifying conviction categories. Also, some commenters felt that crimes that involved defrauding care-dependent or vulnerable individuals should carry a longer disqualification time period than other crimes against property.

Disqualifying Time Periods

1. In the Consolidated Option, the Work Group set minimum disqualification time periods for each conviction category, with longer periods for the more serious and/or violent crimes.

Comments

One commenter recommended starting the disqualification time period on the date of the criminal activity or the filing of the criminal charge rather than the date of conviction or completion of the sentence. Several commenters felt that the disqualifying time periods were too short. Another commenter wanted to see any crime against care-dependent or vulnerable individuals (including fraud) be an automatic lifetime disqualifier, while allowing opportunities to apply for a variance. One commenter felt that reoffending issues were not addressed adequately in this option and that the clock on felony crime against a person should be reset after a second offense, not be measured from the first offense. Another commenter recommended increasing the disqualification time periods for crimes outside the permanent disqualifying crime categories.

2. The tiers included in Preliminary Option 1 would have specific disqualification time periods that begin from the date of conviction. The number of years for these time periods was not specified.

Comments

One commenter said that reliance on a clear redemption period is misplaced as there may not be such a thing as a point of redemption and if there is, that redemption period may extend many more years.

3. After an automatic initial negative fitness determination as described in Preliminary Option 2, the applicant would be eligible to apply for a variance after specific time periods, which would start from the point of completion of sentence requirements.

Comments

Several commenters were supportive of this approach to disqualification time periods and the use of date of sentence completion as a start date.

Variance Process

1. In the Consolidated Option, either the prospective employee or the prospective employer (on behalf of the prospective employee) could apply for a variance, including during the disqualification period. At the end of the disqualification period, that conviction would no longer be considered a reason for an automatic negative fitness determination.

Comments

One commenter concurred with this variance application process. A number of commenters recommended separate and distinct variance and appeal processes to decrease the likelihood of confusion and/or delays.

2. The Work Group endorsed a waiver or variance process for all disqualifying crimes in Preliminary Option 1.

Comments

One commenter supported this option's recommendation to allow application for a variance at any time during the disqualification period.

3. The variance process in Preliminary Option 2 would allow a prospective employee to seek a variance after specified time periods. For categories with no stated minimum disqualification time period, States would have the ability to make a variance determination at any time.

Comments

One commenter supported this option because it allows the opportunity to apply for a variance after a disqualifying conviction and provide for an appropriate individualized assessment of risk.

Rehabilitation Factors

1. The Consolidated Option followed the rehabilitation factors required under Section 6201 of the Affordable Care Act: passage of time, extenuating circumstances, demonstration of rehabilitation, and relevancy of the particular disqualifying information with respect to the current employment of the individual.

Comments

Several commenters were supportive of the inclusion of variances and consideration of rehabilitation factors in any proposed Federal program. In addition, they felt that a proposed national program must also address and incorporate due process protections to permit existing and prospective health care workers to request further review, appeal, and/or otherwise respond to an adverse finding or negative determination. Several commenters recommended including an individual's employment as a direct access employee as an additional, discrete factor.

2. Preliminary Option 1 recommended rehabilitation factors including: personal character, time elapsed since conviction, completion of sentence requirements, nature of the crime in relation to potential job duties, and age at the time of offense.

Comments

No comments were received regarding this option.

3. Rehabilitation factors that would be considered in Preliminary Option 2 included: passage of time, complete criminal history, age at the time of offense, harm to the victim, circumstances of the crime, fulfillment of sentence requirements, contribution to societal conditions, participation in rehabilitation, character references/recommendations from past employers, similarity between past victim(s) and potential persons to be served, work history and current employment, and the nature of the position sought.

Comments

No comments were received regarding this option.

Other Considerations

Disqualifying Convictions

One commenter disagreed with all three options, stating that certain crimes should be permanent disqualifiers without the opportunity to provide for a variance, including: all crimes in the Consolidated Option category "Crimes Against Care-Dependent or Vulnerable Individuals," murder, non-negligent homicide, negligent homicide, rape, sexual assault, cruelty and torture, domestic violence, and cruelty to animals.

Another commenter stated that currently, persons with substantiated abuse are banned from working with nursing home residents and that the same standard should be applied to anyone convicted for a crime against a person, including exploitation.

Variance Process

One commenter did not agree with allowing someone to automatically be eligible to work with vulnerable persons after a period of time has passed without some type of review. This commenter's State standard requires an individual to request an exemption from disqualification (or variance) to be cleared to work with the elderly. That individual has to provide the circumstances surrounding the criminal incident for

which an exemption is sought, the time period that has elapsed since the incident, the nature of the harm caused to the victim, a history of the employee since the incident, and any other evidence indicating that the individual is leading a positive lifestyle and can be entrusted to work with a vulnerable population. The commenter advised that passage of time alone has not been proven as a reliable mitigation strategy for crimes with this population. The commenter believed the passage of time along with an examination of circumstances surrounding the conviction and rehabilitation are a much more reliable course of action. The commenter admitted that although more resources are required to conduct a variance program through individualized assessments, the additional resources are justified to protect against the risk of harm to the vulnerable elderly.

Another commenter felt that individuals convicted of violent crimes against persons should be required to proactively request a variance to their permanent disqualification which would then initiate a comprehensive review of rehabilitation factors along with mitigating and aggravating considerations.

A commenter suggested the explicit inclusion of the worker's right to initiate and pursue the variance process, with the parties to such actions clearly named and treated equally.

Rehabilitation Factors

One commenter suggested modifying the completion of sentence requirements in rehabilitation factors so that indigent offenders who are unable to pay down debt are not penalized, even though it is a condition for sentence completion.

General Comments

Work Group

Several commenters felt that the lack of criminal justice representation on the Work Group negatively impacted its ability to make fully-informed decisions in developing recommendations. A commenter recommended that prior to finalizing any further recommendations; CMS should confer with public safety and other subject matter experts in order to create an optimal fitness determination policy.

Federal Minimum Standard

Many commenters noted that a Federal minimum standard will likely be adopted as the de facto standard in those states that have not previously adopted more stringent criteria and that any rule should require states to conduct fingerprint-based criminal history record checks at both the state and national levels.

Many commenters stated that any Federal minimum standard must be sufficient to protect the vulnerable populations at risk without requiring the states to impose stricter standards. One commenter felt that no recommendation on minimum periods of disqualification would be better than a federally recommended minimum that leaves elders subject to an unreasonable risk of harm.

A commenter suggested an alternative to a Federal minimum standard: development of a Federal set of core or basic principles to be complied with, at minimum, by all states in program implementation.

One commenter reported that their state's current standards exceed those recommended in the Work Group report and that if Federal regulations are enacted; they must be more stringent than those reflected in the report.

Registry Checks

Several commenters felt that requirements regarding registry checks should be explicitly outlined in any Federal minimum standard rather than assumed and the checks should not be solely relied upon. One commenter suggested the requirement to complete appropriate registry checks prior to fingerprinting. A commenter discussed the importance of developing a mechanism to facilitate sharing of information between state nurse aide registries.

Lifetime Disqualifier

One commenter stated that “[the Work Group] should refrain from calling anything a “Lifetime Disqualifier”” because a variance could be issued after a period of time and that anyone who has committed a serious crime such as sex offenses, murder, or serious bodily harm against the elderly should not be allowed to work with them.

Blumstein Research

Several commenters were highly critical of Dr. Blumstein's research on recidivism and believed that it should not be considered the definitive guide when it comes to determining if the passage of time mitigates the risk in specific circumstances.

Federal Bureau of Investigations

One commenter recommended that the Department of Health & Human Services not rely only on Federal Bureau of Investigations (FBI) information, but to more reliable information available from the private sector. Another commenter was highly critical of fingerprint-based-only background checks.

Other Healthcare Settings

Some commenters felt that background checks should also be conducted at assisted living facilities, dialysis centers, hospitals, acute care settings, and any facilities and/or providers receiving Medicare or Medicaid funding.

Protection for Providers

One commenter wanted the inclusion of “hold harmless” provisions for providers who are given inaccurate information on applicants. This includes protection from litigation initiated by employees who are terminated for failing a background check. Also, a commenter stated that in the event that a background check failed to reveal a job candidate's criminal record, providers must be held harmless for hiring such an individual as long as they have followed all of the required procedures and taken all due precautions.

Civil Rights Act

A commenter recommended that employers need to be reminded of their obligations under Title VII of the Civil Rights Act and the US Equal Employment Opportunity Commission's Enforcement Guidance on the Use of Arrest and Conviction Records in Employment. Conversely, another commenter believed that discrimination in criminal background checks should not be a concern since it is already illegal to discriminate on the basis of race or ethnic origin.

Fingerprint-Based Background Checks

Although one commenter was in strong agreement with the Work Group's goal to address the special concerns of residents and beneficiaries at long-term care facilities and the critical need to protect this vulnerable population, they were highly critical of several areas of the report. The commenter felt that the Work Group relied on false assumptions in developing the options delineated in the report. They dispute the veracity of the statement that name-based background checks are largely inaccurate and question the sources of information used to support that conclusion. The commenter also discussed their belief that the FBI's Integrated Automated Fingerprint Identification System (IAFIS), while national in scope, has limitations that will undermine the efficacy of the NBCP to protect the health, safety, and welfare of the people and property at long-term care facilities if used as the sole source to identify disqualifying convictions for prospective direct patient access employees. They stated that facilities and providers should be allowed to utilize private sector alternatives to perform background checks, including third-party consumer reporting agencies.

Private Sector Background Checks

A commenter questioned the reliability of FBI criminal history information and felt that it should not be the only source of information. They also supported the use of the private sector because the data is more reliable than data provided by the FBI and has robust consumer protections.

Miscellaneous Comments

One commenter recommended that CMS take into account the range of behaviors that can lead to convictions for sex crimes that land people on state sex offender registries and to allow applicants to present information about the facts involved in their conviction in the variance process. Several commenters wanted to have set time limits for reporting back results. One commenter suggested that fees for background checks be fully reimbursable under Medicare and Medicaid and have monetary limits. A commenter also felt that providers need to be instructed that arrest is, in itself, not reason for termination of employment.