

## NOTICE OF PUBLIC HEARING

The New Mexico Health Care Authority Division of Health Improvement is finalizing amendments to the caregivers criminal history screening requirements to include the removing the previous specific fee amount to complete the screening and applies the actual costs incurred by the authority. It also updates the notification process to include the use of updated electronic communication methods and removes the requirement to use certified mail. Specifically, the changes include:

### **8.370.5 NMAC**

**This is an amendment to 8.370.5 NMAC Section 8 and Section 9 effective 1/28/2025.**

#### **8.370.5.8 CAREGIVER AND HOSPITAL CAREGIVER EMPLOYMENT REQUIREMENTS:**

**A. General:** The responsibility for compliance with the requirements of the act applies to both the care provider and to all applicants, caregivers and hospital caregivers. All applicants for employment to whom an offer of employment is made or caregivers and hospital caregivers employed by or contracted to a care provider must consent to a nationwide and statewide criminal history screening, as described in Subsections D, E and F of this section, upon offer of employment or at the time of entering into a contractual relationship with the care provider. Care providers shall submit all fees and pertinent application information for all applicants, caregivers or hospital caregivers as described in Subsections D, E and F of this section. Pursuant to Section 29-17-5 NMSA 1978 (amended) of the act, a care provider's failure to comply is grounds for the state agency having enforcement authority with respect to the care provider to impose appropriate administrative sanctions and penalties.

**B. Exception:** A caregiver or hospital caregiver applying for employment or contracting services with a care provider within 12 months of the caregiver's or hospital caregiver's most recent nationwide criminal history screening which list no disqualifying convictions shall only apply for a statewide criminal history screening upon offer of employment or at the time of entering into a contractual relationship with the care provider. At the discretion of the care provider a nationwide criminal history screening, additional to the required statewide criminal history screening, may be requested.

**C. Conditional employment:** Applicants, caregivers, and hospital caregivers who have submitted all completed documents and paid all applicable fees for a nationwide and statewide criminal history screening may be deemed to have conditional supervised employment pending receipt of written notice given by the authority as to whether the applicant, caregiver or hospital caregiver has a disqualifying conviction.

**D. Application:** In order for a nationwide criminal history record to be obtained and processed, the following shall be submitted to the authority on forms provided by the authority.

(1) A form containing personal identification which has a photograph of the person and which meets the requirements for employment eligibility in accordance with the immigration and nationality act as amended. A reasonable xerographic copy of a drivers license photograph will suffice under Subsection D of 8.370.5.8 NMAC.

(2) A signed authorization for release of information form.

(3) Three complete sets of readable fingerprint cards or other authority approved media acceptable to the department of public safety and the federal bureau of investigation submitted using black ink.

(4) The fee specified by the authority for the nationwide and statewide criminal history screening investigation [~~shall not exceed \$74. Of which, \$24 shall be applied for the federal bureau of investigation nationwide criminal history screening, seven dollars shall be applied for the statewide criminal history screening. The remaining application fee~~] shall be applied to cover costs incurred by the authority to support activities required by the act and these rules. The fees will not be applied to any other activity or expense undertaken by the authority.

(5) If the applicant, caregiver or hospital caregiver must submit another readable set of fingerprint cards upon notice that the fingerprint cards previously submitted were found unreadable, as determined by the federal bureau of investigation or department of public safety, the submission of a second set of fingerprint cards is required, a separate fee will not be charged. A fee shall be charged for submission of a third and subsequent fingerprint sets.

(6) If the applicant, caregiver or hospital caregiver has a physical or medical condition which prevents the applicant, caregiver or hospital caregiver from producing readable fingerprints using commonly available fingerprinting techniques, the applicant, caregiver or hospital caregiver shall submit the fingerprint cards with a notarized affidavit signed by the applicant, caregiver, hospital caregiver, returned to the authority within 14 calendar days, as determined by the postmark, which provides:

(a) identification of the applicant, caregiver or hospital caregiver; and

(b) an explanation of, or a statement describing, the applicant's, caregiver's or hospital caregiver's good faith efforts to supply readable fingerprints; and

(c) the physical or medical reason that prevents the applicant, caregiver or hospital caregiver from producing readable fingerprints using commonly available fingerprinting techniques;

(d) an applicant, caregiver or hospital caregiver meeting the conditions of this paragraph and who has resided in the state of New Mexico for less than 10 years must also submit a 10 year work history in addition to the required affidavits.

(7) All documentation submitted to the authority for the purposes of criminal history screening and for the purposes set forth in 8.370.5.9 NMAC and 8.370.5.10 NMAC shall become the sole property of the authority with the exception of fingerprint cards which shall be destroyed upon clearance by both the federal bureau of investigation and department of public safety. All other submitted documentation shall be retained by the authority for a period of one year from the final date of closure and thereafter shall be archived.

**E. Fees:** The federal bureau of investigation has a mandatory processing fee with no exceptions. The authority and department of public safety impose a state processing and administrative fee. The fee payment must accompany the fingerprint application, or otherwise be credited to the authority prior to or at the same time with the authority's receipt of the application documents. The manner of payment of the fee is by bank cashier check or money order payable to the New Mexico health care authority or other method of funds transfer acceptable to the authority. Business checks will be accepted unless the business tendering the check has previously tendered a check to the authority unsupported by sufficient funds. Neither cash nor personal checks will be accepted. The fee may be paid by the care provider or by the applicant, caregiver or hospital caregiver. The authority will set a fee in addition to the fees imposed by department of public safety and the federal bureau of investigation that will fully and completely cover costs incurred by the authority to support activities required by the act and these rules. The fees will not be applied to any other activity or expense undertaken by the authority.

**F. Timely submission:** Care providers shall submit all fees and pertinent application information for all individuals who meet the definition of an applicant, caregiver or hospital caregiver as described in Subsections B, D and K of 8.370.5.7 NMAC, no later than 20 calendar days from the first day of employment or effective date of a contractual relationship with the care provider.

**G. Maintenance of records:** Care providers shall maintain documentation relating to all employees and contractors evidencing compliance with the act and these rules.

(1) During the term of employment, care providers shall maintain evidence of each applicant, caregiver or hospital caregiver's clearance, pending reconsideration, or disqualification.

(2) Care providers shall maintain documented evidence showing the basis for any determination by the care provider that an employee or contractor performs job functions that do not fall within the scope of the requirement for nationwide or statewide criminal history screening. A memorandum in an employee's file stating "This employee does not provide direct care or have routine unsupervised physical or financial access to care recipients served by (name of care provider)" together with the employee's job description, shall suffice for record keeping purposes.

[8.370.5.8 NMAC - N, 7/1/2024, A, 01/28/2025]

### **8.370.5.9 CAREGIVERS OR HOSPITAL CAREGIVERS AND APPLICANTS WITH DISQUALIFYING CONVICTIONS:**

**A. Prohibition on employment:** A care provider shall not hire or continue the employment or contractual services of any applicant, caregiver or hospital caregiver for whom the care provider has received notice of a disqualifying conviction, except as provided in Subsection B of this section.

(1) In cases where the criminal history record lists an arrest for a crime that would constitute a disqualifying conviction and no final disposition is listed for the arrest, the authority will attempt to notify the applicant, caregiver or hospital caregiver and request information from the applicant, caregiver or hospital caregiver within timelines set forth in the authority's notice regarding the final disposition of the arrest. Information requested by the authority may be evidence, for example, a certified copy of an acquittal, dismissal or conviction of a lesser included crime.

(2) An applicant's, caregiver's or hospital caregiver's failure to respond within the required timelines regarding the final disposition of the arrest for a crime that would constitute a disqualifying conviction shall result in the applicant's, caregiver's or hospital caregiver's temporary disqualification from employment as a caregiver or hospital caregiver pending written documentation submitted to the authority evidencing the final disposition of the arrest. Information submitted to the authority may be evidence, for example, of the certified copy of an acquittal, dismissal or conviction of a lesser included crime. In instances where the applicant, caregiver or

hospital caregiver has failed to respond within the required timelines the authority shall provide notice by [~~certified~~] mail or electronic communication that an employment clearance has not been granted. The care provider shall then follow the procedure of Subsection A of 8.370.5.9 NMAC.

(3) The authority will not make a final determination for an applicant, caregiver or hospital caregiver with a pending potentially disqualifying conviction for which no final disposition has been made. In instances of a pending potentially disqualifying conviction for which no final disposition has been made, the authority shall notify the care provider, applicant, caregiver or hospital caregiver by [~~certified~~] mail or electronic communication that an employment clearance has not been granted. The care provider shall then follow the procedure of Subsection A of 8.370.5.9 NMAC.

**B. Employment pending reconsideration determination:** At the discretion of the care provider, an applicant, caregiver or hospital caregiver whose nationwide criminal history record reflects a disqualifying conviction and who has requested administrative reconsideration may continue conditional supervised employment pending a determination on reconsideration.

**C. Notice of final determination of disqualification:** Upon receipt of a notice of final determination of disqualification a care provider shall:

(1) immediately and permanently remove an applicant, caregiver or hospital caregiver from any position of employment that meets the definition of an applicant, caregiver or hospital caregiver as set forth in Subsections D and K of 8.370.5.7 NMAC; and

(2) notify the authority by letter within 14 calendar days, as determined by the postmark, of the date and type of action taken to satisfy the removal requirements of as set forth in Paragraph (1) of Subsection C of this section via written documentation signed by an authorized agent of the care provider.  
[8.370.5.9 NMAC - N, 7/1/2024; A, 01/28/2025]

A public hearing to receive testimony on this proposed rule will be held on December 20, 2024, 10:00 a.m-10:50 a.m. The public hearing will be a Hybrid, via Zooms as well as in person, pursuant to Section 14-4-5.6 NMSA 1978.

### **Join on your computer, mobile app, or room device**

When: Dec 20, 2024 10:00 AM Mountain Time (US and Canada)

Topic: Proposed Rule Amendments NMAC 8.370.5

Please click the link below to join the Zoom webinar:

<https://us02web.zoom.us/j/85286498652?pwd=syfaoHRRy6CMHKbHcxt00mzLg7sFKR.1>

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All written comment may be dropped off during the scheduled hearing time (see above) at the Division of Health Improvement offices, at the Hozho conference room #109, 5300 Homestead Rd. NE, Albuquerque NM 87110.

Individuals wishing to testify may contact the Division of Health Improvement (DHI), P.O. Box H, Santa Fe, NM 87504, or by calling (505) 476-9093.

Individuals who do not wish to attend the hearing may submit written or recorded comments. Written or recorded comments must be received by 5:00 p.m. on the date of the hearing, December 20, 2024. Please send comments to: Division of Health Improvement P.O. Box H Santa Fe, NM 87504, Recorded comments may be left at (505) 476-9093. You may send comments electronically to: [dhi.hearingrequest@doh.nm.gov](mailto:dhi.hearingrequest@doh.nm.gov). Written and recorded comments will be posted to the agency's website within 3 days of receipt. All comments will be given the same consideration as oral testimony made at the public hearing.

If you are a person with a disability and you require this information in an alternative format, or you require a special accommodation to participate in any HSD public hearing, program, or service, please contact the American Disabilities Act Coordinator, at Office-505-709-5468, Fax-505-827-6286 or through the New Mexico Relay system, toll free at #711. The Department requests at least a 10-day advance notice to provide requested alternative formats and special accommodations.