

FINAL BILL ANALYSIS

BILL #: CS/SB 1992

FINAL HOUSE FLOOR ACTION:

106 Y's 0 N's

SPONSOR: *Sen. Storms (Rep. Holder)*

GOVERNOR'S ACTION: Vetoed

COMPANION BILLS: CS/HB 7233

SUMMARY ANALYSIS

CS/SB 1992 passed the House on May 5, 2011. The bill was vetoed by the Governor on June 23, 2011.

In 2010, the Legislature substantially rewrote the requirements and procedures for background screening of the individuals and businesses that deal primarily with vulnerable populations. Owners, operators, and employees of entities that care for vulnerable persons, and many of their volunteers, are required to undergo background screening.

The bill exempts from screening or rescreening: mental health personnel working in hospitals with less than 15 hours of direct contact with adult patients per week in a hospital; Certified Nursing Assistant applicants who have successfully passed background screening within 90 days of applying for certification; and law enforcement officers working or volunteering in a capacity that would otherwise require them to be screened. The bill exempts from screening the following who provide services through a direct service provider that has a contractual relationship with the Department of Elderly Affairs (DOEA):

- Volunteers with less than 20 hours per month of direct, face-to-face contact with a client;
- Individuals related by blood to the client;
- The client's spouse;
- Attorneys in good standing with the Florida Bar; and
- Individuals providing services within the scope of his or her license.

The bill provides time frames for background screenings by DOEA and the Agency for Health Care Administration (AHCA).

The bill requires electronic fingerprinting vendors to use technology systems that are compliant with the systems used by the Florida Department of Law Enforcement (FDLE) and have the ability to electronically communicate the screening results. Fingerprints will be retained by FLDE when taken on or after July 1, 2013.

Employers are allowed to hire an employee to a position that requires background screening before the screening is complete for training and orientation. The employee may not have any contact with clients until successful completion of the screening.

Personnel of an entity that provides care or care placement services as described in s. 943.0542, F.S., are allowed to apply for an exemption for disqualification.

AHCA, DOEA, FDLE, the Department of Children and Family Services, the Department of Health, the Agency for Persons with Disabilities, and the Department of Juvenile Justice are directed to create a statewide interagency background screening workgroup to develop a work plan for implementing a statewide system for streamlining background screening processes and sharing background screening information. The workgroup must report to the Legislature by November 1, 2011.

I. SUBSTANTIVE INFORMATION

A. EFFECT OF CHANGES:

Current Situation

Background Screening

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

In 1995, the Legislature created standard procedures for the screening of prospective employees, owners, operators, contractors, and volunteers where the Legislature had determined it necessary to conduct criminal history background screenings to protect vulnerable persons. Chapter 435, F.S., outlines the screening requirements. The Florida Department of Law Enforcement (FDLE) processes criminal history checks for the screening entity. In 2010, the Legislature substantially rewrote the requirements and procedures for background screening of these persons and businesses.¹ Major changes made by the 2010 legislation include:

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

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

Mental Health Personnel

“Mental health personnel” are required to be Level 2 screened. “Mental health personnel” includes program directors, clinicians, staff, and volunteers working in public or private mental

¹ Ch. 2010-114, L.O.F.

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

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

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

health programs and facilities who have direct contact with individuals.⁵ Volunteers that have less than ten hours per month of contact with patients are not required to be screened so long as they remain in the line of sight of someone who has been Level 2 screened while having direct contact with patients.⁶

Effect of Changes

The bill restores an exemption from screening removed last year for mental health personnel with 15 hours or less direct contact with patients per week in a hospital licensed pursuant to ch. 395, F.S. The exemption does not apply to persons working in a mental health facility where the primary purpose of the facility is the treatment of minors.

Agency for Health Care Administration Rescreening Schedule

Persons screened under the Agency for Health Care Administration (AHCA) must be rescreened every five years. Last year, authority was given to AHCA to establish by rule a staggered schedule for the rescreening of all persons who have a controlling interest in, is employed by, or contracts with a licensee on July 31, 2010. All such persons must be rescreened by July 31, 2015.

The bill delays until July 31, 2013, the start of the staggered period for rescreens of persons who have a controlling interest in, is employed by, or contracts with a licensee on July 31, 2010. The bill adds the schedule to statute eliminating the need for a rule.

Summer Camps

Summer camps are not licensed by the state but owners, operators, employees, and volunteers are required to be Level 2 screened.⁷ Volunteers that have less than ten hours per month of contact with children are not required to be screened so long as they remain in the line of sight of someone who has been Level 2 screened while having direct contact with children.⁸

The bill adds law enforcement officers with active certification to those licensed persons who do not have to be screened for purposes of ch. 409, F.S. The exemption will apply to law enforcement officers who work or volunteer in summer camps and other facilities regulated under ch. 409 such as foster group homes and residential child-caring agencies.

The Department of Elderly Affairs

The Department of Elderly Affairs (DOEA) is the designated state unit on aging as defined in the Older Americans Act (OAA) of 1965.⁹ As such, DOEA's role is to administer the state's OAA allotment and grants, and to advocate, coordinate, and plan all elder services.¹⁰ The OAA requires states to provide elder services through a coordinated service delivery system through designated Area Agencies on Aging (AAAs). Chapter 430, F.S., requires DOEA to fund service delivery "lead agencies" that coordinate and provide a variety of oversight and elder support services at the consumer level in the counties within each planning and service area. DOEA is

⁵ S. 394.4572(1)(a), F.S.

⁶ S. 394.4572(1)(c), F.S.

⁷ S. 409.175(2)(i) and (k), F.S.

⁸ S. 409.175(2)(i), F.S.

⁹ S. 305(a)(1)(c), Older Americans Act.

¹⁰ S. 430.04(1), F.S.

94 percent privatized through contracts with local entities and utilizes over 45,000 volunteers to deliver information and services to elders.¹¹ Many of the volunteers are elders themselves.¹²

Direct Service Providers

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

The statute contains no exception from background screening for a volunteer who has occasional or limited contact with elders. In other statutes, there are exceptions for volunteers who are in brief or occasional contact with vulnerable populations. For example, s. 393.0655(1), F.S., exempts from screening a volunteer who assist with persons with developmental disabilities if the volunteer assists less than 10 hours per month and a person who has been screened is always present and has the volunteer within his or her line of sight.¹³

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

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

Area Agencies on Aging and Elder Care Services are entities who contract with DOEA to provide services to elders. Representatives of several of these entities report that the requirement of Level 2 background screening of volunteers has dramatically reduced the number of volunteers, potentially impacting the availability of services to elders.¹⁴ The Meals on Wheels program is dependent on volunteers, and the program is currently losing volunteers who

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

¹² *Id.*

¹³ See e.g. s. 394.4572(1)(a), F.S. (contact with persons held for mental health treatment) and s. 409.175(2), F.S. (contact with children).

¹⁴ Meetings with Health and Human Services Committee staff in November and December of 2010, and correspondence on file with the Committee.

cannot afford to pay for the cost of a Level 2 background screening. Senior centers, congregate meal sites, and health and wellness programs are also dependent on volunteers.

The provisions of the 2010 legislation also impacts Home Care for the Elderly (HCE)¹⁵ caregivers. Many HCE caregivers are family members. These family members receive a monthly stipend of \$106 to help care for a family member at home. The stipend is used to pay for incontinence products, nutritional supplements, respite care, and other needed products and services. The new Level 2 background screening requirement is applicable to these family members who act as caregivers.

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

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

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

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

The bill provides time frames for screenings by DOEA:

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

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

Employment Prior to Screening

Currently an employer may not "hire, select, or otherwise allow an employee to have contact with any vulnerable person that would place the employee in a role that requires background

¹⁵ Department of Elder Affairs, Summary of Programs and Services (2010).

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

screening” until the person has successfully completed the background screening.¹⁷ The language creates uncertainty whether a person can be hired for the purpose of training and orientation prior to successfully completing the background screening.

The bill provides that an employer may hire an employee to a position that requires background screening before the employee completes the screening process for training and orientation purposes. However, the employee may not have direct contact with vulnerable persons until the screening process is successfully completed.

Electronic Screening Vendors

By July 1, 2012, all fingerprints submitted to FDLE must be submitted electronically.¹⁸ An agency may by rule require fingerprints to be submitted electronically prior to that date.¹⁹ An agency may contract with one or more vendors to perform all or part of the electronic fingerprinting and must ensure that each vendor is qualified and will ensure the integrity and security of all personal information.²⁰

The bill requires vendors that do electronic fingerprinting to:

- Meet certain technical standards that are compatible with technology used by FDLE; and
- Have the ability to communicate electronically with the relevant state agency.

FDLE is directed to retain the fingerprints of any person who is screened on or after July 1, 2013.

Exemptions from Disqualification; Qualified Entities

A person disqualified for offenses revealed pursuant to background screening under ch. 435, F.S., may be eligible for an exemption from disqualification. The head of the appropriate agency may grant an exemption from disqualification for:

- Felonies for which at least 3 years have elapsed since the completion of confinement, supervision, or sanction for the disqualifying felony;
- Misdemeanors for which the applicant has completed or been lawfully released from confinement, supervision, or sanction;
- Offenses that were felonies when committed but that are now misdemeanors and for which the applicant has been lawfully released from confinement, supervision, or sanction; or
- Certain findings of delinquency.²¹

The applicant must demonstrate by clear and convincing evidence that the applicant should not be disqualified.²² Disqualification may not be removed for certain serious offenses.²³

A “qualified entity” is a business or organization that provides care, treatment, education, training, instruction, supervision, or recreation to children, the elderly, or individuals with

¹⁷ S. 435.06(2)(a), F.S.

¹⁸ S. 435.04(1)(b), F.S.

¹⁹ S. 435.04(1)(d), F.S.

²⁰ S. 435.04(1)(c), F.S.

²¹ S. 435.07, F.S.

²² S. 435.07(3)(a), F.S.

²³ S. 435.07(4), F.S.

disabilities.²⁴ Qualified entities that register with FDLE may screen personnel and employees through the submission of fingerprints. Each request must be voluntary and conform to the requirements of the National Child Protection Act of 1993, as amended.²⁵

The bill allows personnel employed by qualified entities to apply for exemptions from disqualification under ch. 435, F.S.

Certified Nursing Assistants

Certified Nursing Assistants (CNAs) provide care and assistance to persons with their activities of daily living.²⁶ To become a CNA an individual must:

- Demonstrate a minimum competency to read and write.
- Successfully pass the Level 2 background screening described in s. 400.215, F.S.²⁷
- Meet one of the following requirements:
 - Successfully complete an approved training program and examination.
 - Achieve a minimum score, on the nursing assistant competency examination, be 18 years old, and have a high school degree or the equivalent.

Only CNAs may be employed in nursing homes to provide nursing assistance.²⁸ However, there are limited exceptions for a person to begin working as a CNA for up to four months prior to certification when the person is enrolled in a CNA program, is a CNA in another state, or has preliminarily passed the CNA exam.²⁹ Such individuals must be background screened pursuant to s. 400.215, F.S., before beginning work as a CNA in a nursing home.

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

Statewide Interagency Background Screening Workgroup

The bill requires AHCA, FDLE, DOEA, the Department of Children and Family Services, the Department of Health, and the Agency for Persons with Disabilities to create the Statewide Interagency Background Screening Workgroup. The workgroup shall develop a work plan for implementing a statewide system for streamlining background screening processes and sharing background screening information.

The work plan is to be submitted to Speaker of the House of Representatives and the President of the Senate by November 1, 2011.

²⁴ S. 943.0542(1), F.S.

²⁵ S. 943.0542(2), F.S.

²⁶ S. 464.201(5), F.S.

²⁷ The background screening required by s. 400.215, F.S., refers to the screening described in s. 408.809, F.S., and is identical to the background screening required by s. 430.0402, F.S., except that the following are also disqualifying offenses: s. 741.28, F.S., relating to domestic violence, s. 831.30, F.S., relating to fraud in obtaining medicinal drugs, and s. 831.31, F.S., 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.

²⁸ S. 400.211, F.S.

²⁹ *Id.*

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill will reduce the number of persons who will need to undergo background screening prior to working with vulnerable persons. The Level 2 screenings cost \$43.25 (the \$24 state fee, plus an additional \$19.25 for electronic fingerprints) or \$30.25 (\$24 plus \$6.25 for hard copy fingerprints).³⁰

D. FISCAL COMMENTS:

None.

³⁰ See note 4, supra.