

Tools For The Trade

Business & Clinical Solutions For The Home Care Industry

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Trying to comply

New criminal background check regs have providers scrambling

Attorney, screening experts offer advice



New York State Association of Health Care Providers, Inc.

By Richard Landers

April 1, 2005 was a day New York home care providers had been anticipating for the past three months. When it arrived, their concerns were, indeed, valid.

We're referring, of course, to the New York State Department of Health's (DOH) Criminal History Record Check system, which became effective April 1 and imposed a new set of requirements for criminal background checks of unlicensed direct care employees of home care agencies and nursing homes.

Many home care providers were already performing background checks of prospective employees in response to local laws, contract provisions or their own initiative but, as is generally the case with something new, the devil is in the details. Attempting to comply with the regulations created a nightmare—lack of time to acquire sufficient supplies or training, confusion and unanswered questions—that threatened, for a time at least, to bring the industry to a grinding halt.

'Keep in mind some basic employment law principles.'

Confusion, frustration and even disbelief are justified reactions on the part of providers. Some have written to the Governor and State legislative leaders to express their concerns about an illogical background check system and calling for a whole new system. (HCP is pushing hard in the State Legislature for passage of A.2003-A, Morelle /S.2628-A, Alesi which would create a far superior system.) But, in trying to comply with the current regulations, employment law attorney John Bagyi of HCP Associate Member Bond, Schoeneck and King, says providers should keep in mind some basic employment law principles, general standards relative to screening someone out of consideration for employment. "You still have to engage in the analysis as you'll be making your hiring decision long before the background check information arrives."

According to Bagyi, it is important that your job application have a question about past criminal convictions, including "if yes, give details." You need to insist that question be completed even though applicants frequently leave it blank.

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“If the person answers ‘no’ and the background check reveals that he does, then you should fire him for lying on his job application,” says Bagyi. “My strong recommendation—always fire someone for lying on their application; for one reason, people who lie on their applications are more likely to sue you.”

Certain crimes are enumerated in the regulations as disqualifiers, i.e., the person cannot be hired. If the person tells you about such a conviction on the application, then there’s no point in moving forward with the hiring process; if it’s a lesser crime, say petty theft, then the provider needs to make a business decision on hiring the person at that point.

“But if the background check reveals a conviction you didn’t know about,” says Bagyi, “then you fire the person for lying.”

He also points out an issue that has not received much attention so far: in a unionized workplace a union contract typically calls for a 60- or 90-day probationary hiring period during which time the person cannot file a grievance if he or she is fired. “My recommendation is for the employer to talk to the union and try to negotiate an extension of the probationary period until the background check comes back; you don’t want to find yourself in front of an arbitrator in such a case, it’s just too expensive.”

Concerning an employer’s liability if a worker commits a crime while in the agency’s employ, Bagyi says liability will be lessened by the fact that the regulations call for the employer to get a sworn statement that the applicant has not committed any of the enumerated crimes. “However, your liability will be extensive if you don’t get that statement. Potential liability in home care is quite high,” he adds, “because you’re putting people in someone’s home. My experience is that some home care agencies need to tighten up their human resources operations.”

Yet another issue is that the FBI will be providing what amount to “rap sheets” that include arrests as well as convictions and you are not supposed to use arrests as disqualifiers. Bagyi suggests having someone other than the hiring person review the background information as it comes from the FBI and then passing on only the information that would be disqualifying or saying there is no disqualifying information. “Confidentiality also becomes a concern here and it’s questionable whether you should allow a low-level employee to be the person who looks at the FBI reports,” he says. “You need to build a wall here separating the non-appropriate information from the person making the hiring decision. Without establishing some sort of wall, it would be difficult to defend you in court on the basis of you saying you did not use that information in the hiring decision.”

‘Your liability will be extensive if you don’t get that (sworn) statement.’

One approach many providers have considered is finding a third party vendor to do the screening for them. HCP Associate Member Accufacts Screening, Inc. has been doing background checks on behalf of clients for eight years. President Phil Luizzo says that in response to these latest regulations his firm developed what he calls the

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Check the website for the latest

HCP introduced its “Background Checks Center” in the

Members Only section of the HCP website April 14. It is designed to serve as a clearinghouse for information on all aspects of the new background check regulations and HCP’s efforts to improve the situation for providers. You’ll find the Background Checks Center at: www.nyshcp.org/members/background.shtml.

**HCP’s
Background
Checks Center**

Tools for the Trade

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“Fingerprint Tracking System” or FPS. Clients can access this system via the Web. Another HCP Associate Member, US Uncover, based in Baldwin (Long Island), provides similar services.

There are myriad approaches that providers, upstate and downstate, have taken to secure the actual fingerprints required by the regulations. Some providers have chosen to conduct their own fingerprinting, which requires both the purchase of supplies and appropriate training. Accufacts and US Uncover can provide fingerprint training, both upstate and downstate, but Luizzo cautions there is an art to taking fingerprints—it is not something that can be learned in a few minutes.

‘Without establishing some sort of wall, it would be difficult to defend you in court.’

Other providers are seeking the assistance of outside vendors to help them keep up with their fingerprinting requirements. In the greater metropolitan New York City area, Accufacts and US Uncover send people out to do the fingerprinting for providers. Each company has its own approach to this process and has different services that are offered to assist providers with compliance.

Providers throughout the State have also approached other sources for assistance with fingerprinting—local police or sheriff’s offices, State Trooper barracks, and other local entities that routinely conduct fingerprinting for employment purposes. Carolyn Misak, Vice President of US Uncover, however points out that while providers may be able to go to the local police or sheriff to get fingerprints done, they might not get a warm welcome. “The police aren’t in the business of doing fingerprinting for employment purposes and, generally, they’ll only do it for residents of their own county.”

Once providers receive information on employees from the FBI they may also need to secure assistance reading the FBI rap sheets. Again, some agencies are choosing to turn to outside vendors to assist them, others to attorneys and retired law enforcement professionals, and still others have not determined how they will go about addressing this aspect of the regulations.

Providers doing their own fingerprinting of course need supplies and equipment which has generated other problems—inexperienced users trying to figure out what they need and what supplies would be best for them and, in some case, shortages of supplies. HCP has negotiated a group discount purchasing agreement for members with Armor Forensics, a major supplier. Details of the

‘There’s an art to taking fingerprints.’

agreement and how to take advantage of it can be found in the HCP Background

Checks Center in the *Members Only* section of the HCP website (*see related article*).

Kevin Strock, Director of Northeast Forensic Sales for Armor Forensics, brings up another issue—he’s mystified by the DOH ban on inkless fingerprinting systems. According to Strock, so-called inkless systems are more expensive than traditional ink pads, but are very user-friendly, cleaner, and a preferred method of fingerprinting especially for nonprofessionals. He points

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out that both the FBI and the New York State Division of Criminal Justice Services (DCJS) accept them. "I would bet my job that someone at DOH could not tell the difference between a card that was done on an inkless printer... they look exactly the same," he says. Strock contacted DOH and believes the decision was based on inaccurate information obtained by DOH from an unknown source at the FBI. "I have been through this at least every other year for the past decade," he says about the inkless system issue. "Invariably, someone new or uninformed in the FBI gives misinformation to someone at the State level about these inkless kits."

He points to another major benefit of inkless fingerprinting systems—they make the process nonthreatening and less intimidating to a job applicant than the messier ink pads. He believes that DOH will eventually accept inkless printed cards. In the meantime, Strock has recommended a number of basic ink-based equipment and supplies for home care providers based on several factors including level of experience, card style/size and others.

Misak points out that many providers are continuing to do the background checks they had previously been doing as results come in faster. "We really don't know at this point how long the FBI checks are going to take and some contracts will require the provider to do a quicker check."

Providers who are not contractually obliged to do one of the quicker background checks may just wait for the FBI check to come through if they feel comfortable doing that. However, says Misak, "the potential liability is going to fall on you." Most providers, she believes, feel the need to do something in addition to the FBI check but are trying "not to break the bank."

As for the future, HCP is pushing hard on several fronts: to modify the regulations, replace them altogether through the legislative process and to help providers comply with the existing regulations. In addition to the fingerprinting supply agreement with Armor Forensics, HCP has arranged for some efficient and cost-effective fingerprinting training alternatives for use by members and their Chapters, upstate as well as downstate. HCP Tools



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