

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: PCB HHSC 11-08 Background Screening

SPONSOR(S): Health & Human Services Committee

TIED BILLS: **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Health & Human Services Committee	16 Y, 0 N	Shaw	Gormley

SUMMARY ANALYSIS

In 2010, the Legislature substantially rewrote the requirements and procedures for background screening of the individuals and businesses that deal primarily with vulnerable populations. A Level 2 background screening requirement was created for direct services providers who provide services through a contractual relationship with the Department of Elderly Affairs (DOEA). A direct service provider is defined as a person who pursuant to a program to provide services to the elderly, has direct, face-to-face contact with a client while providing services to the client or has access to the client's living areas or to the client's funds or personal property. Volunteers are specifically included as "direct service providers".

PCB HHSC 11-08 amends the definition of direct service provider to include individuals who have direct, face-to-face contact with a client and have access to the client's living areas or to the client's funds or personal property.

The bill creates an exemption from background screening for the following direct care providers:

- Volunteers who assist on an intermittent basis for less than 20 hours of direct, face-to-face contact with a client per month.
- Individuals who are related by blood to the client.
- The client's spouse.

The bill also creates an exemption from additional screening for an individual who becomes a direct care provider who has previously been screened as a condition of licensure by the Agency for Health Care Administration.

The bill provides time frames for DOEA to stagger the implementation of the background screening requirements. The bill also provides that direct care providers must be screened every 5 years unless their finger prints are continuously retained and monitored by the Department of Law Enforcement in the federal fingerprint retention program.

Rule-making authority is granted to DOEA to establish the staggered implementation schedule.

The bill provides that if an applicant for certification as a Certified Nursing Assistant (CNA) has successfully passed the required Level 2 background screening within 90 days of applying for certification, the Board of Nursing shall waive the requirement that the applicant pass another background screening.

The bill has no fiscal impact on state or local government.

The bill has an effective date of July 1, 2011.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background Screening

Currently, Florida has one of the largest vulnerable populations in the country with over 25% of the state's population over the age of 65, and many more children and disabled adults. These vulnerable populations require special care because they are at an increased risk of abuse.

In 1995, the Legislature created standard procedures for the screening of prospective employees where the Legislature had determined it necessary to conduct criminal history background screenings to protect vulnerable persons. Chapter 435, F.S., outlines the employment screening requirements. The Florida Department of Law Enforcement (FDLE) provides criminal history checks to the employer.

In 2010, the Legislature substantially rewrote the requirements and procedures for background screening of the persons and businesses that deal primarily with vulnerable populations.¹ Major changes made by the act include:

- No person who is required to be screened may begin work until the screening has been completed.
- All Level 1² screenings were increased to Level 2³.
- By August 1, 2012, all fingerprints submitted to FDLE must be submitted electronically.
- Certain personnel that were not being screened were required to begin Level 2 screening.
- The addition of serious crimes that disqualify an individual from employment working with vulnerable populations.
- Agencies were authorized to request the retention of fingerprints by the Florida Department of Law Enforcement.
- An exemption for a disqualifying felony may not be granted until at least three years after the completion of all sentencing sanctions for that felony.
- All exemptions from disqualification may be granted only by the agency head.

Level 2 background screenings cost \$43.25 (the \$24 state fee, plus an additional \$19.25 for electronic fingerprints) or \$30.25 (\$24 plus \$6.25 for hard copy fingerprints).⁴

The Department of Elderly Affairs

In 1988, the Department of Elderly Affairs ("DOEA" or "the department") was created by the passage of a constitutional amendment. In 1991, the department was codified in s. 40.41, F.S., and organized pursuant to Chapter 430, F.S. The department began operation in January 1992.

The department is the designated state unit on aging as defined in the Older Americans Act (OAA) of 1965.⁵ As such, the department's role is to administer the state's OAA allotment and grants, and to

¹ Ch. 2010-114, L.O.F.

² Section 435.03, F.S. Level 1 screenings are name-based demographic screenings that must include, but are not limited to, employment history checks and statewide criminal correspondence checks through FDLE. Level 1 screenings may also include local criminal records checks through local law enforcement agencies. A person undergoing a Level 1 screening must not have been found guilty of any of the listed offenses.

³ Section 435.04, F.S. A Level 2 screening consists of a fingerprint-based search of FDLE and the Federal Bureau of Investigations (FBI) databases for state and national criminal arrest records. Any person undergoing a Level 2 screening must not have been found guilty of any of the listed offenses.

⁴ *Criminal History Record Checks/Background Checks Fact Sheet* January 4, 2011. Available at <http://www.fdle.state.fl.us/Content/getdoc/39b8f116-6d8b-4024-9a70-5d8cd2e34aa5/FAQ.aspx> (last visited April 1, 2011).

⁵ s. 305(a)(1)(C), Older Americans Act

advocate, coordinate, and plan all elder services.⁶ The OAA requires states to provide elder services through a coordinated service delivery system through designated Area Agencies on Aging (AAAs). There are 11 AAAs – 1 in each of the state’s 11 planning and service areas—that are responsible to the department to provide services.

In addition, ch. 430, F.S., requires that the department fund service delivery “lead agencies” that coordinate and provide a variety of oversight and elder support services at the consumer level in the counties within each planning and service area.

The department is 94 percent privatized through contracts with local entities and utilizes over 45,000 volunteers to deliver information and services to elders.⁷ Many of the volunteers are elders themselves.⁸

Direct Service Providers

The 2010 revision of the background screening laws created s. 430.0402, F.S., requiring Level 2 background screenings for direct services providers who provide services through a contractual relationship with the Department of Elderly Affairs. A direct service provider is defined as a person who pursuant to a program to provide services to the elderly, has direct, face-to-face contact with a client while providing services to the client or has access to the client’s living areas or to the client’s funds or personal property. Volunteers are specifically included as “direct service providers”.

The statute contains no exception from background screenings for a volunteer who has occasional or limited hours. There are exceptions for volunteers who are in brief or occasional contact with vulnerable populations other than elders. For example, s. 393.0655(1), F.S., exempts from screening a volunteer who assist with persons with developmental disabilities if the volunteer assists less than 10 hours per month and a person who has been screened is always present and has the volunteer within his or her line of sight.⁹

Section 430.0402, F.S., also provides that in addition to the offenses listed in s.435.04, F.S., direct service providers must also be screened for offenses prohibited under the following:

- Any authorizing statutes, if the offense was a felony.
- Section 409.920, relating to Medicaid provider fraud.
- Section 409.9201, relating to Medicaid fraud.
- Section 817.034, relating to fraudulent acts through mail, wire, radio, electromagnetic, photoelectronic, or photooptical systems.
- Section 817.234, relating to false and fraudulent insurance claims.
- Section 817.505, relating to patient brokering.
- Section 817.568, relating to criminal use of personal identification information.
- Section 817.60, relating to obtaining a credit card through fraudulent means.
- Section 817.61, relating to fraudulent use of credit cards, if the offense was a felony.
- Section 831.01, relating to forgery.
- Section 831.02, relating to uttering forged instruments.
- Section 831.07, relating to forging bank bills, checks, drafts, or promissory notes.
- Section 831.09, relating to uttering forged bank bills, checks, drafts, or promissory notes.

⁶ s. 430.04(1), F.S.

⁷ Department of Elder Affairs, Summary of Programs and Services (2010)

⁸ *Id.*

⁹ See e.g. s. 394.4572(1)(a), F.S. (contact with persons held for mental health treatment) and s. 409.175(2), F.S. (contact with children).

Area Agencies on Aging and Elder Care Services are entities who contract with the Department of Elderly Affairs to provide services to elders. Representatives of several of these entities report that the requirement of Level 2 background screening of volunteers has dramatically reduced the number of volunteers potentially impacting the availability of services to elders.¹⁰ The Meals on Wheels program is dependent on volunteers, and the program is currently losing volunteers who cannot afford to pay for the cost of a level 2 background screening. Senior centers, congregate meal sites, and health and wellness programs are also dependent on volunteers.

The provisions of the 2010 legislation also impacts Home Care for the Elderly (HCE)¹¹ caregivers. Many HCE caregivers are family members. These family members receive a monthly stipend of \$106 to help care for family member at home. The stipend is used to pay for incontinence products, nutritional supplements, respite care, and other needed products and services. The new Level 2 background screening requirement is applicable to these family members who act as caregivers.

Certified Nursing Assistants

Certified Nursing Assistants (CNAs) provide care and assistance to persons with their activities of daily living.¹² To become a CNA an individual must:

- Demonstrate a minimum competency to read and write.
- Successfully pass the Level 2 background screening described in s. 400.215.¹³
- Meet one of the following requirements:
 - Successfully complete an approved training program and achieve a minimum score, on the nursing assistant competency examination.
 - Achieve a minimum score, on the nursing assistant competency examination, be 18 years old, and have a high school degree or the equivalent.

Only CNAs may be employed in nursing homes to provide nursing assistance.¹⁴ However, there are limited exceptions for a person to begin working as a CNA for up to four months prior to certification when the person is enrolled in a CNA program, is a CNA in another state, or has preliminary passed the CNA exam.¹⁵ Such individuals must be background screened pursuant to S. 400.215, F.S. before beginning work as a CNA in a nursing home.

Effect of the Bill

PCB HHSC 11-08 amends the definition of direct service provider to include individuals who have direct, face-to-face contact with a client and have access to the client's living areas or to the client's funds or personal property. Current law defines a direct services provider as having client contact or living area/property access.

The bill creates an exemption from background screening for the following:

- Volunteers who assist on an intermittent basis for less than 20 hours of direct, face-to-face contact with a client per month.
- Individuals who are related by blood to the client.
- The client's spouse.

¹⁰ Meetings with Health and Human Services Committee staff in November and December of 2010, and correspondence on file with the Committee.

¹¹ Department of Elder Affairs, Summary of Programs and Services (2010)

¹² s. 464.201(5), F.S.

¹³ The background screening required by s. 400.215, F.S., refers to the screening described in s. 408.809, F.S. and is identical to the background screening required by s. 430.0402, F.S. except that the following are also disqualifying offenses: s. 741.28, relating to domestic violence, s. 831.30, relating to fraud in obtaining medicinal drugs, and s. 831.31, relating to the sale, manufacture, delivery, or possession with the intent to sell, manufacture, or deliver any counterfeit controlled substance, if the offense was a felony.

¹⁴ s. 400.211, F.S.

¹⁵ *Id.*

The bill provides an exemption from additional background screening for an individual who becomes a direct care provider and provides services within the scope of his or her license. The exemption applies to a person who was previously screened by the Agency for Health Care Administration as a condition of licensure. Such individuals would include owners, administrators, and employees of such entities as nursing homes, assisted living facilities, home health agencies, and adult day cares.¹⁶

The bill provides time frames for screenings by the Department of Elderly Affairs:

- Individuals serving as direct service providers on July 31, 2010, must be screened by July 1, 2012.
- DOEA may adopt rules to establish a schedule to stagger the implementation of the required screenings over a 1-year period, beginning July 1, 2011, through July 1, 2012.
- Individuals shall be rescreened every 5 years following the date of his or her last background screening unless the individual's fingerprints are continuously retained and monitored by the Department of Law Enforcement in the federal fingerprint retention program.

The bill removes "any authorizing statutes, if the offense was a felony" for the list of disqualifying offenses for direct services providers. The term "authorizing statute" is not defined by Chapter 430. The term is defined in s. 408.803, F.S., and relates to entities regulated by the Agency for Health Care Administration. Its inclusion in s. 430.0402, F.S., appears to be a scrivener's error.

The bill provides that if an applicant for CNA certification has successfully passed the background screening required by s. 400.215, F.S., or s 408.809, F.S. within 90 days of applying for the certification, the Board of Nursing shall waive the requirement that the applicant pass another background screening.

B. SECTION DIRECTORY:

- Section 1:** Amends s. 430.0402, F.S., relating to screening of direct service providers.
Section 2: Amends s. 464.203, F.S., relating to certified nursing assistants; certification requirements.
Section 3: Provides an effective date of July 1, 2011.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

¹⁶ For a complete list of entities see s. 408.802, F.S.

The bill will reduce the number of persons who will need to undergo background screening prior to working with vulnerable persons. The bill will reduce the number of Certified Nursing Assistants who are required to have two background screenings within a 90 day period. The Level 2 screenings cost \$43.25 (the \$24 state fee, plus an additional \$19.25 for electronic fingerprints) or \$30.25 (\$24 plus \$6.25 for hard copy fingerprints).¹⁷

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not Applicable. This bill does not appear to affect county or municipal governments.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The Department of Elderly Affairs is given rule-making authority to establish a schedule to stagger the implementation of the required background screenings over a 1-year period, beginning July 1, 2011, through July 1, 2012.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On April 5, 2011, the Health and Human Services Committee adopted one amendment which provided that if an applicant for certification as a Certified Nursing Assistant (CNA) has successfully passed the Level 2 background screening required by s. 400.215, F.S., or s 408.809, F.S. within 90 days of applying for the certification, the Board of Nursing shall waive the requirement that the applicant pass another background screening.

The Proposed Committee Bill was reported favorably. This analysis reflects the Proposed Committee Bill, as amended.

¹⁷ See note 4, supra.