



The Florida Senate

Interim Project Report 2001-043

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Committee on Health, Aging and Long-Term Care

Senator Burt Saunders, Chairman

BACKGROUND SCREENING OF APPLICANTS FOR LICENSURE OF HEALTH CARE FACILITIES AND PROGRAMS

SUMMARY

In 1998, the Legislature expanded the applicability of caregiver background screening requirements to include owners and operators of the majority of health care facilities licensed, certified, or registered by the Agency for Health Care Administration. The impetus for broadening the application of screening requirements to include the owners and operators of health care facilities came from a series of prosecutions resulting from investigations conducted by several Statewide Grand Juries impaneled beginning in 1996, with assistance of the Office of the Statewide Prosecutor. These investigations culminated in findings of widespread billing-related fraud in the state's health care sector, particularly among Medicaid providers and claims filed for reimbursement from private insurers. The Office of the Statewide Prosecutor, the Medicaid Fraud Control Unit within the Department of Legal Affairs, and the Agency for Health Care Administration recommended to the Legislature adoption of anti-fraud legislation with an emphasis on detection and prevention.

The requirements for background screening of owners and operators of health care facilities and programs were contained in chapter 98-171, *Laws of Florida*. Section 71 of chapter 98-171, *Laws of Florida*, directed the Agency for Health Care Administration to convene a workgroup to evaluate the effectiveness of background screening requirements in preventing and deterring health care fraud and abuse. The agency workgroup submitted a report of its findings and recommendations to the Legislature December 2000. The background screening requirements enacted in chapter 98-171, *Laws of Florida*, are repealed by s. 71 of that law, effective June 30, 2001, unless reviewed and saved through reenactment by the Legislature prior to that date.

The AHCA workgroup report includes three recommendations: (1) The State should establish a centralized unit to process screening requests and

maintain a database for purposes of licensure, certification, and enrollment and exemption processes. (2) The Legislature should amend the law to ensure uniform screening requirements among licensed facilities. (3) The Legislature should create an interagency task force to propose changes to chapter 435, F.S., providing employment screening guidelines and standards, for legislative approval. The purpose is to review and update the listing of criminal offenses, address statute of limitation issues, and identify civil actions considered for disqualification.

Staff recommends that the background screening requirements created by chapter 98-171, *Laws of Florida*, as amended, be reenacted and that the interagency workgroup convened by AHCA pursuant to s. 71 of chapter 98-171, *Laws of Florida*, continue in existence with respect to background screening of entities regulated by AHCA and the employment screening requirements contained in chapter 435, F.S., to review and update the listing of criminal offenses against which such screening is performed, address statute of limitation issues, and identify civil actions that should be considered for disqualification as a part of screening.

BACKGROUND

The health and safety of the public is put at risk by health care practitioners and business owners who have a history of fraud, abuse, or other crimes that may form a pattern of behavior or a mode of doing business that is continuously repeated. Besides the increased risk of obtaining substandard health care-related goods and services, state and federal tax dollars, in the form of Medicaid and Medicare reimbursements, may be lost through payment for such substandard and poor-quality goods and services or for goods and services that were never provided to patients.

Nationally, since 1993, there has been an unprecedented focus on health care fraud and abuse under the Medicaid and Medicare programs. With the increased attention came investigations, indictments, and convictions. The development of effective management tools, combined with aggressive enforcement and other efforts to prevent improper payments to providers, has saved taxpayers an estimated \$60 billion since 1993 (*A Comprehensive Strategy to Fight Health Care Waste, Fraud and Abuse*, U.S. Department of Health and Human Services, March 9, 2000).

In Florida, in 1996, the Thirteenth Statewide Grand Jury was impaneled to investigate cases involving crimes against the government, specifically looking into issues surrounding Medicaid fraud. During its term, the Grand Jury issued four reports concerning home health care agencies, assisted living facilities, durable medical equipment providers, and clinics. That investigation resulted in 29 indictments charging 78 defendants with a total of 2,407 criminal offenses. The list of offenses included indictments for Medicaid provider fraud, organized fraud, communications fraud, racketeering, grand theft, sales tax theft, and money laundering. In total the criminal defendants were responsible for the theft of more than \$25 million from the Medicaid program.

As a result of the Grand Jury's recommendations, the Agency for Health Care Administration (AHCA or agency) proposed several reform measures for the Medicaid program. The proposed reforms, enacted in 1998 by the Legislature, essentially created a fingerprinting requirement for Medicaid providers and increased penalties for giving false information on a Medicaid provider application.

Protection of Vulnerable Adults

Effective September 1, 2000, the system for conducting pre-employment background screening of paid caregivers of elderly and disabled persons was revised. Committee Substitute for Senate Bill 358, enacted as chapter 2000-349, Laws of Florida, established a structured previous-employer reference check, continued criminal background checks, and removed the requirement for screening applicants through the central abuse registry and tracking system.

The central abuse registry and tracking system is redesignated as the "abuse hotline." The requirements that Department of Children and Family Services (DCFS) classify reports it investigates, notify persons named in investigative reports, and maintain records

were repealed. The Department of Children and Family Services' interactions with and responsibility for perpetrators of abuse, neglect, and exploitation were significantly reduced. The terms "elderly person" and "disabled person" were changed to "vulnerable adult."

Medicaid Providers Criminal History Screening

Section 409.907, F.S., permits the AHCA Medicaid program to deny enrollment in the Florida Medicaid program to any individual provider or any provider who is a corporation, partnership, or other business entity if the provider, or any officer, director, billing agent, managing employee, affiliated person or any partner or shareholder have an ownership interest of five percent or greater has been proven to have violated one or more of eleven enumerated criminal, civil, or other legal offenses. Denial or disqualification of a person from obtaining Medicaid provider enrollment status may occur when one of the enumerated offenses is a part of the applicant's criminal history record, regardless of whether adjudication was withheld or the applicant entered a plea of *nolo contendere*. A denial of an applicant's request for provider enrollment in the Medicaid program is not subject to appeal through the background screening system. However, an applicant may appeal, pursuant to chapter 120.57, F.S., such a denial by submitting to AHCA a certified, corrected copy of the Florida Department of Law Enforcement (FDLE) or Federal Bureau of Investigation (FBI) report that gave rise to the original AHCA denial.

The Medicaid Contract Management section at AHCA is responsible for conducting background screening on all individuals applying for enrollment as a Medicaid provider. A Medicaid provider may apply for licensure, certification, or registration of a health care facility or program or as a caregiver. Providers are tracked through an automated fraud and abuse system at the time of screening. This system checks for Florida criminal offenses, as well as bankruptcies, liens, and judgments that may have been filed against these individuals. The system provides results of Florida background screenings within three days of submission. Once enrolled, a provider must reenroll every three years and is required, at that time, to submit another fingerprint card for screening or else present proof that a Level 2 criminal history check has been completed within the prior 12 months.

Background Screening Relating to Licensure, Certification, or Registration of a Health Care Facility or Program

The Agency for Health Care Administration's role is to license certain health care facilities and programs, such as nursing homes, hospitals, and hospices, and regularly inspect or survey those facilities and programs. Furthermore, AHCA is responsible for investigating complaints about the facilities and programs that it licenses.

Background screening of certified nursing assistants (CNAs) other direct caregivers had been an established practice for some time when, in 1998, the Legislature expanded the requirement for background screening. Prior to 1998, only certain owners and employees of the following listed facility types were subject to statutorily mandated background screening: assisted living facilities; adult family care homes; adult day care centers; crisis stabilization units; nursing homes; home health agencies; nurse registries; intermediate care facilities for the developmentally disabled; residential treatment facilities; and homemaker, companion, and sitter services.

Chapter 98-171, *Laws of Florida*, applied background screening requirements to applicants for licensure, certification, and registration of health care facilities and health care services. As a result, for the first time, effective July 1, 1998, not only owners and employees, but also the administrators and financial officers involved in the operation of the following types of health care facilities or services, were required to submit to criminal history checks and screening through the central abuse registry of the Department of Children and Family Services. The categories of facility types or service providers whose owners and operators are now subject to statutory background screening requirements are: abortion clinics; adult day care centers; adult family care homes; ambulatory surgery centers; assisted living facilities; birth centers; clinical laboratories; crisis stabilization units; drug-free workplace laboratories; durable medical equipment providers, health care service pools; home health agencies; homemaker, sitter, companion agencies; home medical equipment providers; homes for special services; hospice; hospitals; intermediate care facilities for the developmentally disabled; multiphasic health testing centers; nurse registries; nursing homes; organ procurement organizations, tissue banks, eye banks; prescribed pediatric extended care centers; residential treatment facilities; transitional living facilities; and utilization review agencies. The agency began implementation on October 1, 1998.

The 1998 legislation gave AHCA authority to prohibit licensure of unsuitable applicants, which helps in preventing harm to patients and residents in health care

facilities or those receiving services from health care service providers. Additionally, the Legislature mandated background screening of all nursing home personnel who provide personal care or who may have access to a resident's living areas, funds, or property.

The law imposed background screening requirements on a licensure applicant's managing employees and financial officers, and provided that the screening requirements could be imposed on any other individual who is an applicant, if AHCA has probable cause to believe that the individual has been convicted of an offense that would disqualify the individual from employment under chapter 435, F.S., relating to employment screening. Background screening must conform to level 2 employment screening, under chapter 435, F.S., which until September 1, 2000, included screening through the FBI's databases, state-criminal-records checks, and an abuse registry check. The abuse registry check was discontinued effective September 1, 2000. The screening requirements may be waived if an applicant provides proof of such screening within the previous 5 years in conjunction with any other state health care licensure, certification, or registration requirements.

An applicant entity, seeking level 2 screening, must submit to AHCA, along with the application for initial or renewal licensure: (1) a description and explanation of any exclusions, permanent suspensions, or terminations to which it is subject under the Medicare or Medicaid programs or submit proof of compliance with Medicare or Medicaid program ownership and control-interest disclosure requirements; and (2) for a member of its board of directors, its officers, or any individual owning 5 percent or more of the applicant entity, a description and explanation of any conviction of an offense that would preclude employment under the level 2 screening standards of chapter 435, F.S. An exception is provided for a director of a not-for-profit organization when the director serves solely in a voluntary capacity, does not regularly participate in the day-to-day operational decisions of the organization, receives no remuneration for services on the board of directors, has no financial interest, and has no family member with a financial interest in the organization, if the director and the organization include a statement in the licensure application affirming such a relationship.

The agency is then authorized to issue a provisional license to an applicant or a managing employee of the applicant who meets the standards for the state criminal records check, but for whom AHCA had not yet received results from the FBI's criminal records check or to an applicant or managing employee of the applicant

who is waiting for a response from AHCA to a request for exemption from disqualification from employment, as provided for under chapter 435, F.S. The agency may grant a license or certify or register an applicant entity after it receives the FBI results report for each individual who is made subject to the background screening requirements, but only if such reports confirm that all standards have been met or upon AHCA granting an exemption from disqualification under chapter 435, F.S.

The agency may not grant a license, certify, or register an applicant entity if the applicant, or a managing employee of the applicant, has been found guilty of, regardless of adjudication, or has entered a plea of *nolo contendere* or guilty to any offense that would preclude employment under the level 2 screening standards of chapter 435, F.S. However, a license may be granted to an applicant or a managing employee of the applicant who was granted an exemption from disqualification. The agency may deny or revoke a license if the applicant or a managing employee of the applicant: (1) has falsely represented or omitted a material fact in the application relating to exclusion, permanent suspension, or termination from the Medicare or Medicaid program or relating to describing or explaining a board member's, an officer's, or a 5-percent owner's conviction that would preclude employment under level 2 screening standards provided under chapter 435, F.S.; or (2) has been excluded, permanently suspended, or terminated from the Medicare or Medicaid program.

Screening Levels

Level 1 Screening

Level 1 screening requirements are provided in section 435.03, F.S. Level 1 screening applies to all employees required by law to be screened as a condition of employment and continued employment. It involves, but is not limited to, employment history checks and a search of the FDLE databases. Level 1 screening may also include local criminal records checks through local law enforcement agencies. A list of offenses is enumerated under subsection 435.03(2), F.S., against which an individual's past is checked. Any person for whom employment screening is required by statute must not have been found guilty of, regardless of adjudication, or entered a plea of *nolo contendere* or guilty to any offense prohibited under the enumerated statutory provisions or under any similar statute of another jurisdiction.

Most direct care staff in health care facilities are required to submit to this level of screening; only direct care staff

working in intermediate care facilities for the developmentally disabled must all undergo Level 2 screening. Nursing home direct care staff hired after October 1, 1998, who have not maintained continuous residency in Florida for the 5 years prior to the date on which they are applying for employment must undergo Level 2 screening. While most financial officers are subject to Level 2 screening, financial officers of adult family care homes are subject to only Level 1 screening. Level 1 screening costs \$15.

Level 2 Screening

Level 2 screening requirements are provided in section 435.04, F.S. Such screening is required of all employees in positions designated by law as positions of trust or responsibility that requires a security background investigation as a condition of employment and continued employment. Security background investigations include, but are not limited to, employment history checks, fingerprinting for all purposes and offenses specified under s. 435.04(1), F.S., statewide criminal and juvenile records checks through FDLE, federal criminal records checks through the Federal Bureau of Investigation, and may include local criminal records checks through local law enforcement agencies. A list of offenses is enumerated under subsection 435.04(2), F.S., against which an individual's past is checked. A security background investigation must ensure that no person so screened has been found guilty of, regardless of adjudication, or entered a plea of *nolo contendere* or guilty to any offense prohibited under the enumerated statutory provisions or under any similar statute of another jurisdiction.

All owners and administrators of health care facilities or health care service providers are subject to Level 2 screening. Except for financial officers of adult family care homes, who are subject to Level 1 screening requirements, all financial officers of health care facilities or health care service providers are also subject to Level 2 screening. Level 2 screening costs \$39.

Sharing of Screening Information

Section 435.10, F.S., requires employers to share personnel information, if requested, regarding a former employee. As of September 2000, there were more than 200,000 screening records in the AHCA background screening database. Employers can, by way of the Internet, determine that an applicant has been screened and determine if the applicant is disqualified from employment. If a job applicant is disqualified as a result

of screening, he or she may apply to DOH or AHCA for an exemption from disqualification.

Exemption from Employment Disqualification

A prospective employee may apply for *exemption* from employment disqualification, when the disqualification was based on a criminal offense. Such requests must be made to AHCA by facility owners, administrators, financial officers, and personnel who are unlicensed or uncertified. Licensed health care professionals, including licensed nursing home administrators, must submit requests for exemption from employment disqualification to the Department of Health (DOH).

An exemption from employment disqualification gives individuals who are determined to be ineligible to operate a health care facility or for employment as an administrator, manager, or financial officer of a health care facility, due to their criminal history, the opportunity to work within a health care facility or for a health care service provider despite having a criminal history. Eligibility for exemption requires that an individual must not have been adjudicated guilty of a disqualifying felony offense within the previous three years, and, the individual must demonstrate by clear and convincing evidence that she or he will not present a danger if employed within the health care field. Individuals applying for an exemption have the burden of providing sufficient evidence of rehabilitation, including but not limited to: (1) the circumstances surrounding the criminal incident for which an exemption is sought; (2) the time period that has elapsed since the incident; (3) the nature of the harm caused to the victim; (4) a history of the applicant since the incident; and (5) any other evidence or circumstance indicating that the applicant is leading a positive lifestyle.

Due Process

Individuals who request an exemption from employment disqualification because of a criminal conviction and who are denied such an exemption by either DOH or AHCA may request a hearing before an administrative law judge. Administrative law judges of the Division of Administrative Hearings, within the Department of Management Services, may hear appeals of adverse findings against an applicant for exemption from employment disqualification. Florida, like other states, provides an avenue to protest or appeal adverse actions imposed by any state entity against a resident or an entity doing business in the state. Chapter 120, F.S., sets forth the procedures for such protests or appeals.

Background Screening Vendors and Agencies

Licensed health care providers have the option of obtaining Level 1 screening reports from three sources—directly from FDLE, a third-party vendor, or AHCA. There are numerous third-party-information vendors throughout Florida that provide services to the health care industry. These companies specialize in brokering information obtained from official repositories such as FDLE, the Department of Highway Safety and Motor Vehicles, professional licensure databases, credit bureaus, and other such sources. Typically, the private-sector information vendor does not interpret the data retrieved for its clients. Additionally, while these private organizations assist some health care providers with retrieving Level 1 criminal history information, they act as a pass through in submitting requests for Level 2 security background investigations, on behalf of their clients, to AHCA for processing and interpretation. Health care providers obtaining their criminal history information directly from FDLE are responsible for interpreting the reports to determine the applicant's employment eligibility.

Repeal of Background Screening Requirements

Section 71 of chapter 98-171, Laws of Florida, prospectively repeals the provisions of law elsewhere created in that act that require an applicant for licensure, certification, or registration to operate certain health care facilities or programs to undergo background screening. These provisions of law may be saved from repeal, if prior to the scheduled date of repeal, June 30, 2001, the Legislature reviews them and reenacts them.

In preparation for the legislatively mandated review of the background screening requirements, s. 71 of chapter 98-171, Laws of Florida, required AHCA to conduct a review of the effectiveness of licensure, certification, and registration applicant background screening requirements in preventing persons with specified criminal backgrounds from operating health care facilities or programs, and in preventing or deterring health care fraud and abuse. The agency was also directed to convene a workgroup composed of representatives from, at a minimum: (1) the Statewide Prosecutor's Office, (2) the Attorney General's Office, (3) the Department of Children and Families, and (4) the Department of Elder Affairs. Such a workgroup was convened with representation from several divisions within AHCA, including: the General Counsel's office, Medicaid Program Integrity, and Medicaid Contract Management. The workgroup meetings were attended by a variety of other interested parties both governmental

and private-sector. The workgroup convened by AHCA to evaluate the effectiveness of the statutorily established background screening requirements submitted its report to the Legislature and the Governor in December 2000. The workgroup's findings and recommendations are reported in the findings section below.

METHODOLOGY

To evaluate the effectiveness and efficiency of background screening requirements, committee staff interviewed AHCA background screening staff, examined documents used in the screening process and observed AHCA staff performing screening tasks. Committee staff attended a meeting of the mandated AHCA-convened workgroup and analyzed the findings and recommendations contained in the workgroup report.

FINDINGS

Between October 1, 1998, and September 1, 2000, AHCA has reviewed an approximate total of 225,000 abuse screenings and 87,000 criminal history screening reports. Also, the agency has reviewed more than 1,200 exemption requests since October 1998. The agency does not maintain the numbers of screenings and exemptions processed on behalf of applicants for licensure, certification, or registration of a health care facility or program or the managing employees of such entities.

Since July 1997, Medicaid Contract Management has conducted 26,970 screenings on new Medicaid providers and has accepted an additional 2,002 screenings from other state agencies. Upon review of the screening results, 127 providers were terminated from participation in the Medicaid program and 110 applications for participation as a Medicaid provider were denied due to a finding of at least one disqualifying criminal offense in their criminal history record.

Background screening works as both a preventive measure and a deterrent to individuals who have established a criminal history involving fraud or other criminal conduct who may seek to obtain licensure, certification, or registration of a health care facility or program as well as prevents or deters potentially abusive individuals from working in health care settings. Because background screening is required, the AHCA-convened workgroup concluded that background screening is means of reducing health care fraud and abuse and that, consequently, there are unknown numbers of individuals

who do not apply for employment or licensure in health care because they are hesitant to reveal their criminal record. Screening requirements seem to reduce some of the liability concerns of facility owners and administrators, as well.

The workgroup concluded that all screening procedures have limitations, and their use does not guarantee that individuals who pass through screening will not abuse those in their care. The need for vigilance in protecting those at risk of victimization is constant. However, it is reasonable to assume that the background screening requirements act as deterrents and effective methods for reducing the incidence of victimization by caregivers.

The following recommendations were submitted by the workgroup:

- Establish a centralized unit to process screening requests and maintain a database for purposes of licensure, certification, enrollment, and exemption processes.
- Review and amend legislation to ensure uniform screening requirements among licensed facilities and health care service providers.
- Create an interagency task force to propose changes to chapter 435, F.S., providing employment screening guidelines and standards, for legislative approval. The purpose is to review and update the listing of criminal offenses, address statute of limitation issues, and identify civil actions considered for disqualification.

RECOMMENDATIONS

Staff recommends the reenactment of the background screening requirements created by chapter 98-171, *Laws of Florida*, as amended. This regulatory device is an effective tool in combating health care provider fraud and abuse because it has prevented certain individuals who have established a record of past criminal conduct, such as fraud, from obtaining licensure, certification, or registration of health care facilities or programs or from managing the operations or finances of such facilities. By preventing such individuals from operating as health care providers in Florida, the public has an added measure of protection in obtaining safe and good quality services.

Staff recommends that the interagency workgroup convened by AHCA pursuant to s. 71 of chapter 98-171, *Laws of Florida*, continue in existence with respect to background screening of entities regulated by AHCA and

the employment screening requirements contained in chapter 435, F.S., to review and update the listing of criminal offenses against which such screening is performed, address statute of limitation issues, and

identify civil actions that should be considered for disqualification as a part of screening.

COMMITTEE(S) INVOLVED IN REPORT (*Contact first committee for more information.*)

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MEMBER OVERSIGHT

Senators Brown-Waite and Clary