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Center for Clinical Standards and Quality/Survey & Certification Group

Ref: S&C: 13-24-NH

DATE: **April 12, 2013**

TO: State Survey Agency Directors

FROM: Director
Survey and Certification Group

SUBJECT: Report of the National Background Check Program (NBCP) Long-Term Care (LTC) Criminal Convictions Work Group

Memorandum Summary

- **The National Background Check Program Purpose:** To provide grants to States to implement background checks on prospective direct patient access employees in the LTC field.
- **Role of The Office of Inspector General (OIG)**: Tasked by statute with evaluating the NBCP and has recommended that the Centers for Medicare & Medicaid Services (CMS) develop standards in defining direct patient access and identifying convictions that disqualify an individual from nursing facility employment.
- **NBCP LTC Criminal Convictions Work Group:** Made up of grantee State Agency representatives and other interested state officials and has prepared options in response.
- **Request of Stakeholders:** To review the Work Group's options and provide CMS comments.

The Patient Protection and Affordable Care Act (P.L. 111-148) became Federal law in March 2010. Section 6201 of the Affordable Care Act established the National Background Check Program to identify efficient, effective, and economical procedures for LTC facilities or providers to conduct background checks on prospective direct patient access employees on a national basis.

The OIG issued interim report OEI-07-09-00110 in March 2011, which revealed, through an analysis of Federal Bureau of Investigation-maintained criminal history records, that 92% of nursing facilities employed one or more individuals with a history of criminal conviction. In response, the OIG recommended that CMS define those employee classifications that are direct patient access employees and work with participating States to develop a list of convictions that disqualify an individual from nursing facility employment, including periods for which each conviction bars the individual from employment.

A Work Group made up of CMS employees and volunteers from 11 State Agencies has developed options to respond to this directive. The Work Group's mission was to provide CMS with options to consider in developing:

- Common definitions of direct access employee; and
- A list of State convictions that should disqualify individuals from direct access employment with long-term care facilities and providers, the conviction types that should be considered for mitigation or rehabilitation, and the time period for which each conviction should disqualify individuals from employment.

The Work Group developed a Consolidated Option for defining a direct access employee:

- An individual who has direct access to a resident or beneficiary through ownership, employment, or a contract/agreement with a LTC facility or provider. This does not include volunteers or students, unless they perform regular or unsupervised functions equivalent to those of direct access employees. This does not include contractors performing repairs, deliveries, installations, or similar services only for the facility or provider.
- Direct access is having, or expecting to have, duties that involve one-on-one contact with a resident or beneficiary, or access to the resident or beneficiary's property, personally identifiable information, or financial information.

The Work Group suggested the utilization of categories of disqualifying convictions rather than lists of individual crimes. This categorization was developed due to the wide variance among States regarding definitions of specific crimes. Suggested categories included: (1) crimes against care-dependent or vulnerable individuals, (2) crimes against the person, (3) crimes against property, and (4) crimes related to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance.

Regarding rehabilitation factors, the Work Group elected to follow those noted in Section 6201 of the Affordable Care Act, including:

- Passage of time;
- Extenuating circumstances;
- Demonstration of rehabilitation; and
- Relevancy of the particular disqualifying information with respect to the current employment of the individual.

Minimum disqualification times were based on whether the charges were felonies or misdemeanors, whether they were violent or non-violent, and the amount of time that had elapsed from time of conviction or time of release from prison.

CMS will consider the Work Group's findings and options for the definition of a direct access employee, disqualifying convictions, and rehabilitation factors. They recognize the need for balance between the need to protect the safety and well-being of residents and beneficiaries and the need to manage, employ, and provide employment opportunities to a high-quality workforce.

The LTC Criminal Convictions Work Group report is being made available to internal and external stakeholders and the public for their review. CMS will formulate a plan for future action regarding the Work Group's recommendations.

/s/
Thomas E. Hamilton

Attachment

cc: Survey and Certification Regional Office Management

Report

Centers for Medicare & Medicaid Services

National Background Check Program

Long Term Care Criminal Convictions Work Group

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Executive Summary

The Centers for Medicare & Medicaid Services (CMS) formed the CMS Long Term Care Criminal Convictions Work Group (Work Group) with 11 volunteer members—1 from each of 11 State agencies[1]—in response to a March 2011 U.S. Department of Health and Human Services (HHS) Office of Inspector General (OIG) report. In its report, the OIG examined whether nursing facilities were employing individuals who had criminal convictions. The OIG recommended that CMS explore two issues, which formed the basis of the Work Group's mission. The CMS responded to the OIG, accepting its recommendations, and recruited volunteers from State agencies to form the Work Group to assist CMS in considering these issues. The CMS contracted with CNA to provide technical assistance to the Work Group.

The Work Group's mission was to work closely with designated CMS Central and Regional Office staff to provide CMS with options to consider in developing:

- Common definitions of a "direct access employee";[2] and
- A list of State convictions that should disqualify individuals from direct access employment with long term care (LTC) facilities and providers, the conviction types that should be considered for mitigation or rehabilitation, and the time period for which each conviction should disqualify individuals from employment.

The Work Group considered all LTC facilities and providers identified in Section 6201 of the Patient Protection and Affordable Care Act of 2010 (Affordable Care Act). These include: (1) skilled nursing facilities, (2) nursing facilities, (3) home health agencies, (4) hospice care, (5) LTC hospitals, (6) personal care services, (7) adult day care, (8) residential care, (9) intermediate care facilities for the mentally retarded, and (10) any other facility or provider of LTC services as determined by the State.

The Work Group's activities assisted CMS in identifying current practices and provided options for CMS to consider, if it should decide to develop a Federal regulation that mandates the use of common definitions of a "direct access employee" and standard considerations for disqualifying convictions and rehabilitation factors. The Work Group favored CMS consideration of a Federal regulation as the Work Group felt this would enhance the safety of LTC residents and beneficiaries and ensure that job applicants were treated similarly across the States.

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[1] Originally, one State agency representative from each of 10 States volunteered. The volunteer from the 11th State joined in January 2012, which was approximately six months after the first Work Group meeting. The Work Group members are from both National Background Check Program grantee States and non-grantee States.

[2] While the term used in the OIG report was "direct patient access employee," in this paper we use the term "employee with direct access to individuals served in long term care settings." This is because CMS does not use the term "patient" in reference to LTC settings. To abbreviate, we use "direct access employee."

Purpose and Scope. The purpose of this report is to document the Work Group's findings and options for CMS regarding definitions of a "direct access employee" and disqualifying convictions and rehabilitation factors. The options considered and presented include one Consolidated Option[3] and two preliminary options (Preliminary Options 1 and 2). While the Work Group's mission was to develop new options, another alternative would be to maintain the status quo of existing State and Federal laws. As described in the OIG report and as discovered in our review of State statutes and regulations, there is significant variation in current State laws and practices.

Findings. To understand States' existing definitions of a "direct access employee," disqualifying convictions, and rehabilitation factors, we reviewed relevant statutes and regulations from all States within the U.S.[4] We also reviewed the literature to identify additional sources of information and held discussions with State representatives and other experts.

We found that most States do not have a definition of a "direct access employee"; rather, most States use an outcome-based definition to indicate who in an LTC setting is subject to a criminal background check. While most States do not define the complete term of a "direct access employee," many define at least some components of this term (e.g., "direct access"). A few States also include job titles and duties in their definitions. States have varying methods of approaching contractors and volunteers in their definitions and requirements for who is subject to a criminal background check.

Regarding disqualifying convictions and rehabilitation factors, we found that most States had legislation addressing these issues. However, State-specific disqualifying convictions and rehabilitation factors varied substantially across States. Some States used broad categories of types of crimes, but the majority of States took a more specific approach and listed each disqualifying crime in their statutes or regulations. Most States took both felony and misdemeanor convictions into consideration when determining whether an individual would be disqualified (for any time period) from working in the LTC industry. Some States had permanent or lifetime employment bans, while others used a time-limited approach, and others used a combination of both. While a number of States applied the same disqualification time period every time a specific crime was committed, others made case-by-case determinations. In

[3] The Work Group first developed two preliminary options during its second and third meetings. After additional consideration and research, at its fourth meeting, the Work Group developed a Consolidated Option that combined and revised aspects of its first two preliminary options. The Consolidated Option was the most developed of the options; therefore, it is presented first, followed by the preliminary options.

[4] "State" refers to the definition provided under 45 CFR 74.2 as "any of the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, or any agency or instrumentality of a State exclusive of local governments." By "territory or possession of the United States" we mean Guam, the U.S. Virgin Islands, American Samoa, and the Commonwealth of the Northern Mariana Islands. This definition is consistent with the definition used by CMS in the grant solicitation for the National Background Check Program (CFDA #93.506).

addition, many States explained in their legislation their review mechanisms that allow employees or prospective employees to appeal decisions, demonstrate rehabilitation, or request a review of the initial negative fitness determination.

In addition to State statutes and regulations, Section 1128(a) of the Federal Social Security Act (SSA) (42 U.S.C. 1320a-7) outlines four types of convictions that result in the mandatory exclusion of certain individuals and entities from participation in Medicare and State health care programs (i.e., these conviction types exclude a person or entity recognized as a provider or supplier under the programs). Excluded individuals (per the SSA) are listed on the HHS OIG's List of Excluded Individuals/Entities, which is often checked prior to conducting a criminal history background check. Additionally, some States go further than the SSA and include stricter disqualifying convictions and more restrictive disqualification time periods in their State statutes and regulations.

We found limited information in the literature pertaining to the types of criminal convictions that are associated with potential harm to LTC residents and beneficiaries and whether the passage of time since a conviction (or any other rehabilitation factor) reduces the risk of harm to LTC residents and beneficiaries. However, existing studies suggest that the likelihood of committing another crime decreases with more time without criminal activity. While findings regarding the exact length of time that must pass before an individual is unlikely to commit another crime varied by study as well as by the type of the original criminal conviction (e.g., aggravated assault versus robbery), the literature suggests that time-limited disqualification periods (rather than permanent disqualification periods) may be most advisable.

***Options*.** The Work Group reviewed the findings from State statutes and regulations and the literature and used this information to develop its options for CMS. As part of its Consolidated Option, the Work Group developed a consolidated goal statement to highlight its overarching intent, which was to: Build on existing regulations to address the special concerns of residents and beneficiaries and protect their health, safety, and welfare while maintaining a quality workforce for LTC facilities and providers.

As the Work Group developed its options, it assumed that criminal history checks would be fingerprint-based rather than name-based. However, it is important to note that the majority of State requirements for background checks do not currently include fingerprint-based checks; therefore, this would be a change for many States. The Work Group also intended that its options serve as Federal minimums, where States would be free to enact stricter parameters as they saw fit. This would create a minimum level of uniformity across the States, but also provide States with the option of enacting more stringent requirements according to their own specifications. Work Group members discussed whether minimum Federal requirements would make it more difficult for States to maintain or create more stringent standards. The Work Group believed that under all of its options States would have the opportunity to implement

stricter standards, if desired. Demonstrating that this is indeed feasible, some States have enacted stricter standards than what are currently required under the SSA.

The Work Group's options are described briefly below. Additional details, including the full definitions, lists of disqualifying convictions and rehabilitation factors, and a comparison of the features of each option is included in Section 4 of this report.

Definition of "Direct Access Employee"

Consolidated Option. This definition incorporated individuals who have "direct access" to residents or beneficiaries through ownership of, employment with, or a contract/agreement with an LTC facility or provider. The term "agreement" was added for volunteers who may have a memorandum of understanding or a similar type of agreement (but not a formal contract) with the facility or provider. The definition specifies that "direct access" is physical contact with a resident or beneficiary or access to the resident or beneficiary's property, personally identifiable information, or financial information. The definition does not include volunteers or students, unless they perform regular or unsupervised functions equivalent to those performed by "direct access employees." The definition also does not include contractors performing repairs, deliveries, installations, or similar services only for the facility or provider. This exclusion assumes that those contractors would not have direct access (e.g., a contractor that made deliveries to the facility but would not have direct access to the residents or beneficiaries).

Preliminary Option 1. This definition included individuals with access to LTC residents and beneficiaries, including employees, contractors, administrators, owners, students, and volunteers. However, there were exceptions for certain contractors and volunteers. The definition was intended to go beyond just the LTC facilities and providers identified in Section 6201 of the Affordable Care Act; it applied to all facilities and providers receiving Medicare or Medicaid funds.

Preliminary Option 2. This definition explained the words in the term "direct access employee."[5] The definition applied to individuals with direct access through employment or a contract; however, it did not include volunteers or students unless they had equivalent functions to those of a "direct access employee." The definition applied to the LTC facilities and providers identified in Section 6201 of the Affordable Care Act.

Status Quo. The status quo allows States to define "direct access employee" as they determined to be appropriate. While most States do not have a definition of "direct access employee," most

[5] It also defined "patient," which is consistent with the term used in Section 6201 of the Affordable Care Act ("direct patient access employee"). However, this definition was developed prior to the Work Group's adoption of the term "direct access employee" rather than "direct patient access employee."

States use an outcome-based definition to determine who is subject to criminal background checks, as described previously.

Disqualifying Convictions and Rehabilitation Factors

The disqualifying convictions and rehabilitation factors in the Consolidated and Preliminary Options 1 and 2 were intended to apply to all the LTC facilities and providers identified in Section 6201 of the Affordable Care Act. However, this could potentially vary depending on which definition of "direct access employee" is selected.

Consolidated Option. The Work Group developed general categories of disqualifying convictions, giving States the flexibility to determine which specific crimes would fall within the broader categories. The Work Group set minimum disqualification time periods for each conviction category. The Work Group carefully considered these disqualification time periods, using the current empirical research that has estimated recidivism rates. The intent was that there would be longer disqualification periods for more serious, as well as more violent, crimes. The Work Group determined that the LTC facility or provider (on behalf of the prospective employee) or the prospective employee could apply for a variance, including during the disqualification period. At the end of the disqualification period, that conviction would no longer be considered a reason for an automatic negative fitness determination. However, the crime may still be considered in relation to subsequent convictions to determine patterns of criminal activity. During the variance review, the Work Group recommended consideration of the four rehabilitation factors required under Section 6201 of the Affordable Care Act: passage of time, extenuating circumstances, demonstration of rehabilitation, and relevancy of the particular disqualifying information with respect to the current employment of the individual.

Preliminary Option 1. This option included a three-tier system to classify the categories of disqualifying convictions according to the severity of the crimes. The tiers would have specific disqualification time periods. Recommended time periods were not defined, but it was determined that the time periods should begin from the date of conviction. As Federal minimums, the disqualifying convictions included felonies, not misdemeanors, leaving room for States to select which, if any, misdemeanors should be included.[6] This option included the recommendation that there be a waiver or variance process available for all disqualifying crimes. The recommended rehabilitation factors to be considered in the variance process included the following: character of the person, time elapsed since the conviction, completion of sentence requirements, nature of the crime in relation to potential job duties, and age at the time of the offense.

[6] All of the options gave States opportunities to enact stricter requirements.

Preliminary Option 2. This option identified categories of disqualifying convictions, where all disqualifying convictions would result in an automatic initial negative fitness determination. After specified time periods had elapsed, prospective employees would be eligible to seek a variance. For categories with no stated minimum disqualification time period, States would have the ability to make a variance determination at any time. The time periods varied, as the group determined that for felony convictions, applicants would need to wait longer before seeking a variance than for misdemeanor convictions. The disqualification time periods would start from the point of completion of sentence requirements. Rehabilitation factors that would be considered in the variance process included the following: the passage of time, the person's complete criminal history, the person's age at the time of the crime, the harm to the victim and circumstances of the crime, the person's fulfillment of sentence requirements, the person's contributions to societal conditions (community involvement, attainment of education), the person's participation in rehabilitation programs such as counseling or therapy, character references and recommendation letters from past employers, the similarity between the person's victim(s) and potential persons to be served, work history and current employment, and the nature of the position sought.

Status Quo. The status quo allows States to choose their own disqualifying convictions and rehabilitations factors. As described previously, State-specific disqualifying convictions and rehabilitation factors vary substantially across States. Some States use permanent or lifetime employment bans, while others use a time-limited approach, and others use both. Opportunities to demonstrate rehabilitation or request a variance also vary across States.

Conclusions. The Work Group's options for CMS consideration are presented in this report. The Work Group hopes that CMS will consider these findings and options as it determines its next steps, as well as in the potential development of a Federal regulation. The Work Group also hopes that CMS will consider the options in order to improve the safety of LTC residents and beneficiaries and to ensure that job applicants are treated similarly across States.

1. Introduction

The Centers for Medicare & Medicaid Services (CMS) formed the CMS Long Term Care Criminal Convictions Work Group (Work Group) in response to a March 2011 U.S. Department of Health and Human Services (HHS) Office of Inspector General (OIG) report titled "Nursing Facilities' Employment of Individuals with Criminal Convictions." In its report, the OIG examined whether nursing facilities were employing individuals who had criminal convictions. The OIG ultimately recommended that CMS do the following in its efforts to ensure that States conduct background checks consistently on prospective "direct access employees" seeking jobs with long term care (LTC) facilities and providers:

- Clearly define the employee classifications that are direct access employees;[7] and
- Work with participating States to develop a list of State[8] convictions that disqualify an individual from nursing facility employment[9] under the Federal regulation and periods for which each conviction bars the individual from employment (OIG, 2011).

The CMS formed the Work Group with 11 volunteer members—1 from each of 11 State agencies.[10] The CMS contracted with CNA, a non-profit research and analysis company, to provide technical assistance to the Work Group in addressing the OIG recommendations. CNA also provides CMS-contracted technical assistance for the National Background Check Program (NBCP).[11]

The Work Group consisted of the following individuals:

- Alaska Department of Health and Social Services, Teresa Narvaez;[12]

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[7] While the term used in the OIG report was "direct patient access employee," in this paper we use the term "employee with direct access to individuals served in long term care settings." This is because CMS does not use the term "patient" in reference to LTC settings. To abbreviate, we use "direct access employee."

[8] By "State" we refer to the definition provided under 45 CFR 74.2 as "any of the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, or any agency or instrumentality of a State exclusive of local governments." By "territory or possession of the United States" we mean Guam, the U.S. Virgin Islands, American Samoa, and the Commonwealth of the Northern Mariana Islands. This definition is consistent with the definition used by CMS in the grant solicitation for the National Background Check Program (NBCP) (CFDA #93.506).

[9] The Work Group expanded this to LTC facilities and providers identified in Section 6201 of the Patient Protection and Affordable Care Act of 2010 (Affordable Care Act).

[10] Originally, one State agency representative from each of 10 States volunteered. The volunteer from the 11th State joined in January 2012, which was approximately six months after the first Work Group meeting. The Work Group members are from both NBCP grantee States and non-grantee States.

[11] The NBCP was created under the Affordable Care Act (available at http://www.gpo.gov/fdsys/pkg/BILLS-111hr3590enr/pdf/BILLS-111hr3590enr.pdf).

[12] Tracey Marshall also supported the Work Group on behalf of the Alaska Department of Health and Social Services.

- Arkansas Department of Human Services, Renee Davison;
- California Department of Public Health, Juan Chacon;
- CMS Regional Office I, Beverly Kercz;
- CMS Regional Office VI, Connie Jones;
- Colorado Department of Public Health and Environment, Roberta Lopez;
- Connecticut Department of Public Health, Matthew Antonetti;
- Florida Agency for Health Care Administration, CaraLee Starnes;[13]
- Georgia Department of Community Health, David Ostrander;
- Illinois Department of Public Health, Toni Colón;[14]
- Kansas Department for Aging and Disability Services, Steve Irwin;
- Maryland Department of Health and Mental Hygiene, Gwendolyn Winston; and
- Michigan Department of Licensing and Regulatory Affairs, Toni Dennis.

While the OIG report focused on convictions among employees of nursing facilities specifically, the Work Group took into account all of the types of LTC facilities and providers identified in Section 6201 of the Patient Protection and Affordable Care Act of 2010 (Affordable Care Act). These include: (1) skilled nursing facilities, (2) nursing facilities, (3) home health agencies, (4) hospice care, (5) LTC hospitals, (6) personal care services, (7) adult day care, (8) residential care, (9) intermediate care facilities for the mentally retarded,[15] and (10) any other facility or provider of LTC services as determined by the State.

Mission. The Work Group's mission was to provide CMS with options to consider in developing:

- Common definitions of a "direct access employee"; and
- A list of State convictions that should disqualify individuals from direct access employment with LTC facilities and providers, the conviction types that should be

[13] CaraLee Starnes left State employment with the Florida Agency for Health Care Administration and was replaced by Robert (Bob) Reifinger as the Work Group representative from Florida (effective May 31, 2012).

[14] Jonna Veach left State employment with the Illinois Department of Public Health and was replaced by Toni Colón as the representative from Illinois (effective November 1, 2011).

[15] We used the term "intermediate care facilities for the mentally retarded" as it is used in Section 6201 of the Affordable Care Act. However, this could potentially change in the future due to Rosa's Law, S.2781, 111th Cong. (2010). This is an act "to change references in [select] Federal law to mental retardation to references to an intellectual disability, and change references to a mentally retarded individual to references to an individual with an intellectual disability."

considered for mitigation or rehabilitation, and the time period for which each conviction should disqualify individuals from employment.

The Work Group's activities assisted CMS in identifying current practices and provided options for CMS to consider, if it should decide to develop a Federal regulation that mandates the use of common definitions of a "direct access employee" and standard considerations for disqualifying convictions and rehabilitation factors. The Work Group favored CMS consideration of a Federal regulation as the Work Group felt this would enhance the safety of LTC residents and beneficiaries and ensure that job applicants were treated similarly across the States.

Purpose of the Report. The purpose of this report is to document the findings and options from the Work Group regarding defining "direct access employee" and disqualifying convictions and rehabilitation factors. The options considered and presented include the Consolidated Option and two preliminary options (Preliminary Options 1 and 2), as well as the status quo.

The Work Group first developed two preliminary options during its second and third meetings.[16] In these two meetings, the Work Group broke into two subgroups to develop two options for the definition of a "direct access employee" (at the second meeting) and two options for the disqualifying convictions and rehabilitation factors (at the third meeting). Earlier reports of this project discussed the Work Group's preliminary findings and options in greater detail and presented summaries of each State's definition of a "direct access employee" (Working Paper 1) and disqualifying convictions and rehabilitation factors (Working Paper 2) (Borsky, Stewart, Carta, Gritz, & McMahon, 2012a; Borsky, Stewart, Carta, Gritz, & McMahon, 2012b). At its fourth meeting, after additional consideration and research, the Work Group developed the Consolidated Option, which combined and revised aspects of its first two preliminary options.

While the Work Group's mission was to develop new options, another alternative would be to maintain the status quo of existing State and Federal laws. However, as described in the OIG report and as discovered in our review of State statutes and regulations, there is significant variation in current laws and practices. Notwithstanding the existing laws, the OIG found that almost all nursing facilities employed one or more individuals with at least one criminal conviction (OIG, 2011). This occurred despite the fact that most States required some type of background check in nursing facilities.

This report addresses the following:

- Existing State definitions of and approaches to defining a "direct access employee";

[16] The Work Group held five meetings. The purpose of the first Work Group meeting was to introduce its mission and begin preliminary discussions. The purpose of the second Work Group meeting was to discuss definitions of a "direct access employee." The purpose of the third Work Group meeting was to discuss disqualifying convictions and rehabilitation factors. The purpose of the fourth Work Group meeting was to develop the Consolidated Option. The purpose of the fifth Work Group meeting was to discuss next steps for this report.

- Evidence from the literature about alternative approaches to defining a "direct access employee";
- Existing State disqualifying convictions and rehabilitation factors;
- Evidence from the literature regarding the types of crimes that are associated with potential harm to LTC residents and beneficiaries, and rehabilitation factors that are associated with a reduction in the risk of harm to LTC residents and beneficiaries; and
- Options for a definition of "direct access employee" and disqualifying convictions and rehabilitation factors, as developed by the Work Group.

Key Consideration. Throughout the Work Group's effort, it considered the importance of balancing the need to protect the safety and well-being of residents and beneficiaries of LTC facilities and providers with the need to employ, manage, and provide employment opportunities to a high-quality workforce. In addition, the Work Group considered the cost implications of its options.[17]

To highlight these issues, we have provided two excerpts from a book describing the challenges LTC leadership faces (Farrell, Brady, & Frank, 2011). These excerpts are from a journal of events experienced by nursing home administrator David Farrell. The first excerpt depicts the risks residents and beneficiaries can encounter. The second excerpt depicts some of the potential benefits of providing employment opportunities and managing a high-quality workforce.

Protecting the Safety of Residents and Beneficiaries

> One of our newer CNAs [certified nurse assistants], Dolmi, reported that a veteran CNA, Lisa, was kicking one of the residents yesterday while the resident was suspended in the air, held up by a Hoyer lift.
>
> She was explaining the situation to Andy when I walked in. 'She seemed so angry,' Dolmi said. 'I was scared of her face. I couldn't sleep last night.'
>
> I asked her to start over for me and be very specific.
>
> She said, 'I was helping Lisa transfer a resident using a Hoyer lift when the resident started to sway. I was trying to steady the resident when Lisa became very angry and started kicking her. I was so scared. Lisa was so mad. I know it's my obligation to report this.' Tears started to flow down her cheeks...

[17] While the Work Group considered the cost implications of its options, it did not determine who or what entities would bear the costs of the background checks.

> As an organization, we are stuck. If we fire Lisa, she has a solid wrongful termination case against us. If we don't fire her, we may be exposing vulnerable residents to someone who may have abused a resident—and exposing ourselves to possible repercussions from the DHS.
>
> I feel the sheer weight of the decision, and the consequences of the decision for everyone involved. In my gut, right now, I know I'm responsible for protecting people. And I feel in my gut that Lisa may have the potential to abuse a resident. She has been known to scream and curse. She could cross the line to physical abuse.
>
> It's better for her to move on. We cannot confirm that the incident did not occur, and I must protect the residents. That's my main concern... (Farrell et al. 2011, pp. 43-46)

Managing a High-quality Workforce

> Jay is an older African American male and a native of our city who just got certified as a nursing assistant and is looking for his first job as a CNA. He looks as if he has had some rough times in his life, but he is well dressed and polite. I interviewed him, just like everyone else who fills out an application. After three weeks and no word back from me, Jay reappeared and asked that a copy of his CPR card be included with his application.
>
> While he was waiting, I watched him politely open a door for someone pushing a resident in a wheelchair. I was impressed by that action; he anticipated a need and acted, so I decided I needed to speak with him again.
>
> We had a conversation as I was picking up cigarette butts out of the ground cover in the front of the facility. A daily chore of mine. 'Why should I hire you?' I asked.
>
> Jay said, 'Because I will not let you down. I am very eager to work. I have had some issues in the past but now I am responsible for my three-year-old girl.' He pulled out her picture from his wallet and I looked at it. I have a beautiful three-year-old daughter myself.
>
> I looked closely at Jay. He was well groomed. He looked right back into my eyes. He looked sincere and determined. He really wanted a job and a chance.
>
> 'A lot of people apply here. I only hire people of good character. Will you respect the elders?' I asked. I started picking up the butts again.

‘I won’t let you down,’ he said. ‘I am a good person. And yes, I treat elderly people like my grandparents.’

We hired him that day, just last Monday. Today, Friday, Andy came in to my office and said that the background check on Jay had come back and it wasn’t good.

The report listed three felonies. One was drunk driving, another was selling drugs, and the third was for disorderly conduct. All told, he had spent 122 days in jail, all in 2001.

‘Did he reveal this during the interview?’ I asked.

‘Yes, he did. But technically, we should not hire him. If something happens and they look at this background check, we will be blamed. I will meet with him and let him know that he can’t work here. We cannot risk it.’

Just then, we were interrupted by something. I can’t remember what it was, maybe a fire alarm, but Andy left before I could respond to what he had just said about letting Jay go.

A couple of hours passed as we both worked frantically, addressing issues left and right. Around 3:15 p.m., I saw Jay waiting to speak to Andy. I started looking for Andy to talk about the situation but was distracted again. Finally, I caught up with him at 4:15 p.m. ‘So, did you meet with Jay?’ I asked.

‘No, he is still waiting for me.’

‘Maybe we should reconsider letting him go. He has done fine in orientation,’ I said. ‘How are guys like that ever going to turn their lives around unless people like us give them a chance? Let’s give him a chance. What do you think?’

‘Sure, you are right. He has been doing a great job. Let’s give him a chance,’ said Andy.

Thirty minutes later, Andy came into my office. ‘That guy was so grateful he cried for 10 minutes in my office,’ he said. ‘I had to shut my door so he could compose himself. He was so used to being rejected he was just expecting it. When it didn’t happen, he just could not hold back the tears.’

I am grateful to be in a position where I can give people chances. A nursing home administrator has many opportunities to make a positive difference in

> people's lives – and I'm not talking only of the residents. (Farrell et al., 2011, pp. 61-62).

Outline of Report. In Section 2 of this report, we present a brief overview of the approach used to address the Work Group's objectives. In Section 3, we present the findings based on our research and analysis of State statutes and regulations, the literature, and State subject matter expert (SME) discussions. In Section 4, we present the Work Group's options for the definition of a "direct access employee" and disqualifying convictions and rehabilitation factors. We then compare the options and discuss other areas of consideration. In Section 5, we present our conclusions, including a discussion of our proposed decision tree to assist with implementation of the options.

This report includes four appendixes. Appendix A contains a glossary of key terms used in this report. Appendix B lists the Work Group's project milestones. Appendix C includes the list of State agencies and organizations we contacted for State- or organization-specific information about definitions of "direct access employee" or disqualifying convictions and rehabilitation factors. Appendix D contains the decision tree to guide LTC facilities and providers and States through potential implementation of the Consolidated Option.

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2. Approach

To help the Work Group accomplish its mission of providing CMS with options on the definition of a "direct access employee" and State disqualifying convictions and rehabilitation factors, we reviewed existing State statutes and regulations. We wanted to understand States' current approaches, and checked whether States had existing definitions of "direct access employee" and disqualifying convictions and rehabilitation factors similar to each other, and whether there was information from States that we could consider for potential use in developing Federal recommendations. Recognizing that there may be nuances that are not documented in the State statutes and regulations, we also determined that it would be beneficial to talk with State SMEs to better understand each State's unique approach. In addition, we determined that we would review the literature to examine whether there was an existing list(s) of job titles or duties that could be appropriate for the definition of a "direct access employee." We also reviewed the literature to see whether there was scientific evidence documenting the types of crimes that may be associated with potential harm to LTC residents and beneficiaries, and whether there were factors that were potentially associated with recidivism.

After we reviewed information from the State statutes and regulations, held discussions with State SMEs, and reviewed the literature, we conducted a preliminary analysis of this information and presented it to the Work Group at its second and third meetings. The Work Group members reviewed and discussed this information and developed preliminary options for the definition of a "direct access employee" and disqualifying convictions and rehabilitation factors, which are documented in two working papers (Borsky et al., 2012a; Borsky et al., 2012b). At the Work Group meetings, the Work Group members also presented information about their States' experiences handling similar issues. The Work Group reviewed the information and working papers and developed the Consolidated Option for CMS at its fourth meeting.

2.A. Preliminary Research and Analysis

We conducted a qualitative review of the following:

- State statutes and regulations;
- Input from State SMEs; and
- Relevant literature.

Our review of State statutes and regulations covered all States. We developed a Microsoft Access database to serve as a repository for the information collected through this qualitative review and analysis.

We began by developing a list of State statutes and regulations pertaining to criminal background checks for employees of LTC facilities and providers. Using Lexis, a legal research database, we obtained the most recent copies of the identified statutes and regulations, and identified and

obtained other relevant information, including case law and journal articles. We reviewed and analyzed these legal documents in order to understand each State's approach to defining a "direct access employee"[18] and disqualifying convictions and rehabilitation factors.

To confirm the findings from the State statutes and regulations, we contacted SMEs from State agencies. (See Appendix C for a list of the contacted State agencies.) The State SMEs agreed to talk with us on a voluntary basis and with the understanding that their comments were not for attribution. We contacted at least one representative from each State to confirm that we had identified all of the relevant statutes and regulations, and to ensure that we were interpreting the information correctly. The questions we asked SMEs varied by State, depending on any gaps in information and clarifications needed. If State SMEs identified additional relevant statutes and regulations, we subsequently obtained copies of these documents through Lexis and reviewed them as part of our analysis. State SMEs also indicated whether their States were in the process of drafting, or planning to draft, new statutes or regulations that may be relevant to the Work Group's activities.

In addition to talking with State SMEs, we spoke with a limited number of individuals from non-governmental organizations (NGOs), government employees (e.g., Federal Bureau of Investigation (FBI) employees), and academic researchers. For example, we contacted the FBI and academic researchers to obtain the most recent data on recidivism. Another component of our research methodology included a literature review, where we examined peer-reviewed and professional journals and trade association websites and materials.

2.B. Work Group Meetings

The Work Group held its first meeting on July 7, 2011, as a teleconference, where the Work Group's mission was introduced and preliminary discussions began. At the second Work Group meeting, September 15 and 16, 2011, based on our preliminary analysis of the State statutes and regulations, the literature, and SME discussion notes, we presented our findings pertaining to the definition of a "direct access employee." In addition, the Work Group members developed their preliminary options for a definition of "direct access employee." At the third Work Group meeting, January 11 and 12, 2012, we presented our findings pertaining to disqualifying convictions and rehabilitation factors. (See Appendix B for a timeline of the Work Group activities.) The Work Group members also developed their preliminary options for disqualifying convictions and rehabilitation factors at the third meeting. At its fourth meeting, March 20 through 22, 2012, the Work Group reviewed Preliminary Options 1 and 2 and the earlier research findings to develop the Consolidated Option. The fifth and final meeting of the Work Group was convened via teleconference on September 20, 2012, to discuss the next steps for this report.

[18] Most States do not use the term "direct access employee." However, as the intent of the term is to describe who is required to have a criminal background check, we focused our search on this broader definition of the term.

During these meetings, Work Group members presented their States' approaches to defining a "direct access employee" and disqualifying convictions and rehabilitation factors, and the implications of their approaches. The presentations emphasized the similarities and differences among States. We also presented the findings from the review of State statutes and regulations, the literature, and SME discussions. To prepare for the meetings, we sent all meeting materials via email to the Work Group members at least one week prior to each meeting. In addition, we posted meeting materials on a website that was accessible to the Work Group members.

During the second and third Work Group meetings, the Work Group members divided into two subgroups to independently formulate preliminary options regarding the definition of a "direct access employee" (this was the topic of discussion at the second meeting) and disqualifying convictions and rehabilitation factors (these were the topics of discussion at the third meeting).[19,20] The purpose of splitting into two subgroups was to encourage discussion and foster different perspectives. After the subgroups formulated their preliminary options, the full Work Group came together and each subgroup presented its recommendations. These preliminary options are described in this report and documented in more detail in Working Papers 1 and 2 (Borsky et al., 2012a; Borsky et al., 2012b). As we completed the drafts of the working papers, we sent them to Work Group members via email, and the Work Group members provided us with feedback that included suggestions that were used to inform the Consolidated Option.

At its fourth meeting, the Work Group reviewed the preliminary options and the research findings to develop the Consolidated Option. To develop its Consolidated Option for a definition of a "direct access employee" and to ensure that the definition captured the Work Group's intent, the Work Group examined illustrative examples of potential employees and workers to see whether the employees and workers met the definitional requirements of a "direct access employee." In some instances, the Work Group members realized that their definition did not capture all of the intended employee types; therefore, they revised the definition accordingly. To develop its Consolidated Option for disqualification time periods, the Work Group discussed recent research findings pertaining to recidivism presented by Dr. Alfred Blumstein, J. Erik Jonsson Professorship of Urban Systems and Operations Research and former dean of the Heinz School at Carnegie Mellon University, and Toni Dennis, from the Michigan Department of Licensing and Regulatory Affairs. Discussions at this meeting included Work Group members as well as CMS Central Office and Regional Office staff. The Work Group also held a fifth meeting via teleconference in September 2012 to discuss next steps for this report.

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[19] In order to foster candid discussions, CMS Central Office project staff did not participate in the breakout groups, but the two CMS Regional Office staff did participate to contribute their knowledge of LTC facilities and providers. CNA and University of Colorado staff facilitated and took notes during the subgroup discussions.

[20] At the second meeting, the Work Group focused on definitions of a "direct access employee;" and at the third meeting, the Work Group focused on disqualifying convictions and rehabilitation factors.

2. Approach

This report documents the Work Group's Consolidated Option and Preliminary Options 1 and 2 and conclusions. It also includes a comparison of these options with the status quo.

3. Findings

In this section, we present the findings from our review of existing definitions of a "direct access employee" and approaches to handling disqualifying convictions and rehabilitation factors (as of March 1, 2012). These findings include information from State statutes and regulations, the literature review, and State SME discussions.

3.A. Definition of "Direct Access Employee"

Statutes and Regulations

Type of Definition. We reviewed the State definitions of "direct access employee" and the types of employees for whom States require criminal background checks. The majority of States (80 percent) used outcome-based definitions, rather than lists of job titles or duties. (See Appendix A for definitions of these terms.) However, 12 States incorporated specific job titles and duties in their definitions. One example of the various approaches taken was Oklahoma's, which was to require background checks for nurse aides, hospice employees or contract workers, Medicaid personal care assistants, and non-technical service workers (Okla. Statutes, 2011a; Okla. Statutes, 2011b; Okla. Statutes, 2011c; Okla. Admin. Code, 2010). Kansas required background checks for all unlicensed employees (Kan. Statutes Annotated, 2011a; Kan. Statutes Annotated, 2011b; Kan. Statutes Annotated, 2011c). Illinois incorporated an outcome-based definition by stating that individuals working in a health-related occupation where they provide direct care or have access to LTC residents, living quarters, or financial, medical, or personal records would be required to have a background check (Ill. Compiled Statutes, 2011). Illinois also specified types of employees required to have a background check, including home health care aides, nurse aides, personal care assistants, private duty nurses, and day training professionals (Ill. Admin. Code, 2011; Ill. Compiled Statutes, 2011).

Overall, we found that most States (approximately 90 percent) do not have a comprehensive definition of a "direct access employee," but almost all States define components of this term (e.g., "direct access"). An example was Connecticut's definition for "direct access," which described regular, scheduled access to residents or their property, financial information, or medical records (Conn. Public Act, 2011). Hawaii was one of the few States that defined the full term "direct access employee." Hawaii statutes stated:

> 'Direct patient access employee' means any individual, including a volunteer, who has access to a patient or resident of a healthcare facility, or any provider through employment or through an agreement or contract with such a facility or provider. Such individuals include but are not limited to: physicians, nurses, nursing assistants, home health aides, therapists, activities personnel, and support staff (i.e., housekeeping, dietary, etc.) who have direct access to patients or patient belongings (Hawaii Revised Statutes, 2011).

3. Findings

Nearly all States (approximately 93 percent) had statutes and regulations that addressed the need for employees with direct access, or who provided direct care to residents and beneficiaries at LTC facilities and providers, to undergo background checks.[21] However, States varied in their approaches to addressing contractors, volunteers, and students.

Contractors. Nearly three-quarters (73 percent) of States required background checks for contractors if they were providing care equivalent to that being provided by employees who were required to have a background check (or had equivalent access). For example, the District of Columbia required background checks for contractors if they performed a complementary or assistance role to licensed health care professionals in providing direct care or carrying out common nursing tasks (District of Columbia Code Annotated, 2011).

Some States specified requirements for only certain types of contractors. For example, in Kansas, background checks were not required for unlicensed contractors if the work being performed was merely incidental (Kan. Statutes Annotated, 2011a; Kan. Statutes Annotated, 2011b). Delaware made exceptions for contractors working on physical structures, systems, or the facility grounds, on as-needed basis (Del. Code Annotated, 2011).

Volunteers (Including Students). Less than one quarter (around 19 percent) of States required background checks for all volunteers (including students). Some specified particular parameters for requiring such checks. For example, Tennessee only required checks for volunteers if they volunteered more than 36 hours in a calendar year (Tenn. Code Annotated, 2011a). New Hampshire did not require volunteers to have background checks if they only volunteered on an infrequent basis (N.H. Code of Admin. Rules, 2011a). A few States, such as Michigan, made different provisions for volunteers based on provider type—hospice volunteers[22] were required to receive a background check, but volunteers for other facility and provider types were not (Mich. Compiled Laws, 2011a; Mich. Compiled Laws, 2011b).

While students were usually included in the statutes or regulations under the volunteer category, some States specifically outlined different requirements for them. In Texas, students were exempt from background check requirements, but in Iowa and Nevada students were required to have checks prior to clinical rotations (Iowa Annotated Statutes, 2011; Nev. Revised Statutes Annotated, 2011a; Nev. Revised Statutes Annotated, 2011b). Pennsylvania required a background check for any student in an internship or clinical rotation (Pa. Admin. Code, 2011). In Ohio, students were considered to be receiving remuneration in the form of course credit, and were therefore required to undergo background checks, unlike other volunteers who were not

[21] In this context, when we use the term "background checks," it does not necessarily or usually indicate fingerprint-based background checks.

[22] 42 C.F.R. §418.114 requires criminal background checks for all hospice employees who have direct patient contact or access to patient records (including volunteers and contractors).

compensated by course credit or money for their services (they were not subject to background checks) (Ohio Admin. Code, 2011a; Ohio Admin. Code, 2011b).

Facilities and Providers. We also learned that some States have different definitions of a "direct access employee" for different facility and provider types. One example is California, where employees in adult day care and residential care facilities for older individuals who have *contact* with clients or the potential for direct contact with clients were required to have background checks (Calif. Code Regulations, 2011; Calif. Health & Safety Code, 2011b; Calif. Health & Safety Code, 2011c). However, for home health agencies, skilled nursing facilities, and intermediate care facilities in California, only those staff with direct *care* access required background checks (Calif. Health & Safety Code, 2010a; Calif. Health & Safety Code, 2010b; Calif. Health & Safety Code, 2011a; Calif. Health & Safety Code, 2011d).

Only approximately 18 percent of States applied their "direct access employee" definitions to every facility and provider type listed in Section 6201 of the Affordable Care Act. However, most State definitions, such as California's definition, applied to a subset of those facility and provider types. The most commonly included LTC facilities and providers were: skilled nursing facilities, nursing facilities, home health providers, hospice providers, residential care facilities, and intermediate care facilities for the mentally retarded. Thirty-two percent of States did not include LTC hospitals on their lists of applicable facilities, and 27 percent did not include personal care facilities. Finally, 21 percent did not include adult day care in their statutes and regulations.[23]

In addition, States sometimes named LTC facility and provider types that were not identified in Section 6201 of the Affordable Care Act. For example, Alaska included "pioneer homes"[24] in its legislation (Alaska Admin. Code, 2011; Alaska Statutes, 2011), and Arkansas included "elder care" providers in its regulations (Ark. DHS, 2011). However, a common approach used by a number of States was to list facility and provider types and then include "catch-all" language covering more types of facilities and providers. Detailed information about these State definitions can be found in Appendix B of Working Paper 1 (Borsky et al., 2012a).

Potential State Changes. It is clear that each State differs in its approach to defining a "direct access employee" and/or who is subject to a criminal background check. State SMEs described a number of potential legislative changes to their States' current definitions. For example, some States hope to revise their definitions of a "direct access employee" to make them more specific, whereas others want to make their definitions more balanced (neither too broad nor too specific). Some States propose to change the types of employees required to undergo background checks,

[23] Not all States have all types of LTC facilities and providers listed in Section 6201 of the Affordable Care Act. For example, Alaska does not have adult day care programs.

[24] Pioneer homes are licensed assisted living facilities for older individuals that provide varying levels of care (e.g., from the provision of housing and meals to staff assistance with activities of daily living).

such as contractors or licensed employees. In addition, some States expressed interest in expanding their definitions to apply to more LTC facility and provider types.

Literature Review

In addition to reviewing the statutes and regulations, we examined peer-reviewed journals, association websites and materials, Federal government documents, and survey results to learn about the following:

- Whether and how the term "direct access employee" was defined in the literature; and
- Whether a comprehensive list of job titles and duties already existed that could be used to identify the types of employees who are "direct access employees."

***Outcome-based Definitions*.** We found that there were a few Federal sources with definitions, such as the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (MMA) and the Affordable Care Act. These definitions use outcome-based approaches to defining the term. Section 6201 of the Affordable Care Act, which uses a similar definition to the one used in the MMA of 2003, defines the term as follows:

> The term 'direct patient access employee' means any individual who has access to a patient or resident of a long-term care facility or provider through employment or through a contract with such facility or provider and has duties that involve (or may involve) one-on-one contact with a patient or resident of the facility or provider, as determined by the State for purposes of the nationwide program. Such term does not include a volunteer unless the volunteer has duties that are equivalent to the duties of a direct patient access employee and those duties involve (or may involve) one-on-one contact with a patient or resident of the long-term care facility or provider.

In CMS' initial response to the OIG report, CMS noted that the Affordable Care Act's definition is broad and does not consist of a list of job titles or duties. The CMS believed that "... any limitation to certain clinical or 'direct care' job titles would diminish the safety of residents, since they could be harmed by janitors, maintenance staff, housekeepers, etc." (HHS OIG, 2011). The CMS response went on to define the term as "anyone who routinely comes into contact or has the potential to come into contact with residents/clients…which in nursing homes should include all staff" (HHS OIG, 2011). This suggests that perhaps an outcome-based definition would be preferable to a list of job titles and duties. We also identified several other sources that recommended background checks for all LTC employees (Marciano, 2001; Payne & Fletcher, 2005). However, the appropriateness of requiring background checks for all employees may depend on the type of facility or provider.

Another Federal source we found was the U.S. Department of Veterans Affairs' (VA) background check policy. The VA conducts background checks on 43 salaried occupations involving "direct patient care access or an impact on patient care"; these staff are defined as

licensed or nationally certified practitioners. It also conducts background checks on non-salaried (fee basis) health care practitioners and "without compensation" employees, such as researchers and research assistants with outside (e.g., university) funding (GAO, 2004; GAO, 2006).

During our discussions with experts from LTC NGOs, we found that most used or were familiar with outcome-based definitions. They favored this approach as opposed to using a job title- or duty-based definition. Some noted that a job title- or duty-based definition would be difficult to implement because LTC facilities and providers use a myriad of titles and, therefore, an outcome-based definition may be more appropriate.

List of Job Titles and Duties. In addition to identifying outcome-based definitions, we searched for comprehensive lists of job titles or duties that documented the types of employees who could be considered "direct access employees." While we found several sources that list LTC job categories, positions, and titles, we did not find any comprehensive lists of the types of employees who should be subject to criminal background checks. In studying the lists we did identify, we found that a wide range of job titles exist across LTC facility and provider types, and likely none of the existing lists were exhaustive or would be directly transferable to the Work Group's mission of defining a "direct access employee." Discussions with experts from NGOs confirmed that job titles and duties vary greatly across organizations and job titles are not always indicative of the work being performed (e.g., employees often perform work outside of their job descriptions). For a list of the job titles and duties identified see Appendix C in Working Paper 1 (Borsky et al., 2012a).

Volunteers and Students. We also reviewed the literature for findings on whether volunteers and students should be subject to criminal background checks. However, the literature on these issues was limited. Several sources reviewed did not include or address volunteers in their definitions of "direct access employees" or who was required to have a background check (MMA, 2003; Marciano, 2011; Payne & Fletcher, 2005). However, other sources noted that volunteers were included in their definitions of a "direct access employee" or who was required to have a background check (Affordable Care Act, 2010; GAO, 2004; GAO, 2006). For example, the VA requires volunteers with access to residents or beneficiaries, resident or beneficiary information, or pharmaceuticals to be screened (GAO, 2004; GAO, 2006). A National Adult Day Services Association survey found that most of its members screen volunteers, but the type of screening varies (e.g., name-based or fingerprint-based background check) (NADSA, 2011).

The literature was also limited as to whether students are or should be required to have background checks. We identified two sources that discussed whether nursing students in health care settings are or should be subject to criminal background checks (Jones, Boswell & Cannon, 2009; Farnsworth & Springer, 2006). These studies noted that background checks on students are required only under State law or a facility's internal policy, and stated that there is no Federal legal duty for nursing schools to perform background checks on their students. However, according to feedback we received from some experts, some States' nursing schools conduct

criminal background checks on their students due to their understanding of the guidelines from The Joint Commission pertaining to all active clinical staff (The Joint Commission, 2010).

Overall, the literature review for alternative definitions of a "direct access employee" provided few examples of relevant definitions for Work Group consideration (other than the Federal definitions). In the literature, there is no comprehensive list of all the relevant job titles or duties of a "direct access employee"; however, there are some sources that list selections of job titles and occupations. Our review of the job titles found that there are different titles for similar roles, which could make it infeasible to develop a comprehensive list of job titles or duties.

3.B. Disqualifying Convictions and Rehabilitation Factors

Statutes and Regulations

We reviewed State statutes and regulations on disqualifying convictions and rehabilitation factors for employees of LTC facilities and providers. This included an overall assessment of the "common ground" found across the States—meaning the similarities in approaches taken to address disqualifying convictions and rehabilitation factors. It also included an assessment of the variation across the States in how they approached disqualifying convictions and rehabilitation factors. See Appendix B of Working Paper 2 for an overview of the disqualifying convictions and rehabilitation factors in each State (Borsky et al., 2012b).

Disqualifying Conviction Categories. We found that approximately 90 percent of States had legislation addressing the issue of disqualifying convictions for LTC employees in some manner. Most State legislation addressed crimes in the following categories, either as outright disqualifying crimes or as crimes requiring the individual to undergo additional review:

- Violent crimes against the person;
- Sexual crimes against the person;
- Crimes against the vulnerable (to include children, older adults, adults with disabilities, residents in LTC settings, etc.);
- Crimes against property; and
- Crimes involving a controlled substance (to include possession, distribution, and/or the manufacture of illegal drugs as well as driving under the influence (DUI) offenses, etc.).

Regarding the categorization of State disqualifying convictions, about 20 percent of States used categories of crimes. However, the majority of States took a more specific approach and listed each individual crime in their statutes or regulations. The numbers of crimes listed varied considerably. For example, Hawaii listed 9 disqualifying convictions (Hawaii Revised Statutes, 2011) while New York listed more than 140 (N.Y. State Penal Code, 2011).

Felonies and Misdemeanors. Most States took both felony and misdemeanor convictions into consideration when determining whether an individual would be disqualified (for any time period) from working for LTC facilities or providers. However, California, Rhode Island, New Hampshire, and Connecticut did not include most misdemeanor criminal convictions (e.g., simple assault, shoplifting) as disqualifiers.

Common Disqualifying Crimes Within Each Crime Category. Within each of these categories (violent crimes, sex crimes, crimes against the vulnerable, crimes against property, and crimes involving a controlled substance), there were particular crimes that were frequently treated as disqualifiers across the States. In the category of violent crimes, first-degree murder was a disqualifier in almost all cases. In the category of sexual crimes, forcible rape was often a disqualifier. In the category of crimes against the vulnerable, felony abuse and/or neglect was often a disqualifying crime. In the category of crimes against property, felony theft was most often a disqualifier. Finally, in the category of crimes involving a controlled substance, felony manufacture and distribution of illegal drugs was frequently a disqualifier.

Overview of Disqualification Time Periods. Disqualification time periods varied across the States. For similar misdemeanor crimes, disqualification time periods ranged from 0 to 10 years. For example, a crime of petit larceny was disqualifying for 7 years in Oklahoma, but had no disqualification period in Mississippi (Okla. Statutes, 2011b; Code of Miss. Rules, 2011).

States had wide ranges in disqualification time periods for similar felony crimes, as well. For example, Wisconsin did not have specific disqualification periods associated with felonies, such as kidnapping, while in Arkansas kidnapping was a permanent disqualifier (Wis. Annotated Statutes, 2011; Ark. Code Annotated, 2011).

While a number of States applied the same disqualification time period every time a specific crime was committed, others made case-by-case determinations. For example, while one State's statute stated that a forgery crime results in a 5-year employment prohibition (allowing for rehabilitation after that period of time has passed) (Idaho Admin. Code, 2010), other States, such as Iowa and Massachusetts, allowed for case-by-case determinations instead, and specified no blanket disqualifying conviction consequences (Iowa Annotated Statutes, 2011; Annotated Laws of Mass., 2011).

A third approach was to provide broad guidelines for review in the statutes and regulations, but also allow for flexibility in application of the law for specific types of cases. For example, in Ohio, if a conviction under review was a one-time event and the crime did not explicitly target older adults, then rehabilitation for that individual was possible after 5 years (Ohio Admin. Code, 2011b).

In SME discussions, two States described very different approaches to disqualification time periods. One State, which had an extensive list of disqualifying convictions, had 1-, 3-, 5-, and

10-year and permanent barriers associated with specific crimes. However, this State is considering removing the 1-year barrier. It indicated that usually by the time the applicant is seeking employment, the 1-year barrier has passed, so dealing with these 1-year barrier crimes results in wasted time and resources. Conversely, another State described its system in which an applicant with a disqualifying conviction is permanently barred from employment with an LTC facility or provider. This State indicated that its approach provides very few opportunities for rehabilitation and limits the applicant pool. To remedy this situation, this State wanted to revise the current time limits to include 1-, 3-, 5-, 10-, and 15-year and permanent barriers to provide more flexibility.

Disqualification Time Periods Within Each Crime Category. About 45 percent of States found felony convictions in the category of violent crimes against the person to be permanent disqualifiers, while approximately 35 percent prohibited LTC employment for convicted violent felons for a specified time period. The remaining States did not specify time periods for felony violent crimes against the person in statutes or regulations. For felony sex crimes and crimes against the vulnerable, approximately 48 percent of States considered such crimes to be permanent disqualifiers, around 34 percent considered these crimes to be disqualifying for a specific time period, and approximately 18 percent didn't specify time periods in statutes and regulations.

The majority of States, approximately 70 percent, did not consider felony crimes against property to be permanent disqualifiers, but around 48 percent did require a time-limited disqualification period for these crimes. Felony convictions for crimes involving a controlled substance were permanent disqualifiers in only 25 percent of States. However, more than 50 percent of States required a time-limited disqualification period for these crimes.

Permanent Disqualifications. Among those States that identified permanent barrier crimes in statutes and regulations, there were differences as to what types of convictions resulted in permanent disqualification. In a number of States, the severity of the crime committed determined whether the conviction was permanently disqualifying—but the threshold for making this determination varied by State. For example, in Rhode Island, felony drug offenses were permanently disqualifying crimes but misdemeanor drug possession crimes were not (General Laws of R.I., 2011). In Tennessee, felony and misdemeanor drug offenses (to include possession) were all considered permanent disqualifiers (Tenn. Code Annotated, 2011b).

Some States made distinctions based on whether a crime was violent or non-violent. For example, in South Carolina, both robbery and forgery were permanently disqualifying crimes (S.C. Code of Laws Annotated, 2010). However, in Alabama, the violent crime of robbery was considered a permanently disqualifying crime but the non-violent crime of forgery was not a permanently disqualifying crime (Ala. DMH, 2009). Similarly, in Idaho, there was a 5-year

employment prohibition for mainly non-violent offenses, but permanent disqualification for any serious violent offenses (Idaho Admin. Code, 2010).

Rehabilitation Factors. In addition to including disqualifying convictions in statutes and regulations, many States detailed their review mechanisms to allow employees or prospective employees to appeal decisions, demonstrate rehabilitation, or request a review of their initial negative fitness determinations. Factors commonly taken into consideration in these review mechanisms across the States were:

- The nature and gravity of the conviction;
- The nature of the job sought or held;
- The time elapsed since the conviction or completion of the sentence;
- The individual's age at the time of the offense; and
- Evidence of rehabilitation (such as a program completion certificate, or criminal history since conviction).

In contrast to these commonalities were distinct differences in how States approached rehabilitation factors and review mechanisms. As an example, States were split on the broad question of whether any crime should be permanently disqualifying without an opportunity for review or rehabilitation. While about 75 percent of States permitted some kind of rehabilitation opportunity for all individuals with criminal convictions, approximately 25 percent, including Guam, Pennsylvania, Puerto Rico, South Carolina, and South Dakota, did not allow for any rehabilitation opportunities.

Finally, States varied in the factors they used for their rehabilitation or appeal/variance decisions. In addition to the common factors outlined above, some States looked at other factors, such as: the applicant's work history and current employment, the mental capacity of the victim, the circumstances under which the crime was committed, the consequences of the crime, the likelihood of re-offense, and the number of crimes committed overall. Several States, such as New Hampshire, considered whether the individual posed a current threat to the health, safety, or well-being of residents, as well as the relationship between the crime committed and the position being sought (N.H. Code of Admin. Rules, 2011b). Several States, such as Minnesota, considered evidence of counseling or other rehabilitation in making the determination (Minn. Rules Admin. Code, 2010).

Federal Social Security Act. In addition to reviewing State statutes and regulations, we also reviewed the Federal Social Security Act (SSA) to understand how Federal law affects disqualifying convictions and rehabilitation factors. Section 1128(a) of the SSA outlines the four conviction types that require the mandatory exclusion of certain individuals and entities (i.e., a person or entity recognized as a provider or supplier under the programs) from participation in Medicare and State health care programs. The four exclusionary conviction types are: conviction

of program-related crimes, conviction relating to patient abuse, felony conviction relating to health care fraud, and felony conviction relating to controlled substance. Section 1128(c)(3)(B) outlines the period of exclusion. It says the minimum period of exclusion is not less than five years. However, there is an exception if it is determined that the exclusion would impose a hardship on beneficiaries. If it would impose such a hardship, the exclusion can be waived for three of the four mandatory exclusionary conviction types (i.e., conviction of program-related crimes, felony conviction relating to health care fraud, and felony conviction relating to controlled substance). It cannot be waived for a conviction relating to patient abuse (i.e., an individual convicted of patient abuse must be excluded for a minimum of five years with no waiver option). Excluded individuals (per the SSA) are listed on the HHS OIG's List of Excluded Individuals/Entities (LEIE), which is often checked prior to conducting a criminal history background check. Additionally, some States go further than the SSA and include stricter disqualifying convictions and more restrictive disqualification time periods in their State statutes and regulations.

In addition to the findings described above, we also reviewed the literature for further evidence on these issues to inform the Work Group's options. Findings from the literature are described below.

Literature Review

In addition to reviewing State statutes and regulations, we conducted a literature review of legal and administrative journals and trade association materials to answer the following questions:

- What types of criminal convictions are associated with the potential for harm to LTC residents and beneficiaries?
- Does the passage of time since conviction reduce the risk of harm to LTC residents and beneficiaries?
- Do other rehabilitation factors reduce the risk of harm to LTC residents and beneficiaries?
- Should disqualifying criminal convictions be tailored based on job type or activities?

Knowing the answers to these questions was critical to meeting the Work Group's goal of balancing the need to protect LTC residents and beneficiaries from harm with the need to employ and manage a high-quality workforce. While prior research suggested that individuals who are released from imprisonment need employment opportunities to reduce recidivism, residents and beneficiaries of LTC services also need to be protected from harm (The Annie E. Casey Foundation, 2008). To balance these concerns, we sought a better understanding of how the criminal record, in particular the passage of time between convictions, is associated with potential risk (The Annie E. Casey Foundation, 2008). We used the literature review to search for information on these issues to inform the Work Group's options.

What Types of Criminal Convictions Are Associated with Potential Harm to LTC Residents and Beneficiaries?

Research by the AARP Public Policy Institute (AARP PPI) identified two categories of crimes that should disqualify someone from working with older adults. First, it indicated that people with a history of abusing older adults should not be given the opportunity to do so again (AARP PPI, 2010). Second, a risk factor repeatedly associated with abuse and neglect, according to the National Center on Elder Abuse, is substance abuse; therefore, substance abuse offenses were the other category of crime identified in the research report that should disqualify someone from working with older adults (AARP PPI, 2010). A systematic review of mistreatment of older individuals in nursing homes found that the following were often characteristics of abusers: drug or alcohol dependence, history of domestic violence or mental illness, and other personal factors (e.g., lower job satisfaction and burnout) (Lindbloom, Brandt, Hough, & Meadows, 2007).

Beyond this, there was limited evidence in the literature of any direct correlation between specific types of past criminal convictions and the likelihood of abusing an older adult.[25] However, two studies reported findings on convictions and abuse against older individuals. In one study, researchers reviewed the data for LTC facilities and providers in Arizona and Kansas and found that nurse aides with a previous non-disqualifying criminal conviction had a higher incidence of findings of substantiated abuse than nurse aides who did not have a criminal history (AARP PPI, 2010). In another study, nurse aides listed on an abuse registry had a higher criminal conviction rate—21 percent—than the overall population of nurse aides in the State, which had a criminal conviction rate of 14 percent (this study did not identify the types of convictions) (HHS DALTCP, 2006).

Payne and Gainey (2006) found that 48 percent of nursing home employees convicted of abuse against older individuals had committed other offenses in the past. However, there was no information regarding the types of prior offenses committed. The study characterized these offenders as serial abusers, pathological tormentors, or "stressed-out" abusers. Serial abusers are those who have committed a prior harmful crime. Pathological tormentors are those who have only been caught once but may have potentially committed previous crimes, but not gotten caught. "Stressed-out" abusers are those who immediately react negatively or violently in retaliation for some relatively innocuous act on the part of an LTC resident or beneficiary. The study noted that serial abusers represented the majority of the employees who had committed other offenses in the past.

[25] Some Work Group members asked whether evidence of committing animal abuse was associated with potential harm to LTC residents and beneficiaries. While our literature review did not identify literature on this topic, future research could continue to examine this issue and whether there is evidence of potential harm to the general population (not just LTC residents and beneficiaries).

Does the Passage of Time Since Conviction Reduce the Risk of Harm to LTC Residents and Beneficiaries?

While this question specifically focuses on the risk of harm to LTC residents and beneficiaries, only limited research was available to provide an answer. Therefore, we broadened our review to include research on the risk of harm to the general population. National overall recidivism rates show that a large percentage of former inmates are reconvicted or rearrested for a crime within several years of prison release (Langan & Levin, 2002; Pew Center on the States, 2011). For example, according to 1994 data from the Bureau of Justice Statistics (BJS), 46.9 percent are reconvicted for any type of crime, and 67.5 percent are rearrested for a felony or serious misdemeanor (Langan & Levin, 2002). Both a younger age at the time of release and a prior criminal record have been linked with a higher recidivism rate (Langan & Levin, 2002). The re-arrest rates also vary by the type of the original offense. For example, according to one study, property offenders had the highest average rate of re-arrest at 73.8 percent, whereas sex offenders had the lowest average rate of re-arrest at 43 percent (Langan, Schmitt, & Durose, 2003).

While the number of relevant research studies is limited, existing studies have indicated that the likelihood of committing another crime decreases with more time without criminal activity (Blumstein & Nakamura, 2009; Blumstein & Nakamura, 2012; Bushway & Sweeten, 2007; Kurlychek, Brame & Bushway, 2006). While some studies refer to this concept as recidivism, other studies refer to it as "redemption time," or the length of time after which the risk of reoffending is nearly the same as a counterpart of the same age in the general population[26] (Blumstein & Nakamura, 2009). The implication of these findings is that lifetime bans for all convictions might be unnecessary (Bushway & Sweeten, 2007; Blumstein & Nakamura, 2009; Blumstein & Nakamura, 2012). Nevertheless, Bushway and Sweeten noted that child sex offenders should be permanently barred from working with children, and offenders who have committed a crime against an older individual should be permanently barred from working with older individuals (Bushway & Sweeten, 2007).

Research has found that "redemption time" varies by the type of crime committed and by age at the time of arrest or conviction (Blumstein & Nakamura, 2009; Craig, 2011). One study examined the arrest records (not conviction records) of 88,000 individuals who were 16, 18, and 20 years old and who had a first arrest in 1980. The study followed the group over a 27-year span to determine at what point the risk of a new arrest was the same as that for a person in the general population or for someone who had never been arrested (Blumstein & Nakamura, 2009). The crime types included those for which there were sufficient sample sizes, those that were

[26] "Redemption time" can also refer to the length of time after which the risk of reoffending is "sufficiently close" to that for those who have never been arrested (Blumstein & Nakamura, 2009). Comparisons with the general population and those never arrested are described subsequently.

reasonably serious, and those that did not result in permanent damage to the person (e.g., DUI and murder were excluded).

According to this study, violent offenders require 8 years to reach nearly the same risk level for reoffending as non-offenders (this excludes offenders who have committed murder or non-negligent manslaughter), whereas property offenders require 4.8 years to reach nearly the same risk level as non-offenders (or those without a prior arrest). Other research found that after 6 or 7 years, the risk of reoffending is similar to the risk that an individual without a criminal record would commit an offense (Kurlychek et al., 2006). Recent research by Blumstein and Nakamura found somewhat similar "redemption times" (Blumstein personal communication, February 2012).

Table 1 shows the "redemption times" when using as a comparison the likelihood that the general population of the same age (including those with arrest records) will offend (Blumstein & Nakamura, 2009). As the table shows, younger offenders require longer "redemption times."

Table 1. Redemption Times (Blumstein & Nakamura, 2009)

Crime Committed	If First Arrested at Age 20	If First Arrested at Age 16
Robbery	4.4 years	8.5 years
Burglary	3.2 years	4.9 years
Aggravated assault	3.3 years	4.9 years

Research also has examined the average length of a criminal career (Piquero, Farrington, & Blumstein, 2007). A criminal career is defined as the time from the first crime to the time of the last crime. According to the Cambridge Study of Delinquent Development, the average criminal career length was 10 years (for those with two or more convictions) (Piquero et al., 2007). However, this study also found that the age at first conviction had an impact—if the individual was age 10 to 16 at the time of the first conviction, the average career was longer (11 to 14 years). According to this study, the average time between convictions was 3.27 years (for individuals with two or more convictions), and the average time period between convictions was shorter for those with higher numbers of convictions (Piquero et al., 2007).

Do Other Rehabilitation Factors Reduce the Risk of Harm to LTC Residents and Beneficiaries?

Lipsey (1992) reviewed 443 rehabilitation studies that used control group comparisons and found that certain treatment programs have a positive effect on recidivism for high-risk offenders; however, there was no definition given for the term "high-risk offenders." The average reduction in recidivism for the groups of individuals who underwent treatment programs was from 60 to 25 percent, with the greatest reductions found when offenders participated in community-based rather than prison programs. According to another study, the characteristics of effective treatment programs included the following: they provided services lasting at least a few months; they met targeted criminogenic needs (i.e., those needs associated with the likelihood of recidivism); they delivered services in a manner that facilitated learning of new pro-social skills;

they taught in a firm, fair manner, with positive reinforcers; and their therapists related to offenders in interpersonally sensitive and constructive ways (Gendreau, 1996).

The criminal courts within the judiciary systems of most States have instituted a treatment-based drug court approach for drug-related offenses, which is a common example of recent rehabilitation initiatives introduced in the judicial branch. The drug courts provide an opportunity for nonviolent drug offenders to participate in ongoing treatment and court supervision in lieu of jail time. Peters and Murrin (2000) examined the recidivism rates of people who graduated from drug programs, those who did not graduate, and those who were not enrolled to begin with (i.e., placed on probation). They found that those who graduated after at least one year of participating in a multifaceted treatment program (including, for example, substance abuse treatment, social services, employment services, and vocational services) were significantly less likely to be arrested and had fewer arrests during a three-year follow-up period than the other two groups (Peters & Murrin, 2000).

Should Disqualifying Criminal Convictions Be Tailored Based on Job Type or Activities?

The literature provided a few factors to consider when contemplating tailoring convictions to specific job types. The first factor is that the Equal Employment Opportunity Commission (EEOC) does not allow blanket exclusions of people with criminal histories, as that could have a disparate impact on minorities. The EEOC has indicated that under Federal law (Title VII), employers must consider convictions on a case-by-case basis (EEOC 1987; EEOC, 2012). According to the EEOC, the type of conviction and the nature of the job sought must be considered (EEOC 1987; EEOC, 2012). The second factor comes from a review of LTC data by researchers in two States. Research by the AARP PPI (2010) found that the probability that a person will reoffend increases if the person is placed in a similar situation as when the original crime occurred. Research by the AARP PPI (2010) also indicated that another factor to consider is whether excluding people with a criminal history from certain LTC positions may simply push them into other jobs where screening is not performed.

In addition, the U.S. Office of Personnel Management examines several factors when considering whether a prospective employee is suitable for Federal employment (not necessarily health care-related Federal employment) (5 CFR 731, Section 202). These factors include: misconduct or negligence in employment; criminal or dishonest conduct; intentional false statement, or deception or fraud in examination or appointment; refusal to furnish testimony; alcohol abuse or illegal use of drugs without evidence of rehabilitation; knowing and willful engagement in activities designed to overthrow the U.S. government by force; statutory or regulatory bars which prevent lawful employment; nature of the position; nature and seriousness of the conduct; circumstances surrounding the conduct; recency of the conduct; age of person involved; contributing societal conditions; and absence or presence of evidence of rehabilitation.

In our review of the literature, we found limited evidence regarding the types of crimes that are associated with potential harm to LTC residents and beneficiaries, and whether the passage of time since conviction or other rehabilitation factors reduce the risk of harm to LTC residents and beneficiaries. However, existing studies suggest that the likelihood of committing another crime decreases with more time without criminal activity. The exact length of time before an individual is unlikely to commit another crime varied by study as well as the category of the original criminal conviction (or arrest). These findings helped inform the Work Group members' options, particularly their options for disqualification time periods.

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4. Options

As previously discussed, at its second and third meetings, the Work Group reviewed information from our analysis of the statutes, regulations, and literature to develop preliminary options for (1) a definition of "direct access employee" and (2) disqualifying convictions and rehabilitation factors (Borsky et al., 2012a; Borsky et al., 2012b). At its fourth meeting, the Work Group reviewed and revised its preliminary options to develop its Consolidated Option for CMS.

As the Work Group developed its Consolidated Option, it established its consolidated goal statement to outline the purpose of defining a "direct access employee" and developing a list of disqualifying convictions and rehabilitation factors. The Work Group considered various missions for inclusion in the consolidated goal statement, including: (1) protect the health, safety, and welfare of LTC residents and beneficiaries, (2) go beyond existing regulations to protect vulnerable individuals from predators and other potential abusers, (3) consider the costs, and (4) protect a vulnerable population without being unduly burdensome on the States. After careful consideration, the Work Group determined that its goal was to do the following: build on existing regulations to address the special concerns of residents and beneficiaries and protect their health, safety, and welfare while maintaining a quality workforce for LTC facilities and providers.

In addition, the Work Group determined that its options would set Federal minimums, where States would be free to enact stricter parameters as they saw fit. While this would create a minimum level of uniformity across the States, it would also provide States with the option of enacting more stringent requirements according to their specifications. Most of the Work Group's options would apply to all the LTC facilities and providers identified in Section 6201 of the Affordable Care Act; however, one of the definitions of a "direct access employee" would apply to all facility and provider types receiving Medicare or Medicaid funding. The Work Group decided that its options should be implemented with fingerprint-based, as opposed to name-based, background checks. However, it is important to note that currently many State background checks are not fingerprint-based; therefore, this would be a change for many States.

The next two subsections describe the Work Group's Consolidated Option and Preliminary Options 1 and 2 for defining "direct access employee" (subsection 4.A.) and disqualifying convictions and rehabilitation factors (subsection 4.B.), as well as a brief discussion of the status quo on these issues. The third subsection, subsection 4.C., describes other areas of consideration raised during Work Group discussions.

4.A. Options for Definitions of a "Direct Access Employee"

While the options for defining a "direct access employee" vary, they all use an outcome-based approach to define the term, which is similar to the approach used in Section 6201 of the Affordable Care Act. The Work Group determined that this was preferable to using a list of job

titles or duties, as an outcome-based definition would better allow for broad application and account for job title variation across different facilities and providers as well as States. Work Group members noted that a job title- or duty-based approach could not be inclusive of all of the possible job titles or duties in the LTC field, and identifying which employees had direct access based solely on job title or duty would be convoluted and cumbersome.

In its two preliminary options, the Work Group used the terminology from Section 6201 of the Affordable Care Act, which included the word "patient." However, CMS uses the term "resident" for anyone living in a nursing home and "beneficiary" for anyone receiving other LTC services. After the Work Group developed its preliminary options, it adopted CMS' terminology for its Consolidated Option. Therefore, while the Work Group used the term "patient" in its preliminary options, it used the term "residents and beneficiaries" instead in its Consolidated Option to CMS.

Consolidated Option

The Consolidated Option for defining a "direct access employee" covers individuals who have "direct access" to residents or beneficiaries through ownership of, employment with, or a contract/agreement with an LTC facility or provider. The term "agreement" was added for volunteers and students whose organizations or schools may have a memorandum of understanding (MOU) or a similar type of agreement, but not a formal contract, with the facility or provider. The definition specifies that "direct access" is one-on-one contact with a resident or beneficiary or access to the resident or beneficiary's property, personally identifiable information (PII), or financial information.

The Work Group recognized that volunteers, students, and contractors can also work in facilities, but some may not have direct access to residents or beneficiaries. Therefore, the Work Group included two exceptions in its Consolidated Option for defining a "direct access employee"—one for volunteers and students and one for contractors. The definition does not include volunteers or students, unless they perform regular or unsupervised functions equivalent to those performed by "direct access employees." The definition also does not include contractors performing repairs, deliveries, installations, or similar services for the facility or provider. This exclusion assumes that those contractors would not have direct access (e.g., a contractor that made deliveries to the facility but would not have direct access to the residents or beneficiaries).

The Work Group's Consolidated Option for defining a "direct access employee" is as follows:

- An individual who has direct access to a resident or beneficiary through ownership, employment, or a contract/agreement with an LTC facility or provider. This does not include volunteers or students, unless they perform regular or unsupervised functions equivalent to those of "direct access employees." This does not include contractors

performing repairs, deliveries, installations, or similar services [only][27] for the facility or provider.

- Direct access is having, or expecting to have, duties that involve one-on-one contact with a resident or beneficiary, or access to the resident or beneficiary's property, personally identifiable information, or financial information.

Regarding the terms "regular" and "unsupervised," the Work Group recognized that these were not explained in its definition and there were no single common definitions of these words. While at first the Work Group wanted to leave the definitions of these two terms to the discretion of the LTC facilities and providers, the Work Group later determined that it should recommend definitions for these terms to ensure a standardized minimum interpretation. However, Work Group members had different perspectives on how these terms were best defined. While their definitions were similar, they varied in terms of their specificity and stringency. The options for definitions of "unsupervised" and "regular" included the following:

Unsupervised

- Without direct or immediate observation or supervision. Direct or immediate observation or supervision means on-site, close contact whereby the supervisor is able to respond quickly to the needs of (and monitor the activities of) the supervisee.
- Without direct onsite observation or supervision; not within sight and sound of supervision.
- Without direct or immediate observation or supervision. Direct or immediate observation or supervision means on-site, close contact/physical proximity whereby the supervisor regularly monitors the activities of the supervisee to a level that the supervisor is able to physically respond quickly to mitigate, avoid, and correct errors and to immediately attend to the needs of the circumstance.
- Without direct onsite observation or supervision.
- The individual performs the functions in question outside the presence of an individual who has been approved for direct access after a background check has been performed.

Regular

- Occurring at fixed, uniform, or normal intervals; periodic.
- Occurring at fixed, uniform, or normal intervals equivalent to those of "direct access employees"; periodic; that of equivalent fixed, uniform, or normal intervals.

[27] CNA added the text in brackets to clarify the Work Group's intent, which was to apply this to contractors that provide these services and no other types of services.

- Scheduled and expected.

As CMS considers the options for definitions of a "direct access employee," it can also consider these options for definitions of "unsupervised" and "regular," depending on the level of stringency and specificity that is desired.

Preliminary Option 1

The first preliminary option provided criteria for what would constitute "direct access," which included access to the residents or beneficiaries or their belongings, living quarters, personal information, or financial information. The subgroup that developed this option was unsure whether access to medical records should be included as part of "direct access." Some Work Group members thought that including those who have access to medical records may be too far-reaching without more evidence that this could contribute to harm of residents or beneficiaries. While not explicit in the definition, subgroup members indicated that residents and beneficiaries included those who receive services from an applicable facility or provider. Regarding LTC facility and provider types, this option is unique compared with the other options, as it would apply to all facility and provider types receiving Medicare or Medicaid funding. The subgroup chose to expand its definition in this way (to include more than the nine facility and provider types listed in Section 6201 of the Affordable Care Act[28]) because the subgroup viewed the definition as a Federal definition rather than a State-level definition.

This option also describes the types of employees who would be included (i.e., employees, contractors, administrators, owners, students, and direct care facility volunteers); however, it does not explicitly address licensed employees. The subgroup members who developed this option agreed that licensed employees could be included, assuming they meet the requirements of the definition. This definition also includes two exceptions for contractors and volunteers to try to limit the scope to only those who were most likely to have the type of access that would allow them to potentially harm the resident or beneficiary. Contractors providing services to the facility (e.g., delivery, maintenance, lawn care) were explicitly excluded because it was thought that these people were not likely to have direct access to residents or beneficiaries without supervision from the facility. To distinguish between the types of volunteers who provide direct care to residents and beneficiaries and all other volunteers, this definition used the term "direct care facility volunteers."

Preliminary Option 1's definition of "direct access employee" is as follows:

- Any individual who has or may have access to a patient, resident, client, or recipient receiving Medicare or Medicaid funds. This includes but is not limited to employees, contractors, administrators, owners, students, and direct care facility volunteers who have

[28] States participating in the National Background Check Program are required to include the nine facility and provider types listed in the Affordable Care Act in their background check initiatives.

or may have access to the residents, residents' belongings, living quarters, personal information, and financial information [and medical records].[29] "Contractor" does not include individuals or entities performing repairs, deliveries, installations, and similar services for the facility. A "direct care facility volunteer"[30] does not include religious organizations or civic groups not providing direct care.

- Applicable facilities and providers include those receiving Medicare or Medicaid funds.

Preliminary Option 2

The subgroup members who developed Preliminary Option 2 chose to define the words within the term "direct access employee." It defined the nature of activities that would constitute direct access, which included interaction with a patient or patient's property, PII, medical records, treatment information, or financial information. A "patient" is an individual receiving services provided by the facility or provider. The subgroup members defined "employees" as individuals with direct access, including contract employees. It explicitly included licensed individuals, but did not include volunteers or students unless they had equivalent duties to those of a "direct access employee." This option would apply to the facility and provider types listed in Section 6201 of the Affordable Care Act. While this approach was used in an effort to remain within the scope of the project, subgroup members agreed that this option could be expanded at the State level if necessary.

Preliminary Option 2's definition of "direct access employee" is as follows:

- "Direct access" is where an employee has, or is expected to have, interaction with a patient or patient's property, personally identifiable information, medical records, treatment information, or financial information. "Patient" is a recipient of services provided by a covered facility or provider.[31] "Employee" is any individual who has direct access to a patient through employment or through a contract with such a facility or provider. This includes licensed individuals. This does not include volunteers or students unless they have equivalent functions to those of "direct access employees."[32]
- Applicable facilities and providers include the LTC facilities and providers identified in [Section 6201 of] the Affordable Care Act.

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[29] The subgroup was undecided as to whether access to medical records should be included in the definition.

[30] The subgroup created this term to encompass the types of volunteers it thought should be subject to criminal background checks.

[31] There was discussion of whether to include "a patient's property, personally identifiable information, medical records, treatment information, or financial information" here, or to include this as part of "direct access," or under both terms.

[32] This preliminary option used the term "patient" explicitly in its definition; however, in the Consolidated Option we use the term "resident or beneficiary."

Status Quo

The status quo would be to allow States to define "direct access employee" as they determined to be appropriate. While some States have begun to follow the Affordable Care Act's definition, others use their own definitions, as previously described in Section 3. Our review of State statutes and regulations showed that most States did not use the exact term "direct access employee"; however, through their State statutes and regulations, they defined who was required to have a criminal background check for employment with LTC facilities and providers. Most States had statutes and regulations addressing the need for employees with direct access, or who provide direct care to residents and beneficiaries of LTC facilities and providers, to undergo some type of a background check. However, States varied in their approaches to addressing contractors, volunteers, and students. Most States required background checks for contractors if they were providing care equivalent to that being provided by employees who were required to have a background check (or had equivalent access). The majority of States did not require background checks for all volunteers. See Section 3 for more information about each State's approach, and for more detailed information about each State's requirements see Working Paper 1 (Borsky et al., 2012a).

Comparison of Options and Key Discussion Points

Throughout the development of the options, the Work Group considered which types of workers it should include, what constitutes access, and to what facilities and providers these options should apply. It was clear that certain types of workers, such as an LTC facility and provider employees, would be included. However, regarding other types of workers, such as volunteers, students, contractors, professionals providing services, licensed professionals, and owners, the Work Group recognized that some of these individuals may be considered "direct access employees" whereas others would not. The Work Group discussed how best to incorporate these worker types in its consolidated definition. In the next subsection, we describe and compare some of the features of each option and provide an explanation of the Work Group's decision-making process. Table 2 provides a brief comparison of the options.[33]

[33] The table does not include the status quo, as currently there is significant variation across States.

Table 2. Features of Each Option's Definition of "Direct Access Employee"

Feature	Covered in the Consolidated Option?	Covered in Preliminary Option 1?	Covered in Preliminary Option 2?
Employees	Yes	Yes	Yes
Contractors	Yes, with specific criteria	Yes, with specific criteria	Yes
Volunteers	No, unless they meet specific criteria	Yes, with specific criteria	No, unless they meet specific criteria
Students	No, unless they meet specific criteria	Yes	No, unless they meet specific criteria
Owners	Yes	Yes	Not explicit
Licensed individuals	Not explicit	Not explicit	Yes
Professionals providing services	No	Not addressed	Not addressed
Access to resident or beneficiary	Yes	Yes	Yes
Access to resident's or beneficiary's property	Yes	Yes	Yes
Access to resident's or beneficiary's financial information	Yes	Yes	Yes
Access to resident's or beneficiary's personal information	Yes, if PII	Yes	Yes, if PII
Access to resident's or beneficiary's medical records	No, unless PII	Maybe	Yes
Section 6201 LTC facilities and providers	Yes	Some	Yes
Other facilities and providers	No	All receiving Medicare or Medicaid funding	No
Other key features	This option includes individuals (e.g., volunteers, students) covered by an agreement with the LTC facility or provider, one-on-one contact, and suggested definitions for "regular" and "unsupervised."	This option narrows the definition of volunteers covered to only "direct care facility volunteers."	This option does not include any exclusions for contractors.

Employees. Work Group members were in agreement that employees who have direct access should be subject to a criminal background check. There was no variation across the options. According to our review of State statutes and regulations, most States had statutes or regulations addressing the need for employees with direct access, or who provide direct care, to undergo background checks. Therefore, all options are similar regarding this feature.

Contractors. In its Consolidated Option, the Work Group decided that contractors performing repairs, deliveries, installations, or similar services only (i.e., no other types of services) for the facility or provider would not be included in the definition and, therefore, would not be required to undergo background checks. The Work Group discussed the varying types of contractors that may work for an LTC facility or provider and determined that those with limited or infrequent, if any, access to residents or beneficiaries should not be required to get background checks.

Although the Work Group chose not to include a blanket background check requirement for all contractors in its Consolidated Option, it is important to note that some contractors performing the types of services listed above may potentially come into contact with LTC residents or beneficiaries. The Work Group assumed that these contractors' access would be limited; however, the LTC facility or provider may want to consider the type of access a contractor performing these services may have. For example, a cable repairman may need to enter individual residents' rooms. While there may be an assumption that the facility would provide a certain level of supervision in such instances, staff may not always be available to stay with the contractor at all times. Again, this emphasizes the importance of having the LTC facility or provider consider the type of access a contractor will or could have.

The preliminary options included certain types of contractors, but the specific criteria for contractors varied. Preliminary Option 1 was similar to the Consolidated Option as it excluded certain types of contractors. It did not include individuals or entities performing repairs, deliveries, installations, or similar services for the facility. Preliminary Option 2 included all contractors as long as they met the other requirements of the definition (i.e., there were no exclusions for contractors).

Volunteers. In its Consolidated Option, the Work Group did not include volunteers unless they performed regular or unsupervised duties equivalent to those of a "direct access employee." The Work Group members also proposed several definitions for "unsupervised" and "regular," as they recognized that these terms needed further clarification. In addition, for the background check requirement to apply, the Work Group said volunteers (or their volunteer organizations) must have some form of an agreement (or contract) with the LTC facility or provider. These were the types of volunteers that the Work Group thought were most likely to have potential opportunities to harm residents or beneficiaries. The Work Group felt that limiting the background check requirement to these types of volunteers would protect the safety and well-

being of residents and beneficiaries, ensure that volunteers continued to feel welcomed to offer their assistance in LTC, and contain costs incurred by LTC facilities and providers and States.

Under the Consolidated Option, the following types of volunteers would not likely meet the definitional requirements of a "direct access employee":

- Volunteers who offer services infrequently or take on more of a visitor role;
- Volunteers who are continually supervised; and
- Fellow residents or beneficiaries in LTC facilities who may offer to help other residents or beneficiaries (e.g., by delivering mail).

The Work Group also discussed the issue of volunteers' ages and potential legal ramifications of requiring minors to undergo background checks. The Work Group noted that the duties of young volunteers would likely not include regular or unsupervised access to residents or beneficiaries and, therefore, these volunteers would not be required to have background checks. However, the Work Group ultimately decided to leave age-related requirements to the discretion of the States.

The preliminary options each included a subset of volunteers as well, but their volunteer criteria differed from the Consolidated Option and from one another. Preliminary Option 1 explicitly included "direct care facility volunteers," which did not include religious organizations or civic groups not providing direct care. This option was less restrictive than the Consolidated Option, as it only included volunteers providing direct care rather than those with direct access.

Preliminary Option 2 was closer to the Consolidated Option. It did not include volunteers unless they had equivalent functions to those of "direct access employees." This was also a similar approach to the one used in the Affordable Care Act's definition. However, unlike the Consolidated Option, Preliminary Option 2 did not add in the criteria of regular or unsupervised functions equivalent to those of a "direct access employee." Therefore, Preliminary Option 2 was broader than the Consolidated Option. It also left more for interpretation as the types of equivalent access were not defined.

It is important to note that 42 C.F.R. §418.114 requires criminal background checks for all hospice employees who have direct patient contact or access to patient records, including volunteers and contractors. The reasons for this requirement include the lack of direct oversight provided for employees working directly in the home and the unique vulnerability of those receiving hospice services.

Students. The Consolidated Option excluded students, unless they perform regular or unsupervised functions equivalent to those of "direct access employees." In addition, for the background check requirement to apply, students' schools must have an agreement (or contract) with the LTC facility or provider. The Work Group's intent was for its definition to include students who enter the facility for a clinical rotation program, as they would likely have regular

or unsupervised direct access to residents or beneficiaries, and they would also likely have an agreement with the facility or provider. However, students who complete community service at the LTC facility or provider would not likely be included, as they most often would not have regular or unsupervised direct access, and their schools likely would not have an agreement with the LTC facility or provider. Furthermore, students doing community service would often be minors; the Work Group determined that the States could opt to place age restrictions on background checks for such students.

As with volunteers, the Work Group discussed the issue of supervision for students. While students in clinical programs are likely to be supervised, the level of supervision may change as the students become more comfortable in their roles and the instructors/supervisors become more comfortable with the students' abilities. There is also the potential that a student doing community service at the facility may be trusted to work unsupervised after multiple visits as the staff becomes more familiar with the student. The Work Group provided suggested definitions of "unsupervised" and "regular," as noted above.

According to the Work Group, requiring students to undergo such checks during their coursework would provide those with criminal convictions a more realistic understanding of the challenges they could face in the job market after graduation. The Work Group noted that not all schools require students to undergo background checks, so students who graduate from their programs and have criminal records are sometimes surprised to find that their criminal histories may prohibit them from employment.

Both preliminary options also included some students. Preliminary Option 1 was broader than the Consolidated Option, as it included all students as long as they met the other requirements of the definition. Preliminary Option 2 was closer to the Consolidated Option, as it excluded students unless they had equivalent functions to those of "direct access employees."[34] However, Preliminary Option 2 did not add in the criteria of "unsupervised and regular functions" equivalent to those of a "direct access employee," which was used in the Consolidated Option.

***Owners*.** In its Consolidated Option, the Work Group intended that those licensed to own and operate a facility and have direct access would be required to undergo background checks. The Work Group chose the term "ownership" to cover owners, operators, and administrators, recognizing that these terms may vary by State and LTC facility or provider type. The Work Group noted that not all owners will have direct access and, therefore, they may not all be required to have background checks. For example, an owner may be out-of-State with little to no contact with residents or beneficiaries, or access to the residents or beneficiaries' property, PII,

[34] This preliminary option used the term "patient" explicitly in its definition; however, in the Consolidated Option we use the term "resident or beneficiary."

or financial information. In other situations, the owner may have frequent direct access to residents or beneficiaries.

Preliminary Option 1 also included owners (as well as administrators) as long as they met the other definitional requirements. Preliminary Option 2 did not explicitly address owners or ownership in its definition; however, the intent was that all individuals with "direct access" would be covered by the definition.

Licensed Professionals. For its Consolidated Option, the Work Group decided that it would not explicitly include licensed professionals in its definition of a "direct access employee"; in fact, it did not use the terms "licensed" or "unlicensed." The Work Group discussed extensively whether licensed professionals should be required to have background checks under these options, and whether this should be explicitly addressed in the definition of a "direct access employee." In its Consolidated Option, the Work Group chose not to explicitly include licensed employees in the definition due to variation in existing State licensing requirements and the potential for duplication of efforts and spent resources. As the Work Group's options were intended to be Federal minimums, the Work Group decided to let States determine whether they would use their existing State licensing requirements or follow any new Federal minimum requirements for prospective "direct access employees."

In Preliminary Option 1, the Work Group also did not explicitly include licensed or unlicensed employees. Rather, it described the nature of the activity that would determine whether a prospective employee would be a "direct access employee." However, through discussion during the second Work Group meeting, the Work Group members who developed this option agreed that licensed employees could be included under this definition, assuming they met the requirements of the definition. In Preliminary Option 2, the Work Group explicitly included licensed individuals.

Professionals Providing Services Directly to a Resident/Beneficiary. The Work Group determined that to be considered a "direct access employee" under its Consolidated Option an individual would have to be employed or contracted by, or have an agreement with, an LTC facility or provider. The Work Group incorporated this language in its definition to distinguish between professionals providing contracted services on behalf of the facility or provider and professionals providing services directly to the resident or beneficiary (i.e., paid directly by the resident or beneficiary).

The Work Group discussed various types of professionals who provide services directly to residents or beneficiaries for payment but who are not contracted by (or do not have an agreement with) the facility or provider (e.g., hair dresser, massage therapist). The Work Group agreed that because residents and beneficiaries have the right to employ professionals to come into their places of residence, professionals providing the services directly to a resident or beneficiary (and paid directly by the resident or beneficiary) should not be considered "direct

access employees" and thus should not be required to undergo background checks. However, the Work Group noted that if the professionals contracted or had an agreement with the facility or provider, they would be required to undergo background checks, as this type of arrangement would fall under the "contract/agreement" umbrella. This was not an issue specifically discussed during the Work Group's development of the preliminary options.

Access to Resident. All options include prospective employees who may have direct access to a resident or beneficiary. Work Group members noted that a prospective employee who may have physical direct access to a resident or beneficiary could potentially cause harm to the resident or beneficiary; therefore; he or she would be included in the options. The Consolidated Option adds the criteria of one-on-one contact with a resident or beneficiary, but the preliminary options are broader and do not incorporate this criteria.

Access to Resident's Property. All options include prospective employees who will have direct access to a resident's property. Work Group members noted that a prospective employee who will have direct access to the property of a resident or beneficiary could potentially cause harm to the resident or beneficiary; therefore, he or she would be included in the options as well.

Access to Resident's Financial Information. All options include prospective employees who will have direct access to a resident's financial information.

Access to Resident's Personal Information. The Consolidated Option and Preliminary Option 2 included access to PII specifically, but not all types of personal information. Preliminary Option 1 was broader and included direct access to all types of personal information.

Access to Resident's Medical Records. The Consolidated Option does not explicitly include direct access to medical records. However, it does include direct access to PII, which may include some types or elements of medical records. The first preliminary option may include medical records; however, some Work Group members of the first subgroup were undecided as to whether this was appropriate. Some thought that including those who have access to medical records may be too far-reaching without more evidence that this could contribute to harm of residents or beneficiaries. The second preliminary option included direct access to medical records.

Section 6201 LTC Facilities and Providers. The Consolidated Option and Preliminary Option 2 were intended to apply to all LTC facilities and providers identified in Section 6201 of the Affordable Care Act. Preliminary Option 1 included some of these LTC facilities and providers, but it used a broader approach as described below.

Other Facilities and Providers. Preliminary Option 1 was intended to apply to all facilities and providers receiving Medicare or Medicaid funds. While this would include many LTC facilities and providers identified in Section 6201 of the Affordable Care Act, it would only include

facilities and providers receiving Medicare or Medicaid funds. In addition, it would go beyond just LTC facilities and providers. Neither the Consolidated Option nor Preliminary Option 2 used this approach; they were intended to apply to all LTC facilities and providers identified in Section 6201 of the Affordable Care Act.

4.B. Options for Disqualifying Convictions and Rehabilitation Factors

The Work Group's options for disqualifying convictions and rehabilitation factors vary; however, they were all intended to be Federal minimums, where States could enact more strict requirements. Furthermore, the Work Group assumed that the prospective employee would have undergone and cleared all appropriate registry checks (e.g., checks of LEIE, the National Sex Offender Registry, and State abuse registries) prior to the criminal history check.

The Consolidated Option included convictions determined to be disqualifying based on the nature of the offense, set minimum disqualification time periods, and provided for opportunities for rehabilitation. Preliminary Option 1 included convictions determined to be disqualifying based on the severity of the offense, intended to set minimum disqualification time periods (but lengths of time were not specified), and provided opportunities for rehabilitation. Preliminary Option 2 was more restrictive than the Consolidated Option or Preliminary Option 1, as it included convictions determined to be disqualifying based on the nature of the offense (similar to the Consolidated Option), set lifetime disqualifications with the opportunity for prospective employees to request a variance after a minimum period of time had elapsed, and provided opportunities for rehabilitation only after the minimum period of time had elapsed.

In this subsection, we first describe the disqualifying convictions and rehabilitation factors in the Consolidated Option and then we describe the disqualifying convictions and rehabilitation factors in the preliminary options. We also briefly describe the status quo regarding disqualifying convictions and rehabilitation factors.

Consolidated Option

In its Consolidated Option, the Work Group listed general categories—and sub-categories—of disqualifying convictions. The Work Group set minimum disqualification time periods for each conviction category with the intent that there would be longer disqualification periods for more serious or more violent crimes. It also determined that the LTC facility or provider (on behalf of the prospective employee) or the prospective employee could apply to the State for a variance, including during the disqualification period. At the end of the disqualification period, that conviction would no longer be considered a reason for an automatic negative fitness determination, although it may still be considered in relation to subsequent convictions to determine whether there is a pattern of criminal history. The Work Group recommended four rehabilitation factors for consideration during the variance review; these factors are also noted in Section 6201 of the Affordable Care Act.

4. Options

Disqualifying Convictions. The Work Group recommended using the following categories of disqualifying convictions: (1) crimes against care-dependent or vulnerable individuals, (2) crimes against the person, (3) crimes against property, and (4) crimes related to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance. The categorical approach (as opposed to trying to document a comprehensive list of all possible disqualifying crimes) was considered to be a more practical method for States to implement due to the fact that States have unique and independent approaches to defining crimes. This method would allow States to determine which crimes fell within the recommended categories of disqualifying convictions (and sub-categories, which we discuss below).

Table 3 shows the Work Group's Consolidated Option regarding disqualifying convictions and disqualification time periods.[35] As all of the Work Group's options were crafted to be Federal minimums, the last three of the four crime categories only include felony convictions, with States having the option to independently include misdemeanor convictions. It is important to note that for each crime listed in Table 3, not only is the actual crime disqualifying, but any conviction of attempt, solicitation, conspiracy, aiding, or abetting for any of these crimes would also be disqualifying (for the same time period as if the conviction were for the crime itself).

Disqualification Time Periods. The Work Group recommended that the disqualification time periods start from the date of conviction or the date of release from imprisonment, whichever is later. After the specified time period elapsed, the conviction would no longer result in an automatic negative fitness determination. See Table 3 for the disqualification time periods associated with each disqualifying category.

Felony convictions of crimes against care-dependent or vulnerable individuals were assigned a 10-year disqualification period. The Work Group agreed that misdemeanors should require a shorter disqualification period; however, they could not reach agreement on a recommended length of time. One exception to the disqualification period rule for this crime category was for failure to register on the sex offender registry. While the Work Group was not in agreement as to whether this should be on the list, those who wanted to include it thought felony convictions for this crime should require a 5-year disqualification period and misdemeanor convictions should require a shorter disqualification period.

Crimes against the person (felonies only) are categorized by whether they are violent or non-violent. The Work Group recommended that a violent crime conviction result in a 10-year disqualification period and a non-violent crime conviction result in a 5-year disqualification period. Crimes against property (also felonies only) are assigned a 5-year disqualification period. However, the Work Group did not agree on the inclusion of arson or cruelty to animals. Finally,

[35] The Work Group did not discuss pleas of no contest (nolo contendere). State and Federal laws determine whether and under what circumstances a defendant may enter a plea of no contest.

felony crimes related to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance were assigned a 5-year disqualification period.

Variance Process. The Work Group recommended that the prospective employee, or the LTC facility or provider on behalf of the prospective employee, be eligible to apply for a variance, even during the disqualification period. During the variance process, the individual or his or her potential employer would request that the State consider whether the prospective employee has provided evidence of rehabilitation, which could impact the State's fitness determination. The variance process would likely be separate from the appeal process, which is used to challenge the accuracy of a prospective employee's record. However, the decision to integrate or separate the variance and appeal processes would be left to the discretion of the State. Additionally, after the specified disqualification time period has elapsed (see Table 3), the conviction would no longer be considered a reason for an automatic negative fitness determination. However, it may still be considered in relation to subsequent convictions to determine whether there is a pattern of criminal history. It is important to note that the provider may not be allowed to know the contents of a criminal history record or that one even exists.

While the majority of Work Group members supported this overall approach to the variance process, a few had alternative perspectives. For example, one did not agree with having a separate variance process during the disqualification period. One remarked that each State should make the determination regarding whether a variance process would be permitted. Another member recommended that only the LTC facility or provider be eligible to request a variance and not the prospective employee.

Rehabilitation Factors. The Work Group recommended that the four rehabilitation factors noted in Section 6201 of the Affordable Care Act be taken into consideration in the variance process, including:

- Passage of time (e.g., time elapsed since criminal conviction);
- Extenuating circumstances (e.g., [offender's] age at the time of conviction, substance abuse, or mental health issues);
- Demonstration of rehabilitation (e.g., character references, employment history, education, training); and
- Relevancy of the particular disqualifying information with respect to the current employment of the individual (e.g., job type and job duties, whether the crime was committed in an LTC facility).

Although these rehabilitation factors are broad, the Work Group chose to set them as Federal minimums and let each State expand upon them as it determined appropriate. The Work Group opted to use the same language as in Section 6201 of the Affordable Care Act because it is already included in approved legislation. For clarification purposes, the Work Group included

examples of the rehabilitation factors, which are not explicitly listed in Section 6201 of the Affordable Care Act.

Preliminary Option 1

Disqualifying Convictions. In the first preliminary option, the subgroup selected a three-tier system to classify the categories of disqualifying convictions according to the severity of the crime committed—Tiers 1, 2, and 3 (see Table 4). The disqualifying convictions included felonies only (not misdemeanors) because the subgroup noted that this would be a set of Federal minimum requirements, where the States could enact stricter parameters, if desired. The subgroup noted that the States should be allowed to select which, if any, misdemeanors should be included as disqualifiers. Table 4 shows the categories of disqualifying crimes in Preliminary Option 1.

Disqualification Time Periods. The tiers would correspond with specific disqualification time periods; however, the subgroup did not reach consensus on the recommended time periods. It requested more information on recidivism rates in order to appropriately determine and recommend time periods.[36] However, the subgroup determined that the time periods should begin from the date of conviction.

Variance Process. As they developed their recommendations, the members of this subgroup discussed the benefits of allowing those who have been rehabilitated to return to the workforce (e.g., expanding the applicant pool and offering meaningful employment opportunities). The subgroup recommended that there be a waiver or variance process available for all offenders to allow for due process and preclude potential court challenges.

Rehabilitation Factors. The rehabilitation factors to be considered in the variance process under this option included:

- The person's character;
- The time elapsed since the conviction;
- Completion of sentence requirements;
- The nature of the crime relative to potential job duties; and
- The applicant's age at the time of the offense.

The subgroup also stated that the fitness determination should be made within a reasonable time frame (e.g., 30 days), but the exact amount of time should be up to the States.

[36] This information was presented at the fourth Work Group meeting to facilitate the development of the Consolidated Option.

Table 3. Categories of Disqualifying Crimes and Minimum Disqualification Time Periods for the Consolidated Option

Disqualifying Crimes[a]	Minimum Disqualification Time Periods (Years)[b]
1. Crimes Against Care-Dependent or Vulnerable Individuals a. Felony and misdemeanor i. Sex crimes 1. Sexual assault and battery 2. Child pornography: distribution 3. Child pornography: possession	If felony, then 10. If misdemeanor, then 10 or less.[c]
ii. Abuse, neglect, mistreatment, exploitation of a person (includes children and adults) iii. Failure to register on sex offender registry [c]	If felony, then 5. If misdemeanor, then less than 5.
2. Crimes Against the Person a. Violent (felony) i. Murder and non-negligent homicide ii. (Forcible) rape or sexual assault iii. Assault iv. Battery v. Robbery vi. Cruelty and torture vii. Domestic violence	10
b. Non-violent (felony) i. Stalking ii. Alteration or diversion of drugs iii. Negligent homicide [c]	5
3. Crimes Against Property a. Felony i. Theft ii. Identity theft iii. Burglary iv. Arson [c] v. Fraud vi. Financial crimes (including uttering) [d] vii. Forgery viii. Cruelty to animals [c]	5
4. Crimes Related to the Unlawful Manufacture, Distribution, Prescription, or Dispensing of a Controlled Substance (Felony Only)	5

[a] Includes attempt, solicitation, conspiracy, aiding, and abetting for all applicable crimes.
[b] Start date of disqualification time period is date of conviction or date of release from imprisonment, whichever is later.
[c] Indicates where there were varying perspectives from Work Group members (the Work Group did not reach consensus).
[d] See the glossary in Appendix A for a definition of "uttering."

Table 4. Categories of Disqualifying Crimes for Preliminary Option 1

Categories of Disqualifying Crimes[a]
1. Tier 1
a. Murder
b. Robbery
c. Arson[b]
d. Sex crimes (e.g., rape)
e. Attempted murder, solicitation of murder
f. Kidnapping
g. Child pornography
h. Abuse, neglect, mistreatment, exploitation of a person (includes children and adults)
i. Human trafficking[b]
j. Distribution of child pornography
k. Distribution and manufacture of drugs
2. Tier 2
a. Assault
b. Battery
c. Arson[b]
d. Cruelty and torture
e. Stalking
f. Human trafficking[b]
3. Tier 3
a. Theft
b. Identity theft
c. Burglary

[a] Tiers would cross-reference to specific disqualification periods, which the subgroup did not define.
[b] Indicates where there were varying perspectives from Work Group members (the Work Group did not reach consensus regarding whether this category should be included as a disqualifier).

Preliminary Option 2

Disqualifying Convictions. For the second preliminary option, the subgroup stated that its goal was to protect the health, safety, and welfare of residents and beneficiaries. The subgroup identified the following general categories to classify disqualifying crimes: crimes against the person, crimes against property, crimes against public administration/public welfare, crimes involving alcohol and drugs, and sex crimes. The categories included but were not limited to the crimes listed in Table 5, meaning that States could choose to be more restrictive. In addition to including convictions for these crimes in these categories, attempt or conspiracy to commit any crime in one of these categories would be disqualifying.

Disqualification Time Periods. All crimes in these categories were to result in an automatic negative fitness determination. However, after specified time periods had elapsed, prospective employees would be eligible to seek a variance (as described in greater detail below). The subgroup chose the automatic disqualification approach in order to place a certain level of responsibility on the applicant to seek a variance and prove that he or she is not a threat to the vulnerable population served.

The time periods varied for categories that did have minimum disqualification periods, as the subgroup determined that for felony convictions, applicants should wait a longer period of time than for misdemeanor convictions before seeking a variance. The disqualification periods would start from the point of completion of sentence requirements. States could also set stricter minimums for the disqualification periods.

Variance Process. For disqualification categories with a specific minimum disqualification period, after the time period elapsed, prospective employees could seek a variance. For categories with no stated minimum disqualification period, States would have the ability to make a variance determination at any time. The State then would make the final fitness determination.

Rehabilitation Factors. The rehabilitation factors to be considered in the variance process under this option included:

- Passage of time;
- The person's complete criminal history;
- The person's age at the time of the crime;
- The harm to the victim and circumstances of the crime;
- The person's fulfillment of sentence requirements;
- The person's contributions to societal conditions (e.g., community involvement, attainment of education);
- The person's participation in rehabilitation programs such as counseling or therapy;

- Character references and recommendation letters from past employers;
- The similarity between the offender's victim(s) and potential persons served;
- Work history and current employment; and
- The nature of the position sought.

Status Quo

The status quo would allow States to set their own disqualifying convictions and rehabilitation factors as they determined appropriate. Through our review of State statutes and regulations we found that most States had legislation addressing the issue of disqualifying convictions for LTC employees in some manner, but approaches varied. For example, some States listed categories of crimes, while the majority listed each individual crime in their statutes or regulations. Furthermore, the disqualification periods differed significantly across the States. Some used time-limited approaches, while others used permanent disqualifications. Many States offered review mechanisms to allow employees or prospective employees to appeal decisions, demonstrate rehabilitation, or request a review of the initial negative fitness determination. For more detailed information about the State approaches see Section 3 of this report and for information about each State's requirements see Working Paper 2 (Borsky et al., 2012b).

In addition to the individual State requirements, as previously described, the SSA outlines four types of convictions that require the mandatory exclusion of certain individuals and entities from participation in Medicare and State health care programs. This Federal requirement would remain under the status quo as well as the other options.

Table 5. Categories of Disqualifying Crimes and Minimum Disqualification Time Periods for Preliminary Option 2

Category of Disqualifying Crimes	Minimum Disqualification Time Period (Years)[a]
1. Crimes Against the Person a. Abuse and neglect b. Homicide c. Assault and battery d. Robbery e. Crimes against a vulnerable person f. Kidnapping (includes abduction) g. Human trafficking	5 except as noted below Felony: 5; Misdemeanor: 3
2. Crimes Against Property a. Burglary b. Arson c. Fraud d. Theft e. Financial crimes f. Malicious destruction of property	5 except as noted below If <$500, then 3 If <$500, then 3
3. Crimes Against Public Administration/ Public Welfare a. Alteration or diversion of food or drugs b. Cruelty to animals c. Terrorist activity	5
4. Crimes Involving Alcohol and Drugs a. Possession of controlled substance b. Manufacture or distribution of controlled substance c. Conviction involving alcohol or drug use	Felony: 5; Misdemeanor: lack of consensus on time, if any
5. Sex Crimes a. Lewd and lascivious activity b. Sexual assault and battery c. Possession and distribution of child pornography d. Failure to register on the sex offender registry[b]	Felony: 15; Misdemeanor: lack of consensus on time, if any

[a] The disqualification time periods are from the completion of sentence requirements.
[b] Indicates that there were varying perspectives from Work Group members (the Work Group did not reach consensus regarding whether this category should be included as a disqualifier).

Comparison of Options and Key Discussion Points

Throughout the development of the options (i.e., the Consolidated Option, Preliminary Option 1, and Preliminary Option 2), the Work Group considered what types of disqualifying convictions, the length of disqualification time periods, and whether rehabilitation factors should be considered. Table 6 provides a brief comparison of each of the options.[37]

Identifying disqualification time periods was a particular challenge for the Work Group, especially while developing the preliminary options at the second and third Work Group meetings. Although limited information regarding recidivism was available at the first three Work Group meetings, additional research was presented at the fourth meeting to help Work Group members identify appropriate disqualification time periods. Dr. Blumstein presented his most recent empirical findings about recidivism rates at this meeting. While in one of the preliminary options the Work Group considered using lifetime disqualifications (with the opportunity to request a variance), the Work Group ultimately decided in its Consolidated Option that this policy did not align with current recidivism research, which indicates that the likelihood of committing another crime decreases with more time without criminal activity. Therefore, in the Consolidated Option the Work Group chose to assign disqualification time periods to different crimes based on their severity.

[37] The table does not include the status quo, as there is so much variation across States. However, in the prior section, we provided an overview of States' various approaches.

Table 6. Features of Each Option's Disqualifying Convictions and Rehabilitation Factors

Feature	Included in the Consolidated Option?	Included in Preliminary Option 1?	Included in Preliminary Option 2?
Federal minimums[a]	Yes	Yes	Yes
Felony convictions	Yes	Yes	Yes
Misdemeanor convictions	Yes, for some categories of crimes	No	Yes
Categories of disqualifying convictions	Yes, categories by who or what the crime was committed against	Yes, tiers by crime severity	Yes, categories by who or what the crime was committed against
Lifetime disqualifications	No	No	Yes, automatic negative fitness determinations
Time-limited disqualifications	Yes	Yes, but did not reach consensus on time periods	No, but could apply for variance after certain time period
Specification of when the disqualification period is initiated	Yes, date of conviction or date of release from imprisonment, whichever is later	Yes, date of conviction	Yes, date of completion of sentence requirements
Variance process	Yes	Yes	Yes, only after disqualification period ends
Rehabilitation factors	Yes	Yes	Yes
Section 6201 LTC facilities and providers	Yes	Yes	Yes
Other key features	This option includes attempt, solicitation, conspiracy, aiding, and abetting for all applicable crimes.	This option includes a "reasonable" time requirement for making fitness determinations.	This option includes attempts or conspiracy to commit any crime in one of the listed categories.

[a] All of the options set Federal minimums, where States would be free to enact stricter parameters. If States already had stricter requirements in place, they could maintain them.

Federal Minimums. All of the options were intended to provide a set of Federal minimum requirements. These would establish a baseline level of uniformity across States, but still allow States to enact stricter State-specific requirements, as desired. The Work Group wanted to ensure that States could enact stricter requirements or maintain their existing State laws if they were stricter than the recommended minimums.

4. Options

Felony Convictions. All of the options incorporated felony disqualifying convictions; however, the specific types of felony convictions varied. Despite the variation, certain felony convictions were included in all of the options (e.g., sex crimes, murder/homicide).

Misdemeanor Convictions. The Consolidated Option included some misdemeanor convictions, as the Work Group believed that these misdemeanors should be part of the Federal minimums. Preliminary Option 1 did not include any misdemeanor convictions, as the intent was that the Federal minimums should only include felony convictions and States would select which, if any, misdemeanor convictions to include. Preliminary Option 2 followed a similar approach to the Consolidated Option's approach and included some misdemeanor convictions. However, the specific types of misdemeanor convictions varied between these two options.

***Categories of Disqualifying Convictions*.** For the Consolidated Option, the Work Group first considered categorizing crimes by whether they were violent or non-violent offenses (e.g., not specifying subcategories such as murder and non-negligent homicide). However, the Work Group decided that while this may be a simpler approach, it left too much to State interpretation. Therefore, the Work Group opted to identify more specific crimes within each category to ensure these would be Federal minimums. The Work Group used categories based on the nature of the offense, or who or what the crime was committed against.

In the preliminary options, the Work Group adopted a similar approach and established categories of disqualifying crimes. For Preliminary Option 1, the Work Group used tiers of crimes based on the severity of the offense. For Preliminary Option 2, the Work Group used similar types of disqualification categories as were used in the Consolidated Option.

Lifetime Disqualifications. As described above, Work Group members reviewed the most recent recidivism research available to ensure that they developed disqualification periods based on empirical evidence to protect the health and safety of residents and beneficiaries. In its Consolidated Option, the Work Group chose not to include any lifetime disqualifications, as the empirical recidivism research did not align with this approach. Preliminary Option 1 also did not include lifetime disqualifications.

However, Preliminary Option 2 included lifetime disqualifications with the opportunity to request a variance. With this approach, all disqualifying crimes would result in an automatic negative fitness determination. After the specified time period had elapsed, prospective employees would be eligible to seek a variance. The subgroup chose the automatic disqualification approach in order to place a certain level of responsibility on the applicant to seek a variance and prove that he or she was not a threat to the vulnerable population served. For categories with no stated minimum disqualification period, States would have the ability to make a variance determination at any time. The time periods varied for categories that did have minimum disqualification periods, as the subgroup determined that for felony convictions, applicants should wait a longer period of time than for misdemeanor convictions.

Time-limited Disqualifications. Both the Consolidated Option and Preliminary Option 1 used time-limited disqualification periods. However, the specific time limits varied. The Work Group adopted this approach in these options to follow current recidivism research, which indicates that the likelihood of committing another crime decreases with more time without criminal activity. Therefore, the Work Group chose to assign disqualification periods based on the severity of the crime. As previously described, Preliminary Option 2 used a lifetime disqualification approach.

Specification of When the Disqualification Period is Initiated. The start date of the disqualification period varied among the options. The Consolidated Option used the date of conviction or the date of release from imprisonment, whichever is later. Preliminary Option 1 used the date of conviction, while Preliminary Option 2 used the date of completion of sentence requirements.

Variance Process. Throughout its discussion in developing the Consolidated Option, the Work Group considered different variance processes. It considered allowing an LTC facility or provider (on behalf of the prospective employee) or the prospective employee to request a variance during the disqualification period (Preliminary Option 1), or only allowing such requests after the end of the disqualification period (Preliminary Option 2). It also considered whether the prospective employee should be automatically eligible to apply for employment at the end of the disqualification period (Preliminary Option 1), or whether a fitness determination had to be made on a case-by-case basis after the end of the disqualification period (Preliminary Option 2). In its Consolidated Option, the Work Group ultimately determined that every prospective employee should be eligible to apply for a variance and deserved an opportunity to have his or her case heard even during the disqualification period (often the LTC facility or provider will request a variance on behalf of the prospective employee).

While some Work Group members preferred the stricter approach in Preliminary Option 2, where a prospective employee could only apply for a variance after the completion of the disqualification period, the Work Group ultimately agreed that its Consolidated Option was appropriate for setting Federal minimums, as States would have the authority to set stricter parameters. The Work Group also noted the potential for legal implications if individuals did not have opportunities to seek a variance.

Rehabilitation Factors. All options included suggested rehabilitation factors for consideration in the variance process, but the specific factors varied. In its consolidated option, the Work Group chose to include only the four identified in Section 6201 of the Affordable Care Act. These included the passage of time, extenuating circumstances, demonstration of rehabilitation, and relevancy of the particular disqualifying information with respect to the current employment of the individual. The Work Group noted that this would provide States with the freedom to

define more specific types of rehabilitation factors based on their experiences and existing processes.

The Work Group included numerous rehabilitation factors in its preliminary options. Preliminary Option 1 included the following: the person's character, the time elapsed since the conviction, completion of sentence requirements, the nature of the crime relative to potential job duties, and the applicant's age at the time of the offense. Preliminary Option 2 included the following: passage of time, the offender's complete criminal history, the offender's age at the time of the crime, the harm to the victim and circumstances of the crime, the offender's fulfillment of sentence requirements, the offender's contributions to societal conditions (e.g., community involvement, attainment of education), the offender's participation in rehabilitation programs such as counseling or therapy, character references and recommendation letters from past employers, the similarity between the offender's victim(s) and potential persons served, work history and current employment, and the nature of the position sought.

Section 6201 LTC Facilities and Providers. All options were intended to apply to the LTC facilities and providers identified in Section 6201 of the Affordable Care Act.

4.C. Other Areas of Consideration

In this section, we present additional areas of consideration raised by Work Group members; these issues have implications for the implementation of the Work Group's Consolidated Option and Preliminary Options 1 and 2, as well as for maintaining the status quo. The Work Group addressed some of these issues in its Consolidated Option as well as in Preliminary Options 1 and 2. However, the Work Group did not address all of them, as some, while important, were beyond the scope of the Work Group's primary mission.

Employee Considerations

Public Safety and Discrimination. The Work Group noted that public safety is not necessarily served by imposing background check requirements and disqualification periods on every person who has contact with LTC residents and beneficiaries. Employee advocates maintain that background check results do not necessarily correlate to whether employees will commit crimes against LTC residents or beneficiaries in the future. Such advocates also note that providing stable employment to those with criminal records actually improves public safety and limits recidivism (NELP, 2011).

As one legal scholar noted, "society's attitude toward those with criminal records is comparable to its attitude toward power plants, power lines, highways, and reservoirs: it is generally agreed that these structures are necessary and beneficial to modern society, but no one wants them to be located on or near their property. Similarly, it is generally agreed that employment is beneficial to ex-offenders, but often no employer wants to be the one employing them" (O'Brien & Darrow, 2007). Moreover, because African Americans account for 28.3 percent of all arrests, despite

being 12.9 percent of the population, employment advocacy groups consider the LTC background check requirement for a broader "direct access employee" population potentially discriminatory (NELP, 2011).

The Work Group discussed issues related to discrimination in deciding on its preliminary and consolidated options and noted that successful implementation would require a fair process, allowing prospective employees the ability to appeal negative fitness determinations. For every option discussed, balancing employee opportunities with the safety of residents and beneficiaries remained an important consideration.

Accuracy of Records. The Work Group noted that background check results are not always accurate[38] and, therefore, disqualify some individuals from employment erroneously. Employee advocates point to this example: 50 percent of FBI rap sheets produced for employment purposes were missing final disposition information, meaning that some workers who were arrested but who were ultimately found innocent were still reported (NELP, 2011).

Thus, the Work Group recognized that a broader "direct access employee" definition would necessitate expanded opportunities to review and appeal fitness determinations. Under all of the options, such processes would also need to be made available to those contractors, volunteers, and students who have direct access to residents or beneficiaries. In contrast, maintaining the status quo might not necessitate the development of expanded opportunities to review and appeal employment decisions.

LTC Facility and Provider Considerations

Workforce. LTC facilities and providers are concerned with maintaining an available workforce and a high-quality labor pool. The national demand for direct care workers is expected to increase by 34 percent from 2006 to 2016, which is three times greater than the projected growth rate in overall employment levels for the same period (PHI & DCWA, 2009). The Work Group discussed how longer periods of disqualification could have a negative impact on the workforce, especially in rural areas. The Work Group noted that rural areas have small populations and the available workforces are more limited than they might be in more urban areas. Applying a more restrictive approach to disqualifying convictions and rehabilitation factors could result in limiting the available workforce for LTC facilities and providers; therefore, the Work Group included time-limited disqualification periods and opportunities for variance requests.

The Consolidated Option does not include any lifetime disqualifications, and allows for a variance process even during the disqualification time period, allowing for more employment opportunities for the workforce. Preliminary Option 1 took a similarly expansive approach. In contrast, Preliminary Option 2 included lifetime disqualifications, as under this option

[38] This is especially true for background checks that are not fingerprint-based.

disqualifying crimes resulted in an automatic negative fitness determination. Thus, implementation of Preliminary Option 2 would potentially limit the available workforce pool. Maintaining the status quo would allow each State to approach disqualification differently.

Supervision. For the Consolidated Option, the Work Group did not reach consensus on definitions of the terms "regular" and "unsupervised" as they apply to volunteers and students (in determining who would be required to have background checks). The Work Group noted that the definition of "supervision" may be unclear to LTC facilities and providers. For example, is a volunteer supervised if there is an employee (who has undergone a background check and is considered a "direct access employee") present in the room with the volunteer and beneficiary at all times? Or is it enough to have an employee "supervisor" onsite during the visit, but not in the same room? The Work Group's initial approach in addressing these issues in its Consolidated Option was similar to the approach in Section 6201 of the Affordable Care Act. The Affordable Care Act says that provisional employees must be supervised, but the nature of that supervision is not explicitly defined. While the Work Group recognized that for implementation purposes, the facility or provider is in the best position to determine what constitutes supervision, it also discussed the need to have definitions for "regular" and "unsupervised" to create baseline standards.

For all of the options discussed, the definitions of these terms (i.e., "regular" and "unsupervised") determine who is considered a "direct access employee." Notably, the Consolidated Option and Preliminary Option 2 take a slightly less restrictive approach in not including students and volunteers unless they perform regular or unsupervised functions equivalent to those of a "direct access employee," while Preliminary Option 1 includes students and direct care facility volunteers who have *or may have* access to LTC residents or beneficiaries or their belongings, personal information, or medical records. Maintaining the status quo would leave defining the terms entirely to the States. Using the Consolidated Option or Preliminary Option 2 would potentially result in fewer background check requirements for students and volunteers compared with using Preliminary Option 1.

State Considerations

Reciprocity and Parity Across States. The Work Group discussed the fact that States have unique and independent approaches to defining crimes. While there are many similarities in crimes prosecuted across the States, there are also important differences. The Work Group noted that standardizing these crimes or "translating" a crime from one State to another could be a challenge. As an example, identity theft is a crime in many, but not all, States. Thus, a person with an identity theft conviction in one State might not be barred from employment in another State. Similarly, States have different thresholds for what constitutes felonies and misdemeanors for many different crimes. For example, in one State, the threshold for making the crime of theft a felony is if the damages amount to $300 or more. In another State, the threshold is $1,000.

While discussing these issues, the Work Group touched on "moral turpitude" as an example of a legal concept that is not defined the same way in every State. "Moral turpitude" is generally considered to be an "act of baseness, vileness or depravity in the private and social duties which a man owes to his fellow men or to society in general, contrary to the accepted and customary rule of right and duty between man and man" (Sosa-Martinez v. United States Attorney General, 2005). The issue with this concept is that it is defined by community standards, which can differ from State to State. For example, homosexuality was considered a crime of moral turpitude in a number of States until relatively recently, but it was not considered a crime of moral turpitude in other States during the same time period. Similarly, prostitution is considered a crime of moral turpitude in many States today, but is not considered to be a crime at all in parts of Nevada. In considering related implications, the Work Group decided to set Federal minimums for disqualifying convictions to create minimum standards for States. All of the options discussed by the Work Group would bring this challenge to the table, if implemented.

Juvenile Convictions. The Work Group identified another inconsistency across the States—how juvenile conviction records are treated. In some States, but not in others, a juvenile conviction for a sex crime is recorded in that individual's record as simply a juvenile crime, not specifically a sex crime, and is sealed as part of that individual's juvenile record. Thus, if another State conducts a background check on that individual, it would not know that the individual had a sex crime conviction. If that State disqualified people for sex crime convictions and this individual was not identified as having that specific conviction, that individual could be cleared for employment. Similar to the reciprocity issues discussed above, all of the Work Group's options would create the challenge of dealing with this issue, if implemented.

Arrests, Guilty Pleas, Convictions, and Expungements. The Work Group noted that variation exists across the States in how arrests, guilty pleas, convictions, and expungements are considered with respect to making fitness determinations. In some States, arrests are treated like criminal convictions in the fitness determination process and can therefore be reviewed in making the fitness determination. In other States, they cannot be reviewed or considered. As a Federal example, earlier this year Minnesota, Pepsi Co. was found by the EEOC to have engaged in race-based discrimination in its former use of criminal background checks. Pepsi's policy had stated that applicants who had been arrested (but not yet prosecuted or convicted) could not be hired. In this instance, the EEOC determined that 300 African Americans were adversely affected when Pepsi's criminal background check policy disproportionately excluded African American applicants from employment (EEOC, 2012).

The Work Group also expressed concern that an individual arrested for a serious crime could negotiate a plea for a lesser conviction, thus potentially circumventing disqualification time period requirements for the more serious crime that was committed. This is a common issue for States, where an individual who had committed a more serious crime might receive a less serious criminal conviction following negotiations with prosecutors. If such an individual moved out of State, his or her new State of residence would not know the circumstances surrounding the initial

arrest. Similarly, the Work Group expressed concern that individuals with expunged records would not have their criminal histories fully identified by background checks, even if they had committed disqualifying crimes. While the implications of this were troubling to the Work Group, it noted that setting a Federal floor was all that could be done to promote a standard for States to follow. The Work Group noted that despite Federal guidance, States define crimes in different ways and have unique criminal conviction processes, and that it will take time to overcome these challenges and develop a unified approach. This challenge would remain regardless of which option were used.

Federal Registries. The Work Group discussed States' use of different Federal registries (such as the LEIE) in the background check process.[39] Work Group members shared that some of their States use this registry to check every potential employee, while others do not. Some Work Group members noted that using the LEIE was a valuable cost-saving measure prior to conducting fingerprint-based background checks. Some of the Work Group members also noted that they check the National Sex Offender Registry as part of their standard background checks.[40]

Other Federal registries include the National Practitioner Data Bank and the Health Integrity and Protection Data Bank. The Work Group noted that these data sources are used primarily during the licensure process, or for finding information about doctors or other licensed health care providers (HHS HRSA, 2000; HHS HRSA, 2001). The Work Group noted that there was a need for a national nurse aide registry, but that significant information technology costs and software development challenges would be associated with creating and using such a registry.

Residency Requirements. The Work Group also discussed how some States, such as North Carolina, have different requirements for State- and Federal-level background checks, depending on an individual's length of residency (General Statutes of N.C., 2011). The Work Group noted that it remains difficult to prove exactly how long a person has lived in a given State.

Military Convictions. The Work Group discussed that military convictions are reported to the Criminal Justice Information Services Division of the FBI, per Department of Defense Instruction 5505.11 (DOD, 2010). However, because this is a recent requirement, the Work Group recognized that implementation might vary across the different military services. The Work Group was also concerned about the fact that there are different legal standards for criminal convictions under the Uniform Code of Military Justice than under Federal and State laws. This could lead to inconsistencies in how criminal convictions are defined or categorized. The discussion of these issues helped to inform the Work Group's recommendation to set Federal minimums regarding disqualifying convictions.

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[39] More information available at: https://oig.hhs.gov/exclusions/.

[40] More information available at: http://www.nsopw.gov/Core/Portal.aspx?AspxAutoDetectCookieSupport=1.

Background Checks for Workers From Other Countries. The Work Group discussed the challenge of conducting background checks on individuals who have moved to the United States from other countries. In particular, concerns were raised about the inability of facilities and providers to obtain accurate background check information on individuals who are not U.S. residents. The Work Group discussed related implications, as well as the possibility of obtaining information from international criminal conviction databases or criminal justice resources, such as Interpol. The Work Group recognized that doing so would be a challenge, although a number of States have requested information from foreign governments about particular individuals in the past.

As described earlier in this section, some of the issues raised here were addressed in the Work Group's options. While others were beyond the scope of the Work Group's primary mission, future efforts might benefit from further examination of these issues for a better understanding of their potential impacts on criminal background checks.

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5. Conclusions

5.A. Summary of Options

Since its first meeting in July 2011, the Work Group has endeavored to meet its two objectives: (1) define a "direct access employee," and (2) determine which convictions should disqualify a "direct access employee" from working in LTC and what types of rehabilitation factors should be considered in the variance process. As it developed its options, the Work Group sought to balance the need to protect the safety and well-being of LTC residents and beneficiaries with the need to employ a high-quality workforce. It also considered the cost implications of its options.[41] This balance is reflected in the Work Group's Consolidated Option and Preliminary Options 1 and 2. It is also reflected in the Work Group's consolidated goal statement, which says the Work Group aimed to build on existing regulations to address the special concerns of residents and beneficiaries and protect their health, safety, and welfare while maintaining a quality workforce for LTC facilities and providers.

As the Work Group developed its options, it assumed that criminal history checks would be fingerprint-based. It also intended its options to set Federal minimums, where States would be free to enact stricter parameters as they saw fit. This would create a minimum level of uniformity across the States, but it would also provide States with the option of enacting more stringent parameters according to their own specifications. Most of the Work Group's options would apply to all of the LTC facility and provider types identified in Section 6201 of the Affordable Care Act.

In this section, we summarize the Work Group members' Consolidated Option, as it was the most fully developed of the options. However, when Preliminary Options 1 and 2 differ significantly from the Consolidated Option, we highlight the differences.

Direct Access Employee

The Work Group developed its outcome-based definitions of a "direct access employee" under the assumption that the LTC facility or provider would determine whether the prospective employee met the definitional requirements.[42] The facility or provider is best suited for this role, as it knows the prospective employee's job description and the nature of the individual's work activities, especially regarding potential interaction with residents and beneficiaries. The Work Group's definitions are intended to guide the facilities and providers in determining who is a "direct access employee." The Work Group also assumed that not all individuals working in

[41] While the Work Group considered the cost implications of its options, it did not determine who or what entities would bear the costs of the background checks.

[42] There may be times when the State determines whether the prospective employee meets the definitional requirements.

LTC would be classified as "direct access employees"; rather, classification as a "direct access employee" would depend on an individual's work and the nature of his or her duties. In its Consolidated Option, the Work Group noted that individuals who are employed by the facility or provider and have "direct access" to residents and beneficiaries would most likely be "direct access employees." However, the Work Group recognized that there are other individuals working in a facility, such as volunteers, students, and contractors, whose job descriptions may differ from those of employees. Therefore, the Work Group developed two exceptions in its definition—one for volunteers and students and one for contractors. These exceptions were intended to more narrowly restrict the classification of "direct access employees" to those volunteers, students, and contractors most likely to interact with residents and beneficiaries and have potential opportunity to harm them.

The preliminary options also included exceptions for these types of prospective workers. However, the exception criteria varied among the options. For example, in Preliminary Option 1, contractors performing repairs, deliveries, installations, and similar services (and no other types of services) were not included. Preliminary Option 1 also had the unique feature of being intended to apply to all facilities and providers receiving Medicare or Medicaid funding. In Preliminary Option 2, all contractors were included, assuming they met the other requirements of the definition.

Disqualifying Convictions

The Work Group developed its disqualifying conviction categories and rehabilitation factors with the intent that States would implement them as minimum requirements. The Work Group developed general categories of disqualifying convictions, which would allow States the flexibility to determine which specific crimes fell within these categories. The Work Group noted that this would be important because there may be variation in the way States define their crimes. While the categories varied across the options, the intent was similar.

Disqualification Time Periods and Variance Process

In its Consolidated Option, the Work Group recommended minimum disqualification time periods for each conviction category. The intent was that there would be longer disqualification periods for more serious or more violent crimes. The disqualification period would begin on the date of conviction or the date of release from imprisonment, whichever was later. Facilities and providers (on behalf of the prospective employee), or the prospective employee, could apply for a variance, even during the disqualification period. At the end of the disqualification period, that conviction would no longer be considered a reason for an automatic negative fitness determination. However, it may still be considered in relation to subsequent convictions to determine a pattern of criminal history.

While Preliminary Option 1 did not include specific disqualification time periods, its intent was that the disqualification periods would be based on the severity of the crimes. Facilities and

providers (on behalf of the prospective employee), or the prospective employee, would be able to apply for a variance during the disqualification period. The disqualifying convictions in Preliminary Option 2 would result in an automatic negative fitness determination. However, facilities and providers (on behalf of the prospective employee), or the prospective employee, could apply for a variance at the end of the disqualification period. The start dates of the disqualification periods also varied—in Preliminary Option 1, the disqualification period began on the date of conviction, whereas in Preliminary Option 2, it began on the date of the completion of sentence requirements.

Rehabilitation Factors

In its Consolidated Option, the Work Group outlined four rehabilitation factors to be considered in the variance process; these factors are also noted in Section 6201 of the Affordable Care Act. Preliminary Options 1 and 2 each included other rehabilitation factors.

5.B. Implementation

This final section describes how the Work Group's Consolidated Option could be implemented by States and LTC facilities and providers. We focus on the Consolidated Option as it was the most fully developed of the options. However, when the features of the Consolidated Option differ significantly from those of the preliminary options, we also describe the features of the preliminary options. We summarize some of the implementation-related issues that the Work Group members discussed at its fourth meeting when it developed its Consolidated Option. We conclude with some final considerations.

Suggested Decision Tree

Appendix D presents a decision tree to illustrate how the Work Group's Consolidated Option could be implemented by LTC facilities and providers as well as States. The decision tree has two horizontal swim lanes—the top swim lane is for the LTC facility or provider and the bottom swim lane is for the State background check unit. For purposes of presentation, we have assigned specific responsibilities to the facility or provider and the State; however, a State program may assign these responsibilities differently. For example, in some States, the facility or provider may not be allowed to know the contents of a criminal history record or that one even exists. Therefore, some steps assigned to the facility or provider in our decision tree may instead be assigned to the prospective employee or another entity.

The decision tree is only for the criminal history check component of the fitness determination process; it does not apply to the registry check or other components. While the decision tree shows the facility or provider as requesting a variance, it is important to note that a prospective employee can also request a variance and be notified of the final fitness determination outcome. For details about the assumptions used in developing the decision tree, see Appendix D.

5. Conclusions

The primary steps in the decision tree are listed below.

- Step 1: The LTC facility or provider would determine who is a "direct access employee."
- Step 2: The State would determine whether the prospective "direct access employee" has any disqualifying convictions within the disqualification time period and issue a fitness determination accordingly.
- Step 3: The LTC facility or provider could make an offer of employment or request a variance from the State, depending on the State's fitness determination.
- Step 4: The State could consider the rehabilitation factors for the variance request and re-issue a fitness determination accordingly, depending on the State's fitness determination.
- Step 5: The LTC facility or provider could then make an employment offer, if allowed per the State's variance determination.

Examples to Illustrate Implementation of the Consolidated Option

To illustrate how the decision tree would work and the implementation of the Consolidated Option, below we provide three fictitious examples of individuals applying to work for an LTC facility or provider and we describe how the facility or provider and State would make their fitness determinations. As we discuss these examples we reference the decision tree in Appendix D to highlight the various steps and decision points in the process. We also highlight decision points that differ significantly in the preliminary options compared with the Consolidated Option.

Example 1—Employee: *Betty is applying for employment as a financial analyst at a home health agency. She would manage the finances at the home health agency, including submitting requests for reimbursement from health insurance companies. She is not expected to have any physical contact with beneficiaries; however, she will have access to the beneficiaries' health insurance and medical treatment information, and potentially bank account information. Betty had a felony conviction for dispensing a controlled substance four years ago. She did not serve a prison sentence.*

First, the facility would need to determine whether Betty would have direct access. We know that Betty is not expected to have one-on-one contact with any beneficiaries; however, she would have access to some PII (e.g., full names and dates of birth, and potentially bank account information for the beneficiaries) that she would need in order to submit for reimbursement from insurance companies (NIST, 2010). Therefore, the facility would determine that she would have direct access. The next decision step for the facility is to determine what type of worker she would be—an employee/owner, contractor, or volunteer/student. We know she would be an employee and therefore would be subject to a criminal background check. The facility would submit a request to the State to conduct a fingerprint-based criminal background check.

When the State conducts its check, it would learn that Betty was convicted of felony dispensing of a controlled substance four years ago, which is on the list of disqualifying convictions. The State would check how much time had passed since Betty was convicted or released from imprisonment, whichever were later. She was convicted four years ago, and she did not serve a prison sentence. The disqualification period for this offense is 5 years; therefore, she would receive a negative fitness determination. After the State notifies the facility of this determination, the facility would decide whether it wanted to request a variance. If it does, it would request a variance and the State would review the rehabilitation factors and issue a fitness determination. If the facility does not request a variance, it would be unable to make an employment offer to Betty.

Under Preliminary Options 1 and 2, felony dispensing of a controlled substance is not a disqualifying conviction. Therefore, in this case, the facility would determine whether to offer employment.

Example 2—Contractor*: Robert is employed by a food-services company that wishes to assign him to work as a cook at an assisted living facility with which it has a contract. As a contracted cook, he would usually stay in the kitchen preparing meals for the residents. However, the facility also expects that Robert will deliver food to residents' rooms when the facility is short-staffed. Robert was convicted of felony sexual assault and battery 11 years ago. He served a 4-year prison sentence; it has been 7 years since he completed his prison sentence.*

The first step would be for the LTC facility to determine whether Robert would have direct access. The facility expects him to deliver food to residents' rooms. While doing this, he could have one-on-one contact with a resident or beneficiary. Therefore, the facility would conclude that he would have direct access. Next, the facility would need to consider the type of arrangement he would have with the facility. We know he would be a contractor. As the definition has an exception for some contractors, the facility needs to ask whether Robert would perform repairs, deliveries, installations, or similar services [only] for the facility. According to the description of Robert's position, the answer would be no. Therefore, the facility would determine that Robert would be a "direct access employee" and would be subject to a criminal background check. The facility would submit a request to the State to conduct a fingerprint-based criminal background check.

The State would then conduct a fingerprint-based criminal background check. The State would learn that Robert had a conviction for felony sexual assault and battery. He was convicted 11 years ago and served a 4-year prison sentence, and it has been 7 years since he completed his prison sentence. The State would check the list of disqualifying convictions and see that felony sexual assault and battery is disqualifying. The State would need to consider how much time had passed since the conviction or release from prison, whichever were later. A felony conviction of sexual assault and battery has a 10-year disqualification period. As it has only been 7 years since

Robert completed his prison sentence, the State would issue a negative fitness determination and notify the facility. Robert could not be assigned to work at the facility, unless a variance were obtained.

Under Preliminary Options 1 and 2, felony sexual assault and battery were disqualifying. While the intent of Preliminary Option 1 was to include disqualification time periods, the subgroup did not specify these time periods. Under Preliminary Option 2, since Robert was convicted he would receive an automatic negative fitness determination. As it has only been 7 years since Robert completed his prison sentence, he could not request a variance (minimum disqualification period for felony sex crimes is 15 years under Preliminary Option 2).

***Example 3—Volunteer**: Al is applying to volunteer at a nursing facility. If accepted, the organization he volunteers through has an agreement with the facility whereby he would provide assistance with activities on a weekly basis. He would perform tasks such as delivering mail and meals to residents and reading to residents. Through some of these activities, he would be expected to have one-on-one contact with the residents. Al was convicted of felony domestic violence 12 years ago; he did not serve a prison sentence.*

The LTC facility would first determine whether Al would have direct access. We know that Al is expected to have one-on-one contact with residents. The next decision step for the facility is to determine what type of worker he would be—an employee/owner, contractor, or volunteer/student. He would be a volunteer, and we know that his organization has an agreement with the facility. We also know that he would volunteer on a weekly basis. The description above does not indicate whether he would be supervised. The facility would need to determine whether his activities would be considered regular or unsupervised functions equivalent to those of "direct access employees." Assuming that the facility determined that this would be the case (due to the fact that he would volunteer on a weekly basis), he would be considered a "direct access employee" and would be subject to a criminal background check. The facility would submit a request to the State to conduct a fingerprint-based criminal background check.

Under Preliminary Option 1, Al would not be considered a direct access employee as he would be a volunteer who would not provide direct care (only direct care volunteers were included in the definition of "direct access employee"). Under Preliminary Option 2, the key question is whether Al would have duties equivalent to those of a "direct access employee." Assuming he would, he would be subject to a criminal background check.

The State would determine whether Al had any criminal convictions. We know he has a conviction for domestic violence, which is on the list of disqualifying convictions. The State would check how much time had passed since Al was convicted or released from imprisonment, whichever were later. Al did not serve a prison sentence and the conviction was 12 years ago; as

the disqualification time period for this crime is 10 years, the disqualifying conviction is not within the disqualification time period. Al would receive a positive fitness determination.[43] The State would notify the facility of the positive fitness determination. The facility could then determine whether it wanted to allow Al to volunteer.

Under Preliminary Option 1, domestic violence was not specifically listed as a disqualifying conviction. However, the State would need to consider whether domestic violence fell within the categories of sex crimes; abuse, neglect, mistreatment, exploitation of a person (includes children and adults); assault; or battery. If it fell within one of these categories, the State would need to consider the disqualification time period (undetermined by the Work Group subgroup). Under Preliminary Option 2, domestic violence was not specifically listed as a disqualifying conviction. However, the State would need to consider whether domestic violence fell within the categories of abuse and neglect, assault and battery, crimes against the vulnerable, or sexual assault and battery. If so, the State would need to review the disqualification period, which varies depending on the category of disqualifying convictions. If the offense was committed beyond the minimum disqualification period, the facility or provider could request a variance. The State would then review the variance request and consider the specified rehabilitation factors.

Implementation Considerations

If any of the Work Group's options were enacted through a Federal regulation, there would be several potential implications. At its fourth meeting, the Work Group discussed some of the implications for members' own States or agencies that would arise from the Consolidated Option. Overall, the State Work Group members noted numerous potential advantages of the Consolidated Option. One State noted that it was excited about the prospect that this would allow it to implement a criminal history check requirement as part of its background check process, as currently the State has no similar requirement. Another State noted that it welcomed a push for these requirements from the Federal government, as it has wanted to expand its background check requirements for some time. The prospect of having the authority to request an FBI fingerprint-based criminal background check (rather than relying on a name-based search only) was a benefit raised by one State. Another State noted that these options would expand its current State requirements to additional LTC facilities and providers. While the Work Group members viewed this as a benefit, they also noted that it would bring implementation challenges as some State agencies only have jurisdiction over a subset of the LTC facility and provider types to which these options would apply. Therefore, implementation of the options would potentially require extensive collaboration across State agencies.

The State Work Group members discussed other difficulties they would expect to encounter in implementing the options. For example, cost was a significant issue. While they welcomed the

[43] The facility may not be notified of Al's prior criminal history as he received a positive fitness determination.

requirements, the Work Group members wanted to know how the costs of the background checks would be paid, and whether the State system for processing background checks would be reimbursed. Some Work Group members noted that the requirements would lead to increases in the volume of background checks in their States, which would increase resource requirements and costs. Discussion among the Work Group members highlighted the assumption that if there were a Federal requirement, the costs would be reimbursed, at least in part, through Federal funding (e.g., Medicare or Medicaid payments), which Work Group members viewed as beneficial to implementation.

The potential need for new State statutes and regulations was also raised as an issue, which some indicated would take a significant amount of time. However, one State noted that a Federal requirement would make it easier for the State to re-write its regulations. One State that currently has stricter requirements noted that it would hope that these options would not necessitate a reversal of its new background check policies by mandating that it relax its requirements. The State noted that while the options would only be Federal minimums, it was nevertheless concerned that providers in the State would want to use the Federal standards rather than the State's stricter standards. In particular, the State was concerned about the disqualification time periods and whether minimum Federal requirements would make it more difficult for States to maintain or create more stringent standards. However, the Work Group wanted to ensure that all States would have the opportunity to implement stricter standards, if desired. There is existing precedent for this where States have enacted more stringent requirements than Federal law mandated. For example, under Section 1128(c) of the SSA, the mandatory exclusions are not required to be permanent exclusions; however, some States go further than the SSA and include stricter disqualifying convictions and more restrictive disqualification time periods in their State statutes and regulations.

Final Considerations

As CMS determines its next steps, including whether it will pursue a new Federal regulation, the Work Group hopes that CMS will consider the Work Group's findings and options for the definition of a "direct access employee" and disqualifying convictions and rehabilitation factors. The Work Group also hopes that CMS will consider the balance between the need to protect the safety and well-being of residents and beneficiaries and the need to manage, employ, and provide employment opportunities to a high-quality workforce, which was a critical consideration that the Work Group focused on in developing its options. The Work Group welcomed the opportunity to develop these options for CMS, and it will look to CMS to consider the most appropriate course of action moving forward.

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Appendix A. Glossary

Direct access employee – employee with direct access to individuals served in LTC settings. More specifically, as defined by the Work Group, this is an individual who has direct access to a resident or beneficiary through ownership, employment, or a contract/agreement with an LTC facility or provider. This does not include volunteers or students, unless they perform regular or unsupervised functions equivalent to those of "direct access employees." This does not include contractors performing repairs, deliveries, installations, or similar services [only] for the facility or provider. Direct access is having, or expecting to have, duties that involve one-on-one contact with a resident or beneficiary, or access to the resident or beneficiary's property, PII, or financial information.

Direct care workers – paraprofessional workers that include "...nurse aides or assistants, personal care aides or assistants, home health aides, home care aides and others who provide paid hands-on assistance with bathing, eating, dressing and other activities of daily living for persons with disabilities" (DALTCP, 2004).

Felony – a criminal offense that is more serious than a misdemeanor, and is typically characterized under Federal law and many State statutes as any offense punishable by death or imprisonment in excess of one year.

Job title- or duty-based definition of a "direct access employee" – a definition where "direct access employee" status is determined by the job title, assigned duties, or employment status of the employee, not by the consequences of actual or expected interaction with residents and beneficiaries. A job title- or duty-based definition often includes a list of applicable job titles or personnel duties that identify which employees are "direct access employees."

List of Excluded Individuals/Entities (LEIE) – this is a list produced by the U.S. Department of Health and Human Services, Office of Inspector General, that "...provides information to the health care industry, patients and the public regarding individuals and entities currently excluded from participation in Medicare, Medicaid and all other Federal health care programs" (HHS, n.d.).

Misdemeanor – a criminal offense that is less serious than a felony and generally punishable by a fine, a jail term of up to one year, or both.

Non-governmental organization – non-profit organizations that are independent from the State or Federal government.

Outcome-based definition of a "direct access employee" – a definition where "direct access employee" status is determined by the consequences of actual or expected interaction with residents and beneficiaries, not the job title, assigned duties, or employment status of the

employee. Outcome-based definitions often describe the nature of the contact between the employee and residents or beneficiaries.

Petit larceny – a form of larceny, or the stealing of another's personal property, in which the value of the property taken is generally low (although the exact amount varies by State).

Personally identifiable information (PII) – "any information about an individual maintained by an agency, including (1) any information that can be used to distinguish or trace an individual's identity, such as name, Social Security number, date and place of birth, mother's maiden name, or biometric records; and (2) any other information that is linked or linkable to an individual, such as medical, educational, financial, and employment information" (NIST, 2010).

Subject matter expert (SME) – an individual with expertise on a particular topic, such as background checks in LTC.

Uttering – passing or making use of a forged writing or document with knowledge of its forged nature and the intent to defraud.

Appendix B. Project Milestones

Activity	Completion Date
First Work Group Meeting – introductions and project overview	July 12, 2011 (teleconference/webinar)
Second Work Group Meeting – discuss definitions of "direct access employee"	September 15-16, 2011 (St. Louis, MO)
Working Paper 1 – preliminary options for definitions of "direct access employee"	November 18, 2011
Feedback on Working Paper 1 – Work Group members to provide to CNA	December 30, 2011
Third Work Group Meeting – discuss disqualifying convictions and rehabilitation factors	January 11-12, 2012 (Baltimore, MD)
Working Paper 2 – preliminary options regarding disqualifying convictions and rehabilitation factors	February 17, 2012
Feedback on Working Paper 2 – Work Group members to provide to CNA	March 9, 2012
Fourth Work Group Meeting – discuss Consolidated Option for definition(s) of "direct access employee" and disqualifying convictions and rehabilitation factors	March 20-22, 2012 (Sacramento, CA)
Draft Report – document options (Working Papers 1 and 2 included as appendixes to the Draft Report)	April 27, 2012
Feedback on Draft Report – Work Group members to provide to CNA	May 22, 2012
Fifth Work Group Meeting – discuss next steps for the Draft Report	September 20, 2012
Revised Draft Report – CNA to submit revised Draft Report to CMS and Work Group	October 16, 2012
Feedback on Revised Draft Report – Work Group members and CMS to provide to CNA	November 6, 2012
Revised Report – CNA to submit Revised Report to CMS and Work Group	Three weeks after receipt of comments (report is not for public release)
CMS Clearance Process – report not for public release until completion of clearance process	To be determined

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Appendix C. List of Contacted State Agencies and Other Organizations

Alabama Department of Public Health

Alabama Medicaid Agency

Alaska Department of Health and Social Services

American Health Care Association

American Samoa Office of the Attorney General

Arkansas Department of Human Services

Arizona Department of Health Services

California Department of Public Health

Carnegie Mellon University

Colorado Department of Public Health and Environment

Connecticut Department of Public Health

District of Columbia Department of Health

Delaware Department of Health and Social Services

The Federal Bureau of Investigation

Florida Agency for Health Care Administration

Genesis Health Care

Georgia Department of Human Services

Guam Department of Public Health and Social Services

Hawaii Department of Health

Iowa Department of Human Services

Idaho Department of Health and Welfare

Illinois Department of Public Health

Indiana State Department of Health

Kansas Department of Health and Environment

Kentucky Cabinet for Health and Family Services

LeadingAge

Louisiana Department of Health and Hospitals

Massachusetts Department of Public Health

Maryland Department of Health and Mental Hygiene

Maine Department of Health and Human Services

Michigan Department of Licensing and Regulatory Affairs

Minnesota Department of Human Services

Missouri Department of Health and Senior Services

Mississippi State Department of Health

Montana Department of Public Health and Human Services

National Adult Day Services Association

National Association for Home Care & Hospice

North Carolina Department of Health and Human Services

North Dakota Department of Health

Northern Mariana Islands Department of Public Health

Nebraska Department of Health and Human Services

New Hampshire Department of Health and Human Services

New Jersey Department of Health

New Mexico Department of Health

Nevada Department of Health and Human Services

New York Department of Health

Ohio Department of Health

Oklahoma State Department of Health

Oregon Department of Human Services

Pacific Retirement Services, Inc.

Pennsylvania Department of Aging

Phoenix Care Solutions

Puerto Rico Department of Health

Rhode Island Office of Attorney General

South Carolina Department of Health and Environmental Control

South Dakota Department of Health

Tennessee Department of Health

Texas Department of Aging and Disability Services

United States Virgin Islands Department of Health

United States Department of Justice, Bureau of Justice Statistics

Utah Department of Health

Virginia Department of Health

Vermont Department of Disabilities, Aging, and Independent Living

Washington Department of Social and Health Services

Wisconsin Department of Health Services

West Virginia Department of Health and Human Resources

Wyoming Department of Health

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Appendix D. Decision Tree – Consolidated Option

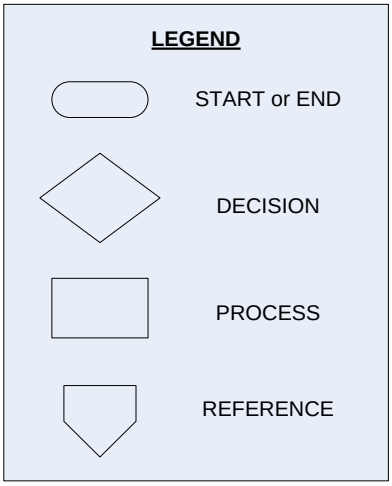
This decision tree illustrates how the Centers for Medicare & Medicaid Services (CMS) Long Term Care Criminal Convictions Work Group's Consolidated Option could be implemented by long term care (LTC) facilities and providers as well as States. We illustrate the Consolidated Option rather than the preliminary options because the Consolidated Option was developed based on the preliminary options and was the most developed of the options. The Consolidated Option is intended to set Federal minimums, where States would be free to enact stricter parameters as they saw fit.

The decision tree has two horizontal swim lanes—the top swim lane is for the LTC facility or provider and the bottom swim lane is for the State background check unit. The assumptions used to develop the decision tree include the following:

- Specific responsibilities are assigned to the facility or provider and to the State. However, a State program may assign these responsibilities differently. For example, instead of a facility or provider, the prospective employee could request a variance and be notified of the final fitness determination outcome. In addition, in some States, LTC facilities and providers (instead of or in addition to the State background check unit) may receive criminal history information from the background check. However, in other States the facility or provider may not be allowed to know the content of a criminal history record or that one even exists. Therefore, some steps may be reassigned.
- The employer should advise a prospective employee of the disqualifying convictions and disqualification time periods prior to the steps outlined in the decision tree.
- The decision tree is only for the criminal history check component of the fitness determination. The decision tree does not include other components of the fitness determination, such as the registry checks.
- Prospective employees will need to be fingerprinted so the State can conduct the fingerprint-based criminal background check; however, this process is not shown in the decision tree.
- The decision tree does not include the process of offering provisional employment or making the actual employment offer.
- The decision tree is intended for use each time a prospective employee applies for a position with an LTC facility or provider; if a facility or provider were to consider a prospective employee for more than one position, it would need to re-start this decision-making process for each position, because the expected job duties are key to the fitness determination.

- This is one suggested model for a decision tree; State background check units may elect to use alternative models.
- This is a model for the Consolidated Option only; it does not include the preliminary options.

The decision tree uses various shapes to signify different stages in the decision-making process (see the legend below). An oval signifies the start or end of the decision. A diamond shows a key decision point. A rectangle represents a procedural step or process. A pentagon signifies a reference to the next step in the process.



The five primary steps in the suggested decision tree for the Consolidated Option are described below. Prior to the first step, the LTC facility or provider would conduct checks of the appropriate registries (e.g., the U.S. Department of Health and Human Services Office of Inspector General's List of Excluded Individuals/Entities (LEIE), the National Sex Offender Registry (NSOR), and State abuse registries).

Step 1: The LTC facility or provider would determine whether the prospective employee would be a "direct access employee."

- In the first step, the LTC facility or provider would determine whether the prospective employee would be a "direct access employee." The initial decision point is "will the prospective employee have direct access?" The LTC facility or provider would need to consult the definition of direct access to make this determination. If the person would not have direct access, a background check would not be required and the process ends.
- If the person would have direct access, the next decision point is "will the prospective employee have one of the following arrangements with the LTC facility or provider: employment or ownership, contract, or volunteer or student?" If the answer is "employment or ownership," a background check would be required. The next step

would be the State background check unit Disqualifying Convictions Determination (Step 2).

- If the answer is "contract," the facility or provider determines whether the prospective employee will "perform repairs, deliveries, or installations, or similar services [only]." It is assumed that prospective employees who would only perform these services would not have direct access. If the answer to this question is "no," a background check would be required and the next step would be the State background check unit Disqualifying Convictions Determination (Step 2). If the answer is "yes," a background check would not be required and the process ends.

- If the answer is "volunteer or student," the facility or provider determines whether the prospective employee will "have an agreement with the LTC facility or provider." If not, a background check would not be required and the process ends. If so, the facility or provider asks, will the prospective employee "perform regular or unsupervised duties equivalent to those of a direct access employee?" If the answer is "no," a background check would not be required and the process ends. If the answer is "yes," a background check would be required and the next step would be the State background check unit Disqualifying Convictions Determination (Step 2).

Step 2: The State would determine whether the prospective "direct access employee" has any disqualifying convictions within the disqualification time period and issue a fitness determination accordingly.

- In the second step, the State would determine whether the prospective "direct access employee" has any disqualifying convictions within the disqualification time period and issue a fitness determination accordingly. The State would first ask, "does the prospective employee have a disqualifying conviction?" The State would need to consult the list of disqualifying convictions. If the answer is "no," the State would issue a positive fitness determination (i.e., eligible) and the State would notify the LTC facility or provider of the fitness determination outcome. The State may also notify the prospective employee of the fitness determination outcome. The next step would be the Employment Offer or Variance Request (Step 3).

- If the prospective employee does have a disqualifying conviction, the State would ask, "was the conviction within the disqualification period?" The State would need to consult the disqualification time periods for each conviction. If the conviction was not within the disqualification period, the State would issue a positive fitness determination (i.e., eligible) and the State would notify the LTC facility or provider of the fitness determination outcome. The State may also notify the prospective employee of the fitness determination outcome. The next step would be the Employment Offer or Variance Request (Step 3).

- If the prospective employee does have a conviction within the disqualification period, the State issues a negative fitness determination (i.e., disqualified) and the State notifies the facility or provider of the fitness determination outcome. The State may also notify the prospective employee of the fitness determination outcome. The next step would be the Employment Offer or Variance Request (Step 3).

Step 3: The LTC facility or provider could make an offer of employment or request a variance from the State, depending on the State's fitness determination.

- In the third step, the LTC facility or provider could make an offer of employment or request a variance from the State, depending on the State's fitness determination. The facility or provider would ask, "did the State issue a positive fitness determination?" If the answer is "yes," the facility or provider can make an employment offer and the process ends.

- If the answer is "no" regarding whether the State issued a positive fitness determination, the facility or provider has the option of requesting a variance (a prospective employee may also request a variance). The facility or provider would need to ask, "does the facility or provider want to request a variance?" If not, the facility or provider cannot make an employment offer and the process ends. If so, the facility or provider submits a request for a variance and the next step is the State background check unit Variance Determination (Step 4).

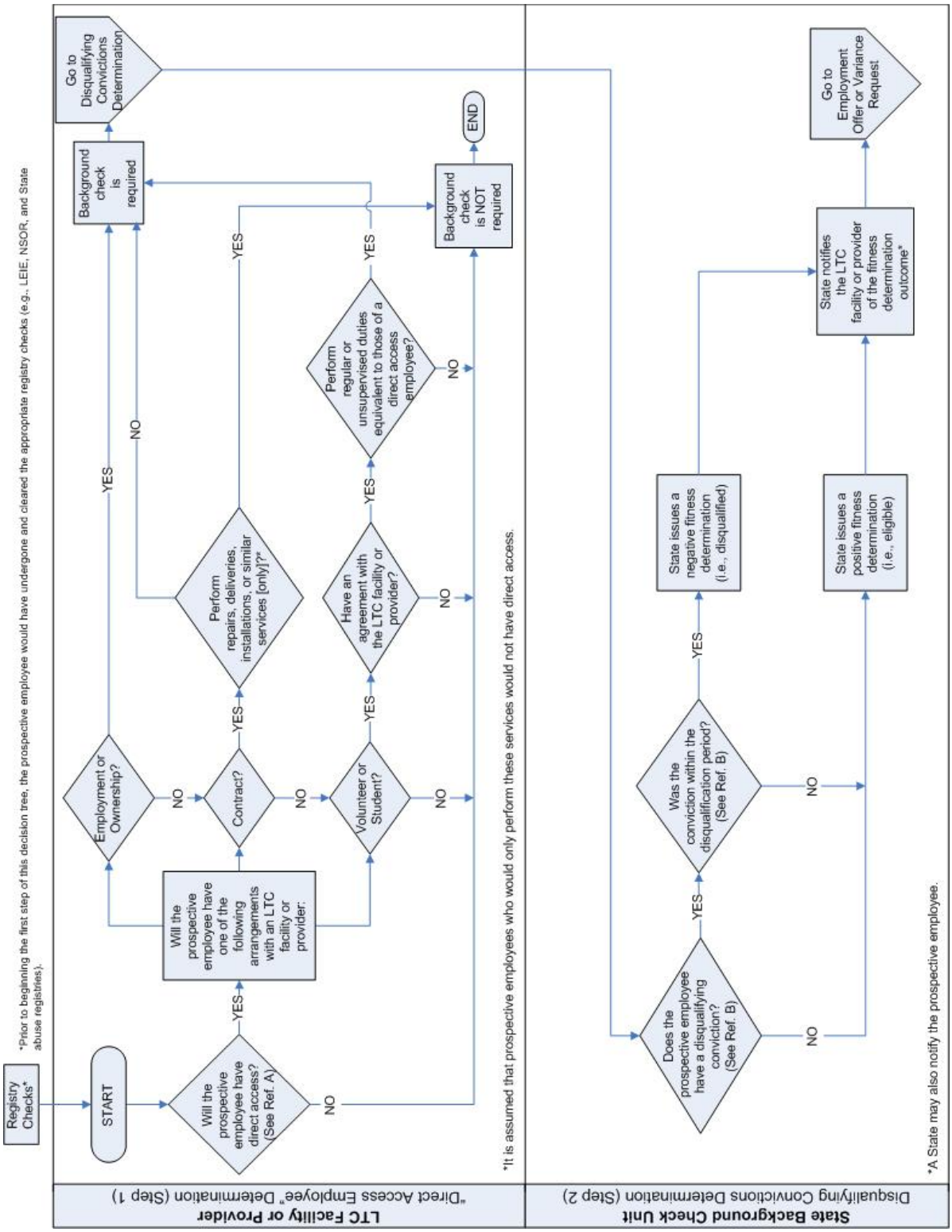
Step 4: The State would consider the rehabilitation factors for the variance request and re-issue a fitness determination accordingly.

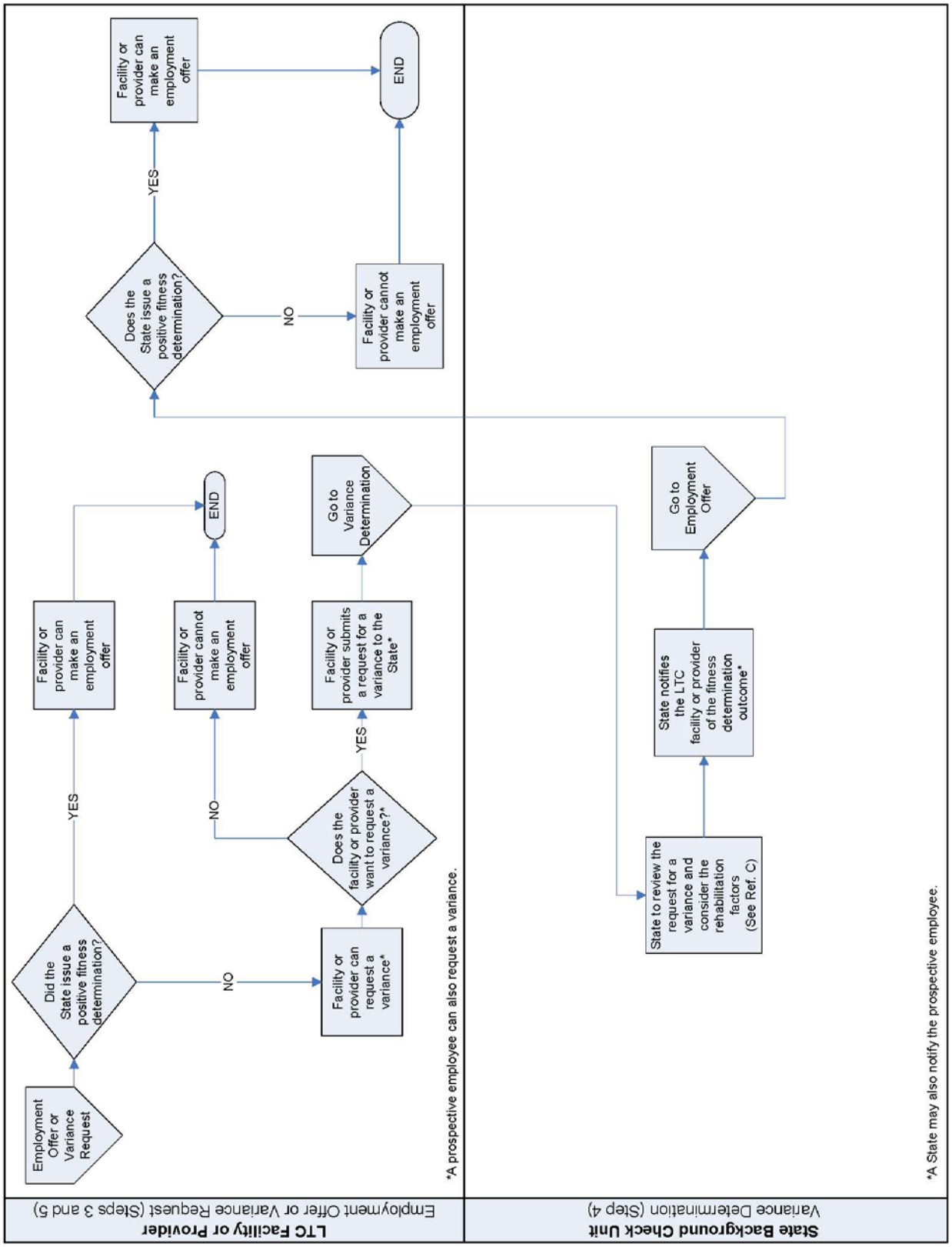
- In the fourth step, the State would consider the rehabilitation factors for the variance request and re-issue a fitness determination accordingly. The State notifies the LTC facility or provider of the fitness determination outcome (the State may also notify the prospective employee). The next step is the Employment Offer (Step 5).

Step 5: The LTC facility or provider could then make an employment offer, if allowed by the State's variance determination.

- In the fifth, and final step, the LTC facility or provider could make an employment offer and the process ends. If the prospective "direct access employee" is still determined to be "ineligible," the facility or provider cannot make an employment offer and the process ends.

Figure 1. Suggested Decision Tree for the Consolidated Option




LTC Facility or Provider
Employment Offer or Variance Request (Steps 3 and 5)
Employment Offer or Variance Request
Did the State issue a positive fitness determination?
YES
NO
Facility or provider can make an employment offer
Facility or provider cannot make an employment offer
END
Facility or provider can request a variance*
Does the facility or provider want to request a variance?*
YES
NO
Facility or provider submits a request for a variance to the State*
Go to Variance Determination
*A prospective employee can also request a variance.
Does the State issue a positive fitness determination?
YES
NO
Facility or provider can make an employment offer
Facility or provider cannot make an employment offer
END
State Background Check Unit
Variance Determination (Step 4)
State to review the request for a variance and consider the rehabilitation factors (See Ref. C)
State notifies the LTC facility or provider of the fitness determination outcome*
Go to Employment Offer
*A State may also notify the prospective employee.

Reference A: Consolidated Option for the Definition of "Direct Access Employee"

A "direct access employee" is an individual who has **direct access** to a resident or beneficiary through ownership of, employment with, or a contract/agreement with an LTC facility or provider. This does not include volunteers or students, unless they perform regular or unsupervised duties equivalent to those of "direct access employees." This also does not include contractors performing repairs, deliveries, installations, or similar services [only] for the facility or provider.

Direct access is having, or expecting to have, duties that involve one-on-one contact with a resident or beneficiary, or access to the resident or beneficiary's property, personally identifiable information, or financial information.

Reference B: Categories of Disqualifying Crimes and Minimum Disqualification Time Periods for the Consolidated Option

Disqualifying Crimes[a]	Minimum Disqualification Time Periods (Years)[b]
1. Crimes Against Care-Dependent or Vulnerable Individuals a. Felony and misdemeanor i. Sex crimes 1. Sexual assault and battery 2. Child pornography: distribution 3. Child pornography: possession ii. Abuse, neglect, mistreatment, exploitation of a person (includes children and adults)	If felony, then 10. If misdemeanor, then 10 or less.[c]
iii. Failure to register on sex offender registry [c]	If felony, then 5. If misdemeanor, then less than 5.
2. Crimes Against the Person a. Violent (felony) i. Murder and non-negligent homicide ii. (Forcible) rape or sexual assault iii. Assault iv. Battery v. Robbery vi. Cruelty and torture vii. Domestic violence	10
b. Non-violent (felony) i. Stalking ii. Alteration or diversion of drugs iii. Negligent homicide [c]	5
3. Crimes Against Property a. Felony i. Theft ii. Identity theft iii. Burglary iv. Arson [c] v. Fraud vi. Financial crimes (including uttering) [d] vii. Forgery viii. Cruelty to animals [c]	5
4. Crimes Related to the Unlawful Manufacture, Distribution, Prescription, or Dispensing of a Controlled Substance (Felony Only)	5

[a] Includes attempt, solicitation, conspiracy, aiding, and abetting for all applicable crimes.
[b] Start date of disqualification time period is date of conviction or date of release from imprisonment, whichever is later.
[c] Indicates where there were varying perspectives from Work Group members.
[d] See the glossary in Appendix A for a definition of "uttering."

Reference C: Consolidated Option for Rehabilitation Factors

The rehabilitation factors to be considered in the variance process include:

- Passage of time (e.g., time elapsed since criminal conviction);
- Extenuating circumstances (e.g., [offender's] age at the time of conviction, substance abuse, or mental health issues);
- Demonstration of rehabilitation (e.g., character references, employment history, education, training); and
- Relevancy of the particular disqualifying information with respect to the current employment of the individual (e.g., job type and job duties, whether the crime was committed in an LTC facility).

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