

EMPLOYEE BACKGROUND CHECKS

SUMMARY

Recently-released federal privacy and security guidelines require state Health Benefit Exchanges to perform fingerprint-based criminal background checks (background checks) prior to hiring any person whose position will have access to personal information for Covered California applicants and enrollees. The guidance also requires periodic rescreening of employees with access to this information. These guidelines are laid out in the Minimum Acceptable Risk Standards for Exchanges (MARS-E), which is one of three federal guidances on Exchange privacy and security standards. Covered California staff have determined that authorizing legislation and implementing regulations are needed prior to implementing pre-employment background checks.

This Board Recommendation Brief highlights implementation issues such as defining the positions and types of offenses that will disqualify individuals from employment with Covered California. It also lays out next steps including providing technical assistance for required state legislation and developing emergency regulations to implement a screening process. At the March Board meeting, staff will make final recommendations and request Board action to adopt policies as may be revised based on input and discussion.

ISSUE

Many Covered California employees will have access to Personal Identifying Information, Personal Health Information and/or Federal Tax Information. Federal guidance requires that Covered California protect and safeguard customers from unauthorized and illegal access to or disclosure of their Personal Identifying Information, Personal Health Information or Federal Tax Information. To comply with federal guidance, Covered California must implement background checks to identify and exclude from hire, applicants with a demonstrated history of abuse of personal information or other offenses that may indicate potential propensity to abuse such information. Covered California will also receive subsequent arrest and conviction records on employees whose duties require access to Personal Identifying Information, or Federal Tax Information, which will meet the periodic rescreening requirements of MARS-E.

Background checks and security screening are required by the Centers for Medicare and Medicaid Services and the Internal Revenue Service (IRS) for any employee who is authorized to have access to Personal Identifying Information or Federal Tax Information, respectively. Many state agencies in health, education and financial areas also require background checks. For example, the departments listed conduct background checks on some or all of their employees:

- Franchise Tax Board
- Department of Motor Vehicles
- California State Teachers' Retirement System (CalSTRS)
- California State Lottery
- Department of Managed Health Care

IMPLEMENTATION CONSIDERATIONS

Criminal Background Check Process

Per the requirements of the MARS-E (PS-3 Personnel Screening), all Covered California employees with access to sensitive information such as Personal Identifying Information, Personal Health Information, and Federal Tax Information are required to be screened before they may be authorized to obtain access to the information system and devices containing such information. Specifically, Covered California must:

1. Perform a background check for all persons prior to employment; and
2. Require appropriate personnel to obtain and hold a moderate-risk security clearance as defined in the DHHS Personnel Security/Suitability Handbook.

The MARS-E also requires Covered California to rescreen individuals periodically, consistent with the criticality/sensitivity rating of the position. IRS Publication 1075, Tax Information Security Guidelines also requires screening and consideration of an employee's background and security clearance when designating personnel who are authorized to access Federal Tax Information.

Based on the federal guidance outlined above, Covered California has determined that background checks are required for all service center employees, most employees working in the area of eligibility and enrollment, and many employees working in the area of information technology, including IT support staff and those involved in the development and maintenance of the California Eligibility, Enrollment, and Retention System(CalHEERS).

Background checks will be obtained through the Department of Justice (DOJ) for California convictions and through the FBI's database for federal convictions. Applicants will be required to be fingerprinted by a certified Live Scan operator. The fingerprints will be submitted digitally to DOJ who will then forward them to the FBI.

- **Prospective Covered California employees:** As a condition of employment, Covered California will require background checks of all prospective employees whose duties include access to Personal Identifying Information, Personal Health Information or Federal Tax Information. Hiring offers will be made contingent on an acceptable background criminal record check, and prospective employees will not begin employment until the criminal record check is completed and approved.
- **Current Covered California employees:** CMS requires all employees have a criminal records check before hire. Because some employees in these positions have already been hired and more will be hired before legislation can be obtained to authorize obtaining the criminal records, the treatment of existing employees will need to be discussed with CMS.
- **Periodic rescreening of employees:** Once an employee has been fingerprinted and approved for hire, Covered California will receive any subsequent arrest and conviction information from DOJ for California offenses.

Disqualifying Offenses

Covered California staff will list the offenses that will provide a justification for disqualifying an individual from employment in the implementing regulations (see Next Steps below). Staff intend to use the judicially created standard of crimes of moral turpitude for disqualifying offenses. This standard is used by other state departments and is a simple shorthand as compared to enumerating each disqualifying crime.

Covered California's implementing regulations will also specify mitigating factors that could be considered in determining whether the offense disqualifies an individual for the position. Factors could include: age when the offense was committed; length of time since the offense was committed; whether there have been any intervening convictions and if the applicant remains on probation or parole; and whether the applicant has established a stable job history since the conviction and end of any sentence imposed.

Cost of Background Checks

The estimated cost for an individual criminal background check is approximately \$65 which includes the cost of fingerprinting and fees charged by DOJ and the FBI. Covered California proposes to pay for background check for all applicants selected for hire. With an estimated hiring program of approximately 900 employees who would be subject to background checks in 2013, the estimated cost to Covered California in 2013 would be approximately \$60,000, with ongoing annual costs of approximately \$38,000.

REQUIRED AUTHORITY

Covered California must have explicit statutory authority in order to receive criminal record information from DOJ and the FBI, and subsequent criminal arrest and conviction information from DOJ. A draft of regulatory language is attached. Covered California must receive statutory authority in the 2013 legislative session in order to comply with federal requirements. Covered California will then promulgate emergency regulations to further specify background check requirements including disqualifying crimes and affected positions.

NEXT STEPS

Covered California staff will take the following actions to finalize and implement the employee background criminal record check program:

- Provide technical assistance to the Legislature to draft statutory authorization language
- Develop, and submit for adoption at the March 2013 Board meeting, implementing regulations.

REFERENCE MATERIAL

Centers for Medicare and Medicaid Services (CMS). Catalog of Minimum Acceptable Risk Standards for Exchanges (MARS-E), Exchange Reference Architecture Supplement.

Note: because the MARS-E is not publicly available at this time, the relevant section is copied below:

Table 180. PS-3: Personnel Screening

PS-3: Personnel Screening

Control

The organization:

- a. Screens individuals prior to authorizing access to the information system; and
- b. Rescreens individuals periodically, consistent with the criticality/sensitivity rating of the position.

For FTI: Individuals must be screened before authorizing access to information systems and devices containing FTI.

Implementation Standards

1. Perform criminal history check for all persons prior to employment.
2. Require appropriate personnel to obtain and hold a moderate-risk security clearance as defined in the DHHS Personnel Security/Suitability Handbook.

Guidance

Screening and rescreening are consistent with applicable federal laws, Executive Orders, directives, policies, regulations, standards, guidance, and the criteria established for the risk designation of the assigned position. The Catalog of Minimum Acceptable Risk Controls for Exchanges – Exchange Reference Architecture Supplement 135 Version 1.0 August 1, 2012 Centers for Medicare & Medicaid Services System and Communications Protection (SC) – Technical

PS-3: Personnel Screening

organization may define different rescreening conditions and frequencies for personnel accessing the information system based on the type of information processed, stored, or transmitted by the system.

Applicability:

Exchanges

Reference(s): IRS-1075: 9.12 **Related Control Requirements:**

Assessment Procedure: PS-3.1

Assessment Objective

Determine if:

- (i) the organization screens individuals prior to authorizing access to the information system;
- (ii) the organization defines conditions requiring re-screening and, where re-screening is so indicated, the frequency of such re-screening; and
- (iii) the organization re-screens individuals according to organization-defined conditions requiring re-screening and, where re-screening is so indicated, the organization-defined frequency of such re-screening.

Assessment Methods and Objects

Examine: Personnel security policy; procedures addressing personnel screening; records of screened personnel; security plan; other relevant documents or records.

Interview: Organizational personnel with personnel security responsibilities.

Also note: the MARS-E normalizes privacy and security standards found in the following publicly available documents:

1. NIST SP 800-37v1 (Guide for Applying the Risk Management Framework to Federal Information Systems), dated Feb 2010.
2. NIST SP 800-53v3 (Recommended Security Controls for Federal Information Systems and Organizations), dated Aug 2009.*
3. CMS Minimum Acceptable Risk Standards for Exchanges – Exchange Reference Architecture Supplement v1, dated Aug 2012; and
4. CMS Information Security (IS) Authorization to Operate Package Guide v3, Dec 2011.

*The NIST SP 800-53v3 is most relevant to this briefing paper.

Internal Revenue Service (IRS). Publication 1075, Tax Information Security Guidelines for Federal, State and Local Agencies. Available online: <http://www.irs.gov/pub/irs-pdf/p1075.pdf>