**Section 119.261 Application for waiver of the prohibition against employment**

a) Hiring of direct care employees

 A provider shall not *knowingly hire* or retain *any* person after January 1, 1998 in a full-time, part-time or contractual direct care position if that person *has been convicted of committing or attempting to commit one or more of the* following *offenses unless the applicant or employee obtains a waiver pursuant to* subsections (i) through (l) of this Section (Section 25 of the Health Care Worker Background Check Act [225 ILCS 46/25]):

1) Murder, homicide, manslaughter or concealment of a homicidal death (Sections 9-1 through 9-3.3 of the Criminal Code of 1961 [720 ILCS 5/9-1 through 9-3.3]);

2) Solicitation of murder and solicitation of murder for hire (Sections 8-1.1 and 8-1.2 of the Criminal Code of 1961 [720 ILCS 5/8-1.1 and 8-1.2]);

3) Kidnaping or child abduction (Sections 10-1, 10-2, 10-5 and 10-7 of the Criminal Code of 1961 [720 ILCS 5/10-1, 10-2, 10-5 and 10-7]);

4) Unlawful restraint or forcible detention (Sections 10-3, 10-3.1 and 10-4 of the Criminal Code of 1961 [720 ILCS 5/10-3, 10-3.1 and 10-4]);

5) Assault, battery or infliction of great bodily harm (Sections 12-1, 12-2, 12-3, 12-3.1, 12-3.2, 12-4, 12-4.2, 12-4.3, 12-4.4, 12-6 and 12-7 of the Criminal Code of 1961 [720 ILCS 5/12-1, 12-2, 12-3, 12-3.1, 12-3.2, 12-4, 12-4.2, 12-4.3, 12-4.4, 12-6 and 12-7]);

6) Sexual assault or abuse (Sections 12-13, 12-14, 12-15 and 12-16 of the Criminal Code of 1961 [720 ILCS 5/12-13, 12-14, 12-15 and 12-16]);

7) Indecent solicitation of a child (Section 11-6 of the Criminal Code of 1961 [720 ILCS 5/11-6]);

8) Predatory criminal sexual assault of a child (Section 12-14.1 of the Criminal Code of 1961 [720 ILCS 5/12-14.1]);

9) Sexual exploitation of a child (Section 11-9.1 of the Criminal Code of 1961 [720 ILCS 5/11-9.1]);

10) Exploitation of a child (Section 11-19.2 of the Criminal Code of 1961 [720 ILCS 5/11-19.2]);

11) Child pornography (Section 11-20.1 of the Criminal Code of 1961 [720 ILCS 5/11-20.1]);

12) Endangering the life or health of a child (Section 12-21.6 of the Criminal Code of 1961 [720 ILCS 5/12-21.6]);

13) Cruelty to children (Section 53 of the Criminal Jurisprudence Act [720 ILCS 115/53], repealed by P.A. 89-234, effective January 1, 1996);

14) Abuse or gross neglect of a long-term care facility resident (Section 12-19 of the Criminal Code of 1961 [720 ILCS 5/12-19]);

15) Criminal neglect of an elderly or disabled person (Section 12-21 of the Criminal Code of 1961 [720 ILCS 5/12-21]);

16) Theft, financial exploitation of an elderly or disabled person, robbery or burglary (Sections 16-1, 16-1.3, 16A-3, 18-1, 18-2, 19-1 and 19-3 of the Criminal Code of 1961 [720 ILCS 5/16-1, 16-1.3, 16A-3, 18-1, 18-2, 19-1 and 19-3]);

17) Aggravated robbery (Section 18-5 of the Criminal Code of 1961 [720 ILCS 5/18-5]);

18) Criminal trespass (Section 19-4 of the Criminal Code of 1961 [720 ILCS 5/19-4]);

19) Home invasion (Section 12-11 of Criminal Code of 1961 [720 ILCS 5/12-11]);

20) Arson (Sections 20-1 and 20-1.1 of the Criminal Code of 1961 [720 ILCS 5/20-1 and 20-1.1]);

21) Unlawful use of weapons or aggravated discharge of a firearm (Sections 24-1 and 24-1.2 of the Criminal Code of 1961 [720 ILCS 5/24-1 and 24-1.2]);

22) Armed violence (Article 33A of the Criminal Code of 1961 [720 ILCS 5/Art. 33A]);

23) Heinous battery (Section 12-4.1 of the Criminal Code of 1961 [720 ILCS 5/12-4.1]);

24) Tampering with food, drugs or cosmetics (Section 12-4.5 of the Criminal Code of 1961 [720 ILCS 5/12-4.5]);

25) Aggravated stalking (Section 12-7.4 of the Criminal Code of 1961 [720 ILCS 5/12-7.4]);

26) Ritual mutilation and ritualized abuse of a child (Sections 12-32 and 12-33 of the Criminal Code of 1961 [720 ILCS 5/12-32 and 12-33]);

27) Forgery (Section 17-3 of the Criminal Code of 1961 [720 ILCS 5/17-3]);

28) Vehicular hijacking and aggravated vehicular hijacking (Sections 18-3 and 18-4 of the Criminal Code of 1961 [720 ILCS 5/18-3 and 18-4]);

29) Manufacture, delivery or trafficking of cannabis (Sections 5, 5.1 and 9 of the Cannabis Control Act [720 ILCS 550/5, 5.1 and 9]); and

30) Delivery of cannabis on school grounds (Section 5.2 of the Cannabis Control Act [720 ILCS 550/5.2]);

31) Delivery of cannabis by a person at least 18 years of age to a person under 18 who is at least three years his or her junior (Section 7 of the Cannabis Control Act [720 ILCS 550/7]); and

32) Manufacture, delivery or trafficking of controlled substances (Sections 401, 401.1, 404, 405, 405.1, 407 and 407.1 of the Illinois Controlled Substances Act [720 ILCS 570/401, 401.1, 404, 405, 405.1, 407 and 407.1]).

b) Definitions

 For the purposes of this Section, the following terms are defined:

 *"Applicant."* A person *seeking employment with* a provider *who has received a bona fide conditional offer of employment.* (Section 15 of the Health Care Worker Background Check Act [225 ILCS 46/15])

 *"Conditional offer of employment." A bona fide offer of employment by* a provider *to an applicant, which is contingent* on *the receipt of a report from the Department of State Police indicating that the applicant does not have a record of conviction of any of the criminal offenses enumerated in* subsections (a)(1) through (32) of this Section. (Section 15 of the Health Care Worker Background Check Act [225 ILCS 46/15])

 *"Direct care." The provision of nursing assistance* *with meals, dressing, movement, bathing, or other personal needs of maintenance, or general supervision and oversight of the physical and mental well-being of an individual* who is incapable of maintaining a private, independent residence or *who* *is incapable of managing his or her person whether or not a guardian has been appointed for that individual.* (Section 15 of the Health Care Worker Background Check Act [225 ILCS 46/15])

 *"Initiate." The obtaining of the authorization for a record check from a student, applicant, or employee. The* provider *shall transmit all necessary information and fees to the Illinois State Police within 10 working days after receipt of the authorization.* (Section 15 or the Health Care Worker Background Check Act [225 ILCS 46/15])

 "Nurse Aide Registry." The registry of nurse aides kept by the Department of Public Health pursuant to Section 3-206.01 of the Nursing Home Care Act [210 ILCS 45/3-206.01].

 "UCIA" The Uniform Conviction Information Act [20 ILCS 2635].

c) Nurse Aide Registry

 For all applicants for nurse aide positions, the provider shall check the Nurse Aide Registry to determine the date of the applicant's last UCIA criminal history record check. *If it has been more than one year since the records check, the* provider *must initiate or have initiated on* its *behalf a UCIA criminal history record check for the nurse aide.* (Section 30(b) of the Health Care Worker Background Check Act [225 ILCS 46/30(b)])

d) Conditional offers

 Effective January 1, 1996, if the provider *makes a conditional offer of employment to an applicant other than a nurse aide* who is not exempt under subsection (m) of this Section for a direct care position, the provider shall *initiate or have initiated on* its *behalf a UCIA criminal history record check* except as provided for in subsection (e)(2) of this Section. (Section 30(c) of the Health Care Worker Background Check Act [225 ILCS 46/30(c)])

e) Initiation of UCIA criminal history record check

1) By January 1, 1997 the provider *must initiate a UCIA criminal history record check for all* direct care *employees* who were hired before January 1, 1996, who have not already had a UCIA criminal history record check and who are not exempt in accordance with subsection (m) of this Section. (Section 30 of the Health Care Worker Background Check Act [225 ILCS 46/30])

2) If the agency initiated a criminal background check on an employee hired after January 1, 1996 and before January 1, 1998, the agency does not need to initiate an additional criminal history record check to determine if the employee has a record of conviction of any of the offenses enumerated in subsections (a)(2), (7), (9) through (13), (17), (22) through (28), (30) and (31) of this Section. (Section 25.1 of the Health Care Worker Background Check Act [225 ILCS 46/25.1])

f) Request for UCIA criminal history record check

 The provider shall *request* the *UCIA criminal history record check* in accordance with the requirements of *the Department of State Police*. (See 20 Ill. Adm. Code 1265.) The provider shall notify *the applicant or employee of the following whenever a non-fingerprint* UCIA Criminal History Record search *is made.* (Section 30 of the Health Care Worker Background Check Act [225 ILCS 46/30]):

1) *That the* provider *shall request or have requested on* its *behalf a UCIA criminal history record check pursuant* to the Health Care Worker Background Check Act;

2) *That the applicant or employee has a right to obtain a copy of the criminal records report, challenge the accuracy and completeness of the report and request a waiver* in accordance with subsection (j)(1) of this Section;

3) *That the applicant, if hired conditionally, may be terminated if the criminal records report indicates that the applicant has a record of conviction of any of the criminal offenses enumerated* in subsections (a)(1) through (32) of this Section *unless the applicant's identity is validated and it is determined that the applicant or employee does not have a disqualifying criminal history record based on a fingerprint-based records check pursuant to* subsection (h) of this Section or the employee receives a waiver pursuant to subsection (j)(1) of this Section;

4) That the applicant or employee cannot work in a direct care position while a waiver request is pending;

5) *That the applicant, if not hired conditionally, shall not be hired if the criminal records report indicates that the applicant has a record of conviction of any of the criminal offenses enumerated in* subsections (a)(1) through (32) of this Section *unless the applicant's record is cleared based on a fingerprint-based record check pursuant to* subsection (h) of this Section or the employee receives a waiver pursuant to subsection (j)(1) of this Section;

6) *That the employee may be terminated if the criminal records report indicates that the employee has a record of conviction of any of the criminal offenses enumerated in* subsections (a)(1) through (32) of this Section *unless the record is cleared based on a fingerprint-based records check pursuant to* subsection (h) of this Section or the employee receives a waiver pursuant to subsection (j)(1) of this Section.

g) Conditional employment

 The provider *may conditionally employ an applicant to provide direct care for up to* three *months pending the results of a UCIA criminal history record check.* (Section 30(g) of the Health Care Worker Background Check Act [225 ILCS 46/30(g)])

h) Request for fingerprint-based UCIA criminal records check

 *An applicant, employee, or nurse aide whose UCIA criminal history record check indicates a conviction for committing or attempting to commit one or more of the offenses enumerated in* subsections (a)(1) through (32) of this Section *may request that the* provider *commence a fingerprint-based UCIA criminal records check by submitting information in a form and manner prescribed by the Department of State Police* (see 20 Ill. Adm. Code 1265) *within 30 days after receipt of the criminal records report* to validate identity and clear one's record. (Section 35 of the Health Care Worker Background Check Act [225 ILCS 46/35])

i) Eligibility for waiver

1) *An applicant, employee, or nurse aide may request a waiver of the prohibition against employment.* (Section 40 of the Health Care Worker Background Check Act [225 ILCS 46/40])

2) The Department *may grant a waiver based* on *any mitigating circumstances, which may include but not be limited to:*

A) *The* applicant's, employee's or nurse aide's *age at* the time that *the crime was committed;*

B) *The circumstances surrounding the crime;*

C) *The length of time since the conviction;*

D) *The applicant or employee's criminal history since the conviction;*

E) *The applicant or employee's work history;*

F) *The applicant or employee's current employment references;*

G) *The applicant or employee's character references;*

H) *Nurse Aide Registry records; and*

I) *Other evidence demonstrating the ability of the applicant or employee to perform the employment responsibilities competently and evidence that the applicant or employee does not pose a threat to the health or safety of residents,* recipients *or clients.* (Section 40(b) of the Health Care Worker Background Check Act [225 ILCS 46/40(b)])

j) Application for waiver

1) If the applicant, employee or nurse aide wishes to request a waiver, the request shall be submitted *within 5 calendar days after receipt of the criminal records report.* A complete waiver request shall include the following:

A) A statement specifying any mitigating circumstances (see subsection (i)(2) of this Section) the person believes are relevant to the employment in question; and

B) Either:

i) Information necessary for the Department to obtain a fingerprint-based UCIA criminal records check, including a suitable set of fingerprints, in a form and manner prescribed by the Department of State Police (see 20 Ill. Adm. Code 1265), the fee for such a check (which shall not exceed the actual cost of the check) and the findings of the required non fingerprint-based UCIA criminal records check conducted by the Department of State Police; or

ii) The report of the results of the fingerprint-based UCIA criminal records check done pursuant to subsection (h) of this Section.

2) Provider staff may assist the applicant, employee or nurse aide in completing the application.

3) The waiver request shall be submitted to:

 Accreditation, Licensure and Certification

 Department of Human Services

 405 Stratton Building

 Springfield IL 62765

k) Waiver decision

1) The waiver request shall be reviewed by a panel of Department staff. The Department shall return a decision to the applicant, employee, or nurse aide and the provider within 30 calendar days after receipt of the completed waiver request including receipt of a report from the State Police based on the fingerprint-based record check.

2) The provider *is not obligated to* hire *or offer permanent employment to an applicant or to retain an employee who is granted a waiver.* (Section 40(f) of the Health Care Worker Background Check Act [225 ILCS 46/40(f)])

3) The Department *shall be immune from liability for any waivers granted.* (Section 40(e) of the Health Care Worker Background Check Act [225 ILCS 46/40(e)])

l) Appeal of the decision

1) The applicant, employee, or nurse aide may request further review of his or her request for a waiver within 30 calendar days after the receipt of the Department's denial of the waiver.

2) The applicant, employee, or nurse aide may submit additional documentation of the mitigating circumstances.

3) The appeal shall be submitted to:

 Director

 Division of Disability and Behavioral Health Services

 Department of Human Services

 100 South Grand Avenue East

 Springfield IL 62762

4) The Secretary shall act on the appeal within 30 calendar days after receipt of the appeal and shall issue a final decision granting or denying the waiver request.

m) This Section *shall not apply to:*

1) *An individual who is licensed by the Department of Professional Regulation or the Department of Public Health under another law;* or

2) *An individual employed or retained by* the provider as defined by Section 15 of the Health Care Worker Background Check Act [225 ILCS 46/15] *for whom a criminal background check is required by another law of this State.* (Section 20 of the Health Care Worker Background Check Act [225 ILCS 46/20])

n) *The* provider shall *send a copy of the results of the* UCIA criminal history record check *to the State Nurse Aide Registry for an individual employed as a nurse aide* within 10 working days after receipt of the results. (Section 30(b) of the Health Care Worker Background Check Act [225 ILCS 46/30(b)])

o) *The* provider *shall retain on file for a period of* five *years records of criminal records requests for all employees. The files shall be subject to inspection by the* Department's Office of Accreditation and Licensure. *The* provider *shall retain the results of the UCIA criminal history records check and waiver, if appropriate, for the duration of the individual's employment. A fine of $500 may be imposed for failure to maintain these records.* (Section 50 of the Health Care Worker Background Check Act [225 ILCS 46/50])

(Source: Amended at 23 Ill. Reg. 190, effective December 15, 1998)