

105TH CONGRESS
2D SESSION

H. R. 4789

To require criminal and abusive work history background checks for direct care employees in nursing facilities, home health agencies, and hospice programs under the Medicare and Medicaid Programs, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

OCTOBER 10, 1998

Mr. WELLER (for himself and Mr. NEY) introduced the following bill; which was referred to the Committee on Commerce, and in addition to the Committee on Ways and Means, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

A BILL

To require criminal and abusive work history background checks for direct care employees in nursing facilities, home health agencies, and hospice programs under the Medicare and Medicaid Programs, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE; TABLE OF CONTENTS.**

4 (a) SHORT TITLE.—This Act may be cited as the
5 “Elderly and Disabled Protection Act of 1998”.

1 (b) TABLE OF CONTENTS.—The table of contents of
 2 this Act is as follows:

Sec. 1. Short title; table of contents.

Sec. 2. Requiring background checks for direct care employees in nursing facilities, home health agencies, and hospice programs.

Sec. 3. Expanded role of State direct care employee registries; national registry coordination system; procedures for background checks.

Sec. 4. Definitions.

3 **SEC. 2. REQUIRING BACKGROUND CHECKS FOR DIRECT**
 4 **CARE EMPLOYEES IN NURSING FACILITIES,**
 5 **HOME HEALTH AGENCIES, AND HOSPICE**
 6 **PROGRAMS.**

7 (a) REQUIREMENTS.—

8 (1) IN GENERAL.—A covered facility in a
 9 State—

10 (A) may not employ (directly or through
 11 an agency) any individual as a direct care em-
 12 ployee unless the facility has requested from the
 13 State direct care employee registry a back-
 14 ground check;

15 (B) may not employ such an individual or
 16 continue such employment if the report on such
 17 background check reveals that the individual
 18 has been convicted of a disqualifying crime; and

19 (C) shall report to such registry docu-
 20 mented findings of patient abuse by a direct
 21 care employee.

1 (2) EMPLOYMENT PENDING REPORT.—Nothing
2 in this subsection shall be construed as preventing a
3 covered facility from—

4 (A) seeking a background check on pro-
5 spective direct care employees before they are
6 employed; or

7 (B) employing direct care employees dur-
8 ing the period in which a background check has
9 been sought under paragraph (1)(A) and before
10 a report on such check has been provided to the
11 facility under paragraph (1)(B).

12 (b) PENALTIES.—In addition to any other sanctions
13 provided under law—

14 (1) IN GENERAL.—A covered facility that vio-
15 lates subsection (a)(1)(A) shall be subject to a civil
16 penalty in an amount not to exceed—

17 (A) for the first such violation, \$2,000;
18 and

19 (B) for the second and each subsequent
20 violation within any 5-year period, \$5,000.

21 (2) KNOWING RETENTION OF WORKER.—In ad-
22 dition to any civil penalty under paragraph (1), a
23 covered facility that—

1 (A) knowingly continues to employ a direct
 2 care employee in violation of subsection
 3 (a)(1)(B); or

4 (B) knowingly fails to submit a report re-
 5 quired under subsection (a)(1)(C);

6 shall be subject to a civil penalty in an amount not
 7 to exceed \$5,000 for the first such violation, and
 8 \$10,000 for the second and each subsequent viola-
 9 tion within any 5-year period.

10 (c) ENFORCEMENT THROUGH MEDICARE AND MED-
 11 ICAID PROGRAMS.—

12 (1) NURSING FACILITIES.—

13 (A) MEDICARE PROGRAM.—Section
 14 1819(b) of the Social Security Act (42 U.S.C.
 15 1395i–3(b)) is amended by adding at the end
 16 the following new paragraph:

17 “(8) REQUIREMENT FOR BACKGROUND CHECKS
 18 FOR DIRECT CARE PERSONNEL.—A skilled nursing
 19 facility shall comply with the requirements of section
 20 2(a) of the Elderly and Disabled Protection Act of
 21 1998 with respect to any direct care employee it em-
 22 ploys.”.

23 (B) MEDICAID PROGRAM.—Section
 24 1919(b) of such Act (42 U.S.C. 1396r(b)) is

1 amended by adding at the end the following
2 new paragraph:

3 “(8) REQUIREMENT FOR BACKGROUND CHECKS
4 FOR DIRECT CARE PERSONNEL.—A nursing facility
5 shall comply with the requirements of section 2(a) of
6 the Elderly and Disabled Protection Act of 1998
7 with respect to any direct care employee it em-
8 ploys.”.

9 (2) HOME HEALTH AGENCIES AND HOSPICE
10 PROGRAMS.—

11 (A) MEDICARE PROGRAM.—

12 (i) HOME HEALTH AGENCIES.—Sec-
13 tion 1891(a) of such Act (42 U.S.C.
14 1395bbb(a)) is amended by adding at the
15 end the following:

16 “(7) The agency complies with the requirements
17 of section 2(a) of the Elderly and Disabled Protec-
18 tion Act of 1998 with respect to any direct care em-
19 ployee it employs.”.

20 (ii) HOSPICE PROGRAMS.—Section
21 1861(dd)(2)(G) of such Act (42 U.S.C.
22 1395x(dd)(2)(G)) is amended by inserting
23 before the period at the end the following:
24 “, including compliance with the require-
25 ments of section 2(a) of the Elderly and

1 Disabled Protection Act of 1998 with re-
2 spect to any direct care employee it em-
3 ploys”.

4 (B) MEDICAID PROGRAM.—Section
5 1902(a)(57) of such Act (42 U.S.C.
6 1396a(a)(57)) is amended—

7 (i) by inserting “(A)” after “(57)”;

8 and

9 (ii) by adding at the end the follow-
10 ing:

11 “(B) provide that each provider of home health
12 care or personal care services and each hospice pro-
13 gram receiving funds under the plan shall comply
14 with the requirements of section 2(a) of the Elderly
15 and Disabled Protection Act of 1998 with respect to
16 any direct care employee it employs;”.

17 (d) EFFECTIVE DATES.—The requirements of sub-
18 section (a) shall apply with respect to a covered facility—

19 (1) beginning as of such date (specified by the
20 Secretary and not later than 60 days after the date
21 the Secretary has established the national registry
22 coordination system under section 3(b)), with re-
23 spect to the hiring of individuals as a direct care em-
24 ployee by the facility on and after such date; and

1 (2) as of 1 year after the date described in
 2 paragraph (1), with respect to individuals first em-
 3 ployed as such an employee before the date de-
 4 scribed in such paragraph.

5 **SEC. 3. EXPANDED ROLE OF STATE DIRECT CARE EM-**
 6 **PLOYEE REGISTRIES; NATIONAL REGISTRY**
 7 **COORDINATION SYSTEM; PROCEDURES FOR**
 8 **BACKGROUND CHECKS.**

9 (a) EXPANDED ROLE OF REGISTRY.—

10 (1) IN GENERAL.—Each State shall expand its
 11 direct care employee registry established under sec-
 12 tions 1819(e)(2) and 1919(e)(2) of the Social Secu-
 13 rity Act to carry out the following functions:

14 (A) RECEIPT OF REQUESTS.—The registry
 15 shall provide for the receipt of requests for
 16 background checks described in section 2(a)(1).

17 (B) CONDUCT OF BACKGROUND
 18 CHECKS.—Upon receipt of such a request with
 19 respect to an individual, the registry, in coordi-
 20 nation with the national registry coordination
 21 system established by the Secretary under sub-
 22 section (b) and in accordance with this section,
 23 shall provide for the performance of (or the col-
 24 lection of information concerning) a background
 25 check (including a criminal background check

1 and an abusive work history background check)
2 requested under section 2(a) and for the sub-
3 mittal of a background check report (as defined
4 in paragraph (2)) on such check to the request-
5 ing facility.

6 (C) PROVISION OF INFORMATION TO NA-
7 TIONAL REGISTRY COORDINATION SYSTEM.—
8 The registry shall provide for the reporting to
9 the national registry coordination system of—

10 (i) a criminal background check sum-
11 mary (as defined in paragraph (3)) on any
12 individual on whom it obtains a criminal
13 background check under subsection (c)(3);
14 and

15 (ii) the identity of any individual for
16 whom the registry has documented find-
17 ings of patient abuse and such additional
18 information as the State registry involved
19 may disclose concerning such findings.

20 (2) BACKGROUND CHECK REPORT DEFINED.—

21 For purposes of this section, the term “background
22 check report” means, with respect to a background
23 check concerning an individual, a statement contain-
24 ing the following:

1 (A) Whether the individual has been con-
2 victed of a disqualifying crime.

3 (B) Whether there are documented find-
4 ings of patient abuse by the individual in a
5 State direct care employee registry and, if so,
6 such additional information as the State reg-
7 istry involved may disclose concerning such
8 findings.

9 Such report shall not include information from the
10 criminal background check other than the informa-
11 tion described in subparagraph (A).

12 (3) CRIMINAL BACKGROUND CHECK SUMMARY
13 DEFINED.—For purposes of this section, the term
14 “criminal background check summary” means, with
15 respect to a criminal background check concerning
16 an individual, the following information:

17 (A) The identity of the individual.

18 (B) The date of the criminal background
19 check.

20 (C) Whether the check revealed that—

21 (i) the individual had not been con-
22 victed of any crime,

23 (ii) the individual has been convicted
24 of a national disqualifying crime, or

1 (iii) the individual has been convicted
2 of a crime that is not a national disqualify-
3 ing crime.

4 (4) CONFORMING MEDICARE AND MEDICAID
5 AMENDMENTS.—Sections 1819(e)(2) and 1919(e)(2)
6 of the Social Security Act (42 U.S.C. 1395i–3(e)(2),
7 1396r(e)(2)) are each amended—

8 (A) in subparagraph (C), by striking “A
9 State” and inserting “Subject to section 3(e) of
10 the Elderly and Disabled Protection Act of
11 1998, a State”, and

12 (B) by adding at the end the following new
13 subparagraph:

14 “(D) EXPANDED FUNCTIONS.—Effective
15 not later than 90 days after the date of the es-
16 tablishment of the national registry coordina-
17 tion system under section 3(b) of the Elderly
18 and Disabled Protection Act of 1998, the State
19 shall—

20 “(i) modify the operations of its reg-
21 istry so it performs the functions required
22 under section 3(a) of such Act; and

23 “(ii) provide for the specification of a
24 State agency that is separate from the reg-
25 istry and that will be responsible for the

1 performance of criminal background checks
2 under such section.”.

3 (b) NATIONAL REGISTRY COORDINATION SYSTEM.—

4 (1) ESTABLISHMENT.—The Secretary shall es-
5 tablish methods by which State direct care registries
6 can pool and share information regarding individuals
7 concerning criminal background check summaries
8 and the existence of documented findings of patient
9 abuse.

10 (2) DEADLINE FOR ESTABLISHING SYSTEM.—

11 The Secretary shall provide for the establishment of
12 the national registry coordination system by not
13 later than 1 year after the date of the enactment of
14 this Act.

15 (3) CONSULTATION WITH FBI ON CRIMINAL

16 BACKGROUND CHECKS.—In carrying out this Act
17 with respect to criminal background checks, the Sec-
18 retary shall consult with the Director of the Federal
19 Bureau of Investigation.

20 (c) PROCEDURES FOR CRIMINAL BACKGROUND

21 CHECKS.—A registry shall carry out its responsibilities
22 under subsection (a)(1)(B), in relation to a criminal back-
23 ground check with respect to an individual, in a manner
24 consistent with the following:

1 (1) DETERMINATION OF WHETHER RECENT
2 CRIMINAL BACKGROUND CHECK DONE.—The reg-
3 istry shall determine whether the registry (or,
4 through the national registry coordination system,
5 the direct care employee registry of another State)
6 has obtained a criminal background check on the in-
7 dividual within the previous year.

8 (2) USE OF PREVIOUS BACKGROUND CHECK.—
9 If there has been such a check done within such pe-
10 riod, if the check revealed that—

11 (A) the individual had not been convicted
12 of any crime, the registry need not request a
13 new criminal background check and may as-
14 sume that the individual has not been convicted
15 of any disqualifying crime;

16 (B) the individual has been convicted of a
17 national or state disqualifying crime, the reg-
18 istry need not request a new criminal back-
19 ground check and shall treat the individual as
20 having been convicted of a disqualifying crime;
21 or

22 (C) the individual has been convicted of a
23 crime that is not a national or state disqualify-
24 ing crime and the State has disqualifying
25 crimes that are other than national disqualify-

1 ing crimes, the registry shall request a criminal
2 background check as provided under paragraph
3 (3).

4 (3) REQUESTING STATE CRIMINAL BACK-
5 GROUND CHECK AGENCY TO OBTAIN CRIMINAL
6 BACKGROUND CHECK.—If there has not been such a
7 check done within such period or in the case de-
8 scribed in paragraph (2)(C), the registry shall re-
9 quest the State criminal background check agency of
10 the State—

11 (A) to perform a criminal background
12 check on the individual;

13 (B) to determine, on the basis of such
14 check, whether the individual—

15 (i) has not been convicted of any
16 crime;

17 (ii) has been convicted of a national
18 disqualifying crime; or

19 (iii) has been convicted of a crime
20 that is a State disqualifying crime; and

21 (C) to submit to the registry a criminal
22 background check summary on the individual.

23 (4) APPLICATION OF CERTAIN PROCEDURES
24 FOR CRIMINAL BACKGROUND CHECKS.—Under regu-
25 lations of the Secretary, the following provisions in

1 section 3 of the National Child Protection Act of
2 1993 (Public Law 103–209) shall apply to criminal
3 background checks required of a direct care em-
4 ployee with respect to a covered facility to be per-
5 formed under this Act in the same manner as they
6 apply to providers with respect to qualified entities:

7 (A) Subsection (a)(2) (relating to access to
8 records and timeliness of response).

9 (B) Subsection (b) (relating to guidelines
10 on background checks), other than paragraph
11 (1)(B), except that denial of unsupervised ac-
12 cess under paragraph (1)(E) shall be treated
13 for purposes of this section as a denial of unsu-
14 pervised access to patients in covered facilities
15 and determinations under paragraph (4) shall
16 be made only with respect to crimes relating to
17 patient abuse.

18 (C) Subsection (c) (relating to authority of
19 Attorney General).

20 (D) Subsection (d) (relating to limitation
21 on liability).

22 (d) PROCEDURES FOR ABUSIVE WORK HISTORY
23 BACKGROUND CHECKS.—A registry shall carry out its re-
24 sponsibilities under subsection (a)(1)(B), in relation to

1 abusive work history background check with respect to an
2 individual, in a manner consistent with the following:

3 (1) INCLUSION OF INFORMATION ON DOCU-
4 MENTED FINDINGS OF PATIENT ABUSE.—The reg-
5 istry shall maintain a list of all individuals in the
6 State who are (or were) direct care employees and
7 with respect to whom there are specific documented
8 findings of patient abuse, as well as any brief state-
9 ment of the individual disputing the findings. Such
10 findings shall be made available in the same manner
11 as findings described in sections 1819(c)(2)(B) and
12 1919(c)(2)(B) of the Social Security Act.

13 (2) FORWARDING INFORMATION ON INDIVID-
14 UALS WITH DOCUMENTED FINDINGS OF PATIENT
15 ABUSE.—If the registry has a documented finding
16 described in paragraph (1) with respect to an indi-
17 vidual, the registry—

18 (A) shall provide the national registry co-
19 ordination system with—

20 (i) information on the identity of the
21 individual and the State;

22 (ii) information on the fact that such
23 a finding was made; and

1 (iii) such additional information re-
2 specting the finding as the Secretary may
3 require; and

4 (B) shall provide, to another State direct
5 care employee registry that requests informa-
6 tion on an individual for whom such a docu-
7 mented finding has been made through the sys-
8 tem, information respecting the finding.

9 (e) FEES.—A State may assess a covered facility a
10 fee for the conduct of a background check under section
11 2(a) in an amount that does not exceed the actual cost
12 to the State of obtaining the criminal background check
13 and the abusive work history background check on an indi-
14 vidual. Such a facility may recover all of the fee from the
15 individual involved.

16 **SEC. 4. DEFINITIONS.**

17 For purposes of this Act:

18 (1) BACKGROUND CHECK; CRIMINAL BACK-
19 GROUND CHECK; ABUSIVE WORK HISTORY BACK-
20 GROUND CHECK.—

21 (A) BACKGROUND CHECK.—The term
22 “background check” includes a criminal back-
23 ground check and an abusive work history back-
24 ground check.

1 (B) CRIMINAL BACKGROUND CHECK.—The
2 term “criminal background check” means a
3 check of the criminal history record system
4 maintained by the Federal Bureau of Investiga-
5 tion based on fingerprint identification or any
6 other method of positive identification for the
7 purpose of determining whether an individual
8 has been convicted of a disqualifying crime.

9 (C) ABUSIVE WORK HISTORY BACKGROUND
10 CHECK.—The term “abusive work history back-
11 ground check” means, with respect to an indi-
12 vidual, a check of State direct care employee
13 registries for the purpose of determining wheth-
14 er there is a documented finding that the indi-
15 vidual was involved in patient abuse.

16 (2) COVERED FACILITY.—The term “covered
17 facility” means a nursing facility (including a skilled
18 nursing facility), home health agency, or hospice
19 program which receives payment under any federally
20 funded program.

21 (3) DIRECT CARE EMPLOYEE.—

22 (A) IN GENERAL.—The term “direct care
23 employee” means a nurse aide, home health
24 care aide, personal care assistant, private duty
25 nurse aide, day attendant, housekeeper, library

attendant, laundry assistant, or similar worker who performs nursing or related tasks involving direct patient care in a covered facility.

(B) EXCLUSIONS.—Such term does not include an individual—

(i) who is a physician, physician assistant, nurse practitioner, physical, speech, or occupational therapist, physical or occupational therapy assistant, registered professional nurse, licensed practical nurse, or licensed or certified social worker, or registered dietitian;

(ii) who volunteers to provide such services without monetary compensation; or

(iii) who meets such other requirements as the Secretary may specify.

(4) DISQUALIFYING CRIME; NATIONAL DISQUALIFYING CRIME; STATE DISQUALIFYING CRIME.—

(A) DISQUALIFYING CRIME.—The term “disqualifying crime” means, with respect to an individual applying for employment in a State, a criminal offense that is a national disqualify-

1 ing crime or a State disqualifying crime in that
2 State.

3 (B) NATIONAL DISQUALIFYING CRIME.—

4 The term “national disqualifying crime”
5 means—

6 (i) a criminal offense described in sec-
7 tion 1128(a) of the Social Security Act; or

8 (ii) felony homicide, battery, or as-
9 sault (including sexual assault),

10 regardless of the date of conviction for the
11 crime.

12 (C) STATE DISQUALIFYING CRIME.—The

13 term “State disqualifying crime” means, with
14 respect to a State, such criminal offenses (other
15 than national disqualifying crimes) as the State
16 may under law treat as a State disqualifying
17 crime for purposes of this Act and for such pe-
18 riod of time as the State may provide.

19 (5) NATIONAL REGISTRY COORDINATION SYS-

20 TEM.—The term “national registry coordination sys-
21 tem” means a system established under section 3(b).

22 (6) PATIENT ABUSE.—The term “patient

23 abuse” means such incidence of abuse, neglect, mis-
24 treatment, or misappropriation of property of an in-

1 dividual receiving services in a covered facility as the
2 Secretary shall specify in regulations.

3 (7) SECRETARY.—The term “Secretary” means
4 the Secretary of Health and Human Services.

5 (8) STATE CRIMINAL BACKGROUND CHECK
6 AGENCY.—The term “State criminal background
7 check agency” means, with respect to a State, the
8 State agency specified by the State to provide for
9 the conduct of criminal background checks under
10 this Act.

11 (9) STATE DIRECT CARE EMPLOYEE REG-
12 ISTRY.—The term “State direct care employee reg-
13 istry” means a nurse aide registry that is established
14 under sections 1819(e)(2)(A) and 1919(e)(2)(A) of
15 the Social Security Act and that provides for func-
16 tions required of such a registry under section 3 of
17 this Act.

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