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CMS PROPOSED RULE & FEDERAL PILOT PROGRAM FOCUS ON HEALTH CARE PROVIDERS' EMPLOYEE CRIMINAL BACKGROUND CHECKS: COULD THERE BE A NATIONWIDE EMPLOYEE BACKGROUND CHECK REQUIREMENT?

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In May 2005, the Centers for Medicare and Medicaid Services ("CMS") released a proposed rule which would revise the Hospice Conditions of Participation ("CoPs") that hospices must meet to participate in the Medicare and Medicaid programs.¹ Part of the proposed rule would set forth a new requirement mandating that hospices obtain a criminal background check for all hospice and contract employees prior to employment. Furthermore, a pilot program, applicable to certain health care providers including hospices in selected states, is currently being implemented to evaluate national and state background checks on prospective employees with direct access to patients.² The proposed rule and the pilot program evidence CMS's interest in implementing a national employee background check requirement for health care providers including hospices. We provide a brief overview of the proposed rule and the pilot program for your review.

I. The Proposed Rule. Currently, there is no federal statutory requirement that hospices conduct background checks on prospective employees. Although, "[m]ost states and many liability

¹ 70 Fed. Reg. 30840, 30860 (May 27, 2005).

² The pilot program was established by Section 307 of the Medicare Prescription Drug, Improvement, and Modernization Act ("MMA") of 2003 (PL 108-173).

insurers require hospices to obtain criminal background checks on employees."³ In fact, according to CMS, "[i]n 2002, 39 states required criminal background checks for hospice employees."⁴ However, many of these programs require background checks only for those employees involved with patient care, or who have contact with financial information.⁵ The proposed rule would implement a stricter hospice background check requirement and would apply to hospices nation-wide. The proposed rule states that "hospice[s] must obtain a criminal background check on *each* hospice employee and contracted employee before employment at the hospice."⁶

What would this mean for hospices? According to CMS, the rule would require each hospice to obtain a criminal background check on *each* employee, including but not limited to those employees who have hands-on patient contact, those who are employed in an administrative or maintenance capacity, those who are volunteers and those who provide services under contract.⁷ CMS believes that this is an important safety measure to protect both patients and hospices.⁸ Release of the final CoPs is not expected until spring of 2008.

II. The Pilot Program. The federal pilot program for background checks is designed to reduce patient abuse and to identify efficient, effective and economical procedures for conducting background checks. CMS selected seven states to participate in the pilot program. The states represent a mix of rural and urban areas and

³ National Hospice and Palliative Care Organization Final Comment Letter to CMS on CMS-3844 (Medicare and Medicaid Programs: Hospice Conditions of Participation) (July 26, 2005) (hereinafter referred to as "NHPCO Letter").

⁴ 70 Fed. Reg. at 30871.

⁵ NHPCO Letter.

⁶ 70 Fed. Reg. at 30893 [emphasis added].

⁷ *Id.* at 30871.

⁸ *Id.* at 30860.

⁹ The pilot program is applicable to hospices state wide in Alaska, Idaho, Michigan, Nevada and New Mexico and is applicable to hospices in selected counties in Illinois and Wisconsin.

¹⁰ Pursuant to section 307(g)(5)(A) of the MMA, the other types of health care providers that are subject to the requirements of the pilot program are as follows: (i) skilled nursing facilities; (ii) nursing facilities; (iii) home health agencies; (iv) long-term care hospitals; (v) providers of personal care services; (vi) residential care providers that arrange for, or directly provide, long-term care services; and (vii) intermediate care facilities for the mentally retarded.

include ethnically and culturally diverse populations. The pilot states include: Alaska, Idaho, Illinois, Michigan, Nevada, New Mexico and Wisconsin.⁹ The pilot program became fully operational in March 2006 and will run until September 2007. Hospices are subject to the requirements of the pilot program.¹⁰ The pilot program's minimum requirements, set forth in Section 307 of the MMA, are as follows:

- Covered health care providers must conduct background checks for all direct patient access employees prior to the applicant's employment.
- The applicant must provide a written statement disclosing any disqualifying information and authorize the hospice to conduct a national and state criminal record check. The applicant must also provide a set of 10 rolled fingerprints.
- The background check must include a search of any available registry (including state nurse aide registries) that would likely contain disqualifying information about the applicant and a search of state and national criminal history records through a 10 rolled fingerprint check, utilizing state criminal records and the Integrated Automated Fingerprint Identification system of the Federal Bureau of Investigation.
- The background check may be terminated at any stage once disqualifying information regarding the applicant has been obtained.
- The background check results must only be used for the purpose of determining suitability of employment.
- Covered providers may not knowingly employ any direct patient access applicant who has any disqualifying information.

Although there is no current federal statutory requirement that hospices conduct background checks on prospective employees, the proposed CoPs and the pilot program indicate that CMS is entertaining the idea of a nationally-mandated federal hospice employee background check requirement. It is important to note, however, that

the results of the pilot program will not be reviewed until after it ends in September 2007. This, combined with the fact that the hospice CoPs will not be finalized until spring of 2008, indicates that hospice administrators have time to think about their employee background check policies.

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