

**TITLE 7           HEALTH**  
**CHAPTER 1       HEALTH GENERAL PROVISIONS**  
**PART 9           CAREGIVERS CRIMINAL HISTORY SCREENING REQUIREMENTS**

**7.1.9.1           ISSUING AGENCY:** New Mexico Department of Health.  
[7.1.9 1 NMAC - Rp 7 NMAC 1.9.1, 08/15/02]

**7.1.9.2           SCOPE:** This rule has general applicability to all caregivers and care providers in New Mexico as set forth in Subsection D of 7.1.9.7 NMAC and care providers as set forth in Subsection E of 7.1.9.7 NMAC. This rule does not apply to caregivers as set forth in Paragraph 2 of Subsection D of 7.1.9.7 NMAC and does not apply to care providers as set forth in Paragraph 2 of Subsection E. of 7.1.9.7 NMAC.  
[7.1.9 2 NMAC – Rp 7 NMAC 1.9.2, 08/15/02]

**7.1.9.3           STATUTORY AUTHORITY:** Sections 29-17-2 through 29-17-5, NMSA 1978 Amended.  
[7.1.9 3 NMAC – Rp 7 NMAC 1.9.3, 08/15/02]

**7.1.9.4           DURATION:** Permanent.  
[7.1.9 4 NMAC – Rp 7 NMAC 1.9.4, 08/15/02]

**7.1.9.5           EFFECTIVE DATE:** 08/15/02, unless a later date is cited at the end of a section.  
[7.1.9 5 NMAC – Rp 7 NMAC 1.9.5, 08/15/02]

**7.1.9.6           OBJECTIVE:** The objective of this part of Chapter 1, General Provisions, under Title 7, Health, is to establish the requirements for complying with the Caregivers Criminal History Screening Act. Generally included within these rules are the requirements and procedures for submission of applicant and caregiver fingerprints, payment of fees, and administrative reconsideration for caregivers with a disqualifying conviction. These rules are intended to have all covered care providers meeting the requirements of the Act.  
[7.1.9 6 NMAC – Rp 7 NMAC 1.9.6, 08/15/02]

**7.1.9.7           DEFINITIONS:**

**A.           “act”** means the Caregivers Criminal History Screening Act, Sections 29-17-2 to 29-17-5, NMSA 1978.

**B.           “applicant”** means a person who applies, and is offered employment or contractual service with, a care provider to provide services as a caregiver, whether as an employee or contractor.

**C.           “care”** means the therapy, services, treatment, support, supervision, assistance with the activities of daily living, or management of a care recipient.

**D.           “caregiver”** means any person whose employment or contractual service with a care provider includes direct care or routine and unsupervised physical or financial access to any care recipient serviced by that provider.

**(1)** “caregiver” includes:

(a) Compensated persons such as employees, contractors, and employees of contractors;

(b) Guardianship service providers and case management entities that provide services to people with developmental disabilities; and,

(c) Administrators or operators of facilities who are routinely on site.

**(2)** “caregiver” does not include:

(a) Persons who provide natural supports;

(b) Independent health care professionals, licensed or Medicaid certified in good standing, who are not otherwise associated with the care provider as an administrator, operator or employee, and who are involved in the treatment or management of the medical care of a care recipient such as attending or treating physicians or other health care professionals providing consultation or ancillary services; or

(c) A person who has undergone a nationwide criminal history screening by the New Mexico Children’s and Juvenile Facility Criminal Records Screening Act, Sections 32A-15-1 to 32A-15-4, NMSA 1978.

**E.           “care provider”** includes:

**(1)** Care provider or provider includes State owned or operated health care facilities, Intermediate care facilities for the mentally retarded, Long-term care hospitals, Psychiatric hospitals, Rehabilitation hospitals, Hospice services, Guardianship providers, Adult residential care facilities, Adult community residential facilities,

Adult limited diagnostic treatment centers, Case management entities providing services to persons with developmental disabilities, Adult boarding homes, Adult day care centers, Adult family care homes, Adult halfway homes, Care providers operating respite, companion or personal care programs funded by the State Agency on Aging, Care providers funded through the New Mexico Children Youth and Families Department providing homemaker and adult care services, Disabled and Elderly residential care providers providing services paid for in whole or in part by state funds, home health agencies, all residential, habilitation service or respite service care providers authorized to be reimbursed in whole or in part by state funds or under any Medicaid or Medicaid Waiver program, Nursing home facilities, any other care provider entity which is licensed or Medicaid certified and which is not specifically identified herein.

(2) **“care provider”** does not include: Care provider or provider does not include general acute care hospitals, outpatient treatment facilities, diagnostic and treatment facilities, ambulatory surgical centers and facilities, end-stage renal dialysis and treatment facilities, rural health clinics, private physicians’ offices or other clinics that operate in the same manner as private physicians’ offices in group practice settings, and any care facility located at or performing services exclusively for any correctional facility .

**F. “conditional employment”** means employment pursuant to a bona fide offer of employment by a care provider to an applicant, which is contingent upon the receipt of notice from the Department that the applicants’ nationwide criminal history screening indicates no existence of a disqualifying conviction, or notice from the Department following an administrative reconsideration that the applicant may be employed. This includes that period of employment during the time allowed for responding to the Departments’ request for additional information in cases where the applicants’ criminal history record indicates an arrest, without a clear disposition, for a crime included in the list of disqualifying convictions.

**G. “consent”** is the written acknowledgment of permission to conduct a nationwide criminal history screening. Consent also includes, with respect to the criminal history record, permission for the Department, following an attempt to obtain clarifying information from the applicant, to attribute, as a rebuttable presumption, disqualifying conviction status to any arrest for crimes that would constitute a disqualifying conviction and for which the arrest appearing on the nationwide criminal history record lacks a clear disposition.

**H. “department”** means the New Mexico Department of Health, Criminal History Screening Program.

**I. “disqualifying conviction”** means a plea, judgment or verdict of guilty or a conviction following a plea of nolo contendere, conditional plea of guilty or nolo contendere, or an *Alford* plea, in this state or from any other state to a felony crime listed in 7.1.9.11 NMAC. If a conviction may be considered in or used for sentence enhancement in a subsequent proceeding, then it is a disqualifying conviction under these rules if the conviction is for a crime listed in 7.1.9.11 NMAC.

**J. “DPS”** means the New Mexico Department of Public Safety.

**K. “nationwide criminal history screening”** means a criminal history background investigation of an applicant through the use of fingerprints reviewed by the Department of Public Safety and submitted to the Federal Bureau of Investigation, resulting in the generation of a nationwide criminal history record for that applicant.

**L. “nationwide criminal history record”** means information concerning a person’s arrests, indictments, or other formal criminal charges, and any dispositions arising therefrom, including convictions, dismissals, acquittals, sentencing, and correctional supervision, collected by criminal justice agencies and stored in the computerized databases of the Federal Bureau of Investigation, the National Law Enforcement Telecommunications System, the New Mexico Department of Public Safety, or the repositories of criminal history information of other states.

**M. “natural supports”** means those resources, systems and persons that are readily available to the general community, including a care recipient, without regard to the care provider.

**N. “routine”** means, in the context of care provision or financial access by an applicant, that which is non-episodic and regularly scheduled or assigned.

**O. “unsupervised”** means, in the context of care provision or financial access, that which occurs without the on-site, visual or physical presence of another caregiver, or of a family member of the care recipient or of another individual representing the care provider.

[7.1.9.7 NMAC – Rp 7 NMAC 1.9.7, 08/15/02]

#### 7.1.9.8 CAREGIVER EMPLOYMENT REQUIREMENTS:

**A. General:** The responsibility for compliance with the requirements of the Caregivers Criminal History Screening Act applies to both the care provider and to all applicants and caregivers. Pursuant to the

requirements of NMSA, 1978 Section 29-17-5 (Amended) Caregivers Criminal History Screening Act a Care Provider's failure to comply is grounds for the state agency having enforcement authority with respect to the care provider to impose appropriate administrative sanctions and penalties.

**B. Conditional Employment:** All applicants for employment to whom an offer of employment is made, or employees and caregivers employed by or contracted to a care provider must consent to and submit consent form documents, personal identification documents, fingerprints and fees required for a nationwide criminal history screening. Applicants who have submitted all completed documents and paid all applicable fees for a nationwide criminal history screening may be deemed to have conditional employment pending receipt of written notice given by the Department as to whether the applicant has a disqualifying conviction.

**C. Exception:** Excepted from the requirement for a nationwide criminal history screening are applicants for whom a determination was made under the requirements of the Caregivers Criminal History Screening Act within the previous 12 months that the applicant's criminal history record did not reflect a disqualifying conviction; or applicants for whom an employment clearance determination was made under the requirements of the Caregivers Criminal History Screening Act pursuant to a request for administrative reconsideration within the previous 12 months.

**D. Application:** In order for a nationwide criminal history record to be obtained and processed, the following must be submitted to the Department on forms provided by the Department:

(1) a form containing personal identification which has a photograph of the person and which meets the requirements for employment eligibility in accordance with the Immigration and Nationality Act as amended. A reasonable xerographic copy of a drivers license photograph will suffice under Subsection D of 7.1.9.8 NMAC.

(2) signed authorization for Release of Information; and

(3) two (2) complete sets of readable fingerprint cards (or other Department approved media) acceptable to DPS and the FBI; and

(4) the fee specified by the Department, to include fees imposed by DPS and the FBI, which shall not exceed seventy-four dollars (\$74).

(5) All documentation submitted to the Department of Health for the purposes of criminal history screening and for the purposes set forth in 7.1.9.9 NMAC and 7.1.9.10 NMAC shall become the sole property of the Department of Health with the exception of fingerprint cards which shall be destroyed pursuant to Subparagraph a below.

(a) Upon clearance by both the FBI and DPS, fingerprint cards shall be destroyed.

(b) All submitted documentation shall be retained by the Department for a period of one year from the final date of closure and thereafter shall be archived.

**E. Fees:** The FBI has a mandatory processing fee with no exceptions. The Department and DPS impose a state processing and administrative fee. The fee payment must accompany the fingerprint application, or otherwise be credited to the Department prior to or contemporaneous with the Departments' receipt of the application documents. The manner of payment of the fee is by bank cashier check payable to the New Mexico Department of Health, or other method of funds transfer acceptable to the Department. Business checks will be accepted unless the business tendering the check has previously tendered a check to the Department unsupported by sufficient funds. Neither cash nor personal checks will be accepted. The fee may be paid by the care provider or by the applicant.

(1) The applicant must submit another, readable set of fingerprint cards upon notice that the fingerprint cards previously submitted were found unreadable, as determined by the FBI or DPS. When the submission of a second set of a fingerprint cards is required, a separate fee will not be charged. A fee shall be charged for submission of third and subsequent fingerprint sets.

(2) If the applicant has a physical or medical condition which prevents the applicant from producing readable fingerprints using commonly available fingerprinting techniques, the applicant shall submit the fingerprint cards with an notarized affidavit signed by the applicant which provides:

(a) identification of the applicant;

(b) an explanation of, or a statement describing, the applicants' or caregivers' good faith efforts to supply readable fingerprints;

(c) the physical or medical reason that prevents the applicant from producing readable fingerprints using commonly available fingerprinting techniques; and,

(d) An applicant meeting the conditions of this section and who has resided in the State of New Mexico for less than ten (10) years must also submit a ten (10) year work history in addition to the required affidavits.

(3) The Department will set a fee in addition to the fees imposed by DPS and the FBI that will fully and completely cover costs incurred by the Department to support activities required by the Act and these rules, not to exceed forty dollars (\$40). The fees will not be applied to any other activity or expense undertaken by the Department.

**F. Timely Submission:** Individuals are required to agree to a nationwide criminal history screening pursuant to the Act upon offer of employment or at the time of entering into a contractual relationship with the provider. Providers must submit all fees and pertinent application information for all individuals who meet the definition of a caregiver, as described in Subsection D of 7.1.9.7 NMAC, no later than thirty (30) calendar days from the caregivers' first day of employment or effective date of a contractual relationship with the provider.

**G. Maintenance of Records:** Care providers must maintain documentation relating to all employees and contractors evidencing compliance with the Act and these rules.

(1) During the term of employment, care providers must maintain evidence of each caregiver's clearance, pending reconsideration, or disqualification.

(2) Care providers must maintain evidence showing the basis for any determination by the care provider that an employee or contractor performs job functions that do not fall within the scope of the requirement for nationwide criminal history screening. A memorandum in an employees' file stating "This employee does not provide direct care or have routine unsupervised physical or financial access to care recipients served by [name of care provider]," together with the employees' job description, shall suffice for record keeping purposes. [7.1.9.8 NMAC – Rp 7 NMAC 1.9.8, 08/15/02]

#### 7.1.9.9 CAREGIVERS AND APPLICANTS WITH DISQUALIFYING CONVICTIONS.

**A. Prohibition on Employment:** A care provider shall not hire or contract with any applicant, or continue the employment or contractual services of any caregiver, for whom the care provider has received notice of a disqualifying conviction, except as provided in Paragraph 2 of Subsection A of 7.1.9.9 NMAC.

(1) In cases where the criminal history record lists an arrest for a crime that would constitute a disqualifying conviction and no disposition is listed for the arrest, the Department will attempt to notify the applicant and request information from the applicant within a reasonable time as set forth in the Departments' notice regarding the disposition of the arrest.

(2) An applicant's failure to respond within the required timelines shall result in that applicant's disqualification from employment as a caregiver in the State of New Mexico. ["Timelines" refers to the thirty (30) days as described in Subparagraph a of Paragraph 1 of Subsection B of 7.1.9.10.]

**B. Employment Pending Reconsideration Determination:** At the discretion of the care provider, a caregiver whose nationwide criminal history record reflects a disqualifying conviction and who has requested administrative reconsideration may continue to be employed pending a determination on reconsideration.

**C. Notice of Final Determination of Disqualification:** Upon receipt of a notice of Final Determination of Disqualification a care provider must:

(1) Immediately and permanently remove a caregiver from any position of employment that meets the definition of caregiver as set forth in Subsection D of 7.1.9.7NMAC.

(2) Notify the department of the date and type of action taken to satisfy the removal requirements of as set forth in Subsection C subparagraph 1of 7.1.9.9 NMAC via written documentation signed by an authorized agent of the care provider.

[7.1.9.9 NMAC - Rp 7 NMAC 1.9, 08/15/02]

#### 7.1.9.10 ADMINISTRATIVE RECONSIDERATION.

**A. Availability:** The applicant whose nationwide criminal history record reflects a disqualifying conviction may request an informal administrative reconsideration from the Department.

**B. Procedure for Requesting Administrative Reconsideration:**

(1) an applicant given notice of a disqualifying conviction must submit a written request for an administrative reconsideration. To be effective, the written request must:

(a) be made within thirty (30) days, as determined by the postmark, from the date of the notice issued by the Department;

(b) be properly addressed to the Caregivers Criminal History Screening Program;

(c) state applicants' name, home and work address, telephone;

(d) applicants' employer or proposed employer name, address and telephone;

(e) state the date of hire;

(f) state the position title;

- (g) describe the duties of the position; and,
- (h) describe the care recipients.

(2) If the applicant wishes to submit and have considered additional documentation (as specified in Paragraph 1 of Subsection C of 7.1.9.10 NMAC) that additional documentation must be included with the request for an administrative reconsideration.

(3) An applicant requesting reconsideration must include a signed declaration identifying with specificity any criminal felony convictions.

**C. Written Documentation:** The documentation submitted with the request for an administrative reconsideration may include information on the following:

(1) Credible and reliable evidence of the actual disposition of any arrest for which the nationwide criminal history record was incomplete. This could be evidence, for example, of the certified copies of an acquittal, a dismissal, or conviction of a lesser included crime, submitted to refute or rebut the presumption of a disqualifying conviction created because the nationwide criminal history record was incomplete in not showing the disposition of an arrest for a crime that constitutes a disqualifying conviction.

- (2) The person's age at the time of each disqualifying conviction.
- (3) Any mitigating circumstances when the offense was committed.
- (4) Any court imposed sentence or punishment and, if completed, when completed.
- (5) Any rehabilitation since the offense.
- (6) The person's full employment history since the disqualifying convictions.
- (7) And other relevant materials the applicant may wish to submit.

**D. Reconsideration Proceeding:** The reconsideration proceeding is intended to be an informal review of written documentation; it is non-adversarial and administrative. It will be conducted by a reconsideration committee designated for that purpose by the Department. The reconsideration committee will issue an employment clearance determination based upon the completed request for reconsideration and all supporting documents submitted. In cases where the reconsideration committee finds the need for additional or clarifying information, the reconsideration committee may request that the applicant supply such additional information within the time set forth in the reconsideration committees' request.

**E. Factors in Determination:** In determining whether an applicant whose nationwide criminal history record reflects a disqualifying conviction may be employed, the reconsideration committee shall take into account the requirements of the Criminal Offender Employment Act, sections 28-2-1 to 28-2-6, NMSA 1978. However, that act is not dispositive. The following factors may be considered.

- (1) Total number of disqualifying convictions;
- (2) Time elapsed since last disqualifying conviction or since discharge of sentence;
- (3) Circumstances of crime including whether violence was involved;
- (4) Activities evidencing rehabilitation, including but not limited to substance abuse or other rehabilitation programs;
- (5) Whether conviction was expunged by the court or whether an unconditional pardon was granted;
- (6) False or misleading statement(s) about any conviction in the signed declaration;
- (7) Evidence that applicant poses no risk of harm to the health and safety of care recipients; and,
- (8) Age of applicant at time of disqualifying conviction.

**F. Grounds for Reconsideration Employment Clearance Determination:** An applicant will be issued a reconsideration employment clearance determination by the Department where the request for reconsideration and accompanying documentation clearly demonstrates that the applicant has satisfied one of the following three grounds for a reconsideration employment clearance determination.

(1) **Inaccuracy:** The nationwide criminal history record inaccurately reflects a disqualifying conviction. This ground for a reconsideration employment clearance determination applies:

- (a) In instances of factual error in the nationwide criminal history record, from any source;
- (b) In instances of error arising from the Departments' application or use of the inappropriate criminal statute or standard to the disqualifying conviction at issue; and
- (c) In instances where the Department, pursuant to the applicants' or caregivers' required consent, applies a rebuttable presumption of a disqualifying conviction to an arrest for a felony that lacks a clear disposition in the nationwide criminal history record.

(2) **No Risk of Harm:** The employment or contractual services provided by an applicant with a disqualifying conviction presents no risk of harm to a care recipient. The reconsideration employment clearance determination issued by the reconsideration committee under this ground may be limited, in certain cases, based upon the evidence in the request for reconsideration and the accompanying documentation.

(a) The reconsideration determination whether the applicant presents no risk of harm to a care recipient is based upon the risk arising from the disqualifying conviction.

(3) **No Bearing on Fitness:** The disqualifying conviction does not directly bear upon applicants' or caregivers' fitness for employment.

[7.1.9.10 NMAC - Rp 7 NMAC 1.10, 08/15/02]

**7.1.9.11 DISQUALIFYING CONVICTIONS.** The following felony convictions disqualify an applicant from employment as a caregiver.

- A. Homicide.
- B. Trafficking. Trafficking in controlled substances.
- C. Kidnapping, False Imprisonment, Aggravated Assault or Aggravated battery.
- D. Rape, Criminal Sexual Penetration, Criminal Sexual Contact, Incest, Indecent Exposure, or Other

Related Sexual Offenses.

- E. Crimes involving Adult Abuse, Neglect or Financial Exploitation.
- F. Crimes involving Child Abuse or Neglect.

G. Crimes involving Robbery, Larceny, Extortion, Forgery, Embezzlement, Credit Card Fraud, or Receiving Stolen Property.

[7.1.9.11 NMAC – Rp 7 NMAC 1.9.12, 08/15/02]

**History of 7.1.9. NMAC:**

**Pre NMAC History: None.**

**History of Repealed Material:** 7 NMAC 1.9, Caregivers Criminal History Screening Requirements, filed 08-03-1998, repealed 08/15/02.