

111TH CONGRESS  
1ST SESSION

# H. R. 2223

To provide for nationwide expansion of the pilot program for national and State background checks on direct patient access employees of long-term care facilities or providers.

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## IN THE HOUSE OF REPRESENTATIVES

APRIL 30, 2009

Mr. SESTAK (for himself, Mr. EHLERS, Ms. KILPATRICK of Michigan, Mr. COURTNEY, Mrs. TAUSCHER, and Mr. UPTON) introduced the following bill; which was referred to the Committee on Energy and 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

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## A BILL

To provide for nationwide expansion of the pilot program for national and State background checks on direct patient access employees of long-term care facilities or providers.

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.**

4       This Act may be cited as the “Patient Safety and  
5       Abuse Prevention Act”.

1 **SEC. 2. FINDINGS AND PURPOSES.**

2 (a) FINDINGS.—Congress makes the following find-  
3 ings:

4 (1) Frail elders are a highly vulnerable popu-  
5 lation who often lack the ability to give consent or  
6 defend themselves. Since the best predictor of future  
7 behavior is past behavior, individuals with histories  
8 of abuse pose a definite risk to patients and resi-  
9 dents of long-term care facilities.

10 (2) Every month, there are stories in the media  
11 of health care employees who commit criminal mis-  
12 conduct on the job and are later found, through a  
13 background check conducted after the fact, to have  
14 a history of convictions for similar crimes.

15 (3) A 2006 study conducted by the Department  
16 of Health and Human Services determined that—

17 (A) criminal background checks are a valu-  
18 able tool for employers during the hiring proc-  
19 ess;

20 (B) the use of criminal background checks  
21 during the hiring process does not limit the pool  
22 of potential job applicants;

23 (C) a correlation exists between criminal  
24 history and incidences of abuse; and

25 (D) the long-term care industry supports  
26 the practice of conducting background checks

1           on potential employees in order to reduce the  
2           likelihood of hiring someone who has the poten-  
3           tial to harm residents of long-term care facili-  
4           ties.

5           (4) A national survey of State Adult Protective  
6           Services agencies identified more than 500,000 re-  
7           ports of elder and vulnerable adult abuse in 2004,  
8           and a national report concluded that more than  
9           15,000 nursing home complaints involved abuse, in-  
10          cluding nearly 4,000 complaints of physical abuse,  
11          more than 800 complaints of sexual abuse, and  
12          nearly 1,000 complaints of financial exploitation.

13          (5) The Department of Health and Human  
14          Services has determined that, while 41 States now  
15          require criminal background checks on certified  
16          nurse aides prior to employment, only half of those  
17          require criminal background checks at the Federal  
18          level.

19          (b) PURPOSES.—The purposes of this Act are to—

20                (1) lay the foundation for a coordinated, nation-  
21                wide system of comprehensive State registry and  
22                criminal background checks that would greatly en-  
23                hance the chances of identifying individuals with  
24                problematic backgrounds who change jobs frequently  
25                and move across State lines to avoid detection;

1           (2) stop individuals who have a record of sub-  
 2           stantiated abuse, or a serious criminal record, from  
 3           preying on helpless elders and individuals with dis-  
 4           abilities; and

5           (3) provide assurance to long-term care employ-  
 6           ers and the residents they care for that abusive  
 7           workers will not be hired into positions that give  
 8           them access to extremely vulnerable individuals re-  
 9           ceiving long-term care services in health care set-  
 10          tings across the United States.

11 **SEC. 3. NATIONWIDE PROGRAM FOR NATIONAL AND STATE**  
 12                           **BACKGROUND CHECKS ON DIRECT PATIENT**  
 13                           **ACCESS EMPLOYEES OF LONG-TERM CARE**  
 14                           **FACILITIES AND PROVIDERS.**

15          (a) IN GENERAL.—The Secretary of Health and  
 16          Human Services (in this section referred to as the “Sec-  
 17          retary”) shall establish a program to identify efficient, ef-  
 18          fective, and economical procedures for long-term care fa-  
 19          cilities or providers to conduct background checks on pro-  
 20          spective direct patient access employees on a nationwide  
 21          basis (in this subsection, such program shall be referred  
 22          to as the “nationwide program”). Except for the following  
 23          modifications, the Secretary shall carry out the nationwide  
 24          program under similar terms and conditions as the pilot  
 25          program under section 307 of the Medicare Prescription

1 Drug, Improvement, and Modernization Act of 2003 (Pub-  
2 lic Law 108–173; 117 Stat. 2257), including the prohibi-  
3 tion on hiring abusive workers and the authorization of  
4 the imposition of penalties by a participating State under  
5 subsection (b)(3)(A) and (b)(6), respectively, of such sec-  
6 tion 307:

7 (1) AGREEMENTS.—

8 (A) NEWLY PARTICIPATING STATES.—The  
9 Secretary shall enter into agreements with each  
10 State—

11 (i) that the Secretary has not entered  
12 into an agreement with under subsection  
13 (c)(1) of such section 307;

14 (ii) that agrees to conduct background  
15 checks under the nationwide program on a  
16 Statewide basis; and

17 (iii) that submits an application to the  
18 Secretary containing such information and  
19 at such time as the Secretary may specify.

20 (B) CERTAIN PREVIOUSLY PARTICIPATING  
21 STATES.—The Secretary shall enter into agree-  
22 ments with each State—

23 (i) that the Secretary has entered into  
24 an agreement with under such subsection  
25 (c)(1), but only in the case where such

1 agreement did not require the State to  
2 conduct background checks under the pro-  
3 gram established under subsection (a) of  
4 such section 307 on a Statewide basis;

5 (ii) that agrees to conduct background  
6 checks under the nationwide program on a  
7 Statewide basis; and

8 (iii) that submits an application to the  
9 Secretary containing such information and  
10 at such time as the Secretary may specify.

11 (2) NONAPPLICATION OF SELECTION CRI-  
12 TERIA.—The selection criteria required under sub-  
13 section (c)(3)(B) of such section 307 shall not apply.

14 (3) REQUIRED FINGERPRINT CHECK AS PART  
15 OF CRIMINAL HISTORY BACKGROUND CHECK.—The  
16 procedures established under subsection (b)(1) of  
17 such section 307 shall—

18 (A) require that the long-term care facility  
19 or provider (or the designated agent of the  
20 long-term care facility or provider) obtain State  
21 and national criminal history background  
22 checks on the prospective employee through  
23 such means as the Secretary determines appro-  
24 priate that utilize a search of State-based abuse  
25 and neglect registries and databases, including

1 the abuse and neglect registries of another  
2 State in the case where a prospective employee  
3 previously resided in that State, State criminal  
4 history records, the records of any proceedings  
5 in the State that may contain disqualifying in-  
6 formation about prospective employees (such as  
7 proceedings conducted by State professional li-  
8 censing and disciplinary boards and State Med-  
9 icaid Fraud Control Units), and Federal crimi-  
10 nal history records, including a fingerprint  
11 check using the Integrated Automated Finger-  
12 print Identification System of the Federal Bu-  
13 reau of Investigation; and

14 (B) require States to describe and test  
15 methods that reduce duplicative fingerprinting,  
16 including providing for the development of “rap  
17 back” capability by the State such that, if a di-  
18 rect patient access employee of a long-term care  
19 facility or provider is convicted of a crime fol-  
20 lowing the initial criminal history background  
21 check conducted with respect to such employee,  
22 and the employee’s fingerprints match the  
23 prints on file with the State law enforcement  
24 department, the department will immediately  
25 inform the State and the State will immediately

1 inform the long-term care facility or provider  
2 which employs the direct patient access em-  
3 ployee of such conviction.

4 (4) STATE REQUIREMENTS.—An agreement en-  
5 tered into under paragraph (1) shall require that a  
6 participating State—

7 (A) be responsible for monitoring compli-  
8 ance with the requirements of the nationwide  
9 program;

10 (B) have procedures in place to—

11 (i) conduct screening and criminal his-  
12 tory background checks under the nation-  
13 wide program in accordance with the re-  
14 quirements of this section;

15 (ii) monitor compliance by long-term  
16 care facilities and providers with the proce-  
17 dures and requirements of the nationwide  
18 program;

19 (iii) as appropriate, provide for a pro-  
20 visional period of employment by a long-  
21 term care facility or provider of a direct  
22 patient access employee, not to exceed 30  
23 days, pending completion of the required  
24 criminal history background check and, in  
25 the case where the employee has appealed



1 the results of such background check,  
2 pending completion of the appeals process,  
3 during which the employee shall be subject  
4 to direct on-site supervision (in accordance  
5 with procedures established by the State to  
6 ensure that a long-term care facility or  
7 provider furnishes such direct on-site su-  
8 pervision);

9 (iv) provide an independent process by  
10 which a provisional employee or an em-  
11 ployee may appeal or dispute the accuracy  
12 of the information obtained in a back-  
13 ground check performed under the nation-  
14 wide program, including the specification  
15 of criteria for appeals for direct patient ac-  
16 cess employees found to have disqualifying  
17 information which shall include consider-  
18 ation of the passage of time, extenuating  
19 circumstances, demonstration of rehabilita-  
20 tion, and relevancy of the particular dis-  
21 qualifying information with respect to the  
22 current employment of the individual;

23 (v) provide for the designation of a  
24 single State agency as responsible for—

1 (I) overseeing the coordination of  
2 any State and national criminal his-  
3 tory background checks requested by  
4 a long-term care facility or provider  
5 (or the designated agent of the long-  
6 term care facility or provider) utilizing  
7 a search of State and Federal crimi-  
8 nal history records, including a finger-  
9 print check of such records;

10 (II) overseeing the design of ap-  
11 propriate privacy and security safe-  
12 guards for use in the review of the re-  
13 sults of any State or national criminal  
14 history background checks conducted  
15 regarding a prospective direct patient  
16 access employee to determine whether  
17 the employee has any conviction for a  
18 relevant crime;

19 (III) immediately reporting to  
20 the long-term care facility or provider  
21 that requested the criminal history  
22 background check the results of such  
23 review; and

24 (IV) in the case of an employee  
25 with a conviction for a relevant crime

1           that is subject to reporting under sec-  
2           tion 1128E of the Social Security Act  
3           (42 U.S.C. 1320a–7e), reporting the  
4           existence of such conviction to the  
5           database established under that sec-  
6           tion;

7           (vi) determine which individuals are  
8           direct patient access employees (as defined  
9           in paragraph (6)(B)) for purposes of the  
10          nationwide program;

11          (vii) as appropriate, specify offenses,  
12          including convictions for violent crimes, for  
13          purposes of the nationwide program; and

14          (viii) describe and test methods that  
15          reduce duplicative fingerprinting, including  
16          providing for the development of “rap  
17          back” capability such that, if a direct pa-  
18          tient access employee of a long-term care  
19          facility or provider is convicted of a crime  
20          following the initial criminal history back-  
21          ground check conducted with respect to  
22          such employee, and the employee’s finger-  
23          prints match the prints on file with the  
24          State law enforcement department—

1 (I) the department will imme-  
2 diately inform the State agency des-  
3 ignated under clause (v) and such  
4 agency will immediately inform the fa-  
5 cility or provider which employs the  
6 direct patient access employee of such  
7 conviction; and

8 (II) the State will provide, or will  
9 require the facility to provide, to the  
10 employee a copy of the results of the  
11 criminal history background check  
12 conducted with respect to the em-  
13 ployee at no charge in the case where  
14 the individual requests such a copy.

15 (5) PAYMENTS.—

16 (A) NEWLY PARTICIPATING STATES.—

17 (i) IN GENERAL.—As part of the ap-  
18 plication submitted by a State under para-  
19 graph (1)(A)(iii), the State shall guar-  
20 antee, with respect to the costs to be in-  
21 curred by the State in carrying out the na-  
22 tionwide program, that the State will make  
23 available (directly or through donations  
24 from public or private entities) a particular  
25 amount of non-Federal contributions, as a

1 condition of receiving the Federal match  
2 under clause (ii).

3 (ii) FEDERAL MATCH.—The payment  
4 amount to each State that the Secretary  
5 enters into an agreement with under para-  
6 graph (1)(A) shall be 3 times the amount  
7 that the State guarantees to make avail-  
8 able under clause (i), except that in no  
9 case may the payment amount exceed  
10 \$3,000,000.

11 (B) PREVIOUSLY PARTICIPATING  
12 STATES.—

13 (i) IN GENERAL.—As part of the ap-  
14 plication submitted by a State under para-  
15 graph (1)(B)(iii), the State shall guar-  
16 antee, with respect to the costs to be in-  
17 curred by the State in carrying out the na-  
18 tionwide program, that the State will make  
19 available (directly or through donations  
20 from public or private entities) a particular  
21 amount of non-Federal contributions, as a  
22 condition of receiving the Federal match  
23 under clause (ii).

24 (ii) FEDERAL MATCH.—The payment  
25 amount to each State that the Secretary

1 enters into an agreement with under para-  
2 graph (1)(B) shall be 3 times the amount  
3 that the State guarantees to make avail-  
4 able under clause (i), except that in no  
5 case may the payment amount exceed  
6 \$1,500,000.

7 (6) DEFINITIONS.—Under the nationwide pro-  
8 gram:

9 (A) LONG-TERM CARE FACILITY OR PRO-  
10 VIDER.—The term “long-term care facility or  
11 provider” means the following facilities or pro-  
12 viders which receive payment for services under  
13 title XVIII or XIX of the Social Security Act:

14 (i) A skilled nursing facility (as de-  
15 fined in section 1819(a) of the Social Secu-  
16 rity Act (42 U.S.C. 1395i–3(a)).

17 (ii) A nursing facility (as defined in  
18 section 1919(a) of such Act (42 U.S.C.  
19 1396r(a)).

20 (iii) A home health agency.

21 (iv) A provider of hospice care (as de-  
22 fined in section 1861(dd)(1) of such Act  
23 (42 U.S.C. 1395x(dd)(1)).

1 (v) A long-term care hospital (as de-  
2 scribed in section 1886(d)(1)(B)(iv) of  
3 such Act (42 U.S.C. 1395ww(d)(1)(B)(iv)).

4 (vi) A provider of personal care serv-  
5 ices.

6 (vii) A provider of adult day care.

7 (viii) A residential care provider that  
8 arranges for, or directly provides, long-  
9 term care services, including an assisted  
10 living facility that provides a level of care  
11 established by the Secretary.

12 (ix) An intermediate care facility for  
13 the mentally retarded (as defined in sec-  
14 tion 1905(d) of such Act (42 U.S.C.  
15 1396d(d)).

16 (x) Any other facility or provider of  
17 long-term care services under such titles as  
18 the participating State determines appro-  
19 priate.

20 (B) DIRECT PATIENT ACCESS EM-  
21 PLOYEE.—The term “direct patient access em-  
22 ployee” means any individual who has access to  
23 a patient or resident of a long-term care facility  
24 or provider through employment or through a  
25 contract with such facility or provider and has

1 duties that involve (or may involve) one-on-one  
2 contact with a patient or resident of the facility  
3 or provider, as determined by the State for pur-  
4 poses of the nationwide program. Such term  
5 does not include a volunteer unless the volun-  
6 teer has duties that are equivalent to the duties  
7 of a direct patient access employee and those  
8 duties involve (or may involve) one-on-one con-  
9 tact with a patient or resident of the long-term  
10 care facility or provider.

11 (7) EVALUATION AND REPORT.—

12 (A) EVALUATION.—The Inspector General  
13 of the Department of Health and Human Serv-  
14 ices shall conduct an evaluation of the nation-  
15 wide program.

16 (B) REPORT.—Not later than 180 days  
17 after the completion of the nationwide program,  
18 the Inspector General of the Department of  
19 Health and Human Services shall submit a re-  
20 port to Congress containing the results of the  
21 evaluation conducted under subparagraph (A).

22 (b) FUNDING.—

23 (1) NOTIFICATION.—The Secretary of Health  
24 and Human Services shall notify the Secretary of  
25 the Treasury of the amount necessary to carry out



1 the nationwide program under this section for the  
2 period of fiscal years 2010 through 2012, except  
3 that in no case shall such amount exceed  
4 \$160,000,000.

5 (2) TRANSFER OF FUNDS.—Out of any funds  
6 in the Treasury not otherwise appropriated, the Sec-  
7 retary of the Treasury shall provide for the transfer  
8 to the Secretary of Health and Human Services of  
9 the amount specified as necessary to carry out the  
10 nationwide program under paragraph (1). Such  
11 amount shall remain available until expended.

12 **SEC. 4. MANDATORY STATE USE OF NATIONAL CORRECT**  
13 **CODING INITIATIVE.**

14 (a) IN GENERAL.—Section 1903(r) of the Social Se-  
15 curity Act (42 U.S.C. 1396b(r)), as amended by section  
16 3(a) of the QI Program Supplemental Funding Act of  
17 2008 (Public Law 110–379), is amended—

18 (1) in paragraph (1)(B)—

19 (A) in clause (ii), by striking “and” at the  
20 end;

21 (B) in clause (iii), by adding “and” after  
22 the semicolon; and

23 (C) by adding at the end the following new  
24 clause:

1                   “(iv) effective for claims filed on or  
2                   after October 1, 2010, incorporate compat-  
3                   ible methodologies of the National Correct  
4                   Coding Initiative administered by the Sec-  
5                   retary (or any successor initiative to pro-  
6                   mote correct coding and to control im-  
7                   proper coding leading to inappropriate pay-  
8                   ment) and such other methodologies of  
9                   that Initiative (or such other national cor-  
10                  rect coding methodologies) as the Sec-  
11                  retary identifies in accordance with para-  
12                  graph (4);” and

13               (2) by adding at the end the following new  
14       paragraph:

15       “(4) Not later than September 1, 2010, the Secretary  
16       shall do the following:

17               “(A) Identify those methodologies of the Na-  
18               tional Correct Coding Initiative administered by the  
19               Secretary (or any successor initiative to promote cor-  
20               rect coding and to control improper coding leading  
21               to inappropriate payment) which are compatible to  
22               claims filed under this title.

23               “(B) Identify those methodologies of such Ini-  
24               tiative (or such other national correct coding meth-  
25               odologies) that should be incorporated into claims

1 filed under this title with respect to items or services  
2 for which States provide medical assistance under  
3 this title and no national correct coding methodolo-  
4 gies have been established under such Initiative with  
5 respect to title XVIII.

6 “(C) Notify States of—

7 “(i) the methodologies identified under  
8 subparagraphs (A) and (B) (and of any other  
9 national correct coding methodologies identified  
10 under subparagraph (B)); and

11 “(ii) how States are to incorporate such  
12 methodologies into claims filed under this title.

13 “(D) Submit a report to Congress that includes  
14 the notice to States under subparagraph (C) and an  
15 analysis supporting the identification of the meth-  
16 odologies made under subparagraphs (A) and (B).”.

17 (b) EXTENSION FOR STATE LAW AMENDMENT.—In  
18 the case of a State plan under title XIX of the Social Se-  
19 curity Act (42 U.S.C. 1396 et seq.) which the Secretary  
20 of Health and Human Services determines requires State  
21 legislation in order for the plan to meet the additional re-  
22 quirements imposed by the amendment made by sub-  
23 section (a)(1)(C), the State plan shall not be regarded as  
24 failing to comply with the requirements of such title solely  
25 on the basis of its failure to meet these additional require-

1 ments before the first day of the first calendar quarter  
2 beginning after the close of the first regular session of the  
3 State legislature that begins after the date of enactment  
4 of this Act. For purposes of the previous sentence, in the  
5 case of a State that has a 2-year legislative session, each  
6 year of the session is considered to be a separate regular  
7 session of the State legislature.

○