

**Safe at Home?
Developing Effective Criminal
Background Checks and
Other Screening Policies
for Home Care Workers**

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Research Report

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AARP's Public Policy Institute informs and stimulates public debate on the issues we face as we age. Through research, analysis and dialogue with the nation's leading experts, PPI promotes development of sound, creative policies to address our common need for economic security, health care, and quality of life.

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EXECUTIVE SUMMARY

KEY FINDINGS

States increasingly require criminal background screening of in-home direct care workers to protect vulnerable care recipients from harm, yet there is no uniform protocol for screening and disqualifying candidates. While the idea of screening is almost universally endorsed by state-level policymakers, they need guidance on what works and is cost-effective, particularly in the current recession. A review of federal Medicaid law and state law, research to date, experience in selected states, and input from key stakeholders reveals the following:

Medicaid Policies Defer to States—and State Laws and Practices Vary Widely

- While the Medicaid program (the major funder of long-term care) requires states to develop and implement provider qualification standards, there is no federal Medicaid requirement mandating criminal background checks, often used as a screening tool, for home and community-based services (HCBS) workers.
- Forty-six states and the District of Columbia mandate preemployment criminal background checks for defined categories of Medicaid in-home workers, based on a 50-state review of laws by the National Conference of State Legislatures for AARP.
- Most of these states enumerate criminal offenses that preclude employment, although the list of disqualifying crimes and the length of the disqualification vary widely.
- Only six states exempt family members or other relatives from criminal background check requirements.

Criminal Background Screening Faces Challenges

- Multiple options and data sources for screening—e.g., state and county records, national FBI checks, state adult protective services registries, commercial databases—are not integrated, and databases may have gaps and errors.
- Costs and staffing burdens are substantial.

Efficacy of Background Checks in Reducing Risk Is Unproven; New Research May Help Policymakers

- There has been no robust scholarship on the relationship between general criminal behavior and elder mistreatment.
- The evidence basis for determining disqualifying offenses is limited, although research could provide a scientific basis for specifying a criminal history that is cause for concern.
- Recent criminology research may provide a scientific basis for the length of disqualification after criminal behavior.

Complementary Strategies Can Help Reduce Risks of Abuse

- These tools include reference checks; interviews; signed statements about job history; and alcohol, drug, and credit checks.

Self-Directed Programs Raise Special Issues

- The self-directed model allows participants to recruit, hire, and supervise their own workers, who may be family members or friends.
- Because these programs allow more choice and risk taking, some states and programs make background checks and/or disqualifications optional.

PROMISING PRACTICES, POLICY OPTIONS, AND FUTURE RESEARCH

Increase the accuracy, speed, and cost-effectiveness of criminal background checks by implementing promising state practices. A federal seven-state pilot program, with an investment of federal funds, yielded promising practices, including the following:

- Integration of data sources on criminal and other relevant history
- Information sharing between various state agencies conducting background checks
- Electronic fingerprint capture to cut time and enhance accuracy
- Dedicated state personnel to maximize efficiency and expertise
- Use of a tiered system, i.e., checking low-cost state records and registries as a first step, followed by higher-cost FBI checks for remaining smaller pool of applicants
- Rap-back system to automatically flag new crimes after hiring home care workers

Avoid unnecessary disqualifications to increase fairness and reduce unintended effects on the workforce. In the future, states and employers should do the following:

- Base disqualifying crimes and the length of disqualifications on solid evidence.
- Provide a waiver or “rehabilitation review” process to allow applicants to demonstrate that they are qualified despite some criminal history.
- Permit appeals of disqualifications to enable applicants to prove that criminal background check results are erroneous.

Use multiple tools to enhance the safety of the home care workforce. Complementary approaches include the following tools:

- Reference checks
- Credit histories
- Detailed application forms with disclosure requirements
- Thorough interviews
- Drug and alcohol screening
- Training and supervision of workers, pre- and postemployment

Empower consumers and employers through education and other resources, such as the following:

- Education on the benefits and limitations of criminal background check screening, including the fact that it can be underinclusive or overinclusive in identifying appropriate job candidates
- Education on complementary screening methods
- Registries of prescreened individuals.

Recognize that self-directed programs raise distinct issues. Self-directed programs should do the following:

- Allow more risk taking and choice for participants when screening and hiring.
- Make criminal background checks available, but allow flexibility in acting on the results, especially for family members and friends.

Conduct additional research on key issues. Government entities could ultimately better target their resources if they fund research now on the following topics:

- The efficacy of criminal background check screening and other screening tools in reducing risk to home care participants
- The deterrent effect of criminal background check requirements
- The evidence for identifying disqualifying offenses and the length of disqualification
- The effect of criminal background screening on the retention of workers

BACKGROUND

Each year, millions of Americans of all ages, many of them elders, receive Medicaid-funded assistance in their homes and communities with completing everyday activities. These home and community-based services range from hands-on help with bathing, dressing, and eating to transportation for medical appointments and links with community events and other services. They play an invaluable role in allowing mature adults to stay in the community-based settings they prefer, rather than enter an institution. At the same time, there are long-standing concerns about the safety of such individuals and their potential risk for being abused or exploited by the workers who provide their direct care. Criminal background checks for people who work with vulnerable elders are one commonly used tool aimed at reducing the risk of elder abuse.

The Medicaid program is the largest single source of funding for long-term care services in the country. Medicaid HCBS for elders and people with disabilities are not provided through a single program, but rather through a patchwork of Medicaid authorities that vary considerably in scope, eligibility, staffing, and service delivery models. Most of these programs contract for services with provider agencies, which must meet state-defined criteria to qualify for participation in the Medicaid program; those criteria may or may not include a check of employees' criminal records. In contrast, some programs allow service recipients to hire their workers directly and may have different background screening requirements. The frontline workers in Medicaid HCBS programs—who

frequently have intimate, ongoing, and unsupervised contact with the population they assist—comprise a variety of licensed and unlicensed staff types whose titles and job descriptions vary across programs.

PURPOSE

AARP’s Public Policy Institute undertook this study to examine the current use of criminal background checks for Medicaid direct-care workers in home and community-based settings. The aging of the population and the increasing demand among consumers to receive long-term services and supports at home warrant a review of current research and policy in this area. This study summarizes the literature on this subject; provides some guidance on cost-effective strategies for screening in-home workers; and further explores the efficacy and feasibility of using criminal background checks as a means for reducing the risk of elder abuse, neglect, and exploitation.

METHODOLOGY

This study examines federal regulations and the diversity of state statutes and Medicaid policies regarding worker screening, with a focus on their application in three states that represent a spectrum of on-the-ground screening policies for Medicaid direct care workers, particularly those in self-directed programs: Arkansas, Michigan, and New Mexico. In addition, this study analyzes key policy issues related to criminal background checks for Medicaid staff, including perceived barriers, costs, evidence of efficacy in reducing the risk of abuse, impact on the workforce, and special considerations raised by self-directed HCBS programs. In addition to statutory analysis and literature review, this report incorporates themes that emerged from an invitational roundtable of experts convened by AARP in February 2009 to further explore these issues.

I. INTRODUCTION

“The live-in caretaker of an 84-year-old Huntington Beach woman allegedly took out fraudulent loans in her name, bilking the older woman out of about \$200,000 and putting the woman’s home in danger of foreclosure, authorities said Tuesday. Cindi Dee Powell, 54, has been charged with financial elder abuse, grand theft, identity theft, vehicle theft, fraud and forgery. She remains in custody. According to police, Powell moved in with Constance Wakefield about two years ago to help the woman, who uses a wheelchair, around the house and drive her to appointments. Wakefield hired Powell through a classified ad and was not aware that Powell was on probation in another elder abuse case.”

Los Angeles Times, March 11, 2009¹

“A 54-year-old woman is behind bars charged with injury to an elderly person. Police say Esther Pleasant was caught on tape assaulting an 86-year-old woman. Pleasant was employed as a home health care worker taking care of the disabled woman. Family members became suspicious after seeing a bruise on their mom. They set up a 24-hour surveillance camera. ‘I seen she abused her the whole time she was giving her a bath, which took about an hour,’ said Elizabeth Mouton, the woman’s daughter. ‘She abused her the whole hour.’”

KFDM-TV News, Texas, February 27, 2009²

“As the population of older adults grows to comprise approximately 20 percent of the U.S. population, they will face a health care workforce that is too small and critically unprepared to meet their health needs. If our aging family members and friends are to continue to live robustly and in the best possible health, we need bold initiatives designed to boost recruitment and retention of geriatric specialists and health care aides....”

Retooling for an Aging America: Building the Health Care Workforce, Institute of Medicine, April 2008.³

Elder abuse by direct care workers—physical abuse, financial exploitation, neglect—is in the paper every day.⁴ The aging population boom means that more people will need home care, and qualified workers are in short supply. States are facing a fiscal crunch that may limit their resources for ensuring that older people receiving home and community-based services (HCBS) are safe and secure. In this environment, policymakers must examine how best to spend their limited long-term care dollars.

¹ www.latimes.com/news/local/la-me-ocstory11-2009mar11,0,24126.story.

² www.kfdm.com/news/woman_30380__article.html/elderly_police.html.

³ www.iom.edu/Object.File/Master/53/509/HealthcareWorkforce_FS.pdf.

⁴ Data on elder abuse, neglect, and exploitation by direct care workers are scant, although anecdotal evidence is abundant. R. J. Bonnie and R. B. Wallace, *Elder Mistreatment: Abuse, Neglect, and Exploitation in an Aging America* (Washington, DC: National Research Council of the National Academies, National Academies Press, 2003); MetLife Mature Market Institute, the National Committee for the Prevention of Elder Abuse, and the Center for Gerontology at Virginia Polytechnic Institute and State University, *Broken Trust: Elders, Families and Finances* (2009).

States increasingly require criminal background screening of in-home direct care workers to protect vulnerable care recipients from harm, yet there is no uniform protocol for screening and disqualifying candidates. While the idea of screening is almost universally endorsed by state-level policymakers, they need guidance on what works and is cost-effective, particularly at a time when funds to provide quality care are limited. The efficacy of background checks in reducing risk has not yet been fully or rigorously explored, heightening the need for policymakers and program personnel to identify the most efficient set of screening practices. For self-directed programs that allow individuals to hire friends and family, respect for personal choice may call for alternative screening methods.

II. BACKGROUND

Currently, an estimated 17 percent of adults over the age of 65 require assistance with daily activities, such as eating, meal preparation, and housekeeping, and the prevalence of such need rises with age. The Medicaid program, a federal-state partnership, is the largest funder of long-term care services to provide these types of support for daily living. In 2004, Medicaid paid for 49 percent of all long-term care costs.⁵ According to the Congressional Research Service, approximately 70 percent of these adults who need long-term care live in the community, not in institutions such as nursing homes.⁶

Demand for, and use of, Medicaid-funded home and community-based long-term care has risen appreciably in the past decade, fueled by several factors. These include state expansion in the number of programs providing such care, increasing demographic pressure from an aging society, and a Supreme Court decision affirming individuals' right to community placement, when appropriate.⁷ Between 2000 and 2004 alone, Medicaid spending on home and personal care grew approximately 14 percent.⁸ Furthermore, the aging of the so-called baby boom generation will add millions to the number of older Americans who will potentially require long-term care. The number of adults ages 65 and older is projected to grow from 35 million in 2000 to 71.5 million by 2030.⁹

With this population expansion will come an increasing demand for a qualified workforce to provide these services. According to the Bureau of Labor Statistics, in 2006 approximately 767,000 people nationwide were employed as personal and home health care aides, and the agency expects a 51 percent increase in workforce size over the next decade.¹⁰ At the same time, the Census Bureau is reporting little or no growth in the

⁵ Dennis Smith, "The Future of Long-Term Care and Medicaid," Testimony before the House Committee on Small Business, July 10, 2006.

⁶ R. Price, *Long-Term Care for the Elderly* (Washington, DC: Congressional Research Service, 1996).

⁷ In *Olmstead v. L. C.* (98-536), 527 U.S. 581 (1999), the Supreme Court affirmed the right of individuals with disabilities to live in their community in its six to three ruling against the state of Georgia.

⁸ J. Holahan and M. Cohen, *Understanding the Recent Changes in Medicaid Spending and Enrollment Growth Between 2000–2004* (Menlo Park, CA: Kaiser Commission on Medicaid and the Uninsured, 2006), 6.

⁹ Federal Interagency Forum on Aging-Related Statistics, available at www.agingstats.gov.

¹⁰ Bureau of Labor Statistics, *Occupational Outlook Handbook: 2008–2009 Edition* (Washington, DC: Bureau of Labor Statistics, 2008), 2.

number of women ages 25 to 54 with little education, which has been the traditional labor pool for this occupation.¹¹

Each year, millions of Americans, many of them elders, receive Medicaid-funded assistance in their homes and communities with everyday activities.¹² These home and community-based services range from hands-on help with bathing, dressing and eating, to transportation services and linkage to community events and other services. Medicaid is not the only funding source for long-term care; there are a variety of other federal and state programs, and many individuals purchase long-term services and supports directly. In addition, volunteers play a critical role in delivering long-term services and supports to older adults. Across the country, volunteers deliver meals to homebound individuals, assist with money management and tax preparation, provide assistance with everyday activities, and provide support for end-of-life care.

All these services play an invaluable role in allowing beneficiaries to stay in the community-based settings they prefer, rather than enter an institution. At the same time, there are long-standing concerns about the safety of such individuals and the potential risk of abuse or neglect by the paid workers and volunteers who provide direct care. For services provided under the Medicaid Section 1915(c) waiver authority, which funds much of this home and community-based care, ensuring the health and welfare of service recipients—defined as freedom from abuse, neglect, and exploitation—is a key statutory requirement facing states.¹³

Elder abuse, defined as any type of mistreatment that results in harm to an older adult, is a real social problem whose causes and prevalence are not well understood.¹⁴ Estimates are that, for every case of elder abuse reported, as many as five incidents may not be. As the older U.S. population grows, so do the risks of elder abuse, mistreatment, and exploitation. The National Center for Elder Abuse found a 16 percent increase in the number of reports substantiated by Adult Protective Services (APS) between 2000 and 2004.¹⁵ Current estimates are that approximately 2.1 million older Americans a year are victims of physical, financial, and other types of abuse and neglect from a variety of sources, including self-neglect.¹⁶ Elder abuse can range from physical and sexual abuse (the latter of which is relatively rare) to emotional abuse or financial exploitation. Self-neglect, followed by caregiver neglect and financial exploitation, are the most common forms of mistreatment, according to numbers of reports substantiated by states.¹⁷

¹¹ M. Toossi, "Labor Force Projections to 2016: More Workers in Their Golden Years," *Monthly Labor Review* (November 2007).

¹² Kaiser Commission on Medicaid and the Uninsured, *Medicaid Home and Community-Based Service Programs: Data Update* (Dec. 2007) (Menlo Park, CA: Henry J. Kaiser Family Foundation, 2007).

¹³ States operating Medicaid section 1915(c) waiver programs to fund HCBS for elders and people with disabilities must meet the six assurances articulated in 42 CFR 441.302: consistent determination of level of care for program eligibility, individualized service planning, use of qualified providers, maintenance of participant health and welfare, administrative oversight by the state Medicaid agency, and integrity of financial payments.

¹⁴ Bonnie and Wallace, *Elder Mistreatment* (2003).

¹⁵ P. Teaster et al., *Abuse of Adults 60+: The 2004 Survey of Adult Protective Services* (Washington, DC: National Center on Elder Abuse, 2006).

¹⁶ Bonnie and Wallace, *Elder Mistreatment* (2003).

¹⁷ Teaster et al., *Abuse of Adults 60+* (2006).

According to a review of state APS programs, the vast majority of substantiated elder abuse allegations occurred in domestic settings.¹⁸

Older long-term care recipients are especially vulnerable to mistreatment because of cognitive and physical disabilities, which can impair their ability to communicate and increase their likelihood of being dependent on others for assistance. According to the *National Elder Abuse Incidence Study*, older adults who need more physical assistance, or who have compromised cognitive function, are more likely to be abused.¹⁹ The current workforce providing direct HCBS support services to this vulnerable population is characterized by high rates of turnover because of the low wages and limited opportunities for advancement in this field. As the population ages, the Institute of Medicine has raised concerns that the health care workforce will not be large or skilled enough to meet the increasingly complex needs of older adults.²⁰

Although accurate and comprehensive data on elder abuse are lacking, limited evidence from nursing home settings suggests that abuse of long-term care recipients by direct care staff is not an insignificant issue, at least in institutional settings.²¹ Concerns about elder abuse perpetrated by those paid to provide direct care has prompted recent federal legislation designed to reduce the risks to the aging population. In 2003, as part of the Medicare Modernization Act, Congress directed the federal Centers for Medicare and Medicaid Services (CMS) to conduct a pilot project funding criminal background checks for staff in selected long-term care settings.²² Based on the results of this pilot, the Senate introduced the Patient Safety and Abuse Prevention Act of 2007²³ to establish a nationwide system of background checks. Senators reintroduced the legislation in March 2009.²⁴ The Elder Justice Act of 2007 seeks a comprehensive approach to addressing elder abuse by providing states with resources to prevent elder abuse, increasing prosecution of those who mistreat the elderly, and providing victim assistance.²⁵ In addition, over the past several years, numerous bills have been introduced to reduce the risks of abuse to elders and ensure the safety of the health care workforce.²⁶

¹⁸ Ibid. .

¹⁹ Toshio Tataru et al., *National Elder Abuse Incidence Study: Final Report* (Washington, DC: National Center on Elder Abuse, in collaboration with Westat, Inc., 1998).

²⁰ Institute of Medicine, *Retooling for an Aging America: Building the Health Care Workforce* (Washington, DC: Institute of Medicine, 2008).

²¹ L. Nerenberg, "Abuse in Nursing Homes," *National Center on Elder Abuse Newsletter* (May 2002).

²² P.L. 108-173.

²³ S. 1577.

²⁴ S. 631.

²⁵ S. 1070 and H.R. 1783

²⁶ Senate Special Committee on Aging, *Building on Success: Lessons Learned from the Federal Background Check Pilot Program for Long-Term Care Workers* (Washington, DC: Senate Special Committee on Aging, 2008).

III. PURPOSE

AARP’s Public Policy Institute undertook this study to examine the current use of criminal background checks for Medicaid direct care workers in home and community-based settings. The aging of the population and the increasing demand among consumers to receive long-term services and supports at home warrant a review of current research and policy in this area. This study summarizes the literature on this subject, provides some guidance on cost-effective strategies for screening in-home workers, and further explores the efficacy and feasibility of using criminal background checks as a means for reducing the risk of elder abuse, neglect, and exploitation.

IV. METHODOLOGY

Criminal background checks for staff working with vulnerable elders are one commonly used tool aimed at reducing the risk of elder abuse. This report reviews the current status of criminal background checks for Medicaid direct care staff who work in HCBS programs that serve older adults and people with disabilities.²⁷ Specifically, we examine federal regulations and the diversity of state statutes and Medicaid policies regarding worker screening, with a focus on three states—Arkansas, Michigan, and New Mexico—that represent a spectrum of on-the-ground screening policies for Medicaid direct care workers, particularly those in self-directed programs.²⁸ In addition, we analyze the key policy issues related to criminal background checks for Medicaid staff, including perceived barriers, costs, evidence of efficacy in reducing the risk of abuse, impact on the workforce, and special considerations raised by self-directed HCBS programs. In addition to statutory analysis and literature review, this report incorporates themes that emerged from an invitational roundtable of experts convened by AARP in February 2009 to explore these issues.²⁹ While this report focuses on Medicaid-funded home care, these policy considerations also apply to HCBS funded privately or through other government programs.

V. OVERVIEW OF MEDICAID-FUNDED HCBS

Medicaid is a complex program with standards for ensuring provider qualifications. This overview provides context for the discussion of screening home care workers funded by Medicaid.

PROGRAM OVERVIEW

The major source of publicly funded long-term care in the community is Medicaid. Enacted in 1965 under the Social Security Act, Medicaid is a joint federal-state entitlement program designed to provide health insurance for individuals with limited

²⁷ While the overall focus of this report is on older adults, by and large the policy considerations apply to all populations receiving long-term care services and supports.

²⁸ A more comprehensive review of state law on criminal background checks was conducted by the National Conference of State Legislatures, under contract to AARP. See appendix B.

²⁹ Roundtable participants are listed in appendix D.

income and resources. Its original intent was to cover primary and acute care services such as physician visits and hospital stays, with only limited coverage for institutional long-term care. Over the past few decades, however, Medicaid has steadily increased funding for community living for older adults and people with disabilities by expanding offerings under state plan services and HCBS waiver programs, and today approximately 27 percent of all Medicaid long-term care dollars are for noninstitutional care.³⁰

Services

States participating in Medicaid must cover a minimum set of services for particular groups. These mandatory services include home health services, comprising skilled nursing services, home health aides, and medical supplies for the home. States may also choose to offer additional, optional services, which must be available to all Medicaid recipients but which can be limited to control utilization. Personal care services for older adults and people with disabilities—which include assistance with performing activities of daily living, such as bathing, dressing, laundry, and money management—are optional services authorized in more than 30 states. In addition, 48 states operate at least one Medicaid Section 1915(c) waiver program specifically designed to provide supports in the home or a community-based setting to individuals who would otherwise be in an institution.³¹ These waiver services include case management, homemaker, home health aide, personal care, adult day care, habilitation, respite, and other services. States can target these services to a particular group (e.g., older adults and people with disabilities, or children with developmental disabilities).

States have also used the authority under Section 1115 of the Social Security Act to provide HCBS to older adults, most notably the Cash and Counseling Demonstration and Evaluation, which tested the concept of self-directed care, including hiring legally responsible family members and managing individual budgets. More recently, Section 6086 of the Deficit Reduction Act of 2005³² added two new options for Medicaid-funded HCBS: Section 1915(i) to expand the offerings under the State Plan to include HCBS services as an optional benefit, and Section 1915(j), the Self-Directed Personal Assistance Service State Plan Option. Appendix A provides more detail on the different Medicaid authorities and funding sources.

Service Delivery Models

In general, Medicaid HCBS programs employ two models of service delivery under the state plan, waiver, or demonstration authorities: the traditional agency model and the self-directed model. In a traditional agency model, provider agencies apply to participate in the state's Medicaid program. Once certified, the provider and the Medicaid state agency enter into a formal contractual arrangement referred to as a provider agreement. The traditional provider agency recruits, hires, supervises, and pays direct care workers. The agency is responsible for ensuring that all certification standards are met, including preemployment screening.

³⁰ E. Kassner et al., *Balancing Act: State Long-Term Care Reform* (Washington, DC: AARP Public Policy Institute, July 2008).

³¹ Arizona and Vermont are the two states that do not operate at least one Medicaid section 1915(c) waiver program.

³² P.L. 109-171.

In contrast, the self-directed model allows beneficiaries to recruit, hire, and supervise their own workers. These direct care workers may be friends, family, and even legally responsible individuals.³³ The Medicaid Section 1915(c) waiver requires agencies to provide two support functions: (1) offering information and assistance in the form of counseling and (2) assisting with the management of the individual budget, processing timesheets, and filing/reporting/paying employment taxes. The beneficiary may serve as the employer of the worker (fiscal agent model), or may serve as the managing employer (hiring and supervising the worker), with the state agency serving as the common law employer (agency with choice) for tax purposes.

Provider Qualifications

Federal Medicaid regulations require that states define the provider qualification standards that govern participation in their Medicaid programs.³⁴ States must enact standards for provider participation to ensure that providers are qualified, effective, and cost-efficient and to protect program beneficiaries, but these requirements must not unfairly restrict participation in the Medicaid program. As long as states meet these criteria, they have significant latitude in specifying their provider qualification requirements.

The instructions for the most recent application of the Section 1915(c) waiver program, the primary Medicaid vehicle for funding HCBS, further underscore this point. Guidance on establishing provider qualifications states, “Provider qualifications must be reasonable and appropriate in light of the nature of the services. They must reflect sufficient training, experience, and education to ensure that individual will receive services from qualified person in a safe and effective manner. Provider qualifications and standards should not contain provisions that have the effect of limiting the number of providers by the inclusion of requirements unrelated to quality and effectiveness.”³⁵

OTHER FEDERAL FUNDING SOURCES SUPPORT HCBS

While the various Medicaid authorities provide the bulk of federal funding for HCBS programs, other federal agencies are taking leadership roles for individuals not covered by the Medicaid program. The Administration on Aging, created by the Older Americans Act, funds services for millions of older persons. Local programs, administered by the Area Agencies on Aging and the associated aging network providers, include home-delivered meals, transportation, adult day care, legal assistance, and health promotion. The Medicare program funds approximately 20 percent of all long-term care, primarily through home health services to almost 3 million individuals annually.

DEMAND FOR HCBS DIRECT CARE WORKFORCE GROWING

As noted above, the demand for a direct care workforce for Medicaid and other HCBS programs is expected to grow in the coming years. According to the Bureau of Labor Statistics, personal and home care aides and home health aides are two of the top three

³³ Legally responsible relatives include spouses, parents of minor children, and legally appointed guardians.

³⁴ Section 1915(2)(B)(b)(4) and Section 1915(2)(c)(2)(A).

³⁵ Centers for Medicare and Medicaid Services, *Application for a §1915(c) Home and Community-Based Waiver [Version 3.5]: Instructions, Technical Guide, and Review Criteria* (Baltimore, MD: Centers for Medicare and Medicaid Services, 2008), 137.

fastest growing occupations in the coming decade.³⁶ These workers, who have the most direct and consistent contact with program participants, provide the hands-on and other support necessary for participants to complete daily living activities and remain in the community. Already there is evidence of insufficient personnel to provide these services, even before expected demographic trends fully kick in.³⁷

Currently, this workforce consists of a variety of licensed and unlicensed workers whose titles and responsibilities vary by state and program. This workforce includes personal care attendants, home health aides, homemakers, chore services workers, certified nursing assistants, and other direct support professionals. Their work can be physically and emotionally demanding, turnover is high, wages are low, and both benefits and opportunities for advancement tend to be limited.³⁸ Their training and certification requirements vary, as does the nature of their work. Some direct care workers assist only one individual; others work with several. Some provide hands-on physical assistance to participants; others may have responsibilities only for cleaning participants' homes; and some perform quasi-medical tasks. Nearly all, however, have direct access to Medicaid participants and their homes. In short, this workforce is the crucial nexus between Medicaid HCBS programs and the vulnerable population it serves.

VI. MEDICAID POLICIES ON CRIMINAL BACKGROUND CHECKS DEFER TO STATES

The Medicaid program has no broad mandate for criminal background screening. State laws vary considerably, and the data sources for criminal history are not integrated for ease of use.

No MEDICAID MANDATE

Currently no federal Medicaid law requires long-term care providers to perform systematic, comprehensive background checks on employees with direct access to vulnerable seniors. Similarly, no overarching national guidelines or regulations specify the types of screening, including criminal background checks, required for volunteers working with this population. Thus, states and individual programs have the flexibility to develop their own pre- and posthiring activities to comply with state laws and meet their specific quality standards.

However, while CMS does not require HCBS waiver programs to conduct criminal background checks on workers, if programs choose to do so (and many do), CMS does require the state to provide to CMS information about such checks, including

- The types of positions that must undergo such investigations,

³⁶ Available at www.bls.gov/news.release/ecopro.t06.htm.

³⁷ E. Scala, L. Hendrickson, and C. Regan, *A Compendium of Three Discussion Papers: Strategies for Promoting and Improving the Direct Service Workforce: Applications to Home and Community-Based Services* (New Brunswick, NJ: Rutgers Center for State Health Policy, 2008).

³⁸ M. Wilner, "Towards a Stable and Experienced Caregiving Workforce," *Generations* (Fall 2000).

- The entity responsible for conducting the checks or investigations,
- The scope of the required investigation, and
- The program's process to ensure that mandatory investigations have been conducted.³⁹

If states require screening, they must supply similar types of information. Data provided by CMS on 146 approved Section 1915(c) waivers showed that all states required criminal background checks for at least some provider staff.

Medicaid program policies on worker qualifications, including screening of criminal histories, vary by authority and state, and even within states. For example, CMS waiver policy stipulates that participants in self-directed Medicaid programs cannot be charged for the cost of criminal background checks on potential workers, but takes no position on whether such checks should be performed. As a result, some states require checks for self-directed workers and some do not.

CMS does have policies for excluding certain providers from the Medicaid and Medicare programs, based on fraudulent and/or abusive behavior. The Office of Inspector General List of Excluded Individuals/Entities includes providers prohibited from participating in any federally funded health care program, including Medicaid, on the basis of fraud, patient abuse, and certain other criteria. In addition, federal law requires each state to maintain a certified nurse aide registry, which must include any findings related to abuse, neglect, or misappropriation of property.⁴⁰ However, these registries rarely include home care workers.⁴¹

MULTIPLE OPTIONS AND DATA SOURCES FOR WORKER SCREENING NOT INTEGRATED

States and provider agencies, along with entities serving beneficiaries who hire and direct their own workers, can and do access a variety of data sources when conducting background checks for HCBS direct care workers. In general, these sources are not integrated within a state and must be searched separately. Each source has advantages and disadvantages.

National FBI Checks

The Federal Bureau of Investigation (FBI) maintains a repository of criminal records, the Interstate Identification Index, comprising records from all states and territories, as well as from federal and international criminal justice agencies. For a fee, the FBI will conduct a fingerprint-based search of this index for noncriminal justice purposes (e.g., background checks). In 2005, the FBI processed approximately 10 million noncriminal justice fingerprint checks.⁴² Fingerprints are considered one of the few reliable means of

³⁹ Ibid, 115.

⁴⁰ 42 CFR 483.156 .

⁴¹ Government Accountability Office, *Long-Term Care: Some States Apply Criminal Background Checks to Home Care Workers*, PEMD-96-5 (Washington, DC: GAO, 1996).

⁴² *Federal Register*, Volume 73, Number 119 (June 19th, 2008), page 34910.

personal identification, along with voice prints and retinal scans. While the FBI database is national in scope, the FBI relies on state reports for its data. An FBI search will not reveal state-level convictions that have not yet been reported.

The FBI will accept fingerprints in three different formats: electronically, via LiveScan or other technologies that read fingerprints from a touch screen; inked onto a card; or a scan of an inked card. Electronic submissions are processed quickly, on average within three days. In contrast, inked cards can take up to six weeks to process, and also run the risk of smudging, which may render the prints unusable. In October 2007, the FBI changed its fee schedule for processing noncriminal justice record checks. It reduced the charge for processing electronic fingerprint records, including scanned copies of inked prints, from \$24 to \$19.25, and raised the charge for processing inked cards from \$24 to \$30.25. (There is no fee for checks run for criminal justice purposes.)

Office of Inspector General List of Excluded Individuals/Entities

The U.S. Department of Health and Human Services' Office of Inspector General maintains a searchable, online list of individuals and entities that are prohibited from participating in any federally funded health care program.⁴³ The bases for exclusion include convictions for program-related fraud and patient abuse, licensing board actions, and default on Health Education Assistance Loans. Online name-based searches are free; users have the option of verifying Social Security Numbers (SSNs) or Employer CMS Criminal Background Check Pilot Sought to Facilitate Comprehensive Screening

State and County Criminal Records Check

All states and some counties maintain electronic criminal records that include information on convictions and often include information on arrests, prosecutions, court determinations, and records from corrections departments. This information may be name based or fingerprint based. Frequently, these databases can be searched for minimal or no charge.⁴⁴ Name-based or SSN-based checks rely on the accuracy of information provided by the potential employee, and are therefore subject to fraud if false information is provided. Potential employees could have names that are identical to ones in the database, resulting in "false positives," and aliases may raise the risk of "false negatives." State records do not capture information on convictions in other states. Even local fingerprint checks, which are more accurate than name-based checks, may not catch out-of-state convictions.

State Adult Protective and Child Protective Services Registries

State abuse registries contain information on allegations of abuse that have been substantiated by state Adult or Child Protective Services agencies,⁴⁵ including the name of the alleged perpetrator. Twenty-one states maintain such registries, according to the *2004 Survey of Adult Protective Services*.⁴⁶ Another five states do not maintain a specific

⁴³ Available at <http://exclusions.oig.hhs.gov>.

⁴⁴ Center for Democracy and Technology, "A Quiet Revolution in the Courts: Electronic Access to State Court Records" (2002). Available at www.cdt.org/publications/020821courtreports.shtml.

⁴⁵ Not all allegations of abuse substantiated by adult or child protective services investigators result in criminal convictions. Substantiated findings are those that meet the criteria in a statute that defines abuse or neglect and that result in a formal charge.

⁴⁶ These states are Arkansas, Delaware, Hawaii, Indiana, Iowa, Kansas, Louisiana, Massachusetts, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Mexico, Oklahoma, Oregon, Texas, Utah, Vermont, Washington, and Wyoming.

register but do maintain some type of database of individuals involved in abuse cases.⁴⁷ The 2004 survey revealed a paucity of information regarding what happens to perpetrators of sustained allegations as a result of APS intervention.⁴⁸

There is no clear or consistent definition of “abuse registry.” This term may refer to a list of perpetrators of sustained⁴⁹ incidents of elder abuse managed by the state APS agency and, in many instances, may be used to determine whether those individuals should be prohibited from working with certain vulnerable populations or in certain settings, such as nursing homes. In some states, APS contributes information about reports or their dispositions to an abuse registry that is maintained by another state agency. The term’s third use refers to a database of reports made to APS case recorders. It is important to note that not all persons on these registries have been convicted of actual crimes, because there is generally a lower standard for inclusion on the registries (sustained abuse allegations versus criminal convictions).

In some states, information about elder abuse is collected by disparate programs and agencies and may never be collated into one source. Often, coordination is lacking among agencies responsible for reporting and investigating elder abuse, and reporting may not be mandatory. Furthermore, underreporting of abuse is likely prevalent. Because individual states maintain these registries, conducting a thorough check may require checking the records of every state where the applicant has lived. In addition, some abuse registries may focus only on nursing home staff and not include home care workers.

National and State Sex Offender Registry

The Department of Justice maintains the Dru Sjordin National Sex Offender Public Web Site,⁵⁰ which allows for a name-based search across participating state Web sites of registered sex offenders. This site is open to the public and can be used free of charge, subject to a user agreement.

Department of Motor Vehicle Records

This is a potentially important search when staff provide Medicaid-funded transportation, including carrying passengers to and from community events, shopping, running errands, or medical appointments. Most motor vehicle histories show driving history over the past three to seven years. There is no national database; each state has its own database of drivers’ records, typically located at the bureau or department of motor vehicles, which is available for public searches in some states. Required information for a search includes full name, address, date of birth, and SSN. While information from a database search varies from state to state, driving records will reflect moving vehicle violations such as speeding tickets, accident history, and convictions.

Commercial Databases

Individual vendors also maintain a number of commercial databases of criminal information, which provide background checks for a fee. These databases, which are

⁴⁷ These states are Alaska, Idaho, New Jersey, West Virginia, and Wisconsin.

⁴⁸ Teaster et al., *Abuse of Adults 60+* (2006)

⁴⁹ That is, an incident that has been investigated and deemed substantiated by the state agency.

⁵⁰ Accessible at www.nsopr.gov.

regulated by the Fair Credit Reporting Act, aggregate criminal history information from multiple state sources, including county courthouses, correctional facilities, and state criminal record depositories. These commercial databases are not truly national in scope, because not all states make their data available, and also may not be current, since updates are done only periodically.⁵¹

CMS PILOT SOUGHT TO FACILITATE COMPREHENSIVE SCREENING

In 2003, as part of the Medicare Prescription Drug Improvement and Modernization Act (MMA), Congress authorized a pilot project funding background checks on workers in certain long-term care settings.⁵² The intent of the pilot was to fund the expansion of participating states' criminal background check systems to screen workers seeking employment in a variety of long-term care settings, including care recipients' homes, and to incorporate FBI criminal records checks. Specifically, the legislative goals were to have grant recipients identify "efficient, effective and economical" procedures for conducting criminal background checks in select long-term care settings. In 2005, CMS provided \$16.4 million in funding over three years to seven states: Alaska, Idaho, Illinois, Michigan, Nevada, New Mexico, and Wisconsin. Participating states used this funding to invest in state databases, create workforce background check units, update applicable laws and regulations, and offer additional training to long-term care providers. The pilot concluded in 2007.⁵³

CMS contracted with Abt Associates to conduct an independent evaluation of the pilot program and released the final report of the evaluation in 2008.⁵⁴ During the pilot program, the seven states conducted 204,339 criminal background checks and fitness determinations. Seventy-eight percent of job applicants (158,476) passed the background check and fitness determination. Fewer than 4 percent (7,463) were disqualified because of the background check findings. However, the report indicated that, of the 204,339 criminal checks conducted, 38,400 records (close to 19 percent) were withdrawn before a final fitness determination. The evaluators suggested that the criminal background check requirement may have deterred applicants who knew the results would disqualify them from employment opportunities. But the evaluators noted that there was a lack of quantifiable evidence on the reasons for the withdrawals.

The report found great variation across the pilot states on the time it took to process a background check. The median time was 15 days, but 25 percent of the background checks took 33 days and 10 percent took 81 days or more to process. The method used to collect fingerprints was the key factor in the processing time: states that used electronic fingerprint methods processed checks much more quickly than states using fingerprint cards. Four of the seven states used an electronic LiveScan system to capture fingerprints, while the remaining states used fingerprint cards.

⁵¹ U.S. Department of Justice, *The Attorney General's Report on the History of Criminal Background Checks* (Washington, DC: Department of Justice, 2006).

⁵² P.L. 108-173, section 307.

⁵³ Senate Special Committee on Aging, *Building on Success: Lessons Learned from the Federal Background Check Pilot Program for Long-Term Care Workers* (Washington, DC: Senate Special Committee on Aging, 2008).

⁵⁴ Abt Associates, *Evaluation of the Background Check Pilot Program—Final Report* (Washington, DC: Abt Associates, 2008).

The report also found differences among the states as to who conducted the checks, the entity that made the final determination, and the types of disqualifying offenses barring employment (above minimum MMA requirements). All of the pilot states had provisional employment policies, and most had an appeals process to allow applicants to dispute fitness determinations.

While the evaluation attempted to address the efficacy of background checks at reducing the incidence of abuse, neglect, and exploitation through qualitative methods, it found no quantitative evidence on efficacy.

The evaluation includes a number of “lessons learned” by pilot states that may be important for future policy and program development:

- ***Web-based systems are useful for conducting initial registry checks.*** Both state agency officials and employers agreed that Web applications for conducting background checks were successful in speeding up the processing of background checks, automating the process, and eliminating unnecessary costs.
- ***Electronic fingerprint capture should be used whenever feasible.***
- ***Supervision of provisional hires is difficult to enforce.***
- ***One background check program can be used across multiple agencies.*** Most states have background check requirements for several types of workers, including teachers, bus drivers, child care workers, and health care workers. There could be benefits from increased collaboration and information sharing across the agencies that run background check programs.
- ***Many stakeholders see value in having the fitness decision made by a state agency.***
- ***Rehabilitation review programs—allowing individuals with a disqualifying offense in the past to be cleared for employment if they were able to demonstrate that they did not pose a risk to patient safety—are important for increasing fairness and reducing unintended workforce effects.***
- ***Rap-back systems*** (see Michigan, section VII) ***could improve effectiveness and efficiency.***

VII. CURRENT VARIATION IN STATE POLICIES AND PRACTICES

There is substantial variation in the state statutes and Medicaid provider qualification policies on criminal background screening for the Medicaid staff who provide HCBS to older adults. In the absence of federal Medicaid requirements, it is state laws that primarily determine program policies. Results from a review of statutes in 50 states, the District of Columbia, and the U.S. territories by the National Conference of State Legislatures (NCSL) found that while most states do have laws mandating criminal background checks for long-term care workers, the laws vary in terms of who must be screened, who is exempted, what criminal convictions preclude employment and for how long, whether provisional

employment is allowed, and who bears the cost of screening.⁵⁵ An in-depth look at three states confirmed this diversity, particularly for workers in self-direction programs.

NCSL REVIEW FOUND WIDE USE, CONSIDERABLE VARIATION ACROSS STATES

Researchers at NCSL reviewed state statutes and regulations in a nationwide survey of policies regarding criminal background checks for in-home direct care workers.⁵⁶ Appendix B is a table of the NCSL findings. NCSL found that criminal background checks are widely used by states to screen potential HCBS direct care workers. Almost all states mandate preemployment criminal background checks of at least some type for defined categories of Medicaid in-home workers; only four states have no such requirement.⁵⁷ Only three states⁵⁸ allow all employers full discretion on whether to conduct checks, and three other states⁵⁹ allow certain employers full discretion. These statutory requirements tend to focus on categories of employees or long-term care settings, rather than program funding source.

Significant diversity exists, however, in how the resulting findings are applied and for how long, as well as who is exempt from screening, conditional employment, and appeals. Many states exempt certain categories of individuals providing services inside the home, such as volunteers, faith-based organizations, and family members. Six states⁶⁰ exclude family members or other relatives from a criminal background check requirement. Nearly all (95 percent) states and territories with a background check statute require, at a minimum, that state criminal data sources be searched, but a minority of states require reviews of more comprehensive federal data sources. The costs of conducting checks may be borne by employers or the state, shared between the two, or even passed on to the potential employee. Twenty-eight states allow conditional employment until a background check is completed, most often with time limits or supervisory requirements. In addition, 25 states with a criminal background check requirement allow waivers or appeals for such issues as disputing an inaccurate record or presenting evidence of rehabilitation.

The types of convictions that preclude employment vary considerably. While most states and territories list the offenses that preclude employment, eight⁶¹ do not. Some states, such as Michigan, have a lengthy list of disqualifying convictions, while others, like Alaska, have a relatively short list. Some consider only felonies as a basis for disqualification, while others include certain misdemeanors as well. A few states disqualify only applicants with a history of offenses against dependent or vulnerable individuals or fraud-related offenses. In addition, 13 states have provisions whereby certain convictions would no longer be disqualifying after a certain period.

⁵⁵ Only Louisiana, Montana, Nevada, and North Dakota do not have laws related to criminal background checks for home care workers.

⁵⁶ D. Folkemer et al., *State Policies on Criminal Background Checks for In-Home Direct Care Workers* (Washington, DC: National Conference of State Legislatures, 2009).

⁵⁷ Louisiana, Montana, Nevada, and North Dakota.

⁵⁸ California, South Dakota, and Tennessee.

⁵⁹ Delaware, Kansas, and Vermont.

⁶⁰ Alabama, Alaska, Delaware, Florida, South Carolina, and Utah.

⁶¹ Colorado, Connecticut, Hawaii, Maryland, New Hampshire, North Carolina, Oregon, and South Dakota.

Even within the same state, comparable workers operating in different programs might face different background check requirements. For example, in Florida, employees providing direct services to individuals with developmental disabilities face a more rigorous background screening process than do staff from a home health agency. A personal care attendant employed by an agency in Delaware may be screened against state or national criminal data, but a family member hired under a self-directed program to perform the same tasks may not be screened at all. Similarly, in many states, direct care workers employed in certain long-term care settings, such as licensed group homes or assisted living facilities, may have statutory criminal background check requirements, while comparable workers in an unlicensed or different setting do not.

PROFILES OF CRIMINAL BACKGROUND CHECKS IN THREE STATES EXEMPLIFY STATE VARIABILITY

To illustrate the diversity regarding criminal background checks for Medicaid direct care workers, we examined the statutory and programmatic requirements in three states: Arkansas, Michigan, and New Mexico. Table 1 summarizes the background screening requirements for Medicaid HCBS staff in each state, followed by a brief narrative profile. Detailed overviews are included in appendix C.

Table 1							
Criminal Background Check Requirements Vary in Arkansas, Michigan, and New Mexico							
	Criminal Background Checks Required	Exceptions Regarding Self-Directed Care	Type of Check	Party Responsible for Cost	Conditional Employment	Waiver or Appeal Available	Disqualifications in Law
AR	Yes	Yes not required for one program	State and federal under certain conditions	Not specified	Yes expires after 45 days	Yes	Yes
MI	Yes	Checks are required, but individuals have flexibility in acting on findings	State and federal under certain conditions	State reimburses cost	Yes employee must certify in writing that he/she has committed no offenses	Yes	Yes additional requirements may be imposed at the local level and may vary
NM	Yes	None	State and federal required	Employer or employee	Yes must be supervised employment and begins once check is requested	Yes	Yes

Arkansas

Rather than applying criminal background checks to a broadly defined service category or employment group, Arkansas ties checks to specific providers identified in state law. The three provider types named in legislation include home health and hospice agencies and providers participating in Elderchoices, one of the state’s Medicaid HCBS waiver programs. Other entities that may provide Medicaid HCBS are exempt from conducting checks for direct care workers. Checks of state-level criminal data are required, via the

Department of State Police; federal-level checks are required for individuals who have not lived continually in the state for the past five years or have not provided in-home care for at least 60 continuous days prior to application. Arkansas permits provisional employment pending results.

Arkansas legislation is largely silent on the application of criminal background checks for the almost 5,000 individuals hiring their own caregivers, and background checks are not a condition of participation in one of the Medicaid programs offering self-direction. IndependentChoices, a self-directed state plan service program, does not require criminal background checks or offer them as an option to program participants. State policy on criminal background check requirements for the self-directed service delivery system, however, appears to be evolving. Recently, the Department of Human Services issued a policy rule for Alternatives, an HCBS waiver program serving adults with disabilities, requiring a criminal background check for individuals seeking to be certified as Alternatives providers and specifying the disqualifying crimes.⁶² The proposed Arkansas Next Choices waiver program, targeted to individuals living in institutions but desiring to live in the community, would require state criminal background checks for personal attendants, adult family home providers, and companion service providers as a condition of Medicaid certification.

Michigan

Michigan's criminal background check program has undergone significant modification in recent years as a result of the state's participation in the CMS pilot project, which necessitated new legislation specifying which long-term care providers must screen staff, the process for conducting checks, and which crimes preclude employment and for how long. Currently, Michigan uses a tiered, iterative approach to screening applicants for employment with select long-term care providers. In this electronic system, low-cost, public, state data are searched first, and more expensive national fingerprint checks are reserved for cases where no disqualifying data are found during the initial state search. The list of disqualifying crimes is extensive. However, many crimes have sunset provisions of 1, 3, 5, 10, or 15 years, after which they no longer affect fitness for employment. This legislation does not cover all providers whose staff have direct access to Medicaid long-term care recipients in their homes.

Employers may hire workers provisionally under certain conditions, pending the result of the screening. The state also instituted a "rap-back" system, so that state law enforcement officials report crimes committed after the initial screening to the Department of Community Health and the employer for action. During one 18-month period of the pilot, state officials conducted 103,251 checks, resulting in disqualification of 6,932 applicants—nearly 7 percent—based on state criteria.

Provider qualification requirements for Michigan's Medicaid HCBS waiver program serving older adults, MI Choice, differ somewhat from the state laws on screening outlined above. Requirements in the waiver are only for a state-level check through the state police, but the checks cover a much broader list of provider types than the automated statewide screening program. Self-directed workers also must have a criminal background check. Participants in Medicaid self-directed programs do have some

⁶² Policy 1088, "Participant Exclusion Rule," Arkansas Department of Human Services.

flexibility in how they act upon the findings of these checks, although certain convictions are deal-breakers, including Medicaid fraud, elder abuse, and criminal sexual conduct. The state is finding that many potential direct care workers in the self-directed program are “coming back with less than sparkling records,” and many of these are family members of program participants. Waiver participants have the flexibility to hire family members with previous convictions, provided they are not on the list of non-negotiable offenses. In addition, waiver agents, who conduct assessments and contract with the fiscal intermediaries, may have their own policies regarding which criminal offenses preclude employment. As a result, workers may face different screening requirements depending on where they seek employment in the state.

New Mexico

New Mexico, also participated in the CMS pilot and has detailed, comprehensive, and far-reaching legislation and policies related to worker screening. According to state statute, all Medicaid direct services workers, including those in self-directed programs, must undergo a criminal background check. There are no exceptions. The New Mexico Caregivers Criminal History Screening Act, passed during the 1998 legislature and amended in 2005, requires any person or entity identified as a “care provider” or “provider” that the potential to abuse, neglect, or exploit other individuals in a long-term care setting to undergo screening. The law specifies the care provider’s responsibility and the types of disqualifying crimes and convictions. New Mexico also developed a comprehensive, electronic incident management and prescreening employment system and publishes annual reports on activity. State officials noted the benefits of having these systems collocated under one administrative division.

Like Michigan, New Mexico includes in its background check program independent providers hired directly by participants in any self-directed programs. In contrast to Arkansas state law, the requirement for background checks is linked to job function, not employer type. New Mexico requires both a state-level and federal FBI check. An appeals process allows applicants to request reconsideration of employment fitness determinations. In state fiscal year 2006, the New Mexico Division of Health Improvement processed 22,759 criminal background checks, resulting in 435 disqualifications, or approximately 2 percent of applicants.

VIII. THEMES FROM RESEARCH AND STATE REVIEWS

Our review of the literature and state policies, as well as discussion with experts in the field, revealed complexity and only limited evidence on key policy questions related to criminal background checks as a means of protecting older adults using Medicaid HCBS. Despite the knowledge gaps, there appears to be a public policy consensus about the need for systems to ensure that individuals with certain criminal histories do not work in long-term care settings. For example, all the witnesses at a recent hearing on the topic by the Senate Special Committee on Aging deemed criminal background checks “critical” to protecting older adults.

Criminal background checks are one tool among many to reduce the risk of elder abuse among long-term care recipients. Elder abuse experts and others cite a variety of interventions—such as conducting reference checks, examining credit histories, and

requiring a full disclosure form—that, together, can mitigate the chances of elder mistreatment.

COST, DATA INTEGRATION, AND COMPLETENESS AFFECT FEASIBILITY OF BACKGROUND CHECKS

The feasibility of conducting criminal background checks for Medicaid direct care workers is primarily a function of their costs (both fees and labor), the completeness of various data sources, the ease with which they can be accessed, and the waiting time for results. While the FBI recently reduced its fees for electronic fingerprint checks, the issue of cost remains important for states. As economic conditions worsen, states have fewer resources to support the Medicaid program.⁶³ The staff time devoted to searching databases, processing FBI requests, and interpreting results can be appreciable. Participants in Michigan’s pilot expressed concern about the continued sustainability of their new automated system in the absence of federal funding. Many private vendors will conduct background checks for a fee; however, these can be upward of \$45 per check, a substantial amount given the size of the Medicaid direct care workforce. Criminologist Vern Quinsey, an expert on screening and recidivism, has argued for a cost-benefit approach to background screening, noting that if enough background information can be found without accessing costly criminal records, a decision not to hire can be made.⁶⁴ Checking low-cost electronic state databases before paying for FBI checks, an approach used by Michigan and other states in the CMS pilot, is one example of a cost-effective strategy.

One of the key goals of the CMS pilot was to develop more efficient and timely systems for processing criminal background checks. States responded by investing in electronic fingerprinting technology, database enhancements and coordination, training, and staffing. States that participated in the pilot project did report a dramatic decrease in the amount of time to process checks, in some cases from several weeks to just a few days.⁶⁵ These enhancements, however, were possible because of the federal financial investment the states received. Other states may still face barriers to timely processing. In states where provisional employment is not allowed, lengthy processing time may translate into delayed employment, and staffing gaps and may present major challenges to recipients who are in need of services.

A 2004 report issued by the Governor’s Elder Abuse Task Force in Oregon illustrates these barriers. The governor convened a task force to examine strategies for reducing the backlog in criminal background checks for providers. At that time, the Department of Human Services was conducting approximately 17,000 criminal background checks each month for long-term care facilities and other providers. Task force members suggested strengthening guidelines so caregivers are better supervised until checks are completed, creating a registry of individuals who committed a crime against vulnerable adults, and developing a list of disqualifying crimes to expedite employment fitness determinations.

⁶³ Kaiser Commission on Medicaid and the Uninsured, *Medicaid in a Crunch: A Mid-FY 2009 Update on State Medicaid Issues in a Recession* (Washington, DC: The Henry J. Kaiser Family Foundation, January 2009).

⁶⁴ National Committee for the Prevention of Elder Abuse, “What Can We Learn from Criminal Background Checks: An Interview with Forensic Psychologist Vern Quinsey” (n.d.), available at www.preventelderabuse.org/nexus/bgchecks.html.

⁶⁵ Senate Special Committee on Aging, *Building on Success* (2008).

However, members were also cognizant of the cost implications of such actions, noting that budgetary constraints would likely delay or preclude implementation.

Experts at AARP's roundtable agreed that the current patchwork of criminal record data sources is not well integrated and could result in critical holes in individual criminal histories. Creating ways to link and streamline current systems, to both enhance the scope and reduce the cost of background checks, is a valid policy goal, independent of the issue of the efficacy of such checks. A complementary recommendation was the development of registries or databases of prescreened individuals to expedite the hiring process. While such integration of multiple databases and registry development may have appreciable short-term costs, long-term payoffs could include reduced waiting times to obtain results and, consequently, more efficient hiring, rap-back capabilities to avoid rescreening workers who change jobs, and more complete criminal histories.

EFFICACY OF BACKGROUND CHECKS IN REDUCING RISK UNPROVEN

As a public policy tool, criminal background checks are promoted as a means of reducing the likelihood that an older adult will be abused by someone paid to provide direct care. However, several factors complicate the task of assessing the efficacy of background checks in accomplishing this goal. First, the true prevalence of abuse of any type by Medicaid direct care workers is not well understood, although studies suggest that elder abuse is most often perpetrated by family members, not strangers.⁶⁶ Underreporting of elder abuse cases is known to be a widespread problem. In addition, some instances of maltreatment by workers may not rise to the level of reportable abuse. Complaints regarding direct care worker actions may be unreported or unsubstantiated, thus undercounting the incidence of maltreatment. States may have parallel and uncoordinated systems for addressing elder mistreatment. Every state must have a long-term care ombudsman program; however, only 10 states use this position to address complaints about noninstitutional care. State APS programs may have higher standards in determining a finding of "abuse, neglect, or exploitation" than a societal definition of undesirable behavior.

Limited understanding of the correlation between past criminal convictions and likelihood of abusing an older adult further complicates the ability to evaluate the impact of criminal background screening instruments. Criminal data do show high rates of recidivism for individuals who have been incarcerated; according to the U.S. Department of Justice, 4 in 10 jail inmates in a recent review had a current or past sentence for a violent offense.⁶⁷ A 15-state study in 1994 found a 67 percent re-arrest rate for felony or serious misdemeanor.⁶⁸

In reviewing data from long-term care institutions in Arizona and Kansas, researchers from the Lewin Group found that nurse aides with a previous criminal conviction (one that did not disqualify them from employment) had a higher rate of substantiated abuse than aides without a criminal history.⁶⁹ They also reported that the probability of future

⁶⁶ Tatara, *National Elder Abuse Incidence Study* (1998)

⁶⁷ Bureau of Justice Statistics, "Criminal Offenders Statistics," available at www.ojp.usdoj.gov/bjs/crimoff.htm.

⁶⁸ P. Lanigan and D. Levin, *Recidivism of Prisoners Released in 1994* (Washington, DC: U.S. Department of Justice, Bureau of Justice Statistics, 2002).

⁶⁹ The Lewin Group, *Ensuring a Qualified Long-Term Care Workforce: From Pre-employment Screens to On-the-Job Monitoring* (Washington, DC: Department of Health and Human Services, Assistant Secretary for Planning and Evaluation, 2006).

criminal activity rises when the circumstances are similar to those under which previous criminal activity occurred. These findings argue for preventing known abusers from being employed in situations where they have the opportunity to abuse again.

However, there has been no robust scholarship on the relationship between general criminal behavior and elder mistreatment. Indeed, there is not much scholarship in the area of elder abuse determinants in general. A review, published in 2007, of database citations for “elder abuse” in the peer review literature found a relative dearth of scholarship on this issue and a lack of diversity in the elder abuse literature.⁷⁰ One study of cases of elder sexual abuse found that “the criminal histories of sexual offenders differ considerably,” suggesting there was no one profile of previous criminal behavior that could be used to identify future abusers.⁷¹

An impact evaluation of the Michigan criminal background check pilot project examined this question via a review of pre- and postpilot data gathered through a telephone survey on abuse. Researchers from Michigan State University found no statistically significant difference in self-reported abuse rates before and after the pilot was implemented. However, due to the relatively short time between pre- and post- data collections, the researchers were unable to conclusively state that the program had no impact.⁷² In general, states and vendors can point only to the numbers of potential workers screened and disqualified, leaving unanswered the question of what abuses may have been avoided by excluding these individuals from the workforce.

A related issue is that of deterrence—whether the mere threat of a background check deters some individuals with criminal histories from seeking employment in community-based long-term care. The Abt evaluation of the CMS pilot speculates that the large number of withdrawn applications may be the result of the background check requirement, but notes the absence of hard evidence on this issue. The lack of other studies on this question underscores the need for additional scholarship.

Finally, excluding people with a criminal history from certain long-term positions may simply push them into other jobs where screening is not performed. As noted above, in many states there are categories of long-term care workers or employers who are not subject to state criminal background check statutes. In addition, potential workers with criminal histories may seek employment in other sectors of the economy, thus displacing, rather than eliminating, the impact of any future recidivism.

Conducting background checks and excluding certain individuals with criminal histories from having unsupervised access to vulnerable elders and their personal information may reduce mistreatment. It may reduce liability and risk for employers as well. Employers whose employees harm others can be liable under the doctrine of “negligent hiring” if it can be shown that they did not take adequate steps to safeguard against such outcomes.⁷³

⁷⁰ C. Erlingsson, “Search for Elder Abuse: A Systematic Review of Database Citations,” *Journal of Elder Abuse and Neglect* 19, no. 3/4 (2007).

⁷¹ A. Burgess, *Elder Victims of Sexual Abuse and Their Offenders*, unpublished report (Washington, DC: U.S. Department of Justice, 2006).

⁷² Unpublished data provided by Tom Conner, Michigan State University.

⁷³ M. Lear, “Just Perfect for Pedophiles? Charitable Organizations That Work with Children and Their Duty to Screen Volunteers,” *Texas Law Review* 76, (1997): 173.

Furthermore, state laws that authorize national criminal checks typically protect agencies against liability for their decisions to hire/not hire or fire, if acting in good faith. This provides some protection for agencies that choose to act upon background check results. Employers often have to make their own judgments about using information uncovered in a background check, outside of state requirements.

Participants in AARP’s roundtable emphasized the importance of acknowledging the limitations of criminal background checks as screening mechanisms. In particular, some voiced concerns over the “false sense of security” that a background check may give an employer or service recipient. Given the lack of research on the efficacy of checks in preventing elder abuse and the known data gaps depending on the sources searched, some argued that HCBS participants should be better educated about the limitations of criminal background checks. However, there may be value in conducting checks beyond potentially reducing elder abuse, such as promoting a more stable workforce.

EVIDENCE BASIS FOR DETERMINING DISQUALIFYING OFFENSES IS LIMITED

In light of the broad variation in state law provisions on disqualifying offenses, we examined the literature regarding which crimes should disqualify an individual from working with vulnerable older adults. There appears to be general consensus that people with a history of abusing older adults should not be given the opportunity to do so again. Beyond that, the literature is scant. Alfred Blumstein, a quantitative criminologist at Carnegie Mellon University, notes that one can develop a “crime switch matrix” to predict the likelihood of committing a type of crime in the future based on a prior conviction. This research would afford the possibility of having a more scientific basis for establishing specific risks for home-care-worker applicants for any specified crimes of future concern, whether those be violent or property, or both.⁷⁴

As a general guideline, employers should avoid hiring people who have committed crimes against vulnerable individuals. Another researcher posits that the following factors also merit consideration:

- Crimes that involve a betrayal of trust
- Applicant criminal versatility (variety of criminal convictions)
- Young age at first arrest
- Total number of convictions⁷⁵

Another often-noted risk factor is substance abuse, which is a known correlate or predictor of criminal recidivism. According to the National Center on Elder Abuse, substance abuse is the most frequently cited risk factor associated with elder abuse and

⁷⁴ Correspondence between Naomi Karp and Alfred Blumstein, March 24, 2009.

⁷⁵ National Committee for the Prevention of Elder Abuse, “What Can We Learn” (n.d.).

neglect.⁷⁶ Some have argued that drug-related convictions should be considered closely for in-home workers with access to medications.⁷⁷

In some states, the list of disqualifying crimes is so broad that the background check screening and disqualification appears overinclusive. It may be hard to see a nexus between some misdemeanor convictions and the risk of harm to older adults. At the same time, criminal background screening may be seen as underinclusive. Much “bad behavior” rises to the level of unacceptable mistreatment of home care recipients but is not criminal in nature. A worker may be verbally abusive or consistently inattentive, but the abuse or neglect might fall in the civil tort realm rather than the criminal arena.⁷⁸ In these cases, a job applicant may have a poor work history, but a criminal background check alone may fail to reveal the salient facts.

NEW RESEARCH MAY PROVIDE BASIS FOR LENGTH OF DISQUALIFICATION AFTER CRIMINAL BEHAVIOR

With regard to statutory provisions permitting hiring after a specified time lapse since conviction, we found limited evidence basis for defining “look-back” periods for specific crimes, although there is some new scholarship in this field. Recent research⁷⁹ by Alfred Blumstein and Kiminori Nakamura at Carnegie Mellon University explores the topic of “redemption in the presence of widespread criminal background checks.”

They posit that criminal background checks have become ubiquitous because of advances in information technology and growing concerns about employers’ liability. But the probability of recidivism declines with time “clean,” so there is some point when a person with a criminal record who remains free of further contact with the justice system is of no greater risk than any counterpart of the same age—an indication of redemption from the mark of crime.

Their study is the first to use data from a state criminal history repository to ascertain the declining hazard of re-arrest with time clean. They compare the risk of reoffending for someone with a record (who stayed clean) to the risk for (1) the general population of the same age and (2) individuals with no prior record. This enables the scientific determination of a point when redemption has likely been reached, as opposed to arbitrary selection of cutoff points by legislatures or individual employers. Earlier studies show that recidivism rates vary with the age and type of crime of the earlier arrest.

For example, Blumstein and Nakamura found that someone arrested for robbery at age 20 who stays clean for four years has no greater risk of a later arrest than someone of the same age cohort in the general population. Similarly, an 18-year-old arrested for a crime

⁷⁶ National Committee for the Prevention of Elder Abuse (n.d.), available at www.preventelderabuse.org/issues/substance.html.

⁷⁷ Nonprofit Risk Management Center, “Checking Criminal Histories: Some Considerations Before You Begin” (1998), available at <http://nonprofitrisk.org/library/articles/employment05001998.shtml>.

⁷⁸ C. Sabatino and S. Hughes, *Addressing Liability Issues in Consumer-Directed Personal Assistant Services: The National Cash and Counseling Demonstration and Selected Other Models* (Washington, DC: Department of Health and Human Services, Office of the Assistant Secretary for Planning and Evaluation, 2004).

⁷⁹ Alfred Blumstein and Kiminori Nakamura, “Redemption in the Presence of Widespread Criminal Background Checks,” *Criminology* 47, no. 2 (May 2009).

of violence who stayed clean for eight years has about the same risk of re-arrest as a never-arrested person, and a lesser risk after that.⁸⁰

The policy implications they cite include the following:

- Employers could be given documents explaining the diminished value of records older than a certain number of years for risk assessment purposes.
- Statutes could protect employers from liability if they acted based on those guidelines.
- Records could be sealed or not disseminated if older than X years.

IMPACT ON THE WORKFORCE IS UNCLEAR

There is little question that the workforce for providing HCBS direct care services is already inadequate to meet the demand for workers. This gap will likely worsen in the coming decades as the number of older adults grows and the cohort of women ages 25 to 54, the traditional labor pool for direct care workers, stagnates.⁸¹ Conducting criminal background checks and disqualifying potential workers does limit the pool of available workers, at least marginally. The magnitude of this reduction, however, is unclear. States participating in the CMS pilot screened 204,339 potential employees and disqualified 7,463—less than 4 percent.⁸² An unknown number may have been deterred from seeking employment as a result of the screening requirement.

In their study of nurse aides in nursing homes, researchers from the Lewin Group concluded that criminal background checks do not limit the pool of potential job applicants, based on employer reports only.⁸³ We did not find comparable studies of the workforce in community-based settings, nor was shortage of community-based workers raised as a concern in the materials we reviewed. Again, most program staff we interviewed agreed that those disqualified were appropriately excluded from the workforce.

One policy implication of some criminal background check laws and policies is the removal of home health aides and other direct care positions from the universe of potential career training options for prisoner rehabilitation programs. While such programs tend to focus on other, nonhuman services positions, the growing shortage of HCBS workers may prompt reevaluation of these exclusions.

If those who are excluded are viewed as truly unfit for working with vulnerable populations, then such a reduction of the potential workforce may be considered entirely appropriate. However, if criminal background disqualification is a blunt instrument, workforce shortages may motivate heightened scrutiny of this type of screening.

⁸⁰ There are some limitations (i.e., generalizability of findings, concern about mobility, arrest vs. conviction, etc.) of the study, and Blumstein and Nakamura are conducting further research incorporating national criminal history records, not just state-based records.

⁸¹ Toosi, “Labor Force Projections” (2007).

⁸² Abt Associates, *Evaluation* (2008).

⁸³ The Lewin Group, *Ensuring a Qualified Long-Term Care Workforce* (2006).

OTHER STRATEGIES CAN ALSO CONTRIBUTE TO REDUCING RISKS OF ABUSE

Criminal background checks are just one potential tool for reducing the risk of elder abuse. Our review suggests several other strategies are available to states and Medicaid administrators in attempting to address this problem.⁸⁴

Employers and states can and do utilize reference checks, thorough in-person interviews, detailed job applications, signed statements by potential employees as to past work history and criminal convictions, and alcohol and drug testing.⁸⁵ AARP roundtable participants agreed that criminal background data should be coupled with these other screening data to mitigate the risk of elder abuse more effectively. Credit histories may be important for identifying possible risk of theft. A system or set of processes using multiple screening techniques could both reduce risk to clients and help mitigate potential liability for HCBS providers.

Other strategies are part of multiple, ongoing initiatives to build a better, more reliable, more skilled long-term care workforce. These strategies include better training and supervision of direct care workers, improved recruitment techniques, reduced hours, opportunities for full-time employment, better benefits, recognition programs, and increased opportunities for advancement. In light of the projected growth in demand for direct care workers to provide long-term care, improving workforce conditions and worker quality will be both crucial and challenging.

Finally, it can be argued that a little supervision goes a long way. Greater oversight by supervisory staff; use of monitoring cameras in care areas; and unscheduled visits by advocates, family members, and supervisors all discourage mistreatment and reduce the opportunity for abuse, although researchers and others have raised concerns regarding the challenges of supervising the direct care workforce.⁸⁶ Alerting nonprogram personnel to the signs of abuse may also decrease or even prevent adverse outcomes. For example, Oregon developed a banking kit for financial institutions to help them recognize suspicious activity that may indicate financial abuse or exploitation of an older person.⁸⁷

RAP-BACK AND POSTEMPLOYMENT CHECKS ENHANCE VALUE OF SCREENING

Monitoring criminal activity after an individual has been employed may enhance protections for home care recipients. Preemployment screening is retrospective only—a check of any criminal convictions prior to beginning employment. Direct care workers are rarely rescreened, except perhaps when they change employers. Recognizing this phenomenon, three states participating in the CMS pilot project⁸⁸ used some of their grant

⁸⁴ See, for example, S. Dawson and R. Surpin, “Direct-Care Healthcare Workers: You Get What You Pay For,” *Workforce Issues in a Changing Society* (Spring 2001); and M. Wilner, “Toward a Stable and Experienced Caregiving Workforce,” *Generations* (Fall 2000).

⁸⁵ D. Arrindell, “Criminal Background Checks for Home Care Aides,” *Caring* (April 1997).

⁸⁶ E. Scala, L. Hendrickson, and C. Regan, *Strategies for Promoting and Improving the Direct Service Workforce: Applications to Home and Community-Based Services* (New Brunswick, NJ: Rutgers Center for State Health Policy, 2008); Government Accountability Office, *Long-Term Care: Some States Apply Criminal Background Checks to Home Care Workers* (Washington, DC: GAO, 1996).

⁸⁷ State of Oregon, *Governor’s Elder Abuse Task Force: Final Report* (October 2004).

⁸⁸ Alaska, Michigan, and Illinois.

funding to create “rap-back” programs. Under such programs, any new crimes are automatically flagged in the state’s criminal records database and communicated back to the employer. Rap-back programs can be used to disqualify workers after employment based on subsequent criminal activity, as was done in Michigan, where approximately 300 workers were disqualified as a result of the rap-back feature. In addition, rap-back can save money by avoiding the cost of refingerprinting direct service workers each time they change jobs, because criminal history information is updated continually.

Currently such rap-back provisions exist only at the state level. However, the Patient Safety and Abuse Act includes a provision mandating that the FBI develop a rap-back capability for its Integrated Automated Fingerprint Identification System. The bill would require the FBI to develop the capacity to both store and retrieve fingerprint information from this database,⁸⁹ thus reducing the cost of conducting checks.

CURRENT POLITICAL BACKDROP MUST BE RECOGNIZED

While research to underpin policy decisions in this area may be scant, an evaluation of criminal background screening for home care workers must be realistic regarding the political backdrop against which this dialogue is occurring. Independent of their evidence bases, criminal background checks are frequently viewed as a “good” or “right” thing to do, and policymakers have acted accordingly. As one roundtable participant put it, “the train has left the station.” Fear of liability is a key driver in the move to use background checks, along with the fear of adverse publicity. Provider agencies have been sued over whether a criminal background check was done. In response, one suggestion at the roundtable was to develop an algorithm for disqualification, based on the best available evidence, and then offer legislative safe harbor to those who use it. Nonetheless, it was noted that high-profile or egregious cases of criminal abuse will create political pressure for a strong reaction in the policy arena.

Current legislative initiatives seek to refine and enhance states’ ability to provide comprehensive criminal background information, leaving alone the question of how best to interpret and apply these data. Once better systems have been developed, one long-term legislative goal under consideration would be to mandate criminal background checks for the Medicare and Medicaid programs and to expand the range of worker types who must be screened. In light of these legislative and political trends, some roundtable participants urged a more nuanced and evidence-based policy solution.

IX. SPECIAL ISSUES FOR CONSIDERATION: SELF-DIRECTED WORKERS

Self-directed programs, whose participants have greater control over the workers who provide their direct care, raise special issues concerning criminal background checks. The self-directed model allows participants to recruit, hire, and supervise their own workers. In some cases, these direct care workers may be friends, family, or even legally responsible relatives or guardians. Criminal background or abuse registry checks may or

⁸⁹ S. 631.

may not be conducted for such workers, depending on state law, Medicaid program provider qualifications, or the request of the individual participant.

Clearly, participants in such programs and their families have the right to know about the backgrounds of the individuals they hire to provide them support and assistance. Typically, Medicaid self-directed programs provide a mechanism for a participant to obtain criminal record checks on potential workers. However, not all programs require or even facilitate such checks for participants who direct their own care. Some state laws create an exemption clause for workers hired under self-direction. If checks are not mandated by statute, or if an exemption is allowed, state Medicaid program staff must determine which requirements, if any, will apply to self-directed programs.

A range of philosophical approaches to self-directed long-term care underpins the varying state strategies on criminal background checks. On one hand, some in the field contend that individuals should have the option to request a criminal background check, and, if the results are positive, should have the final authority to decide whether or not to hire the individual. This approach allows individuals to take on more risk and supports the principle of empowering participants to make their own fully informed decisions. At the other extreme, there are state programs that require background and abuse registry checks on all potential employees hired under self-direction and mandate which crimes preclude employment. These laws may include family, friends, and legally responsible relatives.

CMS data on 146 of the more than 300 approved Medicaid Section 1915(c) waivers indicate that most states require criminal background checks of all their traditional agency waiver providers, either as a condition of Medicaid certification or state law.⁹⁰ Within these same 146 programs, all but five states in the sample also require criminal background checks on workers hired under the self-directed service delivery system, without exceptions for friends or family of self-directed program participants.⁹¹ These five states vary in how they address criminal checks for self-directed workers. Pennsylvania law, for example, requires criminal background checks on all home and community-based waiver providers, except when employed by individuals under the self-directed option. In contrast, Idaho requires criminal background checks on all home care workers, but if results show prior criminal history, those who are self-directing can determine whether to hire. Where checks are mandated, disqualifying events are the same for traditional and self-directed providers.

Our case studies of three states showed a continuum of rules and practices. In Arkansas, background checks are neither required nor provided for self-directed workers in one of two Medicaid programs offering self-direction. In Michigan, such checks are required, but participants have some flexibility to act upon the results. At the other end of the spectrum, in New Mexico, not only are checks required for all worker types, but the bases for exclusion are codified in statute as well.

From a policy perspective, self-directed programs that require criminal record checks for workers must also decide whether to prohibit participants from hiring anyone with a

⁹⁰ The database provided by CMS is being built iteratively and does not include all approved waivers, or even a random sample.

⁹¹ The exceptions are Colorado, Idaho, North Dakota, Pennsylvania and Illinois.

criminal record or the circumstances under which someone with a record may not be employed, if such prohibitions are not already codified in statute. Policy must also address the scope of the criminal background check: state, regional, and/or national. In every case, support should be available to help participants understand and analyze the background check. When they have discretion in hiring, participants may need assistance in assessing the potential risk associated with hiring someone with a criminal background. In this way, participant choice, the core of the self-direction philosophy, can be respected at the same time the participant is better empowered to make the choice.

This theme of enhancing choice with education and support was echoed at the AARP roundtable. Several participants with expertise in self-direction agreed that criminal background checks should be made available to those who hire their own staff, but they should be afforded flexibility in how they act on the results. This approach is currently the policy in California's In-Home Supportive Services program, which has been offering self-direction for 35 years and has been providing tools for background checks without making them mandatory. Roundtable experts emphasized that participants should be aided in understanding what the criminal records data do and do not encompass. Other considerations inherent in respecting choice include recognition that the labor pool for self-direction generally comes from the same community as those who are self-directing, and that societal and professional definitions of "abuse" may differ appreciably.

Self-directed programs present unique challenges to implementing criminal background checks. Typically in an agency model of care, the provider agency, which hires and serves as the common law employer, performs and finances the check. However, in many self-directed models, the participant is the legal employer. Having this individual navigate the criminal background system is generally not feasible or desirable. As a result, the entity providing financial management services frequently performs the criminal background checks on behalf of the participant. This is the case whether the check is mandated by state law, required as a condition to qualify as a provider, or simply desired by the participant. Medicaid waiver funding prohibits deducting the cost of mandated criminal background checks from the participant's individual budget, necessitating an alternate source of funding.

The exclusion of family members and legally responsible relatives as paid workers on the basis of a criminal records check may clash with daily realities. Presumably, family members already have a relationship with the individual and may currently be providing informal assistance that will persist, regardless of criminal findings. As noted above, data on elder abuse show that the most common category of abusers is family members. Most of the common law rules granting parental and spousal immunity in abuse cases have been overruled.⁹² Family members excluded from paid employment due to criminal convictions may well continue to have informal direct access to the program participant.

There are legal issues to consider as well. In a review of self-directed care, Charles Sabatino and Sandra Hughes observed, "Legal research revealed that there are very few reported cases that discuss liability issues in the context of government sponsored

⁹² S. Hughes and C. Sabatino, "Addressing Liability Issues in Consumer-Directed Personal Assistant Services: The National Cash and Counseling Demonstration," *Stetson Law Review* 35 (2005): 251.

consumer-directed care.”⁹³ They concluded that offering background checks is one way to reduce risks for those who self-direct, adding that such risk is low level in general “because of the infrequency of misconduct that rises to the level of abuse or neglect. Of course, on the rare occasions when it does occur, the injury to the consumer can be extremely serious.”⁹⁴ From the states’ perspective, the greater the control exercised by the state in the hiring process, the greater the perceived liability for negligent workers.

X. MOVING FORWARD: PROMISING PRACTICES, POLICY OPTIONS, AND FUTURE RESEARCH

Experimentation in the states—particularly through the CMS criminal-background-check pilot project—as well as research and policy discussions to date suggest some promising practices and policy options to enhance screening of potential home care workers. In addition, this review of literature, law, and practice highlights several areas for research that can inform policy and practice in the future. Policymakers, program managers, and researchers should consider these suggestions:

Increase the accuracy, speed, and cost-effectiveness of criminal background checks by implementing promising state practices. The CMS pilot demonstrated the value of the following approaches, among others:

- Integration of data sources on criminal and other relevant history through Web-based and other system enhancements
- Information sharing between various state agencies conducting background checks to avoid costly duplication of efforts
- Electronic fingerprint capture to cut time and enhance accuracy of record checks
- Dedicated state personnel to maximize efficiency and expertise
- Use of a tiered system, i.e., checking low-cost state records and registries as a first step, followed by higher-cost FBI checks for the remaining smaller pool of applicants
- Rap-back system to automatically flag new crimes after hiring home care workers.

Avoid unnecessary disqualifications to increase fairness and reduce unintended effects on the workforce. The recent criminology research discussed above suggests that we are moving toward a more-solid evidence basis for disqualifying potential workers. States have developed procedures to avoid rejection of qualified candidates. In the future, states and employers should do the following:

- Base disqualifying crimes on solid evidence, e.g., crime-switch matrices with supporting data.

⁹³ C. Sabatino and S. Hughes, *Addressing Liability Issues in Consumer-Directed Personal Assistant Services: The National Cash and Counseling Demonstration and Selected Other Models* (Washington, DC: Department of Health and Human Services, Office of the Assistant Secretary for Planning and Evaluation, (2004), v.

⁹⁴ Sabatino and Hughes, *Addressing Liability Issues* (2004), ix.

- Base the length of disqualifications in statutes and regulations on evidence about “redemption,” as described in the Blumstein/Nakamura research.
- Provide a waiver or “rehabilitation review” process to allow applicants to demonstrate that they are qualified despite some criminal history.
- Permit appeals of disqualifications to enable applicants to prove that criminal background check results are erroneous.

Use multiple tools to enhance the safety of home care program participants. Although legislators and employers have made criminal background checks ubiquitous, numerous screening and evaluation tools can complement them. These include the following:

- Reference checks
- Credit histories
- Detailed application forms with disclosure requirements
- Thorough interviews
- Drug and alcohol screening
- Training and supervision of workers, pre- and postemployment.

Empower consumers and employers through education and other resources. Home care recipients (especially those in self-directed programs), family members, and agencies supplying workers can benefit from the following:

- Education on the benefits and limitations of criminal background check screening, including the fact that it can be underinclusive or overinclusive in identifying appropriate job candidates
- Education on complementary screening methods
- Registries of prescreened individuals.

Recognize that self-directed programs raise distinct issues. Self-direction gives participants more independence because they recruit, hire, and supervise their workers, and those workers may be family members, friends, or others in their communities. Therefore, self-directed programs should do the following:

- Allow more risk taking and choice for participants when screening and hiring.
- Make criminal background checks available, but allow flexibility in acting on the results, especially for family members and friends.

Conduct additional research on key issues. Considerable resources are devoted to conducting criminal background checks in almost every state. Government entities could ultimately better target their resources if they fund research now on the following topics:

- The efficacy of criminal background check screening and other screening tools in reducing risk to older adults receiving home care services

- The deterrent effect of criminal background check requirements
- The evidence for identifying disqualifying offenses and the length of disqualification
- The effect of criminal background screening on the retention of workers.

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Federal Interagency Forum on Aging-Related Statistics: www.agingstats.gov

Kaiser Commission on Medicaid and the Uninsured, Henry J. Kaiser Family Foundation: www.kff.org

Kaiser Family Foundation State Health Facts: www.statehealthfacts.org/

National Sex Offender Registry: www.nsopr.gov/

National Committee for the Prevention of Elder Abuse: <http://www.preventelderabuse.org>

Nonprofit Risk Management Center: <http://nonprofitrisk.org>

New Mexico Division of Health Improvement: <http://dhi.health.state.nm.us>

Office of Inspector General List of Excluded Entities and Individuals: <http://exclusions.oig.hhs.gov/>

APPENDIX A: MEDICAID AND OTHER FEDERAL FUNDING SOURCES FOR LONG-TERM CARE

MEDICAID FUNDING

State Plan Services

Mandatory Services: All states participating in the federal Medicaid program must cover a minimum set of services for select groups of eligible beneficiaries. Among these mandatory services are physician care and inpatient and outpatient hospital care; in 1970, home health services were added.⁹⁵ Mandatory home health includes nursing services, home health aides, and medical supplies for the home. Home health aide services are predominantly nonmedical in nature but differ from personal care (described below) in that they require oversight by a medical professional (nurse supervision) and must be provided by a licensed home health agency. Generally, home health aides receive more training than personal care workers and perform some paraprofessional tasks as part of the skilled care Medicaid-eligible individuals receive. Nearly 1 million individuals received Medicaid-funded home health services in 2004.⁹⁶

Optional Services: States may create additional service categories, to be matched by federal dollars, known as optional services. Individuals who are deemed eligible for Medicaid are entitled to access both mandatory and optional services if a medical need exists, but the state can impose benefit limits to control utilization of the latter. Personal care services for people with disabilities, including elders, were formally added to the law as an optional service in 1993.⁹⁷ Personal care workers provide assistance with the activities of daily living (e.g., bathing, dressing, grooming, and transferring) and instrumental activities of daily living (e.g., personal hygiene, light housework, laundry, meal preparation, transportation, grocery shopping, using the telephone, medication management, and money management). Workers may be referred to as personal care workers, direct service workers, attendants, or community workers. Relatives of the recipient may provide these services at Medicaid expense, provided they are not considered “legally responsible” for the recipient. In 2004, approximately 775,000 Medicaid beneficiaries received personal care, which was an authorized optional service in 33 states.⁹⁸

Section 1915(c) Waivers

In 1981, Congress amended the Social Security Act to allow states to add home and community services as an alternative to institutionalization for older adults and people with disabilities. With this authority, states were allowed the discretion to develop programs—including case management, homemaker, home health aide, personal care, adult day care, habilitation, respite, and other services—for individuals who would otherwise require institutional care. Unlike the requirements for state plan services, a section 1915(c) waiver allows states to target individualized services to a particular group

⁹⁵ J. O’Keefe and G. Smith, *Understanding Medicaid Home and Community Services: A Primer* (Washington, DC: Department of Health and Human Services, Office of Disability, Aging, and Long-Term Care Policy, 2000), 8.

⁹⁶ Kaiser State Health Facts, available at www.statehealthfacts.org/comparetable.jsp?ind=248&cat=4.

⁹⁷ *Ibid.*, p. 11.

⁹⁸ Kaiser State Health Facts.

(e.g., elders and adults with disabilities or children with developmental disabilities). Expanded income limitations (up to 300 percent of Supplemental Security Income) and geographic limitations may also be applied. The Kaiser Foundation estimated that in 2004, more than 300 waiver programs spent more than \$23 billion serving more than 1 million recipients (more than half seniors).⁹⁹

Section 1115 Demonstration

States have used the authority under Section 1115 to develop a wide range of alternative approaches to service delivery that feature innovative program designs. This section of the Social Security Act allows states to offer experimental pilots intended to demonstrate an efficient use of the Medicaid statutes. To a very large extent, states may waive many of the requirements found under the State Plan and Section 1915(c) waiver authorities. It was under this type of authority that states first implemented the Cash and Counseling Demonstration and Evaluation and tested the concepts of self-direction, including hiring legally responsible family members. More recently, CMS has begun to incorporate the provision of self-direction into mainstream waivers, and the passage of the Deficit Reduction Act of 2005 (discussed below) has offered additional opportunities for implementing this delivery model. As a result, states are now generally using the Section 1115 authority to redesign and reform their entire Medicaid programs, rather than to implement self-direction.

Deficit Reduction Act of 2005

Section 6086 of the Deficit Reduction Act (DRA) of 2005¹⁰⁰ added section 1915(i) to the Social Security Act, effective January 2007, to authorize home and community services as a state plan services option. While this optional coverage is similar to section 1915(c), it breaks the eligibility link between home and community services and institutional care. Further, states may choose to limit the geographic area, and once approved, additional renewals are not required. The regulation does limit income levels to individuals whose income does not exceed 150 percent of the federal poverty level. In addition, unlike Section 1915(c), this authority does not allow a program to target a specific population; rather, the state must establish a common eligibility standard that applies to the entire group of potentially eligible individuals (i.e., those under the state plan). A state may, however, establish functional criteria specific to the program or an individual service. The eligibility admissions criteria must be less stringent than those applied to institutionalization admissions, and states may limit the eligible population to a specific number. In addition, states may apply a waiting list once the number of eligible participants is achieved.

Section 6087 of the DRA of 2005 also added section 1915(j), the Self-Directed Personal Assistance Service State Plan Option. This new authority allows states to develop self-directed services as an optional state plan service. Language in the statute defines self-direction as services that are “planned and purchased under the direction and control of the individual or the individual’s authorized representative.”¹⁰¹ Individuals may recruit,

⁹⁹ M. Kitchener, T. Ng, C. Harrington, and M. O’Malley, *Medicaid Home and Community-Based Service Programs: Data Update* (Menlo Park, CA: Kaiser Family Foundation, December 2007).

¹⁰⁰ P.L. 109-171.

¹⁰¹ *Ibid.*, section 6807.

hire, manage, and dismiss home care workers. In addition, beneficiaries may use a flexible personalized budget to purchase equipment, items, supplies, goods, and services that directly relate to meeting their personal care needs. Cash payments may be made to the participant, and they may hire legally responsible relatives, including a spouse, parents of minor children, and legal guardians, if the state elects this level of flexibility.

OTHER FEDERAL FUNDING FOR HCBS

The Administration on Aging (AoA), through funding in the Older Americans Act (OAA), provides a range of services for older adults. Area Agencies on Aging and their associated aging network providers use this funding to offer home-delivered meals, transportation, adult day care, legal assistance, and health promotion. In addition, OAA amendments in 2006 created the Nursing Home Diversion and Modernization grant program. Participating states are developing programs to divert individuals from nursing homes into community-based programs, with a goal of delaying or avoiding the need to access Medicaid funding to pay for nursing home services. As part of this initiative, the Veterans Health Administration is funding programs in select states to create a system of HCBS targeting veterans. The Veterans Health Administration is partnering with AoA and will invest more than \$10 million to serve veterans at risk of institutionalization.

These programs will include a combination of agency-provided services and opportunities for recipients to hire their own staff. Grant recipients are required to create effective quality management and improvement programs that include provider capacity and capacity measures; however, states are given flexibility in devising these systems. Grant requirements are silent on requiring criminal background checks on either agency staff or those who elect to self-direct. State laws and individual provider qualifications will govern preemployment screening.

Medicare, established as a social insurance program under the Social Security Act of 1965, provides health insurance to individuals ages 65 and older and for younger persons with permanent disabilities. The Medicare program funds approximately 20 percent of all long-term care, primarily through home health services to almost 3 million individuals annually. While the duties of Medicare home health aides typically mirror those of a personal care worker, a home health aide must meet certain federally defined conditions of participation. These conditions include training and competency evaluations. While these conditions do not mandate preemployment screening or background checks, agencies must ensure that worker meet all state licensure and certification standards, which frequently include background checks.

APPENDIX B: NCSL CHART (LAWS CURRENT AS OF DECEMBER 15, 2008)

50-State Overview of Criminal Background Checks for In-Home Direct Care Workers													
	Relevant Statutes and/or Regulations	Checks: Mandatory or Discretionary for Providers or Employers ¹	Scope: Publicly Funded Care Only or Publicly and Privately Funded Care ²	Excludes Certain Provider Categories	Required for Volunteers	Addresses Consumer-Directed Care ³	Type of Check			Party Responsible for Cost	Conditional Employment	Disqualifying Offenses ⁴	Waiver or Appeal Available
							State Only	State and Federal	State and Sometimes Federal				
Alabama	Code Title 38 Chapter 13	Mandatory	Publicly and privately funded care	Yes	Yes	No		Yes		Employer, employee, or state agency	Yes; begins when individual signs criminal conviction statement and ends when background check is complete	Homicides, other violent offenses, sex-related offenses, offenses against dependent or vulnerable individuals, drug-related offenses	Yes
Alaska	Admin Code Sec. 47.05.300	Mandatory	Publicly funded care only	Yes	Yes	No		Yes		Employee or employer; fee waived for volunteer unless volunteer resides in the client's home	Yes; check must be requested within 10 days of employment	Homicides, other violent offenses, offenses against dependent or vulnerable individuals, fraud-related offenses, drug-related offenses, property crimes	Yes
Arizona	Code Sec. 36-411	Mandatory	Publicly and privately funded care	None specified	Yes	No		Yes		Employee or state agency	Yes; check must be requested within 20 days of employment	Homicides, sex-related crimes, other violent offenses, fraud-related offenses, drug-related offenses, offenses against dependent or vulnerable individuals, DUI, and property crimes	Yes
Arkansas	Public Health and Welfare Code Title 20, Chapter 33, Subchapter 2	Mandatory	Publicly and privately funded care	None specified	Not specified	No			Yes	Not specified	Yes; expires after 45 days	Homicides, other violent offenses, sex-related offenses, and offenses against dependent or vulnerable individuals	Yes
California	Welfare and Institutions Code Sec. 15660, Sec. 12301.6 & 12305.81	All Discretionary	Publicly & privately-funded care	None specified	Not specified	No		Yes		Cost shared by county (35%) and state (65%); state pays 100% of cost once a county's nonprofit consortium or public authority has conducted background checks for at least 50 percent of all providers on their registries.	Not specified	Offenses against dependent or vulnerable individuals or fraud-related offenses.	Yes

	Relevant Statutes and/or Regulations	Checks: Mandatory or Discretionary for Providers or Employers ¹	Scope: Publicly Funded Care Only or Publicly and Privately Funded Care ²	Excludes Certain Provider Categories	Required for Volunteers	Addresses Consumer-Directed Care ³	Type of Check			Party Responsible for Cost	Conditional Employment	Disqualifying Offenses ⁴	Waiver or Appeal Available
							State Only	State and Federal	State and Sometimes Federal				
Colorado	Title 25, Article 27.5-107	Mandatory	Publicly and privately funded care	None specified	Not specified	No				Employer or employee	No	None specified	Not specified
Connecticut	Chapter 400o, Section 20-678	Mandatory	Publicly and privately funded care	None specified	Not specified	No		Yes		Employer (agency) or the applicant	Not specified	None specified	Not specified
Delaware	Title 16, Chapter 11, Subch. V	Mandatory; some discretionary	Publicly and privately funded care	Yes	Not specified	No		Yes		State pays for one check every five years; employer pays for additional checks	Yes; begins once individual has applied for check	Homicides, sex-related offenses, other violent offenses, and drug-related offenses	Not specified
District of Columbia	Section 44-551 and 44-552	Mandatory	Publicly and privately funded care	Yes	Yes; unless supervised	No		Yes		Employer or applicant	No	Homicides, other violent offenses, sex-related offenses, offenses against dependent or vulnerable individuals, fraud-related offenses, and drug-related offenses	Not specified
Florida	Title XXIX, Chapter 400	Mandatory	Publicly and privately funded care	Yes	Yes; unless supervised and working fewer than 40 hours per month	No			Yes	Employer or employee (at the discretion of employer)	Yes; DD [[sp out]] providers - expires after 90 days and must be under direct supervision of screened employee; home care providers are on probation until results are received	Homicides, sex-related offenses, other violent offenses, drug-related offenses, property crimes, offenses against dependent or vulnerable individuals	Yes
Georgia	Section 31-7-301	Mandatory	Publicly and privately funded care	None specified	Not Specified	No				Employee or employer	Not specified	Homicides, other violent offenses, sex-related offenses, and offenses against dependent or vulnerable individuals	Not specified
Hawaii	Title 20, Chapter 346-335, and Chapter 846-2.7	Mandatory	Publicly funded care only	None specified	Yes	No		Yes		Not specified	Yes; check must be requested within five days of employment	None specified	No

	Relevant Statutes and/or Regulations	Checks: Mandatory or Discretionary for Providers or Employers ¹	Scope: Publicly Funded Care Only or Publicly and Privately Funded Care ²	Excludes Certain Provider Categories	Required for Volunteers	Addresses Consumer-Directed Care ³	Type of Check			Party Responsible for Cost	Conditional Employment	Disqualifying Offenses ⁴	Waiver or Appeal Available
							State Only	State and Federal	State and Sometimes Federal				
Idaho	Rules Governing Mandatory Criminal History Checks," (16.05.06)	Mandatory	Publicly and privately funded care	None specified	Yes	No		Yes		Not specified	Not specified	Homicides, sex-related offenses, other violent offenses against dependent or vulnerable individuals, fraud-related offenses, drug-related offenses	Yes
Illinois	Code 225 ILCS 46	Mandatory	Publicly and privately funded care	None specified	Not specified	No	Yes			State (Medicaid program) or employer	Yes; expires after three months	Homicides, other violent offenses, sex-related offenses, drug-related offenses, fraud-related offenses, property crimes	Yes
Indiana	Code Title 16, Article 27	Mandatory	Publicly and privately funded care	None specified	Not specified	No		Yes		Employer; may pass fee on to employee	Yes; 21 days	Violent offenses, sex-related offenses, and offenses against dependent or vulnerable individuals	Not specified
Iowa	Section 135C.33	Mandatory	Publicly and privately funded care	None specified	Yes	No		Yes		Not specified	Not specified	Offenses against dependent or vulnerable individuals	Yes
Kansas	Code 65-5112, 65-5117	Mandatory; some discretionary	Publicly and privately funded care	Yes	No	Yes; discretionary			Yes	Employer or employee	Yes; expires when check is complete	Homicides, sex-related offenses, and offenses against dependent or vulnerable individuals	Not specified
Kentucky	Statute 216.785	Mandatory	Publicly and privately funded care	None specified	Not specified	No	Yes			State agency or applicant	Not specified	Offenses against dependent or vulnerable individuals, sex-related offenses, property crimes, drug-related offenses and fraud-related offenses	Yes
Louisiana	No statute or regulation found												
Maine	Section 2142	Mandatory	Publicly and privately funded care	Yes	No	No		Yes		Not specified	Not specified	Sex-related offenses, offenses against dependent or vulnerable individuals, and fraud-related offenses	Not specified

	Relevant Statutes and/or Regulations	Checks: Mandatory or Discretionary for Providers or Employers ¹	Scope: Publicly Funded Care Only or Publicly and Privately Funded Care ²	Excludes Certain Provider Categories	Required for Volunteers	Addresses Consumer-Directed Care ³	Type of Check			Party Responsible for Cost	Conditional Employment	Disqualifying Offenses ⁴	Waiver or Appeal Available
							State Only	State and Federal	State and Sometimes Federal				
Maryland	Section 19-4B-03	Mandatory	Publicly and privately funded care	None specified	Not specified	No			Yes	Agency or employee	Not specified	None specified	Yes
Massachusetts	Section 172C	Mandatory	Publicly and privately funded care	None specified	Yes	No	Yes			Not specified	Not specified	Homicides, other violent offenses, sex-related offenses, offenses against dependent or vulnerable individuals, drug-related offenses, and fraud-related offenses	Yes
Michigan	MI Choice Waiver Minimum Operating Standards	Mandatory	Publicly and privately funded care	Yes	Yes	Yes; not exempt			Yes	State reimburses cost	Yes; employee must certify in writing that he or she has committed no offenses	Homicides, other violent offenses, sex-related offenses, offenses against dependent or vulnerable individuals, drug-related offenses, fraud-related offenses, property crimes	Yes
Minnesota	Statute Chapter 245C	Mandatory	Publicly and privately funded care	Yes	Yes; unless supervised	Yes; not exempt			Yes	Employer	Yes; only under direct supervision	Homicides, other violent offenses, sex-related offenses, offenses against dependent or vulnerable individuals, drug-related offenses, fraud-related offenses, and property crimes	Yes
Mississippi	43-11-13	Mandatory	Publicly and privately funded care	None specified	Not specified	No		Yes		State or employer	Yes; employer may contract with applicant but they are prohibited from providing patient care services until check is completed and no disqualifying offenses are found	Homicides, other violent offenses, sex-related offenses, offenses against dependent or vulnerable individuals, drug-related offenses and property crimes	Yes
Missouri	Section 660-317	Mandatory	Publicly and privately funded care	None specified	Not specified	No			Yes	Not specified	Yes	Offenses against dependent or vulnerable individuals	Not specified

	Relevant Statutes and/or Regulations	Checks: Mandatory or Discretionary for Providers or Employers ¹	Scope: Publicly Funded Care Only or Publicly and Privately Funded Care ²	Excludes Certain Provider Categories	Required for Volunteers	Addresses Consumer-Directed Care ³	Type of Check			Party Responsible for Cost	Conditional Employment	Disqualifying Offenses ⁴	Waiver or Appeal Available
							State Only	State and Federal	State and Sometimes Federal				
Montana	2007 Senate Joint Resolution 7	No - State Department of Public Health and Human Services workgroup will study issue and make recommendations to the 2009 legislature											
Nebraska	Rules: NAC 15-006	Mandatory	Publicly and privately funded care	Applies to personal assistance providers	Not specified	No	Yes			Not specified	Not specified	Homicides, other violent offenses, sex-related offenses, offenses against dependent or vulnerable individuals, drug-related offenses, fraud-related offenses, and property crimes	Not specified
Nevada	No statute or regulation found												
New Hampshire	2003 Chapter 185; Sec. 161-16a	Mandatory	Publicly and privately funded care	None specified	Not specified	No	Yes			Employer; may pass fee on to employee	Yes; but individual may not begin work until check is completed	None specified	Not specified
New Jersey	Code 45:11-24.3 - 45:11-24.5	Mandatory	Publicly and privately funded care	None specified	Not specified	No		Yes		State	Yes; expires after 60 days for state check and 120 days for federal check	Homicides, other violent offenses, property crimes, offense against dependent or vulnerable individuals, and drug-related offenses	Yes
New Mexico	29-17-1 through 29-17-5	Mandatory	Publicly and privately funded care	None specified	Not specified	Yes; not exempt		Yes		Employer or employee	Yes; must be supervised employment and begins once check is requested	Homicides, other violent offenses, sex-related offenses, offenses against dependent or vulnerable individuals, drug-related offenses, property crimes, and fraud-related offenses	Yes
New York	Public Health Law 2899 and Executive Code 845B	Mandatory	Publicly and privately funded care	None specified	Not specified	No			Yes	Agency/provider; agency is forbidden from seeking reimbursement from employee	Yes; must be supervised when in contact with consumers	Homicides, other violent offenses, sex-related offenses, offenses against dependent or vulnerable individuals, drug-related offenses, and fraud-related offenses	Yes

	Relevant Statutes and/or Regulations	Checks: Mandatory or Discretionary for Providers or Employers ¹	Scope: Publicly Funded Care Only or Publicly and Privately Funded Care ²	Excludes Certain Provider Categories	Required for Volunteers	Addresses Consumer-Directed Care ³	Type of Check			Party Responsible for Cost	Conditional Employment	Disqualifying Offenses ⁴	Waiver or Appeal Available
							State Only	State and Federal	State and Sometimes Federal				
North Carolina	Statute 131E-265	Mandatory	Publicly and privately funded care	None specified	Not specified	No			Yes	Not specified	Yes; check must be submitted within five days of employment	Homicides, other violent offenses, sex-related offenses, offenses against dependent or vulnerable individuals, drug-related offenses, property crimes, DUI, and fraud-related offenses; none are automatically disqualifying	Yes
North Dakota	No statute or regulation found												
Ohio	Revised Code Section 3701.881 Revised Code Section 173.394	Mandatory	Publicly and privately funded care	Yes	No	No			Yes	Employer	Yes; expires after 30 days	Homicides, other violent offenses, sex-related offenses, offenses against dependent or vulnerable individuals, drug-related offenses, and fraud-related offenses	Yes
Oklahoma	Chapter 71 of 2008	Mandatory	Publicly and privately funded care	Yes	Not specified	Yes; not exempt	Yes			Employer	Yes; expires after 30 days	Homicides, other violent offenses, sex-related offenses, offenses against dependent or vulnerable individuals, drug-related offenses, and fraud-related offenses	Yes
Oregon	Administrative Code Chapter 407-007-200	Mandatory	Publicly and privately funded care	None specified	Yes	No			Yes	Not specified	Yes; only under direct supervision and begins once check is requested	Homicides, other violent offenses, sex-related offenses, offenses against dependent or vulnerable individuals, drug-related offenses, fraud-related offenses, DUI, and property crimes; none are automatically disqualifying	Yes
Pennsylvania	2006 Act 69	Mandatory	Publicly and privately funded care	Yes	No	No			Yes	Employer	Yes; expires after 30 days for residents and 90 days for nonresidents	Homicides, other violent offenses, sex-related offenses, offenses against dependent or vulnerable individuals, and fraud-related offenses	Not specified
Rhode Island	Sec. 23-17-34	Mandatory	Publicly and privately funded care	None specified	Not specified	No	Yes			State	Yes; check is required within one week of employment	Homicides, other violent offenses, sex-related offenses, offenses against dependent or vulnerable individuals, drug-related offenses, and fraud-related offenses	Not specified

	Relevant Statutes and/or Regulations	Checks: Mandatory or Discretionary for Providers or Employers ¹	Scope: Publicly Funded Care Only or Publicly and Privately Funded Care ²	Excludes Certain Provider Categories	Required for Volunteers	Addresses Consumer-Directed Care ³	Type of Check			Party Responsible for Cost	Conditional Employment	Disqualifying Offenses ⁴	Waiver or Appeal Available
							State Only	State and Federal	State and Sometimes Federal				
South Carolina	Article 23, Criminal Records Checks of Direct Care Staff	Mandatory	Publicly and privately funded care	Yes	Yes	No			Yes	Employee or employer	No	Homicides, other violent offenses, sex-related offenses, offenses against dependent or vulnerable individuals, drug-related offenses, and fraud-related offenses	Not specified
South Dakota	Rules: 67:54:06:08	Mandatory	Publicly and privately funded care	None specified	Not specified	Yes; not exempt				Not specified	Not specified	No convictions that affect applicant's fitness for employment.	[[Should something be in this cell?]]
Tennessee	Chapter 0030-1-6	All discretionary	Publicly and privately funded care	None specified	Yes	No			Yes	Employer	Yes	Homicides, other violent offenses, sex-related offenses, offenses against dependent or vulnerable individuals, drug-related offenses, and fraud-related offenses	Not specified
Texas	Chapter 250, Health and Safety Code Handbook	Mandatory	Publicly and privately funded care	None specified	Not specified	No	Yes			Employer	Yes; pending the results of the check but only in emergency situations	Homicides, other violent offenses, sex-related offenses, and offenses against dependent or vulnerable individuals	Not specified
Utah	Code Sec. 62A-2-120, 62A-3-104.3, 62A-3-106.5, 62A-3-311.1 and 62A-5-101	Mandatory	Publicly and privately funded care	Yes	Not specified	No			Yes	Employee	No	Homicides, other violent offenses, sex-related offenses, offenses against dependent or vulnerable individuals, drug-related offenses, and fraud-related offenses	Yes
Vermont	Background Check Policy (Department of Disabilities, Aging and Independent Living, Agency of Human Services)	Mandatory; some discretionary	Publicly funded care only	None specified	Yes	Yes; not exempt	Yes			State	Yes; expires after 60 days	Homicides, other violent offenses, sex-related offenses, offenses against dependent or vulnerable individuals, drug-related offenses, fraud-related offenses, and property crimes	Yes
Virginia	Code Sec. 32.1-126.01	Mandatory	Publicly and privately funded care	Yes	No; unless supervised	No	Yes			Employer	Yes; expires after 30 days	Homicides, other violent offenses, sex-related offenses, and offenses against dependent or vulnerable individuals	Not specified

	Relevant Statutes and/or Regulations	Checks: Mandatory or Discretionary for Providers or Employers ¹	Scope: Publicly Funded Care Only or Publicly and Privately Funded Care ²	Excludes Certain Provider Categories	Required for Volunteers	Addresses Consumer-Directed Care ³	Type of Check			Party Responsible for Cost	Conditional Employment	Disqualifying Offenses ⁴	Waiver or Appeal Available
							State Only	State and Federal	State and Sometimes Federal				
Washington	Code Title 70 (sections 127 and 128)	Mandatory	Publicly and privately funded care	None specified	Yes	No			Yes	State or employer	Yes; pending the results of the check	Homicides, other violent offenses, sex-related offenses, offenses against dependent or vulnerable individuals, drug-related offenses, and fraud-related offenses	Not specified
West Virginia	Rules: 64-50	Mandatory	Publicly and privately funded care	None specified	Not specified	No	Yes			Not specified	Not specified	Offenses against dependent or vulnerable individuals and fraud-related offenses	
Wisconsin	The Wisconsin Caregiver Law, Sec. 50.065	Mandatory	Publicly and privately funded care	Yes	Yes; unless client requests exemption	Yes; not exempt			Yes	Employer	Not specified	Homicides, other violent offenses, sex-related offenses, offenses against dependent or vulnerable individuals, and fraud-related offenses	Yes
Wyoming	Statute 7-19-201	All discretionary					Yes						
Puerto Rico	8 L.P.R.A. Sec. 481	Mandatory	Publicly and privately funded care	None specified	Yes	No	Yes			Not specified	Not specified	Homicides, other violent offenses, sex-related offenses, offenses against dependent or vulnerable individuals, fraud-related offenses, and property crimes	Not specified
U.S. Virgin Islands	No statute or regulation found												
Guam	No statute or regulation found												
Samoa	No statute or regulation found												
Wake Islands	No statute or regulation found												

¹ "Discretionary" indicates that law states checks are discretionary for some employer groups.

² "Publicly funded care only" indicates that law or regulation covers at least one program funded wholly or in part by state dollars (e.g., Medicaid waiver program); "Publicly and privately-funded care" indicates that law broadly applies to home care workers both privately and publicly funded.

³ Indicates that statute explicitly mentions consumer-directed care, and if mentioned, whether it is exempt or not exempt under CBC requirements.

⁴ Offenses listed are disqualifying for some period of time, according to law. In two states (North Carolina and Oregon), these offenses are not automatically disqualifying, and employment is at the discretion of the employer. See disqualifying offenses categories on next page.

DISQUALIFYING OFFENSES CATEGORIES

Homicides

Includes:

- Murder
- Voluntary or involuntary manslaughter
- Criminal, negligent, or vehicular homicide
- Infanticide
- Assisted suicide
- Attempted murder

Other Violent Offenses

Includes:

- Assault (including aggravated)
- Assault with intent to commit a felony
- Battery (including aggravated)
- Kidnapping, abduction, or unlawful restraint
- False imprisonment
- Robbery
- Armed robbery
- Stalking
- Witness intimidation or retaliation
- Felonies involving bodily injury or abuse
- Malicious wounding by a mob
- Carjacking
- Drive-by shooting

Sex-related offenses

Includes:

- Prostitution
- Rape
- Sexual assault (including aggravated)
- Statutory sexual assault
- Sexual battery (including aggravated)
- Indecent assault (including aggravated)
- Sexual abuse
- Sodomy
- Incest
- Crimes against nature

Offenses against a dependent or vulnerable individual

Includes:

- Causing injury to a child or dependent/vulnerable adult (to include disabled, developmentally disabled, elderly, ruled to be not competent)
- Crime against a child
- Violation of Adoption and Safe Families Act
- Child abuse or cruelty to children
- Child molestation
- Enticing a child for indecent purposes or indecent solicitation of a child
- Sexual exploitation of a child
- Indecent or aggravated indecent liberties with a child
- Concealing death of a child
- Endangering the welfare of children
- Dealing in infant children; sale or purchase of a child
- Corruption of minors
- Abandonment or endangerment of a child
- Crimes against nature involving children
- Custodial misconduct (including sexual misconduct)
- Knowing or reckless abuse or neglect of patients
- Failure to provide for a functionally impaired person
- Abuse, neglect, exploitation, or mistreatment of a vulnerable adult
- Failure to report battery, neglect, or exploitation of a vulnerable adult
- Causing injury to a person 60 years or older
- Abuse of residents of penal facilities
- Violation of a position of trust

Drug-related offenses

Includes:

- Sale or use of controlled substances
- Sale or manufacture of controlled substances
- Unlawful distribution or possession with intent to distribute controlled substances
- Trafficking in controlled substances

Fraud-related offenses

Includes:

- Fraud
- Forgery
- Extortion or blackmail
- Misappropriation of property
- Financial exploitation
- Perjury
- Medicaid or insurance fraud
- Larceny or felony banking violations
- Improper credentialing

DUI

Includes:

- Driving while intoxicated
- Operating a vehicle while under the influence

Property crimes

Includes:

- Theft or burglary
- Offenses against property
- Tampering with public records
- Criminal mischief
- Breaking and entering
- Arson

APPENDIX C: STATE PROFILES

ARKANSAS

Arkansas statutes¹⁰² require background checks for employees or applicants to a home health or hospice agency. Applicants who have not been continuously employed in the state for the past 12 months or who have not had a check in the last 12 months must be checked through the Department of Arkansas State Police. Individuals who have not lived continually in the state for the past five years or have not provided in-home care for at least 60 continuous days prior to application must also have a federal criminal history check. The law exempts family members employed by an agency, volunteers, and individuals working in an administrative capacity.

State-level checks are initiated within 20 days of hiring; national checks within 10 days. If a check is positive, the state licensing agency issues a disqualification; most violent crimes automatically disqualify an applicant. Applicants may be temporarily hired (up to 45 days) pending the results of the check. Operators of the covered agencies must also submit to state and national criminal history checks. The provider agency absorbs all costs of the checks.

Title 20, Chapter 33, Subchapter 203 of the statute requires criminal record checks for ElderChoices provider applicants and employees caring for older adults or people with disabilities. ElderChoices, a Section 1915(c) Medicaid waiver in existence since the early 1990s, provides individuals 65 and older with a multitude of services, including homemaker, chore, adult day care, and adult foster care.

Personal care is provided as a State Plan service. Although no specific legislation mandates criminal checks for personal care agencies, most agencies conduct checks as a matter of good business practice. Where required, criminal history check forms must be initiated within five business days of an individual's employment. The Bureau notifies the agency of the outcome within three days of receipt of the request. If a criminal history record is found in the Bureau's index, the applicant is temporarily disqualified from employment until the licensing agency issues a determination. The provider agency absorbs the cost of the check.

Recently, Arkansas released a policy rule requiring providers seeking to be certified for Alternatives, a Section 1915(c) waiver program offering self-direction to adults with disabilities, to undergo a criminal background check and specifying the crimes that would disqualify potential providers. The proposed Arkansas Next Choices waiver program, targeted to individuals living in institutions but desiring to live in the community, also would require state criminal background checks for personal attendants, adult family home providers, and companion service providers as a condition of Medicaid certification. In this program, checks would also apply to hiring of family members. The cost of the check would be deducted from the waiver participant's self-directed budget. In contrast, IndependentChoices, a self-directed state plan service program, does not require or even offer criminal background checks as an option. If an individual hiring staff

¹⁰² Public Health and Welfare Code, Title 20, Chapter 33, Subchapter 2, Rule 007 05 005.

wishes to conduct a check, she or he must perform it as an individual employer outside the Medicaid system.

Additional screening information is available through the adult abuse registry, maintained by the Arkansas Division of Aging and Adult Services, Adult Protective Services. The registry provides information about individuals found, through the APS process, to have abused, neglected, or exploited an older adult or person with a disability. Information provided to requestors includes whether a substantiated report lists the name of an employee, applicant, or volunteer as an offender. State legislation specifies individuals or groups with whom the information may be shared. An employer or volunteer agency may query the registry to screen an employee, applicant, or volunteer by providing a signed, notarized release from the person they seek to query. While state laws do not require providers to check this registry as a routine prescreening employment step, many voluntarily complete this step. Two Medicaid HCBS waiver programs do require providers to check the abuse registry as a condition of participation: the Developmental Disability Waiver and the Arkansas Next Choices programs. The cost of maintaining the registry is approximately \$60,000 annually and includes data collection resources and staff time. The APS program also manages a Mortality Review Committee to review deaths in institutions.

MICHIGAN

To participate in the CMS background check pilot, Michigan passed four new pieces of legislation specifying which long-term care providers must screen staff, the process for conducting checks, and which crimes preclude employment and for how long. Covered settings included institutional long-term care providers (e.g., nursing homes and skilled nursing facilities, intermediate care facilities for the mentally retarded), hospice and home health agencies, personal care agencies, and residential services providers, including adult foster care. The four separate statutes were designed to mirror existing codes for licensing public health occupations and facilities, psychiatric facilities, and adult foster care programs.

Working with Michigan State University, the Department of Community Health developed a tiered, iterative approach to screening applicants for employment with the providers listed above. In this electronic system, low-cost, public, state data are searched first, and more expensive national fingerprint checks are reserved only for cases where no disqualifying data are found during initial searches. The state covers the costs of screening, with limited matching funds from Medicaid. The list of disqualifying crimes is extensive. However, many crimes have sunset provisions of 1, 3, 5, 10, or 15 years, after which they no longer affect fitness for employment. The length of exclusion is linked to the seriousness of the crime.

Employment eligibility decisions are made by state analysts, who review the findings from the background check against state statutes and communicate the results to the potential employer. Michigan allows provisional employment under certain conditions, pending the results of the screening. The state also instituted a rap-back system, whereby crimes committed after screening are reported back by state law enforcement officials to the Department of Community Health and the employer for action. More than 300 individuals working in long-term care have been determined ineligible following the introduction of the rap-back program.

Discussions with state staff and the system designers indicated general satisfaction with the system, especially with the large numbers of screenings conducted and the support from the long-term care provider community. During one 18-month period of the pilot, state officials conducted 103,251 checks, resulting in disqualification of 6,932 applicants—nearly 7 percent—based on state criteria. Some of the system limitations cited were the lack of appeals on the basis of rehabilitation (only data errors can be appealed), the requirement that workers be rescreened every time they change employers, and the fact that not all providers whose staff have direct access to Medicaid long-term care recipients in their homes are included in the legislation.

Provider qualification requirements for Michigan’s Medicaid HCBS waiver program serving older adults, known as MI Choice, differ somewhat from the state laws on screening outlined above. Each waiver agent for MI Choice, as well as direct HCBS providers, must conduct a state-level criminal background review through the Michigan State Police for each paid and/or volunteer staff person who will be entering participant homes. In contrast to providers covered under the new statewide legislation, national-level checks are generally not done. Covered staff include all home-based services—homemaker, personal care, respite care provided in the home, chore services, personal emergency response systems, private-duty nursing, counseling, home-delivered meals, training, and nursing facility transition services—a much broader list than included under the automated statewide screening program. Individuals chosen directly by the service recipients to perform certain duties under the HCBS waiver (i.e., self-directed workers) also must have a state-level criminal background check through the Michigan State Police. The waiver agent and direct provider must conduct the reference and background checks before authorizing the employee to furnish services in a participant’s home.¹⁰³

Participants in Medicaid self-directed programs do have some flexibility in how they act upon the findings of these checks. Certain convictions are non-negotiable, including Medicaid fraud, elder abuse, and criminal sexual conduct. Generally, early drug offenses are ignored when the potential worker has a history of rehabilitation. All of the direct care workers in self-directed programs are monitored closely by a care manager or supports coordinator and the fiscal intermediary.

According to Tari Muniz of the Michigan Department of Community Health, the state is finding that many potential direct care workers in the self-directed program have criminal records, and many of these are family members of program participants. Waiver participants have the option to hire family members with previous convictions, provided their crimes are not on the list of non-negotiable offenses. Family members are the most common category of direct care staff hired by those who self-direct. Ms. Muniz noted an additional level of variability for direct care workers in Michigan. The state relies on waiver agents in the self-directed program to conduct needs assessment, authorize services, and contract with the fiscal intermediaries. Waiver agents may have their own policies regarding which criminal offences preclude employment. Ms. Muniz said that one waiver agent with which she was familiar had a list of disqualifying offenses developed by its own consumer advisory council. Because policies may differ by waiver agent, workers may face different screening requirements depending on where they seek employment.

¹⁰³ Michigan Department of Community Health, “Minimum Operating Standards for MI Choice Waiver Program Services,” October 1, 2008.

NEW MEXICO

The Division of Health Improvement (DHI) is responsible for the administration of activities to ensure safety and quality in New Mexico's health care facilities and HCBS settings. DHI licenses facilities, manages incidents, disseminates provider deficiency reports, oversees all criminal background screening activity, and maintains the employee abuse registry. State statute mandates that all Medicaid direct services workers, including those in self-direction programs, without exception, must undergo a background check. The New Mexico Caregivers Criminal History Screening Act, passed during the 1998 legislative session and amended in 2005, requires that all persons whose employment or contractual service with a care provider includes direct care or routine and unsupervised physical or financial access to any care recipient must undergo a nationwide criminal history screening. This law prevents persons who have been convicted of certain crimes from working with individuals receiving health care. The law is specific about the conviction history, the care provider's responsibility, and the types of crimes and convictions.

Any person or entity identified as a "care provider" or "provider" that has the potential to abuse, neglect, or exploit other individuals in a long-term care setting must comply with this law. This provision explicitly includes independent providers hired directly by participants in any self-directed program. Volunteers are considered "contractually bound" to their sponsoring agencies, and therefore mandatory criminal checks also apply to this group. The extensive list of covered Medicaid providers includes any skilled nursing facility; care for the mentally retarded; psychiatric care; rehabilitation; home health agency; homemaker agency; home for the aged or disabled; group home; adult foster care home; guardian service provider; case management entity that provides services to people with developmental disabilities; private residence that provides personal care; adult residential care or nursing care for two or more persons not related by blood or marriage to the facility's operator or owner; adult day care center; boarding home; adult residential care home; residential service or rehabilitation service authorized to be reimbursed by Medicaid; any licensed or Medicaid-certified entity or any program funded by the state Agency on Aging that provides respite, companion, or personal care services; and programs funded by the Adult Services Division of Children, Youth and Families Department that provide homemaker or adult day care services.

Checks are required for both profit and nonprofit providers, without exception. Family members or friends hired under the self-directed option are not excluded. Both federal and state-level checks are completed. The cost of the checks is absorbed by either the applicant, facility, or agency or the state (for self-direction only). There is an appeals process; job applicants can request that their determination be reconsidered.

Data are captured on the number of checks performed and the number and types of disqualifications.

The state has created a comprehensive *Caregiver Criminal History Screening Guidebook* to explain the process.¹⁰⁴ This *Guidebook* offers

¹⁰⁴ Available at <http://dhi.health.state.nm.us/elibrary/cchspmanual/contents.pdf>.

- Copies of associated legislation
- Explanation of the process
- Instructions for completing forms
- Process for reconsideration
- Techniques for taking good fingerprints
- Frequently asked questions

To complement other screening activity (including criminal background checks), New Mexico established the Employee Abuse Registry in 2005. This electronic database identifies persons with substantiated instances of abuse, neglect, or exploitation. All HCBS providers must check the registry prior to hiring. Information in the database includes name, date of birth, address, Social Security number, and other appropriate identifying information. Individuals listed on the registry are ineligible for employment or contracting when the duties include direct, face-to-face care or services. Incidents are reported online or in writing to the Adult Protective Services Office, which investigates the allegation and updates the registry within two days of substantiation.

APPENDIX D: AARP ROUNDTABLE ATTENDEES

Name	Organizational Affiliation
Kris Baldwin	State of Arkansas Department of Health and Human Services Division of Aging and Adult Services
Henry Claypool	Policy Director, Independence Care System
Marie-Therese Connolly	Senior Scholar, Woodrow Wilson International Center for Scholars
Suzanne Crisp	Director, Program Design and Implementation The National Resource Center for Participant- Directed Services Boston College
Dawn Daly	Supervisor, Background Check Unit, National Center for Missing and Exploited Children
Barbara Dieker	Director, Office of Elder Rights Administration on Aging U.S. Department of Health and Human Services
Bill Ditto	State of New Jersey Director of the Division of Disability Services Cash and Counseling Program
William Dombi	Vice President for Law National Association for Home Care and Hospice
Pamela Doty	Senior Policy Analyst Division of Disability, Aging, and Long-Term Care Policy Assistant Secretary for Planning and Evaluation U.S. Department of Health and Human Services
Donna Folkemer	Group Director State Health Policy Leadership National Conference of State Legislatures
Sara Galantowicz	Senior Research Leader, The Healthcare Business of Thomson Reuters
Erin McGaffigan	Director, Public Policy The National Resource Center for Participant- Directed Services Boston College
Anne Montgomery	Senior Policy Advisor Senate Special Committee on Aging
Emily Rosenoff	Policy Analyst U.S. Department of Health and Human Services Office of the Assistant Secretary for Planning and Evaluation Disability, Aging and Long-Term Care Policy

Safe at Home? Developing Effective Criminal Background Checks
and Other Screening Policies for Home Care Workers

Name	Organizational Affiliation
Charles Sabatino	Director, American Bar Association Commission on Law and Aging
Barbara Strother	Chief, Adult Protective Services Department of Human Services District of Columbia Government
Anna Wolke	Policy Associate, Forum for State Health Policy Leadership National Conference of State Legislatures