

Janet T. Mills  
Governor

Jeanne M. Lambrew, Ph.D.  
Commissioner



Maine Department of Health and Human Services  
Commissioner's Office  
11 State House Station  
109 Capitol Street  
Augusta, Maine 04333-0011  
Tel: (207) 287-3707; Fax: (207) 287-3005  
TTY: Dial 711 (Maine Relay)

March 10, 2020

Senator Geoff Gratwick, Chair  
Representative Patricia Hymanson, Chair  
Joint Standing Committee on Health and Human Services  
#100 State House Station  
Augusta, Maine 04333-0100

Dear Senator Gratwick, Representative Hymanson, and Members of the Joint Standing Committee on Health and Human Services:

Please find attached, a summary of the work of the stakeholder group established by Resolve 2019, Chapter 53, *Resolve, To Review the Implementation of the Maine Background Check Center Act*. The Resolve tasked the Department of Health and Human Services, and the Division of Licensing and Certification with assessing the effects of the implementation of the Maine Background Check Center. The stakeholder group also worked to address questions and concerns articulated in a letter from this Committee last year. The Department has not taken a position on the recommendations made by the stakeholder group.

It should be noted that the Legislature did not provide any resources to the Department for the convening, research, and writing of this report.

Sincerely,

A handwritten signature in cursive script that reads 'Jeanne M. Lambrew'.

Jeanne M. Lambrew, Ph.D.  
Commissioner

JML/klv

Attachment

## **Report to the Legislature pursuant to Resolve 2019, Chapter 53**

### **Introduction**

Pursuant to Resolve 2019, Ch. 53 (LD 934), Resolve, To Review the Implementation of the Maine Background Check Center Act, the Department of Health and Human Services convened a stakeholder group to assess the effects of implementation of the Maine Background Check Center Act and make recommendations to the Legislature.

In a companion letter to the Resolve, members of the Joint Standing Committee on Health and Human Services expressed their “support of fingerprint-based criminal background checks for persons who work with vulnerable populations.” Additionally, they expressed the hope that the study group will help “improve the Maine Background Check Center Act in order to ensure the safety of vulnerable populations.” The letter from the Committee additionally included a list of topics that arose in the course of public hearings for four bills related to the Maine Background Check Center. These topics were shared with the work group for consideration and discussion.

As directed, a work group was established that consisted of the Maine Health Care Association, Maine Hospital Association, Maine Long Term Care Ombudsman Program, State Bureau of Identification, Bureau of Motor Vehicles, members of the Legislature, staff from the Division of Licensing and Certification, Home Care and Hospice Alliance of Maine, Maine Association for Community Service Providers as well as a home health, behavioral, and developmental disability organization.

### **The Maine Background Check Center**

The Maine Background Check Center Act (22 MRSA Chapter 1691) was established by the Maine Legislature in 2015 to promote and protect the health and safety of children and adults in need of support and care and was passed with unanimous support. In the three years prior to submission of this legislation, a 40-member stakeholder group and an Executive Advisory Committee worked on this legislation. The stakeholder group included representatives from AARP, area agencies on aging, the Maine Long Term Care Ombudsman program, the Maine Hospital Association, the Maine Healthcare Association, the Maine Hospice Council, the Maine Home Care and Hospice Alliance, the State Bureau of Investigation (SBI), Office of MaineCare Services and other state agencies, the Center for Medicare and Medicaid Services (CMS), the Office of the Attorney General, various providers, advocacy groups and member organizations. The Executive Advisory Committee included Commissioners of DHHS DPFR, DPS, and various representatives of other state agencies.

Currently, the Maine Background Check Center (MBCC) completes two levels of background check:

- A pre-screening, completed at no cost to the employer, which may eliminate some applicants from consideration for hire on the basis of disqualifying offenses listed on publicly available databases: The Maine and National Sex Offender Registries, the Office of the Inspector General’s fraud registry, Maine Excluded Provider Registry (Office of MaineCare Services) and the Maine Registry of Certified Nursing Assistants.



- If the applicant is eligible for employment following the pre-screening, the employer may proceed to request the criminal background check, which at this time includes State Bureau of Identification (SBI) conviction data. This also initiates the rap-back service for any future convictions that are entered on the SBI database.

## **Definitions**

**Rap Back Monitoring:** automatically and constantly monitoring an individual's Record of Arrest and Prosecution (RAP) within the State of Maine and reporting new results to the MBCC.

**Waiver:** allows an employer to employ a direct access worker with a disqualifying criminal conviction if granted specific permission by the Department. An employer may not request a waiver of a direct access worker's disqualification for employment due to the direct access worker's appearance on any disqualification registry cited in rule. The MBCC will only approve waivers where the employer has attested that they reasonably determined that the health and safety of a protected individual is not in jeopardy and a denial of a waiver request is not otherwise warranted in accordance with State or federal law.

**Portability:** the ability of a background check to follow an employee, such that a new background check does not need to be completed by a new employer if a recent check by another employer is still valid.

## **Workgroup Discussion**

Per the Resolve and accompanying letter, below are the tasks assigned to the study group, conversations had, and recommendations made.

### *Alternate Vendors*

The alternate vendor program allows an employer to use a non-MBCC vendor to complete a background check. Currently the MBCC cannot complete national background checks internally, so the AV program was established to allow providers to obtain limited nation-wide searches. It should be noted that alternate vendor information can be questionable, incomplete, and limited in scope as the far majority only report a 7-year criminal history. That said, many feel that limited information is better than none.

The group discussed the history and capabilities of alternate vendors. MBCC staff noted the increased demand on the MBCC to review each vendor to be sure they meet MBCC criteria.

Additionally, the group noted that alternate vendors do not have access to the rap back feature or present employers with an option for requesting a waiver, as the MBCC does not receive conviction data.

Alternate vendors offer employers an efficiency by providing in batch uploads of requests for background checks. Stakeholders recommended that the Department should investigate if this service can this be provided through the MBCC website.

### *Portability of Checks*

The payor for the background check ‘owns’ the report, which prohibits sharing the data with a new employer when a direct access worker transitions to a new employer. This might be circumvented if the employee were to bear the cost of the background check.

If checks are made portable, who the responsible party is for paying for the check should be considered. If it is the employer who is responsible, but other employers are able to piggy-back on a check for the sake of portability, who is responsible when it is time for the 5-year recheck? If the employee is the responsible party, this would not be an issue.

The stakeholder group recommended that the Department should consider access be granted to multiple employers when a person is already the MBCC system (in scenarios where the person has several jobs or has transferred to a different employer) for a reduced fee. The members of the work group adopted a practice of referring to this a “light” background check.

Providers are concerned that an additional cost to the employee would have a negative impact on their ability to recruit employees for low-paying jobs. One option might be employers reimbursing the cost upon hire. A statute change may be required to implement policy changes outlined above.

### *Fingerprinting*

Biometric-based Federal Bureau of Investigation criminal histories are considered the gold standard of criminal background checks. The only way the FBI allows these checks are by the submission of fingerprints. Federal level conviction data provides the broadest scope of information, and therefore can best enhance the safety of vulnerable people. Currently, Federal rap back is not available in Maine, and would require a significant technological investment by the State Bureau of Identification.

The limited locations and availability of sites for collection of fingerprints is a concern for employers, as the process of obtaining fingerprints may present a delay in hiring (Conditional hire may be a solution to address this concern and is allowable under current rule in force). Requiring fingerprinting for all direct access workers would eliminate arguments supporting the alternate vendor option, as this would no longer meet the requirements.

### *Discrimination*

Concerns were raised about waiver requests being denied based on non-substantive or discriminatory reasoning. After review of waiver requests there appears to be no valid concern. As of the time of this report, only a single waiver request has been denied for cause. Others that were not granted were either not completed or rescinded by the employer or applicant.

### *Comprehensiveness of Checks*

The inability to directly access Child Protective Services and Adult Protective Services data presents an administrative and financial burden for employers, as they must manually request a search for substantiated findings through separate agencies. Stakeholders recommended that the Department pursue direct access to databases through a Memorandum of Understanding (MOU) to allow MBCC access to existing databases.



Stakeholders recommended that the Department pursue Bureau of Motor Vehicles (BMV) driving history data through linkage with InforME. This is not required for all categories of direct access worker. This function should be needs-based only, when required by licensee/position; the Department could charge additional fee when this is required.

The work group suggests a phase-in of fingerprinting for currently enrolled employees at the time of five-year recheck. MBCC staff explained that the five-year recheck is driven by federal standards for re-subscription for rap-back monitoring.

#### *Costs*

MBCC program changes will incur additional costs in software development. If utilization of the MBCC outpaces funding needs, MBCC could consider decreasing fees. Implementing a lower fee requires rule revision in accordance with 22 MRS, Ch. 1691.

Fingerprinting fees are outside of the Department's control. These are set by Idemia, the Department of Public Safety's fingerprint collection contractor.

Members of the work group asked if costs be subsidized by the Department. Department funding for mandated fingerprint background checks for licensed child care providers (see 22 MRS § 8302-B) has created a precedent.

### **Recommendations**

#### *Rule revisions*

- Consider revising fee structure to reflect a lower per-use cost.
- If fingerprinting is required, eliminate alternate vendor program

#### *Statutory changes*

- 22MRS Ch. 1691: Remove child care and children's residential as mandated users<sup>1</sup>; clarify substance abuse scope (not just "drug treatment centers"); add other licensee groups (to include providers of "direct support professionals".)
- Consider changing language that requires the employer to conduct the background check to allow payment by the employee.

#### *Additional Recommendation*

- Use the initial research (crosswalk spreadsheets - attached) completed as part of this project for a more thorough review of the regulatory environment, and better coordinate background check requirements in statute and rule.

### **Conclusion**

After much discussion, the stakeholder group was unable to come to a consensus on the following items:

*Fingerprinting* – Provider representatives advocated for this as an option, but not as a mandate for all provider types. For the Department, this raises questions regarding how frequently this

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<sup>1</sup> This change was passed unanimously by the HHS Committee in LD 2053, and as of March 9, 2020 is passed to be engrossed by the Senate.

option would be selected and the result would be inconsistency in results between providers and the goal of a broader, consistent background check would not be met.

*Alternate vendors* – Providers supported the continued use of approved alternate vendors that are available at a lower cost. Vendors can do batch uploads instead of manually submitting each applicant, which is a benefit for larger providers. For the Department, use of alternative vendors presents a concern due to the lack of ongoing oversight of the results of background checks and assuring compliance with the disqualifying offenses in rule.

*Costs* – Providers have expressed concerns over the burden that may be placed on employees in entry level staff positions if the responsibility for paying for background checks were to shift to employees in order to allow portability.

*Portability* - Providers feel this would be helpful but should not be at the expense of the employee. The Department's concern is that statutes limit who may receive the results of background checks.

*Add-Ons* - Providers advocated for an option to purchase only rap back services, while conducting general background checks through alternate vendors. Providers also advocated for MBCC to add the functionality of providing BMV data as required for jobs that require transporting clients. The Department notes that requiring all providers to do fingerprint background checks would integrate the rap back feature, which no alternate vendor can provide, so providing a separate option for that service alone would not be required.