Proposed Rulemaking

~~Title~~Rules for Conducting Criminal History Record Checks for Home Health, Hospice, and Private Care Agencies in Arkansas

Promulgated by:
Department of Health

Title 20. Public Health and Welfare

Chapter I. Generally, Department of Health

Subchapter B. Health Facilities

Part 42. Rules for Conducting Criminal History Record Checks for Home Health, Hospice, and Private Care Agencies in Arkansas

Subpart 1. Generally

20 CAR § 42-101. Purpose.

The purpose of this part is to provide direction to home health, hospice, and private agencies in the State of Arkansas as it relates to criminal record checks for employees, operators, and applicants.

20 CAR § 42-102. Definitions.

As used in this part:

(1) "Bureau" means the Identification Bureau of the Division of Arkansas State Police;

(2) "Care" means treatment, services, assistance, education, training, instruction, or supervision for which the service provider is compensated either directly or indirectly;

(3) "Department" means the Department of Health;

(4) "Determination" means the determination made by the licensing or certifying agency or a third-party employee evaluation service that a service provider, operator, applicant for employment with, or employee of a service provider is or is not disqualified from licensure, exemption from licensure, certification, any other operating authority, or employment based on the criminal history of the:

(A) Service provider;

(B) Operator;

(C) Applicant; or

(D) Employee;

(5)(A) "Employee" means any person who has unsupervised access to clients of a service provider except as provided in subdivision (5)(B) of this section, below, and:

(i) Provides care to clients of a service provider on behalf of, under the supervision of, or by arrangement with the service provider;

(ii) Is employed by a service provider to provide care to clients of the service provider;

(iii) Is engaged as an independent contractor to provide care to clients of the service provider;

(~~iii~~iv) Is a temporary employee placed by an employment agency with a service provider to provide care to clients of the service provider; or

(~~iv~~v) Resides in an alternative living home in which services are provided to individuals with developmental disabilities.

(B) "Employee" does not include a person who:

(i) Is a family member of a client receiving care from a service provider;

(ii) Is a volunteer; or

(iii) Works in an administrative capacity and does not have unsupervised access to clients of a service provider;

(6) "HFS" means the Division of Health Facility Services of the Department of Health;

(7) "Home health agency" means a service as defined by Arkansas Code § 20-10-801 et seq., whether or not the agency has applied for or possesses any license necessary for operation;

(8) "Hospice agency" means a service as defined by Arkansas Code § 20-7-117 whether or not the agency has applied for or possesses a license;

(9) "Index" means the database, maintained by the Identification Bureau of the Division of Arkansas State Police, of criminal records checks that have been conducted on applicants for employment with and employees of home health or hospice agencies;

(10) "Licensing or certifying agency" means the state agency charged with licensing, exempting from licensure, certifying, or granting other operating authority to a service provider;

(11) "National criminal history records check" means a review of national criminal records maintained by the Federal Bureau of Investigation based on fingerprint identification or other positive identification methods;

(12) "Operator" means the person signing the application of:

(A) A service provider for licensure;

(B) An exemption from licensure;

(C) A certification; or

(D) Any other operating authority;

(13) "Private care agency" means a service as defined in Arkansas Code § 20-10-2201 et seq., whether or not the agency has applied for or possesses a license;

(14) "Registry records check" means the review of one (1) or more database systems maintained by a state agency that contain information relative to a person's suitability for licensure, certification, exemption from licensure, or any other operating authority to be a service provider or for employment with a service provider to provide care;

(15) "Report" means a statement of the criminal history of a service provider, operator, applicant for employment with, or employee of, a service provider issued by the Identification Bureau of the Division of Arkansas State Police;

(16) "Service provider" means any of the following:

(A) An Alternative Community Services Waiver Program provider certified by the Division of Developmental Disabilities Services of the Department of Human Services;

(B) A childcare facility as defined by Arkansas Code § 20-78-202;

(C) A church-exempt childcare facility as recognized under Arkansas Code § 20-78-209;

(D) An early intervention program provider certified by the Division of Developmental Disabilities Services of the Department of Human Services;

(E) An Elder Choices provider certified by the Division of Aging, Adult, and Behavioral Health Services of the Department of Human Services;

(F) A home healthcare service under § 20-10-801;

(G) A hospice program under § 20-7-117;

(H) A long-term care facility as defined by § 20-10-702; or

(I) A nonprofit community program as defined by § 20-48-101; ~~and~~

(17) "State criminal history records check" means a review of state criminal records conducted by the Identification Bureau of the Division of Arkansas State Police; and~~.~~

(18) "Third-party employee evaluation service" means an independent, third party, not associated with the licensing or certifying agency or the service provider, authorized or otherwise eligible under state and federal law to perform national criminal history record checks and state criminal history records checks in order to provide the determination of eligibility for employment under Arkansas Code §20-38-101, et seq.

20 CAR § 42-103. Evidence of criminal history records checks.

(a) **Home health and hospice agencies.** All home health and hospice agencies must maintain evidence that criminal history records checks have been completed on all operators, applicants for employment, and employees of the service provider.

(b) **Private care agencies.**

(1) Private care agencies must be ~~certified as Elder Choices providers by the Division of Aging, Adult, and Behavioral Health Services of the Department of Human Services in order to obtain Arkansas licensure~~licensed by the Department of Health.

(2) Private care agencies must therefore maintain evidence that criminal history records checks have been completed on all:

(A) Operators;

(B) Applicants for employment; and

(C) Employees.

~~(3) Elder Choices providers are also subject to Department of Human Services certification requirements for registry records checks.~~

(c) A service provider shall maintain on file, subject to inspection by the Arkansas Crime Information Center, the Identification Bureau of the Division of Arkansas State Police, or the licensing or certifying agency evidence that criminal history records checks have been completed on all operators, applicants for employment, and employees of the service provider.

(d) Each home health, ~~or~~ hospice, or private care agency must have safeguards to ensure the confidentiality of criminal history check records maintained.

20 CAR § 42-104. Failure to comply.

(a) **Home health, ~~and~~ hospice, and private care agency.** Failure to comply with this part shall be grounds to deny or revoke a home health, ~~or~~ hospice, or private care agency's license.

(b) **Private care.** Loss of Elder Choices certification shall be grounds to deny or revoke a private care agency's license.

20 CAR § 42-105. Operators.

(a) Each home health, ~~and~~ hospice, and private care agency shall obtain a state criminal history records check and a national criminal history records check on each operator no fewer than one (1) time every five (5) years.

(b) For a home health or hospice agency initially applying for licensure, the process will include the following:

(1) Evidence of a completed application for a criminal history records check on the operator; and

(2) Upon receiving the results of the state criminal history records check and the national criminal history records check, the Division of Health Facilities Services will issue a determination of whether the home health or hospice agency is disqualified from licensure.

(c) For a home health, ~~or~~ hospice, or private care agency that is currently licensed but is completing the application for the annual renewal of the agency, the process will include the following:

(1) Evidence of current completed criminal history records checks or of new applications for criminal history records checks on the operator must be submitted to the division with the annual renewal application; and

(2) For new criminal history records checks applications, upon receiving results of the state criminal history check and national history check the division will issue a determination of whether the agency may continue licensure based on results of the operator's criminal history records check.

20 CAR § 42-106. Applicants, employees, and temporary employees.

(a) Each home health, ~~or~~ hospice, or private care applicant or employee must complete a state criminal history check unless the applicant or employee is licensed as a professional as described in 20 CAR § 42-111.

(b)(1) A federal criminal history check must also be completed if the applicant or employee has not continuously lived in the State of Arkansas for the past five (5) years.

(2) The home health, ~~or~~ hospice, or private care agency will be responsible for verification of this information.

(3) Examples of evidence that can be used to verify the above may include, but is not limited to, employment records, payroll check stubs, tax records, rent/house payment records, utility bills, school records, etc.

(c) **Temporary employees.** If a service provider uses temporary employees to provide care, the service provider shall:

(1) Use a contract to detail the requirements for placing temporary employees with the service provider; and

(2) Ensure that the contract pertaining to the service provider's use of temporary employees requires the entity providing the temporary employees to comply with the following terms:

(A) The entity is responsible for conducting a criminal history records check on each temporary employee under Arkansas Code § 20-38-101 et seq., before the placement of the temporary employee with the service provider; and

(B) The entity shall:

(i) Maintain all documentation regarding criminal history records checks for each temporary employee placed with a service provider; and

(ii) Provide copies of the documentation to the service provider, which shall be made available to the appropriate licensing or certifying agency upon request.

(d) A service provider shall:

(1) Inform employees that continued employment is contingent on the satisfactory results of criminal history records checks; and

(2) Conduct periodic criminal history records checks on all employees no fewer than one (1) time every five (5) years.

(e) If the licensing or certifying agency determines that an applicant or employee is disqualified from employment based on the criminal history of the applicant or employee, the service provider shall:

(1) Deny employment to the applicant; or

(2) Terminate the employment of the employee.

(f) If the licensing agency, ~~or~~ certifying agency, or third-party employee evaluation service issues a determination that an applicant or employee is not disqualified from employment or if there is no criminal history on an applicant or employee, the service provider may employ the applicant or continue the employment of the employee.

20 CAR § 42-107. Challenges to criminal history information.

A person may challenge the completeness or accuracy of his or her criminal history information under Arkansas Code § 12-12-1013.

20 CAR § 42-108. Assignment of facility identification numbers.

(a) Each home health, ~~and~~ hospice, and private care agency ~~facility~~ shall have a facility identification number assigned.

(b) Contact the Division of Health Facilities Services criminal history records program at (501) 661-2201 to obtain an ID number.

20 CAR § 42-109. Applications.

(a) Completed applications for either national criminal history records checks, state criminal history records checks, or both, ~~are~~ shall be submitted by the agency ~~to the Division of Arkansas State Police~~via the electronic Division of State Police's Online Criminal Background Check System at https://cbc.ark.org.

(b) National criminal history records checks shall only be required for individuals that have resided in Arkansas for less than five (5) years.

(c) For applications for national criminal history records checks, the agency shall submit, with the completed electronic application:

(1) The consent form provided by the Department of Health; and

(2) The applicant's fingerprints obtained through an approved harvester.

~~(b) Applications may be completed and mailed or completed online and submitted electronically.~~

~~(1) **Applications by mail.**~~

~~(A)(i) Application forms for state criminal history records checks are available from the Division of Health Facilities Services.~~

~~(ii) No other applications will be accepted.~~

~~(B) Fingerprint cards for national criminal history records checks are available from the Division of Health Facilities Services.~~

~~(C)(i) The application must be completely filled out.~~

~~(ii) The application shall be signed by the subject of the criminal history records check and notarized by a notary public.~~

~~(D)(i) The original application with the appropriate fee must be sent directly to the Identification Bureau of the Division of Arkansas State Police at the address provided on the application.~~

~~(ii) A copy of the application for a criminal history must be sent to the Division of Health Facilities Services.~~

~~(E) If a national history check is required, the completed fingerprint card must accompany the application.~~

~~(2) **Electronic applications.** Electronic applications are completed online through the Division of Arkansas State Police website: www.asp.state.ar.us.~~

20 CAR § 42-110. List of disqualifying offenses.

The following is a list of disqualifying offenses:

(1) Criminal attempt, Arkansas Code § 5-3-201, criminal complicity, Arkansas Code § 5-3-202, criminal solicitation, Arkansas Code § 5-3-301, or criminal conspiracy, Arkansas Code § 5-3-401;

(2) Capital murder, Arkansas Code § 5-10-101;

(3) Murder, Arkansas Code §§ 5-10-102 and 5-10-103;

(4) Manslaughter, Arkansas Code § 5-10-104;

(5) Negligent homicide, Arkansas Code § 5-10-105;

(6) Kidnapping, Arkansas Code § 5-11-102;

(7) False imprisonment in the first degree, Arkansas Code § 5-11-103;

(8) Permanent detention or restraint, Arkansas Code § 5-11-106;

(9) Robbery, Arkansas Code §§ 5-12-102 and 5-12-103;

(10) Battery, Arkansas Code §§ 5-13-201 and 5-13-202;

(11) Assault, Arkansas Code §§ 5-13-204 and 5-13-206;

(12) Coercion, Arkansas Code § 5-13-208;

(13) Introduction of controlled substance into body of another person, Arkansas Code § 5-13-210;

(14) Terroristic threatening, Arkansas Code § 5-13-301;

(15) Terroristic act, Arkansas Code § 5-13-310;

(16) Any sexual offense, Arkansas Code § 5-14-101 et seq.;

(17) Voyeurism, Arkansas Code § 5-16-102;

(18) Death threats concerning a school employee or student, Arkansas Code § 5-17-101;

(19) Incest, Arkansas Code § 5-26-202;

(20) Domestic battery, Arkansas Code §§ 5-26-303 — 5-26-306;

(21) Interference with visitation, Arkansas Code § 5-26-501;

(22) Interference with court-ordered custody, Arkansas Code § 5-26-502;

(23) Endangering the welfare of an incompetent person, Arkansas Code §§ 5-27-201 and 5-27-202;

(24) Endangering the welfare of a minor, Arkansas Code §§ 5-27-205 and 5-27-206;

(25) Contributing to the delinquency of a minor, Arkansas Code § 5-27-209;

(26) Contributing to the delinquency of a juvenile, Arkansas Code § 5-27-220;

(27) Permitting abuse of a minor, Arkansas Code § 5-27-221;

(28) Soliciting money or property from incompetent persons, Arkansas Code § 5-27-229;

(29) Engaging children in sexually explicit conduct for use in visual or print media, Arkansas Code § 5-27-303;

(30) Pandering or possessing visual or print medium depicting sexually explicit conduct involving a child, Arkansas Code § 5-27-304;

(31) Transportation of minors for prohibited sexual conduct, Arkansas Code § 5-27-305;

(32) Employing or consenting to the use of a child in a sexual performance, Arkansas Code § 5-27-402;

(33) Producing, directing, or promoting a sexual performance by a child, Arkansas Code § 5-27-403;

(34) Computer crimes against minors, Arkansas Code § 5-27-601 et seq.;

(35) Adult felony abuse of an endangered or impaired person, Arkansas Code § 5-28-103;

(36) Theft of property, Arkansas Code § 5-36-103;

(37) Theft of services, Arkansas Code § 5-36-104;

(38) Theft by receiving, Arkansas Code § 5-36-106;

(39) Forgery, Arkansas Code § 5-37-201;

(40) Criminal impersonation, Arkansas Code § 5-37-208;

(41) Financial identity fraud, Arkansas Code § 5-37-227;

(42) Arson, Arkansas Code § 5-38-301;

(43) Burglary, Arkansas Code § 5-39-201;

(44) Breaking or entering, Arkansas Code § 5-39-202;

(45) Resisting arrest, Arkansas Code § 5-54-103;

(46) Felony interference with a law enforcement officer, Arkansas Code § 5-54-104;

(47) Cruelty to animals, Arkansas Code § 5-62-101;

(48) Felony violation of the Uniform Controlled Substances Act, Arkansas Code §§ 5-64-101 – 5-64-501 et seq.;

(49) Public display of obscenity, Arkansas Code § 5-68-205;

(50) Promoting obscene materials, Arkansas Code § 5-68-303;

(51) Promoting obscene performance, Arkansas Code § 5-68-304;

(52) Obscene performance at a live public show, Arkansas Code § 5-68-305;

(53) Prostitution, Arkansas Code § 5-70-102;

(54) Patronizing a prostitute, Arkansas Code § 5-70-103;

(55) Promotion of prostitution, Arkansas Code §§ 5-70-104, 5-70-105, and 5-70-106;

(56) Stalking, Arkansas Code § 5-71-229;

(57) Criminal use of a prohibited weapon, Arkansas Code § 5-73-104;

(58) Simultaneous possession of drugs and firearms, Arkansas Code § 5-74-106; and

(59) Unlawful discharge of a firearm from a vehicle, Arkansas Code § 5-74-107.

20 CAR § 42-111. Professional licenses excluded from requirement.

The following is a list of professional licenses excluded from requirement:

(1) Licensed professional counselors, as outlined in Arkansas Code § 17-27-101 et seq.;

(2) Dentists, as outlined in Arkansas Code § 17-82-101 et seq.;

(3) Nurses, as outlined in Arkansas Code § 17-87-101 et seq.;

(4) Occupational therapists, as outlined in Arkansas Code § 17-88-101 et seq.;

(5) Pharmacists, as outlined in Arkansas Code § 17-92-101 et seq.;

(6) Physical therapists, as outlined in Arkansas Code § 17-93-301 et seq.;

(7) Physicians and surgeons, as outlined in Arkansas Code § 17-95-201 et seq.;

(8) Podiatrists, as outlined in Arkansas Code § 17-96-101 et seq.;

(9) Psychologists and psychological examiners, as outlined in Arkansas Code § 17-97-101 et seq.;

(10) Speech-language pathologists and audiologists, as outlined in Arkansas Code § 17-100-101 et seq.; and

(11) Social workers, as outlined in Arkansas Code § 17-46-101 et seq. [repealed].