Virginia Joint Commission on Health Care

Final Report: Impact of Barrier Crime Laws

SJ 106 (Patron: Senator Devolites-Davis)

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Authority for the Study

- SJR 106 (2006) directs JCHC to study the impact of barrier crime laws on social service and health care employers.
- Specifically, JCHC shall:
  - Determine the effectiveness of barrier crimes laws in protecting consumers, residents, patients, and clients;
  - Examine the difficulty experienced by employers in finding qualified applicants and employees and the difficulty experienced by prospective employees in finding jobs;
  - Compare Virginia's barrier crimes laws with laws related to criminal convictions and employment in other states; and,
  - Gather data on employment discrimination based on an individual's criminal conviction record from state agencies, institutions, boards, bureaus, commissions, councils, or any instrumentality of the Commonwealth.

Authority for the Study (cont.)

- In conducting the study, JCHC staff shall consider comments from affected entities, including:
  - Representatives of Long-Term Care Providers and Advocacy Groups;
  - The Virginia Association of Community Service Boards;
  - The Substance Abuse and Addiction Recovery Alliance;
  - The Consortium of Substance Abuse Organizations;
  - The Virginia Association of Drug and Alcohol Programs;
  - The Virginia Association of Alcoholism and Drug Abuse Counselors;
  - The Department of Mental Health, Mental Retardation and Substance Abuse Services (DMHMRSAS);
  - The Department for the Aging; and,
  - The Department of Rehabilitative Services.

Presentation Outline

- ***Rationale for Barrier Crime Laws***
- **Virginia's Barrier Crime Laws**
- **Federal Laws**
- **Discrimination and Liability Issues**
- **Transformation Initiative**
- **Workgroup Discussions and Recommendations**
- **Other States**
- **Policy Options**

Rationale for Barrier Crime Laws

- Barrier crime laws came into existence to protect the most vulnerable populations.
- Research indicates that as workplace violence and crime rates grew, as well as negligent hiring lawsuits, the list of barrier crime laws and mandatory background checks also grew.
- Since the passage of the barrier crime law in Virginia, the list of crimes has become more exhaustive and the requirements more stringent.

Rationale for Barrier Crime Laws

- A 2006 study conducted by the U.S. Department of Health and Human Services (HHS) determined that:
  - Criminal background checks are a valuable tool for employers during the hiring process,
  - The use of criminal background checks during the hiring process does not limit the pool of potential job applicants,
  - "a correlation exists between criminal history and incidences of abuse,' and
  - The long-term care industry supports the practice of conducting background checks on potential employees in order to reduce the likelihood of hiring someone who has potential to harm residents.

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Virginia's Barrier Crime Laws

- Virginia's barrier crime laws prohibit persons convicted of certain statutorily-defined crimes from obtaining employment with certain employers, mostly those employers specializing in the care of vulnerable populations, such as children, the elderly, and those with mental disabilities.

Virginia's Barrier Crime Laws

- As noted previously, this study is focusing on barrier crime laws as they relate to social services and health care employers which include:
  - Social service agencies as defined in *Code of Virginia,* Title 63.2:
    - Child Welfare Agencies (§63.2-1721),
    - Foster or Adoptive Homes approved by Child Placing Agencies (§63.2-1721),
    - Family Day Homes approved by Family Day Systems (§63.2-1721),
    - Unlicensed and Licensed Exempt Child Day Centers (§63.2-1724),
    - Child Day Centers and Family Day Homes(§§63.2-1725, 63.2-1720),
    - Assisted Living Facilities (§§63.2-1721, 63.2-1720), and
    - Adult Day Centers (§63.2-1720).

Virginia's Barrier Crime Laws

- Health care entities as defined in *Code of Virginia,* Title 32.1:
  - Licensed Nursing Homes (§32.1-126.01), and
  - Licensed Home Care Organization, Home Care Organization Exempt from Licensure, and Licensed Hospice (§32.1-162.9:1).
- Behavioral health care facilities as defined in *Code of Virginia,* Title 37.2:
  - Community Service Boards (§37.2-506),
  - Behavioral Health Authority (§37.2-607), and
  - DMHMRSAS (§37.2-416).

Virginia Barrier Crime Laws

- The following crimes listed in the *Code of Virginia* § 63.2-1719 and §37.2-314 are barrier crimes for all social service and health care entities. The 28 felonies include:
  - Murder,
  - Abduction,
  - Assaults & Bodily Wounding,
  - Carjacking,
  - Threats of death or bodily injury,
  - Arson,
  - Use of Machine Gun,
  - Use of Sawed-off Shotgun,
  - Incest,
  - Taking Indecent liberties,
  - Abuse & Neglect of Children,
  - Possession of child pornography,
  - Abuse & Neglect of Incap. Adults,
  - Escape from Jail, and
  - Malicious Wounding by mob,
  - Abduction for Immoral Purpose,
  - Robbery,
  - Felony Stalking,
  - Sexual Assault,
  - Drive-by Shooting,
  - Aggressive use of Machine Gun,
  - Pandering,
  - Crimes Against Nature involving Children,
  - Taking Indecent liberties, custodial relationship,
  - Poss. of Pornography with intent to distribute,
  - Electronic Facilitation of Pornography,
  - Delivery of Drugs to Prisoners,
  - Felonies by Prisoners.
- The 2 misdemeanors are:
  - Failure to secure medical attention, and
  - Employing or permitting a minor to assist in an act constituting an offense under Article 5 (§18.2-372 et seq.)

Additional Barrier Crimes for Specific Social Services Employers

- For child welfare agencies or foster and adoptive homes approved by child placing agencies, the following are additional barriers to employment under §63.2-1719:
  - Burglary;
  - Felony violation relating to possession or distribution of drugs;
  - Conviction of any other felony not included in the definition of barrier crime unless 5 years have elapsed since conviction;
  - A founded complaint of child abuse and neglect; and,
  - Prior adult convictions and juvenile convictions or adjudications of delinquency based on a crime that would be a felony if committed by an adult within or outside the Commonwealth.
- For children's residential facilities the following are additional barriers to employment, volunteer work, or providing services on a regular basis under §63.2-1719:
  - Extortion by threat, burglary, felony distribution of drugs, felony violation relating to drug possession in the 5 years prior to the application, and felony convictions relating to drug possession while still on probation or parole or having failed to pay court costs.

Additional Barrier Crimes for Behavioral Health Care Employers

- DMHMRSAS defines its barrier crimes in *Code of Virginia* §37.2-314.
  - This section expands upon the list in §63.2-1719 and also includes the following as a bar to employment:
    - Burglary,
    - Extortion by Threat,
    - Distribution of drugs, and
    - Possession of drugs.
  - This section applies to DMHMRSAS employees in direct consumer care positions, as well as CSBs and BHAs in direct consumer care positions.
  - This section also applies to persons who accept employment at a State facility, or facility that receives, monitors, or disburses funds, and were not employed by DMHMRSAS prior to July 1, 1996.

Virginia Barrier Crime Laws Exceptions

- There are some statutory exceptions to Virginia's barrier crime laws.
  - "A licensed assisted living facility or adult day care center may hire an applicant convicted of one misdemeanor barrier crime not involving abuse or neglect, if five years have elapsed following the conviction." *Code of Virginia* §63.2-1720.
  - "A child day center may hire for compensated employment persons who have been convicted of not more than one misdemeanor offense under § 18.2-57 if 10 years have elapsed following the conviction, unless the person committed such offense while employed in a child day center or the object of the offense was a minor." *Code of Virginia* §63.2-1720.
  - "A children's residential facility may hire for compensated employment or for volunteer or contractual service purposes persons who have been convicted of not more than one misdemeanor offense under § 18.2-57 or 18.2-57.2, if 10 years have elapsed following the conviction, unless the person committed such offense in the scope of his employment, volunteer, or contractual services." *Code of Virginia* §63.2-1726.

Virginia Barrier Crime Laws Exceptions

- A licensed nursing home, home care organization or hospice "may hire an applicant who has been convicted of one misdemeanor specified in this section not involving abuse or neglect, if five years have elapsed following the conviction." *Code of Virginia* §§32.1-126.01, 32.1-162.9:1

- A DMHMRSAS provider, CSB, or BHA "may hire for compensated employment persons who have been convicted of not more than one misdemeanor offense under § 18.2-57 or 18.2-57.2, if 10 years have elapsed following the conviction, unless the person committed the offense while employed in a direct consumer care position." *Code of Virginia* §§37.2-416, 37.2-506, 37.2-607.

Screening Process for Employment at Adult Substance Abuse Treatment Programs

- In addition, a screening process has been added in statute (§§37.2-506, 37.2-416) to allow CSBs, BHAs and DMHMRSAS providers to consider for employment in adult substance abuse treatment programs only, persons convicted of certain barrier crime offenses including:
  - Unlawful hazing (§18.2-56);
  - Reckless handling of a firearm (§18.2-56.1);
  - Any misdemeanor or felony violation related to:
    - reckless endangerment of others by throwing objects (§18.2-51.3);
    - threat (§18.2-60),
    - breaking and entering a dwelling house with intent to commit misdemeanor in (§18.2-92),
    - possession of burglarious tools (§18.2-94),
    - any felony violation relating to distribution of drugs, except an offense pursuant to subsections H1 or H2 of §18.2-248, or
    - An equivalent offense in another state.

Screening Process for Employment at Adult Substance Abuse Treatment Programs (cont.)

- Eligibility for screening requires that the applicant shall:
  - Have completed all prison or jail terms;
  - Not be under probation or parole supervision;
  - Have no pending charges in any locality;
  - Have paid all fines, restitution, and court costs for any prior convictions; and
  - Have been free of parole or probation for at least 5 years for all convictions.

Screening Process for Employment at Adult Substance Abuse Treatment Programs (cont.)

- Screening will determine:
  - (i) if the criminal behavior was substantially related to the applicant's substance abuse, and,
  - (ii) whether the applicant has been successfully rehabilitated and is not a risk to consumers based on the criminal history background and substance abuse history.

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Federal Laws

- In general, the federal government does not preclude employment by social services and health entities except in a few specific instances.
  - Persons seeking to provide foster or adoptive home care must have background checks conducted through national crime information databases and state child abuse registries as required by the Adam Walsh Act.
    - Convictions warranting mandatory exclusion:
      - Program-related crimes,
      - Patient Abuse,
      - Health Care Fraud, and
      - Controlled-substance related crimes.
    - Convictions warranting permissive exclusion:
      - Fraud or kickbacks,
      - Obstruction of investigation,
      - Misdemeanor related to controlled substance,
      - License revocation or suspension,
      - Exclusion or suspension under federal or state health program, and
      - Claims for excessive charges or unnecessary services.

Federal Laws (Cont.)

- The National Child Protection Act (42 U.S.C. §5119a) allows states to conduct a nationwide criminal history background check for the purpose of determining whether an individual who shall have unsupervised access to children, the elderly, or individuals with disabilities has been convicted of a crime that bears upon the fitness of the individual to provide care to or have responsibility for the safety and well-being of children, the elderly, or individuals with disabilities.

Federal Pilot Program for Background Checks

- Section 307 of the Medicare Prescription Drug, Improvement and Modernization Act of 2003 (MMA) (PL108-173) directs the Secretary of Health and Human Services (HHS), in consultation with the Attorney General, to establish procedures for conducting background checks on prospective direct patient access employees providing long term care.
  - These procedures are being developed through a pilot project involving the following states:
    - Alaska, Idaho, Illinois, Michigan, Nevada, New Mexico and Wisconsin.

Pending Federal Legislation

- Federal legislation that would establish additional background checks is being considered.
  - Patient Safety and Abuse Prevention Act of 2007 (S.1577 & H.R.3078)
    - Would amend Titles XVIII and XIX of the Social Security Act to require screening, including national criminal history background checks, of direct patient access employees of skilled nursing facilities, nursing facilities, and other long-term care facilities and providers, and to provide for nationwide expansion of the pilot program for national and State background checks on direct patient access employees of long-term care facilities or providers.

Pending Federal Legislation (Cont.)

- Senior Safety and Dignity Act of 2007 (H.R.1476)
  - Would amend Titles XVIII and XIX of the Social Security Act to expand the nursing home patients' bill of rights to include requiring background checks on direct access employees and requiring nursing long-term care facilities to establish disaster emergency and evacuation plans.

- The enforcement provisions of each of these bills provides that any state that fails to enforce the provisions of this legislation would be excluded from participation under the Medicare and Medicaid programs.

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Discrimination Issues

- "The widespread availability of criminal record information has made it easier for employers and licensing boards to identify and reject people with a criminal record." Margaret Colgate Love, "Relief from the Collateral Consequences of a Criminal Conviction: A State-by-State Resource Guide." (October 2005).
- Title VII of the Civil Rights Act of 1964 establishes parameters affecting the scope of a potential employer's inquiries about prior arrests, convictions, and other aspects of the applicant's criminal history.
  - Under Title VII, employers may exclude applicants with arrest or conviction records if they can prove that the applicant's criminal history prevents the latter from satisfying certain job requirements.
  - Employers can usually defend Title VII challenges by availing themselves of the "business necessity" defense.

Discrimination Issues (Cont.)

- 33 states have laws to limit consideration of conviction in connection with employment and/or licensing decisions, requiring that the offense be substantially or directly related to the license and/or employment sought.
- A few states allow consideration of an offender's rehabilitation, establishing a standard that, if met, precludes denial of licensure or employment.
  - In a few states rehabilitation is presumed after passage of a certain period of time.
- Some states have codified their policies of eradicating discrimination based on criminal records (CT, NJ, NY).
- Wisconsin and Hawaii have enacted fair employment laws that expressly preclude, absent an exception, employment discrimination based on a criminal record.
  - These general nondiscrimination laws do not apply to specific prohibitions under state or federal law for particular jobs or licenses that deal with vulnerable populations.

Liability Issues

- Under the negligent hiring doctrine, "one who conducts an activity through employees is subject to liability for harm resulting from the employer's conduct if the employer is negligent in hiring an improper person in work involving an unreasonable risk of harm to others." Southeast Apartments Management, Inc, et al v. Jackman, 257 Va. 256 (1999).
- Additionally, an employer is liable for negligence for employing a person with known propensities, or propensities which should have been discovered by reasonable investigation, in a position in which it should have been foreseeable that the hired individual posed a threat to others. Southeast Apartments Management, Inc, et al v. Jackman, 257 Va. 256 (1999).

Liability Issues (Cont.)

- Under the doctrine of respondeat superior, an employer is vicariously liable for an employees acts committed within the "scope of employment."
- Liability under the negligent hiring doctrine allows a plaintiff to recover in circumstances where the respondeat superior, "scope of employment" limitation protects employers from liability. Interim Personnel of Central VA, Inc. v. Messer, 263 Va. 435 (2002).

Liability Issues (Cont.)

- Enactment of a statutory employment or licensing requirement imputes a duty of care onto employers in the industry governed by the provision.
  - In some states, an employer's failure to perform a state-mandated criminal background check is considered negligence per se in a negligent hiring case (Mahan v. Am-Guard, Inc., 2003; Mueller by Math v. Community Consolidated School District 54, 1997).
    - In Virginia, such a failure could be considered negligence per se.
  - In other states, the failure is admissible as evidence of negligence. (Connes v. Molalla Transport Sys., Inc., 1991).

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The Transformation Initiative

- Whereas the barrier crime laws for employers caring for children, the elderly and disabled are becoming more expansive and restrictive, a different movement is occurring in the mental health and substance abuse arena.
- Specifically, the President launched the New Freedom Commission on Mental Health with the purpose of transforming the mental health system by focusing on recovery and making mental health care consumer and family driven.
- Additionally, Virginia has in place its own System Transformation Initiative to transform Virginia's "services delivery system to one that truly embraces the concepts of recovery, self-determination and empowerment." "The System Transformation Initiative," available at http://www.dmhmrsas.virginia.gov/PressReleases/admPR-Transformatio.htm.

Transformation Initiative

- Consumers of substance abuse services face severe shortages of core services needed for successful recovery in the community, including, affordable housing, reliable transportation, and employment assistance. "Review of Community Services Board Substance Abuse Outpatient Services for Adults", Office of the Inspector General (Report: #129-06).
- "Many substance abuse treatment professionals enter the field having experienced significant personal problems with drug and alcohol problems or having had close family members with serious problems:
  - 27% of staff identified themselves as being in recovery from drug or alcohol addiction. 81% make this fact known to the persons they serve;
  - 64% responded that they have been significantly affected by the substance use disorder of a close family member.
  - Consumers who were interviewed often mentioned that they value working with staff members who are in recovery." "Review of Community Services Board Substance Abuse Outpatient Services for Adults", Office of the Inspector General (Report: #129-06).

Transformation Initiative

- Enforcement of absolute barrier crimes with no opportunity to determine whether intervening factors (particularly those related to an individual's substance use disorder or mental illness) should be considered contradicts the principles of a transformed mental health system.
  - The vision of the transformed system is that every person with a substance use disorder and/or mental illness can achieve some level of recovery.
  - Evidence suggests that peer support can play an important role in the recovery process.

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Workgroup

- In March 2007, JCHC staff convened a workgroup to discuss SJR 106 and the intended goal of the legislation.
- The workgroup included representatives from various stakeholders. Specifically, in attendance, were representatives from:
  - Virginia Association of Community Services Boards;
  - Alzheimer's Association of Virginia;
  - Virginia Assisted Living Association;
  - Virginia Health Care Association;
  - Virginia Association for Home Care & Hospice;
  - SAARA of Virginia;
  - DMHMRSAS, Office of Substance Abuse Services;
  - Virginia Health Care Association;
  - SAARA of Northern Virginia, President;
  - Virginia Association for Nonprofit Homes for the Aging; and,
  - Virginia Network for Private Providers.
- Staff also held meetings with representatives from the Virginia Department of Health and the Virginia Department of Social Services.

Workgroup Discussions

- Research findings and the testimony of stakeholders revealed that persons with a history of mental illness and/or substance abuse problems often have criminal backgrounds related to their illness or substance abuse problems, and often have difficulty obtaining employment, making rehabilitation more difficult.
- Employers also have difficulty obtaining a qualified workforce.
- "The collateral consequences of conviction have grown more numerous and more disabling….and can frustrate the chances of successful offender reentry" into society. Margaret Colgate Love, "Relief from the Collateral Consequences of a Criminal Conviction: A State-by-State Resource Guide." (October 2005).

Workgroup Discussions

- It is difficult to determine the number of individuals in Virginia who have been denied employment because of a criminal conviction.
- From July 1, 2006- December 30, 2006, the Virginia State Police (VSP) received 16,601 requests for background checks.
  - 13,708 resulted in a no "hit" for a barrier crime.
  - 2,893 resulted in a "hit" for a barrier crime and/or qualified for assessment, but required more research for verification.
  - The VSP does not track the number of persons out of the 2,893 possible hits for barrier crimes that are actually denied employment because of a barrier crime in their background.
- Additionally, it is impossible to determine the number of qualified individuals who do not apply for positions because they do not want to undergo a background check.

Workgroup Discussions

- Although workforce shortages affect most of the health and social service providers in Virginia, most of the workgroup participants indicated they were not interested in changing the barrier crime laws affecting their services.
- However, this was not the sentiment expressed by representatives of CSBs who suggested:
  - Removing the current barrier crimes provisions pertaining to employment in adult substance abuse treatment facilities and allowing consideration of an individual's entire criminal record.
  - Providing for a rehabilitation assessment for employment of individuals with serious mental illness similar to the assessment allowed for individuals with substance use disorder.

Workgroup Discussions

- Virginia law (§§ 37.2-416, 37.2-506, 37.2-608) allows individuals with substance use disorder, with certain barrier crimes on their record, be assessed for rehabilitation and therefore become eligible to work in direct care within an adult substance use program.
- There is no similar provision in Virginia law to allow individuals with mental illness and certain barrier crimes to qualify for rehabilitation assessment.
  - Consumers with serious mental illness may have assaults in their background making them ineligible to be employed as peer counselors. Often, these such assaults involve a family member or a law enforcement officer during the ECO/TDO process.
- Many consumers with serious mental illness could benefit from peer contact, similar to the benefits enjoyed by consumers with substance use disorder.
- The CSBs estimate that over 40 mental health consumers would qualify for employment if they could be assessed for rehabilitation in the same manner as allowed for substance use disorder.

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Other States

- States differ in the degree and manner in which they mandate employment restrictions based on the criminal record of the applicants in social service and health care fields.
  - For example, the majority of states require background checks for licensing/employment purposes, but not all of those states list the barrier crimes in Code.
    - If not listed in the Code, barrier crimes might be listed in the Administrative Rules and Regulations of the state, or no specific barrier crimes exist and the hiring decision is at the discretion of the employing/licensing entity.
  - The types of barrier crimes also vary across the states from the generalized, "all felonies," to the specific, violent crimes.
  - Additionally, the entities with barrier crime restrictions also vary across the states; some states limit barrier crimes to entities that deal with children while others have barrier crimes for all entities that deal with vulnerable populations.
- Since this presentation is narrow in focus, the following slides will contain examples of how other states screen and assess persons with a criminal background for employment in the health and social services fields. (State-specific information can be provided at request, and will be included in the written report).

Levels of Barrier Crimes

- Alaska is an example of a state that provides levels of barrier crimes for employment in an area serving a vulnerable population.
  - Depending on the level of crime, the regulations specify 1, 3, 5 and 10 year periods of ineligibility, as well as permanent ineligibility.
  - The most violent crimes are permanent barriers to employment.
    - 2 or more felonies of any type is also a permanent barrier to employment.
  - A misdemeanor for domestic violence constitutes a barrier crime for 1 year.

Assessment of Eligibility

- Colorado is an example of a state that allows assessment of a disqualification of eligibility for employment.
  - Assessment is only allowed for certain misdemeanors, and only after a certain period of time has elapsed.
- Florida provides levels of screening based on the type of employment sought.
  - Allows exemptions from disqualification.
    - Felonies and misdemeanors can be exempted after a certain amount of time has elapsed.
    - Granted after weighing the mitigating circumstances.

Assessment for Eligibility

- Illinois and New Jersey are examples of states that list the barrier crimes in Code; however, allow an individual to request a waiver/reconsideration for any crime.
  - Granted after an evaluation of the evidence and the mitigating circumstances.
  - In New Jersey, the individual must affirmatively demonstrate rehabilitation.

Policy Options

- **Option 1:** Take no action.
- **Option 2:** Introduce legislation to remove the barrier crime provisions from *Code of Virginia* §§37.2-506, 37.2-416 and allow CSBs, BHAs and DMHMRSAS to consider the entire criminal background record, along with all other relevant information, when hiring persons in direct consumer care positions in adult mental health and/or substance abuse programs. This would have the effect of removing all barrier crimes placing the full responsibility for making the hiring decision on the employing entity.

Policy Options

- **Option 3:** Introduce legislation to amend the *Code of Virginia* §§37.2-506, 37.2-416 to allow for a rehabilitation assessment for any applicant who has been convicted of a barrier crime, unless the offense was intentional violent harm against an adult or child, to work in adult substance abuse or adult mental health treatment programs.

- **Option 4:** Introduce legislation to amend *Code of Virginia* §§37.2-506, 37.2-416 to provide a screening option for consumers with serious mental illness to be assessed for employment in adult mental health and/or adult substance abuse treatment centers.

Public Comments

- Written public comments on the proposed options may be submitted to JCHC by close of business on November 5, 2007. However, to ensure comments are included in the preliminary draft that will be sent to JCHC members, comments must be received by close of business November 1, 2007. Comments may be submitted via:
  - E-mail (sareid@leg.state.va.us)
  - Facsimile (804/786-5538) or
  - Mail to Joint Commission on Health Care
    P.O. Box 1322
    Richmond, Virginia 23218

- Comments will be summarized and presented to JCHC during its November 8th meeting.

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