

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

BILL: CS/SB 2330

SPONSOR: Criminal Justice Committee and Senator Saunders

SUBJECT: Employment Background Screening

DATE: April 24, 2003 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Clodfelter	Cannon	CJ	Fav/CS
2.	_____	_____	HC	_____
3.	_____	_____	APJ	_____
4.	_____	_____	AJ	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

This bill revises the Level 1 and Level 2 employment screening standards set forth in ch. 435, F.S. The bill specifies additional screening standards for persons employed in health care facilities licensed or registered by the Agency for Health Care Administration (AHCA), or seeking professional licensure or certification through the Department of Health.

The bill also provides an exception to ch. 94-228, Laws of Florida, to require consideration of disqualifying offenses regardless of when they were committed. A reference to prior sunset repeal of a requirement for background screening of applicants for registration as a health care services pool is also deleted.

This bill substantially amends, creates, or repeals the following sections of the Florida Statutes: 400.980, 435.03, 435.04, 943.0585, and 943.059.

II. Present Situation:

The Agency for Health Care Administration (AHCA) licenses, certifies, and registers health care facilities, health care providers, and health care services or programs. AHCA is responsible for the regular inspection or survey of those entities and investigates reported complaints. The Department of Health licenses, certifies, or registers health care practitioners.

The 1995 Legislature enacted ch. 435, F.S., to establish statewide standards for employment screening. This chapter specifies the types of criminal offenses that disqualify an individual from employment in a position for which a background screening is required. Persons subject to the outlined provisions must not have been found guilty of any prohibited offense, regardless of the level of adjudication or plea entered.

Chapter 95-228, Laws of Florida, which included the creation of ch. 435, F.S., provided that the act applied to offenses committed on or after October 1, 1995. This has been judicially determined to preclude exclusion of persons from employment under the provisions of ch. 435, F.S., on the basis of consideration of offenses committed before that time. In both *Guest v. Department of Juvenile Justice*, 786 So.2d 677 (Fla. 1st Dist. 2001) and *Florida Public Employees Council 79, AFSCME v. Department of Children and Families*, 794 So.2d 733 (Fla. 1st Dist. 2001), the First District Court of Appeal found that persons who had committed offenses listed as disqualifying under ch. 435, F.S., prior to October 1, 1995, did not have standing to contest the constitutionality of ch. 435, F.S. The cases did not address whether the agencies could consider offenses committed prior to the applicable date of ch. 435, F.S., independently of the statutory framework.

Currently, there are two types of criminal history screenings. A Level 1 criminal history background check is strictly a demographic search of the Florida Department of Law Enforcement's (FDLE) criminal history repository. This screening provides a quick response to the requestor of felony and serious misdemeanor offenses that occurred within the state. The cost of a Level 1 screening is \$15.

A Level 2 criminal history background check is based on both a demographic check and a fingerprint check. The search encompasses not only all arrests in Florida, but nationwide as well. The cost of a Level 2 screening is \$39. Currently, AHCA is processing Level 1 and Level 2 criminal history background checks for individuals applying to operate or to be employed in health care facilities licensed by AHCA.

In 1998, as part of Florida's effort to ensure a safe living environment for the elderly and other vulnerable populations, the Legislature established mandatory background screening for certain individuals applying to operate or be employed in a health care facility licensed by AHCA. Nursing homes, assisted living facilities, home health agencies, nurse registries, hospices, health care services pools, and home medical equipment providers are among the facility types licensed under ch. 400, F.S., that are currently complying with background screening requirements set forth in ch. 435, F.S.

The 1998 legislation also included a sunset provision for the background screening program that was effective June 30, 2001, unless reviewed and reenacted by the Legislature. In preparation for the sunset review, AHCA was directed to conduct a study of the effectiveness of the background screening requirements in preventing persons with specified criminal histories from owning, operating or working within health care facilities. To accomplish this study, AHCA assembled an interagency workgroup which concluded that background screening was an effective method in reducing the incidence of victimization by caregivers. The workgroup proposed three recommendations, one of which was to review and revise ch. 435, F.S. In response to these recommendations, the Legislature enacted ch. 2001-67, Laws of Florida, which reenacted the background screening requirements and called for the reconvening of the interagency workgroup to study uniform screening requirements among health care facilities and propose amendments to ch. 435, F.S. However, the requirement for background screening of applicants for registration as a health care services pool was not reinstated.

The 2001 workgroup held three public meetings to discuss the issues and recommended specific amendments and additions to the statute in a report submitted to the Governor, the President of the Senate, and the Speaker of the House of Representatives in December 2001. The report recommended amendments to ch. 435, F.S., to conform that chapter to recent changes in criminal statutes. The report recommended creating background screening requirements directed at persons employed in health care facilities licensed by AHCA or seeking professional licensure or certification by the Department of Health. The new requirements would identify criminal offenses that elderly and vulnerable populations frequently fall victim to, such as burglary, fraudulent acts, identity theft, and financial crimes, such as uttering or forgery.

The National Elder Abuse Incidence Study: Final Report published by the U.S. Administration on Aging in 1998 established that financial/material exploitation accounted for 30.2 percent of substantiated reports of elder maltreatment in 1996. A 1999 report published by the National Center of Elder Abuse (NCEA) stated that a troubling characteristic of financial crime is its repetitive nature. Victims are likely to become targets for re-victimization and offenders are likely to re-offend.

A prior sampling of AHCA's Background Screening Unit's Level 1 and Level 2 results indicated that 26 percent of Level 1 criminal history reports contain one or more of these additional offenses, while 6 percent of Level 2 criminal history reports contain one or more of these additional offenses.

The report also recommended a provision for re-screening every 5 years or following a break in employment of more than 90 days. Current standards allow a facility to use a criminal history screening from a previous employer, which leaves open the possibility that a person could be hired based on an outdated screening.

AHCA's Background Screening Unit indicates that in fiscal year 2000-01, 19 percent of the individuals screened at Level 1 had a criminal history, with 3 percent being disqualified and 5 percent potentially disqualified. Level 2 data showed approximately 10 - 13 percent of screenings disclosed a criminal history with 2 percent disqualified and 3 - 7 percent potentially disqualified. These percentages are lower than in previous years, a possible indication that background screening is serving as a deterrent for some individuals with criminal backgrounds seeking employment within the health care field.

AHCA currently receives criminal history records from FDLE, including sealed and expunged records. Section 943.0595(4)(a)5, F.S., provides for the release of expunged criminal history records and s. 943.0589(4)(a)5, F.S., provides for the release of sealed criminal history records to several entities including the Department of Children and Families and the Department of Juvenile Justice. Facilities licensed under ch. 400, F.S., and regulated by AHCA are subject to these sections of law, but the statutes do not specifically authorize release of sealed and expunged records to AHCA and do not include 9 additional providers regulated by the Agency and subject to background screening.

III. Effect of Proposed Changes:

Section 1: Provides that the background screening requirements of ch. 435, F.S., require consideration of specified offenses regardless of when they were committed. This supersedes application of s. 64 of ch. 95-228, Laws of Florida, which prohibited consideration of offenses committed prior to October 1, 1995. The statute already provides a mechanism for the applicant or employee to request an exemption from the automatic exclusions from employment, which is intended to satisfy constitutional due process requirements.

Section 2: Repeals s. 400.980(4)(h), F.S., which includes a June 30, 2001, sunset provision repealing a requirement that applicants for registration as a health care services pool undergo a Level 2 background screening. The repeal did not affect background screening of individuals employed by health care services pools.

Section 3: Amends s. 435.03, F.S., which establishes Level 1 employment screening standards, to modify the list of prohibited offenses. Subsection (2) of s. 435.03, F.S., is amended as follows:

- s. 794.011, F.S., relating to sexual battery, is replaced with a general reference to ch. 794, F.S., relating to sexual battery, and
- s. 798.02, F.S., relating to lewd and lascivious behavior, is deleted; however, ch. 800, F.S., relating to lewdness and indecent exposure is kept on the list.

Subsection (3) of s. 435.03, F.S., is also amended to remove the current limitation on the types of employees who must be screened for acts of domestic violence as defined in s. 741.28, F.S., and to add screening for a violation of any order for injunction for protection as described in s. 741.30, F.S., or s. 741.31, F.S.

Section 4: Amends s. 435.04, F.S., which establishes Level 2 employment screening standards, to modify the list of prohibited offenses. Subsection (2) of s. 435.04, F.S., is amended as follows:

- s. 794.011, F.S., relating to sexual battery, is replaced with a general reference to ch. 794, F.S., relating to sexual battery, and
- s. 798.02, F.S., relating to lewd and lascivious behavior, is deleted; however, ch. 800, F.S., relating to lewdness and indecent exposure is kept on the list.

Subsection (3) is amended to remove the current limitation on the types of employees who must be screened for committing acts of domestic violence as defined in s. 741.28, F.S.

Section 5: Amends 943.0585, F.S., to add AHCA to the list of agencies that can receive expunged records from FDLE, and to add statutory references to ten health-related areas for which AHCA is already permitted or required to conduct a background screening.

Section 6: Amends s. 943.059(4), F.S., to add AHCA to the list of agencies that can receive sealed records from FDLE, and to add statutory references to ten health-related areas for which AHCA is already permitted or required to conduct background screening.

Section 7: Reenacts 39.821(1), F.S., to incorporate amendments made to s. 435.04, F.S.

Section 8: Reenacts 400.414(1)(g), F.S., to incorporate amendments made to s. 435.03, F.S.

Section 9: Provides that the act is to take effect upon becoming a law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

The CS does not require screening of current employees. However, discovery of prior offenses that retroactively disqualify persons who committed offenses prior to October 1, 1995, may result in litigation challenging the constitutionality of the statute. Under current case law, it does not appear likely that the background screening requirements and disqualification standards will be considered to be a violation of the constitutional provision against *ex post facto* punishments. The more significant challenge may be raised by current employees who have disqualifying offenses that predate October 1995, such as the plaintiffs in the *Guest* and *Florida Public Employees Council 79, AFSCME* cases. However, s. 435.07, F.S., provides a mechanism to request an exemption from disqualification that should satisfy any constitutional due process concerns.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

Retroactive extension of the applicability of the screening criteria may result in challenges to the constitutionality of the statute. While it is anticipated that the courts would uphold the constitutionality of the statute, defense of such an action would have a cost that cannot currently be determined.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.
