






Background Checks

Advanced

The Background Checks - Advanced packet is intended to help answer any questions that remain after reading through the Basics and Intermediate packets. The content in this document focuses on legislation and includes reports used to make recommended changes in 2022 by the Department of Health Care Policy and Financing (HCPF). This information is provided for all stakeholders to utilize.

CONSUMER DIRECT CARE NETWORK COLORADO

COLORADO
Department of Health Care Policy & Financing

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Background Checks Advanced

The following are advanced resources regarding background checks and legislation.

Resources

Colorado Ban the Box Legislation:
cdle.colorado.gov/workplace-conditions/colorado-chance-to-compete-act-ban-the-box

Colorado Bureau of Investigation Employment and Background Checks:
cbi.colorado.gov/sections/biometric-identification-and-records-unit/employment-and-background-checks

Colorado Bureau of Investigation Vendor Contact Information:

- **Colorado Fingerprinting:**
  Toll-Free Phone: **833.224.2227**
  Website: ColoradoFingerprinting.com
- **IdentoGO:**
  Toll-Free Phone: **844.539.5539**
  Website: UEnroll.IdentoGO.com

Colorado Social Media Legislation:
cdle.colorado.gov/workplace-conditions/social-media-and-the-workplace-law

Denver DA:

- Consumer Protection Complaints: DenverDA.org/Consumer-Protection-Complaints
- Consumer Resources: DenverDA.org/Consumer-Resources
- Consumer Outreach: DenverDA.org/Consumer-Outreach
- Fraud Alerts and Newsletter: DenverDA.org/Fraud-Alerts
- Identity Theft Assistance: DenverDA.org/Identity-Theft
- Bad Check Restitution Program: CheckProgram.com/staticwebsites/DenverCO
- Aging and Disability Resources: DenverDA.org/Aging-And-Disability-Resources
- Self Help and General Resources: DenverDA.org/Self-Help-And-General-Resources

Equal Employment Opportunity Commission:
EEOC.gov/Prohibited-Employment-PoliciesPractices

NOLO:
Additional information about viewing a criminal record.
nolo.com/legal-encyclopedia/question-criminal-record-check-another-person-28151.html#:~:text=But%2C%20for%20the%20most%20part,the%20court%20from%20public%20view

Second Chance Center:
SCCColorado.org

AARP Public Policy Institute

Safe at Home? Developing Effective Criminal Background Checks and Other Screening Policies for Home Care Workers

Sara Galantowicz
Healthcare and Science business of Thomson Reuters

Suzanne Crisp
Boston College

Naomi Karp and Jean Accius
AARP Public Policy Institute

Research Report

AARP

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AARP's Public Policy Institute informs and stimulates public debate on the issues we face as we age. Through research, analysis and dialogue with the nation's leading experts, PPI promotes development of sound, creative policies to address our common need for economic security, health care, and quality of life.

The views expressed herein are for information, debate, and discussion, and do not necessarily represent official policies of AARP.

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* Formerly of Thomson-Reuters.

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Also providing valuable external reviews were Pamela Doty of the U.S. Department of Health and Human Services, Office of the Assistant Secretary for Planning and Evaluation (ASPE) and Dr. A.E. "Ted" Benjamin of the UCLA Center for Health Policy Research.

We also appreciate the generous assistance of AARP staff members who shared comments and suggestions, including Ilene Henshaw and Rhonda Richards from Government Relations and Advocacy; Dorothy Siemon from the Office of Policy Integration; and Susan Reinhard, Richard Deutsch and Enid Kassner from the Public Policy Institute.

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EXECUTIVE SUMMARY

KEY FINDINGS

States increasingly require criminal background screening of in-home direct care workers to protect vulnerable care recipients from harm, yet there is no uniform protocol for screening and disqualifying candidates. While the idea of screening is almost universally endorsed by state-level policymakers, they need guidance on what works and is cost-effective, particularly in the current recession. A review of federal Medicaid law and state law, research to date, experience in selected states, and input from key stakeholders reveals the following:

Medicaid Policies Defer to States—and State Laws and Practices Vary Widely

- While the Medicaid program (the major funder of long-term care) requires states to develop and implement provider qualification standards, there is no federal Medicaid requirement mandating criminal background checks, often used as a screening tool, for home and community-based services (HCBS) workers.

- Forty-six states and the District of Columbia mandate preemployment criminal background checks for defined categories of Medicaid in-home workers, based on a 50-state review of laws by the National Conference of State Legislatures for AARP.

- Most of these states enumerate criminal offenses that preclude employment, although the list of disqualifying crimes and the length of the disqualification vary widely.

- Only six states exempt family members or other relatives from criminal background check requirements.

Criminal Background Screening Faces Challenges

- Multiple options and data sources for screening—e.g., state and county records, national FBI checks, state adult protective services registries, commercial databases—are not integrated, and databases may have gaps and errors.

- Costs and staffing burdens are substantial.

Efficacy of Background Checks in Reducing Risk Is Unproven; New Research May Help Policymakers

- There has been no robust scholarship on the relationship between general criminal behavior and elder mistreatment.

- The evidence basis for determining disqualifying offenses is limited, although research could provide a scientific basis for specifying a criminal history that is cause for concern.

- Recent criminology research may provide a scientific basis for the length of disqualification after criminal behavior.

Complementary Strategies Can Help Reduce Risks of Abuse

- These tools include reference checks; interviews; signed statements about job history; and alcohol, drug, and credit checks.

Self-Directed Programs Raise Special Issues

- The self-directed model allows participants to recruit, hire, and supervise their own workers, who may be family members or friends.
- Because these programs allow more choice and risk taking, some states and programs make background checks and/or disqualifications optional.

PROMISING PRACTICES, POLICY OPTIONS, AND FUTURE RESEARCH

Increase the accuracy, speed, and cost-effectiveness of criminal background checks by implementing promising state practices. A federal seven-state pilot program, with an investment of federal funds, yielded promising practices, including the following:

- Integration of data sources on criminal and other relevant history
- Information sharing between various state agencies conducting background checks
- Electronic fingerprint capture to cut time and enhance accuracy
- Dedicated state personnel to maximize efficiency and expertise
- Use of a tiered system, i.e., checking low-cost state records and registries as a first step, followed by higher-cost FBI checks for remaining smaller pool of applicants
- Rap-back system to automatically flag new crimes after hiring home care workers

Avoid unnecessary disqualifications to increase fairness and reduce unintended effects on the workforce. In the future, states and employers should do the following:

- Base disqualifying crimes and the length of disqualifications on solid evidence.
- Provide a waiver or "rehabilitation review" process to allow applicants to demonstrate that they are qualified despite some criminal history.
- Permit appeals of disqualifications to enable applicants to prove that criminal background check results are erroneous.

Use multiple tools to enhance the safety of the home care workforce. Complementary approaches include the following tools:

- Reference checks
- Credit histories
- Detailed application forms with disclosure requirements
- Thorough interviews
- Drug and alcohol screening
- Training and supervision of workers, pre- and postemployment

Empower consumers and employers through education and other resources, such as the following:

- Education on the benefits and limitations of criminal background check screening, including the fact that it can be underinclusive or overinclusive in identifying appropriate job candidates
- Education on complementary screening methods
- Registries of prescreened individuals.

Recognize that self-directed programs raise distinct issues. Self-directed programs should do the following:

- Allow more risk taking and choice for participants when screening and hiring.
- Make criminal background checks available, but allow flexibility in acting on the results, especially for family members and friends.

Conduct additional research on key issues. Government entities could ultimately better target their resources if they fund research now on the following topics:

- The efficacy of criminal background check screening and other screening tools in reducing risk to home care participants
- The deterrent effect of criminal background check requirements
- The evidence for identifying disqualifying offenses and the length of disqualification
- The effect of criminal background screening on the retention of workers

BACKGROUND

Each year, millions of Americans of all ages, many of them elders, receive Medicaid-funded assistance in their homes and communities with completing everyday activities. These home and community-based services range from hands-on help with bathing, dressing, and eating to transportation for medical appointments and links with community events and other services. They play an invaluable role in allowing mature adults to stay in the community-based settings they prefer, rather than enter an institution. At the same time, there are long-standing concerns about the safety of such individuals and their potential risk for being abused or exploited by the workers who provide their direct care. Criminal background checks for people who work with vulnerable elders are one commonly used tool aimed at reducing the risk of elder abuse.

The Medicaid program is the largest single source of funding for long-term care services in the country. Medicaid HCBS for elders and people with disabilities are not provided through a single program, but rather through a patchwork of Medicaid authorities that vary considerably in scope, eligibility, staffing, and service delivery models. Most of these programs contract for services with provider agencies, which must meet state-defined criteria to qualify for participation in the Medicaid program; those criteria may or may not include a check of employees' criminal records. In contrast, some programs allow service recipients to hire their workers directly and may have different background screening requirements. The frontline workers in Medicaid HCBS programs—who

frequently have intimate, ongoing, and unsupervised contact with the population they assist—comprise a variety of licensed and unlicensed staff types whose titles and job descriptions vary across programs.

PURPOSE

AARP's Public Policy Institute undertook this study to examine the current use of criminal background checks for Medicaid direct-care workers in home and community-based settings. The aging of the population and the increasing demand among consumers to receive long-term services and supports at home warrant a review of current research and policy in this area. This study summarizes the literature on this subject; provides some guidance on cost-effective strategies for screening in-home workers; and further explores the efficacy and feasibility of using criminal background checks as a means for reducing the risk of elder abuse, neglect, and exploitation.

METHODOLOGY

This study examines federal regulations and the diversity of state statutes and Medicaid policies regarding worker screening, with a focus on their application in three states that represent a spectrum of on-the-ground screening policies for Medicaid direct care workers, particularly those in self-directed programs: Arkansas, Michigan, and New Mexico. In addition, this study analyzes key policy issues related to criminal background checks for Medicaid staff, including perceived barriers, costs, evidence of efficacy in reducing the risk of abuse, impact on the workforce, and special considerations raised by self-directed HCBS programs. In addition to statutory analysis and literature review, this report incorporates themes that emerged from an invitational roundtable of experts convened by AARP in February 2009 to further explore these issues.

I. INTRODUCTION

> "The live-in caretaker of an 84-year-old Huntington Beach woman allegedly took out fraudulent loans in her name, bilking the older woman out of about $200,000 and putting the woman's home in danger of foreclosure, authorities said Tuesday. Cindi Dee Powell, 54, has been charged with financial elder abuse, grand theft, identity theft, vehicle theft, fraud and forgery. She remains in custody. According to police, Powell moved in with Constance Wakefield about two years ago to help the woman, who uses a wheelchair, around the house and drive her to appointments. Wakefield hired Powell through a classified ad and was not aware that Powell was on probation in another elder abuse case."
>
> *Los Angeles Times, March 11, 2009*[1]

> "A 54-year-old woman is behind bars charged with injury to an elderly person. Police say Esther Pleasant was caught on tape assaulting an 86-year-old woman. Pleasant was employed as a home health care worker taking care of the disabled woman. Family members became suspicious after seeing a bruise on their mom. They set up a 24-hour surveillance camera. 'I seen she abused her the whole time she was giving her a bath, which took about an hour,' said Elizabeth Mouton, the woman's daughter. 'She abused her the whole hour.'"
>
> *KFDM-TV News, Texas, February 27, 2009*[2]

> "As the population of older adults grows to comprise approximately 20 percent of the U.S. population, they will face a health care workforce that is too small and critically unprepared to meet their health needs. If our aging family members and friends are to continue to live robustly and in the best possible health, we need bold initiatives designed to boost recruitment and retention of geriatric specialists and health care aides…."
>
> *Retooling for an Aging America: Building the Health Care Workforce, Institute of Medicine, April 2008.*[3]

Elder abuse by direct care workers—physical abuse, financial exploitation, neglect—is in the paper every day.[4] The aging population boom means that more people will need home care, and qualified workers are in short supply. States are facing a fiscal crunch that may limit their resources for ensuring that older people receiving home and community-based services (HCBS) are safe and secure. In this environment, policymakers must examine how best to spend their limited long-term care dollars.

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1 www.latimes.com/news/local/la-me-ocstory11-2009mar11,0,24126.story.

2 www.kfdm.com/news/woman_30380___article.html/elderly_police.html.

3 www.iom.edu/Object.File/Master/53/509/HealthcareWorkforce_FS.pdf.

4 Data on elder abuse, neglect, and exploitation by direct care workers are scant, although anecdotal evidence is abundant. R. J. Bonnie and R. B. Wallace, *Elder Mistreatment: Abuse, Neglect, and Exploitation in an Aging America* (Washington, DC: National Research Council of the National Academies, National Academies Press, 2003); MetLife Mature Market Institute, the National Committee for the Prevention of Elder Abuse, and the Center for Gerontology at Virginia Polytechnic Institute and State University, *Broken Trust: Elders, Families and Finances* (2009).

States increasingly require criminal background screening of in-home direct care workers to protect vulnerable care recipients from harm, yet there is no uniform protocol for screening and disqualifying candidates. While the idea of screening is almost universally endorsed by state-level policymakers, they need guidance on what works and is cost-effective, particularly at a time when funds to provide quality care are limited. The efficacy of background checks in reducing risk has not yet been fully or rigorously explored, heightening the need for policymakers and program personnel to identify the most efficient set of screening practices. For self-directed programs that allow individuals to hire friends and family, respect for personal choice may call for alternative screening methods.

II. BACKGROUND

Currently, an estimated 17 percent of adults over the age of 65 require assistance with daily activities, such as eating, meal preparation, and housekeeping, and the prevalence of such need rises with age. The Medicaid program, a federal-state partnership, is the largest funder of long-term care services to provide these types of support for daily living. In 2004, Medicaid paid for 49 percent of all long-term care costs.[5] According to the Congressional Research Service, approximately 70 percent of these adults who need long-term care live in the community, not in institutions such as nursing homes.[6]

Demand for, and use of, Medicaid-funded home and community-based long-term care has risen appreciably in the past decade, fueled by several factors. These include state expansion in the number of programs providing such care, increasing demographic pressure from an aging society, and a Supreme Court decision affirming individuals' right to community placement, when appropriate.[7] Between 2000 and 2004 alone, Medicaid spending on home and personal care grew approximately 14 percent.[8] Furthermore, the aging of the so-called baby boom generation will add millions to the number of older Americans who will potentially require long-term care. The number of adults ages 65 and older is projected to grow from 35 million in 2000 to 71.5 million by 2030.[9]

With this population expansion will come an increasing demand for a qualified workforce to provide these services. According to the Bureau of Labor Statistics, in 2006 approximately 767,000 people nationwide were employed as personal and home health care aides, and the agency expects a 51 percent increase in workforce size over the next decade.[10] At the same time, the Census Bureau is reporting little or no growth in the

[5] Dennis Smith, "The Future of Long-Term Care and Medicaid," Testimony before the House Committee on Small Business, July 10, 2006.

[6] R. Price, *Long-Term Care for the Elderly* (Washington, DC: Congressional Research Service, 1996).

[7] In *Olmstead v. L. C.* (98-536), 527 U.S. 581 (1999), the Supreme Court affirmed the right of individuals with disabilities to live in their community in its six to three ruling against the state of Georgia.

[8] J. Holahan and M. Cohen, *Understanding the Recent Changes in Medicaid Spending and Enrollment Growth Between 2000–2004* (Menlo Park, CA: Kaiser Commission on Medicaid and the Uninsured, 2006), 6.

[9] Federal Interagency Forum on Aging-Related Statistics, available at www.agingstats.gov.

[10] Bureau of Labor Statistics, *Occupational Outlook Handbook: 2008–2009 Edition* (Washington, DC: Bureau of Labor Statistics, 2008), 2.

number of women ages 25 to 54 with little education, which has been the traditional labor pool for this occupation.[11]

Each year, millions of Americans, many of them elders, receive Medicaid-funded assistance in their homes and communities with everyday activities.[12] These home and community-based services range from hands-on help with bathing, dressing and eating, to transportation services and linkage to community events and other services. Medicaid is not the only funding source for long-term care; there are a variety of other federal and state programs, and many individuals purchase long-term services and supports directly. In addition, volunteers play a critical role in delivering long-term services and supports to older adults. Across the country, volunteers deliver meals to homebound individuals, assist with money management and tax preparation, provide assistance with everyday activities, and provide support for end-of-life care.

All these services play an invaluable role in allowing beneficiaries to stay in the community-based settings they prefer, rather than enter an institution. At the same time, there are long-standing concerns about the safety of such individuals and the potential risk of abuse or neglect by the paid workers and volunteers who provide direct care. For services provided under the Medicaid Section 1915(c) waiver authority, which funds much of this home and community-based care, ensuring the health and welfare of service recipients—defined as freedom from abuse, neglect, and exploitation—is a key statutory requirement facing states.[13]

Elder abuse, defined as any type of mistreatment that results in harm to an older adult, is a real social problem whose causes and prevalence are not well understood.[14] Estimates are that, for every case of elder abuse reported, as many as five incidents may not be. As the older U.S. population grows, so do the risks of elder abuse, mistreatment, and exploitation. The National Center for Elder Abuse found a 16 percent increase in the number of reports substantiated by Adult Protective Services (APS) between 2000 and 2004.[15] Current estimates are that approximately 2.1 million older Americans a year are victims of physical, financial, and other types of abuse and neglect from a variety of sources, including self-neglect.[16] Elder abuse can range from physical and sexual abuse (the latter of which is relatively rare) to emotional abuse or financial exploitation. Self-neglect, followed by caregiver neglect and financial exploitation, are the most common forms of mistreatment, according to numbers of reports substantiated by states.[17]

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[11] M. Toossi, "Labor Force Projections to 2016: More Workers in Their Golden Years," *Monthly Labor Review* (November 2007).

[12] Kaiser Commission on Medicaid and the Uninsured, *Medicaid Home and Community-Based Service Programs: Data Update (Dec. 2007)* (Menlo Park, CA: Henry J. Kaiser Family Foundation, 2007).

[13] States operating Medicaid section 1915(c) waiver programs to fund HCBS for elders and people with disabilities must meet the six assurances articulated in 42 CFR 441.302: consistent determination of level of care for program eligibility, individualized service planning, use of qualified providers, maintenance of participant health and welfare, administrative oversight by the state Medicaid agency, and integrity of financial payments.

[14] Bonnie and Wallace, *Elder Mistreatment* (2003)..

[15] P. Teaster et al., *Abuse of Adults 60+: The 2004 Survey of Adult Protective Services* (Washington, DC: National Center on Elder Abuse, 2006).

[16] Bonnie and Wallace, *Elder Mistreatment* (2003).

[17] Teaster et al., *Abuse of Adults 60+* (2006).

According to a review of state APS programs, the vast majority of substantiated elder abuse allegations occurred in domestic settings.[18]

Older long-term care recipients are especially vulnerable to mistreatment because of cognitive and physical disabilities, which can impair their ability to communicate and increase their likelihood of being dependent on others for assistance. According to the *National Elder Abuse Incidence Study*, older adults who need more physical assistance, or who have compromised cognitive function, are more likely to be abused.[19] The current workforce providing direct HCBS support services to this vulnerable population is characterized by high rates of turnover because of the low wages and limited opportunities for advancement in this field. As the population ages, the Institute of Medicine has raised concerns that the health care workforce will not be large or skilled enough to meet the increasingly complex needs of older adults.[20]

Although accurate and comprehensive data on elder abuse are lacking, limited evidence from nursing home settings suggests that abuse of long-term care recipients by direct care staff is not an insignificant issue, at least in institutional settings.[21] Concerns about elder abuse perpetrated by those paid to provide direct care has prompted recent federal legislation designed to reduce the risks to the aging population. In 2003, as part of the Medicare Modernization Act, Congress directed the federal Centers for Medicare and Medicaid Services (CMS) to conduct a pilot project funding criminal background checks for staff in selected long-term care settings.[22] Based on the results of this pilot, the Senate introduced the Patient Safety and Abuse Prevention Act of 2007[23] to establish a nationwide system of background checks. Senators reintroduced the legislation in March 2009.[24] The Elder Justice Act of 2007 seeks a comprehensive approach to addressing elder abuse by providing states with resources to prevent elder abuse, increasing prosecution of those who mistreat the elderly, and providing victim assistance.[25] In addition, over the past several years, numerous bills have been introduced to reduce the risks of abuse to elders and ensure the safety of the health care workforce.[26]

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[18] Ibid. .

[19] Toshio Tatara et al., *National Elder Abuse Incidence Study: Final Report* (Washington, DC: National Center on Elder Abuse, in collaboration with Westat, Inc., 1998).

[20] Institute of Medicine, *Retooling for an Aging America: Building the Health Care Workforce* (Washington, DC: Institute of Medicine, 2008).

[21] L. Nerenberg, "Abuse in Nursing Homes," *National Center on Elder Abuse Newsletter* (May 2002).

[22] P.L. 108-173.

[23] S. 1577.

[24] S. 631.

[25] S. 1070 and H.R. 1783

[26] Senate Special Committee on Aging, *Building on Success: Lessons Learned from the Federal Background Check Pilot Program for Long-Term Care Workers* (Washington, DC: Senate Special Committee on Aging, 2008).

III. PURPOSE

AARP's Public Policy Institute undertook this study to examine the current use of criminal background checks for Medicaid direct care workers in home and community-based settings. The aging of the population and the increasing demand among consumers to receive long-term services and supports at home warrant a review of current research and policy in this area. This study summarizes the literature on this subject, provides some guidance on cost-effective strategies for screening in-home workers, and further explores the efficacy and feasibility of using criminal background checks as a means for reducing the risk of elder abuse, neglect, and exploitation.

IV. METHODOLOGY

Criminal background checks for staff working with vulnerable elders are one commonly used tool aimed at reducing the risk of elder abuse. This report reviews the current status of criminal background checks for Medicaid direct care staff who work in HCBS programs that serve older adults and people with disabilities.[27] Specifically, we examine federal regulations and the diversity of state statutes and Medicaid policies regarding worker screening, with a focus on three states—Arkansas, Michigan, and New Mexico—that represent a spectrum of on-the-ground screening policies for Medicaid direct care workers, particularly those in self-directed programs.[28] In addition, we analyze the key policy issues related to criminal background checks for Medicaid staff, including perceived barriers, costs, evidence of efficacy in reducing the risk of abuse, impact on the workforce, and special considerations raised by self-directed HCBS programs. In addition to statutory analysis and literature review, this report incorporates themes that emerged from an invitational roundtable of experts convened by AARP in February 2009 to explore these issues.[29] While this report focuses on Medicaid-funded home care, these policy considerations also apply to HCBS funded privately or through other government programs.

V. OVERVIEW OF MEDICAID-FUNDED HCBS

Medicaid is a complex program with standards for ensuring provider qualifications. This overview provides context for the discussion of screening home care workers funded by Medicaid.

PROGRAM OVERVIEW

The major source of publicly funded long-term care in the community is Medicaid. Enacted in 1965 under the Social Security Act, Medicaid is a joint federal-state entitlement program designed to provide health insurance for individuals with limited

[27] While the overall focus of this report is on older adults, by and large the policy considerations apply to all populations receiving long-term care services and supports.

[28] A more comprehensive review of state law on criminal background checks was conducted by the National Conference of State Legislatures, under contract to AARP. See appendix B.

[29] Roundtable participants are listed in appendix D.

income and resources. Its original intent was to cover primary and acute care services such as physician visits and hospital stays, with only limited coverage for institutional long-term care. Over the past few decades, however, Medicaid has steadily increased funding for community living for older adults and people with disabilities by expanding offerings under state plan services and HCBS waiver programs, and today approximately 27 percent of all Medicaid long-term care dollars are for noninstitutional care.[30]

Services

States participating in Medicaid must cover a minimum set of services for particular groups. These mandatory services include home health services, comprising skilled nursing services, home health aides, and medical supplies for the home. States may also choose to offer additional, optional services, which must be available to all Medicaid recipients but which can be limited to control utilization. Personal care services for older adults and people with disabilities—which include assistance with performing activities of daily living, such as bathing, dressing, laundry, and money management—are optional services authorized in more than 30 states. In addition, 48 states operate at least one Medicaid Section 1915(c) waiver program specifically designed to provide supports in the home or a community-based setting to individuals who would otherwise be in an institution.[31] These waiver services include case management, homemaker, home health aide, personal care, adult day care, habilitation, respite, and other services. States can target these services to a particular group (e.g., older adults and people with disabilities, or children with developmental disabilities).

States have also used the authority under Section 1115 of the Social Security Act to provide HCBS to older adults, most notably the Cash and Counseling Demonstration and Evaluation, which tested the concept of self-directed care, including hiring legally responsible family members and managing individual budgets. More recently, Section 6086 of the Deficit Reduction Act of 2005[32] added two new options for Medicaid-funded HCBS: Section 1915(i) to expand the offerings under the State Plan to include HCBS services as an optional benefit, and Section 1915(j), the Self-Directed Personal Assistance Service State Plan Option. Appendix A provides more detail on the different Medicaid authorities and funding sources.

Service Delivery Models

In general, Medicaid HCBS programs employ two models of service delivery under the state plan, waiver, or demonstration authorities: the traditional agency model and the self-directed model. In a traditional agency model, provider agencies apply to participate in the state's Medicaid program. Once certified, the provider and the Medicaid state agency enter into a formal contractual arrangement referred to as a provider agreement. The traditional provider agency recruits, hires, supervises, and pays direct care workers. The agency is responsible for ensuring that all certification standards are met, including preemployment screening.

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[30] E. Kassner et al., *Balancing Act: State Long-Term Care Reform* (Washington, DC: AARP Public Policy Institute, July 2008).

[31] Arizona and Vermont are the two states that do not operate at least one Medicaid section 1915(c) waiver program.

[32] P.L. 109-171.

In contrast, the self-directed model allows beneficiaries to recruit, hire, and supervise their own workers. These direct care workers may be friends, family, and even legally responsible individuals.[33] The Medicaid Section 1915(c) waiver requires agencies to provide two support functions: (1) offering information and assistance in the form of counseling and (2) assisting with the management of the individual budget, processing timesheets, and filing/reporting/paying employment taxes. The beneficiary may serve as the employer of the worker (fiscal agent model), or may serve as the managing employer (hiring and supervising the worker), with the state agency serving as the common law employer (agency with choice) for tax purposes.

Provider Qualifications

Federal Medicaid regulations require that states define the provider qualification standards that govern participation in their Medicaid programs.[34] States must enact standards for provider participation to ensure that providers are qualified, effective, and cost-efficient and to protect program beneficiaries, but these requirements must not unfairly restrict participation in the Medicaid program. As long as states meet these criteria, they have significant latitude in specifying their provider qualification requirements.

The instructions for the most recent application of the Section 1915(c) waiver program, the primary Medicaid vehicle for funding HCBS, further underscore this point. Guidance on establishing provider qualifications states, "Provider qualifications must be reasonable and appropriate in light of the nature of the services. They must reflect sufficient training, experience, and education to ensure that individual will receive services from qualified person in a safe and effective manner. Provider qualifications and standards should not contain provisions that have the effect of limiting the number of providers by the inclusion of requirements unrelated to quality and effectiveness."[35]

OTHER FEDERAL FUNDING SOURCES SUPPORT HCBS

While the various Medicaid authorities provide the bulk of federal funding for HCBS programs, other federal agencies are taking leadership roles for individuals not covered by the Medicaid program. The Administration on Aging, created by the Older Americans Act, funds services for millions of older persons. Local programs, administered by the Area Agencies on Aging and the associated aging network providers, include home-delivered meals, transportation, adult day care, legal assistance, and health promotion. The Medicare program funds approximately 20 percent of all long-term care, primarily through home health services to almost 3 million individuals annually.

DEMAND FOR HCBS DIRECT CARE WORKFORCE GROWING

As noted above, the demand for a direct care workforce for Medicaid and other HCBS programs is expected to grow in the coming years. According to the Bureau of Labor Statistics, personal and home care aides and home health aides are two of the top three

[33] Legally responsible relatives include spouses, parents of minor children, and legally appointed guardians.

[34] Section 1915(2)(B)(b)(4) and Section 1915(2)(c)(2)(A).

[35] Centers for Medicare and Medicaid Services, *Application for a §1915(c) Home and Community-Based Waiver [Version 3.5]: Instructions, Technical Guide, and Review Criteria* (Baltimore, MD: Centers for Medicare and Medicaid Services, 2008), 137.

fastest growing occupations in the coming decade.[36] These workers, who have the most direct and consistent contact with program participants, provide the hands-on and other support necessary for participants to complete daily living activities and remain in the community. Already there is evidence of insufficient personnel to provide these services, even before expected demographic trends fully kick in.[37]

Currently, this workforce consists of a variety of licensed and unlicensed workers whose titles and responsibilities vary by state and program. This workforce includes personal care attendants, home health aides, homemakers, chore services workers, certified nursing assistants, and other direct support professionals. Their work can be physically and emotionally demanding, turnover is high, wages are low, and both benefits and opportunities for advancement tend to be limited.[38] Their training and certification requirements vary, as does the nature of their work. Some direct care workers assist only one individual; others work with several. Some provide hands-on physical assistance to participants; others may have responsibilities only for cleaning participants' homes; and some perform quasi-medical tasks. Nearly all, however, have direct access to Medicaid participants and their homes. In short, this workforce is the crucial nexus between Medicaid HCBS programs and the vulnerable population it serves.

VI. MEDICAID POLICIES ON CRIMINAL BACKGROUND CHECKS DEFER TO STATES

The Medicaid program has no broad mandate for criminal background screening. State laws vary considerably, and the data sources for criminal history are not integrated for ease of use.

NO MEDICAID MANDATE

Currently no federal Medicaid law requires long-term care providers to perform systematic, comprehensive background checks on employees with direct access to vulnerable seniors. Similarly, no overarching national guidelines or regulations specify the types of screening, including criminal background checks, required for volunteers working with this population. Thus, states and individual programs have the flexibility to develop their own pre- and posthiring activities to comply with state laws and meet their specific quality standards.

However, while CMS does not require HCBS waiver programs to conduct criminal background checks on workers, if programs choose to do so (and many do), CMS does require the state to provide to CMS information about such checks, including

- The types of positions that must undergo such investigations,

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[36] Available at www.bls.gov/news.release/ecopro.t06.htm.

[37] E. Scala, L. Hendrickson, and C. Regan, *A Compendium of Three Discussion Papers: Strategies for Promoting and Improving the Direct Service Workforce: Applications to Home and Community-Based Services* (New Brunswick, NJ: Rutgers Center for State Health Policy, 2008).

[38] M. Wilner, "Towards a Stable and Experienced Caregiving Workforce," *Generations* (Fall 2000).

- The entity responsible for conducting the checks or investigations,
- The scope of the required investigation, and
- The program's process to ensure that mandatory investigations have been conducted.[39]

If states require screening, they must supply similar types of information. Data provided by CMS on 146 approved Section 1915(c) waivers showed that all states required criminal background checks for at least some provider staff.

Medicaid program policies on worker qualifications, including screening of criminal histories, vary by authority and state, and even within states. For example, CMS waiver policy stipulates that participants in self-directed Medicaid programs cannot be charged for the cost of criminal background checks on potential workers, but takes no position on whether such checks should be performed. As a result, some states require checks for self-directed workers and some do not.

CMS does have policies for excluding certain providers from the Medicaid and Medicare programs, based on fraudulent and/or abusive behavior. The Office of Inspector General List of Excluded Individuals/Entities includes providers prohibited from participating in any federally funded health care program, including Medicaid, on the basis of fraud, patient abuse, and certain other criteria. In addition, federal law requires each state to maintain a certified nurse aide registry, which must include any findings related to abuse, neglect, or misappropriation of property.[40] However, these registries rarely include home care workers.[41]

MULTIPLE OPTIONS AND DATA SOURCES FOR WORKER SCREENING NOT INTEGRATED

States and provider agencies, along with entities serving beneficiaries who hire and direct their own workers, can and do access a variety of data sources when conducting background checks for HCBS direct care workers. In general, these sources are not integrated within a state and must be searched separately. Each source has advantages and disadvantages.

National FBI Checks

The Federal Bureau of Investigation (FBI) maintains a repository of criminal records, the Interstate Identification Index, comprising records from all states and territories, as well as from federal and international criminal justice agencies. For a fee, the FBI will conduct a fingerprint-based search of this index for noncriminal justice purposes (e.g., background checks). In 2005, the FBI processed approximately 10 million noncriminal justice fingerprint checks.[42] Fingerprints are considered one of the few reliable means of

[39] Ibid, 115.

[40] 42 CFR 483.156 .

[41] Government Accountability Office, *Long-Term Care: Some States Apply Criminal Background Checks to Home Care Workers, PEMD-96-5* (Washington, DC: GAO, 1996).

[42] *Federal Register,* Volume 73, Number 119 (June 19th, 2008), page 34910.

personal identification, along with voice prints and retinal scans. While the FBI database is national in scope, the FBI relies on state reports for its data. An FBI search will not reveal state-level convictions that have not yet been reported.

The FBI will accept fingerprints in three different formats: electronically, via LiveScan or other technologies that read fingerprints from a touch screen; inked onto a card; or a scan of an inked card. Electronic submissions are processed quickly, on average within three days. In contrast, inked cards can take up to six weeks to process, and also run the risk of smudging, which may render the prints unusable. In October 2007, the FBI changed its fee schedule for processing noncriminal justice record checks. It reduced the charge for processing electronic fingerprint records, including scanned copies of inked prints, from $24 to $19.25, and raised the charge for processing inked cards from $24 to $30.25. (There is no fee for checks run for criminal justice purposes.)

Office of Inspector General List of Excluded Individuals/Entities

The U.S. Department of Health and Human Services' Office of Inspector General maintains a searchable, online list of individuals and entities that are prohibited from participating in any federally funded health care program.[43] The bases for exclusion include convictions for program-related fraud and patient abuse, licensing board actions, and default on Health Education Assistance Loans. Online name-based searches are free; users have the option of verifying Social Security Numbers (SSNs) or Employer CMS Criminal Background Check Pilot Sought to Facilitate Comprehensive Screening

State and County Criminal Records Check

All states and some counties maintain electronic criminal records that include information on convictions and often include information on arrests, prosecutions, court determinations, and records from corrections departments. This information may be name based or fingerprint based. Frequently, these databases can be searched for minimal or no charge.[44] Name-based or SSN-based checks rely on the accuracy of information provided by the potential employee, and are therefore subject to fraud if false information is provided. Potential employees could have names that are identical to ones in the database, resulting in "false positives," and aliases may raise the risk of "false negatives." State records do not capture information on convictions in other states. Even local fingerprint checks, which are more accurate than name-based checks, may not catch out-of-state convictions.

State Adult Protective and Child Protective Services Registries

State abuse registries contain information on allegations of abuse that have been substantiated by state Adult or Child Protective Services agencies,[45] including the name of the alleged perpetrator. Twenty-one states maintain such registries, according to the *2004 Survey of Adult Protective Services*.[46] Another five states do not maintain a specific

[43] Available at http://exclusions.oig.hhs.gov.

[44] Center for Democracy and Technology, "A Quiet Revolution in the Courts: Electronic Access to State Court Records" (2002). Available at www.cdt.org/publications/020821courtrecords.shtml.

[45] Not all allegations of abuse substantiated by adult or child protective services investigators result in criminal convictions. Substantiated findings are those that meet the criteria in a statute that defines abuse or neglect and that result in a formal charge.

[46] These states are Arkansas, Delaware, Hawaii, Indiana, Iowa, Kansas, Louisiana, Massachusetts, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Mexico, Oklahoma, Oregon, Texas, Utah, Vermont, Washington, and Wyoming.

register but do maintain some type of database of individuals involved in abuse cases.[47] The 2004 survey revealed a paucity of information regarding what happens to perpetrators of sustained allegations as a result of APS intervention.[48]

There is no clear or consistent definition of "abuse registry." This term may refer to a list of perpetrators of sustained[49] incidents of elder abuse managed by the state APS agency and, in many instances, may be used to determine whether those individuals should be prohibited from working with certain vulnerable populations or in certain settings, such as nursing homes. In some states, APS contributes information about reports or their dispositions to an abuse registry that is maintained by another state agency. The term's third use refers to a database of reports made to APS case recorders. It is important to note that not all persons on these registries have been convicted of actual crimes, because there is generally a lower standard for inclusion on the registries (sustained abuse allegations versus criminal convictions).

In some states, information about elder abuse is collected by disparate programs and agencies and may never be collated into one source. Often, coordination is lacking among agencies responsible for reporting and investigating elder abuse, and reporting may not be mandatory. Furthermore, underreporting of abuse is likely prevalent. Because individual states maintain these registries, conducting a thorough check may require checking the records of every state where the applicant has lived. In addition, some abuse registries may focus only on nursing home staff and not include home care workers.

National and State Sex Offender Registry

The Department of Justice maintains the Dru Sjordin National Sex Offender Public Web Site,[50] which allows for a name-based search across participating state Web sites of registered sex offenders. This site is open to the public and can be used free of charge, subject to a user agreement.

Department of Motor Vehicle Records

This is a potentially important search when staff provide Medicaid-funded transportation, including carrying passengers to and from community events, shopping, running errands, or medical appointments. Most motor vehicle histories show driving history over the past three to seven years. There is no national database; each state has its own database of drivers' records, typically located at the bureau or department of motor vehicles, which is available for public searches in some states. Required information for a search includes full name, address, date of birth, and SSN. While information from a database search varies from state to state, driving records will reflect moving vehicle violations such as speeding tickets, accident history, and convictions.

Commercial Databases

Individual vendors also maintain a number of commercial databases of criminal information, which provide background checks for a fee. These databases, which are

[47] These states are Alaska, Idaho, New Jersey, West Virginia, and Wisconsin.

[48] Teaster et al., *Abuse of Adults 60+* (2006)

[49] That is, an incident that has been investigated and deemed substantiated by the state agency.

[50] Accessible at www.nsopr.gov.

regulated by the Fair Credit Reporting Act, aggregate criminal history information from multiple state sources, including county courthouses, correctional facilities, and state criminal record depositories. These commercial databases are not truly national in scope, because not all states make their data available, and also may not be current, since updates are done only periodically.[51]

CMS Pilot Sought to Facilitate Comprehensive Screening

In 2003, as part of the Medicare Prescription Drug Improvement and Modernization Act (MMA), Congress authorized a pilot project funding background checks on workers in certain long-term care settings.[52] The intent of the pilot was to fund the expansion of participating states' criminal background check systems to screen workers seeking employment in a variety of long-term care settings, including care recipients' homes, and to incorporate FBI criminal records checks. Specifically, the legislative goals were to have grant recipients identify "efficient, effective and economical" procedures for conducting criminal background checks in select long-term care settings. In 2005, CMS provided $16.4 million in funding over three years to seven states: Alaska, Idaho, Illinois, Michigan, Nevada, New Mexico, and Wisconsin. Participating states used this funding to invest in state databases, create workforce background check units, update applicable laws and regulations, and offer additional training to long-term care providers. The pilot concluded in 2007.[53]

CMS contracted with Abt Associates to conduct an independent evaluation of the pilot program and released the final report of the evaluation in 2008.[54] During the pilot program, the seven states conducted 204,339 criminal background checks and fitness determinations. Seventy-eight percent of job applicants (158,476) passed the background check and fitness determination. Fewer than 4 percent (7,463) were disqualified because of the background check findings. However, the report indicated that, of the 204,339 criminal checks conducted, 38,400 records (close to 19 percent) were withdrawn before a final fitness determination. The evaluators suggested that the criminal background check requirement may have deterred applicants who knew the results would disqualify them from employment opportunities. But the evaluators noted that there was a lack of quantifiable evidence on the reasons for the withdrawals.

The report found great variation across the pilot states on the time it took to process a background check. The median time was 15 days, but 25 percent of the background checks took 33 days and 10 percent took 81 days or more to process. The method used to collect fingerprints was the key factor in the processing time: states that used electronic fingerprint methods processed checks much more quickly than states using fingerprint cards. Four of the seven states used an electronic LiveScan system to capture fingerprints, while the remaining states used fingerprint cards.

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[51] U.S. Department of Justice, *The Attorney General's Report on the History of Criminal Background Checks* (Washington, DC: Department of Justice, 2006).

[52] P.L. 108-173, section 307.

[53] Senate Special Committee on Aging, *Building on Success: Lessons Learned from the Federal Background Check Pilot Program for Long-Term Care Workers* (Washington, DC: Senate Special Committee on Aging, 2008).

[54] Abt Associates, *Evaluation of the Background Check Pilot Program—Final Report* (Washington, DC: Abt Associates, 2008).

The report also found differences among the states as to who conducted the checks, the entity that made the final determination, and the types of disqualifying offenses barring employment (above minimum MMA requirements). All of the pilot states had provisional employment policies, and most had an appeals process to allow applicants to dispute fitness determinations.

While the evaluation attempted to address the efficacy of background checks at reducing the incidence of abuse, neglect, and exploitation through qualitative methods, it found no quantitative evidence on efficacy.

The evaluation includes a number of "lessons learned" by pilot states that may be important for future policy and program development:

- ***Web-based systems are useful for conducting initial registry checks.*** Both state agency officials and employers agreed that Web applications for conducting background checks were successful in speeding up the processing of background checks, automating the process, and eliminating unnecessary costs.
- ***Electronic fingerprint capture should be used whenever feasible.***
- ***Supervision of provisional hires is difficult to enforce.***
- ***One background check program can be used across multiple agencies.*** Most states have background check requirements for several types of workers, including teachers, bus drivers, child care workers, and health care workers. There could be benefits from increased collaboration and information sharing across the agencies that run background check programs.
- ***Many stakeholders see value in having the fitness decision made by a state agency.***
- ***Rehabilitation review programs—****allowing individuals with a disqualifying offense in the past to be cleared for employment if they were able to demonstrate that they did not pose a risk to patient safety****—are important for increasing fairness and reducing unintended workforce effects.***
- ***Rap-back systems*** (see Michigan, section VII) ***could improve effectiveness and efficiency.***

VII. CURRENT VARIATION IN STATE POLICIES AND PRACTICES

There is substantial variation in the state statutes and Medicaid provider qualification policies on criminal background screening for the Medicaid staff who provide HCBS to older adults. In the absence of federal Medicaid requirements, it is state laws that primarily determine program policies. Results from a review of statutes in 50 states, the District of Columbia, and the U.S. territories by the National Conference of State Legislatures (NCSL) found that while most states do have laws mandating criminal background checks for long-term care workers, the laws vary in terms of who must be screened, who is exempted, what criminal convictions preclude employment and for how long, whether provisional

employment is allowed, and who bears the cost of screening.[55] An in-depth look at three states confirmed this diversity, particularly for workers in self-direction programs.

NCSL Review Found Wide Use, Considerable Variation across States

Researchers at NCSL reviewed state statutes and regulations in a nationwide survey of policies regarding criminal background checks for in-home direct care workers.[56] Appendix B is a table of the NCSL findings. NCSL found that criminal background checks are widely used by states to screen potential HCBS direct care workers. Almost all states mandate preemployment criminal background checks of at least some type for defined categories of Medicaid in-home workers; only four states have no such requirement.[57] Only three states[58] allow all employers full discretion on whether to conduct checks, and three other states[59] allow certain employers full discretion. These statutory requirements tend to focus on categories of employees or long-term care settings, rather than program funding source.

Significant diversity exists, however, in how the resulting findings are applied and for how long, as well as who is exempt from screening, conditional employment, and appeals. Many states exempt certain categories of individuals providing services inside the home, such as volunteers, faith-based organizations, and family members. Six states[60] exclude family members or other relatives from a criminal background check requirement. Nearly all (95 percent) states and territories with a background check statute require, at a minimum, that state criminal data sources be searched, but a minority of states require reviews of more comprehensive federal data sources. The costs of conducting checks may be borne by employers or the state, shared between the two, or even passed on to the potential employee. Twenty-eight states allow conditional employment until a background check is completed, most often with time limits or supervisory requirements. In addition, 25 states with a criminal background check requirement allow waivers or appeals for such issues as disputing an inaccurate record or presenting evidence of rehabilitation.

The types of convictions that preclude employment vary considerably. While most states and territories list the offenses that preclude employment, eight[61] do not. Some states, such as Michigan, have a lengthy list of disqualifying convictions, while others, like Alaska, have a relatively short list. Some consider only felonies as a basis for disqualification, while others include certain misdemeanors as well. A few states disqualify only applicants with a history of offenses against dependent or vulnerable individuals or fraud-related offenses. In addition, 13 states have provisions whereby certain convictions would no longer be disqualifying after a certain period.

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[55] Only Louisiana, Montana, Nevada, and North Dakota do not have laws related to criminal background checks for home care workers.

[56] D. Folkemer et al., *State Policies on Criminal Background Checks for In-Home Direct Care Workers* (Washington, DC: National Conference of State Legislatures, 2009).

[57] Louisiana, Montana, Nevada, and North Dakota.

[58] California, South Dakota, and Tennessee.

[59] Delaware, Kansas, and Vermont.

[60] Alabama, Alaska, Delaware, Florida, South Carolina, and Utah.

[61] Colorado, Connecticut, Hawaii, Maryland, New Hampshire, North Carolina, Oregon, and South Dakota.

Even within the same state, comparable workers operating in different programs might face different background check requirements. For example, in Florida, employees providing direct services to individuals with developmental disabilities face a more rigorous background screening process than do staff from a home health agency. A personal care attendant employed by an agency in Delaware may be screened against state or national criminal data, but a family member hired under a self-directed program to perform the same tasks may not be screened at all. Similarly, in many states, direct care workers employed in certain long-term care settings, such as licensed group homes or assisted living facilities, may have statutory criminal background check requirements, while comparable workers in an unlicensed or different setting do not.

PROFILES OF CRIMINAL BACKGROUND CHECKS IN THREE STATES EXEMPLIFY STATE VARIABILITY

To illustrate the diversity regarding criminal background checks for Medicaid direct care workers, we examined the statutory and programmatic requirements in three states: Arkansas, Michigan, and New Mexico. Table 1 summarizes the background screening requirements for Medicaid HCBS staff in each state, followed by a brief narrative profile. Detailed overviews are included in appendix C.

Table 1
Criminal Background Check Requirements Vary in Arkansas, Michigan, and New Mexico

	Criminal Background Checks Required	Exceptions Regarding Self-Directed Care	Type of Check	Party Responsible for Cost	Conditional Employment	Waiver or Appeal Available	Disqual-ifications in Law
AR	Yes	Yes not required for one program	State and federal under certain conditions	Not specified	Yes expires after 45 days	Yes	Yes
MI	Yes	Checks are required, but individuals have flexibility in acting on findings	State and federal under certain conditions	State reimburses cost	Yes employee must certify in writing that he/she has committed no offenses	Yes	Yes additional requirements may be imposed at the local level and may vary
NM	Yes	None	State and federal required	Employer or employee	Yes must be supervised employment and begins once check is requested	Yes	Yes

Arkansas

Rather than applying criminal background checks to a broadly defined service category or employment group, Arkansas ties checks to specific providers identified in state law. The three provider types named in legislation include home health and hospice agencies and providers participating in Elderchoices, one of the state's Medicaid HCBS waiver programs. Other entities that may provide Medicaid HCBS are exempt from conducting checks for direct care workers. Checks of state-level criminal data are required, via the

Department of State Police; federal-level checks are required for individuals who have not lived continually in the state for the past five years or have not provided in-home care for at least 60 continuous days prior to application. Arkansas permits provisional employment pending results.

Arkansas legislation is largely silent on the application of criminal background checks for the almost 5,000 individuals hiring their own caregivers, and background checks are not a condition of participation in one of the Medicaid programs offering self-direction. IndependentChoices, a self-directed state plan service program, does not require criminal background checks or offer them as an option to program participants. State policy on criminal background check requirements for the self-directed service delivery system, however, appears to be evolving. Recently, the Department of Human Services issued a policy rule for Alternatives, an HCBS waiver program serving adults with disabilities, requiring a criminal background check for individuals seeking to be certified as Alternatives providers and specifying the disqualifying crimes.[62] The proposed Arkansas Next Choices waiver program, targeted to individuals living in institutions but desiring to live in the community, would require state criminal background checks for personal attendants, adult family home providers, and companion service providers as a condition of Medicaid certification.

Michigan

Michigan's criminal background check program has undergone significant modification in recent years as a result of the state's participation in the CMS pilot project, which necessitated new legislation specifying which long-term care providers must screen staff, the process for conducting checks, and which crimes preclude employment and for how long. Currently, Michigan uses a tiered, iterative approach to screening applicants for employment with select long-term care providers. In this electronic system, low-cost, public, state data are searched first, and more expensive national fingerprint checks are reserved for cases where no disqualifying data are found during the initial state search. The list of disqualifying crimes is extensive. However, many crimes have sunset provisions of 1, 3, 5, 10, or 15 years, after which they no long affect fitness for employment. This legislation does not cover all providers whose staff have direct access to Medicaid long-term care recipients in their homes.

Employers may hire workers provisionally under certain conditions, pending the result of the screening. The state also instituted a "rap-back" system, so that state law enforcement officials report crimes committed after the initial screening to the Department of Community Health and the employer for action. During one 18-month period of the pilot, state officials conducted 103,251 checks, resulting in disqualification of 6,932 applicants—nearly 7 percent—based on state criteria.

Provider qualification requirements for Michigan's Medicaid HCBS waiver program serving older adults, MI Choice, differ somewhat from the state laws on screening outlined above. Requirements in the waiver are only for a state-level check through the state police, but the checks cover a much broader list of provider types than the automated statewide screening program. Self-directed workers also must have a criminal background check. Participants in Medicaid self-directed programs do have some

[62] Policy 1088, "Participant Exclusion Rule," Arkansas Department of Human Services.

flexibility in how they act upon the findings of these checks, although certain convictions are deal-breakers, including Medicaid fraud, elder abuse, and criminal sexual conduct. The state is finding that many potential direct care workers in the self-directed program are "coming back with less than sparkling records," and many of these are family members of program participants. Waiver participants have the flexibility to hire family members with previous convictions, provided they are not on the list of non-negotiable offenses. In addition, waiver agents, who conduct assessments and contract with the fiscal intermediaries, may have their own policies regarding which criminal offenses preclude employment. As a result, workers may face different screening requirements depending on where they seek employment in the state.

New Mexico

New Mexico, also participated in the CMS pilot and has detailed, comprehensive, and far-reaching legislation and policies related to worker screening. According to state statute, all Medicaid direct services workers, including those in self-directed programs, must undergo a criminal background check. There are no exceptions. The New Mexico Caregivers Criminal History Screening Act, passed during the 1998 legislature and amended in 2005, requires any person or entity identified as a "care provider" or "provider" that the potential to abuse, neglect, or exploit other individuals in a long-term care setting to undergo screening. The law specifies the care provider's responsibility and the types of disqualifying crimes and convictions. New Mexico also developed a comprehensive, electronic incident management and prescreening employment system and publishes annual reports on activity. State officials noted the benefits of having these systems collocated under one administrative division.

Like Michigan, New Mexico includes in its background check program independent providers hired directly by participants in any self-directed programs. In contrast to Arkansas state law, the requirement for background checks is linked to job function, not employer type. New Mexico requires both a state-level and federal FBI check. An appeals process allows applicants to request reconsideration of employment fitness determinations. In state fiscal year 2006, the New Mexico Division of Health Improvement processed 22,759 criminal background checks, resulting in 435 disqualifications, or approximately 2 percent of applicants.

VIII. THEMES FROM RESEARCH AND STATE REVIEWS

Our review of the literature and state policies, as well as discussion with experts in the field, revealed complexity and only limited evidence on key policy questions related to criminal background checks as a means of protecting older adults using Medicaid HCBS. Despite the knowledge gaps, there appears to be a public policy consensus about the need for systems to ensure that individuals with certain criminal histories do not work in long-term care settings. For example, all the witnesses at a recent hearing on the topic by the Senate Special Committee on Aging deemed criminal background checks "critical" to protecting older adults.

Criminal background checks are one tool among many to reduce the risk of elder abuse among long-term care recipients. Elder abuse experts and others cite a variety of interventions—such as conducting reference checks, examining credit histories, and

requiring a full disclosure form—that, together, can mitigate the chances of elder mistreatment.

COST, DATA INTEGRATION, AND COMPLETENESS AFFECT FEASIBILITY OF BACKGROUND CHECKS

The feasibility of conducting criminal background checks for Medicaid direct care workers is primarily a function of their costs (both fees and labor), the completeness of various data sources, the ease with which they can be accessed, and the waiting time for results. While the FBI recently reduced its fees for electronic fingerprint checks, the issue of cost remains important for states. As economic conditions worsen, states have fewer resources to support the Medicaid program.[63] The staff time devoted to searching databases, processing FBI requests, and interpreting results can be appreciable. Participants in Michigan's pilot expressed concern about the continued sustainability of their new automated system in the absence of federal funding. Many private vendors will conduct background checks for a fee; however, these can be upward of $45 per check, a substantial amount given the size of the Medicaid direct care workforce. Criminologist Vern Quinsey, an expert on screening and recidivism, has argued for a cost-benefit approach to background screening, noting that if enough background information can be found without accessing costly criminal records, a decision not to hire can be made.[64] Checking low-cost electronic state databases before paying for FBI checks, an approach used by Michigan and other states in the CMS pilot, is one example of a cost-effective strategy.

One of the key goals of the CMS pilot was to develop more efficient and timely systems for processing criminal background checks. States responded by investing in electronic fingerprinting technology, database enhancements and coordination, training, and staffing. States that participated in the pilot project did report a dramatic decrease in the amount of time to process checks, in some cases from several weeks to just a few days.[65] These enhancements, however, were possible because of the federal financial investment the states received. Other states may still face barriers to timely processing. In states where provisional employment is not allowed, lengthy processing time may translate into delayed employment, and staffing gaps and may present major challenges to recipients who are in need of services.

A 2004 report issued by the Governor's Elder Abuse Task Force in Oregon illustrates these barriers. The governor convened a task force to examine strategies for reducing the backlog in criminal background checks for providers. At that time, the Department of Human Services was conducting approximately 17,000 criminal background checks each month for long-term care facilities and other providers. Task force members suggested strengthening guidelines so caregivers are better supervised until checks are completed, creating a registry of individuals who committed a crime against vulnerable adults, and developing a list of disqualifying crimes to expedite employment fitness determinations.

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[63] Kaiser Commission on Medicaid and the Uninsured, *Medicaid in a Crunch: A Mid-FY 2009 Update on State Medicaid Issues in a Recession* (Washington, DC: The Henry J. Kaiser Family Foundation, January 2009).

[64] National Committee for the Prevention of Elder Abuse, "What Can We Learn from Criminal Background Checks: An Interview with Forensic Psychologist Vern Quinsey" (n.d.), available at www.preventelderabuse.org/nexus/bgchecks.html.

[65] Senate Special Committee on Aging, *Building on Success* (2008).

However, members were also cognizant of the cost implications of such actions, noting that budgetary constraints would likely delay or preclude implementation.

Experts at AARP's roundtable agreed that the current patchwork of criminal record data sources is not well integrated and could result in critical holes in individual criminal histories. Creating ways to link and streamline current systems, to both enhance the scope and reduce the cost of background checks, is a valid policy goal, independent of the issue of the efficacy of such checks. A complementary recommendation was the development of registries or databases of prescreened individuals to expedite the hiring process. While such integration of multiple databases and registry development may have appreciable short-term costs, long-term payoffs could include reduced waiting times to obtain results and, consequently, more efficient hiring, rap-back capabilities to avoid rescreening workers who change jobs, and more complete criminal histories.

EFFICACY OF BACKGROUND CHECKS IN REDUCING RISK UNPROVEN

As a public policy tool, criminal background checks are promoted as a means of reducing the likelihood that an older adult will be abused by someone paid to provide direct care. However, several factors complicate the task of assessing the efficacy of background checks in accomplishing this goal. First, the true prevalence of abuse of any type by Medicaid direct care workers is not well understood, although studies suggest that elder abuse is most often perpetrated by family members, not strangers.[66] Underreporting of elder abuse cases is known to be a widespread problem. In addition, some instances of maltreatment by workers may not rise to the level of reportable abuse. Complaints regarding direct care worker actions may be unreported or unsubstantiated, thus undercounting the incidence of maltreatment. States may have parallel and uncoordinated systems for addressing elder mistreatment. Every state must have a long-term care ombudsman program; however, only 10 states use this position to address complaints about noninstitutional care. State APS programs may have higher standards in determining a finding of "abuse, neglect, or exploitation" than a societal definition of undesirable behavior.

Limited understanding of the correlation between past criminal convictions and likelihood of abusing an older adult further complicates the ability to evaluate the impact of criminal background screening instruments. Criminal data do show high rates of recidivism for individuals who have been incarcerated; according to the U.S. Department of Justice, 4 in 10 jail inmates in a recent review had a current or past sentence for a violent offense.[67] A 15-state study in 1994 found a 67 percent re-arrest rate for felony or serious misdemeanor.[68]

In reviewing data from long-term care institutions in Arizona and Kansas, researchers from the Lewin Group found that nurse aides with a previous criminal conviction (one that did not disqualify them from employment) had a higher rate of substantiated abuse than aides without a criminal history.[69] They also reported that the probability of future

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66 Tatara, *National Elder Abuse Incidence Study* (1998)

67 Bureau of Justice Statistics, "Criminal Offenders Statistics," available at www.ojp.usdoj.gov/bjs/crimoff.htm.

68 P. Lanigan and D. Levin, *Recidivism of Prisoners Released in 1994* (Washington, DC: U.S. Department of Justice, Bureau of Justice Statistics, 2002).

69 The Lewin Group, *Ensuring a Qualified Long-Term Care Workforce: From Pre-employment Screens to On-the-Job Monitoring* (Washington, DC: Department of Health and Human Services, Assistant Secretary for Planning and Evaluation, 2006).

criminal activity rises when the circumstances are similar to those under which previous criminal activity occurred. These findings argue for preventing known abusers from being employed in situations where they have the opportunity to abuse again.

However, there has been no robust scholarship on the relationship between general criminal behavior and elder mistreatment. Indeed, there is not much scholarship in the area of elder abuse determinants in general. A review, published in 2007, of database citations for "elder abuse" in the peer review literature found a relative dearth of scholarship on this issue and a lack of diversity in the elder abuse literature.[70] One study of cases of elder sexual abuse found that "the criminal histories of sexual offenders differ considerably," suggesting there was no one profile of previous criminal behavior that could be used to identify future abusers.[71]

An impact evaluation of the Michigan criminal background check pilot project examined this question via a review of pre- and postpilot data gathered through a telephone survey on abuse. Researchers from Michigan State University found no statistically significant difference in self-reported abuse rates before and after the pilot was implemented. However, due to the relatively short time between pre- and post- data collections, the researchers were unable to conclusively state that the program had no impact.[72] In general, states and vendors can point only to the numbers of potential workers screened and disqualified, leaving unanswered the question of what abuses may have been avoided by excluding these individuals from the workforce.

A related issue is that of deterrence—whether the mere threat of a background check deters some individuals with criminal histories from seeking employment in community-based long-term care. The Abt evaluation of the CMS pilot speculates that the large number of withdrawn applications may be the result of the background check requirement, but notes the absence of hard evidence on this issue. The lack of other studies on this question underscores the need for additional scholarship.

Finally, excluding people with a criminal history from certain long-term positions may simply push them into other jobs where screening is not performed. As noted above, in many states there are categories of long-term care workers or employers who are not subject to state criminal background check statutes. In addition, potential workers with criminal histories may seek employment in other sectors of the economy, thus displacing, rather than eliminating, the impact of any future recidivism.

Conducting background checks and excluding certain individuals with criminal histories from having unsupervised access to vulnerable elders and their personal information may reduce mistreatment. It may reduce liability and risk for employers as well. Employers whose employees harm others can be liable under the doctrine of "negligent hiring" if it can be shown that they did not take adequate steps to safeguard against such outcomes.[73]

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[70] C. Erlingsson, "Search for Elder Abuse: A Systematic Review of Database Citations," *Journal of Elder Abuse and Neglect* 19, no. 3/4 (2007).

[71] A. Burgess, Elder Victims of Sexual Abuse and Their Offenders, unpublished report (Washington, DC: U.S. Department of Justice, 2006).

[72] Unpublished data provided by Tom Conner, Michigan State University.

[73] M. Lear, "Just Perfect for Pedophiles? Charitable Organizations That Work with Children and Their Duty to Screen Volunteers," *Texas Law Review* 76, (1997): 173.

Furthermore, state laws that authorize national criminal checks typically protect agencies against liability for their decisions to hire/not hire or fire, if acting in good faith. This provides some protection for agencies that choose to act upon background check results. Employers often have to make their own judgments about using information uncovered in a background check, outside of state requirements.

Participants in AARP's roundtable emphasized the importance of acknowledging the limitations of criminal background checks as screening mechanisms. In particular, some voiced concerns over the "false sense of security" that a background check may give an employer or service recipient. Given the lack of research on the efficacy of checks in preventing elder abuse and the known data gaps depending on the sources searched, some argued that HCBS participants should be better educated about the limitations of criminal background checks. However, there may be value in conducting checks beyond potentially reducing elder abuse, such as promoting a more stable workforce.

Evidence Basis for Determining Disqualifying Offenses Is Limited

In light of the broad variation in state law provisions on disqualifying offenses, we examined the literature regarding which crimes should disqualify an individual from working with vulnerable older adults. There appears to be general consensus that people with a history of abusing older adults should not be given the opportunity to do so again. Beyond that, the literature is scant. Alfred Blumstein, a quantitative criminologist at Carnegie Mellon University, notes that one can develop a "crime switch matrix" to predict the likelihood of committing a type of crime in the future based on a prior conviction. This research would afford the possibility of having a more scientific basis for establishing specific risks for home-care-worker applicants for any specified crimes of future concern, whether those be violent or property, or both.[74]

As a general guideline, employers should avoid hiring people who have committed crimes against vulnerable individuals. Another researcher posits that the following factors also merit consideration:

- Crimes that involve a betrayal of trust
- Applicant criminal versatility (variety of criminal convictions)
- Young age at first arrest
- Total number of convictions[75]

Another often-noted risk factor is substance abuse, which is a known correlate or predictor of criminal recidivism. According to the National Center on Elder Abuse, substance abuse is the most frequently cited risk factor associated with elder abuse and

[74] Correspondence between Naomi Karp and Alfred Blumstein, March 24, 2009.

[75] National Committee for the Prevention of Elder Abuse, "What Can We Learn" (n.d.).

neglect.[76] Some have argued that drug-related convictions should be considered closely for in-home workers with access to medications.[77]

In some states, the list of disqualifying crimes is so broad that the background check screening and disqualification appears overinclusive. It may be hard to see a nexus between some misdemeanor convictions and the risk of harm to older adults. At the same time, criminal background screening may be seen as underinclusive. Much "bad behavior" rises to the level of unacceptable mistreatment of home care recipients but is not criminal in nature. A worker may be verbally abusive or consistently inattentive, but the abuse or neglect might fall in the civil tort realm rather than the criminal arena.[78] In these cases, a job applicant may have a poor work history, but a criminal background check alone may fail to reveal the salient facts.

New Research May Provide Basis for Length of Disqualification after Criminal Behavior

With regard to statutory provisions permitting hiring after a specified time lapse since conviction, we found limited evidence basis for defining "look-back" periods for specific crimes, although there is some new scholarship in this field. Recent research[79] by Alfred Blumstein and Kiminori Nakamura at Carnegie Mellon University explores the topic of "redemption in the presence of widespread criminal background checks."

They posit that criminal background checks have become ubiquitous because of advances in information technology and growing concerns about employers' liability. But the probability of recidivism declines with time "clean," so there is some point when a person with a criminal record who remains free of further contact with the justice system is of no greater risk than any counterpart of the same age—an indication of redemption from the mark of crime.

Their study is the first to use data from a state criminal history repository to ascertain the declining hazard of re-arrest with time clean. They compare the risk of reoffending for someone with a record (who stayed clean) to the risk for (1) the general population of the same age and (2) individuals with no prior record. This enables the scientific determination of a point when redemption has likely been reached, as opposed to arbitrary selection of cutoff points by legislatures or individual employers. Earlier studies show that recidivism rates vary with the age and type of crime of the earlier arrest.

For example, Blumstein and Nakamura found that someone arrested for robbery at age 20 who stays clean for four years has no greater risk of a later arrest than someone of the same age cohort in the general population. Similarly, an 18-year-old arrested for a crime

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[76] National Committee for the Prevention of Elder Abuse (n.d.), available at www.preventelderabuse.org/issues/substance.html.

[77] Nonprofit Risk Management Center, "Checking Criminal Histories: Some Considerations Before You Begin" (1998), available at http://nonprofitrisk.org/library/articles/employment05001998.shtml.

[78] C. Sabatino and S. Hughes, *Addressing Liability Issues in Consumer-Directed Personal Assistant Services: The National Cash and Counseling Demonstration and Selected Other Models* (Washington, DC: Department of Health and Human Services, Office of the Assistant Secretary for Planning and Evaluation, 2004).

[79] Alfred Blumstein and Kiminori Nakamura, "Redemption in the Presence of Widespread Criminal Background Checks," *Criminology* 47, no. 2 (May 2009).

of violence who stayed clean for eight years has about the same risk of re-arrest as a never-arrested person, and a lesser risk after that.[80]

The policy implications they cite include the following:

- Employers could be given documents explaining the diminished value of records older than a certain number of years for risk assessment purposes.
- Statutes could protect employers from liability if they acted based on those guidelines.
- Records could be sealed or not disseminated if older than X years.

IMPACT ON THE WORKFORCE IS UNCLEAR

There is little question that the workforce for providing HCBS direct care services is already inadequate to meet the demand for workers. This gap will likely worsen in the coming decades as the number of older adults grows and the cohort of women ages 25 to 54, the traditional labor pool for direct care workers, stagnates.[81] Conducting criminal background checks and disqualifying potential workers does limit the pool of available workers, at least marginally. The magnitude of this reduction, however, is unclear. States participating in the CMS pilot screened 204,339 potential employees and disqualified 7,463—less than 4 percent.[82] An unknown number may have been deterred from seeking employment as a result of the screening requirement.

In their study of nurse aides in nursing homes, researchers from the Lewin Group concluded that criminal background checks do not limit the pool of potential job applicants, based on employer reports only.[83] We did not find comparable studies of the workforce in community-based settings, nor was shortage of community-based workers raised as a concern in the materials we reviewed. Again, most program staff we interviewed agreed that those disqualified were appropriately excluded from the workforce.

One policy implication of some criminal background check laws and policies is the removal of home health aides and other direct care positions from the universe of potential career training options for prisoner rehabilitation programs. While such programs tend to focus on other, nonhuman services positions, the growing shortage of HCBS workers may prompt reevaluation of these exclusions.

If those who are excluded are viewed as truly unfit for working with vulnerable populations, then such a reduction of the potential workforce may be considered entirely appropriate. However, if criminal background disqualification is a blunt instrument, workforce shortages may motivate heightened scrutiny of this type of screening.

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[80] There are some limitations (i.e., generalizability of findings, concern about mobility, arrest vs. conviction, etc.) of the study, and Blumstein and Nakamura are conducting further research incorporating national criminal history records, not just state-based records.

[81] Toosi, "Labor Force Projections" (2007).

[82] Abt Associates, *Evaluation* (2008).

[83] The Lewin Group, *Ensuring a Qualified Long-Term Care Workforce* (2006).

OTHER STRATEGIES CAN ALSO CONTRIBUTE TO REDUCING RISKS OF ABUSE

Criminal background checks are just one potential tool for reducing the risk of elder abuse. Our review suggests several other strategies are available to states and Medicaid administrators in attempting to address this problem.[84]

Employers and states can and do utilize reference checks, thorough in-person interviews, detailed job applications, signed statements by potential employees as to past work history and criminal convictions, and alcohol and drug testing.[85] AARP roundtable participants agreed that criminal background data should be coupled with these other screening data to mitigate the risk of elder abuse more effectively. Credit histories may be important for identifying possible risk of theft. A system or set of processes using multiple screening techniques could both reduce risk to clients and help mitigate potential liability for HCBS providers.

Other strategies are part of multiple, ongoing initiatives to build a better, more reliable, more skilled long-term care workforce. These strategies include better training and supervision of direct care workers, improved recruitment techniques, reduced hours, opportunities for full-time employment, better benefits, recognition programs, and increased opportunities for advancement. In light of the projected growth in demand for direct care workers to provide long-term care, improving workforce conditions and worker quality will be both crucial and challenging.

Finally, it can be argued that a little supervision goes a long way. Greater oversight by supervisory staff; use of monitoring cameras in care areas; and unscheduled visits by advocates, family members, and supervisors all discourage mistreatment and reduce the opportunity for abuse, although researchers and others have raised concerns regarding the challenges of supervising the direct care workforce.[86] Alerting nonprogram personnel to the signs of abuse may also decrease or even prevent adverse outcomes. For example, Oregon developed a banking kit for financial institutions to help them recognize suspicious activity that may indicate financial abuse or exploitation of an older person.[87]

RAP-BACK AND POSTEMPLOYMENT CHECKS ENHANCE VALUE OF SCREENING

Monitoring criminal activity after an individual has been employed may enhance protections for home care recipients. Preemployment screening is retrospective only—a check of any criminal convictions prior to beginning employment. Direct care workers are rarely rescreened, except perhaps when they change employers. Recognizing this phenomenon, three states participating in the CMS pilot project[88] used some of their grant

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[84] See, for example, S. Dawson and R. Surpin, "Direct-Care Healthcare Workers: You Get What You Pay For," *Workforce Issues in a Changing Society* (Spring 2001); and M. Wilner, "Toward a Stable and Experienced Caregiving Workforce," *Generations* (Fall 2000).

[85] D. Arrindell, "Criminal Background Checks for Home Care Aides," *Caring* (April 1997).

[86] E. Scala, L. Hendrickson, and C. Regan, *Strategies for Promoting and Improving the Direct Service Workforce: Applications to Home and Community-Based Services* (New Brunswick, NJ: Rutgers Center for State Health Policy, 2008); Government Accountability Office, *Long-Term Care: Some States Apply Criminal Background Checks to Home Care Workers* (Washington, DC: GAO, 1996).

[87] State of Oregon, *Governor's Elder Abuse Task Force: Final Report* (October 2004).

[88] Alaska, Michigan, and Illinois.

funding to create "rap-back" programs. Under such programs, any new crimes are automatically flagged in the state's criminal records database and communicated back to the employer. Rap-back programs can be used to disqualify workers after employment based on subsequent criminal activity, as was done in Michigan, where approximately 300 workers were disqualified as a result of the rap-back feature. In addition, rap-back can save money by avoiding the cost of refingerprinting direct service workers each time they change jobs, because criminal history information is updated continually.

Currently such rap-back provisions exist only at the state level. However, the Patient Safety and Abuse Act includes a provision mandating that the FBI develop a rap-back capability for its Integrated Automated Fingerprint Identification System. The bill would require the FBI to develop the capacity to both store and retrieve fingerprint information from this database,[89] thus reducing the cost of conducting checks.

CURRENT POLITICAL BACKDROP MUST BE RECOGNIZED

While research to underpin policy decisions in this area may be scant, an evaluation of criminal background screening for home care workers must be realistic regarding the political backdrop against which this dialogue is occurring. Independent of their evidence bases, criminal background checks are frequently viewed as a "good" or "right" thing to do, and policymakers have acted accordingly. As one roundtable participant put it, "the train has left the station." Fear of liability is a key driver in the move to use background checks, along with the fear of adverse publicity. Provider agencies have been sued over whether a criminal background check was done. In response, one suggestion at the roundtable was to develop an algorithm for disqualification, based on the best available evidence, and then offer legislative safe harbor to those who use it. Nonetheless, it was noted that high-profile or egregious cases of criminal abuse will create political pressure for a strong reaction in the policy arena.

Current legislative initiatives seek to refine and enhance states' ability to provide comprehensive criminal background information, leaving alone the question of how best to interpret and apply these data. Once better systems have been developed, one long-term legislative goal under consideration would be to mandate criminal background checks for the Medicare and Medicaid programs and to expand the range of worker types who must be screened. In light of these legislative and political trends, some roundtable participants urged a more nuanced and evidence-based policy solution.

IX. SPECIAL ISSUES FOR CONSIDERATION: SELF-DIRECTED WORKERS

Self-directed programs, whose participants have greater control over the workers who provide their direct care, raise special issues concerning criminal background checks. The self-directed model allows participants to recruit, hire, and supervise their own workers. In some cases, these direct care workers may be friends, family, or even legally responsible relatives or guardians. Criminal background or abuse registry checks may or

[89] S. 631.

may not be conducted for such workers, depending on state law, Medicaid program provider qualifications, or the request of the individual participant.

Clearly, participants in such programs and their families have the right to know about the backgrounds of the individuals they hire to provide them support and assistance. Typically, Medicaid self-directed programs provide a mechanism for a participant to obtain criminal record checks on potential workers. However, not all programs require or even facilitate such checks for participants who direct their own care. Some state laws create an exemption clause for workers hired under self-direction. If checks are not mandated by statute, or if an exemption is allowed, state Medicaid program staff must determine which requirements, if any, will apply to self-directed programs.

A range of philosophical approaches to self-directed long-term care underpins the varying state strategies on criminal background checks. On one hand, some in the field contend that individuals should have the option to request a criminal background check, and, if the results are positive, should have the final authority to decide whether or not to hire the individual. This approach allows individuals to take on more risk and supports the principle of empowering participants to make their own fully informed decisions. At the other extreme, there are state programs that require background and abuse registry checks on all potential employees hired under self-direction and mandate which crimes preclude employment. These laws may include family, friends, and legally responsible relatives.

CMS data on 146 of the more than 300 approved Medicaid Section 1915(c) waivers indicate that most states require criminal background checks of all their traditional agency waiver providers, either as a condition of Medicaid certification or state law.[90] Within these same 146 programs, all but five states in the sample also require criminal background checks on workers hired under the self-directed service delivery system, without exceptions for friends or family of self-directed program participants.[91] These five states vary in how they address criminal checks for self-directed workers. Pennsylvania law, for example, requires criminal background checks on all home and community-based waiver providers, except when employed by individuals under the self-directed option. In contrast, Idaho requires criminal background checks on all home care workers, but if results show prior criminal history, those who are self-directing can determine whether to hire. Where checks are mandated, disqualifying events are the same for traditional and self-directed providers.

Our case studies of three states showed a continuum of rules and practices. In Arkansas, background checks are neither required nor provided for self-directed workers in one of two Medicaid programs offering self-direction. In Michigan, such checks are required, but participants have some flexibility to act upon the results. At the other end of the spectrum, in New Mexico, not only are checks required for all worker types, but the bases for exclusion are codified in statute as well.

From a policy perspective, self-directed programs that require criminal record checks for workers must also decide whether to prohibit participants from hiring anyone with a

[90] The database provided by CMS is being built iteratively and does not include all approved waivers, or even a random sample.

[91] The exceptions are Colorado, Idaho, North Dakota, Pennsylvania and Illinois.

criminal record or the circumstances under which someone with a record may not be employed, if such prohibitions are not already codified in statute. Policy must also address the scope of the criminal background check: state, regional, and/or national. In every case, support should be available to help participants understand and analyze the background check. When they have discretion in hiring, participants may need assistance in assessing the potential risk associated with hiring someone with a criminal background. In this way, participant choice, the core of the self-direction philosophy, can be respected at the same time the participant is better empowered to make the choice.

This theme of enhancing choice with education and support was echoed at the AARP roundtable. Several participants with expertise in self-direction agreed that criminal background checks should be made available to those who hire their own staff, but they should be afforded flexibility in how they act on the results. This approach is currently the policy in California's In-Home Supportive Services program, which has been offering self-direction for 35 years and has been providing tools for background checks without making them mandatory. Roundtable experts emphasized that participants should be aided in understanding what the criminal records data do and do not encompass. Other considerations inherent in respecting choice include recognition that the labor pool for self-direction generally comes from the same community as those who are self-directing, and that societal and professional definitions of "abuse" may differ appreciably.

Self-directed programs present unique challenges to implementing criminal background checks. Typically in an agency model of care, the provider agency, which hires and serves as the common law employer, performs and finances the check. However, in many self-directed models, the participant is the legal employer. Having this individual navigate the criminal background system is generally not feasible or desirable. As a result, the entity providing financial management services frequently performs the criminal background checks on behalf of the participant. This is the case whether the check is mandated by state law, required as a condition to qualify as a provider, or simply desired by the participant. Medicaid waiver funding prohibits deducting the cost of mandated criminal background checks from the participant's individual budget, necessitating an alternate source of funding.

The exclusion of family members and legally responsible relatives as paid workers on the basis of a criminal records check may clash with daily realities. Presumably, family members already have a relationship with the individual and may currently be providing informal assistance that will persist, regardless of criminal findings. As noted above, data on elder abuse show that the most common category of abusers is family members. Most of the common law rules granting parental and spousal immunity in abuse cases have been overruled.[92] Family members excluded from paid employment due to criminal convictions may well continue to have informal direct access to the program participant.

There are legal issues to consider as well. In a review of self-directed care, Charles Sabatino and Sandra Hughes observed, "Legal research revealed that there are very few reported cases that discuss liability issues in the context of government sponsored

[92] S. Hughes and C. Sabatino, "Addressing Liability Issues in Consumer-Directed Personal Assistant Services: The National Cash and Counseling Demonstration," *Stetson Law Review* 35 (2005): 251.

consumer-directed care."[93] They concluded that offering background checks is one way to reduce risks for those who self-direct, adding that such risk is low level in general "because of the infrequency of misconduct that rises to the level of abuse or neglect. Of course, on the rare occasions when it does occur, the injury to the consumer can be extremely serious."[94] From the states' perspective, the greater the control exercised by the state in the hiring process, the greater the perceived liability for negligent workers.

X. MOVING FORWARD: PROMISING PRACTICES, POLICY OPTIONS, AND FUTURE RESEARCH

Experimentation in the states—particularly through the CMS criminal-background-check pilot project—as well as research and policy discussions to date suggest some promising practices and policy options to enhance screening of potential home care workers. In addition, this review of literature, law, and practice highlights several areas for research that can inform policy and practice in the future. Policymakers, program managers, and researchers should consider these suggestions:

Increase the accuracy, speed, and cost-effectiveness of criminal background checks by implementing promising state practices. The CMS pilot demonstrated the value of the following approaches, among others:

- Integration of data sources on criminal and other relevant history through Web-based and other system enhancements
- Information sharing between various state agencies conducting background checks to avoid costly duplication of efforts
- Electronic fingerprint capture to cut time and enhance accuracy of record checks
- Dedicated state personnel to maximize efficiency and expertise
- Use of a tiered system, i.e., checking low-cost state records and registries as a first step, followed by higher-cost FBI checks for the remaining smaller pool of applicants
- Rap-back system to automatically flag new crimes after hiring home care workers.

Avoid unnecessary disqualifications to increase fairness and reduce unintended effects on the workforce. The recent criminology research discussed above suggests that we are moving toward a more-solid evidence basis for disqualifying potential workers. States have developed procedures to avoid rejection of qualified candidates. In the future, states and employers should do the following:

- Base disqualifying crimes on solid evidence, e.g., crime-switch matrices with supporting data.

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[93] C. Sabatino and S. Hughes, *Addressing Liability Issues in Consumer-Directed Personal Assistant Services: The National Cash and Counseling Demonstration and Selected Other Models* (Washington, DC: Department of Health and Human Services, Office of the Assistant Secretary for Planning and Evaluation, (2004), v.

[94] Sabatino and Hughes, *Addressing Liability Issues* (2004), ix.

- Base the length of disqualifications in statutes and regulations on evidence about "redemption," as described in the Blumstein/Nakamura research.

- Provide a waiver or "rehabilitation review" process to allow applicants to demonstrate that they are qualified despite some criminal history.

- Permit appeals of disqualifications to enable applicants to prove that criminal background check results are erroneous.

Use multiple tools to enhance the safety of home care program participants. Although legislators and employers have made criminal background checks ubiquitous, numerous screening and evaluation tools can complement them. These include the following:

- Reference checks

- Credit histories

- Detailed application forms with disclosure requirements

- Thorough interviews

- Drug and alcohol screening

- Training and supervision of workers, pre- and postemployment.

Empower consumers and employers through education and other resources. Home care recipients (especially those in self-directed programs), family members, and agencies supplying workers can benefit from the following:

- Education on the benefits and limitations of criminal background check screening, including the fact that it can be underinclusive or overinclusive in identifying appropriate job candidates

- Education on complementary screening methods

- Registries of prescreened individuals.

Recognize that self-directed programs raise distinct issues. Self-direction gives participants more independence because they recruit, hire, and supervise their workers, and those workers may be family members, friends, or others in their communities. Therefore, self-directed programs should do the following:

- Allow more risk taking and choice for participants when screening and hiring.

- Make criminal background checks available, but allow flexibility in acting on the results, especially for family members and friends.

Conduct additional research on key issues. Considerable resources are devoted to conducting criminal background checks in almost every state. Government entities could ultimately better target their resources if they fund research now on the following topics:

- The efficacy of criminal background check screening and other screening tools in reducing risk to older adults receiving home care services

- The deterrent effect of criminal background check requirements
- The evidence for identifying disqualifying offenses and the length of disqualification
- The effect of criminal background screening on the retention of workers.

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Kaiser Family Foundation State Health Facts: www.statehealthfacts.org/

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National Committee for the Prevention of Elder Abuse: http://www.preventelderabuse.org

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APPENDIX A: MEDICAID AND OTHER FEDERAL FUNDING SOURCES FOR LONG-TERM CARE

MEDICAID FUNDING

State Plan Services

Mandatory Services: All states participating in the federal Medicaid program must cover a minimum set of services for select groups of eligible beneficiaries. Among these mandatory services are physician care and inpatient and outpatient hospital care; in 1970, home health services were added.[95] Mandatory home health includes nursing services, home health aides, and medical supplies for the home. Home health aide services are predominantly nonmedical in nature but differ from personal care (described below) in that they require oversight by a medical professional (nurse supervision) and must be provided by a licensed home health agency. Generally, home health aides receive more training than personal care workers and perform some paraprofessional tasks as part of the skilled care Medicaid-eligible individuals receive. Nearly 1 million individuals received Medicaid-funded home health services in 2004.[96]

Optional Services: States may create additional service categories, to be matched by federal dollars, known as optional services. Individuals who are deemed eligible for Medicaid are entitled to access both mandatory and optional services if a medical need exists, but the state can impose benefit limits to control utilization of the latter. Personal care services for people with disabilities, including elders, were formally added to the law as an optional service in l993.[97] Personal care workers provide assistance with the activities of daily living (e.g., bathing, dressing, grooming, and transferring) and instrumental activities of daily living (e.g., personal hygiene, light housework, laundry, meal preparation, transportation, grocery shopping, using the telephone, medication management, and money management). Workers may be referred to as personal care workers, direct service workers, attendants, or community workers. Relatives of the recipient may provide these services at Medicaid expense, provided they are not considered "legally responsible" for the recipient. In 2004, approximately 775,000 Medicaid beneficiaries received personal care, which was an authorized optional service in 33 states.[98]

Section 1915(c) Waivers

In l981, Congress amended the Social Security Act to allow states to add home and community services as an alternative to institutionalization for older adults and people with disabilities. With this authority, states were allowed the discretion to develop programs—including case management, homemaker, home health aide, personal care, adult day care, habilitation, respite, and other services—for individuals who would otherwise require institutional care. Unlike the requirements for state plan services, a section 1915(c) waiver allows states to target individualized services to a particular group

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[95] J. O'Keefe and G. Smith, *Understanding Medicaid Home and Community Services: A Primer* (Washington, DC: Department of Health and Human Services, Office of Disability, Aging, and Long-Term Care Policy, 2000), 8.

[96] Kaiser State Health Facts, available at www.statehealthfacts.org/comparetable.jsp?ind=248&cat=4.

[97] Ibid, p. 11.

[98] Kaiser State Health Facts.

(e.g., elders and adults with disabilities or children with developmental disabilities). Expanded income limitations (up to 300 percent of Supplemental Security Income) and geographic limitations may also be applied. The Kaiser Foundation estimated that in 2004, more than 300 waiver programs spent more than$23 billion serving more than 1 million recipients (more than half seniors).[99]

Section 1115 Demonstration

States have used the authority under Section 1115 to develop a wide range of alternative approaches to service delivery that feature innovative program designs. This section of the Social Security Act allows states to offer experimental pilots intended to demonstrate an efficient use of the Medicaid statutes. To a very large extent, states may waive many of the requirements found under the State Plan and Section 1915(c) waiver authorities. It was under this type of authority that states first implemented the Cash and Counseling Demonstration and Evaluation and tested the concepts of self-direction, including hiring legally responsible family members. More recently, CMS has begun to incorporate the provision of self-direction into mainstream waivers, and the passage of the Deficit Reduction Act of 2005 (discussed below) has offered additional opportunities for implementing this delivery model. As a result, states are now generally using the Section 1115 authority to redesign and reform their entire Medicaid programs, rather than to implement self-direction.

Deficit Reduction Act of 2005

Section 6086 of the Deficit Reduction Act (DRA) of 2005[100] added section 1915(i) to the Social Security Act, effective January 2007, to authorize home and community services as a state plan services option. While this optional coverage is similar to section 1915(c), it breaks the eligibility link between home and community services and institutional care. Further, states may choose to limit the geographic area, and once approved, additional renewals are not required. The regulation does limit income levels to individuals whose income does not exceed 150 percent of the federal poverty level. In addition, unlike Section 1915(c), this authority does not allow a program to target a specific population; rather, the state must establish a common eligibility standard that applies to the entire group of potentially eligible individuals (i.e., those under the state plan). A state may, however, establish functional criteria specific to the program or an individual service. The eligibility admissions criteria must be is less stringent than those applied to institutionalization admissions, and states may limit the eligible population to a specific number. In addition, states may apply a waiting list once the number of eligible participants is achieved.

Section 6087 of the DRA of 2005 also added section 1915(j), the Self-Directed Personal Assistance Service State Plan Option. This new authority allows states to develop self-directed services as an optional state plan service. Language in the statue defines self-direction as services that are “planned and purchased under the direction and control of the individual or the individual’s authorized representative.”[101] Individuals may recruit,

[99] M. Kitchener, T. Ng, C. Harrington, and M. O’Malley, *Medicaid Home and Community-Based Service Programs: Data Update* (Menlo Park, CA: Kaiser Family Foundation, December 2007).

[100] P.L. 109-171.

[101] Ibid, section 6807.

hire, manage, and dismiss home care workers. In addition, beneficiaries may use a flexible personalized budget to purchase equipment, items, supplies, goods, and services that directly relate to meeting their personal care needs. Cash payments may be made to the participant, and they may hire legally responsible relatives, including a spouse, parents of minor children, and legal guardians, if the state elects this level of flexibility.

OTHER FEDERAL FUNDING FOR HCBS

The Administration on Aging (AoA), through funding in the Older Americans Act (OAA), provides a range of services for older adults. Area Agencies on Aging and their associated aging network providers use this funding to offer home-delivered meals, transportation, adult day care, legal assistance, and health promotion. In addition, OAA amendments in 2006 created the Nursing Home Diversion and Modernization grant program. Participating states are developing programs to divert individuals from nursing homes into community-based programs, with a goal of delaying or avoiding the need to access Medicaid funding to pay for nursing home services. As part of this initiative, the Veterans Health Administration is funding programs in select states to create a system of HCBS targeting veterans. The Veterans Health Administration is partnering with AoA and will invest more than $10 million to serve veterans at risk of institutionalization.

These programs will include a combination of agency-provided services and opportunities for recipients to hire their own staff. Grant recipients are required to create effective quality management and improvement programs that include provider capacity and capacity measures; however, states are given flexibility in devising these systems. Grant requirements are silent on requiring criminal background checks on either agency staff or those who elect to self-direct. State laws and individual provider qualifications will govern preemployment screening.

Medicare, established as a social insurance program under the Social Security Act of 1965, provides health insurance to individuals ages 65 and older and for younger persons with permanent disabilities. The Medicare program funds approximately 20 percent of all long-term care, primarily through home health services to almost 3 million individuals annually. While the duties of Medicare home health aides typically mirror those of a personal care worker, a home health aide must meet certain federally defined conditions of participation. These conditions include training and competency evaluations. While these conditions do not mandate preemployment screening or background checks, agencies must ensure that worker meet all state licensure and certification standards, which frequently include background checks.

APPENDIX B: NCSL CHART (LAWS CURRENT AS OF DECEMBER 15, 2008)

50-State Overview of Criminal Background Checks for In-Home Direct Care Workers

	Relevant Statutes and/or Regulations	Checks: Mandatory or Discretionary for Providers or Employers[1]	Scope: Publicly Funded Care Only or Publicly and Privately Funded Care[2]	Excludes Certain Provider Categories	Required for Volunteers	Addresses Consumer-Directed Care[3]	Type of Check			Party Responsible for Cost	Conditional Employment	Disqualifying Offenses[4]	Waiver or Appeal Available
							State Only	State and Federal	State and Some-times Federal				
Alabama	Code Title 38 Chapter 13	Mandatory	Publicly and privately funded care	Yes	Yes	No		Yes		Employer, employee, or state agency	Yes; begins when individual signs criminal conviction statement and ends when background check is complete	Homicides, other violent offenses, sex-related offenses, offenses against dependent or vulnerable individuals, drug-related offenses	Yes
Alaska	Admin Code Sec. 47.05.300	Mandatory	Publicly funded care only	Yes	Yes	No		Yes		Employee or employer; fee waived for volunteer unless volunteer resides in the client's home	Yes; check must be requested within 10 days of employment	Homicides, other violent offenses, offenses against dependent or vulnerable individuals, fraud-related offenses, drug-related offenses, property crimes	Yes
Arizona	Code Sec. 36-411	Mandatory	Publicly and privately funded care	None specified	Yes	No		Yes		Employee or state agency	Yes; check must be requested within 20 days of employment	Homicides, sex-related crimes, other violent offenses, fraud-related offenses, drug-related offenses, offenses against dependent or vulnerable individuals, DUI, and property crimes	Yes
Arkansas	Public Health and Welfare Code Title 20, Chapter 33, Subchapter 2	Mandatory	Publicly and privately funded care	None specified	Not specified	No			Yes	Not specified	Yes; expires after 45 days	Homicides, other violent offenses, sex-related offenses, and offenses against dependent or vulnerable individuals	Yes
California	Welfare and Institutions Code Sec. 15660, Sec. 12301.6 & 12305.81	All Discretionary	Publicly & privately-funded care	None specified	Not specified	No		Yes		Cost shared by county (35%) and state (65%); state pays 100% of cost once a county's nonprofit consortium or public authority has conducted background checks for at least 50 percent of all providers on their registries.	Not specified	Offenses against dependent or vulnerable individuals or fraud-related offenses.	Yes

	Relevant Statutes and/or Regulations	Checks: Mandatory or Discretionary for Providers or Employers[1]	Scope: Publicly Funded Care Only or Publicly and Privately Funded Care[2]	Excludes Certain Provider Categories	Required for Volunteers	Addresses Consumer-Directed Care[3]	Type of Check			Party Responsible for Cost	Conditional Employment	Disqualifying Offenses[4]	Waiver or Appeal Available
							State Only	State and Federal	State and Some-times Federal				
Colorado	Title 25, Article 27.5-107	Mandatory	Publicly and privately funded care	None specified	Not specified	No				Employer or employee	No	None specified	Not specified
Connecticut	Chapter 400o, Section 20-678	Mandatory	Publicly and privately funded care	None specified	Not specified	No		Yes		Employer (agency) or the applicant	Not specified	None specified	Not specified
Delaware	Title 16, Chapter 11, Subch. V	Mandatory; some discretionary	Publicly and privately funded care	Yes	Not specified	No		Yes		State pays for one check every five years; employer pays for additional checks	Yes; begins once individual has applied for check	Homicides, sex-related offenses, other violent offenses, and drug-related offenses	Not specified
District of Columbia	Section 44-551 and 44-552	Mandatory	Publicly and privately funded care	Yes	Yes; unless supervised	No		Yes		Employer or applicant	No	Homicides, other violent offenses, sex-related offenses, offenses against dependent or vulnerable individuals, fraud-related offenses, and drug-related offenses	Not specified
Florida	Title XXIX, Chapter 400	Mandatory	Publicly and privately funded care	Yes	Yes; unless supervised and working fewer than 40 hours per month	No			Yes	Employer or employee (at the discretion of employer)	Yes; DD [[sp out]] providers - expires after 90 days and must be under direct supervision of screened employee; home care providers are on probation until results are received	Homicides, sex-related offenses, other violent offenses, drug-related offenses, property crimes, offenses against dependent or vulnerable individuals	Yes
Georgia	Section 31-7-301	Mandatory	Publicly and privately funded care	None specified	Not Specified	No				Employee or employer	Not specified	Homicides, other violent offenses, sex-related offenses, and offenses against dependent or vulnerable individuals	Not specified
Hawaii	Title 20, Chapter 346-335, and Chapter 846-2.7	Mandatory	Publicly funded care only	None specified	Yes	No		Yes		Not specified	Yes; check must be requested within five days of employment	None specified	No

	Relevant Statutes and/or Regulations	Checks: Mandatory or Discretionary for Providers or Employers[1]	Scope: Publicly Funded Care Only or Publicly and Privately Funded Care[2]	Excludes Certain Provider Categories	Required for Volunteers	Addresses Consumer-Directed Care[3]	Type of Check			Party Responsible for Cost	Conditional Employment	Disqualifying Offenses[4]	Waiver or Appeal Available
							State Only	State and Federal	State and Some-times Federal				
Idaho	Rules Governing Mandatory Criminal History Checks," (16.05.06)	Mandatory	Publicly and privately funded care	None specified	Yes	No		Yes		Not specified	Not specified	Homicides, sex-related offenses, other violent offenses, offenses against dependent or vulnerable individuals, fraud-related offenses, drug-related offenses	Yes
Illinois	Code 225 ILCS 46	Mandatory	Publicly and privately funded care	None specified	Not specified	No	Yes			State (Medicaid program) or employer	Yes; expires after three months	Homicides, other violent offenses, sex-related offenses, drug-related offenses, fraud-related offenses, property crimes	Yes
Indiana	Code Title 16, Article 27	Mandatory	Publicly and privately funded care	None specified	Not specified	No		Yes		Employer; may pass fee on to employee	Yes; 21 days	Violent offenses, sex-related offenses, and offenses against dependent or vulnerable individuals	Not specified
Iowa	Section 135C.33	Mandatory	Publicly and privately funded care	None specified	Yes	No		Yes		Not specified	Not specified	Offenses against dependent or vulnerable individuals	Yes
Kansas	Code 65-5112, 65-5117	Mandatory; some discretionary	Publicly and privately funded care	Yes	No	Yes; discretionary			Yes	Employer or employee	Yes; expires when check is complete	Homicides, sex-related offenses, and offenses against dependent or vulnerable individuals	Not specified
Kentucky	Statute 216.785	Mandatory	Publicly and privately funded care	None specified	Not specified	No	Yes			State agency or applicant	Not specified	Offenses against dependent or vulnerable individuals, sex-related offenses, property crimes, drug-related offenses and fraud-related offenses	Yes
Louisiana	No statute or regulation found												
Maine	Section 2142	Mandatory	Publicly and privately funded care	Yes	No	No		Yes		Not specified	Not specified	Sex-related offenses, offenses against dependent or vulnerable individuals, and fraud-related offenses	Not specified

	Relevant Statutes and/or Regulations	Checks: Mandatory or Discretionary for Providers or Employers[1]	Scope: Publicly Funded Care Only or Publicly and Privately Funded Care[2]	Excludes Certain Provider Categories	Required for Volunteers	Addresses Consumer-Directed Care[3]	Type of Check			Party Responsible for Cost	Conditional Employment	Disqualifying Offenses[4]	Waiver or Appeal Available
							State Only	State and Federal	State and Some-times Federal				
Maryland	Section 19-4B-03	Mandatory	Publicly and privately funded care	None specified	Not specified	No			Yes	Agency or employee	Not specified	None specified	Yes
Massachusetts	Section 172C	Mandatory	Publicly and privately funded care	None specified	Yes	No	Yes			Not specified	Not specified	Homicides, other violent offenses, sex-related offenses, offenses against dependent or vulnerable individuals, drug-related offenses, and fraud-related offenses	Yes
Michigan	MI Choice Waiver Minimum Operating Standards	Mandatory	Publicly and privately funded care	Yes	Yes	Yes; not exempt			Yes	State reimburses cost	Yes; employee must certify in writing that he or she has committed no offenses	Homicides, other violent offenses, sex-related offenses, offenses against dependent or vulnerable individuals, drug-related offenses, fraud-related offenses, property crimes	Yes
Minnesota	Statute Chapter 245C	Mandatory	Publicly and privately funded care	Yes	Yes; unless supervised	Yes; not exempt			Yes	Employer	Yes; only under direct supervision	Homicides, other violent offenses, sex-related offenses, offenses against dependent or vulnerable individuals, drug-related offenses, fraud-related offenses, and property crimes	Yes
Mississippi	43-11-13	Mandatory	Publicly and privately funded care	None specified	Not specified	No		Yes		State or employer	Yes; employer may contract with applicant but they are prohibited from providing patient care services until check is completed and no disqualifying offenses are found	Homicides, other violent offenses, sex-related offenses, offenses against dependent or vulnerable individuals, drug-related offenses and property crimes	Yes
Missouri	Section 660-317	Mandatory	Publicly and privately funded care	None specified	Not specified	No			Yes	Not specified	Yes	Offenses against dependent or vulnerable individuals	Not specified

	Relevant Statutes and/or Regulations	Checks: Mandatory or Discretionary for Providers or Employers[1]	Scope: Publicly Funded Care Only or Publicly and Privately Funded Care[2]	Excludes Certain Provider Categories	Required for Volunteers	Addresses Consumer-Directed Care[3]	Type of Check			Party Responsible for Cost	Conditional Employment	Disqualifying Offenses[4]	Waiver or Appeal Available
							State Only	State and Federal	State and Some-times Federal				
Montana	2007 Senate Joint Resolution 7	No - State Department of Public Health and Human Services workgroup will study issue and make recommendations to the 2009 legislature											
Nebraska	Rules: NAC 15-006	Mandatory	Publicly and privately funded care	Applies to personal assistance providers	Not specified	No	Yes			Not specified	Not specified	Homicides, other violent offenses, sex-related offenses, offenses against dependent or vulnerable individuals, drug-related offenses, fraud-related offenses, and property crimes	Not specified
Nevada	No statute or regulation found												
New Hampshire	2003 Chapter 185; Sec. 161-I6a	Mandatory	Publicly and privately funded care	None specified	Not specified	No	Yes			Employer; may pass fee on to employee	Yes; but individual may not begin work until check is completed	None specified	Not specified
New Jersey	Code 45:11-24.3 - 45:11-24.5	Mandatory	Publicly and privately funded care	None specified	Not specified	No		Yes		State	Yes; expires after 60 days for state check and 120 days for federal check	Homicides, other violent offenses, property crimes, offense against dependent or vulnerable individuals, and drug-related offenses	Yes
New Mexico	29-17-1 through 29-17-5	Mandatory	Publicly and privately funded care	None specified	Not specified	Yes; not exempt		Yes		Employer or employee	Yes; must be supervised employment and begins once check is requested	Homicides, other violent offenses, sex-related offenses, offenses against dependent or vulnerable individuals, drug-related offenses, property crimes, and fraud-related offenses	Yes
New York	Public Health Law 2899 and Executive Code 845B	Mandatory	Publicly and privately funded care	None specified	Not specified	No			Yes	Agency/provider; agency is forbidden from seeking reimbursement from employee	Yes; must be supervised when in contact with consumers	Homicides, other violent offenses, sex-related offenses, offenses against dependent or vulnerable individuals, drug-related offenses, and fraud-related offenses	Yes

	Relevant Statutes and/or Regulations	Checks: Mandatory or Discretionary for Providers or Employers[1]	Scope: Publicly Funded Care Only or Publicly and Privately Funded Care[2]	Excludes Certain Provider Categories	Required for Volunteers	Addresses Consumer-Directed Care[3]	Type of Check			Party Responsible for Cost	Conditional Employment	Disqualifying Offenses[4]	Waiver or Appeal Available
							State Only	State and Federal	State and Some-times Federal				
North Carolina	Statute 131E-265	Mandatory	Publicly and privately funded care	None specified	Not specified	No			Yes	Not specified	Yes; check must be submitted within five days of employment	Homicides, other violent offenses, sex-related offenses, offenses against dependent or vulnerable individuals, drug-related offenses, property crimes, DUI, and fraud-related offenses; none are automatically disqualifying	Yes
North Dakota	No statute or regulation found												
Ohio	Revised Code Section 3701.881 Revised Code Section 173.394	Mandatory	Publicly and privately funded care	Yes	No	No			Yes	Employer	Yes; expires after 30 days	Homicides, other violent offenses, sex-related offenses, offenses against dependent or vulnerable individuals, drug-related offenses, and fraud-related offenses	Yes
Oklahoma	Chapter 71 of 2008	Mandatory	Publicly and privately funded care	Yes	Not specified	Yes; not exempt	Yes			Employer	Yes; expires after 30 days	Homicides, other violent offenses, sex-related offenses, offenses against dependent or vulnerable individuals, drug-related offenses, and fraud-related offenses	Yes
Oregon	Administrative Code Chapter 407-007-200	Mandatory	Publicly and privately funded care	None specified	Yes	No			Yes	Not specified	Yes; only under direct supervision and begins once check is requested	Homicides, other violent offenses, sex-related offenses, offenses against dependent or vulnerable individuals, drug-related offenses, fraud-related offenses, DUI, and property crimes; none are automatically disqualifying	Yes
Pennsylvania	2006 Act 69	Mandatory	Publicly and privately funded care	Yes	No	No			Yes	Employer	Yes; expires after 30 days for residents and 90 days for nonresidents	Homicides, other violent offenses, sex-related offenses, offenses against dependent or vulnerable individuals, and fraud-related offenses	Not specified
Rhode Island	Sec. 23-17-34	Mandatory	Publicly and privately funded care	None specified	Not specified	No	Yes			State	Yes; check is required within one week of employment	Homicides, other violent offenses, sex-related offenses, offenses against dependent or vulnerable individuals, drug-related offenses, and fraud-related offenses	Not specified

	Relevant Statutes and/or Regulations	Checks: Mandatory or Discretionary for Providers or Employers[1]	Scope: Publicly Funded Care Only or Publicly and Privately Funded Care[2]	Excludes Certain Provider Categories	Required for Volunteers	Addresses Consumer-Directed Care[3]	Type of Check			Party Responsible for Cost	Conditional Employment	Disqualifying Offenses[4]	Waiver or Appeal Available
							State Only	State and Federal	State and Some-times Federal				
South Carolina	Article 23, Criminal Records Checks of Direct Care Staff	Mandatory	Publicly and privately funded care	Yes	Yes	No			Yes	Employee or employer	No	Homicides, other violent offenses, sex-related offenses, offenses against dependent or vulnerable individuals, drug-related offenses, and fraud-related offenses	Not specified
South Dakota	Rules: 67:54:06:08	Mandatory	Publicly and privately funded care	None specified	Not specified	Yes; not exempt				Not specified	Not specified	No convictions that affect applicant's fitness for employment.	[[Should something be in this cell?]]
Tennessee	Chapter 0030-1-6	All discretionary	Publicly and privately funded care	None specified	Yes	No			Yes	Employer	Yes	Homicides, other violent offenses, sex-related offenses, offenses against dependent or vulnerable individuals, drug-related offenses, and fraud-related offenses	Not specified
Texas	Chapter 250, Health and Safety Code Handbook	Mandatory	Publicly and privately funded care	None specified	Not specified	No	Yes			Employer	Yes; pending the results of the check but only in emergency situations	Homicides, other violent offenses, sex-related offenses, and offenses against dependent or vulnerable individuals	Not specified
Utah	Code Sec. 62A-2-120 ,62A-3-104.3, 62A-3-106.5, 62A-3-311.1 and 62A-5-101	Mandatory	Publicly and privately funded care	Yes	Not specified	No			Yes	Employee	No	Homicides, other violent offenses, sex-related offenses, offenses against dependent or vulnerable individuals, drug-related offenses, and fraud-related offenses	Yes
Vermont	Background Check Policy (Department of Disabilities, Aging and Independent Living, Agency of Human Services)	Mandatory; some discretionary	Publicly funded care only	None specified	Yes	Yes; not exempt	Yes			State	Yes; expires after 60 days	Homicides, other violent offenses, sex-related offenses, offenses against dependent or vulnerable individuals, drug-related offenses, fraud-related offenses, and property crimes	Yes
Virginia	Code Sec. 32.1-126.01	Mandatory	Publicly and privately funded care	Yes	No; unless supervised	No	Yes			Employer	Yes; expires after 30 days	Homicides, other violent offenses, sex-related offenses, and offenses against dependent or vulnerable individuals	Not specified

	Relevant Statutes and/or Regulations	Checks: Mandatory or Discretionary for Providers or Employers[1]	Scope: Publicly Funded Care Only or Publicly and Privately Funded Care[2]	Excludes Certain Provider Categories	Required for Volunteers	Addresses Consumer-Directed Care[3]	Type of Check			Party Responsible for Cost	Conditional Employment	Disqualifying Offenses[4]	Waiver or Appeal Available
							State Only	State and Federal	State and Some-times Federal				
Washington	Code Title 70 (sections 127 and 128)	Mandatory	Publicly and privately funded care	None specified	Yes	No			Yes	State or employer	Yes; pending the results of the check	Homicides, other violent offenses, sex-related offenses, offenses against dependent or vulnerable individuals, drug-related offenses, and fraud-related offenses	Not specified
West Virginia	Rules: 64-50	Mandatory	Publicly and privately funded care	None specified	Not specified	No	Yes			Not specified	Not specified	Offenses against dependent or vulnerable individuals and fraud-related offenses	
Wisconsin	The Wisconsin Caregiver Law, Sec. 50.065	Mandatory	Publicly and privately funded care	Yes	Yes; unless client requests exemption	Yes; not exempt			Yes	Employer	Not specified	Homicides, other violent offenses, sex-related offenses, offenses against dependent or vulnerable individuals, and fraud-related offenses	Yes
Wyoming	Statute 7-19-201	All discretionary					Yes						
Puerto Rico	8 L.P.R.A. Sec. 481	Mandatory	Publicly and privately funded care	None specified	Yes	No	Yes			Not specified	Not specified	Homicides, other violent offenses, sex-related offenses, offenses against dependent or vulnerable individuals, fraud-related offenses, and property crimes	Not specified
U.S. Virgin Islands	No statute or regulation found												
Guam	No statute or regulation found												
Samoa	No statute or regulation found												
Wake Islands	No statute or regulation found												

[1] "Discretionary" indicates that law states checks are discretionary for some employer groups.

[2] "Publicly funded care only" indicates that law or regulation covers at least one program funded wholly or in part by state dollars (e.g., Medicaid waiver program); "Publicly and privately-funded care" indicates that law broadly applies to home care workers both privately and publicly funded.

[3] Indicates that statute explicitly mentions consumer-directed care, and if mentioned, whether it is exempt or not exempt under CBC requirements.

[4] Offenses listed are disqualifying for some period of time, according to law. In two states (North Carolina and Oregon), these offenses are not automatically disqualifying, and employment is at the discretion of the employer. See disqualifying offenses categories on next page.

DISQUALIFYING OFFENSES CATEGORIES

Homicides

Includes:

- Murder
- Voluntary or involuntary manslaughter
- Criminal, negligent, or vehicular homicide
- Infanticide
- Assisted suicide
- Attempted murder

Other Violent Offenses

Includes:

- Assault (including aggravated)
- Assault with intent to commit a felony
- Battery (including aggravated)
- Kidnapping, abduction, or unlawful restraint
- False imprisonment
- Robbery
- Armed robbery
- Stalking
- Witness intimidation or retaliation
- Felonies involving bodily injury or abuse
- Malicious wounding by a mob
- Carjacking
- Drive-by shooting

Sex-related offenses

Includes:

- Prostitution
- Rape
- Sexual assault (including aggravated)
- Statutory sexual assault
- Sexual battery (including aggravated)
- Indecent assault (including aggravated)
- Sexual abuse
- Sodomy
- Incest
- Crimes against nature

Offenses against a dependent or vulnerable individual

Includes:

- Causing injury to a child or dependent/vulnerable adult (to include disabled, developmentally disabled, elderly, ruled to be not competent)
- Crime against a child
- Violation of Adoption and Safe Families Act
- Child abuse or cruelty to children
- Child molestation
- Enticing a child for indecent purposes or indecent solicitation of a child
- Sexual exploitation of a child
- Indecent or aggravated indecent liberties with a child
- Concealing death of a child
- Endangering the welfare of children
- Dealing in infant children; sale or purchase of a child
- Corruption of minors
- Abandonment or endangerment of a child
- Crimes against nature involving children
- Custodial misconduct (including sexual misconduct)
- Knowing or reckless abuse or neglect of patients
- Failure to provide for a functionally impaired person
- Abuse, neglect, exploitation, or mistreatment of a vulnerable adult
- Failure to report battery, neglect, or exploitation of a vulnerable adult
- Causing injury to a person 60 years or older
- Abuse of residents of penal facilities
- Violation of a position of trust

Drug-related offenses

Includes:

- Sale or use of controlled substances
- Sale or manufacture of controlled substances
- Unlawful distribution or possession with intent to distribute controlled substances
- Trafficking in controlled substances

Fraud-related offenses

Includes:

- Fraud
- Forgery
- Extortion or blackmail
- Misappropriation of property
- Financial exploitation
- Perjury
- Medicaid or insurance fraud
- Larceny or felony banking violations
- Improper credentialing

DUI

Includes:

- Driving while intoxicated
- Operating a vehicle while under the influence

Property crimes

Includes:

- Theft or burglary
- Offenses against property
- Tampering with public records
- Criminal mischief
- Breaking and entering
- Arson

APPENDIX C: STATE PROFILES

ARKANSAS

Arkansas statutes[102] require background checks for employees or applicants to a home health or hospice agency. Applicants who have not been continuously employed in the state for the past 12 months or who have not had a check in the last 12 months must be checked through the Department of Arkansas State Police. Individuals who have not lived continually in the state for the past five years or have not provided in-home care for at least 60 continuous days prior to application must also have a federal criminal history check. The law exempts family members employed by an agency, volunteers, and individuals working in an administrative capacity.

State-level checks are initiated within 20 days of hiring; national checks within10 days. If a check is positive, the state licensing agency issues a disqualification; most violent crimes automatically disqualify an applicant. Applicants may be temporarily hired (up to 45 days) pending the results of the check. Operators of the covered agencies must also submit to state and national criminal history checks. The provider agency absorbs all costs of the checks.

Title 20, Chapter 33, Subchapter 203 of the statute requires criminal record checks for ElderChoices provider applicants and employees caring for older adults or people with disabilities. ElderChoices, a Section 1915(c) Medicaid waiver in existence since the early 1990s, provides individuals 65 and older with a multitude of services, including homemaker, chore, adult day care, and adult foster care.

Personal care is provided as a State Plan service. Although no specific legislation mandates criminal checks for personal care agencies, most agencies conduct checks as a matter of good business practice. Where required, criminal history check forms must be initiated within five business days of an individual's employment. The Bureau notifies the agency of the outcome within three days of receipt of the request. If a criminal history record is found in the Bureau's index, the applicant is temporarily disqualified from employment until the licensing agency issues a determination. The provider agency absorbs the cost of the check.

Recently, Arkansas released a policy rule requiring providers seeking to be certified for Alternatives, a Section 1915(c) waiver program offering self-direction to adults with disabilities, to undergo a criminal background check and specifying the crimes that would disqualify potential providers. The proposed Arkansas Next Choices waiver program, targeted to individuals living in institutions but desiring to live in the community, also would require state criminal background checks for personal attendants, adult family home providers, and companion service providers as a condition of Medicaid certification. In this program, checks would also apply to hiring of family members. The cost of the check would be deducted from the waiver participant's self-directed budget. In contrast, IndependentChoices, a self-directed state plan service program, does not require or even offer criminal background checks as an option. If an individual hiring staff

[102] Public Health and Welfare Code, Title 20, Chapter 33, Subchapter 2, Rule 007 05 005.

wishes to conduct a check, she or he must perform it as an individual employer outside the Medicaid system.

Additional screening information is available through the adult abuse registry, maintained by the Arkansas Division of Aging and Adult Services, Adult Protective Services. The registry provides information about individuals found, through the APS process, to have abused, neglected, or exploited an older adult or person with a disability. Information provided to requestors includes whether a substantiated report lists the name of an employee, applicant, or volunteer as an offender. State legislation specifies individuals or groups with whom the information may be shared. An employer or volunteer agency may query the registry to screen an employee, applicant, or volunteer by providing a signed, notarized release from the person they seek to query. While state laws do not require providers to check this registry as a routine prescreening employment step, many voluntarily complete this step. Two Medicaid HCBS waiver programs do require providers to check the abuse registry as a condition of participation: the Developmental Disability Waiver and the Arkansas Next Choices programs. The cost of maintaining the registry is approximately $60,000 annually and includes data collection resources and staff time. The APS program also manages a Mortality Review Committee to review deaths in institutions.

MICHIGAN

To participate in the CMS background check pilot, Michigan passed four new pieces of legislation specifying which long-term care providers must screen staff, the process for conducting checks, and which crimes preclude employment and for how long. Covered settings included institutional long-term care providers (e.g., nursing homes and skilled nursing facilities, intermediate care facilities for the mentally retarded), hospice and home health agencies, personal care agencies, and residential services providers, including adult foster care. The four separate statutes were designed to mirror existing codes for licensing public health occupations and facilities, psychiatric facilities, and adult foster care programs.

Working with Michigan State University, the Department of Community Health developed a tiered, iterative approach to screening applicants for employment with the providers listed above. In this electronic system, low-cost, public, state data are searched first, and more expensive national fingerprint checks are reserved only for cases where no disqualifying data are found during initial searches. The state covers the costs of screening, with limited matching funds from Medicaid. The list of disqualifying crimes is extensive. However, many crimes have sunset provisions of 1, 3, 5, 10, or 15 years, after which they no long affect fitness for employment. The length of exclusion is linked to the seriousness of the crime.

Employment eligibility decisions are made by state analysts, who review the findings from the background check against state statutes and communicate the results to the potential employer. Michigan allows provisional employment under certain conditions, pending the results of the screening. The state also instituted a rap-back system, whereby crimes committed after screening are reported back by state law enforcement officials to the Department of Community Health and the employer for action. More than 300 individuals working in long-term care have been determined ineligible following the introduction of the rap-back program.

Discussions with state staff and the system designers indicated general satisfaction with the system, especially with the large numbers of screenings conducted and the support from the long-term care provider community. During one 18-month period of the pilot, state officials conducted 103,251 checks, resulting in disqualification of 6,932 applicants—nearly 7 percent—based on state criteria. Some of the system limitations cited were the lack of appeals on the basis of rehabilitation (only data errors can be appealed), the requirement that workers be rescreened every time they change employers, and the fact that not all providers whose staff have direct access to Medicaid long-term care recipients in their homes are included in the legislation.

Provider qualification requirements for Michigan's Medicaid HCBS waiver program serving older adults, known as MI Choice, differ somewhat from the state laws on screening outlined above. Each waiver agent for MI Choice, as well as direct HCBS providers, must conduct a state-level criminal background review through the Michigan State Police for each paid and/or volunteer staff person who will be entering participant homes. In contrast to providers covered under the new statewide legislation, national-level checks are generally not done. Covered staff include all home-based services—homemaker, personal care, respite care provided in the home, chore services, personal emergency response systems, private-duty nursing, counseling, home-delivered meals, training, and nursing facility transition services—a much broader list than included under the automated statewide screening program. Individuals chosen directly by the service recipients to perform certain duties under the HCBS waiver (i.e., self-directed workers) also must have a state-level criminal background check through the Michigan State Police. The waiver agent and direct provider must conduct the reference and background checks before authorizing the employee to furnish services in a participant's home.[103]

Participants in Medicaid self-directed programs do have some flexibility in how they act upon the findings of these checks. Certain convictions are non-negotiable, including Medicaid fraud, elder abuse, and criminal sexual conduct. Generally, early drug offenses are ignored when the potential worker has a history of rehabilitation. All of the direct care workers in self-directed programs are monitored closely by a care manager or supports coordinator and the fiscal intermediary.

According to Tari Muniz of the Michigan Department of Community Health, the state is finding that many potential direct care workers in the self-directed program have criminal records, and many of these are family members of program participants. Waiver participants have the option to hire family members with previous convictions, provided their crimes are not on the list of non-negotiable offenses. Family members are the most common category of direct care staff hired by those who self-direct. Ms. Muniz noted an additional level of variability for direct care workers in Michigan. The state relies on waiver agents in the self-directed program to conduct needs assessment, authorize services, and contract with the fiscal intermediaries. Waiver agents may have their own policies regarding which criminal offences preclude employment. Ms. Muniz said that one waiver agent with which she was familiar had a list of disqualifying offenses developed by its own consumer advisory council. Because policies may differ by waiver agent, workers may face different screening requirements depending on where they seek employment.

[103] Michigan Department of Community Health, "Minimum Operating Standards for MI Choice Waiver Program Services," October 1, 2008.

NEW MEXICO

The Division of Health Improvement (DHI) is responsible for the administration of activities to ensure safety and quality in New Mexico's health care facilities and HCBS settings. DHI licenses facilities, manages incidents, disseminates provider deficiency reports, oversees all criminal background screening activity, and maintains the employee abuse registry. State statute mandates that all Medicaid direct services workers, including those in self-direction programs, without exception, must undergo a background check. The New Mexico Caregivers Criminal History Screening Act, passed during the 1998 legislative session and amended in 2005, requires that all persons whose employment or contractual service with a care provider includes direct care or routine and unsupervised physical or financial access to any care recipient must undergo a nationwide criminal history screening. This law prevents persons who have been convicted of certain crimes from working with individuals receiving health care. The law is specific about the conviction history, the care provider's responsibility, and the types of crimes and convictions.

Any person or entity identified as a "care provider" or "provider" that has the potential to abuse, neglect, or exploit other individuals in a long-term care setting must comply with this law. This provision explicitly includes independent providers hired directly by participants in any self-directed program. Volunteers are considered "contractually bound" to their sponsoring agencies, and therefore mandatory criminal checks also apply to this group. The extensive list of covered Medicaid providers includes any skilled nursing facility; care for the mentally retarded; psychiatric care; rehabilitation; home health agency; homemaker agency; home for the aged or disabled: group home; adult foster care home; guardian service provider; case management entity that provides services to people with developmental disabilities; private residence that provides personal care; adult residential care or nursing care for two or more persons not related by blood or marriage to the facility's operator or owner; adult day care center; boarding home; adult residential care home; residential service or rehabilitation service authorized to be reimbursed by Medicaid; any licensed or Medicaid-certified entity or any program funded by the state Agency on Aging that provides respite, companion, or personal care services; and programs funded by the Adult Services Division of Children, Youth and Families Department that provide homemaker or adult day care services.

Checks are required for both profit and nonprofit providers, without exception. Family members or friends hired under the self-directed option are not excluded. Both federal and state-level checks are completed. The cost of the checks is absorbed by either the applicant, facility, or agency or the state (for self-direction only). There is an appeals process; job applicants can request that their determination be reconsidered.

Data are captured on the number of checks performed and the number and types of disqualifications.

The state has created a comprehensive *Caregiver Criminal History Screening Guidebook* to explain the process.[104] This *Guidebook* offers

[104] Available at http://dhi.health.state.nm.us/elibrary/cchspmanual/contents.pdf.

- Copies of associated legislation
- Explanation of the process
- Instructions for completing forms
- Process for reconsideration
- Techniques for taking good fingerprints
- Frequently asked questions

To complement other screening activity (including criminal background checks), New Mexico established the Employee Abuse Registry in 2005. This electronic database identifies persons with substantiated instances of abuse, neglect, or exploitation. All HCBS providers must check the registry prior to hiring. Information in the database includes name, date of birth, address, Social Security number, and other appropriate identifying information. Individuals listed on the registry are ineligible for employment or contracting when the duties include direct, face-to-face care or services. Incidents are reported online or in writing to the Adult Protective Services Office, which investigates the allegation and updates the registry within two days of substantiation.

APPENDIX D: AARP ROUNDTABLE ATTENDEES

Name	Organizational Affiliation
Kris Baldwin	State of Arkansas Department of Health and Human Services Division of Aging and Adult Services
Henry Claypool	Policy Director, Independence Care System
Marie-Therese Connolly	Senior Scholar, Woodrow Wilson International Center for Scholars
Suzanne Crisp	Director, Program Design and Implementation The National Resource Center for Participant-Directed Services Boston College
Dawn Daly	Supervisor, Background Check Unit, National Center for Missing and Exploited Children
Barbara Dieker	Director, Office of Elder Rights Administration on Aging U.S. Department of Health and Human Services
Bill Ditto	State of New Jersey Director of the Division of Disability Services Cash and Counseling Program
William Dombi	Vice President for Law National Association for Home Care and Hospice
Pamela Doty	Senior Policy Analyst Division of Disability, Aging, and Long-Term Care Policy Assistant Secretary for Planning and Evaluation U.S. Department of Health and Human Services
Donna Folkemer	Group Director State Health Policy Leadership National Conference of State Legislatures
Sara Galantowicz	Senior Research Leader, The Healthcare Business of Thomson Reuters
Erin McGaffigan	Director, Public Policy The National Resource Center for Participant-Directed Services Boston College
Anne Montgomery	Senior Policy Advisor Senate Special Committee on Aging
Emily Rosenoff	Policy Analyst U.S. Department of Health and Human Services Office of the Assistant Secretary for Planning and Evaluation Disability, Aging and Long-Term Care Policy

Name	Organizational Affiliation
Charles Sabatino	Director, American Bar Association Commission on Law and Aging
Barbara Strother	Chief, Adult Protective Services Department of Human Services District of Columbia Government
Anna Wolke	Policy Associate, Forum for State Health Policy Leadership National Conference of State Legislatures

A Healthcare Employer Guide to Hiring People with Arrest and Conviction Records

SEIZING THE OPPORTUNITY TO TAP A LARGE, DIVERSE WORKFORCE

NELP NATIONAL EMPLOYMENT LAW PROJECT

SAFER FOUNDATION A Road Back

SEPTEMBER 2016

Contents

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NELP NATIONAL EMPLOYMENT LAW PROJECT

The National Employment Law Project (NELP) is a non-profit research and advocacy organization that partners with local communities to secure the promise of economic opportunity for today's workers.

SAFER FOUNDATION
A Road Back

For 44 years, Safer Foundation has been supporting the efforts of people with arrest and conviction records to become employed members of the community, and as a result reduce recidivism.

“Our need for workers in healthcare is almost insatiable. If we only look at the population that has a perfect education, the perfect physical abilities, the perfect background, we can’t meet [demand]. It’s a business rationale, it’s not just philanthropic or just a mission.”

PAMELA PAULK
Former Senior V.P. of Human Resources,
Johns Hopkins Hospital & Health System
May 7, 2015

A. Executive Summary

A Growing Need for Healthcare Workers

As healthcare employers are well aware, growth in healthcare jobs is projected to far exceed other industries over the next decade, with employment in the healthcare and social assistance sector adding 3.8 million jobs to become the largest employment sector in the nation.[1] You may have already observed increased demand for healthcare services as a result of changes made by the Affordable Care Act and the demographic shift led by aging baby boomers. To meet this demand, you'll need to implement appropriate workforce development strategies and invest in qualified workers.

An Undiscovered Pool of Diverse and Valuable Talent

An often overlooked and underutilized pool of talented individuals is eager to become a part of your workforce and help you meet increased demand. Every year, nearly 700,000 people reenter society from incarceration; they are among the estimated 70 million adults in the U.S. who have an arrest and conviction record.[2] A disproportionate number of people with records are people of color, who have mostly been charged with non-violent crimes. Employers who have taken part in programs to give these individuals a second chance have praised their enthusiasm, worth ethic, and loyalty.

People with records have limited employment opportunities in the healthcare industry for a myriad of reasons, including employer attitudes and misperceptions; the often overly stringent background checks required for occupational certifications and licenses; lack of guidance in properly hiring people with records; and the underutilization of rehabilitative legal mechanisms that allow hospitals and other healthcare employers to hire people with records.

Given the burgeoning market for healthcare services and the forecasted competition for skilled workers, we encourage you to fully consider qualified people with records when filling healthcare job openings. The singular

This toolkit avoids the use of stigmatizing labels, like "ex-offender" or "felon," in favor of the term "people with records," which seeks to decouple an individual's past mistakes from his or her future potential.

demand for workers combined with the nation's recognition of the need for criminal justice reform presents an opportunity for you to invest in previously untapped talent pools, including people with arrest or conviction records.

Let's Seize the Opportunity

As the healthcare industry continues to grow, employers have an opportunity to launch innovative workforce development strategies to assure a diversified pipeline of qualified healthcare workers.

Businesses of all sizes and types come and go in the communities they serve. However, healthcare organizations help keep many communities afloat and steady, even in hard financial and uncertain times.

Adopting a hiring policy for people with records can help you achieve your business objectives while advancing your mission to serve the public. Consult this toolkit for guidance on implementing a hiring program for people with records.

Several healthcare providers and trainers featured in the toolkit are at the forefront of a movement to invest in workforces in underserved communities. We can all learn from their experiences in developing policies and practices that work.

With the guidance provided in the toolkit, you can be proactive in recruiting people with records from your community. Please share this toolkit with your HR and talent acquisition teams. And good luck as you begin your journey!

LEADERSHIP AT THE FEDERAL LEVEL

Look for an upcoming report from the U.S. Department of Health and Human Services (HHS), Office of the Assistant Secretary for Planning and Evaluation (ASPE), on employment in the healthcare sector for people with records. The report is part of a national initiative to improve opportunities for people with arrest and conviction records. Expected release: late 2016.

Melody Young: A Success Story

A large part of Melody Young's life is service to others. As a nurse, she devotes her time at work to meeting the needs of her patients. She volunteers her free time as an anti-violence community activist and participates in local government. She believes that change and growth are possible for anyone and always asks youth the million dollar question: "What do you want to be in life?" For Ms. Young, the answer to that question was simple, but achieving her dream of becoming a nurse was a bit more complicated.

Photo used with permission of Melody Young

Ms. Young began her career in healthcare years ago as a home health aide. After a drug offense, however, she was sent to prison. It was a frightening place, and she quickly realized that she didn't belong there and decided to turn things around. She earned an early release based upon her outstanding behavior.

Upon release, Ms. Young found a job at a restaurant. But she wanted to accomplish more. She took a chance and entered the CNA training program at a nursing home. Three months later, she was hired by the Rehabilitation Institute of Chicago, but her time there was cut short. Without a "healthcare waiver," Illinois law prohibited her from working in a healthcare setting. The hospital terminated her, losing a reliable, loyal, and passionate employee who was beloved by both patients and staff.

"I have confidence not arrogance. I live by how I can accommodate the person with quality patient care. I do all that I can for my patients. It's not just a job."

Ms. Young was not deterred. With the help of the Safer Foundation, she secured a healthcare waiver.[3] She set out to earn her nursing degree, first receiving her associate degree in nursing and later her LPN degree.[4]

Ms. Young's first nursing position was at a nursing home, where she was hired after sharing her story of struggle and perseverance. Her commitment and professionalism were rewarded when she became a nurse at the nursing home. A skilled worker, her certifications include CPR instruction, wound care, IV therapy, and medical surgery geriatrics.

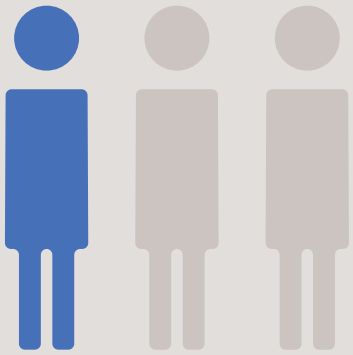
Today, Ms. Young is employed by the U.S. Department of Veterans Affairs. She approaches every new opportunity by asking what she can do to accommodate and bond with patients and co-workers. "I have integrity, and that leads to advancement," she explains.

Ms. Young was pardoned by the governor in 2015.

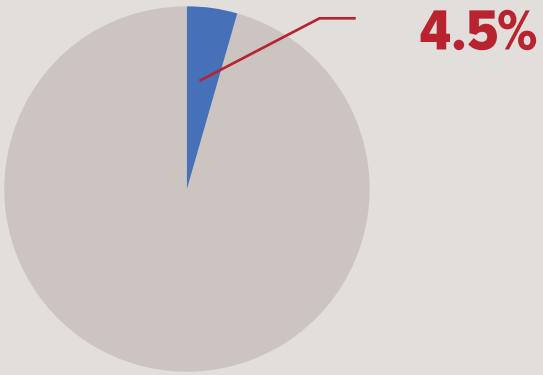
A Look at the Numbers

We are all affected when millions of Americans—both men and women, particularly people of color—are locked out of jobs because of an arrest or conviction record.

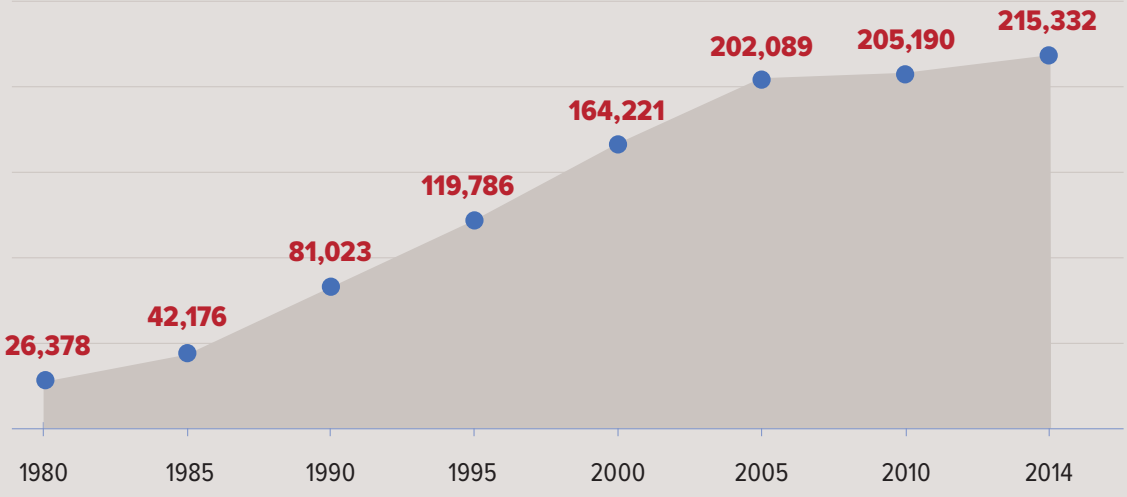
70 MILLION PEOPLE in the U.S. have a record. That's nearly **1 IN 3 ADULTS**.[5]



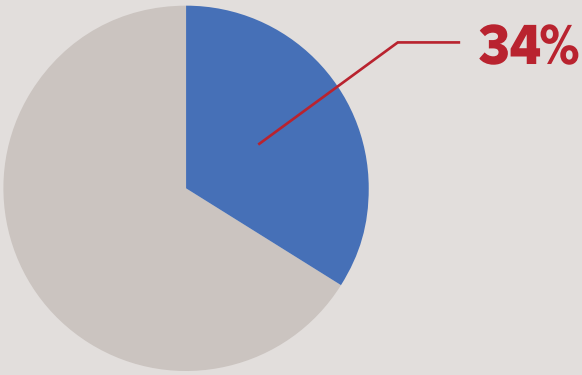
ONLY 4.5% of U.S. arrests involved violent crimes in 2014.[6]



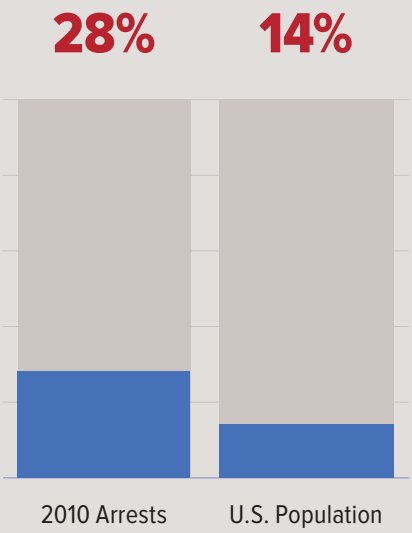
Incarceration of **WOMEN** grew **700%** from 1980–2014.[7]



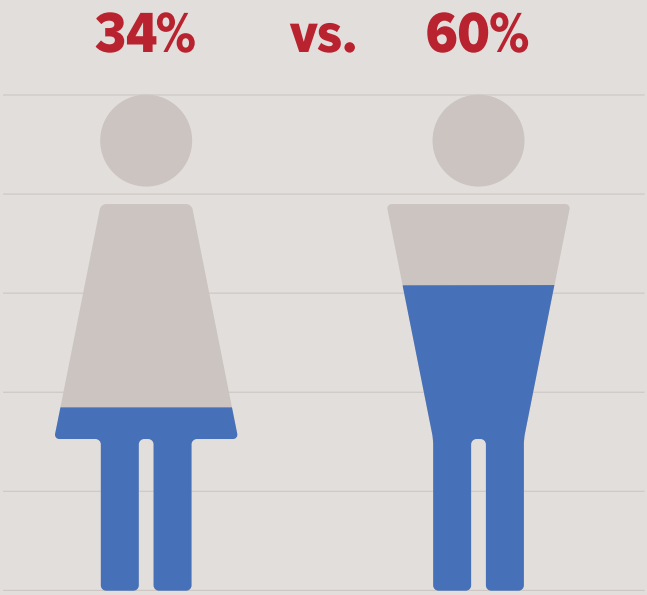
MEN with a **CRIMINAL RECORD** account for about **34%** of the **UNEMPLOYED** prime working age **MEN**.[8]



28% of **ALL 2010 ARRESTS** were of **AFRICAN AMERICANS**, despite African Americans comprising **ONLY 14%** of the **U.S. POPULATION**.[9]

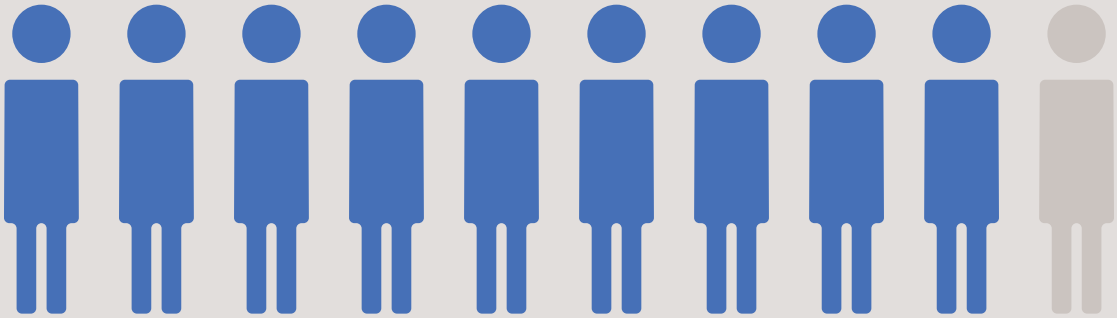


Only **34%** of **TEXAS WOMEN** were employed 8–10 months after release from prison (compared to **60%** of **MEN**).[10]



NEARLY HALF of U.S. children have at least one parent with a record.[11]

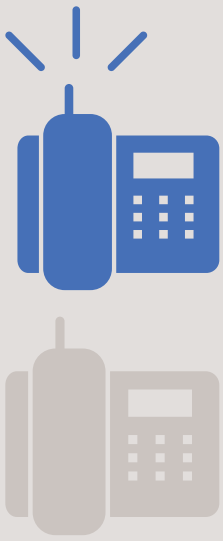
The stigma of a record is devastating to employment prospects.



9 IN 10 employers conduct **CRIMINAL BACKGROUND CHECKS**.[12]

HALF of the records in the FBI database are **INACCURATE**.[13]

Background checks for employment using **FBI DATA** grew **600%** from 2002–12 (17 million total).



27,254 RESTRICTIONS in state laws may limit someone with a record from obtaining an occupational license.[14]

A criminal record **REDUCES** the likelihood of a job callback by **50%**.[15]

When given a fair chance to work, people with records make good employees, whose employment helps improve our economic health and public safety.

Putting **100 formerly incarcerated** people back to work could increase their **lifetime earnings** by **$55 million**, increase their **income tax contributions** by **$1.9 million**, and boost **sales tax revenue** by **$770,000**. And it would save **$2 million** in criminal justice expenditures.[16]

Harvard researchers observed that **MILITARY MEMBERS** with felony convictions are promoted **FASTER** and were **NO MORE** likely to be discharged.[18]

Employment is the **#1** most important factor for decreasing recidivism.[19]

MORE PRODUCTIVE

Studies have found workers with records to be **MORE** productive than other workers and have **LESS** job turnover.[17]

$78 –$87 BILLION LOST

America's GDP lost an estimated **$78 BILLION–$87 BILLION** in 2014 because people with felony records could not participate in the labor market.[20]

B. How to Use this Toolkit

This toolkit will equip you with the knowledge you need to recruit and hire qualified workers with records in your community, implement best practices for employing people with records, and establish your organization as a leader in using innovative workforce strategies to promote the health and safety of your community.

MAKING THE CASE FOR BOTTOM-LINE RESULTS

Sections C and D of this toolkit further explain how hiring people with records can improve your bottom line and help fulfill your mission for better patient care and community health outcomes. This toolkit also provides guidance on building critical top-down support for implementing an initiative to hire people with records as staff.

SIX STEPS TO AN EFFECTIVE HIRING PROGRAM

Section E equips you with a step-by-step guide to help you or your human resources personnel navigate the hiring process while ensuring compliance with the relevant federal, state, and local laws and effectively balance the factors that govern the screening of people with an arrest or conviction record.

LEARN FROM OTHER EMPLOYERS

Section F explores best practices used by model healthcare employers to successfully hire people with records, and details the key steps they take in their hiring protocols. **Section G** offers guidance on how to collaborate with trainers and community intermediaries who work to connect employers and candidates in order to develop a robust, reliable, and resilient pipeline of qualified, diverse workers.

Materials in this toolkit are available for download at www.nelp.org and www.saferfoundation.org

C. Myth-Busters: Hiring People with Records

Making decisions based on inaccurate assumptions does a disservice to your business and community. This section addresses some common misperceptions about hiring people with records so that you and your HR staff can make fully informed decisions.

MYTH #1: I will be exposed to substantial negligent-hiring liability if I hire someone with a record.

FACT: Negligent hiring liability is not a substantial risk. Most people with records have offenses that do not pose the "foreseeable" risk of harm that is legally required to prove negligent hiring. As a healthcare employer, you can avoid potential risk of liability by evaluating both the applicant and job opening—taking into account the age of the offense, the nature of the position, and the degree of on-the-job supervision by other employees. In contrast, if your business instead adopts a blanket "no hire" policy for people with records, you may well find your business in violation of the federal civil rights laws that protect workers from hiring discrimination.

Check whether your state also provides specific protection against negligent hiring liability when hiring people with records by consulting the Resources in Appendix B of this toolkit.

Moreover, "[n]o research has shown that workplace violence is generally attributed to employee ex-offenders or that hiring ex-offenders is causally linked to increased workplace violence."[21]

MYTH #2: People with records won't be reliable employees.

FACT: Workers with records have been shown to have higher retention on the job[22] and have been promoted at a higher rate than other employees.[23] For example, a three-year tracking study of a Johns Hopkins Hospital program that hired nearly 500 people with records from the Baltimore area resulted in zero "problematic" terminations of employees with a record.[24]

MYTH #3: Federal and state laws regulating healthcare employment prevent me from hiring people with records.

FACT: While federal and state laws often require background checks of many categories of healthcare workers, the laws do not prohibit hiring anyone with a record. Instead, for certain healthcare occupations, the laws list specific offenses, such as serious felonies, that prevent the individual from being licensed or certified by the state. In addition, many laws and regulations allow for "waivers," "certificates of rehabilitation," and appeal processes that allow an individual with a disqualifying record to demonstrate that she does not pose a risk of safety or security on the job. Moreover, because of the significant racial impact of wholesale criminal record exclusions on people of color, the U.S. Equal Employment Opportunity Commission (EEOC) has cautioned employers not to rely on state laws in defense of their hiring practices.[25]

THE FACTS ABOUT RECIDIVISM

The latest research makes clear that a person's chances of recidivism decline significantly over time, including for people with felony records. For example, the risk that an individual with a burglary record will commit another crime is no greater than the risk for any other person in the general population after 3.8 years have passed since the individual's offense. The likelihood that an individual with an assault record will commit another crime is no greater than the likelihood of any other person in the general population after 4.3 years have passed since the individual's offense.[26]

"Cultural competency is crucial to closing disparities in health and education. Services that are respectful of and responsive to the beliefs, practices, and cultural and linguistic needs of diverse communities are needed to help bring about positive outcomes. Communities and their education and health care systems must be able to address the needs of their diverse populations without cultural differences hindering the conversation and delivery of services."

From: *Investing in Boys and Young Men of Color: The Promise and Opportunity*
Rhonda Bryant, Linda Harris, and Kisha Bird at Center for Law and Social Policy [27]

D. Access an Untapped Workforce of People with Records for Bottom-Line Results

The Benefits of Hiring People with Arrest or Conviction Records

Nearly one in three American adults of working age has an arrest or conviction record.[28] If properly leveraged, these 70 million people can enhance your workforce. This untapped talent pool is already being sought by industry leaders looking to remain competitive in a global economy. In 2016, Johns Hopkins Hospital and Health System joined nearly 200 major corporations, including American Airlines, the Coca-Cola Company, Google, PepsiCo, and Facebook, in signing the White House **Fair Chance Business Pledge**. The pledge symbolizes a dedicated effowrt to providing economic opportunity for all, by embracing fair-chance hiring of people with records and setting an example for other businesses. A moral case can be made for hiring underrepresented groups, but hiring people with records is also good business.

Interested in signing the pledge? Visit https://www.whitehouse.gov/issues/criminal-justice/business-pledge

D. Access an Untapped Workforce of People with Records for Bottom-Line Results

WHITE HOUSE FAIR CHANCE BUSINESS PLEDGE:
Johns Hopkins Hospital and Health System[29]

The Johns Hopkins Hospital and Health System's (JHHS) practice of providing access and opportunity to the returning citizens of Baltimore is not a charitable endeavor, but a strategic part of the way we conduct our business. We are not just an organization that conducts business in Baltimore, but an integral part of the community—interwoven and connected for 126 years and counting.

When Mr. Hopkins endowed the Hospital, he recognized that the service we provide can only have a positive lasting impact if all members of the community are a part of JHHS mission. We have made sure to keep Mr. Hopkins' directives, which in many ways mirror the Fair Chance Business Pledge, at the forefront of all that we do. This is evidenced in our hiring practice, which embraces our community's citizens who meet our hiring requirements—including returning citizens.

We have banned the box in our hiring process and have an established practice of individually reviewing applicants that have a criminal background. This thoughtful, detailed process has enabled us to have a strong returning citizen hire rate over the years.

Our long standing partnerships with community based partners, particularly those that serve returning citizens, and understand our organization and the work we do, provides us with a pipeline of talented applicants. We share our practices with other Baltimore City companies and encourage dialogue on the importance of engaging all of our citizens in the employment process.

Lastly, our organization[']s unwavering commitment to Baltimore City and Maryland is reflected in our Institution's leadership, managerial and supervisory staff, who understand that we have a lot of talented people in our community. We recognize that we cannot afford to let good talent get away—especially talent that might need a second chance.

Bottom-Line Benefits

of hiring people with arrest or conviction records from your community:

1. Enlarge Your Local Talent Pool with Qualified Candidates

Competitive companies cannot afford to overlook 70 million potential employees of diverse backgrounds. This is especially true with the skills shortage in the healthcare industry, where cultural competency is key to delivering quality and effective healthcare that responds to the needs of the community. Through simple and efficient programs, such as employee-led training and robust recruiting, this accessible and driven talent pool can strengthen your business and lead to better health outcomes. Community intermediaries can help streamline hiring processes by vetting, training, recommending, and continuously supporting applicants. These partners decrease costs by delivering qualified applicants specifically suited to your needs.

2. Reduce Recruiting Costs

Qualified applicants are vital to growth, but finding them can be expensive. Community intermediaries that prepare people with records for employment can significantly reduce these costs. These partners can assist you in recruiting more skilled individuals for hard-to-fill positions.
The result?

- **Increased output of services**
- **For the same expenditure of resources**
- **Equating to more profit**

Intermediary organizations connect employers with candidates. They provide training and employment services for those seeking employment and are essential partners for employers. Community-based nonprofits, training organizations, governmental agencies, government-funded job centers, and workforce development boards are examples of intermediary groups you can identify in your region.

Community intermediaries recruit candidates based on your demands and qualifications. Vetted candidates are then trained based on the needs of your company then sent directly to you for interviews. Successful candidates are provided support services after being hired, and unsuccessful candidates receive follow-up assistance to address issues that prevented them from being hired. All of these essential services are provided with a community partner and reduce employer costs.

For more information on working with intermediary organizations, see Section G of this toolkit.

Opportunities in Healthcare & Middle-Skill Jobs[30]

SAN FRANCISCO / BAY AREA

21 to 23 percent of healthcare jobs are middle skilled; healthcare jobs requiring less than a bachelor's degree are expected to grow 16 percent in 10 years and pay a median hourly wage of $29.32.

NEW YORK CITY

14 percent projected growth rate for healthcare sector between 2014 and 2019; 37 percent of healthcare occupations are middle skilled; over 25,000 postings across positions in five occupation areas that require less than a bachelor's degree.

CHICAGO

More than 410,000 total healthcare jobs in 2014; 10 percent healthcare job growth projected between 2014 and 2019; healthcare jobs comprise 23 percent of middle-skill online job postings for jobs earning at least a living wage.

COLUMBUS

Middle-skill healthcare job growth of 14 percent projected between 2013 and 2018; approximately 2,051 annual openings for middle-skill healthcare jobs between 2013 and 2018.

LOS ANGELES

596,000 healthcare jobs; 23 percent are middle skilled; $37.51 median hourly wage; 29,500 middle-skill healthcare job postings between July 2013 and July 2014.

DALLAS-FORT WORTH

32,990 online job postings for healthcare jobs July 2013-June 2014; 5.5 percent average annual job growth projected for middle-skill healthcare jobs between 2013 and 2018.

3. Advance Your Corporate Social Responsibility, Diversity, and Compliance with Employment Laws

A growing number of "ban the box" laws now apply to private employers.

People of color are disproportionately represented among those with arrest or conviction records, making that population particularly diverse. And diversity pays. McKinsey & Company found that diverse companies perform 35 percent better than industry averages.[31] One major advantage of diversity is innovation, which spurs growth. In response to a Forbes survey of large firms, 85 percent opined that diversity is key to driving innovation.[32] Diverse companies stand ready to capitalize on a progressively diverse society.

In addition to driving innovation, the increased diversity resulting from hiring people with records also better positions private employers to comply with the anti-discrimination and affirmative action mandates and the minority-owned business preferences that apply to federal contractors, as has been emphasized by both the Equal Employment Opportunity Commission (EEOC) and the Department of Labor's Office of Federal Contract Compliance Programs (OFFCP). Similarly, healthcare employers are in a good position to avoid legal challenges by taking steps to fully comply with the federal consumer protection laws regulating background checks for employment and the growing number of "ban the box" laws that now apply to private employers.

Please see Appendix C for more information.

COMMUNITY VALUE OF HIRING PEOPLE WITH RECORDS

- Strengthen the local economy by reducing unemployment
- Increase economic self-sufficiency, which supports strong and healthy families
- Improve the health and safety of the community with lower rates of crime and recidivism by increasing employment of those with prior convictions.[38]

4. Reduce Turnover & Increase Productivity by Hiring Loyal, Committed Personnel

Qualified employees are vital to growth within the sector and meeting the increasing demand for a skilled workforce, but finding them can be expensive. Retention of skilled employees is essential to the success of the healthcare industry, which faces the challenges of an annual turnover rate of 19.2

percent.[33] Lost productivity and other factors associated with turnover typically cost an employer **21 percent of an employee's salary**.[34]

People with records have proven themselves to be loyal, committed employees. A three-year tracking study of a program at Johns Hopkins Hospital that hired nearly 500 people with records from the Baltimore area documented the low turnover rate and high retention rate of their target group after 40 months.[35] The retention rate for people with records surpassed the rate for similarly-situated employees without an arrest or conviction record. In addition, zero "problematic" terminations involved people with records.

Evolv, a data provider that studies employee retention, found that workers with records were more productive than those without an arrest or conviction record. According to Evolv's CEO, the increased productivity is likely related to the employees feeling "a sense of loyalty to the companies that took the risk to hire them."[36] In addition, the Social IMPACT Research Center researched a transitional job program that employed people facing employment barriers and reported that employers supported the program because it was "lowering the cost of hiring new employees and increasing business productivity [and] improving financial well-being and customer satisfaction."[37] One-third of those who participated in the program were people with records and recently released from prison (within the last two years).

5. Improve Quality of Care & Health Outcomes

In addition to increasing your bottom line, engaging communities through hiring people with records can also improve your quality of care. Employees from the community have a distinctive understanding of how cultural, environmental, and local resources influence health outcomes and healthy lifestyles. As a result, qualified community workers with records can create more effective links between vulnerable populations and the healthcare system. These individuals also display strong compassion in delivering quality patient

care to those in their community. What is the tangible impact?

- **Increased knowledge by healthcare employees and patients**
- **Improved access to care**
- **Better health outcomes for vulnerable communities**
- **More effective disease prevention**

For example, reentry community health workers hired from the local community increase appointment-keeping and prescription regimen adherence while facilitating several other high-value preventive measures for high-risk populations, rehabilitative care, and health education.[39] Moreover, employing people with records, who are historically underrepresented in the job market, contributes to a variety of socioeconomic and health benefits for those individuals and their families. The result? Healthier communities with less crime and recidivism and an improved economic climate.

6. Access Significant Tax Credits & Cost-Free Employee Insurance

The government incentivizes hiring these qualified applicants with records through the **Work Opportunity Tax Credit** and wage subsidies related to federal job-training and other workforce development programs. The tax credit offers between $1,500 and $2,400 per year for each qualified candidate hired, depending on the number of hours worked in the first year. Some states and cities offer additional tax credits.

The **Federal Bonding Program** minimizes perceived risks of hiring these qualified applicants. The program provides "fidelity bonds" for employees with conviction histories to insure employers against losses caused by any dishonest acts of an employee. Employers receive the bond free of charge for at least the first six months of employment.

Review the Resources in Appendix B for more information.

Improved Health Outcomes by Employing Community Health Workers

CHW Ronald Sanders (right) assists TCN patient

Transitions Clinic Network (TCN) is a national network of primary care clinics that address the needs of recently released prisoners with chronic medical conditions. For over a decade, the clinics have employed community health workers (CHWs) with a history of incarceration to provide culturally appropriate healthcare. In order to facilitate such hiring, TCN clinics have successfully worked with human resources departments in the wide variety of healthcare settings in which TCN clinics operate, including county hospital systems and public universities. **Over time, Transitions Clinic Network has observed improved health outcomes for their patients, when compared with expedited primary care facilities that do not employ CHWs with convinction histories**. In a randomized controlled trial, the patients of the TCN program reduced their emergency department utilization by about 50 percent over 12 months, thus also reducing healthcare costs.[40] The success of the TCN model demonstrates that employing people with records in healthcare settings is not only feasible and cost-effective, but necessary to ensuring positive health outcomes for our country's most marginalized communities.

Did you know that, by 2020, 157 million people in the U.S. are expected to have one chronic condition while 81 million are expected to have multiple chronic conditions? Chronic illness especially impacts people of color and those with low incomes, both of whom already face poorer health outcomes than the general population.[41]

A Snapshot of Healthcare Workers

FRONTLINE HEALTHCARE WORKERS

According to the Frontline Health Workers Coalition, "frontline workers" are "often based in the community and come from the community they serve and play a critical role in providing a local context for proven health solutions, and they connect families and communities to the health system. They are the first and the only link to health-care for millions of people, are relatively inexpensive to train and support, and are capable of providing many life-saving interventions."[42]

Responsibilities: First point of contact when answering phones; arranging transportation for patients; arranging appointments; patient follow-up; and taking vital signs.

Roles: Customer service; administrative support; direct care in health education, chronic disease, rehabilitative care, and preventive services.

Examples: Medical assistants; medical records & health information technicians; administrative assistants; home care aides, and community health workers.[43]

ENTRY-LEVEL HEALTHCARE JOBS

Entry-level positions generally require a GED or high school diploma as well as limited training and experience.

Examples: certified nursing assistant; home health aide; personal care aide; food service assistant; transporter; environmental services assistant; health information clerk; and emergency medical technician.

MIDDLE-SKILL HEALTHCARE OCCUPATIONS

Middle-skill jobs do not require a bachelor's degree, but these skilled positions require some education and training (e.g., associate degree/certifications) beyond high school and more experience.

Examples: licensed practical nurse; certified medical assistant; and phlebotomy technician.[44]

"Th[e] new [U.S. Department of Justice, Office of Justice Programs] policy statement replaces unnecessarily disparaging labels with terms like 'person who committed a crime' and 'individual who was incarcerated,' decoupling past actions from the person being described and anticipating the contributions we expect them to make when they return. We will be using the new terminology in speeches, solicitations, website content, and social media posts, and I am hopeful that other agencies and organizations will consider doing the same."

KAROL MASON
U.S. Assistant Attorney General, Head of the Office of Justice Programs, Department of Justice[45]

E. A Step-by-Step Guide to Hiring People with Arrest or Conviction Records

We've already highlighted how a huge number of job-seekers are held back by their record: nearly one in three adults have an arrest or conviction record[46] that can reduce his or her chances of a callback or job offer by 50 percent.[47] But employers also lose out if they **ignore a large talent pool** by prematurely discounting applicants with an arrest or conviction record. Use the following guide to learn how to tap this talent pool by implementing fair hiring policies that reduce bias, bring employers into compliance with federal civil rights and consumer protection laws, assist employers in demonstrating their due diligence in adopting best practices, and strike a balance between **fairness**, **quality**, and **safety**.

STEP 1: Adopt humanizing language when describing people with records

When describing this population on job postings, applications, internal assessments, and among staff, avoid terminology such as "ex-offender" or "ex-convict." Even the term "formerly incarcerated" can be stigmatizing because not all individuals with a criminal record have been incarcerated—some have never even been convicted of an offense. Moreover, such terminology focuses a person's identity not on their capabilities but on former involvement in the criminal justice system. A better alternative would be to adopt language that centers on the person, such as a person with an arrest or conviction record, as opposed to ex-felon or ex-offender.

STEP 2: Eliminate blanket bans against hiring people with records and adopt fair screening standards

Review the hiring criteria for an open position and remove blanket exclusions of applicants with a record. Do not assume someone is automatically disqualified from employment in healthcare solely because that person has a record. State laws requiring background checks of healthcare workers are usually nuanced and may moderate broad employment restrictions by providing protections to

healthcare employers and jobseekers (e.g., Illinois' healthcare waivers). Only when necessary should you include in the job posting the specific convictions and arrests (or class of convictions and arrests) that are statutorily disqualifying or may form a significant barrier to hiring an applicant.

As required by the federal civil rights laws (Title VII of the Civil Rights Act of 1964), which regulate criminal background checks because of their disproportionate impact on people of color, employers must take into account the background of the job applicant, not just the record. According to guidelines issued in 2012 by the U.S. Equal Employment Opportunity Commission (EEOC), the employer must consider

- **The age of the offense**
- **The nature of the offense**
- **Whether the individual's record is directly related to the job**
- **Any evidence of rehabilitation**

Finally, limit your background check to those aspects that are relevant and whose consideration is allowed by law. Depending on the state, it may be illegal to screen out people based on arrest records and to consider convictions older than a specified number of years.

By strictly complying with these civil rights protections, employers avoid discouraging potential candidates from applying, which helps expand the talent pool for recruitment.

THE 2012 EEOC GUIDANCE IS HAVING AN IMPACT ON EMPLOYER HIRING PRACTICES.

In a 2015 survey, 72 percent of employer respondents asserted that they perform "individualized assessments" of candidates with records—an increase from 64 percent of respondents in 2014—thus indicating that "the EEOC's guidance continues to have a growing impact on employer hiring practices."[48]

STEP 3: Eliminate criminal history inquiries from job applications ("ban the box")

To ensure a fair process, you should wait until the end of the hiring process to ask about an applicant's record. Delaying arrest and conviction record inquiries is necessary for several reasons. Including such questions on an application can have a "chilling effect" on potential applicants with a criminal record. Your ideal candidate might be deterred from even applying.

E. A Step-by-Step Guide to Hiring People with Arrest or Conviction Records

By removing criminal history inquiries from applications, employers are able to draw from a wider talent pool, while still conducting a background check later in the hiring process. Even employers and HR professionals with good intentions may be affected by unconscious bias and inadvertently exclude qualified applicants with a record. Without early access to record information, employer callback decisions won't be based on arrest or conviction history—but rather on the strength of the applicant's qualifications.

BAN THE BOX—GIVING PEOPLE WITH RECORDS A FAIR CHANCE FOR EMPLOYMENT

"Banning the box" means removing criminal history inquiries from job applications and delaying background checks until after an interview or conditional offer of employment. Such delayed inquiries prevent the stigma of a criminal record from overshadowing a job candidate's qualifications.

Ban-the-box policies have been embraced by 24 states and over 130 localities, covering more than half of the nation's workforce. In 2015, President Obama directed federal agencies to ban the box. A number of corporations—including Starbucks, Facebook, and Koch Industries—and philanthropies have also adopted fair-chance hiring policies.

State and local ban-the-box policies cover government employers, including many public healthcare delivery providers. In addition, nine states and many of the nation's largest cities (including Baltimore, Chicago, New York City, Philadelphia, San Francisco, Seattle, and Washington, D.C.) expressly cover not just public employers, but private employers as well. Some ban-the-box laws exempt certain healthcare positions from coverage. Fair-chance policies have proven effective; for example, since banning the box, Durham County, North Carolina has nearly tripled the number of applicants with criminal records who are recommended for hire.[49]

STEP 4: Avoid making suitability decisions based on self-disclosure

To employers, self-reporting questions during interviews or on applications can be a test of a candidate's integrity. The expectation of self-disclosure, however, undermines the goal of fair chance hiring policies, which were developed to highlight what matters most—qualifications, work experience, and competence.

Besides, self-disclosure questions do not make for quick and simple responses. The rap sheet is a complicated document, and the reliability of third-party background checks is spotty. Well-intentioned applicants/candidates may be unable to recall the details of their conviction history out of confusion or misinformation rather than conscious omission. Or, hiring managers may have in hand an inaccurate background check report that does not corroborate a candidate's account.

» **Capitalize employment opportunities with a rational analysis—not an impulsive rejection.**

STEP 5: If a background check is necessary, use a reliable screening firm and provide the applicant an opportunity to verify the accuracy of the information

Employers and commercial reporting agencies that conduct private background checks must comply with the federal consumer protection law, called the Fair Credit Reporting Act (FCRA), which regulates background checks for employment.

Before obtaining a background check, FCRA requires that the applicant be provided a disclosure document that:

- Conspicuously indicates that the background check is for employment purposes; and
- Obtains the candidate's written consent to perform a background check.

Many background check companies produce out-of-date or inaccurate criminal history information. When selecting a screening firm, ask about their process to verify the reliability of the firm. Some indicators of reliability include policies that demonstrably comply with the FCRA. When generating reports, reliable screening firms use records from the court of a candidate's county or state of residence and not database searches alone. A firm should use at least two pieces of information—name and date of birth—to generate a match and report a positive record. Accreditation from an organization such as the National Association of Professional Background Screeners may also be a helpful indicator of reliability.[50]

STEP 6: Send a "pre–adverse action" notice with a copy of the background report and allow the applicant to produce evidence of rehabilitation

If the employer decides to deny employment based on the background check report, the applicant must also be provided a "pre–adverse action" notice, which provides the applicant an opportunity to review the report and challenge the accuracy of the information. The pre–adverse action notice should include a copy of the background check, a summary of the candidate's rights under FCRA, and a reasonable timeline within which a candidate should respond.[51]

As required by many "ban the box" laws and consistent with the EEOC's criminal background check guidelines, employers should also notify the applicant of the specific offense that is considered disqualifying and provide an opportunity to present evidence of rehabilitation before making a final hiring decision.

In addition, the EEOC urges employers to consider the following mitigating evidence as part of an "individualized assessment":

- The facts or circumstances of the offense;
- Evidence of work history;
- Rehabilitation efforts such as education and training; and
- Employment or character references[52]

Some states also issue evidence of rehabilitation (e.g., Illinois' Certificates of Relief from Disability) that reaffirms a person's successful rehabilitation. By providing room for mitigating evidence, employers help protect themselves against liability for violations of civil rights laws.

STEP 7: HIRE THE CANDIDATE or formally rescind the offer

After considering the additional information, if you still deem the candidate unfit for the job, notify him or her in writing that you are rescinding the offer and explain the reasons for your decision.

But if you consider the candidate qualified for the job after assessing the mitigating evidence, hire the applicant.

High Road Employers

Employers who provide meaningful jobs with living wages and favorable benefits

EQUALS

Higher retention + High productivity

LEADING TO

An overall stronger bottom line as companies reduce recruitment costs and increase productivity

KAISER PERMANENTE'S BACKGROUND CHECK PROCESS

To apply for a position at Kaiser Permanente, the individual creates an account online that includes his or her profile, qualifications, and skills. When a particular position of interest to the individual is posted, he or she provides a "submission of interest" for the position. In 2014, Kaiser Permanente ended the practice of requesting criminal history information from the applicant as part of the "submission of interest" process. The criminal background check does not take place until Kaiser Permanente has extended a conditional offer of employment to the individual.

Consistent with the requirements of the consumer laws regulating employers and background check companies, Kaiser Permanente provides the individual with a consent form to sign because the criminal background check is initiated by an outside vendor. The form also describes the individual's right to receive a copy of the criminal history report and the other requirements of the consumer laws. Consistent with the California law that regulates background checks prepared by private companies for employers, Kaiser Permanente limits the background check to convictions that occurred within the past seven years and does not include arrests that did not lead to conviction (pending cases are included), infractions, or cases that have been dismissed. Background checks required by state law for licensing or certification are conducted by the State of California Department of Justice.

Because Kaiser Permanente is a recipient of federal funding, it must also check the Fraud and Abuse Control Information System (FACIS) to determine if care providers are prohibited from receiving federal funds because of sanctions or discipline imposed by a government body. Importantly, Kaiser Permanente recruiters review the background check report provided by the vendor—it is not reviewed by the hiring managers. Kaiser Permanente does not apply a specific "matrix" of disqualifying offenses as part of the screening process, and instead it evaluates each applicant's information individually and takes into account the job functions of the specific position. Kaiser Permanente seeks to screen out individuals with a violent offense or a conviction that would be a risk to its members or patients. Depending on the nature of the position, more minor offenses like drunk or disorderly conduct or driving under the influence (DUI) are often not considered disqualifying, depending upon the circumstances.

If there is a conviction of concern to the recruiter or an open arrest, the recruiter follows a structured process to engage with the individual about the nature of the offense and to solicit other explanatory information. As required by the consumer protection laws, if the offense disqualifies the individual from the position, Kaiser Permanente will issue an "adverse action" letter, allowing the individual to challenge the accuracy of the information.

A Hiring Manager's Key for Hiring People with an Arrest or Conviction Record

DURING policy review on the use of background checks, consider:

- Who will have access to the record?
- Who will provide the record? If a consumer reporting agency:
    - How careful and accurate is their process?
    - What and how many pieces of information do they match before issuing a positive report? (Name and date of birth should be the baseline.)

BEFORE including a record-based exclusion on a job posting, consider:

- Is the disqualifying offense directly related to the position?
- For the particular position, are there any statutory bars to hiring people with a certain conviction? If so:
    - Are they lifetime bars?
    - Are they mandatory or discretionary, i.e., does the law require that employers not hire people with a disqualifying offense, or can hiring managers exercise discretion?

AFTER extending a conditional offer of employment and receiving the applicant's background history, consider:

- Does the nature of an offense have any bearing on the job sought?
    - Will the nature of the job sought, such as easy access to medications or patient information or direct patient-care responsibilities, allow a particular past offense to recur?
- If the conviction is related to the nature of the job, how long ago did the offense occur?
    - Have a few years passed without incident? (The likelihood of re-offending declines significantly with time; a person who has not committed an offense over the past several years is no more likely to commit a crime than anyone else in the general population.)
- Has the person taken rehabilitative steps since the conviction? (For instance, did she obtain an education or gain work experience?) And are those rehabilitative steps reflected in the way she explains her history of arrest or conviction?

Ernesto Diaz: A Success Story[53]

Photo used with permission of Ernesto Diaz

For the past six years, Ernesto Diaz has been a hard-working employee of Royal Ambulance in Northern California. He has filled multiple roles at the company, progressing from an entry-level position to management.

Mr. Diaz's interest in healthcare began during a low point in his life. As a teenager in Berkeley, California, he became involved with gangs, sold drugs, and got into fights. He cycled in and out of jail, was expelled from high school, and eventually ended up in juvenile detention for assault with a deadly weapon and battery. While there, he took a first-aid class with a visiting firefighter, and "it sparked an interest in helping people," he says. Through a program that later evolved into the nationally recognized Alameda County EMS Corps,[54] Mr. Diaz was able to begin first responder training while incarcerated, and later obtained his EMT certification after his release. He soon began working at Royal Ambulance, and that's when "something clicked," he says. "Friends around me continued to go to jail. But I was so fed up with it. I felt proud of myself—I had a job and responsibility... I needed to put that other stuff behind me."

Mr. Diaz began as an intern; at only 18, he didn't yet satisfy Royal's age requirement for EMTs. Instead, he worked with the billing and operations departments and was soon hired as a biller. Desiring more responsibility, he later transitioned into the marketing department, where he quickly proved himself as a successful account manager. The company promoted Mr. Diaz to his current position as regional manager. He trains and supervises account managers and teaches classes to employees at skilled nursing facilities on topics such as administering CPR and recognizing the signs of a stroke. One of his favorite aspects of the job is client interaction—transporting patients to medical appointments and checking in on how they're doing.

Still only in his 20s, Mr. Diaz aspires to climb even higher: "My biggest goal is to get back into school." He has his sights on a college diploma.

“ We have a philosophy that Johns Hopkins is ‘of the community’ of Baltimore. We need to do something about creating opportunities. This community has disproportionately high rates of unemployment, dysfunctional families, crime, abandoned homes, etc. It is in our best interest to take constructive steps to introduce the people of East Baltimore into the workforce.”

RONALD R. PETERSON
President of Johns Hopkins Hospital & Health System

F. Chart New Territory

Model Employer Practices for Hiring People with Records

1. Johns Hopkins Hospital & Health System: *An Employer Model for Hiring*

Johns Hopkins Hospital and Health System, under the leadership of President Ronald Peterson and Senior Director of Central Recruitment Services Michele Sedney, is the premier model of a healthcare employer successfully hiring people with records from the community into entry-level and middle-skill positions.

Johns Hopkins is a worldwide and nationally acclaimed hospital and health-care system with more than 40,000 employees. As the second-largest employer in Maryland, it attracts 9,000 to 12,000 applicants per month and hires 1,800 people per year.[55] Johns Hopkins launched an initiative to hire those in the Baltimore community with records after recognizing the hospital had a need to find stable, reliable employees to fill entry-level, higher-turnover positions. By hiring from this population, the hospital system advanced its mission to better serve the local community. The program has been widely recognized as a national leader in promoting the hiring of people with records.

"First and foremost, this is a good business decision. These are good, loyal, solid workers. And I have the numbers to prove it."[56]

SPOTLIGHT: CHAMPION OF CHANGE

Pamela Paulk was honored as a 2014 White House Champion of Change for leading the Johns Hopkins initiative to hire people with arrest or conviction records while serving as senior vice president of human resources. She was appointed president of Johns Hopkins Medicine International in January 2015.

What do the numbers show?

BETTER RETENTION

A 2009 study at John Hopkins of about 500 hires of people with records showed their **RETENTION RATE OUTMATCHED** that of **EMPLOYEES WITHOUT RECORDS** after 40 months.

NO PROBLEMATIC TERMINATIONS

What about those with higher-level offenses? Johns Hopkins conducted a study of 79 employees with more serious records for **3-6 YEARS** after their hiring date.[57]

At the end of the study period **73** individuals were still employed and only **ONE** was involuntarily terminated.

CAREFUL SCREENING

With or without a record, not all people are well suited for a career in healthcare. Johns Hopkins attributes much of its program's success to **THOROUGH SCREENING**.

100% of their candidates have their background checked after an offer is extended: **50%** are hired; **25%** are ruled out based on conviction background; **25%** are ruled out for other reasons.

For over a decade, **5%** of each year's total hires have had a record, and **20% OF ENTRY-LEVEL HIRES HAVE HAD A RECORD**.

COMMON POSITIONS:

While many people with records at Johns Hopkins are hired into entry-level positions, such as food service technician, environmental services technician, and clerical positions, some are placed in middle- or high-skill positions in IT and clinical roles. Johns Hopkins staff also have access to career development opportunities and funding for additional certification and training.

HOW DOES JOHNS HOPKINS DO IT? IS IT DIFFICULT?

No, it's much like a regular application process.

1. Typical application and interview process (no questions about history of arrests or convictions)
2. If selected, a conditional offer is made
3. After the conditional offer, the background check is conducted
4. Results of background check are reviewed by the human resources investigator/screener

When assessing the relevance of an applicant's background, Johns Hopkins considers the following factors:

- Job and duties
- Time, nature, and number of convictions
- Circumstances and relationship between convictions
- Time between conviction and decision to hire
- Attempts at rehabilitation by the applicant
- Employment before and after to judge the extent of rehabilitation
- Age at time of the conviction
- Whether applicant disclosed information
- Impact of conviction and relevance to security and safety of employees, patients, and visitors

5. If an applicant is hired, his or her background file is kept confidential by HR, and the manager is only notified if necessary.
6. When needed, a coach is assigned to support an applicant's transition

JOHNS HOPKINS' TOP FACTORS LEADING TO SUCCESS

- Identify and collaborate with reputable local intermediaries for referrals; help referrers build the pre-hire curriculum to meet your specific needs
- Receive support for program from security staff
- Screen closely
- Provide internships
- Utilize job coaches for transition into employment
- Have top-down leadership support

2. Mount Sinai Health System, Institute for Advanced Medicine, Coming Home Program: *An Employer Model for Hiring Community Health Workers*[58]

Mount Sinai

The Mount Sinai Health System, Institute for Advanced Medicine's Coming Home Program is located in New York City. Since the program's inception in 2006, it has served more than 3,000 patients returning home from prison and jail and has successfully employed nine formerly incarcerated staff members.

From left to right: Beth Hribar, CHP Program Director; Emily Gertz, Director of Special Projects; Debra Barnes, CHP Peer; Iris Bowen, CHP Coordinator; Edwin Lopez, CHP Peer; Mary Johnson, CHP Clinical Director; Sylviah Nyamu, Research Assistant. Photo used with permission of the Coming Home Program.

The Coming Home Program (CHP) operates out of a hospital-based clinic (part of a six-site network of hospital and community clinics caring for more than 13,000 patients with or at-risk for HIV/AIDS). CHP's mission is to improve the physical and mental health and emotional and social well-being of people with a history of incarceration during their transition from prison or jail to their communities. The threefold objectives are to:

- Provide **continuity of care** from incarceration through reentry and beyond
- Offer **targeted counseling and supportive services** from formerly incarcerated staff
- Ensure all clinic staff are able to work effectively with formerly incarcerated people through **ongoing training**

SAMPLE COMING HOME PROGRAM JOB POSTING
Community Health Advocate

The Institute for Advanced Medicine (IAM) is recruiting a Community Health Advocate (CHA). The CHA will support patients of the Institute who are formerly incarcerated to promote engagement in healthcare and other social services during the transition from prison/jail to the community.

The CHAs will play a key role in the Institute's Coming Home Program (CHP) which strives to improve the mental and physical health and social and emotional well-being of people with a history of incarceration by providing linkage to care, offering supportive counseling, and implementing staff training to ensure that all IAM employees are knowledgeable about the experience of incarceration.

The CHA will perform a number of tasks including: visiting patients at their home or in the community, meeting with patients in the IAM, accompanying patients to medical and other appointments, providing supportive counseling, educating patients about chronic disease management, conducting outreach, collaborating with the healthcare team, and tracking all activities.

The ideal candidate will be formerly incarcerated with at least three years of professional experience. The candidate should be adaptable to change, mature, able to problem solve, and diplomatic. Candidates should also have good time management, excellent verbal communication skills and a strong sense of appropriate boundaries. The position requires organizational skills, computer literacy, a desire to learn and grown, and the capacity to work well with a diverse group of people including healthcare providers and administrators.

The shared experience between the Community Health Advocate and the patient is critical to this role; a direct and personal understanding of incarceration and sensitivity to the challenges of reentry are required. A willingness to disclose your personal experience of incarceration with staff and patients is also required.

HOW DOES MOUNT SINAI'S COMING HOME PROGRAM RECRUIT AND RETAIN FORMERLY INCARCERATED STAFF?

Unlike Johns Hopkins, which emphasizes confidentiality and keeps all criminal background files within the human resources department, **the lynchpin** of the Coming Home Program is staff transparency about their criminal justice history and use of their background of incarceration to more effectively serve patients.

However, the program relies on a network of intermediaries for referrals and the vetting process is nearly identical to staff without criminal histories. All potential hires go through the corporate human resources process. The major difference in approach is that applicants are notified that they will be expected to share their incarceration history with other staff members as well as patients.

WHAT TO KEEP IN MIND WHEN YOU'RE TRYING TO START A PROGRAM WITHIN YOUR ORGANIZATION?: *Advice from Emily Gertz, Director of Special Projects for the Institute for Advanced Medicine*

PATIENCE IS KEY

Implementing a program within a hospital takes time. But as long as you have champions leading the initiative, the program can grow and build momentum.

NOT ALL STAFF IDENTIFY IN THE SAME WAY

There may be staff who have arrest or conviction records or who are formerly incarcerated and do not want to self-identify if their job does not require disclosure of their justice involvement.

INDIVIDUAL STAFF EXPERIENCES

Depending on their incarceration experience, some staff members may need more support and training to address the impact incarceration has had on them.

3. Roseland Community Hospital: *Hiring for Healthcare Career Pathways*

Roseland Community Hospital ("RCH") has served the residents of Chicago's far South Side for more than 85 years.[59] As a non-profit, safety net hospital, Roseland has long been dedicated to serving the community to the fullest extent possible. More recently, however, the hospital leadership recognized that providing opportunities for workers with conviction records was an important part of that mission. "People make mistakes. Things happen," says Paulette Clark, Roseland's human resources manager. "If people want to turn their lives around and we can help, then we'd like to do that." After coming to that realization, the HR team obtained the approval of the hospital CEO, which provided them with top-down support for hiring those with records.

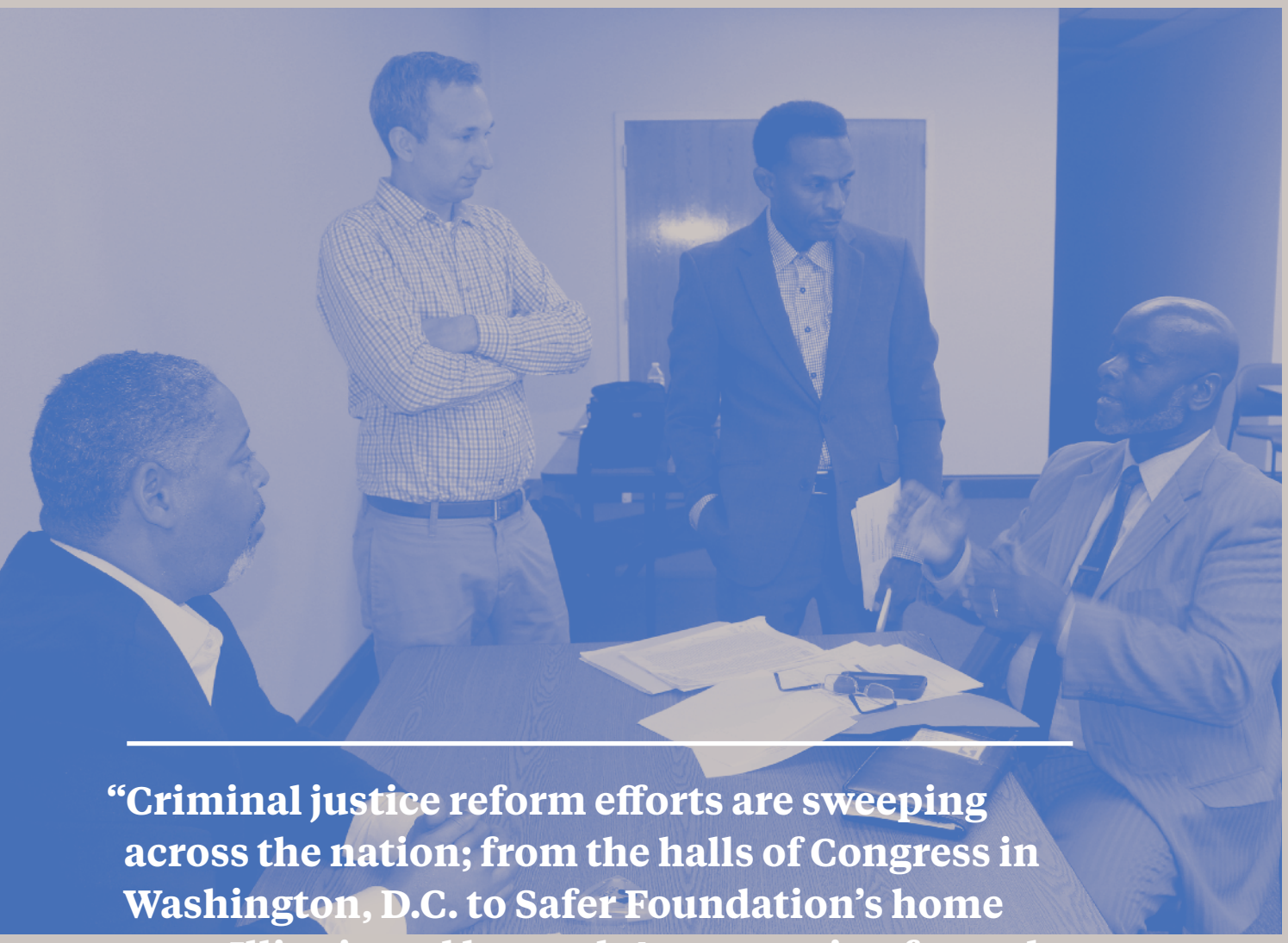
Working with Safer Foundation, Roseland decided to hire workers as part of a healthcare career pathway program. The employees start in lower-level positions, receive training from Roseland, and eventually advance into patient-care positions. Safer Foundation helped find qualified applicants, and the HR team examined the applicants' resumes holistically, looking for indications they were making efforts to leave their pasts behind them. The managers who would oversee the work of the new employees interviewed the applicants, and, when the results of those interviews came back favorably, the applicants were offered positions. Things are going well, and Roseland hopes to continue hiring people as a part of this pathway program. As Clark sees it, "People deserve a second chance. We're open to giving them opportunities."[60]

CAREER PATHWAYS HELP EMPLOYERS OVERCOME STAFFING CHALLENGES

Healthcare employers benefit from investing in career pathways for people with records who are hired into entry-level positions. This workforce development strategy is essential to reducing costs while improving patient care and filling vacancies in higher-level positions.

STRENGTHEN YOUR BOTTOM LINE & GROW YOUR OWN TALENT FROM ENTRY-LEVEL WORKERS

CONCERNS	GOALS
Lack of diversity in your talent pool	Increase diversity of workforce
Low quality staff	Increase access to quality talent
Shortage of frontline and middle-skill workers	Overcome shortage of frontline and middle-skill workers
Difficulties ensuring quality patient care	Improve service delivery and health outcomes
Reduced productivity and a rise in associated costs	Maintain high standards of skill among frontline and middle-skill staff, thereby freeing up physicians for their own work
High turnover among frontline workers	Increase retention by providing opportunity for career advancement from entry-level positions
High cost of recruiting new employees	Decrease recruiting costs by working with community intermediaries



"Criminal justice reform efforts are sweeping across the nation; from the halls of Congress in Washington, D.C. to Safer Foundation's home state Illinois and beyond. As our nation faces the reality that mass incarceration has been a failure, we are now moving to reduce the number of people in our jails and prisons. The next big issue we face is how we will integrate those coming out of our jails and prisons into our communities in a productive way. Opening career opportunities in industries with explosive growth must be one of the key success factors for successful reentry."

VICTOR DICKSON

President & CEO, Safer Foundation

G. Leverage Community Intermediaries

How to Build Partnerships to Source and Develop Diverse Talent

Across the nation, key factors in healthcare have converged to create a workforce picture that has many skilled positions going unfilled, while at the same time, thousands of working-age people with records should be gainfully employed but cannot find jobs.

While most of the 70 million people with a record have old or minor offenses, some may have more recent interactions with the criminal justice system. In such cases, the need for workforce development has a promising partner in prison "reentry" policy. Paired with reentry programs, workforce development for people with records serves the dual goal of overcoming skill shortages and improving community health outcomes.

Local community-based intermediary groups connect the surging employer demand with the employment needs of this target population. These partners assist businesses in finding qualified candidates **at reduced costs**.

Creating Value through Intermediaries

Below are **Seven Tips** for developing and building lasting, successful, and mutually beneficial relationships with local sourcing partners.

TIP #1: Conduct preliminary research of the key players in your region that are successfully working with people who were formerly incarcerated or have an arrest or conviction record.

Some intermediaries may not work exclusively with people with records. However, they can serve as valuable partners, especially if they focus on workforce development and providing training and employment opportunities. The preferred sourcing partners are reputable community organizations

that work with people with records for vocational and job readiness training and employment related services, while also providing ongoing support for referred candidates.

TIP #2: Reach out to the identified intermediaries to begin the conversation and see what they have to offer.

You may find out there is one community intermediary that can assist you in education, job-readiness training, and employment referrals exclusively for people with records. Or perhaps there is a group that focuses on soft-skills training for healthcare, offering a seamless and efficient career pathway in healthcare that includes education, training, and employment services.

The closer the collaboration among community intermediaries working in tandem to build and diversify the pipeline of healthcare talent, the better the results for your organization—so seek ways to connect these groups. For example, if there is an intermediary focusing on training and employment opportunities for people with records and another group focusing on training at-risk populations in key healthcare career pathways, try to develop a three-fold collaboration where the employer, healthcare trainer, and workforce development intermediary are working closely together.

TIP #3: Develop points of contact and build relationships.

These partnerships are critical in allowing intermediaries to become familiar with your organization and understand your specific hiring needs. Develop communication strategies around competency needs, demand planning, talent-flow analysis, and shared goals.

TIP #4: Provide your contacts with a pre-hire curriculum to meet your existing and future needs and to achieve your organization's objectives.

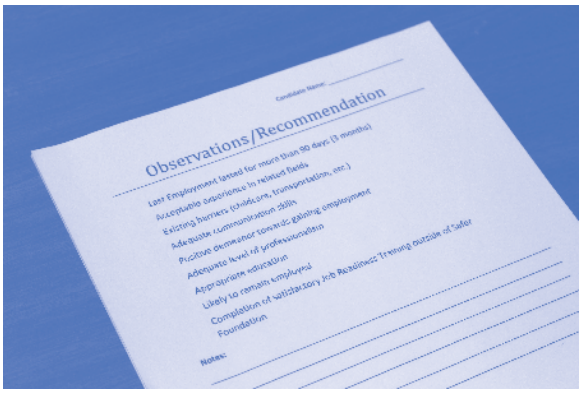
Inform your intermediary of required credentials and certifications; educational requirements; preferred or required training and experience; any necessary certificates or waivers; desired employee skills, behavior, and other qualities; and any reference requirements.

TIP #5: Share open positions with intermediaries.

Work with your contacts to agree upon a notification process for suitable open positions. In addition, you should develop a system to obtain and assess candidates sent to your organization through your intermediaries. Ask your contacts whether job descriptions are needed.

Tip #6: Keep an open line of communication.

Communication and feedback is the key to assuring that intermediaries provide the training and skills for the talent you need. Be honest if you are noticing missing competencies among referred candidates. Intermediaries need this feedback to improve their candidate screening, support, and training processes. Give your intermediaries regular feedback on referral quality through email or conference calls (we suggest bi-weekly).



Tip #7: Track & evaluate referred candidates.

Collecting certain data regarding your employees with records will help you make informed decisions about future recruitment strategies. Moreover,

A Close Look at One Intermediary's Venture: Paving the Way to Healthcare Opportunities in Chicago

For over 43 years, Safer Foundation has helped people with arrest or conviction records become employed, productive members of society. After observing the growth of the healthcare industry, Safer announced the Safer Demand Skills Collaborative—at its 2015 healthcare forum, co-sponsored by Congressman Danny Davis. Through the Demand Skills Collaborative, Safer develops public and private partnerships among employers, trainers, and industry experts to create demand skills training that leads to living-wage careers for candidates in high-need communities.

From Left to Right: Pamela Paulk, former VP of Human Resources, Johns Hopkins Hospital & Healthcare System; Victor Dickson, President & CEO, Safer Foundation; Congressman Danny Davis, 7th District, IL; Melody Young, LPN

The 2015 forum brought together 30 high-level healthcare executives involved in hiring decisions. It was a first step in facilitating increased hiring of people with records by healthcare employers in the Chicago area. Ten healthcare organizations, including a major hospital network, federally qualified health centers, and safety net hospitals, expressed interest in working with Safer to increase hiring of people with records. Given the positive response, Safer expanded its programming to take on this critical challenge. As of July 2016, Safer has referred ten people with records—nine of whom were retained for more than 90 days—in federally qualified health centers, a major hospital network, and local community hospitals. The positions include: housekeeping, CNA, CMA, transporter, treatment counsellor.

CHALLENGES IN ASSISTING HEALTHCARE EMPLOYER PARTNERS:

- Identifying qualified candidates with an interest in healthcare
- Finding and working with qualified, reputable healthcare trainers and referral organizations
- Helping candidates apply for an Illinois healthcare worker waiver
- Developing relationships with healthcare employers
- Helping employers develop trainings on hiring people with records

sharing tangible successes will help build confidence throughout your organization about hiring people with records. To get started, identify and commit to tracking key success measures such as the following:

- Cost savings
- Employee productivity and job performance
- Number of candidates placed into internships and the number of those interns hired into permanent positions
- Breakdown of placements into entry-level, middle-skill, and more advanced positions ;
- Number of employees with records that advance to higher-skill positions;
- Retention and turnover rates
- Number of involuntary terminations and "problematic" terminations (i.e., those involving an incident)
- Employee satisfaction

Preparing to Meet Future Needs: Workforce Development Best Practices for Employers

Anticipating changes to the sector, some healthcare providers, trainers, and service providers have developed strategies that leverage partnerships, career pathways, and coaching to improve service and community health outcomes. Their talent-pipeline management strategies combine career advancement, networked recruitment of job-ready workers, and employer-driven customized education and training. The following are some of the proven ways you can help your business grow and thrive within the community you serve.

FILL FRONTLINE AND MIDDLE-SKILL JOBS THROUGH LOCAL RECRUITMENT

Health centers that help meet the needs of underserved communities have received stimulus payments through the Affordable Care Act. According to the U.S. Department of Health and Human Services, health centers serve one in seven people living in poverty.[61] Their focus on primary care emphasizes preventive care, patient education, and self-care coaching. The task of patient

education is increasingly being delegated to frontline workers who enjoy significant direct patient interaction.

However, high turnover in frontline positions hinders the primary goal of preventive healthcare by eroding the knowledge, skill, and experience levels needed in these positions to enable improved health outcomes. This, in turn, adds to the work of clinicians and reduces their productivity.

You can meet your primary care goals, improve patient interaction, and increase retention by leveraging partnerships for local recruitment. Several intermediaries have a long history of serving distressed communities. In addition to the services they provide, these intermediaries have the knowledge and credibility needed to create a locally based talent pipeline.

Example: The Baltimore Alliance for Careers in Healthcare (BACH) is a workforce development consortium that serves a dual customer role of training frontline healthcare workers for high-growth, high-shortage hospital jobs and creating a talent pipeline at all entry-level positions through local partnerships. In an effort to overcome the shortage of frontline staff, BACH undertook a gap analysis to determine local demand and supply characteristics. They found that local recruitment and training would be an important tool in meeting staffing demands and addressing high local unemployment (43 percent of city residents ages 16 and over were out of the workforce and 31 percent lacked a high school diploma[62]). With intervention and outreach to community-based organizations in distressed neighborhood, BACH developed a network to lay the groundwork for local healthcare training.

IMPLEMENT EMPLOYER-LED TRAINING PROGRAMS

Not all post-secondary training programs are designed to meet employers' needs for workers who are job-ready upon graduation and capable of critical thinking and multitasking. As an employer, you may also need non-clinical skills, such as knowledge in health information technology, which may not be a readily accessible credential. Three-way partnerships between employers, colleges, and community-based intermediaries can address this misalignment between supply and demand by creating the right talent pipeline for your workforce demands.

Partnerships whose members are aligned in their expectations, methods, and mission effectively marshal resources to train for job placement, career progression, and quality service provision.

Example: The Allied Health Care Career Network (AHCCN) in Chicago is comprised of seven diverse training partners. Each of the partners provides a different service as part of a wide range of training—from language and basic education remediation, to training for lower-skill jobs like home health aides, to professional training and credentialing for middle- to high-skill nursing positions.

Partners in the AHCCN are in the process of implementing a soft-skills training that uses psychological self-sufficiency to build a talent pipeline that possesses not only technical but also career skills critical for on-the-job success. Agreements among network members consist of shared goals and practices. Mutual accountability is enforced through memoranda of understanding that define conditions of participation. The network's governance policy is reviewed annually.

TAILOR TRAININGS TO THE EMPLOYEE

Community-based intermediaries are equipped to provide comprehensive wrap-around support services to new recruits and trainees in need of extra services. Coupled with workforce development, their knowledge and referral network can create a stable pipeline that meets both the workforce demands of employers and training needs of employees. As partners, they can help you reduce expenditures on screening and recruitment and those resulting from high turnover.

Example: Some employer members of BACH have developed career pathways to recruit and train entry-level incumbent employees for frontline job vacancies. In so doing, the cost of employing new workers can be reduced if incumbent employees undertaking career advancement choose to hold their job while they train and employers with the capacity are able to provide necessary support. The supports can include covering the cost of training or logistics such as transportation until an incumbent employee is trained and qualified to apply for a frontline job.

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EXAMPLE OF CAREER PATHWAY:

CAREER MAP FOR PATIENT CARE POSITIONS

STEP #1 8TH GRADE – HS/GED	STEP #2 HS/GED	STEP #3 HS/GED – AA	STEP #4 AA – BS
Transporter **Duties:** Transports patients, equipment, and supplies. **Food Service Assistant** **Duties:** Prepares and serves food to patients, staff, and visitors. **Environmental Services Assistant** **Duties:** Performs a variety of cleaning functions.	**Nurse Extender** **Duties:** Under the direction of an RN, provides a variety of environmental, nutritional, clinical support, and transportation services and activities to promote patient comfort and satisfaction. **Other Requirements:** Certified nursing assistant license required in some states; six months of acute care experience; training that teaches the following skills: IV starts, EKGs, Foley catheters, blood drawing, oxygen therapy, NG tubes, suctioning, drain managements, and wound care. **Nursing Assistant** **Duties:** Under the direct supervision of an RN, performs delegated patient care functions of an uncomplicated nature. **Other Requirements:** Nursing assistant certification in some states.	**Licensed Practical Nurse** **Duties:** Under the direct supervision of an RN, provides direct patient care for an assigned group of patients. **Other Requirements:** Graduation from approved practical nursing education program; current license. **Medical Assistant** **Duties:** Obtains accurate patient information and creates a positive office image by responding professionally to all patients, staff, and other customers. **Other Requirements:** One year of medical office experience; basic computer experience.	**Registered Nurse (RN)** **Duties:** Assesses, plans, implements, and evaluates nursing care of patients from admission through discharge. **Other Requirements:** Valid RN license; some previous related clinical experience may be required.

KEY

HS = high school
GED = high school equivalency
AA = associate degree (2 yrs.)
BS = bachelor's degree (4 yrs.)

NAVIGATING CAREER MAPS:

Each position category (patient care, administrative, technician), includes a series of steps from left to right. Generally, education, experience, and salary increase as you move to the right across the map. Within a given step, there is sometimes an increase in the required experience and education/training as you move from the bottom to the top of the page.

Content used with permission of the Baltimore Alliance for Careers in Healthcare.[63]

Example: The AHCCN strives to accommodate adult workers in career training. The network includes partners that utilize contextualized bridging in basic education for individuals testing below 8th grade. Contextualized bridging combines remedial training with basic job-specific knowledge. By making training job-relevant even for basic education, employer and trainee needs are simultaneously addressed.

Reducing the opportunity cost of career training and advancement is crucial to developing an engaged and trained workforce. For low-income adults with records, quitting a job for a career advancement opportunity can be straining. Trainers with the AHCCN also develop partner college-approved curriculum that is relatively condensed and scheduled to accommodate working adults allowing them to hold their jobs, support their families and simltaneously pursue career advancement opportunities.

Entry-level workers at MEDSTAR Good Samaritan Hospital (Baltimore) take the next step in their career development. Graduating cohort of CNAs. Photo used with permission of BACH.

FORGE CAREER PATHWAYS

Demand for post-secondary education in the healthcare sector continues to grow. In order to meet minimum qualifying standards for mid- to high-skill positions, applicants must at least have an associate or bachelor's degree. In 2010, the Institute of Medicine recommended that by 2020, 80 percent of nurses hold a Bachelor of Science degree. Simultaneously, positions along the career ladder are either being eliminated or their qualifications are increased ("credential creep").[64] As a result, training costs can increase dramatically, reducing both accessibility and economic mobility and leaving the talent pipeline dry.

Two ways to restore steps in the career ladder are:

1. Optimizing credential attainment through "stackable credentials"—defined by the U.S. Department of Labor as "a part of a sequence of credentials that can be accumulated over time to build up an individual's qualifications and help them to move along a career pathway or up a career ladder to different and potentially higher-paying jobs."[65]
2. Utilizing competency-based career mapping—an evaluation of various roles throughout your organization that entails comparing and connecting competency/skill requirements to better identify paths of employee advancement.

G. Leverage Community Intermediaries

Effective career pathways allow for stackable, industry-recognized credentials; multiple entry and exit points; flexible options; and work-based training. Partnerships can implement career pathways by identifying and strategizing around emerging occupations through dynamic, periodic short- and long-term labor market analyses and by connecting different jobs to develop multiple career pathways.

PROVIDE MENTORSHIP

Healthcare training can be time intensive. Although training eventually pays off through employment in highly skilled jobs, these jobs often require an associate or bachelor's degree. Necessary training steps leading up to high-skill opportunities are typically shorter and lower paying. Mentorship is key to keeping trainees engaged throughout all stages of their training. Mentors can gain trainee buy-in by providing realistic expectations about training timelines and suggesting ways to alternate intervals of work with short-term training. Helping employees onto career pathways increases both skill and retention within your workforce.

Example: Some employers involved with BACH assign coaches to their incumbent worker-trainees. Coaches provide basic career guidance and coordinate between the employer and the trainee, checking in frequently during training and bringing specific challenges such as financial and transportation challenges to the employer's attention.

Example: AHCCN also provides a transition coordinator who helps implement trainings that lead to career pathways and not merely a job placement. In addition to identifying client needs and making referrals, transition coordinators gauge worker interest and competency, match those interests and skills with employer demands, and advise both on process and timeline. Transition coordinators also monitor clients for up to a year for job retention.

“As a country, we have to make sure that those who take responsibility for their mistakes are able to transition back to their communities. It’s the right thing to do. It’s the smart thing to do.”

BARACK OBAMA

President of the United States[66]

Conclusion

Make an Impact Today

The changing landscape of healthcare signals that it's time to re-think the historical perception that hospitals and primary care facilities are solely acute-care institutions. Healthcare entities generally do not re-locate and often serve as the largest local employers and economic engines. As such, these "anchor institutions" can help elevate economically marginalized communities by investing in surrounding underserved neighborhoods. By **hiring people with records from your community**, you can help improve your local economy, increase public safety, and achieve better health outcomes for your neighbors.

Healthcare employers face intense competition and a significant shortage of frontline and middle-skill workers. If employers neglect to implement new recruitment and hiring strategies, the industry will face tremendous challenges to meet the rising demand for a diverse workforce.

» **It's time to exercise your hiring power to unlock the potential of the 70 million Americans with records while reducing costs and improving patient care.**

Use this toolkit to become a champion in your organization for investing in employees with records while improving your bottom line and leading efforts to reduce recidivism.

Let's work together to both build a skilled workforce that's ready to meet the demands of the 21st century economy and ensure economic opportunity for all Americans.

Appendix A

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https://www.doleta.gov/business/incentives/opptax/PDF/WOTC_Employer_Guide.pdf

Appendix B

Resources

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http://nyachnyc.org/about-us/vision-mission/

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http://kcc.kentuckianaworks.org/JobSeekers/KentuckyCareerCenterLocations/KentuckyHealthCareerCenter.aspx

Appendix C

Key Laws Regulating Employment Background Checks

Fair-Chance Laws delay employer inquiries about a job applicant's conviction record until later in the hiring process. In their simplest form, ban-the-box laws (a subset of fair-chance laws) prohibit employers from including such questions on their job applications. More robust fair-chance laws require an employer to first extend a conditional offer of employment, or at least conduct an in-person job interview, before asking about the applicant's record. They may also include other measures to ensure the accuracy and reliability of the background check process. Fair-chance policies are gaining momentum across the nation and have been adopted in numerous states and over 100 cities and counties. Most existing policies apply to only government employers, but laws governing the hiring practices of private employers are also spreading to new states and localities. Visit www.nelp.org/campaign/ensuring-fair-chance-to-work/ for more information.

The Fair Credit Reporting Act (FCRA) regulates background checks obtained from a third-party consumer reporting agency. In order to be in compliance, employers must follow FCRA guidance before obtaining a background check (obtaining written authorization from a candidate) as well as before and after taking adverse action (providing candidate with pre–adverse action notice with a copy of her background report with summary of rights under FCRA and adequate response time; a notification as to the decision and reasoning in the event of a denial).

Title VII of the Civil Rights Act of 1964 prohibits discrimination—both direct and disparate impact—in employment on the basis of race, color, religion, national origin, or gender. People with arrest or conviction records are protected under Title VII because the use of criminal background checks has a significant "disparate impact" on people of color. In 2012, the EEOC issued detailed guidelines regulating criminal background checks for employment under Title VII, precluding blanket restrictions against hiring people with records and requiring a case-by-case review of the individual's application. However, a policy resulting in disparate impact will not necessarily violate Title VII if the employer has considered the convictions in light of business necessity and established that its exclusions target specific conduct that would compromise the requirements of the job and there are no alternatives to such exclusions.

Federal & State Occupational Licensing Laws regulate licensed professions. Requirements for most licensed occupations vary by state, as do the specific occupations that are licensed. All states require a background check when licensing certain professions, including many healthcare positions, including long-term care workers, registered nurses, and certified nurse assistants. Some states have strict standards limiting employment of people with records for certain health care occupations (e.g., many nursing boards will not certify anyone with a felony record), and others provide special "waivers," "certificates of rehabilitation," and appeal processes allowing people with records to produce mitigating information and evidence of rehabilitation. Thus, health care employers and workers need to be well informed about their rights and responsibilities under the law of the state where they are located.

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National Background Check Program

National Home and Community Based Services (HCBS) Conference

September 3, 2015

Presenters

- Don Howard, MSW, NBCP Program Officer
- Sarah Richardson Fahrendorf, Esq. , NBCP Program Officer
- Suzanne Crisp, Director of Program Design and Implementation, National Resource Center for Participant-Directed Services, Boston College

Agenda

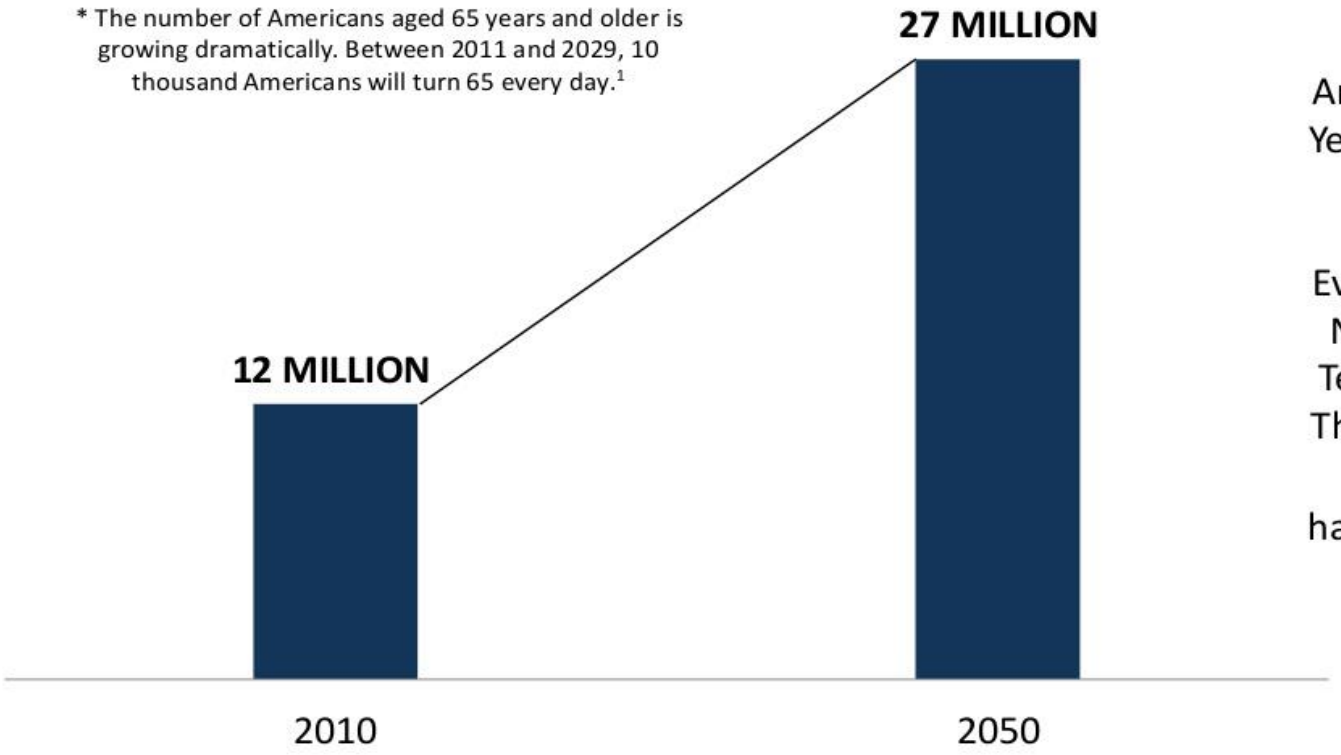
- Current Environment
- Interventions to Prevent Abuse and Neglect
  - Individual
  - Caregiver / Provider
  - State Protections – AARP Safe at Home?
  - Federal Protections – National Background Check Program
- AARP Study – Safe at Home?
- National Background Check Program (NBCP) Overview
  - Current stage implementation of background check systems in grantee States
  - Challenges States face to implementation
  - Examples of specific States that have excelled in different areas of implementation
- Questions & Answers

Current Environment

- Preaching to the choir…
  - More people receive long term services and supports (LTSS) at home and in the community than in institutions.
  - Trend will increase as the U.S. population ages.
  - In Olmstead vs. L.C., 527 U.S. 581 (1999), the U.S. Supreme Court held that public entities are required to provide integrated settings most appropriate to meet the individual's needs.
  - Home and community-based services (HCBS) give participants more control of their environment.
  - May be less expensive than care provided in institutional settings.

Number of Americans Needing LTSS

* The number of Americans aged 65 years and older is growing dramatically. Between 2011 and 2029, 10 thousand Americans will turn 65 every day.[1]



48% of Americans 40 Years or Older Say that Almost Everyone Will Need Long-Term Care as They Age, but only **35%** have set aside money[2]

SOURCE OF GRAPHIC: Kaye H, Harrington C, LaPlante M. Long-Term Care: Who Gets It, Who Provides It, Who Pays, And How Much? Health Affairs. January 2010 2010; 29(1):11-21.

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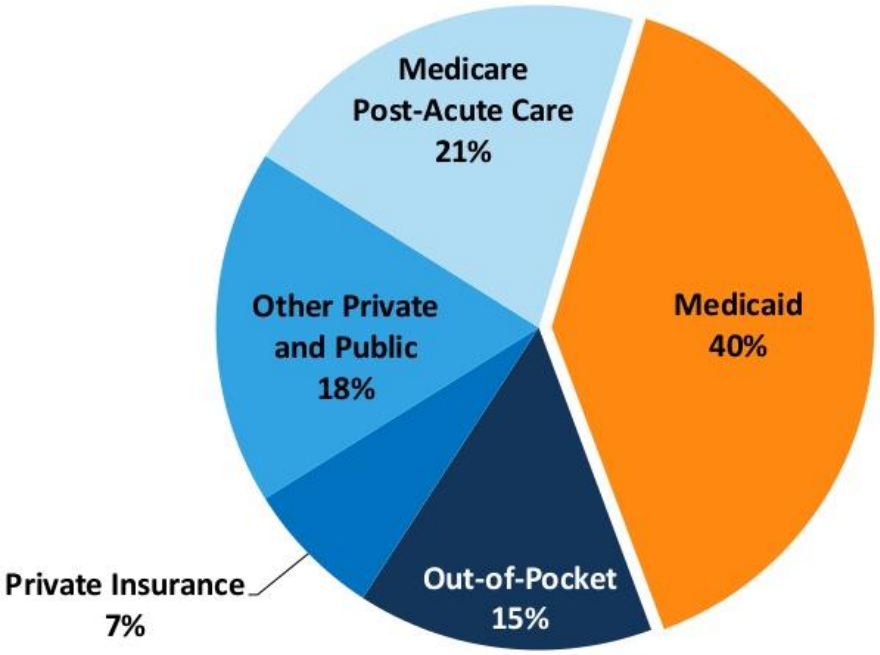
Expenditure Breakdown for LTSS

Medicaid is the Primary Payer of Long-Term Care



Total Long-Term Care Spending, 2011 = $357 billion

NOTE: Total LTSS expenditures include spending on residential care facilities, nursing homes, home health services, and home and community-based waiver services. Expenditures also include spending on ambulance providers. All home and community-based waiver services are attributed to Medicaid.
SOURCE: KCMU estimates based on CMS National Health Expenditure Accounts data for 2011.

The Cost of Abuse

- Direct medical costs associated with violent injuries to older adults are estimated to add more than $5.3 billion to national health expenditures.
- Elders who experienced abuse, even modest abuse, had a 300% higher risk of death than those not abused.
- Victims of elder abuse have significantly higher levels of psychological distress and lower perceived self-efficacy than older adults who have not been victimized.

Source: http://www.ncea.aoa.gov/Library/Data/index.aspx#abuser

The Face of Abuse

- Case: *Ohio (Rape)*
  - Case summary:
    - A home health aide who was charged with raping the juvenile sister of the man he was caring for had been convicted of attacking a woman in North Carolina four years before.
  - NBCP State: Yes
  - NBCP Program Element: registry checks (residency requirements).

The Face of Abuse (continued)

- Case: *New Jersey (Murder, Robbery)*
  - Case summary:
    - Nursing agency negligently hired an applicant for a position as a certified nursing assistant and assigned him to the plaintiffs' home without conducting an adequate pre-employment screening and criminal background check.
  - NBCP State: No
  - NBCP Program Element: registry checks (professional licensing registry checks).

Abuse and Neglect

- Many vulnerable persons receive LTSS.
- Caregivers at home or in the community may receive less supervision than in formal institutional settings.
- What interventions can prevent abuse and neglect?
  - Individual
  - Caregiver / Provider
  - State Protections
  - Federal Protections

Long-Term Services and Supports Breakdown

Institutions - Medicaid	Medicaid Home and Community-Based Services (HCBS)	Medicare
Intermediate Care Facilities for Individuals with Intellectual Disabilities (ICF/IID)	Home Health Services Mandatory State Plan Nursing Services Aide Services Medical Supplies Skilled Nursing	Home Health Services Part-time or intermittent skilled care Physical and Occupational therapies Speech language pathologies Medical social services Medical supplies
Skilled Nursing Facilities (SNF)	State Plan Personal Care (Optional)	Can pay up to 100 days in SNF for rehab
Mental Health Facilities	Waiver Services - States Define	Hospice

Interventions

- What interventions can prevent abuse & neglect?
  - Individual

Individuals

- Children and adults with disabilities experience violence and abuse at least twice as often as their non-disabled peers.
- Cases involving victims with disabilities often lack witnesses or physical evidence.
- Abuse victims often suffer some degree of cognitive impairment
  - Defense claims victim "consented" to giving assets
  - Allegations are explained away as "delusions"
  - Mental illness label creates visions of untrustworthiness in jurors' minds
  - Victims may be uncooperative if they feel humiliated or stereotyped
  - http://www.justice.gov/elderjustice/ "Manual on Prosecuting Crimes Involving Victims with Disabilities."

Interventions

- What interventions can prevent abuse and neglect?
  - Caregiver / Provider

Screening Opportunities and Requirements

Federal Law and Regulation

- Hospice (42 CFR 418.114(d))
- NBCP grant requirements, Section 620I of the Affordable Care Act
- OIG List of Excluded Individuals and Entities (LEIE)
- Medicare certification – providers must comply with Federal, State, and local laws
- Federal requirements – States must maintain a Certified Nurse Aide Registry.
- Federal Bureau of Investigation (FBI) Rap Back

State Law and Regulation

- Certification – applies to both facilities and providers
- Licensure of practitioners, facilities, provider types
- Medicaid, by program.
- State Rap Back

Provider Policy

- Including criminal background checks, reference checks, interviews, signed statements about job, and/or alcohol/drug checks

Caregivers Can Help Prevent Abuse

- Third parties, not victims, most likely to report elder abuse. A 2003 National Research Council study notes that a review of substantiated APS (adult protective services) reports found:
  - 14.8% came from in-home or out-of-home services providers.
  - 8.8% came from the victims
- States have mandatory reporting requirements.
  - Ultimately, it will be up to the individual caregiver or support person.

Interventions

- What interventions can prevent abuse & neglect
- State Protections

Screening Opportunities and Requirements

Federal Law and Regulation

- Hospice (42 CFR 418.114(d))
- NBCP grant requirements, Section 620I of the Affordable Care Act
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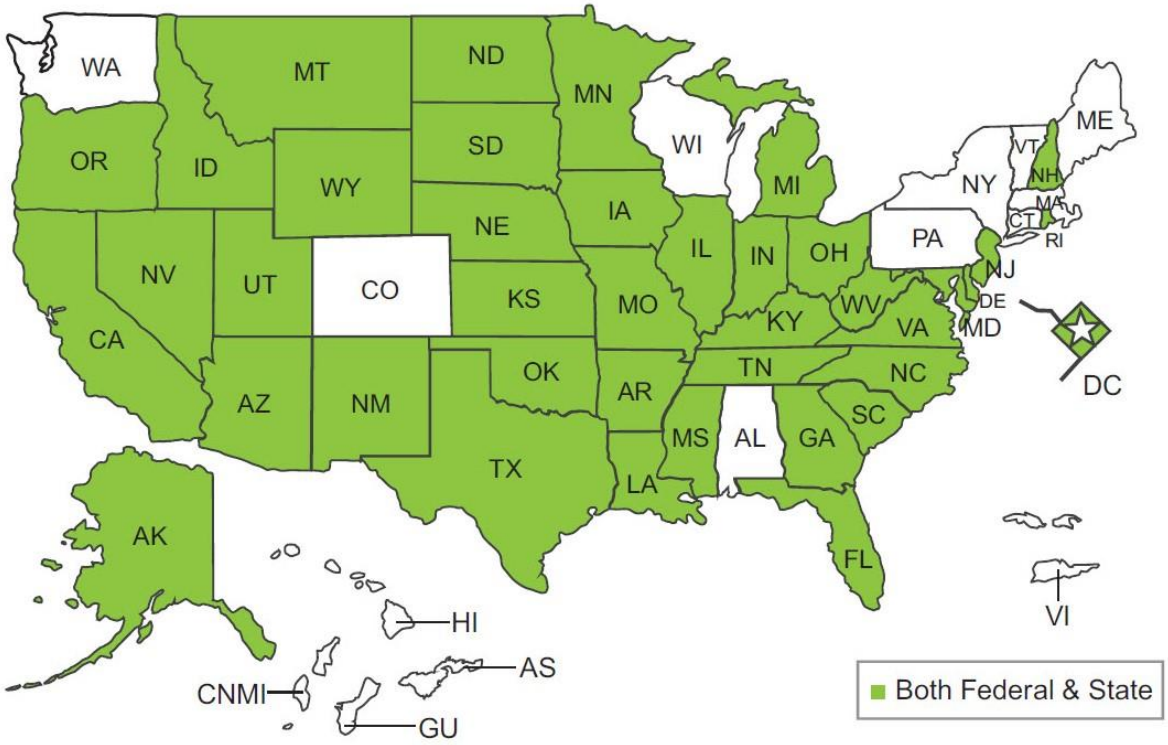
- Medicaid, by program.
- State Rap Back

Provider Policy

- Including criminal background checks, reference checks, interviews, signed statements about job, and/or alcohol/drug checks

Initial Licensure for Nurses

- State criminal background check requirements



- Map courtesy of the National Council of State Boards of Nursing (NCSBN).

AARP Study

- *Safe at Home? Developing Effective Criminal Background Checks and Other Screening Policies for Home Care Workers*

  http://www.aarp.org/relationships/caregiving/info-09-2009/2009-12.html

  - Published by AARP Public Policy Institute.
  - Highlighted the need for fingerprint-based background checks of home and community care providers, such as home health aides (HHAs).
  - Fingerprint based criminal background checks can help reduce the risk of abuse.

Review of Medicaid Law and State Law

- States are responsible for administering the Medicaid program.
- State background check practices vary widely.
- No federal Medicaid requirement mandating criminal background checks on employees.
- States that did mandate pre-employment criminal background checks had very different disqualifiers.
- States had multiple options and data sources for screening were not integrated.
- Six states exempt family members and other relatives for HCBS.

Quality and Home Care in Self-Direction

- Hire qualified and competent staff.
  - Conduct initial and on-going criminal screenings and/or criminal background checks per State requirements.
  - Develop appropriate worker/provider qualifications.
  - Provide initial and on-going worker training.
- Train participants on identifying and reporting abuse and neglect.
- Apply a risk identification and management system.
- Develop monitoring strategies on all levels.
- Frequent home visits or telephone contacts.
- If individual lacks capacity, designate a representative.

Advancing Policy

- Additional research is needed:
  - Incidence of abusers with a criminal history.
  - Risk of abuse from family members versus paid caregivers.
- Acknowledge participants' rights and risks while safeguarding health and welfare.
  - Develop a risk identification and management system.
- Standardization across funding sources and programs will reduce program confusion and create efficiencies.

What interventions can prevent abuse & neglect

- Protections at the Federal Level

Screening Opportunities and Requirements

Federal Law and Regulation

- Hospice (42 CFR 418.114(d))
- NBCP grant requirements, Section 6201 of the Affordable Care Act
- OIG List of Excluded Individuals and Entities (LEIE)
- Medicare certification – providers must comply with Federal, State, and local laws
- Federal requirements – States must maintain a Certified Nurse Aide Registry.
- Federal Bureau of Investigation (FBI) Rap Back

State Law and Regulation

- Certification – applies to both facilities and providers
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- State Rap Back

Provider Policy

- Including criminal background checks, reference checks, interviews, signed statements about job, and/or alcohol/drug checks

National Background Check Program

- Affordable Care Act, Section 6201
  - Established NBCP to improve the health and safety of long term care (LTC) residents and beneficiaries and their families by establishing a nationwide program for screening of certain applicants (direct patient access employees) seeking employment with LTC facilities and providers
    - Encompasses wide range of LTC providers

"Long-Term Care Facility or Provider"

- Affordable Care Act Section 6201(a)(6)(E)

- LONG-TERM CARE FACILITY OR PROVIDER.—The term "long-term care facility or provider" means the following facilities or providers which receive payment for services under title XVIII or XIX of the Social Security Act: H. R. 3590—608
  - (i) A skilled nursing facility (as defined in section 1819(a) of the Social Security Act (42 U.S.C. 1395i–3(a))).
  - (ii) A nursing facility (as defined in section 1919(a) of such Act (42 U.S.C. 396r(a))).
  - (iii) A home health agency.
  - (iv) A provider of hospice care (as defined in section 1861(dd)(1) of such Act (42 U.S.C. 1395x(dd)(1))).
  - (v) A long-term care hospital (as described in section 1886(d)(1)(B)(iv) of such Act (42 U.S.C. 1395ww(d)(1)(B)(iv))).
  - (vi) A provider of personal care services.
  - (vii) A provider of adult day care.
  - (viii) A residential care provider that arranges for, or directly provides, long-term care services, including an assisted living facility that provides a level of care established by the Secretary.
  - (ix) An intermediate care facility for the mentally retarded (as defined in section 1905(d) of such Act (42 U.S.C. 1396d(d))).
  - (x) Any other facility or provider of long-term care services under such titles as the participating State determines appropriate.

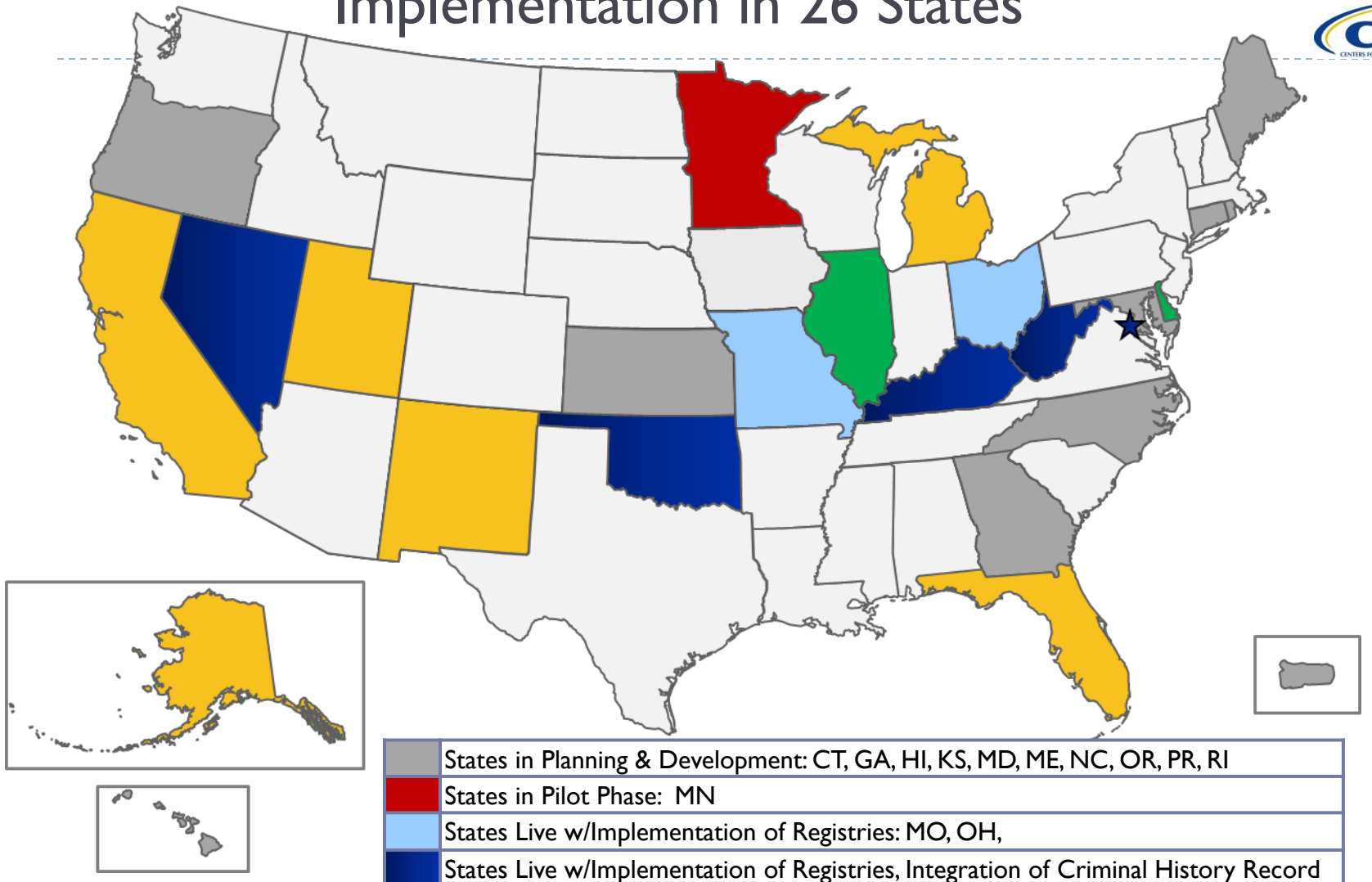
Affordable Care Act Section 6201(a)(6)(D)

- Covers prospective "direct patient access employees"
- DIRECT PATIENT ACCESS EMPLOYEE.—The term "direct patient access employee" means any individual who has access to a patient or resident of a long-term care facility or provider through employment or through a contract with such facility or provider and has duties that involve (or may involve) one-on-one contact with a patient or resident of the facility or provider, as determined by the State for purposes of the nationwide program. Such term does not include a volunteer unless the volunteer has duties that are equivalent to the duties of a direct patient access employee and those duties involve (or may involve) one-on-one contact with a patient or resident of the long-term care facility or provider.

National Background Check Program

- Participation by 26 States
- Over $50 million in grant awards
- Technical Assistance available to grantee States and States interested in applying
- Nurse Aide Registry Pilot
- CMS Regional Collaborative

National Background Check Program Implementation in 26 States



	States in Planning & Development: CT, GA, HI, KS, MD, ME, NC, OR, PR, RI
	States in Pilot Phase: MN
	States Live w/Implementation of Registries: MO, OH,
	States Live w/Implementation of Registries, Integration of Criminal History Record Information (CHRI): DC, KY (Voluntary), OK, NV, WV
	States Live w/Implementation of Registries, Integration of CHRI and Statewide Rap Back: AK, CA, FL, MI, NM, UT
	State Graduated: DE, IL

Program Overview

- NBCP created under the Affordable Care Act (Section 6201)
- Managed by U.S. Department of Health and Human Services (HHS) Centers for Medicare and Medicaid Services (CMS)
- Grant program in effect from 2010 until funds are expended

Program Overview - Purpose

- Help States protect vulnerable populations in long term care from abuse, neglect and exploitation
- To identify efficient, effective, and economical processes for States to conduct background screening activities
- Establish standardized framework for States to conduct comprehensive, fingerprint-based background checks on all prospective direct access employees of long term care facilities and providers

Program Overview - History

- NBCP Pilot (2004-2007) with 7 States
  - A variety of approaches
- HHS Office of Inspector General (OIG) report on Nursing Facilities' Employment of Individuals with Criminal Convictions (2009 – 2011)
  - Nursing facilities in KS, NE, IA, MO (130,000 total employees)
  - Findings suggested that insufficient background checks were performed
- Subsequent OIG report on prior criminal convictions of certified nurse aides (CNAs) having administrative findings on State nurse aide registries (NARs)

State Agencies Involved in NBCP

- State Coordinating Agency:
  - Department of Health
  - Department of Social Services
  - Department of Human Services
  - Department of Medicaid
  - Department of the Attorney General
  - Department of Licensing and Regulatory Affairs
- State Criminal Justice Information Services (CJIS) Organization:
  - State Bureau of Investigation
  - State Police
- State IT Organization

NBCP Program Requirements

- Define direct patient access employee
- Include all long-term care entities specified
- Fingerprint-based search of State and Federal criminal history
- Search of abuse/neglect registries
  - Federal (OIG List of Excluded Individuals and Entities – LEIE)
  - State (including Professional licensing boards)
  - Prior States if any (including Professional licensing boards)
- Develop and test rap back capability and other methods to reduce duplicate checks (State and Federal)
- Independent appeal process
- Provisional employment
- Monitor provider compliance with NBCP
- Security and privacy safeguards

Impact of State Rap Back in MI and FL

- MI state rap back between Jan. 2014 – June 2014
  - 50,517 new applications filed
  - 5,227 rap back hits – 483 individuals (9%) were deemed ineligible
- FL state rap back, January 2013 - May 2014:
  - Processed 259,321 applications
    - 4,353 rap back hits
    - 1,337 individuals (30%) went from Eligible to Not Eligible for offenses including:
      - Grand Theft
      - Battery and Assault
      - Sex Offenses
      - Exploitation of the Elderly

Challenges States Face in Implementation

- Enabling legislation
  - NBCP grant does not require States to have authorizing legislation in place prior to award. Most States begin legislative initiatives shortly after grant award.
    - Only Alaska did not require any new State-level legislation.
  - 9 NBCP States do not have enabling legislation to meet all NBCP requirements
- Fingerprint-based checks
  - 12 States currently submit fingerprints for both State and Federal (FBI) criminal history checks for all applicants
  - 14 States currently do not submit all fingerprints to the State and FBI
- Criminal History Record Information (CHRI) Integration with State Bureaus of Investigation
- Resistance from Stakeholders
  - Executives, Legislature, providers, or workers

State Examples - Delaware

- First State to graduate.
- Met all the requisite terms of NBCP
- Created an Advisory Board composed of State agency stakeholders and provider end users, to enhance communication and seek input on and build consensus for the goals of the grant.

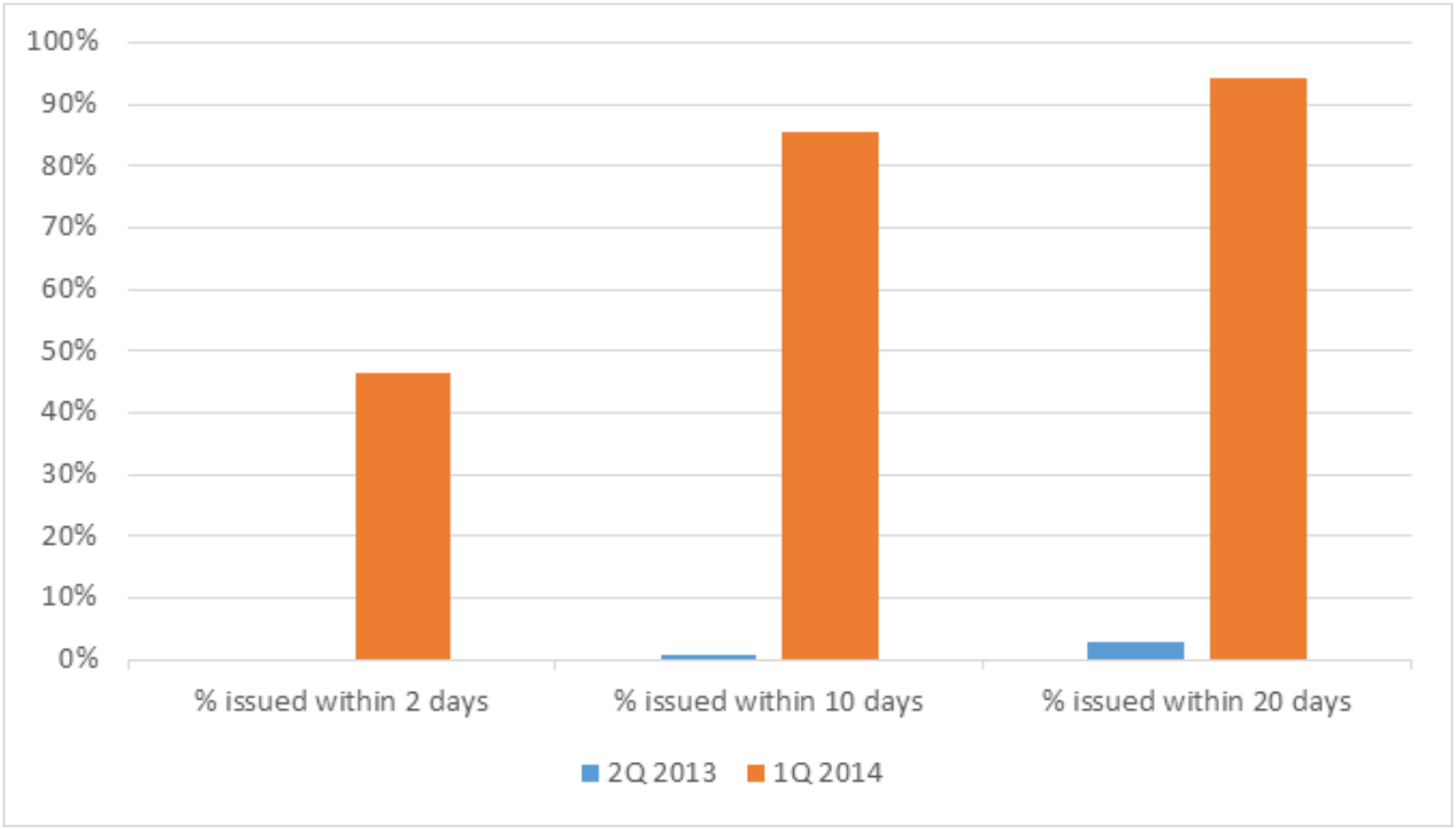
State Examples – New Mexico

- Implemented a Statewide fingerprint based program and a technical assistance-provided background check system during the fall of 2013.
- Results:

New Mexico CCHSP determinations	Before system upgrades (2Q 2013)	After system upgrades (1Q 2014)
Total issued	2,307	8,367
Eligible determinations	2,255	8,284
Ineligible determinations	52	83

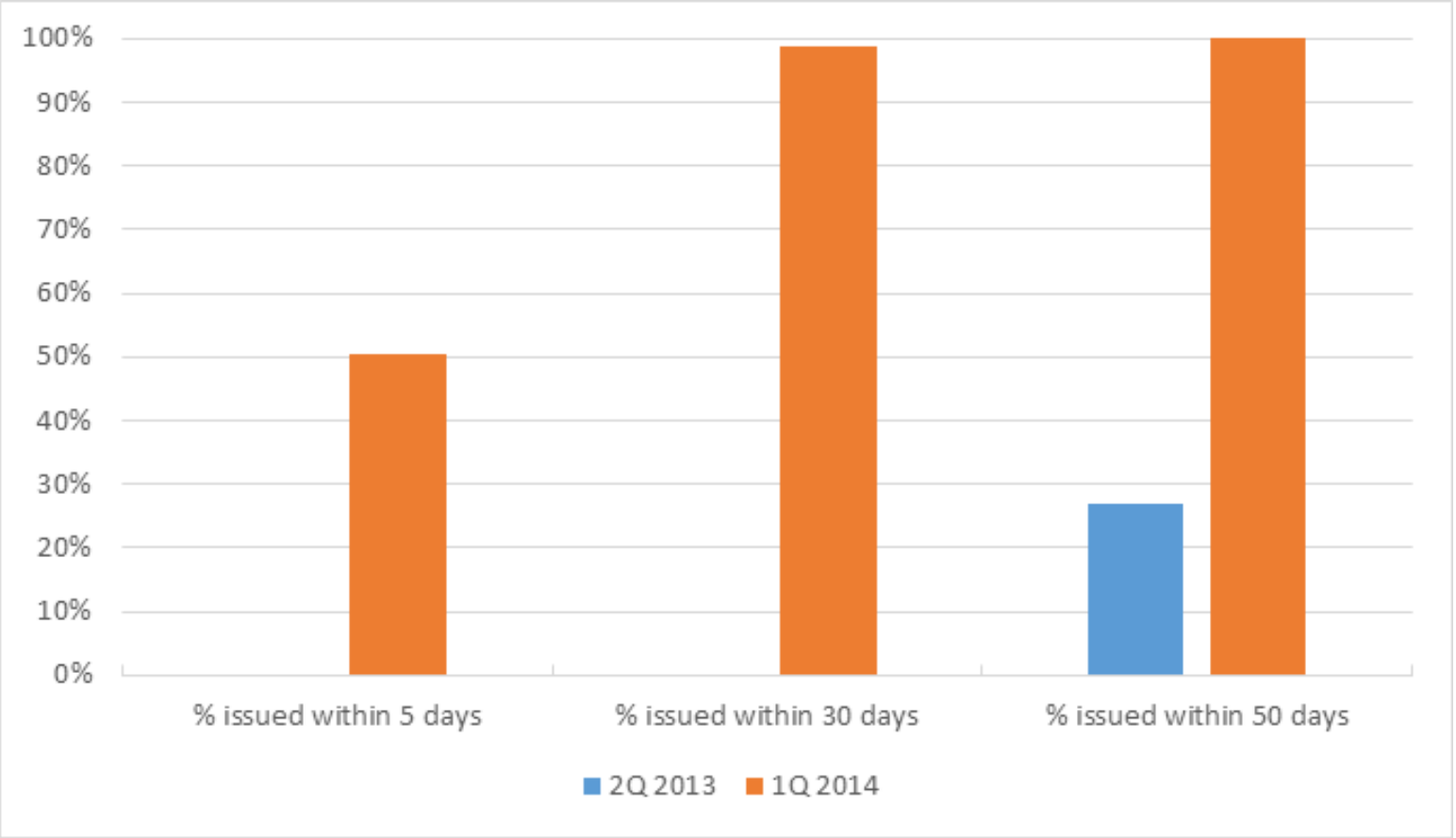
New Mexico, (*cont'*)

- Cumulative percentage of eligible determinations issued before and after system upgrades (at selected intervals), 2Q 2013 vs. 1Q 2014



New Mexico, (*cont'*)

- Cumulative percentage of ineligible determinations issued before and after system upgrades (at selected intervals), 2Q 2013 vs. 1Q 2014



State Examples – DC and NM

- Streamlined screenings based on an existing fingerprint-based check, January–June 2014

State	Number of fingerprint-based checks conducted	Number of screenings based on existing checks	Notes
District of Columbia	1,937	328	Did not include connections that did not report a registry check status or date. Most existing checks were eligible, the others were pending
New Mexico	9,580	1,142	All existing checks were eligible
Total	**11,517**	**1,470**	**13% of applicants did not require fingerprints**

- Cost Savings (based on fees avoided):
  - District of Columbia - $16,400
  - New Mexico - $37,686

Data Collection Efforts

- Collect and analyze data quarterly. Develop a Cross-State Comparison Report.
- 12 out of 26 States are submitting a data file:
  - 5 States provide data that is comparable
  - 7 States currently provide data that cannot be assessed:
    - Inconsistencies in report queries
    - Limited numbers of applicants and/or data elements
    - System start-up issues
    - Late submission of data.

Quarterly Report, June 2014

Measure	Alaska	District of Columbia	Georgia	Michigan	New Mexico
Number of records	44,126	14,331	2,667	121,375	28,642
Number eligible	20,382	9,845	2,617	90,204	22,590
Number ineligible	1,740	89 [a]	27	2,668 [b]	260 [c]
Number pending	987	433	20	– [d]	922
Number disqualified but waived	0	0	0	0	147
Number blank determinations	17,695	2,085	3	13,019	2,026
Number closed with no determination	3,322	1,879	0	14,284	2,697

a. The District of Columbia had 41 applicants who failed the registry check and either were classified as closed with no determination or had a blank determination. For comparability with other States, these 41 applicants should be added to the ineligible total and subtracted from the blank and no determination totals.

b. Michigan had 525 applicants who failed the registry check and either were classified as closed with no determination or had a blank determination. For comparability with other States, these 525 applicants should be added to the ineligible total and subtracted from the other two.

c. New Mexico had 9 applicants who failed the registry check whose applications were closed with no determination. For comparability with other States, these 9 applicants should be added to the ineligible total and subtracted from the no determination total.

d. Michigan does not currently use a designation of pending. Of its records with a blank fitness determination, most reflected applications that underwent a rap back process and were found still to be eligible for employment; however, at least 903 records would have been categorized as pending by most states based on having had a registry search conducted or fingerprints collected.

Quarterly Report, June 2014 (*cont'*)

Measure	Alaska [a]	District of Columbia	Georgia	Michigan	New Mexico
Number of appeals	N/A	13	10	256 [b]	232
Number of rehabilitation appeals	N/A	0	7	0	231
Number of error-related appeals	N/A	13	3	256	1
Number granted	N/A	10	5	193	144
Number denied	N/A	0	3	63	51
Number pending	N/A	3	2	0	19
Number referred	N/A	0	0	0	0
Blank appeal decisions	N/A	0	0	0	18

a. AK does not currently have the capability to report information on appeals.

b. MI includes appeals filed for rap back checks.

Select Data Analysis Results

- Analysis of the data available (even legacy) is showing results:
  - Three States reported "streamlined screenings" in Q1 2014
    - Total of 13,316 fingerprint-based checks
    - Total of 2,660 subsequent screenings of same individuals – no fingerprints required
  - Four States reported FBI determination results in Q1 2014:
    - 165 individuals with "eligible" State CHRI, were disqualified due to FBI CHRI.

HCBS Specific Data Results

State	Facility/Provider Type	Number of Records	Number Eligible	Number Ineligible
Alaska (November 2014–March 2015)	Home Health Agency	82	81	1
	Hospice	28	28	0
	Personal Care	1,699	1,629	70[a,b,c]
District of Columbia (June 2012–March 2015)	Home Health Agency	9,629	9,615	14
	Hospice	97	95	2
	Personal Care	0	0	0
Michigan (May 2013–March 2015)	Home Health Agency	18,344	18,260	84
	Hospice	5,923	5,911	12
	Personal Care	N/A	N/A	N/A
New Mexico (October 2015–March 2015)	Home Health Agency	14,682	14,402	280
	Hospice	1,370	1,359	11
	Personal Care	1,099	1,091	8

a. 48 of these records had a final overall ineligible determination status; 7 were pending; 6 were found ineligible after the end of the quarter; 6 were waived (appeal granted); 3 were left blank (2 of these were closed).

b. An additional 7 were found ineligible based on criminal history and overall fitness determination.

c. Another 3 were found ineligible based on criminal history; 2 of them were waived and 1 is still pending.

Positive Case Scenario– Criminal History

- Case: *Recent Arrest*
  - Case summary:
    - New employee called into work on her first day for a "family emergency." Requested a new start date for the following day.
    - FL background check system received notice the same day under the State rap back program that she had been arrested for Exploitation of the Elderly.
  - NBCP State: Florida
  - NBCP Program Element: State criminal history rap back.

Ongoing Opportunities for the States

- Current solicitation
  - Posted on Grants.gov and CMS website at https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/SurveyCertificationGenInfo/BackgroundCheck.html
  - Applications accepted until solicitation is cancelled
  - CMS will review applications and make awards on a flow basis
- 6th Year Grant Extension
  - CMS is now accepting applications for a 6th year grant extension
  - Purpose: Allow States to reach their milestones and maximize the use of their grant funds.

Thank you!

For further information:

CMS Background Check email:

background_checks@cms.hhs.gov