

**HOUSE OF REPRESENTATIVES STAFF ANALYSIS**

**BILL #:** CS/HB 7069    PCB CCJP 10-04    Background Screening  
**SPONSOR(S):** Policy Council, Criminal & Civil Justice Policy Council; Snyder and Porth  
**TIED BILLS:** **IDEN./SIM. BILLS:** SB 2416; SB 1520

	<b>REFERENCE</b>	<b>ACTION</b>	<b>ANALYST</b>	<b>STAFF DIRECTOR</b>
Orig. Comm.:	Criminal & Civil Justice Policy Council	14 Y, 0 N	Thomas	Havlicak
1)	Policy Council	17 Y, 0 N, As CS	Thomas	Ciccone
2)	Full Appropriations Council on Education & Economic Development			
3)				
4)				
5)				

**SUMMARY ANALYSIS**

Florida law mandates criminal background screening of certain individuals applying to operate or to be employed in a business that deals primarily with vulnerable persons. Each provider, employee, or contractor required to submit to a criminal background screening may be subject to one of two types of screening requirements. A Level 1 screening simply requires a name check against state records, while a Level 2 screening requires a fingerprint search against state and national records. If a person's screening results determine he or she is not qualified to work in a position of trust due to their criminal history, he or she may apply for an exemption from disqualification.

CS/HB 7069 substantially rewrites requirements and procedures for background screening of the persons and businesses that deal primarily with vulnerable populations. Key changes made by the bill:

- Require that no person required to be screened may begin work until the screening has been completed.
- Increase all Level 1 screening to Level 2 screening.
- Require all fingerprints to be submitted electronically by July 1, 2012.
- Require certain personnel that are not presently being screened to begin Level 2 screening.
- Add additional serious crimes to the list of disqualifying offenses.
- Authorize agencies to request the retention of fingerprints by the Florida Department of Law Enforcement.
- Provide that 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.
- Require that all exemptions from disqualification be granted only by the agency head.

The new screening requirements will be prospective. Existing persons working with vulnerable populations are not required to be rescreened until such time they are otherwise required to be rescreened by existing law.

The bill does not appear to have a significant fiscal impact on state or local governments.

The bill takes effect July 1, 2010.

## HOUSE PRINCIPLES

Members are encouraged to evaluate proposed legislation in light of the following guiding principles of the House of Representatives

- Balance the state budget.
- Create a legal and regulatory environment that fosters economic growth and job creation.
- Lower the tax burden on families and businesses.
- Reverse or restrain the growth of government.
- Promote public safety.
- Promote educational accountability, excellence, and choice.
- Foster respect for the family and for innocent human life.
- Protect Florida's natural beauty.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### **Background**

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 Florida Legislature created standard procedures for the screening of prospective employees where the Legislature had determined it necessary to conduct criminal history background checks to protect vulnerable persons. Chapter 435, F.S., outlines the screening standards for Level 1 employment screening and Level 2 employment screening. The Florida Department of Law Enforcement (FDLE) provides criminal history checks to the employer.

In September, 2009, the Fort Lauderdale Sun Sentinel ran a series of articles following an investigation of background screening of persons working with vulnerable populations in Florida.<sup>1</sup> The Sun Sentinel spent six months investigating Florida's background screening system for caregivers of children, the elderly and disabled. The newspaper obtained screening databases from the Agency for Health Care Administration (AHCA), the Department of Children and Families (DCF), and Broward County. Among the findings are the following:

- Since 1985, DCF has granted exemptions to more than 6,500 people with criminal records to work in child care, substance abuse and mental health counseling, and with the disabled.
- Lack of proof that a nationwide criminal check on employees had been conducted is the most frequent violation found by state inspectors in day care centers. Screening problems are among the four most common violations in assisted living facilities, adult day cares and nursing agencies. Home health agencies and nursing homes are also cited, but less frequently.
- Florida seniors and disabled adults have been beaten, neglected and robbed by caregivers with criminal records.

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<sup>1</sup> Sun Sentinel. Criminals and Convicted Felons Working in South Florida Day-care Centers and Nursing Homes. The entire series of articles may be found at <http://www.sun-sentinel.com/news/sfl-trust-florida-criminals-child-elder-care-html,0,3829069.htmlstory> (accessed February 15, 2010).

- More than 3,500 people with criminal records - including rape, robbery and murder - have been allowed to work with the elderly, disabled and infirm through exemptions granted by the state over the past two decades.
- Hundreds of employees are working with vulnerable persons because employers failed to check their backgrounds or kept them on the job despite their criminal pasts.
- Facility owners and administrators require a nationwide FBI check, but not employees caring for patients. With some exceptions, they are checked only for crimes in Florida.
- For most businesses, employees can begin work before screening results come back.
- At nursing homes, some employees had worked as long as seven years without any check.

The newspaper performed analyses to determine how many exemptions have been granted, who obtained them and for what crimes. FDLE crosschecked the newspaper's list of 8,750 people granted exemptions against its criminal database and found:

- 1,818 people were re-arrested, 1,067 of them on felony charges.
- The crimes included 3,123 felonies and 3,321 misdemeanors.
- The majority of the felonies were drug- and theft-related but also included child molestation, sex offenses, murder, arson, extortion, kidnapping, and cruelty toward a child.<sup>2</sup>

### **Level 1 and Level 2 Background Screenings**

The provisions of ch. 435, F.S., apply whenever a Level 1 or Level 2 screening for employment is required by law. Screenings can be done following Level 1 or Level 2 standards, depending on what direction is provided in a specific statute.<sup>3</sup>

Level 1 screenings<sup>4</sup> 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. Anyone undergoing a Level 1 screening must not have been found guilty of any of the offenses listed below:

- Section 393.135, relating to sexual misconduct with certain developmentally disabled clients and reporting of such sexual misconduct.
- Section 394.4593, relating to sexual misconduct with certain mental health patients and reporting of such sexual misconduct.
- Section 415.111, relating to abuse, neglect, or exploitation of a vulnerable adult.
- Section 782.04, relating to murder.
- Section 782.07, relating to manslaughter, aggravated manslaughter of an elderly person or disabled adult, or aggravated manslaughter of a child.
- Section 782.071, relating to vehicular homicide.
- Section 782.09, relating to killing of an unborn quick child by injury to the mother.
- Section 784.011, relating to assault, if the victim of the offense was a minor.
- Section 784.021, relating to aggravated assault.

<sup>2</sup> A full report of the FDLE results can be found at <http://www.sun-sentinel.com/media/acrobat/2009-09/49418865.pdf>.

<sup>3</sup> A Level 1 screening is referred to as a "background screening" in s. 435.03, F.S., while a Level 2 screening is referred to as a "security background investigation" in s. 435.04, F.S.

<sup>4</sup> Level 1 screenings are outlined in s. 435.03, F.S.

- Section 784.03, relating to battery, if the victim of the offense was a minor.
- Section 784.045, relating to aggravated battery.
- Section 787.01, relating to kidnapping.
- Section 787.02, relating to false imprisonment.
- Section 794.011, relating to sexual battery.
- Former s. 794.041, relating to prohibited acts of persons in familial or custodial authority.
- Chapter 796, relating to prostitution.
- Section 798.02, relating to lewd and lascivious behavior.
- Chapter 800, relating to lewdness and indecent exposure.
- Section 806.01, relating to arson.
- Chapter 812, relating to theft, robbery, and related crimes, if the offense was a felony.
- Section 817.563, relating to fraudulent sale of controlled substances, only if the offense was a felony.
- Section 825.102, relating to abuse, aggravated abuse, or neglect of an elderly person or disabled adult.
- Section 825.1025, relating to lewd or lascivious offenses committed upon or in the presence of an elderly person or disabled adult.
- Section 825.103, relating to exploitation of an elderly person or disabled adult, if the offense was a felony.
- Section 826.04, relating to incest.
- Section 827.03, relating to child abuse, aggravated child abuse, or neglect of a child.
- Section 827.04, relating to contributing to the delinquency or dependency of a child.
- Former s. 827.05, relating to negligent treatment of children.
- Section 827.071, relating to sexual performance by a child.
- Chapter 847, relating to obscene literature.
- Chapter 893, relating to drug abuse prevention and control, only if the offense was a felony or if any other person involved in the offense was a minor.
- Section 916.1075, relating to sexual misconduct with certain forensic clients and reporting of such sexual misconduct.
- Has not committed an act that constitutes domestic violence as defined in s. 741.28.

A Level 2 screening<sup>5</sup> 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 offenses for Level 1 or the offenses listed below:

- Section 787.04(2), relating to taking, enticing, or removing a child beyond the state limits with criminal intent pending custody proceedings.
- Section 787.04(3), relating to carrying a child beyond the state lines with criminal intent to avoid producing a child at a dependency hearing.
- Section 790.115(1), relating to exhibiting firearms or weapons within 1,000 feet of a school.
- Section 790.115(2)(b), relating to possessing an electric weapon or device, destructive device, or other weapon on school property.
- Section 843.01, relating to resisting arrest with violence.
- Section 843.025, relating to depriving a law enforcement, correctional, or correctional probation officer means of protection or communication.
- Section 843.12, relating to aiding in an escape.

<sup>5</sup> Level 2 screenings are outlined in s. 435.04, F.S.

- Section 843.13, relating to aiding in the escape of juvenile inmates in correctional institutions.
- Section 874.05(1), relating to encouraging or recruiting another to join a criminal gang.
- Section 944.35(3), relating to inflicting cruel or inhuman treatment on an inmate resulting in great bodily harm.
- Section 944.46, relating to harboring, concealing, or aiding an escaped prisoner.
- Section 944.47, relating to introduction of contraband into a correctional facility.
- Section 985.701, relating to sexual misconduct in juvenile justice programs.
- Section 985.711, relating to contraband introduced into detention facilities.

Additionally, the security background investigations conducted for employees and contractors of the Department of Juvenile Justice (DJJ) must ensure that no persons have been found guilty of any offense prohibited under any of the following provisions of the Florida Statutes or under any similar statute of another jurisdiction:

- Section 784.07, relating to assault or battery of law enforcement officers, firefighters, emergency medical care providers, public transit employees or agents, or other specified officers.
- Section 810.02, relating to burglary, if the offense is a felony.
- Section 944.40, relating to escape.

The Department of Juvenile Justice may not remove a disqualification from employment to any person who is disqualified for any offense disposed of during the most recent 7-year period.

There are two additional requirements that are unique to the Level 2 screening process. Employees undergoing a Level 2 screening are required to inform an employer immediately if they are convicted of any of the disqualifying offenses listed in the statute during the time they are employed. In addition, each employer that is licensed by a state agency must attest upon each renewal that it is in compliance with the screening provisions.<sup>6</sup>

In addition to Level 1 and Level 2 disqualification offenses<sup>7</sup>, additional disqualification offenses were added to s. 408.809(5), F.S., (for screening done under the purview of AHCA) during the 2009 Legislative Session. These offenses apply to both the Level 1 and Level 2 screening. These additional offenses are:

- Any specific authorizing statutes, if the offense was a felony.
- Chapter 408, if the offense was a felony.
- Section 409.920, relating to Medicaid provider fraud, if the offense was a felony.
- Section 409.9201, relating to Medicaid fraud, if the offense was a felony.
- Section 741.28, relating to domestic violence.
- Chapter 784, relating to assault, battery, and culpable negligence, if the offense was a felony.
- Section 810.02, relating to burglary.
- 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.

<sup>6</sup> *Id.* at s. 435.04(5), F.S.

<sup>7</sup> Section 435.03, and s. 435.04, F.S., respectively.

- 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.
- Section 831.30, relating to fraud in obtaining medicinal drugs.
- Section 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.

## **Level 2 Fingerprint Submission**

Criminal histories for Level 2 background screenings are obtained through the submission of the applicant's fingerprints to FDLE. Currently, there are two ways to submit the applicant's fingerprints: hardcopy submission or electronic submission. Each type of fingerprint submission has a different process and varies in the time it takes to have results returned.

The hard copy fingerprint submission is as follows:

- (1) An applicant submits a completed hard copy fingerprint card to a regulatory agency;
- (2) The agency must forward the card to FDLE within 5 days;
- (3) FDLE sends the original card to the FBI for a national criminal records check, and enters prints into their system to run a state criminal history check. FDLE reports back to the regulatory agency regarding the *state* criminal history check.
- (4) The FBI's response to the agency is mailed to the employer separately from FDLE's response and at a later date. Results from the FBI can take from 4 to 6 weeks.

The electronic fingerprint submission is as follows:

- (1) An applicant has fingerprints taken through the use of a "livescan" device<sup>8</sup> that digitally takes their fingerprints. The prints are then securely emailed to FDLE;
- (2) FDLE processes the prints for a state check and e-mails the electronic submission to the FBI for a national check;
- (3) A bundle of both the FDLE and the FBI results are then sent to the agency within 2 to 3 days.<sup>9</sup>

Currently, due to the length of time required to respond to hard copy fingerprint submissions, a person may begin to work while awaiting the results of a Level 2 background screening.

The fee for a Level 1 screening request is \$24.00. The fee for a Level 2 screening request is \$43.25<sup>10</sup> if submitted electronically, while a hard copy submission costs \$54.25. Currently, over 75% of fingerprints are submitted electronically.<sup>11</sup>

Electronic submissions have many benefits including reduced processing time, improved quality of prints for searching, reduction in potential missed identifications, national and state results bundled together and retention of finger prints for future records. Electronic submissions that are retained by FDLE allow for easy notification to employers if the applicant is arrested. In addition, fingerprint submissions for a Level 2 screening have been found to be more accurate than a Level 1 screening (which is name-based check only). Level 1 screenings conducted in Florida were found to have an error rate of 11.7%.<sup>12</sup> A name-based check does not identify any convictions outside of Florida and may contain false positives and false negatives when trying to correctly identify the applicant.

<sup>8</sup> Livescan devices may be owned by agencies or may be owned by third party vendors. Livescan is a computer device that captures electronic finger prints more accurately than hard copy, and allows for faster submission and retention of the prints. Many state agencies already have livescans in place, and FDLE has established a process to set up any new device.

<sup>9</sup> Results regarding criminal histories for both hard copy and electronic fingerprint submissions are always sent to the agency and never directly to the applicant.

<sup>10</sup> The Agency for Health Care Administration: Background Screening. Available at: [http://www.fdhc.state.fl.us/mchq/long\\_term\\_care/Background\\_Screening/index.shtml](http://www.fdhc.state.fl.us/mchq/long_term_care/Background_Screening/index.shtml).

<sup>11</sup> Criminal History Record Check Process. Florida Department of Law Enforcement. Jan. 12, 2010.

<sup>12</sup> Interstate Identification Index Name Check Efficacy. Report of the National Task Force to the U.S. Attorney General. July 1999. NCJ-179385. Pg 7.

## **Exemptions from Disqualification**

If a person is disqualified from applying for employment in a facility through a Level 1 or Level 2 background screening, ch. 435, F.S., provides a mechanism for those individuals to pursue an exemption from disqualification. An agency may grant an exemption from disqualification to any applicant or employee otherwise disqualified for:

- Felonies committed more than three years prior to the date of disqualification;
- Misdemeanors;
- Offenses that were felonies when committed but are now misdemeanors;
- Findings of delinquency; or
- Commissions of acts of domestic violence as defined in s. 741.30.<sup>13</sup>

Once an application for exemption is received, the agency determines if a hearing is warranted. A notice is sent to the applicant to request a personal interview. The informal interview is typically conducted by telephone. The review officer poses questions regarding the applicant's criminal/abuse history, work history, and their motivations for seeking employment in a position of trust. A review committee will make a decision to grant or deny the application based on this interview and the applicant is notified by mail in 14 days.<sup>14</sup>

Pursuant to s. 435.07, F.S., an applicant seeking an exemption must demonstrate by clear and convincing evidence that they should not have been disqualified. The applicant must give sufficient evidence of rehabilitation, which could include:

- An explanation of the circumstances surrounding the criminal incident for which an exemption is sought,
- The time period that has elapsed since the incident,
- The nature of the harm caused to the victim,
- The history of the employee since the incident, or
- Any other evidence indicating that the employee will not present a danger in continued employment.<sup>15</sup>

If one agency grants an exemption, it is not binding on other agencies.<sup>16</sup>

Since 2006, nearly 44% of the total applications for exemption processed by AHCA have been granted. The Fort Lauderdale Sun Sentinel reported on the high recidivism rate among people granted exemptions. The Sun Sentinel reported that one in five people granted exemptions were re-arrested after having been granted the exemption.<sup>17</sup>

## **Screening Statistics for Certain Agencies**

The following chart outlines current screening statistics that are performed by agencies affected by this bill. These totals are for the most recent one-year period available.

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<sup>13</sup> Section 435.07(1), F.S.

<sup>14</sup> A decision is contestable under the traditional administrative appeal process found in chapter 120, F.S.

<sup>15</sup> Section 435.07(3), F.S.

<sup>16</sup> Section 435.07(5), F.S.

<sup>17</sup> Sun Sentinel. Criminals and Convicted Felons Working in South Florida Day-care Centers and Nursing Homes. <http://www.sun-sentinel.com/news/sfl-trust-florida-criminals-child-elder-care-html,0,3829069.htmlstory> (accessed February 10, 2010).

	FDLE <sup>18</sup>	AHCA	DCF	DOEA	G.A.L. <sup>19</sup>	DJJ	APD <sup>20</sup>
<b>Level 1 Screens<sup>21</sup></b>	914,863	35,438	0	0	2,400	0	0
<b>Level 2 Screens</b>	1,236,191	28,323	109,945	628	0	12,199	21,159
<b>Disqualified Level 1</b>	N/A	2,368	N/A	N/A	Unknown	0	0
<b>Disqualified level 2</b>		1,028	1,032	37	0	361	Unknown
<b>Exemptions Requested<sup>22</sup></b>	N/A	605	539	36	Unknown	61	136
<b>Exemptions Granted</b>	N/A	182	398	22	Unknown	49	104
<b>Exemptions Denied</b>	N/A	53	130	13	Unknown	Unknown	33
<b>Retains Fingerprints</b>	N/A <sup>23</sup>	No	No	No	No	Yes	No
<b>Rescreening</b>	N/A	Adminis- trators	Yes, Level 1 only	No	No	Yes	Yes

### **Effect of Proposed Changes**

The bill substantially rewrites requirements and procedures for background screening of the persons and businesses that deal primarily with vulnerable populations. The bill provides that “vulnerable persons” includes minors and adults whose ability to perform the normal activities of daily living or to provide for his or her own care or protection is impaired due to a mental, emotional, long-term physical, or developmental disability or dysfunctioning, or brain damage, or the infirmities of aging. Key changes made by the bill:

- Require that no person required to be screened may be employed until the screening has been completed and it is determined that the person is qualified.
- Increase all Level 1 screening to Level 2 screening. This will not require existing employees to be rescreened until they otherwise come up for rescreening pursuant to existing law.

<sup>18</sup> FDLE processes all Level 1 and Level 2 screens, but does not make determinations for disqualifications or exemptions. The totals in this chart reflect all screens handled by FDLE, and are not limited to just those screens affected by the agencies listed.

<sup>19</sup> Guardian ad Litem.

<sup>20</sup> Totals for APD in this chart are for the annual average over the past five years.

<sup>21</sup> Most Level 1 screens go directly to FDLE and do not show up on this chart as handled under the agency, and are therefore under-reported. The number handled directly at FDLE for each agency is unknown.

<sup>22</sup> Not all exemption requests are acted upon. Many are not processed because the applicant does not respond to requests for information, the agency does not have jurisdiction, or the applicant withdraws the request.

<sup>23</sup> FDLE is the agency where fingerprints are retained for those agencies that retain fingerprints.

- Require all fingerprint submissions to be submitted electronically by July 1, 2012, or sooner, should an agency decide to do so by rule. However, for those applying under AHCA, electronic prints will be required as of July 1, 2010.
- Require certain personnel that deal substantially with vulnerable persons that are not presently being screened to begin Level 2 screening. This includes homes for special services, transitional living facilities, prescribed pediatric extended care centers, and certain direct service providers under the Department of Elder Affairs.
- Add additional serious crimes to the list of disqualifying offenses for Level 1 and Level 2 screening.
- Provide that an adjudication of delinquency that has not been sealed or expunged, as well as, any pending arrest for disqualifying offenses that are awaiting final disposition, may be the basis for disqualification.
- Authorize agencies to request the retention of fingerprints by FDLE. The bill also provides for rulemaking and related implementation provisions for retention of fingerprints.
- Provide that an exemption for a disqualifying felony may not be granted until after at least three years from the completion of all sentencing sanctions for that felony.
- Require that all exemptions from disqualification be granted only by the agency head.
- Rewrite present screening provisions for clarity and consistency.

**Section 1** (guardian ad litem), **sections 6 and 7** (home health agency personnel; nurse registry personnel; and companions and homemakers), **section 8** (hospices), **sections 12, 13, and 14** (home medical equipment providers), **section 16** (health care services pools), **sections 21 and 22** (employees and volunteers in summer day camps and summer 24-hour camps), **section 23** (consumer directed care personnel), **sections 25 and 26** (assisted living facilities), **sections 27 and 28** (adult family-care homes), and **sections 29 and 30** (adult day care centers), increase from Level 1 screening to Level 2 screening for relevant personnel. These provisions are also being revised for clarity and consistency and to conform to the screening provisions being placed in s. 408.809, F.S. By placing the procedures for screening in a single statute, s. 408.809, F.S., AHCA can achieve efficiencies and consistency in the application of screening requirements. Many of the existing provisions being deleted are duplicative of provisions in ch. 435, F.S., and are unnecessary or may conflict with changes made by this bill.

**Section 2** removes a reference to ch. 435, F.S., for background screening of hurricane mitigation inspectors participating in the My Safe Florida Home Program established within the Department of Financial Services. These persons will still undergo fingerprinting and criminal background screening at the state and national level, but not pursuant to ch. 435, F.S., since they do not deal primarily with vulnerable children or adults.

**Section 3** adds additional disqualifying offenses for the screening of direct service providers for persons with developmental disabilities. The additional offenses are:

- Any specific authorizing statutes, if the offense was a felony.
- Chapter 393, if the offense was a felony.
- Section 409.920, relating to Medicaid provider fraud, if the offense was a felony.
- Section 409.9201, relating to Medicaid fraud, if the offense was a felony.
- 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.

**Section 4** (mental health personnel), **section 5** (nursing homes), **section 15** (intermediate care facilities for developmentally disabled persons), **section 17** (health care clinics), and **section 24** (Medicaid providers), revise provisions related to the screening of personnel. These screening provisions already require Level 2 screening, but are being revised for clarity and consistency. They are also being revised to conform to the screening provisions being placed in s. 408.809, F.S. By placing the procedures for screening in a single statute, s. 408.809, F.S., AHCA can achieve efficiencies and consistency in the application of screening requirements. Many of the existing provisions being deleted are duplicative of provisions in ch. 435, F.S., and are unnecessary or may conflict with changes made by this bill.

**Section 9** (homes for special services), **section 10** (transitional living facilities), **section 11** (prescribed pediatric extended care centers), and **section 31** (certain direct service providers under the Department of Elder Affairs), provide Level 2 background screening for personnel in these facilities. Presently, these groups do not have such screening requirements.

**Sections 18, 19, and 20** bills revise AHCA's general provisions relating to screening. These changes are intended to provide for consistency and clarity. The change to s. 408.806, F.S., provides a reference to the submission of an affidavit by licensure applicants in s. 435.05(3), F.S., subject to the penalty of perjury, stating that all persons subject to background screening have been screened and are qualified. The change to s. 408.808, F.S., deletes a cross-reference to language being struck by the bill regarding a provisional status for persons pending screening results. Changes to s. 408.809, F.S., provide that:

- Any person whose responsibilities may require them to provide personal care or services directly to clients, including contractors, must be screened. However, this change does not require a person who is employed or contracts with a licensee on or before June 30, 2010, to submit to any additional rescreening if that licensee has written evidence that the person has already been screened and qualified according to Level 1 or Level 2 standards.
- Proof of compliance with Level 2 screening standards submitted within the previous 5 years to meet requirements of AHCA, the Department of Health, the Agency for Persons with Disabilities, or the Department of Children and Family Services satisfies screening requirements if the person has not been unemployed for more than 90 days. After 5 years, the person must be rescreened.
- Fingerprints must be provided in electronic format.
- Provide that an adjudication of delinquency that has not been sealed or expunged, as well as, any pending arrest for disqualifying offenses that are awaiting final disposition, may be the basis for disqualification.
- Screening results will be reviewed by the agency and maintained in a database. The qualifying or disqualifying status of the person named in the request will be posted on a secure website

accessible to all licensees [this is current law for nursing homes and is being moved from s. 400.215(1)(b), F.S.].

- An employer is not liable for unemployment compensation or other monetary reimbursement, upon notice of a disqualifying offense listed, for terminating the person against whom the report was issued, whether or not the person has filed for an exemption.

**Section 32** provides that ch. 435, F.S., only applies to background screenings that are required by law to be conducted under the chapter. This section also provides that, in accordance with the doctrine of incorporation by reference, that a reference in the Florida Statutes to any provision in ch. 435, F.S., includes all subsequent amendments to ch. 435, F.S. This section also grants rulemaking authority to the agencies in order to implement the background screening provisions.

**Section 33** provides:

- A definition of “employment” to clarify that its use in the chapter is limited to those activities that require the employee to be subject to screening.
- A definition of “vulnerable person” to include all minors and those adults whose ability to perform the normal activities of daily living or to provide for his or her own care or protection is impaired due to a mental, emotional, long-term physical, or developmental disability or dysfunctioning, or brain damage, or the infirmities of aging.
- A revision to the definition of “licensing agency” – to “agency” – to clarify that its use includes all agencies that facilitate background screening, not just those agencies that issue licenses.

**Section 34** revises the provisions related to Level 1 screening to delete the current list of disqualifying offenses and instead, incorporate the expanded list of disqualifying offenses provided by the bill for Level 2 screening in s. 435.04, F.S. This section also requires a check of the Dru Sjodin National Sex Registry for Level 1 screenings and provides that juvenile adjudications and arrests pending final disposition for disqualifying offenses may be used as a basis for disqualification for Level 1 screening.

**Section 35** revises the provisions related to Level 2 screening as follows:

- Require all fingerprint submissions to be submitted electronically by July 1, 2012, or sooner, should an agency decide to do so by rule. However, for those applying under AHCA, electronic prints will be required July 1, 2010.
- Provide that an adjudication of delinquency that has not been sealed or expunged, as well as, any pending arrest for disqualifying offenses that are awaiting final disposition, may be the basis for disqualification.
- Authorize an agency to contract with one or more vendors to perform all or part of the electronic fingerprinting pursuant to this section.
- Delete specific provisions for nursing homes, assisted living facilities, and the Department of Juvenile Justice (these are being transferred to the specific statutes on these topics).
- Deletes requirements for attestation and affidavits by employees and employers (these are being moved to s. 435.05, F.S.).

**Section 35** also provides the following additional disqualifying offenses to Level 2 screening (which means they will also apply to Level 1 screening):

- Chapter 784, relating to assault, battery, and culpable negligence, if the offense was a felony (therefore, the bill strikes existing specific references to crimes in this chapter).
- Section 787.025, relating to luring or enticing a child.
- Section 794.05, relating to unlawful sexual activity with certain minors.
- Section 810.02, relating to burglary (presently, felony burglary is a disqualifying offense for those being screening under DJJ).
- Section 810.14, relating to voyeurism, if the offense is a felony.
- Section 810.145, relating to video voyeurism, if the offense is a felony.
- Section 944.40, relating to escape (presently, escape is a disqualifying offense for those being screening under DJJ).
- Any crime that constitutes domestic violence.

**Section 36** deletes existing authority that allows employees to work pending the outcome of their background screening. This section also inserts requirements for attestation and affidavits by employees and employers that are being stricken in s. 435.04, F.S.

**Section 37** provides that an employer may not hire an employee until the screening process is completed and that if an employer becomes aware that an employee has been arrested for a disqualifying offense, the employer must remove the employee from contact with any vulnerable person. This section also provides for certain employer immunity for decisions made to terminate an employee based on a disqualifying offense.

**Section 38** provides that:

- An exemption from disqualification may not be granted for a disqualifying felony until at least three years after the applicant has completed or been lawfully released from confinement, supervision, or sanction for the disqualifying felony.
- An exemption for a disqualifying misdemeanor may not be granted until the completion of all sanctions for that misdemeanor.
- An exemption may not be given for a disqualifying offense committed as a juvenile until at least 3 years after the completion of all sanctions for the offense if the disqualifying offense is a felony if committed by an adult.
- Only the head of an agency may grant an exemption from disqualification.
- The agency may consider as part of its deliberations of the employee's rehabilitation subsequent arrests and convictions, even if that subsequent crime is not a disqualifying offense.
- The standard of review by the administrative law judge of the agency's decision as to rehabilitation is whether the agency's intended action is an abuse of discretion.
- An exemption may not be granted from disqualification from employment for any person who has been designated as a sexual predator pursuant to s. 775.21, F.S.; a career offender pursuant to s. 775.261, F.S.; or a sexual offender pursuant to s. 943.0435, F.S.

**Section 39** provides that each agency is responsible for collecting and paying any fee related to fingerprints retained on its behalf to FDLE. The amount of the annual fee and procedures for the submission and retention of fingerprint information and for the dissemination of search results is to be established by rule of FDLE.

**Section 40** deletes an obsolete reference in s. 456.039(4)(d), F.S., to the “health care practitioner credentialing system” that was repealed in 2001.

**Section 42** of the bill removes a reference to ch. 435, F.S., for background screening of construction contractors under the Department of Business and Professional Regulation. These persons will still undergo fingerprinting and criminal background screening at the state and national level, but not pursuant to ch. 435, F.S., since they do not deal primarily with vulnerable children or adults.

**Section 43** authorizes agencies to request the retention of fingerprints by FDLE and to adopt rules that require employers to keep the agency informed of any change in the affiliation, employment, or contractual status or place of affiliation, employment, or contracting of each person whose fingerprints are retained. This section also allows FDLE to participate in a federal fingerprint retention program once one is implemented, provided that FDLE is funded and equipped to participate.

**Section 44** makes technical changes by removing obsolete references in s. 943.053, F.S.

**Section 45** amends the background screening provisions of the Department of Juvenile Justice for consistency with other changes made by this bill; to remove redundant provisions; to add an additional disqualifying offense for the criminal use of personal identification information; to add the disqualifying offense of assault or battery of law enforcement officers, firefighters, emergency medical care providers, public transit employees or agents, or other specified officers (which is being struck from s. 435.04, F.S.); and to authorize the adoption of rules that describe the procedure and requirements necessary to implement the employment screening and fingerprint retention services.

**Sections 40, 46, 47, 48, 49, 50, 51, and 52** correct cross-references to conform to changes made by the bill.

**Section 53** provides that the changes made by the bill are intended to be prospective in nature and that persons are not required to be rescreened who are employed or licensed on the effective date of the bill until such time they are otherwise required to be rescreened pursuant to law, at which time they must meet the requirements for screening as set forth in the bill.

**Section 54** provides that the bill takes effect July 1, 2010.

**B. SECTION DIRECTORY:**

Section 1. Amends s. 39.821, F.S., relating to qualifications of guardians ad litem.

Section 2. Amends s. 215.5586, F.S., relating to the My Safe Florida Home Program.

Section 3. Amends s. 393.0655, F.S., relating to screening of direct service providers.

Section 4. Amends s. 394.4572, F.S., relating to screening of mental health personnel.

Section 5. Amends s. 400.215, F.S., relating to personnel screening requirement.

Section 6. Amends s. 400.506, F.S., relating to licensure of nurse registries; requirements; penalties.

Section 7. Amends s. 400.512, F.S., relating to screening of home health agency personnel; nurse registry personnel; and companions and homemakers.

Section 8. Amends s. 400.6065, F.S., relating to background screening.

Section 9. Amends s. 400.801, F.S., relating to homes for special services.

Section 10. Amends s. 400.805, F.S., relating to transitional living facilities.

- Section 11. Creates s. 400.9065, F.S., relating to background screening.
- Section 12. Amends s. 400.934, F.S., relating to minimum standards.
- Section 13. Amends s. 400.953, F.S., relating to background screening of home medical equipment provider personnel.
- Section 14. Repeals s. 400.955, F.S., relating to procedures for screening of home medical equipment provider personnel.
- Section 15. Amends s. 400.964, F.S., relating to personnel screening requirement.
- Section 16. Amends s. 400.980, F.S., relating to health care services pools.
- Section 17. Amends s. 400.991, F.S., relating to license requirements; background screenings; prohibitions.
- Section 18. Amends s. 408.806, F.S., relating to license application process.
- Section 19. Amends s. 408.808, F.S., relating to license categories.
- Section 20. Amends s. 408.809, F.S., relating to background screening; prohibited offenses.
- Section 21. Amends s. 409.175, F.S., relating to licensure of family foster homes, residential child-caring agencies, and child-placing agencies; public records exemption.
- Section 22. Repeals s. 409.1758, F.S., relating to summer camp personnel; fingerprints not required for screening purposes.
- Section 23. Amends s. 409.221, F.S., relating to consumer-directed care program.
- Section 24. Amends s. 409.907, F.S., relating to medicaid provider agreements.
- Section 25. Amends s. 429.14, F.S., relating to administrative penalties.
- Section 26. Amends s. 429.174, F.S., relating to background screening.
- Section 27. Amends s. 429.67, F.S., relating to licensure.
- Section 28. Amends s. 429.69, F.S., relating to denial, revocation, and suspension of a license.
- Section 29. Amends s. 429.911, F.S., relating to denial, suspension, revocation of license; emergency action; administrative fines; investigations and inspections.
- Section 30. Amends s. 429.919, F.S., relating to background screening.
- Section 31. Creates s. 430.60, F.S., relating to screening of direct service providers.
- Section 32. Amends s. 435.01, F.S., relating to applicability of this chapter.
- Section 33. Amends s. 435.02, F.S., relating to definitions.
- Section 34. Amends s. 435.03, F.S., relating to Level 1 screening standards.
- Section 35. Amends s. 435.04, F.S., relating to Level 2 screening standards.
- Section 36. Amends s. 435.05, F.S., relating to requirements for covered employees and employers.

Section 37. Amends s. 435.06, F.S., relating to exclusion from employment.

Section 38. Amends s. 435.07, F.S., relating to exemptions from disqualification.

Section 39. Amends s. 435.08, F.S., relating to payment for processing of fingerprints and state criminal records checks.

Section 40. Amends s. 456.039, F.S., relating to designated health care professionals; information required for licensure.

Section 41. Amends s. 464.203, F.S., relating to certified nursing assistants; certification requirement.

Section 42. Amends s. 489.115, F.S., relating to certification and registration; endorsement; reciprocity; renewals; continuing education.

Section 43. Amends s. 943.05, F.S., relating to Criminal Justice Information Program; duties; crime reports.

Section 44. Amends s. 943.053, F.S., relating to dissemination of criminal justice information; fees.

Section 45. Amends s. 985.644, F.S., relating to departmental contracting powers; personnel standards and screening.

Section 46. Amends s. 381.60225, F.S., relating to background screening.

Section 47. Amends s. 409.912, F.S., relating to cost-effective purchasing of health care.

Section 48. Amends s. 464.018, F.S., relating to disciplinary actions.

Section 49. Amends s. 468.3101, F.S., relating to disciplinary grounds and actions.

Section 50. Amends s. 744.309, F.S., relating to who may be appointed guardian of a resident ward.

Section 51. Amends s. 744.474, F.S., relating to reasons for removal of guardian.

Section 52. Amends s. 985.04, F.S., relating to oaths; records; confidential information.

Section 53. Provides the changes made by this act are intended to be prospective in nature.

Section 54. Provides an effective date of July 1, 2010.

## **II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

### **A. FISCAL IMPACT ON STATE GOVERNMENT:**

#### **1. Revenues:**

The bill will result in an increase in the number of persons required to be background screened, resulting in an increase in the related fees collected by the Florida Department of Law Enforcement.

#### **2. Expenditures:**

The Florida Department of Law Enforcement will expend additional resources in performing the higher number of Level 2 background screens. However, the Department has reported that it does not need additional positions unless it is required to retain additional fingerprints.

AHCA anticipates that certain nursing homes could request up to \$200,000 annually for reimbursement of increased background screening costs associated with this bill that would be an allowable cost on the Medicaid Nursing Home Cost Reports. The total state impact using the anticipated Federal Medical Assistance Percentage (FMAP) rates for FY 2010-11 would be \$78,474. The balance would be federal earnings.

#### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

##### 1. Revenues:

This bill should have no impact on local government revenues.

##### 2. Expenditures:

Staff is not aware of any local governments that use ch. 435, F.S., for background screening, though they do perform criminal background checks on certain employees. The bill will have no fiscal impact on background screening done outside of the ch. 435, F.S., process. It may be that some local governments are associated, or help fund, local programs that do use such screening.

#### C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill increases the number of persons who will need to undergo background screening prior to working with vulnerable persons. It also will require the screening to be done using Level 2 standards instead of Level 1, which has a greater cost associated with it. Level 1 costs \$24, and Level 2 costs that same \$24, plus an additional \$19.25 (electronic fingerprints) or \$30.25 (hard card fingerprints). By increasing the cost and the number of those persons required to be screened, there will be an impact on employers and employees. It is anticipated that in most cases, the fees will be passed on to the employee and the employer may or may not reimburse that employee.

#### D. FISCAL COMMENTS:

The bill does not create a direct negative fiscal impact on state government, except for potential Medicaid reimbursement for allowable expenses (background screening) for some nursing homes. However, while it does not mandate retention of fingerprints, it does authorize an agency to request such retention by the Florida Department of Law Enforcement. If such a request is made, then that agency would realize associated costs that would be passed on to employers. The agency could also realize additional workload in maintaining a list of employers for whom fingerprints should be retained, as well as, making any notifications to employers should the agency be notified that a person whose fingerprints have been retained has been arrested.

The following agencies have reported that the bill will have a neutral or no fiscal impact on revenues or expenditures (assuming they do not end up having to retain fingerprints):

- Florida Department of Law Enforcement
- Department of Children and Families
- Agency for Persons with Disabilities
- Agency for Health Care Administration –see AHCA’s additional comments below
- Department of Elder Affairs
- Department of Juvenile Justice

The following agency has reported that the bill will have a fiscal impact:

- Guardian ad Litem – this agency pays for the screening of their volunteers and employees. By increasing the screening to Level 2, they predict an additional \$30 per volunteer will be spent. They anticipate approximately 2,400 screens to be done next year, resulting in an increased

expenditure of \$72,000. However, the agency is not required by law to pay for these screenings.

### **Agency for Health Care Administration**

While the Agency for Health Care Administration reports that the bill's fiscal impact will be neutral, it also provides the following comments:

The Agency's background screening workload is expected to increase based upon the shift from Level 1 to Level 2 screening that will require screening currently sent directly to FDLE to be conducted through the Agency. The workload will also increase because of the increase in the number of persons subject to screening based on the uniform definition of when screening is required (access to client living areas, property or funds).

The Agency expects to process approximately 86,000 additional screenings each year. The resources necessary to do this work will be offset by the efficiencies gained through use of electronic fingerprint (Livescan), and movement of OPS staff funding of \$142,098 within the Agency. Therefore no new resources will be required.

Shift existing OPS funding: In January 2010, the Division of Medicaid provided \$142,098 in OPS funds to the Background Screening section to consolidate background screening within the Agency. These resources assist with the direct staff screening requirements of certain Medicaid providers which in some cases are duplicative of screenings for licensure, bringing efficiency to Agency background screening duties. Moving the OPS funding to Health Quality Assurance will secure the necessary resources to support the additional Level 2 workload in the bill. Funds would be moved from Org. Code 68500000000 to 68304030000.

### **III. COMMENTS**

#### **A. CONSTITUTIONAL ISSUES:**

##### **1. Applicability of Municipality/County Mandates Provision:**

Not applicable because this bill does not appear to require counties or cities to: spend funds or take action requiring the expenditure of funds; reduce the authority of counties or cities to raises revenues in the aggregate; or reduce the percentage of a state tax shared with counties or cities.

##### **2. Other:**

None.

#### **B. RULE-MAKING AUTHORITY:**

The bill provides specific rulemaking direction in several places in the bill related to implementation of fingerprints screening, retention of fingerprints, and the electronic submission of fingerprints. All rulemaking is directed to be accomplished pursuant to ch. 120, F.S.

#### **C. DRAFTING ISSUES OR OTHER COMMENTS:**

None.

### **IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES**

On February 16, 2010, the Criminal & Civil Justice Policy Council adopted 10 amendments to the Proposed Council Bill (PCB CCJP 10-04), which then became HB 7069. The amendments adopted were:

Amendment 1 – requires screening for all employees and volunteers that have direct unsupervised contact with patients in mental health programs and facilities.

Amendment 2 - clarifies that only contractors and employees with direct client contact must be screened for those groups under the Agency for Health Care Administration.

Amendment 3 - clarifies that FDLE is to collect screening fees as provided in existing law.

Amendment 4 – revises the applicability provision for clarity and gives agencies rulemaking authority to implement the screening provisions.

Amendment 5 – clarifies language regarding the electronic submission of prints to remove reference to an approved FBI format and to clarify that the fingerprints are to be submitted to FDLE.

Amendment 6 – clarifies that an employee who has been arrested for a disqualifying offense may not return to work until the “arrest is resolved in such a way that the employer determines that the employee is still eligible for employment.”

Amendment 7 – revises fingerprint retention language to clarify when notification must be given of a change in affiliation, employment, or contractual status.

Amendment 8 – changes “federal criminal records check” to “national criminal records check.”

Amendment 9 – technical - removes an extra word.

Amendment 10 – changes background screening for Guardians ad Litem from Level 1 to Level 2.

On March 9, 2010, the Policy Council adopted 10 amendments to the bill. The amendments adopted were:

Amendment 1 – repeals section 409.1758 – relating to screening of summer camp employees; deletes an obsolete reference in s. 456.039(4)(d), F.S., to the “health care practitioner credentialing system” that was repealed in 2001.

Amendment 2 – provides that juvenile adjudications and arrests pending final disposition for disqualifying offenses may be used as a basis for disqualification for screening of direct service providers for persons with developmental disabilities.

Amendment 3 – clarifies that the affidavit requirement in s. 408.806(1)(h), F.S., is the same as that in s. 435.05(3), F.S.

Amendment 4 – ensures that employees with access to client living areas are screened, but not necessarily every contractor; clarifies rescreening requirements and provides that existing screened employees are to be screened over the next five years in a staggered fashion: provides that juvenile adjudications and arrests pending final disposition for disqualifying offenses may be used as a basis for disqualification for screening under AHCA.

Amendment 5 – provides that juvenile adjudications and arrests pending final disposition for disqualifying offenses may be used as a basis for disqualification for screening of direct service providers for providers under the Department of Elder Affairs.

Amendment 6 – requires a check of the Dru Sjodin National Sex Registry for Level 1 screenings; provides that juvenile adjudications and arrests pending final disposition for disqualifying offenses may be used as a basis for disqualification for Level 1 screening.

Amendment 7 –clarifies that fingerprints provided for Level 2 screening are to be submitted to FDLE; provides that juvenile adjudications and arrests pending final disposition for disqualifying offenses may be used as a basis for disqualification for Level 2 screening.

Amendment 8 – provides for certain employer immunity for decisions made to terminate an employee based on a disqualifying offense; provides that an exemption for a disqualifying misdemeanor may not be granted until the completion of all sanctions for that misdemeanor; provides that an exemption may not be given for a disqualifying offense committed as a juvenile until at least 3 years after the completion of all sanctions for the offense if the disqualifying offense is a felony if committed by an adult.

Amendment 9 –adds career offenders and sexual offenders to those who may never be eligible for an exemption from disqualification.

Amendment 10 –clarifies that FDLE does not have to retain prints upon request of an agency if it does not have sufficient funds and equipment to do so.

The bill was reported favorably as a Council Substitute. The analysis reflects the Council Substitute.