

Federal Certification Requirements for Background Checks in Nursing Home, Home Health and Hospice Agency Employment

When the National Background Check Program (NBCP) grant was established in 2010, participating states were supported to identify efficient, effective and economical procedures to conduct background checks on prospective direct patient access employees. Under NBCP, States could adopt a single screening program that covered all direct patient access staff in a variety of long term care (LTC) settings, including institutional, residential, and non-residential providers. This guide shows a summary of the screening requirements authorized in the Affordable Care Act, and those currently in place through federal regulation, for nursing homes, home health agencies, and hospice agencies. The guide also includes excerpts from CMS guidance and rulemaking that supports the adoption of NBCP-compliant screening programs to address and support the federal requirements. The appendix is a more detailed comparison of the four sets of requirements across the specific background screening components.

NATIONAL BACKGROUND CHECK PROGRAM

PL 111-148, Section 6201 (a)

(3) REQUIRED FINGERPRINT CHECK AS PART OF CRIMINAL HISTORY BACKGROUND CHECK. The procedures established under subsection (b)(1) of such section 307 shall—

(A) require that the long-term care facility or provider (or the designated agent of the long-term care facility or provider) obtain State and national criminal history back-ground checks on the prospective employee through such means as the Secretary determines appropriate, efficient, and effective that utilize a search of State-based abuse and neglect registries and databases, including the abuse and neglect registries of another State in the case where a prospective employee previously resided in that State, State criminal history records, the records of any proceedings in the State that may contain disqualifying information about prospective employees (such as proceedings conducted by State professional licensing and disciplinary boards and State Medicaid Fraud Control Units), and Federal criminal history records, including a fingerprint check using the Integrated Automated Fingerprint Identification System of the Federal Bureau of Investigation;

(B) require States to describe and test methods that reduce duplicative fingerprinting, including providing for the development of “rap back” capability by the State such that, if a direct patient access employee of a long-term care facility or provider is convicted of a crime following the initial criminal history background check conducted with respect to such employee, and the employee’s fingerprints match the prints on file with the State law enforcement department, the department will immediately inform the State and the State will immediately inform the long-term care facility or provider which employs the direct patient access employee of such conviction; and

(C) require that criminal history background checks conducted under the nationwide program remain valid for a period of time specified by the Secretary.

(4) STATE REQUIREMENTS. An agreement entered into shall require that a participating State:

- (A) be responsible for monitoring compliance with the requirements of the nationwide program;
- (B) have procedures in place to—
- (i) conduct screening and criminal history background checks under the nationwide program in accordance with the requirements of this section;
 - (ii) monitor compliance by long-term care facilities and providers with the procedures and requirements of the nationwide program;
 - (iii) as appropriate, provide for a provisional period of employment by a long-term care facility or provider of a direct patient access employee, not to exceed 60 days, pending completion of the required criminal history background check and, in the case where the employee has appealed the results of such background check, pending completion of the appeals process, during which the employee shall be subject to direct on-site supervision (in accordance with procedures established by the State to ensure that a long-term care facility or provider furnishes such direct on-site supervision);
 - (iv) provide an independent process by which a provisional employee or an employee may appeal or dispute the accuracy of the information obtained in a background check performed under the nationwide program, including the specification of criteria for appeals for direct patient access employees found to have disqualifying information which shall include consideration of the passage of time, extenuating circumstances, demonstration of rehabilitation, and relevancy of the particular disqualifying information with respect to the current employment of the individual;
 - (v) provide for the designation of a single State agency as responsible for—
 - (I) overseeing the coordination of any State and national criminal history background checks requested by a long-term care facility or provider (or the designated agent of the long-term care facility or provider) utilizing a search of State and Federal criminal history records, including a fingerprint check of such records;
 - (II) overseeing the design of appropriate privacy and security safeguards for use in the review of the results of any State or national criminal history background checks conducted regarding a prospective direct patient access employee to determine whether the employee has any conviction for a relevant crime;
 - (III) immediately reporting to the long-term care facility or provider that requested the criminal history background check the results of such review; and
 - (IV) in the case of an employee with a conviction for a relevant crime that is subject to reporting under section 1128E of the Social Security Act (42 U.S.C. 1320a–7e), reporting the existence of such conviction to the database established under that section;
 - (vi) determine which individuals are direct patient access employees (as defined in paragraph (6)(B)) for purposes of the nationwide program;
 - (vii) as appropriate, specify offenses, including convictions for violent crimes, for purposes of the nationwide program; and
 - (viii) describe and test methods that reduce duplicative fingerprinting, including providing for the development of “rap back” capability such that, if a direct patient access employee of a long-term care

facility or provider is convicted of a crime following the initial criminal history background check conducted with respect to such employee, and the employee's finger-prints match the prints on file with the State law enforcement department—

(I) the department will immediately inform the State agency designated under clause (v) and such agency will immediately inform the facility or provider which employs the direct patient access employee of such conviction; and

(II) the State will provide, or will require the facility to provide, to the employee a copy of the results of the criminal history background check conducted with respect to the employee at no charge in the case where the individual requests such a copy.

(6) **DEFINITIONS.** Under the nationwide program:

(A) **CONVICTION FOR A RELEVANT CRIME.** The term “conviction for a relevant crime” means any Federal or State criminal conviction for—

(i) any offense described in section 1128(a) of the Social Security Act (42 U.S.C. 1320a–7); or

(ii) such other types of offenses as a participating State may specify for purposes of conducting the program in such State.

(B) **DISQUALIFYING INFORMATION.** The term “disqualifying information” means a conviction for a relevant crime or a finding of patient or resident abuse.

(C) **FINDING OF PATIENT OR RESIDENT ABUSE.** The term “finding of patient or resident abuse” means any substantiated finding by a State agency under section 1819(g)(1)(C) or 1919(g)(1)(C) of the Social Security Act (42 U.S.C. 1395i–3(g)(1)(C), 1396r(g)(1)(C)) or a Federal agency that a direct patient access employee has committed—

(i) an act of patient or resident abuse or neglect or a misappropriation of patient or resident property; or

(ii) such other types of acts as a participating State may specify for purposes of conducting the program in such State.

(D) **DIRECT PATIENT ACCESS EMPLOYEE.** The term “direct patient access employee” means any individual who has access to a patient or resident of a long-term care facility or provider through employment or through a contract with such facility or provider and has duties that involve (or may involve) one-on-one contact with a patient or resident of the facility or provider, as determined by the State for purposes of the nationwide program. Such term does not include a volunteer unless the volunteer has duties that are equivalent to the duties of a direct patient access employee and those duties involve (or may involve) one-on-one contact with a patient or resident of the long-term care facility or provider.

(E) **LONG-TERM CARE FACILITY OR PROVIDER.** The term “long-term care facility or provider” means the following facilities or providers which receive payment for services under title XVIII or XIX of the Social Security Act:

(i) A skilled nursing facility (as defined in section 1819(a) of the Social Security Act (42 U.S.C. 1395i–3(a))).

- (ii) A nursing facility (as defined in section 1919(a) of such Act (42 U.S.C. 1396r(a))).
- (iii) A home health agency.
- (iv) A provider of hospice care (as defined in section 1861(dd)(1) of such Act (42 U.S.C. 1395x(dd)(1))).
- (v) A long-term care hospital (as described in section 1886(d)(1)(B)(iv) of such Act (42 U.S.C. 1395ww(d)(1)(B)(iv))).
- (vi) A provider of personal care services.
- (vii) A provider of adult day care.
- (viii) A residential care provider that arranges for, or directly provides, long-term care services, including an assisted living facility that provides a level of care established by the Secretary.
- (ix) An intermediate care facility for the mentally retarded (as defined in section 1905(d) of such Act (42 U.S.C. 1396d(d))).
- (x) Any other facility or provider of long-term care services under such titles as the participating State determines appropriate.

NURSING HOMES

§ 483.12 Freedom from abuse, neglect, and exploitation

(Issued October 4, 2016; Phase 2, Effective November 28, 2017; Implementation Date November 28, 2017)

The resident has the right to be free from abuse, neglect, misappropriation of resident property, and exploitation as defined in this subpart. This includes but is not limited to freedom from corporal punishment, involuntary seclusion and any physical or chemical restraint not required to treat the resident's medical symptoms. (a) The facility must—...

(3) Not employ or otherwise engage individuals who—

(i) Have been found guilty of abuse, neglect, exploitation, misappropriation of property, or mistreatment by a court of law;

(ii) Have had a finding entered into the State nurse aide registry concerning abuse, neglect, exploitation, mistreatment of residents or misappropriation of their property; or

(iii) Have a disciplinary action in effect against his or her professional license by a state licensure body as a result of a finding of abuse, neglect, exploitation, mistreatment of residents or misappropriation of resident property.

Pub. 100-07 State Operations Provider Certification, Transmittal 169-Advanced Copy

F606: INTENT: *The facility must not hire an employee or engage an individual who was found guilty of abuse, neglect, exploitation, or mistreatment or misappropriation of property by a court of law; or*

who has a finding in the State nurse aide registry concerning abuse, neglect, exploitation, mistreatment of residents or misappropriation of resident property, or has had a disciplinary action in effect taken against his/her professional license. The facility must report knowledge of actions by a court of law against an employee that indicates the employee is unfit for duty.

EMPLOYMENT: *...Some States may have additional requirements for criminal background checks and State law may prohibit persons convicted of certain crimes from working in a long-term care facility. The State Survey Agency may use its own authority for assuring facility compliance such as the use of the National Background Check Program or specific State licensure requirements that may address criminal background checks. In addition, some facilities may have more stringent hiring restrictions than what is required by State or Federal law.*

HOME HEALTH

§484.12 Condition of Participation: Compliance With Federal, State and Local Laws, Disclosure and Ownership Information, and Accepted Professional Standards and Principles. (NOTE: This section does not include any specific screening requirements or employment restrictions.)

42 CFR 455.434 - Criminal background checks. (NOTE: This is a section under the Medicaid Program Integrity rules. It only applies to owners, agents, or managing employees.)

The State Medicaid agency—

(a) As a condition of enrollment, must require providers to consent to criminal background checks including fingerprinting when required to do so under State law or by the level of screening based on risk of fraud, waste or abuse as determined for that category of provider.

(b) Must establish categorical risk levels for providers and provider categories who pose an increased financial risk of fraud, waste or abuse to the Medicaid program.

(1) Upon the State Medicaid agency determining that a provider, or a person with a 5 percent or more direct or indirect ownership interest in the provider, meets the State Medicaid agency's criteria hereunder for criminal background checks as a “high” risk to the Medicaid program, the State Medicaid agency will require that each such provider or person submit fingerprints.

(2) The State Medicaid agency must require a provider, or any person with a 5 percent or more direct or indirect ownership interest in the provider, to submit a set of fingerprints, in a form and manner to be determined by the State Medicaid agency, within 30 days upon request from CMS or the State Medicaid agency.

Summary: As defined in 42 CFR 455.434, fingerprint-based background checks will be applied to individuals who have indicated a 5 percent or greater direct or indirect ownership in a provider or supplier identified as "high" risk. Federal "high" risk providers (as defined in 42 CFR 424.518(c) and 42 CFR 455.450(e)) include the following: 1) newly enrolling home health agencies; 2) newly enrolling durable medical equipment, prosthetics, orthotics, and supplies providers (including hearing aid dealers);

and 3) providers and suppliers who have been elevated to the high risk category in accordance with enhanced screening requirements.

§455.436 Federal database checks.

The State Medicaid agency must do all of the following:

(a) Confirm the identity and determine the exclusion status of providers and any person with an ownership or control interest or who is an agent or managing employee of the provider through routine checks of Federal databases.

(b) Check the Social Security Administration's Death Master File, the National Plan and Provider Enumeration System (NPPES), the List of Excluded Individuals/Entities (LEIE), the Excluded Parties List System (EPLS), and any such other databases as the Secretary may prescribe.

(c)

(1) Consult appropriate databases to confirm identity upon enrollment and reenrollment; and

(2) Check the LEIE and EPLS no less frequently than monthly.

Conditions of Participation for Home Health Agencies, Final rule, p. 229-231. Federal Register January 13, 2017, [CMS-3819-F]

***Comment:** We received a few comments related to criminal background checks. Specially, one commenter stated that background checks should be done for all staff members, especially those who plan to go to a patient's home to deliver health care. A few additional commenters advised that CMS should require reasonable and appropriate standards for criminal background screenings and that criminal background checks should be required for all owners, operators, or employees that have direct patient contact or access to patient records in order to validate competency according to minimum standards established by the Secretary.*

***Response:** The National Background Check Program (NBCP), as established by the Affordable Care Act, aims to create a nationwide system for conducting comprehensive background checks on applicants for employment by the LTC facilities and providers. Prior to passage of this law and creation of the NBCP, many states already required background checks for LTC workers, but state requirements and programs varied. The intent of the NBCP is to set-up a standard, effective, and economical program to conduct background checks that also includes fingerprint-based criminal history checks. We believe that this comprehensive program that fosters consistency in implementation is a preferable way to improve the volume and scope of background checks that are conducted for HHA employees and contractors.*

HOSPICE

§418.114(d) Standard: Criminal Background Checks

Rev. 69, Issued: 12-15-10, Effective: 10-01-10, Implementation: 10-01-10)

42 CFR 418.114 – L795 (1) *The hospice must obtain a criminal background check on all hospice employees who have direct patient contact or access to patient records. Hospice contracts must require that all contracted entities obtain criminal background checks on contracted employees who have direct patient contact or access to patient records. L796 (2) - Criminal background checks must be obtained in accordance with State requirements. In the absence of State requirements, criminal background checks must be obtained within three months of the date of employment for all states that the individual has lived or worked in the past 3 years.*

APPENDIX

Requirement	NBCP	Fed Nursing Home	Fed HHA	Fed Hospice
Legislation/CFR	Voluntary PL111-118 (PPACA)	Condition of Participation (Medicare and Medicaid) 24CFR483.12 (rev. 2017)	§484.12 Condition of Participation (Medicaid) 42 CFR 455.434 - Criminal background checks	§418.114(d) Standard: Criminal Background Checks
State agency required to perform or review checks	Single State Agency to manage program, including notifications.	No	Yes	No, but must comply with State requirements (if any)
Entities covered	9 types, plus others if the State chooses	Only nursing homes receiving Medicaid or Medicare	New or re-enrolling HHAs, DME providers	Hospices
Employees covered	Direct patient access “Direct Access” (LTCCC)	All (employees, the medical director, consultants, contractors, volunteers. Students)	Only 5% owners, agents, managing employees)	Employees and contracted entities with direct patient access or access to patient records
Deadline for check	Implied 60 days (preliminary employment)	Before hiring	Prior to enrollment; or 30 days after State or CMS request	State requirements, or 90 days after starting employment

CRIMINAL BACKGROUND CHECK REQUIREMENTS

Requirement	NBCP	Fed Nursing Home	Fed HHA	Fed Hospice
In State (of facility)	Yes	Not specifically, but implied (“been found guilty of...by a court of law.”)	Not stated	Not specified, but implied (“Must have a criminal background check...in accordance with State requirements”)
Other States	No	Implied (“a court of law”)	Not stated	No
National	Yes	Implied (“a court of law”)	Yes (through fingerprinting)	No
Fingerprint	Yes	No	Yes	No

REGISTRY CHECK REQUIREMENTS

Requirement	NBCP	Fed Nursing Home	Fed HHA	Fed Hospice
In-State NAR finding	Yes	Yes (only specific findings)	No	No
In-State Adult Abuse	Yes “abuse and neglect registries”	No	No	No
In-State Child Abuse	Yes “abuse and neglect registries”	No	No	No
In-State Prof Lic.	Yes	Yes (only specific findings)	Yes	License must be current
Fed. LEIE/SAM	Implied (source of federal exclusionary convictions)	No	Yes	No
Fed. NSOR	No	No	No	No
Other States	Yes abuse and neglect registries of States of previous residence	No (guidance says facilities “should make a reasonable effort” to find information)	Yes, prof. licensure in any State	Not specified
Specific Exclusions	Yes	Yes	Yes	No
Periodic Re-check	Yes, “as specified by the Secretary”	No	Yes, monthly LEIE/EPLS	No
Appeal/waiver required	Yes Title VII criteria	No	Yes, reinstatement rules	No
Enforcement/Penalty	State agency to enforce	Deficiency through State survey	Yes, termination or denial of enrollment	No