

Date of Hearing: January 14, 2020

ASSEMBLY COMMITTEE ON HUMAN SERVICES
Eloise Gómez Reyes, Chair
AB 367 (Flora) – As Introduced February 4, 2019

SUBJECT: Presence at care facilities: conviction of crimes

SUMMARY: Adds certain crimes to the existing list of crimes for which a criminal record exemption may not be granted for purposes of licensure, permitting, certification, employment, volunteering, residence, or presence in certain community care facilities, Residential Care Facilities for Persons with Chronic Life-Threatening Illness (RCFCLTIs), Residential Care Facilities for the Elderly (RCFEs), and child day care facilities, as specified. Specifically, **this bill:**

- 1) Prohibits the Department of Justice (DOJ) and the California Department of Social Services (CDSS) from charging a fee for the fingerprinting of an applicant for a license or special permit to operate a facility that provides nonmedical board, room, and care for six or fewer children, or for obtaining an applicant's criminal record, as specified.
- 2) Deletes the inclusion of any adult who works in a community care facility that is eligible to accept placement of a dependent child from the list of entities to whom certain requirements related to criminal record clearances and exemptions, as specified, apply.
- 3) Deletes the prohibition on CDSS' ability to grant a criminal record exemption to certain applicants for licensure of a community care facility, as specified, if either the applicant or any other individual associated with the facility has a felony conviction for: child abuse or neglect; spousal rape; crimes against a child, including child pornography; or for a crime involving violence; as well as physical assault; battery; or a drug or alcohol related offense that occurred within the last five years; and, further, deletes the requirement that this prohibition be operative to the extent that compliance with the provisions is required by federal law in order to receive certain federal funding, as specified.
- 4) Prohibits CDSS from granting a criminal record exemption for a license, special permit, or certificate of approval, or for individuals seeking employment, residence, or presence in certain community care facilities, RCFCLTIs, RCFEs, and child day care facilities, for a conviction for any of the following offenses, as specified:
 - a) Rape of a spouse where: the person is prevented from resisting by any intoxicating or anesthetic substance; the person is at the time unconscious of the nature of the act, including if the victim is asleep; or, the act is accomplished against the victim's will by threatening to use the authority of a public official to incarcerate, arrest, or deport the victim or any other person;
 - b) Pimping (not of a minor);
 - c) Pandering (not of a minor); and,
 - d) Identity theft, as specified.

- 5) Prohibits DOJ and CDSS from charging a fee for the fingerprinting of an applicant who will serve six or fewer children or any family daycare applicant for a license, or for obtaining the applicant's criminal record, as specified.
- 6) Deletes the ability of CDSS to charge a reasonable fee for the costs of processing electronic fingerprint images and related information.
- 7) Makes technical changes.

EXISTING LAW:

- 1) Establishes the Community Care Facilities Act, which allows for the licensure and oversight of out of home placements for abused and neglected children by CDSS. (Health and Safety Code [HSC] Section 1500 *et seq.*)
- 2) Establishes the Community Care Licensing Division (CCLD) within CDSS and requires CDSS to license group care facilities, private foster family agencies, and foster family homes in order to place children who are in the child welfare system. Further requires, prior to licensure, a foster home provider to undergo a criminal background check, as specified. (HSC 1502 and 1522)
- 3) Defines a "community care facility" as any facility, place, or building that is maintained and operated to provide nonmedical residential care, day treatment, adult day care, or foster family agency services for children, adults, or children and adults, including, but not limited to, the physically handicapped, mentally impaired, incompetent persons, and abused or neglected children, and includes: residential facilities, adult day programs, foster family agencies, group homes, and children's crisis residential programs, among others. (HSC 1502 *et seq.*)
- 4) Defines "residential care facility" as a residential care facility for persons with chronic, life-threatening illness who are 18 years of age or older or are emancipated minors. (HSC 1568.01(j))
- 5) Defines "residential care facility for the elderly" as a housing arrangement chosen voluntarily by persons 60 years of age or over, or their authorized representative, where varying levels and intensities of care and supervision, protective supervision, or personal care are provided, based upon their varying needs, as determined in order to be admitted and to remain in the facility. (HSC 1569.2(o)(1))
- 6) Defines "child day care facility" as a facility that provides nonmedical care to children under 18 years of age in need of personal services, supervision, or assistance essential for sustaining the activities of daily living or for the protection of the individual on less than a 24-hour basis, and may include day care centers, employer-sponsored child care centers, and family day care homes. (HSC 1596.750)
- 7) Requires individuals in community care facilities, including adults responsible for administration or direct supervision of staff, any person, other than a client, residing in the facility, and any staff person, volunteer, or employee who has contact with clients, among others, to obtain either a criminal record clearance or a criminal record exemption from

CDSS before his or her initial presence in a community care facility or certified family home. (HSC 1522(a))

- 8) Allows CDSS to issue a license to certain individuals who meet all of the conditions for licensure, except receipt of the Federal Bureau of Investigation's criminal offender record information search response, if the individual has signed and submitted a statement that they have never been convicted of a crime in the United States, other than a traffic infraction, as specified. Further allows CDSS to revoke a license if it is determined that the licensee has a criminal record. (HSC 1522(a)(1)(E))
- 9) Requires CDSS to deny the applications of certain applicants if the applicant has been convicted of a crime other than a minor traffic violation, unless the department has granted an exemption pursuant to the exemption requirements specified in HSC 1522 (g), if the individual is awaiting trial for a crime other than a minor traffic violation, or, it is discovered by CDSS after licensure that an individual has been convicted of a crime other than a minor traffic violation. (HSC 1522(a)(4))
- 10) Prohibits a criminal records exemption from being granted for an applicant to work, reside, or volunteer in certain facilities (including RCFEs, RCFCLTIs, child day care facilities, and community care facilities) if the applicant has a conviction for certain offenses, as specified, including an offense specified in Penal Code [PEN] Section 290(c), which pertains to crime for which registration as a sex offender is required. (HSC 1522(g)(1)(A), HSC 1569.17(f), HSC 1568.09 (f), HSC 1596.871)
- 11) Specifies that rape of a person who is the spouse of the perpetrator is an act of sexual intercourse that is accomplished under certain circumstances, including where a person is prevented from resisting by an intoxicating or anesthetic substance, or any controlled substance, and this condition was known by the perpetrator; where a person is at the time unconscious of the nature of the act, as specified, and this is known to the accused; and where the act is accomplished against the victim's will by threatening to use the authority of a public official to incarcerate, arrest, or deport the victim or another, and the victim has reasonable belief to believe that the perpetrator is a public official. (PEN 262(a)(2)(3) and (5))
- 12) Declares that any person who, knowing another person is a prostitute, lives or is supported by the earnings of the person's prostitution, or from money loaned to or charged against that person by any keeper or manager of a house where prostitution is practiced or allowed, or who solicits and receives compensation for soliciting for the person is guilty of a felony punishable by imprisonment in the state prison for three, four, or six years. (PEN 266h(a))
- 13) Declares that a person who procures another person for the purpose of prostitution; promises or threatens violence, or causes another person to become a prostitute; procures a person a place in a house of prostitution or as an inmate of any place where prostitution is encouraged or allowed, promises or threatens violence in order to cause an inmate of a house of prostitution in order to remain an inmate; uses fraud or abuse of position of confidence or authority to procure another person for the purpose of prostitution or to enter any place in which prostitution is encouraged or allowed or to come into this state or leave this state for the purpose of prostitution; or receives or gives, or agrees to receive or give any money or thing of value for procuring, or attempting to procure, another person for the purpose of prostitution, or to enter or leave the state for the purpose of prostitution, as specified, is guilty

of pandering, which is a felony and punishable by imprisonment in the state prison for three, four, or six years. (PEN 266i(a))

- 14) Declares certain instances of false personation and cheats, as specified, illegal and punishable under the law, by either a fine or imprisonment in a county jail, or a combination thereof. (PEN 530.5)
- 15) Allows DOJ to provide subsequent state or federal arrest or disposition notification to any entity authorized by state or federal law to receive state or federal summary criminal history information to assist in fulfilling employment, licensing, certification duties, or the duties of approving relative caregivers, nonrelative extended family members, and resource families upon the arrest or disposition of any person whose fingerprints are maintained on file at the DOJ or the Federal Bureau of Investigation as the result of an application for licensing, employment, certification, or approval. (PEN 11105.2(a))
- 16) Requires DOJ to, within 14 calendar days, notify CDSS of the criminal record information, and, if no criminal information has been recorded, provide a statement of that fact. [HSC 1522(c)(2)]

FISCAL EFFECT: Unknown

COMMENTS:

Community Care Licensing Division (CCLD): Within CDSS is CCLD, which is responsible for licensing and investigating complaints against facilities that fall within its jurisdiction, such as RCFEs, child care facilities, and out-of-home placements for foster youth, among others. Typically, these facilities provide non-medical care and supervision for adults and youth in need by providing adult care services, early childhood education (child care), foster care and shelter services for youth, and residential care for seniors or individuals with developmental disabilities. CCLD is also responsible for ensuring these facilities comply with all applicable laws and regulations, including criminal background checks, as well as overseeing any necessary corrective actions in the event of noncompliance.

Criminal background checks: Applicants, licensees, adult residents, certain volunteers, and employees of community care facilities who have contact with clients are required by law to undergo a criminal background check and obtain a criminal record clearance or exemption, if applicable. The background check requires these individuals to submit fingerprints that are used by DOJ to search for any criminal record history. For individuals without a criminal history, DOJ forwards a clearance notice to the applicant or licensee, and to the Caregiver Background Check Bureau (CBCB) of CCLD. In the event that the individual does have a criminal history, DOJ sends a record transcript to CBCB, detailing the person's arrests and convictions. If the crimes meet the criteria necessary to qualify for an exemption, pursuant to current law, CBCB sends an exemption notification letter to the applicant or licensee and to the individual. Individuals who are awaiting an exemption may not be present in a facility until an exemption is granted by CBCB. An exemption is required when an individual has been convicted of any crime other than a minor traffic violation, and current law prohibits CDSS from granting exemptions to individuals who commit certain crimes (referred to as non-exemptible crimes), including convictions for murder, kidnapping, possession of child pornography, sexual exploitation of a child, elder or dependent abuse, and arson, among others.

California State Auditor report: Audit Report 2016-126, released in March 2017, examined the timeliness and quality of CDSS background procedures for individuals who have contact with clients in community care facilities. The report made a number of findings, including:

DOJ does not send CDSS certain necessary information: State law does not explicitly require DOJ to send information related to sentencing and in 2016, DOJ stopped providing that information to CDSS. Pursuant to current law, DOJ is required to provide certain information to CDSS, including every criminal conviction of an individual, every arrest for which an individual is awaiting trial, and every arrest for certain crimes, including murder, elder abuse, and assault, and sex offender status, but not information related to any arrest that was later determined to be a detention only or that resulted in the successful completion of a diversion program or exoneration. CDSS, therefore, issues clearance and exemption decisions based upon incomplete criminal record histories due to DOJ lacking the explicit authority to provide sentencing information; still, state regulations require CDSS to consider whether an applicant is on probation or parole, as well as the length of time that has elapsed since the end of parole, probation, or incarceration.

CDSS does not always obtain or review all pertinent information: The report also found that CBCB clears individuals to be present in licensed facilities without first reviewing convictions for infractions, which are relatively minor crimes and often punishable by a fine imposed by courts; infractions include theft, leaving a child under six years old in a vehicle without supervision, and selling liquor to a minor. While current law requires a criminal record exemption be obtained for convictions of any crimes with the exception of a nonminor traffic violation, background check procedures dictate CDSS staff to review only convictions for misdemeanors or felonies, and not convictions for infractions, as CDSS interprets “minor traffic violation” as inclusive of all infractions, be they traffic-related or otherwise. Current law also allows individuals to be present in a licensed facility based on their in-state criminal history received by DOJ, but prior to the receipt of the federal record of arrests and prosecutions (RAP) sheet if the individual has submitted a self-disclosure form attesting that they have never been convicted of a crime in the United States (other than a traffic violation). The audit report found that CDSS, contrary to state law, allowed individuals who did not submit a self-disclosure form to be present in licensed facilities.

Delays at DOJ and CDSS cause further delays in the issuance of exemption decisions: While DOJ is currently required to provide CDSS with criminal record histories within 14 days of receiving a person’s fingerprints, the State Auditor found that, in some instances, the average amount of time it took DOJ to send information to CDSS was between 30 and 66 days after fingerprinting, which can further delay the date by which CDSS can initiate and complete background checks. It was also determined that the information contained in the DOJ materials affects the timeliness during which CDSS issues a decision on a criminal record exemption. During Fiscal Years 2013-14 and 2015-16, upon receipt of information from DOJ, CBCB took an average of 149 and 170 days – approximately five to six months – to decide whether to grant or deny a standard exemption. The exemption process took an average of about four months, as state regulations allow 45 days for an individual or facility to submit exemption request documents to CDSS.

Auditor’s recommendations: In response to these findings, the audit made a number of recommendations, including, but not limited to:

- Amend state law to clearly direct DOJ to transmit all convictions it receives;
- Require CDSS to change its practice of allowing individuals who have not submitted a self-disclosure form to CDSS to have access to licensed facilities, which is contrary to current state law;
- Establish timeframes by which CDSS must notify individuals and facilities that criminal history exemptions are required, and for evaluating and issuing exemption decisions; and,
- Require DOJ to obtain and transmit subsequent federal RAP sheets and to report to the Legislature periodically about its implementation efforts, among others.

The audit also recommended that the list of non-exemptible crimes be expanded to include eight crimes that are similar to crimes for which an exemption may not be granted, including: rape where the act is accomplished by threatening to use the authority of a public official to incarcerate, arrest, or deport the victim or another and the victim has a reasonable belief that the perpetrator is a public official; rape where the person submits under the belief that the person committing the act is someone known to the victim other than the accused; rape of a spouse where the person is prevented from resisting by any intoxicating or anesthetic substance; rape of a spouse where the person is at the time unconscious of the nature of the act, including if the victim is asleep; rape of a spouse where the act is accomplished against the victim's will by threatening to use the authority of a public official to incarcerate, arrest, or deport the victim or another; pimping (not of a minor); pandering (not of a minor); and, identity theft.

AB 484 (Cunningham), Chapter 526, Statutes of 2017, included instances of rape where either the act is accomplished by threatening to use the authority of a public official to incarcerate, arrest, or deport the victim or another and the victim has a reasonable belief that the perpetrator is a public official, or where the person submits under the belief that the person committing the act is someone known to the victim other than the accused, among the crimes for which registration as a sex offender is required. Pursuant to current law, crimes for which a person must register as a sex offender are non-exemptible. The provisions of this bill would include the six remaining crimes identified by the Auditor, including identity theft, pandering (not of a minor), pimping (not of a minor), and certain instances of spousal rape, among the crimes for which CDSS may not issue a criminal background check exemption.

Need for this bill: According to the author, “[This bill] protects community care facility patients by adding six crimes to the department’s background check non-exemption list for caregivers. While creating small distinctions in the categorization of prohibited crimes, [this bill] will produce a drastic change in the safety and health of patients seeking care in these facilities. CDSS must close this dangerous loophole to ensure the safety and health of the most vulnerable individuals.”

Staff comments: The provisions of this bill seek to expand the list of crimes for which individuals cannot receive a criminal records exemption to include certain instances of spousal rape, pandering (not of a minor), pimping (not of a minor), and identity theft. These provisions are proposed in response to suggestions made by the State Auditor in its 2017 audit report, and seek to increase the safety of residents placed in community care facilities.

While the provisions of this bill may result in increased health and safety of residents, the Legislature has seen an increase in proposed legislation in recent years related to health and

safety in certain community care facilities, specifically as it pertains to the criminal background check process. Some proposals, including this one, have been introduced in response to the Auditor's report and seek to increase the stringency of the existing criminal background check process, while others seek to reform the existing process to allow for greater flexibility in determining whether to issue exemptions to individuals who have committed a crime but have been rehabilitated. It is the role of the Legislature to protect the health and safety of individuals placed in community care facilities. However, it is also important to ensure that the criminal background check process is timely, efficient, and does not pose unnecessary barriers to individuals who wish to provide the much-needed care to residents placed in these facilities. ***Should this bill move forward, the author may wish to consider whether a comprehensive assessment of the existing background check process is necessary to determine if the existing criminal background check process is effective, timely, efficient, and provides for the needs of residents placed in facilities, without also establishing unnecessary barriers to individuals who wish to provide care to residents.***

Recommended committee amendments: In order to allow for continued discretion by CDSS in determining when to grant a criminal records exemption for certain instances of identity theft, ***committee staff recommends the following amendments:***

- On page 16 on line 20 of the bill, delete “, or Section 530.5 of the Penal Code.”
- On page 28 on line 18 of the bill, delete “, or Section 530.5 of the Penal Code.”
- On page 38 on line 3 of the bill, delete “, or Section 530.5 of the Penal Code.”
- On page 47 on line 19 of the bill, delete “, or Section 530.5 of the Penal Code.”
- On page 16, after line 20, insert “The department shall examine and review whether the inclusion of offenses listed in Section 530.5 of the Penal Code among the crimes for which an exemption cannot be granted is appropriate, and shall report its finding to the Legislature no later than January 1, 2022.”

In order to ensure conformity with previously enacted legislation, ***committee staff also recommends the following amendments:***

- On page 2 of the bill, delete lines 36 through 40, inclusive.
- On page 3 of the bill, delete lines 1 through 2, inclusive.
- On page 5 of the bill, after line 16, insert “(E) Any adult who works in a community care facility that is eligible to accept placement of a dependent child.”
- On page 14 of the bill, beginning on line 34, delete “or any other provision of this”.
- On page 15 of the bill, on line 6, delete “or any other provision of this”.
- On page 15 of the bill, on line 10, delete “or any other provision of this”.
- On page 15 of the bill, on line 16, delete “or any other provision of this”.

- On page 16 of the bill, after line 17, insert “(i) Notwithstanding clause (ii) of subparagraph (A), an exemption shall not be granted pursuant to this subdivision to any applicant for licensure of a community care facility eligible to accept placement of a dependent child if either that applicant or any other person specified in subdivision (b) who is associated with the facility has a felony conviction for either of the following offenses:

(I) A felony conviction for child abuse or neglect, spousal abuse, crimes against a child, including child pornography, or for a crime involving violence, including rape, sexual assault, or homicide, but not including other physical assault and battery. For purposes of this subclause, a crime involving violence means a violent crime specified in clause (i) of subparagraph (A) or subparagraph (B).

(II) A felony conviction for physical assault, battery, or a drug or alcohol related offense that occurred within the last five years.

(ii) This subparagraph shall be operative to the extent that compliance with these provisions is required by federal law as a condition for receiving funding under Title IV E of the federal Social Security Act (42 U.S.C. Sect. 670 et seq.).”

- On page 40 of the bill, delete lines 4 through 9, inclusive.
- On page 49 of the bill, after line 20, insert “The State Department of Social Services may charge a reasonable fee for the costs of processing electronic fingerprint images and related information.”

RELATED AND PRIOR LEGISLATION:

AB 447 (Patterson) of 2019 creates a process by which licensees of certain community care facilities can transfer current criminal record clearances of an individual associated with a facility to multiple facilities of the same facility type operated by the same licensee. AB 447 was held on the Senate Appropriations Committee’s suspense file.

AB 1608 (Holden) of 2019 prohibits CDSS from requiring an applicant for a license to operate a community to self-disclose their criminal history information, requires CDSS to annually post on its internet website certain data related to criminal record clearance and exemption approvals and denials, requires CDSS to create a process to grant simplified criminal record exemptions to applicants for a license or special permit to operate or manage a community care facility, and instructs CDSS to consider granting a simplified criminal record exemption to individuals who meet certain criteria. AB 1608 is currently in the Assembly Appropriations Committee.

AB 1796 (Levine) of 2019 prohibits CDSS from granting a criminal record clearance or exemption until it receives a complete state and federal criminal record. AB 1796 is currently in the Assembly Appropriations Committee.

AB 1914 (Flora), Chapter 708, Statutes of 2018, as introduced, was substantially similar to this bill. AB 1914 was amended on June 25, 2018, to pertain to underground excavations and subsurface facilities.

AB 3039 (Holden) of 2018 would have made numerous changes to the criminal background check process for certain community care facilities, home care aide registry applicants, and home

care organizations. AB 3039 was held on the Assembly Appropriations Committee's suspense file.

AB 484 (Cunningham), Chapter 526, Statutes of 2017, made convictions for any crime listed in PEN 261, which pertains to crimes related to rape, abduction, carnal abuse of children, and seduction, a requirement for registering on the sex offender registry.

SB 384 (Wiener), Chapter 541, Statutes of 2017, created a tiered registry for sex offenses such that people are required to register for 10 years, 20 years, or lifetime depending on the offense for which the individual was convicted.

REGISTERED SUPPORT / OPPOSITION:

Support

Association of Regional Center Agencies
California Association for Health Services at Home
California Long-Term Care Ombudsman Association
California Office of the State Long-Term Care Ombudsman
California Police Chiefs Association
Congress of California Seniors
County of San Diego
Retired Public Employees Association
Riverside Sheriffs' Association
San Diego County District Attorney's Office

Opposition

American Civil Liberties Union of California

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