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AFC HOMES: CRIMINAL BACKGROUND CHECKS

House Bill 5184 as passed by the House First Analysis (1-15-04)

Sponsor: Rep. Gary Woronchak
**Committee: Senior Health, Security and
Retirement**

THE APPARENT PROBLEM:

Public Act 303 of 2002 required criminal background checks for all new nursing home employees who provide direct care services to patients. This was in response to several high profile cases of nursing home residents being abused by nurse aides, later discovered to have had previous convictions for assaultive crimes. Bills to require criminal background checks for employees of adult foster care facilities were part of the original legislative package along with the nursing home component, but were not enacted. According to the Department of Consumer and Industry Services web site, adult foster care facilities are residential settings that provide 24-hour personal care, protection, and supervision for individuals who are developmentally disabled, mentally ill, physically handicapped or aged who cannot live alone but who do not need continuous nursing care. An AFC home is restricted to providing care to no more than 20 adults.

Like nursing homes, AFC homes serve a vulnerable population and have a high employee turnover. For that reason, some believe that employees who work in these facilities should undergo a similar background check as workers in nursing homes.

THE CONTENT OF THE BILL:

The bill would add a new section to the Adult Foster Care Facility Act to require background checks on new employees of adult foster care facilities. The bill's provisions would not apply to individuals who were employed by or under contract to a facility on the effective date of the bill. After the bill's effective date, a facility would be prohibited from employing or contracting with an individual without first running a criminal history check on the person. These facilities could not employ or independently contract with an individual who regularly would be providing direct services to residents if he or she had been convicted of either a felony or an attempt or conspiracy to commit a felony within the previous 15

years; a misdemeanor that involved abuse, neglect, assault, battery, or criminal sexual conduct or fraud or theft against a vulnerable adult (as defined under the Michigan Penal Code) within the previous ten years; or an offense evidencing lack of good moral character as listed under R 400.1152 of the Michigan Administrative Code.

Background checks. All persons who had applied for employment or contract services in an adult foster care facility and had received a good faith offer of employment would have to give written consent, along with acceptable identification, for the Department of State Police (DSP) to conduct a criminal history check. If a criminal history check had been performed on the applicant within the previous 24 months, a copy of the criminal history check could be used in lieu of obtaining written consent and requesting a new check. However, if the person were using a prior criminal history check, the facility would have to receive a copy of the previous criminal history check directly from the previous employer.

As a condition of employment, an individual would have to sign a written statement that he or she had been a resident of Michigan for three or more years preceding the good faith offer of employment or independent contract. After receiving the signed consent form from the applicant, the facility would have to request the DSP to conduct a criminal history check on the applicant.

For individuals with three or more years of residency, the criminal check would be limited to a name check of the state Law Enforcement Information Network (LEIN). The DSP would have to provide the facility with a report containing any criminal history record information on the applicant maintained by the department. The facility would have to bear any cost of the criminal history check, and would be

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prohibited from seeking reimbursement from the applicant.

For individuals who had resided in the state for less than three years, the bill would differentiate between those applying for employment at a facility licensed for more than six persons and a facility licensed for six or fewer persons. An individual applying to a facility licensed for more than six persons would have to supply the DSP with two sets of fingerprints. The facility would have to request the DSP to conduct a criminal history check of information maintained by the state and then forward the fingerprints to the Federal Bureau of Investigation (FBI) to do a national criminal history check. The DSP would have to provide the results of its criminal history check to the facility and provide the results of the FBI determination to the Department of Consumer and Industry Services (CIS). If the requesting facility was not a governmental agency, CIS would have to notify the facility in writing of the type of crime disclosed on the FBI report without disclosing the details of the crime. The facility requesting the criminal history check would be responsible for paying any fees for the FBI check and could not pass this cost on to the applicant.

A facility licensed for six or fewer persons would have to request the Department of State Police or state agency responsible for maintaining statewide criminal history information of all the states in which the individual resided during the preceding five years to conduct a criminal history check on the individual. The facility would have to bear the charges of the criminal history check and could not seek reimbursement from the applicant.

Conditional employment. An adult foster care facility could employ or contract with an applicant as a conditional employee before receiving the results of the criminal history check as long as the criminal history check had been requested and the applicant signed a statement that he or she had not been convicted of a felony or the listed misdemeanor offenses; that he or she agreed that if the criminal history check did not confirm the applicant's statements, that his or her employment would be terminated; and that providing such incorrect information was a good cause for termination. If the criminal history report did not confirm a conditionally-employed individual's signed statement, the facility would have to terminate the employment. Knowingly providing false information would constitute a misdemeanor punishable by 90 days imprisonment and a fine of up to \$500, or both. Upon the effective date of the bill, CIS would have to

develop and distribute a model form for the statement of prior criminal convictions at no cost to facilities.

Confidentiality. Information provided on a criminal history record could only be used for evaluating an applicant's qualifications, and a facility would be prohibited from disclosing information to a person who was not directly involved in evaluating the applicant's qualifications. Upon written request from a facility that was considering employing or independently contracting with an individual, a facility that has already obtained criminal history record information under this section on that individual would have to share the information with the requesting facility. A facility would have no liability in connection with a background check or the release of such information except for a knowing or intentional release of false information.

Restrictions on licensees. Currently, the department is prohibited from issuing a license to or renewing a license of a person who has been convicted of a misdemeanor under the act or under Chapter XXA of the Michigan Penal Code (vulnerable adult abuse) for a period of five years after the conviction. The bill would increase the time period to ten years after the conviction. The bill would not change the current prohibition on licensing or renewing a license of a person with a felony conviction under the act or under the vulnerable adult abuse provisions of the penal code.

Concurrent AFC license and foster care license. Currently, an AFC family home can be concurrently licensed as a foster family home or a foster family group home, but minor children who are not related to a resident of the AFC home cannot be received into the home after the filing of an application for an AFC home license.

The bill would create a limited exception to this prohibition. An AFC home licensee could receive a minor child who had been placed in foster care under state laws after filing an application for an AFC home license if the placement were approved at the discretion of the director or his or her designee. The placement decision would have to be based upon a recommendation by a licensed child placing agency or an approved governmental unit and would have to be subject to appropriate terms and conditions determined by the department.

Miscellaneous provisions. As a condition of continued employment, each employee or independent contractor would have to agree in writing to report to the adult foster care facility

immediately upon being arrested for or convicted of one or more of the criminal offenses listed above.

The bill would define “independent contract” as a contract that was entered into by a health facility or agency with an individual who provided the contracted services independently. It would also apply to a contract entered into by one of the above facilities with an organization or agency that employed or contracted with an individual after complying with the bill’s requirement to provide the contracted services to the facility on behalf of the organization or agency. “Health facility or agency” is defined in the Public Health Code (MCL 333.20106).

Further, the bill would change several references to the Department of Mental Health to the Department of Consumer and Industry Services.

(Note: Currently, oversight of adult foster care facilities lies with the Bureau of Family Services, formerly within the Department of Consumer and Industry Services. Executive Order 2003 – 18, which took effect December 7, 2003, transferred the Bureau of Family Services from CIS to the Family Independence Agency and renamed CIS the Department of Labor and Economic Growth.)

MCL 400.713 et al.

FISCAL IMPLICATIONS:

According to the House Fiscal Agency, there would be no significant fiscal impact on the Family Independence Agency, which assumed responsibility for licensing of adult foster care facilities in December 2003. The higher costs to adult foster care facilities may be mitigated to an indeterminate extent by lower liability insurance rates. (11-6-03)

ARGUMENTS:

For:

Adult foster care facilities provide services at a lower level than nursing homes and on a smaller scale, but still serve a vulnerable population. Many AFC homes house Alzheimer’s patients, developmentally disabled adults, and people with mental illnesses, as well as the elderly. Assistance is provided in bathing, dressing, feeding, personal care, and oversight of medications, in addition to 24-hour supervision. Similar to nursing homes, AFC homes tend to have high employee turnover, with many workers moving from state to state. Therefore, it is imperative that

residents not be placed under the care of people who pose a threat to their safety.

The bill would establish a criminal background check process that is similar to that established for nursing homes but with key differences. AFC homes are residential settings and serve fewer residents than nursing homes, with no more than 20 residents allowed. In addition, many AFC homes that are close to the border of neighboring states employ residents of those states. Currently, a name check is only \$10 per name, whereas a fingerprint check is \$54 for both the state and FBI component. Having to pay a charge of \$54 for each potential employee who has lived out of state for the past three years or more, or who lives in a bordering state, would create a hardship for these smaller entities. The bill would address this concern by requiring a fingerprint check only for potential employees of larger AFC homes (those with more than six residents) who had lived in Michigan for less than three years. For the smaller homes, the bill would allow the state police to contact the appropriate agency in each state in which the applicant had previously resided and request a criminal background check, which would be a name check. All potential employees who had lived in the state for at least three years would also have a name check done.

Against:

Name checks are unreliable. The only way to ensure a person’s identification is through fingerprinting. Exempting small homes from the fingerprinting requirement altogether could enable some dangerous persons to fall through the cracks if they conceal residency in a state where they have a record. Perhaps other revenue sources could be explored by small homes to fund the fingerprint checks.

Against:

The bill would exclude persons with a felony conviction from employment for 15 years and ten years for certain misdemeanors. However, the committee substitute would also exclude anyone with a conviction of any of the listed offenses under the Good Moral Character statute. This creates a conflict as a broad range of felony and misdemeanor offenses are included in this list, including most of the misdemeanor offenses for which a person can be employed after 10 years – meaning that a conviction of an offense for which employment can occur after 10 years would automatically be an excluding offense under the list in the Good Moral Character statute. Indeed, the list is so expansive that almost everyone who has a past criminal conviction would be

excluded from employment in an AFC home. This works against the principle that people can change and become responsible, caring citizens. This provision will severely limit the eligible pool of persons for employment.

More importantly, the Good Moral Character statute is intended to apply as a guide for the Department of Consumer and Industry Services to use when licensing certain facilities, including AFC homes. A person with a conviction under this act is barred from licensure. However, unlike an applicant for employment under the bill, an applicant for licensure is entitled to a hearing to demonstrate his or her fitness as a licensee. No such administrative hearing process would be granted to potential employees.

POSITIONS:

The Department of Consumer and Industry Services supports the bill. (11-6-03)

Analyst: S. Stutzky

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