

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 7233 PCB HHSC 11-08 Background Screening
SPONSOR(S): Judiciary Committee, Health & Human Services Committee, Holder
TIED BILLS: None **IDEN./SIM. BILLS:** CS/SB 1992

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Health & Human Services Committee	16 Y, 0 N	Shaw	Gormley
1) Judiciary Committee	17 Y, 0 N, As CS	Thomas	Havlicak

SUMMARY ANALYSIS

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

This bill addresses many issues regarding background screening. The bill exempts from screening:

- Mental health personnel with less than 15 hours of direct contact with patients per week in a hospital.
- Law enforcement officers working or volunteering in summer camps.
- Under the Department of Elderly Affairs, 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.
- Certified Nursing Assistant applicants who have successfully passed background screening within 90 days of applying for certification.

The bill requires electronic fingerprinting vendors to meet certain technical standards and to take two sets of prints from each applicant; one to send to the Florida Department of Law enforcement, the other to keep in case FDLE or the FBI can't read the first set.

The bill allows personnel employed by qualified entities to apply for exemptions from disqualification. The bill provides that an exemption from disqualification granted under prior screenings is preserved through subsequent screenings under certain conditions.

The bill requires state agencies that are part of the screening process to evaluate state and federal regulations that pose barriers to efficient screening for persons working with vulnerable populations and issue recommendations.

The bill has no fiscal impact on state or local government.

The bill has an effective date of July 1, 2011.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

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 the Florida Department of Law Enforcement.
- 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 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

¹ Chapter 2010-114, L.O.F.

² Section 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 Section 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).

⁵ Section 394.4572(1)(a), F.S.

⁶ Section 394.4572(1)(c), F.S.

Effect of Proposed 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.

Agency for Health Care Administration – staggering of rescreens

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.

Effect of Proposed Changes:

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

Effect of Proposed Changes:

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., including summer camps.

The Department of Elderly Affairs

The Department of Elderly Affairs (“DOEA” or “the department”) is the designated state unit on aging as defined in the Older Americans Act (OAA) of 1965.⁹ As such, the department’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 the department 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. The department is 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

⁷ Section 409.175(2)(i) and (k), F.S.

⁸ Section 409.175(2)(i), F.S.

⁹ Section 305(a)(1)(C), Older Americans Act.

¹⁰ Section 430.04(1), F.S.

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

¹² *Id.*

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 the Department of Elderly Affairs 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 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.

Effect of Proposed Changes:

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.

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.

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

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 the Department of Law Enforcement 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.

Electronic Screening Vendors

By July 1, 2012, all fingerprints submitted to FDLE must be submitted electronically.¹⁷ An agency may by rule require fingerprints to be submitted electronically prior to that date.¹⁸ 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.¹⁹

Effect of Proposed Changes:

The bill requires vendors that do electronic fingerprinting to:

- Meet certain technical standards that are compatible with technology used by FDLE;
- Have the ability to communicate electronically with the relevant state agency; and
- Take two sets off prints; one to send to FDLE, the other to keep in case FDLE or the FBI can't read the first set.

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:

- (a) Felonies for which at least 3 years have elapsed since the completion of confinement, supervision, or sanction for the disqualifying felony;

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

¹⁷ Section 435.04(1)(b), F.S.

¹⁸ Section 435.04(1)(d), F.S.

¹⁹ Section 435.04(1)(c), F.S.

- (b) Misdemeanors for which the applicant has completed or been lawfully released from confinement, supervision, or sanction;
- (c) 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
- (d) Certain findings of delinquency.²⁰

The applicant must demonstrate by clear and convincing evidence that the applicant should not be disqualified.²¹ Disqualification may not be removed for certain serious offenses.²²

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 disabilities.²³ 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.²⁴

Effect of Proposed Changes:

The bill allows personnel employed by qualified entities to apply for exemptions from disqualification under ch. 435, F.S. The bill further provides that an exemption from disqualification granted under prior screenings is preserved through subsequent screenings of the same person, provided:

- No new offenses are revealed in the subsequent screening, and
- The person is otherwise still eligible for the exemption.

Certified Nursing Assistants

Certified Nursing Assistants (CNAs) provide care and assistance to persons with their activities of daily living.²⁵ 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.²⁶
- 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.²⁷ 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.²⁸ Such individuals must be background screened pursuant to s. 400.215, F.S., before beginning work as a CNA in a nursing home.

Effect of Proposed Changes:

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

²⁰ Section 435.07, F.S.

²¹ Section 435.07(3)(a), F.S.

²² Section 435.07(4), F.S.

²³ Section 943.0542(1), F.S.

²⁴ Section 943.0542(2), F.S.

²⁵ Section 464.201(5), F.S.

²⁶ 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, relating to domestic violence, s. 831.30, relating to fraud in obtaining medicinal drugs, and s. 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.

²⁷ Section 400.211, F.S.

²⁸ *Id.*

certification, the Board of Nursing shall waive the requirement that the applicant pass another background screening.

Review of State and Federal Laws

The bill requires the Agency for Health Care Administration, the Florida Department of Law Enforcement, the Department of Children and Family Services, the Department of Elderly Affairs, the Department of Health, and the Agency for Persons with Disabilities to evaluate state and federal regulations that pose barriers to efficient screening for persons working vulnerable populations and issue recommendations. Such findings and recommendations are to be made to the Governor, Speaker of the House of Representatives, and the President of the Senate by November 1, 2011.

B. SECTION DIRECTORY:

- Section 1:** Amends s. 394.4572, F.S., relating to screening of mental health personnel.
Section 2: Amends s. 408.809, F.S., relating to background screening; prohibited offenses.
Section 3: Amends s. 409.1757, F.S., relating to persons not required to be refingerprinted or rescreened.
Section 4: Amends s. 430.0402, F.S., relating to screening of direct service providers.
Section 5: Amends s. 435.04, F.S., relating to Level 2 screening standards.
Section 6: Amends s. 435.07, F.S., relating to exemptions from disqualification.
Section 7: Amends s. 464.203, F.S., relating to certified nursing assistants; certification requirements.
Section 8: Provides for certain agencies to evaluate state and federal regulations and issue findings and recommendations.
Section 9: Provides an effective date of July 1, 2011.

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).²⁹

²⁹ See note 4, supra.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not Applicable. This bill does not appear to affect county or municipal governments.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The Department of Elderly Affairs is given rule-making authority to establish a schedule to stagger the implementation of the required background screenings over a 1-year period, beginning July 1, 2011, through July 1, 2012.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On April 5, 2011, the Health & Human Services Committee adopted one amendment which provided that if an applicant for certification as a Certified Nursing Assistant (CNA) has successfully passed the Level 2 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. The Proposed Committee Bill was reported favorably.

On April 14, 2011, the Judiciary Committee adopted seven amendments that:

AMENDMENT 1 - Adds law enforcement officers with active certification to those licensed persons who do not have to be rescreened for purposes of ch. 409, F.S., including summer camps.

AMENDMENT 2 - Restores an exemption from disqualification removed last year for mental health personnel with less than 15 hours of direct contact with patients per week in a hospital setting.

AMENDMENT 3 - Exempts attorneys in good standing with the Florida Bar providing free legal service to low-income seniors from inclusion as a "direct service provider" under the Department of Elderly Affairs.

AMENDMENT 4 - Requires vendors that do electronic fingerprinting to:

- 1) meet certain technical standards that are compatible with FDLE;
- 2) have the ability to communicate electronically with the relevant state agency; and
- 3) take two sets off prints; one to send to FDLE, the other to keep in case FDLE or the FBI can't read the first set.

AMENDMENT 5 - Preserves an exemption from disqualification granted under prior screenings for subsequent screenings of the same person, provided:

- No new offenses are revealed in the subsequent screening, and
- The person is otherwise still eligible for the exemption.

In addition, amendment 5 allows qualified entities to apply for exemptions under ch. 435, F.S.

AMENDMENT 6 – Requires state agencies involved in the background screening process to evaluate state and federal regulations that pose barriers to efficient screening of persons working with vulnerable populations and issue recommendations.

AMENDMENT 7 – Extends by one year the staggering of rescreens for persons under the Agency for Health Care Administration required in last year's bill. The amendment adds the schedule to statute eliminating the need for a rule.

This analysis is drawn to the bill as amended by the Judiciary Committee.