

ADULT FOSTER CARE FACILITY LICENSING ACT (EXCERPT)
Act 218 of 1979

400.734b Employing or contracting with certain employees providing direct services to residents; prohibitions; criminal history check; exemptions; written consent and identification; conditional employment; determination of existence of national criminal history; use of criminal history record information; disclosure; failure to conduct criminal history check; automated fingerprint identification system database; electronic web-based system; costs; definitions.

Sec. 34b. (1) In addition to the restrictions prescribed in sections 13, 22, and 31, and except as otherwise provided in subsection (2), an adult foster care facility shall not employ or independently contract with an individual who regularly has direct access to or provides direct services to residents of the adult foster care facility if the individual satisfies 1 or more of the following:

(a) Has been convicted of a relevant crime described under 42 USC 1320a-7(a).

(b) Has been convicted of any of the following felonies, an attempt or conspiracy to commit any of those felonies, or any other state or federal crime that is similar to the felonies described in this subdivision, other than a felony for a relevant crime described under 42 USC 1320a-7(a), unless 15 years have lapsed since the individual completed all of the terms and conditions of his or her sentencing, parole, and probation for that conviction prior to the date of application for employment or the date of the execution of the independent contract:

(i) A felony that involves the intent to cause death or serious impairment of a body function, that results in death or serious impairment of a body function, that involves the use of force or violence, or that involves the threat of the use of force or violence.

(ii) A felony involving cruelty or torture.

(iii) A felony under chapter XXA of the Michigan penal code, 1931 PA 328, MCL 750.145m to 750.145r.

(iv) A felony involving criminal sexual conduct.

(v) A felony involving abuse or neglect.

(vi) A felony involving the use of a firearm or dangerous weapon.

(vii) A felony involving the diversion or adulteration of a prescription drug or other medications.

(c) Has been convicted of a felony or an attempt or conspiracy to commit a felony, other than a felony for a relevant crime described under 42 USC 1320a-7(a) or a felony described under subdivision (b), unless 10 years have lapsed since the individual completed all of the terms and conditions of his or her sentencing, parole, and probation for that conviction prior to the date of application for employment or the date of the execution of the independent contract.

(d) Has been convicted of any of the following misdemeanors, other than a misdemeanor for a relevant crime described under 42 USC 1320a-7(a), or a state or federal crime that is substantially similar to the misdemeanors described in this subdivision, within the 10 years immediately preceding the date of application for employment or the date of the execution of the independent contract:

(i) A misdemeanor involving the use of a firearm or dangerous weapon with the intent to injure, the use of a firearm or dangerous weapon that results in a personal injury, or a misdemeanor involving the use of force or violence or the threat of the use of force or violence.

(ii) A misdemeanor under chapter XXA of the Michigan penal code, 1931 PA 328, MCL 750.145m to 750.145r.

(iii) A misdemeanor involving criminal sexual conduct.

(iv) A misdemeanor involving cruelty or torture unless otherwise provided under subdivision (e).

(v) A misdemeanor involving abuse or neglect.

(e) Has been convicted of any of the following misdemeanors, other than a misdemeanor for a relevant crime described under 42 USC 1320a-7(a), or a state or federal crime that is substantially similar to the misdemeanors described in this subdivision, within the 5 years immediately preceding the date of application for employment or the date of the execution of the independent contract:

(i) A misdemeanor involving cruelty if committed by an individual who is less than 16 years of age.

(ii) A misdemeanor involving home invasion.

(iii) A misdemeanor involving embezzlement.

(iv) A misdemeanor involving negligent homicide or a violation of section 601d(1) of the Michigan vehicle code, 1949 PA 300, MCL 257.601d.

(v) A misdemeanor involving larceny unless otherwise provided under subdivision (g).

(vi) A misdemeanor of retail fraud in the second degree unless otherwise provided under subdivision (g).

(vii) Any other misdemeanor involving assault, fraud, theft, or the possession or delivery of a controlled substance unless otherwise provided under subdivision (d), (f), or (g).

(f) Has been convicted of any of the following misdemeanors, other than a misdemeanor for a relevant crime described under 42 USC 1320a-7(a), or a state or federal crime that is substantially similar to the misdemeanors described in this subdivision, within the 3 years immediately preceding the date of application for employment or the date of the execution of the independent contract:

(i) A misdemeanor for assault if there was no use of a firearm or dangerous weapon and no intent to commit murder or inflict great bodily injury.

(ii) A misdemeanor of retail fraud in the third degree unless otherwise provided under subdivision (g).

(iii) A misdemeanor under part 74 of the public health code, 1978 PA 368, MCL 333.7401 to 333.7461, unless otherwise provided under subdivision (g).

(g) Has been convicted of any of the following misdemeanors, other than a misdemeanor for a relevant crime described under 42 USC 1320a-7(a), or a state or federal crime that is substantially similar to the misdemeanors described in this subdivision, within the year immediately preceding the date of application for employment or the date of the execution of the independent contract:

(i) A misdemeanor under part 74 of the public health code, 1978 PA 368, MCL 333.7401 to 333.7461, if the individual, at the time of conviction, is under the age of 18.

(ii) A misdemeanor for larceny or retail fraud in the second or third degree if the individual, at the time of conviction, is under the age of 16.

(h) Is the subject of an order or disposition under section 16b of chapter IX of the code of criminal procedure, 1927 PA 175, MCL 769.16b.

(i) Engages in conduct that becomes the subject of a substantiated finding of neglect, abuse, or misappropriation of property by a state or federal agency according to an investigation conducted in accordance with 42 USC 1395i-3 or 1396r.

(2) Except as otherwise provided in this subsection or subsection (6), an adult foster care facility shall not employ or independently contract with an individual who has direct access to residents until the adult foster care facility or staffing agency has conducted a criminal history check in compliance with this section or has received criminal history record information in compliance with subsections (3) and (11). This subsection and subsection (1) do not apply to an individual who is employed by or under contract to an adult foster care facility before April 1, 2006. On or before April 1, 2011, an individual who is exempt under this subsection and who has not been the subject of a criminal history check conducted in compliance with this section shall provide the department of state police a set of fingerprints and the department of state police shall input those fingerprints into the automated fingerprint identification system database established under subsection (14). An individual who is exempt under this subsection is not limited to working within the adult foster care facility with which he or she is employed by or under independent contract with on April 1, 2006 but may transfer to another adult foster care facility, mental health facility, or covered health facility. If an individual who is exempt under this subsection is subsequently convicted of a crime or offense described under subsection (1)(a) to (g) or found to be the subject of a substantiated finding described under subsection (1)(i) or an order or disposition described under subsection (1)(h), or is found to have been convicted of a relevant crime described under 42 USC 1320a-7(a), he or she is no longer exempt and shall be terminated from employment or denied employment.

(3) An individual who applies for employment either as an employee or as an independent contractor with an adult foster care facility or staffing agency and who has not been the subject of a criminal history check conducted in compliance with this section shall give written consent at the time of application for the department of state police to conduct a criminal history check under this section, along with identification acceptable to the department of state police. If the individual has been the subject of a criminal history check conducted in compliance with this section, the individual shall give written consent at the time of application for the adult foster care facility or staffing agency to obtain the criminal history record information as prescribed in subsection (4) or (5) from the relevant licensing or regulatory department and for the department of state police to conduct a criminal history check under this section if the requirements of subsection (11) are not met and a request to the federal bureau of investigation to make a determination of the existence of any national criminal history pertaining to the individual is necessary, along with identification acceptable to the department of state police. Upon receipt of the written consent to obtain the criminal history record information and identification required under this subsection, the adult foster care facility or staffing agency that has made a good faith offer of employment or an independent contract to the individual shall request the criminal history record information from the relevant licensing or regulatory department and shall make a request regarding that individual to the relevant licensing or regulatory department to conduct a check of all relevant registries in the manner required in subsection (4). If the requirements of subsection (11) are not met

and a request to the federal bureau of investigation to make a subsequent determination of the existence of any national criminal history pertaining to the individual is necessary, the adult foster care facility or staffing agency shall proceed in the manner required in subsection (5). A staffing agency that employs an individual who regularly has direct access to or provides direct services to residents under an independent contract with an adult foster care facility shall submit information regarding the criminal history check conducted by the staffing agency to the adult foster care facility that has made a good faith offer of independent contract to that applicant.

(4) Upon receipt of the written consent to conduct a criminal history check and identification required under subsection (3), the adult foster care facility or staffing agency that has made a good faith offer of employment or independent contract to the individual shall make a request to the department of state police to conduct a criminal history check on the individual and input the individual's fingerprints into the automated fingerprint identification system database, and shall make a request to the relevant licensing or regulatory department to perform a check of all relevant registries established according to federal and state law and regulations for any substantiated findings of abuse, neglect, or misappropriation of property. The request shall be made in a manner prescribed by the department of state police and the relevant licensing or regulatory department or agency. The adult foster care facility or staffing agency shall make the written consent and identification available to the department of state police and the relevant licensing or regulatory department or agency. If the department of state police or the federal bureau of investigation charges a fee for conducting the criminal history check, the charge shall be paid by or reimbursed by the department. The adult foster care facility or staffing agency shall not seek reimbursement for a charge imposed by the department of state police or the federal bureau of investigation from the individual who is the subject of the criminal history check. The department of state police shall conduct a criminal history check on the individual named in the request. The department of state police shall provide the department with a written report of the criminal history check conducted under this subsection. The report shall contain any criminal history record information on the individual maintained by the department of state police.

(5) Upon receipt of the written consent to conduct a criminal history check and identification required under subsection (3), if the individual has applied for employment either as an employee or as an independent contractor with an adult foster care facility or staffing agency, the adult foster care facility or staffing agency that has made a good faith offer of employment or independent contract shall comply with subsection (4) and shall make a request to the department of state police to forward the individual's fingerprints to the federal bureau of investigation. The department of state police shall request the federal bureau of investigation to make a determination of the existence of any national criminal history pertaining to the individual. An individual described in this subsection shall provide the department of state police with a set of fingerprints. The department of state police shall complete the criminal history check under subsection (4) and, except as otherwise provided in this subsection, provide the results of its determination under subsection (4) and the results of the federal bureau of investigation determination to the department within 30 days after the request is made. If the requesting adult foster care facility or staffing agency is not a state department or agency and if criminal history record information is disclosed on the written report of the criminal history check or the federal bureau of investigation determination that resulted in a conviction, the department shall notify the adult foster care facility or staffing agency and the individual in writing of the type of crime disclosed on the written report of the criminal history check or the federal bureau of investigation determination without disclosing the details of the crime. The notification shall inform the adult foster care facility or staffing agency and the applicant regarding the appeal process in section 34c and shall include a statement that the individual has a right to appeal the information relied upon by the adult foster care facility or staffing agency in making its decision regarding his or her employment eligibility based on the criminal history check. Any charges imposed by the department of state police or the federal bureau of investigation for conducting a criminal history check or making a determination under this subsection shall be paid in the manner required under subsection (4).

(6) If an adult foster care facility determines it necessary to employ or independently contract with an individual before receiving the results of the individual's criminal history check or criminal history record information required under this section, the adult foster care facility may conditionally employ the individual if all of the following apply:

(a) The adult foster care facility requests the criminal history check or criminal history record information required under this section, upon conditionally employing the individual.

(b) The individual signs a written statement indicating all of the following:

(i) That he or she has not been convicted of 1 or more of the crimes that are described in subsection (1)(a) to (g) within the applicable time period prescribed by subsection (1)(a) to (g).

(ii) That he or she is not the subject of an order or disposition described in subsection (1)(h).

(iii) That he or she has not been the subject of a substantiated finding as described in subsection (1)(i).

(iv) The individual agrees that, if the information in the criminal history check conducted under this section does not confirm the individual's statement under subparagraphs (i) to (iii), his or her employment will be terminated by the adult foster care facility as required under subsection (1) unless and until the individual can prove that the information is incorrect.

(v) That he or she understands the conditions described in subparagraphs (i) to (iv) that result in the termination of his or her employment and that those conditions are good cause for termination.

(c) Except as otherwise provided in this subdivision, the adult foster care facility does not permit the individual to have regular direct access to or provide direct services to residents in the adult foster care facility without supervision until the criminal history check or criminal history record information is obtained and the individual is eligible for that employment. If required under this subdivision, the adult foster care facility shall provide on-site supervision of an individual in the facility on a conditional basis under this subsection by an individual who has undergone a criminal history check conducted in compliance with this section. An adult foster care facility may permit an individual in the facility on a conditional basis under this subsection to have regular direct access to or provide direct services to residents in the adult foster care facility without supervision if all of the following conditions are met:

(i) The adult foster care facility, at its own expense and before the individual has direct access to or provides direct services to residents of the facility, conducts a search of public records on that individual through the internet criminal history access tool maintained by the department of state police and the results of that search do not uncover any information that would indicate that the individual is not eligible to have regular direct access to or provide direct services to residents under this section.

(ii) Before the individual has direct access to or provides direct services to residents of the adult foster care facility, the individual signs a statement in writing that he or she has resided in this state without interruption for at least the immediately preceding 12-month period.

(iii) If applicable, the individual provides to the department of state police a set of fingerprints on or before the expiration of 10 business days following the date the individual was conditionally employed under this subsection.

(7) The department shall develop and distribute the model form for the statements required under subsection (6)(b) and (c). The department shall make the model form available to adult foster care facilities upon request at no charge.

(8) If an individual is conditionally employed under subsection (6), and the information under subsection (3) or report under subsection (4) or (5), if applicable, does not confirm the individual's statement under subsection (6)(b)(i) to (iii), the adult foster care facility shall terminate the individual's employment as required by subsection (1).

(9) An individual who knowingly provides false information regarding his or her identity, criminal convictions, or substantiated findings on a statement described in subsection (6)(b)(i) to (iii) is guilty of a misdemeanor punishable by imprisonment for not more than 93 days or a fine of not more than \$500.00, or both.

(10) An adult foster care facility or staffing agency shall use criminal history record information obtained under subsection (3), (4), or (5) only for the purpose of evaluating an individual's qualifications for employment in the position for which he or she has applied and for the purposes of subsections (6) and (8). An adult foster care facility or staffing agency or an employee of the adult foster care facility or staffing agency shall not disclose criminal history record information obtained under this section to a person who is not directly involved in evaluating the individual's qualifications for employment or independent contract. An individual who knowingly uses or disseminates the criminal history record information obtained under subsection (3), (4), or (5) in violation of this subsection is guilty of a misdemeanor punishable by imprisonment for not more than 93 days or a fine of not more than \$1,000.00, or both. Except for a knowing or intentional release of false information, an adult foster care facility or staffing agency has no liability in connection with a criminal history check conducted in compliance with this section or the release of criminal history record information under this subsection.

(11) Upon consent of an individual as required in subsection (3) and upon request from an adult foster care facility or staffing agency that has made a good faith offer of employment or an independent contract to the individual, the relevant licensing or regulatory department shall review the criminal history record information, if any, and notify the requesting adult foster care facility or staffing agency of the information in the manner prescribed in subsection (4) or (5). Until the federal bureau of investigation implements an automatic notification system similar to the system required of the state police under subsection (14) and federal regulations allow the federal criminal record to be used for subsequent authorized uses, as determined in an order issued by the department, an adult foster care facility or staffing agency may rely on the criminal

history record information provided by the relevant licensing or regulatory department under this subsection and a request to the federal bureau of investigation to make a subsequent determination of the existence of any national criminal history pertaining to the individual is not necessary if all of the following requirements are met:

(a) The criminal history check was conducted during the immediately preceding 12-month period.

(b) The individual has been continuously employed by an adult foster care facility, mental health facility, or covered health facility, or the staffing agency since the criminal history check was conducted in compliance with this section or meets the continuous employment requirement of this subdivision other than being on layoff status for less than 1 year from an adult foster care facility, mental health facility, or covered health facility.

(c) The individual can provide evidence acceptable to the relevant licensing or regulatory department that he or she has been a resident of this state for the immediately preceding 12-month period.

(12) As a condition of continued employment, each employee or independent contractor shall do both of the following:

(a) Agree in writing to report to the adult foster care facility or staffing agency immediately upon being arraigned on 1 or more of the criminal offenses listed in subsection (1)(a) to (g), upon being convicted of 1 or more of the criminal offenses listed in subsection (1)(a) to (g), upon becoming the subject of an order or disposition described under subsection (1)(h), and upon becoming the subject of a substantiated finding described under subsection (1)(i). Reporting of an arraignment under this subdivision is not cause for termination or denial of employment.

(b) If a set of fingerprints is not already on file with the department of state police, provide the department of state police with a set of fingerprints.

(13) In addition to sanctions set forth in this act, a licensee, owner, administrator, or operator of an adult foster care facility or staffing agency who knowingly and willfully fails to conduct the criminal history checks as required under this section is guilty of a misdemeanor punishable by imprisonment for not more than 1 year or a fine of not more than \$5,000.00, or both.

(14) In collaboration with the department of state police, the department of technology, management, and budget shall establish and maintain an automated fingerprint identification system database that would allow the department of state police to store and maintain all fingerprints submitted under this section and would provide for an automatic notification at the time a subsequent criminal arrest fingerprint card submitted into the system matches a set of fingerprints previously submitted under this section. Upon such notification, the department of state police shall immediately notify the department and the department shall immediately contact each respective adult foster care facility or staffing agency with which that individual is associated. Information in the database established under this subsection is confidential, is not subject to disclosure under the freedom of information act, 1976 PA 442, MCL 15.231 to 15.246, and shall not be disclosed to any person except for purposes of this act or for law enforcement purposes.

(15) If an individual independently contracts with an adult foster care facility, subsections (1) and (2) do not apply if the individual is not under the adult foster care facility's control and the contractual work performed by the individual is not directly related to the clinical, health care, or personal services delivered by the adult foster care facility or if the individual's duties are not performed on an ongoing basis with direct access to residents. This exception includes, but is not limited to, an individual who independently contracts with the adult foster care facility to provide utility, maintenance, construction, or communication services.

(16) The department shall maintain an electronic web-based system to assist the adult foster care facilities and staffing agencies required to check relevant registries and conduct criminal history checks of its employees and independent contractors and to provide for an automated notice to the adult foster care facilities and staffing agencies for the individuals entered in the system who, since the initial criminal history check, have been convicted of a disqualifying offense or have been the subject of a substantiated finding of abuse, neglect, or misappropriation of property. The department may charge a staffing agency a 1-time set-up fee of up to \$100.00 for access to the electronic web-based system under this section.

(17) An adult foster care facility, staffing agency, or a prospective employee covered under this section may not be charged for the cost of a criminal history check required under this act.

(18) As used in this section:

(a) "Convicted" means either of the following:

(i) For a crime that is not a relevant crime, a final conviction, the payment of a fine, a plea of guilty or nolo contendere if accepted by the court, or a finding of guilt for a criminal law violation or a juvenile adjudication or disposition by the juvenile division of probate court or family division of circuit court for a violation that if committed by an adult would be a crime.

(ii) For a relevant crime described under 42 USC 1320a-7(a), convicted means that term as defined in 42

USC 1320a-7.

(b) "Covered health facility" means a nursing home, county medical care facility, hospice, hospital that provides swing bed services, home for the aged, or home health agency licensed under article 17 of the public health code, 1978 PA 368, MCL 333.20101 to 333.22260.

(c) "Criminal history check conducted in compliance with this section" includes a criminal history check conducted under this section, under section 134a of the mental health code, 1974 PA 258, MCL 330.1134a, or under section 20173a of the public health code, 1978 PA 368, MCL 333.20173a.

(d) "Direct access" means access to a resident or resident's property, financial information, medical records, treatment information, or any other identifying information.

(e) "Home health agency" means that term as defined in section 20173a of the public health code, 1978 PA 368, MCL 333.20173a.

(f) "Independent contract" means a contract entered into by an adult foster care facility with an individual who provides the contracted services independently or a contract entered into by an adult foster care facility with a staffing agency that complies with the requirements of this section to provide the contracted services to the adult foster care facility on behalf of the staffing agency.

(g) "Mental health facility" means a psychiatric facility or intermediate care facility for people with mental retardation under the mental health code, 1974 PA 258, MCL 330.1001 to 330.2106.

(h) "Staffing agency" means an entity that recruits candidates and provides temporary and permanent qualified staffing for adult foster care facilities, including independent contractors.

(i) "Title XIX" means title XIX of the social security act, 42 USC 1396 to 1396w-5.

(j) "Under the adult foster care facility's control" means an individual employed by or under independent contract with an adult foster care facility for whom the adult foster care facility does both of the following:

(i) Determines whether the individual who has access to residents may provide care, treatment, or other similar support service functions to residents served by the adult foster care facility.

(ii) Directs or oversees 1 or more of the following:

(A) The policy or procedures the individual must follow in performing his or her duties.

(B) The tasks performed by the individual.

(C) The individual's work schedule.

(D) The supervision or evaluation of the individual's work or job performance, including imposing discipline or granting performance awards.

(E) The compensation the individual receives for performing his or her duties.

(F) The conditions under which the individual performs his or her duties.

History: Add. 2006, Act 29, Eff. Apr. 1, 2006;—Am. 2008, Act 135, Imd. Eff. May 21, 2008;—Am. 2008, Act 441, Imd. Eff. Jan. 9, 2009;—Am. 2008, Act 442, Eff. Oct. 31, 2010;—Am. 2010, Act 292, Imd. Eff. Dec. 16, 2010.

Compiler's note: Enacting section 2 of Act 29 of 2006 provides:

"Enacting section 2. Sections 34b and 34c of the adult foster care facility licensing act, 1979 PA 218, MCL 400.734b, as added by this amendatory act, take effect April 1, 2006, since the department has secured the necessary federal approval to utilize federal funds to reimburse those facilities for the costs incurred for requesting a national criminal history check to be conducted by the federal bureau of investigation and the department has filed written notice of that approval with the secretary of state. The department shall issue a medicaid policy bulletin regarding the payment and reimbursement for the criminal history checks by April 1, 2006."

For transfer of powers and duties of state fire marshal to department of labor and economic growth, bureau of construction codes and fire safety, by type II transfer, see E.R.O. No. 2003-1, compiled at MCL 445.2011.

For transfer of powers and duties of the bureau of family services from the department of consumer and industry services to the family independence agency by Type II transfer, see E.R.O. No. 2003-1, compiled at MCL 445.2011.

For transfer of powers and duties of adult foster care licensing advisory council to the family independence agency by Type II transfer, see E.R.O. No. 2003-1, compiled at MCL 445.2011.