TN Division of TennCare | LTSS

Long Term Services and Supports Operational Protocol Title: Background Check Processes for 1915(c) Waiver, Katie Beckett, Employment and Community First CHOICES, and CHOICES Provider

Effective Date: July 1, 2024

Background:

As provided fully in this Protocol, providers of 1915(c) Waiver, Katie Beckett, Employment and Community First (ECF) and CHOICES services (collectively "HCBS" or "providers") are required to: (1) have policies and processes concerning criminal background checks, including registry checks, for employees, subcontractors, and volunteers, in the manner outlined below; (2) conduct all required criminal background checks, including registry checks, in the manner outlined below; and (3) have policies and processes concerning individualized assessments for applicants for employment who have criminal backgrounds conducted. Managed Care Organizations (MCOs) are required to verify that providers meet these three requirements, as outlined below. The Department of Disability and Aging (DDA) will provide oversight and monitoring for the 1915(c), Katie Beckett, CHOICES Community Living Supports (CLS)/CLS-Family Model (FM), and ECF providers. The MCOs will provide oversight and monitoring for all other CHOICES providers.

For CHOICES providers, a Background Check Protocol Roster is required to be used. Providers of 1915(c) Waiver, Katie Beckett, CHOICES CLS/CLS-FM, and ECF services have the option to use the Roster.

Protocol:

This protocol states the expectations for verification of HCBS provider compliance with criminal background check and registry check requirements for applicable employees, subcontractors, and volunteers.

Individuals Subject to Criminal Background Check and Registry Check Requirements

Pursuant to state and federal law, there are three groups of individuals who are subject to the criminal background check and registry check requirements of this Protocol in relation to HCBS providers:

1. Employees, subcontractors, and volunteers who will be in a position that involves having **direct contact** with, or direct responsibility for, members receiving services.
2. Employees, subcontractors, and volunteers who will only have **incidental contact** with members receiving services.
3. Employees, subcontractors, and volunteers who will **not** have either direct or incidental contact.

Providers of HCBS shall be responsible for conducting registry checks as outlined below for **all** employees, subcontractors, and volunteers. However, depending on which of the three groups [direct contact, incidental contact or neither] applies to the employee, subcontractor, or volunteer, the HCBS provider shall comply with all requirements established in Title 52 for obtaining a criminal background check and/or fingerprint check from the Tennessee Bureau of Investigation or, as an alternative, a criminal background check from a state licensed private investigation company.

Definitions:

- **Volunteer:** For purposes of this protocol, a volunteer is an individual, unrelated to the member, who is performing unpaid services for the member. Volunteer does not include natural supports such as relatives or friends of the member who seek to take the member on community outings or visit the member in his or her residence for companionship.
- **Direct Contact:** For purposes of this protocol, an employee, subcontractor, or volunteer is considered to be in a position that involves direct contact with a person receiving services if the employee, subcontractor, or volunteer is supporting the person in the performance of personal care duties or providing assistance with activities of daily living for that person receiving services.
- **Direct Responsibility:** An employee, subcontractor, or volunteer is considered to be in a position that involves direct responsibility for a person receiving services if the employee, subcontractor, or volunteer either has responsibility for the person receiving services or supervisory authority for staff having direct contact with a person receiving services.

More detail on these groups, as well as background check and registry requirements pertaining to them, is included below in the following subsections:

1. **Employees, subcontractors, and volunteers who are involved in providing direct contact for members**

If the employee, subcontractor, or volunteer will be in a position that involves *either* providing direct contact with a member and/or involves direct responsibility for a member, the provider must conduct a criminal background check on that employee, subcontractor, or volunteer which complies with all requirements established in Title 52 for obtaining a criminal background check and/or fingerprint check from the Tennessee Bureau of Investigation or, as an alternative, a criminal background check from a state licensed private investigation company. For an employee, subcontractor, or volunteer who has lived in Tennessee for one (1) year or less, a nationwide background check is required. Such nationwide background checks may be limited to those states where the employee, subcontractor, or volunteer has lived during the past seven (7) years or since the age of eighteen (18) years, whichever is fewer.

Additionally, the provider must also have a registry check conducted which involves verification that employee, subcontractor, or volunteer's name does not appear on any of the following six registries: (1) The Tennessee Department of Health Elderly or Vulnerable Abuse Registry; (2) The National Sex Offender Registry; (3) Systems for Award Management (SAM); (4) OIG's List of Excluded Individuals/Entities (LEIE); (5) TennCare Terminated Provider List; and (6) The Tennessee Felony Offender Information Lookup (FOIL). A description of each of these six registries are provided below:

- The Tennessee Department of Health Elderly or Vulnerable Abuse Registry: The Department of Health pursuant to TCA § 68-11-100, 1 *et seq.* maintains this registry for individuals substantiated for abuse, neglect, mistreatment, and exploitation of vulnerable persons, which includes persons with intellectual disabilities. The law contains all pertinent provisions for notice to individuals and procedures for an administrative appeal before any registry placement.

This check must be performed on the employee, subcontractor, or volunteer **prior to** having direct contact with persons receiving services and/or direct responsibility as described below.

- The National Sex Offender Registry, also known as the Dru Sjodin National Sex Offender Public Website (NSOPW), is a partnership between the U.S. Department of Justice and state, territorial and tribal governments which work together to collect comprehensive information into one national registry led by the Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking. This check must be performed on the employee, subcontractor, or volunteer **prior to** having direct contact with persons receiving services and/or direct responsibility as described below.
- Systems for Award Management (SAM) is an official U.S. Government system that consolidates the capabilities of multiple systems and information sources used by the Federal government in conducting the acquisition and financial assistance process, including grants and cooperative agreements. This check must be performed on the employee, subcontractor, or volunteer **prior to** having direct contact with persons receiving services and/or direct responsibility as described below and on a monthly basis thereafter.
- The OIG's List of Excluded Individuals/Entities (LEIE) provides information to the health care industry and the public regarding individuals and entities currently excluded from participation in Medicare, Medicaid, and all other Federal health care programs. This check must be performed on the employee, subcontractor, or volunteer **prior to** having direct contact with persons receiving services and/or direct responsibility as described below and on a monthly basis thereafter.
- The TennCare Terminated Provider List (TTPL) is a list of providers that TennCare has terminated for cause. If there is a match on the TTPL, a provider should email ProgramIntegrity.TennCare@tn.gov to receive additional verification if necessary. This check must be performed on the employee, subcontractor, or volunteer **prior to** having direct contact with persons receiving services and/or direct responsibility as described below and on a monthly basis thereafter.
- Tennessee Felony Offender Information Lookup (FOIL): The information available on this list pertains to Tennessee felony offenders who are or who have been in the custody of the Tennessee Department of Correction or under the Supervision of the Tennessee Board of Probation and Parole. The information is submitted by various jurisdictions within Tennessee. Confirmation and/or elaboration should be obtained from the originating jurisdiction. This check must be performed on the employee, subcontractor, or volunteer **prior to** having direct contact with persons receiving services and/or direct responsibility as described below.

The criminal background check, including registry checks, must be performed **prior to** that employee, subcontractor, or volunteer having direct contact with persons receiving services and/or direct responsibility. If a potential employee, subcontractor, or volunteer's name appears on any of the registries listed in (1)- (5) above, that individual is disqualified from providing services.

However, if a potential employee, subcontractor, or volunteer's name does **not** appear on the registries listed in (1)- (5) above, but the criminal background check returns results of a prior felony or misdemeanor conviction and/or the employee, subcontractor, or volunteer appears on the Tennessee Felony Offender Information Lookup (the 6th registry), the provider must use its discretion as to whether that individual is appropriate to have direct contact with members and/or direct responsibility for that member. This means conducting an individualized assessment of the potential employee, subcontractor, or volunteer's background check. The provider should, therefore, **not** have a blanket policy of not hiring applicants with prior felony or misdemeanor convictions. The individualized assessment must consider the following three (3) factors:

1. Whether or not the evidence gathered during the individualized assessment shows that the criminal conduct is related to the job in such a way that could place the member at risk;
2. The nature and gravity of the offense or conduct, such as whether the offense is related to physical or sexual or emotional abuse of another person, if the offense involves violence against another person or financial harm to a person; and
3. The time that has passed since the offense or conduct and/or completion of the sentence.

For all employees, subcontractors, and volunteers who qualify to provide services to members, the HCBS provider shall maintain proof that requisite criminal background checks, including registry checks, were completed and provide these records to the MCO and/or DDA for review upon request.

For employees, subcontractors, and volunteers of providers who will be providing direct contact with, or direct responsibility for, members, the criminal background check and registry check must have been performed within thirty (30) days of the first day the employee, subcontractor, or volunteer begins providing direct contact with, or direct responsibility for, members.

As it relates to volunteers providing direct contact, providers may accept a criminal background check conducted by an agency which has provided the volunteer instead of conducting an additional background check on the volunteer, as long as the criminal background check meets the provider's criteria (e.g., goes back the same number of years the provider requires for checks of its staff), and was conducted no later than three hundred and sixty-five (365) calendar days earlier from the date the volunteer will begin assisting any member. However, even if the provider is relying on the results of a criminal background check conducted by the volunteer agency, the provider shall still conduct the required registry checks of the six registries listed above itself prior to the volunteer providing direct contact with, or direct responsibility for, a member.

2. **Employees, subcontractors, and volunteers who will have incidental contact only with members**

An employee, subcontractor, or volunteer who does not have direct contact with a member or direct responsibility for a member, but who has incidental contact only, is an individual who will **not** provide hands on support with any activities of daily living, who does **not** have supervisory authority or responsibility for either the member or for staff having direct contact with a member, and who has limited face-to-face interaction with that member. For purposes of this protocol, face-to-face interaction can be conducted both in-person and through virtual interaction with the member.

If the employee, subcontractor, or volunteer will not have direct contact with, or direct responsibility for, a member receiving service, but will instead have incidental contact only, that employee, subcontractor, or volunteer must have registry checks conducted for all six registries listed above prior to having incidental contact with persons receiving services but does not require a criminal background check. If the potential employee, subcontractor, or volunteer's name appears on any of the registries listed in (1)- (5) above, that individual is disqualified from having incidental contact with members. However, if the potential employee, subcontractor, or volunteer's name does **not** appear on the registries listed in (1)- (5) above, but appears on the Tennessee Felony Offender Information Lookup, the provider must use its discretion as to whether that individual is appropriate to have incidental contact with members. This means conducting an individualized assessment. The provider should, therefore, **not** have a blanket policy of not hiring applicants with prior felony convictions.

For all employees, subcontractors, and volunteers who qualify to provide services constituting only incidental contact with members, the provider shall maintain proof that requisite registry checks were completed and provide these records to the MCO, TennCare and/or DDA for review upon request.

3. Employees, subcontractors, and volunteers who will not have direct or incidental contact

If the employee, subcontractor, or volunteer does not meet the definitions above for either providing direct contact or incidental contact to a member, then the background check and registries (as noted above) are not required to be checked for that employee, subcontractor, or volunteer.

Criminal Background Check and Registry Check Oversight and Monitoring for HCBS Providers

The HCBS provider shall be responsible for complying with all requirements established in both Title 52 and the approved waiver for obtaining a criminal background check and conducting registry checks, as outlined above. Funds may be recouped for services performed by provider employees, subcontractors, or volunteers who have not completed background or registry checks in compliance with this protocol.

MCOs and DDA are required to screen their owners, agents, employees, providers, and subcontractors initially and on an ongoing monthly basis against OIG, SAM, and TTPL.

The MCOs and DDA will continue to follow their distinct processes for review and approval of background check exemptions for potential staff.

It is the responsibility of DDA to provide oversight of compliance with this Protocol for 1915(c), Katie Beckett, CHOICES CLS/CLS-FM, and ECF providers through the Quality Monitoring provisions. The MCOs will provide oversight of compliance for all other CHOICES providers. This will include review of the initial and ongoing background check and registry checks, as applicable, for all new employees, subcontractors, and volunteers of HCBS providers through each entity's Quality Monitoring process.

References

- Contractor Risk Agreement (CRA): Personnel Requirements - Licensure and Background Checks
- Interagency Agreement for I/DD MLTSS Program Operations & Quality Monitoring between TennCare and DDA: Staffing Responsibilities – Criminal Background Check Requirements
- 1915(c) Waivers Appendix C-2.a. and C-2.b.
- TennCare Managed Care Program Integrity Manual
    - TennCare OPI Managed Care Program Integrity Manual