

RULE PROPOSALS

HEALTH AND SENIOR SERVICES

SENIOR SERVICES AND HEALTH SYSTEMS BRANCH

DIVISION OF HEALTH FACILITIES EVALUATION AND LICENSING

Proposed Readoption: *N.J.A.C. 8:43I*

**Criminal Background Investigations: Nurse Aides, Personal Care Assistants
and Assisted Living Administrators**

Authorized By: Heather Howard, Commissioner, Department of Health and Senior Services.

Authority: *N.J.S.A. 26:2H-7.21* and *26:2H-86*.

Calendar Reference: See Summary below for explanation of exception to calendar requirement.

Proposal Number: PRN 2009-350.

Written comments on the proposal must be postmarked on or before January 15, 2010 and mailed to:

Ruth Charbonneau, Director
Office of Legal and Regulatory Affairs
Office of the Commissioner
Department of Health and Senior Services
PO Box 360
Trenton, NJ 08625-0360

The agency proposal follows:

Summary

N.J.A.C. 8:43I, which addresses criminal history background checks for nurse aides, personal care assistants and assisted living administrators is scheduled to expire on May 14, 2010, pursuant to *N.J.S.A. 52:14B-5.1c*. *N.J.A.C. 8:43I* was first adopted by the Department of Health and Senior Services in 1999. The expiration date of the rules was extended by gubernatorial directive from April 19, 2004 to October 19, 2004. See *36 N.J.R. 2421(a)*. *N.J.A.C. 8:43I* expired on October 19, 2004. The rules were then adopted as new rules effective November 15, 2004. See. *36 N.J.R. 3041(a), 5129(a)*. At the time the law took effect, it only required that those

persons seeking initial certification as a nurse aide or personal care assistant submit to a criminal history background check. Pursuant to P.L. 2000, c. 20, all currently certified nurse aides and personal care assistants are required to complete a criminal history background check as a condition of recertification of those credentials. P.L. 2002, c. 25 requires all applicants for certification or recertification as an assisted living administrator to submit to the criminal history background check process. The rules proposed for readoption would continue to establish the process by which interested individuals can complete the required fingerprint-supported check, as well as the process for obtaining a determination of rehabilitation if the individual has been convicted of a disqualifying offense. *N.J.S.A. 26:2H-83* sets forth classes of offenses and crimes that disqualify a person from certification as a nurse aide, personal care assistant or assisted living administrator. The rules proposed for readoption would continue to identify the classes of offenses enumerated at *N.J.S.A. 26:2H-83*, and list the required steps that an applicant must take to file for a determination of rehabilitation. Further, the rules proposed for readoption would continue to provide the assessment criteria the Department will continue to use in weighing a request for a determination of rehabilitation. The rules proposed for readoption would continue to define the steps an applicant needs to take to obtain a conditional certification that would permit the applicant to work during the course of the background investigation, and contain penalty provisions applicable to individuals who file false applications for conditional certification. The rules proposed for readoption would continue to establish the administrative hearing options available for persons who are disqualified from certification. Finally, the rules proposed for readoption would continue to provide for the criminal background investigation registry the Department is required to keep on [page=4169] all applicants for criminal background investigations. Following is a summary of the rules proposed for readoption.

Subchapter 1 establishes the scope of the rules, authority declaration and definitions of terms and phrases used in the rules and the method of obtaining materials, including applications and a statement of compliance with the Privacy Act of 1974, regarding the submission of social security numbers.

Subchapter 2 addresses the Criminal Background Investigation process for the certification and recertification of nurse aides, addresses the application and fingerprinting process, the disqualifying offenses set forth by category, requests for a determination of rehabilitation if an applicant has been convicted of a disqualifying offense or crime, the issuance of a conditional certification, procedures by which individuals convicted of a disqualifying offense after they receive initial clearance from the Department are handled, the hearing rights afforded to an individual denied certification as a nurse aide, penalties for the submission of a false sworn statement, conditions that the applicant must meet in order to obtain full certification and the circumstances that would cause the Department to suspend the criminal background investigation of any applicant.

Subchapter 3 establishes standards for the certification and recertification of personal care assistants. The subchapter establishes standards for the application and fingerprinting process, the disqualifying offenses by category, requests for a determination of rehabilitation if an applicant has been convicted of a disqualifying offense or crime, issuance of a conditional certification, procedures by which individuals convicted of a disqualifying offense after they receive initial clearance from the Department are handled, the hearing rights afforded to an individual denied certification as a personal care assistant, penalties for the submission of a false sworn statement, conditions that must be met by the personal care assistant in order to obtain full certification and the circumstances that would cause the Department to suspend the criminal background investigation of any applicant.

Subchapter 4 establishes standards for the certification and recertification of assisted living administrators. Assisted living administrators are persons the Department certifies to serve as administrators of assisted living facilities or assisted living programs, but who are not licensed solely as nursing home administrators by the Department, pursuant to P.L. 2003, c. 199. The subchapter establishes standards for the application and fingerprinting processes, identifies disqualifying offenses by category, establishes the procedure to file a request for a determination of rehabilitation if the applicant has been convicted of a disqualifying offense or crime, issuance of a conditional certification, procedures by which individuals convicted of a

disqualifying offense after they receive initial clearance from the Department are handled, articulates the hearing rights afforded to an individual denied certification as a nurse aide, establishes penalties for the submission of false sworn statements, establishes conditions that must be met by the prospective assisted living administrator to obtain full certification, identifies the circumstances which will cause the Department to suspend the criminal background investigation on any applicant and provides that the Department may withhold the release of the results of any criminal background investigation if the required fee is not paid.

Subchapter 5 establishes the criminal background registry that the Department maintains pursuant to P.L. 1997, c. 100, and lists the data elements that are part of that registry. The subchapter identifies the information that is not part of the public registry, and identifies the statutes that preclude the disclosure of this information.

Because the Department has provided a 60-day comment period for this notice of proposal, this notice is excepted from the calendar requirement, pursuant to *N.J.A.C. 1:30-3.3(a)5*.

Social Impact

The Department believes that the Legislature intended to enhance the safety of the residents in long-term care and assisted living facilities and/or assisted living programs by screening persons from direct resident care roles who have been convicted of certain crimes and offenses. The rules proposed for readoption have implemented and would continue to codify the statutory mandate for criminal background investigations. The rules proposed for readoption have had, and would continue to have, a direct impact on persons seeking certification or recertification as a nurse aide, personal care assistant and assisted living administrator. The rules proposed for readoption have had, and would continue to have, a direct impact on those facilities seeking to hire or retain these persons, as well as an indirect impact on the residents that are served by these persons.

Residents of long-term care facilities and assisted living facilities are vulnerable to crimes of opportunity. The persons subject to criminal background checks this chapter requires have access to the person and property of the residents, often in an unsupervised environment. It is of extreme importance that these caregivers not have

a predisposition to any offense that could jeopardize the residents to whom they provide care. At the same time, there must be a fair process for permitting those persons who can demonstrate rehabilitation to obtain the certification they seek. The law in this case applies a significant burden on the applicant. Any person who has been convicted of a disqualifying offense must affirmatively establish, by the production of clear and convincing evidence, that they are sufficiently rehabilitated not to be a threat to the residents they serve. The rules proposed for readoption have established, and would continue to establish, processes for the fair and impartial hearings that are afforded to those persons denied certification.

The rules proposed for readoption would continue to have an impact on the approximately 8,000 nurse aide applicants and 17,000 nurse aide renewal applicants each year. The rules proposed for readoption would have an impact on approximately 600 assisted living administrators and applicants each year, and less than 50 personal care assistant applicants each year. Additionally, there are approximately 650 facilities (long-term care, nursing homes, assisted living facilities or programs and hospitals) that employ these personnel.

Economic Impact

The rules proposed for readoption have had and would continue to have a direct economic impact on individuals seeking certification or recertification as assisted living administrators. State law, specifically P.L. 2002, c. 25, requires the assisted living administrator to assume the cost of the background check. The New Jersey State Police (NJSP) set the costs of the State portion of the background checks pursuant to *N.J.A.C. 13:59-1.3* and the Federal portion of the fee is set by the Federal Bureau of Investigation pursuant to *28 CFR 20.31*. There is an additional cost for the processing of the fingerprint appointment pursuant to a Statewide contract the NJSP has entered into for these services. The cost for a first-time applicant is currently set at \$ 70.25. A follow-up check (renewal of a license or certification after the initial background check) is currently set at \$ 25.30.

The Department bears the cost of the background check on nurse aides and personal care assistants, pursuant to P.L. 2000, c. 20. The rules proposed for

readoption would continue to contain a provision for a potential fine of \$ 1,000 for submitting a false sworn statement.

The Department does not expect health care facilities or programs to incur a significant economic impact on as a result of the rules proposed for readoption, as costs are borne either by the applicants who are assisted living administrators or the Department.

Federal Standards Statement

A Federal standards analysis is not required because the rules proposed for readoption are not the subject of any Federal regulation or statute beyond that cited above setting the Federal portion of the background investigation fee.

Jobs Impact

The rules proposed for readoption have not had an impact in the generation or loss of jobs. The Department does not anticipate that the rules proposed for readoption would result in the generation or loss of jobs.

Agriculture Industry Impact

The rules proposed for readoption have not had and would not have an impact on the agriculture industry in New Jersey.

Regulatory Flexibility Analysis

The rules proposed for readoption have imposed and would continue to impose recordkeeping requirements on small businesses as defined by [page=4170] the Regulatory Flexibility Act, *N.J.S.A. 52:14B-16* et seq. The rules would require recordkeeping on a facility in the event a conditionally certified candidate is disqualified, is convicted of a new disqualifying offense while certified and if the facility requests and receives a certification extension from the Department. Specifically, *N.J.A.C. 8:43I-2.5*, *3.5* and *4.5* require an employer to remove a conditionally certified person from direct care responsibilities or, in the case of an assisted living administrator (at *N.J.A.C. 8:43I-4.5*), administrator duties. The Department anticipates that facilities would need to maintain records to document such removals, and, in the case of an assisted living administrator, to notify the Department of the removal. *N.J.A.C. 8:43I-2.6*, *3.6* and *4.6* require employers to remove a certified nurse aide, personal care assistant or assisted living administrator

if the Department notifies the employer that the person is disqualified due to a new criminal conviction. In this case, *N.J.A.C. 8:43I* would continue to require each employer to notify the Department as to the date of termination of the person. As these processes are mandated by the enabling statute for these rules, *N.J.S.A. 26:2H-83* et seq., the Department cannot apply special considerations to small businesses.

The recordkeeping should not be overly burdensome and should not require the hiring of additional personnel as personnel records are already maintained by these businesses.

Smart Growth Impact

The rules proposed for readoption have not had and would not have an impact upon the achievement of smart growth and implementation of the State Development and Redevelopment Plan.

Housing Affordability Impact

The rules proposed for readoption have had and would continue to have an insignificant impact on affordable housing in New Jersey and there is an extreme unlikelihood that the regulation would evoke a change in the average costs associated with housing because the rules establish standards for the conduct of criminal background checks for nurse aides, personal care assistants and assisted living administrators.

Smart Growth Development Impact

The rules proposed for readoption have had and would continue to have an insignificant impact on smart growth and there is an extreme unlikelihood that the regulation would evoke a change in housing production in Planning Areas 1 or 2 or within designated centers under the State Development and Redevelopment Plan in New Jersey because the rules establish standards for the conduct of criminal background checks for nurse aides, personal care assistants and assisted living administrators.

Full text of the rules proposed for readoption may be found in the New Jersey Administrative Code at *N.J.A.C. 8:43I*.