

ALR PROGRAM GUIDANCE
Colorado Department of Public Health and Environment
Health Facilities and Emergency Medical Services Division
MANDATORY PRE-EMPLOYMENT
CRIMINAL BACKGROUND CHECKS

DEFINITIONS. As used in this document:

- (a) **“Arrest record”** means the record of any action taken by an authorized law enforcement officer or entity including, but not necessarily limited to: the custodial taking, seizing or detaining of a person or the issuance of a summons, warrant or other document by a governmental entity citing offenses committed by the named person.
- (b) **“Charge”** means a written statement, summons and complaint, information or other like document issued by a court of law or other judicial authority accusing a person of the commission of a crime.
- (c) **“Conviction record”** means the outcome of an arrest or charge against an individual. A conviction that may disqualify an individual from employment or from serving as a volunteer includes a guilty plea, a plea of “no contest” (also known as *“nolo contendere”*), or an entry of a deferred judgment.
- (d) **“Criminal history background record”** means and includes both arrest records and conviction records.

PREFACE

A licensee/employer may incur a negative action against its health facility license or other legal liability if the licensee/employer either fails to conduct an adequate criminal history background check or if, after conducting such check, hires or offers a volunteer position to an individual with a history of certain criminal convictions. Licensees are urged to consult with their legal and insurance advisors concerning the potential for a negative action against its license or potential lawsuits and the importance of conducting adequate criminal history background checks. This document is not intended to provide legal advice.

HOW TO CONDUCT A CRIMINAL HISTORY BACKGROUND CHECK

STEP ONE: REVIEW THE EMPLOYMENT OR VOLUNTEER APPLICATION. IF CRIMES ARE REPORTED BY THE APPLICANT, PRIOR TO SCHEDULING AN INTERVIEW HAVE PROSPECTIVE EMPLOYEE OR VOLUNTEER PROVIDE A DETAILED, WRITTEN, SIGNED EXPLANATION CONCERNING EACH SUCH CRIME.

A. If a prospective employee does not disclose a guilty or “no contest” criminal conviction or plea on the employment/volunteer application, the licensee must independently confirm that the prospective employee has no conviction by obtaining and assessing criminal history background records.

B. If the prospective employee discloses a guilty or “no contest” criminal conviction or plea on the employment/volunteer application, the licensee must independently determine whether the prospective employee/volunteer disclosure is accurate and complete. This is done by obtaining and assessing criminal history background records. If the prospective employee/volunteer has disclosed a guilty or “no contest” criminal conviction or plea on the employment application, the licensee is expected to obtain a detailed written and signed explanation of the circumstances of each charge and disposition from the prospective employee/volunteer before proceeding to “Step Two.”

STEP TWO: OBTAIN ARREST AND CONVICTION RECORDS FOR ASSESSMENT.¹ THIS IS A MULTI-STEP PROCESS:

A. IF THE PROSPECTIVE EMPLOYEE OR VOLUNTEER HAS RESIDED CONTINUOUSLY IN COLORADO DURING THE PRECEDING TEN YEARS:

(i) **First, obtain ARREST records.** Arrest (police) records may be obtained from the Colorado Bureau of Investigation (CBI) Records Check Website at the following URL:

¹ Licensees may use other criminal databank resources in lieu of or in addition to CBI and CoCourts.com provided the information obtained from such sources provides timely, reliable and comprehensive arrest and conviction records.

AND

(ii) **Second, obtain POLICE reports.** Additionally, a licensee must confirm facts underlying each crime by obtaining law enforcement records directly from the arresting **law enforcement entity** (e.g., police, sheriff, Colorado State Patrol). The licensee may either request the records directly or have the employee request in writing that **THE LAW ENFORCEMENT RECORDS DEPARTMENT SUBMIT THE RECORDS DIRECTLY TO THE LICENSEE RATHER THAN TO THE EMPLOYEE.** To do so, determine the arresting law enforcement entity and consult the law enforcement entity's website for directions on how to request arrest records.

Ask for ALL OFFENDER RECORDS concerning the prospective (or current) employee or volunteer and provide the individual's date of birth. If you are provided with more than one crime, you will need to review each crime to determine which crime requires further investigation (e.g., assault, theft, etc.)

AND,

(iii) **Third, obtain CONVICTION records.** Conviction (court) records must be obtained and assessed in order to determine whether any of the arrests contained in the arrest record resulted in a conviction. Conviction records must be obtained from a reliable source, such as CoCourts.com (available at: CoCourts.com) or by directing the employee to contact the custodian of court records in the jurisdiction where each arrest took place for the purpose of authorizing the release of documents evidencing the disposition of each arrest and arranging for such documents to be sent under seal directly from the official custodian of records to the licensee. Because of the potential for fraud, unsealed records delivered by the prospective employee are not acceptable.

A PROSPECTIVE EMPLOYEE/VOLUNTEER HAS BEEN CONVICTED OF A CRIME IF S/HE HAS PLED: GUILTY; NO CONTEST (also known as "NOLO CONTENDRE"); OR, "GUILTY" PURSUANT TO A "DEFERRED JUDGMENT.

Operations Note: Both "ii" and "iii" above may be conducted at the same time.

STEP THREE: LICENSEE'S RISK ASSESSMENT OF CRIMINAL HISTORY BACKGROUND RECORDS

State regulations state that "The facility **SHALL** ascertain whether prospective staff or volunteers have been convicted of a felony or a misdemeanor that **could pose a risk** to the health, safety, and welfare of the residents, when making employment decision. Therefore, the question to answer is whether this person **COULD** pose **A** risk, and not whether this person **WILL** pose **A** risk.

For each conviction (*plea of: guilty; no contest [nolo contendere]; or guilty with a deferred judgment sentence*) the licensee must conduct an assessment to determine whether prospective staff or volunteers have been convicted of a felony or a misdemeanor that **could pose a risk**, to the health, safety, and welfare of the residents.

The below four categories of convictions may be utilized as a guide in determining disqualifying convictions. Please keep in mind, however, that the standards are whether prospective staff or volunteer "**could pose a risk**" and that employees and volunteers **SHALL be of good, moral and responsible character**:

A. **CATEGORY ONE - Disqualifying felony convictions:** Exercise due care to ensure that assisted living residents are not exposed to individuals who have been convicted of a felony commonly considered so reprehensible by society that, because of the potential danger and exploitation to/of residents, would **automatically and/or permanently** disqualify the individual from holding any position involving direct resident contact. Consider whether residents could be at risk for abuse, exploitation or neglect. These crimes, *which include substantively similar crimes* as defined by other jurisdictions, *include*:

- (i) A crime of violence where the person committed, conspired to commit, or attempted to commit one of the following crimes during which the person either: used, or possessed and threatened the use of, a deadly weapon; or, caused serious bodily injury or death to any other person except another participant; any crime against an at-risk adult or at-risk juvenile; murder; first or second degree assault; kidnapping; sexual offense; aggravated robbery; first degree arson; first degree burglary; escape; criminal extortion;

or, an unlawful sexual offense in which the defendant caused bodily injury to the victim in which the defendant used threat, intimidation, or force against the victim.)

(ii) Any felony offense involving unlawful sexual behavior;

(iii) Any felony, the underlying factual basis of which has been found by the court on the record to include an act of domestic violence;

(iv). Any felony offense against at-risk individuals as defined in §18-6.5-101, C.R.S., et. seq.;

(v) Any felony offense under the “Uniform Controlled Substances Act of 1992” as set forth in §18-19-101, et. seq., C.R.S.;

(vi) Any felony offense of abuse; and,

(vii) Such other felony offenses that would, when viewed from the perspective of a reasonable person with knowledge of relevant facts, create a risk of harm to resident health, safety or welfare, including financial crimes, fraud and relevant financial judgments.

B. CATEGORY TWO - Disqualifying misdemeanors: Exercise due care to ensure that an individual convicted of certain misdemeanors commonly recognized as placing residents at risk for abuse, exploitation or neglect is not employed in a position that involves direct resident contact unless greater than ten years has passed from the time the sentence imposed for the crime is fully discharged. A sentence is fully discharged on the date when all conditions and obligations under the sentence have been fully met. These crimes, which include substantively similar crimes as defined by other jurisdictions, include:

(i) Third degree assault;

(ii) Any misdemeanor, the underlying factual basis of which has been found by the court on the record to include an act of domestic violence;

(iii) Violation of a protection order, as described in §18-6-803.5, C.R.S.;

(iv) Any misdemeanor offense against at-risk individuals as defined in §18-6.5-101, C.R.S., et. seq., C.R.S.;

(v) Any misdemeanor offense of animal cruelty;

(vi) Such other misdemeanor offenses that would, when viewed from the perspective of a reasonable person with knowledge of relevant facts, create a risk of harm to resident health, safety or welfare, including financial crimes, fraud and relevant financial judgments.

C. CATEGORY THREE - All other felony and misdemeanor convictions: When assessing all other felony and misdemeanor convictions not specified above, licensees must conduct an assessment taking into account each factor that appears below. Assessment must be conducted from the viewpoint of an impartial, reasonable individual with knowledge of all facts. This means that, when viewed as a whole, if an impartial person could reasonably conclude that a Category Three conviction has the potential for exposing facility residents to a risk of harm from a health, safety and/or welfare perspective, the prospective employee may not provide direct resident services unless greater than ten years has passed from the time the sentence imposed is fully discharged. A sentence is fully discharged when all conditions and obligations under the sentence have been fully met.

C. CATEGORY FOUR – Other Potentially Disqualifying Conditions:

The following are potentially disqualifying conditions:

- I. The applicant makes a false statement to the employer or Department, including the provision of materially false information, false information regarding criminal history, or failure to disclose information regarding criminal history. Nondisclosure of charges classified as less than a misdemeanor such as violations or infractions may not be considered as a false statement.
- II. The applicant is a registered sex offender in any jurisdiction. [In some jurisdictions it is a rebuttable presumption that an applicant is likely to engage in conduct that would pose a significant risk to the Department, ALR residents, or vulnerable individuals if the applicant has been designated a predatory sex offender or found to be a sexually violent dangerous offender.]
- III. The applicant has an outstanding warrant in any jurisdiction.
- IV. The applicant has a deferred sentence, conditional discharge, or is participating in a diversion program in any jurisdiction for any potentially disqualifying crime.
- V. The applicant is currently on probation, parole, or post-prison supervision for any crime in any jurisdiction, regardless of the original conviction date or date of guilty or no contest plea if there is no conviction date.
- VI. The applicant is found in violation of post-prison supervision, parole, or probation for any crime in any jurisdiction regardless of the original conviction date or date of guilty or no contest plea if there is no

conviction date, within five years or less from the date of application or the date the Department conducted a criminal records check due to imminent danger.

- VII. The applicant has an unresolved arrest, charge, or a pending indictment for any crime in any jurisdiction.
- VIII. The applicant has been arrested in any jurisdiction as a fugitive from another state or a fugitive from justice, regardless of the date of arrest.
- IX. An adjudication in a juvenile court in any jurisdiction, finding that the applicant was responsible for a potentially disqualifying crime that would result in a conviction if committed by an adult.
- X. A finding of “guilty except for insanity,” “guilty except by reason of insanity,” “not guilty by reason of insanity,” “responsible except for insanity,” “not responsible by reason of mental disease or defect,” or similarly worded disposition in any jurisdiction regarding a potentially disqualifying crime, unless the local statutes indicate that such an outcome is considered an acquittal.
- XI. Whether the crime involves moral turpitude (“Moral turpitude” means conduct that is per se morally reprehensible and intrinsically wrong. Crimes involving moral turpitude are inherently contrary to the accepted rules of morality and the duties owed between persons or to society in general. Crimes of moral turpitude include, but are not limited to crimes of violence and crimes that adversely reflect on one’s honesty, integrity, or personal values.

STEP FOUR: RISK WEIGHING TEST

When conducting a risk assessment consider any of the following factors if an applicant has potentially disqualifying convictions or conditions:

- A. Circumstances regarding the nature of potentially disqualifying convictions and conditions including but not limited to:
 - i. The details of incidents leading to the charges of potentially disqualifying convictions or resulting in potentially disqualifying conditions.
 - ii. Age of the applicant at time of the potentially disqualifying convictions or conditions.
 - iii. Facts that support the convictions or potentially disqualifying conditions.
 - iv. Passage of time since commission of the potentially disqualifying convictions or conditions.
 - v. Consideration of state or federal laws, regulations, or rules covering the position, facility, or employer regarding the potentially disqualifying convictions or conditions.
- B. If applicable, circumstances regarding the nature of potentially disqualifying abuse including but not limited to:
 - i. Circumstances leading to the incident of abuse;
 - ii. The nature and type of abuse; and
 - iii. Other information gathered during the scope of the abuse investigation.
 - iv. The date of the abuse incident and abuse investigation, and the age of the applicant at the time of the abuse.
 - v. The quality of the abuse investigation including, if applicable, any exhibits and related documents with consideration taken into account regarding completeness, objectivity, and sufficiency.
 - vi. Due process provided to the applicant after the abuse investigation.
 - vii. Required action resulting from the founded or substantiated abuse including but not limited to training, counseling, corrective or disciplinary action, and the applicant’s compliance.
- C. Other factors when available including but not limited to:
 - i. Other information related to criminal activity including charges, arrests, pending indictments, and convictions. Other behavior involving contact with law enforcement may also be reviewed if information is relevant to other criminal records or shows a pattern relevant to criminal history. Number of offenses for which the individual was convicted or charged.
 - ii. Periods of incarceration.
 - iii. Status of and compliance with parole, post-prison supervision, or probation.
 - iv. Evidence of alcohol or drug issues directly related to criminal activity or potentially disqualifying conditions.
 - v. Evidence of other treatment or rehabilitation related to criminal activity or potentially disqualifying conditions.
 - vi. Likelihood of repetition of criminal behavior or behaviors leading to potentially disqualifying conditions including but not limited to patterns of criminal activity or behavior.

- vii. Information from the Department's or Authority's protective services, abuse, or other investigations in which the investigator documented behavior or conduct by the applicant that would pose a risk to the health, safety or welfare of the residents.
 - viii. Changes in circumstances subsequent to the criminal activity or disqualifying conditions including but not limited to:
 - History of high school, college, or other education related accomplishments.
 - Work history (employee or volunteer).
 - History regarding licensure, certification, or training for licensure or certification.
 - Written recommendations from current or past employers, including Department client employers.
 - ix. Indication of the applicant's cooperation, honesty, or the making of a false statement during the criminal records check process, including acknowledgment and acceptance of responsibility of criminal activity and potentially disqualifying conditions.
- D. Consider the relevancy of the applicant's criminal activity or potentially disqualifying conditions to the paid or volunteer position, or to the environment in which the applicant will reside, work, or visit.

STEP FIVE: LICENSEE'S OVER ALL ASSESSMENT OF CRIMINAL HISTORY BACKGROUND RECORDS

State regulations state that "staff who has direct personal contact with the residents of a facility and any volunteer performing personal services or protective oversight, under the auspices of the facility for residents of such facility, **SHALL be of good, moral and responsible character.**" Therefore, evaluate all of the above information, including reference checks, with that standard in mind, whether the prospective employee or volunteer **is** of good, moral and responsible character in making your employment volunteer engagement decisions. residents in terms of potential resident abuse, exploitation or neglect

FREQUENTLY ASKED QUESTIONS

1. Is a pre-employment background check required by law?

A licensee/owner is required by law to conduct a **PRE-EMPLOYMENT** criminal background check regarding a prospective staff member or volunteer who will be responsible for the care and welfare of facility residents. The purpose of this requirement is to ensure that assisted living residents are protected from abuse, exploitation and neglect. *§25-27-104, Colorado Revised Statutes; 6 C.C.R. 1011-1, Chapter VII, Section 104 (3) (d) (i)]*

The licensee/owner must conduct a criminal background check **BEFORE** making an offer of employment or volunteer opportunity and review all criminal history background records (arrest and conviction) to determine if the prospective employee or volunteer has been convicted of a felony or misdemeanor that could pose a risk to the health, safety and welfare of residents. *[6 C.C.R. 1011-1, Chapter VII, Section 104 (3) (d) (ii)].*

The licensee must also conduct a criminal background check on a current employee or volunteer immediately upon learning of information about a that person that could pose a risk to the health, safety, and welfare of the residents and/or that the person is not of good, moral and responsible character.

2. Should our employment/volunteer application ask for criminal background history, mitigating factors and rehabilitation?

Yes, and you must still conduct an independent criminal background check to verify not only the information the applicant provided, but also whether additional information exists. Also verify whether mitigating factors exist and were properly characterized and whether applicant successfully completed rehabilitation.

3. Should we adopt policy and procedures?

The licensee/owner should develop clear policy and procedural documents that ensure: (a) the employment application asks appropriate questions regarding criminal background; and, (b) criminal history background check procedures are clear, easy to understand and applied consistently with respect to each employment and volunteer applicant and current employee and volunteer. The facility's policy and procedural documents should incorporate the elements of this Guidance Document.

4. What period of time should we include when conducting a criminal history background check?

If there is no disqualifying "Category One" or "Category Two" crime (*see below*) look back period is **TEN YEARS FROM THE TIME THE SENTENCE IMPOSED HAS BEEN FULLY DISCHARGED. A SENTENCE IS FULLY DISCHARGED ON THE DATE WHEN ALL CONDITIONS AND OBLIGATIONS UNDER A SENTENCE HAVE BEEN FULLY MET.**

An **exception** to the general rule exists when a review of the prospective employee's or volunteer's criminal history record discloses an additional crime(s) evidencing a propensity or habit of committing a particular crime. For example, if a prospective employee has a misdemeanor theft conviction within a ten-year period but review of the record also discloses an additional prior theft beyond the ten year look back period, then ALL theft convictions must be included in your review.

5. How long are applicants disqualified from work in our facility?

It depends on the individual circumstances of the applicant. You may consider the guidelines in "Step Three."

6. Are there additional things to consider f the prospective (or current) employee or volunteer candidate (current volunteer) will drive residents?

If a prospective employee or volunteer will drive residents as part of their position responsibilities, care must be taken to ensure that the candidate or current employee or volunteer has a valid driver's license clear of alcohol and/or drug related convictions. If the candidate has arrests that have not yet been adjudicated but is otherwise not disqualified from an offer of employment or continued employment under this policy, the employee or volunteer should not be permitted to drive residents until a disposition is entered in a court of law and the charge is cleared without a resulting conviction.

7. Are there additional things to consider if the prospective (or current) employee or volunteer candidate (current volunteer) will have access to resident medication?

If a current or prospective employee or volunteer will have access to medications, care must be taken to ensure the candidate or current employee/volunteer does not have convictions for drug related offenses or crimes. If the candidate or current employee/volunteer has arrests that have not yet been adjudicated but is otherwise not disqualified from an offer of employment under this policy, the employee or volunteer should not be permitted to have access to medications until a disposition is entered in a court of law and the charge is cleared without a resulting conviction.

**Legal Authority Includes,
But is not Limited to,
the Following:**

The facility shall ascertain whether prospective staff or volunteers have been convicted of a felony or a misdemeanor that could pose a risk to the health safety, and welfare of resident when making an employment decision.

6 CCR 1011-1, Chapter VII, Section 1.104(3)(d)
25-27-104 (2) (g) C.R.S.

Staff who have direct personal contact with the residents of a facility and any volunteer performing personal services or protective oversight, under the auspices of the facility for residents of such facility, shall be of good, moral and responsible character.

6 CCR 1011-1, Chapter VII, Section 1.104(3)(d)
25-27-104 (2) (g) C.R.S.

The owner and administrator of a facility shall be of good, moral, and responsible character. The owner shall ascertain whether the administrator has been convicted of a felony or a misdemeanor that could pose a risk to the health, safety, and welfare of the residents, when making employment decisions.

6 CCR 1011-1, Chapter VII, Section 1.104(3)(c)
25-27-104 (2) (g) C.R.S.

Immunity from civil liability for employer disclosing information - employer shall not maintain blacklist - credit lists excepted

8-2-114 C.R.S.

The text of this statute is available on the next page of this document.

8-2-114. Immunity from civil liability for employer disclosing information - employer shall not maintain blacklist - credit lists excepted.

(1) For purposes of this section, "job performance" means:

- (a) The suitability of the employee for reemployment;
- (b) The employee's work-related skills, abilities, and habits as they may relate to suitability for future employment; and
- (c) In the case of a former employee, the reason for the employee's separation.

(2) It is unlawful for any employer to maintain a blacklist, or to notify any other employer that any current or former employee has been blacklisted by such employer, for the purpose of preventing such employee from receiving employment. Sections 8-2-112 to 8-2-115 shall not be construed to prevent any merchant or professional person, or any association thereof, from maintaining or publishing a list concerning the credit or financial responsibility of any person dealing with them on credit.

(3) Any employer who provides information about a current or former employee's job history or job performance to a prospective employer of the current or former employee upon request of the prospective employer or the current or former employee is immune from civil liability and is not liable in civil damages for the disclosure or any consequences of the disclosure. This immunity shall not apply when such employee shows by a preponderance of the evidence both of the following:

- (a) The information disclosed by the current or former employer was false; and
- (b) The employer providing the information knew or reasonably should have known that the information was false.

(4) This section applies to any employee, agent, or other representative of the current or former employer who is authorized to provide and who provides information in accordance with this section.

(5) Any employer that provides written information to a prospective employer about a current or a former employee shall send, upon the request of such current or former employee, a copy of the information provided to the last-known address of the person who is the subject of the reference. Any person who is the subject of such a reference may obtain a copy of the reference information by appearing at the employer's or former employer's place of business during normal business hours. The employer or former employer may charge a fair and reasonable amount for reproduction costs if multiple copies are requested.

(6) Nothing in this section shall be construed to abrogate or contradict the provisions of part 4 of article 34 of title 24, C.R.S.

Source: L. 05: p. 161, 4. R.S. 08: 401. C.L. 4165. CSA: C. 97, 93. CRS 53: 80-4-14. C.R.S. 1963: 80-11-14. L. 92: Entire section amended, p. 1806, 1, effective April 29. L. 99: Entire section R&RE, p. 210, 1, effective March 31.

ANNOTATION

Law reviews. For article, "State Laws: A Growing Minefield for Employers", see 23 Colo. Law. 1089 (1994).

Section is plain as to limit in its application to particular classes of persons. Resident Participation, Inc. v. Love, 322 F. Supp. 1100 (D. Colo. 1971).

8-2-115. Violation of sections - misdemeanor.

Any person, firm, or corporation violating any provisions of sections 8-2-112 to 8-2-115 is guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not less than ten dollars nor more than two hundred fifty dollars, or by imprisonment in the county jail for not more than sixty days, or by both such fine and imprisonment.

Source: L. 05: p. 161, 5. R.S. 08: 402. C.L. 4166. CSA: C. 97, 94. CRS 53: 80-4-15. C.R.S. 1963: 80-11-15.

ANNOTATION

Law reviews. For article, "Some Legal Aspects of the Colorado Coal Strike", see 4 Den. B. Ass'n Rec. 22 (Dec. 1927). For note, "The Right of a Third Party to Picket Under the Colorado Labor Peace Act", see 20 Rocky Mt. L. Rev. 317 (1948). For article, "Picketing -- Free Speech?", see 28 Dicta 61 (1951).

This section makes it a misdemeanor for "any" person, firm or corporation to violate the boycott statute, which applies to all persons and not merely to labor controversies in general or to employees, employers, or labor organizations subject to title 8 in particular. Resident Participation, Inc. v. Love, 322 F. Supp. 1100 (D. Colo. 1971).

Suggested Websites to Query When Conducting a Criminal Background Check

- Office of Inspector General - List of Excluded Individuals and Entities (LEIE)
 - <http://oig.hhs.gov/exclusions/>

- Verify a License – Colorado Department of Regulatory Agencies (DORA) - Automated Licensure Information System Online (ALISON)
 - http://www.dora.state.co.us/dora_pages/ProfessionVerification.htm

- General Internet Searches
 - Google
 - Facebook
 - Twitter

- Colorado Sex Offender Registry
 - <http://sor.state.co.us/>

- Other State Links – Sex Offender Registry
 - <http://www.fbi.gov/scams-safety/registry>

- US Dept of Justice National Sex Offender Public Website
 - <http://www.nsopw.gov/Core/Portal.aspx?AspxAutoDetectCookieSupport=1>

- Colorado Bureau of Investigation Records Check
 - <https://www.cbirecordscheck.com/index.aspx?aspxautodetectcookiesupport=1>

- Federal Bureau of Investigation Records Check
 - <http://www.fbi.gov/about-us/cjis/background-checks>

- Department of Corrections – Whether on Parole
 - <http://www.doc.state.co.us/oss/>

- Nationwide Nursing Licensure Verification
 - <https://www.nursys.com/LQC/LicensureQuickConfirm.aspx>