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**HEALTH AND HUMAN SERVICES**

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**STATE OF MAINE**

**SENATE**

**127TH LEGISLATURE**

**FIRST REGULAR SESSION**

COMMITTEE AMENDMENT “ ” to S.P. 541, L.D. 1439, Bill, “An Act To Establish a Secure Internet-based Background Check Center for Providers of Long-term Care, Child Care and In-home and Community-based Services”

Amend the bill in section 1 by striking out all of paragraph A-3 (page 1, lines 9 to 13 in L.D.) and inserting the following:

'A-3. "Direct care worker" means an individual who by virtue of employment generally provides to individuals direct contact assistance with personal care or activities of daily living or has direct access to provide care and services to clients, patients or residents regardless of setting. "Direct care worker" does not include a certified nursing assistant employed in that person's capacity as a certified nursing assistant.'

Amend the bill by striking out all of section 8 and inserting the following:

**'Sec. 8. 22 MRSA §1724, first ¶**, as reallocated by RR 2009, c. 2, §49, is amended to read:

Beginning October 1, 2010, a facility or health care provider subject to the licensing or certification processes of chapter 405, 412 or 419 shall obtain, prior to hiring an individual who will work in direct contact with a consumer, criminal history record information on that individual, including, at a minimum, criminal history record information from the Department of Public Safety, State Bureau of Identification. A facility or provider subject to licensing under chapter 419 shall conduct a comprehensive background check for individuals employed in positions that have direct access to a consumer's property, personally identifiable information, financial information or resources in accordance with applicable federal and state laws. The comprehensive background check must be conducted in accordance with state law and rules adopted by the department. The facility or health care provider shall pay for the comprehensive or criminal background check required by this section as applicable.'

**COMMITTEE AMENDMENT**

1 Amend the bill in section 9 in subsection 6 in the first line (page 2, line 36 in L.D.) by  
2 striking out the following: "**Registry notations.**" and inserting the following: "**Prohibited**  
3 **employment based on disqualifying offenses.**"

4 Amend the bill in section 10 in subsection 6-A in paragraph A in the first 2 lines  
5 (page 3, lines 5 and 6 in L.D.) by striking out the following: "shall secure and pay" and  
6 inserting the following: 'must secure or pay'

7 Amend the bill in section 10 in subsection 6-A in paragraph A in subparagraph (1) in  
8 the 2nd line (page 3, line 12 in L.D.) by striking out the following: "shall notify" and  
9 inserting the following: 'must notify'

10 Amend the bill by striking out all of section 14 (page 4, lines 18 to 23 in L.D.) and  
11 inserting the following:

12 '**Sec. 14. 22 MRSA §1812-J, sub-§1, ¶F** is enacted to read:

13 F. "Direct care worker" means an individual who by virtue of employment generally  
14 provides to individuals direct contact assistance with personal care or activities of  
15 daily living or has direct access to provide care and services to clients, patients or  
16 residents regardless of setting. "Direct care worker" does not include a certified  
17 nursing assistant employed in that person's capacity as a certified nursing assistant.'

18 Amend the bill in section 22 in subsection 4 in the 4th line (page 6, line 29 in L.D.)  
19 by striking out the following: "shall" and inserting the following: 'must'

20 Amend the bill in section 25 in §9053 by adding at the end a new subsection to read:

21 '**35. Waiver.** "Waiver" means an exemption granted by the department to a specific  
22 individual who is banned from employment as a direct access worker for a disqualifying  
23 offense.'

24 Amend the bill in section 25 in §9054 in subsection 8 by striking out all of  
25 paragraphs F and G (page 13, lines 12 to 17 in L.D.) and inserting the following:

26 F. Specifying offenses, including offenses that may appear in publicly available  
27 criminal record information, that disqualify an individual from employment as a  
28 direct access worker, including, but not limited to, convictions and other events or  
29 notations;

30 G. Coordinating with federal and state criminal justice agencies as required to  
31 facilitate a criminal record rap back monitoring program; and

32 H. Providing for an independent process for a waiver based on a criminal conviction  
33 that gives an individual with a disqualifying offense who has been banned from  
34 employment pursuant to this chapter the opportunity to demonstrate that the ban  
35 should be waived because the individual does not pose a risk to patients, facilities,  
36 property or others.'

37 Amend the bill in section 25 in §9054 by inserting after subsection 12 the following:

38 '**13. Waiver; disqualifying offense.** In the event that no other federal or state law  
39 mandates an employment prohibition by an employer subject to this chapter, an  
40 individual who is banned from employment because of a disqualifying offense may  
41 initiate a request for a waiver under subsection 8, paragraph H in accordance with a

1 process established by rules adopted pursuant to this chapter under the following  
2 circumstances:

3 A. The individual is seeking to be employed or is currently employed by an  
4 employer subject to the requirements of this chapter;

5 B. The employer has chosen to sponsor the individual's request for the removal of  
6 the ban in order to create or maintain an employment relationship; and

7 C. The employer must attest to the department that the decision to sponsor the  
8 waiver request occurred after the employer considered the objectively reasonable  
9 factors under subsection 15 and the following factors:

10 (1) The nature and gravity of the disqualifying offense or offenses;

11 (2) The time that has passed since the disqualifying offense or offenses;

12 (3) The nature of the employment held or sought;

13 (4) Whether the criminal conduct was employment-related; and

14 (5) A reasonable conclusion that the individual does not pose a threat of harm to  
15 a protected individual or others in the care and support of the individual.

16 The waiver must be sought with respect to the prospective or continued employment by a  
17 specific employer that is willing to sponsor the individual's request. An employee  
18 seeking a waiver may be conditionally employed in accordance with section 9057,  
19 subsection 4 and section 9058, subsection 3 until the waiver is denied.

20 **14. Approval of waiver.** The department shall specify in rule the criteria for issuing  
21 a waiver for a disqualifying offense. The waiver determination is based on a  
22 consideration of the facts and circumstances of the specific individual's conviction that  
23 include the passage of time, extenuating circumstances, a demonstration of rehabilitation  
24 and the relevancy of the particular disqualifying offense with respect to the current or  
25 prospective employment with a sponsoring employer. All waivers are contingent on a  
26 final determination by the department that the employer has reasonably determined that  
27 the health and safety of a protected individual is not in jeopardy and a denial of a waiver  
28 request is not otherwise warranted in accordance with federal or state law.

29 **15. Waivers; factors.** The department shall specify in rule the minimum factors that  
30 an employer must consider when sponsoring a waiver under subsection 13. Any factors  
31 that an employer chooses to consider must be objectively reasonable in supporting the  
32 attestation that the individual to whom the waiver would apply is unlikely to cause harm  
33 to a protected individual or others in the employer's care. Objectively reasonable factors  
34 include:

35 A. The age of the individual applying for a waiver at the time of the disqualifying  
36 offense;

37 B. The amount of time that has passed since the disqualifying offense occurred;

38 C. The total number and type of disqualifying offenses;

39 D. Any proven mitigating circumstances surrounding the disqualifying offense;

1 E. Objective evidence that the individual has successfully completed a criminal  
2 rehabilitation program;

3 F. The relevance of the circumstances pertaining to the disqualifying offense with  
4 respect to the nature of the proposed employment;

5 G. The length and consistency of similar employment post-conviction if applicable;

6 H. Whether the individual is bonded under federal or state law; and

7 I. Personal references or recommendations from employers on behalf of the  
8 individual.

9 **16. Denial or revocation of waiver.** The department shall establish by rule informal  
10 and formal review procedures for denial or revocation of a waiver. Denial or revocation  
11 of waiver procedures must comply with the Maine Administrative Procedures Act and  
12 final determinations may be appealed pursuant to the Maine Administrative Procedures  
13 Act in Title 5, Part 18, Chapter 375, subchapter 4. Rules concerning the denial or  
14 revocation of waiver procedures include, but are not limited to, the following:

15 A. The process of filing a waiver request;

16 B. The time frame for filing a waiver request;

17 C. The time frame for issuing a waiver request decision;

18 D. The rules for employment during the waiver request process; and

19 E. A written determination stating the objectively reasonable factors under  
20 subsection 15 explaining the department's determination to grant, deny or revoke a  
21 waiver.

22 Rules adopted pursuant to this subsection are routine technical rules as defined in Title 5,  
23 chapter 375, subchapter 2-A.'

24 Amend the bill in section 25 in §9054 by renumbering the subsections to read  
25 consecutively.

26 Amend the bill in section 25 in §9055 in subsection 1 in the 3rd line (page 14, line 37  
27 in L.D.) by striking out the following: "\$55" and inserting the following: '\$25'

28 Amend the bill in section 25 in §9059 in subsection 1 in the last line (page 17, line 39  
29 in L.D.) by inserting after the following: "Center" the following: 'or who has not been  
30 granted a waiver as described in this chapter'

31 Amend the bill in section 25 in §9059 in subsection 3 in the 4th line (page 18, line 9  
32 in L.D.) by inserting after the following: "employer" the following: 'or a failure to obtain  
33 or maintain a waiver'

34 Amend the bill by inserting after section 25 the following:

35 '**Sec. 26. 34-A MRSA §11221, sub-§13, ¶A,** as enacted by PL 2011, c. 299, §3,  
36 is amended to read:

37 ~~A. Except as made available to the public through the bureau's Internet website~~  
38 ~~pursuant to subsection 9, the~~ The bureau may not disseminate in electronic form  
39 information about a registrant that is created, collected or maintained in electronic

1 form by or for the bureau, except as made available to the public through the bureau's  
2 Internet website pursuant to subsection 9 and made available to the Background  
3 Check Center established pursuant to Title 22, chapter 1691; and

4 **Sec. 27. 34-A MRSA §11281, sub-§12, ¶A**, as enacted by PL 2011, c. 663, §3,  
5 is amended to read:

6 A. ~~Except for information provided pursuant to subsection 2 and made available to~~  
7 ~~the public through the bureau's website pursuant to subsection 7, paragraph A, the~~  
8 The bureau may not disseminate in electronic form information about a registrant that  
9 is created, collected or maintained in electronic form by or for the bureau, except for  
10 the information provided pursuant to subsection 2 and made available to the public  
11 through the bureau's website pursuant to subsection 7, paragraph A and made  
12 available to the Background Check Center established pursuant to Title 22, chapter  
13 1691; and'

14 Amend the bill by inserting after section 26 the following:

15 '**Sec. 27. Appropriations and allocations.** The following appropriations and  
16 allocations are made.

17 **HEALTH AND HUMAN SERVICES, DEPARTMENT OF (FORMERLY DHS)**

18 **Division of Licensing and Regulatory Services Z036**

19 Initiative: Provides funding for the criminal portion of background checks.

20	<b>OTHER SPECIAL REVENUE FUNDS</b>	<b>2015-16</b>	<b>2016-17</b>
21	All Other	\$228,584	\$308,161
22			
23	OTHER SPECIAL REVENUE FUNDS TOTAL	<u>\$228,584</u>	<u>\$308,161</u>

24 **Division of Licensing and Regulatory Services Z036**

25 Initiative: Provides funding for technology costs for additional background checks.

26	<b>OTHER SPECIAL REVENUE FUNDS</b>	<b>2015-16</b>	<b>2016-17</b>
27	All Other	\$242,370	\$278,697
28			
29	OTHER SPECIAL REVENUE FUNDS TOTAL	<u>\$242,370</u>	<u>\$278,697</u>

30 **Division of Licensing and Regulatory Services Z036**

31 Initiative: Provides funding for one Social Services Manager I position and 2  
32 Identification Specialist II positions to determine applicant employment eligibility and  
33 provide guidance and assistance to agencies and facilities.

1	<b>OTHER SPECIAL REVENUE FUNDS</b>	<b>2015-16</b>	<b>2016-17</b>
2	POSITIONS - LEGISLATIVE COUNT	3.000	3.000
3	Personal Services	\$157,254	\$216,681
4	All Other	\$43,703	\$56,628
5			
6	OTHER SPECIAL REVENUE FUNDS TOTAL	<u>\$200,957</u>	<u>\$273,309</u>

7	<b>HEALTH AND HUMAN SERVICES,</b>		
8	<b>DEPARTMENT OF (FORMERLY DHS)</b>		
9	<b>DEPARTMENT TOTALS</b>	<b>2015-16</b>	<b>2016-17</b>
10			
11	OTHER SPECIAL REVENUE FUNDS	\$671,911	\$860,167
12			
13	DEPARTMENT TOTAL - ALL FUNDS	<u>\$671,911</u>	<u>\$860,167</u>
14			

15 Amend the bill by relettering or renumbering any nonconsecutive Part letter or  
 16 section number to read consecutively.

17 **SUMMARY**

18 This amendment makes the following changes to the bill.

- 19 1. It amends and standardizes the definition of "direct care worker."
- 20 2. It clarifies that facilities or providers licensed under Title 22, chapter 419 are  
 21 required to conduct a background check for individuals employed in positions that have  
 22 direct access to a consumer's property, personally identifiable information, financial  
 23 information or resources in accordance with federal and state laws.
- 24 3. It requires a training program for certified nursing assistants or direct care workers  
 25 either to pay for or secure a background check.
- 26 4. It adds a process for an individual who has a disqualifying offense to secure a  
 27 waiver from the employment ban.
- 28 5. It clarifies that information provided through the Maine Sex Offender Registry is  
 29 available to the Background Check Center.
- 30 6. It adds an appropriations and allocations section.

31 **FISCAL NOTE REQUIRED**

32 **(See attached)**