

# DEPARTMENT OF HEALTH AND SOCIAL SERVICES

## DIVISION OF LONG TERM CARE RESIDENTS PROTECTION

Statutory Authority: 31 Delaware Code, Sections 1145 and 1146 (31 **Del.C.** §§1145 & 1146)  
16 **DE Admin. Code** 3110

### FINAL

### ORDER

#### 3110 Background Checks and Drug Testing for Programs and Home Care Agencies

#### NATURE OF THE PROCEEDINGS:

The Department of Health and Social Services ("Department") / Division of Long Term Care Residents Protection (DLTCRP) initiated proceedings to revise Regulation 3110 Criminal History Record Checks and Drug Testing for Programs and Home Health Agencies. The Department's proceedings to establish the regulation was initiated pursuant to 29 **Delaware Code** Section 10114 and its authority as prescribed by 16 **Delaware Code** Section 1124 and 31 **Delaware Code** Section 512.

The Department published its notice of proposed regulation changes pursuant to 29 **Delaware Code** Section 10115 in the January 2013 Delaware *Register of Regulations*, requiring written materials and suggestions from the public concerning the proposed regulations to be produced by January 31, 2013, at which time the Department would receive information, factual evidence and public comment to the said proposed changes to the regulations.

#### SUMMARY OF PROPOSED AMENDMENT

The proposal establishes Regulation 3110 History Record Checks and Drug Testing for Programs and Home Health Agencies. The proposed change will establish the regulation as required by 16 **Del.C.** §1145(m).

#### Statutory Authority

29 **Del.C.** Chap. 79, "Department of Health and Social Services."

16 **Del.C.** §1145 (m), "Criminal Background Checks."

#### Background

DLCTRP is revising these regulations pursuant to 16 **Del.C.** §1145 (m).

#### Summary of Proposed Amendment

The proposal revises regulations to incorporate the role of the new "Background Check Center established by statute and to conform to 2012 EEOC guidance on reliance on arrest and conviction records as they apply to hiring decisions.

#### SUMMARY OF COMMENTS RECEIVED WITH AGENCY RESPONSE AND EXPLANATION OF CHANGES

On further review, the Division has determined that it is beyond the scope of our authority to issue or mandate the use of guidelines set forth by federal agencies. Therefore we have deleted §§8.3.1 and 8.3.2 that mandated that employers abide by the Equal Employment Commission, Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, 915.002, issued 4/25/12. The Division will provide copies of this document on request and have posted a link to the document on the Division website: <http://www.dhss.delaware.gov/dhss/dltcrp/>

The Governor's Advisory Council for Exceptional Citizens ("GACEC") and the State Council for Persons with Disabilities (SCPD) offered comments. The Delaware Health Care Facilities Association ("DHCFA") also offered comments and suggestions. DLTCRP has considered each comment and responds as follows:

**Comment: 1.** First, in §3.0, definition of "criminal history", the Division includes the following sentence: "It shall be limited to convictions and arrests for which no disposition is available." This is problematic. The EEOC guidance (incorporated by reference at §8.6) discourages reliance on arrest records by employers. Moreover, the incidence of arrest records without disposition is high:

A 2006 study by the DOJ/BJS found that only 50% of arrest records in the FBI's III database were associated with a final disposition.

At 5. Routinely including a high volume of arrest records without disposition manifestly violates a basic precept of the EEOC guidance.

**Response:** *Except for the offenses listed at §8.2 the Division will no longer automatically disqualify applicants. The burden of analyzing and assessing suitability for employment rests with the employer. We are providing employers with the full record so they can conduct such an analysis and assessment in accordance with the EEOC guidelines.*

**Comment 2:** Second, in §3.0 definition of “Division or DLTCRP”, consider adding “and home health agencies” to the end since this is the subject of the regulation.

**Response:** *Amended as recommended.*

“Division” or “DLTCRP” means the Division of Long Term Care Residents Protection, Department of Health and Social Services. The Division is responsible for background checks for **[licensed facilities programs and home health agencies]**.

**Comment 3:** Third, §5.2 envisions the BCC continuously monitoring employees in its Master List for both arrests and convictions. The BCC is then authorized to use its discretion in sharing arrest information with the employer. This is not consistent with the EEOC guidance. The EEOC provides the following characterization of arrest records:

The fact of an arrest does not establish that criminal conduct occurred. Arrests are not proof of criminal conduct. Many arrests do not result in criminal charges, or the charges are dismissed. Even if an individual is charged and subsequently prosecuted, he is presumed innocent unless proven guilty.

**Response:** *The Division will receive and analyze the updates. Charges with unknown dispositions or non-convictions will only be forwarded to the employer at the discretion of the Division. Again, the only convictions the Division will classify as disqualifying are listed at §8.2. Other considerations are left to the employer.*

**Comment 4:** Fourth, §5.2 contains the following sentences:

DLTCRP will monitor the charge until there is a disposition. When the disposition is known, DLTCRP will inform the Employer of the conviction.

This incorrectly presumes that all dispositions will be convictions. Consider substituting “any conviction” for “the conviction”.

**Response:** *The Division reserves the discretion to notify employers of any new criminal court action including both pending and resolved cases, and any wanted status. The Division will inform the employer of the resolution of the criminal court action when known. We have replaced the word “conviction” with “outcome.”*

5.2 The BCC automatically conducts a Rap-back on all employees listed on the Master List. The Rap-back process will provide DLTCRP with information regarding any new arrest or conviction in the state. DLTCRP will determine, at its discretion and depending of the nature of the alleged crime, whether or not to inform the employer of the arrest. DLTCRP will monitor the charge until there is a disposition. When the disposition is known, DLTCRP will inform the Employer of the **[conviction outcome]**.

**Comment 5:** Fifth, the term “discrete” should be substituted for “discreet” throughout the document. It is incorrectly used in §§6.3, 6.4, 9.2, and 10.3.

**Response:** *Substitutions made as recommended.*

6.3 The original Grandfathered employee consent form shall accompany the employee to SBI for fingerprinting if so directed by DLTCRP because an SBI# is not already known by DLTCRP due to prior fingerprinting. A copy of the Grandfathered employee consent form shall be maintained in a **[discreet discrete]** file which is readily accessible, without delay, upon request by an agent of DLTCRP.

6.4 A copy of the BCC consent form executed by an Applicant for employment and a copy of the Master List Retention form executed by an employee who seeks to continue their place on the Master List pursuant to 6.2 above shall be maintained in separate **[discreet discrete]** files which are readily accessible, without delay, upon request by an agent of DLTCRP.

9.2 Evidence of all drug tests not transmitted through the BCC which have been represented to have been secured must be maintained in a **[discreet discrete]** file and be available for inspection, without delay, upon request from an agent of DLTCRP.

10.3 The employer shall ensure that copies of all BCC consent forms signed by Applicants are maintained in a **[discreet discrete]** file which is immediately available, upon request, from any agent of DLTCRP.

**Comment 6:** Sixth, in §6.4, there is a plural pronoun (their) with a singular antecedent (employee). Consider substituting “inclusion” for “their place”.

**Response:** *Substitutions made as recommended.*

6.4 A copy of the BCC consent form executed by an Applicant for employment and a copy of the Master List Retention form executed by an employee who seeks to continue **[their place inclusion]** on the Master List pursuant to 6.2 above shall be maintained in separate **[discreet discrete]** files which are readily accessible, without delay, upon request by an agent of DLTCRP.

**Comment 7:** Seventh, §7.1 states as follows:

7.1 Before hiring an Applicant, employers are required by law to obtain from prior employers and to provide to prospective employers Service Letters which provide specific information as required by the Department of

Labor. 19 **Del.C.** §708.

This is not entirely accurate. Title 19 **Del.C.** §708(b)(6) authorizes conditional employment based on difficult circumstances. At a minimum, consider inserting “generally” prior to “required”.

**Response:** *Revision made as recommended.*

7.1 Before hiring an Applicant, employers are **[generally]** required by law to obtain from prior employers and to provide to prospective employers Service Letters which provide specific information as required by the Department of Labor. 19 **Del.C.** §708.

**Comment 8:** Eighth, §7.2 recites as follows:

When an employee hired after the effective date of the BCC is terminated, the employer shall promptly complete a Service Letter which will be stored by the BCC and available to the next prospective employer. The Service Letter shall expire after 5 years.

While this employer requirement may be conceptually sound, it may lack statutory authority. Title 19 **Del.C.** §708(b)(5) contemplates employers maintaining the Service Letters and honoring requests from prospective employers for the Service Letters pertaining to applicants. Violations of the law result in civil penalties. Council could not locate any statute which permits an employer to simply send the Service Letters to the BCC which would then respond to employer requests for the Letters.

**Response:** *19 Del.C. §708(b)(5) requires the previous employer to provide the letter, it does not specify the manner in which it must be delivered. The mandatory posting of the letter in the BCC by the previous employer upon termination of the employee will result in increased compliance with the statute and provide the letter to the new employer with no delay by the previous employer.*

**Comment 9:** Ninth, in §8.1, first sentence, the word “to” should be inserted between “authorized” and “furnish”. Moreover, in the first sentence, the word “to” should be inserted between “person” and “employers”.

**Response:** *Insertions made as recommended.*

8.1 The SBI is authorized **[to]** furnish information pertaining to the identification and conviction data for any person **[to]** employers or prospective employers so long as the information is used solely for purposes of making an employment decision. 11 **Del.C.** 8513(c) and(c)(1).

**Comment 10:** Tenth, in §8.2, the 15-year period for abuse/neglect convictions seems a bit long. By analogy, felony theft convictions have a 10-year disqualifying period. Consider a shorter period for misdemeanors involving abuse/neglect. The conviction information would still be disclosed pursuant to the criminal background check but there would not be a categorical, “no-exceptions” disqualification from employment if the 15-year standard were modified.

**Response:** *The Division has determined that 15 years is an appropriate time period.*

**Comment 11:** Eleventh, in §8.3.1, consider substituting “inform” for “informs”. There is also a plural pronoun (them) with a singular antecedent (individual). Consider substituting “the individual” for “them”. Alternatively, the term “him” could be substituted. See Delaware Administrative Code Style Manual, §3.3.2.1.

**Response:** *§8.3.1 has been deleted.*

**Comment 12:** Twelfth, in §8.3.2, I believe the fourth “bullet” (Evidence...conduct) is “bunched” with the third bullet.

**Response:** *§8.3.2 has been deleted.*

**Comment 13:** Thirteenth, in §10.8 insert “any” before “other”. Compare analogous §10.8 in the proposed Criminal History Record Checks and Drug Testing regulation. 16 DE Reg. 716 (January 1, 2013).

**Response:** *Amended as recommended.*

10.8 The employer is prohibited from sharing BCC disclosure information with **[any]** other person, agency, or facility except when requested because the subject of the BCC disclosure will be working for that employer in a facility or in the personal private residence of the requesting party.

**Comment 14:** Fourteenth, in §11.1, capitalize “Bureau”.

**Response:** *Amended as recommended.*

11.3 DHSS shall not release to employers copies of actual electronic reports of criminal history records prepared by the Federal **[b B]**ureau of Investigation.

**Comment 15:** Fifteenth, in §11.5.1, there is a plural pronoun (their) with a singular antecedent (Applicant). Consider substituting “his”. See Delaware Administrative Code Style Manual, §3.3.2.1.

**Response:** *Amended as recommended.*

11.5.1 An Applicant shall submit a request in writing to the Department for an on-site review of **[their his]** BCC disclosures.

**Comment 16:** Sixteenth, in §11.5.4, substitute “names” for “name”.

**Response:** Amended as recommended at §12.5.4.

11.5.4 Written documentation of the date and time of the review and the [name names] of those present shall be maintained by DLTCRP.

**Comment 17:** Seventeenth, Title 29 Del.C. §7972 provides for due process and a hearing to contest BCC errors. Hearings must be consistent with the APA. The regulation omits information in this context. For example, in §11.5, an applicant should be able to obtain a written copy of BCC disclosures to bring to an attorney or facilitate checking accuracy based on other records. Moreover, there is no mention of a hearing in the regulation. There is only an obtuse reference to “appeal” in §15.5.5.

**Response:** The determination of a disqualifying conviction based on §8.2 is the only determination made by the Division. Consistent with the statutory language at 29 Del.C. §7972 challenges to those determinations will be consistent with the Administrative Procedures Act, 29 Del.C. Chapter 101. That process for appeal has been successfully applied previously under 16 Del.C., in particular for appeals of remedies imposed for noncompliance and is set forth at §1114. All other information provided through the BCC originates from other sources. Determinations are made by those other sources or by the employers themselves and challenges will be directed to those sources for resolution.

#### FINDINGS OF FACT:

The Department finds that the proposed changes as set forth in the January 2013 *Register of Regulations*, as amended herein, should be adopted.

**THEREFORE, IT IS ORDERED**, that the proposed regulation to amend the Title XIX Medicaid State Plan and the Division of Social Services Manual (DSSM) regarding the Medical Assistance during Transition to the Medicare Program is adopted and shall be final effective March 11, 2013.

Rita Landgraf, Secretary, DHSS

### **3110 Criminal History Background Checks and Drug Testing for Programs and Home Health Care Agencies**

#### **1.0 Purpose**

~~The purpose of these regulations is to ensure the safety and well-being of residents in this State who use the services of home health agencies licensed pursuant to 16 Delaware Code, §122(3)0, and/or self-employed healthcare givers in the resident's own home or home of residence. To this end, persons selected for employment by home health agencies shall be subject to pre-employment criminal history checks and pre-employment drug testing; persons selected for employment by private individuals may be subject to pre-employment criminal history checks and pre-employment drug testing at the discretion of the private individual selecting the person for employment.~~

#### **2.0 Definitions**

~~“Conditional Employment” pertains to the period of time during which an applicant is working while his/her employer has not received the results of (a) the state criminal history record, (b) the federal criminal history record, and (c) the results of the testing for illegal drugs. Conditional employment must end immediately if either the state or federal criminal history record contains disqualifying crime(s) as delineated in Section 3.1 of these regulations.~~

~~“Department or DHSS” means Department of Health and Social Services.~~

~~“Employer” is any person, business entity, management company, home health agency, temporary agency, or other organization that hires persons or that places persons in a private residence for the purposes of providing licensed nursing services, home health aide services, physical therapy, speech pathology, occupational therapy or social services.~~

~~“Final Employment” means employment upon the employer's receipt of the State Bureau of Identification criminal history record containing evidence of no disqualifying convictions, a report by the Department that there are no disqualifying convictions in such person's federal criminal record, and the results of the testing for illegal drugs.~~

~~“Hire” means to begin employment of an applicant, or to pay wages for the services of a person who has not worked for the employer during the preceding three month period, or to refer a caregiver to a private residence in return for a finder or placement fee.~~

~~“Home Health Agency” is any business entity, public or private, which provides directly or through contract arrangements, to individuals in their home or private residence, either (a) two or more of the following services:~~

~~licensed nursing, home health aide, physical therapy, speech pathology, occupational therapy, or social services where at least one of these services is licensed nursing or home health aide services or (b) home health aide services exclusively, provided under appropriate supervision.~~

~~“**Illegal drug**” for purposes of these regulations means marijuana/cannabis, cocaine, opiates including heroin, phencyclidine (PCP), amphetamines, barbiturates, benzodiazepene, methadone, methaqualone and propoxyphene.~~

~~“**Promotion**” means any change in job classification that results in additional responsibility and/or an increase in wages. It does not include a change in job status from part-time to full-time.~~

### **3.0 Criteria For Unsuitability For Employment**

3.1 ~~The following types of criminal convictions (or convictions in another jurisdiction which are comparable under Delaware law) automatically disqualify a person from providing home health services when such conviction occurred within the time periods specified:~~

3.1.1 ~~Conviction of any act causing death as defined in 11 **Delaware Code**, Chapter 5, Subchapter II, Subpart B with no time limit;~~

3.1.2 ~~Conviction of any sexual offense designated as a felony in 11 **Delaware Code**, Chapter 5, Subchapter II, Subpart D with no time limit;~~

3.1.3 ~~Conviction of any violent felony as specified in 11 **Delaware Code**, Section 4201(c) within the last ten years;~~

3.1.4 ~~Conviction of any felony involving a controlled substance, a counterfeit controlled substance, or a designer drug as specified in 16 **Delaware Code**, Chapter 47 within the last ten years;~~

3.1.5 ~~Conviction of any felony other than those specified above within the last five years;~~

3.1.6 ~~Conviction of any misdemeanor involving a controlled substance, a counterfeit controlled substance, or a designer drug as specified in 16 **Delaware Code**, Chapter 47 within the last five years;~~

3.1.7 ~~Conviction of any Class A misdemeanor included in 11 **Delaware Code**, Chapter 5, Subchapter II, Subpart A within the last five years;~~

3.1.8 ~~Conviction of any attempt to commit a crime, as defined in 11 **Delaware Code**, Section 531, with respect to any of the above listed offenses.~~

3.2 ~~For other criminal convictions, the following criteria are to be used by the employer in determining whether a person is suitable for employment in home health care:~~

3.2.1 ~~Type of conviction(s);~~

3.2.2 ~~Frequency of conviction(s);~~

3.2.3 ~~Length of time since conviction(s) occurred;~~

3.2.4 ~~Age at the time of the conviction(s);~~

3.2.5 ~~Record since the conviction(s);~~

3.2.6 ~~Relationship of conviction(s) to type of job assignment.~~

3.3 **Employer Responsibilities**

3.3.1 ~~The employer shall ensure that a *Criminal History Record Request Form* has been completed and that the employer copy is maintained in the employer's files.~~

3.3.2 ~~The employer shall maintain a signed copy of the *Receipt/Verification of Providing Fingerprints Form* from the Delaware State Police.~~

3.3.3 ~~If an employer wishes to have a criminal history record check conducted on an applicant who has been the subject of a qualifying State and Federal background check within the previous 5 years, the costs shall be borne by the employer. Payment shall be made directly to the Delaware State Police. The Department shall, at no cost, provide the results of the Federal Bureau of Investigation information to the employer in the same manner as for any other applicant.~~

3.3.4 ~~If a person is fingerprinted under the auspices of these regulations more than once during a five-year period, the costs shall not be borne by the State. If the State is billed for such fingerprinting costs, payment shall be obtained from the employer specified on the *Criminal History Record Request Form*. Such employer may obtain payment from the applicant.~~

3.3.5 ~~If an applicant who has been conditionally hired is separated from employment for any reason prior to completion of the criminal history check process, the employer shall notify the Department upon such separation.~~

3.3.6 ~~Upon receipt of the results of the criminal history record check and the results of the testing for illegal drugs, the employer shall determine the suitability of an applicant for final employment using the criteria in~~

~~Section 3.2 unless the state or federal criminal history record check has identified a conviction of one or more automatically disqualifying crimes. An applicant for final employment with a conviction of an automatically disqualifying crime shall be terminated immediately.~~

~~3.3.7 The employer shall notify the applicant of the findings of the criminal history record check and the testing for illegal drugs.~~

~~3.3.8 The employer may provide to the individual in need of care a statement that the applicant has satisfactorily completed the criminal history record check and the testing for illegal drugs.~~

~~3.3.9 The Department reserves the right to obtain data from employers on the employment status of applicants covered under these regulations, including but not limited to the requirement that agencies submit on a quarterly basis a list of applicants hired which shall conform in format and content to Division standards.~~

#### ~~3.4 Applicants' Responsibilities~~

~~3.4.1 Applicants are responsible for completing all information accurately and completely on the *Criminal History Record Request Form* and any form provided by the employer for use in obtaining mandatory pre-employment testing for illegal drugs. Any applicant who refuses to complete one or more of these forms shall be deemed to have voluntarily withdrawn his/her application.~~

~~3.4.2 The applicant is responsible for having his/her fingerprints taken and for returning a *Receipt/Verification of Providing Fingerprints to the Delaware State Police Form* to the employer.~~

~~3.4.3 The applicant is responsible for informing any potential employer if he/she has already been fingerprinted in accordance with these regulations. The cost of additional fingerprinting, exceeding the one fingerprinting per five-year period required by these regulations, shall not be borne by the State.~~

~~3.4.4 The applicant is responsible for submitting to the required testing for illegal drugs and providing verification of the testing to the employer.~~

#### ~~3.5 Department's Responsibilities~~

~~3.5.1 When the Department has received all necessary documentation, it shall perform a review and ensure that the employer receives a copy of the applicant's state criminal history report and issue a written summary of the federal criminal history report. If conviction of a disqualifying crime is included on the state or federal criminal history report, the Department shall notify the employer immediately, prohibiting either the hire or continued conditional employment of the applicant.~~

~~3.5.2 Upon notification that an employer intends to hire a person who has previously had the criminal history check conducted by the Department, the Department shall review the criminal history on file and shall review the applicant's criminal history via the Criminal Justice Information System for any subsequent criminal information. If the review reveals a disqualifying conviction subsequent to the original review, the applicant shall be disqualified from employment with the new employer and the previously listed employers shall be notified of the recent conviction and encouraged to make personnel decisions based on the new information.~~

#### ~~3.6 Confidentiality~~

~~3.6.1 In accordance with 11 **Delaware Code**, Section 8513(c), the Department shall receive information from the State Bureau of Identification pertaining to the identification and conviction data of any person for whom the Bureau has a record solely for the purpose of determining suitability for employment of the person whose record is received.~~

~~3.6.2 The Department shall store written and electronically recorded criminal history record information in a secure manner to provide for the confidentiality of records and to protect against any possible threats to their security and integrity.~~

~~3.6.3 The Department shall not release to employers, as defined in Section 3 of these regulations, copies of actual written reports of criminal history records prepared by the Federal Bureau of Investigation.~~

~~3.6.4 The following procedure shall be used to permit the review of criminal history record files by any applicant:~~

~~3.6.4.1 An applicant shall submit a request in writing to the Department for the on-site review of his/her criminal history record file.~~

~~3.6.4.2 An applicant shall make an appointment to review the record at the Department in the presence of a Department employee. The applicant shall present photo identification at the time of the review.~~

~~3.6.4.3 Written documentation of the date and time of the review and the names of those present shall be filed in the criminal history record file of the applicant.~~

~~3.6.4.4 Upon completion of such a review, the Department shall return criminal history records (written or electronic) to secure storage.~~

~~3.6.5 Criminal history record information shall not be disseminated to any person(s) other than the applicant, his/her employer or subsequent employer(s) as defined in Section 3 of these regulations, or the Department.~~

- 3.6.6 All employers shall store criminal history record information in a secure manner to provide for the confidentiality of records and to protect against any possible threats to their security and integrity.
- 3.6.7 Employers shall limit the use of criminal history record information to the sole purpose of determining suitability for employment.

## **1.0 Legal Basis**

The legal basis for these regulations is 16 **Del.C.** §§1145 and 1146 and 29 **Del.C.** §7972.

## **2.0 Purpose**

The overall purpose of these regulations is to ensure the safety and well-being of individuals in the care of home care agencies licensed pursuant to 16 **Del.C.**, Ch 11. To that end, persons selected for employment will be subject to pre-employment background checks and pre-employment drug testing.

## **3.0 Definitions**

**“Agency”** means all programs or home care agencies licensed pursuant to 16 **Del.C.** §122(3(m), or (3)(0), or (3)(x).

**“Applicant”** is a person seeking employment with an employer as defined in 16 **Del.C.** §1145(b)(1).

**“Background Check Center (BCC)”** means the electronic system which combines data streams from various sources within and outside the State in order to assist an employer in determining the suitability of a person for employment in a nursing facility or similar facility, or home care agency as those terms are defined in the enabling statute. See 29 **Del.C.** §7972.

**“BCC disclosures”** means the data on an Applicant that is collected and generated by the BCC system.

**“BCC consent form”** means the form provided by DHSS which informs the Applicant of the scope of the BCC, the Applicant’s legal obligations, and the legal sanctions for failure to provide complete and accurate information.

**“Criminal background check (CBC)”** means the process conducted by the State Bureau of Identification of using an individual’s fingerprints to identify the person and to conduct both a State and a federal criminal background check.

**“Criminal History”** means a report from DLTCRP regarding its review of the Applicant’s entire federal criminal history from the Federal Bureau of Investigation, pursuant to Public Law 92-544 and amended (28U.S.C. § 534) and his or her Delaware record from the State Bureau of Identification. The criminal history shall not include arrests that did not result in a conviction. It shall be limited to convictions and arrests for which no disposition is available.

**“Delaware Health Information Network (DHIN)”** means the State’s sanctioned provider of health information exchange services. 16 **Del.C.** Ch. 103

**“Department” or “DHSS”** means the Department of Health and Social Services. DHSS owns and operates the BCC.

**“Delaware Judicial Information System (DELJIS)”** means the agency which maintains all records of criminal arrests and convictions in the State of Delaware.

**“Division” or “DLTCRP”** means the Division of Long Term Care Residents Protection, Department of Health and Social Services. The Division is responsible for background checks for ~~licensed facilities programs and home health agencies~~.

**“Facility”** means a nursing facility or similar facility licensed pursuant to 16 **Del.C.** Chapter 11.

**“Grandfathered employee”** is a current employee who was employed by an agency prior to July 1, 2001, and thus was exempted from the requirement enacted at that time that all agency employees have a criminal background check.

**“Grandfathered employee consent form”** is a consent form to be used for Grandfathered employees who are not subject to the entire review process of the BCC, and thus need consent only to the assignment of an SBI number, which may involve providing fingerprints at SBI. All Grandfathered persons must be on the BCC Master List within 120 days from commencement of the BCC system.

**“Individualized Assessment”** is the process of evaluating the suitability of an individual with a criminal history for employment.

**“Master List”** is the list maintained by the BCC for each employer. The list contains the names of all persons who:

- Are employed by an employer as defined in 16 **Del.C.** §1145(b)(5);

- : Are employed by a temporary employment agency, home health or personal care agency, or any other entity to work for an agency in a facility or in a private residence as defined in 16 Del.C. §1145(b)(8);
- : Are self-employed individuals working as an independent contractor for the employer;
- : Are listed on an employer's Master List and wish to stay on the Master list to facilitate rehire and have consented to stay on the Master List for not more than 3 years.

**"Master List retention form"** means the form provided by DHSS which an employee whose employment is terminating may choose to execute in order to stay on the Master List for up to 3 years post-fingerprinting in order to facilitate re-employment.

**"Rap-back"** is the process of continuous monitoring an employee's arrest and conviction record through DELJIS. The process is limited to Delaware arrests and convictions.

**"SBI"** means the State Bureau of Identification. It is the agency which processes all criminal background checks in the State of Delaware.

**"Service Letter"** means a letter containing specific information about a prospective employee's prior employment. Service Letters are a statutory requirement found at 19 Del.C. §708.

#### **4.0 Persons Subject to the Law**

- 4.1 All persons working for agencies are required to be on the Master List of the BCC. New Applicants must be processed through the BCC and will automatically be placed on the Master List if hired. Current employees, whether grandfathered or not, must be added to the Master List through the process directed by DLTCRP.
- 4.2 No employer is permitted to continue to employ a grandfathered employee who has not been assigned an SBI number (through fingerprinting or retrieval by DLTCRP of an SBI number previously assigned) and entered into the BCC within 120 days from the date of BCC implementation.
- 4.3 Non-grandfathered current employees must be entered into the BCC by September 30, 2013.

#### **5.0 Rap-back**

- 5.1 The BCC Rap back is designed to accomplish two objectives:
  - 5.1.1 To provide the employer with refreshed information related to the criminal convictions of an employee in order to ensure the safety of the individuals served and;
  - 5.1.2 To reduce the frequency of criminal background checks by maintaining current information regarding each employee's criminal record, avoiding the need to repeat the processing of criminal histories.
- 5.2 The BCC automatically conducts a Rap-back on all employees listed on the Master List. The Rap-back process will provide DLTCRP with information regarding any new arrest or conviction in the state. DLTCRP will determine, at its discretion and depending of the nature of the alleged crime, whether or not to inform the employer of the arrest. DLTCRP will monitor the charge until there is a disposition. When the disposition is known, DLTCRP will inform the Employer of the **[conviction outcome]**.
- 5.3 The Rap-back does not include convictions reported through the FBI. In order to capture that information, a person who is an Applicant is subject to a criminal background check if the previous check is 3 years old or older.

#### **6.0 Consent forms**

- 6.1 An employee must execute a BCC consent form as a condition of employment. The consent ends when the employment ends unless the employee choses to extend the consent to expedite rehire by avoiding the need for repeat fingerprinting if last fingerprinted within 3 years.
- 6.2 An employee whose employment is terminating may, at the time of separation, execute a Master List retention form in order to remain on the Master List of the BCC. The consent period is 3 years from the date last fingerprinted, less the intervening time. E.g. A person fingerprinted on June 1 of year X; can consent to remain on the Master List until May 30 of year x+3 [June 1, 2013 to May 30, 2016]. Consent cannot extend beyond 3 years from the date last fingerprinted.
- 6.3 The original Grandfathered employee consent form shall accompany the employee to SBI for fingerprinting if so directed by DLTCRP because an SBI number is not already known by DLTCRP due to prior fingerprinting. A copy of the Grandfathered employee consent form shall be maintained in a **[discreet discreet]** file which is readily accessible, without delay, upon request by an agent of DLTCRP.
- 6.4 A copy of the BCC consent form executed by an Applicant for employment and a copy of the Master List Retention form executed by an employee who seeks to continue **[their place inclusion]** on the Master List pursuant to 6.2 above shall be maintained in separate **[discreet discreet]** files which are readily accessible.



without delay, upon request by an agent of the Department.

## **7.0 Service Letters**

- 7.1 Before hiring an Applicant, employers are required by law to obtain from prior employers and to provide to prospective employers Service Letters which provide specific information as required by the Department of Labor. 19 Del.C. §708.
- 7.2 When an employee hired after the effective date of the BCC is terminated, the employer shall promptly complete a Service Letter which will be stored by the BCC and available to the next prospective employer. The Service Letter shall expire after 5 years.

## **8.0 Criminal History –**

- 8.1 The SBI is authorized [to] furnish information pertaining to the identification and conviction data for any person to employers or prospective employers so long as the information is used solely for purposes of making an employment decision. 11 Del.C. 8513(c) and(c)(1) or any theft-related misdemeanor conviction within the past 18 months, or theft-related felony within the past 10 years.
- 8.2 **Disqualifying convictions.** No agency shall employ a person who has, within the past 15 years, been convicted of abusing, neglecting or mistreating a resident of a facility, or an adult who is impaired, or of a theft-related misdemeanor within the past 2 years, or of a theft-related felony within the past 10 years. See 11 Del.C. 8564 and 42 CFR §483.13(c)(1)(ii).
- 8.3 DHSS adopts the guidance from the Equal Employment Opportunity Commission, Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, 915.002, issued 4/25/2012

~~**[8.3.1 Individualized Assessment – Before excluding a prospective employee on the basis of a criminal conviction, other than a disqualifying conviction as described in 8.2 above, the employer must conduct an individualized assessment. Individualized assessment generally requires that an employer informs the individual that he or she may be excluded because of past criminal conduct; provides an opportunity to the individual to demonstrate that the exclusion does not properly apply to them; and considers whether the individual's additional information shows that the past criminal conduct is not job related and consistent with business necessity.**~~

**8.3.2 The individual's showing may include information that he or she was not correctly identified in the criminal record, or that the record is otherwise inaccurate. Other relevant individualized evidence includes, for example:**

- The facts or circumstances surrounding the offense or conduct;**
- The number of offenses for which the individual was convicted;**
- The fact that the individual is now older than age at the time of conviction, or release from prison; Evidence that the individual performed the same type of work, post conviction, with the same or a different employer, with no known incidents of criminal conduct;**
- The length and consistency of employment history before and after the offense or conduct;**
- Rehabilitation efforts, e.g., education/training;**
- Employment or character references and any other information regarding fitness for the particular position; and**
- Whether the individual is bonded under a federal, state, or local bonding program.]**

- 8.4 Notification of Criminal History review - If the Criminal History review reveals no criminal history, DLTCRP has no duty to inform the Applicant. If a criminal history is revealed, DLTCRP shall inform the Applicant by United States Mail, or in whatever alternate method the Applicant requests, such as e-mail or text message.

## **9.0 Drug Tests**

- 9.1 The BCC provides an electronic conduit through the Delaware Health Information Network (DHIN) to transmit the results of a drug test from a DHIN participating laboratory to the employer. An employer that chooses not to engage a DHIN-participating laboratory will certify that a drug test has been secured by checking a box in the BCC. If the box is checked, it constitutes a representation that a drug test which complies with statutory requirements, 11 Del.C. 1142, has been secured prior to hiring.
- 9.2 Evidence of all drug tests not transmitted through the BCC which have been represented to have been secured must be maintained in a **[discreet discrete]** file and be available for inspection, without delay, upon request from an agent of DLTCRP.

## **10.0 Further Employer Responsibilities**

- 10.1 An employer must ensure that all persons who perform services for the agency comply with the law.
- 10.2 The employer shall ensure that every application for employment executes the BCC consent form.
- 10.3 The employer shall ensure that copies of all BCC consent forms signed by Applicants are maintained in a ~~[discreet]~~ discrete] file which is immediately available, upon request, from any agent of the Department.
- 10.4 The employer must ensure that no Applicant is employed without first receiving the results of the Applicant's mandatory drug test.
- 10.5 The employer must maintain an accurate Master List by promptly reflecting the termination of any person no longer working in the agency.
- 10.6 An employee whose employment is terminated may remain on the Master List to facilitate reemployment by the same or another agency up to 3 years beyond the date the individual was last fingerprinted. See 6.2 above. When that date is reached the employee will automatically be removed from the Master List without further action by the employer.
- 10.7 An Applicant who is entered into the BCC whose employment status (withdrawn, hired) is not completed by the employer within 30 days will be dropped from the BCC system.
- 10.8 The employer is prohibited from sharing BCC disclosure information with other person, agency, or facility except when requested because the subject of the BCC disclosure will be working for that employer in a facility or in the personal private residence of the requesting party.
- 10.9 The employer shall use the BCC disclosures solely for the purpose of determining the suitability of an Applicant for employment.

## **11.0 Confidentiality**

- 11.1 DHSS shall store written and electronically-recorded BCC disclosures in a secure manner, to provide for the confidentiality of records and to protect against any possible threats to the security or integrity of the information.
- 11.2 DHSS shall limit the use of BCC disclosures to the sole objective of assisting employers determining the suitability of an Applicant for employment.
- 11.3 DHSS shall not release to employers copies of actual electronic reports of criminal history records prepared by the Federal ~~[b]~~B]ureau of Investigation.
- 11.4 The BCC is designed to allow participants to put information regarding their agency or organization on a dedicated page titled "Employment Information". The page was designed to provide an additional resource to the public, and to provide a vehicle for the posting of available employment opportunities. DHSS retains the authority to block or edit material placed on the BCC which it deems false, misleading, or otherwise inappropriate.
- 11.5 The following procedure shall be established to permit the review of personal BCC disclosures by an Applicant:
  - 11.5.1 An Applicant shall submit a request in writing to the Department for an on-site review of ~~[their]~~ his] BCC disclosures.
  - 11.5.2 DLTCRP shall schedule an appointment at a mutually convenient time to enable the Applicant to review the BCC disclosures. Photo identification will be required at the time of the appointment.
  - 11.5.3 The BCC disclosures shall be reviewed in the presence of a DLTCRP employee.
  - 11.5.4 Written documentation of the date and time of the review and the name[s] of those present shall be maintained by DLTCRP.
  - 11.5.5 DLTCRP shall assist the Applicant who wishes to challenge the BCC disclosures by providing information about the source of the data and the way to pursue an appeal.

**6 DE Reg. 1208 (3/1/03)**

**13 DE Reg. 1317 (04/01/10)**

**16 DE Reg. 978 (03/01/13) (Final)**