STATE OF NEW YORK

3878

2017-2018 Regular Sessions

IN ASSEMBLY

January 30, 2017

Introduced by M. of A. LENTOL -- read once and referred to the Committee on Codes

AN ACT to amend the general business law, the mental hygiene law, the public health law, the social services law and the executive law, in relation to the review of criminal history information by authorized employers; and creates the commission on criminal history information

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section 171 of the general business law is amended by adding two new subdivisions 12 and 13 to read as follows:

12. "In-home child care provider" shall mean any person who cares for one or more children in the home of one of such children regardless of the number of hours per week that such child care is provided. A person shall be considered an "in-home child care provider" whether or not such person lives in or outside the home of the child/children for whom he/she is providing care.

13. "In-home child care placement agency" shall mean any employment agency which, for a fee, procures or attempts to procure employment for in-home child care providers whether or not the agency procures or attempts to procure other types of employment or engagements.

§ 2. The general business law is amended by adding a new section 184-b to read as follows:

§ 184-b. Review of criminal history information concerning certain persons available for placement as in-home child care providers. 1. An in-home child placement agency may request and is authorized to receive from the division of criminal justice services criminal history information, as such phrase is defined in paragraph a of subdivision one of section eight hundred forty-five-c of the executive law, concerning persons seeking employment as an in-home child care provider pursuant to such agency.

EXPLANATION--Matter in *italics* (underscored) is new; matter in brackets [-] is old law to be omitted.

LBD03822-02-7

2. Access to and the use of such information shall be governed by section eight hundred forty-five-c of the executive law.

§ 3. The mental hygiene law is amended by adding a new section 16.39 to read as follows:

§ 16.39 Review of criminal history information concerning prospective employees.

(a) Every provider of services issued an operating certificate pursuant to this article, except a "department facility" as that term is defined in subdivision seven of section 1.03 of this chapter, shall request and is authorized to receive from the division of criminal justice services criminal history information, as such phrase is defined in paragraph a of subdivision one of section eight hundred forty-five-c of the executive law, concerning each prospective employee of such entity who has or will have direct contact or the potential for direct contact with any patient or client of such entity.

(b) Access to and the use of such information shall be governed by section eight hundred forty-five-c of the executive law.

§ 4. The mental hygiene law is amended by adding a new section 31.39 to read as follows:

§ 31.39 Review of criminal history information concerning prospective employees.

(a) Every provider of services issued an operating certificate pursuant to this article, except a "department facility" as that term is defined in subdivision seven of section 1.03 of this chapter, shall request and is authorized to receive from the division of criminal justice services criminal history information, as such phrase is defined in paragraph a of subdivision one of section eight hundred forty-five-c of the executive law, concerning each prospective employee of such entity who has or will have direct contact or the potential for direct contact with any patient or client of such entity.

(b) Access to and the use of such information shall be governed by section eight hundred forty-five-c of the executive law.

§ 5. Article 28-D of the public health law is amended by adding a new title 2-A to read as follows:

TITLE II-A

REVIEW OF CRIMINAL HISTORY INFORMATION CONCERNING CERTAIN PROSPECTIVE EMPLOYEES OF NURSING HOMES AND HOME CARE SERVICES AGENCIES

Section 2896-p. Review of criminal history information concerning certain prospective employees of nursing homes and home care services agencies.

§ 2896-p. Review of criminal history information concerning certain prospective employees of nursing homes and home care services agencies. 1. Every certified home health agency, licensed home care services agency or long term home health care program certified under article thirty-six of this chapter, residential health care facility licensed under this article, home care services agency exempt from certification or licensure under article thirty-six of this chapter, and hospice as defined in section four thousand two of this chapter shall request and is authorized to receive from the division of criminal justice services criminal history information, as such phrase is defined in paragraph a of subdivision one of section eight hundred forty-five-c of the executive law, concerning each prospective employee of such entity who has or

will have direct contact or the potential for direct contact with any patient or client of such entity.

2. Access to and the use of such information shall be governed by section eight hundred forty-five-c of the executive law.

§ 6. The social services law is amended by adding a new section 390-k to read as follows:

§ 390-k. Review of criminal history information regarding child care providers. 1. Every child day care provider required to be licensed or registered with the department pursuant to section three hundred ninety of this title shall request and is authorized to receive from the division of criminal justice services criminal history information, as such phrase is defined in paragraph a of subdivision one of section eight hundred forty-five-c of the executive law, concerning each prospective employee of such entity who has or will have direct contact or the potential for direct contact with any child under the care of such provider.

2. A program, school or facility described in subparagraph (ii) of paragraph (a) of subdivision one of section three hundred ninety of this title may request and is authorized to receive from the division of criminal justice services criminal history information, as such phrase is defined in paragraph a of subdivision one of section eight hundred forty-five-c of the executive law, concerning each prospective employee of such entity who has or will have direct contact or the potential for direct contact with any child under the care of such provider.

3. Access to and the use of criminal history information pursuant to subdivisions one and two of this section shall be governed by section eight hundred forty-five-c of the executive law.

§ 7. Subdivision 9 of section 835 of the executive law, as separately amended by chapters 14 and 155 of the laws of 2012, is amended to read as follows:

9. "Qualified agencies" means courts in the unified court system, the administrative board of the judicial conference, probation departments, sheriffs' offices, district attorneys' offices, the state department of corrections and community supervision, the department of correction of any municipality, the financial frauds and consumer protection unit of the state department of financial services, the office of professional medical conduct of the state department of health for the purposes of section two hundred thirty of the public health law, the child protective services unit of a local social services district when conducting an investigation pursuant to subdivision six of section four hundred twenty-four of the social services law, the office of Medicaid inspector general, the temporary state commission of investigation, the commission on criminal history information, police forces and departments having responsibility for enforcement of the general criminal laws of the state, the Onondaga County Center for Forensic Sciences Laboratory when acting within the scope of its law enforcement duties and the division of forensic services of the Nassau county medical examiner's office when acting within the scope of its law enforcement duties.

§ 8. The executive law is amended by adding three new sections 845-c, 845-d and 845-e to read as follows:

§ 845-c. Requests for criminal history information by authorized employers. 1. As used in this section:

a. "Criminal history information" shall mean a record of pending criminal charges, criminal convictions which are not vacated or reversed, and certificates filed pursuant to subdivision two of section seven hundred five of the correction law, and which the division of

criminal justice services is authorized to maintain pursuant to subdivision six of section eight hundred thirty-seven of this article.

b. "Employer" shall mean a person or entity authorized to request criminal history information pursuant to subdivision two of this section.

c. "Prospective employee" shall mean a person who files an application for employment and the employer has a reasonable expectation to hire such person, and for whom the employer is authorized to request criminal history information pursuant to subdivision two of this section.

d. "Authorized person" shall mean one individual designated by an employer who is authorized to request, receive and review criminal history information pursuant to this section, except that where the number of applications received by an employer is so great that one person cannot reasonably perform the functions of the authorized person, an employer may designate one or more additional persons to serve as an authorized person pursuant to this section.

2. Where an employer is authorized or required to request and review criminal history information pursuant to section one hundred eighty-four-b of the general business law, section 16.39 or 31.39 of the mental hygiene law, section twenty-eight hundred ninety-six-p of the public health law or section three hundred ninety-k of the social services law, such employer shall proceed pursuant to the provisions of this section and in a manner consistent with the provisions of article twenty-three-A of the correction law, subdivisions fifteen and sixteen of section two hundred ninety-six of this chapter and all other applicable laws.

3. a. An employer authorized to request and receive criminal history information pursuant to subdivision two of this section shall designate one authorized person who shall request, receive and review criminal history information on behalf of such employer pursuant to this section. Only such authorized person and the prospective employee to whom such criminal history information relates shall have access to such information; provided, however, that criminal history information received by an employer may be disclosed to other persons who are directly participating in the decision to employ such prospective employee and provided further that such other persons shall also be subject to the confidentiality requirements and all other provisions of this section. Each employer shall specifically identify to the division, in writing, in advance of disclosure, the authorized person and each other such agent or employee of the employer who is permitted to have access to criminal history information pursuant to this section.

b. An employer requesting criminal history information pursuant to this section shall do so by completing a form developed for such purpose by the division. Such form shall include a sworn statement of the authorized person certifying that: (i) the person whose criminal history information is requested has applied to be an employee for whom criminal history information is available by law; (ii) the specific type of prospective employment and, where applicable, prospective employment duties which qualify the employer to review criminal history information; (iii) such criminal history information will be used by the employer solely for purposes authorized by law; and (iv) the employer and its agents and employees are aware of and will abide by the confidentiality requirements and all other provisions of this article.

c. An employer authorized to request criminal history information pursuant to this section may inquire of the prospective employee in the manner authorized by subdivision sixteen of section two hundred ninety-

six of this chapter. Prior to requesting such information, an employer shall:

(i) inform the prospective employee in writing that the employer is authorized or, where applicable, required to request his or her criminal history information from the division and review such information pursuant to this section;

(ii) inform the prospective employee that he or she has the right to obtain, review and seek correction of his or her criminal history information pursuant to regulations and procedures established by the division;

(iii) obtain the signed, informed consent of the prospective employee on a form supplied by the division of which indicates that such person has:

(a) been informed of the right and procedures necessary to obtain, review and seek correction of his or her criminal history information;

(b) been informed of the reason for the request for his or her criminal history information;

(c) consented to such request for a report; and

(d) supplied on the form a current mailing or home address for the prospective employee.

Upon receiving such written consent, the employer shall receive or obtain the fingerprints of such prospective employee pursuant to regulations established by the division.

d. A prospective employee may withdraw his or her application for employment pursuant to this section, without prejudice, at any time before employment is offered or declined, regardless of whether the prospective employee or employer has reviewed such prospective employee's criminal history information.

e. The division shall provide requested criminal history information within fifteen business days after the receipt of a request pursuant to this section if such request is:

(i) made by an authorized person on behalf of an employer authorized to receive criminal history information pursuant to subdivision two of this section;

(ii) accompanied by the completed forms described in this subdivision;

(iii) accompanied by fingerprints of the prospective employee obtained pursuant to this subdivision.

f. Criminal history information provided by the division pursuant to this section shall be furnished only by mail or other method of secure and confidential delivery, addressed to the authorized person. Such information and the envelope in which it is enclosed shall be prominently marked "confidential", and shall at all times be maintained by the employer in a secure place.

g. Any negligent disclosure of a confidential report, received by an employer pursuant to this section, to a person not authorized to review it shall entitle the subject of such report to an award of compensatory damages from the employer, together with the costs of the action. Any reckless disclosure of a confidential report, received by an employer pursuant to this section, to a person not authorized to review it shall entitle the subject of such report to three times the award of compensatory damages from the employer, together with the costs of the action. Any intentional disclosure of a confidential report, received by an employer pursuant to this section, to a person not authorized to review it shall entitle the subject of such report to three times the award of compensatory damages from the employer, together with the costs of the action, and such plaintiff may recover punitive damages as well.

h. Fingerprints received by the division pursuant to this section shall be used only to assist the division in providing criminal history information to authorized employers pursuant to this section. Such fingerprints shall be returned to the person who is the subject of such fingerprints within ninety days after the division supplies the requested criminal history information or receives notice that the person has withdrawn the application for employment, or at such other time as authorized pursuant to paragraph a of subdivision two of section eight hundred forty-five-e of this article.

4. Notwithstanding the provisions of subdivision eight-a of section eight hundred thirty-seven of this article or any other law, no fee shall be charged for any criminal history report provided pursuant to this section or subdivision twenty of section twenty-five hundred ninety-h of the education law.

5. The commissioner shall, subject to the approval of the commission on criminal history information, promulgate all rules and regulations necessary to implement the provisions of this section, which shall include convenient procedures for persons to promptly verify the accuracy of their criminal history information and, to the extent authorized by law, to have access to relevant documents related thereto. In addition, any such rule or regulation promulgated by the commissioner prior to the effective date of section eight hundred forty-five-e of this article shall be ineffective and deemed repealed if disapproved by the commission, when formed, by majority vote.

6. Nothing herein shall be construed or interpreted to alter the provisions of article twenty-three-A of the correction law or section two hundred ninety-eight of this chapter, nor in any way diminish the integrity of collective bargaining agreements negotiated between an employer and any certified or authorized collective bargaining agent for an employee or prospective employee, nor to diminish rights which accrue to such employees or prospective employees pursuant to such agreements.

§ 845-d. Commission on criminal history information. There is hereby created in the executive department the commission on criminal history information, which shall consist of the following twelve members who shall be appointed no less than ninety days after the effective date of this section:

1. Three members shall be appointed by the governor:

a. one such member shall be the commissioner;

b. one such member shall be appointed on the recommendation of a statewide organization of employers, whose membership includes employers, as such term is defined in paragraph b of subdivision one of section eight hundred forty-five-c of this article;

c. one such member shall be a representative of labor, who shall be appointed on the recommendation of the New York State Federation of the AFL-CIO;

2. Three members shall be appointed by the chief judge of the court of appeals:

a. one such member shall be a judge or former judge who has substantial experience in presiding over courts of criminal jurisdiction;

b. one such member shall be an academic expert with significant experience in computer hardware and software applications and computerized access to database information;

c. one such member shall be an expert in privacy issues;

3. Two members shall be appointed by the temporary president of the senate;

4. Two members shall be appointed by the speaker of the assembly;

5. One member shall be appointed by the minority leader of the senate; and

6. One member shall be appointed by the minority leader of the assembly.

§ 845-e. Powers and duties of the commission on criminal history information. 1. After review and study and inviting and receiving any public comment, the commission on criminal history information, hereinafter referred to as the commission, shall promulgate standards and regulations governing the procedures of the division pursuant to section eight hundred forty-five-c of this article, including the provision of criminal history information to authorized employers and employees pursuant to such section. The standards and regulations promulgated by the commission shall include procedures designed to assure that:

a. criminal history information provided to authorized employers and prospective employers includes only such information as may be disclosed by law and is accurate, up to date and provided in a timely manner;

b. up-to-date status information is maintained so that cases which have been disposed of are accurately reported;

c. to the maximum extent possible, all provisions of law concerning the confidentiality of fingerprints and criminal history information are observed by the division, by employers and prospective employers authorized by law to review such information, and by their agents and assigns;

d. frequent audits and reviews of the criminal history database, maintained pursuant to subdivision six of section eight hundred thirty-seven of this article, are conducted by a qualified, independent, non-governmental entity, the results of which shall be made available to the public, and which shall assess and monitor the accuracy, completeness and timeliness of database information, including the division's compliance with all applicable laws with respect to the maintenance of such records.

2. For each category of employers authorized to have access to criminal history information pursuant to section eight hundred forty-five-c of this article, the commission shall, after review and study and inviting and receiving any public comment, promulgate standards and procedures for the following matters:

a. whether, instead of returning fingerprints upon completion of the initial search, the division shall subject all or selected categories of the fingerprints obtained by the division pursuant to such section to the division's full search and retain procedures; and

b. whether such employer, or any one or more subcategory of such person or entity's prospective employees, shall, in addition to such authorized or required state criminal history checks, be authorized or required to submit or cause the submission of fingerprints to the federal bureau of investigation for a nationwide criminal history search concerning such person pursuant to applicable federal laws.

3. No member of the commission shall be disqualified from holding any public office or employment, nor shall he or she forfeit any such office or employment by virtue of his or her appointment hereunder. Members of the commission shall receive no compensation for their services but shall be allowed their actual and necessary expenses incurred in the performance of their functions hereunder. A member of the commission may be removed by the appointing authority only for good cause, after notice and an opportunity to be heard. Vacancies shall be filled in the same manner as original appointments.

4. The commission shall be authorized to:

a. call upon any court, agency, department, office, division or public authority of this state to supply it with such information and assistance as the commission deems necessary to discharge its responsibilities. Each court, agency, department, office, division and public authority of this state shall cooperate with the commission and furnish such information and assistance as it requests to accomplish its purposes;

b. conduct public hearings, hear the testimony of witnesses and require the production of any documents the commission deems reasonably necessary to carry out its responsibilities;

c. appoint an executive director, a counsel or counsels and such other staff as the commission determines necessary to carry out its responsibilities;

d. contract with any state or private entity for the provision of such services as the commission determines to be necessary; and

e. take such other actions not inconsistent with the purposes of this section as shall enable the commission to carry out its functions.

5. Matters before the commission shall be decided by majority vote, except that no action or decision may be approved by the commission pursuant to paragraph a or b of subdivision two of this section unless such action or decision is approved by the affirmative votes of two-thirds or more of the members of such commission. A chairperson of the commission shall be selected from among the members of the commission, by majority vote.

6. The commission shall issue an interim report to the governor, chief judge of the court of appeals, the temporary president of the senate, the speaker of the assembly and the minority leaders of the senate and assembly on or before September first, two thousand eighteen and annual reports on each September first thereafter in accordance with the provisions of this section. Such report shall also be made available to the public.

§ 9. Subdivision 8-a of section 837 of the executive law, as amended by chapter 561 of the laws of 2006, is amended to read as follows:

8-a. Charge a fee when, pursuant to statute or the regulations of the division, it conducts a search of its criminal history records and returns a report thereon in connection with an application for employment or for a license or permit, except as provided in subdivision four of section eight hundred forty-five-c of this article. The division shall adopt and may, from time to time, amend a schedule of such fees which shall be in amounts determined by the division to be reasonably related to the cost of conducting such searches and returning reports thereon but, in no event, shall any such fee exceed twenty-five dollars and an additional surcharge of fifty dollars. The comptroller is hereby authorized to deposit such fees into the general fund, provided, however, that the monies received by the division of criminal justice services for payment of the additional surcharge shall be deposited in equal amounts to the general fund and to the fingerprint identification and technology account. Notwithstanding the foregoing, the division shall not request or accept any fee for searching its records and supplying a criminal history report pursuant to section two hundred fifty-one-b of the general business law relating to participating in flight instruction at any aeronautical facility, flight school or institution of higher learning.

§ 10. This act shall take effect immediately provided that sections one through six of this act and section 845-e of the executive law as added by section eight of this act shall take effect on the ninetieth

day after this act shall have become a law. Effective immediately, any rules and regulations of the division of criminal justice services necessary to implement the provisions of this act may be promulgated prior to such effective date.