

Criminal Caregivers: Statutes Requiring Background Checks of Home Health Aides

By Jennifer R. Ellis, J.D.

Across the country, more than 20,000 providers deliver home health care services to nearly 8 million patients, many of them elderly or disabled.ⁱ The number of home health agencies providing Medicare services doubled to 10,500 between 1990 and 1997 because shorter hospital stays require more home care.ⁱⁱ In an effort to meet these growing demands, agencies have sent aides into homes without even checking the aides' records for criminal pasts. (Many states still do not require home health agencies to conduct criminal background checks of their employees.) When agencies fail to conduct criminal history checks, this failure increases the risk that aides might commit horrifying crimes against the very patients entrusted to their care.

Sixty-nine-year-old Paul Welde hired Juan Smith, a home health aide from Keystone Home Health Services in Pennsylvania, to care for his ailing wife, Nancy.ⁱⁱⁱ Smith was an ex-convict who was addicted to crack cocaine.^{iv} While working in the Weldes' home, Smith stabbed Nancy to death with a pair of scissors in order to steal \$800 to support his drug habit.^v

In the eighteen months preceding the murder, Keystone had grown from employing forty home health aides to nearly 200.^{vi} Keystone hired Smith during this period of phenomenal growth.^{vii} Had Keystone conducted a background check, it would have discovered that Smith was fired from other home health agencies and that he had a criminal record.^{viii}

In response to this and other highly publicized crimes, almost two dozen states have enacted statutes requiring home health agencies to conduct some type of criminal

background check of their employees.^{ix} Typically, these statutes require a search for information about a home health applicant's prior arrest record, convictions, or pending indictments. Most of the statutes create a civil remedy for victims when an agency fails to check an aide's background, and that aide then injures a victim.

Most of the statutes require home health aide applicants to submit to both a statewide criminal history screening as well as a national criminal background check, conducted by the F.B.I. Some states, like Ohio,^x only require applicants to submit to a national criminal background check if they have not resided in the state for a minimum number of years. Other states, including Rhode Island^{xi} and Florida,^{xii} do not require national criminal background checks at all, thereby enabling aides who have a criminal record in one state to avoid detection simply by moving to another state to obtain employment.

Florida lawmakers attempted to change their state's statute after John Karlavage, a former doctor convicted of Medicaid fraud in Pennsylvania, moved to Florida, where he received state-mandated training and was eventually hired as an aide by a home health agency.^{xiii} Within three months of Karlavage starting his new line of work, his ninety-five-year-old patient, Charles Gore, developed bedsores.^{xiv} Soon thereafter, Gore's family filed a lawsuit against Karlavage for making financial demands upon Gore's trust officer, who handled more than \$500,000 worth of Gore's accounts.^{xv}

Since Florida's statute required only that the home health agency conduct a statewide criminal background check, its search failed to uncover Karlavage's conviction in Pennsylvania.^{xvi}

Another problem is the issue of *when* an agency should conduct a criminal background check of a home health aide applicant. While some states, including New Mexico^{xvii} and Iowa,^{xviii} require agencies to conduct criminal background checks before hiring an applicant, many states' statutes allow aides to work on a "conditional basis" until the agency has received the criminal screening results. This "conditional" hiring period ranges by statute, from seventy-two hours in Oklahoma,^{xix} to 120 days in New Jersey^{xx} (sixty days pending completion of state screening requirements and an additional sixty days pending completion of national screening requirements). These conditional hiring periods create a "window of opportunity" during which a home health aide with criminal tendencies could victimize a patient.

Upon receipt of notice from state or federal authorities that an applicant's screening has revealed convictions of certain types of crimes, all of the statutes require the home health agency to immediately terminate the aide's conditional employment or to reject the person's application for employment. Disqualifying crimes, enumerated in most of the statutes, include crimes against elders and children, theft, robbery, domestic violence, assault, fraud, drug possession, as well as manslaughter and murder. Some statutes, like Arizona's^{xxi} and New Jersey's,^{xxii} provide applicants an administrative hearing in order to appeal their termination.

Some states' statutes provide that upon an applicant's presentation of proof of compliance with background check requirements, an agency need not conduct a criminal background check at all. For example, in Florida,^{xxiii} a home health agency may hire a home health applicant if: (1) the applicant has been continuously employed as a home health aide in excess of 180 days; (2) the applicant's proof of compliance is

not more than two years old; and (3) the applicant has been screened in Florida. Similarly, under Arizona's^{xxiv} statute, home health agencies may forgo a background check if an applicant changed employment within two years of satisfying such requirements.

Virginia's^{xxv} statute is perhaps the most discretionary. It gives home health agencies the option to choose whether or not to conduct criminal background checks at all. Moreover, the statute expressly provides that an agency's failure to request a criminal background check of an applicant does not constitute negligence *per se* in a civil action.

By contrast, all of the other states' statutes provide agencies relief from liability only *after* conducting criminal background checks of their employees. For example, Ohio's^{xxvi} statute dictates that an agency can avoid civil liability if it relies in good faith on a criminal background check. Under Florida's^{xxvii} statute, an agency is immune from liability once it terminates an employee upon receipt of notice of a criminal record.

Regardless of the variations from state to state, these background check statutes give victims a means of recovering civil damages, and could make the payment of meaningful compensation more prevalent in cases like the following:

John Ward, a handicapped patient confined to a wheel chair, hired Jesse Rogers, a home health aide employed by Trusted Health Resources, Inc. and Visiting Nurse Associations, to care for Ward and his seventy-seven-year-old grandmother, Alba Pellegrini.^{xxviii} After Ward complained to both agencies about Rogers's job performance, Rogers fatally stabbed both Ward and Pellegrini.^{xxix} Rogers had been

fired from another agency weeks earlier amid allegations that he physically abused one elderly patient and stole money from others.^{xxx}

Ward's estate filed a civil action against both agencies for failing to check Rogers's criminal background, references, or work history.^{xxxi} In one of the largest tort awards in Massachusetts's history, a jury awarded Ward's estate \$26.5 million.^{xxxii}

Commenting on the verdict, Timothy Lynch, the attorney for Ward's estate, stated "Right now, what we have here is a moral victory. . . . We feel this case will bring attention to the problem of failing to do background checks on home health aides."^{xxxiii}

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i. See *Home Health Care in Crisis: Criminal Care Givers*, THE RECORD, October 3, 1999.

ii. See *id.*

iii. See Shannon Duffy, *Healthcare Provider to Pay \$550,000 To Husband of Woman Killed by Worker*, THE LEGAL INTELLIGENCER, May 2, 1997.

iv. See *id.*

v. *Id.*

vi. *Id.*

vii. *Id.*

viii. *Id.*

ix. See, ARK. CODE ANN. § 20-33-203 (Michie 2000); ARIZ. REV. STAT. § 36-411 (2000); CAL. HEALTH & SAFETY CODE § 1736.6 (Deering 2001); D.C. CODE ANN. § 32-1352 (2000); FLA. STAT. ch. 400.512 (2000); IOWA CODE § 135C.33 (2001); MASS. GEN. LAWS ANN. ch. 6, § 172C (2001); MINN. STAT. § 256b.0627 (2000); MO. REV. STAT. § 660.317 (1999); N.J. STAT. ANN. § 45:11-24.3 (West 2001); N.M. STAT. ANN. § 29-17-5 (Michie 2000); OHIO REV. CODE ANN. § 3701.881 (Anderson 2000); OKLA. STAT. tit. 63 § 1-1950.1 (West 2000); OR. REV. STAT. § 443.340 (1999); 63 PENN. CONS. STAT. § 674 (2000); R.I. GEN. LAWS § 23-17-34 (2001); VA. CODE ANN. § 19.2-392.02 (2000); WASH. REV. CODE. § 70.127.080 (2001); WIS. STAT. § 50.065 (2000); W. VA. CODE § 16-50-6 (2000).

x. See, OHIO REV. CODE ANN. § 3701.881 (Anderson 2000).

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- xi See, R.I. GEN. LAWS § 23-17-34 (2001).
- xii See, FLA. STAT. ch. 400.512 (2000).
- xiii See Curtis Krueger, *Caregiver's Arrest Shows Gap in State's Screening*, ST. PETERSBURG TIMES, Nov. 24, 1999.
- xiv See *id.*
- xv See *id.*
- xvi See *id.*
- xvii See, N.M. STAT. ANN. § 29-17-5 (Michie 2000).
- xviii See, IOWA CODE § 135C.33 (2001).
- xix See, OKLA. STAT. tit. 63 § 1-1950.1 (West 2000).
- xx See, N.J. STAT. ANN. § 45:11-24.3 (West 2001).
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- xxiii See, FLA. STAT. ch. 400.512 (2000).
- xxiv See, ARIZ. REV. STAT. § 36-411 (2000).
- xxv See, VA. CODE ANN. § 19.2-392.02 (2000).
- xxvi See, OHIO REV. CODE ANN. § 3701.881 (Anderson 2000).
- xxvii See, FLA. STAT. ch. 400.512 (2000).
- xxviii See, Beverly Ford, *Jury Gives Kin \$26.5M in Slayings by Health Aide*, THE BOSTON HERALD, February 27, 1998.
- xxix See *id.*
- xxx See *id.*
- xxxi See *id.*
- xxxii See *id.*
- xxxiii See *id.*