Certified Nursing Assistants

Employment Prohibitions Based on Criminal Convictions

Resolve 2009 Chapter 68

Final Report
December, 2010

Report to the Maine State Legislature
Joint Standing Committee on Health and Human Services
Joint Standing Committee on Criminal Justice and Public Safety

Department of Health and Human Services

Maine People Living
Safe, Healthy and Productive Lives

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EXECUTIVE SUMMARY

Resolve 2009, chapter 68, established a Department of Health and Human Services workgroup during the 124th Maine Legislature. The workgroup membership included representatives of the department, the long-term care ombudsman program, advocates for victims of sexual assault, the district attorney's office, legal services for the elderly, direct care workers, the Maine Health Care Association and the Home Care and Hospice Alliance of Maine. See membership list (Attachment B).

The workgroup was established (1) to examine and make recommendations for changes to the current law prohibiting an individual from employment as a certified nursing assistant (CNA) in certain settings if the individual has been convicted of a crime involving abuse, neglect or misappropriation of property in a health care setting; (2) to review the list of crimes that preclude an individual from employment as a certified nursing assistant and to make recommendations for changes, including but not limited to, the addition of crimes involving sexual assault and violence; (3) to consider issues related to the duration of the employment prohibition and the direct care workers to whom the prohibitions apply; and (4) to determine whether the law should be retroactive.

This report, prepared by DHHS, includes the workgroup's findings and recommendations, and a draft of necessary implementing legislation. In accordance with the Resolve, after receipt and review of the report and recommendations, the Joint Standing Committee on Health and Human Services may submit legislation to the First Regular Session of the 125th Legislature.

NEW LAWS: UAPs ON REGISTRY AND PROVIDER PRE-HIRE BACKGROUND CHECKS.
Two recently enacted laws that impact the CNA Registry were considered by the workgroup. One new law requires the listing of unlicensed assistive persons (UAPs) on the CNA Registry when a complaint against a UAP has been substantiated after a department investigation. UAPs listed on the Registry with a substantiated complaint are banned for life from employment as either a UAP or a CNA in Maine. (See PL 2009, chapter 215)

"Unlicensed assistive person" includes but is not limited to direct support professionals, residential care specialists, personal support specialists, mental health rehabilitation technicians, behavioral specialists, certified residential medication aides, and other direct care workers. "Unlicensed assistive person" does not include a certified nursing assistant employed in the capacity of a certified nursing assistant.

The second new law considered by the workgroup requires providers to secure criminal background checks prior to hiring any employee who will work in direct contact with the client, resident or patient. (Attachment H).

CURRENT LAW
Pursuant to federal law, Maine established and maintains a CNA Registry. Prior to working as a CNA, the individual must be listed on the CNA Registry. Prior to hiring an individual to work as a CNA, prospective employers must check the Registry to verify the individual is listed on the Registry without notations of substantiated complaints or disqualifying criminal convictions that prohibit employment as a CNA in Maine.

Current law bans employment as a CNA when an individual is convicted within the last 10 years of *"a crime involving abuse, neglect or misappropriation of property"* or a crime "*involving sexual misconduct."* The duration of the ban is currently based on the length of the sentence that "*may be imposed under the laws of the state in which the conviction occurred*." Criminal convictions for these disqualifying crimes are included as notations on the Registry. Non-disqualifying Class D and Class E criminal convictions result in a notation on the Registry but do not ban employment as a CNA.

Currently, the Registry obtains in-state criminal background checks on all CNA applicants trained in Maine and enters notations of convictions on the Registry.[1] Beginning January 2011, the Registry will secure a criminal background check on CNAs every 2 years during the reregistration process. The Registry identifies criminal conviction notations as either *disqualifying notations* [that result in an employment ban] or *non-disqualifying notations* [that do not result in an employment ban but may be considered by prospective employers during the hiring process].

FINDINGS

Based on its discussions, research and meetings, the workgroup made the following findings.

Finding #1:

The workgroup examined whether criminal convictions are a reasonable basis for an employment ban. The workgroup concluded that, subject to some changes recommended by the workgroup, notations on the Registry concerning criminal convictions are an effective way to identify workers who should be banned from employment in health care and other direct care settings.

Finding #2:

After thoughtful examination, the workgroup concluded that employment bans should be based on certain "named crimes" that involve the type of offense and criminal conduct reasonably related to potential risk for persons cared for by a CNA, instead of using "length of sentence" to determine which convictions should result in employment bans.

Finding #3:

The workgroup concluded that "named crimes" should replace the current ambiguous statutory language (*involving* sexual misconduct or *involving* abuse, neglect or exploitation). Since employment bans take away the means of making a living as a CNA, the bans should be based on convictions for specific named crimes that are clearly identifiable notations on the Registry and that require little if any interpretation by prospective employers. See Attachment I for the table of named crimes developed by the workgroup. The table includes citations to Maine's criminal code.

Finding #4:

After careful research and discussion, the workgroup concluded that a change is needed to prohibit employment based on some domestic violence convictions. Those crimes are included in the table of specific named crimes. (See Attachment I).

Finding #5:
The workgroup concluded that the length of the employment ban for specific named crimes should be either 10 or 30 years in order to protect vulnerable adults. The workgroup concluded that there should be no automatic lifetime employment bans based on criminal convictions. Attachment I identifies which specific criminal convictions should result in a 10-year employment ban, and which specific criminal convictions should result in a 30-year employment ban.

Finding #6:
The workgroup concluded that some specific criminal convictions should not result in an employment ban. These non-disqualifying convictions should be listed as notations on the Registry. The workgroup concluded that, in accordance with current law, the Registry notation information should be available to prospective employers for consideration during the hiring process. Attachment I identifies specific named crimes that should not ban employment but should be listed as notations on the Registry.

Finding #7:
The workgroup concluded that a reinstatement process is needed that allows CNAs and UAPs to return to work before the expiration of an employment ban. The workgroup concluded that Maine consumers, CNAs, and direct care workers may be better served by a petition process that reviews the individual's criminal conduct and lifts the employment ban when there is compliance with specific criteria established by department rules.

Finding #8:
The workgroup concluded that employers who must secure a pre-hire criminal background check for individuals who will work in direct contact with consumers should be prohibited from hiring individual's with disqualifying convictions. The workgroup concluded that employers should use the table of named crimes to identify disqualifying criminal convictions. See Attachment I for the table of named crimes.

Finding #9:
The workgroup concluded that the department should establish an advisory board to recommend future changes that may need to be made to the "table of named crimes."

RECOMMENDATIONS

1. **Add a table of named crimes to rules governing the Registry.** The workgroup recommends including a table of named crimes in department rules that govern the Registry. The workgroup's table of named crimes is Attachment I.

2. **Draft legislation to amend the CNA and UAP Registry laws.** The workgroup recommends submitting the attached draft legislation to the 125th Legislature (Attachment F). The changes incorporated into the workgroup's draft legislation include the following provisions:

   2.1 New name for Registry. Rename the CNA Registry: *"The Certified Nursing Assistant and Direct Care Worker Registry."*

2.2 **Named crimes.** Base employment bans on convictions for "named crimes" instead of length of sentence.

2.3 **Thirty-year and 10-year bans.** Include language in the law stating that convictions of specific named crimes shall result in a 30-year or a 10-year employment ban. Place the table of named crimes in the Registry rules.

2.4 **Hiring consideration: Registry notations.** Notations of convictions that no longer ban employment, and notations of non-disqualifying convictions that do not ban employment, remain on the Registry and the conviction information is available to prospective employers for consideration during the hiring process.

2.5 **Reinstatement prior to expiration of employment ban.** Create a procedure for CNAs and UAPs to return to work prior to the expiration of an employment ban. The procedure includes a petition for removal of the ban that demonstrates that the individual has been rehabilitated as demonstrated by that person's conduct. Criteria for removal of an employment ban shall be established by department rulemaking. Reinstatement allows CNAs and UAPs to return to work as CNAs or UAPs.

2.6 **Replace ambiguous statutory language.** Replace ambiguous statutory language such as "crimes *involving* sexual misconduct", and "crimes *involving* abuse, neglect, and exploitation" with language that refers to named crimes. (See Attachment I).

2.7 **Exception: currently employed CNAs and UAPs.** No currently employed CNAs or UAPs will loose their jobs when the new employment bans take effect. The new employment bans do not apply to CNAs as long as they continue to work at their current jobs. Employment bans will apply when CNAs or UAPs leave their current employment for a *new* job. CNAs or UAPs with disqualifying criminal convictions may petition for removal of the employment ban prior to its expiration. This petition may help CNAs or UAPs who are seeking new employment to continue to work as CNAs or UAPs in spite of a criminal conviction.

2.8 **Employer pre-hire criminal background checks.** Employers who must secure a pre-hire criminal background check for individual who will work in direct contact with consumers, cannot employ an individual with a disqualifying criminal conviction. A disqualifying criminal conviction is determined by the employer's use of the table of named crimes in the department's rules governing the Registry. The table applies to employees who work in direct contact with consumers including but not limited to CNAs, UAPs and other direct care workers.

2.9 **Advisory board.** The department shall establish an advisory board made up of representatives of the various users of the Registry, including representatives of the department, other state agencies, organizations representing direct care workers, advocacy organizations, the district attorney's office, and employers. The advisory board shall convene at least once every 2 years to recommend changes to the table of named crimes.

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I. INTRODUCTION

WORKGROUP ESTABLISHED

The Department of Health and Human Services is pleased to submit the final report of the "Resolve 68 Workgroup" (workgroup) established pursuant to Resolve 2009, chapter 68 of the 124th Maine Legislature (Attachment A). The workgroup's report, "*Certified Nursing Assistants, Employment Prohibitions Based on Criminal Convictions,"* examines certain criminal convictions that prohibit employment as a certified nursing assistant (CNA) in Maine.

The workgroup membership included representatives of the department, the long-term care ombudsman program, advocates for victims of sexual assault, the district attorney's office, legal services for the elderly, direct care workers, the Maine Health Care Association and the Home Care and Hospice Alliance of Maine. See membership list (Attachment B).

The report includes the findings and recommendations of the workgroup, including suggested draft legislation to amend the CNA Registry statute.

NEW LAW: UNLICENSED ASSISTIVE PERSONS LISTED ON REGISTRY

Recently enacted laws that impact the CNA Registry were considered by the workgroup. One new law requires the listing of unlicensed assistive persons (UAPs) on the CNA Registry when a complaint against a UAP has been substantiated[2] after a department investigation. UAPs listed on the Registry with a substantiated complaint are banded for life from employment as either a UAP or a CNA in Maine. (See PL 2009, chapter 215)

The workgroup found it necessary to consider a number of other direct care workers in addition to CNAs during its discussion and research regarding the implication of employment bans on direct care workers. This is reflected in the workgroup's findings, recommendations and draft legislation.

CNAs WITH EMPLOYMENT BANS ALSO BANNED FROM EMPLOYMENT AS UAP.

The need for the workgroup to consider UAPs and CNAs is also based on a Maine law that states that if an individual cannot work as a CNA in Maine, that individual is also banned from working as a UAP in Maine. See 22 M.R.S.A. §1812-J (7).

NEW LAW: EMPLOYER PRE-HIRE CRIMINAL BACKGROUND CHECKS

Another new law considered by the workgroup creates a mandatory requirement that providers secure criminal background checks prior to hiring employees who will work in direct contact with the client, resident or patient. (Attachment H). The workgroup reviewed actions that may be taken by prospective employers based on a criminal background check of a prospective employee. The workgroup offers findings, recommendations and draft legislation to ensure consistent application of employment bans and hiring considerations based on criminal convictions for both direct care workers and CNAs throughout Maine.

RECOMMENDATIONS ACHIEVABLE WITHIN DEPARTMENTAL RESOURCES

The recommendations made in this report may be accomplished within current departmental resources. We hope this report and recommendations will be a useful reference as you consider the future course of employment of CNAs and other direct care workers in Maine.

II. BACKGROUND: CNA REGISTRY

The numbers: Maine CNAs (as of 9/30/2010)

Inactive CNAs: 39,284 inactive CNAs on Maine's Registry,

Active CNAs: 15,419 active CNAs are listed on the Registry, including:

- **1,490** CNAs (9.6% of all *active* CNAs) with **2,494** criminal convictions, including:
  - **62** CNAs with convictions that occurred in a health care setting
    (4% of CNAs *with convictions,* and 0.40% of *all active* CNAs)
  - **72** CNAs with convictions for crimes classified as Class A, B, or C
    (4.8% of CNAs *with convictions,* and 0.46% of *all active* CNAs)

Federal law

1. Federal law requires each state to have a CNA Registry
CNA Registries are subject to both federal and state laws. The requirements for states to maintain and operate a CNA Registry (Registry) are found in 42 CFR, Part 483, Subpart D, §483.156, and in 22 M.R.S.A. §1812-G. (Attachment C – state law)

2. Federal law: CNAs must be listed on the Registry
In accordance with federal law, all CNAs must be listed on the Registry. The Registry must include all notations of substantiated complaints. (See Attachment E for more information on substantiated complaints.) CNAs listed on the Registry, with no disqualifying notations, may work as CNAs in Maine.

3. Federal law: provider verification that CNA is on Registry
Pursuant to federal law, certain health care providers must check the Registry prior to hiring a CNA to verify that the CNA is listed on the Registry without disqualifying notations that ban employment. To accomplish this, federal law requires CNA Registries to make information about CNAs available to health care providers and the public.

4. Federal law: lifetime employment ban for substantiated complaints
A CNA on the Registry with a notation of a substantiated complaint of abuse, neglect or misappropriation of property may not work as a CNA. (Pursuant to Maine law, a CNA with a substantiated complaint is also banned from employment as a UAP.) This federal life-time employment prohibition based on substantiated complaints cannot be changed by Maine law and is not the focus of this report. See Attachment E for more information about substantiated complaints. The focus of this report is state mandated employment bans based on criminal convictions.

5. Federal law: removal of lifetime ban for one-time finding of neglect.
An individual with only a one-time substantiated complaint for neglect may petition the CNA Registry for removal of the employment ban. The CNA may not file the petition for removal until 12 months after the neglect notation is listed on the CNA Registry.

Current Maine law

1. Conviction-based employment ban. The charge of the workgroup is to examine current state-law prohibitions on employment as a CNA that are based on certain criminal convictions. (See Attachment C: Maine's current CNA Registry law) Current Maine law includes the following conviction-based employment bans:

a. **Crimes involving abuse: lifetime or 10 year employment ban.**

   i. **Abuse in a health care setting: life-time employment ban.** An individual may not be employed in a health care setting as a CNA if that individual has been convicted in a court of law of a crime involving abuse, neglect or misappropriation of property in a health care setting.

   ii. **Abuse in other settings: 10-year employment ban.** An individual may not be employed in a health care setting as a CNA if that individual has a prior conviction within the last 10 years of a crime for which incarceration of less than 3 years may be imposed under the laws of the state in which the conviction occurred involving sexual misconduct or involving abuse, neglect or exploitation in a setting other than a health care setting.

b. **Other crimes: 10-year employment ban.** An individual may not be employed in a health care setting as a CNA if that individual has a prior criminal conviction within the last 10 years of a crime for which incarceration of 3 years or more may be imposed under the laws of the state in which the conviction occurred.

c. **Non-disqualifying convictions: hiring consideration, not ban.** Class D and Class E convictions [3] within 10 years that did not involve as a victim of the act a patient, client or resident of a health care entity are included in the notations on the Registry and the information may be disclosed to prospective employers but these convictions do not disqualify a CNA from employment.

2. Registry verification.

a. **Provider pre-hire Registry verification: is CNA employable?**
   Certain licensed providers[4] are required by federal or state law to check the Registry prior to hiring a CNA to verify that the CNA is listed on the Registry and is allowed to work as a CNA in Maine (no disqualifying notations that ban employment). All active and annotated CNAs are listed on the Registry.

b. Provider pre-hire Registry verification: is UAP annotated?
In addition, some providers are required to check the Registry prior to hiring UAPs to determine whether they have a notation on the Registry for a substantiated complaint of abuse or neglect that bans them from employment as either a UAP. Only annotated UAPs are listed on the Registry.

c. On-line Registry verification available 24/7.
In April 2009, DHHS launched its Registry Web Portal that has made the Registry accessible to providers 24/7 for pre-hire verification of a CNA or a UAP listing and availability for work. The Registry web portal also created efficiencies in the use of DHHS resources. https://gateway.maine.gov/cnaregistry/

d. Registry verification: consumer safety and payment.
Pre-hire Registry verification is important to maintain consumer safety and because Medicare and MaineCare programs may not pay providers for services rendered by an individual who is banned from employment.

3. Notation of non-disqualifying convictions: not a barrier to employment.
Under current law, most Class D and Class E convictions do not ban employment as a CNA, but the conviction information is entered as a non-disqualifying notation on the CNA Registry and a prospective employer has access to this information when making hiring decisions.

Approximately one third of the CNAs who have been annotated for *non-disqualifying* criminal convictions are still active on the Registry. This implies that having information about a conviction available to employers has not created an unnecessary barrier to employment.

4. Criminal background checks.

a. Registry: criminal background checks.
Currently, the Registry obtains in-state criminal background checks on all CNA applicants trained in Maine and enters notations of convictions on the Registry.[5] This practice identifies criminal convictions that may disqualify the individual from working as a CNA.

EVERY 2 YEARS: CRIMINAL BACKGROUND CHECKS
Beginning January 2011, the Registry will secure a criminal background check on CNAs every 2 years during the CNA's reregistration process. At least every 2 years, the Registry updates notations regarding criminal convictions and notifies the CNA and the CNA's employer if a new conviction is identified that disqualifies the individual from employment.

b. Employer: pre-hire criminal background checks.
Beginning October 1, 2010, employers must secure criminal background checks prior to hiring employees who will work in direct contact with a client, resident or patient. (See Attachment H).

Federal initiative: national fingerprint-based criminal background checks

There is a federal-level initiative for national fingerprint-based criminal background checks for CNAs. This initiative hopes to address the need for multi-state criminal background checks of CNAs who have worked in more than one state as a CNA. Multi-state criminal background checks help ensure the safe care of vulnerable persons by CNAs in our mobile society. Even though the fingerprint-based criminal background check is beyond the scope of this report, Section V of the report includes some information about this CNA Registry initiative.

Finding, recommendations and draft Legislation

The workgroup offers findings, recommendations and draft legislation to ensure consistent application of employment bans by the Registry, and by employers, when employment bans are based on criminal convictions.

III. RATIONAL BASIS FOR EMPLOYMENT BANS

1. Serious consequence of bans: risk loss of livelihood.

This report examines the rationale of employment prohibitions based on certain criminal convictions. Because employment bans have such serious consequences, there must be a rational basis for those bans. The issue raised in Resolve 2009 Chapter 68 is whether the current bans on employment are sufficient and appropriately disqualify individuals from employment as a CNA or UAP.

> Finding #1: The workgroup examined whether criminal convictions are a reasonable basis for an employment ban. The workgroup concluded that, subject to some changes recommended by the workgroup, notations on the Registry concerning criminal convictions are an effective way to identify workers who should be banned from employment in health care and other direct care settings.

2. Enhanced Registry: notations of criminal convictions.

In addition to notations of substantiated complaints (See Attachment E), the Maine CNA Registry includes notations regarding certain criminal convictions. Current Maine law bans employment as either a CNA or UAP when an individual CNA is convicted of certain crimes.

3. Ban based on length of criminal sentence

Current Maine law bans employment based on the length of the sentence that *may* be imposed for the criminal conviction. Current law has no correlation between convictions that ban employment and convictions that place vulnerable persons at risk of abuse by a convicted CNA. Only convictions for crimes that place a person at risk of abuse should result in an employment ban. Case law[6] suggests that there must be a rational basis for findings that result in collateral consequences.

Question: Do "named crimes" provide a better rational basis for identifying at-risk conduct than the "length of the sentence" that *may* be imposed?

Finding #2: After thoughtful examination, the workgroup concluded that employment bans should be based on certain "named crimes" that involve the type of offense and criminal conduct reasonably related to potential risk for persons cared for by a CNA, instead of using "length of sentence" to determine which convictions should result in employment bans.

4. Review of Maine's criminal code: named crimes

To answer the question "What criminal conduct is relevant to employment bans?" the workgroup decided it was necessary to look at crimes included in the Maine criminal code.[7]

CRIME VERSUS CONDUCT

The workgroup also had to tackle an issue often raised by prospective employers concerning current Maine CNA law: what are "crimes *involving* abuse, neglect or misappropriation of property?" (emphasis added) Since Maine law has no crime named "*involving* abuse, neglect, or misappropriation of property" it becomes a matter of interpretation. Depending on the interpretation applied, a criminal conviction may or may not ban a CNA from employment. After much discussion, the workgroup determined that actions "*involving* "abuse, neglect and misappropriation of property" described *conduct* that formed the basis of substantiated complaints (not crimes). The workgroup concluded that the CNA law needed to be clarified.

TABLE OF NAMED CRIMES

The workgroup reviewed the named crimes in Maine's criminal code, including a review of the nature of the criminal conduct, and a discussion of the length of time of probable rehabilitation for named crimes. Based on this review, and to replace the ambiguous statutory language in the current CNA law, the workgroup developed a table of named crimes that should result in an employment ban based on the type of offense and criminal conduct. (See Attachment I).

Question: Should "named crimes" replace so-called "crimes *involving* sexual misconduct, or *involving* abuse, neglect, and exploitation" as the basis of employment bans?

Finding #3: The workgroup concluded that "named crimes" should replace the current ambiguous statutory language (*involving* sexual misconduct or *involving* abuse, neglect or exploitation). Since employment bans take away the means of making a living as a CNA, the bans should be based on convictions for specific named crimes that are clearly identifiable notations on the Registry and that require little if any interpretation by prospective employers. See Attachment I for the table of named crimes developed by the workgroup. The table includes citations to Maine's criminal code.

DOMESTIC VIOLENCE CONVICTIONS

The Resolve enacted by the Maine Legislature invited the workgroup to examine whether the employment bans adequately address domestic violence convictions. Domestic violence crimes (assault, threatening, terrorizing, stalking and reckless conduct) are designated Class D crimes (prior convictions make them Class C crimes). Current CNA Registry law does not prohibit CNAs

from working if convicted of a Class D crime and may ban employment based on a Class C crime, depending on the length of the sentence that *may* be imposed for the specific crime.

> Finding #4: After careful research and discussion, the workgroup concluded that a change is needed to prohibit employment based on some domestic violence convictions. Those crimes are included in the table of specific named crimes. (See Attachment I).

BALANCE: SAFE CARE AND UNNECESSARY EMPLOYMENT BARRIERS

As The Lewin Report suggests, it is important to strike a balance between protecting vulnerable people from harm and creating unnecessary barriers to employment for qualified individuals. The report states that there is a need for additional research because of a paucity of literature examining nurse aides, criminal recidivism, and propensity to commit abuse. Criminal recidivism research shows that a history of past criminal convictions may be a possible predictor of future behavior. Other research reports that the probability of future dangerous behavior by criminal offenders increases when circumstances are similar to past situations in which criminal behaviors occurred which has implications for workers who have substantiated findings of consumer abuse.[8]

5. Length of employment ban: 10-year or 30-year

Once crimes were identified, the workgroup addressed the length of the employment ban that should be imposed on a CNA based on convictions for specific named crimes. The workgroup decided that no automatic lifetime ban should be required. Instead, the workgroup suggested 10-year or 30-year employment bans depending on the specific named crime.

> Finding #5: The workgroup concluded that the length of the employment ban for specific named crimes should be either 10 or 30 years in order to protect vulnerable adults. The workgroup concluded that there should be no automatic lifetime employment bans based on criminal convictions. Attachment I identifies which specific criminal convictions should result in a 10-year employment ban, and which specific criminal convictions should result in a 30-year employment ban.

6. Hiring consideration: non-disqualifying convictions (no ban)

The workgroup identified a number of specific named crimes that should not result in an employment ban. If a CNA has a non-disqualifying conviction, the conviction should be listed as a notation on the Registry and the information available to prospective employers for consideration during the hiring process. Prospective employers have access to available information regarding disqualifying and non-disqualifying convictions for each individual listed on the Registry. Non-disqualifying crimes are included in the table of specific named crimes. (See Attachment I).

> Finding #6: The workgroup concluded that some specific criminal convictions should not result in an employment ban. These non-disqualifying convictions should be listed as notations on the Registry. The workgroup concluded that, in accordance with current law, the Registry notation information should be available to prospective employers for consideration during the hiring process. Attachment I identifies specific named crimes that should not ban employment but should be listed as notations on the Registry.

7. Removal of employment ban prior to its expiration

Research[9] shows the importance of having redemption provisions when considering employment bans. For the purposes of the workgroup discussion, a redemption provision means a mechanism such as a petition filed by a CNA requesting removal of the employment ban and the right to return to work as a CNA *before* the expiration of an imposed employment ban. Current Registry law has no redemption provision when the ban is based on a criminal conviction.[10]

PETITION FOR REMOVAL OF EMPLOYMENT BAN

The workgroup discussed situations where individuals with criminal convictions were rehabilitated and would be able to serve society well as a CNA. There is a direct care worker shortage and a mechanism is needed to allow rehabilitated CNAs with convictions to return to work as a CNA before the expiration of an employment ban. CNAs would have to meet specific criteria that demonstrate their ability to safely serve vulnerable persons as a CNA.

An example of a candidate for redemption and return to CNA work is an individual with a one-time domestic violence conviction that resulted after police arrested both parties during a domestic disturbance. This CNA should be able to petition for removal of the employment ban by demonstrating compliance with criteria established by the department.

> Question: Should a reinstatement process be available that allows an individual to return to work as a CNA prior to the expiration of an employment ban?
>
> Finding #7: The workgroup concluded that a reinstatement process is needed that allows CNAs and UAPs to return to work before the expiration of an employment ban. The workgroup concluded that Maine consumers, CNAs, and direct care workers may be better served by a petition process that reviews the individual's criminal conduct and lifts the employment ban when there is compliance with specific criteria established by department rules.

8. Employer pre-hire criminal background checks.

A new Maine law requires most licensed, certified and registered providers in Maine to secure criminal background checks prior to hiring an individual who will *work in direct contact* with consumers (clients, patients and residents). Employees who work in direct contact with consumers include but are not limited to CNAs, UAPs and other direct care workers.

TABLE OF NAMED CRIMES

How do employers make informed hiring decisions after securing criminal background information on prospective employees who will work in direct contact with consumers? The workgroup concluded that employers should be prohibited from hiring individual's with disqualifying criminal convictions as set out in the table of named crimes. (See Attachment I).

STANDARD FOR CONSISTENT HIRING PRACTICES

The table of named crimes gives employers a standard for consistent employment practices when hiring CNAs and direct care workers. The table of named crimes would give prospective employers a standard against which to interpret and apply background check information.

Question: Should the Registry's "table of named crimes" be used by employers who must secure criminal background checks prior to hiring an individual who will work in direct contact with a consumer? A new Maine law requires most licensed, certified, and registered providers to secure pre-hire criminal background checks. (See Attachment H).

Finding #8: The workgroup concluded that employers who must secure a pre-hire criminal background check for individuals who will work in direct contact with consumers should be prohibited from hiring individual's with disqualifying convictions. The workgroup concluded that employers should use the table of named crimes to identify disqualifying criminal convictions. See Attachment I for the table of named crimes.

9. Consumer self-directed services.
Maine has a growing number of workers who are employed directly by consumers. These direct care workers are paid either privately by the consumer, or federal or state funds pay the workers if the consumer is eligible for one of Maine's consumer directed programs.[11]

PUBLICLY-FUNDED PROGRAM REQUIREMENT: CHECK THE REGISTRY
Consumers participating in publicly-funded consumer directed programs must check the Registry prior to hiring an individual. Public funds do not pay for services provided by workers who have a notation on the Registry for a disqualifying criminal conviction or a substantiated complaint.[12]

PRIVATE PAY: CHECK REGISTRY AND SECURE CRIMINAL BACKGROUND CHECK
Though not required to do so, self-directed consumers who pay workers privately are encouraged to check the Registry (it's free and available online as well as by phone), and to secure a criminal background check (there is a fee) prior to hiring a direct care worker. Consumers need to be wise employers who do their research prior to hiring prospective employees. This workgroup suggests that consumer education advocates stress the importance of checking the Registry and securing a pre-hire criminal background check on prospective employees.

10. Advisory board: table of named crimes.
The workgroup, after careful deliberations, developed a table of named crimes that will need to be updated occasionally. (See Attachment I). The workgroup concluded that the department should establish an advisory board made up of representatives of the various users of the Registry, including representatives of the department, other state agencies, organizations representing direct care workers, advocacy organizations, the district attorney's office, and employers. The advisory board should convene at least once every 2 years to recommend changes to the table of named crimes.

Finding #9: The workgroup concluded that the department should establish an advisory board to recommend future changes that may need to be made to the "table of named crimes."

IV. RECOMMENDATIONS

1. **Add a table of named crimes to rules governing the Registry.** The workgroup recommends including a table of named crimes in department rules that govern the Registry. The workgroup's table of named crimes is Attachment I.

2. **Draft legislation to amend the CNA and UAP Registry laws.** The workgroup recommends submitting the attached draft legislation to the 125th Legislature (Attachment F). The changes incorporated into the workgroup's draft legislation include the following provisions:

   2.1 **New name for Registry.** Rename the CNA Registry: *"The Certified Nursing Assistant and Direct Care Worker Registry."*

   2.2 **Named crimes.** Base employment bans on conviction for "named crimes" instead of length of sentence.

   2.3 **Thirty-year and 10-year bans.** Include language in the law stating that convictions for specific named crimes shall result in a 30-year or a 10-year employment ban. Place the table of specific named crimes in the CNA Registry rules.

   2.4 **Hiring considerations: Registry notations.** Notations of convictions that no longer ban employment and notations of non-disqualifying convictions that do not ban employment remain on the Registry and the conviction information is available to prospective employers for consideration during the hiring process.

   2.5 **Reinstatement prior to expiration of an employment ban.** Create a procedure for CNAs and UAPs to return to work prior to the expiration of an employment ban. The procedure includes a petition for removal of the ban that demonstrates that the individual has been rehabilitated as demonstrated by that person's conduct. Criteria for removal of an employment ban shall be established by department rulemaking. Reinstatement allows CNAs and UAPs to return to work as CNAs or UAPs.

   2.6 **Replace ambiguous statutory language.** Replace ambiguous statutory language such as "crimes *involving* sexual misconduct", and "crimes *involving* abuse, neglect, and exploitation" with language that refers to named crimes. (See Attachment I).

   2.7 **Exception: currently employed CNAs and UAPs.** No currently employed CNAs or UAPs will lose their jobs when the new employment bans takes effect. The new employment bans do not apply to CNAs as long as they continue to work at their current jobs. Employment bans will apply when CNAs or UAPs leave their current employment for a *new* job. CNAs or UAPs with disqualifying criminal convictions may petition for removal of the employment ban prior to its expiration. This petition may help CNAs or UAPs who are seeking new employment to continue to work as CNAs or UAPs in spite of a criminal conviction.

   2.8 **Employer pre-hire criminal background checks.** Employers who must secure a pre-hire criminal background check for individual who will work in direct contact with consumers, cannot employ an individual with a disqualifying criminal conviction. A disqualifying criminal conviction is determined by the employer's use of the table of named crimes in the department's rules governing the Registry. The table applies to

employees who work in direct contact with consumers including but not limited to CNAs, UAPs and other direct care workers.

2.9 **Advisory board.** The department shall establish an advisory board made up of representatives of the various users of the Registry, including representatives of the department, other state agencies, organizations representing direct care workers, advocacy organizations, the district attorney's office, and employers. The advisory board shall convene at least once every 2 years to recommend changes to the table of named crimes.

V. POLICY ISSUES FOR FURTHER CONSIDERATION

While preparing this report, the workgroup identified, without further analysis, two (2) additional issues:

1. **Rider D, Section 16.** It is beyond the scope of the mandate of the workgroup to review the state contract, Rider D, Section 16 which prohibits employment of individuals, including CNAs, with criminal convictions. The workgroup recommends that Rider D, Section 16 in state contracts be reviewed in light of the findings and recommendations of this workgroup. (See Attachment G)

2. **National Criminal Background Check.** It is beyond the financial resources of Maine at this time to complete fingerprint based national criminal background checks on CNAs and UAPs. We live in a mobile society and single-state name based criminal background checks may no longer serve the needs of Maine employers and Maine's expanding aging population who require CNA and UAP care today and in the near future.

   LIMITATIONS OF SINGLE-STATE CRIMINAL RECORD CHECKS
   The validity of checking single-state records for convictions misses convictions in other states. Maine does not employ fingerprinting of CNAs which means there is no ability to do national background checks.

   Criminal background checks was the topic of a study conducted by The Lewin Group[13] for the U.S. Department of Health and Human Services that examined the following topics:

   a. The utility and efficacy of nurse aide registries and criminal background checks as strategies for reducing the incidence of nursing home abuse.

   b. The relationship (if any) between past criminal background or previous incidences of abuse and the proclivity toward subsequent abuse, neglect or exploitation.

   c. Innovative strategies for improving the current screening and monitoring process for ensuring a qualified long-term care workforce.

Data from Arizona and Kansas that was reviewed by The Lewin Group indicated the possibility that nurse aides who had previous criminal convictions (that did not ban them from employment) also had higher rates of substantiated abuse than nurse aides without a criminal history.

The Lewin report states that there is a need for additional research because of a paucity of literature examining nurse aides, criminal recidivism, and propensity to commit abuse. Criminal recidivism research shows that a history of past criminal convictions may be a possible predictor of future behavior. Other research reports that the probability of future dangerous behavior by criminal offenders increases when circumstances are similar to past situations in which criminal behaviors occurred. This has implications for workers who have substantiated findings of consumer abuse.

The Lewin report does not suggest that criminal background checks are the *sole* means to prevent abuse, neglect or exploitation. The adequacy of supervision and monitoring, staff burnout, training, and other factors affect the likelihood of abuse as well. Direct care is a stressful job, and individuals react differently to high stress. It is also a job that presents many temptations for neglect and exploitation. For example, prior convictions for drug seeking or trafficking on the part of a CNA may increase the likelihood that the individual may divert drugs for personal use or for its street value. Pre-hire criminal background checks will help ensure safe care of vulnerable persons in private homes - an unsupervised setting.

The Lewin report notes that variations among state laws made it difficult to conclude whether any particular screening strategy is effective. Because states have various employment bans in place, there was no way to determine, absent those bans, whether rates of abuse, neglect and exploitation would have been higher.

Of the four states studied by The Lewin Group (Arizona, Florida, Illinois and Washington), there was consensus across stakeholders that criminal background checks are a necessary element of screening and hiring.

ATTACHMENT A

Resolve Chapter 68
124th Legislature, First Regular Session
H.P. 608 - L.D. 877

Resolve, To Review the Maine Registry of Certified Nursing Assistants

Sec. 1 Convene working group. Resolved: That the Department of Health and Human Services shall convene a working group to examine and make recommendations for changes to the current law prohibiting an individual from employment as a certified nursing assistant in certain settings if the individual has been convicted of a crime involving abuse, neglect or misappropriation of property in a health care setting. The working group must include representatives of the department, the long-term care ombudsman program, advocates for victims of sexual assault, law enforcement officials, direct care workers and employers. At least one member of the working group must have expertise in the Maine Criminal Code; and be it further

Sec. 2 Review. Resolved: That the working group under section 1 shall review the list of crimes that preclude an individual from employment as a certified nursing assistant in certain settings and make recommendations for changes, including, but not limited to, the addition of crimes involving sexual assault and violence. The working group shall consider issues related to the duration of the employment prohibition, the direct care workers to which it is applicable and whether the law should be retroactive; and be it further

Sec. 3 Report recommendations. Resolved: That, by January 1, 2010, the Department of Health and Human Services shall report to the Joint Standing Committee on Health and Human Services and the Joint Standing Committee on Criminal Justice and Public Safety the findings and recommendations of the working group under section 1, including any necessary implementing legislation; and be it further

Sec. 4 Legislation. Resolved: That, after receipt and review of the report and recommendations submitted pursuant to section 3, the Joint Standing Committee on Health and Human Services may submit legislation to the Second Regular Session of the 124th Legislature.

ATTACHMENT B

As required by Section 1 of the Resolve, the DHHS, Division of Licensing and Regulatory Services convened a workgroup to study the issues mandated by this resolve. Workgroup members included:

Catherine Cobb, Director, Division of Licensing and Regulatory Services, Chairperson

Jill Barkley, Maine Coalition Against Domestic Violence

Leo Delicata, Esq., Legal Service for the Elderly

Rick Erb, Maine Health Care Association

Evert Fowle, Esq., District Attorney

Brenda Gallant, RN, Director, Long-term Care Ombudsman Program

Elizabeth Gattine, Esq., DHHS, Office of Elder and Adult Services

Helen Hanson, Certified nursing assistant

Vicki Purgavie, Maine Homecare and Hospice Alliance

Tammy Steuber, Division of Licensing and Regulatory Services

Catherine Valcourt, Esq. Division of Licensing and Regulatory Services

Elizabeth Ward-Saxl, Esq. Maine Coalition Against Sexual Assault

ATTACHMENT C.

22 M.R.S.A. §1812-G. MAINE REGISTRY OF CERTIFIED NURSING ASSISTANTS

1. **Established.** The Maine Registry of Certified Nursing Assistants is established in compliance with federal and state requirements. The Department of Health and Human Services shall maintain the registry.

[1991, c. 421, §1 (NEW); 2003, c. 689, Pt. B, §6 (REV) .]

1-A. **Definitions.** As used in this section, unless the context otherwise indicates, the following terms have the following meanings.

A. "Certified nursing assistant" means an individual who has successfully completed an approved nursing assistant training program, holds a certificate of training and meets the eligibility requirements established by the State Board of Nursing for listing on the registry. [2009, c. 215, §1 (NEW).]

B. "Registry" means the Maine Registry of Certified Nursing Assistants established in subsection 1, which is a list of certified nursing assistants, with notations if applicable, and a list of unlicensed assistive persons with notations. [2009, c. 215, §1 (NEW).]

C. "Unlicensed assistive person" means an individual employed to provide hands-on assistance with activities of daily living to individuals in homes, assisted living programs, residential care facilities, hospitals and other health care settings. "Unlicensed assistive person" does not include a certified nursing assistant employed in the capacity of a certified nursing assistant. [2009, c. 215, §1 (NEW).]

[2009, c. 215, §1 (NEW) .]

2. **Contents.** The registry must contain a listing of certified nursing assistants . The listing must include, for any certified nursing assistant listed, a notation of:

A. Any criminal convictions, except for Class D and Class E convictions over 10 years old that did not involve as a victim of the act a patient, client or resident of a health care entity; and [1997, c. 465, §1 (AMD).]

B. Any specific documented findings by the state survey agency of abuse, neglect or misappropriation of property of a resident, client or patient. For purposes of this section, "state survey agency" means the agency specified under 42 United States Code, Sections 1395aa and 1396 responsible for determining whether institutions and agencies meet requirements for participation in the State's Medicare and Medicaid programs. [1991, c. 421, §1 (NEW).]

The registry must also contain a listing of any unlicensed assistive persons who have notations pursuant to section 1812-J.

[2009, c. 215, §1 (AMD) .]

3. **Eligibility requirements for listing.** The State Board of Nursing shall adopt rules pursuant to the Maine Administrative Procedure Act defining eligibility requirements for listing on the registry, including rules regarding temporary listing of nursing assistants who have received training in another jurisdiction. The rules must permit nursing assistants to work under the supervision of a registered professional nurse in a facility providing assisted living services as defined in chapter 1664 and must recognize work in those facilities for the purpose of qualifying for and continuing listing on the registry. Rules adopted regarding the work of nursing assistants in facilities providing assisted living services are routine technical rules as defined by Title 5, chapter 375, subchapter 2-A.

[2009, c. 215, §1 (AMD) .]

4. **Verification of credentials and training.** The department shall verify the credentials and training of all certified nursing assistant applicants to the registry.

[2009, c. 215, §1 (AMD) .]

5. **Verifying certified nursing assistant listing.** A health care institution, facility or organization that employs a certified nursing assistant shall, before hiring a certified nursing assistant, verify with the registry that the certified nursing assistant is listed on the registry.

[2009, c. 215, §1 (AMD) .]

6. **Registry notations.** Except as otherwise provided in this section:

A. An individual may not be employed in a hospital, nursing facility, home health agency or assisted housing program as a certified nursing assistant if that individual has been convicted in a court of law of a crime involving abuse, neglect or misappropriation of property in a health care setting; and [2003, c. 376, §2 (NEW).]

B. An individual may not be employed in a hospital, nursing facility, home health agency or assisted housing program as a certified nursing assistant if that individual:

(1) Has been the subject of a complaint involving abuse or neglect that was substantiated by the department pursuant to its responsibility to license hospitals, nursing facilities, home health agencies and assisted housing programs and that was entered on the registry; or

(2) Has been the subject of a complaint involving the misappropriation of property in a health care setting that was substantiated by the department and entered on the registry. [2009, c. 215, §1 (AMD).]

[2009, c. 215, §1 (AMD) .]

7. **Time limit on consideration of prior criminal conviction.** Except as otherwise provided in this section, an individual may not be employed in a hospital, nursing facility, home health agency or assisted housing program as a certified nursing assistant if that individual has a prior criminal conviction within the last 10 years of:

A. A crime for which incarceration of 3 years or more may be imposed under the laws of the state in which the conviction occurred; or [2003, c. 376, §2 (NEW).]

B. A crime for which incarceration of less than 3 years may be imposed under the laws of the state in which the conviction occurred involving sexual misconduct or involving abuse, neglect or exploitation in a setting other than a health care setting. [2003, c. 376, §2 (NEW).]

[2003, c. 599, §4 (AMD); 2003, c. 634, §3 (AMD); 2003, c. 599, §5 (AFF) .]

8. **Exception.** The restrictions on employment under subsections 6 and 7 do not apply to an individual listed and active on the registry prior to the effective date of this subsection, as long as the individual meets other state and federal requirements for certified nursing assistants and continues to maintain an active status by timely reregistration as required by the rules.

[2009, c. 215, §1 (AMD) .]

9. **Notification.** A nursing assistant training program must notify applicants to that program of the restrictions under subsections 6 and 7 prior to the acceptance of any applicant.

[2003, c. 376, §2 (NEW) .]

SECTION HISTORY
2009, c. 215, §1 (AMD).

ATTACHMENT D

22 §1812-J. UNLICENSED ASSISTIVE PERSONS

1. **Definitions.** As used in this section, unless the context otherwise indicates, the following terms have the following meanings.

A. "Certified nursing assistant" means an individual who has successfully completed an approved nursing assistant training program, holds a certificate of training and meets the eligibility requirements established by the State Board of Nursing for listing on the registry. [2009, c. 215, §2 (NEW).]

B. "Registry" means the Maine Registry of Certified Nursing Assistants, which is a list of certified nursing assistants, with notations if applicable, and a list of unlicensed assistive persons with notations and is established under section 1812-G. [2009, c. 215, §2 (NEW).]

C. "State survey agency" has the same meaning as in section 1812-G, subsection 2, paragraph B. [2009, c. 215, §2 (NEW).]

D. "Unlicensed assistive person" means an individual employed to provide hands-on assistance with activities of daily living to individuals in homes, assisted living programs, residential care facilities, hospitals and other health care settings. "Unlicensed assistive person" does not include a certified nursing assistant employed in the capacity of a certified nursing assistant. [2009, c. 215, §2 (NEW).]

[2009, c. 215, §2 (NEW) .]

2. **Complaint investigation.** The department may investigate complaints of abuse, neglect or misappropriation of property of a client, patient or resident in a home or health care setting against unlicensed assistive persons employed or placed by a licensed, certified or registered agency or facility.

[2009, c. 215, §2 (NEW) .]

3. **Substantiated complaint; registry listing.** When a complaint against an unlicensed assistive person is substantiated by the department and the unlicensed assistive person must be listed on the registry pursuant to subsection 4, the department's decision becomes final agency action as defined in Title 5, section 8002, subsection 4.

[2009, c. 215, §2 (NEW) .]

4. **Registry listing.** The registry listing for an unlicensed assistive person with a notation must include but is not limited to the following information:

A. Documentation of the department's investigation, including the nature of the allegation and the evidence that led the department to substantiate the allegation of abuse, neglect or misappropriation of property; [2009, c. 215, §2 (NEW).]

B. The date of the hearing, if the unlicensed assistive person chose to appeal the department finding that the complaint was substantiated; and [2009, c. 215, §2 (NEW).]

C. The unlicensed assistive person's statement to the department disputing the allegation, if the unlicensed assistive person chose to submit one. [2009, c. 215, §2 (NEW).]

[2009, c. 215, §2 (NEW) .]

5. **Right to hearing.** The department shall notify the unlicensed assistive person of the right to request a hearing to contest the finding that the complaint under subsection 3 was substantiated.

[2009, c. 215, §2 (NEW) .]

6. **Petition for removal of a finding of neglect.** No sooner than 12 months after the date a neglect finding is placed on the registry, an unlicensed assistive person may petition the department to remove a notation from the registry if the substantiated complaint of neglect is a one-time occurrence and there is no pattern of neglect.

[2009, c. 215, §2 (NEW) .]

7. **Prohibited employment.** The following unlicensed assistive persons may not be employed or placed by a licensed, certified or registered agency or facility:

A. An unlicensed assistive person listed on the registry with a notation; [2009, c. 215, §2 (NEW).]

B. An unlicensed assistive person who, while working as a certified nursing assistant, had a notation on the registry for a complaint that was substantiated by the state survey agency for abuse or neglect; or [2009, c. 215, §2 (NEW).]

C. An unlicensed assistive person who, while working as a certified nursing assistant, had a notation on the registry for a complaint that was substantiated by the state survey agency for misappropriation of property in a health care setting. [2009, c. 215, §2 (NEW).]

[2009, c. 215, §2 (NEW) .]

8. **Rules.** The department may adopt rules to implement this section. Rules adopted pursuant to this subsection are routine technical rules as defined in Title 5, chapter 375, subchapter 2-A.

[2009, c. 215, §2 (NEW) .]

SECTION HISTORY
2009, c. 215, §2 (NEW).

ATTACHMENT E

SUBSTANTIATED COMPLAINTS
(Abuse, neglect and misappropriation of property)

LIFETIME EMPLOYMENT BAN

FEDERAL LAW

1. Federal law: CNA substantiated complaints result in lifetime employment bans

Substantiated complaints of abuse, neglect and misappropriation of property result in lifetime employment bans. This information is included in notations on the CNA Registry, and is available to prospective employers. Complaints against CNAs are subject to the federal definition of abuse that has a higher standard of abuse than definitions of adult abuse[14] and child abuse[15] in Maine protective services laws because a substantiated finding of abuse may result in loss of livelihood and potential for future employment. The federal definition of abuse is found in the Code of Federal Regulations:

> *Abuse means the willful infliction of injury, unreasonable confinement, intimidation, or punishment with resulting physical harm, pain or mental anguish. 42 C.F.R. §488.301.*

2. Federally required database: CNA substantiated complaints

In compliance with federal law, states maintain CNA Registry data about substantiated complaints of abuse, neglect and misappropriation of property in health care settings. The information is available to prospective employers. It is viewed as an effective way to identify caregivers who may place vulnerable adults at risk of abuse, neglect or exploitation.

Studies[16] have examined rates of abuse in nursing facilities and whether there are correlations to staffing ratios, worker burnout and other issues. The number of substantiated complaints of abuse, neglect and misappropriation of property is determined through the network of CNA Registries that operate in each state.

CNAs with substantiated findings may not work as a CNA. (Maine law states that a CNA with a substantiated complaint may not work as a CNA or a UAP.) The federal life-time employment prohibition based on substantiated findings cannot be changed by Maine law and is not the focus of this report. The focus of this report is state mandated employment bans based on criminal convictions.

3. Federal law: CNA reinstatement after one-time neglect is substantiated

Federal law has one redemption provision for an individual with a one-time neglect substantiated complaint when it is the only notation. No other reinstatement is available to overcome the lifetime employment ban for substantiated complaints, including repeated substantiated complaints for neglect.

MAINE LAW

1. Maine law added UAPs with substantiated complaints to Registry database.
State law requirements were amended to require the Registry to include unlicensed assistive persons, also called direct care workers, with substantiated complaints for abuse, neglect or misappropriation. See 22 M.R.S.A. §1812-J. (Attachment D). This information is included in notations on the Registry, and is available to prospective employers. Substantiated complaints of abuse, neglect and misappropriation of property result in lifetime employment bans.

Amendments that addressed UAP listing on the Registry resulted in the creation of a new section (§1812-J) for the unlicensed assistive persons language. As a result, some CNA Registry language in section 1812-G that applies to UAPs should be included in the new UAP Registry section. This will be fixed in the draft legislation submitted by the workgroup.

ATTACHMENT F

An Act to Amend the Registry of Certified Nursing Assistants

Be it enacted by the People of the State of Maine as follows:

Sec. 1. 22 MRSA §1812-G, sub-§1, as amended by PL 2003, c. 689, Pt. 8, §6, is further amended to read:

1. **Established.** The Maine Registry of Certified Nursing Assistants and Direct Care Workers (Registry) is established in compliance with federal and state requirements. The Department of Health and Human Services shall maintain the registry.

Sec. 2. 22 M.R.S.A. §1812-G, sub-§1-A, as enacted by PL 2009, c. 215. §1, is amended to read:

1-A. **Definitions.** As used in this section, unless the context otherwise indicates, the following terms have the following meanings.

A. "Certified nursing assistant" means an individual who has successfully completed an approved nursing assistant training program, holds a certificate of training, and meets the eligibility requirements established by the State Board of Nursing for listing on the registry.

B. "Registry" means the Maine Registry of Certified Nursing Assistants and Direct Care Workers established in subsection 1, which is a list of certified nursing assistants, with notations if applicable, and a list of unlicensed assistive persons with notations.

C. "Unlicensed assistive person" also referred to as “direct care worker” means an individual employed to provide hands-on assistance with activities of daily living to individuals in private homes, assisted living programs, residential care facilities, hospitals and other health care settings. “Unlicensed assistive person” includes but is not limited to direct support professionals, residential care specialists, personal support specialists, mental health rehabilitation technicians, behavioral specialists, certified residential medication aides, and other direct care workers. "Unlicensed assistive person" does not include a certified nursing assistant employed in the capacity of a certified nursing assistant.

D. “Abuse” means, for the purposes of this chapter, the willful infliction of injury, unreasonable confinement, intimidation, or punishment with resulting physical harm, pain or mental anguish.

E. “Criminal conviction” includes the following:

1. “Disqualifying criminal convictions” means, for the purposes of this chapter, those criminal convictions identified in rules adopted by the department that prohibit employment as a certified nursing assistant or an unlicensed assistive person.

2. "Non-disqualifying criminal convictions" means, for the purposes of this chapter, those criminal convictions identified in rules adopted by the department that are included as notations on the registry but do not prohibit employment as a certified nursing assistant or an unlicensed assistive person.

F. "Department" means Department of Health and Human Services

G. "Direct care worker" means unlicensed assistive person.

H. "Health and direct care settings" for the purposes of this chapter means settings where certified nursing assistants or unlicensed assistive persons are providing direct care in their capacity as certified nursing assistants or unlicensed assistive persons.

I. "Misappropriation of property" means, for the purposes of this chapter, the deliberate misplacement, exploitation, or wrongful, temporary or permanent use of a client's, patient's or resident's belongings or money without that person's consent.

J. "Neglect" means, for the purposes of this chapter, failure to provide goods and services necessary to avoid physical harm, mental anguish, or mental illness.

K. "State survey agency" means the agency specified under 42 United States Code, Sections 1395aa and 1396 that is responsible for determining whether institutions and agencies meet requirements for participation in the State's Medicare and Medicaid programs.

The department shall adopt rules necessary to implement this section in accordance with the Maine Administrative Procedure Act. Rules adopted pursuant to this section are routine technical rules as defined in Title 5, chapter 375, subchapter 2-A.

Sec. 3. 22 M.R.S.A. §1812-G, sub-§2, is repealed and the following enacted in its place:

2. **Registry listing.** The registry must contain a listing of certified nursing assistants. The registry must also contain a listing of any unlicensed assistive persons who have notations pursuant to section 1812-J.

2-A. Registry notations. For each listed certified nursing assistant, the registry must include, a notation of:

A. Any criminal conviction of a certified nursing assistant discovered by the department.

B. Any substantiated complaint against a certified nursing assistant with specific documented findings by the state survey agency of abuse, neglect or misappropriation of property of a resident, client or patient. Only the state survey agency may investigate complaints against a certified nursing assistant of abuse, neglect, or misappropriation of property of a resident, client, or patient. The registry notation must include but is not limited to the following information:

1. Documentation of the state survey agency investigation, including the nature of the

allegation and the evidence that led the state survey agency to substantiate the allegation of abuse, neglect, or misappropriation of property;

2. The date of the hearing, if the certified nursing assistant chose to appeal the state survey agency finding that the complaint was substantiated; and

3. The certified nursing assistant's statement to the state survey agency disputing the allegation, if the certified nursing assistant chose to submit one.

The department shall adopt rules necessary to implement this section in accordance with the Maine Administrative Procedure Act. Rules adopted pursuant to this section are routine technical rules as defined in Title 5, chapter 375, subchapter 2-A.

Sec. 4. 22 M.R.S.A. §1812-G, sub-§6, is repealed.

Sec. 5 22 M.R.S.A. §1812-G, sub-§7, is repealed and the following enacted in its place:

2-B. Criminal background checks. The registry shall secure at least a state-based criminal background check on active CNAs every 2 years during the reregistration process.

2-C. Time limit on consideration of prior criminal conviction. The registry shall examine criminal convictions within the last thirty years when making a decision concerning the impact a conviction has on a CNA's employability.

2-D Conviction for specific named crime. Department rules shall categorize criminal convictions as disqualifying convictions or non-disqualifying convictions. Specific named crimes shall be based on Maine's Criminal Code, chapter 17-A, Part 2 or similar conduct for convictions in other jurisdictions. In determining non-disqualifying criminal convictions, the department shall consider whether moral character and conduct demonstrate that individuals will respect the person and property of the people in their care

A. Disqualifying criminal convictions prohibit employment as a CNA in health and direct care settings as a CNA for either a 30-year or a 10-year period. Disqualifying criminal convictions are included as notations on the registry.

B. Non-disqualifying criminal convictions do not prohibit employment as a CNA. Non-disqualifying criminal convictions are included as notations on the registry.

2-E. Length of employment ban: criminal conviction. Subject to section 2-F, an employment ban that is based on a disqualifying criminal conviction is for a 30-year period or a 10-year period. The department shall adopt rules that specify which disqualifying criminal convictions prohibit employment for 30 years and which disqualifying criminal convictions prohibit employment for 10 years.

2-F. Petition for removal of an employment ban: criminal conviction. An individual may petition the department for removal of an employment ban that is based on a disqualifying criminal conviction prior to its expiration. Removal of the employment ban allows the individual to

work as a CNA.

A. No sooner than 2 years after an individual is discharged from the legal restraints imposed by the criminal conviction, an individual may petition the department for removal of a 10-year employment ban.

B. No sooner than 15 years after an individual is discharged from the legal restraints imposed by the criminal conviction, an individual may petition the department for removal of a 30-year employment ban.

C. The successful petitioner must meet the removal criteria established by department rules. Criteria shall include but not be limited to an assessment of the risk of reoffending and the conduct of the petitioner. A petition for removal shall be denied if the conduct that lead to the conviction would have resulted in a lifetime ban under section 2-G of this chapter.

D. When the department grants a petition for removal of an employment ban, the individual may work as a CNA but the notation of the criminal conviction remains on the registry. A notation that a petition was filed and its outcome is included on the registry.

E. Upon request of a provider, the department shall verify that the employment ban has been removed.

2-G. Substantiated complaint: lifetime employment ban. An individual may not be employed in health or direct care settings as a certified nursing assistant if that individual has a notation on the registry of a complaint involving abuse, neglect or misappropriation of property of a client, patient or resident that was investigated and substantiated by the state survey agency. Except as provided in section 2-H, an employment ban based on a substantiated complaint is a lifetime ban from employment as a CNA. CNAs with notations of substantiated complaints on the registry may not be employed as an unlicensed assistive person.

2-H. Petition for removal of substantiated finding of neglect No sooner than 12 months after the date a substantiated finding of neglect is placed as a notation on the registry, an individual may petition the department for removal of the substantiated finding of neglect. The successful petitioner must meet the removal criteria established by department rules. Criteria shall include but not be limited to an assessment of the risk of reoffending and the conduct of the petitioner.

3. Eligibility requirements for listing. The State Board of Nursing shall adopt rules pursuant to the Maine Administrative Procedure Act defining eligibility requirements for listing on the registry, including rules regarding temporary listing of nursing assistants who have received training in another jurisdiction. The rules must permit nursing assistants to work under the supervision of a registered professional nurse in a facility providing assisted living services as defined in chapter 1664 and must recognize work in those facilities for the purpose of qualifying for and continuing listing on the registry. Rules adopted regarding the work of nursing assistants in facilities providing assisted living services are routine technical rules as defined by Title 5, chapter 375, subchapter 2-A.

4. Verification of credentials and training. The department shall verify the credentials and training of all certified nursing assistant applicants to the registry.

4-A. Provider verification fee. The department may establish a provider verification fee not to exceed $25 annually per provider for verification of a certified nursing assistant's credentials and training. Providers may not pass the cost on to the individual certified nursing assistant. Provider verification fees collected by the department must be placed in a special revenue account to be used by the department to operate the registry, including but not limited to the cost of criminal history record checks. The department may adopt rules necessary to implement this subsection. Rules adopted pursuant to this subsection are routine technical rules as defined in Title 5, chapter 375, subchapter 2-A.

5. Verifying certified nursing assistant listing. A health care institution, facility or organization that employs a certified nursing assistant shall, before hiring a certified nursing assistant, verify with the registry that the certified nursing assistant is listed on the registry.

6. RESERVED.

7. RESERVED.

The department shall adopt rules necessary to implement this section in accordance with the Maine Administrative Procedure Act. Rules adopted pursuant to this section are routine technical rules as defined in Title 5, chapter 375, subchapter 2-A.

Sec. 6. 22 M.R.S.A. §1812-G, sub-§8, as enacted by PL 2003, c. 376, §8, is amended to read:

8. **Exception: conviction prior to June 2, 2003.** If a criminal conviction occurred prior June 2, 2003, ~~T~~ the restrictions on employment under sections ~~subsections 6 and 7~~ 2-C, 2-D and 2-E do not apply to an individual listed and active on the registry as a certified nursing assistant prior to June 2, 2003, ~~the effective date of this subsection,~~ as long as the individual meets other state and federal requirements for certified nursing assistants and continues to maintain an active status by timely reregistration as required by the rules.

8-A. Exception: currently employed CNAs. CNAs who would otherwise be banned for conduct that is prohibited pursuant to this chapter are not banned for that conduct if the CNAs were employed as CNAs on the effective date of this chapter and the conduct occurred prior to the effective date as long as they continue to work for the same employer at the same facility or program. When there is a change of employer or employment at a specific facility or program, the CNA is subject to this chapter.

The department shall adopt rules necessary to implement this section in accordance with the Maine Administrative Procedure Act. Rules adopted pursuant to this section are routine technical rules as defined in Title 5, chapter 375, subchapter 2-A.

Sec. 7. 22 M.R.S.A. §1812-G, sub-§9, as enacted by PL 2003, c. 376, §2, is amended to read:

9. **Notification.** Prior to the acceptance of any applicant, ~~A~~ a nursing assistant training program and all UAP training programs must notify applicants to ~~that~~ the program of the employment restrictions under ~~sub~~sections ~~6 and 7~~ 2-C, 2-D and 2-E. ~~prior to the acceptance of any applicant.~~

The department shall adopt rules necessary to implement this section in accordance with the Maine Administrative Procedure Act. Rules adopted pursuant to this section are routine technical rules as defined in Title 5, chapter 375, subchapter 2-A.

Sec. 8. 22 M.R.S.A. §1812-G, sub-§10, is enacted to read:

10. Amending the table of named crimes: advisory board. The department shall establish, chair and staff an advisory board consisting of no more than 10 individuals who represent various users of the certified nursing assistant and direct care worker registry. The advisory board shall include representatives of the department, other state agencies, organizations representing direct care workers, advocacy organizations, the district attorney's office, and employers. At least once every 2 years, the advisory board shall convene to:

A. Recommend changes to the table of named crimes in the department's certified nursing assistant and direct care worker registry rules.

B. Provide the rational basis for each change to the department.

The department shall adopt rules necessary to implement this section in accordance with the Maine Administrative Procedure Act. Rules adopted pursuant to this section are routine technical rules as defined in Title 5, chapter 375, subchapter 2-A.

Sec. 9. 22 M.R.S.A. §1812-J, sub-§1, as enacted by PL 2009, c. 215, §2, is amended to read:

1. **Registry.** The Maine Registry of Certified Nursing Assistants and Direct Care Workers (Registry) is established in compliance with federal and state requirements. The Department of Health and Human Services shall maintain the registry.

1-A. Definitions. As used in this section, unless the context otherwise indicates, the following terms have the following meanings.

A. "Certified nursing assistant" means an individual who has successfully completed an approved nursing assistant training program, holds a certificate of training, and meets the eligibility requirements established by the State Board of Nursing for listing on the registry.

B. "Registry" means the Maine Registry of Certified Nursing Assistants and Direct Care Workers, which is a list of certified nursing assistants, with notations if applicable, and a list of unlicensed assistive persons with notations and is established under section 1812-G.

C. RESERVED. ~~"State survey agency" has the same meaning as in section 1812-G,~~

~~subsection 2, paragraph B.~~

D. "Unlicensed assistive person" also referred to as “direct care worker” means an individual employed to provide hands-on assistance with activities of daily living to individuals in private homes, assisted living programs, residential care facilities, hospitals and other health care settings. “Unlicensed assistive person” includes but is not limited to direct support professionals, residential care specialists, personal support specialists, mental health support specialists, mental health rehabilitation technicians, behavior specialists, other qualified mental health professionals, certified residential medication aides, registered medical assistants and other direct care workers. "Unlicensed assistive person" does not include a certified nursing assistant employed in the capacity of a certified nursing assistant.

E. “Abuse” means, for the purposes of this chapter, the willful infliction of injury, unreasonable confinement, intimidation, or punishment with resulting physical harm, pain or mental anguish.

F. “Criminal conviction” includes the following:

1. “Disqualifying criminal convictions” means, for the purposes of this chapter, those criminal convictions identified in rules adopted by the department that prohibit employment as an unlicensed assistive person.

2. “Non-disqualifying criminal convictions” means, for the purposes of this chapter, those criminal convictions identified in rules adopted by the department that are included as notations on the registry but do not prohibit employment as an unlicensed assistive person.

G. “Department” means Department of Health and Human Services

H. “Direct care worker” means unlicensed assistive person.

I. “Finding,” includes the following:

1. “Substantiated finding” means an administrative determination made by the department, after investigation of a complaint, that the level of abuse, neglect or misappropriation of property was of high severity. High severity shall be determined by criteria set out in department rules. Criteria shall include but not be limited to conduct that poses a threat of harm to future consumers. Substantiated findings are listed as notations on the registry. The person with a substantiated finding is prohibited from employment as a UAP or CNA.

2. “Adverse finding” means an administrative determination made by the department, after investigation of a complaint, that the level of abuse, neglect or misappropriation of property was of low to moderate severity. Low to moderate severity shall be determined by criteria set out in department rules. Criteria shall include but not be limited to conduct that poses no a threat of harm to future consumers. Adverse findings are not listed as notations on the registry. The person with an adverse finding is not prohibited from employment as a UAP.

3. "Unsubstantiated finding" means an administrative determination made by the department, after investigation of a complaint, that no evidence was found to support either a substantiated finding or an adverse finding of abuse, neglect or misappropriation of property. Unsubstantiated findings are not listed as notations on the registry and are not a barrier to continued employment as a UAP.

J. "Health and direct care settings" for the purposes of this chapter means settings where certified nursing assistants or unlicensed assistive persons, are providing direct care in their capacity as certified nursing assistants or unlicensed assistive persons.

K. "Misappropriation of property" means, for the purposes of this chapter, the deliberate misplacement, exploitation, or wrongful, temporary or permanent use of a client's, patient's or resident's belongings or money without that person's consent.

L. "Neglect" means, for the purposes of this chapter, failure to provide goods and services necessary to avoid physical harm, mental anguish, or mental illness.

The department shall adopt rules necessary to implement this section in accordance with the Maine Administrative Procedure Act. Rules adopted pursuant to this section are routine technical rules as defined in Title 5, chapter 375, subchapter 2-A.

Sec. 10. 22 M.R.S.A. §1812-J, sub-§2-A, as enacted by PL 2009, c. 215, §2, is amended to read:

2. **Complaint investigation.** The department may investigate complaints of abuse, neglect or misappropriation of property of a client, patient or resident in a private home, or a health or direct care setting against unlicensed assistive persons. ~~employed or placed by a licensed, certified or registered agency or facility.~~

The department shall adopt rules necessary to implement this section in accordance with the Maine Administrative Procedure Act. Rules adopted pursuant to this section are routine technical rules as defined in Title 5, chapter 375, subchapter 2-A.

Sec. 11. 22 M.R.S.A. §1812-J, sub-§2-B, is enacted to read:

2-B. Department decision after investigation of complaint. The department, after investigation of the complaint, shall make one of the following decisions based on criteria established by rule:

1. A substantiated finding of abuse, neglect or misappropriation of property of a client, patient or resident;

2. An adverse finding of abuse, neglect; or misappropriation of property of a client, patient or resident; or

3. A decision that the evidence does not support a substantiated or adverse finding.

The department shall adopt rules necessary to implement this section in accordance with the Maine Administrative Procedure Act. Rules adopted pursuant to this section are routine technical rules as defined in Title 5, chapter 375, subchapter 2-A.

Sec. 12. 22 M.R.S.A. §1812-J, sub-§3, as enacted by PL 2009, c. 215, §2, is amended to read:

3. **Substantiated finding: registry notation.** When the department's decision becomes final agency action as defined in Title 5, section 8002, subsection 4, the unlicensed assistive person is listed on the registry with a notation of the substantiated complaint pursuant to subsection 4. ~~a complaint against an unlicensed assistive person is substantiated by the department and the unlicensed assistive person must be listed on the registry pursuant to subsection 4, the department's decision becomes final agency action as defined in Title 5, section 8002, subsection 4.~~

The department shall adopt rules necessary to implement this section in accordance with the Maine Administrative Procedure Act. Rules adopted pursuant to this section are routine technical rules as defined in Title 5, chapter 375, subchapter 2-A.

Sec. 13. 22 M.R.S.A. §1812-J, sub-§4, as enacted by PL 2009, c. 215, §2, is amended to read:

4. **Registry listing.** The registry listing for an unlicensed assistive person with a notation must include but is not limited to the following information:

A. Documentation of the ~~department's investigation, including the~~ nature of the allegation and the evidence that led the department to substantiate the allegation of abuse, neglect or misappropriation of property;

B. The date of the hearing, if the unlicensed assistive person chose to appeal the department finding that the complaint was substantiated; and

C. The unlicensed assistive person's statement to the department disputing the allegation, if the unlicensed assistive person chose to submit one.

4-A. Adverse finding: no registry notation. An adverse finding by the department of a complaint against an unlicensed assistive person does not prohibit employment and is not listed as a notation on the registry.

5. **Right to hearing.** The department shall notify the unlicensed assistive person of the right to request a hearing to contest the finding that the complaint under subsection 3 was substantiated.

The department shall adopt rules necessary to implement this section in accordance with the Maine Administrative Procedure Act. Rules adopted pursuant to this section are routine technical rules as defined in Title 5, chapter 375, subchapter 2-A.

Sec. 14. 22 M.R.S.A. §1812-J, sub-§6, as enacted by PL 2009, c. 215, §2, is amended to read:

6. Petition for removal of a substantiated finding of neglect. No sooner than 12 months after the date a ~~neglect~~ substantiated finding of neglect is placed on the registry, an unlicensed assistive person may petition the department to remove a notation from the registry if the substantiated complaint of neglect is a one-time occurrence and there is no pattern of neglect The successful petitioner must meet the removal criteria established by department rules. Criteria shall include but not be limited to an assessment of the risk of reoffending and the conduct of the petitioner.

The department shall adopt rules necessary to implement this section in accordance with the Maine Administrative Procedure Act. Rules adopted pursuant to this section are routine technical rules as defined in Title 5, chapter 375, subchapter 2-A.

Sec. 15. 22 M.R.S.A. §1812-J, sub-7, as enacted by PL 2009, c. 215, §2, is amended to read:

7. **Prohibited employment based on substantiated complaint.** Subject to section 6 of this chapter, an ~~An~~ employment ban based on a substantiated complaint is a lifetime employment ban. The following unlicensed assistive persons may not be employed or placed by a licensed, certified or registered agency or facility.

A. An unlicensed assistive person listed on the registry with a notation for a substantiated complaint;

B. An unlicensed assistive person who, while working as a certified nursing assistant, had a notation on the registry for a complaint that was substantiated by the state survey agency for abuse or neglect; or misappropriation of property.

C. ~~An unlicensed assistive person who, while working as a certified nursing assistant, had a notation on the registry for a complaint that was substantiated by the state survey agency for in a health care setting.~~

8. **Rules.** The department may adopt rules to implement this section. Rules adopted pursuant to this subsection are routine technical rules as defined in Title 5, chapter 375, subchapter 2-A.

Sec. 16. 22 M.R.S.A. §1812-J, sub-9, is enacted to read:

9. Employer pre-hire background checks. Employers subject to licensing, certification and registration laws must secure criminal background checks prior to hiring an individual who will work in direct contact with consumers and cannot employ an individual with a disqualifying criminal conviction. A disqualifying criminal conviction is determined by the employer's use of the table of named crimes in the department's certified nursing assistant and direct care worker registry rules. The table applies to employees who work in direct contact with consumers including but not limited to CNAs, UAPs and other direct care workers.

The department shall adopt rules necessary to implement this section in accordance with the Maine Administrative Procedure Act. Rules adopted pursuant to this section are routine technical rules as defined in Title 5, chapter 375, subchapter 2-A

Sec. 17. 22 M.R.S.A. §1812-J, sub-10, is enacted to read:

10. Exception: currently employed UAPs. UAPs who would otherwise be banned for conduct that is prohibited pursuant to section 9 of this chapter are not banned for that conduct if the UAPs were employed as UAPs on the effective date of this chapter and the conduct occurred prior to the effective date as long as they continue to work for the same employer at the same facility or program. When there is a change of employer or employment at a specific facility or program, the UAP is subject to this chapter.

The department shall adopt rules necessary to implement this section in accordance with the Maine Administrative Procedure Act. Rules adopted pursuant to this section are routine technical rules as defined in Title 5, chapter 375, subchapter 2-A

Sec. 18. 22 M.R.S.A. §1812-J, sub-11, is enacted to read:

11. Notification. Prior to the acceptance of any applicant, all UAP training programs must notify applicants to the program of the employment restrictions in this chapter.

The department shall adopt rules necessary to implement this section in accordance with the Maine Administrative Procedure Act. Rules adopted pursuant to this section are routine technical rules as defined in Title 5, chapter 375, subchapter 2-A

Sec. 19. 22 M.R.S.A. §1717, sub-1, ¶ D, as amended by PL 2007, c. 324, §2, is further amended to read:

1. Definitions. As used in this section, unless the context otherwise indicates, the following terms have the following meanings.

A. "Activities of daily living" means tasks that are routinely performed by an individual to maintain bodily function, including, but not limited to, mobility; transfers in position among sitting, standing and prone positions; dressing; eating; toileting; bathing; and personal hygiene assistance.

B. "Hires and employs" means recruits, selects, trains, declares competent, schedules, directs, defines the scope of the positions of, supervises or terminates individuals who provide personal care.

B-1. "Home care services" means assistance with activities of daily living and related tasks.

C. "Personal care agency" means a business entity or subsidiary of a business entity that is not otherwise licensed by the Division of Licensing and Regulatory Services and that hires and employs unlicensed assistive personnel to provide assistance with activities of daily living and related tasks to individuals in the places in which they reside, either permanently or temporarily. An individual who hires and employs unlicensed assistive personnel to provide care for that individual is not a personal care agency, except when permitted by rule of the department.

C-1. "Placement agency" means any person or entity engaged for gain or profit in the business of securing or attempting to secure home care services work for an individual or of securing or attempting to secure a home care services worker for a consumer. "Placement agency" includes, but is not limited to, employment agencies, nurse registries and any other entity

that places a home care services worker for hire by a consumer in that consumer's temporary or permanent residence for purposes of providing home care services.

D. "Unlicensed assistive person ~~personnel~~" also referred to as "direct care worker" means individuals employed to provide hands-on assistance with activities of daily living to individuals in private homes, assisted living centers, residential care facilities, hospitals and other health care settings. "Unlicensed assistive person" includes but is not limited to direct support professionals, residential care specialists, personal support specialists, mental health rehabilitation technicians, behavioral specialists, certified residential medication aides, and other direct care workers. "Unlicensed assistive person ~~personnel~~" does not include certified nursing assistants employed in their capacity as certified nursing assistants.

The department shall adopt rules necessary to implement this section. Rules adopted pursuant to this section are routine technical rules as defined in Title 5, chapter 375, subchapter 2-A.

Sec. 20. 22 M.R.S.A. §1717, sub-3, as amended by PL 2007, c. 324, §2, is further amended to read:

3. Employer pre-hire criminal background checks. ~~Prohibited employment.~~ Prior to hiring an individual who will work in direct contact with a consumer, a ~~A~~ personal care agency or a placement agency shall obtain criminal history record information on that individual, including, at a minimum, criminal history record information from the Department of Public Safety, State Bureau of Identification. The personal care agency or the placement agency shall pay for the criminal background check required by this section. ~~about applicants for positions as unlicensed assistive personnel or home care services workers and~~

A. Disqualifying criminal convictions: prohibited employment. A personal care agency or a placement agency cannot employ an individual with a disqualifying criminal conviction to work in direct contact with a consumer. A disqualifying criminal conviction is determined by the employer's use of the table of named crimes in the department's certified nursing assistant and direct care worker registry rules. The table applies to employees who work in direct contact with consumers including but not limited to CNAs, UAPs and other direct care workers.

B. Exception: currently employed CNAs and UAPs. CNAs and UAPs who would otherwise be banned for conduct that is prohibited pursuant to section 3 (A) of this chapter are not banned for that conduct if the CNAs and UAPs were employed as CNAs and UAPs on the effective date of this chapter and the conduct occurred prior to the effective date as long as they continue to work for the same employer at the same facility or program. When there is a change of employer or employment at a specific facility or program, the CNA or UAP is subject to this chapter.

3-A. Prohibited employment. A personal care agency or a placement agency ~~shall obtain criminal history record information about applicants for positions as unlicensed assistive personnel or home care services workers and~~ may not hire or place an individual who

A. While working as a certified nursing assistant was the subject of a complaint investigation by the state survey agency that resulted in a substantiated finding that was placed as a notation on the certified nursing assistant and direct care worker registry; ~~Has worked as a certified nursing assistant and has been the subject of a notation by the state survey agency for a~~

~~substantiated complaint of abuse, neglect or misappropriation of property in a health care setting that was entered on the Maine Registry of Certified Nursing Assistants;~~

B. While working as an unlicensed assistive person was the subject of a complaint investigation by the department that resulted in a substantiated finding that was placed as a notation on the certified nursing assistant and direct care worker registry; ~~Has been convicted in a court of law of a crime involving abuse, neglect or misappropriation of property in a health care setting;~~ or

C. While working as a certified nursing assistant was convicted of a disqualifying criminal conviction in accordance with section 1812-G (2-A) that was placed as a notation on the certified nursing assistant and direct care worker registry. ~~Has a prior criminal conviction within the last 10 years of:~~

~~(1) A crime for which incarceration of 3 years or more may be imposed under the laws of the state in which the conviction occurred; or~~

~~(2) A crime for which incarceration of less than 3 years may be imposed under the laws of the state in which the conviction occurred involving sexual misconduct or involving abuse, neglect or exploitation in a setting other than a health care setting.~~

D. Has any disqualifying criminal conviction.

The department shall adopt rules necessary to implement this section in accordance with the Maine Administrative Procedure Act. Rules adopted pursuant to this section are routine technical rules as defined in Title 5, chapter 375, subchapter 2-A

Sec. 21. 22 M.R.S.A. §2138, as enacted by PL 2009, c. 621, §5, is amended to read:

1. Prohibited employment. A temporary nurse agency may not hire, employ or place an individual who:

A. While working as a certified nursing assistant was the subject of a complaint investigation by the state survey agency that resulted in a substantiated finding that was placed as a notation on the certified nursing assistant and direct care worker registry;

~~1. Subject of notation. Has worked as a certified nursing assistant and has been the subject of a notation by the state survey agency for a substantiated complaint of abuse, neglect or misappropriation of property in a health care setting that was entered on the Maine Registry of Certified Nursing Assistants established under section 1812-G;~~

B. While working as an unlicensed assistive person was the subject of a complaint investigation by the department that resulted in a substantiated finding that was placed as a notation on the certified nursing assistant and direct care worker registry; or

~~2. Convicted of crime involving abuse, neglect or misappropriation. Has been convicted in a court of law of a crime involving abuse, neglect or misappropriation of property; or~~

C. While working as a certified nursing assistant was convicted of a disqualifying criminal conviction in accordance with section 1812-G (2-A) that was placed as a notation on the certified nursing assistant and direct care worker registry.

~~3. Other prior conviction. Has a prior criminal conviction within 10 years prior to application of:~~
~~A. A crime for which incarceration of 3 years or more may be imposed under the laws of the state in which the conviction occurred; or~~
~~B. A crime for which incarceration of less than 3 years may be imposed under the laws of the state in which the conviction occurred involving sexual misconduct or involving abuse, neglect or exploitation in a setting other than a health care setting.~~

D. Has any disqualifying criminal conviction.

2. Employer pre-hire criminal background checks. Prior to hiring an individual who will work in direct contact with a consumer, a temporary nurse agency shall obtain criminal history record information on that individual, including, at a minimum, criminal history record information from the Department of Public Safety, State Bureau of Identification. The temporary nurse agency shall pay for the criminal background check required by this section.

A. Disqualifying criminal convictions: prohibited employment. A temporary nurse agency cannot employ an individual with a disqualifying criminal conviction to work in direct contact with a consumer. A disqualifying criminal conviction is determined by the employer's use of the table of named crimes in the department's certified nursing assistant and direct care worker registry rules. The table applies to employees who work in direct contact with consumers including but not limited to CNAs, UAPs and other direct care workers.

B. Exception: currently employed CNAs and UAPs. CNAs and UAPs who would otherwise be banned for conduct that is prohibited pursuant to section 2 (A) of this chapter are not banned for that conduct if the CNAs and UAPs were employed as CNAs and UAPs on the effective date of this chapter and the conduct occurred prior to the effective date as long as they continue to work for the same temporary nurse agency. When there is a change of employer, the CNA or UAP is subject to this chapter.

The department shall adopt rules necessary to implement this section. Rules adopted pursuant to this section are routine technical rules as defined in Title 5, chapter 375, subchapter 2-A.

Sec. 22. 22 M.R.S.A. §2149-A, sub-2, as amended by PL 2003, c. 634, §4, is further amended to read:

2. **Employer pre-hire criminal background checks.** ~~Employment.~~ Prior to hiring an individual who will work in direct contact with a consumer, a ~~A~~ home health care provider shall obtain criminal history record information on that individual, including, at a minimum, criminal history record information from the Department of Public Safety, State Bureau of Identification. The home health care provider shall pay for the criminal background check required by this section. ~~about applicants for positions as unlicensed assistive personnel as defined in section 1717, subsection 1, paragraph D and may not hire an individual who:~~

A. Disqualifying criminal convictions: prohibited employment. A home health care provider cannot employ an individual with a disqualifying criminal conviction to work in direct contact with a consumer. A disqualifying criminal conviction is determined by the employer's use

of the table of named crimes in the department's certified nursing assistant and direct care worker registry rules. The table applies to employees who work in direct contact with consumers including but not limited to CNAs, UAPs and other direct care workers.

B. Exception: currently employed CNAs and UAPs. CNAs and UAPs who would otherwise be banned for conduct that is prohibited pursuant to section 2 (A) of this chapter are not banned for that conduct if the CNAs and UAPs were employed as CNAs and UAPs on the effective date of this chapter and the conduct occurred prior to the effective date as long as they continue to work for the same home health care provider. When there is a change of employer, the CNA or UAP is subject to this chapter.

2-A. Prohibited employment. A home health care provider may not hire an individual who:

A. While working as a certified nursing assistant was the subject of a complaint investigation by the state survey agency that resulted in a substantiated finding that was placed as a notation on the certified nursing assistant and direct care worker registry; ~~Has worked as a certified nursing assistant and has been the subject of a notation by the state survey agency for a substantiated complaint of abuse, neglect or misappropriation of property in a health care setting that was entered on the Maine Registry of Certified Nursing Assistants;~~

B. While working as an unlicensed assistive person was the subject of a complaint investigation by the department that resulted in a substantiated finding that was placed as a notation on the certified nursing assistant and direct care worker registry; ~~Has been convicted in a court of law of a crime involving abuse, neglect or misappropriation of property in a health care setting;~~ or

C. While working as a certified nursing assistant was convicted of a disqualifying criminal conviction in accordance with section 1812-G (2-A) that was placed as a notation on the certified nursing assistant and direct care worker registry. ~~Has a prior criminal conviction within the last 10 years of:~~

~~(1) A crime for which incarceration of 3 years or more may be imposed under the laws of the state in which the conviction occurred; or~~

~~(2) A crime for which incarceration of less than 3 years may be imposed under the laws of the state in which the conviction occurred involving sexual misconduct or involving abuse, neglect or exploitation in a setting other than a health care setting.~~

D. Has any disqualifying criminal conviction.

The department shall adopt rules necessary to implement this section. Rules adopted pursuant to this section are routine technical rules as defined in Title 5, chapter 375, subchapter 2-A.

Sec. 23. 22 M.R.S.A. §7851, sub-4, as enacted by PL 2003, c. 634, §6, is amended to read:

4. Prohibited employment. A licensed assisted housing program may not hire ~~as unlicensed assistive personnel as defined in section 1717, subsection 1, paragraph D an individual who is~~

~~prohibited from employment as a certified nursing assistant pursuant to section 1812-G. , subsection 6 or 7~~ an individual who:

A. While working as a certified nursing assistant was the subject of a complaint investigation by the state survey agency that resulted in a substantiated finding that was placed as a notation on the certified nursing assistant and direct care worker registry;

B. While working as an unlicensed assistive person was the subject of a complaint investigation by the department that resulted in a substantiated finding that was placed as a notation on the certified nursing assistant and direct care worker registry; or

C. While working as a certified nursing assistant was convicted of a disqualifying criminal conviction in accordance with section 1812-G (2-A) that was placed as a notation on the certified nursing assistant and direct care worker registry.

D. Has any disqualifying criminal conviction.

4-A. **Employer pre-hire criminal background checks.** Prior to hiring an individual who will work in direct contact with a consumer, a licensed assisted housing program shall obtain criminal history record information on that individual, including, at a minimum, criminal history record information from the Department of Public Safety, State Bureau of Identification. A licensed assisted housing program shall pay for the criminal background check required by this section.

A. Disqualifying criminal convictions: prohibited employment. A licensed assisted housing program cannot employ an individual with a disqualifying criminal conviction to work in direct contact with a consumer. A disqualifying criminal conviction is determined by the employer's use of the table of named crimes in the department's certified nursing assistant and direct care worker registry rules. The table applies to employees who work in direct contact with consumers including but not limited to CNAs, UAPs and other direct care workers.

B. Exception: currently employed CNAs and UAPs. CNAs and UAPs who would otherwise be banned for conduct that is prohibited pursuant to section 4 (A) of this chapter are not banned for that conduct if the CNAs and UAPs were employed as CNAs and UAPs on the effective date of this chapter and the conduct occurred prior to the effective date as long as they continue to work for the same licensed assisted housing program at the same facility or program. When there is a change of employer or employment at a specific facility or program, the CNA or UAP is subject to this chapter.

Sec. 24. 22 M.R.S.A. §8606, as amended by PL 2003, c. 634, §10, is further amended to read:

1. **Employer pre-hire criminal background checks.** ~~Criminal history record information~~**.** Prior to hiring an individual who will work in direct contact with a consumer, an ~~An~~ adult day care program shall obtain criminal history record information on that individual, including, at a minimum, criminal history record information from the Department of Public Safety, State Bureau of Identification. The adult day care program shall pay for the criminal background check required by this section. ~~about applicants for positions as unlicensed assistive personnel as~~

~~defined in section 1717, subsection 1, paragraph D and may not hire an individual who:~~

A. Disqualifying criminal convictions: prohibited employment. An adult day care program cannot employ an individual with a disqualifying criminal conviction to work in direct contact with a consumer. A disqualifying criminal conviction is determined by the employer's use of the table of named crimes in the department's certified nursing assistant and direct care worker registry rules. The table applies to employees who work in direct contact with consumers including but not limited to CNAs, UAPs and other direct care workers.

B. Exception: currently employed CNAs and UAPs. CNAs and UAPs who would otherwise be banned for conduct that is prohibited pursuant to section 1 (A) of this chapter are not banned for that conduct if the CNAs and UAPs were employed as CNAs and UAPs on the effective date of this chapter and the conduct occurred prior to the effective date as long as they continue to work for the same adult day care program. When there is a change of employer, the CNA or UAP is subject to this chapter.

2. Prohibited employment. An adult day care program may not hire an individual who:

A. While working as a certified nursing assistant was the subject of a complaint investigation by the state survey agency that resulted in a substantiated finding that was placed as a notation on the certified nursing assistant and direct care worker registry (Registry); ~~Has worked as a certified nursing assistant and has been the subject of a notation by the state survey agency for a substantiated complaint of abuse, neglect or misappropriation of property in a health care setting that was entered on the Maine Registry of Certified Nursing Assistants;~~

B. While working as an unlicensed assistive person was the subject of a complaint investigation by the department that resulted in a substantiated finding that was placed as a notation on the registry; ~~Has been convicted in a court of law of a crime involving abuse, neglect or misappropriation of property in a health care setting;~~ or

C. While working as a certified nursing assistant was convicted of a disqualifying criminal conviction in accordance with section 1812-G (2-A) that was placed as a notation on the certified nursing assistant and direct care worker registry. ~~Has a prior criminal conviction within the last 10 years of:~~

~~(1) A crime for which incarceration of 3 years or more may be imposed under the laws of the state in which the conviction occurred; or~~

~~(2) A crime for which incarceration of less than 3 years may be imposed under the laws of the state in which the conviction occurred involving sexual misconduct or involving abuse, neglect or exploitation in a setting other than a health care setting.~~

D. Has any disqualifying criminal conviction.

The department shall adopt rules necessary to implement this section. Rules adopted pursuant to this section are routine technical rules as defined in Title 5, chapter 375, subchapter 2-A.

SUMMARY

This bill implements the recommendations of the workgroup created by Resolve 2009, chapter 68 that reviewed (1) employment bans based on criminal convictions; (2) the rational basis for the employment ban; and (3) the length of the employment ban that prohibits individuals from working as a certified nursing assistant (CNA) or an unlicensed assistive person (UAP).

This bill changes the name of the registry to reflect a recent statutory change that added the listing of UAPs on the registry if they have substantiated complaints of abuse, neglect or misappropriation of property of the client, patient or resident.

This bill amends the CNA Registry law as follows:

1. Amends and adds definitions including definitions of "abuse," "disqualifying criminal convictions," and "non-disqualifying criminal convictions" that clarify portions of the law that have been troublesome regarding enforcement by the department, compliance by the CNAs, and interpretation by providers.

2. Replaces ambiguous statutory language with language that states that specific named crimes promulgated by the department's rulemaking process shall form the rational basis for employment bans for CNAs. Criminal convictions for named crimes replace current statutory language that bases employment bans on the length of the sentence that "*may*" be imposed.

3. States that not all convictions result in employment bans. When a CNA has a non-disqualifying criminal conviction that does not ban employment, hiring is based on the prospective employer's discretion.

4. Disqualifying criminal convictions result in 30-year or 10-year employment bans.

5. Individuals with employment bans may petition the department for removal of an employment ban prior to its expiration

6. States that CNAs are not subject to the new employment bans if they are employed as CNAs on the effective date of this new law.

7. An advisory board is established by the department to consider future amendments to the table of named crimes.

This bill amends unlicensed assistive person (UAP) laws as follows:

8. Amends and adds definitions that apply to UAPs that have substantiated complaints, including definitions of "substantiated findings" that prohibit employment and "adverse findings" that do not prohibit employment.

9. Amends the complaint investigation provisions to include determinations that may be made by the department after investigation of a complaint.

10. States that “adverse findings” do not prohibit employment and are not listed as notations on the registry.

11. States that UAPs are not subject to the new employment bans if they are employed as UAPs on the effective date of this new law.

12. States that UAP training programs must notify candidates about the employment restrictions in this chapter prior to acceptance of a student applicant.

This bill also updates statutes that make reference to CNA registry and UAP laws to reflect the above changes.

This bill states that the table of named crimes must be used by employers who must secure pre-hire criminal background checks prior to hiring an individual who will work in direct contact with consumers. Individuals with disqualifying criminal convictions are prohibited from employment.

ATTACHMENT G

Mane Department of Health and Human Services
PURCHASED SERVICES CONTRACT (2011)
RIDER D
Additional Requirements – Client Services
http://www.maine.gov/dhhs/purchased-services/contract-2011/rider-d/client-services.pdf

16. BACKGROUND CHECKS. The Provider agrees to conduct background checks on all prospective employees, persons contracted or hired, consultants, volunteers, students, and other persons who may provide services under this contract. Background checks on persons professionally licensed by the State of Maine will include a confirmation that the licensee is in good standing with the appropriate licensing board or entity. The Provider shall not hire or retain in any capacity any person who may directly provide services to a client under this contract if that person has a record of:

(a) any criminal conviction that involves client abuse, neglect or exploitation;

(b) any criminal conviction in connection to intentional or knowing conduct that caused, threatened, solicited or created the substantial risk of bodily injury to another person;

(c) any criminal conviction resulting from a sexual act, contact, touching or solicitation in connection to any victim; or

(d) any other criminal conviction, classified as Class A, B or C or the equivalent of any of these, or any reckless conduct that caused, threatened, solicited or created the substantial risk of bodily injury to another person within the preceding two years. Employment of persons with records of such convictions more than two years ago is a matter within the Provider's discretion after consideration of the individual's criminal record in relation to the nature of the position.

The Provider shall contact child protective services units within State government to obtain any record of substantiated allegations of abuse, neglect or exploitation against an employment applicant before hiring the same. In the case of a child protective services investigation substantiating abuse, neglect or exploitation by a prospective employee of the Provider, it is the Provider's responsibility to decide what hiring action to take in response to that substantiation, while acting in accordance with licensing standards.

Providers are not required to obtain records from child protective services for employees who (a) do not provide services to children, and (b) work in settings where there is on-site supervision at all times.

ATTACHMENT H
Public Law 2009, Chapter 621 (LD 1464)

An Act To Amend Licensing, Certification and Registration Requirements for Health Care Providers and Other Facilities

Be it enacted by the People of the State of Maine as follows:

Sec. 1. 22 MRSA §1723 is enacted to read:

§ 1723. Criminal background checks

Beginning October 1, 2010, a facility or health care provider subject to the licensing or certification processes of chapter 405, 412 or 419 shall obtain, prior to hiring an individual who will work in direct contact with a consumer, criminal history record information on that individual, including, at a minimum, criminal history record information from the Department of Public Safety, State Bureau of Identification. The facility or health care provider shall pay for the criminal background check required by this section.

The department may adopt rules necessary to implement this section. Rules adopted pursuant to this section are routine technical rules as defined in Title 5, chapter 375, subchapter 2-A.

Sec. 2. 22 MRSA §2131, sub-§1, as enacted by PL 1989, c. 579, §4, is amended to read:

1. Registration; renewal. ~~Effective January 1, 1990, every~~A temporary nurse agency shall register with the department and renew the registration as required by rule thereafter. For purposes of this chapter, unless the context otherwise indicates, "temporary nurse agency" means a business entity or subdivision thereof that provides nurses to another organization on a temporary basis within this State.

Sec. 3. 22 MRSA §2131, sub-§4, as amended by PL 2001, c. 494, §2, is repealed and the following enacted in its place:

4. Penalty. The following penalties apply to violations of this chapter.

A. A person who operates a temporary nurse agency without registering or who fails to verify the inclusion of a certified nursing assistant on the Maine Registry of Certified Nursing Assistants established under section 1812-G before hiring that certified nursing assistant pursuant to subsection 1-A commits a civil violation for which a fine of not less than $500 per day but not more than $10,000 per day may be adjudged. Each day constitutes a separate violation.

B. A person who operates a temporary nurse agency in violation of the employment prohibitions in section 2138 commits a civil violation for which a fine of not less than $500 per day but not more than $10,000 per day may be adjudged. Each day constitutes a separate violation.

Sec. 4. 22 MRSA §2131, sub-§5 is enacted to read:

5. Rules. The department may adopt rules necessary to implement this section. Rules adopted pursuant to this subsection are routine technical rules as defined in Title 5, chapter 375, subchapter 2-A.

Sec. 5. 22 MRSA c. 417-A is enacted to read:

CHAPTER 417-A

BACKGROUND CHECKS FOR TEMPORARY NURSE AGENCIES

§ 2136. Definitions

As used in this chapter, unless the context otherwise indicates, the following terms have the following meanings.

1. Hire, employ or place. "Hire, employ or place" means to recruit, select, train, declare competent, schedule, direct, define the scope of the position of or supervise an individual who provides temporary care pursuant to chapter 417.

2. Temporary nurse agency. "Temporary nurse agency" means a business entity or subdivision thereof that provides nurses to another organization on a temporary basis within this State.

§ 2137. Criminal background checks

Beginning October 1, 2010, a temporary nurse agency shall obtain, prior to hiring, employing or placing an individual who will work in direct contact with a consumer, criminal history record information on that individual, including, at a minimum, criminal history record information from the Department of Public Safety, State Bureau of Identification. The temporary nurse agency shall pay for the criminal background check required by this section.

The department may adopt rules necessary to implement this section. Rules adopted pursuant to this section are routine technical rules as defined in Title 5, chapter 375, subchapter 2-A.

§ 2138. Prohibited employment

A temporary nurse agency may not hire, employ or place an individual who:

1. Subject of notation. Has worked as a certified nursing assistant and has been the subject of a notation by the state survey agency for a substantiated complaint of abuse, neglect or misappropriation of property in a health care setting that was entered on the Maine Registry of Certified Nursing Assistants established under section 1812-G;

2. Convicted of crime involving abuse, neglect or misappropriation. Has been convicted in a court of law of a crime involving abuse, neglect or misappropriation of property; or

3. Other prior conviction. Has a prior criminal conviction within 10 years prior to application of:

A. A crime for which incarceration of 3 years or more may be imposed under the laws of the state in which the conviction occurred; or

B. A crime for which incarceration of less than 3 years may be imposed under the laws of the state in which the conviction occurred involving sexual misconduct or involving abuse, neglect or exploitation in a setting other than a health care setting.

§ 2139. Complaints

1. Complaint investigation. The department is authorized to investigate complaints against a temporary nurse agency to ensure compliance with this chapter.

2. Injunctive relief. Notwithstanding any other remedies provided by law, the Attorney General may seek an injunction to require compliance with the provisions of this chapter.

3. Enforcement. The Attorney General may file a complaint with the District Court seeking civil penalties or injunctive relief or both for violations of this chapter.

4. Jurisdiction. The District Court has jurisdiction pursuant to Title 4, section 152 for violations of this chapter.

5. Burden of proof. The burden is on the department to prove, by a preponderance of the evidence, that the alleged violation of this chapter occurred.

6. Right of entry. This subsection governs the department's right of entry with respect to temporary nurse agencies.

A. An application for registration of a temporary nurse agency constitutes permission for entry and inspection to verify compliance with applicable laws and rules.

B. The department has the right to enter and inspect the premises of a temporary nurse agency registered by the department at a reasonable time and, upon demand, has the right to inspect and copy any books, accounts, papers, records and other documents in order to determine the state of compliance with applicable laws and rules.

C. To inspect a temporary nurse agency that the department knows or believes is being operated without being registered, the department may enter only with the permission of the owner or person in charge or with an administrative inspection warrant issued pursuant to the Maine Rules of Civil Procedure, Rule 80E by the District Court authorizing entry and inspection.

7. Administrative inspection warrant. The department and a duly designated officer or employee of the department have the right to enter upon and into the premises of an unregistered temporary nurse agency with an administrative inspection warrant issued pursuant to the Maine Rules of Civil Procedure, Rule 80E by the District Court at a reasonable time and, upon demand, have the right to inspect and copy any books, accounts, papers, records and other documents in order to determine the state of compliance with this chapter. The right of entry and inspection may extend to any premises and documents of a person, firm, partnership, association, corporation or other entity that the department has reason to believe is operating a temporary nurse agency without being registered.

8. Noninterference. An owner or operator of an unregistered temporary nurse agency may not interfere with, impede or obstruct an investigation by the department, including, but not limited to, interviewing persons receiving services or persons with knowledge of the agency.

9. Violation of injunction. A person, firm, partnership, association, corporation or other entity that violates the terms of an injunction issued under this chapter shall pay to the State a fine of not less than $500 nor more than $10,000 for each violation. Each day of violation constitutes a separate offense. In any action brought by the Attorney General against a person, firm, partnership, association, corporation or other entity for violating the terms of an injunction under this chapter, the District Court may make the necessary orders or judgments regarding violation of the terms of the injunction.

In an action under this chapter, when a permanent injunction has been issued, the District Court may order the person, firm, partnership, association, corporation or other entity against which the permanent injunction is issued to pay to the General Fund the costs of the investigation of that person, firm, partnership, association, corporation or other entity by the Attorney General and the costs of suit, including attorney's fees.

10. Suspension or revocation of registration. A temporary nurse agency found to be in violation of this chapter may have its registration to operate as a temporary nurse agency suspended or revoked. The department may file a complaint with the District Court requesting suspension or revocation of a registration to operate a temporary nurse agency.

11. Rules. The department may adopt rules to implement this section. Rules adopted pursuant to this subsection are routine technical rules as defined in Title 5, chapter 375, subchapter 2-A.

Sec. 6. 22 MRSA §7704 is enacted to read:

§ 7704. Criminal background checks

Beginning October 1, 2010, a facility or health care provider subject to the licensing or certification processes of chapter 1663, a nursery school subject to chapter 1675 or a hospice provider subject to chapter 1681 shall obtain, prior to hiring an individual who will work in direct contact with a consumer, criminal history record information on that individual, including, at a minimum, criminal history record information from the Department of Public Safety, State Bureau of Identification. The entity seeking to employ the individual shall pay for the criminal background check required by this section.

The department may adopt rules necessary to implement this section. Rules adopted pursuant to this section are routine technical rules as defined in Title 5, chapter 375, subchapter 2-A.

Sec. 7. 22 MRSA §7946, sub-§4, as enacted by PL 1987, c. 774, §4, is amended to read:

4. Income from penalties. Any income from penalties ~~shall~~must be placed in a special revenue account and be used ~~if needed and available when a receiver is appointed pursuant to section 7933, or for other costs associated with the protection of health or property of residents of long-term care facilities which are fined or sanctioned pursuant to this chapter~~by the department for purposes related to improving the quality of care for residents of long-term care facilities.

Sec. 8. 34-B MRSA §1224 is enacted to read:

§ 1224. Criminal background checks

Beginning October 1, 2010, a facility or health care provider subject to the licensing provisions of section 1203-A shall obtain, prior to hiring an individual who will work in direct contact with a consumer, criminal history record information on that individual, including, at a minimum, criminal history record

information from the Department of Public Safety, State Bureau of Identification. The facility or health care provider shall pay for the criminal background check required by this section.

The department may adopt rules necessary to implement this section. Rules adopted pursuant to this section are routine technical rules as defined in Title 5, chapter 375, subchapter 2-A.

Sec. 9. Appropriations and allocations. The following appropriations and allocations are made.

PUBLIC SAFETY, DEPARTMENT OF

State Police 0291

Initiative: Provides funding for 400 hours of overtime within the State Bureau of Identification.

GENERAL FUND	**2009-10**	**2010-11**
Personal Services	$0	$6,887
GENERAL FUND TOTAL	$0	$6,887

HIGHWAY FUND	**2009-10**	**2010-11**
Personal Services	$0	$6,617
HIGHWAY FUND TOTAL	$0	$6,617

Effective 90 days following adjournment of the 124th Legislature, Second Regular Session, unless otherwise indicated.

[1] Since September 13, 2003, Maine law requires a criminal background check before an individual is accepted for enrollment in a training program to become a CNA. See Resolve 2003, chapter 96.

[2] See Attachment E for more information about substantiated complaints.

[3] Pursuant to 17-A M.R.S.A. §§ 1252 (2) (D) and 1301 (1-A) (D), a Class D criminal offense is any criminal offense for which the maximum period of incarceration is a definite period of less than one year, a fine up to $2000, or both. Pursuant to 17-A M.R.S.A. §§ 1252 (2) (E) and 1301 (1-A) (E), a Class E criminal offense is any criminal offense for which the maximum period of incarceration is a definite period not to exceed 6 months, a fine up to $1000, or both. For similar crimes committed in other jurisdictions, the Maine CNA Registry applies 17-A M.R.S.A. §4-A (3) (D) and (E). (From Section 1.4 of the *Rules Governing the Maine Registry of Certified Nursing Assistants.*)

[4] Including but not limited to nursing facilities (22 M.R.S.A. chapter 405), hospitals (22 M.R.S.A. chapter 405), temporary nurse agencies (22 M.R.S.A. chapter 417), personal care agencies and placement agencies (22 M.R.S.A. chapter 401), home health services (22 M.R.S.A. chapter 419), adult day programs (22 M.R.S.A. chapter 1679), and assisted housing programs (22 M.R.S.A. chapter 1664).

[5] Since September 13, 2003, Maine law requires a criminal background check before an individual is accepted for enrollment in a training program to become a CNA. See Resolve 2003, chapter 96.

[6] See *Kane v. Commissioner of the Department of Health and Human Services*, 2008 ME 185, 960 A.2d 1196, Alexander, J.

[7] 17-A M.R.S.A. Part 2, Substantive Offenses.

[8] The Lewin Group. U.S. Department of Health and Human Services, Office of Disability, Aging and Long-Term Care Policy. (May, 2006). *Ensuring A Qualified Long-Term Care Workforce: From Pre-Employment Screens To On-The-Job Monitoring*, page 41. http://aspe.hhs.gov/daltcp/reports/2006/LTCWqual.pdf

[9] Nakamura, Kiminori. 2008. Redemption in the Presence of Widespread Criminal Background Checks. The Heinz School, Carnegie Mellon University, Pittsburgh. The Heinz School Second Paper, April 21, 2008. http://www.heinz.cmu.edu/research/233full.pdf

[10] The only current Registry redemption provision is a federal law that allows a CNA with a one-time *substantiated complaint* for neglect to petition for removal of the lifetime employment ban. The petitioner must demonstrate compliance with specific criteria, including having only a one-time substantiated neglect complaint notation on the Registry and no pattern of abusive behavior. Federal law has a waiting period of 12 months before a CNA may file the petition for removal of the substantiated neglect complaint notation. (See Attachment E)

[11] Consumer Directed Attendant Services (10-144 C.M.R. Ch 101, Section 12); Home and Community Benefits for the Elderly and For Adults With Disabilities, Family Provider Service Option (10-144 C.M.R. Ch 101, Section 19); In-home and Community Support Services (10-149 C.M.R. Ch Ch 5, Section 63); and Homemaker Services, Self-Directed Option (10-149 C.M.R. Ch 5, Section 69).

[12] Section 12.06 (J): Consumer directed attendant services program; Section 19.05 (E): Home and Community Benefits for the Elderly and For Adults With Disabilities, Family Provider Service Option; Section 63.05 (D): In-home and Community Support Services; and Section 69:05 (4): Homemaker Services, Self-Directed Option.

[13] The Lewin Group. *Ensuring A Qualified Long-Term Care Workforce: From Pre-Employment Screens To On-The-Job Monitoring*, II STUDY METHODOLOGY.

[14] Maine definition of adult abuse: *"Abuse" means the infliction of injury, unreasonable confinement, intimidation or cruel punishment that causes or is likely to cause physical harm or pain or mental anguish; sexual abuse or sexual exploitation; or the intentional, knowing or reckless deprivation of essential needs. "Abuse" includes acts and omissions.* See 22 M.R.S.A. §3472 (1).

[15] Maine definition of child abuse: *"Abuse or neglect" means a threat to a child's health or welfare by physical, mental or emotional injury or impairment, sexual abuse or exploitation, deprivation of essential needs or lack of protection from these or failure to ensure compliance with school attendance requirements under Title 20-A, section 3272, subsection 2, paragraph B or section 5051-A, subsection 1, paragraph C, by a person responsible for the child.* See 22 M.R.S.A. §4002(1).

[16] The Lewin Group. *Ensuring A Qualified Long-Term Care Workforce: From Pre-Employment Screens To On-The-Job Monitoring*; see Sections (I. C.) Context and Contribution of this Study, and (IV. A.) Conclusion.

EMPLOYMENT RESTRICTIONS AND REGISTRY NOTATIONS	NAMED CRIMES

WHO USES THIS TABLE OF NAMED CRIMES?

(1) THE REGISTRY. The Registry uses this chart to determine which convictions result in an employment ban for CNAs. Criminal convictions are listed as notations on the Registy.

(2) PROVIDERS. Providers use this chart to determine who cannot be hired to work in direct contact with consumers based on convictions identified during a pre-hire criminal background check.

WHO IS SUBJECT TO EMPLOYMENT BANS?

(1) CNAs

(2) UAPs (also known as direct care workers)

HOW TO USE THIS TABLE.

(1) Convictions for crimes listed under the 30-year and 10-year employment ban sections of this table are disqualifying convictions that ban the individual from working as a CNA or UAP.

(2) Convictions for crimes listed under "Hiring Consideration & Listed on Registry" are non-disqualifying convictions that do not ban employment.

30-year Employment Ban						
Class A & Murder 30-year ban Sentence <30	**Murder - §201**	**Manslaughter - §203**	**Elevated Aggravated Assault - §208-B**	**Elevated Aggravated Assault on a Pregnant Person-§208-C**	**Gross Sexual Assault - §253**	**Sexual Exploitation of a Minor - §282**
	Dissemination of Sexually Explicit Material - §283	**Kidnapping - §301**	**Robbery - §651**	**Arson - §802**	**Aggravated Trafficking of Scheduled Drugs-§1105-A**	**Unlawful Sexual Contact §255-A**
Class B 30-year ban Sentence <10	**Gross Sexual Assault - §253**	**Sexual Exploitation of a Minor - §282**	**Kidnapping - §301**	**Tampering with a Witness, Informant, Victim or Juror-§454**	**Robbery - §651**	**Aggravated Promotion of Prostitution (Promoting Children under 18)-§852**
	Unlawful Trafficking in Scheduled Drugs - §1103	**Agg Traff & Furn of Scheduled Drugs - §1105-A,B,C**	**Unlawful Sexual Contact §255-A**	**Sexual Abuse of Minors - §254**		
Class C 30-year ban Sentence <5	**Tampering with a Witness,Informant, Victim or Juror - §454**	**AggTraff & Furn in Scheduled Drugs-§1105-A,B,C**	**Trafficking/Furn. Counterfeit Drugs - §1104**	**Unlawful Trafficking in Scheduled Drugs - §1103**	**Endangering Welfare Dependent Person - Priors* - §555**	**Endangering Welfare of a Child, Priors - §554**

	Abandonment of a Child (under age 6) - §553	**Violation of a Protection Order, Priors - §506-B**	**Assault §207**	**Domestic Violence Assault - Priors - §207A**	**Domestic Violence Criminal Threatening - Priors - §209-A**	**Domestic Violence Terrorizing - Priors - §210-B**
	Domestic Violence Stalking - Priors - §210-C	**Domestic Violence Reckless Conduct - §211-A**	**Gross Sexual Assault - §253**	**Terrorizing - §210**	**Sexual Misconduct Child - Priors - §258**	**Visual Sex Aggression Child - Priors - §256**
	Solicitation of Child by Computer to Commit a Prohibited Act- §259	**Unlawful Sexual Contact - §255-A**	**Incest - §556**			
Class D 30-year ban Sentence <1	**Incest - §556**	**Aiding or Soliciting Suicide - §204**	**Solicitation of a Child by Computer to Commit a Prohibited Act- §259**			
10-year Employment Ban						
Class A 10-year ban Sentence <30	**Aggravated Cultivation of Marijuana §1105-D**					
Class B 10-year ban Sentence <10	**Aggravated assault - §208**	**Aggravated Reckless Conduct - §213**	**Dissemination Sexually Explicit Material - §283**	**Theft by Unauthorized Taking or Transfer - §353**	**Theft by Deception - §354**	**Theft or Loss, Mislaid or Mistakenly Delivered Property- §356-A**
	Theft of Services - §357	**Theft by Misapplicaton of Property - §358**	**Cultivation of Marijuana - §1117**	**Burglary (Residence) - §401**	**Aggravated Cultivation of Marijuana - §1105-D**	**Aggravated Forgery - §702**
	Negotiating Worthless Instrument(over 10K) - §708	**Hindering Apprehension or Prosecution - §753**	**Escape from Prison w/Weapon - §755**	**Unlawful possesson of scheduled drugs -§1107-A**	**Forgery §703**	**Receiving Stolen Property §359**

Class C 10-year ban Sentence <5	**Theft by Unauthorized Taking or Transfer-§353**	**Theft by Deception - §354**	**Theft by Extortion §355**	**Theft or Loss, Mislaid or Mistakenly Delivered Property- §356-A**	**Theft of Services - §357**	**Theft by Misapplication of Property - §358**
	Receiving Stolen Property - §359	**Aggravated Criminal Trespass - §402-A**	**Aggravated Criminal Invasion of Computer Privacy - §433**	**Perjury - §451**	**Violation of a Protection Order - §506-B**	**Hindering Apprehension or Prosecution- §753**
	Obstructing Criminal Prosecution-§754	**Escape - §755**	**Trafficking Prison Contraband - §757**	**Patronizing Prostitution Of a Minor- §855**	**Cultivation of Marijuana - §1117**	**Acquiring Drugs by Deception - §1108**
	Stealing Drugs - §1109	**Illegal Importation of Drugs - §1118**	**Sexual Abuse of Minor - §254**	**Dissemination of Sexually Explicit Material-§283**	**Poss. Of Sexually Explicit Material - §284**	**Aggravated Cultivating Marijuana- §1105-D**
	Forgery - §703	**Unauthorized Use of Property §360**	**Home Repair Fraud §908**			
Class D 10-year ban Sentence <1	**Falsifying Physical Evidence - §455**	**Tampering Public Records - §456**	**Violation of a Protection Order-§506-B**	**Abandonment of a Child - §553**	**Endangering Welfare Dependent Person-§555**	**Assault on Officer - §752-A**
	Home Repair Fraud - §908	**Misuse Entrusted Property - §903**	**Private Bribery - §904**	**Misuse of Identification - §905-A**	**Misuse of Scanning Device - §905-B**	**Possession of Theft Devices - §907**
	Endangering the Welfare of a Child- §554	**Acquiring Drugs by Deception - §1108**	**Possession of Machine Gun - §1051**	**Stealing Drugs §1109**	**Trafficking or Possession of Hypodermic Apparatus- §1111**	**Trafficking or Furnishing Imitation Drugs-§1116**
	Unlawful Trafficking Scheduled Drug - §1103	**Illegal Importation of Drugs-§1118**	**Unlawful Possession of Scheduled Drugs - §1107-A**	**Patronizing Prostitution of a Minor - §855**	**Sexual Abuse of a Minor - §254**	**Visual Sex Aggression against a Child-§256**
	Sexual Misconduct Child §258	**Unlawful Sexual Touching- §260**				

Class E 10-year ban Sentence <6 months	**Falsifying Private Records - §707**	**Failure to Report Sexual Assault of a Person in Custody-§760**	**Possession or Transfer of Theft Devices - §907**	**Unlawful Sexual Contact §255-A**	**Unlawful Sexual Touching - §260**	
Hiring Consideration & Listed on the Registry						
Class B Hiring Consideration & Listed on CNA Registry	**Aggravated Gambling - §953**					
Class C Hiring Consideration & Listed on CNA Registry	**Negotiating a Worthless Instrument §708**	**Criminal Use of Explosives - §1001**	**Aggravated Criminal Mischief - §805**	**Criminal Restraint - §302**	**Burglary (Non-Residence) - §401**	
Class D Hiring Consideration & Listed on CNA Registry	**Theft by Unauthorized Taking or Transfer-§353**	**Theft of Services - §357**	**Receiving Stolen Property - §359**	**Criminal Trespass - §402**	**Failure to Disperse - §502**	**False Swearing - §452**
	Violation of a Protection Order-§506-B	**Forgery - §703**	**Theft by Deception - §354**	**Theft or Loss, Mislaid or Mistakenly Delivered Property-§356-A**	**Theft by Misapplicaton of Property§358**	**Unauthorized Use of Property - §360**
	Criminal Threatening - §209	**Criminal Invasion of Computer Privacy-§432**	**False Public Alarm Report - §509**	**Hindering Apprehension or Prosecution-§753**	**Obstructing Govt Administration - §751**	**Refusing to Submit to Arrest - §751-B**
	Escape - §755	**Obstructing Report Crime/Injury - §758**	**Failure to Report or Control Dangerous Fire §804**	**Deceptive Business Practices - §901**	**Deceptive Insurance Practices - §901-A**	**Defrauding a Creditor - §902**
	Unlawful Gambling - §954	**Indecent Conduct - §854**	**Criminal Use of Laser Pointers-§1002-A**	**Unsworn Falsification - §453**	**Cultivation of Marijuana-§1117**	**Criminal Mischief - §806**
	Assault - §207	**Assault by Hunting - §208-A**	**Reckless Conduct §211**	**Negotiating Worthless Instrument - §708**	**Burglary (Unlocked Car) - §405**	**Criminal Restraint - §302**
	Possession Sexually Explicit Material - §284	**Terrorizing - §210**	**Engaging a Prostitute - §853-B**	**Engaging in Prostitution - §853-A**	**Domestic Violence Criminal Threatening - §209-A**	**Domestic Violence Assault - §207-A**

	Domestic Violence Terrorizing - §210-B	**Domestic Violence Stalking §210-C**	**Domestic Violence Reckless Conduct §211-A**			
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Class E Hiring Consideration & Listed on CNA Registry	**Theft by Unauthorized Taking - §353**	**Theft of Services - §357**	**Receiving Stolen Property -§359**	**Criminal Trespass - §402**	**Disorderly Conduct - §501-A**	**Failure to Disperse - §502**
	Obstructing Public Ways - §505	**Criminal Simulation - §705**	**Theft by Deception - §354**	**Theft or Loss, Mislaid or Mistakenly Delivered Property- §356-A**	**Theft by Misapplicaton of Property - §358**	**Negotiating Worthless Instrument - §708**
	Hindering Apprehension or Prosecution - §753	**Indecent Conduct - §854**	**Unlawful Possession of Scheduled Drugs - §1107-A**	**Criminal Use of Laser Pointers - §1002-A**	**Cultivation of Marijuana - §1117**	**Unauthorized Use of Property - §360**
	Refusing to Submit to Arrest §751-B	**Engaging in Prostitution - §853-A**	**Engaging a Prostitute - §853-B**	**Harassment - §506-A**		