Department of Health and Human Services

**OFFICE OF
INSPECTOR GENERAL**

# NURSING FACILITIES'
# EMPLOYMENT OF INDIVIDUALS
# WITH CRIMINAL CONVICTIONS

## OBJECTIVE

To determine whether and to what extent nursing facilities employed individuals with criminal convictions.

## BACKGROUND

A member of Congress requested that the Office of Inspector General (OIG) undertake this evaluation. Federal regulation prohibits Medicare and Medicaid nursing facilities from employing individuals found guilty of abusing, neglecting, or mistreating residents by a court of law, or who have had a finding entered into the State nurse aide registry concerning abuse, neglect, or mistreatment of residents or misappropriation of their property. Interpretive guidelines from the Centers for Medicare & Medicaid Services (CMS) for this regulation state that "[nursing] facilities must be thorough in their investigations of the past histories of individuals they are considering hiring." However, Federal law does not require that nursing facilities conduct State or Federal Bureau of Investigation (FBI) criminal background checks. State background check requirements vary in terms of what must be checked (e.g., statewide criminal history databases, publically available sex offender registries) and who must be checked (e.g., direct-care workers only, all staff).

We selected a stratified random sample of 260 nursing facilities from the universe of 15,728 Medicare-certified nursing facilities and requested data on all individuals who were employed by the sampled nursing facilities on June 1, 2009. To gain access to criminal history record information, we entered into an Information Transfer Agreement with FBI. We compared employee data with the criminal history records FBI provided to identify individuals with criminal convictions employed by the sampled nursing facilities.

Consistent with the congressional request and objective of this evaluation, we used FBI data to determine whether individuals employed by nursing facilities had criminal convictions. Federal regulation prohibits Medicare and Medicaid nursing facilities from employing individuals found guilty of abusing, neglecting, or mistreating residents by a court of law, or who have had a finding entered into the State nurse aide registry concerning abuse, neglect, or mistreatment of residents or misappropriation of their property. FBI-maintained criminal history records do not contain detailed information (i.e., they do not indicate whether the victim of a crime was a nursing facility resident) to determine whether a conviction disqualifies an individual from nursing facility employment under Federal regulation. Therefore, we did not determine whether these individuals were employed in violation of Federal regulation as that question is outside the scope of this evaluation.

## FINDINGS

**Almost all nursing facilities employed one or more individuals with at least one criminal conviction.** Our analysis of FBI-maintained criminal history records revealed that 92 percent of nursing facilities employed at least one individual with at least one criminal conviction. Nearly half of nursing facilities employed five or more individuals with at least one conviction. Forty-four percent of employees with convictions were convicted of crimes against property (e.g., burglary, shoplifting, writing bad checks), making it the most common type of crime committed. Overall, 5 percent of nursing facility employees had at least one conviction in FBI-maintained criminal history records. Most convictions occurred prior to employment. Eighty-four percent of employees with convictions had their most recent conviction prior to their beginning date of employment.

**Despite the lack of a Federal requirement for nursing facilities to conduct criminal background checks, most States required, and/or nursing facilities reported conducting, some type of background check.** Forty-three States required nursing facilities to conduct either an FBI or a statewide criminal background check for prospective employees. Some nursing facilities located in the remaining eight States reported conducting criminal background checks even though

they were not required to do so.  All but 2 percent of nursing facilities reported conducting some type of background check.

## RECOMMENDATION

After completion of our data collection, the Patient Protection and Affordable Care Act (P.L. 111-148) became Federal law.  It requires the Secretary of Health & Human Services (HHS) to carry out a nationwide program for States to conduct national and statewide criminal background checks for direct patient access employees of nursing facilities and other providers.  States may participate in this National Background Check Program by entering into agreements with the Secretary.

In light of our findings and in carrying out the mandate for HHS to implement the nationwide criminal background check program, we recommend that CMS:

**Develop background check procedures.**  To ensure that States conduct background checks consistently, CMS should (1) clearly define the employee classifications that are direct patient access employees and (2) work with participating States to develop a list of State and local convictions that disqualify an individual from nursing facility employment under the Federal regulation and periods for which each conviction bars the individual from employment.

## AGENCY COMMENTS AND OFFICE OF INSPECTOR GENERAL RESPONSE

In its written comments on the draft report, CMS agreed with our recommendation.  CMS stated that in its solicitation to States for the National Background Check Program, the definition of "direct patient access employee" is anyone who routinely comes into contact or has the potential to come into contact with residents or clients, which for nursing facilities should include all staff.  CMS also stated that it will work with the States through the National Background Check Program to assist them in developing lists of convictions that disqualify individuals from employment, as well as defining whether any of those conviction types can be assumed to be mitigated because of the passage of time and which convictions should never be considered mitigated or rehabilitated.

# ➤ T A B L E   O F   C O N T E N T S

## OBJECTIVE

To determine whether and to what extent nursing facilities employed individuals with criminal convictions.

## BACKGROUND

A member of Congress requested that the Office of Inspector General (OIG) undertake this evaluation. This information has never been collected nationally prior to this evaluation.

### Federal Requirement

Nursing facilities participating in Medicare and Medicaid are required to provide services that maintain the dignity and well-being of all residents.[1, 2] Federal regulation prohibits Medicare and Medicaid nursing facilities from employing individuals found guilty of abusing, neglecting, or mistreating residents by a court of law. Employment of individuals who have had a finding entered into the State nurse aide registry[3] concerning abuse, neglect, or mistreatment of residents or misappropriation of their property is also prohibited.[4] Interpretive guidelines from the Centers for Medicare & Medicaid Services (CMS) for this regulation state that "[nursing] facilities must be thorough in their investigations of the past histories of individuals they are considering hiring."[5]

Neither Federal law nor regulation specifically requires that nursing facilities check State or Federal Bureau of Investigation (FBI) criminal history records for prospective employees. Despite this, nursing facilities have access to FBI criminal history records to conduct criminal background checks on individuals applying for positions involving direct

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[1] In this report, we refer to Medicare-certified skilled nursing facilities and Medicaid-certified nursing facilities as "nursing facilities."

[2] Social Security Act, §§ 1819(b)(2) and 1919(b)(2).

[3] A nurse aide is any individual providing nursing or nursing-related services to residents in a nursing facility who is not a licensed health professional, a registered dietitian, or someone who volunteers to provide such services without pay. Nurse aides assist residents in their activities of daily living, such as bathing, dressing, eating, and toileting. Sections 1819(e)(2) and 1919(e)(2) of the Social Security Act and 42 CFR § 483.156 require each State to establish and maintain a registry of individuals who have completed training and who the State finds to be competent to function as nurse aides.

[4] 42 CFR § 483.13(c)(1)(ii).

[5] CMS, *State Operations Manual*, Appendix PP, F225.

patient care.[6]  Some States require such checks under their own authority.  Sources of background check information and specific State requirements are discussed below.

**Sources of Background Check Information**

*FBI criminal background checks*.  For FBI criminal background checks, an individual provides identifying information (usually full name, Social Security number (SSN), date of birth, race, and gender) and a set of fingerprints (electronic or rolled manually) to a State law enforcement agency.  The State law enforcement agency provides the individual's information and fingerprints to FBI to match against criminal background information maintained in its databases (e.g., the Interstate Identification Index, which is an electronic repository of criminal history record information that FBI maintains).  FBI then provides the requesting law enforcement agency with a criminal history report, if one is found, containing the dates of any arrests, arresting agencies, and offenses for which the individual was charged and/or convicted.  The FBI database includes information on both Federal crimes and crimes reported by States.

*Statewide criminal background checks*.  For statewide criminal background checks, an individual must provide identifying information similar to that required to conduct an FBI criminal background check, but usually is not required to submit fingerprints.  This type of background check is conducted by a State law enforcement agency (e.g., State Police, Highway Patrol) and provides information similar to that in the Interstate Identification Index, but only for crimes committed within that State.

*Additional databases*.  In addition to conducting an FBI and/or statewide criminal background check, some nursing facilities search other available databases (e.g., State abuse registries, National Sex Offender Registry).  Additionally, Federal regulations require all States to maintain a nurse aide registry, which nursing facilities are required to check for nurse aides.[7]  The information contained in these databases may also disqualify an individual from employment in a nursing facility, but checking these databases is not a component of FBI or statewide criminal background checks.

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[6] P.L. 105-277 § 124 (Oct. 21, 1998).  Section 124 does not further define "direct patient care."

[7] 42 CFR § 483.75(e)(6).

**State Requirements for Background Checks on Nursing Facility Employees**
State background check requirements vary in terms of what must be
checked (e.g., statewide criminal history databases, publically available
sex offender registries) and who must be checked (e.g., direct-care
workers only, all staff). Ten States require an FBI criminal background
check as well as a statewide check. Thirty-three States require a
criminal background check in the State where the nursing facility is
located. The remaining eight States do not have a background check
requirement.[8] The State requirements or the lack thereof do not
prohibit nursing facilities from conducting more extensive checks on
their own initiative. Table 1 provides an overview of the types of
criminal background checks States require.

**Table 1: Nursing Facility Criminal Background Check Requirements by State**

| Type of Check Required | States | Number of States |
|---|---|---|
| FBI and Statewide | AK, AZ, DE, ID, MI, MS, NM, NV, NY, TN | 10 |
| Statewide* | AR, CA, DC, FL, GA, IL, IN, IA, KS, KY, LA, ME, MD, MA, MN, MO, NE, NH, NJ, NC, OH, OK, OR, PA, RI, SC, TX, UT, VA, VT, WA, WV, WI | 33 |
| None | AL, CO, CT, HI**, MT, ND, SD, WY | 8 |
| **Total** | | **51** |

Source: OIG Internet research and phone calls to States, 2009.

*Note: Some States that require statewide checks also require nursing facilities to conduct an
FBI check if the individual has not lived in the State for a minimum period of time
(e.g., 5 years).

**Note: A statute requiring FBI checks exists in Hawaii; however, no implementing rules have
been published. A Hawaii State official confirmed that nursing facilities are not yet required to
conduct such checks.

**State-Identified Disqualifying Conditions**
As discussed above, Federal regulation prohibits employing individuals
who have certain types of convictions or who have certain findings
entered against them in State nurse aide registries. In addition, some
States have more specifically identified types of convictions that bar
individuals from obtaining employment in nursing facilities. States
differ in regard to what types of convictions disqualify individuals and

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[8] This report refers to the 50 States and the District of Columbia as "States."

how recently a conviction must have occurred to disqualify them. For example, one State lists nine types of convictions (including murder, voluntary manslaughter, and felony battery within the previous 5 years) that bar individuals from employment at nursing facilities.

Internet research and structured interviews with State staff indicate that some States allow individual nursing facilities to make decisions regarding the employability of individuals with criminal convictions, while others rely on a State agency (e.g., Department of Public Health) to make such determinations. Some States allow employees to work at nursing facilities provisionally until the results of their background checks are obtained.

**Legislative History Regarding Background Check Requirements**
The Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (MMA) established a Background Check Pilot Program.[9] The purpose of the pilot program was to "identify efficient, effective, and economical procedures" for conducting State and national criminal background checks on prospective "direct patient access employees," as defined in the statute.[10] Participating States required a fingerprint-based FBI and statewide criminal background check, as well as a search of other databases (e.g., State nurse aide registries, State sex offender registries) likely to contain disqualifying information. CMS selected seven States (Alaska, Idaho, Illinois, Michigan, Nevada, New Mexico, and Wisconsin) to participate in the pilot program, which concluded in September 2007.[11] Across the participating States, 204,339 criminal background checks were initiated, of which 7,463 resulted in individuals' not being hired by a nursing facility; an additional 38,400 individuals withdrew their applications prior to completion of their criminal background checks.[12]

On March 23, 2010, the Patient Protection and Affordable Care Act (P.L. 111-148) became Federal law. Section 6201 requires the Secretary

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[9] P.L. 108-173, § 307.

[10] Section 307 of P.L. 108-173 defines a "direct patient access employee" as any individual (other than a volunteer) 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, as determined by a participating State for purposes of conducting the pilot program in such State. This term applies to employees checked through the pilot program.

[11] States' participation in the pilot program began between 2005 and 2006.

[12] Abt Associates, Inc., *Evaluation of the Background Check Pilot Program*, August 2008, p. 207.

of Health & Human Services (Secretary) to carry out a nationwide program for States to conduct national and statewide criminal background checks for direct patient access employees of nursing facilities and other providers similar to the pilot program the MMA established. This National Background Check Program is to be conducted through means that utilize a fingerprint-based search of State and Federal criminal history records. States may participate in the nationwide program by entering into agreements with the Secretary. Grant funding will be disbursed to States in fiscal years 2010 through 2012.

**Related Testimony and Reports**

In 2002, the Government Accountability Office (GAO) testified before the U.S. Senate Special Committee on Aging that sources (e.g., State nurse aide registries) used to screen prospective employees do not contain complete or up-to-date information.[13] GAO noted that some States require nursing facilities to conduct only statewide criminal background checks. Consequently, individuals who have been convicted of crimes in one State can cross State lines to obtain employment in another State.

In 2005, OIG issued two reports related to the employment of nurse aides in nursing facilities nationwide. In the first report, OIG found that more than 1,500 nurse aides with substantiated findings of abuse, neglect, or misappropriation of property in 1 State had active certifications in other States.[14] In addition, 36 employees who were not nurse aides (e.g., janitors) with histories of abuse in 1 State had active certifications as nurse aides in other States. The second report found that while 85 percent of nursing facilities conducted background checks of nurse aides, half of these were limited in scope (e.g., they covered a single State).[15]

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[13] GAO, *Many Shortcomings Exist in Efforts to Protect Residents from Abuse* (GAO-02-448T), March 2002.

[14] OIG, *Nurse Aide Registries: State Compliance and Practices* (OEI-07-03-00380), February 2005.

[15] OIG, *Nurse Aide Registries: Long Term Care Facility Compliance and Practices* (OEI-07-04-00140), July 2005.

## METHODOLOGY

**Scope and Limitations**

We reviewed FBI criminal histories of individuals employed by sampled nursing facilities on June 1, 2009. We did not determine the criminal histories of individuals employed in other types of long-term care settings (e.g., hospice) or nursing facility residents. Additionally, we did not seek to determine the effectiveness of conducting criminal background checks as an employment screening tool for nursing facility employees.

Our estimate of the number of nursing facility employees with criminal convictions relies entirely upon the accuracy of the information contained in FBI's Interstate Identification Index. Because the Interstate Identification Index relies on local, State, and Federal law enforcement agencies to report criminal records, it is possible that not all criminal history record information was accurate and up-to-date.

The criminal history record information we received from FBI suggested that the records did not contain all of the convictions for particular employees. For example, criminal history record information contained notations of probation violations (suggesting that a conviction occurred), but the record did not contain the convictions leading to the imposition of probation periods. In addition, many charges had no corresponding disposition information (e.g., conviction, dismissal), so we could not determine whether a conviction occurred. Finally, it is possible that some individuals' records did not contain convictions because they were removed following a judicial diversion program (e.g., completion of an alcohol and substance abuse education course).

Our estimates are conservative because we did not include criminal convictions if we could not conclusively identify the individual (e.g., if identifiers were similar but did not exactly match). Also, we could not confirm that the information that nursing facilities provided us was accurate or that the information the employees provided to the nursing facilities was accurate.

FBI-maintained criminal history records do not contain detailed information (i.e., whether the victim of a crime was a nursing facility resident) to determine whether a conviction disqualifies an individual from nursing facility employment under Federal regulation. Therefore, we limited our use of the FBI data, consistent with the congressional request, to determining whether individuals employed by nursing

facilities had criminal convictions, but we did not determine whether these individuals were employed in violation of Federal regulation.

Finally, the Information Transfer Agreement[16] entered into by FBI and OIG stipulates that identifying information contained in FBI records shall be used only for research and statistical purposes. Therefore, we were prohibited from recontacting nursing facilities to further inquire about the background checks they conducted on specific individuals. In addition, the Information Transfer Agreement prohibits OIG from releasing information that may be used to identify individuals or nursing facilities associated with this evaluation.

**Sample and Data Sources**

We selected a stratified random sample from the universe of 15,728 nursing facilities contained in the Online Survey, Certification, and Reporting (OSCAR) database as of February 10, 2009. To produce nationwide estimates of the number and percentage of nursing facilities employing individuals with criminal convictions, we selected a sample of 260 nursing facilities from 3 strata as shown in Table 2.

**Table 2: Nursing Facility Population and Sample Size**

| Stratum Definition | Population Size | Sample Size |
|---|---|---|
| Nursing facilities from States that require FBI and statewide checks | 1,987 | 110 |
| Nursing facilities from States that require statewide checks | 12,687 | 110 |
| Nursing facilities from States that have no background check requirement | 1,054 | 40 |
| **Total** | **15,728** | **260** |

Source: OSCAR database, February 10, 2009.

We chose to stratify based on State background check requirements in an effort to determine whether differing requirements played a role in nursing facility employment of individuals with criminal convictions. We did not identify an effect that might be explained by a number of factors (e.g., checks conducted by nursing facilities in addition to those that their States require, differences among States regarding the

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[16] An Information Transfer Agreement governs the terms of OIG's access to FBI criminal history records for research purposes.

circumstances that prohibit individuals from working in nursing facilities).

**Data Collection**

_Employee data_.  From each of the 260 sampled nursing facilities, we requested information for all noncontract individuals who were employed on June 1, 2009.[17]  We requested each employee's full name, SSN, date of birth, race, gender, beginning date of employment, and job classification.  We also requested whether each individual was considered a direct-care employee.[18]  Four nursing facilities did not respond to our request because they were no longer operating; therefore, we received data for 35,286 employees from 256 nursing facilities.[19]  See Appendix A for a profile of sampled nursing facility employee characteristics.

To assess whether a nursing facility provided us with information for all of its employees, we compared the number of employees submitted to us with the total number of employees listed in the OSCAR database for that facility.  We contacted four nursing facilities that provided information for +/- 25 percent of the number of employees as listed in OSCAR to determine whether the information provided correctly answered our request.  We requested and received revised employee data from these four facilities; however, given routine staffing fluctuations, we did not question the accuracy of employee data that closely approximated the number of employees listed in OSCAR.

_Mail survey_.  We sent the administrator of each of the sampled nursing facilities a survey about background check procedures.  The survey included questions about the types of background checks they conducted, when the nursing facilities began conducting background checks, what the costs of conducting background checks were, and what job classifications they considered direct care.  We received completed

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[17] We did not request identifying information for individuals who provide services for a nursing facility through a staffing agency (e.g., contract employees).  Generally, for States that require criminal background checks, staffing agencies, not the nursing facilities, are responsible for conducting checks and making decisions about employment for contract employees.

[18] Sampled nursing facilities differed on what job classifications constituted direct-care staff.

[19] Nursing facilities provided information on 46 individuals who were employed in 2 different sampled nursing facilities as of June 1, 2009.  Therefore, we collected data on 35,240 unique individuals.

surveys from all 256 nursing facilities.  See Appendix B for a profile of sampled nursing facilities' reported background check characteristics.

*Criminal history records*.  To gain access to criminal history record information, we entered into an Information Transfer Agreement with FBI.  We provided the employee data obtained from nursing facilities to FBI.  FBI performed a name-based match with the Interstate Identification Index.  Of the 35,286 names we provided, we received the criminal history record information for approximately 11,200 individuals who closely matched the names we provided.[20] Because FBI uses an algorithm to conduct name-based searches, we received multiple matches for some of the searches, especially for individuals with common names.

**Analysis**

*Employee data and criminal history records*.  Using the SSN, date of birth, race, and gender identifiers, we further examined the matches FBI provided to identify the individuals employed by the nursing facilities. We determined that approximately 4,400 individuals matched the identifiers of the individuals employed by sampled nursing facilities.[21]

We analyzed the information to identify individuals with criminal convictions employed by the sampled nursing facilities.  Using six broad categories of offenses, we recorded convictions for each positively matched individual's criminal history.[22]  Following are examples of specific offenses included in each broad category; these lists do not include every specific offense we found in each of the six categories:

- crimes against persons:  assault, battery, murder, rape, robbery;

- crimes against property:  burglary, larceny, possession of stolen property, shoplifting, theft, vandalism, writing bad checks;

- driving under the influence of drugs or alcohol (DUI):  driving under the influence, driving while intoxicated;

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[20] FBI did not provide any matches for approximately 24,000 individuals; therefore, we did not perform further analysis on these individuals.

[21] The identifiers of the other approximately 6,800 individuals did not match the identifiers of the sampled nursing facility employees (e.g., different date of birth, different SSN).

[22] We consulted FBI definitions of "crime" to assist us in categorizing offenses.  Accessed at http://www.fbi.gov/ucr/ on August 14, 2009.

- driving-related crimes (other than DUI): leaving the scene of an accident, transporting an open container of alcohol in a vehicle;

- drug-related crimes: possession of drugs or paraphernalia, sale of controlled substances; and

- other: disorderly conduct, prostitution, resisting arrest, weapons violations.

*Sex offender registries*. The criminal history record information provided by FBI indicated that a few nursing facility employees were registered as sexual offenders. Because additional information is readily available on sexual offenses, we examined Federal and State sex offender registries for these employees.[23] The examination of these registries demonstrated how such checks can provide additional information to complement a criminal background check. See Appendix C for the results of our review.

**Standards**

This study was conducted in accordance with the *Quality Standards for Inspection and Evaluation* approved by the Council of the Inspectors General on Integrity and Efficiency.

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[23] Most other types of offenses (e.g., drug-related crimes) do not have similar registries.

Consistent with a congressional request, the objective of this evaluation is to determine whether and to what extent nursing facilities employed individuals with criminal convictions. Federal regulation prohibits Medicare and Medicaid nursing facilities from employing individuals found guilty of abusing, neglecting, or mistreating residents by a court of law, or who have had a finding entered into the State nurse aide registry concerning abuse, neglect, or mistreatment of residents or misappropriation of their property. FBI-maintained criminal history records do not contain detailed information (i.e., they do not indicate whether the victim of a crime was a nursing facility resident) to determine whether a conviction disqualifies an individual from nursing facility employment under Federal regulation. Therefore, we used the FBI data to determine whether individuals employed by nursing facilities had criminal convictions. We did not determine whether these individuals were employed in violation of Federal regulation as that question is outside the scope of this evaluation.

## Almost all nursing facilities employed one or more individuals with at least one criminal conviction

Our analysis of FBI-maintained criminal history records revealed that 92 percent of nursing facilities employed at least one individual with at least one criminal conviction.[24] The number of individuals with at least 1 conviction employed by these nursing facilities ranged from 1 to 66.

Nearly half of nursing facilities employed five or more individuals with at least one conviction. For example, a nursing facility with a total of 164 employees had 34 employees with at least 1 conviction each. These 34 individuals had 102 total convictions categorized as follows: 29 convictions for crimes categorized as other, 25 convictions for crimes against property, 18 drug-related convictions, 16 convictions for crimes against persons, 8 convictions for DUI, and 6 driving-related convictions. Table 3 shows the percentages of nursing facilities that employed various percentages of employees with convictions.

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[24] Appendix D presents the point estimates and confidence intervals for all population estimates.

**Table 3: Percentage of Nursing Facilities That Employed Various Percentages of Employees With Criminal Convictions**

| Percentage of Employees With Criminal Convictions | Percentage of Nursing Facilities |
|---|---|
| None | 7.7% |
| Up to 5.0% | 51.8% |
| Greater than 5.0% to 10.0% | 26.0% |
| Greater than 10.0% to 15.0% | 6.3% |
| Greater than 15.0% to 20.0% | 5.7% |
| Greater than 20.0% to 25.0% | 2.5% |
| **Total** | **100.0%** |

Source: OIG analysis of FBI criminal history records and nursing facility employee data, 2009.

**The most common criminal conviction was for crimes against property**
Among employees with criminal convictions, the most common criminal conviction was for crimes against property, such as burglary, shoplifting, and writing bad checks (44 percent). Table 4 shows the categories of crimes for which nursing facility employees were convicted.

**Table 4: Categories of Crimes for Which Nursing Facility Employees Were Convicted**

| Category of Crime | Percentage of Employees With Criminal Convictions |
|---|---|
| Crimes against property | 43.6%* |
| Other | 26.4% |
| DUI | 20.3% |
| Drug-related crimes | 16.2% |
| Crimes against persons | 13.1% |
| Driving-related crimes other than DUI | 11.9% |

Source: OIG analysis of FBI criminal history records and nursing facility employee data, 2009.

Percentages do not sum to 100 percent because some employees had criminal convictions of more than one category.

*The percentage of employees with property convictions was statistically higher than all the other categories at the 95-percent confidence level.

**Five percent of nursing facility employees had at least one criminal conviction**

Overall, 5 percent of nursing facility employees had at least one conviction in FBI-maintained criminal history records. Employees with at least one conviction in their criminal history records averaged two convictions per employee. The number of criminal convictions per employee in our sample ranged from 1 to 110.

Five percent of staff identified by the nursing facilities as direct-care employees had criminal convictions, which mirrors the conviction rate for nursing facility staff in general. The term "direct-care staff" encompasses many job classifications (e.g., nurses, nurse aides). Sampled nursing facilities differed on what job classifications constituted direct-care staff. In addition to reporting which of their employees they consider direct-care staff, nursing facilities reported the job classifications of all of their employees. Table 5 shows the percentage of employees with certain job classifications who had convictions.

**Table 5: Nursing Facility Employees With Certain Job Classifications Who Had Convictions**

| Job Classification | Percentage of Employees With Convictions |
|---|---|
| Housekeeping/laundry/maintenance/security | 6.5% |
| Certified nursing and medication aides | 6.4% |
| Dietary | 5.7% |
| Nursing (e.g., registered and licensed practical nurses) | 3.6% |
| All other | 2.7% |
| Administration | 2.6% |

Source: OIG analysis of FBI criminal history records and nursing facility employee data, 2009.

**Most criminal convictions occurred prior to employment**

Eighty-four percent of employees with criminal convictions had their most recent conviction prior to their beginning date of employment. Of the employees with criminal convictions prior to the beginning date of employment, 38 percent had their most recent conviction 10 or more years prior to employment. For example, 1 individual employed since 2005 had 13 convictions for crimes against property, the last of which was in 1988. No further convictions appeared in this employee's

criminal history record.  Table 6 shows the elapsed time between an employee's most recent conviction before his or her beginning date of employment.

**Table 6:  Elapsed Time Between Employee's Most Recent Conviction Before Beginning Date of Employment**

| Elapsed Time Before Beginning Date of Employment | Percentage of Employees With Convictions Prior to Employment |
|---|---:|
| Less than 1 year | 7.5% |
| 1 year to less than 5 years | 28.6% |
| 5 years to less than 10 years | 26.1% |
| 10 years or more | 37.8% |
| **Total** | **100.0%** |

Source:  OIG analysis of FBI criminal history records and nursing facility employee data, 2009.

Sixteen percent of employees with convictions had their most recent conviction after their beginning date of employment.  For example, one individual employed since January 2009 in a nursing facility housekeeping department was convicted of assault in July 2009.  The individual pleaded guilty to the charge and was sentenced to 2 years' probation and 60 hours of community service.  Another individual employed in a nursing facility maintenance department since 1978 had no convictions listed in the criminal history record until 1991.  The individual's criminal history record listed a total of five convictions (two for drug-related crimes and three for DUI), all of which occurred after the beginning date of employment.  A nursing facility would need to conduct periodic criminal background checks to identify these convictions.  Table 7 shows the elapsed time between an employee's beginning date of employment and his or her most recent conviction.

**Table 7:  Elapsed Time Between Employee's Beginning Date of Employment and Most Recent Conviction**

| Elapsed Time After Beginning Date of Employment | Percentage of Employees With Convictions After Beginning Date of Employment |
|---|---:|
| Less than 6 months | 15.8% |
| 6 months to less than 1 year | 10.7% |
| 1 year to less than 2 years | 22.4% |
| 2 years to less than 5 years | 23.3% |
| 5 years to less than 10 years | 14.9% |
| 10 years or more | 12.8% |
| **Total** | **100.0%*** |

Source:  OIG analysis of FBI criminal history records and nursing facility employee data, 2009.
*Percentages do not sum to 100 percent because of rounding.

**Despite the lack of a Federal requirement for nursing facilities to conduct criminal background checks, most States required, and/or nursing facilities reported conducting, some type of background check**

Forty-three States required nursing facilities to conduct either an FBI or a statewide criminal background check for prospective employees.  Ten States required FBI criminal background checks and 33 States required statewide criminal background checks.

Some nursing facilities located in the remaining eight States reported conducting criminal background checks even though they were not required to do so.  All but 2 percent of nursing facilities reported conducting some type of background check.[25]  The most common type of background check nursing facilities reported conducting was a statewide criminal background check, followed by other types of checks (e.g., State abuse registries, State nurse aide registries) and then FBI criminal background checks.[26]  Half of nursing facilities reported using

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[25] These nursing facilities were located in two States; one State required nursing facilities to conduct statewide criminal background checks and the other State had no requirements for conducting criminal background checks.

[26] Difference was statistically significant at the 95-percent confidence level.  The percentage of nursing facilities that reported conducting each type of check and the results of the difference tests are available in Appendix D.

other sources for background checks, such as State-specific abuse or sex offender registries and private agencies.

Administrators for 94 percent of nursing facilities that conduct background checks reported conducting them on all classifications of employees. Another 4 percent reported conducting background checks only on direct-care staff.[27] However, sampled nursing facilities differed on what job classifications constituted direct-care staff. For example, 14 nursing facilities considered all employees in the nursing facilities to be direct care (i.e., having the potential of direct access to residents), while other nursing facilities limited the definition to discrete job classifications (e.g., nurses, therapists, and activity workers).

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[27] The remaining facilities did not answer this question.

After completion of our data collection, the Patient Protection and Affordable Care Act (P.L. 111-148) became Federal law. It requires the Secretary to carry out a nationwide program for States to conduct national and statewide criminal background checks for direct patient access employees of nursing facilities and other providers similar to the pilot program MMA established. The program is being carried out in fiscal years 2010 through 2012. Public Law 111-148 also requires OIG to review the nationwide program and submit a report to Congress no later than 180 days after the completion of the nationwide program.

In light of our findings and in carrying out the mandate for the Department of Health & Human Services to implement the nationwide criminal background check program, we recommend that CMS:

**Develop background check procedures**
To ensure that States conduct background checks consistently, CMS should (1) clearly define the employee classifications that are direct patient access employees and (2) work with participating States to develop a list of State and local convictions that disqualify an individual from nursing facility employment under the Federal regulation and periods for which each conviction bars the individual from employment.

## AGENCY COMMENTS AND OFFICE OF INSPECTOR GENERAL RESPONSE

In its written comments on the draft report, CMS agreed with our recommendation to develop background check procedures. CMS stated that in its solicitation to States for the National Background Check Program, the definition of "direct patient access employee" is anyone who routinely comes into contact or has the potential to come into contact with residents or clients. For nursing facilities, this definition should include all staff.

CMS also stated that it will work with the States through the National Background Check Program to assist them in developing lists of convictions that disqualify individuals from employment, as well as defining whether any of those conviction types can be assumed to be mitigated because of the passage of time and which convictions should never be considered mitigated or rehabilitated. We did not make any changes to the report based on CMS's comments. The full text of CMS's comments on the draft report can be found in Appendix E.

### Table A-1:  Profile of Sampled Nursing Facility Employee Characteristics

| Characteristic | Subgroup | Number of Employees (n=35,286) | Percentage of Employees |
|---|---|---|---|
| Job Classification | Certified nursing and medication aides | 12,456 | 35.3% |
| | Nursing (e.g., registered and licensed practical nurses) | 6,986 | 19.8% |
| | Dietary | 3,866 | 11.0% |
| | Housekeeping/laundry/maintenance/security | 3,814 | 10.8% |
| | Administration | 3,584 | 10.2% |
| | Supervisory nursing | 1,090 | 3.1% |
| | Hospitality/activities/chaplains | 1,018 | 2.9% |
| | Therapists | 866 | 2.5% |
| | Aides not otherwise specified | 677 | 1.9% |
| | Social workers | 466 | 1.3% |
| | Other clinical personnel | 258 | 0.7% |
| | Other | 79 | 0.2% |
| | Transportation | 81 | 0.2% |
| | Beauticians | 45 | 0.1% |
| Gender | Male | 5,171 | 14.7% |
| | Female | 29,893 | 84.7% |
| | Not specified | 222 | 0.6% |
| Age on June 1, 2009 | Under 21 | 1,926 | 5.5% |
| | 21–30 | 7,065 | 20.0% |
| | 31–40 | 7,274 | 20.6% |
| | 41–50 | 8,520 | 24.1% |
| | 51–60 | 7,434 | 21.1% |
| | Over 60 | 3,066 | 8.7% |
| | Not specified | 1 | Less than 0.1% |
| Race | White | 19,412 | 55.0% |
| | Black or African American | 8,791 | 24.9% |
| | Hispanic | 2,777 | 7.9% |
| | Asian | 1,383 | 3.9% |
| | Other or not specified | 2,923 | 8.3% |
| Direct-Care Employee | Yes | 24,605 | 69.7% |
| | No | 10,677 | 30.3% |
| | Not specified | 4 | Less than 0.1% |
| Length of Employment on June 1, 2009 | 0 to 2 years | 15,047 | 42.6% |
| | Greater than 2 to 5 years | 7,818 | 22.2% |
| | Greater than 5 to 8 years | 3,816 | 10.8% |
| | Greater than 8 to 10 years | 1,780 | 5.0% |
| | Greater than 10 to 15 years | 2,761 | 7.8% |
| | Greater than 15 to 20 years | 1,841 | 5.2% |
| | Greater than 20 years | 2,220 | 6.3% |
| | Not specified | 3 | Less than 0.1% |

Source:  Office of Inspector General analysis of nursing facility employee data, 2009.

Subgroups for some characteristics may not sum to 100 percent because of rounding.

**Table B-1: Profile of Sampled Nursing Facilities' Reported Background Check Characteristics**

| Characteristic | Subgroup | Number of Sampled Nursing Facilities (n=252) | Percentage of Sampled Nursing Facilities |
|---|---|---|---|
| Year Nursing Facility Began Conducting Background Checks | 1988–1999 | 93 | 36.9% |
| | 2000–2004 | 59 | 23.4% |
| | 2005–2008 | 49 | 19.4% |
| | Since establishment of the nursing facility | 24 | 9.5% |
| | Unknown/not specified | 27 | 10.7% |
| 2008 Total Costs for Background Checks | $0 | 33 | 13.1% |
| | Less than $1,000 | 50 | 19.8% |
| | $1,000 to less than $5,000 | 112 | 44.4% |
| | $5,000 to less than $10,000 | 22 | 8.7% |
| | $10,000 to less than $15,000 | 6 | 2.4% |
| Range: $0–$29,565 Average: $2,781 | $15,000 or more | 5 | 2.0% |
| | Unknown/not specified | 24 | 9.5% |
| 2008 Cost Per Background Check | $0 | 33 | 13.1% |
| | Less than $25 | 89 | 35.3% |
| | $25 to less than $50 | 44 | 17.5% |
| | $50 to less than $75 | 33 | 13.1% |
| Range: $0–$190.08 Average: $37.15 | More than $75 | 41 | 16.3% |
| | Unknown/not specified | 12 | 4.8% |

Source: Office of Inspector General analysis of nursing facility survey responses, 2009.

Percentages do not sum to 100 percent because of rounding.

**Different Types of Resources Reveal Different Information**

In our analysis of the Federal Bureau of Investigation (FBI) criminal history records, we identified seven individuals employed in five sampled nursing facilities whose criminal history records indicated that they are currently registered as sex offenders. We chose to examine Federal and State sex offender registries to see what additional information these registries might contain about these employees and how additional checks might complement a criminal background check. Conducting name searches on the National Sex Offender Registry (a public Web site) positively identified only four of the seven individuals as sex offenders.[28] Conducting name searches on Web sites for individual State sex offender registries yielded six of the seven individuals' names.

There was one name that FBI criminal history records identified as a sex offender that we could not identify on the national or relevant State sex offender registries. The criminal history record showed a February 2009 registration as a sex offender with the sheriff's department located in the county in which the employing nursing facility was located. We were unable to verify this information with another source because the Web site for the sheriff's department did not offer the ability to search its sex offender registry.

Upon closer examination of two individuals whose FBI criminal history records indicated "Subject of record is a registered sexual offender," the individuals' names were included on a list found on a Web site maintained by their State Office of Attorney General. The title of the list was "Convicted Sex Offenders and Offenders Against Children." For both individuals, the information indicated that they were "registered offenders against children" and not "registered sexual offenders." The description key of the list indicated that the two individuals were "offenders against children, who have not yet committed a sexually-related offense."

The results of this analysis demonstrate that searches of different sources of background check information may produce different criminal history information.

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[28] The Dru Sjodin National Sex Offender Public Web site can be accessed at http://www.nsopw.gov.

**Table D-1: Point Estimates and Confidence Intervals**

| Estimate Characteristic | Sample Size | Point Estimate | 95-Percent Confidence Interval |
|---|---|---|---|
| **Estimates of nursing facilities that employ individuals with convictions** | | | |
| Percentage of nursing facilities that employ one or more individuals with at least one conviction | 256 | 92.3 | 87.0–95.6 |
| Percentage of nursing facilities that employ five or more individuals with at least one conviction | 256 | 47.8 | 40.1–55.5 |
| **Estimates of nursing facilities whose employees include certain percentages of individuals with convictions** | | | |
| Percentage of nursing facilities with 0 percent of employees with convictions | 256 | 7.7 | 4.5–13.0 |
| Percentage of nursing facilities with up to 5 percent of employees with convictions | 256 | 51.8 | 44.0–59.5 |
| Percentage of nursing facilities with more than 5 and up to 10 percent of employees with convictions | 256 | 26.0 | 19.8–33.4 |
| Percentage of nursing facilities with more than 10 and up to 15 percent of employees with convictions | 256 | 6.3 | 3.5–11.0 |
| Percentage of nursing facilities with more than 15 and up to 20 percent of employees with convictions | 256 | 5.7 | 2.9–10.9 |
| Percentage of nursing facilities with more than 20 and up to 25 percent of employees with convictions | 256 | 2.5 | 0.9–6.8 |
| **Estimates of nursing facility employees with one or more convictions** | | | |
| Percentage of nursing facility employees with crimes against property | 1,772 | 43.6 | 39.5–47.7 |
| Percentage of nursing facility employees with other crimes | 1,772 | 26.4 | 23.7–29.4 |
| Percentage of nursing facility employees with driving under the influence of drugs or alcohol (DUI) crimes | 1,772 | 20.3 | 17.6–23.2 |
| Percentage of nursing facility employees with drug-related crimes | 1,772 | 16.2 | 13.7–19.0 |
| Percentage of nursing facility employees with crimes against persons | 1,772 | 13.1 | 11.2–15.4 |
| Percentage of nursing facility employees with driving-related crimes other than DUI | 1,772 | 11.9 | 9.9–14.3 |

**Table D-1: Point Estimates and Confidence Intervals (Continued)**

| Estimate Characteristic | Sample Size | Point Estimate | 95-Percent Confidence Interval |
|---|---|---|---|
| **Estimates of nursing facility employees with convictions in certain job classifications** | | | |
| Nursing facility employees that have at least one conviction | 35,286 | 4.9 | 4.2–5.9 |
| Percentage of direct-care staff with convictions | 24,605 | 5.1 | 4.2–6.3 |
| Percentage of housekeeping/laundry/maintenance/security staff with convictions | 3,814 | 6.5 | 5.38–7.81 |
| Percentage of certified nursing and medication aides with convictions | 12,456 | 6.4 | 5.1–8.0 |
| Percentage of dietary staff with convictions | 3,866 | 5.7 | 4.7–7.0 |
| Percentage of nursing staff (e.g., registered and licensed practical nurses) with convictions | 6,986 | 3.6 | 2.8–4.7 |
| Percentage of all other types of staff with convictions | 4,581 | 2.7 | 2.1–3.5 |
| Percentage of administrative staff with convictions | 3,584 | 2.6 | 1.9–3.6 |
| **Estimates of nursing facility employees whose most recent conviction was prior to employment** | | | |
| Percentage of nursing facility employees with convictions who have their most recent conviction prior to the beginning date of employment | 1,772 | 84.0 | 80.4–87.0 |
| Percentage whose most recent conviction was less than 1 year prior to beginning employment | 1,498 | 7.5 | 5.8–9.8 |
| Percentage whose most recent conviction was more than 1 year but less than 5 years prior to beginning employment | 1,498 | 28.6 | 25.0–32.5 |
| Percentage whose most recent conviction was more than 5 years but less than 10 years prior to beginning employment | 1,498 | 26.1 | 21.7–31.0 |
| Percentage whose most recent conviction was more than 10 years prior to beginning employment | 1,498 | 37.8 | 33.8–42.0 |

**Table D-1:  Point Estimates and Confidence Intervals (Continued)**

| Estimate Characteristic | Sample Size | Point Estimate | 95-Percent Confidence Interval |
|---|---|---|---|
| **Estimates of nursing facility employees whose most recent conviction was after beginning employment** | | | |
| Percentage of nursing facility employees with convictions whose most recent conviction was after beginning employment | 1,772 | 16.0 | 13.0–19.6 |
| Percentage whose most recent conviction was less than 6 months after beginning employment | 274 | 15.8 | 10.9–22.4 |
| Percentage whose most recent conviction was more than 6 months but less than 1 year after beginning employment | 274 | 10.7 | 7.0–16.0 |
| Percentage whose most recent conviction was more than 1 year but less than 2 years after beginning employment | 274 | 22.4 | 16.1–30.1 |
| Percentage whose most recent conviction was more than 2 years but less than 5 years after beginning employment | 274 | 23.3 | 19.0–28.2 |
| Percentage whose most recent conviction was more than 5 years but less than 10 years after beginning employment | 274 | 14.9 | 10.6–20.7 |
| Percentage whose most recent conviction was more than 10 years after beginning employment | 274 | 12.8 | 8.0–20.0 |
| **Estimates of nursing facilities that conduct different types of background checks** | | | |
| Percentage of nursing facilities that do not conduct any type of background check | 256 | 2.4 | 0.8–6.8 |
| Percentage of nursing facilities that reported conducting Statewide criminal history checks | 256 | 87.4 | 81.6–91.6 |
| Percentage of nursing facilities that reported using other sources for background checks | 256 | 50.8 | 43.1–58.6 |
| Percentage of nursing facilities that reported conducting FBI criminal history checks | 256 | 23.5 | 18.0–30.0 |
| Percentage of nursing facilities that conduct background checks on all employees | 256 | 93.7 | 88.9–96.5 |
| Percentage of nursing facilities that conduct background checks only on direct-care employees | 256 | 3.9 | 2.0–7.6 |

Source:  Office of Inspector General (OIG) analysis of Federal Bureau of Investigation (FBI) criminal history records and nursing facility employee data, 2009.

**Table D-2:  Point Estimates and Confidence Intervals for Differences in Categories of Convictions**

| Category of Conviction | Percentage of Employees With Convictions | Percentage Difference | 95-Percent Confidence Interval on Difference | p-value |
|---|---|---|---|---|
| Property | 43.6 | 17.1 | 10.6–23.7 | <0.0001 |
| Other | 26.4 | | | |
| Property | 43.6 | 23.3 | 15.4–31.2 | <0.0001 |
| DUI | 20.3 | | | |
| Property | 43.6 | 27.4 | 21.0–33.8 | <0.0001 |
| Drugs | 16.2 | | | |
| Property | 43.6 | 30.4 | 23.8–37.0 | <0.0001 |
| Persons | 13.1 | | | |
| Property | 43.6 | 31.6 | 25.5–37.8 | <0.0001 |
| Other driving (not DUI) | 11.9 | | | |

Confidence intervals and p-values are reported for each single comparison.  Applying a Bonferroni threshold of 0.05/5, differences for all five simultaneous comparisons are statistically significant at the 95-percent confidence level.

Source:  OIG analysis of FBI criminal history records and nursing facility employee data, 2009.

**Table D-3:  Point Estimates and Confidence Intervals for Differences in Type of Check Conducted**

| Type of Background Check | Percentage of Nursing Facilities Conducting Check | Percentage Difference | 95-Percent Confidence Interval on Difference | p-value |
|---|---|---|---|---|
| Statewide* | 87.4 | 36.6 | 27.1–46.1 | <0.0001 |
| Using other source | 50.8 | | | |
| Statewide | 87.4 | 64.0 | 56.5–71.4 | <0.0001 |
| FBI | 23.5 | | | |
| Using other source | 50.8 | 27.4 | 17.0–37.7 | <0.0001 |
| FBI | 23.5 | | | |

*Confidence intervals and p-values are reported for each single comparison.  Applying a Bonferroni threshold of 0.05/3, differences for all three simultaneous comparisons are statistically significant at the 95-percent confidence level.

Source:  OIG analysis of nursing facility survey responses, 2009.

# ► APPENDIX ~ E

## AGENCY COMMENTS

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DEPARTMENT OF HEALTH & HUMAN SERVICES

Centers for Medicare & Medicaid Services

200 Independence Avenue SW
Washington, DC 20201

DATE:      JAN 1 2 2011

TO:        Daniel R. Levinson
           Inspector General

FROM:      Donald M. Berwick, M.D.
           Administrator

SUBJECT:   Office of Inspector General (OIG) Draft Report: "Nursing Facilities' Employment of
           Individuals With Criminal Convictions" (OEI-07-09-00110)

Thank you for the opportunity to review and comment on the subject OIG draft report. The OIG's
study focused on determining whether and to what extent nursing facilities employed individuals
with criminal convictions. During this study, the OIG:

- Found almost all nursing facilities employed one or more individuals with at least one
  criminal conviction.

- Discovered that despite the lack of a Federal requirement for nursing facilities to conduct
  criminal background checks, most States required and/or nursing facilities reported
  conducting some type of background check.

In its report, OIG made recommendations to the Secretary of Health and Human Services (HHS) and
the Administrator of the Centers for Medicare & Medicaid Services (CMS). In making these
recommendations, OIG took into consideration the Patient Protection and Affordable Care Act
(P.L.111-148) provision that the HHS Secretary must implement a nationwide grant program for
States to conduct national and statewide criminal background checks for direct patient access
employees of nursing facilities and other providers. Our response to these recommendations is stated
below.

### OIG Recommendation

To develop background check procedures and ensure that States conduct background checks
consistently, CMS should clearly define the employee classifications that are direct patient access
employees.

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**CMS Response**

The CMS agrees with this recommendation. Our solicitation for the CMS National Background Check Program makes it clear that in each of the nine required long-term care settings of the Program (including nursing homes), a direct access employee is anyone who routinely comes into contact or has the potential to come into contact with residents/clients. This is a broad, and outcome-based, rather than job title-based definition, which in nursing homes should include all staff. We believe that any limitation to certain clinical or "direct care" job titles would diminish the safety to residents, since they could be harmed by janitors, maintenance staff, housekeepers, etc.

**OIG Recommendation**

To develop background check procedures and ensure that States conduct background checks consistently, CMS should work with participating States to develop a list of State and local convictions that disqualify an individual from nursing facility employment under the Federal regulation and periods for which each conviction bars the individual from employment.

**CMS Response**

The CMS agrees with this recommendation. CMS will work with the States through the National Background Check Program to assist them to develop lists of convictions that disqualify individuals for service, as well as defining whether any of those conviction types can be assumed to be mitigated due to passage of time (e.g., drug possession 20 years ago, driving under the influence five years ago) and which should never be considered mitigated or rehabilitated.

The CMS appreciates the opportunity to comment on this draft report, and we look forward to working with the OIG on this and other issues.

## ◤ A C K N O W L E D G M E N T S

# Office of Inspector General
### http://oig.hhs.gov

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