



COMMISSIONER
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October 18, 2016

To: All Nursing Facilities (NFs)

Subject: Provider Letter No. 16-39 - Information Related to Review of Criminal History, Nurse Aide Registry (NAR), and Employee Misconduct Registry (EMR) on Facility Job Applicants and Employees (Replaces Provider Letter 15-34)

The Texas Department of Aging and Disability Services (DADS) is re-issuing this letter to separate information pertaining to NFs from the other DADS regulated programs.

[Chapter 250 of the Texas Health and Safety Code \(THSC\)](#), NAR and Criminal History Checks of Employees and Applicants for Employment in Certain Facilities Serving the Elderly or Persons with Disabilities, was enacted in 1993. From 1995 through 2003, the statute was amended several times. This letter conveys information on issues and common questions related to the requirement to perform criminal history checks and related checks of the NAR and EMR on job applicants and employees.

THSC Chapter 250 requires certain long-term care NFs to verify the employability of individuals by conducting a criminal history record check within 72 hours of hiring an employee or, in the case of nursing homes and assisted living facilities, within 24 hours.

NFs are authorized by THSC Chapter 250 (through an amendment in 2001) to obtain criminal history record information directly from the [Texas Department of Public Safety \(DPS\)](#). THSC Chapter 250 also allows the option of using a private agency to obtain DPS crime record information. A search of the DPS crime record database satisfies the minimum requirement under THSC Chapter 250 for a criminal history check on job applicants and employees. Private agencies may offer search possibilities that exceed the minimum requirement, such as obtaining out-of-state crime record information, which is ordinarily not contained in DPS' databases.

All NFs licensed by DADS are also required to check the EMR and the NAR to determine the employability of a job applicant before making an offer of employment to the applicant. In addition to the initial verification of employability, THSC §250.003 requires a facility or an individual employer or a financial management services agency on behalf of an individual employer to annually search the NAR and the EMR to determine whether an employee of the facility or of an individual employer is designated in either registry as having abused, neglected, or exploited a consumer or an individual using the consumer directed service option; and maintain in the facility's or individual employer's books and records, a copy of the results of the annual search.

1. What types of facilities or agencies are covered under THSC Chapter 250?

THSC §250.001 states:

(3) "Facility" means:

- (A) a nursing home, custodial care home, or other institution licensed by the Department of Aging and Disability Services under Chapter 242;
- (B) an assisted living facility licensed by the Department of Aging and Disability Services under Chapter 247;
- (C) a home and community support services agency licensed under Chapter 142;
- (D) an adult day care facility licensed by the Department of Aging and Disability Services under Chapter 103, Human Resources Code;
- (E) a facility for persons with mental retardation licensed under Chapter 252;
- (G) a facility that provides mental health services and that is operated by or contracts with the Department of State Health Services;
- (H) a local mental health or mental retardation authority designated under Section 533.035;
- (I) a person exempt from licensing under Section 142.003(a)(19);
- (L) a prescribed pediatric extended care center licensed by the Department of Aging and Disability Services under Chapter 248A.

2. On which job applicants and staff personnel are providers required to perform criminal history checks?

NFs are required to check the criminal history record of **all** employees and applicants (to whom an offer of employment is made).

3. Which convictions prohibit employment?

The convictions that prohibit employment are outlined in THSC §250.006. The convictions listed in THSC §250.006(a) constitute a permanent bar to employment. The convictions listed in THSC §250.006(b) bar employment for a period of five years from the date of conviction, with the exception of burglary [Section 30.02 (burglary of a habitation or a building) of the Penal Code], which is a permanent bar to employment in nursing homes and assisted living facilities, as outlined in THSC §250.006(c).

In the case of offenses that are not automatic bars to employment, facilities are to consider whether those offenses represent a "contraindication to employment," per §250.003(a) and (c).

4. Can an individual be employed in an "emergency situation" without a criminal history check?

THSC §250.003(b) allows a NF to hire a person pending the results of a criminal history check "on a temporary or interim basis...in an emergency requiring immediate employment." A criminal history check must be requested with 72 hours of employment, or, in the case of nursing homes and assisted living facilities, within 24 hours.

Given the availability of real-time online criminal history checks, providers should be able,

in most cases, to get the results of a criminal history check before the decision to hire is made.

5. Should a NF notify applicants/employees of criminal history checks?

THSC §250.005(a) requires that if a facility, financial management services agency, or individual employer believes that a conviction may bar a person from employment, in a facility or by an individual employer under THSC §250.006, or may be a contraindication to employment, the facility must notify the applicant or employee. THSC §250.005(b) requires that DPS give a person notified under subsection (a) the opportunity to be heard concerning the accuracy of the criminal history record information and to notify the facility or individual employer if inaccurate information is discovered.

6. How can a provider obtain crime record information from DPS?

DPS maintains three websites that provide criminal history information. The information maintained on these sites is part of DPS' Computerized Criminal History System, the statewide repository of criminal history data reported to DPS by local criminal justice agencies in Texas. DPS information generally does not include records of offenses in other states, nor does it include federal offenses or offenses under military law. [Access the three sites online.](#)

The public Criminal History Conviction Database site contains public record information (convictions and deferred adjudications only) and is available to the general public. Use of this site requires completion of an online application, the establishment of a user account, and the purchase of credits to pay for searches.

The Sex Offender Registry website includes public sex offender registration information submitted to DPS by local law enforcement agencies. A search of the Sex Offender Registry does not require a user account and there is no fee.

The Crime Records Service Secure Site is restricted. Access is available only to legislatively authorized government entities, criminal justice agencies, and legislatively authorized private entities. Use of this site requires completion of an online application, the creation of a user account; and the purchase of credits to pay for searches. The NFs specified in THSC §250.001(3) are authorized to access this site to obtain criminal history record information on the individuals described in THSC §250.002(a)(1)(2)(3). This site provides the most complete criminal history information and the fee for searches is approximately two-thirds less than the fee at the public site. Some providers regulated by DADS use this site to do their criminal history searches when the searches are authorized under THSC Chapter 250.

The criminal record reports on individuals run on the Crime Records Service Secure Site typically give identification information (including alias names), arrest details (including dates and arresting agency), information on charges (including the arrest offense, statute citation reference, level of offense, and the arrest disposition), and court record information (including final pleading, disposition and disposition date, and sentencing information, if convicted). On occasion, the data on a report may appear incomplete or missing; in most cases, the reason for this is that the local law enforcement agency or court simply has not yet

reported the information to DPS. DPS staff, upon request, will contact local authorities to obtain the unreported information.

The key information on criminal record reports that should be reviewed by providers is the statute citation reference (to see if the offense matches one of the offenses listed in THSC §250.006) and the disposition data (to determine if the individual was convicted of a listed offense). NFs should also be mindful of the provision in THSC §250.003(a) and (c) that advises against the hiring of individuals who have convictions (other than those which automatically bar) that would be a “contraindication to employment with the consumers the facility serves.”

If a criminal record report appears to be incomplete (e.g., there is no disposition data), or if there is a question about any of the information (numbers, abbreviations, acronyms, etc.) on the report, providers can contact DPS staff for clarification or to request that DPS obtain the disposition data. The main phone number for the DPS Criminal History Inquiry Unit is (512) 424-2474. The number for the Error Resolution Department (the department that obtains and verifies information such as disposition data) is (512) 424-7256. Several crime records technicians are usually available by phone. NFs with questions about criminal record reports should not hesitate to contact DPS if they need clarification or additional information.

7. Is crime record information obtained from DPS confidential?

All criminal record information obtained from DPS is privileged information in accordance with THSC §250.007 and TGC §411.085. The information is for the exclusive use of the requesting NF or the private agency on behalf of the requesting NF and the applicant or employee who is the subject of the records search. The records may not be released or otherwise disclosed to any person or agency except on court order, or with the written consent of the person being investigated. A person commits an offense if the person releases or otherwise discloses any information received under THSC Chapter 250 without the authorization described. However, DADS, as a regulatory agency is entitled by THSC §250.002(a) and Government Code §411.1387 to obtain criminal history information from DPS. DPS defines access to criminal history information as the ability to receive, view, or discuss criminal history record information regardless of the retrieval method. DPS agrees that surveyors, while on site, may review the confidential criminal history reports that providers have retrieved from the DPS secure website. If, during a survey or investigation, a surveyor needs to retain a particular criminal history report, the surveyor will obtain a copy from DPS.

8. How is standing as a certified nurse aide (CNA) affected by criminal history?

The state of Texas maintains a registry of all nurse aides who are certified to provide services in nursing facilities and skilled nursing facilities licensed by DADS. The requirements of THSC Chapter 250 apply to nurse aides' employment in certain licensed facilities serving the aged or disabled. They do not affect nurse aide certification or NAR listing. This means that after successful completion of training, if a CNA is certified he or she will be placed on the NAR. If there is a finding of an alleged act of abuse, neglect or misappropriation the CNA will be listed as unemployable in the NAR. As a practical matter, since THSC Chapter 250 prohibits employment "in direct contact with a consumer or client," it would be problematic for nurse aide trainees to complete the clinical portion of their training if they have a disqualifying conviction. It is important for prospective nurse aide training students and new employees to understand this before committing themselves to nurse aide training.

9. In THSC Chapter 250, there are references in sections 250.006(a)(14) and 250.006(c)(2) to convictions "under the laws of another state, federal law, or the Uniform Code of Military Justice..." Are NFs required to conduct criminal history searches for convictions under these jurisdictions?

NFs may, but are not required to, conduct criminal history record searches for convictions in other states and convictions under federal and military law. However, if a NF becomes aware that an employee or an applicant has a conviction under the laws of another state or federal or military law that is "substantially similar" to one of the Texas Penal Code convictions listed in THSC §250.006, the NF may not employ the individual.

10. Individuals sometimes receive "deferred adjudication" for criminal offenses. Is "deferred adjudication" considered to be a conviction?

"Deferred adjudication community supervision" is provided under Article 42.12 [781D] Section 5 of the Texas Code of Criminal Procedure. In a deferred adjudication with community supervision, the judge may, after receiving the defendant's plea of guilty or nolo contendere (no contest), hearing the evidence, and finding that it substantiates the defendant's guilt, defer further proceedings without entering an adjudication of guilt and place the defendant on community supervision. On successful completion of the period of community supervision, the court may dismiss the proceedings and discharge the defendant. Except for Penal Code §12.42(g) (Repeat and Habitual Offender), a dismissal and discharge may not be deemed a conviction for the purposes of disqualifications or disabilities imposed by law for the conviction of an offense.

11. Criminal history record reports sometimes show offenses that were committed by an applicant or employee when they were a juvenile. How should juvenile offenses be regarded in determining suitability for employment under THSC Chapter 250?

There are significant differences in the criminal justice procedures used to process juvenile and adult offenders. Juveniles may be arrested and charged with the Penal Code offenses listed in §250.006. Juveniles may be prosecuted for crimes as adults. If a juvenile is prosecuted as an adult, the same rules apply to that conviction as to any other adult conviction. However, juveniles may also not be prosecuted as adults but instead go through

the juvenile justice system under the Juvenile Code (Title 3 of the Family Code). Juvenile courts conduct adjudication hearings to determine whether a child did, in fact, engage in delinquent conduct. **Under Family Code §51.13(a), an order of adjudication or disposition in a juvenile proceeding is not considered a criminal conviction, with an exception for individuals who reach “habitual offender status.”** An order of adjudication or disposition under the Juvenile Justice Code does not impose any civil disability ordinarily resulting from a conviction, with an exception for the civil commitment of sexually violent predators.

12. How should NFs check the EMR and NAR?

DADS directs providers to verify employability of nurse aides using the Employability Status Check Search website. This website consolidates checks of the EMR, NAR and checks of other systems. Therefore, verifying a nurse aide's status through the Employability Status Check Search system is the equivalent of using the NAR and is considered in compliance with all applicable federal regulations and state licensure laws. [EMR](#) should be used for initial verification of employability and for annual employability checks.

Providers may also find it useful to search the online “Sanctions Database” and the “Search Nurse Aide Registry” database maintained by DADS’ Regulatory Services Credentialing Branch. These databases, as well as detailed information on both the EMR and the NAR, are available through menu links on the [Regulatory Services Credentialing webpage](#).

13. Is there a requirement for facilities or agencies to conduct annual criminal history checks?

No. There is no requirement in the THSC for facilities or agencies to conduct annual criminal history checks.

If you need additional information or have specific questions, please contact:

Criminal History Record Checks
Policy, Rules, and Curriculum Development Section
(512) 438-3161

EMR and NAR
Professional Credentialing Enforcement, Registry Branch
(512) 438-5495

Sincerely,

Mary T. Henderson
Associate Commissioner
Regulatory Services

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