

January 30, 2013

Tom Murray, Deputy Director
DHSS/DLTCRP
3 Mill Road, Suite 308
Wilmington, DE 19806

RE: DLTCRP Proposed Long Term Care (LTC) Criminal History Check and Drug Test Regulation [16 DE Reg. 716 (1/1/13)]

Dear Mr. Murray:

The Governor's Advisory Council for Exceptional Citizens (GACEC) has reviewed the Division of Long Term Care Residents Protection (DLTCRP) proposal to adopt a new set of comprehensive standards covering criminal history checks and drug testing for nursing and similar facilities. The changes are motivated, in part, to incorporate the role of the new "Background Check Center" (BCC) established by Senate Bill No. 216 enacted in July, 2012. The changes are also intended to conform to 2012 Equal Employment Opportunity Commission (EEOC) guidance on reliance on arrest and conviction records to disqualify individuals from employment. See §8.3. Council would like to share the following observations.

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/BJA 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.

Second, §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.

At 12.

Third, §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”.

Fourth, 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.

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

Sixth, §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”.

Seventh, §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.

Eighth, 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”.

Ninth, 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.

Tenth, 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.

Eleventh, in §8.3.2, I believe the fourth “bullet” (Evidence...conduct) is “bunched” with the third bullet.

Twelfth, in §12.3, capitalize “Bureau”.

Thirteenth, in §12.5.1, there is a plural pronoun (their) with a singular antecedent (Applicant). Consider substituting “his”. See Delaware Administrative Code Style Manual, §3.3.2.1.

Fourteenth, in §11.5.4, substitute “names” for “name”.

Fifteenth, 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.

Thank you for your time and consideration of our comments and recommendations. Please feel free to contact me or Wendy Strauss should you have any questions.

Sincerely,

Dafne A. Carnright
Vice Chairperson

DAC:kpc