

**REGULATION FOR BACKGROUND CHECKS FOR ASSISTED  
LIVING FACILITIES AND ADULT DAY CARE CENTERS**

**22 VAC 40-90**

**Effective September 1, 2006**

# **Technical Assistance**

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**DEPARTMENT OF SOCIAL SERVICES  
COMMONWEALTH OF VIRGINIA**

**TECHNICAL ASSISTANCE**  
VIRGINIA DEPARTMENT OF SOCIAL SERVICES  
REGULATION FOR BACKGROUND CHECKS FOR ASSISTED LIVING  
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**TABLE OF CONTENTS**

<b>PART I.</b>	<b>INTRODUCTION</b>
Section 10	Definitions
Section 20	Legal base and applicability
<b>PART II.</b>	<b>THE SWORN STATEMENT OR AFFIRMATION</b>
Section 30	Sworn statement or affirmation

**PART I.  
INTRODUCTION**

**22 VAC 40-90-10. Definitions**

**22 VAC 40-90-10. Definitions: “Barrier crimes”**

**Question:** *The definition of barrier crimes contains the following statement, “Applicants for employment [in assisted living facilities and adult day care centers] convicted of one misdemeanor barrier crime not involving abuse or neglect may be hired if five years have elapsed following the conviction.” To meet this exception, did the barrier crime conviction have to have been for abuse and neglect of children as set out in § 18.2-371.1 or of incapacitated adults as set out in § 18.2-369?*

**Answer:** Virginia Code § 63.2-1720(B) merely refers to “one misdemeanor barrier crime not involving abuse or neglect.” The Code does not make a distinction between types of abuse or neglect. Therefore, it applies to any type of abuse or neglect. (0001 – 3/09)

**22 VAC 40-90-10 Definitions: “Criminal History Record Report”**

**Question:** *May facilities use a private company to obtain criminal history reports in which, for a fee, the company provides a report from many databases including the Virginia State Police?*

**Answer:** No, the *Code of Virginia* and the definition of “criminal history record report” require the criminal history record report to be obtained directly from the Central Criminal Records Exchange of the Virginia State Police. (0002 – 3/09)

**22 VAC 40-90-10. Definitions: “Employee”**

**Question:** *Would the lawn service, plumber, etc. who work under a contract with the facility be considered employees of the facility?*

**Answer:** Persons who perform certain specific services pursuant to a contract are not necessarily “employees” of the facility. Trash collection is a good example. If all the trash collector does is empty the dumpster, then that person is not a contract employee. It is a discrete service being provided on a regular basis through a contract. There is no employer-employee relationship between the trash collector and the facility.

Persons such as nurses or direct care workers who work through an employment agency are contract employees. There is an employer-employee relationship between the worker and the facility, but the manner in which the worker came to be employed at the facility is through a contract, not what we consider to be the normal hiring process. Employees such as nutritionists or physical therapists with whom the facility has a contract to provide services to the residents would be considered contract employees because there is an employer-employee relationship between the worker and the facility. Each contract situation will need to be assessed to determine if there is an employer-employee relationship. (0013-6/09)

**22 VAC 40-90-20. Legal base and applicability**

**Question:** *Are assisted living facility board members required to undergo criminal background checks? If so, are “unpaid” board members subject to this requirement?*

**Answer:** For a corporation that is applying for a license...background checks are needed for officers of the corporation, including the president, senior vice-presidents, secretary, treasurer and any other officer or agent empowered to act on behalf of the corporation in matters relating to the assisted living facility (ALF). Whether or not these individuals are paid makes no difference as far as the requirement for background checks. The background checks are done on a one time basis for the officers and agents of a licensed entity, so only new officers or agents would need to have the check on subsequent renewal applications. (0003 – 3/09)

**Question:** *Do the provisions for background checks and sworn statements apply each time an entity applies for a license for an ALF? For example: Company A is licensed to operate an ALF. The background checks and sworn statements have been obtained. Six months later company A buys Company D and applies for an ALF license. Does Company A have to obtain the background checks and sworn statements again?*

**Answer:** When reference is made to the background check, it includes both the criminal history record check and the sworn statement. A person required to obtain a background check as an applicant for licensure only has to obtain the check once for that licensed entity. This applies when a licensee (licensed entity) has multiple assisted living facilities, but the officers and agents remain the same. So in your example, Company A would not need new background checks, unless there was a new officer or agent from the time the checks were originally done.

Please note that if an individual is also an employee of the ALF and had a check as an employee, a new check would be required for the individual as an applicant for licensure. (0004 – 3/09)

**Question:** *Are current licensees required to submit new background checks when they submit their renewal application?*

**Answer:** Current ALF licensees are required to submit new background checks when they submit their renewal application if the background checks have not been submitted with a previous application. For subsequent renewals, a background check would only be required for a new individual, such as a new officer of a corporation. (0005 – 3/09)

**Question:** *If the licensee is a limited liability company (LLC), who must submit a background check?*

**Answer:** For a limited liability company, all the members, each manager, and any registered agent must submit a background check. (0006 – 3/09)

**Question:** *In some cases the licensee is a large out-of-state corporate entity (Washington & Tennessee for example). How does this regulation relate to people who are not residents of Virginia?*

**Answer:** Large out-of-state corporations whose officers or agents are not residents of Virginia must meet the same requirements for background checks as everyone else. An out-of-state corporation may arrange for the originals of the documents to be retained at one of its facilities in Virginia or may submit the originals to the licensing office, which will then need to copy them and return the originals. (0007 – 3/09)

**Question:** *Is it sufficient for board members to only undergo a background check upon the initial application for licensure as an assisted living facility?*

**Answer:** According to § 63.2-1721 of the Code of Virginia, all applicants must undergo a background check. Background checks are not required for all board members, but only for those who are officers or agents. All officers must have a background check. In respect to agents, this is someone empowered to act on behalf of the unincorporated association, partnership, limited liability company, corporation or public agency in matters relating to the assisted living facility. An agent may or may not be a member of the board. The officers and agents must submit background checks at the time of initial application for licensure as an assisted living facility. For renewal applications, any officers or agents who have not previously submitted background checks must submit them. (0008 – 3/09)

**Question:** *In some cases the owners have several facilities and each is licensed as a separate paper LLC, would the owners have to undergo a background check more than once?*

**Answer:** Yes, each LLC is a separate licensed entity. The Code of Virginia at § 63.2-1702 requires background checks of officers and agents of a limited liability company (LLC) applying for licensure. The members, managers, and registered agent of each LLC would have to submit a new sworn statement or affirmation and a criminal history record check prior to licensure. (0009 – 3/09)

**Question:** *The licensee is also the administrator and already has a background check on file. Must this person submit a new check as licensee?*

**Answer:** The licensee who is also the administrator and already has a background check on file must submit a new background check as licensee. There have been changes in the law over time and also, it is possible that there has been a conviction for a barrier crime since the original background check. (0010 – 3/09)

**Question:** *A corporation is purchasing a currently licensed ALF. The corporation does not plan to replace the current employees at the facility. Do the current employees have to have new background checks since the licensee will be different?*

**Answer:** Since the current employees are going to have a new employer, they will have to provide a new sworn statement or affirmation prior to their first day of employment by the new licensee; and they will have to have new criminal history record checks within 30 days of employment by the new licensee. (0011 - 3/09)

## **PART II. THE SWORN STATEMENT OR AFFIRMATION.**

### **22 VAC 40-90-30. Sworn statement or affirmation.**

**Question :** *May the sworn statement or affirmation model form (or facility created form) be used for applicants for licensure and employees? Standards 30 A and B references*

*the sworn statement/affirmation for both. Or do we continue to use the previous sworn disclosure model (or facility created form) for employees?*

**Answer:** The Sworn Disclosure Statement 032-05-163 is for use by applicants for employment in an ALF or ADCC. The Sworn Statement or Affirmation 032-05-800 is for use by applicants for ALF licensure. These forms are not interchangeable. Information regarding a founded complaint of child abuse or neglect is on the form for applicants for ALF licensure, but is not on the form for applicants for employment. (0012 – 3/09)