

**STATE OF MAINE**

**MAINE BACKGROUND CHECK CENTER RULE**

**10-144 CODE OF MAINE RULES  
CHAPTER 60**



**Department of Health and Human Services  
Division of Licensing and Certification  
11 State House Station  
Augusta, Maine 04333-0011**

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October 17, 2018**

**Division of Licensing and Certification**

**Department of Health and Human Services**

**MAINE BACKGROUND CHECK CENTER RULE**

**10-144 C.M.R. Chapter 60**

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**SUMMARY STATEMENT**

This rule is established to govern the Maine Background Check Center (MBCC), which operates an Internet-based system that employers use to access criminal records and other background information to determine the eligibility of individuals to work in direct access positions serving vulnerable children, elderly persons, dependent adults and persons with disabilities in Maine. The online system is maintained by the MBCC in coordination with the Department of Public Safety, the State Bureau of Identification and with other state and federal agencies, including the Federal Bureau of Investigation (FBI).

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**AUTHORITY**

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This rule is effective October 17, 2018.

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## SECTION 1: DEFINITIONS

**Comprehensive background check report** means a comprehensive report generated by the Maine Background Check Center or an alternate vendor based on a search and analysis of the State Bureau of Identification (SBI) Criminal History Record Information and may include other databases as applicable to the employer and the direct access worker's position, such as:

- The Federal Bureau of Investigation;
- The National Sex Offender Public Website;
- The Maine Sex Offender Registry;
- Maine Child Protective Services records;
- The Maine Registry of Certified Nursing Assistants and Direct Care Workers;
- The Federal Office of the Inspector General's exclusion list;
- The MaineCare exclusion list; and
- Other applicable registries and professional licensing records.

The comprehensive background check report informs an employer when an offense appears in an individual's record that may disqualify the individual from employment as a direct access worker.

**Conditional employment** means a period of employment, not to exceed 60 contiguous calendar days, during which a direct access worker or grandfathered employee may seek to correct an error on a comprehensive background check report generated by the MBCC, or an employer may request a waiver of a disqualifying offense. Interruptions in employment for legally required leave such as Family Medical Leave or a layoff in workforce are not included in the 60 calendar day period.

**Department** means the Department of Health and Human Services.

**Direct Access** means access to the property, personally identifiable information, financial information and resources of an individual or physical access to an individual who is a Medicare or Medicaid beneficiary or other protected individual served by a provider subject to this rule.

**Direct access employment** means any activity involving direct access services including employment for wages, contracting for temporary staff or use of unsupervised volunteers or students who perform functions similar to those performed by direct access workers.

**Direct access worker** means an individual who by virtue of employment has direct access to a Medicare or Medicaid beneficiary or other protected individual served by a provider subject to this rule. "Direct access worker" does not include an individual performing repairs, deliveries, installations or similar services who does not have direct access without supervision. "Direct access worker" includes but is not limited to the following individuals:

- A. An individual seeking employment as a direct access worker;

- B. An employee who is employed upon the effective date of this rule and who is required to have a background check in accordance with this rule;
- C. A former employee who consents, prior to leaving employment, to periodic review of that employee's criminal background for a fixed time;
- D. An independent contractor pursuant to Title 26, section 1043, subsection 11, paragraph E or Title 39-A, section 102, subsection 13-A or a worker who is placed with a provider by a temporary nurse agency or a personal care agency or a placement agency registered pursuant to section 1717; and
- E. A volunteer, student, or other person with direct access who routinely performs unsupervised functions similar to those performed by a direct access worker for a provider.

**Direct personal supervision** means that the supervisor has immediate access to the conditionally employed individual with ability to promptly respond to an emergency situation, for the purpose of conditional employment.

**Employer** means a person or other legal entity that employs or places a direct access worker or otherwise provides direct access services. "Employer" includes a provider, a temporary nurse agency, a personal care agency and a placement agency.

**Maine Background Check Center (MBCC)** means the Internet-based system established and maintained by the Department in accordance with 22 M.R.S. §9054, used by employers to request background checks on potential or current direct access workers to determine the eligibility of individuals to work in direct access positions with vulnerable Mainers including children, elderly persons, dependent adults and persons with disabilities.

**Person** means any individual, partnership, association, organization, corporation, trust, or other entity.

**Personally identifiable information** means information that permits the identity of an individual to whom the information applies to be able to be reasonably inferred or known by either direct or indirect means.

**Protected individual** means a person who is in need of support, who is vulnerable to abuse, neglect and exploitation and who receives services offered by providers subject to this rule. A protected individual requires special protective measures by criminal justice, social services and health care agencies; may be a patient, consumer, beneficiary or resident; and is typically elderly, a child or an individual with disabilities in need of assistance.

**Provider** means a licensed, certified or registered entity that employs direct care workers to provide long-term care, child care and in-home and community-based services under this rule.

**Rap Back Monitoring** means automatically and constantly monitoring an individual's Record of Arrest and Prosecution (RAP) and reporting new results to the MBCC.

**Substantial non-compliance** means failure to comply with the administrative and record-keeping requirements outlined in this rule.

**Quick Check** means a no-cost check of publically accessible registries performed by a prospective employer using the direct access worker's first and last names only.

**User fee** means the fee charged to an employer for each background check.

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**SECTION 2: SCOPE, EMPLOYER OBLIGATIONS, ENROLLMENT, AND FEES**

- A. Scope.** The provisions of this rule apply to all employers and direct access workers required to use the MBCC in accordance with 22 M.R.S. §9054.
- B. Employer obligations.** An employer subject to this rule shall use the MBCC to conduct a comprehensive background check that includes a criminal history records check for all direct access workers. The employer shall comply with the requirements of this chapter when making employment-related decisions for direct access workers.
- C. Mandatory use of the MBCC by providers:** Use of the MBCC is mandatory for the following providers (as defined in 22 M.R.S. §9053):
1. Child Care facilities;
  2. Child placing agencies;
  3. Children’s residential care facilities;
  4. Family child care providers;
  5. Nursery schools;
  6. Hospice providers;
  7. Home health care providers;
  8. Nursing facilities;
  9. Personal care agencies and placement agencies;
  10. Temporary nurse agencies;
  11. Adult day care programs;
  12. Assisted housing programs;
  13. Residential care facilities;
  14. Intermediate care facilities for individuals with intellectual disabilities;
  15. Mental health services facilities or providers; and
  16. Drug treatment centers.
- D. Constitutionality clause.** Should any section, paragraph, sentence, clause, or phrase of this rule be declared unconstitutional or invalid for any reason, the remainder of this rule will not be affected thereby.
- E. Employer enrollment, administrator, and user requirements.** Employers must comply with the following enrollment, administrator, and user requirements.
1. Employers must identify at least one individual to serve as its background check administrator.
  2. The administrator must:
    - a. Create and maintain an account in the Department’s MBCC website ;
    - b. Complete all enrollment procedures required to use the website; and





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**SECTION 3: CONDUCTING BACKGROUND CHECKS AND REPORTS**

- A. Notice.** Employers must provide notice regarding the background check process and disqualifying offenses to direct access workers using forms provided by the Department.
- B. Authorization and releases.** Employers must obtain authorization and releases from direct access workers using forms provided by the Department prior to requesting a background check.
- 1. Same document.** The notice, authorization and release may be in the same document.
  - 2. Maintain records.** Employers must maintain copies of all signed notice, authorization and release forms.
    - a.** Employers must retain signed notice, authorization, and release forms:
      - i.** For one year if the direct access worker is not hired; or
      - ii.** Until new notices, authorizations, and releases are obtained for the direct access worker's next background check; or
      - iii.** For a minimum of one year after the direct access worker's status as a direct access worker ends.
    - b.** Employers must make the signed forms available immediately upon request from the Department.
- C. Obtaining information required to conduct checks.** Employers must obtain and direct access workers must provide the information and documentation identified in this sub-section.
- 1. Identifying information.** Employers must obtain the following information from direct access workers in order to complete a background check:
    - a.** Full name, including maiden name, and all previously used names;
    - b.** Date of birth;
    - c.** Current address; and
    - d.** The identification number from a:
      - i.** State-issued identification card or driver's license;
      - ii.** Military identification card;

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- iii. Passport; or
      - iv. Other form of photographic or government certified identification approved by the Department.
    - 2. **Failure to provide current address.** The MBCC or the approved alternate vendor will use the employer's address provided to issue all notices regarding the direct access worker. Failure to provide a correct current address may delay the receipt of notices. Delay caused by failure to provide a correct current address will not extend the period for conditional employment.
    - 3. **Retain Form I-9.** Employers must complete and retain the United States Citizenship and Immigration Services (USCIS) Employment Eligibility Verification Form I-9 and documentation relied upon to establish the identity of every direct access worker.
    - 4. **Notice of legal name change.** Employers must notify the MBCC of the legal name change of a direct access worker in writing within ten business days of learning of the change. The notification must include proof of the name change, such as a court document, marriage certificate or divorce decree.
  - D. **Use of the MBCC or alternate vendors.** Employers must use the MBCC to complete a direct access worker's comprehensive background check, unless the employer has received written approval to use an alternate vendor, as set forth in this rule. Employers must comply with the instructions and requirements of the system.
    - 1. **Phased implementation.** The MBCC or approved alternate vendors will become operational for employers in a staged and orderly process based on the type of employer and the number of direct access workers employed. Employers have 14 business days from the date of notification by the Department to begin use of the MBCC.
    - 2. **Grandfathered employees.** Individuals serving as direct access workers who were employed as direct access workers prior to the date the MBCC becomes operational for that employer are considered grandfathered employees. Employers have 365 calendar days from the date the MBCC becomes operational for the employer to obtain a comprehensive background check report on grandfathered employees.
    - 3. **Master list.** Employers must create and maintain a master list of all their direct access workers that reflects the date and result of background checks completed.
      - a. Employers must keep the direct access workers' employment status current.

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- b.** Employers must update their master list in the system within 30 calendar days of terminating or separating from a direct access worker employee.
  - 4. Placed and temporary workers.** Employers must complete comprehensive background checks for individuals hired as direct access workers in accordance with 22 M.R.S. §9054(4).
  - 5. Alternate vendors.** Employers may seek approval from the Department to continue use of an alternate vendor to conduct all comprehensive background checks.
    - a.** A vendor must comply with the following conditions to be approved by the Department:
      - i.** The employer was using an alternate vendor to conduct comprehensive background checks for his or her direct access workers on, or before, February 6, 2017;
      - ii.** The employer applies to the Department for the use of a vendor within the 14 business day period following the notification described in Section 3(D)(1) of this rule;
      - iii.** The vendor produces a background check report for each direct access worker that complies with the standards set forth in 22 M.R.S. §9054, including continuous monitoring of convictions (rap back);
      - iv.** The employer provides an attestation of continued use of the approved background check vendor to the Department every 365 calendar days following the initial approval;
      - v.** The employer maintains a master list of all direct access workers and the status of their comprehensive background checks and provides access of this list to the Department, upon request, during regular business hours;
      - vi.** The employer complies with all other standards put forth in this rule and remains liable to sanctions for violations of this rule; and
      - vii.** The direct access worker may not be employed in a direct access position, if the employer receives a disqualifying report from their approved alternative vendor, and the Department will not accept waiver requests from employers using an alternate vendor.
    - b.** Any report, underlying data and analysis made by the alternate vendor pursuant to these rules must be made available to the Department upon the

Department's written request. If an employer or the alternate vendor refuse to give reports, underlying data, and analysis to the Department, the Department may send written notice to the employer that its approval of the alternate vendor is withdrawn.

- c. After receiving a complete application, the Department will make a decision to approve or deny the use of an alternate vendor and provide a formal written decision to the employer within ten business days. The Department will only approve if the use of an alternate vendor meets the requirements of this rule and 22 M.R.S. §9054.
- d. Use of the vendor shall cease immediately upon the vendor's inability to conduct a comprehensive background check in compliance with this rule.
- e. If the employer ceases to use the alternate vendor, then the employer must immediately begin use of the MBCC.

- E. **Quick check.** Employers may opt to screen potential direct access workers by conducting a quick check prior to paying for a comprehensive background check. Search results indicating disqualifying offenses that preclude employment may be used to make employment decisions. If no disqualifying offenses result from this search, the employer shall initiate a comprehensive background check prior to making an employment decision.
- F. **Rap back monitoring.** All direct access workers hired by employers as direct access workers are automatically enrolled in criminal record rap back monitoring, as a function of the MBCC search.
  - 1. **Automatic monitoring.** Rap back monitoring automatically monitors direct access workers' criminal records for five years following a request for a comprehensive background check.
  - 2. **Update master list to cease monitoring.** To cease rap back monitoring of a direct access worker, employers must update their master lists of direct access workers in the MBCC to indicate that worker is no longer employed by that employer.
- G. **Periodic subsequent comprehensive background checks.** Employers must follow the same process used to obtain an initial comprehensive background check to obtain a periodic comprehensive background check. Subsequent comprehensive background checks must be obtained at least every five years following the date of hire or the anniversary date of a previous comprehensive background check.
- H. **Transfers and promotions.** A background check must be completed on an individual who is currently employed in a position other than as a direct access worker when they are transferred or promoted into a position as a direct access worker, unless a

comprehensive background check has already been conducted through the MBCC or an approved alternate vendor.

**I. Disqualifying offenses.** An individual with a disqualifying offense, including a disqualifying criminal conviction; substantiated complaint of abuse, neglect, or misappropriation of funds; or listing on a fraud or Sex Offender Registry as described below may not work as a direct access worker during the disqualification period.

**1. Reports received from the Maine State Bureau of Identification (SBI).** Unless specified otherwise in the licensing rule specific to the employer’s work, pursuant to 22 M.R.S. §9054(11), the Table of Disqualifying Crimes below lists disqualifying criminal offenses by the class of crime (A-E) and the length of time following the conviction that a direct access worker may not be employed as a direct access worker:

<b>Table of Disqualifying Crimes</b>			
Criminal Offense	Disqualification Periods		
	30 Years	10 Years	5 Years
<b>OFFENSES OF GENERAL APPLICABILITY (Attempt, Solicitation, and Conspiracy)</b>			
Criminal conspiracy		A, B, C	
Criminal attempt	A	B, C	
Aggravated attempted murder	A		
Criminal solicitation		A, B, C	
<b>OFFENSES AGAINST THE PERSON</b>			
Murder	A		
Felony murder	A		
Manslaughter		A, C	
Aiding or soliciting suicide			D
Assault		C	
Domestic violence assault		C	
Aggravated assault	A, B		
Elevated aggravated assault	A		
Elevated aggravated assault on a pregnant person	A		
Domestic violence criminal threatening		C	
Terrorizing		C	
Stalking		B, C	
Reckless conduct domestic violence		C	
Aggravated reckless conduct		B	
Violation of a protection order			C
Illegal sale and use of fetuses			C
Causing denial of rights of a mentally ill person			C
Causing unwarranted hospitalization of a person			E
<b>SEX ASSAULTS</b>			
Gross sexual assault	A	B, C	

Criminal Offense	Disqualification Periods		
	30 Years	10 Years	5 Years
Sexual abuse of a minor		C	D, E
Unlawful sexual contact	A	B, C	D, E
Visual sexual aggression against child		C	D
Contact with a child under 14 in a restricted zone		C	D
Sexual misconduct with a child under 14 years of age		C	D
Solicitation of a child to commit a prohibited act		C	D
Unlawful sexual touching			D
Failing to register as a sex offender		B, C	D
<b>SEXUAL EXPLOITATION OF MINORS</b>			
Sexual exploitation of minor	A	B	
Dissemination of sexually explicit material	A	B, C	
Possession of sexually explicit material		B, C	D
<b>KIDNAPPING AND CRIMINAL RESTRAINT</b>			
Kidnapping	A, B		
Criminal restraint		C	
Criminal restraint by parent		C	
Causing unwarranted hospitalizations.		C	
<b>THEFT</b>			
Theft by unauthorized taking or transfer		B	C
Theft by deception		B	C
Insurance deception		B	C
Theft by extortion			C
Theft of lost, mislaid or mistakenly delivered property		B	C
Theft of services		B	C
Theft by misapplication of property		B	C
Receiving stolen property		B	C
Unauthorized use of property		B	C
Organized retail theft			C
<b>BURGLARY</b>			
Burglary			A, B, C
Burglary of motor vehicle			C
<b>FALSIFICATION IN OFFICIAL MATTERS</b>			
Tampering with a witness, informant, juror or victim		B, C	
Falsifying physical evidence			D
Tampering with public records or information			D
<b>OFFENSES AGAINST THE FAMILY</b>			
Abandonment of child		C	
Endangering the welfare of a child		C	
Endangering welfare of dependent person		C	
Incest		C	D

Criminal Offense	Disqualification Periods		
	30 Years	10 Years	5 Years
<b>ROBBERY</b>			
Robbery		A, B	
<b>FORGERY AND RELATED OFFENSES</b>			
Aggravated forgery		B	
Forgery		B, C	
Negotiating a worthless instrument		B, C	
<b>OFFENSES AGAINST PUBLIC ADMINISTRATION</b>			
Refusing to submit to arrest or detention			D
Assault on an officer/firefighter			C
Unlawful interference with law enforcement dogs			C, D
Assault on an emergency medical care provider		C	
Unlawful interference with law enforcement horses			C, D
Hindering apprehension or prosecution			B, C
Obstructing criminal prosecution			C
Escape			B, C
<b>ARSON AND OTHER PROPERTY DESTRUCTION</b>			
Arson	A		
Causing a catastrophe	A		
Aggravated criminal mischief		C	
<b>SEX TRAFFICKING, PROSTITUTION AND PUBLIC INDECENCY</b>			
Aggravated sex trafficking	B		
Sex trafficking		C	
Patronizing prostitution of minor/person with mental disability		C	D
<b>FRAUD</b>			
Act or omission with the intent to defraud		C	
Misuse of entrusted property	B, C		
Misuse of identification			D
<b>CRIMINAL USE OF EXPLOSIVES AND RELATED CRIMES</b>			
Criminal use of explosives		C	
Criminal use of disabling chemicals			D
Criminal use of electronic weapon			D
<b>DRUGS</b>			
Unlawful trafficking in scheduled drugs		B	C, D
Trafficking in or furnishing counterfeit drugs			C
Aggravated trafficking of scheduled drugs		A, B	C
Aggravated trafficking or furnishing of counterfeit drugs		B	
Aggravated furnishing of scheduled drugs		B	C
Aggravated cultivating of marijuana		A, B	C
Aggravated unlawful operation of a meth laboratory		A	

Criminal Offense	Disqualification Periods		
	30 Years	10 Years	5 Years
Unlawfully furnishing scheduled drugs			C
Unlawful operation of a methamphetamine laboratory		B	
MOTOR VEHICLES			
Eluding/passing a roadblock		B	C
Operating under the influence resulting in injury/death	B	C	
Leaving the scene of accident with injury/death		C	
Operating after suspension-accident with death		B	

2. Comparable convictions for similar crimes in this and other jurisdictions result in disqualification as in the Table above.
3. A disqualifying offense includes any act that results in the direct access worker being listed on any of the following lists or registries at the time of application or thereafter. If there is a difference in length between the disqualification periods in the table above and a list or registry or between registries, and one of them results in a current disqualification, then whichever results in the current disqualification will control. Lists prohibiting employment include the following:
  - a. National Sex Offender Public Website;
  - b. Maine Sex Offender Registry;
  - c. Maine Registry of Certified Nursing Assistants and Direct Care Workers annotated list;
  - d. Federal Office of the Inspector General exclusion list;
  - e. MaineCare exclusion list; or
  - f. The exclusion list of any other applicable registries.

## J. Reports

1. The MBCC or the approved alternate vendor shall issue background check reports in accordance with 22 M.R.S. §§ 9054 (9) and (10).
2. Content of the Background Check Report: The content of the Background Check Report must include notice that the individual submitted for a background check has: (a) no disqualifying offenses; or (b) has a disqualifying offense(s); or (c) a criminal charge without disposition that upon final disposition may result in a disqualifying offense. The background check report must include information specific to the individual along with information about the source and type of offense sufficient to allow the individual named in the report to challenge the information.



- 3.** The background check report is considered preliminary until the individual subject to the background check has had the opportunity to challenge or decline to challenge the accuracy of the records obtained, after which the report shall be final, unless:

  - a.** A direct access worker corrects an error pursuant to this rule, and the correction results in a new background check report that does not disqualify the direct access worker; or
  - b.** An employer sponsors a waiver and that waiver is granted by the Department.
- 4.** The MBCC or the approved alternate vendor may issue a new background check report regarding any direct access worker, when the MBCC or the approved alternate vendor:

  - a.** Receives new information based on rap back monitoring that would result in a disqualification; or
  - b.** The MBCC or the alternate vendor receives information which would result in the disqualification of a direct access worker who has a current report that does not disqualify him or her.
- 5.** Any background check report issued by the MBCC or the approved alternate vendor supersedes a prior report and/or waiver granted to an employer and becomes final, except as above.

**SECTION 4: ERROR CORRECTIONS AND WAIVERS**

- A. Conditional employment.** The employer shall notify each direct access worker of the results of the MBCC or approved alternate vendor comprehensive background check report.
1. The employer shall record the date when the results of the report regarding eligibility for hire are provided to the direct access worker.
  2. An employer may hire a direct access worker or retain a grandfathered direct access worker on a conditional basis by meeting the requirements of 22 M.R.S. §§ 9057(4) and 9058(3) and this rule.
  3. An employer may continue conditional employment when that direct access worker pursues an error correction, or when the employer sponsors a waiver request. A direct access worker retained on a conditional basis must be under direct personal supervision during conditional employment.
- B. Error corrections.** If a direct access worker believes the comprehensive background check report contains an error, the direct access worker may challenge the accuracy of the information believed to be in error as follows.
1. **Records created or generated outside the MBCC.** The error correction process described in this paragraph applies to records created or generated by entities other than the MBCC.
    - a. Direct access workers must follow any instructions provided by the employer or the entity responsible for creating or generating the records containing the error, such as the SBI, other applicable databases and registries or a professional licensing entity.
    - b. If the entity responsible for creating or generating the records corrects an error, the employer may access the Department's background check system to verify any updated information.
    - c. If the SBI notifies the MBCC of the correction of an error, the MBCC shall notify the employer of the error correction and provide a corrected comprehensive background check report to the employer and notify the direct access worker.
    - d. If errors are not corrected by the end of the 60 days of conditional employment, employers are prohibited from employing the direct access worker unless they obtain a waiver or until the error is corrected and a non-disqualifying report is issued.

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2. **Records created or generated by the MBCC or an approved alternate vendor.** The error correction and challenge process described in this paragraph applies to records created or generated by the MBCC or approved alternate vendor.
    - a. Direct access workers must submit a request to correct information in records created or generated by the MBCC or approved alternate vendor within ten days after the MBCC or approved alternate vendor issues the notice of disqualification to their employer.
    - b. Requests must be made in writing and directed to the Department, and must specify what information is in error.
    - c. The Department will issue its decision in writing within ten days of the request. The decision may be appealed, in accordance with Section 6(D)(1) of this rule.
    - d. If errors are not corrected by the end of the 60 days of conditional employment, employers are prohibited from employing the direct access worker unless they obtain a waiver or until the error is corrected and a non-disqualifying report is issued.
  
  - C. **Waivers.** If a direct access worker has a disqualifying criminal conviction listed in the table in Section 3(I)(1) or in Section 3(I)(2) of this rule on his or her comprehensive background check report, employers may only employ the direct access worker if they obtain a waiver from the Department. Direct access workers and employers must comply with the provisions in this sub-section to obtain a waiver from the Department.
    1. An employer may not request a waiver of a direct access worker's disqualification for employment due to the direct access worker's appearance on any disqualification list cited in Section 3(I)(3) of this rule. A direct access worker shall appeal directly to the listing entity to correct any perceived error.
    2. Employers must consider all of the below factors in determining whether to sponsor a waiver:
      - a. Age of the direct access worker applying for a waiver;
      - b. The amount of time passed since the disqualifying offense occurred;
      - c. The total number and type of disqualifying offenses;
      - d. Any proven mitigating circumstances surrounding the disqualifying offense;

- e. Objective evidence that the direct access worker has successfully completed a criminal rehabilitation program;
      - f. The relevance of the circumstances pertaining to the disqualifying offense with respect to the nature of the proposed employment;
      - g. The length and consistency of similar employment post-conviction (if applicable);
      - h. Whether the direct access worker is bonded under federal or State law; and
      - i. Personal references or recommendations from employers on behalf of the direct access worker.
3. If the employer has considered all the required factors above and, following this consideration, has determined that sponsoring a waiver is appropriate, then the employer must request the waiver through the MBCC by meeting the following criteria:
  - a. The direct access worker must complete the waiver request form provided on the MBCC website.
  - b. The employer must attest that it considered the above factors required to employ the direct access worker conditionally and sponsor a waiver, including:
    - i. The nature and gravity of the disqualifying offense or offenses;
    - ii. The time that has passed since the disqualifying offense or offenses;
    - iii. The nature of the employment held or sought; and
    - iv. Whether the criminal conduct was employment-related.
  - c. The employer must submit the waiver request form to the Department and attest that it is objectively reasonable to conclude that the direct access worker is unlikely to cause harm to a protected individual or others in the employer's care, and that a denial of the waiver is not otherwise warranted in accordance with State or federal law. The employer must submit the waiver request in accordance with instructions provided on the MBCC website within 30 days of the date of the disqualifying letter.
4. The MBCC will only approve waivers where the employer has attested that they reasonably determined that the health and safety of a protected individual is not in jeopardy and a denial of a waiver request is not otherwise warranted in

accordance with State or federal law. (See 22 M.R.S. §9054 (14)). The Department shall consider the following:

- a.** The passage of time;
  - b.** The demonstration of the direct access worker 's rehabilitation;
  - c.** The facts and circumstances of the conviction; and
  - d.** The relevancy of the particular disqualifying offense to the current or prospective employment.
- 5.** Within ten business days of receiving the waiver request, the MBCC will issue a written determination letter including the reason for the decision to the employer and direct access worker by email or, if no email address is on record, by mail.
  - a.** A waiver shall only allow the employment of the direct access worker by the sponsoring employer in the position identified in the background check system. Waivers are not transferrable to a new employer.
  - b.** If the waiver request is denied, the direct access worker may appeal the decision, in accordance with Section 6(D)(1) of this rule.
  - c.** The Department may revoke a waiver when the waiver was based on false or substantially incorrect information.

**SECTION 5: CONFIDENTIALITY**

A criminal background check record and other personally identifiable information provided to an employer in compliance with this rule are confidential. An employer may use this information only to determine the eligibility of an individual for new or continued employment, and the personally identifiable information or background check record may not be disseminated in any way that does not comply with this rule or applicable laws.

**SECTION 6: ENFORCEMENT AND APPEALS**

- A. Referral for licensing actions.** The MBCC may refer substantial noncompliance with this rule or violations of the applicable statutes, including but not limited to providing false or substantially incorrect information to the Department, to the appropriate State government program, unit, or office for further licensing action.
- B. Penalties.** The Department may impose a penalty on employers for:
1. Failing to secure a background check in accordance with this rule;
  2. Knowingly employing a disqualified direct access worker for direct access employment, except for conditional employment in accordance with this rule;
  3. Failure or refusal to terminate, or remove from direct access employment, a direct access worker who is disqualified from employment based on this rule;
  4. Conditionally employing a direct access worker before receiving verification that the direct access worker has met the requirements of conditional employment; or
  5. Failing to comply with the confidentiality requirements and conditional employment requirements of 22 M.R.S. Chapter 1691.
- C. Fines.** An employer who fails to comply with the provisions of this rule is subject to the penalties set out under this subsection.
1. An employer who fails to secure a background check in accordance with this rule may be fined not less than \$500 but not more than \$10,000 per day, beginning on the first day the violation occurs and for each day of continued violation. Each day constitutes a separate offense.
  2. An employer who knowingly employs a disqualified direct access worker for direct access employment may be fined not less than \$500 but not more than \$10,000 per day, beginning on the first day the violation occurs and for each day of continued violation. Each day constitutes a separate offense.
  3. An employer who conditionally employs an individual before receiving verification that the individual has met the requirements of conditional employment may be fined not less than \$500 but not more than \$10,000 per day.
  4. An employer who fails to comply with the confidentiality requirements and conditional employment requirements of this rule may be fined not less than \$500 but not more than \$5,000 for each violation.
- D. Appeal procedure.** Direct access workers and employers may request appeals in accordance with this sub-section.

1. **Direct access worker appeals.** A direct access worker may request an administrative hearing to appeal the denial of a request to challenge and correct information in records created or generated by the MBCC or alternate vendors, or denial of a request for a waiver, or a revocation of a waiver.
  - a. **Administrative hearing.** A request for a hearing must be made in writing to the Department and must specify the reason for the appeal. A request for a hearing must be mailed within 30 days from receipt of the Department's decision to deny the request to correct information in records and/or reports created or generated by the MBCC or approved alternate vendor.
  - b. **Hearing process.** The hearing will be conducted pursuant to the Department's Administrative Hearings Rules at 10-144 C.M.R. Ch. 1, and in conformity with Maine's Administrative Procedure Act at 5 M.R.S. Ch. 375.
  - c. **Judicial review.** The final decision shall notify the direct access worker that a person who is aggrieved by a final agency action may be entitled to judicial review in the Superior Court.
  
2. **Employer appeals.** An employer may request an administrative hearing to appeal fines imposed by the Department, the denial of a request for a waiver, revocation of a waiver, or the denial of a request for the use of an alternate vendor.
  - a. **Administrative hearing.** An employer may appeal sanctions issued by the Department pursuant to this rule and the applicable statutes by submitting a request for hearing in writing to the Department within 30 days of the receipt of the notice of sanctions. The request must specify the reason for the appeal.
  - b. **Hearing process.** The hearing will be conducted, pursuant to the Department's Administrative Hearings Rules at 10-144 C.M.R. Ch. 1, and in conformity with Maine's Administrative Procedure Act at 5 M.R.S. Ch. 375.
  - c. **Judicial review.** The final decision shall notify the employer that a person who is aggrieved by a final agency action may be entitled to judicial review in the Superior Court.

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## STATUTORY AUTHORITY AND REGULATORY HISTORY

### STATUTORY AUTHORITY:

22 M.R.S. ch. 1691

### EFFECTIVE DATE:

October 17, 2018 – filing 2018-224