

SB

81

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CS SB 81 (HSS) ver. D Sectional
(DHSS centralize registry; license; background checks)
Created by: Department of Law
March 22, 2018

Section 1. Amends Title 12 of the Alaska statutes to bring the Department of Public Safety criminal background check process into compliance with federal law; specifically, this amendment allows public safety share criminal history information with the Department of Health and Social Services.

Section 2. This section makes conforming edits to rename “Centralized Registry” to the “the civil history database check” (AS 47.05.330) to more accurately describe the current practice and avoids confusion with the “the central registry” in AS 47.17.040 (see section 14).

Sections 3 and 4. These sections would amend AS 47.05.310(b) and 47.32.310(d) to clarify that barrier crimes apply to individuals as well as entities.

Section 5. This section would amend AS 47.05.310(e) to allow an individual to seek a background check. Under the current law, only entities can seek a background check. This section would also remove, at the request of the Department of Public Safety, the designation of the Department of Health and Social Services (DHSS) as a criminal justice agency for purpose of the background check program. (see also section 1).

Section 6. This section would amend AS 47.05.310(f) to make it clear that DHSS may – in addition to exceptions to the barrier crime provisions – approve a variance for a barrier crime.

Section 7. This section would amend AS 47.05.310(h) to address how a non-licensed provider, such as a relative who is receiving payment by the Office of Children’s Services, is treated under the statute. This amendment would make it clear that such providers, while not being paid by DHSS, are still subject to background checks prior to placement.

Section 8. This section would add a new section to AS 47.05.310 to address immunity from civil or criminal liability for reporting during the background check process.

Section 9. This section would provide a similar framework for the civil history database checks as background checks (see AS 47.05.310). This means that the same process applies to a person who is found to have a barring criminal conviction under AS 47.05.310 as well as a barring civil finding under AS 47.05.330.

Section 10. This section would repeal and reenact current statute to outline how the department will review existing databases, rather than create a separate database for the civil history checks. This section further provides that information reviewed would be confidential and is not subject to a public records request. Specifically, this section:

- Clarifies that we are looking to evaluate health, safety, and welfare issues when reviewing databases related to licensed entities, not technical violations that may lead to a nonrenewal, suspension or revocation of a license;
- Clarifies that we are looking to identify persons whose children are subjects of a child in need of aid petition;
- Clarifies that we are looking to evaluate health, safety, and welfare issues when reviewing databases related to licensed providers (occupational licensing under AS 08), not unrelated technical violations;
- Adds that a person who works for the state – not just the Department of Health and Social Services – is subject to a barring condition if they are terminated from employment for a substantiated allegation of assaultive, neglectful, or exploitive behavior.

Section 11. This would amend the current immunity section to reflect the change to civil history database check.

Section 12. This would establish a new section to address the ability to seek a variance for any finding under this chapter and how to appeal a decision if there is disagreement with any decision made by DHSS, including providing a legal mechanism to share information held by the Office of Children’s Services for proposes of pursuing a variance.

Section 13. This section would amend AS 47.05.390(6) to expand the definition of “entity” to include an individual service provider.

Section 14. This section amends AS 47.10.093(b) to allow for the sharing of information in the possession of OCS that will be necessary to pursue a variance as provided in section 12 of this bill.

Section 15. This section would rename the central registry maintained by the Office of Children’s Services to the “child protection registry” to avoid confusion. It also clarifies what is maintained on this registry, including substantiated findings under AS 47.10 or AS 47.17.

Section 16. This new subsection would clarify that before a substantiated finding can be placed on the child protection registry, the person must have been afforded notice of the finding and the opportunity to challenge the finding.

Section 17. This section would make a conforming edit to AS 47.32.010(c) replacing the centralized registry with civil history database check.

Section 18. This section would amend AS 47.32 to provide authority for DHSS to consider prior adverse licensing findings in determining whether to grant or deny a license or whether to place a condition on a license.

Section 19. This would add a new section to make it clear that when there is an allegation that an employee or individual affiliated with a licensed entity is alleged to have engaged in any behavior that would impact the safety or welfare of a resident, the department may investigate that individual and issue a report on the findings of that investigation. This section would further provide that if a finding of abuse or neglect is substantiated then that finding will be part of the civil registry process and may result in a person being prohibited from employment or licensure in the future. This section would also make it clear that before such a finding can be used, due process must be afforded.

Section 20. This is technical fix to rename the “registry” to the “civil history database.”

Section 21. This is technical fix that would clarify when formal hearings are required when an enforcement action is taken after a licensing investigation.

Section 22. This would add a new section to clarify that when law enforcement is investigating a crime that is also the subject of a licensing investigation, the material gathered by DHSS may be shared with the law enforcement as a matter of law in a concurrent investigation.

Section 23. This section would clarify that all divisions who implement AS 47.32 may share information with each other for the purpose of administering the licensing programs at DHSS.

Section 24. This section would repeal reference to provisions of the current law that are no longer necessary as a result of the prior sections of this bill.

Section 25. This is an applicability section for purposes of applying the criminal and civil background checks before, on, or after the effective date of this act.

Section 26. This section would advise the revisor regarding title changes to reflect amendments in this act, including the change to include the civil history registry.

Section 27. This provides for an immediate effective date.

Summary of Changes in CS SB 81 ver. D

Senate Health and Social Services

March 13, 2018

By Department of Law

Section 1 contains the amendment requested by the Department of Public Safety to ensure compliance with federal laws relating to the sharing of criminal history information with the Department of Health and Social Services.

Section 2 contains a technical fix that removes the word “registry” and instead refers to databases to avoid the concern raised by the Ombudsman regarding confusion over the term “registry.”

Old Section 7 was deleted as it was determined in consultation with legislative legal the section was redundant. It was determined that keeping what is now section 7 in the CS was sufficient to require relative placement to have background checks.

Section 10 is re-written to address the concerns raised by the Ombudsman’s office. Specifically, the rewrite:

- Removes the confusion caused by using the word “registry.” Similar to Sections 2, 8, 18, and 21, the change redefines registry to “databases”;
- Clarifies that we are looking to evaluate health, safety, and welfare issues when reviewing databases related to licensed entities, not technical violations that may lead to a nonrenewal, suspension or revocation of a license;
- Clarifies that we are looking to identify persons whose children are subjects of a child in need of aid petition;
- Clarifies that we are looking to evaluate health, safety, and welfare issues when reviewing databases related to licensed providers (occupational licensing under AS 08), not unrelated technical violations;
- Adds that a person who works for the state – not just the Department of Health and Social Services – is subject to a barring condition if they are terminated from employment for a substantiated allegation of assaultive, neglectful, or exploitive behavior.

Section 12 is amended as requested by the Ombudsman’s Office to clarify persons who are seeking variances have access to information they need to pursue a variance.

Section 14 adds a new section to effectuate the access of information under AS 47.10 for variance committees.

Section 17 (former Section 16) contains a technical fix that remove the word “registry” that refer to databases to avoid confusion as articulated by the Ombudsman.

Section 19 (former Section 18) removes the qualifier of “unsupervised” before “volunteer” as to persons who can be investigated. The Department wants to be able to investigate any volunteer – unsupervised or otherwise – who has engaged in abusive, neglectful, or exploitative behavior against a child or adult in care.

Sections 20 is added to this CS to amend AS 47.32.140(d) to remove the word “registry” and instead refer to databases to avoid the concern raised by the Ombudsman regarding confusion over the term “registry.”.

Section 22 (former Section 20) is amended to add a new subsection to clarify that information can be shared with law enforcement if that information is from a concurrent investigation.

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March 7, 2017

The Honorable Pete Kelly
President of the Senate
Alaska State Legislature
State Capitol, Room 111
Juneau, AK 99801-1182

Dear Senator Kelly:

Under the authority of Article III, Section 18, of the Alaska Constitution, I am transmitting a bill relating to the criminal history, civil history, and establishing a civil registry for certain individuals or entities that are licensed or certified by the Department of Health and Social Services.

There are hundreds of individuals and entities that provide medical assistance and other services to Alaskans in need through individual assistance or group living homes. Many of the people qualifying for assistance are ill, elderly, or disabled. We must make sure that those providing services to these individuals are qualified to do so; that qualification includes assurance that an individual's or entity's past background does not reveal behaviors inconsistent with the safe care of our vulnerable citizens. Recognizing this need, the Legislature enacted statutes (AS 47.05.310 - 47.05.390) in 2005 to centralize and formalize the process by which the Department of Health and Social Services (Department) conducts criminal background checks for entities and individuals who seek to be licensed providers or who are paid, in whole or in part, by the Department to provide services to individuals in the Department's care and custody. Additionally, the 2005 legislation authorized the Department to create a centralized registry (that my bill would rename the civil registry) so the State could rely on certain civil findings to bar persons from owning, operating, and being an administrator of certain licensed facilities. Over the ensuing years, certain gaps in the statutes have become apparent. This legislation is designed to clarify and amend current statutes to fix those gaps. The changes proposed by the bill ensure proper application and fairness under the system.

This bill would make amendments to the criminal background statute (AS 47.05.310), removing substantive references to the centralized civil registry under AS 47.05.330 to alleviate confusion, inconsistencies, and redundancy between the statutes. These amendments would further clarify that individuals as well as entities may request a criminal and civil history background check. These amendments would also remove language that the Department of Health and Social Services is a criminal justice agency as unnecessary to accomplish the background checks needed.

The bill would add a new section to AS 47.05, establishing a civil history check statute that mirrors the criminal background check statute, primarily to clarify that the same individuals would be subject to review and possible bar, depending on the results of their background check under the centralized civil registry. This statute would further clarify what type of civil findings would prohibit an individual or entity from obtaining a license and would establish procedures for an individual or entity to request an exception or variance, or to request that incorrect information in a registry be addressed in a written finding.

To simplify and more accurately set out the centralized civil registry, the bill would repeal and reenact AS 47.05.330, providing for the identification of a civil registry. The Department would identify by regulation each register the Department would review to identify the names and certain civil events that would preclude someone from being allowed to own, operate, be employed by, or be paid by the State to provide medical assistance services.

The bill would add an important new provision as AS 47.05.360, establishing that a person could seek a variance from being allowed to own, operate, be employed by, or be paid by the State to provide services due to a condition identified as part of a criminal or civil history background check. If the request for a variance was denied, a person could seek review in superior court.

This bill makes amendments to AS 47.17.040, clarifying that the confidential child protection registry would contain substantiated findings of abuse or neglect. The amendment would further clarify that this information can be used for licensing both in and out of this state and confirms the due process protections before placement on the central registry.

Another gap addressed is to AS 47.32.090, allowing the Department to investigate an employee, contractor, or volunteer of a licensed entity and, if conduct that did not comply with licensing standard is substantiated, place the employee, contractor, or volunteer on the civil registry. Currently State law only allows the Department to investigate and issue findings against an entity, not against individuals who work for the entity.

Additionally, changes were made to AS 47.32.150(b), allowing a person subject to a civil fine as an enforcement action to have the right to appeal the fine. The bill would allow the Department to share, on a confidential basis, licensing information with a law enforcement agency upon request, further strengthening protections for vulnerable citizens. The bill would also address limitations in current law that limit sharing and access to the Divisions of Public Health and Public Assistance by amending AS 47.32.190 to allow any division of the Department that is responsible for licensing to share and gather information in order to implement the protections of AS 47.32, centralized licensing. This change is needed because licensing is done by the Office of Children's Services, Division of Health Care Services, and Division of Public Assistance. This amendment simply allows those divisions who are responsible for licensing to share and access information to implement this chapter without reference to specific divisions. This provides the Department with flexibility to implement the chapter when they make organizational changes in the future.

The Honorable Pete Kelly
Transmittal Health Care Background Checks
March 7, 2017
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This bill will improve the background check process and protect our vulnerable citizens. Additionally, it will add the necessary safeguards to allow persons to challenge or request a variance from the provisions that would otherwise bar individuals from certain employment. In order to protect vulnerable Alaskans yet offer due process and confidentiality protections to individuals, I am transmitting this bill and urge your prompt and favorable action on this measure.

Sincerely,



Bill Walker
Governor

Enclosure

FREQUENTLY ASKED QUESTION:

(background check/centralized registry checks and substantiations/central registry checks)

Created by: Department of Law

May 3, 2017

Background and centralized registry checks

1. **What is a background check?**

A background check identifies criminal and civil events in a person's history that have been identified by statute and regulation to be inconsistent with ensuring the health, safety, and welfare of individuals receiving services from programs overseen by the Department of Health and Social Services (DHSS). A background check consists of a review of both state and FBI fingerprint-based criminal history and internal and external databases and registries in Alaska and other states in which the individual has resided.

2. **Who can request a background check?**

Any individual or provider/entity that is licensed, or is seeking licensure, under AS 47.32 or certification and/or enrollment in the Medicaid program or any individual seeking to work, volunteer, or train in such an entity.

3. **What is the Background Check Program ("BCP")?**

The Background Check Unit (BCP) is a unit in the Division of Health Care Services that is responsible for the processing of all background check determinations submitted under AS 47.05.300 et. seq.

4. **How does the BCP gather the information it reports?**

Submission of a complete application authorizes the BCP to research and review an individual's background. The BCP accesses the State of Alaska criminal justice database (APSIN), departmental and other state's databases and registries, such as Online Resource for Children in Alaska (ORCA), Juvenile Offender Management Information System (JOMIS), and Certified Nurse Aid (CAN) registries and reviews State and Federal fingerprint-based results to make an eligibility determination. The BCP may also review court or administrative documents to assure the proper decision is being made.

5. **What is the Centralized Registry?**

Although identified in both statutes and regulations, there is no stand-alone database named "the centralized registry." When SB 151 was passed in 2005, the *intent* was to develop and maintain an internal database for all individuals who had a civil finding related to the abuse, neglect, or

exploitation of a minor or a vulnerable adult; had a license revoked or suspended; or who had a Medicaid fraud finding. The idea was that an individual who had been provided notice of the adverse action and had been afforded due process would then be added to this database for future review. This was intended to identify/track individuals that were a danger to the vulnerable population but would not be found with just a criminal records search. However, this stand-alone database was never developed; rather, the BCP, in order to meet the intent of the statute, reviews a compilation of already existing external and internal databases/registries (such as ORCA, CNA registry) to identify any negative action.

6. **Who is on the Centralized Registry**

While the Centralized Registry itself was never developed, individuals who are listed on one of the database/registries reviewed that meets the criteria above would be found to have a barring condition.

7. **What is the difference between a “barring condition” and a “barring crime”?**

A barring condition is the result of a negative civil action that is identified through a review of the databases and registries available to the BCP. A barring crime is a criminal offense that is identified through APSIN or review of State and FBI fingerprint search results.

8. **How do you get on the Centralized Registry?**

Databases and registries reviewed by the BCP for negative civil actions are maintained by a variety of other agencies and/or divisions. Notice of the event that would have led to the placement on one or more of those databases or registries would have been provided by that agency or agencies, along with the opportunity to challenge the placement. For example, if an individual was found to have a CNA certification revocation on the CNA registry, the individual would have been contacted by the Board of Nursing regarding the details of the revocation and opportunity to contest the revocation.

9. **How can I find out if I’m on the Centralized Registry?**

Individuals can contact other agencies or divisions with which they have had association to request such information. In addition, if an individual has applied for a background check through the BCP, any identification on a registry that constitutes a barring condition is provided in writing to the individual.

10. **How do I get off the Centralized Registry?**

The individual would need to work with the court, administrative hearing, or originating agency to determine if the removal from the database or registry is possible.

11. Can I file an appeal before my name is placed on the Centralized Registry?

No, but that is because no one should be identified on a database or registry until they have been properly noticed and had an opportunity to challenge the finding. If such a notice and opportunity was not afforded, the original agency must afford due process before the BCP can rely upon the finding.

12. Who has access to the Centralized Registry?

Some databases, such as the CNA registry, are public registries and do not require special access. Other registries, such as JOMIS, are not. State employees who have been granted access to secure databases and registries are subject to strict confidentiality laws and cannot access or share information in these databases unless authorized by state law. Failure to follow those rules can result in disciplinary action, up to and including termination from state employment.

13. How is the information gathered?

BCP staff access each applicable database and registry. If information is identified during that review that constitutes a barring condition, the BCP notifies the individual, in writing, of the specific findings causing the barring condition. Notification to the individual includes information on how to submit an appeal or how to request a variance to the barring determination.

14. What are the potential consequences of being on the Centralized Registry?

The consequences of being identified on a database or registry would prohibit the individual, unless a variance approval is granted, from association with entities that are required to conduct background checks on individuals associated with their entity.

15. How long do you stay on the Centralized Registry?

Under current regulation, a bar under the Centralized Registry is permanent, unless specifically identified with a time-limited exclusion period. Any individual, who is barred under the Centralized Registry, unless federally prohibited, can request a variance from the Commissioner of DHSS.

16. What is a variance and how do I request one?

A variance is a process in which an individual who was barred for criminal and/or civil actions may apply to request approval to associate with an entity after showing rehabilitation has occurred and other actions have been taken or will be taken to reduce the potential risk to the health, safety, and welfare of the individuals they will serve. Information how to apply for a variance is included when

an individual is notified of a barring background check determination. Variance request information is reviewed by the Variance Review committee who makes a recommendation to the DHSS Commissioner. The Commissioner of DHSS makes the final decision on whether a variance is appropriate.

17. What information is shared with the variance committee?

There is no limit on what can be submitted by the applicant or the oversight division to support a case for a variance. Variance requests must contain sufficient information to address each criminal and/or civil barrier identified on the notice to the applicant. The variance application does require certain specific information and is listed expressly in the variance application.

18. What is “reconsideration” and how do I ask for it?

There are two types of reconsiderations in the background check process.

- A. Barrier determination reconsideration. This is only used when an individual believes an error was made in the background check process where the applicant has new or different factual information than what was relied upon by the BCP when making a determination. For example, the applicant can provide new information showing a conviction for assault (a barrier crime) was pleaded down to a non-barrier crime of disorderly conduct. The reconsideration request would be reviewed and a new decision would be made on the individual’s eligibility.
- B. Variance Reconsideration. This is used when the Commissioner denies the variance request and the individual requests reconsideration of that decision. The individual would need to provide additional information showing why it should be approved.

SUBSTANTIATIONS AND CENTRAL REGISTRY CHECKS

1. What is the Central Registry?

The Central Registry is separate and apart from the Centralized Registry. The Central Registry is the child protection database maintained by the Office of Children’s Services (OCS) and includes ORCA, JOMIS (and its predecessor database PROBER), the OCS statewide information systems. The central registry is required under AS 47.17.040.

2. Who is on the Central Registry?

Any individual who has been investigated by the OCS, which includes individuals who have applied for or who have been licensed as foster care providers, an unlicensed relative who provides care for children in OCS custody, or any individual who has been included in a protective services report or report of harm. This includes parents, guardians, or custodians who have had OCS take custody of their children under AS 47.10, including individuals whose parental rights have been terminated.

3. How do you get on the Central Registry?

If an allegation of abuse or neglect made to OCS is investigated, a record of that investigation is maintained on the Central Registry. The outcome of that investigation is what is reported to agencies and individuals with child protection functions inside and outside the state. This includes foster care licensing agencies from out of state and other state child welfare agencies.

4. What is a “substantiation”?

When child abuse or neglect under AS 47.10 or AS 47.17 is determined and the individual has been identified as the perpetrator.

5. How can I find out if I’m on the Central Registry?

You will be notified via written correspondence from OCS that an allegation has been made and substantiated, thereby placing you on the Central Registry.

6. How do I get off the Central Registry?

You don’t. However, being on the Central Registry does not necessarily equate to a barring condition. If an allegation was investigated and found to be unsubstantiated, then the individual is reported to have a clean record on the Central Registry, assuming no other allegations were ever substantiated.

7. Can I appeal before my name is placed on the Central Registry?

Individuals are advised of their rights to appeal substantiation in the letter they receive from OCS informing them of the substantiation. If the individual doesn’t use that process or uses the process and is unsuccessful in having the substantiation overturned, their negative child abuse and neglect history will continue to be reportable to appropriate agencies.

8. When does a Central Registry finding become a barring condition?

Any finding by a court that there is a fair probability or substantial chance that your child could be a child in need of aid or a finding that your child is, in fact, a child in need of aid, creates a barring condition for licensing purposes.

9. Who has access to the Central Registry?

OCS staff has full access to ORCA. The Background Check Program, the Department of Law (Child Protection Section) and the Division of Juvenile Justice all have some limited access.

10. Who, other than OCS, has access to information from the Central Registry?

- A. Out-of-state child protection agencies;
- B. Individuals applying for a private adoption in Alaska;
- C. Individuals contracting with OCS to complete home studies for placement/adoption;
- D. Private home study writers for placement/adoption;

- E. Individuals applying to be licensed through Division of Public Assistance to provide child care, and individuals involved with tribal foster care or child care licensing;
- F. Individuals applying to be licensed by department partners;
- G. Child Placement Agencies;
- H. Grantees; and
- I. BCP.

11. Are substantiations on the Centralized Registry?

No.

12. Are substantiations on the Central Registry?

Yes, but they are not a barrier condition for a background check.

13. What are the potential consequences of being on the Central Registry?

Being on the Central Registry alone does not equate to a barrier. Only child in need of aid (CINA) findings are barriers under the Centralized Registry; however, if you are on the Central Registry and information is shared on that fact, it may result in some of the following:

A. Will this prevent me from adopting a foster child?

Not necessarily. It is a case-by-case determination as to what is in the best interests of a child. OCS will rely on the home study and assessment process to inform that decision.

B. Will this prevent me from adopting my wife's children (step-parent adoption)?

Through the home study and assessment process, OCS would review this information to make decisions about the best interests of the child.

C. I am in the military and want to apply for a job that requires a top security clearance. Will a substantiation prevent me from getting a security clearance?

The state has no control over how the agencies receiving this information use it. Our analysis stops with the determination of whether the requesting agency is entitled to receive the information or not.

D. I volunteer as a wrestling coach at my kid's school. Will this substantiation prevent me from being a coach?

Schools do not have automatic access to the Central Registry.

E. If my son or daughter's children are removed from the home by OCS, will this substantiation prevent my grandchildren from being placed with me?

Unless you have your own barrier crime or condition, it will not prevent you from being a caregiver. Through the home study and assessment process, OCS would review this information to make decisions about the best interests of the child.

F. **Will this substantiation prevent me from working at a daycare center?**

While substantiation on its own is not a barrier condition, child care agencies are given information on the background of their potential employees and are notified of substantiations. There is no state law that says this is a bar, but some facilities may have an internal policies not to hire someone with a substantiation.

G. **Will this substantiation prevent me from working at a nursing home?**

No.