

Federal and Texas legal issues affecting home health agencies and hospices, provided as a free service to our clients and friends  
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### CRIMINAL BACKGROUND INFORMATION: REPORTING REQUIREMENTS AND OPERATIONAL CHALLENGES FOR AGENCIES

On September 8, 2006, the Texas Department of Aging & Disability Services (DADS) announced proposed revisions to the licensure rules for Home and Community Support Services Agencies (HCSSAs or Agencies), which, if adopted, would clarify and elaborate on the background information that must be reported by an applicant in connection with an initial license application or renewal. 31 *Tex. Reg.* 36

While criminal background reporting is not new to State licensure, the proposed rules bring to light the fact that DADS and the Medicare and Medicaid Programs all require similar yet distinct disclosures in their applications. Compliance with the State licensure requirements is critical because HCSSAs are required to be licensed in order to enroll in Medicare and Medicaid. This underscores the need for Agencies to carefully review the questions posed on each application, to ensure that all requested information is correctly reported.

#### SCOPE OF APPLICABILITY

A threshold issue for any Agency is what individuals, within or outside of their organization are covered by the disclosure requirements. The State license application requests background information on the applicant, its "affiliates," and managers. "Affiliates" are defined to include certain owners, officers, members, partners, and other close business associates. Elsewhere in the regulations, however, DADS has the authority to deny, revoke or suspend a license based on the criminal background of a "controlling person." A "controlling person" includes a person with the ability directly or indirectly, to influence, control, manage, expend money or direct the policies of an Agency. This encompasses outside management and individuals who, "because of a personal or familial relationship" with an owner of manager of an Agency, are *in a position to exercise control* over the Agency, regardless of whether that individual is formally recognized as such.

Medicare (CMS Form-855A) requests information on the provider or any owner of the provider. Texas Medicaid requires that the *principals* of an applicant submit a signed and notarized Principal Information Form (PIF-2) in connection with enrollment. "Principals" include those with a 5 percent or more ownership or controlling interest in the applicant, directors and officers, and certain key employees who exercise operational or managerial control over the applicant, or who directly or indirectly conduct its day to day operations.

#### INFORMATION TO BE REPORTED

Each application/enrollment form specifies the history and legal actions that must be reported, as well as the time frames

covered. Medicare providers and owners must report certain misdemeanor and felony convictions within the 10 years preceding the enrollment, including guilty pleas and adjudications, regardless of whether records were expunged or appeals are pending. Medicaid requires principals to report all prior *convictions* in any court, including a court's acceptance of a plea of guilty or *nolo contendere* a deferred adjudication, or other program where judgment or conviction has been withheld. DADS proposes to add to the definition of a reportable conviction "an adjudication of guilt based on a finding of guilt, a plea of guilty or ... *nolo contendere*." According to DADS sources, an applicant for a license must only include those *nolo* pleas that ultimately resulted in an adjudication of guilt.

#### OPERATIONAL CHALLENGES FOR AGENCIES

The increasing emphasis on reporting adverse legal history to State and Federally funded health care programs highlights the need for Agencies to conduct their own due diligence before offering ownership interests in their Agencies to individuals, hiring or contracting with key management or administrative personnel, and doing business with outside entities. One way to minimize the potential exposure of an Agency or applicant is to clearly define the job descriptions, duties, lines of authority, limitations on authority, and internal reporting requirements for employees, contractors and management companies. A contract may be narrowly drafted so as to avoid bringing certain individuals within the scope of the reporting requirements by ensuring that they are not in a position to control or influence the Agency's day to day operations. Agencies may undertake to conduct their own criminal background checks or may be entitled to reasonably rely on signed statements made by others with whom they contract. Ultimately, Agencies may avoid adverse action by terminating their relationships with individuals whose backgrounds are at issue, or requiring owners to divest their ownership interests.

Most applications and renewals require the individual signing to formally certify or attest to the completeness and truthfulness of the information reported. Therefore, applicants should thoroughly review their applications and discuss these matters with key personnel or, if necessary, legal counsel, prior to submitting information to DADS, Medicare and Medicaid. A truthful application that reveals an individual's criminal background may or may not ultimately be a bar to licensure or enrollment, whereas failure to properly disclose requested information, even if relatively benign, could lead to immediate adverse action.

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