

Licensure, Certification, Registration, and Employment Requirements and Defining “Safety Sensitive Positions”; Senate Sub. for Senate Sub. for HB 2386

Senate Sub. for Senate Sub. for HB 2386 amends law related to licensure, certification, or registration (licensure) qualifications; amends qualifications for employment at adult care homes, hospitals, and home health agencies; and adds all employees of the Kansas Commission on Veterans’ Affairs Office (KCVAO) to the definition of “safety sensitive positions” found in law.

Licensure Qualifications

The bill requires any person, board, commission, or similar body (board) that determines the qualifications of individuals for licensure to revise their requirements to list the specific civil and criminal records (record) that could disqualify an applicant from receiving a license, certification, or registration (license). The revision must occur within 180 days after the effective date of the bill.

The board may list only any disqualifying records directly related to protecting the general welfare and the duties and responsibilities for such entities. In no case are non-specific terms, such as “moral turpitude” or “good character,” or any arrests that do not result in a conviction, to be used to disqualify an individual’s application for licensure.

The bill mandates the record cannot not be used to disqualify the individual for licensure for more than five years from the date of conviction unless the conviction is a class A misdemeanor, felony, sexually violent crime, or any conviction for which issuing a license would conflict with federal law, and the individual has not been convicted of any other crime in the five years immediately preceding the application for a license.

The bill allows any individual with a record to petition the board responsible for licensure at any time for an informal, written advisory opinion (opinion) concerning whether the individual’s record would disqualify the individual from obtaining a license. The petition includes details of the record. The board is required to issue the opinion within 120 days of receiving the petition and the opinion is to be non-binding. The board is authorized to charge up to \$50 for the review and issuance of the opinion in response to the petition.

Agencies Exempted from Licensure Provisions

The bill exempts the following entities from the bill’s provisions related to licensure qualifications:

- Kansas Commission on Peace Officers’ Standards and Training;
- Kansas Highway Patrol;
- Board of Accountancy;

- Behavioral Sciences Regulatory Board;
- State Board of Healing Arts;
- State Board of Pharmacy;
- Emergency Medical Services Board;
- Board of Nursing;
- Kansas Real Estate Commission;
- Kansas Insurance Department;
- Office of the Attorney General;
- Any municipality, as defined in KSA 75-6102; and
- Any profession that has an educational requirement for licensure that requires a degree beyond a bachelor's degree.

The bill requires all boards to adopt and publicly maintain all necessary rules and regulations for the implementation of the bill.

Qualifications for Employment at Adult Care Homes, Hospitals, and Home Health Agencies

Conviction of Crimes Subject to a Complete Prohibition

The bill creates and amends law related to qualifications for employment at adult care homes, hospitals, and home health agencies, and defines terms related to the provisions of the bill.

Continuing law provides that persons convicted of certain crimes as an adult, or adjudicated as a juvenile, may not be employed at an adult care home. The bill expands such classes of persons to include persons who have adverse findings on any state or national registry, which are defined by the Secretary for Aging and Disability Services (Secretary) in rules and regulations. The bill specifies that the provisions of this section of the bill do not apply to persons currently participating in or upon successful completion of a diversion agreement, or who had been employed by an adult care home on or before July 1, 2018, and were continuously employed by the same adult care home.

Continuing law provides that any person convicted of theft may not be employed at listed facilities unless such person was employed at the facility on July 1, 2010, and while such person is continuously employed by the same adult care home. The bill clarifies that the prohibition

does not apply to persons who were employed by an adult care home either on or before July 1, 2010. The bill further provides that the prohibition does not apply during or upon successful completion of a diversion agreement.

Conviction of Crimes Subject to a Six-year Prohibition

Continuing law allows an adult care home to employ persons convicted of certain listed crimes if six or more years have elapsed since the applicant satisfied the sentence imposed or was discharged from supervision. The bill clarifies that the sentence must be completed, or the individual be released from supervision. The bill also allows employment of an applicant who has been granted a waiver of the six-year disqualification. The bill removes certain crimes from the list of those having a six-year disqualification.

The bill subjects the following additional crimes to the six-year employment prohibition:

- Interference with custody of a committed person;
- Mistreatment of a confined person;
- Unlawful administration of a substance;
- Violation of a protective order;
- Promoting obscenity or promoting obscenity to minors; or
- Cruelty to animals.

The bill also subjects the following felony convictions to the six-year employment prohibition:

- Unlawful manufacture of a controlled substance;
- Unlawful cultivation or distribution of a controlled substance;
- Unlawful cultivation or distribution of a controlled substance using a communication facility;
- Unlawful obtainment or sale of a prescription-only drug;
- Unlawful distribution of drug precursors or drug paraphernalia;
- Unlawful distribution or possession of a simulated controlled substance;
- Forgery;

- Criminal use of a financial card;
- Violation of the Kansas Medicaid Fraud Control Act;
- Making a false claim, statement, or representation to the Medicaid program;
- Unlawful acts relating to the Medicaid program;
- Obstruction of a Medicaid fraud investigation;
- Identity theft or identity fraud; or
- Social welfare fraud.

The bill provides that the prohibition of employment of persons convicted of the above crimes does not apply to persons employed by an adult care home on or before July 1, 2018, and while such person is continuously employed by the same adult care home, or to any person during or upon successful completion of a diversion agreement.

The bill also provides that any person subject to a six-year prohibition of employment at a facility may apply to the Secretary for a waiver if five or more years have passed since completion of the sentence associated with the disqualifying conviction.

The bill directs the Secretary to adopt rules and regulations establishing the waiver process and criteria to be considered in evaluating any such waiver request.

Release of Records

The bill directs the Kansas Bureau of Investigation (KBI) to release all records of adult and juvenile convictions and adjudications, and records pertaining to the same from other states or countries, concerning persons working in adult care homes. The KBI is authorized to charge the Kansas Department for Aging and Disability Services (KDADS) a reasonable fee for providing these records.

Fingerprinting of Applicants

The bill requires KDADS to require applicants to be fingerprinted and to submit to a state and national criminal history record check. Fingerprints are used to identify persons and to determine whether the applicant has a record of criminal history in Kansas or other jurisdictions.

The bill authorizes KDADS to submit fingerprints to the KBI and the Federal Bureau of Investigation (FBI) for such criminal history checks. KDADS is allowed to use the information obtained from fingerprinting and the criminal history record check to verify the identify of the person and for making an official determination of the qualifications and fitness of the person to work in the adult care home.

Applicants are given 20 days to submit fingerprints through an authorized collection site in order to be eligible for provisional employment, or the applicant's application will be considered withdrawn.

The bill also requires current or prospective employers of applicants to pay a fee not to exceed \$19 to KDADS for each applicant's criminal history record check. Such fee is paid at the time of fingerprinting to the authorized collection site.

Criminal History Record Check Dispute and Waiver

If applicants dispute the contents of a criminal history record check, the applicant may file an appeal with the KBI.

The bill allows persons who have been disqualified for employment by reason of their criminal history records, and who have submitted fingerprints, to apply for a waiver with KDADS within 30 days of receipt of notice of employment prohibition.

KDADS is directed to adopt rules and regulations specifying the criteria and procedure for issuing a waiver of the employment prohibition. The Secretary is directed to consider the following criteria in granting a waiver:

- Passage of time;
- Extenuating circumstances;
- Demonstration of rehabilitation; and
- Relevancy of criminal history information to the position for which the applicant is applying.

Any employment prohibition issued remains in effect unless or until a waiver is granted.

Eligibility Determination

The bill requires adult care home operators to request eligibility determinations regarding adult and juvenile convictions and adjudications from KDADS. The bill also requires independent contractors that provide employees to work in adult care homes to provide written certification of the employment eligibility of such employees.

The Secretary is directed to provide a pass or fail determination after review of any criminal history record information in writing within three working days of receipt of such information from the KBI or the FBI.

Provisional Employment

The bill allows adult care home operators to hire applicants on a one-time provisional basis of 60 calendar days, pending the results of the criminal history record check. Provisional employees may be supervised only by employees who completed all training required by federal regulations, rules and regulations of KDADS, and the adult care home's policies and procedures.

Continuing law provides that no adult care homes, operators or employees of an adult care home, or an employment agency will be liable for civil damages arising from the decision to employ, refuse to employ, or to discharge from employment any person based on compliance with the above provisions, if such home or employment agency acts in good faith. The bill includes independent contractors in these liability provisions.

Exclusion from Criminal History Record Check

The bill specifies that persons continuously employed by the same adult care home since July 1, 1992, are not subject to a criminal history record check while continuously employed by such adult care home.

Prior law excluded volunteers who work in adult care homes from the criminal history check requirements without exception. The bill specifies that volunteers at adult care homes are not subject to the provisions of the bill unless they perform functions equivalent to those of direct access employees.

The bill also specifies that applicants who have been subject to a criminal history record check within the previous year are not required to submit to a subsequent criminal history record check.

Fees, Deposit

The bill directs the Secretary to establish fees for criminal history record checks through rules and regulations. All fees collected and remitted to KDADS for charges related to criminal history record checks are remitted to the State Treasurer (Treasurer). The Treasurer is directed to deposit the entire amount in the State Treasury to the credit of the State Licensure Fee Fund.

Implementation of Criminal History Checks

The bill allows KDADS to implement the criminal history check provisions in phases for different categories of employers. KDADS is directed to adopt rules and regulations establishing dates and procedures for the implementation of criminal history record checks, and such dates may be staggered to facilitate implementation.

Submission of Fingerprints by Other State Agencies

The bill provides, upon authorization by the Secretary, other state agencies could submit fingerprints for state and national criminal history record checks and review the resulting

criminal history and records as part of the screening process for current or prospective employees.

Authorized agencies and providers could access an Internet-based application portal operated and maintained by KDADS for the purposes of processing criminal history record information requests. Agencies are prohibited from sharing criminal history record information or the resulting pass or fail determinations with any other agency. The Secretary may charge an authorized agency \$1 per request.

Employment in Hospitals

The bill subjects applicants for employment in a center, facility, hospital, or a provider of services to the same provisions applied to adult care homes as described above. The bill also provides that the following crimes will result in a prohibition of employment (this is already present in law for adult care home workers):

- Capital murder;
- First degree murder;
- Second degree murder;
- Voluntary manslaughter;
- Assisting suicide;
- Mistreatment of a dependent adult or mistreatment of an elder person;
- Human trafficking;
- Aggravated human trafficking;
- Rape;
- Indecent liberties with a child;
- Aggravated indecent liberties with a child;
- Aggravated criminal sodomy;
- Indecent solicitation of a child;
- Aggravated indecent solicitation of a child;

- Sexual exploitation of a child;
- Sexual battery;
- Aggravated sexual battery;
- Commercial sexual exploitation of a child; and
- Attempt or conspiracy to commit any of the listed crimes, or similar statutes of other states or the federal government.

Prohibition of Operation

Continuing law prohibits a licensee from operating a center, facility, or hospital or providing services if such licensee has been found to be an adult with impairment in need of a guardian, conservator, or both. The bill specifies the prohibition does not apply to licensees who, as a minor, were found to be in need of a guardian or conservator for reasons other than impairment.

Employment by Home Health Agencies

The bill subjects applicants for employment at home health agencies or employment agencies, or as an independent contractor that provides staff to a home health agency to the same provisions applied to applicants in adult care homes and hospitals as described above.

Drug Screening for Safety Sensitive Positions

The bill adds all employees of the KCVAO to the definition of “safety sensitive positions” in law.

The Director of the Division of Personnel Services, Department of Administration, has the authority to establish and implement drug screening programs for safety sensitive positions, including the ability to screen applicants for illegal drug use upon a conditional offer of employment and to screen employees upon reasonable suspicion of illegal drug use. Previously, only employees of the State’s veterans’ homes were subject to a drug screening upon reasonable suspicion of illegal drug use.

“Safety sensitive positions” include:

- All state law enforcement officers authorized to carry firearms;
- All state corrections officers;
- All state parole officers;

- Heads of state agencies who are appointed by the Governor and employees on the Governor's staff;
- All employees with access to secure facilities of a correctional institution;
- All employees of a juvenile correctional facility;
- All employees within an institution of mental health; and
- All employees with access to a secured biological laboratory in the Office of Laboratory Services, Kansas Department of Health and Environment.