

STATE OF MAINE

MAINE BACKGROUND CHECK CENTER RULE

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



**Department of Health and Human Services
Maine Center for Disease Control and Prevention
11 State House Station
Augusta, Maine 04333-0011**

Effective Date:

**Maine Center for Disease Control and Prevention
Department of Health and Human Services**

MAINE BACKGROUND CHECK CENTER RULE

10-144 C.M.R. Chapter 60

SUMMARY STATEMENT

This rule is established to govern the Maine Background Check Center (MBCC), which operates an Internet-based system that employers use to access criminal records and other background information to determine the eligibility of individuals to work in direct access positions serving vulnerable children, elderly persons, dependent adults and persons with disabilities in Maine.

AUTHORITY

22 M.R.S. Chapter 1691

EFFECTIVE DATE

This rule is effective (date).

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SECTION 1: DEFINITIONS

The definitions in this rule supplement the definitions in the applicable statutes. The definitions in the applicable statutes are not repeated in this rule.

Applicant means an individual applying for employment as a direct access worker as defined in 22 M.R.S. §9053, or an individual currently employed as a direct access worker, for whom a request is being submitted for a background check through the Maine Background Check Center (MBCC).

Comprehensive background check means a background check that includes a search and analysis of the State Bureau of Identification (SBI) Criminal History Record Information and may include other databases as applicable to the employer and the applicant's position, such as:

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

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

Department means the Department of Health and Human Services.

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

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

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

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

Sanctions means administrative actions intended to encourage compliance as described in this rule and the applicable statutes, including civil penalties, statements of deficiencies, and licensing actions.

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

Quick Check means a no-cost background check performed by a prospective employer using the applicant's first and last names only.

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

SECTION 2: SCOPE, ENROLLMENT, AND FEES

- A. Scope.** The provisions of this rule apply to all employers and applicants required to use the MBCC in accordance with 22 M.R.S. §9054.
- B. Constitutionality clause.** Should any section, paragraph, sentence, clause, or phrase of this rule be declared unconstitutional or invalid for any reason, the remainder of this rule will not be affected thereby.
- C. Employer enrollment, administrator, and user requirements.** Employers must comply with the following enrollment, administrator, and user requirements.
1. Employers must identify a single individual to serve as its background check administrator.
 2. The administrator must:
 - a. Create and maintain an account in the Department's MBCC website ;
 - b. Complete all enrollment procedures required to use the website; and
 - c. Comply with all system requirements to maintain the employer's access to the website.
 3. Employers may allow users other than the administrator to access the website. The administrator and each user must complete the user registration process.
 4. Background check records and other personally identifiable information provided by an applicant are confidential and must be stored in a safe and secure manner. All users must comply with the confidentiality requirements of this rule and the applicable statutes.
 5. Employers must update their user list on the website to reflect all current users.
- D. User fees.** User fees are assessed for each comprehensive background check performed or attempted on behalf of an employer. User fees are based on an analysis of the Department's costs for operating the MBCC and performing comprehensive background checks.
1. **Fee upon adoption of this rule.** Upon adoption of this rule, the initial user fee will be \$56 for each comprehensive background check.
 2. **Fee adjustments.** Beginning January 1, 2019, and every two years thereafter, the Department will review the balance in the MBCC Operations Fund to analyze costs and adjust the user fee.

SECTION 3: CONDUCTING BACKGROUND CHECKS

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

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

Department will only approve if the use of an alternate vendor meets the requirements of this rule and 22 M.R.S. §9054.

- c. Use of the vendor shall cease immediately upon the vendor's inability to conduct a comprehensive background check in compliance with this rule.
 - d. If the employer ceases to use the alternate vendor, then the employer must immediately begin use of the MBCC.

- E. **Quick check.** Employers may opt to screen potential employees by conducting a quick check prior to paying for a comprehensive background check. Search results indicating disqualifying offenses that preclude employment may be used to make employment decisions. If no disqualifying offenses result from this search, the employer shall initiate a comprehensive background check prior to making an employment decision.

- F. **Rap back monitoring.** All applicants hired by employers as direct access workers are automatically enrolled in criminal record rap back monitoring, as a function of the MBCC search.
 - 1. **Automatic monitoring.** Rap back monitoring automatically monitors direct access workers' criminal records for five years following a request for a comprehensive background check.
 - 2. **Update master list to cease monitoring.** To cease rap back monitoring of a direct access worker, employers must update their master lists of direct access workers in the MBCC to indicate that worker is no longer employed by that employer.

- G. **Periodic subsequent comprehensive background checks.** Employers must follow the same process used to obtain an initial comprehensive background check to obtain a periodic comprehensive background check. Subsequent comprehensive background checks must be obtained at least every five years following the date of hire or the anniversary date of a previous comprehensive background check.

- H. **Transfers and promotions.** A background check must be completed on an individual who is currently employed in a position other than as a direct access worker when they are transferred or promoted into a position as a direct access worker.

- I. **Disqualifying offenses.** An individual with a disqualifying offense, including a disqualifying criminal conviction; substantiated complaint of abuse, neglect, or misappropriation of funds; or listing on a fraud or Sex Offender Registry as described below may not work as a direct access worker during the disqualification period.
 - 1. **Reports received from the Maine State Bureau of Identification (SBI).** Unless specified otherwise in the licensing rule specific to the employer's work, the Table of Disqualifying Crimes below lists disqualifying criminal offenses by the

class of crime (A-E) and the length of time following the conviction that an applicant may not be employed as a direct access worker:

Table of Disqualifying Crimes			
Criminal Offense	Disqualification Periods		
	30 Years	10 Years	5 Years
OFFENSES OF GENERAL APPLICABILITY (Attempt, Solicitation, and Conspiracy)			
Criminal conspiracy		A, B, C	
Criminal attempt		A, B, C	
Aggravated attempted murder	A		
Criminal solicitation		A, B, C	
OFFENSES AGAINST THE PERSON			
Murder	A		
Felony murder	A		
Manslaughter		A, C	
Aiding or soliciting suicide			D
Assault		C	
Domestic violence assault		C	
Aggravated assault	A, B		
Elevated aggravated assault	A		
Elevated aggravated assault on a pregnant person	A		
Domestic violence criminal threatening		C	
Terrorizing		C	
Stalking		B, C	
Reckless conduct domestic violence		C	
Aggravated reckless conduct		B	
Violation of a protection order			C
Illegal sale and use of fetuses			C
Causing denial of rights of a mentally ill person			C
Causing unwarranted hospitalization of a person			E
SEX ASSAULTS			
Gross sexual assault	A	B, C	
Sexual abuse of a minor		C	D, E
Unlawful sexual contact	A	B, C	D, E
Visual sexual aggression against child		C	D
Contact with a child under 14 in a restricted zone		C	D
Sexual misconduct with a child under 14 years of age		C	D
Solicitation of a child to commit a prohibited act		C	D
Unlawful sexual touching			D
Failing to register as a sex offender		B, C	D
SEXUAL EXPLOITATION OF MINORS			
Sexual exploitation of minor	A	B	
Dissemination of sexually explicit material	A	B, C	

Criminal Offense	Disqualification Periods		
	30 Years	10 Years	5 Years
Possession of sexually explicit material		B, C	D
KIDNAPPING AND CRIMINAL RESTRAINT			
Kidnapping	A, B		
Criminal restraint		C	
Criminal restraint by parent		C	
Causing unwarranted hospitalizations.		C	
THEFT			
Theft by unauthorized taking or transfer		B	C
Theft by deception		B	C
Insurance deception		B	C
Theft by extortion			C
Theft of lost, mislaid or mistakenly delivered property		B	C
Theft of services		B	C
Theft by misapplication of property		B	C
Receiving stolen property		B	C, D
Unauthorized use of property		B	C
Organized retail theft			C
BURGLARY			
Burglary			A, B, C
Burglary of motor vehicle			C
FALSIFICATION IN OFFICIAL MATTERS			
Tampering with a witness, informant, juror or victim		B, C	
Falsifying physical evidence			D
Tampering with public records or information			D
OFFENSES AGAINST THE FAMILY			
Abandonment of child		C	
Endangering the welfare of a child		C	
Endangering welfare of dependent person		C	
Incest		C	D
ROBBERY			
Robbery		A, B	
FORGERY AND RELATED OFFENSES			
Aggravated forgery		B	
Forgery		B, C	
Negotiating a worthless instrument		B, C	D
OFFENSES AGAINST PUBLIC ADMINISTRATION			
Refusing to submit to arrest or detention			D, E
Assault on an officer/firefighter			C
Unlawful interference with law enforcement dogs			C, D
Assault on an emergency medical care provider		C	
Unlawful interference with law enforcement horses			C, D

Criminal Offense	Disqualification Periods		
	30 Years	10 Years	5 Years
Hindering apprehension or prosecution			B, C
Obstructing criminal prosecution			C
Escape			B, C
ARSON AND OTHER PROPERTY DESTRUCTION			
Arson	A		
Causing a catastrophe	A		
Aggravated criminal mischief		C	
SEX TRAFFICKING, PROSTITUTION AND PUBLIC INDECENCY			
Aggravated sex trafficking	B		
Sex trafficking		C	
Patronizing prostitution of minor/person with mental disability		C	D
FRAUD			
Act or omission with the intent to defraud		C	
Misuse of entrusted property	B, C		
Misuse of identification			D
CRIMINAL USE OF EXPLOSIVES AND RELATED CRIMES			
Criminal use of explosives		C	
Criminal use of disabling chemicals			D
Criminal use of electronic weapon			D
DRUGS			
Unlawful trafficking in scheduled drugs		B	C, D
Trafficking in or furnishing counterfeit drugs			C
Aggravated trafficking of scheduled drugs		A, B	C
Aggravated trafficking or furnishing of counterfeit drugs		B	
Aggravated furnishing of scheduled drugs		B	C
Aggravated cultivating of marijuana		A, B	C
Aggravated unlawful operation of a meth laboratory		A	
Unlawfully furnishing scheduled drugs			C
Illegal importation of scheduled drugs		B	C
Unlawful operation of a methamphetamine laboratory		B	
MOTOR VEHICLES			
Eluding/passing a roadblock		B	C
Operating under the influence resulting in injury/death	B	C	
Leaving the scene of accident with injury/death		C	
Operating after suspension-accident with death		B	

2. Comparable convictions for similar crimes in this and other jurisdictions result in disqualification as in the Table above.
3. A disqualifying offense includes any act that results in the applicant being listed on any of the following lists or registries at the time of application or thereafter. If

there is a difference in length between the disqualification periods in the table above and a list or registry or between registries, and one of them results in a current disqualification, then whichever results in the current disqualification will control. Lists prohibiting employment include the following:

- a. National Sex Offender Public Website;
- b. Maine Sex Offender Registry;
- c. Maine Registry of Certified Nursing Assistants and Direct Care Workers annotated list;
- d. Federal Office of the Inspector General exclusion list;
- e. MaineCare exclusion list; or
- f. The exclusion list of any other applicable registries.

J. Reports

1. The MBCC shall issue background check reports in accordance with 22 M.R.S. §9054 (10). The background check report shall be final, unless:
 - a. An applicant corrects an error pursuant to this rule, and the correction results in a new background check report that does not disqualify the applicant; or
 - b. An employer sponsors a waiver and that waiver is granted by the Department.
2. The MBCC may issue a new background check report regarding any applicant, when the MBCC:
 - a. Receives new information based on rap back monitoring that would result in a disqualification; or
 - b. The MBCC receives information which would result in the disqualification of an applicant or employee who has a current report that does not disqualify him or her.
3. Any background check report issued by the MBCC supersedes a prior report and/or waiver granted to an employer and becomes final, except as above.

SECTION 4: ERROR CORRECTIONS AND WAIVERS

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

- b.** Requests must be made in writing and directed to the Department, and must specify what information is in error.
 - c.** The Department will issue its decision in writing within ten days of the request. The decision may be appealed, in accordance with Section 5(E)(1) of this rule.
 - d.** If errors are not corrected by the end of the 60 days of conditional employment, employers are prohibited from employing the applicant as a direct access worker unless they obtain a waiver or until the error is corrected and a non-disqualifying report is issued.
- C. Waivers.** If an applicant has a disqualifying criminal conviction listed in the table in Section 3(I)(1) or in Section 3(I)(2) of this rule on his or her comprehensive background check report, employers may only employ the applicant if they obtain a waiver from the Department. Applicants and employers must comply with the provisions in this subsection to obtain a waiver from the Department.
 - 1.** An employer may not request a waiver of an applicant's disqualification for employment due to the applicant's appearance on any disqualification list cited in Section 3(I)(3) of this rule. An applicant shall appeal directly to the listing entity to correct any perceived error.
 - 2.** Employers must consider all factors specified in 22 M.R.S. §9054(15) in determining whether to sponsor a waiver, which include the following:
 - a.** Age of the individual applying for a waiver;
 - b.** The amount of time passed since the disqualifying offense occurred;
 - c.** The total number and type of disqualifying offenses;
 - d.** Any proven mitigating circumstances surrounding the disqualifying offense;
 - e.** Objective evidence that the individual has successfully completed a criminal rehabilitation program;
 - f.** The relevance of the circumstances pertaining to the disqualifying offense with respect to the nature of the proposed employment;
 - g.** The length and consistency of similar employment post-conviction (if applicable);
 - h.** Whether the individual is bonded under federal or State law; and

- 5.** Within ten business days of receiving the waiver request, the MBCC will issue a written determination letter including the reason for the decision to the employer and applicant by email or, if no email address is on record, by mail.
 - a.** A waiver shall only allow the employment of the applicant by the sponsoring employer in the position identified in the background check system. Waivers are not transferrable to a new employer.
 - b.** If the waiver request is denied, the applicant may appeal the decision, in accordance with Section 5(E)(1) of this rule.
 - c.** The Department may revoke a waiver when the waiver was based on false or substantially incorrect information.

SECTION 5: ENFORCEMENT AND APPEALS

- A. Referral for licensing actions.** The MBCC may refer violations of the applicable statutes and this rule to the appropriate State government program, unit, or office for further licensing action.
- B. Statement of deficiencies.** The Department may issue a Statement of Deficiencies to an employer for any violations of this rule or the applicable statutes. A Statement of Deficiencies shall be accompanied by either a Plan of Correction form or a Directed Plan of Correction.
- C. Plans of Correction or Directed Plan of Correction.** If the employer receives a Plan of Correction form, then he or she must complete it by indicating how and when any deficiency will be, or has been, corrected.
1. The employer must submit the completed Plan of Correction form to the Department within ten calendar days of receipt of the Department's Statement of Deficiencies.
 2. The Department will review the Plan of Correction within ten business days, to determine if it adequately addresses the deficiencies.
 3. If the Department determines that the submitted Plan of Correction does not adequately address the deficiencies, then the Department may issue a Directed Plan of Correction. A Directed Plan of Correction orders the employer to perform specific actions within specific deadlines, which may include revising the employer's original Plan of Correction.
- D. Sanctions.** The Department may impose sanctions on employers for:
1. Substantial noncompliance with this rule;
 2. Failing to fulfill a Plan of Correction or a Directed Plan of Correction;
 3. Failing to secure a background check in accordance with this rule or knowingly employing a disqualified individual for direct access employment except for conditional employment in accordance with this rule;
 4. Conditionally employing an individual before receiving verification that the individual has met the requirements of conditional employment;
 5. Failing to comply with the confidentiality requirements and conditional employment requirements of 22 M.R.S. Chapter 1691;
 6. Providing false or substantially incorrect information to the Department; or

7. Any other substantive violation of this rule.
- E. Licensing sanctions.** The employer's licensing authority may, in accordance with 22 M.R.S. §9063, perform the following actions:
1. Deny a license or certification or registration needed to provide services to protected individuals;
 2. Terminate or revoke a license or certification or registration relied upon to provide services to protected individuals;
 3. Revoke rate agreements or service contracts with the State of Maine relevant to services authorized by the license or certification; or
 4. The Department may refer a matter to the Office of the Attorney General for pursuit of a civil fine, in accordance with 22 M.R.S. §9062, regardless of whether prior administrative action has occurred.
- F. Appeal procedure.** Applicants and employers may request appeals in accordance with this sub-section.
1. **Applicant appeals.** An individual may request an administrative hearing to appeal the denial of a request to correct or challenge to information in records created or generated by the MBCC, or denial of a request for a waiver, or a revocation of a waiver.
 - a. **Administrative hearing.** A request for a hearing must be made in writing to the Department and must specify the reason for the appeal. A request for a hearing must be mailed within ten days from receipt of the Department's decision to deny the request to correct information in records created or generated by the MBCC.
 - b. **Hearing process.** The hearing will be conducted pursuant to the Department's Administrative Hearings Regulations at 10-144 C.M.R. Ch. 1, and in conformity with Maine's Administrative Procedure Act at 5 M.R.S. Ch. 375.
 - c. **Judicial review.** The final decision shall notify the applicant that a person who is aggrieved by a final agency action may be entitled to judicial review in the Superior Court.
 2. **Employer appeals.** An employer may request an administrative hearing to appeal sanctions issued by the Department, the denial of a request for a waiver, revocation of a waiver, or the denial of a request for the use of an alternate vendor.

- a. Administrative hearing.** An employer may appeal sanctions issued by the Department pursuant to this rule and the applicable statutes by submitting a request for hearing in writing to the Department within 30 days of the receipt of the notice of sanctions. The request must specify the reason for the appeal.
- b. Hearing process.** The hearing will be conducted, pursuant to the Department's Administrative Hearings Regulations at 10-144 C.M.R. Ch. 1, and in conformity with Maine's Administrative Procedure Act at 5 M.R.S. Ch. 375.
- c. Judicial review.** The final decision shall notify the employer that a person who is aggrieved by a final agency action may be entitled to judicial review in the Superior Court.

STATUTORY AUTHORITY AND REGULATORY HISTORY

STATUTORY AUTHORITY: 22 M.R.S. Ch. 1691.

EFFECTIVE DATE: