

STATE OF WISCONSIN
DEPARTMENT OF SAFETY AND PROFESSIONAL SERVICES

IN THE MATTER OF RULE-MAKING : PROPOSED ORDER OF THE
PROCEEDINGS BEFORE THE : DEPARTMENT OF SAFETY
DEPARTMENT OF SAFETY AND : AND PROFESSIONAL SERVICES
PROFESSIONAL SERVICE : (CLEARINGHOUSE RULE 11-027)

PROPOSED ORDER

The Wisconsin Department of Safety and Professional Services (formerly the Department of Regulation and Licensing) proposes an order to renumber and amend s. RL 4.08 (intro), and to create RL 4.08 (2), relating to background checks and fingerprinting.

Analysis prepared by the Department of Safety and Professional Services.

ANALYSIS

Statutes interpreted:

Sections 440.03 (13) (a), (b) and (c), and 448.05 (1) (a), Stats.

Statutory authority:

Sections 15.08 (5) (b), 227.11 (2) (a), 440.03 (1), 440.03(13) (d), 448.40 (1), Stats.

Explanation of agency authority:

Section 448.05, Stats., is enforced and administered by the Department of Safety and Professional Services (“DSPS”) and the Medical Examining Board. Specifically, s. 448.40 (1), Stats., authorizes the Medical Examining Board to promulgate rules to carry out the purposes of the Medical Examining Board subchapter. Section 448.05 (1), Stats., is in the Medical Examining Board subchapter.

Further, the Medical Examining Board is obligated under s. 15.08 (5) (b), Stats., to promulgate rules for its own guidance and for the guidance of the trade or profession to which it pertains, and define and enforce professional conduct and unethical practices not inconsistent with the law relating to the particular trade or profession.

DSPS is a department in state government, and is therefore an “agency” under s. 227.01 (1), Stats.. Under s. 227.11(2) (a), Stats., it may promulgate rules interpreting the provisions of any statute enforced or administered by it, if the agency considers it necessary to effectuate the purpose of the statute. Both ss. 440.03 (13) and 448.05 (1), Stats., are enforced and administered by DSPS.

Last, DSPS is authorized under s. 440.03 (1), Stats., to promulgate rules defining uniform procedures to be used by the department, the attached boards, the examining boards, and the affiliated credentialing boards.

Related statute or rule:

Section 440.03 (7) Stats., and Wis. Admin. Code § RL 4.07 (52)

Plain language analysis:

Subject to ss. 111.321, 111.322 and 111.355, Stats., s. 448.05 (1) (a), Stats., requires that an applicant must not have an arrest or conviction record to be qualified for the granting of any license by the Medical Examining Board. Section 448.03 (13) (a), Stats., authorizes DSPS to conduct investigations to determine whether applicants have arrest or conviction records and require applicants to provide any information that is necessary for the investigations. Under s. 448.03 (13) (b), Stats., DSPS may investigate whether applicants for licenses to practice medicine and surgery have arrest or conviction records pursuant to rules it promulgates.

DSPS promulgated Wis. Admin. Code ss. RL 4.07 and RL 4.08 to interpret s. 448.03 (13), Stats.. Under ss. RL 4.07 and RL 4.08, DSPS may require an applicant for physician licensure to submit fingerprints and undergo a criminal background check if “there exists reason to believe that the applicant has failed to accurately describe his or her conviction record.”

Currently, applicants for physician licenses may be required to submit fingerprints and undergo criminal background checks if “there exists reason to believe that the applicant has failed to accurately describe his or her conviction record.” The proposed changes to Wis. Admin. Code s. RL 4.08 enable DSPS to require an applicant for a physician license to submit fingerprints and undergo a criminal background check as part of the licensure process when there is no reason to believe that an applicant has failed to accurately describe his or her conviction record. Therefore, DSPS may require any applicant for a physician license to submit fingerprints and undergo a criminal background check prior to DSPS issuing a license to him or her.

Requiring fingerprints and criminal background checks as part of the physician licensure process involves two changes to Wis. Admin. Code s. RL 4.08. First, the language added to SECTION 1 creates a class of licensed credentials the applicants for which may be required to be photographed, submit fingerprints, and undergo criminal background checks in situations when there is not a reason to believe that an applicant has failed to accurately describe his or her conviction record.

Second, SECTION 2 defines the physician license as a member of the class of licensed credentials created by the changes to SECTION 1. Together, the changes to SECTION 1 and SECTION 2 require all applicants for a physician license to practice medicine and surgery to submit a full set of fingerprints along with their application for licensure. The

fingerprints will be used to verify the applicant's identity and conduct searches for criminal arrests and convictions in accordance with s. 440.03 (13), Stats.

Summary of, and comparison with, existing or proposed federal legislation:

While there are numerous federal laws that empower the FBI to conduct criminal background checks and provide criminal history reports to state agencies for non-criminal purposes, two are most relevant in this case. They are: Public Law 92-544 (1972), 86 Stat. 1115, and the National Child Protection Act of 1993, 42 U.S.C. § 5119a, as amended by the Volunteers for Children Act, Public Law 105-251 (1998).

The most relevant federal law, and the basis of the proposed rule, is Public Law 92-544 (1972). Public Law 92-544 empowers the FBI to conduct criminal background checks and provide the resulting information to state agencies for non-criminal purposes, such as licensing. However, under Pub. L 92-544, the FBI will only conduct background checks and provide criminal history reports to state agencies for non-criminal purposes based on a federal law or state statute that explicitly authorizes background checks and the sharing of criminal history reports for non-criminal purposes.

Under the law, both the U.S. Attorney General and the Director of the FBI have the authority to determine whether a federal law or state statute explicitly authorize criminal background checks and the sharing of criminal history reports with state agencies for non-criminal purposes. *See* Pub. L 92-544 and 28 C.F.R. § 0.85(j). With its authority, the FBI delineated standards to determine whether a law authorizes background checks and the sharing of criminal history reports for non-criminal purposes. The standards are:

- The authorization must exist as the result of legislative enactment or its functional equivalent;
- The authorization must require fingerprinting of the applicant;
- The authorization must, expressly or by implication, authorize use of FBI records for screening of the applicant;
- The authorization must not be against public policy; and
- The authorization must not be overly broad in its scope, it must identify the specific category of applicants/licensees.

On January 7, 2011, Phillip Collins, Deputy Director of the Crime Information Bureau of the Wisconsin Department of Justice confirmed that the FBI approves s. 440.03 (13), Stats., as meeting the FBI standards listed above to enable DSPTS to obtain fingerprints and criminal history reports as part of the physician licensing process. Therefore, Pub. L 92-544 is the federal basis for the proposed changes to s. RL 4.08 that enable DSPTS to obtain criminal history reports from the FBI.

The second relevant federal law is the National Child Protection Act of 1993, 42 U.S.C. § 5119a as amended by the Volunteers for Children Act ("VCA"), Public Law 105-251 (1998). The proposed rule does not rely on the amendments made to 42 U.S.C. § 5119a by VCA because the FBI has approved s. 440.03(13) as adequate statutory authority to

enable DSPS to obtain fingerprints and criminal history reports as part of the physician licensing process. However, the Iowa Medical Board utilizes 42 U.S.C. § 5119a to enable the Board to require applicants for physician licenses to submit fingerprints and the Board to obtain criminal history reports from the FBI as a part of the Board's licensure process. The Iowa Board relies on the amendments made to 42 U.S.C. § 5119a by VCA because the FBI has approved 42 U.S.C. § 5119a as meeting the standards listed above but has not approved any Iowa statute as meeting the standards.

The Volunteers for Children Act enables state agencies and businesses that are designated as "qualified entities" by an authorized state agency to require "providers" to submit fingerprints for non-criminal background checks. Under the law, a "qualified entity" is "a business or organization, whether public, private, for-profit, not-for-profit, or voluntary, that provides care or care placement services, including a business or organization that licenses or certifies others to provide care or care placement services." 42 U.S.C. § 5119c. A "provider" is a person who wants to own, be employed by, be licensed by or volunteer at a "qualified entity." *Id.* The authorized state agency in Iowa has designated the Iowa Medical Board as a "qualified entity" and applicants as "providers." Therefore, the Iowa Medical Board is able to require background checks and obtain criminal history reports for the non-criminal purpose of reviewing applicants for physician licenses.

Comparison with rules in adjacent states:

Illinois: Illinois statute requires applicants for medical licensure to provide fingerprints for a criminal background check. 225 ILCS 60/9.7. The statute further requires the Illinois Department of Professional Regulation to promulgate rules to implement the requirement. *Id.* However, a review of Illinois' application and online instructions indicates that Illinois currently does not require applicants for physician licenses to submit fingerprints or undergo background checks. *See* <http://www.idfpr.com/dpr/WHO/med.asp>, accessed on Jan. 3, 2011.

Iowa: Iowa administrative rules require applicants for medical licensure to pay for and provide a full set of fingerprints for state and federal criminal background checks. IAC 653-9.4(2)p., 9.5(3)p., 9.6(2)j. and 8.4(7). Iowa promulgated the administrative rules based on the federal National Child Protection Act of 1993, 42 U.S.C. § 5119a as amended by the Volunteers for Children Act, Public Law 105-251 (1998). As mentioned above, the Volunteers for Children Act is approved by the FBI as a basis to enable "qualified entities" to require "providers" to submit fingerprints for non-law enforcement criminal background checks.

Michigan: Michigan statute requires applicants for medical licenses to provide fingerprints for state and federal criminal background checks. MCL 333.16174(3).

Minnesota: Minnesota currently does not require applicants for medical licenses to undergo criminal background checks.

Summary of factual data and analytical methodologies:

In February 2010, DSPS was awarded an American Recovery and Reinvestment Act grant to lead a group of ten state medical and osteopathic boards to reduce barriers to the portability of physician licenses. Since the award, DSPS has worked with the boards in Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Missouri and South Dakota to develop best practices to improve the licensing process of physicians. In November, the states identified requiring applicants to submit fingerprints and undergo criminal background as a best practice.

The background check requirement conforms to longstanding recommendations by the Federation of State Medical Boards (“FSMB”). Since April 2001, FSMB has affirmed its position that it is a best practice for state medical boards to “conduct criminal background checks as part of the licensure application process.” *See* Federation of State Medical Boards, *Public Policy Compendium*, April 2010. The FSMB reaffirmed its position in April 2010. *Id.*

Further, as of September 2010, 35 out of 68 U.S. medical and osteopathic boards require applicants to submit fingerprints and undergo criminal background checks as part of the application process. FSMB, *Criminal Background Checks Overview by State*, Last Updated September 6, 2010, at http://www.fsmb.org/pdf/GRPOL_Criminal_Background_Checks.pdf.

Analysis and supporting documents used to determine effect on small business or in preparation of economic report:

Section 227.137, Stats., requires an “agency” to prepare an economic impact report before submitting the proposed rule-making order to the Wisconsin Legislative Council. DSPS is not included as an “agency” in this section. Nonetheless, the department’s Small Business Review Advisory Committee was consulted to determine whether the proposed rule would have any impact on small business in Wisconsin. The Committee concluded that the proposed rule will not have any significant economic impact on a substantial number of small businesses, as defined in s. 227.114 (1), Stats.

Anticipated costs incurred by the private sector:

Every person seeking initial licensure to practice medicine and surgery in Wisconsin will incur the cost of conducting the criminal background check. The cost to the applicant of conducting a criminal background check is approximately \$56.25. The cost is the price the department charges applicants for the professions for which it currently requires the same criminal background check process.

Fiscal estimate:

The department estimates that the proposed rule will have no significant fiscal impact.

Effect on small business:

On May 19, 2011, the department's Small Business Review Advisory Committee determined that the proposed rule will not have any significant economic impact on a substantial number of small businesses, as defined in s. 227.114 (1), Stats.

Agency contact person:

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Place where comments are to be submitted and deadline for submission:

Comments may be submitted to Shawn Leatherwood, Paralegal, Department of Safety and Professional Services, 1400 East Washington Avenue, P.O. Box 8935, Madison, Wisconsin 53708-8935, or by email to Shancethea.L Leatherwood@wisconsin.gov. Comments must be received on or before August 1, 2011, to be included in the record of rule-making proceedings.

TEXT OF RULE

SECTION 1. RL 4.08 (intro) is renumbered RL 4.08(1) and amended to read:

RL 4.08 Photographs and fingerprints. (1) The department may require an applicant for any of the credentials set forth in s. RL 4.07 and not listed in sub. (2) to be photographed and fingerprinted as a part of the credentialing process, if there exists reason to believe that the applicant has failed to accurately describe his or her conviction record. The department may refer photographs and fingerprints so obtained to the department of justice for internal analysis or submission to the federal bureau of investigation for the purpose of verifying the identity of the ~~persons~~ applicant fingerprinted and obtaining records of ~~their~~ his or her criminal arrests and convictions.

SECTION 2. RL 4.08 (2) is created to read:

The department shall require an applicant for a physician license under s. 448.02 to be fingerprinted on 2 fingerprint cards, each bearing a complete set of the applicant's fingerprints. The department of justice may submit the fingerprint cards to the federal bureau of investigation for the purpose of verifying the identity of the applicant fingerprinted and obtaining records of his or her criminal arrests and convictions. The department shall charge the applicant any fees, costs, or other expenses incurred in conducting any investigation under this rule.

(END OF TEXT OF RULE)

The rules adopted in this order shall take effect on the first day of the month following publication in the Wisconsin administrative register, pursuant to s. 227.22 (2) (intro.), Stats.

Dated _____ Agency _____

Ch. RL 4 CR 11-027 (Background Check)